

Washington, D. C.,

Monday, January 12, 1942 .

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

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GEO. L. HART  
EDWIN DICE  
LLOYD L. HARKINS,  
OFFICE MANAGER

**HART & DICE**  
**SHORTHAND REPORTERS**  
416 FIFTH ST. N. W.  
SUITE 301-307 COLUMBIAN BLDG.  
WASHINGTON, D. C.

TELEPHONES  
NATIONAL 0343  
NATIONAL 0344

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Monday, January 12, 1942.

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

Leland Tolman, Assistant Secretary

George J. Burke

Frederick E. Crane

Gordon Dean

George H. Dession

Sheldon Glueck

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McClellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

Fred E. Strine

Marks Alexander

P R O C E E D I N G S

The Chairman (Arthur T. Vanderbilt). Gentlemen, the reporter requests that as usual we keep our respective seats throughout the conference, so as to make his work a bit easier.

We are very happy to have Judge McClellan with us today.

I think everybody is here except Judge Burns.

Mr. Robinson, do you want to start with the discussion from the beginning?

Mr. Robinson. Beginning with rule 1?

The Chairman. Rule 1.

Mr. Robinson. This rule might be called the "Youngquist Rule." You will recall that at our meeting in September Mr. Youngquist felt there should be a rule in which could be placed matters of construction, definition, and application, and it has been the effort to meet that request, which seemed to meet with approval by the other members of the Committee. The extent to which that has been successful of course is for you to say. You have the rule, there, before you. Is it in the supplementary material?

Mr. Leagsdorf. Yes.

Mr. Robinson. That was probably sent out in supplementary material which you received subsequent to the books.

Mr. Youngquist. Yes.

Mr. Robinson. These of you who have not opened that to my work probably have not yet set it in its right place.

Mr. Glueck. I just wanted to raise the question about the congressional mandate. Does anyone have that bill here in which

they raise those various reports?

Mr. Holtzoff. These reports are included in that--the courts that are listed here.

Mr. Glueck. What about the ones he mentions in the note there that ask to be exempted?

Mr. Holtzoff. They are all included; but the point is, it is not mandatory.

Mr. Glueck. That is right. I was going to say, it says--  
"The Supreme Court may make rules for each one of these places."

Mr. Holtzoff. That is right.

Well, before we pass to (b), I would like to ask a question of very minor importance as to (a). It is just a matter of phraseology. In line 3, it seems to me the words "any and" might well be omitted so as to deal with the disposition of all proceedings.

Mr. Robinson. The reason for that is, to follow the language of the statute.

Mr. Holtzoff. I see.

Mr. Robinson. The effort has been made to follow just exactly the statement in the statute.

Mr. Holtzoff. I always had a notion "any and all" was illogical.

Mr. Robinson. You will have to speak to Congress about that.

Mr. Holtzoff. Oh, no, we do not have to follow that practice.

Mr. Robinson. Oh, no; I do not say that--if we are following the language.

Mr. Heltzoff. I think a good many statutes are poorly drafted. I suggest we omit "any and", and leave "all proceedings".

Mr. Robinson. The reason has been stated--we are trying to follow the precise language under which we act. If you wish to make that comparison, if you will turn to the last part of your draft books you will find the statute set out under the index tab "statutes". There, you will find the Criminal Rules Act of June 29, 1940, chapter 445, set out--

"Be it enacted \* \* \* That the Supreme Court of the United States shall have the power to prescribe, from time to time rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, \* \* \*", etc.

So the effort simply has been to set out our authorizing statute as early as possible, and that is the reason for that expression. Of course the "or" has been changed to "and", but aside from that the language is that of the enabling act.

Mr. Waite. Mr. Reporter, to cheer you up on that, regardless of form, I read that first section to a layman yesterday, and he listened carefully and said, "My God! That is a more auspicious beginning than I supposed a group of lawyers could possibly make!"

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Mr. Heltzoff. Mr. Chairman, I would like to move to strike out the words "any and" in line 3, so that the sentence will read:

"These rules shall be construed to secure the just, speedy, and inexpensive disposition of all proceedings \* \* \*  
I am making this motion just in the interest of style.

Mr. Youngquist. Why don't we leave that to the "Committee on Style" rather than spend our time on it? We have enough to do on that anyway. I move that as a substitute.

Mr. Waite. I will support that.

Mr. Heltsoff. There isn't any, yet.

Mr. Medalie. It sounds very colloquial, doesn't it?

Mr. Heltsoff. "Any and all".

Mr. Medalie. Yes.

Mr. Heltsoff. It does sound colloquial.

The Chairman. Was there a motion--not seconded?

Mr. Orfield. Second.

Mr. Waite. I seconded the substitute motion, and if there isn't a "committee on style" I am prepared to move we appoint a committee on style as a matter of expedition.

The Chairman. Will you include that in the substitute motion, Mr. Youngquist?

Mr. Youngquist. All right.

The Chairman. All right.

The Chairman. You have a substitute motion that this matter raised by Mr. Heltsoff be referred to a committee on style, which is created by the motion. Are there any remarks on the substitute motion?

(The substitute motion was AGREED TO.)

Mr. Heltsoff. I have got a point on line 5. I do not know whether that belongs to the committee on style or not. The words "in proceedings" in line 5 seem to be unnecessary.

Mr. Robinson. That, again, Mr. Chairman, is language of the statute. That is the simple reason. It may be that is not a sufficient reason.

Mr. Holtzoff. No. Grammatically I think the phrase does not correctly connect with what goes before, and I think if those two words were stricken out it would be a grammatically correct sentence.

Mr. Robinson. I should be very glad to have that left with the committee on style also, if that is the wish of the Committee.

The Chairman. I should like to suggest also to the committee on style that the sentence, from the words in line 4, "prior to", might well be bracketed for future consideration, in view of the instructions of the Court that we were supposed to bring in recommendations relating to appellate practice.

Mr. Holtzoff. Mr. Chairman, when we do that, we have to separate these rules from the rules relating to trial practice, because under the enabling act the rules relating to trial practice have to be submitted to the Congress, whereas under the Criminal Appellate Rules Act of 1933 those rules do not have to be submitted to the Congress, so it seems to me we would have to separate the rules into two groups, anyway.

The Chairman. I think it would be unfortunate if we had to do it, because one of the main purposes in making the suggestion to the Court was so that we might have a single, unified body of rules, and if there is one to control the trial practice we would have really two sets of rules, and if published together, we would not have unified rules.

Mr. Holtzoff. But you would not want to ask the Supreme Court to surrender a portion of its power over appellate procedure by submitting to the Congress the entire body of the rules?

The Chairman. I do not take it they would be surrendering them. It would be going in as a portion of the whole thing, but that is a matter that can be decided later. It is merely a question for the style committee. Are there any other comments on paragraph (a)?

Mr. Seasongood. Isn't this the last session before you send the things out? B

The Chairman. I would assume that the style committee's function would mean, if we follow the precedent of the present Constitution, that when we think we have agreed upon a set of rules, then the style committee will do their work, and we will find, if we follow the precedent of the Federal Constitution, we will agree to a lot of things that we never suspected. E

All right, if there is nothing further, we will proceed to paragraph (b).

Mr. Robinson. That, you will observe, takes expressions from paragraph (a) which have been condensed or shortened in paragraph (a), and extends them, including of course (b) (2), which as you will observe takes in the matter which aroused considerable discussion at our former meeting, namely, To what district courts shall the rules apply? Mr. Holtzoff prepared a rule 2 on that, and if paragraph (b) (2) is used, it is suggested that it would supersede rule 2 in your draft.

Mr. Youngquist. It is suggested that it would do what?

Mr. Robinson. That it would supersede rule 2.

Mr. Youngquist. Yes.

Mr. Robinson. 2 could then be omitted.

Mr. Crane. Where is that?

Mr. Robinson. That is your second.

Mr. Crane. I see.

Mr. Glueck. There are some items in this (b), however, which are not referred to in (a), aren't there--for instance, "committing magistrate"?

Mr. Robinson. That is included in (a) 5 and 6, also at line 15, paragraph (b) (3):

"'Committing magistrate' includes United States Commissioner\* \* \*"

I think the combination of rule 1, paragraph (a) lines 5 and 6, with (in rule 1) paragraph (b), lines 15, 16, and 17, takes care of that. Doesn't it, Mr. Glueck?

Mr. Glueck. I mean, you said that this is merely an expansion of items mentioned in (a).

Mr. Robinson. Yes.

Mr. Glueck. But you see this is a generic term. It includes commissioners and other types of committing magistrates, doesn't it?

Mr. Robinson. Yes.

Mr. Glueck. This is line 15.

Mr. Robinson. Yes, that is true.

Mr. Glueck. What other types do we have in the Federal judiciary?

Mr. Robinson. That is done to incorporate the provisions of the federal statute on that subject. If you are familiar with that statute, you know that that lets in justices of the peace, United States Commissioners, judges of state courts, and mayors of cities.

Mr. Glueck. Oh, yes.

Mr. Robinson. And of course we do not want to include all

that list at this point, so that simply tacks on to the statute.

Mr. Crane. May I ask about (1), "determination of the question of guilt".

"Determination of the question of guilt" includes a verdict, a finding of guilty or not guilty by the court if a jury has been waived, and a plea of guilty."

Now, what about the other plea of nolo contendere? Isn't that also a plea?

Mr. Robinson. You see, Judge Crane, what we were again trying to do was to follow the language of the enabling act under which we operate. Those are its words, you see.

In your appendix you have-

"Any or all proceedings prior to verdict or finding of guilty or not guilty by the court if a jury has been waived, and by a plea of guilty."

Mr. Crane. I think there might be a question raised whether a man has been found guilty if he has pleaded nolo contendere. He may, and he may go to jail. You would not want to have a definition that excludes anything of that kind?

Mr. Robinson. I go back again to what Mr. Youngquist presented at our last meeting. It is not exactly the idea to make the words mean what we say they mean, but it is to interpret our use of them here rather than attempt a finite definition. Isn't that right, Mr. Youngquist?

Mr. Youngquist. Yes, so as to obviate the need of scattering definitions throughout the rest of the rules. I have noted the same point that Judge Crane has, whether nolo contendere should be included. Strictly, it is not a determination of the question of guilt.

Mr. Crane. I know, but it is treated--

Mr. Youngquist. But I think it should be included. I think it should, in view of the practical consequences of the plea, be included.

Mr. Crane. Some smart judge will take that as meaning that it is not a question of guilt.

Mr. Youngquist. That is right. I have the same notation, and I may add, while I have the floor, we later speak of holidays. In one place we speak of them as holidays "under federal or state law". That is, whether under federal or state law. I think that should be included in our definitions.

Mr. Robinson. Right.

Mr. Youngquist. We have a number of definitions in rule 95, I find, where it might be thrown in.

Mr. Crane. What should we do with this plea of nolo contendere?

Mr. Holtzoff. I think we should insert "and plea of nolo contendere".

The Chairman. How about "non vult"?

Mr. Holtzoff. I do not think the Federal courts use "non vult".

Mr. Crane. I think the Pennsylvania courts do; but the nolo contendere is just as good.

The Chairman. Will you so move, Judge Crane?

Mr. Crane. Yes.

The Chairman. Is that seconded?

Mr. Crane. I move that be included.

(The motion was duly AGREED TO.)

The Chairman. Is there anything further on (b) (1)?

Mr. Medalie. That means that how you are to put in this *nolo contendere* addition is left to the committee on style, is that it?

The Chairman. I think that is right. It is a matter of weaving it in.

Mr. Crane. Yes.

The Chairman. I take it we need not spend time on it.

All right, (b) (2). Do you want to compare that with the proposed language for this rule 2, which apparently we do not need if this stands?

Mr. Heltzoff. It is the same thing.

Mr. Longsdorf. Mr. Chairman, I see something in rule 2 that I think ought to be questioned. The district courts in Alaska and the Canal Zone have jurisdiction over territorial crimes. In Alaska the district court has it, and in the Canal Zone the justice or some form of inferior court has jurisdiction over these. I think we ought to be careful not to use language which might draw these territorial crimes and the proceeding into these rules.

Mr. Heltzoff. I think we should draw them in. We have the same situation in the District of Columbia. In the District of Columbia all local crimes are tried in the district court, because the district court is a combination state-federal court, and that is true of the district court of Alaska and the district court in the Canal Zone. Now, in the district court in the District of Columbia they use the same procedure for federal offenses and local offenses. It would be very confusing to have two sets of proceedings.

Mr. Longsdorf. So they do in Alaska, but they do not, in

the Canal Zone, as I understand it.

Mr. Heltzoff. No, in the Canal Zone they do. The judge of the district court in the Canal Zone handles all criminal offenses, and it seems to me if these rules are going to be applicable to Alaska and the Canal Zone--and I venture to say they should--they should be as applicable to local offenses or territorial offenses as they are to federal offenses, because you would not want the same court to use two sets of procedure.

Mr. Longsdorf. I came away from reading that Canal Zone criminal procedure act with the impression that there were justices of the peace down there who had certain trial jurisdiction.

Mr. Heltzoff. Well, there are justices of the peace and there is a police court, just as there is a police court here in the District of Columbia for the trial of minor offenses, but all felonies in the District of Columbia are tried in the District Court irrespective of whether they are federal offenses or are cognizable under a statute of purely local application, and the procedure is the same in all cases.

To have two sets of procedures would be exceedingly confusing.

The Chairman. Is there anything further on that point, gentlemen?

Mr. Seasongood. Is the question up as to whether they are applicable to the Canal Zone? That is part of this, isn't it? I notice that this Governor wrote, in a letter of August 27:

"It is recalled that a similar situation arose following the passage of the act of March 8, 1934, empower-

ing the Supreme Court to prescribe rules of practice in proceedings in criminal cases after verdict, and the general rules promulgated under the 1934 act were not extended to the Canal Zone, nor were there any special rules prescribed for the Zone."

Is there any inconsistency in having these "after verdict" not apply to the Canal Zone, and then having ours apply to the Canal Zone?

Mr. Holtzoff. Well, I think the Supreme Court could well extend the rules afterward to the Canal Zone. It has that power. It did not do it originally when it promulgated those rules, but the district judge of the Canal Zone is very anxious to have these rules applicable to his court, and of course he is in a much better position to determine that question than the Governor of the Canal Zone. The Governor of the Canal Zone is a military governor, and he is too casual and sporadic in his contacts with the district court. I do not think that on a matter of this kind his opinion should be preferred to that of the district judge.

Mr. Seasongood. The only point that occurred to me in reading the letters was this. Here is Wheeler, acting Governor, too, and he makes a serious question:

"When Congress, by the act of June 19, 1934, empowered the Supreme Court to prescribe rules of practice and procedure in civil cases, it was provided such rules should be for the district courts of the United States, a phrase construed in the Mookeneey case as excluding territorial courts such as the United States District Court for the District of the Canal Zone."

I just raise the question--I do not pretend to know the answer--whether it is confusing to have your criminal rules apply to the Canal Zone and your civil rules not apply, and your rules after verdict not apply.

Mr. Holtzoff. Well, the Supreme Court has authority to apply them, so that there is no lack of power. We might perhaps suggest that the whole body of rules be extended to the Canal Zone. Certainly the district judge wants to see that done.

Mr. Youngquist. And the district judge suggests no reason why there should be an exception made in the Canal Zone.

Mr. Holtzoff. Yes.

Mr. Youngquist. We have this situation, Mr. Seasongood. The statute that we are working under now includes by name the Canal Zone, which the statute on civil rules did not, and I should think we ought in the first instance at least to include the Canal Zone with the others.

Mr. Seasongood. I do not say we should not. I just present the question whether there will be any lack of harmony in the district court rules, having one set apply, the other not applying.

Mr. Glueck. Isn't that a matter of notifying the Supreme Court about this business of "after the verdict" and leaving it to them, rather than us?

The Chairman. Yes.

Mr. Glueck. We can't do anything about it in rules, certainly.

The Chairman. May we leave it, then, with a note to be made, to go to the Court, when our report is filed, calling the

Court's attention to this difference between the district, here, and applying it to the appellate rules?

Mr. Seasongood. Yes.

The Chairman. The next question is on (b) (3).

Mr. Holtzoff. There is a matter for the committee on style, in line 16, "any" I think ought to be "every".

Mr. Dean. Mr. Chairman, before we pass to that I would like to suggest that the question be acted upon as to whether these rules should apply to the Virgin Islands. That would be the only one that it was not applicable to under this.

Mr. Holtzoff. The reason this draft doesn't include the Virgin Islands, Mr. Dean, is that the district attorney for the Virgin Islands objected. Personally, I should have put the Virgin Islands in.

Mr. Dean. I would like to see some of the other United States attorneys--we have had about five in the last six or seven years--give some of their impressions, and also the district judge.

Mr. Holtzoff. I corresponded with the district attorneys, those dealing with the territories and possessions, and asked each of them to get the opinions of the parties interested, and all I got from the Virgin Islands was a letter stating that he did not think the rule ought to apply to the Virgin Islands; but I should be inclined further to extend them.

Mr. Dean. I would like to see it left open, anyway, and not excluded at this meeting. On the basis of the information we have here, I do not think it is sufficient to exclude them.

The Chairman. You move they be included?

Mr. Dean. I would like to move that, yes.

Mr. Holtzoff. I second the motion, Mr. Chairman.

The Chairman. Is there any discussion.

(The motion was AGREED TO.)

The Chairman. Is there anything further on (b) (3)?

Mr. Glueck. That is a matter of style, Mr. Chairman.

The Chairman. Yes.

Mr. Glueck. But there is still the point, that I did not make very well--that in lines 5 and 6 in (a) we speak only of commissioners. Now, the question is whether item (3) under (b) shouldn't be "United States Commissioners, including other committing magistrates", instead of the way it is put here.

The Chairman. Or, alternatively, that in line 6 we refer to "committing magistrates"?

Mr. Glueck. Yes.

Mr. Holtzoff. I prefer the other alternative, because to say "the commissioner" shall include committing magistrates is a "title" definition, which gives to a word a meaning other than the proper one.

Mr. Glueck. You are right. It is rather far-fetched. I prefer yours.

The Chairman. You make that as a motion?

Mr. Glueck. I so move.

The Chairman. It is moved and seconded that the words in line 6, "United States Commissioners", be changed to read "committing magistrates".

Mr. Crane. Yes, line 6?

The Chairman. Line 6, going back to rule 1.

Mr. Waite. Mr. Chairman, that raises in my mind a question which is frankly predicated on ignorance. Are there any

proceedings before United States Commissioners which should be included in (a), which would not be within their functions as committing magistrates?

Mr. Holtzoff. Yes, there are.

Mr. Dean. Yes, there are a few.

Mr. Waite. Then if it were changed to "committing magistrates" it would limit the other functions.

Mr. Holtzoff. In supporting that motion, I overlooked the fact that the United States Commissioners, by a recent act, have certain trial jurisdiction. In other words, the United States Commissioners sit as committing magistrates. They also have trial jurisdiction over petty offences committed on federal reservations.

The Chairman. Could we not say, then, "United States Commissioners and other committing magistrates"?

Mr. Sath. Right.

Mr. Holtzoff. Then are there other limits to the words "United States Commissioners"? It limits them, doesn't it, to their functions as committing magistrates? You say "United States Commissioners."

Mr. Glueck. We would say, "and committing magistrates".

The Chairman. All right.

Mr. Crane. How have we got that now, Mr. Chairman?

The Chairman. Tentatively, subject to a motion by somebody, "before United States Commissioners and committing magistrates." Is there any objection to that?

Mr. Robinson. I think that is all right.

(The amendment was AGREED TO.)

Mr. Glueck. Then the question arises, Mr. Chairman,

whether, with that amendment, item (3) under (b) is still necessary.

Mr. Robinson. I would go back to the statement made a moment ago to the effect that that is based on the federal statute in which many types of committing magistrates are authorized by law, and I believe that (3) should be retained in order to show that we are not interfering with that statute in any way.

That has been considered pretty carefully--I think it was at our meeting in September--and I think we decided we had better leave the justice of the peace alone.

Mr. Holtzoff. I believe we should leave them alone, but is the definition necessary? Isn't the phrase "committing magistrate" a term of art, so that you do not have to define it?

Mr. Robinson. Not when it is defined by statute, I believe.

Mr. Dean. It is not defined by statute, though, is it?

Mr. Holtzoff. No.

Mr. Dean. Doesn't the statute simply list the titles of people who do act as committing magistrates, without attempting to define the words?

Mr. Robinson. They are defined--I mean, included in the statute under that general heading.

Mr. Dean. Would it run counter to any style we have generally adopted, to refer specifically to that statute, saying, "'committing magistrate' shall include all those officials designated in section so-and-so, title," etc.?

Mr. Holtzoff. I do not think we should refer to that statute, because Congress might pass some other act in the future, naming some other committing magistrates. I think it

would be a dangerous thing to incorporate a statute by reference.

Mr. Dean. Quite right.

Mr. Glueck. If the term were ever litigated, they would consult that other statute, though, wouldn't they?

Mr. Holtzoff. I would rather feel as Mr. Glueck does, that this is surplus.

Mr. Glueck. I so move.

Mr. Holtzoff. I second.

The Chairman. It is moved and seconded that (3) (b) be deleted.

(The motion was AGREED TO.)

Mr. Seasongood. I do not want to be fussy, but on this ought we not to say, "United States Commissioners and other committing magistrates"?

The Chairman. I suggested it.

Mr. Seasongood. Because you say here, in (3), "committing magistrates" includes United States Commissioners and any others.

The Chairman. That is going out.

Mr. Robinson. That is going out.

Mr. Holtzoff. That is going out.

Mr. Seasongood. I know, but if "committing magistrate" includes United States Commissioners, then we ought to say here, "United States Commissioners and other committing magistrates."

Mr. Youngquist. The reason for it is, as I understand it, that the United States Commissioners have jurisdiction over petty offences, which is above and beyond their jurisdiction as committing magistrates; and if you insert the word "other",

that might be construed to apply to them only in their capacity as committing magistrates, and not in their function under the petty offences law.

Mr. Seth. Are we going to include those petty-offence rules that the Supreme Court has already promulgated, in this?

Mr. Longsdorf. They are not in this book.

Mr. Seth. I mean, are they to be included in our rules?

Mr. Holtzoff. They should be a part of these, in order that these rules may be complete.

Mr. Seth. Yes, but they have already promulgated those rules.

Mr. Youngquist. Yes, they are in the appendix, here.

Mr. Seth. Well.

Mr. Longsdorf. Mr. Chairman, upon this question of committing magistrates, I think you will agree that section 591 of Title 18 is the section which grants jurisdiction to those enumerated state officers who may be committing magistrates. If I am right about that, it is of course beyond our reach to alter that in any way, and the statute cannot be superseded by anything we do.

It may be, in view of that, that we ought to be careful to avoid any possible misunderstanding in these rules.

Mr. Glueck. What is meant really is, in line 6, "United States Commissioners in their capacity as magistrates," is that right?

Mr. Holtzoff. Yes.

Mr. Glueck. That is the limitation intended. Why can't we say something like that, and then say, "and other committing magistrates"?

The Chairman. Or say, "before committing magistrates, including United States Commissioners"?

Mr. Robinson. I think you are getting back almost to reinstating this. Before you get through with it, I think that is what you will be driven to.

Mr. Holtzoff. Isn't that a matter for the committee on style?

Mr. Glueck. Yes, I think so.

Mr. Holtzoff. Because they know what we want, it is just a question of the phraseology.

The Chairman. Does someone move to refer that?

Mr. Holtzoff. I so move, Mr. Chairman.

(The motion was seconded and was AGREED TO.)

The Chairman. Now we come to (b) (4).

Mr. Holtzoff. I suggest that that is also surplusage, and that the same disposition be made of this as was made of (3).

I move we strike out (4), "party". The word "party" is a word of art, you do not have to define it.

Mr. Medalie. I second the motion.

The Chairman. I missed the motion. Will you restate it.

Mr. Holtzoff. I move we strike out (4), on the ground that the word "party" is a word of art, and that to define it is surplusage.

Mr. Robinson. I might say that was based on a discussion at the former meeting, at which there seemed to be some doubt on the part of some of the members of the Committee, whether or not "party" would clearly include the United States. Now, if there is no doubt, of course, this should go out.

Mr. Holtzoff. I do not think there is any question about

what the word "party" means.

Mr. Robinson. Well, the point was raised, and we just put it in here for your consideration. Of course, it is immaterial whether it goes out or stays in. If you think it is unnecessary, it ought to go out.

Mr. Youngquist. We ordinarily use the word "party" in connection with civil proceedings, and the word "prosecution" and "the accused" in criminal proceedings. Perhaps that was the reason.

Mr. Holtzoff. The word "party" is used in criminal proceedings, Mr. Youngquist, the same.

Mr. Youngquist. Under the old style, I mean, that I was accustomed to when I was practicing criminal law.

Mr. Crane. I do not see what you need that for. "Party" means the United States or a defendant. The United States, by its consent, can be a defendant, can't it?

Mr. Holtzoff. This is criminal.

Mr. Crane. Oh, criminal. That's right. Well, what do we want it for?

Mr. Holtzoff. I do not think we need it.

Mr. Crane. "The party proceeded against."

The Chairman. There is a motion to strike (b) (4). Is there any other discussion?

(The motion was duly AGREED TO.)

The Chairman. (b) (5).

Mr. Crane. That is too broad, isn't it, "any paper filed"?

Mr. Medalie. It includes a notice of appearance.

The Chairman. And it does not exclude oral pleas.

Mr. Crane. No.

The Chairman. Which are pleadings, as much as any paper.

Mr. Holtzoff. I think the only pleadings are the accusation, by indictment or information, and the plea; just as in a civil case, your pleadings are the complaint, answer, and reply. Any motion that you make is not a "pleading".

Mr. Crane. I should think that did not need definition any more than the dictionary words we are using here need definition.

Mr. Robinson. That, too, was raised by some member of the research group, here, because the previous discussion at one of the meetings resulted in a difference of opinion as to what the word "pleadings" meant.

Mr. Crane. I think there was more discussion as to what form the pleadings should take.

Mr. Robinson. There was that, also, but if you will notice the transcript, there--

Mr. Crane. We are using English words here, and we have not attempted to define them, as to whether they meant something, and I should think the same would be true of "pleadings." All of us have been using "pleadings" all our professional life. I should think it is a little dangerous to try to define it, when it has a definition pretty well understood in criminal nomenclature.

Mr. Robinson. May I ask a little information on this point, Mr. Holtzoff? When you say the pleadings include only the written accusation, the indictment, or the information--

Mr. Crane (interposing). He means, of course, oral pleadings, too.

Mr. Holtzoff. Well--and the defendant's plea, too.

Mr. Robinson. And the defendant's plea, is that your view, too?

Mr. Crane. Yes.

Mr. Robinson. It should not go beyond that?

Mr. Crane. Sure; you take the motions that are made--any motion in respect to grand jury minutes, or a change of venue, or anything else; those are not pleadings. Bills of particulars required by our rules are not pleadings.

Mr. Medalie. Is there any purpose served by this definition? Is there anything that comes up in the rules where the word "pleadings" is used, that requires definition?

Mr. Robinson. I think maybe, Mr. Medalie, that is a point that I do not think you can really define, yourself, until you see what is in the rules.

The Chairman. Tentatively, may we put the motion, subject to the matter being reconsidered if it becomes necessary later? You have heard the motion to strike (b) (5).

(The motion was duly AGREED TO.)

The Chairman. Subdivision (c) (1).

Mr. Robinson. That subsection is based on rule 81, (d) and (3), of the first tentative draft, which in turn came largely from the civil rules.

It would seem that this would be the opportunity, Mr. Youngquist, to include matters of this sort in a general rule, rather than wait until practically the end of our drafting to make such definitions or limitations or applications. That is the reason it is here.

Mr. Youngquist. I think it should be.

Mr. Glueck. I think as a matter of fact when it comes to

really drafting, rule 1 ought to be drafted last, to see what this grab bag will include and exclude.

Mr. Robinson. That is exactly right. In fact, it ought to be considered by this Committee last. I was just thinking, we are probably starting at it backwards by considering it now.

The Chairman. We are doing very well.

Mr. Robinson. Yes. We are saying things that will need to be said later, also. Now, Mr. Youngquist's point a minute ago, when he said he would like to include this point and that point in this rule, shows exactly what the rule is for, and things are to be put in it as the need arises, and things that are not needed are to be left out, as it becomes apparent they are not needed, here.

I wonder if the Committee agrees that such a rule is necessary. I am inclined to agree with Mr. Youngquist's suggestion at our last meeting, that we probably should have a rule of application, of definition, and construction.

Mr. Crane. I think we ought to reconsider that.

Mr. Robinson. In other words, we might not need the rule, at all.

Mr. Crane. I think it ought to be reconsidered.

Mr. Holtzoff. I am strongly opposed to definitions in a statute.

Mr. Crane. So am I.

Mr. Holtzoff. And that is also applicable to rules, and I think there has been a rather undesirable tendency in recent years to have a long list of definitions in a statute. I think one of two things happens as a result--you either define words that need no definition, or else you attach a definition

which distorts the usual meaning of the word; and I have noticed a good many statutory definitions doing that. I do not say we should have no definitions at all, but we should have just as few as possible, it seems to me, and only where there is a real necessity for it.

The Chairman. Can't we consider that matter at the end?

Mr. Crane. I think so. We can then consider this question of definitions.

The Chairman. I take it that, as at our meeting in September, all our votes are purely tentative on these matters, so if we vote now we are not foreclosing ourselves.

Referring to the last line, beginning on line 30, is there any point that that might be extended to cover territorial legislation, or, I mean, these outlying possessions, or is that sufficient as it is now? You know the answer to that, Mr. Holtzoff.

Mr. Holtzoff. Of course, the sole purpose of the sentence as now drafted and as it is found in the civil rules is to provide that the words "statutes of the United States" include those acts of Congress which are locally applicable here in the District of Columbia. Now, the District of Columbia has no separate legislature, the Congress legislates for the District.

The territories other than the Canal Zone have their own legislative bodies, so that there are territorial statutes in the various territories, of local application, that are passed by the territorial legislature. Now, I must say that I am not sure whether--I do not think the words "statutes of the United States" should include those.

The Chairman. No, I meant, should there be any provision

added, referring to the territorial legislation?

Mr. Dean. I think it is wise. There is a decision, Mr. Holtzoff, you remember, by the Judge of the United States District Court for China, in which, operating under the laws of the United States, he makes applicable to Shanghai the divorce laws of Alaska and the criminal laws of the District of Columbia!

Mr. Holtzoff. Yes.

Mr. Dean. On the theory that those are laws of the United States. Now, I think some other judge might also say those are "statutes of the United States" in a very broad sense, so I suggest some reference to either excluding or including the territorial statutes.

Mr. Holtzoff. You do not have to exclude them, because this definition seems to me to exclude them by necessary implication.

The Chairman. May we refer back to the Reporter of the staff, the question of whether there should not be an added sentence to cover the question of territorial laws, and let it go at that?

If there is no further comment, we will pass on to rule 3, rule 2 having been--

Mr. Robinson. That is tentative.

Mr. Holtzoff. I am not sure rule 2 ought to go out. I just wanted to raise a question.

The Chairman. All right. I thought--

Mr. Holtzoff (interposing). Because the thought was, the definition of the district court in rule 1 makes rule 2 unnecessary; but how about "United States Commissioners and committing magistrates" in these territories? If we leave rule 2

out, we will create a question as to whether proceedings before commissioners in Alaska for example or the Canal Zone or Hawaii or Porto Rico will be governed by these rules. I am a little bothered about that.

The Chairman. You are anticipating, I take it, that rule (1) (b) will eventually go out?

Mr. Holtzoff. No, even if 1 (b) stays, rule 1 (b) is sufficient, so far as the first sentence of rule 2 is concerned, but it does not cover the commissioners in these territories, which are covered by the second sentence of rule 2.

The Chairman. Let me put a question this way, then: Is there any objection to the substance of rule 2, holding tentatively the question as to whether or not it is duplicated by 1 (b) (2)?

Mr. Robinson. Of course, the motion has been made in regard to the Virgin Islands. There would still have to be that change made in rule 2, if that is in.

Mr. Longsdorf. Mr. Chairman, there is another thing to be considered in connection with rule 2. There is a decision in the Supreme Court of the United States--I cannot cite it now, by name--that criminal proceedings in the United States district courts of Alaska are governed by the Criminal Procedure Code of Alaska and not by the federal statutes; and there is a Ninth Circuit decision following that.

Mr. Holtzoff. If these rules are adopted and made applicable to Alaska, they will superside that.

Mr. Longsdorf. They will superside that. I am calling attention to that.

The Chairman. All right, if there is no objection, rule 2

will stand tentatively, with the Virgin Islands included.

Mr. Seasongoed. May I call attention to the fact that in the act it says "the supreme courts of Hawaii and Puerto Rico," and we just make it the district courts of Hawaii and Puerto Rico, is that right?

Mr. Holtzoff. I think that is all right, because the supreme court of Hawaii has only appellate jurisdiction and not trial jurisdiction.

Mr. Seasongoed. Why do they say here, "in the supreme courts of Hawaii and Puerto Rico", then?

Mr. Holtzoff. I think I can tell you a bit of history back of that.

Mr. Seasongoed. Well, if it is of no importance I do not care, but it is just a variance between the rules and the act.

Mr. Holtzoff. That court was listed in the act of 1933 conferring authority on the Supreme Court to make rules of criminal appeals. Our enabling act is the same in its phraseology, and I think the necessary distinction was not drawn which should have been.

Mr. Glueck. It is a matter of draftsmanship.

Mr. Holtzoff. I think it is a matter of draftsmanship. I think I am guilty of a mistake.

Mr. McClellan. Do you want to strike out the word "other"? Do you want to strike out that word in the next to the last line in rule 2, to be consistent?

Mr. Holtzoff. Strike out the word "other" in line 5 of rule 2.

The Chairman. If there is no objection, that will be done.

Mr. Robinson. That is the point Mr. Seasengood raised a minute ago, under rule 1 (a), line 6, I believe.

Mr. Seasengood. It ought to be considered in connection with the other.

The Chairman. It is the identical question, is it not?

Mr. Seasengood. Yes.

The Chairman. It is a matter for the committee on style.

Mr. Seasengood. Will the "supreme court and district courts of Hawaii and Puerto Rico" go to the same committee?

The Chairman. Yes. Make a note, there.

Mr. Glueck. I think, apart from the definition, even if this is only repetitious, since it deals with the geographic jurisdiction of the rules, it ought to stand on its own bottom as a separate section.

Mr. Robinson. Where would you put it, Sheldon? Do you think it should come in as the very first rule of the whole code, or just where?

Mr. Glueck. Probably.

Mr. Robinson. That was our idea.

The Chairman. I like Mr. Waite's thought on it, starting the rules as they are, with proper definition of policy.

Mr. Robinson. So do I.

The Chairman. Your suggestion can be left to the committee and on style, /if there are no further questions, we will go on to rule 3.

Mr. Robinson. Rule 3 is a repetition of the rule 3 in the first tentative draft, which referred to that, and which received the consideration of this Committee, with a change which Mr. Longsdorf felt to be necessary. That change was the

adding of the words-

"or by arrest without a warrant."

In a later rule, the term "written accusation" is defined, where it is stated to include indictment, information, or a complaint, so that clause of the former rule 3, the first tentative draft is not repeated at this point.

I think there may be a question, too, of including a definition of "written accusation", or, that is, stating what it includes, in a rule 1, if we have a rule 1, defining terms; but now, apart from that, the rule 3 as you have it now in lines 1 and 2, down to and including the word "accusation", is the same as rule 3 was in the first tentative draft, which was on the point passed by the committee, and as to the addition, "or by arrest without a warrant", I should like to ask Mr. Longsdorf to state his reason for wishing to have that added, if you will.

Mr. Waite. Mr. Chairman, before we go into that, may I call attention to the fact that rule 23, alternative, is essentially the same as rule 3, but that the alternative to rule 23 is more broadly and specifically stated. I wonder if we cannot consider rule 3 and an alternative 23 together, since they seem to cover precisely the same point.

Mr. Glueck. Rule 23, as it stands, deals with the method of starting the wheels rolling, and the alternative rule really deals with the question of time for the purpose of tolling the statute of limitations, so aren't there really two different points, there? I admit there is some overlapping.

Mr. Waite. I should say they are essentially the same thing, Sheldon. One says a criminal proceeding may be commenced

by filing a written accusation or by an arrest without a warrant; the other says a criminal proceeding is commenced by filing an indictment or an information, and when the defendant has been arrested. You see, 23 is broader, but it would seem to duplicate No. 3.

Mr. Holtzoff. Mr. Chairman, I am very much troubled by the phrase "by an arrest without a warrant". It seems to me that a proceeding is commenced either by the filing of a complaint and the issuance of a warrant, or, if the arrest is without a warrant, when the prisoner is arraigned and the complaint is filed. Our enabling statute does not authorize the formulation of an entire code of criminal procedure. It only authorizes the rules to regulate proceedings in court.

Now, when a man is arrested without a warrant the criminal proceeding is not commenced. The criminal proceeding is commenced when the arresting officer presents a complaint to the committing magistrate and only then can they be arrested without a warrant.

Therefore, we have ~~put~~ the phrase, "or arrest without a warrant", be stricken out.

Mr. Longsdorf. Mr. Chairman, I have not yet responded to Mr. Robinson's suggestion that I explain these words.

My only notion in putting them in was that the originating act in the prosecution may be either a complaint followed by an arrest or an arrest followed by a complaint. I think, as a commencing proceeding, the two of them are more or less coupled. A complaint does not accomplish very much until you have got the prisoner personally within the jurisdiction of the committing magistrate or of the court. An arrest does not accomplish

much unless you follow it up with a complaint, and jurisdictionally then it is the combination of the two that is the originating process.

Mr. Holtzoff. But the court gets no jurisdiction of the proceeding--the proceeding in the court is not started, until some document is presented to the court. When a person is arrested, there is no proceeding pending until he is taken before the magistrate or a complaint is filed. As a practical matter, you will get a lot of complications if you give the court jurisdiction at that point, because if you do, then you can never release your prisoner.

Mr. Longsdorf. Are we doing so?

Mr. Holtzoff. Once he says "I arrest you," he could not let the prisoner go. Our statute permits us to regulate court proceedings.

Mr. Medalie. I know, but there, you see, you start too late. I think you, Mr. Longsdorf, started too early. The arrest does not take the court into this business.

Mr. Holtzoff. That is right.

Mr. Medalie. And the court can get into this function before a complaint is filed, namely, with arraignment upon an arrest, because after the arraignment, the presentation of the defendant to the magistrate, then the court, the magistrate, may do certain things.

Mr. Holtzoff. But the complaint is filed at that time, isn't it?

Mr. Medalie. Not necessarily. It is filed after there has been palaver and goodness knows what else.

Mr. Holtzoff. Well, I would accept your--

Mr. Medalie (continuing). There is another point about it. The magistrate may not even have taken a complaint, and nevertheless have made a commitment, and he may have fixed bail and have done other things which of course he should not do until a complaint is filed, but nevertheless having done that, there is a proceeding pending before him, and it would be unrealistic to exclude everything that happens before him until he very properly orders a complaint to be drawn and receives it.

Now, for example, when a complaint is drawn and before it is filed, it must be signed and sworn to by the affiant or the complainant. That is a part of the judicial procedure, too, and yet a complaint has not yet been filed.

Mr. Holtzoff. I would be glad to accept an amendment to my motion, so that this rule 3 should read:

"A criminal proceeding may be commenced by filing a written accusation or by arraigning a prisoner before a committing magistrate."

Mr. Medalie. "Upon arraignment"?

Mr. Crane. May I ask this? I do not know, and so I am just asking, now, a question to get information. You see a statute of limitations sometimes is quite a question, as to whether the prosecution has been brought within 5 or 10 years, or the 3 years, 2, years, or whatever it happens to be. Now, in civil matters that is sometimes started by an arrest by the sheriff, and in criminal matters may that not be started by arrest before the complaint, and satisfy the language?

Mr. Holtzoff. The arrest does not toll the statute of limitations. The filing of a complaint does.

Mr. Crane. Does it depend entirely upon the complaint, the

filing?

Mr. Holtzoff. That is my understanding.

Mr. Youngquist. I have difficulty understanding, I think, the commencement of the criminal proceeding other than defining the event which tells the statute of limitations. Why do we have to say when a criminal proceeding commences, except for that purpose?

Mr. Crane. A question of that sort has arisen in New York in recent matters in criminal prosecution. I had it only incidentally. I had to adjourn a hearing I am in with the Attorney General.

Mr. Dean. Mr. Chairman, my impression is that under the present law, in the federal system, the statute is not tolled by the filing. Is that true, that it is tolled by the filing of the complaint before the United States Commissioner? I think not.

Mr. Holtzoff. I was under the impression it was.

Mr. Dean. No, not except in tax cases, where there is a special statute, on income-tax proceedings, and there it is specifically provided that the statute shall start to run on the filing of the complaint before the commissioner; but otherwise you have to wait for indictment. That is my impression, at least.

Mr. Crane. But it is a kind of open question.

Mr. Dean. Right.

Mr. Holtzoff. I think that the commissioner's complaint does not tell the statute, and in order to tell the statute you have to find an indictment or file an information, if the crime is prosecuted by indictment or information.

The Chairman. Now, gentlemen, we seem to be getting somewhat afield. We have rule 3 and rule 23, and alternative rule 23. Suppose we try to dispose of one or the other. I suggest we take alternative 23, and see whether you want that, or not.

Mr. Medalie. May I ask why we want it with respect to statutes of limitation? These rules of procedure cannot do anything about statutes of limitation, can they?

Mr. Youngquist. Yes, they can.

Mr. Medalie. Can they?

Mr. Youngquist. Yes. They become law, if Congress does not change them.

Mr. Medalie. I did not get that.

Mr. Youngquist. Under the act of 1940, when these rules are prescribed by the Supreme Court and submitted to Congress, and Congress takes no action upon them, they become law, so far as superseding other statutory matter in conflict.

Mr. Holtzoff. But they have to be limited to procedural matters.

Mr. Youngquist. Oh, yes.

The Chairman. This is a procedural matter.

Mr. Holtzoff. I am not so sure.

Mr. Glueck. It is substantive, because it fixes the crime.

Mr. Holtzoff. I think in a criminal case the statute is more than any set of rules.

Mr. Medalie. May I suggest this. I can see that there may be controversy on both sides of this, as to whether it is procedural or substantive. I think this is something we have

a right to legislate on, through rules, if we define the time when the criminal proceeding is commenced and do not use the words with respect to the statute of limitations, then since we define the word "commenced," that has definite reference to anything that deals with the commencement, and if we are wrong in thinking that this is applicable to the statute of limitations, we will avoid derision by its exclusion in this alternative rule 23. And I think we are touchy about being the subject of derision. We are supposedly experts.

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MR. CRANE: Therefore, you would favor Rule 23 at the top of that page?

THE CHAIRMAN: Yes.

MR. GLUECK: If that be so, I would much rather--

MR. MEDALIE: With the addition "arraignment before a magistrate."

MR. GLUECK: Well, do you think that is necessary to mention at all? For what purpose is it necessary outside of this "statute of limitations"?

MR. MEDALIE: Well, we are defining what happens before a magistrate in various places here. One of them is the defendant's rights to be advised that he may have counsel. Another right that goes with the criminal proceeding is the right to have reasonable bail fixed. In other words, we define what is applicable to any proceedings in a court, in any judicial tribunal or agency, by fixing the time.

MR. HOLTZOFF: May I say this, while I personally have presumed they were always procedural, nevertheless, under the civil rules they are fairly held to be substantive because the federal courts under the Erie Railroad v. Tompkins followed the State statute of limitations. I infer from that it must be regarded as substantive, because the substantive law is followed by the federal courts in some cases, and, therefore, the statute of limitations would be regarded as substantive, it seems to me, in criminal cases.

THE CHAIRMAN: At any rate, Mr. Medalie, as to Rule 23 you are suggesting we add the "arraignment before a magistrate"?

MR. MEDALIE: Yes.

MR. LONGSDORF: The first, or alternate?

MR. MEDALIE: "Arraignment" is sufficient, isn't it?

MR. YOUNGQUIST: An indictment or information when it first appears before a magistrate.

MR. MEDALIE: I suggest that would do it.

THE CHAIRMAN: "By bringing it before the committing magistrate."

MR. HOLTZOFF: "Or appearance before." "Or appearance by the defendant before a committing magistrate."

MR. MEDALIE: "Or appearance by defendant before a committing magistrate."

MR. LONGSDORF: No, I think that smacks of voluntary appearance.

MR. MEDALIE: Well, why not?

MR. LONGSDORF: It is too much.

MR. SETH: "Bringing before" I think is better.

MR. YOUNGQUIST: Sometimes he comes by summons, doesn't he?

MR. MEDALIE: Yes.

MR. YOUNGQUIST: Would it appear better to say "when he first appears before a magistrate"?

MR. LONGSDORF: I don't think it is very weighty.

THE CHAIRMAN: Well, of course the Committee on Style-- the question is now to add the words "or appearance before a committing magistrate."

MR. HOLTZOFF: "Appearance of the defendant." We are on Rule 3 now.

MR. MEDALIE: Twenty-three, I think.

THE CHAIRMAN: Rule 23.

MR. MEDALIE: "Or the appearance of the defendant before a

committing magistrate." The appearance of the defendant.

MR. SEASONGOOD: Is that in the first sentence?

MR. MEDALIE: I think so, because the district judge would have no jurisdiction except--

THE CHAIRMAN: As to committing magistrate.

MR. MEDALIE: Yes, but in the proceeding before the district judge it has reached a committing magistrate who would have no jurisdiction until either indictment or information.

MR. CRANE: You can never get enough to cover circumstances that may arise. You cannot foresee them. A man may stop in to see the judge and tell him he is not guilty.

MR. MEDALIE: Instead of using the word "appearance" alone we say the "appearance of the defendant."

MR. CRANE: Yes.

MR. MEDALIE: It is a viewpoint, anyway, that he is a defendant when he appears. Now, how he becomes a defendant, he may be arrested by an F.B.I. man and brought on. But if he just walks in and says "Good morning, Judge," that isn't the appearance of the defendant.

MR. YOUNGQUIST: I am still bothered about running athwart the present rules when we say "the proceeding is commenced by filing a written accusation."

MR. WECHSLER: It occurs to me, Mr. Chairman, that there is another phase of this problem that is perhaps more important than the statutes of limitation phase. If a criminal proceeding can be deemed to have commenced earlier than the filing of the written accusation, or the appearance of the defendant before the committing magistrate, then it would follow, I take it, that the court would have jurisdiction under the enabling Act to address

itself to the duty to produce the defendant before a committing magistrate, and to the right--generally, to the rights of the defendant following arrest. Now, in my mind it is a doubtful question whether under the statute the court can go that far. If the court can go that far I would be strongly in favor of drafting rules to meet the situation. If the court cannot go that far then I see no point in the rule other than its possible effect on the statute of limitation, and with respect to its effect on the statute of limitation I do not believe, as a matter of policy, that it is desirable to hold the statute to the appearance of the defendant before a magistrate rather than to the filing of the written accusation, which I understand to be the present law. Therefore, I suggest that we consider the question of our jurisdiction as the basic question before us, and if we decide, or if it has been decided against jurisdiction, it would drop the rule. That is, against jurisdiction from the time of arrest.

MR. MEDALIE: I think this overlooks what I have pointed out, that even though the defendant does not *insist* on the filing of a complaint, or overlooks it, or proceeds informally, he still has certain rights with respect to bail and counsel, notification of friends and relatives, and other things. Those rights are important rights, and we ought to make sure under the rules that there is compulsion on the part of the magistrate to see that the defendant knows those rights.

MR. WECHSLER: But those are covered by specific rules, Mr. Medalie.

MR. MEDALIE: But if the case is not covered by the specific rules, what rules have we? We want to be sure that there is no

question but what the case is pending before him.

MR. WECHSLER: But it would not be necessary to put a rule so stating. The rule before the committing magistrate would be beyond the power of the court unless the case is pending there, but I don't think you have to affirm the jurisdiction by rule.

MR. YOUNGQUIST: Doesn't the language applying to any and all criminal proceedings cover all that we are talking about?

MR. MEDALIE: Well, what we are dealing with is a case where, by common consent or oversight or failure of a committing magistrate to insist on the filing of a complaint, the rules of criminal procedure still would be applicable even though the rights have been waived or overlooked.

MR. YOUNGQUIST: It is a proceeding, nonetheless.

MR. MEDALIE: Probably so, but it would be better if there were no question about it. In addition to that, if we have the power to legislate on the statute of limitations, we are thereby doing it.

MR. WECHSLER: We may be doing it the wrong way.

MR. MEDALIE: I don't know that we have the right to do it at all.

MR. YOUNGQUIST: If you place that limitation upon the commencement of a proceeding, then when we come to the search warrant, which we are not including in the rules, we have something that occurs before there is any written accusation and before there is any appearance. It would make the rules inconsistent in that respect. I think it would be much better to omit all reference to what constitutes the commencement of a criminal proceeding. We do have it definitely in the statutes and the decisions. We don't need to restate that. And I think

we would be much safer if we omit entirely any definition of the commencement of a criminal proceeding, and, I so move.

MR. LONGSDORF: Seconded.

MR. MEDALIE: There is a difference between a criminal proceeding and a criminal prosecution. I think that is really the point, isn't it? In other words, you may have a search warrant without any pending against anybody.

MR. YOUNGQUIST: Yes.

MR. MEDALIE: You may have a grand jury inquiry without a prosecution impending, but it is a criminal proceeding. In other words, the motion is that we mind our own business on the statute of limitations.

THE CHAIRMAN: Your motion, I take it, is we drop Rule 3, Rule 23, and Rule 23-A. Any further discussion?

MR. GLUECK: I think, Mr. Chairman, we ought to give serious attention to what Mr. Wechsler mentioned. I think if there is any area here in which we can really bring about a thoroughgoing reform, I would be certain to insist on that, if this were a State proceeding; it is quite a vague borderline area, right around arrest and bail, and the opportunity to have counsel at a certain stage, and what the police do in extorting a confession.

THE CHAIRMAN: That is where the dirty work happens.

MR. GLUECK: That is where the dirty work happens. Now-- the question is--I think Mr. Wechsler is in some doubt as to whether that is in our jurisdiction.

MR. WECHSLER: Well, the question in my mind is whether we can say that a proceeding has been commenced before a United States Commissioner at the time of arrest, relying on the duty

to bring the arrested person before a commissioner. It is not clear to me that we cannot, under that language--I agree that if it is possible to do so we ought to reach in that area, and I don't know whether there is any legislative history of the enabling Act that would answer the question.

MR. HOLTZOFF: There isn't any. But that is a question that does not have to be decided at this moment.

MR. CRANE: How would that conflict with Rule 3?

THE CHAIRMAN: All those in favor say "aye."

Opposed, "no."

(The motion was carried.)

THE CHAIRMAN: All right, gentlemen, we had better recess at this time.

(There followed a short recess.)

THE CHAIRMAN: Rule 4, gentlemen.

Mr. Robinson: Rule 4 has been the special production of Mr. Longsdorf, so I would like to have him state it.

MR. LONGSDORF: I think that the reasons for it are rather plain. It is quite possible, I think we all agree, that we might overlook something. It is not desirable to leave the impression that we did not think of that possibility. So we ought to have some sort of rule of that kind, but it seems to be covered in the concluding clause of Rule 10, which is much shortened and simplified and suits me better than the original draft.

THE CHAIRMAN: That is 10-B.

MR. LONGSDORF: 10-B. The language of 10-B, by the way, is largely borrowed from section 377 of Title 28 of the U. S. Code; "Usages and Principles of Law" seems to have a meaning pretty

well fixed by construction.

MR. HOLTZOFF: I would rather see Rule 10-B adopted than Rule 4, because Rule 4 would give rise to a good many questions. It provides that any matter not covered by the rules or statutes shall be governed by the "usage and practice prevalent heretofore in the courts of the United States." Well, of course, that practically goes back to the conformit<sup>y</sup>ve principle, because on matters of that kind the federal courts followed State courts in a lot of <sup>procedures</sup> conclusions.

MR. LONGSDORF: Not in criminal cases.

MR. HOLTZOFF: Oh, yes.

MR. LONGSDORF: Well, to some extent. I said I was better satisfied with 10-B than I was with the original.

MR. HOLTZOFF: Now, on 10-B you <sup>don't?</sup> need the last clause "agreeable to the usages and principles of law."

MR. LONGSDORF: Or due processes of law.

MR. HOLTZOFF: You know in the civil rules there is no provision as to what happens as to any point not covered by the rules. There is a provision that the courts may adopt the local rules not inconsistent with the general rules, and we have that covered somewhat in 10-A, and I think somewhat better than the civil rules. In the concluding phrase "agreeable to the usages and principles of law," you create a question. Does that mean they have to follow pre-existing procedure? So I prefer 10-B, as you do, but I should like to go further and strike out of 10-B that last clause "agreeable to the usages and principles of law."

MR. WECHSLER: There ought to be some standard, should there not?

MR. HOLTZOFF: Well, I go back to the civil rules. There hasn't been any difficulty because of the lack of a standard, a theory being that if there are any questions those can be covered by the local rules. If you have a standard--the difficulty of this standard is it is so ambiguous.

MR. WECHSLER: I was not defending this standard.

MR. HOLTZOFF: I am afraid this standard would be a source of difficulty.

MR. WECHSLER: Yes.

MR. HOLTZOFF: But I don't believe it is necessary to have any standard because if points arise they can be covered by the local rules. There is no difficulty that I know of arising out of such a situation. While this may give rise to litigation. So I move we adopt Rule 10-B with the omission of the words "agreeable to the usages and principles of law."

MR. WECHSLER: I second it.

MR. ROBINSON: It is a provision that matters not taken care of by the State criminal code shall be taken care of by the civil code. In many cases that helps to save situations. Criminal proceedings in State practice. In our work here are we taking care of eventualities of that sort? Obviously we could not follow the analogy of the State statutes of that sort. But, first, is there a need of some saving clause of that sort?

MR. HOLTZOFF: Well, the experience in the civil rules seems to indicate there is no need.

MR. WECHSLER: There is one difficulty. There may be some federal statutes which would not be affected by these rules which, under the blanket provision, such as 10-B, one would

think if it had any effect it would have the effect of abrogating all existing statutes, leaving all questions open to determination de novo by the courts. I don't think we ought to do that, and I don't think Congress would want to do it.

MR. HOLTZOFF: This might be modified to read "not inconsistent with these rules, or with existing statutes that are not superseded by these rules."

MR. WECHSLER: Would it not be better to provide that where these rules do not prescribe the governing rule the court shall proceed according to Acts of Congress, if any; if not, according to local rule; and if no local rule, then to introduce the standard which is proposed later here, of evidence, which is derived from the <sup>Walsh</sup> ~~Walsh~~ case. I don't know what rule that is in, but it is designed to give the court freedom in the adoption of rules of evidence. The same might be done for rules of procedure.

MR. HOLTZOFF: I doubt whether there is any need for your first alternative. I doubt whether there is any need. The experience on the civil rules indicate there is no problem.

MR. CRANE: If anything happens you have to leave it to the court. We had a judge of the criminal courts of New York who had in his desk the other code, and he was always reversed, he could not get either right. Now, you have these rules, and you have to leave it. If this does not cover it, and the statute does not cover it, what is the judge going to do? He is going to do just as he pleases.

THE CHAIRMAN: I was wondering why if the civil rules have worked very well for four years in this respect, we are not justified in repeating that very language. If there has been

no trouble raised on the civil side, why fear it on the criminal side? It is very simple, in all cases not provided for by rule the district court may regulate the practice in any manner not inconsistent with this rule, and let it go at that.

MR. LONGSDORF: Well, Mr. Chairman, the purpose was not to regulate the rule-making power of the district courts, but to provide for possible situations where neither these rules nor any local rule met the situation.

THE CHAIRMAN: The judge then makes them up.

MR. LONGSDORF: No. If I might have that section 377, Title 28, read, perhaps that would shed a little light on it. I wanted to get in something corresponding to that statute which enabled the courts to devise processes necessary to the exercise of their jurisdiction. Perhaps we don't need this. If not, let it go out. But I would like to explain the purpose of putting it in, that if these rules and the local rules had made no provision, then to mark it in language similar to that of section 377 what we might do.

MR. HOLTZOFF: Isn't that more of a theoretical question?

MR. LONGSDORF: Perhaps it is.

MR. HOLTZOFF: Because no such difficulty has been presented by the civil rules. And I suggest we follow the Chairman's suggestion that we adopt the language of the civil rules.

MR. LONGSDORF: Well, I think if you leave it out, the courts will do it, anyway.

MR. MEDALIE: Well, Mr. Chairman, I understand Mr. Longsdorf's view to be this, it is one thing to say the local courts may make rules not inconsistent with these rules over

something that has not been provided for, they have the power to make those rules. Then you have the situation where neither we nor the district courts have made provision. Then what happens there? You get this situation. What shall the district attorney do? What shall counsel for the defendant do in following the proceeding? What rules written or unwritten should they follow?

And that is an area that ought to be covered in some way.

THE CHAIRMAN: It was not covered in the civil rules.

MR. HOLTZOFF: It was not covered in the civil rules. And there is no trouble as a result of it.

MR. MEDALIE: I know we never have troubles in criminal proceedings because it is the most informal proceedings in the world, and nobody's rights are seriously violated, and strangers find out by asking the clerk "What do we usually do around here?" And, the judge usually asks. But still the question might arise, and if you want to draw up a scientific set of rules covering all areas, there ought to be specific provision for that area not covered by rules.

MR. HOLTZOFF: It was not under the civil rules.

MR. MEDALIE: But they were not as scientific as we are here pretending to be.

5 THE CHAIRMAN: I wonder if we don't have it in mind if a certain type of judge will always find necessity for making a particular rule, whereas, if he didn't have that particular authority he would muddle through without framing a particular rule?

I have in mind a judge who would always be troubled by that particular type of power. If it was given to him he would want

to exercise it every Monday morning. Other judges would not be troubled by it, Monday, Tuesday, Wednesday, or Thursday, but if they had to exercise it, they would say, "Well, we have got to do this and do that."

MR. WECHSLER: There is another point, though, Mr. Chairman. Under the civil rules, as I understand it, if there is no applicable rule and no applicable federal statute, then the conformity Act applies.

MR. HOLTZOFF: No, the conformity Act is repealed.

MR. WECHSLER: In toto?

MR. HOLTZOFF: Yes. The conformity Act is repealed not only pro tanto on points covered by the rules, but it is repealed in toto. There was some question in the earlier decisions under the rule.

MR. WECHSLER: Isn't this doctrine of gaps in the law anyhow pretty much of a fiction under modern law? I have been trying to find gaps, but I cannot find them so far.

MR. WAITE: Well, considering it has been repealed, do the federal courts feel absolutely without obligation to look to State law?

MR. HOLTZOFF: Not only do they feel without obligation to look to the State law, but they would feel it did not govern and they would not follow it even if attorneys called attention to it. In other words, State procedure is no longer part of it.

MR. SETH: The civil rule, Rule 83, does provide "Nevertheless may regulate their practice in any manner not inconsistent with these rules."

MR. HOLTZOFF: That is the language suggested by the

Chairman that we adopt here.

MR. SMITH: I think we ought to adopt the same language. And that is part of the authority to make rules. That is in the section on authority to make rules.

MR. HOLTZOFF: You see that §3 is broader than just authority to make rules. They may make them for a particular case.

MR. YOUNGQUIST: It seems to me we would be better off in using for the purpose of Rule 4, 10-B--10-A, standing substantially as it is.

MR. HOLTZOFF: 10-B has that clause--

MR. YOUNGQUIST: Oh, strike that out, yes; strike that out.

THE CHAIRMAN: Well, if you do that, do you impair the civil rules which have consistently, as I understand it, avoided going back to State practice?

MR. YOUNGQUIST: It is only that some suggestion was made at the last meeting here that some restriction be put.

MR. HOLTZOFF: Couldn't we confine it to include the first sentence of Rule §3, and make that the first sentence of Rule 10-A?

MR. YOUNGQUIST: I say "yes," but I doubt it, because as the Chairman says, that might be construed as an implication and covering a lot of rules we don't need.

MR. HOLTZOFF: I think the Chairman was facetious.

THE CHAIRMAN: Well, I am serious, too.

Well, may we have a rule as to Rule 4? I think it is generally agreed that 10-B, or some combination of civil rules, is preferable.

MR. YOUNGQUIST: I move that Rule 4 be substituted with

what now appears as Rule 10-B, striking the words "agreeable to the usages and principles of law."

THE CHAIRMAN: Is that seconded?

MR. WECHSLER: Seconded.

THE CHAIRMAN: Discussion?

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

Opposed, "no."

The motion seems to be carried.

MR. HOLTZOFF: Well, does that exclude the consideration of Rule 5?

THE CHAIRMAN: No. We are just passing Rule 4.

MR. HOLTZOFF: Well, we adopted the 10-B as an alternative.

THE CHAIRMAN: It will all come up again.

We will proceed to Rule 5.

MR. ROBINSON: The Committee, in the September meeting, gave instructions as to what it wanted to have done. Mr. Holtzoff had those instructions in mind, and we asked him to prepare to present Rule 5.

MR. HOLTZOFF: Well, Rule 5 is practically the same rule that was included in the first draft with the exception of the addition of the first sentence, namely, that "No indictment or information shall 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."

And that is now part of the statutory law. The balance we adopted at the September meeting.

MR. GLECK: I would like to suggest for the Committee on Style the question of whether "in matter of" should not be omitted. That rather sounds to me like it should be in

substance "in form only."

MR. HOLTZOFF: I think that is a very good suggestion.

THE CHAIRMAN: Are there any questions?

MR. MEDALIE: Well, this is practically the standard statute.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: If there is no further discussion, all those in favor of Rule 5 say "aye."

Opposed, "no."

(Motion carried.)

THE CHAIRMAN: I would like to ask the Reporter if it would be possible that Rule 5 might follow immediately Rule 1-A. I think it is like Rule 1-A, it sets the tone and the pace, and it might be helpful to the court and Congress and the litigants generally.

MR. ROBINSON: Well, if Rule 1-A is still alive, I think it can be done.

THE CHAIRMAN: That was Rule 1-B that was being overhauled there.

MR. ROBINSON: I think that is a good suggestion, and if Rule 1-A is left, I think it should be there.

THE CHAIRMAN: Well, if Rule 1-A is not there, let us put Rule 5 there. That is with the idea of getting it in earlier.

Any objection on that?

If not, we will go to Rule 6.

MR. HOLTZOFF: Well, that rule is identical with the civil rule, the purpose being that both trial practices, such as on a question of exceptions, shall be the same. It merely eliminates the necessity of noting an exception if an objection has been

overruled, or noting an exception if the court has refused to grant a requested charge. That is the same procedure that is now followed on the civil side.

THE CHAIRMAN: Any discussion?

If not, all those in favor say "aye."

Opposed, "no."

Carried.

MR. ROBINSON: Rule 7 is really left as a blank spot for the Committee's use if they see fit to do so by incorporating the material contained in Rule 10 of the first draft, which had to do with the form in pleadings, caption, names of parties, adoption by reference, and exhibits in pleadings. That is Rule 10 of the first draft.

There has been an inclination of this Committee, and the prior Committee, not to be very explicit as to the contents of pleadings. Some might consider that as largely a clerical matter, and in view of the fact that so many more pleadings in criminal proceedings are oral than written it was suggested that the former old Rule 10 might well be left out.

THE CHAIRMAN: Rule 10 followed the civil rule. Is that right?

MR. ROBINSON: Yes.

MR. HOLTZOFF: I am rather inclined to agree with the suggestion just made by the Reporter that perhaps that rule is surplusage in criminal cases.

MR. ROBINSON: Just for information on that point, why would it be unnecessary in criminal although it is necessary in civil? Or do you think it was unnecessary there also?

MR. HOLTZOFF: Well, there are so many more pleadings and

papers in a civil case. I don't see that it does any harm. I have no objection to it particularly, but I don't think it is of any importance.

Now, you don't have a caption in that indictment, by the way. It is not customary to have captions.

MR. MEDALIE: No captions. You just begin with a long sentence, and you go along with 20 pages and finish with the sentence at the end.

THE CHAIRMAN: Why wouldn't it be a good thing to have paragraphs and number <sup>them</sup> there? Is there any reason why an indictment should read like a prerogative writ?

MR. MEDALIE: No need at all. After a while you get through reading an indictment, and if it is a long one you know what it has and has not got. And if it is a short one, you know what it is about even though they don't specify anything.

MR. ROBINSON: You might note the indictment by George Z. Medalie here in the Mitchell case in the appendix of forms and see whether that is an excellent example to follow, or otherwise.

MR. HOLTZOFF: Doesn't that go to the form of indictments rather than this rule?

MR. MEDALIE: Where is that?

MR. LONGSDORF: Page 38.

MR. ROBINSON: Page 38; that is right.

One purpose of having that indictment here was to show the difficulty of a simplified form, certainly a short form of indictment, in an income tax case.

MR. MEDALIE: The real reason indictments in income tax cases are long is that the United States Attorney usually finds

it easier to do them the way Peyton used to want to have them done in the Department of Justice years ago. That avoided arguments with anybody, so the feeling was, and the form now in the United States Attorney's office, and after a while he said, "Oh, let it go and do it that way."

MR. ROBINSON: What suggestions would you pass on that Mitchell indictment, Mr. Medalie? Do you think, as the Chairman suggests, it might be well to number the paragraphs?

MR. MEDALIE: Well, suppose they didn't number the paragraphs? What happened? You see, the only reason for numbering paragraphs in civil pleadings is that when you draw up a complaint the defendant knows what to deny, so it is a convenience to number the paragraphs. In indictments you don't have to deal with the particular paragraph or any allegation in the pleading you file. There is no need for any numbered paragraph. Now, the only time you might want to do it is when you make a motion for a bill of particulars.

THE CHAIRMAN: You don't need any rule for the adoption of an exhibit by reference.

MR. MEDALIE: It has been done all the time.

THE CHAIRMAN: Then you don't need the rule.

MR. MEDALIE: I don't think so.

THE CHAIRMAN: Then, let us not have it. Unless someone wants it. All right.

Rule 5.

MR. ROBINSON: This is the same rule that was before us in September. The only correction or changes to be made would be in line 21, that blank may be filled "action under Rule 50." Rule 50, which we will come to in due course, and strike out in

80 the rest of that line.

MR. WAITE: Mr. Reporter, I notice what seems to me to be an inconsistency between Rule 8, paragraph A, and Rule 95. Rule 95 provides that Saturdays and Sundays need not be counted in a seven-day period, but this says it shall not be counted at all.

MR. ROBINSON: This is part of the criminal rules.

MR. WAITE: I wonder if there shouldn't be something in here to make it obvious that Rule 8 and Rule 95 do not apply to the same group of rules. Each one of them says the time of computation is provided with respect to these rules.

THE CHAIRMAN: Why shouldn't they be made identical?

MR. HOLTZOFF: I think we might change Rule 95 to correspond, because then you would have the same basis of computation in all branches of criminal as well as civil procedure.

THE CHAIRMAN: Well, why not leave out 95?

MR. WAITE: Well, I gathered from the Reporter he was trying to accomplish a different purpose in 95.

MR. HOLTZOFF: It would be very confusing to lawyers. I think we ought to have the same rule throughout.

MR. MEDALIE: There is something else in that connection. You have something else as to computation of time. One is forward and one is backward. One rule is that certain things shall be done within so many days, for example, after the plea has been entered. Then you have a rule which says that a motion shall be made on five days' notice, or four days' notice, or three days' notice, or two days' notice. The exclusions, you see, then lengthen the time of a party making a motion, to his disadvantage.

What have you against that? Now, I haven't analyzed the

language carefully enough to say whether that is safeguarded. In other words, time running backwards, you probably don't want days excluded, that is, because it restricts the time during which you may do something. In other words, if today I must make a motion rendered in five days, that is, on Friday, and a legal holiday intervenes, then I may not have made that motion today, I may have made it Saturday. Which is a hardship to the person making the motion. And these rules should not impose that hardship.

Now, when something is to be done later, no hardship is imposed on another party by giving the party 20 days plus a holiday or a Sunday.

Now, these are the practical difficulties that do arise.

THE CHAIRMAN: It will only mean one day.

MR. MEDALIE: It is the very difference between having to make a motion on Saturday, or having to make a motion on Monday. And sometimes the time is very short.

MR. HOLTZOFF: Well, I was going to raise a similar point on the length of time for serving a motion, that you have in mind.

THE CHAIRMAN: Let us see if we can go on. I have noted under Rule 95, the second paragraph, to bring that up as a question when we get to it, Mr. Waite.

MR. McLELLAN: Do you omit that second paragraph in 95?

THE CHAIRMAN: No, we are just holding it. We are due to read it when we get there.

MR. MEDALIE: In Rule 8-A, "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute," you leave out the local rule of

the district court?

THE CHAIRMAN: Shall we change that, the Committee on Style?

MR. MEDALIE: These are local rules?

THE CHAIRMAN: By any rule.

MR. MEDALIE: Yes. By any rule.

THE CHAIRMAN: Any further suggestions on 8-A?

MR. SEASONGOOD: I thought we had up once the question of holidays. There are some federal holidays, aren't there?

MR. HOLTZOFF: No; Congress has no constitutional authority to declare a holiday.

MR. SEASONGOOD: Then it is just the State where the court is sitting.

MR. YOUNGQUIST: On Rule 95, is that second paragraph taken from section 13? *On 2* *section 13 of the rules*

MR. HOLTZOFF: Yes. I think it is taken from that.

MR. YOUNGQUIST: That refers to holidays under federal law.

MR. HOLTZOFF: Well, the only holidays under federal law are the District of Columbia. Also the territories.

THE CHAIRMAN: That would explain itself.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: In B, you suggested, Mr. Robinson, leaving out the latter part of line 21, beginning with the word "except," to the end of the line?

MR. ROBINSON: That is right.

THE CHAIRMAN: Are there any further suggestions on B? If not, we will go on to C.

MR. YOUNGQUIST: That leaves off the last two lines

beginning with the word "except"?

MR. ROBINSON: No.

THE CHAIRMAN: "Except as stated in subdivisions thereof."

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MR. HOLTZOFF: You leave that out?

MR. ROBINSON: Yes, they are out.

THE CHAIRMAN: Paragraph C.

MR. MEDALIE: Well, there is where I had my trouble.

MR. HOLTZOFF: That is similar to the civil rule. In other words, the effect of this is to abolish the term as the yardstick of time and specifically operates for the doing of particular things and making particular motions as specified.

MR. MEDALIE: I am talking about excluding holidays. Five days' notice of motion.

MR. HOLTZOFF: That is in D.

MR. MEDALIE: Oh, excuse me.

THE CHAIRMAN: If there is nothing further to be said on C, we will pass that as accepted.

MR. HOLTZOFF: I would like to say a word about D.

THE CHAIRMAN: Then C is accepted.

Then, let us proceed with D.

MR. HOLTZOFF: I have the same thought as Mr. Medalie has, but go a bit further. Because what are you going to do in rural districts where a man is indicted today and goes to trial tomorrow? If he has to give five days' notice, one of two things happens, either he is deprived of the opportunity to make a motion, or the case has to go over the term. I suggest that there ought to be some authority in the court to fix a different time, by rule.

MR. SEASONGOOD: It is in there, isn't it?

MR. HOLTZOFF: Well, it says "by order of the court."  
Then it says, "Such an order may, for cause shown, be made on  
ex parte application."

MR. MEDALIE: Why not say "by order or rule of the court"?

MR. HOLTZOFF: That is my point. "By order or rule of the  
court."

THE CHAIRMAN: By rule or order of the court.

MR. HOLTZOFF: By rule or order of the court.

THE CHAIRMAN: Any objection to that?

If not, that is adopted.

Any other suggestions on D?

MR. WAITE: Mr. Chairman, we are having somewhat of a dis-  
cussion here in connection with D, the last two or three lines,  
37, 38, 39, "Affidavits may be served not later than one day  
before the hearing." Does that mean even if there was a hearing  
on Friday the affidavit may be served on Thursday? That is  
what I took it to mean, but I wanted to be sure.

MR. ROBINSON: That is the same language as the civil Rule  
6-D again on this point. We are trying to follow just the same  
language.

MR. WAITE: If that is what it means, then I am clear on  
it.

MR. ROBINSON: In line 37 strike out the following: "and,  
except as otherwise provided in Rule \_\_\_\_." Because there is no  
exception.

MR. MEDALIE: Strike out "except as otherwise provided"?

MR. ROBINSON: Yes.

THE CHAIRMAN: If there is no further question, we will  
move on to E.

MR. YOUNGQUIST: Is it necessary to put after the line 39 the phrase "or requires"?

MR. ROBINSON: You don't think so?

MR. YOUNGQUIST: I don't think so, no.

THE CHAIRMAN: Rule 8-E.

MR. MEDALIE: How does that go?

MR. HOLTZOFF: I don't see why you need that in criminal procedure. This is one of the civil rules, but I don't see that it would play a part in criminal proceedings, and I move to strike it out.

MR. ROBINSON: How about summons, summons by magistrate mailed, or something of that kind?

MR. HOLTZOFF: This does not refer to service of actual process. This refers to papers in the proceedings.

MR. ROBINSON: It refers to the time.

THE CHAIRMAN: Suppose the district attorney wants to send a notice out to some defendant or defendant's attorney in some little town 150 miles away from where the district attorney is, why shouldn't he have the right to do it by mail, and, if he does it by mail, why shouldn't he have the extra time?

MR. HOLTZOFF: He would have the right to do it by mail. There is another rule that covers that.

THE CHAIRMAN: Well, if he does he should have a little more time, shouldn't he?

MR. HOLTZOFF: I never could understand why there should be more time than for a personal service.

THE CHAIRMAN: That goes right back to lawyers' psychology. Something that is delivered by mail.

MR. HOLTZOFF: Well, you penalize the defendant's counsel,

then, don't you? He wants to serve some paper by mail, but he doesn't do it sufficiently in advance. You impose a burden on counsel.

MR. HOLTZOFF: Suppose you were serving a motion. D provides that you must give five days unless the rule otherwise provides. E says if you serve by mail, you must give three days more.

MR. YOUNGQUIST: No. "Whenever a party has the right or is required to do some act or take some proceedings, and the notice shall be served by mail, then you shall have three days."

MR. MEDALIE: What does this refer to? What act is to be done? I cannot visualize this.

MR. HOLTZOFF: This has a real foundation in civil rules, because you have to serve an answer to a complaint or reply to a counterclaim, and additional time is needed for that purpose.

MR. MEDALIE: Well, what are you called on to do in a criminal case?

MR. ROBINSON: May I suggest, Mr. Chairman, that we follow our usual procedure and proceed to determine whether there is anything that does apply, and if there is nothing that it may be stricken out.

THE CHAIRMAN: On the motion of the Reporter, those in favor say "aye."

Opposed, "no."

We will strike unless necessary.

May we adjourn for lunch now?

MR. YOUNGQUIST: I second the motion.

MR. WAITE: Mr. Chairman, has it been decided yet whether

we are going to have evening meetings?

THE CHAIRMAN: That was understood.

MR. WAITE: I am perfectly satisfied with that.

MR. MEDALIE: I think there is a reasonable prospect of finishing by Thursday morning, is there not?

MR. HOLTZOFF: Yes.

MR. MEDALIE: I have arranged my appointments to finish on Thursday.

THE CHAIRMAN: Well, we are willing to have long evening sessions.

MR. YOUNGQUIST: So am I. I am willing to have long evening sessions.

(Thereupon, at 1 p. m., a recess was taken until 2 p. m., of the same day.)

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AFTER RECESS

(The Committee was called to order at 2 p. m.)

THE CHAIRMAN: All right, gentlemen.

Rule 9.

MR. ROBINSON: Rule 9 has been worked by Mr. Strine, so I would like to ask him to present it.

MR. STRINE: Rule 9 provides that where the process is a summons, the court may dispense with the presence of the defendant and allow him to proceed by his attorney for the defendant's convenience. It does not prevent the continuation of the trial. We have a suggestion to transpose a few sentences, put the second sentence, beginning in line 5, first.

MR. HOLTZOFF: Then you could condense the introductory words in the second sentence, couldn't you?

MR. STRINE: Yes.

MR. HOLTZOFF: And say "Where the process issued is a summons."

MR. STRINE: Yes.

MR. HOLTZOFF: In other words, you would state the general rule first, and the exception second?

MR. STRINE: Yes. And also in line 10 omit the words "nullify the trial or."

MR. LONGSDORF: What was that change?

MR. STRINE: Line 10, eliminate the words "nullify the trial or."

"Shall not prevent the continuation."

THE CHAIRMAN: I am asking a question out of ignorance. Is noncapital an accepted word?

MR. HOLTZOFF: I don't know. I was going to suggest that

the Style Committee ought to change that.

THE CHAIRMAN: Is it a dictionary word?

MR. STRINE: I think it is.

MR. CRANE: Sometimes they confuse that with other things.

MR. HOLTZOFF: I was going to suggest, there are some cases in the federal statutes where it is optional.

THE CHAIRMAN: Then, as I understand it, we strike out from lines 1 and 2, "in any criminal proceeding where," and in place of "where" substitute the word "If." Then that whole sentence comes at the end of the paragraph.

Line 8, the Committee on Style could operate on the word "noncapital."

MR. STRINE: At the end, I might also suggest "return of verdict."

THE CHAIRMAN: Before "verdict," "the return of the verdict."

MR. STRINE: Yes.

THE CHAIRMAN: Line 10, "Nullify the trial or" should come out.

MR. CRANE: I think that is rather important. In some case where a defendant got ou--

THE CHAIRMAN: I suppose in line 11 if you say "reception of the verdict," we could use the same words in line 8?

MR. STRINE: Yes.

THE CHAIRMAN: In line 11 it is "reception." "Return" is the word, I guess, is it not, rather than "reception"?

MR. SETH: Yes.

THE CHAIRMAN: Are there any further suggestions on Rule 9?

MR. SEASONGOOD: I raise the question, suppose he is sick. It says in noncapital cases where the defendant is not in custody.

MR. CRANE: He can only have it suspended with his consent, you know.

MR. SEASONGOOD: I mean he might rather want to get through with it, and let it go on, even though he couldn't be there.

MR. CRANE: I don't think he can consent in those cases. I don't think he can consent in a capital case, can he?

MR. SEASONGOOD: No, not in a capital case.

MR. YOUNGQUIST: If he were absent because of illness would that make it voluntary?

MR. SEASONGOOD: No.

THE CHAIRMAN: And I think he has a right to be there. And that would not postpone the case.

10 MR. MEDALIE: Of course, you have a practical way of working this out.

As I recall, the time this came up more recently, about 1939, Judge Campbell of New York was trying a case, the defendant did not like the way it was going and just walked off. They continued the trial. Now, you say here where the defendant is not in custody. Well, now, the defendant thinks the trial is not going very well, he is quite a desperado, and breaks out of the hands of the marshall. I think that case ought to be covered, too. We are dealing with flight, and flight by forcible means would have no more meaning.

MR. YOUNGQUIST: After he has broken away he is no longer in custody.

MR. MEDALIE: During the trial the defendant is either in custody or is not in custody. That is, he is on bail or he is in the custody of the marshall, or the detention house.

THE CHAIRMAN: You would strike off the clause "where the defendant is not in custody"?

MR. MEDALIE: Yes.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Is there any discussion on that?

All those in favor of striking the words of lines 8 and 9, "where the defendant is not in custody" say "aye."

Opposed, "no."

Carried.

MR. HOLTZOFF: You have to substitute for the word "his voluntary absence," or "defendant's voluntary absence.

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: Oh, yes, that is right.

THE CHAIRMAN: All right.

MR. MEDALIE: What about sentence? Did you deliberately leave out sentence?

MR. HOLTZOFF: You cannot sentence the person.

MR. MEDALIE: Why not? You can try him in absentia here. Why can't you sentence?

MR. LONGSDORF: You have to bring him back and resentence him when you get him, if you do.

MR. WECHSLER: How about the plea? Is that covered by this?

MR. YOUNGQUIST: Well, getting back to the point Mr. Medalie made, certainly if a fine could be collected in a defendant's absence, I don't know any reason why sentence could

not be imposed.

MR. MEDALIE: I don't, either.

MR. GLUECK: He may have the right of a showing of mitigation of sentence.

MR. MEDALIE: He has a right to confront his witnesses, too. Why don't we say "to and including judgment"? Judgment, of course, is sentence.

MR. HOLTZOFF: I am just wondering whether or not that is a violation of due process. I don't know whether it is or not, but it is bothering me. After all, this rule is intended in the situation where during part of the trial the defendant walks out, and the trial continues. But when it comes to sentencing--

MR. MEDALIE: It might be risky, yes.

THE CHAIRMAN: I think we had better leave it out.

MR. MEDALIE: I do, too.

MR. CRANE: I have in mind a case where a witness looked very much like a defendant, and the defendant was in the wash room. The judge called the jury back and gave his charge over again. Now, that is the way these things happen.

MR. HOLTZOFF: It happened in one case where one defendant walked out for a few hours, his absence was not noted, then he came back. The question arose whether that nullified the trial.

THE CHAIRMAN: All those in favor of Rule 9 as thus amended say "aye."

MR. WECHSLER: I am sorry, I didn't get the amendment.

THE CHAIRMAN: No, as amended, these various suggestions which I read before, not the last one, which was withdrawn.

MR. WECHSLER: Well, may I have an opportunity to suggest that the arraignment be specifically included?

THE CHAIRMAN: Well, they are, where the summons is the method. Do you want to go on warrant, too?

MR. WECHSLER: Yes. In other words, I would like to see a general rule that a defendant has the right to be present at the arraignment, pleading, and at every stage of the trial and at the verdict and sentence, - not the language, but the substance of that thought, - subject to the exceptions indicated here.

MR. ROBINSON: That came up particularly in matters of officers of a corporation, particularly in trust cases, where on an arraignment day a defendant might have to come clear across the country just to be present for the formality of arraignment, so this was designed where summons was used, and in cases where it was permitted by the court. This is designed to avoid that unnecessary travel. His lawyer must be present, anyway.

MR. HOLTZOFF: Well, Rule 50 covers the same point in cases of processes other than summons, and it seems to me that there is an overlapping between Rule 9 and Rule 50. Perhaps the two rules ought to be combined into one.

MR. ROBINSON: Well, if you will just defer action on 50 until Rule 51 is presented. It is in the hands of the mimeographer, and is to be in our hands later this afternoon.

THE CHAIRMAN: Mr. Wechsler, will you hold your suggestions on that until we come to it in regular sequence, then?

MR. WECHSLER: Yes.

MR. ROBINSON: It is pretty difficult not to have some

overlapping, and for that reason we would like to work the whole thing out together.

THE CHAIRMAN: Have we voted that Rule 9? I think we have.

Rule 10.

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MR. ROBINSON: Rule 10 begins the rules with respect to district courts. You will recall that at the September meeting the Committee felt that since the administrative office of the United States courts is available, that we should make use, of course, of those services, and in view of the fact, too, that some of the activities are under way in that office and through the conference of the senior circuit judges, we wanted to be sure that our work and theirs would be coordinated. We have in mind we would call on Mr. Tolman to represent the administrative office and ours in working on those rules that affect a court's clerks and dockets, rules 10, 11, and 12, and so I think it would be well at this time, Mr. Chairman, to have Mr. Tolman present--

THE CHAIRMAN: Mr. Tolman, will you come forward.

MR. TOLMAN: This rule is drafted simply to meet the wishes of the committee, as they were expressed at the last meeting.

In the first place, we avoided any direct statement that the district court may make rules, and it was suggested we might put it in this negative way. I don't know whether it will do that or not, but that was our purpose.

The second was to make some sort of rules whereby copies would be readily available, and so for that purpose we have provided that copies of all local rules be sent to the Library

of the United States Supreme Court, and also the libraries of the Department of Justice, and we are admonished to make arrangements for publication of all local rules. I talked to Mr. Chandler, and I have permission to say he will make it and they should be in the office to prevent them, so all members of the bar can have them, and we will try to adjust our appropriations to meet that requirement. However, if the rules are printed by private printers, as they sometimes are, and where the arrangement is satisfactory, and they are not charging too much, we thought we might be able to continue using that method.

MR. YOUNGQUIST: Does this contemplate the original draft of the rules shall go to three places?

MR. TOLMAN: Yes. That is the thought. I suppose it might be made clearer.

MR. HOLTZOFF: It says copies; it does not say originals.

MR. TOLMAN: The Library of the Supreme Court is very anxious to have a complete set of the local rules, and that takes in the corresponding civil rule which requires that copies of all rules and amendments be sent to the Supreme Court. And I thought we might as well state here that the rules go to the Library. The same way with the Department of Justice, which have required that copies be sent to them. I think that it is important for them to have them right away. I have no objection to deleting that.

MR. HOLTZOFF: We will get them anyway, whether it is in the rule or not.

MR. YOUNGQUIST: I was just wondering, you are the litigant in part of those cases, and you get copies, and the defendant does not. I am just wondering whether it has the

appearance of favoritism; just the appearance of it was what I was thinking of.

THE CHAIRMAN: If the copies were sent to the administrative office, will they be more likely to do it?

MR. HOLTZOFF: I think it is a good idea. We will see that they get them.

THE CHAIRMAN: The chance of your getting them are better if they only have to send them to one place.

MR. LONGSDORF: Mr. Chairman, will these local rules, when so filed, be judicial notice before appellate courts?

MR. HOLTZOFF: I have never known of a question to arise. They always are.

MR. LONGSDORF: I cannot tell you right where they are, but I feel sure there are some decisions, old ones, where the appellate courts refused to take judicial notice of the local rule.

MR. ROBINSON: You might keep that in mind and see to it that we do catch that, if it needs to be caught.

THE CHAIRMAN: I don't think there is any real problem nowadays in view of the wide scope of judicial notice. There is judicial notice of so many things.

Well, do you think that would be proper to delete out the reference to libraries?

MR. HOLTZOFF: Yes, I do.

THE CHAIRMAN: If there is no objection--

MR. SETH: Shouldn't the proper circuit courts of appeal be inserted? Shouldn't a copy go to the clerk of the court?

THE CHAIRMAN: Wouldn't the administrative office be sure to send it there?

MR. SETH: I don't know.

MR. LONGSDORF: I know some of the circuit courts have rules requiring district courts to submit their rules.

MR. TOLMAN: I believe that was one of the provisions of the old equity rules. It didn't make any difference. They automatically approved anything. It simply bothered them and therefore we didn't put it in the corresponding rules, civil rules. Mr. Holtzoff suggests that the lines 4 and 5 might as well come out.

THE CHAIRMAN: If there is no objection, that will be done.

Any further suggestions on 10-A?

All those in favor of it as amended say "aye."

Opposed, "no."

(Motion carried.)

THE CHAIRMAN: That brings us to 10-B, which we have considered before, and with respect to which we have deleted the last half of line 16 and line 17, reading "and agreeable to the usages and principles of law."

Anything further on Rule 10-B?

MR. YOUNGQUIST: We transferred that Rule 4.

THE CHAIRMAN: It was then transferred and made Rule 4. I am just wondering whether it will fit better where it is.

MR. ROBINSON: That may be.

THE CHAIRMAN: What do you think about that, gentlemen? Isn't it better where it is?

MR. MEDALIE: I think so.

MR. HOLTZOFF: I think it is better where it is.

THE CHAIRMAN: Will someone move that it stay there, then?

MR. HOLTZOFF: I so move.

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MR. MEDALIE: I second it.

THE CHAIRMAN: It is moved and seconded that Rule 10<sup>(b)</sup> be  
retained in its present place.

Those in favor say "aye."

Opposed, "no."

Carried.

That brings us, then, to Rule 11. 11-A.

Any question on that?

MR. TOLMAN: This is taken from the corresponding civil rule. That in turn comes from old equity rule, which has its origin in a statute which states courts of admiralty and courts of equity shall be deemed always open.

MR. MEDALIE: Hasn't there been any question of the courts being always open?

MR. TOLMAN: There has been. There apparently was a case back in 1919, I believe, when there was a question raised as to whether an order for a new trial made by a district court between terms was properly granted when there was a local rule of court that the courts should take daily adjournments of its session between terms of court, and the Supreme Court held that that local rule was valid.

THE CHAIRMAN: Wasn't the court of equity the only court that was always deemed open?

MR. TOLMAN: Yes.

MR. HOLTZOFF: There is a lot of delay caused by these rules, isn't there?

MR. LONGSDORF: Mr. Chairman, do you want to add arrange-<sup>ments</sup> in Rule 11-A?

THE CHAIRMAN: I am trying to puzzle out why the court should not be open for all purposes. Why should it be limited?

MR. TOLMAN: Would you call the court open when it was not having a formal session?

MR. DEAN: Where the judge is not there but the clerk is there and you want to file a motion, such as for a new trial, is it sufficient to file it with the clerk?

MR. ROBINSON: The latter rule applies that there may be an arraignment.

MR. DEAN: But only before a judge.

MR. ROBINSON: That has to be before a judge.

MR. DEAN: This means, I take it, that the judge need not be there physically in the courthouse, either in chambers or in the courtroom.

MR. GLUECK: Does this cover the arraignment, trial, and sentencing?

MR. TOLMAN: It does. It is rather a strange wording. I think we might stick to the old language.

MR. HOLTZOFF: My notion was we might conform to the civil rule, because this relates to the clerk's office generally, and we ought to have one rule, the civil rule.

THE CHAIRMAN: Anything further?

All those in favor, say "aye."

Opposed, "no."

Carried.

11-B.

MR. TOLMAN: 11-B is also taken from the criminal rule. The exception has been put in for private chamber proceedings in cases under the juvenile delinquency act.

MR. HOLTZOFF: It is a matter of style.

MR. CRANE: The defendant is not required to be present in some trials; he may be absent, but the trial shall be conducted in open court.

THE CHAIRMAN: That is what it says.

MR. CRANE: Yes. It says all trials which require the presence of defendant. Aren't there some trials which do not require the presence of defendant?

MR. HOLTZOFF: It says all trials.

MR. CRANE: I was thinking of proceedings where his presence was not required, but which ought to be in open court. Other proceedings. The court, in other words, is required to conduct proceedings in open court when the defendant is required to be present. Is that so?

MR. GLUECK: This means when the defendant has a right to be present.

MR. TOLMAN: I suppose it would be better to word it that way.

THE CHAIRMAN: All trials at which defendant is required to be present.

MR. CRANE: If he is not required,--

MR. HOLTZOFF: In other words, you can argue a motion in chambers.

MR. CRANE: He is not required to be present in capital cases--misdemeanor cases--is he required to be present?

MR. TOLMAN: I think he is.

MR. DEAN: We have just provided in a previous rule that where it is by summons it may be by counsel.

THE CHAIRMAN: Why, as a matter of policy, should all

these proceedings in criminal cases be in open court rather than chambers?

MR. HOLTZOFF: Suppose a prisoner is brought in late in the afternoon, and the judge is in chambers. Why should it be required that the judge shall go to open court?

MR. CRANE: You say it must be open court when the defendant is required to be present. Now, certainly, there are certain trials that should be done without the defendant being required to be present.

MR. HOLTZOFF: Why not just limit this to all trials?

MR. CRANE: Now, you have got it; you have got it.

MR. TOLMAN: There is a lot of sympathy in chambers.

MR. ROBINSON: Some motions, I suppose, ought to be in open court, like a petition to dismiss.

THE CHAIRMAN: I go to the other extreme. I don't know why they shouldn't all be required to be done in open court.

MR. HOLTZOFF: When you do that you make it impossible for the judge to hear anything outside of the term.

MR. McLELLAN: Sometimes you have four or five matters coming in. If you are working in chambers it seems too bad to have to go down and open up.

MR. CRANE: I don't see why you say "which require the presence of the defendant shall be conducted in open court."

MR. HOLTZOFF: Why not just limit it that all trials shall be conducted in open court?

MR. YOUNGQUIST: I would limit that. I think the judge has suggested all trials and proceedings that require the presence of the defendant.

MR. CRANE: No, that require the presence of the defendant,

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because there are many things that you cannot do in open court.

MR. YOUNGQUIST: How about this: All proceedings that require the presence of the defendant, and all trials shall be held in open court?

MR. MEDALIE: An arraignment requires the presence of defendant. If the judge is decent enough to have it at 6 p. m. I don't know why he should be required to get the janitor and open up, and all of that. All you are dealing with is the defendant's rights, but since you are dealing with the defendant's rights, and the constitutional rights, you don't need to bother. In the normal course, trials will be held in the courtroom, and if the defendant doesn't like it, he does not have to fall back on a rule like this. Those things take care of themselves. Are we afraid the judge is going to be a crook and do something in secret? Many things are done that way by judges in chambers. The newspapers raise a great howl, but what has been done is for the convenience of both parties.

MR. ROBINSON: The incidents you have mentioned are where counsel for defendant is present.

MR. DEAN: The right to speedy and public trial means, I take it, that it is to be held in the open courtroom.

THE CHAIRMAN: The civil rules require that all trials on their merit shall be tried in open court. Other proceedings may be conducted by the judge in chambers, and so forth.

MR. MEDALIE: Where else are you going to conduct? Wherever the judge conducts the trial is the local court. This is not old English law. Anywhere that a trial is conducted is the courtroom.

MR. SEASONGOOD: I think it ought to be in open court.

MR. BURKE: What are the other things that may be done by the judge in chambers without the presence of the clerk or other court officials?

MR. HOLTZOFF: I should think the arraignment of a hearing of a motion.

MR. BURKE: Without the clerk?

MR. HOLTZOFF: Yes.

MR. GLUECK: Who would record?

MR. HOLTZOFF: I suppose the judge could make a record.

MR. GLUECK: Then you get into that difficulty about whether he knew he had the right to counsel, and so on. You remember that difficulty.

MR. HOLTZOFF: Well, then, he has got to make a record.

MR. SEASONGOOD: All you are asking it for is for the convenience of the judge. I think you ought to have it in open court.

MR. HOLTZOFF: It is not only for the convenience of the judge. The courtroom may be locked and the janitor may not be around.

MR. SETH: Mr. Chairman, in lieu of the language which requires the presence of the defendant, I suggest a question which involves the determination of the question of guilt; which is already defined, in open court.

MR. GLUECK: That would rule out, however, a public hearing on the question of sentence. Now, is that desirable?

MR. SETH: I think after he is convicted, it doesn't make much difference.

MR. GLUECK: I think it ought to make much difference.

MR. CRANE: I think all trials should be conducted in

open court.

MR. HOLTZOFF: Isn't the imposition of sentence part of the trial?

MR. CRANE: We consider it as such. I never heard of anybody being sentenced except in open court.

MR. ROBINSON: And you don't want to.

MR. CRANE: And I don't want to.

THE CHAIRMAN: Why aren't we on safe ground if we follow the civil rule, all trials shall be conducted in open court. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials, but no hearing other than one ex parte shall be conducted outside the district without the consent of all the parties.

MR. McLELLAN: I don't think so. I don't think you want to sentence a man--I regard a trial as a place where you resolve the facts and the law, the judge presiding.

MR. CRANE: You can appeal from the verdict.

THE CHAIRMAN: Well, then, would you add "all trials on their merits, and sentence, shall be held in open court"?

MR. GLUECK: Trial on the merits on the civil side might include both the trial of the issue of guilt and innocence, and the result of the hearing in mitigation or relation of sentence may also be a hearing on the merits of the sentence.

MR. MEDALIE: In court.

MR. GLUECK: Yes. .

MR. MEDALIE: I don't think that is what you want, is it? I think from the things you have been interested in for a long time, you know the importance of manythings with respect to

sentence that ought not to be in the courtroom.

MR. GLUECK: That may well be. I want the court to consider the data on which he is to act.

MR. MEDALIE: Now, about sentences, there are a number of judges experienced in criminal cases who take sentences very, very seriously, and some of them--well, one of them, for instance, comes to the courthouse very, very early. He invites the man's wife, or his mother, to come into chambers; or his employer.

MR. CRANE: And then goes out and gives him the limit.

MR. MEDALIE: That may be. But I think it is recognized that many things with respect to sentence ought not to be done in the courtroom.

MR. GLUECK: But I think the final act ought to be in the courtroom.

MR. MEDALIE: All the judge has to do is to walk in and say "Ten years." All the other things that are important can be done in chambers.

MR. CRANE: I would hesitate to ask trial and judgment of sentence, because I never heard of any sentence of judgment being imposed except in open court. In fact, it is so much a part of the trial--as I say, you cannot appeal, you cannot make a move, until you get a sentence.

THE CHAIRMAN: If you have a civil rule, and we don't have one, the first thing you are going to do is to get out to the lawyers to see what we left out, and then figure out why we left them out.

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MR. SEASONGOOD: The essence of criminal procedure ought to be open, to my mind. You ought to hear the arguments, and

everything else these people can say in process of criminal justice. And I don't like this chambers business.

MR. MEDALIE: We have elaborate probation systems in a few places in this country. Some of them are very well worked out. For example, in New York--you have some in Kings that I am not raising local questions--there are other places in the country; that is done tolerably well in Boston, is it not?

MR. GLUECK: Tolerably.

MR. MEDALIE: The subject is so personal to the defendant, his family, the people he works with, the discussion with the probation officer where the judge gets so much of his information, those things ought not to be for public consumption. Most people don't want it for public consumption; and social workers generally don't want it for public consumption.

MR. GLUECK: On the other hand, it is also deemed desirable for the judge to put himself on record as to the reasons why he sentenced as he did, events motivating his opinion in a special opinion.

MR. MEDALIE: Well, I don't know that that is desirable. And I don't know that rationalizing does any good. It is simply something to pick apart, whether it is a lenient sentence or a stiffer sentence.

MR. SEASONGOOD: You don't want someone to whisper to the judge and then he gives a life sentence. I think it ought to be a public act.

MR. MEDALIE: I don't think so. That is not the experience of people who have had something to do with the prosecution.

MR. SEASONGOOD: I am speaking of the common people.

MR. MEDALIE: The public does not get suspicious about

judges who do that.

MR. SEASONGOOD: Oh, yes.

MR. MEDALIE: I don't think so. The judge will say in open court, "Now, I have seen the relatives, I have had a talk with the employer, I have talked this over with the probation officer, and I think so and so." Now, that all says of record that it has been done in chambers, and without a public hearing, and it would be a terrific loss if we impose on judges a compulsion to make public what ought to be private.

I will give you an example of one thing that caused a lot of distress. As a result of the Hines' trial, the probation officer's report was submitted and then published in the newspapers. It caused terrible distress to the man's family because it told all about the defendant's mistress. That never should have happened. It is all right to do that to the defendant. It is not right to do that to his wife or those children.

MR. CRANE: We ought not to particularize too much. We have a judge there in New York who is very fine, and he looks the part, and he explained his sentence once by saying this: "When you appeared before me I knew you were guilty, and I told you if you were convicted I would give you the limit. You took your chances and you lost." He was reversed. And he was reversed on the ground that that was a species of judicial gamble.

MR. SEASONGOOD: They couldn't have reversed it if he had said that all in private, and just said, "This is your sentence."

MR. CRANE: But I don't think we need to be too exact about this, because I think the practice has been everything

is conducted in public except perhaps this probation matter.

MR. GLUECK: I don't approve of reading the probation report in public, by any means.

MR. CRANE: I tell you how that probation system comes in. Where I think it is a very valuable thing indeed is in the suspended sentence. You get the history of a man and his family and everything connected with him, and much of it is given to the judge in his chambers, and the judge suspends sentence. A suspended sentence means he can send for him any time, any time, on just a whim, and send him up.

MR. HOLTZOFF: That isn't the federal system.

MR. CRANE: No. They criticized it one time, and it was found out there was just one percent of those men with suspended sentence who ever came back. And you would be surprised at the young men in New York today who hold honored positions who had 18, 19, 20, or 21 had sentences suspended on them. I talked to the president of one of the big companies in New York, and he told me about something that happened 30 years ago.

You have to leave something to the trial judge, and if he is the kind of man the public is suspicious of, you had better get him off the bench.

MR. MEDALIE: I have seen these things. I think just as Judge Crane says, we ought to leave these things to the judge.

MR. GLUECK: I was going to say, would you object to merely stating what is already necessary, all trials shall be conducted in open court? All other acts or proceedings may be done or conducted by a judge in chambers.

MR. MEDALIE: Well, the imposition of a sentence is always

in court, and should be; but the court is wherever the court holds the court.

THE CHAIRMAN: Yes, but there is a difference between that and just saying--if it is open court, other people have the right--

MR. MEDALIE: No, it isn't. In New York we have some cases, old ones, in dealing with the question of public trials, that say the judge has the right in certain cases that attract a morbid public interest, he has a right to close the courts to everybody but litigants or their counsel. And that should be so.

MR. YOUNGQUIST: I was going to make that suggestion with respect to the preceding clause. There are cases where obscene and lascivious acts are involved which should not be washed in public, where the public should be excluded.

MR. CRANE: You haven't got to put that in the rule. Leave that to the judge.

MR. YOUNGQUIST: If you say that all trials must be conducted in open court, then we leave the judge no recourse, and I think we must.

MR. CRANE: You have the same thing in the civil cases, Blank against Blank, a relative of the gentleman right down here in Washington, and one of the worst cases you could imagine. He gave an anonymous name, and it was not heard in open court. But it was a civil case between man and wife.

MR. GLUECK: Well, I know of an instance where that happened, it was not only in open court, but the court was crowded with a lot of hangers-on, and the judge even tried to help the district attorney out in this rape case involving a

girl of twelve. This poor girl sat up on the stand in front of all of us and described minutely just exactly what the accused did, and so forth. It was distressing. And, of course, I suppose in the long run we must leave that to the discretion of judges in the definition of open court.

THE CHAIRMAN: We have in my State trial in open court, and the judges control that by saying, "We will let a certain number of people in," and the sergeant-at-arms controls that. Children and people who have no business there are excluded. And as offsetting the danger of private trial, I think that he ought to use some discretion.

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Mr. Medalie. Isn't this intended only for the protection of the defendant -- this business of having a public trial?

Mr. Youngquist. He has that right by the Constitution.

Mr. Medalie. The defendant has that right by the Constitution, so you need not put it in for him. The only reason for putting it in is that the court shall be compelled to hold a public hearing in which the public is admitted, except in the morbid cases, where admittedly the court has the right to exclude the public.

Mr. Holtzoff. I can conceive of an espionage case involving national defense secrets where you might want to exclude the public.

The Chairman. The judge will know how to take care of that.

Is there anything else intended other than the presentation of the trial and the actual imposition of the sentence?

Mr. Medalie. I should think that would cover the whole thing.

The Chairman. Does that cover it?

Mr. McLellan. I hope that it does, and I do not know that it does not, but I do not see any necessity for the rule at all. A defendant, if he wants it, is entitled to a public trial, to a trial in open court. He will get it whether we put it in the rules or not.

The Chairman. I have in mind two factors on that. No. 1: The people who parallel our rules with the civil rules will ask why they were not paralleled.

Secondly: I have in mind the gentlemen in Congress who will have to approve the rules before they become effective,

and they will look through them from beginning to end to see if there is any place where we have not done everything that we should do to protect the interests of the defendant.

Those are the two things that are bothering me.

Mr. McLellan. May I ask you something? You get a rule here and then you get a question as to what is open court.

Suppose a judge is sitting in his chambers at night, doing some work, and the District Attorney calls up and says, "They want to take a man away tomorrow. They have others going. Will you sentence him?"

I say, "Yes, I will sentence him. Bring him in the room adjoining my office. The doors may be open, the reporters may be notified, the clerk in the office may come in, but I am not going down three or four flights of stairs and walk into a court room about it."

Is that a sentence in open court?

The Chairman. There is no question about it.

Mr. Holtzoff. I do not think "open court" necessarily means the court room.

The Chairman. That is covered, if I can give it to you, by the civil rules. The civil rules say that they shall be conducted in open court and, so far as convenient, in a regular court room.

Clearly, there you would not be required at 6 o'clock at night, to take an elevator and go downstairs and summon a half dozen people; but the very fact that reporters are called in, and the clerk, and the marshal, and whoever is around, renders that an open court.

Mr. Holtzoff. Why should not we borrow that language?

The Chairman. I think we should. That is why I am suggesting it.

Mr. Youngquist. We decided at the last meeting to eliminate that.

Mr. Glueck. Because the purpose here seems to me to be to stress that there are many things that can be done not in open court, why not omit the first sentence and say, "acts or proceedings other than the trial and imposition of sentence may be done," et cetera, "in chambers."

Mr. Holtzoff. If you do that in juvenile delinquency cases --

Mr. Glueck. Isn't it understood that this pertains only to adult cases?

Mr. Holtzoff. Oh, no. I think that express exception is very necessary, because otherwise you would have to bring juvenile delinquency cases into open court.

The Chairman. I think we might well make this proviso in the beginning: "With the exception of juvenile delinquency," and then take substantially the language of the civil rule.

Mr. Glueck. Why not make it read: "All trials shall be conducted and sentences pronounced"?

Mr. Wechsler. I would like to come back to the question of arraignment, so that that question may be put. I realize that there is a division on it. I would like to be able to record myself in favor of arraignment in open court.

Mr. Holtzoff. Wouldn't you create a difficulty for a defendant? Sometimes he might postpone arraignment over a week end.

Mr. Wechsler. Unless the defendant were represented by

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counsel, I would prefer to create that difficulty than to create the other difficulties that I think may be created by foregoing arraignment in open court.

Mr. Holtzoff. Going back to this, in addition to "shall be held in open court," you ought to add, "insofar as practicable in open court," as stated in the civil rules, because that will do away with the possibility of someone saying "open court" is the court room.

The Chairman. Let us get an expression of opinion on Mr. Wechsler's motion, which is to include arraignment in open court. Is there any discussion of that suggestion?

Mr. Youngquist. I cannot see any need for it. That is the only thing.

Mr. Medalie. All that can be involved there that is of any consequence to the defendant is the fixing of bail, isn't it?

Mr. Wechsler. In a case where the defendant is represented by counsel, I agree that there is no need for it. In a case where the defendant is not represented by counsel that seems to me a case in which the court should be and is under an affirmative duty to explain the charge to the defendant and to advise him of his right to counsel and to offer to provide counsel for him. I think it is a guarantee that those things will be done in every case and become matters of record, as they should become matters of record, and it ought to be done in open court for that reason.

The absence of the clerk means in effect the absence of an actual record.

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Mr. Medalie. Let me suggest a simple case. There are

many petty offenses where a person is arrested at unseemly hours. His arraignment ought to be possible. His release, even on nominal bail, ought to be possible. By insisting that arraignments be made only in open court, this large number of defendants who are not criminals are subjected to unjust inconvenience. It ought not to be done.

Mr. Waite. I think there is an uncertainty as to just what is meant by "arraignment." I have thought of it as something quite different from what Mr. Medalie is now talking about.

Mr. Wechsler. So have I.

Mr. Holtzoff. Arraignment is pleading to an indictment or to information.

Mr. Wechsler. That is what I thought. I think he meant something else.

Mr. Medalie. I have used it in the popular sense in which it is used in the court house. You are quite right in making the distinction.

However, let us say a man has been brought down from Poughkeepsie to New York, and he is brought down on a Saturday afternoon on a matter so unimportant except that it violates a federal statute. He ought not to have to come to court --

Mr. Waite. You are now using "arraignment" in the technical sense.

Mr. Medalie. He can use both, if he wants to.

Mr. Waite. We are discussing whether it should be in open court or not. If by "arraignment" we mean the kind of thing you are talking about, which I have never considered arraignment, I might vote one way. If by "arraignment" we mean what the

word technically and properly used means, then I would vote the other way.

We have to decide what we are talking about before we vote.

Mr. Medalie. Take the case I am talking about. A man violates a technical federal statute and a government man arrests him and the man prefers being brought before the judge on a Saturday afternoon to have an arraignment then and there in his chambers. He is told what the charge is, he is told what the indictment and the information contains, and he says, "I want to plead guilty. Please fix bail and let me out."

That is an arraignment.

Mr. Waite. There has been an indictment?

Mr. Medalie. Yes.

Mr. Waite. Yes, I would call that an arraignment.

Mr. Medalie. I think under those conditions -- and there are many such cases -- it is to the interest of the defendant that there be an arraignment and that he does not wait for the rigmarole of a court session. He may be in jail. That is one thing.

The other thing that is equally important to him is his personal convenience. He ought not have to come down a distance of 60, 80, or 150 miles to the federal court house again. It is not worth it either to the Government or to him.

Mr. Waite. Why would he be coming down again? He would come down especially to be arraigned, would he not?

Mr. Medalie. Yes. Let us get this situation. He has been arrested and he is brought in before a judge. He does not want to be released on bail and then come back two days later to plead to the indictment.

Mr. Waite. But he cannot plead unless he has been indicted.

Mr. Medalie. Say he has been.

Mr. Waite. You mean arrested after the indictment?

Mr. Medalie. Yes.

Mr. Waite. Oh, yes.

Mr. Medalie. There are many such cases. He ought not to have to come twice.

Mr. Wechsler. I agree that there are cases where it is advantageous to have that occur in chambers, but I do not see how you can reach those things without at the same time freeing a system from a formal inquiry which in the great bulk of cases seems to make for protection of a defendant's rights.

Mr. Medalie. As a matter of convenience to the courts and to the judges, most defendants are formally arraigned in a court room. Obviously the judge does not want to have his chambers overflowing with defendants and with marshals and with government agents, so actually most of that -- almost all of that -- takes place in the court room.

There is not any danger of anything hidden or surreptitious, because a record has to be made -- that is, a plea has to be entered -- and it is in the first book, which is in the docket.

I do not know what public interest is furthered by insisting that in all cases it must be in the court room.

Mr. Waite. I have in mind an Illinois case that came up not so very long ago. The defendant asked leave to withdraw his plea of guilty, and in the hearing he contended that the judge had persuaded him to make that plea of guilty in an improper way.

Now, if you can have your arraignment in chambers you might

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have a lot of questions about that sort of thing, as to just what the judge said and what he did not say.

Mr. Medalie. I am aware of cases where defendants have made that their claim for the withdrawal of a plea of guilty, on the ground that they were misled in open court by both the District Attorney and the judge. Nothing stopped that claim.

Mr. Waite. But at least, the point is, you have a little more evidence as to what did transpire.

Mr. Medalie. I think what is involved there is that the sum total of such cases against the unnecessary inconvenience to a considerable number of people makes it unnecessary to make that provision and create that other inconvenience against the occasional case. Now, I do not believe that in a district court, say in the Southern District of New York, which is a very busy one, and it has a tremendous number of criminal cases, you get more than one or two claims of that sort during the course of a whole year, if that many.

Mr. Holtzoff. Mr. Chairman, I would like to add a comment to the suggestion made by Mr. Wechsler on the question of protection of defendants. It seems to me that the defendant can be fully as well protected by a proceeding in chambers as he can by a proceeding in open court. Of course, there has to be a record made.

There is another rule here that provides for making a record on the question of counsel, and the fact that the arraignment takes place in chambers when it does would not eliminate the requirement of keeping that record.

Mr. Wechsler. That means a record is made --

Mr. Holtzoff. The record can be made right in chambers.

The judge can make the record, or have his secretary make it, or he can send for the deputy clerk or the clerk in chambers.

Mr. Wechsler. The rule as it stands does not require the presence of the clerk or other court official.

Mr. Holtzoff. I suppose the judge's secretary is just as competent to make the record.

Mr. Medalie. So is the judge.

Mr. Holtzoff. So is the judge.

Mr. Medalie. I have seen many records made by the judge, who picks up the indictment and scrawls something on the back of it and puts his initials there. It is just as effective as a notation made by an official more painstakingly in a large book.

Mr. Holtzoff. As a matter of fact, these are better, because we found many years ago there were a good many sentences recorded by court clerks that were incorrect, and we adopted a rule that required the judge to sign the sentence.

The Chairman. We have a motion by Mr. Wechsler, seconded by Mr. Waite.

Mr. Waite. I did not, but I will.

The Chairman. With respect to arraignment in open court.

Mr. Burke. I thought he coupled with his observation the question of whether the respondent was represented by counsel or not.

Mr. Wechsler. I did, sir.

The Chairman. To include in this proposed rule arraignment when the defendant is not represented by counsel.

Mr. Medalie. May I say a word as to that?

The Chairman. Surely.

Mr. Medalie. I think in the type of case I referred to --

The Chairman. A migratory bird case?

Mr. Medalie. Yes. A man is a fool to waste his money on counsel.

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

Mr. Holtzoff. What are we voting on?

The Chairman. We are voting on Mr. Wechsler's motion to include in those things that must be done in open court -- arraignment where the defendant is not represented by counsel.

All in favor say "Aye." Opposed, "No."

The Chair is in doubt, largely because of the noise on my right.

All in favor of the motion raise their hands. There are eight in favor.

Opposed, six. It is eight to six. It is carried.

Mr. Medalie. I think you will find the bar is going to think we were very impractical in doing this.

The Chairman. It is tentative. There is still a chance to repent.

I take it that the rule will then read about in this form, if the amendments that have been discussed are acceptable:

"Except as otherwise permitted by the Act of June 16, 1938, chapter 486, section 3, 52 Statutes 765 (U. S. C., Title 18, section 923) relating to juvenile delinquents" --

Mr. Holtzoff. That ought to be "persons charged with juvenile delinquency." A person is not a delinquent until he is convicted.

The Chairman. That is what the statute relates to, however.

Do not change it.

(Continuing) "all trials upon the merits" --

Mr. Glueck. Wouldn't you begin with "all arraignments"?

The Chairman. "All arraignments and all trials" --

Mr. Glueck. Pardon me. "All arraignments where the defendant is not represented by counsel, trials" --

The Chairman. "And all trials shall be conducted and sentences imposed in open court."

The second sentence will read just as it is.

Are there any remarks on the motion?

If not, all those in favor say "Aye." Opposed, "No."

The motion is carried.

Rule 11(c).

Mr. Glueck. May I raise a preliminary point, Mr. Chairman?

The Chairman. Surely.

Mr. Glueck. I was wondering whether, for the benefit of the final shot we will take at the whole business, it would not be wise to record a division on all votes, so that we would see, as we glanced down the list at six-to-eight votes, and so on, that that is the thing we would focus our heavy artillery on?

The Chairman. That is the reason why I stated it.

Mr. Medalie. I would like to reserve the privilege, on this particular thing on which we just voted, of preparing a minority report.

Mr. Glueck. I thought it might help us later on. Months may pass. If we had a list which showed a practical unanimity on one hand, then we could regard that as practically finished with except for editorial revision. Then we would get busy on

the matters that we are really divided on.

Do you think that might be a good idea?

The Chairman. I think it is a good idea. Mr. Medalie expressed a desire to file a memorandum with the committee.

Mr. Medalie. Surely.

The Chairman. I take it there is no objection?

Mr. Medalie. That is, if you finally adopt that provision as to arraignments.

I would rather file a memorandum than have some member of the bar ask me, when these rules are promulgated, "Haven't you fellows any practical sense? How do you think justice is administered?"

I want to be able to say that "I told you so."

The Chairman. We have another difficulty here. As chairman I know I have not any right to vote, but I notice that the reporter does not vote. I think he as a member of the committee has a right to vote and should vote.

Mr. Youngquist. Aren't you a member of the committee, Mr. Chairman?

The Chairman. I think I am, but I did not know if I had the right to vote.

Mr. Medalie. You have a right to vote.

You have brought up subdivision (c).

Mr. Youngquist. Before you go to (c), I suppose that (b) now will cover the cases where a man is arraigned and sentenced on an information where he waives a jury and pleads guilty in order to get the thing out of the way and begin to serve his time?

Mr. Holtzoff. Yes.

Mr. Medalie. Or pay his two dollars.

Mr. Youngquist. The case where the information and the waiver of jury trial is usually used is the case where the man has been before the Grand Jury, is held in jail, knows he is guilty, and wants to begin to serve his time. That is the kind of case I am talking about, but that, I think, will be covered by the rule as it now stands.

Mr. Glueck. Does not the term "trial" include the plea of guilty?

Mr. Holtzoff. No. The word "arraignment" covers this.

Mr. Chairman, you were going to adopt the last clause of the civil rule.

The Chairman. No; this last sentence here.

Mr. Holtzoff. I mean the last clause --

The Chairman. That is right.

Mr. Holtzoff. No; there is more there.

Mr. McLellan. Is that the one about in the court room?

The Chairman. What was your question?

Mr. McLellan. I am wondering whether Mr. Holtzoff is talking about an omission in reference to open court, in a court room except when inconvenient, or something of that kind? Is that the thing you have in mind?

Mr. Holtzoff. Yes.

The Chairman. The words in the civil rules are "And so far as convenient, in a regular court room."

That was understood, I think, to be approved.

Are there any questions on (c)? That parallels the civil rule.

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Mr. Medalie. Does the second sentence meet anything that actually happens in criminal cases?

Mr. Holtzoff. Yes.

Mr. Medalie. What?

Mr. Holtzoff. We have one district in the Middle West where the district judges have taken the position that they may not sign an order or even hand down a decision if they are physically present in a division of the district other than the division in which the case is pending. That has created a lot of delay and a lot of difficulty.

Most judges do not accept that interpretation, I venture to say. It is a wrong interpretation, but they do interpret their authority that way. That is why it is useful to have the phrase "within or without the district."

Mr. Medalie. That is not what I was referring to. In subdivision (c) --

Mr. Holtzoff. I beg your pardon. I thought you were talking about the second sentence.

Mr. Medalie. I will just tell you what I mean. The second sentence of subdivision (c) provides for "proceedings in the clerk's office which do not require allowance or order of the court."

What I am asking is, What sort of situation is that? I do not know of any criminal cases, or, at least, I can't think of any, where that would be applicable. I know that happens in civil cases, but I do not know how that happens in criminal cases.

Mr. Holtzoff. In many districts the clerk takes bail.

Mr. Medalie. Does he?

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Mr. Holtzoff. In a good many cases.

Mr. Medalie. Physically?

Mr. Holtzoff. No, but he takes it after the judge fixes it.

Mr. Seasegood. It says "which do not require allowance."

Mr. Medalie. It says motions "are grantable of course by the clerk."

What kind of motion do you know that is "grantable of course by the clerk" in a criminal case?

The taking of bail is nothing more than receiving a deposit either of a paper or of money or of security, but what motion is "grantable of course by the clerk"? I know of none.

Mr. Youngquist. I have noted the same question on my copy. I could not think of anything the clerk could have to do with this in a criminal case, and I do not think it looks well in the rules.

Mr. Medalie. That is right.

Mr. McClellan. Would it cure it any if you left out "all motions, applications, and other," and say, "all proceedings in the clerk's office"? Would that cover this bail business?

Mr. Medalie. I do not think you need it, because clerical acts can be performed by the clerk without judicial action or without requiring the rule, just like the making of entries in the book.

Mr. Youngquist. I move, Mr. Chairman, that the last sentence of (b) be stricken, and if the reporter finds some use for it let it be later reconsidered.

Mr. Glueck. I second it.

The Chairman. You have heard the motion. All those in

3 favor say "Aye." Opposed, "No." The motion is carried.

That takes us to Rule 12.

Mr. Youngquist. I have a notation on Rule 12, Mr. Chairman. So long as we have the administrator's office and the Attorney General, we do not need Rule 12.

Mr. Medalie. I do not think we need Rule 12.

Mr. Glueck. Isn't that a matter of the administrator's office sending memoranda to the different clerks?

The Chairman. May we pass that until Mr. Tolman comes back? He is out on the telephone. May we pass 12 and 13 for the moment and go on to Rule 14?

6 Mr. Robinson. This deals mainly with the form of indictments and informations. You will recall that it was decided at our last meeting that instead of trying to catalogue in a rule the essential parts of an information, we should have the rule stated generally.

As you will see, it is when you come to the chapter on indictments and informations that you have forms to supplement or, rather, to illustrate the rule.

Clearly, in that connection, it would be desirable to include what the civil rules included in civil rule 84, pointing out that forms contained in the Appendix of Forms are indicative and illustrative rather than controlling or mandatory.

That is the object of this general rule. There are still, as you know, in this first chapter, which is devoted to general proceedings --

The Chairman. I notice the language of this rule is more modest than the language of rule 84.

Mr. Robinson. In one of our conferences in the reporter's

4 research staff it was decided that those words "simplicity" and "brevity" were a pious wish and for that reason should be dropped.

Do you know about that, Mr. Longsdorf?

Mr. Longsdorf. I think you took my words. I have used them once or twice. Pious wishes are not wrong.

Mr. Robinson. Do you have any objection to restoring it to the way I had it?

Mr. Longsdorf. Not a bit.

The Court. That keeps the language of Civil Rule 84.

Mr. Robinson. I will put it that it is the wish of the Committee that rule 84 be incorporated as rule 14.

The Chairman. I merely raise the question. I would like to have the thoughts of the Committee on it. Have you the language of the Civil Rule before you?

Mr. Wechsler. What is contemplated in the way of forms? That those forms that are included in this draft are used or that there shall be a fairly complete set of forms at the end?

Mr. Robinson. The present draft includes a set of forms which you find tabulated. You notice that form page 1 of that appendix gives you a form which is annotated on pages 2 and 3, with regard to each allocation and the form of indictment. That is placed there for your consideration.

When we come to the rule on indictments and informations, chapter 3, rules 30 and 31, we will have to determine the matter of the extent to which the form shall be used supplementing the rule.

Mr. Wechsler. May I suggest then, Mr. Chairman, that we pass over this rule 14 until we discover what part forms actually play

5 in the finished product?

Mr. Robinson. Well, I can say as a general matter that our present policy is this: that there will be just as much a resort to forms in criminal rules as there is in the civil rules.

In the civil rules they have a rather complete series of forms, but, of course, the statement is repeated that it is to be understood that those forms are not binding but are merely illustrative. That will be our plan now, subject to instructions from the Committee to the contrary.

Will that help now? Do you want specimen forms for each thing before you would feel that rule 14 can be passed on?

Mr. Wechsler. No. My only thought was that, depending on how complete the forms are, when we know how complete the forms are we will be in a better position to know whether they should be referred to in the rules at all.

Mr. Waite. Are you going to have a permissive rule to the effect that indictments may be in accord with the following forms? This rule just says that these forms are not obligatory. There is nothing in here that I see that says those forms shall be used.

Mr. Robinson. I think that clause you speak of should be written into the rule on the contents of indictments and informations, and I wish that you would suggest it.

Mr. Waite. It is not in rule 30 at present.

Mr. Robinson. Well, you will appreciate the fact by this time, no doubt, that the plan of farming out these rules and having a good many people work on them has led to some adversities and rearrangements that will have to be taken care of.

Mr. Crane. Would we think so well of that nice short form

6 that you can put in your vest-pocket?

Mr. Robinson. I think you will be pleased with it. We have a short form, and the Mimeographing was being finished on it this morning.

Mr. Chairman, as I understand it, the wish is that we defer any further consideration of rule 14 until we have forms.

Mr. Youngquist. I suggest that 14 stand, and then we come back to it, if necessary, until we get the form.

The Chairman. You so move?

Mr. Youngquist. Yes.

Mr. Holtzoff. I second the motion.

The Chairman. Is there any further discussion?

7 All those in favor say "Aye." Opposed, "No." The motion is carried.

Of course, this is all purely tentative.

Now that we have Mr. Tolman back, may we go back to rule 12? Will you outline this rule 12, Mr. Tolman?

Mr. Tolman. We had some question about just exactly what we should propose to the Committee on the subject of books kept by the clerks, and we decided that the only subject that could appropriately be regulated by rule was the one relating to dockets, so this rule is confined to the subject of dockets.

Of course, the clerks keep a great many other records, but they are all so intermingled. The minute books are not separated as to whether they are civil or criminal, and the order books are usually kept together, and the indices are in such a state of flux at the present time that, all in all, we thought perhaps it would be best not to have too much regulation.

The rule we have here on the clerk's criminal docket is

7 modeled on the civil rule corresponding to it. We have tried to make it so that every proceeding that is reported to the court will be entered in the clerk's criminal docket. That would include any case in which the defendant is held to answer in the District Court, even though an indictment or information may not yet have been filed.

We have tried to make the specification that what the docket is to contain is general, but to include all the more important things, and also it will give the judge discretion to ask that other things may be included.

The form and the style docket have been left in the discretion of the administrative office.

We are now working with the clerks of court regarding the types of dockets that they keep and making some improvements, and we find that it takes a long time and that it is a very difficult thing to do.

We feel probably it is better to let it work along slowly than to do everything all at once. There is a good deal of difference in districts. It may be that no uniform style of docket is possible.

On this general subject of books kept by the clerk and the type of clerical work that is done in the clerks' offices, there has been a very careful study made by the Bureau of Administrative Management -- the Division of Administrative Management in the Bureau of the Budget -- and they have made a written report and a number of detailed recommendations. Those recommendations are the basis for our discussions with the clerks.

We are trying to work slowly toward accomplishing them, or such as them as seem to be practicable. In the meantime our

8 principal hope is that you won't make rules that will be too hard and fast on these subjects.

Mr. Holtzoff. Somebody made the suggestion, while you were out of the room, that even this was too much and that we should leave the whole matter to the administrative office.

Mr. Tolman. It might be possible.

Mr. Youngquist. I feel very definitely that that is the job of the administrative office and not the job of the advisory committee or the Supreme Court to detail the manner in which a clerk shall keep a record in his office.

Then, too, if we embalm these rules, or if the Supreme Court does, you may find later that it is advisable to use some other method, and you would have to get an amendment of the rule.

I imagine that the administrative office would rather let that matter be left out.

Mr. Tolman. I do not know exactly what Mr. Chandler would say to that, but I think he would sympathize with that point of view.

There is perhaps only one advantage that I can think of in having a rule on this subject, and that is that we will have very strong sanction for asking the clerk to keep records of all criminal proceedings before them.

Mr. Holtzoff. Do you need that sanction?

The Chairman. I think that is more than offset by the danger of becoming fixed and not susceptible to change.

Mr. Medalie. Furthermore, we are not expert on this. It requires a lot of study to be able to say what is a good method of keeping records. We will never know without a great deal of

9 study, and we ought not to pretend to be expert when really we are not.

Mr. Tolman. I will be glad, if you want to take that action, to report it to Mr. Chandler and see if he thinks that there is anything at all that he would like to have done by rule, and if he can't think of anything, I will report that back to you, if that is agreeable.

The Chairman. It is moved and seconded that tentatively rule 12 be dropped.

Are there any remarks? If not, all in favor say "Aye." Opposed, "No." The motion is carried.

Rule 15 deals with stenographers.

Mr. Tolman. I think on this subject probably Mr. Holtzoff is more qualified to speak than I am. No rule was proposed on the subject. There is in the Civil Rules a rule dealing with the subject of stenographers that provides for the appointment by the Court for the official court reporters, who are to be paid by litigants.

The Judicial Conference at its last session approved legislation that would establish for all Federal courts a unified and adequately financed system of salaried shorthand reporters, which is the thing that the Federal courts now lack.

Mr. Crane. What provision are you going to make? I think it a terrible thing that you can have a trial anywhere without any record to protect the rights of the defendant.

Mr. Tolman. I think that everyone agrees with Judge Crane on that. The question is whether it would not be better to wait for a little while, to see whether that legislation won't move along. If it looks as if it might bog down, we may have

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to do something about it.

Mr. Crane. Is it in Congress?

Mr. Tolman. I think it is before the Bureau of the Budget, on the question of whether the President approves of it.

Mr. Holtzoff. The bill has been drawn and was drawn by the administrative office in cooperation with the Department of Justice, and it has been approved by the Judicial Conference. It has been approved by the Attorney General. We are planning to submit the bill to the Congress, but, in accordance with the usual procedure, before we can do that we have to secure the approval of the Bureau of the Budget, and it is now before the Bureau of the Budget. As soon as the Bureau of the Budget acts, we are planning to submit it to the Congress.

Mr. Crane. They have not a surplus.

Mr. Dession. Does the bill provide for a record in all cases?

Mr. Holtzoff. Yes. The bill is a good deal like the law in existence in most states. It provides for a salaried reporter, who will report all trials.

Mr. Crane. I did not catch that.

Mr. Holtzoff. The bill provides for a system of salaried reporters, who are required to attend and report all trials.

Mr. Crane. Civil and criminal?

Mr. Holtzoff. Yes, civil and criminal.

Mr. Dession. To take it down in shorthand?

Mr. Holtzoff. Yes. Then any party desiring to get a copy of the transcript, for the purposes of appeal or for some other purpose, pays just for his copy.

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There is also another provision that if a defendant in a criminal case is found to be impecunious, he may receive a copy of the transcript for the purpose of an appeal without charge; and in that case the bill provides that the Government shall pay the reporters for the copy. So that an indigent defendant is very well protected under that bill.

Mr. Crane. Have you any general idea what that means in expense to the Government?

Mr. Holtzoff. It means somewhere in the neighborhood of a half million dollars, probably. I do not know exactly. The financial offices of our department are at this very time making a computation for the Bureau of the Budget as to how much it will cost, but I think it will probably run in the neighborhood of a half million dollars, more or less, for the entire United States.

Mr. Seth. But the litigants pay five dollars more for each suit filed. Instead of paying five dollars, they pay ten. That would make up for some of it.

Mr. Seasongood. Why not have a rule on it and then take it out if the law is passed?

Mr. Holtzoff. If you have a rule on this, the rule will be very much limited, because I do not suppose that by a rule of procedure the Supreme Court could create an office and provide that the person holding office shall receive a salary. It would take legislation to go that far.

Mr. Robinson. Are you sure of that? We have had the same question on the matter of the public defender, the extent to which we can fix our rules so that they will apply if and when the public defender system is created. Here it is a question of

12 what needs to be done. Perhaps by a little preparation, even if there should be action one way or the other, it might be well to take care of the situation.

Mr. Holtzoff. But we will need no rule on the subject if salaried court reporters are provided for.

The Chairman. If they do not provide for salaried reporters, ought we not to adopt some such rule as the rule contained in the Civil Rules?

Mr. Holtzoff. I think so, but I think we might leave it until the next session.

The Chairman. Do you make a motion to that effect?

Mr. Holtzoff. I do.

The Chairman. It has been moved and seconded that we leave this subject until our next meeting.

All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Crane. I feel quite strongly on that, and every Federal judge does, I think. I think the time has come where the practice should be what it is to a great extent in the East. There should be a system of having a stenographer there to give some dignity to a trial. We are talking so much about fighting and dying for freedom and liberty. We should be very careful that that freedom and liberty are something that are orderly and in accordance with justice, and I think that this is one of those little things that were overlooked, and an innocent defendant might suffer from it.

I hope it won't be passed indefinitely and forgotten and left entirely to the rule in effect.

Mr. Holtzoff. The Department of Justice is pressing the

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legislation, and in his Annual Report the Attorney General makes mention of this subject in rather emphatic language and recommends the enactment of the legislation. The Annual Report was issued very recently.

The Chairman. That takes us to Rule 15.

Mr. Glueck. I move that that rule be pushed back somewhere to Rule 1, perhaps to be consolidated, because it seems to be of the same type of subject matter as the statement regarding construction, definition, and application in Rule 1.

Mr. McClellan. I second the motion.

The Chairman. It has been moved and seconded.

Is there any discussion? The motion is that the rule, if possible, be made part of Rule 1.

Mr. Robinson. May I ask this question in connection with that? I take it that our draft here, where it seems proper to us, should follow along with the customary order of drafting statutes, or, in fact, Rules of Civil Procedure, so that Rules 15 and 16, namely, title and citation and effective date, will come pretty well toward the end at least of that chapter, which is devoted to the general topics.

Mr. Holtzoff. I think that ought to come at the very end of the rules or at the very beginning of the rules.

Mr. Robinson. Well, do you consider chapter 1 not at the beginning? You have the question whether you want chapter 1 to be the last chapter or whether you want to split it.

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Mr. Holtzoff. Well, the Civil Rules have the corresponding rule at the very end.

Mr. Robinson. Yes, they do.

Mr. Holtzoff. But it seems to me to be illogical, perhaps,

14 to insert somewhere in the middle of the rules those subjects. They ought to be either at the very opening of the rules or at the close.

Mr. Wechsler. I move that it be referred to the Committee on Style.

The Chairman. The substitute motion is that it be referred to the Committee on Style. All those in favor of the substitute motion say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I suppose we did agree to it, because it says so, but that abbreviation looks funny to me. It is a small thing, but it looks so funny to me.

Mr. Longsdorf. The Civil Rules did not specify any abbreviation.

The Chairman. Rule 16.

Mr. Holtzoff. I think comments made with respect to Rule 15 are equally applicable to Rule 16.

The Chairman. If there is no objection, that will be the action with respect to Rule 16.

We will now proceed to Chapter II, Rule 20.

Mr. Robinson. This first chapter has referred to general matters -- "General Provisions," it has been called -- and at this time we take up what is strictly the chronological order, a chapter on complaint, warrant or summons, hearing and bail.

The Chairman. There are two here. The correct one is entitled, "Chapter II. Complaint, Warrant or Summons, Hearing and Bail," is that correct?

Mr. Robinson. Yes.

The Chairman. Rule 20.

Mr. Robinson. That is based on the American Law Institute.

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It has been in Mr. Longsdorf's hands for his consideration.

What do you have to say on it, Mr. Longsdorf?

Mr. Longsdorf. Not very much. Section 591 of Title 18 empowers the United States Commissioners and certain state judges and magistrates to act as committing magistrates and tells what they may do, following the usages of the state courts.

Now, the usages of the state courts have been amalgamated, if I may use that word, by the American Law Institute in its draft of the corresponding matter. You will find that in the American Law Institute Code, in Section 40 and the following sections of that Code.

Mr. Holtzoff. I have a question with regard to Rule 20(a). I am wondering if there is not a gap there. It seems to me that perhaps there ought to be some express provision for a complaint.

Mr. Robinson. I was coming to that just now. There is no provision in Section 591 for the contents of the complaint, and that is left entirely to the state procedure.

I attempted a draft covering the form and contents, the requisites of a complaint. It does not appear in this book at this time, and I wish that the rule may be considered with that in mind.

Mr. Holtzoff. Well, entirely aside from the form of the complaint --

Mr. Robinson. You think there ought to be mention of the word "complaint" in (a)?

Mr. Holtzoff. Yes.

Mr. Robinson. I think so, too.

Mr. Holtzoff. I think we ought to make provision in Rule

16 20(a) for a complaint, and then the rule as to the contents we can consider later.

With that point in mind I suggest that in Rule 20(a), in line 4, after the word "warrant," the following shall be inserted:

"The arresting officer shall forthwith file a complaint, unless a complaint has been theretofore filed."

Then start the word "The" with a capital letter.

Mr. Crane. I think it should be the other way: "If a complaint has not been filed, he should file one."

Mr. Holtzoff. If the arrest is pursuant to a warrant, the complaint had been previously filed. If the arrest is without a warrant, the arresting officer brings the prisoner before a commissioner, and there ought to be a provision for his filing a complaint.

Mr. Robinson. Why not make a separate sentence of it?

10 Mr. Youngquist. It would be very awkward. Is that that the arresting officer shall file a complaint?

Mr. Crane. Yes.

Mr. Youngquist. We are putting that in a sentence that deals with arrest with a warrant.

Mr. Longsdorf. Won't you unburden the syntaxes considerably if you put the necessity of filing a complaint immediately after --

The Chairman. Don't we all understand what is to be done?

Mr. Longsdorf. Yes.

The Chairman. It is solely a matter of language for the Committee on Style.

Is there a motion to insert a provision about filing the

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complaint where arrest has been made without warrant? We will then refer it to the Committee on Style.

Mr. Holtzoff. I so move.

Mr. Longsdorf. I second it.

The Chairman. Is there any discussion?

Those in favor say "Aye." Opposed, "No." It is carried.

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The Chairman. Now, 20(b).

Mr. Longsdorf. I move that that be changed to read this way: that if a person waives preliminary examination, he would be held by the magistrate to answer to the District Court of the United States, which by law has cognizance of the offense, and shall either be held in custody or, in proper case, be admitted to bail as provided by law.

That might not be necessary in view of another rule, but I think it should go in.

Mr. Holtzoff. I am wondering, if you put that in, whether you do not leave a gap for cases that are tried by the magistrate. In the rule as it now stands you make it sufficiently broad as to cover both types of cases.

Mr. Longsdorf. Well, I do not think that we ought to carry the trials by magistrates --

Mr. Holtzoff. No, I mean trials by United States commissioners.

Mr. Longsdorf. Yes, I mean trials by United States commissioners, too. I do not think we should carry these proceedings at all into this rule. I think it should be separate for each of the rules. It is preliminary examination. Besides, the statute calls for an information in those proceedings which are tried before United States commissioners on Federal reservations, national parks, and the like.

Mr. Holtzoff. Not the statute.

Mr. Longsdorf. 18,576.  
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Mr. Holtzoff. As far as I know, the statute does not require an information.

Mr. Robinson. It is the rule to withhold information where

2 there is a complaint.

Mr. Holtzoff. Yes, and we have secured an informal construction that the word "information" in these rules is broad enough to fit.

The Chairman. What is the matter with this as it stands?

Mr. Holtzoff. I think it is all right now.

The Chairman. The motion is to approve striking out the words in line 9 "in proper cases." Are there any remarks?

Mr. Longsdorf. I was not paying attention at the moment, for which I apologize.

The Chairman. It has been moved that we strike out the words in line 9, "or in proper cases," because it goes on to say, "being admitted to bail by law."

Mr. McLellan. You do not want to strike out the "or."

The Chairman. No; just the words "in proper cases."

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Now, Rule 20(c).

Mr. Seth. Should there not be some mention there of admission to bail pending hearing? The commissioner should admit a man to bail if he is going to continue the hearing for six days temporarily.

The Chairman. You would add that at the end of line 16? "Admitting him to bail according to law in the meantime," or some such language?

Mr. Seth. Yes.

Mr. Holtzoff. I do not think we ought to have a six-day mandatory limitation.

Mr. Seth. That was merely carried in from the A.L.I. rules.

3 Mr. Holtzoff. That may be so, but I think it is a dangerous rule, even though it is there, because I know of any number of cases where with the defendant's consent a hearing has been postponed for more than six days and the defendant has been out on bail in the meantime, and it might cause considerable inconvenience to all concerned to make a mandatory six-day period. It may be that the American Law Institute Code had some state statute in mind.

Mr. Longsdorf. It did. Some states have a limit of six days.

Mr. Crane. What is the purpose of any limitation at all?

Mr. Holtzoff. I do not see any purpose.

Mr. Crane. I do not see any. If a man is a judge, magistrate, or commissioner, it is his duty to put it down for such time as is reasonable.

Mr. Holtzoff. I think the New York Code has a provision that an examination shall not be postponed for more than forty-eight hours at a time without the defendant's consent, but I do not think we need that here.

Mr. Crane. When you have a provision for bail here, I do not see the necessity for it. In other words, you turn him over to a magistrate or an official as though he were a mere automaton who had to measure up to a chalk mark, and you leave no discretion for certain developments that we do not know anything about.

The Chairman. What is the motion?

Mr. Crane. That we strike out the time limit.

Mr. Youngquist. Are you not going to make any provision for the protection of the defendant in case the Government seeks

4 a long postponement of the hearing?

The Chairman. I think that is a danger.

Mr. Crane. Could we say "within a reasonable time"?

Mr. Glueck. "For a reasonable time." That is one of these elastic expressions.

Mr. Medalie. This is the situation you really face in practice, especially in the busy districts: The United States Attorney has someone arrested, or a Government agent has someone arrested and then brings the United States Attorney in on it. The case is more elaborate than the so-called complaint before the commissioner would indicate. It requires much preparation.

The Government -- that is, the United States Attorney and the Government agent -- has no intention whatsoever of presenting that case at a public hearing. It does not intend to permit the defendant to cross-examine its main witness or main witnesses and get a chance to examine the exhibits. Accordingly, the commissioner fixes a day as far off as he can without protest.

If the defendant is unable to get bail, he may get some redress by a writ of habeas corpus. If he has given bail, he usually does not trouble, because the only way to raise that point is to have his surety surrender him and get the writ of habeas corpus.

While that is going on, the United States Attorney, with the aid of the Post Office Inspector or the F.B.I. man, proceeds to an elaborate investigation and a building up of the case largely through the Grand Jury process, and so these proceedings drag. Now, practically, these proceedings ought not

5 be permitted to drag, and you might say the man ought never be arrested; but very frequently he ought to be, and the Government should get a chance to build up its case. Now, there is only one way on earth in which that can be performed.

If you have a provision that a man must be discharged at the end of six days, which in effect this is, unless it means nothing, then you have nothing to do in the case of the defendant except to subject himself to the annoyance, inconvenience, and delay of surrendering himself and suing out a writ of habeas corpus to determine whether he has been unjustly treated.

This provision actually does not do anybody any good unless he is prepared to stay in jail and test it by a writ. If this is interpreted to mean that at the end of the two days or the six days the case ends, why, that is exactly what you do not want to do, because you may be turning criminals loose.

Mr. Crane. It ought to go out, then.

Mr. McLellan. I think we<sup>are</sup> all agreed. I thought the only question was whether we would substitute "for a reasonable time."

Mr. Crane. "Postpone the examination for a reasonable time."

The Chairman. I think Mr. Glueck moved that.

Mr. Glueck. Yes.

The Chairman. It has been moved and seconded that line 15 read "examination for a reasonable time, in the meantime admitting to bail as provided by law."

Mr. McLellan. You do not want to say "reasonable time or times," so that you could have more than one continuance; or is that involved?

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The Chairman. I think that is inferred.

Mr. McLellan. All right, sir.

Mr. Longsdorf. There are twelve states which have that two day, six day limit, or something near it, and then a number of others have ten days.

Mr. Medalie. That is the total. I think we are agreed that it is unworkable.

Mr. Longsdorf. I did not particularly favor it.

Mr. Medalie. Did you say, "in the meantime admitting him to bail"?

The Chairman. "As provided by law."

Mr. Medalie. That is all right.

The Chairman. All those in favor of paragraph 20(e) as amended, say Aye; those opposed, No. The Ayes have it, and the motion is carried.

Now we go to Section 20(b).<sup>d</sup>

Mr. Longsdorf. Before we pass on, may I venture to suggest a change somewhat in the language here? This provides that the magistrate shall proceed to examine the case. It does not provide for or say anything about a waiver. I think the phrase, "to examine the case," is perhaps not <sup>be</sup> felicitous, and I want to move this substitute for lines 11 and 12 -- everything in lines 11 and 12 up to the comma in line 12:

"Unless the defendant waives preliminary examination, the magistrate shall proceed promptly to hold a hearing in order to determine whether there is sufficient ground to hold the defendant to answer to the charge against him."

Mr. Robinson. Do you think that that harmonizes with (d)?

Mr. Holtzoff. I am going to suggest that (d) is in part

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repetitious when we come to that.

Mr. Crane. May I say a word about that? We do not have to make rules saying that the magistrate shall hold a defendant only when there is sufficient evidence or a prima facie case against him; that is the law; he could not hold him otherwise. That is substantive law; that is not procedural.

Mr. Holtzoff. I was only suggesting that it is perhaps a matter for the Committee on Style.

Mr. Crane. If he does hold him, if a prima facie case is made out, that is substantive law. If a prima facie case is not made out, the case is discharged. I suggest that this is better than what you suggest, with all due respect to your wisdom, knowledge, and literary style.

Mr. Holtzoff. Perhaps it is. I had a question as to the phrase "examine the case." He holds a hearing; he does not examine the case.

Mr. Crane. They always say "There is a case against the fellow."

Mr. Longsdorf. May I invite your attention to Section 21(d)?

Mr. Holtzoff. I just questioned the phrase "examine the case." I sort of had a feeling that it was not <sup>to</sup> solicitous. That is why I suggested "unless the defendant waives preliminary examination."

Mr. Crane. I think that is very clear and direct -- examine the case against the fellow on the complaint filed against him. That is good, plain Anglo-Saxon.

Mr. Glueck. Of course, the thing is called a preliminary hearing. I suppose that is what Mr. Holtzoff has in mind. We

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all know what is meant by "examination."

Mr. Holtzoff. I was wondering whether that was not a colloquialism.

Mr. Crane. If it is a colloquialism, it is very applicable.

Mr. Holtzoff. It will clear up the whole thing if we leave the matter to the Committee on Style.

Mr. Waite. The Code uses the phrase "examine the case." Personally I think it does not make the slightest bit of difference at all whether we say "examine the case" or use some other phraseology.

Mr. Longsdorf. I agree with that.

Mr. Crane. Style ruins many an opinion.

Mr. Medalie. When you say "examine the case," you mean "hear the evidence," do you not?

Mr. Holtzoff. Yes.

Mr. Medalie. Why do we not say it, then?

Mr. Holtzoff. That is what my suggestion amounts to.

Mr. Crane. Let us leave it to the Committee on Style.

The Chairman. The next is 20(d).

Mr. Robinson. Will you explain that, Mr. Longsdorf?

Mr. Longsdorf. If we are going to insert matter in the previous portions of 20 about waiver, then it may be that (d) will be unnecessary.

Mr. Waite. With respect to 20(d), I should like to raise a question which goes far beneath the style and is an extremely important one of substance. I notice in lines 25, 26, and 27 that it reads:

"The defendant shall not enter any plea, and no statement made by him before the committing magistrate unless

9           made in the presence of his counsel shall be used against him at the trial."

We are providing that he may have counsel if he wants to, and we are also providing that the examination may be conducted without counsel. We are providing that he shall make or may make statements, and to say that if he elects to proceed with the counsel any statement that he may make can be used, it seems to me, is a bit of an absurdity.

The Chairman. And discourages the use of counsel.

Mr. Waite. It does.

Section 48 of the Institute Code, from which these are more or less taken, reads this way:

"Nothing herein contained shall prevent the state from giving in evidence at the trial any admission or confession or other statement of the defendant made at any time, which by law is admissible as evidence against such person."

In order to bring the matter up, regardless of the form in which it is expressed, which I think is at present unimportant, I suggest that beginning in line 25

"no statement made by him before the committing magistrate unless made in the presence of his counsel shall be used against him in the trial"

be omitted and that there be substituted the equivalent of that provision in Section 48 of the Code, that

"Nothing shall prevent the state from giving in evidence at the trial any admission or confession or other statement of the defendant made at any time, which by law is admissible as evidence against such person."

Mr. Holtzoff. Mr. Chairman, I am in full accord with

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everything that Professor Waite has stated, but it does not seem to me that we need that affirmative statement that is contained in the Institute Code. Therefore, subscribing as I do to everything that has just been said, I move as a substitute --

Mr. Waite. I will accept your change in my motion.

Mr. Holtzoff. Then, my motion would be that we strike out the sentence beginning with line 25 in Rule 20(d).

Mr. Medalie. I second that motion.

The Chairman. That is, strike out the entire last sentence?

Mr. Medalie. Of (d).

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

Mr. Waite. To strike everything that follows the phrase, "The defendant shall not enter any plea"?

Mr. Robinson. United States Attorney Douglas McGregor was here and worked with us for some time. Mr. McGregor stated his experience in hearings before commissioners. He said that when you bring in a defendant before a magistrate, the charge is read to him, and he is asked to plead guilty or not guilty, the plea does not give him anything anyway with regard to the advancement of the case or handling of the case and is unfair to the defendant.

He told us that as a United States Attorney, in observing its operation in a good many cases, he thinks that a defendant should not be required to plead guilty or not guilty at that time. He thinks it is unfair when, say, a plea of guilty is entered, to have it used against the defendant in court, especially if he was not represented by counsel at the time when he entered the plea of guilty.

Mr. Holtzoff. I think I misstated my motion. I have your

11 thought in mind. My motion was to leave out the second clause of the sentence beginning on line 25; that is, leave so much of the sentence as says

"The defendant shall not enter any plea"

and strike out the remainder.

Mr. Robinson. Yes. I was speaking of Mr. Waite's motion.

Mr. Crane. I do not get what your motion is, now. Strike out what?

Mr. Holtzoff. Strike out on line 25 --

The Chairman. Beginning with the words "No statement" and ending with the sentence on line 27.

4 Mr. Medalie. I can see the wisdom of Mr. McGregor's observation. The magistrate has nothing to do with the plea of guilty or not guilty, and furthermore the defendant has no opportunity to have determined technically whether he is guilty or not guilty.

As to the rest, including the Institute statement, according to all state rules, the fact is that any statement made by a defendant to a committing magistrate, unless it is in violation of some safeguarding rule, is admissible against him in evidence, and it did not require a procedural rule to make it admissible. Therefore, I think the Institute statement is surplusage.

Now, practically before magistrates it frequently happens that after the defendant has been informed of his rights -- "You need not say anything if you do not want to, but anything you say will be used against you, and you are entitled to counsel" -- he says, "Judge, I don't need any counsel. I am guilty and want to get through with this thing. I stole the pocketbook." That

12 should be admissible against him, but there ought to be no rules that make it impossible to take such a statement. Practical experience shows the wisdom of the rule that makes it admissible. He has been safeguarded as to his rights. He has been warned: "Any statement you make will be used against you." I think that is the practical experience before all magistrates, whether in Federal cases or in state cases.

The Chairman. All those in favor of the motion --

Mr. Medalie. Before you put that question, there is one other thing I want to call attention to.

Under the procedure in our state, Judge Crane, the defendant has to be warned of his rights not to make any statement; and if a statement is made by him, he has to be told before he makes it that it may be used against him. We may want to put that statement in.

The Chairman. All those in favor of the substitute motion say Aye; those opposed, No. The motion is carried.

Do you want to make a motion on this latest point?

Mr. Medalie. Without my stating the language, and leaving it to the Committee on Style, it is that the magistrate shall be required to advise the defendant that he is entitled to counsel and that any statement made by him may be used against him.

Mr. Crane. Do we not have that in Rule 23?

Mr. Medalie. Have we? If there is some rule, this is not necessary. But does it not apply right here at the beginning?

Mr. Holtzoff. I think it does. I venture to say that if your motion is repetitious, it does not do any harm; and if it is not repetitious, it is very important.

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Mr. Medalie. If it is repetitious, it can be taken out of a later section.

The Chairman. Rule 21.

Mr. Waite. Before we get to Rule 21, I want to move an addition to Rule 20, which will unquestionably classify me with the radicals, if there be any others in this group.

I should like to see added a section (e), which would read this way, in essence:

"Whenever any person has been brought before a committing magistrate, as provided in Rule 20, and has been advised of his right to counsel and of his right to waive hearing or to have hearing, the magistrate may interrogate him concerning his participation in the alleged offense or concerning his whereabouts and activities at the time of the alleged offense. Before the magistrate does so interrogate the defendant, he shall inform the defendant that he is under no obligation whatsoever to answer the magistrate's questions, but that if he does answer, his answers may be used as evidence in subsequent proceedings, and that if he declines to answer, the fact of his refusal may be used in so far as the rules of evidence permit."

Now, I am, of course, perfectly well aware of the conventional proposition that that would be unconstitutional because it compels a defendant to incriminate himself. But, after all, that is a disputable matter very definitely whether that is compelling him to incriminate himself, and if so, whether it is compelling him to do so within the prohibition of the constitution.

It is a matter which can only be decided by judicial inter-

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pretation.

This much is sure: If the Supreme Court adopts such a rule as that, the Supreme Court is not later going to say that the rule is unconstitutional. I think it would be well to consider the matter here not on the ground whether it is constitutional or unconstitutional. We should not decide that for the court; we should leave it to the court to consider it on its merits.

The merits amount simply to this: Is it wise -- regardless of the constitutionality, I think we ought to leave it to the court -- is it wise to allow a magistrate to interrogate the defendant after he has told the defendant that he need not answer, that he is under no compulsion to answer, but that if he does not answer, the fact that he does not answer may be used against him? Personally, I think it is a very wise, forward-looking step.

Mr. Crane. In connection with that, I was going to bring up here at the proper time and review what Mr. Glueck said about the questioning by police.

I think what you suggest has some merit, but I think you go too far. I think -- and I advocated it in our state but did not get it much further than the legislature -- that we ought to wipe out this third degree business and say that no confession made to a police officer shall ever be received in evidence unless the confession was made before a magistrate. That does protect the defendant, because if they can take the man to a police station and question him before a captain or other police officers, they could at least take him before a magistrate. If you keep out all the confessions made to police

15 officers under the circumstances I have indicated, it knocks in the head, of course, the temptation to indulge in the third degree. Then, if he wanted to, he might make a confession before a magistrate under at least some form of judicial process.

I go half-way with you in this: that then the magistrate can examine him when he is willing to make a voluntary statement. I would not want to go with you by saying that the magistrate could question him and could compel him to make it. It would be compulsion if his refusal to answer could be used against him.

4 Mr. Waite. That is where I take definite issue with you, and that is what I think we should leave to the Supreme Court.

Mr. Medalie. I think there is a temptation and that you remove the temptation by saying, "If this man wants to make a statement, take him before a magistrate."

What you have in mind is good, but I think you can't press it too far. Think that over, now; you do not have to answer it immediately.

Mr. Holtzoff. I think that if this motion of Professor Waite's were adopted, these rules would have very little chance of getting through Congress. Therefore, I am against it.

Mr. Medalie. I do not think the Supreme Court wants <sup>us</sup> to pass the buck to them. I think we must make up our own minds on the thing. I do not think we ought to do one of the things for which the President was criticized, when he said he was doubtful of the constitutionality of certain proposed legislation but would let the Court pass on it. I do not think we should do that. In any event, I do not like it, legally, to dispose of as an important a suggestion as this, particularly

16 the one that relates to the interrogation of the defendant, if he is not penalized by having offered in evidence against him what we had all supposed could not be, his refusal to answer, because those things cannot be offered against him according to the decisions, except where he had already testified and later refused to testify on the ground that it might incriminate him. There is a Supreme Court decision to that effect.

I think, however, that the provision with respect to the examination of the defendant after the complaint has been presented to him is another matter, and I think that is worth debating.

I therefore move that Mr. Waite's proposal be typewritten, so that we may examine it at the evening session, and that we now take our recess.

The Chairman. The motion is improper, in that it involves two separate subject matters.

Mr. Medalie. I realize that.

Mr. Crane. I second the latter part of it.

The Chairman. If we stop at 4:30, don't you think we ought to start earlier?

(There was then an informal discussion among the members of the Committee which was not recorded. The following then occurred:)

The Chairman. I see that we are about to suffer our first serious disagreement, so I think we had better yield and adjourn now until 8 o'clock, but be prepared to do a reasonable amount of work then.

Mr. Holtzoff. Don't you want to finish Section (d)?

The Chairman. I had understood that a motion to adjourn

17 was not debatable, but we seemingly have abolished all rules of parliamentary law here.

Mr. Holtzoff. I think the first two sentences of 20(d) are repetitious of what goes before.

The Chairman. We have finished that.

Mr. Holtzoff. Were they stricken out?

The Chairman. Yes. We had finished with 20(d) and were on 21. Now we are up to 20(c), which has been submitted by Mr. Waite, and which we will have written out for tonight's session at 8 o'clock.

Mr. Medalie. If it is your intention and your suggestion to us that we should sit later tomorrow, and if you can tell us that now, we can make arrangements to conform with that rule.

The Chairman. I am forewarned by statements made during the morning session and statements made during lunch that if we do not get in the work in the first three days, we are likely to lack a quorum during the latter part of the week.

Mr. Medalie. Can we decide that we will sit tomorrow until 5 or 5:30?

The Chairman. All right. Let us make tomorrow afternoon's session a little longer -- 5 or 5:30. We will begin at 10 o'clock tomorrow morning.

Mr. Medalie. And at 8 o'clock this evening?

The Chairman. Yes. We will recess until 8 o'clock.

(At 4:35 o'clock p. m. a recess was taken until 8 o'clock p. m. of the same date.)

**EVENING SESSION**

The Committee reconvened at 8 o'clock p. m., upon the expiration of the recess.

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The Chairman. Mr. Waite said he might be a few minutes late, so we will postpone consideration of his 21(e) until he arrives and will go on with Rule 21.

Is there any comment on 21(a)?

Mr. Robinson. I would like to state this, Mr. Chairman: that it is based on the American Law Institute Code. I had Mr. Longsdorf examine the American Law Institute Code with a view to seeing how much of it is adaptable for our rules. Of course, we have made various studies of it, but we wanted to get his views, and this rule represents one rule which Mr. Longsdorf thinks may well be taken from the American Law Institute Code.

It may be well to have him state his reasons for taking these paragraphs out, if there is any particular statement on that point.

Mr. Longsdorf. The weightiest reason I have for it is that the procedure before a committing magistrate is made by Section 89 of Title 18 to conform to the usages of the state courts. Accordingly, I concluded that the usage of the state courts, as formulated by the American Law Institute Code, was about the best model I could get, and I used them, compressing them as much as possible to agree with what we are trying to do here in the way of brevity in the rules. I did not put all of them in, because some of them appeared to be unnecessary in our Code, but I got the essentials in -- all that I could -- and I did so with some liberality, so that the Committee could strike out what it wanted, if it deemed there was anything that it did not want.

Mr. Robinson. Of the 400 sections that are in the American

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Law Institute Code, Mr. Longsdorf has found about 70 are rules that we may draw analogies from in our Federal Code. That does not represent its whole contribution, because many sections which we do not draw directly from are parallel and, of course, have their influence.

Mr. Longsdorf. I should like to add that in the American Law Institute Code there are more than 200 sections on topics that we cannot deal with, such as appeals, which are covered by *Criminal* Court of Appeals rules, venue, change of venue, and things like that.

The Chairman. Is there any question about 21(a)?

Mr. Holtzoff. There is a misprint in line 26. That is undoubtedly meant to be "self-incrimination."

Mr. Robinson. I don't know.

Mr. Longsdorf. I have seen "self-crimination" used as much as "self-incrimination."

Mr. Robinson. I think that is something for the Committee on Form.

Mr. Crane. I think "self-incrimination" is the general usage.

Mr. Seasongood. If he testifies, he can't be made to incriminate himself. He can be cross-examined. Any witness subjects himself to cross-examination about previous convictions, or anything else. Why should he give up his privilege against self-incrimination?

Mr. Longsdorf. Well, Mr. Seasongood, you will have to deal with the range of cross-examination on previous convictions when you get into the evidence rules.

Mr. Holtzoff. Is not the last clause surplusage? That

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goes without saying, because it is contained in the Constitution.

Mr. Seasongood. It depends on what kind of rule you have and how he testifies.

Mr. Longsdorf. Of course, if he testifies, he is subject to cross-examination.

Mr. Holtzoff. I move that we strike out the second sentence.

Mr. Robinson. Is that sentence from the A.L.I. Code?

Mr. Longsdorf. Yes. I can read that if you wish to hear it.

Mr. Seasongood. It is entirely ambiguous in this form.

The Chairman. All those in favor of the motion to strike the last sentence say Aye; those opposed, No. The motion is carried unanimously.

Now, Pl(b).

Mr. Holtzoff. I think that that is surplusage, and I move to strike that out. I think that is something entirely in the discretion --

The Chairman. It is permissive, but it is surprising the number of judges who never think of exercising the right, when they really would be helpful to counsel on one side or the other.

Mr. Longsdorf. That is the reason why I put it in.

Mr. Holtzoff. Is there any magistrate who feels he is without that authority?

Mr. Session. Yes. In my state they rarely do it.

Mr. Longsdorf. The A.L.I. Code has that in it.

The Chairman. And it works for both the Government and the defendant. It is something that gives either side the

21 right.

Mr. Robinson. In line 9, is that possible -- to keep all witnesses separate from one another? If you had twenty witnesses, could you put them in different rooms?

The Chairman. You might put them in different corners and have somebody watch them. They manage to do that pretty well in the English courts.

Mr. Robinson. That does not mean they are separate from one another; they are just separate from the witness.

Mr. Crane. You can place them separate from one another. You would be surprised how they copy one another's stories.

The Chairman. You could have ten of them in one room with an officer there to tell them not to talk to one another.

Mr. Crane. It only says "may"; it does not say "you must." There comes a time when the other witnesses repeat what the first witness has said.

The Chairman. Is there any question on (c)?

Mr. Medalie. The word "prisoner." The defendant is frequently not a prisoner.

Mr. Youngquist. It should be "defendant."

Mr. Holtzoff. "Except the defendant."

Mr. Seth. And the last clause, "The Government witnesses may be cross-examined by counsel."

Mr. Holtzoff. What is the necessity or need of (c)? Isn't that obvious?

2 Mr. Seasongood. Before you get to (c), isn't that a matter for agreement by the Style Committee?

Mr. Crane. If you are going to say anything, you had better complete it.

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Mr. Dession. Suppose a defendant walked out of a preliminary examination. Is there any reason why you could not continue?

Mr. Longsdorf. I suppose the sole reason why it is so worded in the A.L.I. Code is that the preliminary examination is really brought on by the Government, and the draftsmen of the A.L.I. Code thought, of course, that the Government could examine the witnesses and that it was not necessary to say anything about it -- just extend an equal privilege to the defendant; probably something of that kind.

The Chairman. On (c), I think that point is well taken for cross-examining his own witnesses.

Mr. Holtzoff. (c) might be deleted entirely. I do not see that it serves any useful purpose.

Mr. Longsdorf. Would you put in the words "all Government witnesses"?

Mr. Holtzoff. It seems to me that that goes without saying. That is probably regular procedure in examining witnesses. I move that we strike (c) out.

The Chairman. I do not think it adds much.

Mr. Glueck. I second the motion.

Mr. Crane. Why not leave it: "All witnesses subject to preliminary examination shall be cross-examined by the defendant"?

Mr. Medalie. I think you ought to keep it in. You must define the functions of the magistrate, because if the magistrate thinks that all he is supposed to do is find out if someone committed a crime, and he stops there, he is not doing enough.

The Chairman. May we not strike from the word "defendant"

23 on, in the middle of line 12?

Mr. Crane. "And the witnesses against him may be examined by him or his counsel."

Mr. Youngquist. Why not say "may be cross-examined" and strike out "by defendant or his counsel"?

Mr. Holtzoff. Well, isn't that implied?

Mr. Longsdorf. I don't think anything is implied by the Code.

Mr. Dession. Is there not still a minor defect here? He is supposed to be present, but if he voluntarily absents himself is there any reason why the preliminary hearing should have to stop?

Mr. Holtzoff. We permit a defendant to absent himself from trial. We certainly should not make examination before a commissioner more rigid than we do at trial.

Mr. Seth. Why not have it read: "The defendant shall have the right to be present at the examination of all witnesses"?

Mr. Holtzoff. Yes, that will take care of it.

The Chairman. As I understand it, we want the defendant to cross-examine Government witnesses.

Mr. Seth. "Cross-examine witnesses against him."

Mr. Youngquist. Sometimes a defendant puts on his own witnesses at a preliminary hearing.

Mr. Crane. "The witnesses against him." "Cross-examine the witnesses against him."

Mr. Youngquist. What about the Government's right to cross-examine witnesses for him? I am wondering whether by giving the defendant alone -- expressing the right to the defendant to cross-examine, we might by implication exclude the

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right of the Government to cross-examine.

Mr. McLellan. Why don't you stop with the word "defendant"?

The Chairman. I think that is the simplest thing. Mr. Medalie urges that you have to tell magistrates they have the right to cross-examine.

Mr. Medalie. He has a right to be present at the examination, he has a right to call witnesses, he has a right, as the Government has, to examine witnesses against him.

Mr. Holtzoff. "The defendant shall have the right to be present at the examination, to cross-examine witnesses against him, and to call witnesses in his own behalf."

Mr. Medalie. If you say "to call witnesses in his own behalf," why not say, "both sides shall have the right to cross-examine adverse witnesses"?

Mr. Longsdorf. The right to call is in Section 21(a); you do not need it here.

Mr. Medalie. All right. "The defendant shall have the right to be present at the examination of all witnesses."

Mr. Longsdorf. "Of all witnesses, and they may be cross-examined."

Mr. Holtzoff. "The defendant shall have the right to be present at the examination and to call witnesses in his own behalf. All witnesses shall be subject to cross-examination."

Mr. Youngquist. "They may call witnesses."

Mr. Holtzoff. In the light of (a), I do not see the need of paragraph (c). Everything that you need in (c) is also covered in (a).

Mr. Medalie. The magistrate might think all he has to do

25 is look at the complaint to see if it charges a crime, and see if the witness so testifies as he did in his deposition and bill, and say, "He has got a case; don't waste my time."

Mr. Seasongood. Many of them just believe the cop, and that is the end of it.

Mr. Holtzoff. I think (a) covers that point. It says "The United States may call witnesses."

Mr. Medalie. That is about calling the witnesses.

The Chairman. In line 3, after the word "examination," put a period. Let it say, "witnesses may be subjected to cross-examination."

Mr. Medalie. That is all right.

Mr. Holtzoff. "Such witnesses shall be subject to cross-examination."

Mr. Medalie. In (a) you still use the word "prisoner." Where did that Britishism come from? The British call every defendant a prisoner.

The Chairman. Make that "defendant" instead of "prisoner."

Mr. Medalie. Do you want to say in (a) "All witnesses including the defendant"?

3 Mr. Robinson. You will have to have a new title: "Calling an Examination of All Witnesses."

Mr. Crane. I prefer to leave it as it is in (c) and just state the fact that the defendant may be present and cross-examine the witnesses.

The Chairman. We all agree on what is meant. Suppose we leave this to the Committee on Style -- (a) and (c).

Mr. Crane. I do not think it needs much alteration; I think it reads pretty well.

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Mr. Medalie. (c) really ought to go into (a).

The Chairman. I think so.

Mr. Holtzoff. That is all right.

Mr. Longsdorf. That is all right.

The Chairman. Is that acceptable?

Mr. Holtzoff. Yes.

The Chairman. (d).

Mr. Longsdorf. How do you propose to combine them?

The Chairman. We will let the Style Committee decide that.

Mr. Longsdorf. All right.

The Chairman. 21(d).

Mr. Crane. "If from the testimony heard." I think "heard" might come out. The magistrate might not have heard anything.

Mr. Holtzoff. The word "testimony" is limited to oral testimony.

Mr. Crane. We could say, "If by the evidence it appears."

Mr. Medalie. Or "If it appears to the magistrate."

Mr. Crane. "If by the evidence it appears that the magistrate is satisfied."

Mr. Medalie. I think that is the language usually used.

Mr. Longsdorf. I think that is better language.

The Chairman. "If by the evidence the magistrate is satisfied that the offense has been committed under the laws of the United States \* \* \*"

Mr. Medalie. "District Court of the United States which by law has cognizance."

Mr. Seth. The offense may have been committed in one

27 place, and the hearing held in New York.

Mr. Holtzoff. But there would have to be a removal proceeding.

I think that clause is surplusage.

The Chairman. "To the District Court of the United States which by law has cognizance."

Mr. Longsdorf. We have a remnant of that conformity rule in Section 591, and the rule for it ought to come out, and the only way to take it out is to take it out by words in these rules, otherwise you will have forty-eight different kinds of preliminary proceedings in the Federal courts.

Mr. Holtzoff. I am just referring to this clause in line 19: "which by law has cognizance of the offense."

I appreciate that Section 591 is a very old statute and is rather ponderously framed. Do we want to perpetuate that?

Mr. Youngquist. Would it be enough to say "have the prisoner answer to the proper District Court"?

Mr. Medalie. Four times in that division you have the word "prisoner."

Mr. Longsdorf. Yes, that ought to be changed each time.

Mr. Holtzoff. As a matter of fact, all you need to say is "Hold the defendant to answer."

The Chairman. Unless the defendant gives bail.

Mr. Crane. You could leave it to the District Court.

The Chairman. Unless there is objection, the words in line 19, "which by law have cognizance of the offense," will be deleted, and it seems to me we can shorten the next line, 20.

Mr. Longsdorf. If you take that phrase out of there, we ought to go back and take it out of this other section over

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here, where it was added in 20.

Mr. Holtzoff. I suppose the Style Committee can take care of that.

The Chairman. In which line?

Mr. Longsdorf. In line 8, Rule 20(b), that very language was inserted at the suggestion --

Mr. Robinson. That was left out. You suggested it be put in, but we left it out.

Mr. Medalie. May I call your attention to the fact that in 20 we have the word "prisoner" many times?

Mr. Holtzoff. "Custody" ought to be "custody of the marshal," ought it not?

Mr. Crane. That is the only one he can be committed to.

Mr. Holtzoff. I don't suppose you need it.

The Chairman. Can't we shorten line 20 and say, "Unless the defendant is admitted to bail"?

Mr. McLellan. "Unless he gives bail."

The Chairman. "Unless the defendant gives bail" is better yet; "and shall commit him to custody unless the defendant --"

Mr. McLellan (interposing). "Unless he gives bail."

Mr. Medalie. Have we a substitute provision for "fixing bail"?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "Unless he gives bail." That will do it.

The Chairman. "Unless it appears that no offense was committed or there is no probable cause to believe the defendant guilty, he shall be discharged."

Mr. Holtzoff. I suggest changing that around a little. Because the way this is phrased seems to put the burden of

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proof on the defendant. I think that it ought to read:

"If it does not appear that an offense was committed or that there is probable cause to believe the defendant guilty, he shall be discharged."

That would shift the burden of proof onto the prosecution.

Mr. Youngquist. How would it be to put a period instead of a semicolon after the word "bail" and say, "otherwise he may be discharged"?

Mr. Holtzoff. There might be a question as to what it refers back to.

Mr. Youngquist. It refers back to the several propositions: is in custody or gives bail.

Mr. Holtzoff. Grammatically, the word "otherwise" would refer back to the last phrase, "unless he gives bail." I think you have a grammatical difficulty there.

Mr. Youngquist. Possibly you have. I have it so cut up here, I can't tell.

Mr. Holtzoff. That is why I am stressing: "If it does not appear that an offense was committed or that there is probable cause."

Mr. McLellan. You want an "and" for that "or" there.

Mr. Glueck. In either event.

Mr. McLellan. "If it does not appear that an offense was committed."

Mr. Holtzoff. "Or that there is not probable cause to believe that an offense was committed."

Mr. Wechsler. No. It should be "and." Both have to appear.

Mr. Holtzoff. That ought to be "and." That is right. I

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can see it now.

Mr. Crane. "If it appears that no offense was committed."

Mr. McLellan. If it does not appear, then an offense was committed.

Mr. Holtzoff. It should be "or."

Mr. Youngquist. Are we starting that out "unless it appears"?

Mr. McLellan. It is still "and."

Mr. Crane. I think it is "and," because if it appears that no offense was committed, you don't need anything more.

Mr. Glueck. He is changing it. He says, "If it does not appear," which makes it "and." Both conditions must then be satisfied.

I would like to inquire of somebody why it is --

Mr. Robinson. Strike out "either." "If it does not appear that an offense was committed and that there is probable cause to believe the defendant guilty."

Mr. Jeasongood. Mr. Chairman, I would like to call attention to the fact that you change in line 15 "The magistrate must be satisfied," and here you say, "If it does not appear."

I am no criminal specialist, but I think probably it is more accurate to say, "If it appears," rather than, "If he is satisfied."

I don't know whether he has to be satisfied if there is not a difference between "appears" and "satisfied." Anyway, you have got to be consistent about it and do it in both places.

The Chairman. That is what makes me favor Mr. Youngquist's suggestion: "Otherwise he would be discharged."

Mr. McLellan. Yes, I think that is sufficient.

Mr. Seasongood. I am making the point that in line 15 you change it to say, "If the magistrate is satisfied," and I think it is probably more accurate to say, "If it appears to the magistrate."

Mr. Holtzoff. Does not the word "satisfied" apply a heavier burden than the prosecution should be required to bear?

Mr. Dession. Probable cause is the only term involved here.

The Chairman. That suggestion originated with Mr. Medalie.

Mr. Medalie. Yes. I don't know what the word "appears" means in the law.

Mr. Dession. Well, if it seems to him; that is what it means.

Mr. Longsdorf. "If it appears" came out of the A.L.I. Code.

Mr. Medalie. Instead of saying it in terms of the magistrate, it could be stated impersonally. First of all, you must establish by evidence that a crime has been committed.

The Chairman. "The evidence shows."

Mr. Medalie. Secondly, there must be sufficient to establish probable cause, and that is not in terms of the magistrate. For example, take an ordinary question of fact in a jury trial or when a case is tried by a judge without a jury. You do not state that a case is established if the judge or the jury is satisfied that such and such a fact is a fact. A case is established if the facts establish the case.

Mr. Holtzoff. Why not say, "If by the evidence it appears," without saying "The magistrate."

The Chairman. "If the evidence shows"?

Mr. Holtzoff. Yes. "If the evidence shows."

Mr. Crane. "If the evidence shows that an offense has been committed."

Mr. Glueck. I would like to ask a legal question here. Suppose the defendant appeals right after the preliminary examination, on the ground that the evidence does not show that there is probable cause?

Mr. Medalie. He can't. His only test is by habeas corpus or lack of jurisdiction.

Mr. Glueck. Suppose under habeas corpus he does it.

Mr. Holtzoff. By that time the District Attorney could take the case before the Grand Jury and get an indictment.

Mr. Glueck. What would be the issue before the Court? How much more would be required?

Mr. Crane. Prima facie.

Mr. Medalie. Enough to satisfy anybody.

Mr. McLellan. Some substantial evidence is all that would be required.

Mr. Crane. You seem to make a distinction between proving the offense before the magistrate and probable cause that the defendant committed it.

Mr. Glueck. We do not qualify the offense part with "probable," do we?

Mr. Crane. No, but on the whole evidence, whether the crime has been committed or the defendant committed it -- on the whole evidence, a prima facie case, it appears that the defendant is guilty of committing a crime, then you hold the prisoner for the trial.

Mr. Medalie. In New York State a man cannot be convicted on the uncorroborated testimony of his accomplice or his uncorroborated confession, but he may be held to answer on the uncorroborated evidence of the accomplice or on the uncorroborated confession.

Mr. Glueck. In what kind of case can't a man be convicted on uncorroborated testimony?

Mr. Medalie. In New York we have a statute providing for that.

Mr. Glueck. That does not apply in the Federal courts.

Mr. Crane. In murder in the first degree I think it is followed in the Federal courts. In murder in the first degree the death of the victim must be proved by direct evidence. There can never be any question about the death of the deceased-- the death of the person alleged to be dead; that must be proved by direct evidence.

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There is a distinction, but I don't know that they have made a distinction before a magistrate or a prima facie case, that you first have to prove from positive evidence that a crime has been committed and then that the defendant was probably guilty of committing it. You do have that distinction when it comes to the arresting police officer. Any of us can arrest a person who is committing a felony, but we have to prove there that a felony was committed; if we do not, we are in trouble. But a police officer can arrest on the probable cause of the commission of a felony -- of the defendant doing it. He has got this discretion. I may be wrong about it, but I never knew it -- if the evidence shows that an offense has been committed and there is probable cause to believe that the defen-

dant committed it. If there is going to be that distinction, I don't think we mean that by that language.

Mr. Medalie. I think we do, Judge, and again I go back to my New York examples. In New York, by statute-- and you know I have argued such cases before you when you were on the bench -- one can't be convicted on the uncorroborated testimony of an accomplice.

Mr. Crane. Right.

Mr. Medalie. The crime may nevertheless be proved by the accomplice before a magistrate. That is not a method of convicting a man, but the testimony is sufficient to establish, for the magistrate's purpose, that the crime has been committed.

Mr. Crane. That is my point.

Mr. Medalie. A magistrate may in his discretion say, "There is no use of my holding this man, because you can't have corroboration of the accomplice."

Mr. Crane. My point is whether a prima facie case is made out.

Mr. Medalie. Judge, the same thing applies to your corpus delicti case.

Mr. Crane. I think it is just a question of language. I think it means this, and I think we are safe in saying this: that when he appears before the magistrate, a crime has been committed, and the defendant is probably guilty of committing it. Using "probable cause" in there, you have something in there that makes a distinction.

Mr. McLellan. If there is probable cause that this man has committed a crime, then you have got it.

Mr. Youngquist. I would suggest this language: "If it appears from the evidence that an offense has been committed and that there is probable cause to believe that the defendant," and so forth. Won't that cover everything you want to say?

Mr. Holtzoff. That is practically what we have now. What we have now is: "If the evidence shows that an offense has been committed against the laws of the United States, and there is --"

Mr. Glueck. Why not leave out the first part and say: "If there is probable cause to believe that the defendant has committed an offense against the laws of the United States"?

Mr. Crane. That takes care of the whole thing.

Mr. Medalie. How does that compare with the Institute provision?

Mr. Crane. "If it appears upon the evidence that the defendant has committed the crime charged." How is that?

Mr. McLellan. Yes.

Mr. Medalie. The comment says that Subsection (d) is taken from 54 and 55 of the Law Institute Code of Criminal Procedure.

Mr. Longsdorf. Shall I read the Law Institute on that?

Mr. Medalie. May we have read, Mr. Chairman, the Institute Code provisions?

The Chairman. Yes.

Mr. Longsdorf. Section 54 of the A.L.I. Code:

"After hearing the evidence and the statement of the defendant, in case he has made one, or his testimony, in case he has testified, if it appears either that an offense has not been committed or that, if committed, there

is no probable cause to believe the defendant guilty thereof, the magistrate shall order that he be discharged." That is 54. Then, the positive of that comes in 55:

"If it appears that any offense has been committed and that there is probable cause to believe the defendant guilty thereof, the magistrate shall hold him to answer."

Mr. Glueck. May I interrupt there? That means, as I understand it, that if the magistrate has doubt, either because of facts or law, as to whether an offense has or has not been committed, that does not cover that situation, does it?

Mr. Holtzoff. Of course, if he has any doubt, this being a preliminary hearing, he should not hold the defendant.

Mr. Glueck. This says, "If he finds an offense has been committed." That means he must; there is no probability or possibility about that.

Mr. Longsdorf. I beg your pardon. As this reads --

Mr. Dession. I think there is a very real distinction. I think to eliminate any question of whether we should try to change rules, we should use one familiar rule and stick to it.

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Why not say, "If there is probable cause to believe that an offense has been committed, and if there is probable cause to believe that the defendant has committed it"?

The Chairman. Why can't we not do what Mr. Glueck says and combine the two?

Mr. Dession. Someone might argue that probable cause on issue No. 1 plus probable cause on issue No. 2 is an inference on an inference and that it is not good enough if you combine the two.

Mr. Crane. "If there be probable cause to believe that

the offense charged has been committed."

Mr. Youngquist. We are arguing from the well established distinction between a showing and an offense. It must appear that an offense has been committed.

There need be for the purpose of binding him over only a showing of probable cause that the defendant committed it. That is the distinction that was recognized by this language here and a distinction that, I think, should be preserved.

Mr. Crane. If a man comes up and says, "A man stopped me in the street and robbed me of my pocketbook," there is just as much question whether that happened as there is whether the man did it himself. It may be a question of identification, for the purpose of putting the fellow in jail. There may be grave doubt as to whether any crime was committed at all.

Mr. Youngquist. Take murder, for instance. A dead body is found, and the circumstances are such as to make it conclusive that it was murder. You may not be able to prove conclusively who did it, as you would have to do on the trial. There is a great difference between the finding of guilt and the finding of probable cause that a man committed an offense--probable cause to the extent that would warrant binding him over for investigation by the Grand Jury.

Mr. Crane. Suppose there were two persons in a room, man and wife. She threatened to commit suicide. She is dead, and the pistol is found. The man is arrested. He is charged with murder and is convicted down in Nassau County. He appeals it to the Court of Appeals.

What are you going to do? He says that she committed suicide, and he so testifies, but he is convicted of murder in

the first degree. If she did commit suicide, there is no crime. It is all one. I think what we mean here is just this: that if there is a prima facie case made out of crime committed by the defendant, he is to be held.

Mr. Holtzoff. In that case should not the magistrate bind the defendant over, even though he is not absolutely convinced?

Mr. Crane. Oh, there is no question about that.

Mr. Medalie. Or you can go further than that. A palpable liar by prima facie evidence charges the defendant with commission of an offense, and in his false testimony, which nobody in the magistrate's presence is willing to believe, covers every element that constitutes a crime. It is the duty of the magistrate to throw that case out.

Mr. Holtzoff. If he does not believe that testimony, yes.

Mr. Crane. In the strikes of the Brooklyn Rapid Transit Company, James Quigley, siding with the strikers, discharged them. The railroad had stenographers in court to take down the testimony, and the Appellate Court removed him from the bench. He was removed from the bench because he simply said he did not believe the testimony and would not hold them. It was his duty, although he did not believe it, to hold them. They removed him.

Mr. McLellan. Wasn't that on the ground that he did believe them but said he didn't?

Mr. Crane. No, it was on the ground whether he believed them or not. A prima facie case had been made out, as Mr. Medalie says, and he should have held them.

Mr. Medalie. I had a similar case for removal in the First Department, not the Second. I could not remove them on the ground that they did not believe the prima facie case, but

on another ground. In other words, the Appellate Division, First Department, does not agree.

Mr. Seasongood. I think this must have been stated in standard textbooks and introduced.

Mr. Medalie. The Institute Code has the two alternative provisions that have been read.

Mr. Glueck. As to the first, Mr. Medalie, if I recall correctly, they did not qualify the offense part with any matter of probability; they just say an offense has been committed.

Mr. Medalie. An offense has not been committed.

Mr. Glueck. Or has not. That is a different way of stating it.

Mr. Medalie. If not committed, then there is no probable cause to consider the defendant guilty.

Mr. Glueck. They do not use the probability item until they come to the defendant.

Mr. Wechsler. Even though the statutes do not use the probability item on the commission of the offense, as a matter of simple logic the probability item is the crucial item, and it ought to be, because if you have a case of conflicting evidence as to whether the crime was committed, that ought to be determined by the magistrate on preliminary hearing.

Then, it seems to me, we ought to depart from traditional language. Therefore, I think Judge Crane's proposal is right and that the draft should appear that way.

Mr. Medalie. I think we are departing from fundamental criminal law, and we ought not to depart from fundamental criminal law on this point. That has been a fundamental of our law all the time; it has never been changed. In other words, we are changing the law.

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Mr. Holtzoff. I am not so sure.

Mr. Wechsler. We are changing the checks, but I do not think we are changing the law that will apply.

Mr. Medalie. I think so.

Mr. Holtzoff. I am not so sure that we are changing the law that would apply; because if you present before a United States commissioner enough evidence showing that a crime has probably been committed and that the defendant has probably committed it, I do not think the commissioner would be justified in discharging the defendant.

Mr. McLellan. When he does find probable cause that the defendant committed the crime with which he is charged, he has covered everything that he needs to cover.

Mr. Holtzoff. I think so.

Mr. McLellan. After all, when you get it stated in a negative form you have to say something different.

Mr. Wechsler. The evidence in the preliminary hearing is to show that there is a substantial complaint or, rather, that the complaint that is filed rests upon substantial grounds. Probable cause is the language that designates substantial grounds, and that is all we are concerned with.

Mr. Medalie. Probable cause has always been used in connection with the defendant's connection with the crime.

Mr. Holtzoff. Aren't you stating the New York rule rather than the common-law rule?

Mr. Wechsler. Most of the statutes say as Mr. Medalie says. They do contain this verbal differentiation between showing the commission of the crime and probable cause to believe that the defendant committed it, but I have always felt

that that was simply a traditional differentiation. These statutes copy one another in the sequence of development, and I do not believe as a logical matter the differentiation is tenable, whether the statutes mean what they say in pointing to such a differentiation. This seems to me to be a place where in a very minor way we can clarify what is traditional confusion in the law, and I think we ought to do so.

Mr. Holtzoff. Does not that bring us back to the suggestion --

The Chairman. Have we progressed to the point where we are willing to vote on whether we agree on the substance of this proposition, namely, that the issue of probable cause shall apply to the commission of the offense? Are you ready to vote on that? Because until we are, we cannot frame a rule.

All those in favor of the law being stated in that form, say "aye"; opposed "no". (Putting the question.)

I think the ayes have it, with two votes in the negative.

Mr. Youngquist. On that one I should like to have my vote registered, because it is a violation of the standards of practice.

Mr. Medalie. Mine, too.

The Chairman. Both are registered.

Mr. Dession. Do you feel that this would be changing the practice or merely the statement?

Mr. Medalie. I think it changes the law.

Mr. Dession. I want to differentiate between the way you think the New York statement is applied before magistrates and on habeas corpus. Would this change it or not?

Mr. Medalie. No; in New York, on habeas corpus you must

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prove that the offense has been committed and that there is something in the way of evidence to indicate that the defendant probably committed it. That is the New York test.

Mr. Holtzoff. Before United States commissioners you do not make out as much of a case as you would do before a magistrate in New York City, I think.

Mr. Medalie. Before United States commissioners you do not do anything; and if we try to put down in a code or set of rules what goes on before United States commissioners we would put in a blank page.

Mr. Crane. We are just dealing with our own difficulties here; actually there is no difficulty. In any United States court the difficulties we are making here for ourselves do not arise at all. But when you get this case before you and are hearing it, no matter where you are as a judge, the whole thing comes down to this: Has it been shown prima facie that the defendant has committed the crime with which he is charged -- larceny or stealing of some kind.

Mr. Gleuck. Suppose some one raises the issue that this is not a crime because of the legal interpretation of a statute: Do they ever raise it that early, in real life?

Mr. Holtzoff. They do not, before United States commissioners. I am not sure what the practice before magistrates is.

Mr. Wechsler. I think that in that event the magistrate should hold the man for determination.

Mr. Dession. Yes; but I should like to know what the policy should be.

The Chairman. We have to express all views on the matter

of law. I should like to suggest that we refer this matter back to the Reporter, to give us a fresh start tomorrow morning. Because my draft has been so marked and re-marked that I cannot decipher it very well.

Mr. Medalie. Before you vote on that, there is another provision or element in the Institute code which we left out. A man may be charged with one offense and the evidence may show that he committed another. Even under code state practice he may be held for the other offense.

Mr. Youngquist. That is here, George.

Mr. Medalie. Does it use "no"? The code uses the words "any offense". In other words, it need not be the offense charged.

Mr. Glueck. Must it be an offense of the same nature, or comprehended within it?

Mr. Holtzoff. Oh, no.

The Chairman. Someone attempted a few minutes ago to restrict this to the offense that has been charged.

Mr. Medalie. Oh, no; that is not even the practice in the various States.

Mr. Glueck. Suppose a man is being examined for embezzlement, and it comes out that he committed a murder?

Mr. Holtzoff. You can hold him.

Mr. Glueck. You can?

Mr. Holtzoff. Surely.

Mr. Medalie. It is an extreme case, but you can hold him.

The Chairman. Gentlemen, this is getting too complicated. I think we should refer it back to the Reporter.

Can you have it for us by tomorrow or perhaps the next day?

Mr. Robinson. Yes.

Mr. Glueck. Let me ask the Reporter to find out for us what phrases are generally used in the State statutes.

Mr. Robinson. Yes; we will do that.

Mr. Longsdorf. You can find them in here.

The Chairman. May we come now to Rule 21 (e)?

Mr. Medalie. That is the established, business-like procedure.

The Chairman. Why do we use, in line 29, both the words "bonds" and "recognizances"?

Mr. Holtzoff. They are two different things. The bond is signed only by the surety, and the recognizance is signed by both the principal and the surety -- no; I am wrong.

Mr. Youngquist. As I understand it, a recognizance is signed by the defendant.

Mr. McLellan. And sometimes he is recognized without signing anything.

The Chairman. It is done orally very often in court.

Mr. McLellan. Yes.

Mr. Youngquist. Elsewhere in the rules you will find the word "undertaking" alone used.

Mr. Holtzoff. It should not be used.

The Chairman. The point I make is that if we use the phrase "bonds or recognizances" in line 29, why should not we use it in line 30?

Mr. Holtzoff. I guess we should.

Mr. Seth. Do you mean recognizances of witnesses?

The Chairman. Yes.

Mr. Seth. Witnesses are not usually put under bond.

The Chairman. I understand they did. You do in the State court.

Mr. Holtzoff. Witnesses are sometimes put under bond, and for failure to give bond they are committed.

Mr. Seth. That is right.

The Chairman. Shouldn't we insert the word "bonds"?

Mr. Seth. That is right.

Mr. Medalie. No; you do not need it: "together with the originals of bonds or recognizances of bail for the defendant" -- you do not need "prisoner" -- "and witnesses".

The Chairman. Are there any further suggestions?

Mr. Longsdorf. You want to take out all after "witnesses", don't you?

Mr. Medalie. No.

Mr. Seth. "appear or testify".

Mr. Longsdorf. Yes; "appear or testify" will do it.

The Chairman. Are there any further corrections in 21 (e)? If not, all those in favor of the paragraph as amended say "aye".

The motion was carried.

The Chairman. Rule 21 (f).

Mr. Holtzoff. It seems to me that (f) is unnecessary and should be stricken, for this reason: (a), (b), (c), (d), and (e) set forth what the procedure shall be. Therefore, (f), which says that the State procedure shall not be followed, becomes surplusage.

Mr. Crane. I do not see what we want (f) for.

Mr. Medalie. I do not think we need it.

Mr. Longsdorf. I am pretty well agreed to that. The only reason I put that in is because we are endeavoring to get rid of the statement contained in 591. If we have done that, we do not need this.

Mr. Holtzoff. I think we have done it.

The Chairman. It might be the first paragraph in our annotations; it might be very good as a note.

Is there a motion made?

Mr. Holtzoff. I move to strike out (f), and to make it a part of the annotation.

The motion was carried.

The Chairman. Now we come to Rule --

Mr. Longsdorf. But I want to put in a word there. I do not think that our commas should contain asseverations of law. It ought to be <sup>suggest</sup> a request in the form of a note saying what we will do.

The Chairman. Yes; that is understood.

Now let us consider Rule 22 (a).

Mr. Robinson. Mr. Holtzoff worked out that rule at the last meeting.

Mr. Holtzoff. Rule 22 (a) contains the provision about when a summons shall be issued. It is substantially in the form agreed upon at the last meeting.

Mr. Longsdorf. Should not some of these commissioner warrants require approval by the United States attorney?

Mr. Holtzoff. The law does not require that the United States attorney approve the warrant, but that the departmental practice forbids an arresting officer to file a complaint

unless the United States attorney first approves the complaint. But that is a matter of departmental practice rather than any statutory requirement.

Shall I go on?

The Chairman. Are there any suggestions with respect to (a)?

Mr. Wechsler. I should like to ask a question.

Mr. Medalie. In line 7 you use the words "service to the marshal or some other officer". It is sufficient if you say "to an officer authorized by law to serve it".

Mr. Holtzoff. I think that is so.

The Chairman. "To an officer"?

Mr. Holtzoff. Yes.

The Chairman. Do we use others than the marshal, as a matter of fact?

Mr. Holtzoff. Yes; we do. For instance, investigating officers like F.B.I. agents or narcotic agents will file a complaint and get a warrant and serve a warrant.

Mr. Wechsler. Mr. Chairman, I have forgotten the point of the proviso for directions by the court. You are dealing with cases before a committing magistrate, in the first sentence. How would you get a direction from the court?

Mr. Longsdorf. This covers both cases.

Mr. Youngquist. Here is the language we suggested at the former meeting:

"A summons in lieu of a warrant may be issued by the committing magistrate or by the clerk, upon the order of the court."

I think that explains it.

Mr. Holtzoff. In other words, the committing magistrate should not have the right to issue only a summons when the United States attorney requests a warrant. That is a privilege which should be reserved for the court.

That is the thought back of this.

Mr. Wechsler. I understood the point about the United States attorney; but Mr. Youngquist has answered my thought about the court. It refers to the clerk, rather than to the committing magistrate.

Mr. Youngquist. I am wondering if in lines 4 and 5 the attorney should not be mentioned before the court. "If the United States attorney" -- should it read this way?

"If the United States attorney so requests or the court so directs".

Will not the matter come up before the attorney, first, in point of time?

Mr. Holtzoff. I think you are right.

Mr. Youngquist. And should not the attorney be mentioned first, in the normal sequence of time? Is there any objection to that change?

Mr. Wechsler. For the committee on style, Mr. Chairman, would not the second sentence be adequate as a proviso to the first? There would be a comma after "warrant" in line 4, and it would read:

"Unless the United States attorney requests or the court directs that a summons be issued instead".

The Chairman. That seems good.

Mr. Holtzoff. Yes.

The Chairman. If there is nothing further on 22 (a)

we shall go to 22 (b).

Mr. Holtzoff. 22 (b) merely deals with the form of the warrant and with the form of the summons, substantially as agreed upon at the last meeting. It is very largely formal.

The Chairman. Are there any questions? If not, we shall move on to 22 (c).

Mr. Medalie. There is one trouble with 22 (b) (2): When the summons is issued by a committing magistrate, is his a court? Is the summons to be in the same form as the warrant? Provision is made that the warrant shall contain the name of the court. The summons is issued by a committing magistrate and cannot be in the name of a court because he is not a court and does not hold a court.

Mr. Holtzoff. But perhaps in line 14 no harm would be accomplished if we just leave out the words "contain the name of the court and".

Mr. Crane. I do not get that. Why shouldn't the summons contain the name of a court?

Mr. Holtzoff. Because the United States commissioner is not a court; he is only a magistrate.

Mr. Crane. It always has been limited to a court, I think. He may not issue it as a court, but it has the name of a court on it.

Mr. Medalie. Suppose he is presiding as a magistrate, but not a commissioner: If not a commissioner, nevertheless he has certain powers under the statute; has he not? He is a State official. Let us say that Mr. La Guardia decides to issue process for some violation of a Federal law in connection with defense work. He is the mayor, and he decides to issue

process. He is not a part of the District Court for the Southern District or the Eastern District of New York.

Mr. Holtzoff. I do not recall whether commissioners' warrants contain the name of a court. Do you?

Mr. Medalie. I do not.

Mr. Holtzoff. I do not think they do, either.

Mr. Medalie. Apart from that, you have other magistrates who are not commissioners.

Mr. Holtzoff. I think all this can be cured by changing line 14 so as to strike out the words "the name of the court and".

Mr. Medalie. The warrant should have the name of the court and also, if issued by a magistrate, should have the name of the magistrate.

Mr. Seth. That is right.

The Chairman. That you get from line 18.

Mr. Holtzoff. But your point would be met by leaving out the name of the court, in line 14.

Mr. Medalie. But I do not want to leave it out; because it ought to be in, when you are dealing with a court.

Mr. Holtzoff. The Chairman says that line 18 brings in the name of the court. It must have the name of the court. He might say, "Bring/<sup>him</sup> before me", and sign it "John C. Knox, District Judge." But that does not give the name of the court, which might be, let us say, the District Court for the Southern District of New York.

The Chairman. Line 14 says he must name the court or the committing magistrate.

Mr. Longsdorf. Is not the State magistrate, if he sits

in connection with the committing of a Federal crime, a part of the Federal court?

Mr. Holtzoff. No.

Mr. Longsdorf. Does not the statute make him that?

Mr. Holtzoff. No; I do not think so. He is not a part of the Federal court. He is just given certain authority to do a limited act. I do not think he is a part of the Federal court.

Mr. Medalie. If my mayor should decide to issue process, he would not do so by virtue of the Federal court. He would do so by virtue of his own dignity and power, God bless him.

Mr. Glueck. The United States statute makes him a magistrate, and therefore an arm of the court.

The Chairman. Gentlemen, what is your pleasure with respect to Mr. Holtzoff's suggestion as to line 14, "the name of the court" -- the words which he says should be deleted?

Mr. Robinson. I agree with Mr. Medalie about that -- that we should not delete them just in order to get away from the name of the committing magistrate.

The Chairman. We have it in line 18.

Mr. Robinson. I do not think so.

The Chairman. It says "brought before the court"-- and thus names the court.

Mr. Wechsler. What would be the harm in putting in the word "magistrate" after "court" in line 14?

Mr. Crane. Have you ever seen one of these summonses? Has any one here seen one of them?

Mr. Glueck. Yes.

Mr. Crane. Has every one seen a summons? Have you, Mr.

Holtzoff?

Mr. Holtzoff. I do not recall.

Mr. Crane. I am asking how many members of the committee have seen a summons. I do not think I have. I think they are talking about something we do not know much about.

Mr. Glueck. Apropos, I think we ought to have some of these documents in here, so that we may look at them.

Mr. Crane. Yes; I think so, too.

Mr. McLellan. Of course they are very common in Massachusetts.

Mr. Glueck. Why not adopt Mr. Wechsler's suggestion, and insert "magistrate" after "court" in line 14?

Mr. Crane. I do not think we should decide on things we have not seen or do not know about. May we get one and find out what has been done with a summons that has been issued?

Mr. Robinson. I may say that when the original draft was prepared it was drafted with a summons there; so we followed it.

Mr. Crane. I do not think we should decide on forms until we see what forms are being used.

Mr. Seasongood. I think so, too.

Mr. Dession. I have seen a Federal form used to suit the occasion. You put the caption on at the top, and you use the usual form, and then you let it be served by the marshal in the usual way, and you sit back and see what happens.

Mr. Medalie. I move that in line 14, after the words "the name of the court" there be inserted the words "or of the magistrate".

The Chairman. The committing magistrate?

Mr. Medalie. Yes.

The Chairman. The motion is to insert in line 14, after the word "court", the words "or of the committing magistrate".

Mr. Medalie. Yes; "or of the committing magistrate."

Mr. Seasongood. If it is the universal practice to have the name of the court, why strike it out? It is all the more impressive with the name of the court.

Mr. Holtzoff. I am just reminded that commissioner's warrants do not have the name of the court, but they have the name of the district in which the commissioner is sitting.

Mr. Crane. Let us go to work and see about these things; because we do not want to write forms based on something which does not exist.

Mr. McLellan. He sees a warrant, not a summons.

Mr. Medalie. This is what happens in the case of a magistrate, whether he be the kind that you have in the city of New York or in Chicago or in any other place where he is merely a justice of the peace. He has a lot of papers which simply say "justice of the peace" or "city magistrate of the City of New York", or whatever it may be. He has a piece of paper which designates who and what he is. He does not simply tear off a piece of paper and write out, "Arrest John Jones for bootlegging".

Mr. Holtzoff. Then it should not be the name of the committing magistrate, but the title; should it not?

Mr. Medalie. Well, he does not issue it as a court. John Smith, city magistrate of the City of New York, in issuing a warrant or, if you will, a summons, under section 22, does not issue it as a court. He issues it because he is a person who, holding a certain office, gets the powers of a Federal committing magistrate.

Mr. Seth. Would it not be well to separate (b) into "warrants issued out of a court" and "warrants issued by the committing magistrate"? Would it not be better to place them in separate paragraphs?

Mr. Holtzoff. Very few warrants are issued by the court.

Mr. Seth. I mean where the indictment or written accusation is filed in court.

Mr. Holtzoff. There is a separate rule as to warrants issued out of a court, upon a warrant or information.

Mr. Seth. This covers both of them.

The Chairman. I think Mr. Seth's point is well taken. At least in the first sentence we should deal with the warrant out of a court; and then if we need a separate sentence to tell whether the warrant issued by magistrates differs from it, we can do that; and then the summons follows.

Mr. Seth. That is right.

The Chairman. Is that suggestion agreeable? If it is, we can refer that back to the Reporter, for restatement.

Mr. Medalie. All right.

The Chairman. Very well; then we pass on to Rule 22 (c).

Mr. Dession. In (b) should not we state something about the penalty for disobedience of the summons-- under penalty of law, or something of that sort?

Mr. Holtzoff. No. If a person does not respond to a summons, he should be arrested.

Mr. Robinson. The code makes it an offense to disobey a summons.

Mr. Holtzoff. The summons is for the defendant's convenience. You issue a summons instead of arresting him. If he

does not choose to obey the summons, then you just issue a warrant and pick him up.

Mr. Dession. Yes; and you will be changing some more law if you put a penalty on him on a summons. At the present time if you issue a summons against an individual you do not have to show probable cause against a summons--

Mr. Medalie. They are against corporations.

Mr. Dession. Yes; they are; I have used them.

Mr. Holtzoff. Against individuals?

Mr. Dession. Well, there is no law against writing out a piece of paper and getting a marshal to serve it; is there? It is like writing a letter. A good many district attorneys use the telephone, and say, "Will you come in?" There is no law against that; but I do not think it has any binding effect if a man does not choose to come in. That would be changing that, if we put a penalty on it.

Mr. Robinson. It would not be a technical summons, anyway.

Mr. Dession. Well, call it what you like.

The Chairman. All right; Rule 22 (c).

Mr. Holtzoff. That is just a statement as to who shall have authority.

Mr. Medalie. Why say "the United States marshal and his deputy"? Is it not sufficient to say, "an officer authorized by law to do so"? The number of officers who will have the authority to execute process will increase in the next year or two.

Mr. Holtzoff. It may be that under the circumstances we can well dispense with paragraph (c). Even though I

drafted it I see no reason why we cannot dispense with it.

The Chairman. I think we can.

Mr. Medalie. All right; I will agree that it goes out.

The Chairman. It is moved and seconded that the paragraph be deleted.

Mr. Crane. It looks good. You have nothing to say who serves it. Why not leave it in-- "served by a United States marshal"? The rules say it takes a marshal to serve them.

Mr. Medalie. There are others besides marshals who can do that.

Mr. Crane. It looks good here. You have a warrant and you have the provision for issuing a summons, but you do not say that a marshal can do it.

The Chairman. In line 7, back of that, there is the provision to cover that-- rule 22(a), line 7.

Gentlemen, did we take care of the subsection? Did we vote on that? All in favor of the motion to strike, say "aye".

Mr. Seth. The civil rules require that it be served by a marshal or some one specially appointed. I think we should have a provision similar to that; I think such a provision should be placed here.

Mr. Holtzoff. In drafting subparagraph (c) I did follow the pattern of the corresponding civil rule.

Mr. Seth. That is right.

Mr. Holtzoff. The corresponding civil rule being that all process shall be served by the marshal or his deputy or some person appointed by the court.

Mr. Seth. Yes -- except subpoenas.

Mr. Holtzoff. Yes, except subpoenas.

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The Chairman. You have made the suggestion about summons.

Mr. Seth. I think a summons should follow the civil rule.

A summons may be served by any one appointed to make service.

Mr. Medalie. And that is followed in the State courts.

Usually the complainant is given the summons.

Mr. Holtzoff. Yes; but you do not ordinarily have the complainant in a Federal case.

Mr. Medalie. You might; you might get an officer who has no power to arrest, like a food and drug inspector.

Mr. Holtzoff. Yes; but why give him a summons?

Mr. Medalie. Because he is the complainant; he makes the affidavit on which the magistrate acts.

Mr. Longsdorf. Mr. Chairman, I think we ought to step a little cautiously in dealing with the summons. The use of summons and the criminal process I think originated in the John Kelsee case. I think that was the first one in the United States. It is commonly cited. Judge Dehaven, in California, a good many years ago found one way to bring in a corporation in answer to an accusation of commission of a crime, and he resorted to section 716 of the Revised Statutes, which is now section 377 of Title 28, and which authorizes the court to devise any process necessary to exercise the acts in its jurisdiction.

So he devised a summons in that case, and that case has been followed, and it was followed in a very peculiar situation in North Dakota, in the John Gunn Brewing Company case, where the defendant was a corporation of Wisconsin, and the information or indictment was filed in North Dakota. There was no way for the marshal of North Dakota to serve a summons in

Wisconsin. So the John Gunn case extended the doctrine of the Kelsee case, and the judge directed that the summons should run to the marshal of the district of Wisconsin, and be by him served in return. And that was upheld by the circuit court of appeals.

So that kind of a summons does not have any exact counterpart on the civil side, and that is the doctrine of summons, I believe, that is followed in the United States courts. I could not find anything else but those two cases which illustrate that.

Mr. Medalie. As against that, you have something that has developed over the last thirty-odd years in the State courts, particularly in the large centers, where it is found in practice that a summons serves all the purposes of a warrant, without any need for harassment, and gives this additional safeguard for the enforcement of the law. But where there is doubt whether a crime has been committed or whether the defendant committed it, the magistrate is willing to hear the case and see whether he can make up his mind that a crime has been committed.

There are so many cases of that kind, and justice is done so substantially in those cases, that we ought to have that done in the Federal courts. Without summonses in Federal criminal procedure, you would have a situation in which the Federal courts would be just a whole generation behind the State courts; and that ought not go on.

The Chairman. Gentlemen, what is your pleasure with respect to subsection (c), both as to the language there and as to the suggestion now made with respect to inserting a provision

10 concerning the services of summons?

Mr. Seasingood. Mr. Chairman, why is it not covered by subdivision (a) and probably in subdivision (c), for the service of a subpoena being specially designated? Why is it not covered by them?

The Chairman. It struck me that it was, but some one has raised objection.

Mr. Seth. It is specifically in the civil rules, and I think it is highly important. In our district you may have an offense, and the marshal may travel 400 miles making a round trip to make service. There ought to be a designation of some one to serve summons -- not to make an arrest, but to serve summons.

The Chairman. If we want to maintain the parallel we would go back in section (a) and restore the language "the marshal or some other officer authorized by law to serve"; because that is the language -- "the marshal or person specially appointed to serve". That is the language of civil rule 4 (a).

Mr. Seth. That is right. But that ought not to extend to the warrant. The warrant ought to go to the marshal or officer.

Mr. Medalie. The words "marshal or officer authorized by law to serve" cover it.

Mr. Seth. Yes; they do.

The Chairman. Section 4 (c) of the civil rules provides as follows:

"Service of all process shall be made by the United States marshal, by his deputy, or by some other person specially appointed by the court for that purpose, except that a subpoena

may be served as provided in rule 45. Special appointments to serve process shall be made freely and substantially the same as when travel fees will result."

Mr. McLellan. May I ask a question-- because I have not been here before.

The Chairman. Yes, Judge.

Mr. McLellan. Have you given thought to permitting a summons in a criminal case, which of course may be followed at any time by a warrant for arrest-- have you given thought to service of a summons in a criminal case by mere mailing?

Mr. Moltzoff. If we do not put in any provision as to how the summons shall be served, it might well be served by mail.

Mr. McLellan. Because it is in the interest of the defendant that you use the summons any way; and why is it not sufficient if by registered mail you send it to him? Then if he does not respond you can send it by an authorized officer, and then make an arrest.

That would do away with any necessity for the court, as under the civil rules, to authorize some one other than an officer to make the service.

Had you considered that?

The Chairman. I think it was mentioned at the first session, but I do not think we came to any conclusion about it.

Mr. McLellan. I do not want to delay the proceedings.

The Chairman. I think it is important, Judge.

Mr. McLellan. But a summons in a criminal case is quite different from that in a civil case, of course.

The Chairman. Can we agree as to section (c) as it stands, plus a provision for liberal service for the summons,

perhaps, including the mail service that Judge McLellan refers to?

Mr. Moltzoff. I am wondering if it is necessary to have any provision at all with respect to how a summons shall be served. It is a mere notice given to the defendant, in his own interest, to come into court, so as to avoid being arrested.

Mr. Crane. Will every one know that? Will everybody know it? You and I and the rest of us know it, but would every one else know it?

The Chairman. That is exactly the point. If it may be served by mail, why not say so?

Mr. Youngquist. That is in the comment on this very rule.

Mr. McLellan. I did not see it.

Mr. Youngquist. It is the last paragraph but one.

Mr. McLellan. I had not seen it.

Mr. Wechsler. Can there be a general formula as to how the summons may be served in any way reasonably calculated to bring it to the actual attention of the defendant? Then you have advised the bar what you intend.

Mr. McLellan. They would not dare send it by mail, even under that.

Mr. Medalie. That is right. I should like to make a motion that would carry out the purpose of Judge McLellan's suggestion. I move that at the appropriate place the following be included:

"A summons may be served by any person designated by the court or the magistrate for that purpose. It may also be served by mail by the magistrate or by the clerk of the court,

when so directed by the court."

The Chairman. Would you say "by registered mail"?

Mr. McLellan. No.

The Chairman. "By mail"?

Mr. McLellan. Yes.

The Chairman. I think that would come at the end of (d); I think it would also require the addition of some language at the end of (c)-- (c) being by whom executed, and (d) being how executed -- if that can be divided easily enough to bring about that purpose.

Is there any discussion on the motion? All those in favor say "aye".

The motion was carried.

The Chairman. Is there any discussion of (d)?

Mr. Longsdorf. Mr. Chairman, can that be recast in form so that we shall have another copy of it? It is rather inconvenient as it is.

The Chairman. Subparagraph (d)?

Mr. Longsdorf. Yes, both those additions.

The Chairman. (c) and (d)?

Mr. Longsdorf. Yes; because it is rather hard to interline all that matter.

The Chairman. All right. That brings us to subsection (e).

Mr. Holtzoff. Subsection (e) is exactly in the language agreed upon at the last meeting.

Mr. Longsdorf. Mr. Chairman, (e) purports to extend -- I mentioned the procedure of issuing summons in those two cases; and (e) purports to extend the territorial range of summons

throughout the State, when the State contains several districts. Let us be quite sure that that does not extend the jurisdiction of the district court.

Mr. Holtzoff. It does not extend the jurisdiction of a court. It merely eliminates the necessity of a removal proceeding from one district to another district of the same State, and that is perfectly logical; because if a person is charged with a State offense he can be arrested in any county of the State and can be carried to any other county, without any extradition proceedings.

Mr. Medalie. I should like to ask this question -- excuse me, but I had a specific technical thing in mind there.

Mr. Longsdorf. Certainly; go ahead.

Mr. Medalie. A man is indicted in the eastern district of New York; he is in the western district of New York -- that is, he is indicted in Brooklyn, and he lives in Buffalo. The marshal of the eastern district has no power, as I understand it, to execute process except in the eastern district.

Mr. Holtzoff. No; that has been changed by a statute which was passed at our request about four or five years ago.

Mr. Medalie. Has it? All right; fine. You fellows think of everything. That answers my question. You mean that the Brooklyn marshal can go to Buffalo and pinch the poor fellow?

Mr. Holtzoff. We had that difficulty.

Mr. Medalie. That is different. Shades of Harry Weinberger!

The Chairman. Very different. Shades of Harry Weinberger, and ghost of Judge Clark!

All right; go on to section (f).

Mr. Dession. I should like to raise one question now, which may be settled later.

The Chairman. Very well; go ahead.

Mr. Dession. We are dealing with summons. As I understand it, a summons to a corporation is enforceable through contempt proceedings. A summons against an individual is not. Should we spell out the legal results that follow from serving one of these things?

Mr. Longsdorf. Yes; I think so.

Mr. Dession. There is no certainty about it.

Mr. Medalie. Do you mean provision that would say, "wilful failure to respond to a summons shall be deemed contempt of court"?

Mr. Dession. We are talking about a summons, without differentiating between summons to a corporation, which in existing practice is enforceable, I believe, and a summons against an individual, which, in existing practice, is not enforceable, as I understand.

Mr. Medalie. If we agree that "summons" as provided for in this section, does not mean anything except an opportunity to a defendant to avoid arrest, then of course the contempt provisions would be inapplicable. By providing here that wilful disobedience to a summons, wilful failure to respond to a summons, shall constitute contempt, would we do something which, by these rules, the rules have the power to enact?

Mr. Holtzoff. I do not believe we should make that a contempt; because that means if a person fails to appear in response to a summons he can be punished first for the crime for which the summons was issued and then again for failure to

1 respond to a summons.

Mr. Dession. You can do that with a corporation; that can be done now. The only reason is, I suppose, that it may be the only way to get a corporation to respond by an actual person.

Mr. Medalie. Of course I can understand in that connection that the fact is that the practice -- not the law, but the practice -- with respect to summonses by our magistrates in State court cases is such that a person is rarely, if ever, fined for disobedience. When the magistrate becomes disgusted because of the person's failure to respond, he issues a warrant. That applies even to parking tickets.

Mr. Glueck. Is the summons process within the meaning of (e)?

Mr. Holtzoff. Oh, yes.

Mr. Longsdorf. Why not?

Mr. Holtzoff. Actually when they desire to summons a corporation they do not bother to issue a summons, but they telephone the attorney for the corporation.

Mr. Seth. What happens if the corporation does not pay attention to a summons?

Mr. Dession. Then you can issue a warrant for the arrest of the president of the corporation.

Mr. Longsdorf. Mr. Chairman, before we pass over (e) let me call attention to this:

"All process other than a subpoena may be executed or served anywhere within the territorial limits of the State in which the district court is held."

What becomes of the John Gunn case, in which the summons

was not served within the district, and could not have been?

Mr. Holtzoff. This provision changes the law.

Mr. Longsdorf. Then you could not get the John Gunn Brewing Company into North Dakota.

Mr. Robinson. In order to meet that point, how about the amendment called 59 (e), which has been considered by Mr. Longsdorf and the rest of us?

Mr. Holtzoff. 59 (e)?

Mr. Robinson. Well, this is 22 (e). I will have 59 (e) in a moment:

"All process other than a subpoena may be executed or served anywhere within the territorial limits" --

And so forth. Then the second sentence is as follows:

"A subpoena may be served within the territorial limits provided in rule" --

That is to be filled in with "59 (e)" at that point, if you have not already filled it in --

", and a summons may be served wherever the court may order it to be served."

Mr. Medalie. You would get outside the State, if that language is as broad as that.

Mr. Robinson. That is right. Why not? That would meet the Gunn case that Mr. Longsdorf is speaking of.

Mr. Medalie. It would meet that case, but it would cause horrible inconvenience if a judge in Portland, Maine, issued a summons to a man in San Diego, California. I think that is rather serious business.

Mr. Longsdorf. I think we should differentiate between summonses to corporations and summonses to natural persons.

Mr. Medalie. Let me say a little more there, please: It would cause horrible inconvenience if a judge at Sitka, Alaska issued a summons to a man in Key West, Florida!

Mr. Holtzoff. I do not believe that a summons should have any different territorial extent than a warrant; because a warrant is issued if a summons does not bring fruit. The two ought to be coterminous.

Mr. Seth. How about the corporation? For instance, there were the proceedings in Denver originally for violation of the anti-trust law, and they issued summonses in 16 States.

Mr. Robinson. That would be changing the law, then, if we did not amend the rules as suggested.

Mr. Seth. That is right.

Mr. Longsdorf. That is my point exactly.

Mr. Seth. You cannot remove them; you cannot do anything unless you allow them to run outside the State of jurisdiction. I agree that they should not be dragged around.

The Chairman. It begins to appear that if we have to get some new name for the summons against an individual we are going to be all mixed up with the practice that has grown up for summonses against corporations and the legal effect of serving them and the places where you can serve them and the penalties for not responding. I think we are talking about two different kinds of animals, but are giving them the same name.

Mr. Robinson. Mr. Chairman, would it take care of it in line 37 to say:

"All process other than a subpoena or summons to a corporation" --

And then, following that, to say:

"A summons to a corporation may be served wherever the court may direct"?

Then, in line 40, we could say:

"Within the territorial limits provided in Rule 59 (e), and a summons to a corporation may be served", and so forth.

The Chairman. Well, gentlemen --

Mr. Holtzoff. Mr. Chairman, I think that would do it.

The Chairman. I think so.

Mr. Seasongood. What is the "and so forth"?

Mr. Robinson. To finish the sentence there:

"may be served wherever the court may order it to be served."

The Chairman. What is your pleasure with respect to (e) as thus amended? Is there any discussion?

Those in favor of the subsection as amended will say "aye".

The motion was carried.

3 The Chairman. That brings us to 22 (f).

Mr. Medalie. In subsection (f) we say:

"The officer executing or serving the process shall make proof of service thereof".

I think the word "proof" is not what we want. A certificate is what we want.

Mr. Seasongood. Return.

Mr. Holtzoff. Return.

Mr. Robinson. That is right; that is a good technical word.

Mr. Seasongood. "Shall make prompt return thereof".

Mr. Holtzoff. "Shall make return thereof to the court of the United States".

Mr. Robinson. Strike out "proof of service" and substitute "return" in line 42.

The Chairman. That brings us to Rule 23, which I think we disposed of.

Mr. Holtzoff. Yes; we did.

The Chairman. Very well; now Rule 24.

Mr. Robinson. Rules 24, 25, 26, 27 and 28: I shall ask Mr. Strine to present that matter to us, because he worked on those rules.

Mr. Strine. The following five rules are drafted to conform to Rule 21 and other rules, and might eventually be subsections of one rule instead of separate rules. The committee has received a number of letters from various Federal judges stating that the present procedure on bail is satisfactory; and I suppose the only questions on bail are the questions of professional bondsmen and sureties on a number of bonds beyond their worth, and perhaps the giving of bonds to habitual criminals who commit crimes when they are out on bail.

The breaking of bail is covered by statute.

In non-capital cases the defendant shall be admitted to bail, and in capital cases he may be admitted to bail in the discretion of the court or judge.

The rules drafted here have not attempted to cover those statutes or to make any change.

As to the qualification question, we have endeavored to cover that in Rule 26.

The first rule here on bail -- Rule 24 -- refers to the

amount of bail, and it merely provides that when a defendant is admitted to bail the magistrate shall fix bail in such amount as in his judgment will insure the presence of the defendant, having regard to the nature of the offense, the financial ability of the defendant to give bail, and the likelihood of the defendant's absconding.

The first two of those have been expressed in the cases, and the third we have added.

The Chairman. May the first two words in line 2 be deleted?

Mr. Holtzoff. Yes.

Mr. McLellan. Yes.

Mr. Wechsler. Which rule is that?

The Chairman. Rule 24.

Mr. Holtzoff. In the same line, Mr. Chairman, the words "in such amount" I think might be stricken out, and just the word "such" left, so as to read:

"The amount thereof shall be such as" -- \* \* \* .

Mr. Seasongood. Yes.

Mr. Dession. Yes.

Mr. Seth. Should not either this rule or Rule 22 contain the provision with respect to a judge's endorsing on the warrant the amount of the bond, when the indictment is returned and a warrant is issued? That is the common practice, at least. He takes the indictment and endorses the amount of the bond, and the marshal takes bond or bail.

Mr. Medalie. You do not want to compel the judge or magistrate to do that, do you? You want to permit him to do it; do you not?

Mr. Seth. Yes, authorize him to do it.

Mr. Medalie. Because he may want to know more about it.

Mr. Seth. Yes.

Mr. Medalie. Otherwise some other judge or magistrate having the power to fix bail would follow that, and be compelled to.

Mr. Seth. Yes; but in the ordinary case he just endorses the amount on the indictment, as a matter of fact.

Mr. Burke. Mr. Chairman, in that connection since we are considering Rule 22 again, I have been wondering, since we are considering the service of summons upon a corporation merely. It is my recollection that in many instances corporations residing in foreign States have been made respondents, and also the individual officers -- John Jones because he happened to be president, and Sam Smith, Treasurer. I am wondering if we are not going to run into a little conflict there between personal interests and purely corporate interests if we make it apply exclusively to corporations.

The Chairman. At the present time can an individual be summoned into a district not in the State in which he resides?

Mr. Holtzoff. No; he cannot be summoned even into a district in which he does not reside or in the same or a different State.

Mr. Seth. He can be arrested and removed; that is all.

The Chairman. Can he be brought in by warrant from another State?

Mr. Holtzoff. No.

Mr. Burke. But here you make provision for service of a summons on a corporate entity; and as I recall, in such cases

they have also included the managing officers and directors of the corporation.

The Chairman. I am wondering how they got them in, Mr. Burke.

Mr. Burke. As individuals.

The Chairman. But getting back to the existing practice, and quite apart from our rule, I wonder how they got the individual defendants to come up from Texas.

Mr. Seth. They arrested them, and removed them.

Mr. Burke. They arrested them.

Mr. Holtzoff. In other words they had to put them through a removal.

Mr. Seth. Unless they came voluntarily -- and usually they do.

Mr. Burke. My thought was whether this might be construed by district attorneys as not permitting the same service of summons that would be available to a corporate defendant.

Mr. Holtzoff. No; we have a rule on removal from one State to another, that I think would cover that point.

Mr. Burke. But that is for removal.

Mr. Holtzoff. That is the only way you can bring a natural person from one district to another, now; you have to have a removal proceeding.

Mr. Youngquist. I do not think you would ever serve a summons on an individual living outside of the State in which the court is located.

The Chairman. In other words it would have to be taken care of on a removal proceeding.

Mr. Youngquist. Or by warrant.

The Chairman. Yes, or by warrant.

Are there any further questions on Rule 24?

Mr. Holtzoff. In line 3, Mr. Chairman, just as a matter of phraseology, I think the word "official" is not a word of art. It should be "officer"; that is a word of art.

Mr. Youngquist. I have: "court or committing magistrate" in mine.

Mr. Medalie. When bail is fixed by a district judge, is it fixed by him as the district judge or as the court?

Mr. Holtzoff. It is fixed by him as the court, unless he is sitting as the committing magistrate.

Mr. Medalie. Then why do we not say as Mr. Youngquist suggests?

Mr. Holtzoff. That is all right.

Mr. Medalie. "By the court or committing magistrate".

Mr. Holtzoff. Yes.

Mr. Medalie. And strike out the words "official admitting to bail", and insert "or committing magistrate".

The Chairman. Yes.

Mr. Medalie. Then I have the further suggestion to make it read, "will insure his presence at the trial or hearing, having regard", and so forth.

The Chairman. His presence?

Mr. Medalie. We have other appearances, in practice, than at the trial or hearing. Sometimes the defendant is required to appear on calendar calls.

Mr. Seth. Yes, and for arraignment.

Mr. Medalie. Even though there is no actual trial; there may or may not be a trial on the day set for a trial.

The Chairman. That is true.

Mr. Medalie. I think the language "in the criminal proceeding" is sufficient.

The Chairman. Yes.

Mr. Holtzoff. "His presence in the criminal proceeding".

The Chairman. You do not even need that.

Mr. Holtzoff. Just "his presence".

The Chairman. Then, as I understand it, the rule will read:

"When the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the court or committing magistrate will insure his presence, having regard to the nature of the offense, his financial ability to give bail, and the likelihood of his absconding."

Is that correct?

Mr. Holtzoff. Is "absconding" the correct word? I thought that was generally used with respect to a debtor, and not a defendant. I would suggest the words "of his failure to appear."

The Chairman. Before we knock this word out, let us be sure about it.

Mr. Holtzoff. You speak of "the absconding debtor".

The Chairman. Is that your thought in the matter, gentlemen?

Mr. Seth. And his mere failure to come into court might not be "absconding". He might still be in town.

Mr. Holtzoff. That is not "absconding".

Mr. Strine. How about "the likelihood of his becoming a fugitive"?

The Chairman. Or "failure to appear".

Mr. Holtzoff. I think that is it.

Mr. Medalie. What would you say of "the likelihood of his failure to appear"?

Mr. Holtzoff. Yes.

The Chairman. Are there any other suggestions?

Mr. Glueck. There seem to be so many "his's". I should prefer to go back, and to say, at the beginning of line 4, "the presence of the defendant." That would help omit so many of the "his's".

The Chairman. Very well. Allthose in favor of the rule as amended say "aye".

The motion was carried.

The Chairman. Rule 25.

Mr. Strine. The purpose of the rule is to eliminate unqualified sureties. It requires all personal sureties to justify by affidavit describing the property in respect of which they propose to justify as to their sufficiency, to set forth all encumbrances thereon, and to state the number and amounts of any other bail bonds on which they are surety, and which are still outstanding.

The rule then requires that sureties, whether personal or corporate, shall give any other information which may be required, and also as to whether a contract of indemnity exists between them or the defendant or any third person. The rule then provides that the officer taking the bail can, in his discretion, refuse to accept any surety not qualified.

Mr. Medalie. You have in the notation on the next page the statement:

"Sureties who have been indemnified have been refused both where the contract of indemnity is with the defendant,\* \* \* and where it is third persons."

I know that the old English rule was that a surety was supposed to be one who, without security, and solely out of confidence in the defendant, went on the bond. That is neither the American rule nor the American practice nor our theory. We recognize that if a man has a little house in the suburbs, and the surety company thinks the man/<sup>who</sup> has a house in the suburbs is a pretty good risk, but nevertheless it takes the house as indemnity -- which it should do -- that is still a good bond.

In our practice we also think that if that man's uncle or mother-in-law puts up his or her house or a handful of securities, or assigns her savings bank book for the purpose, that also is good. In other words, the court cannot do what it should be able to do in having the intermediary-- the surety company or the individual, but more often the surety company-- do this. It is not the purpose to keep people in jail. When it is not necessary to keep them in jail, to feed them, and to keep them from their employment and business, we do not want them in jail.

Mr. Holtzoff. A professional bondsman is much more responsible than an individual bondsman who might happen to be a relative or friend of the defendant.

Mr. Medalie. That is true. When a \$5,000 bail is forfeited we know the bondsman or surety company will run all the way up to Canada and bring the man back by main force, without paying any attention at all to extradition treaties.

Mr. Glueck. How many of these bonds ever are collected upon?

Mr. Medalie. Most of them, where we have the surety practice and where the Government is painstaking about listing qualified surety companies. Isn't that so, Alex?

Mr. Holtzoff. Why, yes. We collect on many more surety company bonds, for forfeiture, than on individual bonds. Certainly the average surety company would not give a bond for the ordinary defendant without commonly being indemnified by some one.

Mr. Medalie. Let me ask the purpose of the original note. Was there a catch in the rule?

Mr. Strine. No. The holding in those cases was not that the bond was invalid or the contract no good. It simply was to the effect that the surety should have an interest in seeing that the defendant is produced; and a surety who has been indemnified does not have that interest. Therefore he may not be a good surety, and the court should consider that point.

Mr. Holtzoff. That is not the present practice, Mr. Strine; I am quite certain of that. Those cases are fairly old.

Mr. Strine. Yes.

Mr. Medalie. This rule, as I understand it, recognizes an indemnified surety. In fact it would be bad business for the investors of the country if a surety company could not take indemnity.

Mr. Strine. The rule does not prohibit that, but it merely provides that the facts should be disclosed.

Mr. Medalie. Is not the real purpose of the disclosure that the Government shall find out whether the surety company

is getting some of the loot that the defendant is charged with stealing or acquiring by fraud, or whether the fund shall be available, in the event of his conviction, for payment of a fine-- or whatever other nefarious idea the Department of Justice has?

Mr. Holtzoff. As a matter of fact-- and I think we ought to require the disclosure-- it seems to me we should require disclosure of the defendant's assets and liabilities in order to see how good the bond is.

Mr. Medalie. But once in a while, when some of the New York evening papers used to conduct drives against crime waves-- campaigns doubtless duplicated in other parts of the country-- they usually began by drawing up articles for criminal law reform, and this was usually one of the things that they brought up-- that the bondsman gets a part of the loot, on bail. I suppose that has been partially true, but not true today to such an extent as to require this.

Mr. Holtzoff. I do not think it should be required.

Mr. Medalie. In any event I should like to suggest this: If the district attorney or the Post Office Department or the F.B.I. believes that the defendant has loot which he turned over to a surety, all that needs to be done is to issue a subpoena for that surety or one of its officers to appear before the grand jury and, under oath, state their knowledge about the matter. Then they have all the information they need.

Accordingly, I move to strike out the provision for the disclosure of the details on the indemnity.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. Before we vote on that motion I should like to ask Mr. Medalie a question about the New York professional bondsman law. Does not the indemnity provision appear in the

New York professional bondsman law?

Mr. Medalie. I hate to say so, but I cannot tell you.

Mr. Longsdorf. Does it not apply only to professional bondsmen, and not to surety companies?

Mr. Medalie. I am sorry I cannot tell you. Really, in the last 20 years I do not believe I twice got bail for a defendant. Usually some other lawyer did that. So I do not know.

Mr. Holtzoff. Here in the District of Columbia, surety companies are not accustomed to write bail bonds. They have professional bondsmen. They render the same services that are rendered by surety companies, let us say, in New York. The Government always is better off if the bond is written by a professional bondsman, because the bondsman will go after the defendant if he becomes a fugitive; and also the bondsman is much more likely to pay his bond in case of default--much more likely than is a surety that is not a professional bondsman--because the professional bondsman wants to keep his credit good.

So I do not think we should discourage professional bondsmen.

Mr. Longsdorf. In California the professional bondsman is regulated by the insurance code.

Mr. Holtzoff. Well, that is not the case here.

Mr. Longsdorf. And I think the same is practically true in New York. So it may be proper in the insurance code to require a professional bondsman to disclose how much he has indemnified. It has a bearing on his worth.

But here I think it is a different question.

8 Mr. Holtzoff. It may be all right under the insurance law, but I do not think it has any place here.

Mr. Longsdorf. I think that is where the idea came from, but I do not know whether it should apply to surety companies. Perhaps not.

The Chairman. May we, in passing on the pending motion, leave it subject to Mr. Holtzoff's or Mr. Strine's checking up with the department as to whether they think it necessary?

Mr. Holtzoff. Oh, I am sure the department does not think it necessary.

The Chairman. Then, with that before us, may we have a vote to strike the second sentence, the sentence beginning in line 9 and ending in line 13?

The motion was carried.

Mr. Holtzoff. I desire to call attention to a minor matter, Mr. Chairman. In line 4 the word "undertaking" is used. I am wondering whether we should not use the word "bond". I do not think they use the word "undertaking" in the Federal courts. Do they? An undertaking is a document that is not signed by the principal, but only by a surety. I think we ought to use the word "bond".

Mr. Strine. I believe "bond" would be the better word.

Mr. Holtzoff. I think so.

The Chairman. Or where the bail is tendered?

Mr. Holtzoff. Yes.

Mr. Dession. Right after "tender" I should like to add the words "and are in good standing". I think that should be inserted. The way you have it there, it is simply forthwith approved. They may get awfully sour before they catch on.

The Chairman. That is covered by the quarterly statement of the Treasury Department as to what are good sureties, and

giving their respective amounts.

Mr. Dession. I say, "and are in good standing". The way you have it stated, if they once qualify they are eligible, no matter how bad they may become.

The Chairman. That is not so; because the list comes out each quarter.

Mr. Dession. I know; but why have it contrary to the practice?

Mr. Youngquist. Can you substitute "are" for "have been" -- in other words, can you change the tense?

Mr. Dession. That is what I said.

The Chairman. Oh, I see.

Mr. Burke. You might reinsert the last sentence-- the sentence appearing in lines 13, 14 and 15-- which would accomplish the same purpose.

The Chairman. I did not understand your suggestion.

Mr. Burke. I say you might, instead of striking out all the balance of the paragraph --

Mr. Holtzoff. We did not strike all of it out.

Mr. Burke. I understood you to say you would strike all of it out.

The Chairman. No, just from line 9 to line 13 -- the sentence beginning in line 9 and ending in line 13.

Mr. Burke. Well, that is all right. The provision there gives the official the authority, in his discretion, to accept or refuse it if it fails to comply with the requirements of law.

9 Mr. Seasongood. That is only the affidavit -- from the statement made in the affidavit; and the surety does not have to

make the affidavit.

My change is simply, after the word "tendered" in line 4, to put in the words "and are in good standing".

Mr. Youngquist. The suggestion I made was with respect to line 2. Will not that do the same thing?

Mr. Holtzoff. I think so -- if you change "have been" to "are".

The Chairman. That would make it read this way, then, as I understand:

"corporate sureties which are approved as provided by law".

Is that correct?

Mr. Holtzoff. Yes.

Mr. Seanson. I do not think so. Why not say they are in good standing? They may have been approved a year ago. This is perfectly clear, and they are in good standing.

The other says that if they are once approved they are eligible.

The Chairman. All right.

Mr. Glueck. In the Committee on Style the word "such" in line 13 was not approved. It refers back to "such official admitting to bail."

Mr. Holtzoff. That ought to be "officer" rather than "official".

Mr. Glueck. All right.

Mr. Seth. The word "such" could go out.

The Chairman. "Any officer approving bail or admitting to bail".

All right. All those in favor of Rule 25 as amended say

"aye".

Mr. Waite. Before you put that motion, I thought you were going to call for any further comments on it.

The Chairman. Pardon me.

Mr. Waite. I think we should have one provision that was threshed out at very considerable length before the American Law Institute, and finally was agreed on. This requires that a surety be qualified, but it does not say what constitutes qualification. I suggest that we add to Rule 25 something the substance of which would be as follows:

"Sureties, other than corporations referred to, shall be considered not qualified unless the individual worth of a single surety or the collective worth of the sureties, if there be more than one, exclusive of other liabilities and the property exempt from execution, is greater than the amount of the particular undertaking."

The idea is to preclude acceptance of one man on a very considerable number of current obligations-- a man whose worth is not sufficient to take care of all of them by any stretch of the imagination.

All of us remember the Chicago surety who was accepted on \$120,000 worth of current bail bonds, when his total assets consisted of an undivided one-third interest in a \$3,000 equity.

Mr. Holtzoff. Does not the last sentence of the rule, as now phrased, cover that thought, Mr. Waite?

Mr. Waite. No. It says that he must be qualified and the official may refuse to accept an unqualified person; but it does not indicate what constitutes qualification.

My idea is that qualification should require a net worth

in excess of the particular undertaking.

Mr. Holtzoff. Is not that obvious-- that a person must be able to pay his obligations?

Mr. Glueck. That has not been obvious in all the State crime surveys, but I do not know about the Federal practice.

11 Mr. Holtzoff. Of course during the prohibition era we did have dozens of bondsmen who used the same piece of property to justify each bond; but that situation is met by the preceding provisions of the rule as now phrased.

Mr. Waite. I cannot find that in it, Mr. Holtzoff. That is what I was looking for.

The Chairman. I agree with you, Mr. Waite. In other words, with a particular bond he qualifies, but he does not disclose how many other bonds he is on at the particular moment.

Mr. Holtzoff. But take the latter part of the first sentence, lines 8 and 9. That very information is required.

Mr. Glueck. The words used are "or otherwise" --"setting forth the encumbrances thereon by mortgage, judgment or otherwise and the number and amount of other undertakings".

Mr. Waite. This says that he must demonstrate what his worth is, but it does not say what his worth must be in order to qualify him. That is the point I am trying to make.

Mr. Holtzoff. The point is that if all you want is full disclosure, this requires him to disclose what other bonds he has written.

Mr. Waite. But it does not say that the officer may not accept him after he has disclosed -- even though the officer finds he is surety on a dozen bonds that he could not possibly pay.

Mr. Holtzoff. Is not that obvious?

Mr. Waite. You may say it is foolish, but it does not prove so.

Mr. Holtzoff. Is not that an obvious conclusion?

Mr. Waite. No. I could find for you records in a score of cities of men who have been accepted on bond after bond after bond, when they could not possibly pay one.

Mr. Holtzoff. That is because this information was not disclosed.

Mr. Waite. No; it was perfectly well known, but still they were accepted.

Mr. Holtzoff. I see.

Mr. Waite. That is why I think some affirmative provision is desirable.

Mr. Seasongood. I agree with Mr. Waite. Did we strike out from line 9 down to the end of the paragraph?

The Chairman. No; from line 9 to line 13; and if Mr. Waite's motion is accepted, I think substitute motions should be made for something to go in in place of that sentence.

Mr. Seasongood. I think the substance of Mr. Waite's motion is desirable, but I think it is a little too long.

Mr. Waite. I had no pride of authorship; but if the substance is met I think it can be phrased by the Reporter.

Mr. Holtzoff. How about saying, "If it appears that the net worth of the surety is less than the amount of the bond, he shall not be accepted"?

Mr. Waite. Correct.

Mr. Robinson. What Mr. Waite talks about and what is in lines 9 to 13 are not the same thing, of course.

Mr. Waite. Oh, no.

Mr. Medalie. You have something here that I should like to see amended; and it covers the situation as to whether the surety has sufficient qualifications over and above his liability. Lines 13 to 15 cover the property qualifications of the surety.

Now these words, if I may take that up in that connection:

"Such official may in his discretion refuse to accept any surety who, from the statements contained in the affidavit, does not appear to be qualified."

The word "qualified" is rather broad. "Qualified" means having sufficient in the way of assets over and above liabilities present and contingent, to meet the possible default in the bond.

I think there is enough there, but I should like to suggest that other changes are necessary in there:

"Such official".

There is no reference to any official.

Mr. Glueck. That has been changed. It now reads: "Any officer admitting to bail."

Mr. Medalie. What about the words "may, in his discretion"? I think he must, and I think we should say "shall".

Mr. Glueck. I think we say "Any officer admitting to bail shall refuse to accept."

Is that Mr. Waite's suggestion?

Mr. Waite. No; I was going to make that suggestion afterwards -- that he be required to refuse a man who is not qualified. But as it now stands it does not define what "qualified" is.

Mr. Medalie. Would it not be better not to define it? We leave out many considerations when we begin to define.

Mr. Waite. I think they have proved by experience that it is necessary to preclude him by rule from accepting any man whose net worth is not at least equal to the amount of the undertaking; because they have disregarded the obvious thing; time and time and time again they have accepted men who are not qualified, according to that definition of "qualified".

Mr. Medalie. That would apply to individuals, but it would not apply to surety companies who obviously operate on an insurance basis.

Mr. Waite. That is all my suggestion is-- as to individuals other than the surety companies.

Mr. Medalie. Yes; I think that is all right.

There is only one other thing I may say in that connection. I agree with you. But talking about the language "from the statements contained in the affidavit", I do not think a judge or magistrate should be limited to the affidavit.

Mr. Waite. I agree with you there.

Mr. Medalie. I think-- and this is the procedure: On occasion the judge or magistrate may interrogate the individual surety and may ask him the precise questions one would ask when a surety is required to justify.

This language limits his action to the affidavit. It may be a perjured affidavit.

Mr. Waite. No; my motion had nothing to do with that at all, but my motion is that, regardless of whether the man has qualified, the individual shall not be considered as qualified unless he has sufficient assets.

Mr. Medalie. I agree.

Mr. Glueck. The surety companies do not have to make an affidavit. Would it be better to say "suitable", instead of "qualified"?

Mr. Medalie. What is that?

Mr. Glueck. Would it be better to say "suitable" instead of "qualified"?

Mr. Medalie. No; "qualified" is the word of art, is it not, as to sureties?

Mr. Holtzoff. Yes; it is.

Mr. Glueck. We passed over, somewhat cavalierly, the point the Reporter has made: that a number of courts regard professional bondsmen as an evil, and evidently there are decisions in many places that the professional personal bondsman is an evil because probably he has some arrangement with the criminal, or is a party to his acts in some way. I do not know whether we ought to ignore the possibility of refusing a man a personal bond because he has a professional bondsman.

Mr. Holtzoff. I do not think that is the experience of the department.

Mr. Glueck. But it is in the cases.

Mr. Holtzoff. But they are rather old cases.

Mr. Medalie. Today the old individual professional bondsman no longer acts as a surety. What these boys have done is this: They have gotten themselves some money--either their own savings or the savings of friends and relatives-- and they put that up as indemnity with the surety company. Then they become steersmen for the surety company, and become licensed bondsmen in New York and other places.

Mr. Holtzoff. But surety companies do not write bail bonds; for instance, in the District of Columbia they still have professional bondsmen, and that is the only kind of bondsmen you can get, unless the defendant has a personal friend; because in this city surety companies do not ordinarily write bail bonds.

I know it is true in Denver and in a great many Federal courts that the bulk of the bail bonds are written by professional bondsmen. In Baltimore and in New York the surety companies write bail bonds, but that is not the case in the majority of districts.

Mr. Seasongood. As a matter of fact, in the southern district, after conviction, they will not accept surety bonds; they require a personal bond. I never knew the reason for that, but they do.

Mr. Medalie. In your district?

Mr. Seasongood. Yes. They require a personal bond.

Mr. Holtzoff. If you do away with personal bonds you will make it impossible for many defendants to get bond, and they will have to stay in jail.

Mr. Medalie. I think so.

Mr. Seasongood. Evidently this is aimed against professional bondsmen and the accompanying evils.

Mr. Holtzoff. Yes, but not because a man is a professional bondsman, but because he has taken on too many bonds at once, and not because there is an evil in a professional bondsman per se.

The Chairman. When he does that he is doing nothing different from what a surety company is.

Mr. Seasongood. Of course a surety company is in that business, and is under State supervision, and has to disclose its assets. But here is a fellow who has a dozen bonds outstanding. It is just his luck if they have not been forfeited.

Mr. Holtzoff. But you will deprive many a poor defendant of the opportunity to give bail if you deprive him of the right to use a professional bondsman instead of a surety company or a personal friend.

Mr. Medalie. I think we safeguard it sufficiently if we look after the qualification of the professional bondsman or personal surety by the test suggested by Professor Waite.

Mr. Seth. Yes.

Mr. Waite. Mr. Chairman, I am afraid my motion has gotten sidetracked in the shuffle. Let me make it over again in somewhat different form.

The Chairman. Yes. Before you do so, I wonder if we can approve the change in the last sentence, so it will read "any officer admitting to bail".

Mr. Dession. What line is that?

The Chairman. Line 13: "Any officer approving bail shall refuse to accept any surety who, from the statements contained in the affidavit, or otherwise, does not appear to be qualified."

Mr. Seth. Could you strike out the words "from the statements contained in the affidavit", and leave it "who does not appear to be qualified"?

Mr. Medalie. That would be better.

The Chairman. Leave it all out?

Mr. Medalie. Yes.

The Chairman. Does that suggest the right of the magistrate to go beyond the papers before him?

Mr. Holtzoff. I should think so.

The Chairman. All right. All in favor of the sentence as thus amended say "aye".

The motion was carried.

The Chairman. Now we go to Mr. Waite's motion.

Mr. Waite. I make it in this form: that the Reporter be requested to include in the revision of this section a provision to the effect that non-corporate sureties shall not be considered acceptable unless their net worth is in excess of the particular undertaking.

Mr. Seth. You do not mean each surety's net worth?

Mr. Seasongood. That would not be enough.

Mr. Glueck. That gives a premium to the insurance companies; does it not?

Mr. Seasongood. Suppose he is on a number of outstanding bonds?

Mr. Waite. I was making that against the background of my previous motion, which was that his worth, exclusive of other liabilities and the property exempt from execution on his other bonds, would be greater than the amount of the particular undertaking.

Mr. Seasongood. It is usual to make it double the amount of the bond, because his real estate might shrink in its value or worth. That is not the test. They usually make it double.

Mr. Waite. I am predicating that on the discussion we previously had; and after threshing it around pro and con, the

general opinion was that it was sufficient if we could show enough, within the meaning of net worth, in excess of the particular obligation.

Mr. Seasongood. I do not think they would like that; because the bond might last for quite a while, and he might not be worth it. That is discretionary in the State courts; they make it double the amount of the obligation. In the Federal courts, the court has discretion for the amount of the bond.

Mr. Waite. This would simply preclude him from accepting anything less.

Mr. Glueck. I should like to know whether there is a real abuse on this score in the Federal practice.

Mr. Holtzoff. I think there was a real abuse during the prohibition era. I do not think there has been any general abuse since the repeal of the prohibition amendment.

Mr. McLellan. I wonder how common the practice is, such as we have in Massachusetts, to require that in individual cases there may be as many as two sureties on a bond.

Mr. Holtzoff. I do not know how common it is, but I know it is not done in the District of Columbia; because where they have a professional bondsman, the one bondsman writes the bond.

Mr. Crane. It is rather hard to get, too, sometimes.

Mr. Seasongood. They require two, both owning real estate, in the southern district.

Mr. McLellan. Yes, but not in the case of a corporate surety.

Mr. Seasongood. Oh, no.

Mr. McLellan. Yes. I think that is rather common practice.

Mr. Holtzoff. I think that in a great many districts in case of bail a single bondsman is accepted.

Mr. McLellan. Then he should have a net worth, as you use the term, well beyond the amount of his undertaking.

Mr. Holtzoff. Yes.

Mr. Medalie. I think also there should be language dealing with his contingent liabilities. Instead of laying down a rule or a measure, just indicate something like this: "does not appear to be qualified, either by reason of his net worth or his contingent liability."

Mr. Holtzoff. In computing his net worth you deduct his contingent liabilities; do you not?

Mr. Medalie. Do you?

Mr. Youngquist. It does not become a liability until bond is forfeited.

Mr. Robinson. Bankruptcy is accounted a liability; is it not?

Mr. Holtzoff. Even before a default.

Mr. Youngquist. I think you would have to specify what you mean here by a liability if you want the court to take it into account. I do not suppose a professional bondsman keeps track of all the contingent liabilities; does he?

Mr. McLellan. Why not this: "does not appear to be qualified by reason of his net worth and contingent liabilities, including his liabilities on other bonds"?

Mr. Waite. The only trouble is -- if any one will read the A.L.I. rule entitled "Sufficiency of Surety":

"If there is only one surety, he shall be worth the amount specified in the undertaking, exclusive of the amount of any

other undertaking on which he may be principal or surety, and exclusive of property exempt from execution, and over and above all liabilities. If there are several sureties they shall in the aggregate be worth that amount exclusive of the amount of their undertakings and of the exemptions and liabilities mentioned above."

Mr. Crane. What is the matter with adopting that?

Mr. Seth. I think so.

Mr. Holtzoff. In other words, if we do not deduct the amount of the bonds that he has written, and charge them off as liabilities?

Mr. Waite. He shall be worth the amount specified in the undertaking, exclusive of the amount of any other undertakings on which he may be principal or surety.

Mr. Seth. What is that number, Professor?

Mr. Waite. No. 78.

Mr. Glueck. It means the opposite, but it is not very well stated.

Mr. Waite. As you say, it is not very well stated; and that is why I was trying to restate it in my draft. But I know what it was intended to mean.

Mr. Holtzoff. Should a professional bondsman be required to have sufficient assets to meet all the bonds on which he is surety, at one time?

Mr. Waite. It depends on what you mean by "professional bondsman". Do you mean a surety?

Mr. Holtzoff. No, an individual. Should he be required to have sufficient assets to meet all of the bonds at one time?

Mr. Waite. That is what that was intended to mean.

Mr. Holtzoff. I am wondering whether that is not too onerous a requirement.

Mr. Seasongood. I think we can get ourselves into a lot of trouble on this, Mr. Chairman, with a lot of courts. The courts take care of this, and they have their own rules to justify it.

Mr. Crane. I agree. Do you think it would be well to make a hard and fast rule about a matter about which a judge is supposed to have some judgment? We have men on the bench who are supposed to have some judgment and discretion and experience. Why should we tell them what to do?

Mr. Medalie. The failure is rather with the magistrates. What actually happens, so far as judges are concerned, is that if the District Attorney does not think the surety is any good, you will hear a roar out of him. That is how it actually works.

Mr. Holtzoff. I do not think we should have a hard and fast, rigid qualification.

The Chairman. Are you ready for the question on Mr. Waite's motion?

Mr. Crane. I want to be sure I understand it. Do I understand that the effect of the motion is that we treat a contingent liability of a surety just as we treat an absolute liability?

Mr. Holtzoff. Yes.

The Chairman. Yes; that is the motion.

Mr. Crane. I understand it now.

The Chairman. All those in favor of the motion say "aye"; opposed "no". (Putting the question). The motion seems to be lost.

Mr. Crane. I agree that some consideration should be given to his contingent liabilities, and not treat them as actual.

Mr. Glueck. Let me say that in the Federal practice, where you really have a superintendent of justice, as it were, in this new office of the administrator of the Federal courts, I do not think you are likely to get in this field the abuse that the surveys have shown in State practice.

Mr. Holtzoff. I agree with Mr. Glueck; and Mr. Medalie has said that if the bond is bad you will hear about it from the United States attorney.

Mr. Medalie. Yes. There is only one trouble: The commissioner in some outlying county, being a good fellow in his own county, might take bonds that he ought not take. Do not forget also that in view of the fact that in some of the cities you occasionally have untrustworthy magistrates-- although not lawyers-- who may admit to bail in some of these cases, so that you may get abuse.

But the answer is that you get rid of them; and there again you will hear from the district attorney and from the newspapers.

The Chairman. Very well, gentlemen.

Rule 26 appears to be a very simple one.

Mr. Holtzoff. Just as matter of phraseology I think we should substitute the word "bond" for "undertaking".

Mr. Crane. How about Rule No. 25?

The Chairman. That was accepted; Rule 25 was modified and accepted. Mr. Waite made a motion which was lost.

Mr. Crane. I see.

Mr. Medalie. You have some difficulty in Rule 26 because of the limitation of the word "returned". One of the difficulties is that if bail lasts only to the day of verdict, and the defendant is convicted, and the judge says, "I will impose sentence ten days from today, and I want to continue the defendant on bail," under this language he must give a new bond.

Mr. Holtzoff. Why not substitute for the phrase "until a verdict is returned" the words "until the proceeding is finally terminated"?

The Chairman. That is too much; it would go to appeal.

Mr. Medalie. "Until judgment"?

Mr. Holtzoff. Suppose a case is nolle prossed?

Mr. Crane. That is a judgment; is it not?

Mr. Holtzoff. No; there is no judgment when there is a nolle prosee.

Mr. Medalie. It says "during the pendency of the criminal proceeding." If it is nolle prossed, there is no longer a pendency of the criminal proceeding.

The Chairman. "Until judgment is rendered"? Is that the language, instead of "verdict"?

Mr. McLellan. Why not say, instead of "during", "throughout the pendency of the criminal proceeding"?

Mr. Medalie. Because you are dealing with the question of appeal. You raise a question.

Mr. Holtzoff. Is there any danger, if you put it that way, that some one will construe this to mean that the judge may not commit the defendant when he is convicted?

Mr. Medalie. No. A judge always has power to revoke

bail.

Mr. Holtzoff. But this says, "shall be continued". I am just wondering whether that language --

Mr. Medalie. "Unless otherwise ordered."

What you have in mind here is "any recognizance or bail shall, unless otherwise ordered".

Mr. Holtzoff. "Shall, unless otherwise ordered", will meet my point.

The Chairman. Do we state "during the pendency of the criminal proceeding"?

Mr. Seansongood. No.

The Chairman. Or do we go on?

Mr. Holtzoff. "Until judgment is entered"?

Mr. Crane. That would be my idea.

Mr. Youngquist. Make him put up a new bond.

Mr. Holtzoff. In line 2 I think it should be "shall continue in effect", instead of "continuing".

The Chairman. All right.

Mr. Holtzoff. And in lines 1 and 2 you say, "Any bail"; change that to "bail", instead of "undertaking for bail."

The Chairman. Then would it read:

"Any recognizance for bail shall, unless otherwise ordered, continue in effect during the pendency of the criminal proceeding until the judgment"?

Mr. Medalie. "Until judgment."

The Chairman. "Until judgment"?

Mr. Holtzoff. Yes; "until judgment".

The Chairman. And then a comma, and then the words "unless better security is required or unless the defendant is

surrendered"? Is not that all you need?

Mr. Medalie. Yes.

Mr. Holtzoff. Yes.

Mr. Seth. Would not the words "unless otherwise ordered" belong down among the exceptions?

Mr. Medalie. We want the continuance.

The Chairman. I think you are right on that, Mr. Seth.

Mr. McLellan. Yes; that is redundant. You have the words "unless otherwise ordered" up above.

Mr. Medalie. There is another provision besides requiring better security. The court may want to commit the defendant.

Mr. Seth. Yes: "unless the court otherwise orders."

The Chairman. The idea is that you have the same thing in two places.

Mr. Holtzoff. Just where would you have it?

The Chairman. At the end.

Mr. Holtzoff. At the very end?

The Chairman. Yes.

Are there any further suggestions?

Mr. Medalie. I think we should make it clear that the court has the power, immediately after verdict, to commit the defendant.

Mr. Seth. Yes.

Mr. Medalie. And when we say "and unless otherwise ordered" -- "after verdict, or at any other time."

Mr. Holtzoff. I am afraid that if you put "unless otherwise ordered" at the tail end the phrase would not serve the purpose intended.

Mr. Crane. It has a different meaning there.

Mr. Medalie. You see there is another situation in which the court may want to commit the defendant, and that is during the trial or when the jury takes the case.

Mr. Longsdorf. It is frequently done.

The Chairman. Let us put the words "or otherwise ordered" after the first "unless". See how this sounds to you:

"Any recognizance or bail shall continue in effect during the pendency of the criminal proceeding, until judgment, unless the court shall otherwise order, or unless better security is required, or unless the defendant is surrendered."

Mr. Glueck. Why not follow with "unless the court shall otherwise order"?

Mr. Seasongood. Yes; because that would cover the others; would it not?

The Chairman. I guess it would.

Mr. Holtzoff. It would not cover the contingency of the defendant's being surrendered.

Mr. Medalie. You also must permit for the surrender of the defendant.

Mr. Youngquist. That is an act of the surety.

Mr. Medalie. It is not recognized here. Do you mean the surety would have the right anyhow?

Mr. Youngquist. Yes.

Mr. Medalie. And we do not need to mention it?

Mr. Youngquist. Yes.

Mr. Medalie. I suppose so.

The Chairman. It would not do any harm to say "unless the court should otherwise order or unless the defendant is surrendered".

Mr. Seth. That is right.

The Chairman. And leave out the mention of increase of bail.

Mr. Seth. Yes, making it different.

The Chairman. Are you ready for the question? (Putting the question:)

The motion was carried.

The Chairman. Rule 27.

Mr. Holtzoff. We have the same word "undertaking". How about if there is a breach of the bail?

Mr. Medalie. You make this mandatory, and it should not be. I can give you cases showing that it should not be.

The Chairman. Make it "may".

Mr. Holtzoff. Yes. But I think it should be mandatory on motion of the United States attorney.

Mr. Medalie. No; because the United States attorney may just be mad at the defendant, and we have seen them get mad at the defendant and do unwise things. If a case is set for May 1st, and if the defendant did not get the notice, and does not show up, there has been a breach; because the breach does not depend on the valid excuses the defendant may have -- for instance, if he thought he did not need to attend, because he was told there would not be a trial or because he was told the calendar was full. The court ordinarily does not forfeit bail. Sometimes it does. Sometimes, on a bail, the judges forfeit your jack. The judge calls the calendar; and for every defendant who does not appear there is a forfeiture, and the surety companies and the bondsmen come in, and then there is a wholesale remission of forfeitures. But the court does not

have to remit.

Mr. Youngquist. A week ago today there was a decision by the Supreme Court of the United States in the matter of forfeiture in a case where there was a wilful breach. The court held under the statute that there be no remission. What was that?

Mr. Holtzoff. That case construed the present statute relating to remission of forfeiture. The statute reads that the court may remit the forfeiture on the application of the surety if the default was not wilful. There have been cases in the circuit court of appeals, back and forth, as to what is meant by the default being wilful -- whether that meant the default of the surety or the <sup>de</sup>fault of the defendant; and now it has been held -- and before that it was held in the Fourth Circuit -- that it means default of the defendant, and not the default of the surety. That is the one that is referred to. I do not think that particularly applies to this rule.

Mr. Youngquist. Yes. I just could not recall it.

The Chairman. Let me read Rule 27 as it now seems to stand:

"If there is a breach, the court may enter a judgment declaring the bail and any money or security that have been deposited as bail forfeited. The surety may thereafter apply to the court for a remission of the forfeiture as provided by law. The application for remission shall be filed prior to the trial or within 90 days thereafter."

Mr. Holtzoff. Is the 90-day period now provided in the law?

Mr. Strine. The law does not fix any period now.

Mr. Holtzoff. I thought not.

Mr. Medalie. There is one trouble even with the word "may", which seems to be necessary even for the most casual breaches -- which are important -- and that is that there is no provision for mandatory forfeiture where it is clearly indicated that there should be a forfeiture.

The Chairman. It is up to the judge.

Mr. Medalie. Yes; it is up to the judge. But if the judge wants to make a wrong judgment, I think we must just face it on occasion.

Mr. Holtzoff. I do not think we should have any limitation on the right to apply for remission of the forfeiture. The existing law has no limitation at all. I do not know of any evil or abuse that makes any such limitation desirable.

The Chairman. Why was 90 days fixed, Mr. Strine?

Mr. Strine. As Mr. Holtzoff stated, no limitation seems to be stated now. The 90 days was fixed merely as some reasonable time.

Mr. Crane. In our State I think we have one year.

Mr. Medalie. One trouble was found with forfeitures during the era of prohibition, when surety companies did wholesale business. They did not discover, until a long time after the forfeiture, that there had been one; and sometimes there were cases of very grave injustice to the surety companies because of that.

Mr. Holtzoff. I move that we strike out all time limitation, because existing law contains none, and no abuses have developed under existing law.

Mr. Medalie. Do you want to strike out all after the

comma in line 5, after "existing law"?

Mr. Holtzoff. Yes.

Mr. Medalie. I so move.

Mr. Holtzoff. I second the motion.

Mr. Glueck. Here again, Mr. Chairman, in many States there have been grave abuses with reference to the business of removal of a forfeiture. You know that, Mr. Robinson. After the State has gone to all the trouble to try to collect on these forfeited bonds, somebody with a little political influence moves to remove the forfeitures, and the whole thing is off.

Mr. Holtzoff. Federal judges are not subject to political influence.

Mr. Glueck. I did not have that <sup>in</sup> mind; I was merely indicating that there is an abuse.

Mr. Holtzoff. But not in the Federal courts.

Mr. Glueck. But I think in the Federal courts, again, it probably will not be a real problem. As a matter of fact the only evidence we have, unfortunately, is evidence as to State courts. No one has made a survey of the practice in Federal courts.

The Chairman. In addition to the changes I read, we now have added the striking out of all the last line and a half, from the word "law" in line 5.

Are you ready for the question on the whole rule?

Mr. Seasongood. I think Mr. Medalie's idea was that we should have a positive entering of judgment unless good cause is shown.

Mr. Medalie. I think this should be studied a little.

Mr. Seasongood. "He shall, unless good cause is shown,

forfeit the bond."

Mr. Youngquist. The same thing is true when he applies for forfeit.

Mr. Medalie. I am not satisfied with this, even with the changes which have been made,-- changes which I think I understand. I think there should be conditions under which forfeitures should be granted.

The Chairman. What about Mr. Seasongood's suggestion: "shall be entered unless good cause be shown to the contrary"?

Mr. Medalie. I think that might meet it; and, after all, our judges are not a blood-thirsty crowd trying to oppress people. In bail bond matters they have been on the whole pretty fair to defendants and sureties. I think that risk is a better risk than leaving out all mandatory provisions.

The Chairman. Shall we say, "shall enter judgment", and then at the end of the sentence say, "unless good cause be shown to the contrary"?

Mr. Crane. Do you have to give notice to them?

Mr. Youngquist. No.

Mr. Crane. Then "good cause to the contrary" means you would have to give them some notice; does it not?

The Chairman. I think so.

Mr. Crane. If you are going to do that, why not give a trial? I think automatically there should be a judgment unless they apply, themselves, in some way to be released from the forfeiture. I think the burden should be upon the bondsman.

The Chairman. Put it in the next sentence, in this way: "The surety may thereafter apply to the court for remission of the forfeiture on good cause shown."

Mr. Crane. Yes; put it there; that is a little better.

Mr. Glueck. Then you are striking it out before?

The Chairman. Yes.

Mr. McLellan. Have you restored the "shall"?

The Chairman. Yes: "If there is a breach, the court shall enter judgment declaring the bail or any money or securities that have been deposited as bail forfeited. The surety may thereafter apply to the court for remission of the forfeiture on good cause shown."

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How is that?

Mr. McCallie. I think you need another provision for other purposes; and that is this.

Mr. Youngquist. Before you come to that, let me raise this point: Under the law, as it is now, there may be no remission in case of a wilful default. So if we leave this "as provided by law", that should stay in, I think.

Mr. Holtzoff. I think you open the door if you say "for good cause shown."

Mr. Seth. I think the words "for good cause shown" should be up at the other end of the sentence.

Mr. Holtzoff. I should like to say that this changes the practice. Today if there is a default, judgment is not automatically entered. A forfeiture is declared automatically by the court on motion of the United States attorney, but later on a proceeding in the nature of a scire facias has to be brought by the United States attorney in order to enter judgment on the forfeiture.

I am not objecting to simplifying that procedure, but I do want to call attention to the fact that you are providing

a change with respect to forfeiture, in comparison with the existing procedure; and I think it should be known that this is being done.

The Chairman. If you have to bring a proceeding, then there is no objection to the phrase "on good cause shown" being in the first sentence.

Mr. Glueck. Is it preferable to have to bring a proceeding?

Mr. Holtzoff. Here is what happens, as I understand it: A bond is declared forfeited, and ordinarily some time elapses before another proceeding is brought to enter judgment on the forfeiture. If he then shows up within a few days the forfeiture is set aside.

Mr. Crane. Our procedure is to give a bond that you are going to produce the body of the defendant; and if you do not produce the body of the defendant the bond is forfeited, and we enter judgment upon it. That is the procedure, right there on that day.

The Chairman. Right there on that day.

10 Mr. Crane. Right there on that day. If there be any reason -- and there are thousands of them -- why bond should not be forfeited and judgment entered, that can be stated.

Mr. Holtzoff. That is not the present procedure. A motion has to be filed. They used to call it scire facias.

Mr. Crane. I would wipe it out; it is no good.

Mr. Holtzoff. But he should have notice.

Mr. Crane. Why should he get it? He has to produce the body of the defendant, and he has failed to do so.

Mr. Holtzoff. He may not have known that the case was set for trial.

Mr. Crane. Then the forfeiture is made, and the judge hears the excuse.

Mr. Holtzoff. But under the remission statute the judge may not set aside a judgment unless the defendant's default was not wilful; so that the surety's excuse is not sufficient. You are getting into a little difficulty here, and you may be causing an occasional hardship to an innocent surety.

Mr. Robinson. Of course you are getting back to the common law procedure of estreat, where they brought the bond out from the judgment files and put it into the bond files, and collected at once.

Mr. Holtzoff. I am not objecting to the change--

Mr. Crane. Mine is simplified. It is known. The fellow who puts up the money takes the risk. It is his business; and as soon as he fails to produce the defendant he has to pay. What is the good of serving him with notice? Let him come forward and state it. In the State of New York we enter judgment, and we have no difficulty; and we give them a year to get out of it.

Mr. Medalie. Let me tell you some things I wrote down while you were talking. First, I do not think a breach is material in most cases. In such cases the Government's interest has not been affected, and the Government has not had any loss. There should not be a forfeiture. It is purely a clerical inadvertence, for all practical purposes. The man is available; he wants to come; he simply did not get a notice.

Suppose we had this: "The court shall declare the bail forfeited. The forfeiture may be remitted for good cause, and where the forfeiture has not been remitted judgment shall be

entered on reasonable notice to the surety or to the defendant--

That is, the defendant has to put up his own money --

"unless the forfeiture was wilful or the interests of the United States were materially affected by the breach."

Mr. Holtzoff. Do you mean unless the default was wilful?

Mr. Medalie. Yes; "unless the default was wilful or the interests of the United States were materially affected by the breach" or by the "default".

Mr. McLellan. Whose default?

Mr. Medalie. The defendant's.

Mr. Robinson. Of course you want to guard against using this to postpone the day of trial.

Mr. Medalie. Then the interests of the United States are materially affected, and the judge would so find.

Mr. Robinson. Would he?

Mr. Medalie. I think so. If he did not, after hearing the evidence, make a provision to cover that.

Mr. Crane. Have we covered all that?

Mr. Robinson. I think so.

The Chairman. We shall have the Reporter write that up.

We have just one more rule in this chapter -- 28 -- if we want to cover it.

Mr. Holtzoff. Do we need Rule 28?

Mr. Strine. I do not think so, Mr. Holtzoff.

Mr. Holtzoff. Then I move to strike it out.

Mr. Crane. I move to strike it out.

The Chairman. Is there any discussion of that-- to strike out Rule 28?

Mr. Wechsler. Mr. Chairman, before we leave the subject of bail, let me put one question: Is it intended to preclude the

possibility of releasing the defendant on his own recognizance or the undertaking of his counsel to produce him, without the filing of a bond?

Mr. Holtzoff. The word "recognizance" is used farther back -- which indicates, it seems to me, that such a course is permissible.

Mr. Wechsler. It is not covered by the basic rule on preliminary examination.

Mr. Holtzoff. I think it is. The word "recognizance" is used there; is it not?

Mr. Wechsler. Let us look at the language. It is Rule 21 (d), lines 20 and 21:

"shall commit him to custody, unless the offense is bailable and the prisoner is admitted to and gives bail."

I do not think you will find it is used consistently; and if it is the intention to allow the practice -- as I think it should be -- I merely suggest that the Reporter check the rules to see if that possibility obtains.

Mr. Holtzoff. It is the common practice in juvenile delinquency cases to release the defendant either on his own recognizance or in the custody of his parents.

Mr. Wechsler. I think it is the common practice, and should be available in other cases as well.

Mr. Holtzoff. Oh, yes.

The Chairman. Do you want to vote on Rule 28 before we go into this matter of Mr. Wechsler's? Is there any objection to the motion to strike?

The motion was carried.

The Chairman. Do you want to make a motion on this other

matter?

12 Mr. Waite. Mr. Chairman, if Mr. Wechsler will consent, may I ask a question before we go back to that?

The Chairman. Surely.

Mr. Waite. I do not know enough about the Federal situation to have any judgment of the desirability of this matter; therefore I am asking the question.

In the Institute code they have a provision to this effect:

"No undertaking--

bail bond --

"shall be invalid, nor shall any person be discharged from his undertaking, nor a forfeiture thereof be stayed, nor shall any judgment thereon be stayed, set aside, or reversed, or the collection of any such judgment be barred or defeated by reason of any defect of form, omission of recital or of condition, failure to note or record the default of any principal or surety, or because of any other irregularity" --

And so forth; I shall not read the rest of it.

Mr. Holtzoff. We have no evil that needs to be redressed by any such provision as that.

The Chairman. We have just one or two other small provisions on the matter, which we can take up in the morning.

Mr. Waite. Mr. Chairman, we still have the matter of Mr. Wechsler's.

The Chairman. Yes; go ahead, Mr. Wechsler.

Mr. Wechsler. My motion, Mr. Chairman, was quite simple: that the rules provide for release of the defendant on his own recognizance or on the recognizance of his counsel or the custody of his counsel or his parents, perhaps, without the filing

of a bond. I do not think the rules as now drafted clearly permit that, and I think they should.

Mr. Robinson. I think they should, certainly; I will second that motion, if it is a motion.

Mr. Wechsler. It is a motion.

The Chairman. Gentlemen, you have heard the motion.

Mr. Medalie. Are you including counsel?

Mr. Wechsler. I did not address myself to the form of it, Mr. Medalie. I think it should be as broad as possible.

Mr. Medalie. Yes; but do not ever bring in a lawyer to guarantee the appearance of a defendant. Any sensible counsel goes up to the judge and whispers to him, "I do not do that kind of thing."

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

The motion was carried.

The Chairman. We are due at 12:15 tomorrow, as I think was announced while all of you were here, over at the Court of Appeals, for luncheon. Was that stated?

Mr. Robinson. No, sir.

Mr. Crane. No; I did not hear it.

The Chairman. About two weeks ago Judge Justin Miller invited the committee to luncheon, to meet the judges of the Court of Appeals and, I think, some others. So if there is no objection we shall be at the Court of Appeals at 12:15 tomorrow.

Mr. Medalie. We start at 10 o'clock tomorrow; do we?

The Chairman. Yes.

Mr. Medalie. And we continue until 5 o'clock?

The Chairman. We continue until 12 o'clock, and then

go to the luncheon. I suppose we should get back here by two o'clock, and then continue until five, and then resume again at eight o'clock. We are making progress.

I received a summons that takes me to the O.P.M. tomorrow morning at ten o'clock; and will you designate some one to preside tomorrow for an hour or so until I get here? I have no choice but to go.

Judge Crane, will you resume your customary presiding responsibilities?

Mr. Crane. Anything you say.

The Chairman. Very well, gentlemen; we adjourn for the evening.

(Thereupon, at 11 o'clock p.m., an adjournment was taken until tomorrow, Tuesday, January 13, 1942, at 10 o'clock a.m.)

Mr. Tolman's  
Copy

(2)

Washington, D. C.

Tuesday, January 13, 1942.

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE  
UNITED STATES SUPREME COURT

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GEO. L. HART  
EDWIN DICE  
LLOYD L. HARKINS,  
OFFICE MANAGER

**HART & DICE**  
**SHORTHAND REPORTERS**  
416 FIFTH ST. N. W.  
SUITE 301-307 COLUMBIAN BLDG.  
WASHINGTON, D. C.

TELEPHONES  
NATIONAL 0343  
NATIONAL 0344

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## ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

## UNITED STATES SUPREME COURT

Washington, D. C.

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Tuesday, January 13, 1942

The Advisory Committee met at 10 o'clock, pursuant to adjournment, in Room 147-B, Supreme Court Building, Washington, D. C., Frederick E. Crane, presiding.

## PRESENT:

Same as previously noted; Arthur T. Vanderbilt absent at the morning session.

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P R O C E E D I N G S

The Chairman (Frederick E. Crane). Gentlemen, shall we get to work?

We had this proposition of Mr. Waite's, but I think we had better wait until he comes.

I think we are down to rule 30, and Mr. Robinson has something to explain regarding it.

Mr. Robinson. The first rule 30, with the index tab on it in your books, is based on the work of the Committee at its September meeting. It is rewritten with words deleted and other changes made in accordance with the votes of the Committee.

However, a substitute rule 30 has been prepared also, for your consideration, and you will find it just following this old rule 30. You will find it, the third page after the chapter headed Chapter 3, "Indictment, information, and Complaint, Rule 30.

My suggestion, Judge Crane, would be that we start with the new rule, using the old one for whatever reference purposes the members of the Committee may wish to use it for.

Mr. Holtzoff. I would like to ask a question, Mr. Robinson. Subsection (c) of paragraph 1 of the old rule, which abolishes demurrers--has that been carried into the new rule? I do not find it there.

Mr. Robinson. Yes. As I just stated to you, Mr. Holtzoff, that is in a later chapter.

Mr. Holtzoff. It is a later rule?

Mr. Robinson. Just a minute, please. You will observe that chapter V deals with arraignment, pleas, motions, and notices, and therefore, under chapter V, subsequently, we will come to that matter of abolishing demurrers, and all that.

Mr. Holtzoff. I see.

The Chairman. Is the first one the new one?

Mr. Holtzoff. The second one.

Mr. Robinson. The second one is the new one.

The Chairman. The second one?

Mr. Robinson. Yes, sir.

The Chairman. You want us to take that up?

Mr. Robinson. Shall I take up rule 30 (a)?

The Chairman. Yes, you may.

Mr. Robinson. The heading, "Written Accusation of a Criminal Offense."

"The written accusation of a criminal offence may be indictment, information, or complaint. Information of a capital offence is by indictment. Accusation of infamous offence which is not capital is by indictment, unless the

person accused waives indictment, as provided in rule 30 (e), and consents to the accusation by information.

Accusation of an offence which is not infamous and which is not a petty offence is by indictment or by information. Accusation of petty offence is by information or by complaint."

As you know, the Federal law has those classifications of offences, and while it seems somewhat repetitious perhaps, it is necessary I think for us to consider the form of written accusation which is to be used for each classification of federal offence.

Mr. Medalie. Why do you limit petty offences to the information or complaint, in view of the fact that you may have indictments of many counts, which may include a petty offence with more serious offences?

Mr. Robinson. I was basing that largely on the fact that the Supreme Court has provided rules governing petty offences, and in those rules it is stated only that petty offences may be charged by information.

Mr. Holtzoff. Oh, no; those rules--

Mr. Medalie (interposing). If you provide that petty offences are to be charged by information or complaint and exclude their being charged by indictment, you create procedural difficulties.

Mr. Robinson. Now, just a moment. Those are petty offences committed within jurisdictions that have exclusive or concurrent, within the federal jurisdiction.

Mr. Holtzoff. Yes.

Mr. Robinson. But I wanted to explain this, just as soon

as I can get to it, that we need to consider, too, the possibilities of dealing with petty offences in places other than these under exclusive federal jurisdiction, before a United States Commissioner. That is just a consideration that the research staff has been giving a good deal of time to, and while it is true that we do not want to have any part in setting up new sorts of federal courts, namely, under United States Commissioners, still the possibility of dealing with Alex's "migratory bird" cases and others, other than by the district court, itself, is one that we have got to consider, you know, so that is still involved, Alex, and that is a point--if you do not mind I would like to pass it, because it is not involved here.

Mr. Heltzoff. No, but I would like to say this. At the present time commissioners have jurisdiction of petty offences only on federal reservations. What may happen as the result of future legislation, we do not know, and we could not legislate and should not legislate for that.

Mr. Robinson. Certainly.

Mr. Heltzoff. Now, it seems to me that to cure Mr. Medalie's objection, to which I agree, all we need is to insert a word in the last sentence:

"Accusation of a petty offence is by indictment, information, or complaint."

Mr. Medalie. Yes.

Mr. Dean. May."

Mr. Robinson. Yes, that is all right.

Mr. Dean. There is at the present time as I recall a federal statute which says that "petty offences"--and it

defines them--"may be prosecuted by information." This, again, says "may be".

Mr. Robinson. Yes.

Mr. Holtzoff. They do not have to be.

Mr. Dean. Those are petty offences, not necessarily on federal reservations or territories, and not necessarily within the jurisdiction of United States Commissioners.

Mr. Robinson. Right.

Mr. Longsdorf. This section 541 is the one you refer to, is it not, Mr. Dean?

Mr. Dean. I have forgotten the section number, but it defines them, and says they may be prosecuted by information.

Mr. Glueck. As a matter of comment, merely, the "by" ought to come out, now, in line 10, before "complaint".

The Chairman. Yes, that is right.

Mr. Robinson. That is right.

The Chairman. "By information, indictment, or complaint."

Well, is this satisfactory to you all, this section (a) of rule 30?

Mr. Dean. I still have one question about it, and that is whether or not it contemplates that a complaint should ever be filed before anyone other than a United States Commissioner.

Mr. Holtzoff. No, it does not.

Mr. Dean. Well, shouldn't we then indicate some how or other what a complaint is? A complaint is not an accusatory document in the same sense that an information or an indictment is, because it is one that is only used before a United States Commissioner, whereas the other two are filed with the federal district court. In other words, we have nowhere here defined

"complaint".

Mr. Holtzoff. I wonder if that could not be cured by changing this last sentence to read as follows:

"Accusation of a petty offence is by indictment or information, if prosecuted in the district court, or by complaint, if prosecuted before a United States Commissioner."

Mr. Dean. Some such language as that.

Mr. Longsdorf. Mr. Chairman, if I may address Mr. Holtzoff, I think that that section 541 of Title 18 contains no such limiting means. It says:

"Petty offences may be prosecuted by information or complaint."

But it does not enlighten us very much about what the complaint is, of course, because it uses only the word. I think the complaint referred to in section 541 is probably an accusative complaint and not a preliminary one.

Mr. Holtzoff. Yes. Well, the difference as I understand it between a complaint and information is that an information is filed by a public prosecutor, and a complaint may be filed by anyone--the arresting officer, or anyone else.

Mr. Longsdorf. I do not know whether that would be true if it is the basis of a trial for an offence.

Mr. Holtzoff. It is. That is the practice, and that is being followed for the trial of petty offences committed on reservations.

Mr. Longsdorf. Yes.

Mr. Holtzoff. Trial before commissioners is upon complaint made by the arresting officer.

Mr. Longsdorf. Usually made by the warden or somebody else.

Mr. Robinson. Of course, this needs to be considered, Mr. Holtzoff, that we do take the petty offence rules promulgated January 6 last year, which do provide for the trial of petty offences on informations.

Mr. Longsdorf. And they do not mention complaints.

Mr. Robinson. They do not mention complaints.

Mr. Holtzoff. But we have secured a formal construction administratively from the Supreme Court that that term, "information," in that rule is to be construed as including either information by the public prosecutor or a complaint by any other--by an arresting officer.

Mr. Robinson. In other words, there can be accusation then by complaint or by information, used in the sense of complaint, as well as a committing magistrate proceeding based on a complaint?

Mr. Holtzoff. Yes.

Mr. Crane. Wouldn't Mr. Dean's suggestion cure it?

Mr. Robinson. What is that, Judge?

The Chairman. Would you state it again?

Mr. Dean. Well, I think we are under some compulsion to define this word "complaint", and I think it is obvious that there is some disagreement here as to what it means. Secondly, I think there is some misunderstanding as to whether it might be used in the federal district court.

I have never heard of a complaint being used in a federal district court. Now, if we do not intend to use it there, I think we should state so, and define a complaint as an accusatory

document before a United States Commissioner.

Mr. Holtzoff. I wonder if my amendment would not cure that point, Mr. Dean?

Mr. Dean. I am not sure that it would not. I am not sure that it would not.

The Chairman. What was your amendment?

Mr. Holtzoff. My amendment was to modify the last sentence of 30 (a) so as to make it read as follows:

"An accusation of a petty offence in the district court is made by indictment or information, and before a United States Commissioner, is by complaint."

I think it should be-

"is by information or complaint."

Mr. Robinson. Yes, you would have to change that.

Mr. Youngquist. You do not discriminate though between your different proceedings. I think that the distinctions ought to come at the beginning of the paragraph where you describe the written accusations.

What we want to do, I take it, is to say that indictments or informations may be used in the district court; informations may be used also before a magistrate in the prosecution of petty offences; complaints may be used before the magistrate, either for the prosecution of petty offences or as a basis for a preliminary examination. I think that is what we are trying to say, isn't it?

Mr. Holtzoff. I think that is right.

The Chairman. Trying not to say that.

Mr. Youngquist. Would it be simpler for the Reporter to say that?

Mr. Robinson. I think so. You would have it right after the heading?

Mr. Youngquist. Well, in some appropriate place.

Mr. Robinson. As you have been speaking I have been wanting to ask you about the possibility of using your definition section for something of this kind.

Mr. Glueck. I was going to suggest, Mr. Chairman, the possibility of putting that into rule 1.

Mr. Robinson. Whenever we begin to degenerate into too many small details, I begin to think about your definition section.

The Chairman. Would that be a rule 1 definition?

Mr. Glueck. Yes, "and application".

The Chairman. :And application.

Mr. Holtzoff. I think we could well afford to define "information or complaint," because there is confusion in the cases as to the meaning of the term "information". There is one line of authorities which limits it to a document signed by the public prosecutor, and there is another line of authorities which construes the term "information" as broad enough to include a complaint by an arresting officer, so that I think it would be useful for the purposes of these rules, clearly to define these terms in the definition section.

Mr. Robinson. It is rather a tough order on definitions, though, isn't it, Alex?

Mr. Holtzoff. I think that is exactly the type of thing that ought to be defined.

Mr. Robinson. Yes.

Mr. Holtzoff. The term is susceptible of two meanings.

Mr. Robinson. I would appreciate a memorandum from you on that, if you will help in that definition.

Mr. Holtzoff. I will be glad to.

The Chairman. Is that agreeable to you, Mr. Dean?

Mr. Dean. Yes.

Mr. Seth. The statute says "petty offences in the district courts may be prosecuted by complaint." Now, ought we to ignore that?

Mr. Holtzoff. Not in the district court, I do not think.

Mr. Seth. Yes, it does--the general statute covering anything punishable by not more than six months and not more than \$500 fine may be prosecuted by complaint in the district court.

Mr. Holtzoff. By information, or complaint?

Mr. Seth. Or complaint.

Mr. Medalie. Now, "complaint" as I understand it is nothing more or less than an affidavit setting forth the facts which constitute the crime. In stating the nature and contents of the written accusation you deal with complaint just as though you were dealing with a mere technical document which is called an indictment or an information.

Now as a matter of fact, in order to charge a person with a crime by affidavit, you cannot set forth facts in the summary way that you can in an information or in an indictment. The complaint must go into the facts. You are creating limitations on a complaint, which practically assassinates every characteristic of an affidavit.

Mr. Robinson. I do not think that is true throughout the districts of the country, George, because I know that some

complaints--and I have some specimens here--the body or charging part of the complaint could be substituted for the body or charging part of an indictment or information without any illegality one way or another.

Mr. Holtzoff. I have seen some very general complaints.

Mr. Medalie. I know, but those are not proper complaints.

Mr. Robinson. Oh, I don't know.

Mr. Medalie. A person should not be deprived of his liberty by an arrest on an affidavit, unless the affidavit sets forth the facts.

Mr. Robinson. Well, if it sets forth the facts which will be sufficient for an indictment or information, he surely cannot object to it.

Mr. Medalie. I think he can.

Mr. Robinson. Why?

Mr. Medalie. Because an affidavit must contain facts upon the knowledge of the affiant. You cannot draw conclusions.

Mr. Robinson. Well, there is some dispute about that. Some affidavits are based on information and belief.

Mr. Medalie. Then you have to set forth the sources of your information and the grounds for your belief.

Mr. Robinson. Not always. Not always, under the cases. That is, you do not always have to disclose your informant--do you, in all districts? I know there is some variety of opinion on that.

The Chairman. Do you have to define in detail the nature of the complaint? Do we not just say, "complaint" as used in these rules cares for these petty offences? Wouldn't that be sufficient, leaving the complaint to be used as it has been

heretofore--that is, the nature of it?

Mr. Medalie. Well, because, here we admit a complaint to be as general and as summary as an information or an indictment. In other words, we are saying that an affidavit does not have to contain the facts that an affidavit ought to contain, when you define it, just as we do an indictment or an information.

Mr. Holtzoff. Well, I do not think an officer who swears to a complaint is required to disclose confidential sources.

Mr. Robinson. I don't, either.

Mr. Medalie. Well, assuming he doesn't, he must state his facts.

Mr. Youngquist. Mr. Chairman, is it proposed we define "complaint"?

The Chairman. Yes.

Mr. Youngquist. I see no need for it.

The Chairman. Neither do I.

Mr. Youngquist. Do you think there is real need, George?

Mr. Medalie. I do not think you really need to. It is a term that has a definite meaning in criminal law, but a complaint nevertheless is essentially an affidavit.

Mr. Holtzoff. I think we could well afford to define the word "information", because the cases view the term "information" in two different senses.

Mr. Robinson. That is right.

Mr. Holtzoff. One line of authorities limiting the term "information" strictly to an accusation by a public officer, and the other line of authorities defining it broadly enough to include what we generally call a "complaint." That being so, I think we might define the term, so that we know in what sense

we are using them in these rules.

Mr. Medalie. Well, regardless of whether you define it, the fact remains that a complaint is an affidavit.

Mr. Crane. You haven't got to state that in the rule, have you?

Mr. Medalie. No, I don't think you have to state it, but if you admit a complaint--that is, an affidavit--to charge a person with a crime, so that he may be arrested or held, and by implication provide that it doesn't contain any more than a short form indictment or information, you do not set up a standard of having a person who sets forth facts on oath set forth facts.

Mr. Robinson. But who said the short form indictment or information was going to be adopted or recognized? We haven't adopted that, have we?

Mr. Medalie. I am not saying the short form is adopted.

The Chairman. Before coming to the definitions, and what form they should take, Mr. Holtzoff has made a motion that we deal with this matter in rule(1) by defining particularly "indictment", but particularly "information" and "complaint", and what courts they are used in, and where; and I am ready for a vote on that.

Those in favor of this motion, for defining these words and putting them into definitions of rule 1, say aye. Opposed, no.

(The motion was duly AGREED TO.)

The Chairman. Now we come to the nature of the definition, as to what the definition shall be. Suppose we leave that. Professor Robinson's suggestion was that Mr. Holtzoff get up some definitions for him, he to report later on them, rewriting this subdivision (a). Is that your suggestion?

Mr. Robinson. Well, the way you put it, Judge, it sounds as if I am trying to pass the buck to Alex. I do not mean to do that, of course.

Mr. Holtzoff. I think nobody would so construe it.

Mr. Robinson. I would be willing to work with him on that, surely.

The Chairman. All right, then (a) is to be rewritten.

Mr. Robinson. Are there any other suggestions or corrections on rule (a), Judge?

The Chairman. Is that satisfactory, Mr. Dean, and does it meet your objections?

Mr. Dean. Oh, yes.

The Chairman. Are there any other objections, now? If not, we will pass to (b).

Mr. Robinson. Do you wish, Mr. Chairman, that I read that, as I did the first section?

The Chairman. I think so, yes. That will give us a chance to read it again while you are reading it.

Mr. Robinson. (reading)

"(b) Nature and contents of a written accusation.

The written accusation shall be a plain, concise, and definite statement of the essential facts which constitute the offence charged against the accused."

Mr. Holtzoff. Suggested by Judge Crane?

Mr. Robinson. Yes, Judge, you will recognize that as your idea, from our September meeting, to try to state in a few words what was contained in the former rule, which sought to catalog or list the essential elements of the offence.

The Chairman. I recognize it.

Mr. Robinson: Continuing at line 14:

"It is sufficient without a formal commencement or a conclusion or other allegation which is not necessary in order to state the essential elements of the offence or to give notice to the accused or his assistants in making his defense or to protect him against a second prosecution for the same offence."

The Chairman. "It is sufficient without a formal commencement or a conclusion or other allegation which is not necessary in order to state the essential elements of the offence or to give notice to the accused or his assistants or to protect him against\* \* \*."

I do not quite get that.

Mr. Glueck. That is a very clumsy sentence.

Mr. Robinson. Yes. Well, I would like to explain it. It perhaps has a touch of propaganda in it, that is the reason it gets clumsy. The object is to head off any possible criticism that by shortening our requirement for an indictment or information we tend to overlook the essential requirements of an indictment or information, namely, that it fails to give the accused adequate notice, or fails to protect him against second jeopardy.

The Chairman. I should think you would very much confuse by so many negatives.

Mr. Holtzoff. I suggest that could be left to the committee on style, because that is really a question of phraseology rather than of substance.

Mr. Glueck. May I suggest some such language as this to the committee on style:

"It shall be adequate even though not containing a formal commencement."

You see, when you say "it is sufficient" you sort of throw us off.

Mr. Robinson. When you say "shall be" you get into mandatory matters generally, not in this particular case perhaps.

Mr. Glueck. Not here.

Mr. Robinson. I think "it is sufficient" is preferable here, to "shall be".

Mr. Glueck. Some general language of that kind, because I think the present tense is the thing that throws us off.

The Chairman. Yes.

Mr. Holtzoff. The civil rules use the present tense, almost throughout.

Mr. Glueck. They do?

Mr. Holtzoff. Yes; and it was done intentionally.

Mr. Robinson. Yes.

Mr. Dean. I wonder if we need it, if we are going to have forms in the back, from which there will be omitted any formal commencement or conclusion?

Mr. Robinson. I think we do, Gordon.

Mr. Dean. Why?

Mr. Robinson. Because we are going to say expressly that those forms are merely illustrative, and I think that a good many district attorneys might hesitate to leave out "contrary to the form of the statute, and against the peace and dignity of the United States," and similar expressions, unless the rule expressly says they do not need to be in there.

The Chairman. You do not mind my exposing my ignorance, do

you?

Mr. Robinson. Well, you probably have none to expose.

The Chairman. Tell me what you mean by "formal commencement and formal conclusion and other allegations not necessary."

Mr. Robinson. Well, the formal commencement would include, "The grand jurors, being duly empaneled and sworn, upon their oaths say," or some other form of that sort. The formal conclusion is what, you know, was called "contra formam statuti," I think--"against the form of the statute in such cases made and provided, and against the peace and dignity of the state" or "of the United States."

You will find those in these forms at the back of the book.

The Chairman. I think Mr. Dean's suggestion is probably a good one, because unless you have some such statements and it is a clear case as to what you mean--frankly, I did not know what you mean; I might have guessed at it, but I did not know definitely what you meant by "the formal commencement and the formal conclusion."

Mr. Waite. Jim, you asked to be reminded at this point of what I had mentioned in connection with section 14, that there was no statement that these forms were permissible and might be followed. If you put that in here, these forms may be followed, that would coincide with what Mr. Dean has just suggested, that you don't need to say anything about "formal conclusions," and so forth, if your forms do not have them; but you say that the forms may be used.

Mr. Robinson. I believe this language, too, is in your American Law Institute Code, isn't it, John?

Mr. Waite. Yes.

Mr. Robinson. And it is understood, isn't it, by the members of the American Law Institute, that that refers to commencements and to what others speak of as "formal conclusions"?

Mr. Waite. Oh, yes. With all due respect to Judge Crane, I think the lawyers dealing with that would know precisely what we mean.

The Chairman. That is all I want to know, if you think so.

Mr. Glueck. I move that the terminology be left to the committee on style.

The Chairman. As to this sentence?

Mr. Glueck. As to both the first and second sentences. For instance, it may be advisable to leave off in line 14, "charged against the accused." That may be surplusage.

The Chairman. Well.

Mr. Glueck. Go up to line 14. I think, up to line 19, it is desirable to have this in, but to make it clearer.

The Chairman. Yes. Are you all in favor of that?

Mr. Robinson. I consent.

(The motion was duly AGREED TO.)

The Chairman. All right.

Mr. Robinson. Line 19:

"It is not necessary to state that the accused acted unlawfully, feloniously, wilfully, maliciously, negligently, or recklessly, or to characterize his offence \* \* \* unless such words are used in the statute, in the rule or other law as part of the legal definition of the offence charged."

Mr. Holtzoff. I would like to ask a question about that last clause, beginning with the word "unless." I am heartily in favor of the first part of this sentence, but "unless"--that

clause would mean to imply or would probably give rise to an inference that an omission of the word "malicious" or "malice aforethought" in a first-degree murder indictment would invalidate the indictment.

Mr. Robinson. That is exactly what it is intended to do.

Mr. Youngquist. I think it should.

Mr. Holtzoff. Well, I do not think it should, because while we want to inform the defendant what he is charged with, I would like to go back to the type of indictment that they have been using in King's County, Mr. Chairman, which I believe was designed by Judge Cropsey. Now, they had a murder indictment there which alleged "that the defendant murdered John Smith in the following manner and on the following date."

The word "murdered" covered "with malice aforethought" and all the other, and "intent" and so on. Now, it seems to me that we ought to, in the reformed procedure, get to a point where the omission of an adjective or an adverb even though it is part of the offense should not invalidate the indictment.

The Chairman. If you will pardon me the interruption, I think you have gotten that a little bit too narrow. Now, we did take out all this "malice aforethought," and that, but you had to state the nature of the crime, the act, and for murder in the first degree, the use of the word "murder" was not sufficient.

Mr. Holtzoff. Wasn't it?

The Chairman. No. You charged a murder in the first degree, "in that with premeditation and deliberation," and so forth. That constitutes malice. "That with premeditation and deliberation," these are the words of the statute, "he did kill

John Jones on the night of so and so." Now, "premeditation and deliberation," those are facts. "Premeditated and intended to kill him and did kill him"--those are facts, and those facts have to be stated. That was the short form; but the word "murder" did not cover it, because there is murder in the first degree, murder in the second degree; and murder in the first degree was "with premeditation." Murder in the second degree was without premeditation but with intent; and those are the statutes.

We had to use the words. We had to state the facts. But the other adjectives were all left out, and that was covered by the first sentence, which is-

"plain and concise and definite statement of the essential facts."

F-a-c-t-s! Facts are so important to all of us. We think we always get to the law before we get to the facts, but the facts must be stated which constitute an offence charged against the accused.

I do not see how you can narrow that, and I do not see how you can enlarge upon it. And, as you know, we have found it worked pretty well.

Mr. Holtzoff. Well, I just had in mind the thought, it is not necessary to require an allegation of intent in the technical terminology of the old common law and to invalidate an indictment if such intent is not properly alleged.

What we want is to preserve the right of the defendant to be sufficiently apprized of the crime with which he is charged, so that he may make his defense. Now, suppose the United States attorney makes a mistake in the manner in which he alleges the

intent. No defendant is ever really and honestly prejudiced by such a failure or such an omission.

Mr. Youngquist. Well, Alex, isn't this true--that the mere fact that he makes a mistake in the manner of alleging the intent would not invalidate the indictment, in either event, but since intent, premeditation, and other states of mind are essential elements of certain offences, how can you state an offence without including those allegations?

Mr. Holtzoff. Well, suppose, for example, by mistake, the United States attorney in charging a fraud against the Government sets forth the facts of the fraud, and he fails to say, "with intent to defraud the United States." Now, wouldn't it make a laughing-stock of the law to let a defendant go free because the United States attorney, very reprehensibly perhaps, or perhaps his stenographer, forgot to copy in the words "with intent to defraud the United States"?

Mr. Seth. That is an essential element of the crime.

Mr. Glueck. There is no jeopardy there.

Mr. Holtzoff. He may go free on the statute of limitations.

Mr. Glueck. Yes.

Mr. Crane. If you started to allege fraud, now, any law student starting to allege fraud, how could you possibly allege fraud without intent to deceive and intent to cheat?

Mr. Holtzoff. If you are a good pleader, you would say that.

The Chairman. I know, but we will agree we cannot make rules for people who do not know the law.

Mr. Holtzoff. Well.

Mr. Glueck. No, I like this the way it stands. Where a term used, of this kind, is put into the statute, particularly,

not such things as "feloniously", because they usually are surplusage, or "unlawfully," but when it comes to "wilfully, maliciously, negligently, recklessly, fraudulently," it seems to me those are the substances of certain offences. We just can't get around it.

Mr. Holtzoff. Just to bring the matter to a head, to get an expression of opinion, I move to strike out the second clause of the sentence beginning on line 19. That is the clause beginning with the word "unless" and ending with the end of the sentence.

The Chairman. Is that motion seconded?

(Not seconded.)

The Chairman. The motion is this--to strike out "unless such words are used in the statute or rule or other law as part of the legal definition of the offence charged."

Now, the motion is to strike those words out. Is that seconded?

(Not seconded.)

Mr. McClellan. If I may vote against it after seconding it--(laughter)

The Chairman. Whether it is seconded or not, let us get an expression of opinion.

Mr. Holtzoff. I would just as leave withdraw the motion, because I hear no expression of opinion.

The Chairman. No, this discussion is not too formal. Are you in favor of striking it out? If anybody is, say so; if not, we will consider it lost.

Mr. Dession. I would favor it, except I am not sure it goes quite as far as I would like to go. I am for it that far.

Isn't the problem this: I suppose we would all agree that before the pleading is finished facts should be set out which clearly cover every substantive detail of an offence. Now, the question in my mind is how much of that has got to be in the indictment or information, as against a demurrer, and how much of it are we left to have either there or in a bill of particulars, just so, when you put your initial pleading and your bill, which fits (if there is one) together, you have got it all there.

The Chairman. All you have got to do is state those facts which make an offence at law.

Mr. Dession. Well, normally I should say one would put all that in the initial pleading, because you do not always leave everything for a bill of particulars, I assume, but if we want to guard against pleadings being dismissed through an inadvertent error, then I think the extremely short form of pleading might be worth considering here; and so I would like to raise that question by asking those who have had experience with the New York short-form pleading. And as I understand it, that means that all you need in your indictment is a correct characterization of the offence, not setting out its elements, but if you said "first-degree murder," that is enough.

The Chairman. Just to answer your question--Mr. Medalie will correct me if I am not correct, because sometimes there is a big difference, sitting in a court where cases come up finally and only a few out of a great majority, and he is perhaps more familiar with it--but I haven't known of any short indictment that did not state all the elements of an offence.

Now, if they wanted to get the particulars, they would get

a bill of particulars, specifying certain details of the facts that the court may think they are entitled to have, but I do not know that any indictment has been dismissed because it did not state facts sufficient under the short form. Of course, that does not apply to certain matters where perhaps it is a testing out as to whether or not there has been a crime committed, on those facts, at all. That is a different matter.

Mr. Dession. No. I understand that. We have in Connecticut a statute modeled on your New York statute, and it is perfectly true that the State's attorneys do not ordinarily rely on that statute to the extreme. In other words, they will not simply give the name of the offence and leave everything else to the bill; but the point is, under the statute as we understand it there, one could do that.

Now, the effect at first is to avoid, to practically make the demurrer meaningless, except in cases where one could not in a bill of particulars allege facts that would round it out.

Mr. Glueck. But where you have a provision for the amendment of an indictment right then and there as you have, I think--don't you?--I do not see such a problem here. If anything is wrong, you just move to amend, right then and there.

Mr. Holtzoff. Oh, I don't think you can amend the indictment by adding an important allegation.

Mr. Dession. That is a little variance, is it not?

Mr. Medalie. Yes. I just want to make this thing clear. The short-form indictment, which is called a "simplified indictment," under the New York Code of Criminal Procedure, with the 1929 amendment, provides that you simply state the name of the crime, if it had one, such as treason, arson, murder, manslaughter,

or the like, or if it be a misdemeanor having no general name, such as an assault, and the like, a brief description of it, and if it is given by statute, a statement of the crime may also contain a reference to the statute defining the crime.

In other words, no element of the offence is stated, under the simplified indictment. The word is "simplified" indictment, rather than "short form". Now, the form given was-

"The grand jury of such and such a county by this indictment accuses A B of the following crime:

(SIGNED) District Attorney."

That is your simplified indictment, and that of course is not covered by our discussion at all.

Short forms such as Cropsey followed in King's County, simply say that "on such and such a date, A, with premeditation and intent to kill, killed or murdered B with a pistol," or "with a knife." That is the short form.

Mr. Glueck. Yes, but that includes the elements of the allegation of first degree murder.

Mr. Medalie. Every element is there, in a simple statement of fact.

Mr. Glueck. Premeditation and deliberation are both necessary in New York.

Mr. Medalie. Yes, I meant to bring that out. Just as Judge Crane said, you cannot say "murdered," because there are two kinds of murder.

Mr. Dession. You would have to say "first degree murder," as I understand, and that would be good against a demurrer, and one would be entitled to a bill of particulars.

Mr. Medalie. Yes.

The Chairman. Of course, in practice, I do not know of any judge--I do not know how it is possible for any of us not to give a man a fair show.

Mr. Dession. Well, he will get it under a bill of particulars, under this statute.

The Chairman. Surely.

Mr. Holtzoff. Of course, we want to avoid a bill of particulars as much as possible by having the indictments set forth sufficient so that bills of particulars would not be necessary.

Mr. Dession. But isn't this clear, under a statute of that kind--and that simplified indictment is what I had in mind--ordinarily the district attorney will, when he draws this indictment, put his allegations of fact in, because he wants to avoid a bill of particulars, too.

Mr. Holtzoff. Yes.

Mr. Robinson. That is true.

Mr. Dession. The point is that if through inadvertence he has left out some word which it later develops should be there, that statute will protect him against demurrer and enable him to protect it by having a bill of particulars. Now, isn't that the result we want to get?

Mr. Holtzoff. Yes, but this provision of this rule will not protect the United States attorney in such contingency.

Mr. Dession. I agree, and that is why I am not sure this rule simplifies it as much as we want to.

Mr. Holtzoff. Why didn't you second my motion?

Mr. Seasongood. The motion is seconded.

Mr. Dession. I do go that far with you.

The Chairman. Do you want to strike out the words, -

"unless such words are in the statute or in the rule or other law as part of the legal definition of the offense charged"?

Mr. Seasongood. I understand that you always put in the statute under which the crime is committed.

The Chairman. Yes.

Mr. Seasongood. Well, then, if you have the statute, of course it is there in the statute, so what is the use repeating it in the indictment? And why isn't it all right to say he "committed first-degree murder, within statute such and such," and then as counsel looks at the statute he sees what is charged.

The Chairman. These words have reference, as I understand it--

"Unless such words are used in the statute or rule or other law as part of the legal definition of the offense charged"--

Suppose the word "reckless" is used, as in the case of reckless automobile driving resulting in manslaughter; most of the States now have a rule that it is manslaughter if a person drives--what are the words?--"recklessly," or "with gross negligence," I think.

Mr. Dession. Yes.

The Chairman. "Gross negligence."

Mr. Robinson. Sometimes it is "negligently."

The Chairman. Yes--"negligently." I think you would have to use those words, and that is what this prescribes.

Mr. Robinson. In a case of that kind.

Mr. Seasongood. If you said "manslaughter" wouldn't it be there in the statute?

"Whoever unlawfully kills a person is guilty of manslaughter."

It might state "negligently."

The Chairman. It might be good as against demurrer.

Mr. Longsdorf. You have many varieties of manslaughter. That is why I do not think that is a good example.

Mr. Glueck. Then under the federal system you have a code, and you could merely refer to the section of the code.

Mr. Heltzoff. Suppose you just allege that the defendant defrauded the United States by doing so and so?

The Chairman. I would get a new assistant!

Mr. Seasongood. Isn't that a violation of section so and so of the United States Code?

Mr. Dession. Under your simplified statute, here is what would happen: That is all right, provided you are able to follow it up immediately with a bill of particulars setting forth whatever words anyone could want to use, but if for any reason that bill of particulars is not provided or cannot be provided, then I take it you go right back and sustain a demurrer.

The point is it can be done by a bill of particulars. Now, the only question is in which paper these words must all appear.

The Chairman. Well, we had discussion on that, I guess, and according to the consensus it stays in.

Now, do you want to read the rest?

Mr. Youngquist. I should like to ask a question or two about the words,-

"unless such words are used in the statute or rule"

Mr. Robinson. That is right.

Mr. Youngquist. (reading)

"or other law, as part of the"

What does "rule" and what does "other law" as there used mean?

Mr. Robinson. "Rule" means a rule which has been passed or promulgated under the authority of a statute.

Mr. Youngquist. You mean "regulation"?

Mr. Dean. "Administrative regulation."

Mr. Heltzoff. That ought to be "regulation."

Mr. Youngquist. "Regulation" would express to me at least the thought.

The Chairman. Let us make that "regulation," if there is no objection.

Mr. Youngquist. Then what does "law" mean?

Mr. Robinson. I think we need both, because we do have some provisions of administrative bodies that are called "rules". That is what the indictment division of the Department of Justice tells me.

Mr. Youngquist. All right, let's make it "rule or regulation".

Mr. Robinson. Right.

Mr. Youngquist. Now, what does "or other law" mean, there, Mr. Reporter?

Mr. Glueck. Sometimes an expression is used which merely states a well known common law name of a crime.

Mr. Robinson. That is about it.

Mr. Glueck. In which event you have to go to the common law for a judicial interpretation.

Mr. Medalie. Like "murder on the high seas"?

Mr. Youngquist. All right, that explains it.

Mr. Seasongood. There aren't any common law federal offences, are there?

Mr. Robinson. No.

Mr. Glueck. No, there are no offences, but where the statute uses a common law term and doesn't define it, then you have got to go to the cases for a definition.

Mr. Seasongood. That is in the statute.

Mr. Medalie. I think you have another situation, in defining federal territory, a place in a state, like the post-office building, like the customs house. The laws of the State of New York, for example, up till a certain date--they change it as they go along; every once in a while they catch up and bring it up to date--those laws are applicable. Those laws may be either statute or common law, as the case may be in the particular State, and I think you are safe in using the language "or other law".

Mr. Glueck. Or an Indian reservation--something within a State? How about that?

Mr. Holtzoff. No, Indian reservations, those crimes are provided by federal statute, but others, the federal reservations generally--

Mr. Glueck. But suppose they commit a crime which the federal statute does not account for?

Mr. Holtzoff. Then the crime is not triable in the courts.

Mr. Glueck. How about West Point?

Mr. Holtzoff. Well, I say, on all federal reservations, other than Indian reservations, the state law governs, except

as to those crimes that are defined in the federal statutes.

Mr. Medalie. That is the same as a crime committed in a post-office building.

Mr. Holtzoff. Yes.

Mr. Medalie. Customs house, national park, and so on.

Mr. Holtzoff. The only difference is that on Indian reservations the crimes are not punishable unless defined.

Mr. Dession. Doesn't that become clear, that "other law," if it means anything, means--

The Chairman. I do not think it is pertinent, here, but I wish that some time they could make it a little clearer as to when federal law applies to reservations like West Point, because I had a very sad experience regarding it, which depends more on the law governing the giving of copies, and when it came to a dock down in the Brooklyn Navy Yard where a man was killed, tried before me for murder in the first degree, my grief! we couldn't get the attorney general down here--long before your day--and neither of the title companies could ever find out how the United States got the property.

Mr. Robinson. A good place to pick for a murder!

The Chairman. A man was convicted of less than murder in the first degree. He was convicted. I gave him a long-term sentence. Then I got panicky and wrote the Governor, Governor Whitman, and he wrote back and said that I had not given him enough! and so I always was quite anxious about the man, until he came out. When he came out, I had him pardoned by Smith, so he could go back to his employment in Burlington, Vt.

He went back up there in the employment of the post office, and he got a big document like that, with a big seal on it,

which restored his citizenship, so he got in the post office. He hadn't been there very long before I got a letter saying he got married and was in difficulty--borrowed \$500 from the mail by taking it out of the bag--in a little difficulty, and would I kindly send him down another certificate of character. He is down here now in some jail in the South. I get a letter from him once in a while.

Mr. Dession. Well, it seems to me this "or other laws", if it means anything, must mean that we incorporate all of the substantive case law. Now, if that is true, this is not making any change whatever in existing practice. Any artificial flourish which may now be necessary is still going to be necessary. That is, it doesn't change anything.

Mr. Medalie. We make only substantive law the subject matter of this. We don't make the procedural requirements that go with crimes in particular States. In a particular State that has common law crimes--I don't know if there are any. Are there?

Mr. Burke. Oh, yes.

Mr. Dession. In Pennsylvania.

Mr. Medalie. They may have procedure or pleading that requires great elaboration, with much technicality. That doesn't go with the common law definition of the crime, does it?

Mr. Robinson. No.

Mr. Dession. Well, I see that it would accomplish that.

The Chairman. Shall we go on now again, with (f), line 25? Will you read that, Mr. Robinson.

Mr. Robinson.(reading)

"If such terms or characterizations are necessary, they may be used without repetition in the same count or

accusation."

The Chairman. Go on.

Mr. Robinson. (reading)

"If there is more than a single count, allegations may be incorporated in one count by reference to allegations contained in another count, and the repetition of such allegations is thereby made unnecessary."

Mr. Youngquist. Why not strike out that last clause on the repetition?

Mr. Robinson. Well, somebody might need it for explanation, I think.

Mr. Holtzoff. No, because you have it in the first part of the sentence.

Mr. Youngquist. Incorporated by reference.

Mr. Robinson. I am willing to leave that to the committee on style, if you desire. I am not just ready to strike it out without examining it a little bit further.

The Chairman. All right.

Mr. Robinson. (reading)

"The indictment, information, or complaint should state in each count the official or customary citation of the statute, rule, or regulation which the accused is alleged therein to have violated, but the omission of such citation or an erroneous citation shall not invalidate the indictment, information, or complaint, or any proceedings thereunder."

Mr. Youngquist. I suggest, in place of "indictment, information, or complaint" we insert "written accusation".

Mr. Robinson. You prefer that?

The Chairman. Where is that?

Mr. Youngquist. My suggestion is that we substitute for the words "indictment, information, or complaint" where they appear in the last sentence the words "written accusation".

Mr. Robinson. Would we have to do that in line 30 and in other parts of the same paragraph, if we did that there?

Mr. Youngquist. Yes--30 and 35.

Mr. Robinson. Would you tell us why you think that ought to be done?

Mr. Youngquist. Well, we start with a reference to written accusations, and elsewhere as I recall it we define the written accusation as being "by indictment, information, or complaint". I think it would be simpler to use throughout, the words "written accusation" where we include all three of those forms.

Mr. Robinson. These words were used intentionally rather than "written accusation" because it was felt that it would make more explicit and more forceful to the minds of lawyers and United States attorneys and others that those are the terms we are talking about. Now, I can refer that to the committee on style, too, Mr. Youngquist, if you don't mind that, without taking action.

Mr. Youngquist. All right.

Mr. Dean. You use the term "written accusation" in other places though, Jim, instead of "information, indictment, or complaint," such as in line 34.

Mr. Robinson. Certainly, in lines 12 and 32, you are starting out.

Mr. Dean. 44 is about procedure.

Mr. Robinson. We haven't got to that yet.

Mr. Dean. Line 34, you use it.

Mr. Robinson. Well, I think maybe there is a reason for using it there.

Mr. Dean. Why define it anywhere--define "written accusation" as including indictment, information, and complaint--if every time thereafter that you want to use the words "written accusation" you refer to all three? That is I think the point that Mr. Youngquist makes. He means it saves space.

It is also in accordance with the principle we have just announced in this rule that you can incorporate by reference.

Mr. Robinson. I didn't hear you.

Mr. Dean. I say, it is also in line with the principle in this very rule, that you do not have to repeat.

Mr. Youngquist. In line 28.

Mr. Robinson. Line 28? Well, of course, that is applying to written accusations.

The Chairman. You make that as a motion, that we define it?

Mr. Dean. I think it is a good suggestion, which would simplify the rules throughout, particularly since we have defined it.

Mr. Glueck. I second the motion.

The Chairman. It is moved, in rule (1) where we have the definition, we include a definition of "written accusation."

Mr. Youngquist. No.

Mr. Glueck. No, I beg your pardon, Mr. Chairman. I think the motion was that inasmuch as we have the definition of "written accusation" to include these three possibilities, that hereafter we merely refer to the written accusation only, instead of "indictment, information, or complaint."

The Chairman. Those in favor of that, say aye. Are you

sure you understand that?

Well, we have here, you see, the words "indictment, information, and complaint," and they run through this chapter very frequently, and it is suggested that instead of the three words, the words "written accusation" be used, and that somewhere--is it in this chapter?--that "written accusation" be defined as including "complaint, indictment, and information."

Mr. Robinson. Yes.

Mr. Holtzoff. It is already defined in rule 38, Mr. Chairman.

The Chairman. It is defined? Then if it be defined, the motion is that the words "written accusation" be used instead of the words "indictment, information, and complaint," where those words are necessary.

Mr. Youngquist. Is that right?

The Chairman. Is that understood by everybody?

(The motion was duly AGREED TO.)

Mr. Holtzoff. Mr. Chairman, I would like to raise a question as to the desirability of that whole last sentence. This last sentence provides that the indictment should cite the statute, but a failure to cite it carries no penalty, just as hortatory or precatory words. It seems to me that in those circumstances it is surplusage.

Mr. Dean. You can cite it by the figure, though, can't you? I think that is the answer, isn't it?

Mr. Holtzoff. I think that is, and a good pleader will always cite statutes, but some do not, and I do not think there ought to be a requirement. Certainly there is no requirement today.

The Chairman. But it says-

"The omission of such citation or an erroneous citation shall not invalidate the written accusation."

Mr. Holtzoff. Well, that being so, then it does not seem to me that this sentence serves any purpose.

Mr. Dean. It does.

Mr. Seasongood. I think it serves an educational purpose.

Mr. Dean. It does serve a purpose.

The Chairman. It points to the better practice, that is all.

Mr. Youngquist. The word "shall" is used, instead of in line 32, which indicates that it is an indication rather than a requirement.

Mr. Holtzoff. Couldn't we cover that by our simple forms?

The Chairman. Is there any objection to leaving it? I think that is pretty good.

Mr. Robinson. It is based on the recommendation of the Department of Justice, the section having to do with informations. Before I forget it, I want to express my appreciation for the assistance of the Department of Justice, and particularly its indictment section. Mr. W. W. Barron and Mr. George Kneipp have been really very generous with their time, and during the past two or three months we have had numerous conferences, and I am indebted to them for some of these forms that have been placed in the book.

This language as well as other language has been checked by them, at least by Mr. Kneipp, and their attitude has been this, that they have been willing to offer us any possible assistance but at no time have they made any request or in any way exerted

any pressure to get us to adopt their views; and because of their helpfulness, including these matters that Mr. Holtzoff is just referring to, namely, lines 30 to 35, I wanted us all to recognize our indebtedness to them.

That is all I have to say, there.

Mr. Dean. Mr. Chairman, I would like to argue for the retention of this, because it makes clear that you can get it by a bill of particulars.

The Chairman. I think the concensus is for its retention.

Mr. Holtzoff. I am not addressing my remarks to that.

Mr. Wechsler. I have this question about it, Mr. Chairman. It seems it sometimes happens that an indictment which the trial court sustains under statute A was erroneously sustained, under that statute, but can be sustained on appeal under statute B, which was not in the mind of the draftsman or brought to the attention of the trial court.

Under the present rule of the Supreme Court that is permissible so long as the allegations are the same, of course. I wonder if there is anything in this language that would alter that rule? If so, I think it is a question that ought to be considered deliberately.

Mr. Robinson. Doesn't line 34 take care of that?

Mr. Wechsler. How about line (c) 2, however, which rather suggests that an amendment is necessary?

It may not be possible to get an amendment after judgment.

Mr. Robinson. I agree with your position, and I will say our effort has been to incorporate that view in our provisions.

Mr. Dession. It seems this might very well result in the conclusion that you had a material variance, and I think your

point is important.

Mr. Wechsler. Yes. That is my difficulty. Therefore, I am wondering whether it might not be well to strike (c) (2).

Mr. Youngquist. Yes.

Mr. Wechsler. And let the language of lines 30-35 stand. The result then would be that it is regarded as good practice, but not essential to the validity of the document.

Mr. Youngquist. I second that motion.

The Chairman. Do you want to take a vote on that motion in regard to (2), Mr. Wechsler? We haven't had that read, yet.

Mr. Wechsler. As you choose, Mr. Chairman. I will withhold it.

The Chairman. We are dealing with that?

Will you read that amendment as to the written accusation. Read the subdivision (2) so we will all know what it is.

Mr. Robinson. Beginning with line 42?

The Chairman. Yes, line 42.

Mr. Robinson. (reading)

"Erroneous citation. The court is authorized to amend an erroneous citation, rule, or other law, which is cited as the basis of the written accusation. The court may grant additional time or whatever other relief may be proper on account of the erroneous citation or on account of the amendment."

The Chairman. Would you want that stricken out, Mr. Wechsler?

Mr. Wechsler. I move it be stricken, Mr. Chairman, for the reasons stated.

Mr. Youngquist. I second the motion.

Mr. Holtzoff. I second the motion.

The Chairman. You have all heard the motion. Are there any questions about it?

Mr. Medalie. Yes. I have myself had difficulty finding out what the statute, rule, or regulation was, under which the Government was proceeding.

Now, there is a tremendous body of criminal law embraced within "rules and regulations." What the Supreme Court had to say about it in the early days of the new dispensation is still partly true. It is difficult for even experts to know, and those in the very departments that framed the regulations, just what the regulations are; and a lawyer who has recourse only to an ordinary over-sized library and various services finds it extremely difficult to find out all of these regulations.

It is very important for the proper preparation and defense of a case that a defendant and his counsel should get that information. Sometimes the importance of it is not evident even until a trial. Lawyers frequently call up the prosecutor and say, "Well, now, Joe, for goodness sake, will you tell me what this rule is, where I can find it? Have you a copy?" And not infrequently the young assistant district attorney says, "I will try to get one," his knowledge being based on a memorandum that comes from some department official, other than the Department of Justice.

I think it is very important, and we ought not to delete these things. I will agree that the right to amend ought to exist down to and including the time of trial, but the defendant and his counsel ought to get that information.

Mr. Holtzoff. Well, I have in mind the identical situation that Mr. Wechsler referred to. I do not think we ought to make

the criminal procedure more complicated than it is. Today, suppose you indict a person for harboring, admitting that the allegations are not sufficient to make out the crime of harboring, but they are sufficient to make the defendant out as an accessory after the fact. That is a typical situation that occasionally arises.

Mr. Medalie. This does not prevent that. It is the power of the court.

Mr. Holtzoff. No, but if I may finish, I understand of course that under this there could be an amendment prior to the trial, but suppose there is a conviction and you go up on appeal, I think that the appellate court should have the right to affirm the conviction, if the conviction may be sustained under the one statute or the other statute, rather than the one stated in the indictment.

Mr. Medalie. Now, there really are different elements in these offenses, and I think a defendant ought to have an opportunity to raise the question. If he raises the point during the trial, or at a proper place, before the trial, he ought to be set right, and all that is in this, here, is giving him an opportunity to say that he does not know, and ask to be set right.

Now, if during the trial--now take your case--if during the trial of a person charged with harboring, on facts that do not make out harboring, but which make out this "accessory after the fact" situation that you mention, he should know that, even during the trial. I do not say that he should raise the question after a conviction, for the first time.

Mr. Holtzoff. No, but suppose he raises it by the motion in arrest of judgment?

Mr. Medalie. I will agree it is too late. He should raise it during the trial. If at any time when he could meet the situation, he raises it, he ought to be set right.

Mr. Wechsler. Suppose he raises it during the trial, and the trial judge improperly rules that the indictment is sufficient and that the evidence makes a case. The trial judge has improperly interpreted the statute under which the indictment is based. There is a conviction and judgment. On appeal the defendant renews his contention; the attorney representing the Government on appeal finds himself unable to sustain the trial judge on the statute which he interpreted, but there is another statute under which the allegations of the indictment and the propositions proved constitute an offence against the United States. Why should not the judgment be affirmed? It is now, and I do not know of any abuse incident to procedure.

Mr. Medalie. I do not think there is likely to be abuse in matters of that kind. I think that gives an example of how it is we are led off the track of our discussion of regulations.

Mr. Wechsler. Well, the regulation case may be a special case, but this covers statutes as well as regulations.

Mr. Medalie. Yes, but primarily I would like the regulation thing attended to.

Mr. Wechsler. Then I think we might draft a rule specifically directed to the regulation, where the violation charged is a violation of the regulation.

Mr. Medalie. I agree with Professor Wechsler that in the case of well known crimes or statutory crimes the situation is not serious and we need not trouble about it, but I do think that when it comes to rules and regulations which would warrant

indictment, the person ought to know what the rule or regulation is.

Mr. Youngquist. George, subdivision(2) would not take care of what you have in mind, it seems to me. Really what you are suggesting is that at the request of the defendant the Government be required to elect before the case is submitted to the jury, what statute or rule or regulation they choose to prosecute, is that it?

Mr. Medalie. Yes, you are right, and I am willing to limit it to "regulation" because a lawyer ought to be able to find his way around statutes. Even if it is difficult, he can with effort do so.

Mr. Youngquist. But then if you do require the government to elect in that situation, the appellate court may not sustain a conviction on some rule or regulation other than the elected one, may it?

Mr. Medalie. You are quite right, yet we can provide for that. The test is whether the defendant has been misled honestly in his defense, or is uninformed.

Mr. Wechsler. That is right.

Mr. Medalie. And we should make provision for that. I do not believe that the demand for the rule or regulation should be a technical trick, and we must safeguard against that.

The Chairman. Is there anything else on subdivision (2)? The motion is to strike it out because it is covered, as it is claimed, by the lines 30-35, in the other provision at the top of the page. Did you wish to speak, Mr. Waite?

Mr. Waite. I will wait until after this motion is put.

The Chairman. No, no.

Mr. Waite. No, I am perfectly willing to wait.

The Chairman. Does it pertain to this motion?

Mr. Waite. No. I can vote in favor of this motion and then raise what I wanted to afterwards.

The Chairman. Oh, all right.

Mr. Medalie. There is something else, Judge, that is involved here, and that is the whole subdivision (c). As I remember it, and I haven't used that one for a good many years, it is Ex Parte Bain, I think it is 121 U. S., or something like that.

Mr. Wechsler. That is right.

Mr. Medalie. The last time I had it was in Westchester county over 20 years ago, and I may be wrong in the citation, but you know what I mean. The court may not amend--so the Supreme Court said, and the reason for that rule is that the indictment guaranteed by the Constitution is the act of the grand jury, and you cannot amend what the grand jury did, or the grand jury may indict, and amend an indictment, that is not the indictment of the grand jury. Now, that is not bad reasoning.

There is another way of dealing with it. For example, certain defects, errors, or omissions may be supplied without amendment. In other words, however we do this, we should do it in such a way that it does not offend that judicial constitutional rule.

Mr. Robinson. That is right. That case has been considered, and we think has not been in any way infringed on.

Mr. Medalie. But if you may amend the indictment, you do infringe on Ex Parte Bain, I think.

Mr. Robinson. Where do you find a provision that the indictment may be amended? I do not know of anything in it about amending the indictment.

Mr. Dean. (c) (1), isn't it?

Mr. Holtzoff. (c) (2) is the one we have been talking about.

The Chairman. If we come down to (c) we will have open discussion on that, if we dispose of (b). The only reason we took up (c) (2) was because it would be unnecessary if we adopt (b).

Mr. Holtzoff. There is a motion pending to strike out (c) (2), Mr. Chairman.

The Chairman. Yes, I know.

Mr. Holtzoff. Do you want to take a vote on that?

The Chairman. I thought perhaps that before going down to (c) we had better dispose of (b) first.

Mr. Medalie. I thought we had disposed of (b).

The Chairman. We have not disposed of (b), because I take it up in connection with the last sentence of (b), "The indictment, information, or complaint should state".

Mr. Medalie. May we vote on the question as to whether (c) (2) should be omitted?

The Chairman. Well, all right, we will put that first, if that is your desire. There is a motion made to strike out (c) (2).

Mr. Robinson. May I just say another matter that is to be considered--I am not taking sides either for or against this clause at all--

The Chairman. Do not be too modest.

Mr. Robinson. --but I do want to say this: It may not be in the minds of all of you, but the attitude of the United States attorneys properly ought to be considered. This proposal

has been considered at various judicial conferences, and we have had the advantage of United States attorneys in the office and otherwise, and we have their views, and there is a feeling that the Government would be--that is, on the part of some of them, and on the part of some judges--that the Government would be weakening its position by being required to cite the section of a statute or rule or regulation on which the indictment or information is based.

Now, (c) (2) tends to allay the apprehension that will be met by these rules when they are promulgated along about two or three months from now if present plans mature along with it, and I suggest it would not be wise for us needlessly to raise any apprehensions in the minds of a large portion of those concerned and charged with the duties of law enforcement of the Government, and I do not think personally that (c) (2) is applicable elsewhere.

That is merely my opinion, however, and I will be governed by what the majority opinion of the Committee is as to what you want.

Mr. Holtzoff. I would like to make a comment on that. I think that (c) (2) makes the work of the United States Attorney more difficult, because I construe (c) (2) as it is, Mr. Wechsler, as sort of a limitation on the last clause of (b), which provides that the omission of such citation or an erroneous citation shall not invalidate the indictment or accusation.

Then if you add (c) (2), which requires the amendment of an erroneous citation, and that gives rise to the question, what happens if you forgot to ask for an amendment, and that is the reason why I am in favor of striking out (c) (2).

The Chairman. The only reason Mr. Wechsler made that motion is that with the clause here, the sentence between 30-35, (c) (2) was unnecessary.

Mr. Holtzoff. Yes.

Mr. Robinson. I understand that. I think it is necessary. That is my point.

Mr. Waite. Mr. Chairman, in view of what the Reporter has said, perhaps I ought to go ahead with what I was planning to say before we vote on this motion.

I am in thorough agreement with you, Mr. Holtzoff, that no conviction ought to be reversed because of some omission in the indictment such as referred to here. On the other hand, I quite agree with Mr. Medalie that the defense counsel is entitled to know with some degree of accuracy what rule or statute is charged to have been violated; so if subsection (2) is stricken out, I had in mind to suggest that we add to the end of (b) this provision--(b) winds up this way:

"but the omission of such citation or an erroneous citation shall not invalidate the indictment, information or complaint or any proceedings thereunder."

I think that is very wise.

Now, I suggest that we add:

"If, however, the omission or error is called to the court's attention before the trial or during the trial, the court may direct correction of the accusation and may grant additional time or whatever other relief may be proper on account of the erroneous citation."

Mr. Robinson. May I say, Mr. Waite, that we did have that originally in (b), just as you say, but it seems we get extensively

into an amendment by doing that, and (b) is on the nature and contents of a written accusation, and therefore it was felt that to be accurate in placing the matter under a proper heading, it should be put down under (c) (2). That was the reason; and you add what I think probably should be added, and I think Mr. Medalie would approve.

Mr. Medalie. Yes.

Mr. Robinson. --that (c) (2) be amended, if we retain that provision, that amendment must be made before trial, if you want a fixed time, that it should be made.

Mr. Waite. That is the thing I am interested in--before or during the trial.

Mr. Robinson. I think that would be a good suggestion.

The Chairman. Let me make this suggestion before putting the motion, to see if it meets with your approval. Everybody seems to be in favor of section (b). It is subdivision or section (c) that is causing the trouble.

We can amend that, on subdivision (2), when we come to it, just as you suggest, but if (b) is satisfactory to everybody, let us get rid of it, then take up (c) as a whole.

Mr. Waite. (b) would not be satisfactory if we struck out (c). That is what I am driving at.

The Chairman. Yes. Then we can go back and amend it, if we strike out (c). Is that satisfactory to you, Mr. Wechsler, if we do that?

Mr. Wechsler. Yes.

The Chairman. Just hold your motion in suspense until we get through with that.

Those in favor of (b) as amended, or suggested, say aye.

Mr. Dession. No.

The Chairman. You are not in favor of it?

Mr. Dession. On the grounds I stated before. I think it to some extent contemplates the pleading in the case of an information, and I do not want to see that done.

The Chairman. Well, it seems to be carried, and that probably will straighten itself out as we go along with some of these others.

Mr. Dession. I simply want to register my dissent on that at this point.

(The motion was duly AGREED TO.)

The Chairman. Now, we have disposed of (b) and gotten it out of the way. Now we will take up (c), and this section or subdivision (2), first, upon the motion of Mr. Wechsler to strike that out.

Mr. Medalie. Don't you want to take (1) first?

The Chairman. We will take (1) first if you prefer to do that.

Mr. Medalie. I would like to address myself to that.

The Chairman. Mr. Wechsler has a motion. Is that with your consent, Mr. Wechsler?

Mr. Wechsler. Oh, yes; indeed.

Mr. Medalie. The heading of (1) is "Surplusage." I think it should be "Surplusage and Variance," and my suggestion was made because I still respect Ex Parte Bain--or I "fear" it--put it any way you wish. With due regard for my fear of Ex Parte Bain, I would suggest that there be no provision for the amendment of an indictment, and I propose in substance the following language:

"The court may direct that a word or words which constitute surplusage may be disregarded where prejudicial to the defendant or confusing to the jury, and that any variance between the indictment and the proof that has not been prejudicial to the defendant shall be disregarded."

Mr. Heltzoff. I would like to say a word about your suggestion. Judge Lindley, of the Seventh Circuit, in the Seventh Circuit Conference, made a strong point of the desirability of the court having power to strike surplusage from an indictment, because he calls attention to the fact that the jury may take the indictment into the jury room and may read the indictment, and he called attention to an indictment that he had in which there were numerous very prejudicial allegations--allegations very prejudicial to the defendant, which were not relevant to the charge set forth, and he felt that as a matter of justice to the defendant there ought to be some way of striking out such surplusage from that so that the indictment could not be read to the jury with the surplusage in it.

Mr. Medalie. He could have done another thing much more simply--he could have accomplished the same result much more simply. It isn't necessary that the jury have the indictment, but the court can give the jury a schedule of counts, and similar things.

When an indictment contains surplusage, it ought not to go to the jury, and that's all there is to it. Now, a lot of dirty remarks in an indictment about the defendant just means that the Government cannot send that indictment in to the grand jury, and shouldn't, and just because they have gone and filed a scurrilous, unwise and unwarranted indictment is no reason why fundamental

laws should be changed or tampered with. And I think generally speaking, prosecutors do not file scurrilous indictments. In the one instance that the Judge mentions, this thing may have happened, but it happens so rarely that we are not depriving the Government of any substantial right or the jury of any substantial aid by ignoring that case.

Mr. Robinson. It seems to me that the point just now being discussed indicates that the difficulty both with (c) (2) and the recommendations in regard to it in this matter, I do not think that we need to look ahead to see whether or not a conviction is to be held invalid or upheld. That more or less partakes of surgery.

But I do think that we had better consider keeping the trial running along in a fair way, and if that requires that an indictment with scurrilous surplusage be amended by having the scurrilous part stricken out, or if it requires that a citation be corrected so that the arguments of counsel and the general conduct of the trial may be corrected, before the time comes to consider reversing a conviction, if any, it seems to me that we had better use preventive methods rather than surgical methods. That is a rough analogy, but that is the reasoning that I think ought to be considered basic in what we are doing here.

Mr. Medalie. Let us take the trial of a case in which the indictment contains certain erroneous allegations; that is, the proof does not conform to certain allegations in the indictment. All we need then is--

Mr. Robinson (interposing). Pardon me, now, George, just right there. I think we take that "detour" you were speaking about awhile ago with Mr. Wechsler. It is not just a matter of

having a variance, but it is a matter, as I understand Alex's comment, when he came back from speaking at the Seventh Judicial Conference and told me what Judge Lindley had said, it was a matter of protecting the defendant's rights.

Mr. Holtzoff. Yes.

Mr. Robinson. Before you get to a jury.

Mr. Holtzoff. That's right. The particular indictment he had before him was an indictment under the Sherman Act, I think, or under the anti-procurement act, where there were a lot of factual allegations creating atmosphere, which did not relate to the specific charge against the defendant, evidence of which obviously was inadmissible; but if that indictment were read to the jury--and I suppose counsel has a right to read the indictment to the jury in his summing up--

Mr. Robinson. Certainly.

Mr. Holtzoff. --and you can't stop him from doing it--it would have prejudiced the jury against the defendant improperly, so the suggestion was made by Judge Lindley that in order to protect a defendant against prejudicial, irrelevant allegations in an indictment, there ought to be some way by which it could be stricken; and I am suggesting that, for the defendant's protection, rather than for any interest that the Government might have.

Mr. Robinson. So the point isn't the matter of variance, but it is a matter of whether we are going to privilege libel. That is what it amounts to.

Mr. Holtzoff. Yes, sir.

Mr. Glueck. Let me ask, is this to be done, in practice, on the initiative of the judge, or only on motion of the accused?

Mr. Heltzoff. Well, ordinarily it would be done on the motion of the defense counsel, of course, although the judge could do it on his own initiative, but like most actions of a judge, the action would be taken on motion of the defense counsel.

Mr. Medalie. I notice this in your subdivision (1), and it may be in favor of what you say. You deal only with surplusage.

Mr. Robinson. That is right.

Mr. Medalie. Where the crime is alleged to have been committed on May 1, but is proved to have been committed on June 1, you do not provide for amendment. That, I suppose, is in deference to the rule in *Ex Parte Bain*.

Mr. Robinson. I think that is right.

Mr. Medalie. In other words, striking from an indictment is different from rewriting statements in it.

Mr. Heltzoff. That is right.

Mr. Medalie. Now, perhaps we are safe on that.

Mr. Heltzoff. All right.

Mr. Robinson. I think so, George. It ties in with our definition, too, in 30 (b).

Mr. Medalie. Do you think that is a sound distinction, Judge?

The Chairman. I should think so. I think so.

Mr. Medalie. Wait, now--I just want to think down the list of justices!

The Chairman. I suppose in that case and in others you cannot amend the indictment if it changes any substantive part of the indictment, but Mr. Medalie, in the change of something

that does not touch the substance of the offence, I should think it would be all right.

Mr. Medalie. No, that isn't it. You can't tinker with an indictment by rewriting any part of it. That I think is a fair statement of Ex Parte Bain, without over extending its holding.

Mr. Robinson. Well, George, there is a later case than that, and they cite it.

The Chairman. How old is the Bain case?

Mr. Medalie. It is 121 U.S. That is awfully old. Nobody reads that far back.

Mr. Robinson. 1887.

Mr. Holtzoff. There is a difference between striking something out of an indictment and changing something that is in it.

Mr. Medalie. Yes, that is what I have been pointing out. You didn't listen to my statement of my own reformation on the subject.

Mr. Robinson. Ex Parte Bain was decided in 1887, 121 U.S. 1.

Mr. Medalie. That was in my life-time.

Mr. Robinson. There was also a 1940 case that was in your life-time.

Mr. Medalie. I haven't caught up. What does that say?

Mr. Robinson. It is United States versus Reisley, 32 Federal Supplement 432, in which a word had been erased from an indictment and another had been substituted in place of it.

Mr. Medalie. Who decided that?

Mr. Robinson. 32 Supplement. I think there was certiorari refused on that. I am not sure.

Mr. Holtzoff. That must have been the district court.

Mr. Dean. That is the district court. What judge wrote that opinion? Judge Supp?

Mr. Robinson. We could send and get that 32 Supplement.

Mr. Glueck. What district?

Mr. Robinson. I do not know.

The Chairman. We move on. I doubt whether the courts today have any such rigid attitudes toward either evidence or pleading as they may have had in an earlier day. We know they had cases where they dismissed complaints and indictments because they left out a word, "dual". We have passed away from all these rigid attitudes, and we approach it with the idea that if a man has had a fair opportunity to know what he is charged with, he has got to stand the defense, and I do not think we are anywhere near so rigid, the courts today, either as to rules of evidence or as to the pleadings. We have gotten away beyond that. We are thinking of other things today, of course, than the rigidity by which everything is supposed to fit into a certain pigeon hole; and I should hate to see anything frozen so that we could not put life into our criminal procedure to meet the situations that have developed today.

Mr. McClellan. I still have difficulty with the right of the court to make any fundamental amendment or change in an indictment. I do not think we want to place this upon that ground. In order that I may understand what you are doing, I would like to know whether (c) (1) really contemplates anything more than such a change as the defendant (the accused) may ask for? And if it doesn't, why not say that the court upon motion of the defendant may do so and so, and not extend to the Government the right of even changing the indictment by taking something out of

it, because when you take it out, you do not know what the effect may be on the meaning of what you have left.

Mr. Seasongood. Suppose the court wants to do it of its own motion?

Mr. McClellan. I would not let the court meddle with a thing of that kind on his own motion. If the defendant does not move for it, I would not let him do it.

Mr. Holtzoff. I second the motion that we insert those words in (c) (1).

The Chairman. What is that?

Mr. Robinson. "The court, on motion of the defendant."

Mr. Holtzoff. "On motion of the defendant."

The Chairman. "The court, on motion of the defendant"?

Mr. Holtzoff. Yes.

The Chairman. That is (c) (1) I was talking about, Judge, and you were talking about (c) (2).

Mr. McClellan. No, I am talking about (c) (1).

The Chairman. Is that satisfactory to you, to put "on motion of the defendant" in?

Mr. McClellan. Yes, sir.

Mr. Seasongood. I do not see why you should limit it in that way. Suppose the defendant is not properly represented, and the court thinks it is injurious to the defendant. I do not see why he should not have the power to strike it out.

Mr. Holtzoff. The court could suggest to counsel that he make the motion.

Mr. McClellan. Oh, yes; that is so.

Mr. Wechsler. I wonder, Mr. Chairman, if it would be equally acceptable to use the words, "for the protection of the

defendant," instead of "on motion of the defendant," which would interpose the limitation that is desired and still eliminate the necessity for a motion.

The Chairman. Judge McClellan?

Mr. Youngquist. The danger on that would be that the defendant may disagree with the court as to what is or is not for his protection. I think it might better be left.

Mr. Seasongood. That will infuriate the prosecutor. With the explanation that Mr. Holtzoff makes, which had not occurred to me, that the judge can say, "Well, you move to strike that out," I would withdraw what I said.

The Chairman. Is there anything else now about subdivision (1)?

Mr. Medalie. Yes. It should not be limited only to surplusage, because any other change made on motion of the defendant ought to be validated. I think consent of defendant would cure a violation or any infringement of the Ex Parte Bain rule by the court.

Mr. Youngquist. I wonder if you are right about that, Judge? Suppose it is an indictment for an infamous crime, or a capital offense. It does not call in the class of informations, at all.

Mr. Medalie. Well, we have no trouble with informations.

Mr. Youngquist. No.

Mr. Medalie. Because they are not upon an act of the grand jury.

Mr. Youngquist. No.

Mr. Medalie. And therefore do not come within that condemnation.

Mr. Dession. We are allowing a defendant to waive indictment.

Mr. Youngquist. I am thinking of a class that may be prosecuted by information. There you might have the right to provide for amendment and all that, but where you have a crime that must be prosecuted by indictment, I doubt the advisability of going beyond what is here proposed.

Mr. Medalie. You can waive indictment, why can't you do anything else with the indictment?

The Chairman. I will tell you why, along the line you speak of. If a judge dismisses an indictment, the Government has an appeal, doesn't it?

Mr. Holtzoff. No, not under the federal statute.

The Chairman. Don't they, under federal statute?

Mr. Holtzoff. Only if a constitutional question is involved or a question of statutory construction. We have been trying to pass an act to enlarge our authority to appeal, so as to cover such cases as that.

The Chairman. Of course, the reason he dismisses an indictment is because it doesn't state facts sufficient to constitute the crime.

Mr. Holtzoff. The Government has no appeal, unfortunately.

The Chairman. Then my objection would not apply.

Mr. Wechsler. Ordinarily it involves the construction of a statute, if it is on the ground that the indictment does not constitute a crime. It is only when there is poor pleading that there is no appeal.

Mr. Holtzoff. I know, but the Supreme Court has held, hasn't it, that whether the facts constitute a crime is not a

statutory question, unless the meaning of the statute is involved? They have declined to entertain a good many of our appeals where we have pressed that question.

The Chairman. Well, gentlemen, what shall we do, now, with subdivision (1)? We have got "Surplusage and Variance."

"The court, on motion of the defendant, is authorized to strike from the indictment"  
and the rest remains as it is.

Mr. Holtzoff. I move we adopt (c) (1) with this change.

The Chairman. "On motion of the defendant?"

Mr. Holtzoff. Yes.

Mr. Wechsler. Mr. Chairman, if there is to be a motion of the defendant, may we not eliminate the words beginning with the word "especially" in line 39?

Mr. Holtzoff. Yes.

The Chairman. Take "especially" out?

Mr. Wechsler. Take out everything--"especially" and everything after that in the paragraph.

Mr. Glueck. Everything after that.

Mr. Wechsler. Since it is to be on motion of the defendant, I should think that the requirement that it be prejudicial to the defendant is unnecessary.

The Chairman. Yes. Do you want to take out "variance"?

Mr. Robinson. George says "variance" may go out of the title.

The Chairman. Well, you read it as it is now, Mr. Robinson. Will you read it as it is now.

Mr. Robinson. (reading)

"Surplusage. The court on motion of the defendant is

authorized to strike from an indictment, an information, or a complaint a word or words which constitute surplusage."

The Chairman. Those in favor of this--

Mr. Medalie (interposing). Excuse me. May I make another suggestion? Why "is authorized"? Why not "may"?

Mr. Youngquist. "May."

Mr. Robinson. All right.

Mr. Youngquist. Leave that to the style committee.

Mr. Seasongood. I still think you ought to give the Government a locus penitentiae and let it strike out anything as surplusage? I do not see any use of limiting that power in the court.

The Chairman. Does anybody else wish to say anything? If not, I will put the motion as to whether we shall adopt subdivision (1) as just read.

(The motion was duly AGREED TO.)

The Chairman. Now we come to Mr. Wechsler's motion to strike out subdivision 2. That is open to further discussion, if any.

Mr. Youngquist. Should we consider in connection with that Mr. Waite's proposed addition to (b)?

Mr. Holtzoff. Why not consider Mr. Wechsler's?

Mr. Youngquist. They involve exactly the same subject matter.

Mr. Wechsler. Mr. Chairman, might it help in the consideration of this if instead of moving to strike (c) (2) I move that the question be referred back to the Reporter for further consideration? my purpose being to achieve a result under which a judgment will be affirmed if the only vice is that the statute

was wrongly cited, my further purpose being to adopt any proper regulation for the trial, for notice to the defendant, especially in the case of regulations.

That further study may be deemed to be wise, it seems to me, rather than to simply to operate on the text. We have got a problem here that requires attention.

Mr. Dean. Second the motion.

Mr. Medalie. I go along with it, provided that when we do take care of this business about informing counsel--

Mr. Robinson. You want those words in about the time limit, that the court is only authorized before trial?

Mr. Seth. At or before trial.

Mr. Medalie. I do not think you need that here, but the first thing is to get this out. The next thing to do is, either now or later, to make provision for supplying the defendant with information as to regulations and rules.

Mr. Holtzoff. Isn't that all taken care of by Mr. Wechsler's suggestion?

Mr. Youngquist. Yes.

Mr. Holtzoff. I think it is.

Mr. Medalie. I did not understand it that way.

Mr. Youngquist. Yes.

The Chairman. Mr. Waite?

Mr. Wechsler. I think Mr. Waite's point would be covered by my suggestion, Judge Crane.

The Chairman. I wonder if he would be willing to write out what he has, here.

Mr. Wechsler. He has written it here, and I will read it to the Committee if I can make out his handwriting.

The Chairman. Have him write it out and submit it to the Reporter, if he can do that. He is absent, but if he will, we will have him write out what he has suggested and submit that to the Reporter and see whether it has suggestions to be adopted.

Mr. Wechsler. Yes.

(Mr. Waite later wrote out a memorandum containing his suggestions and submitted them to the Reporter, Mr. Robinson.)

Mr. Seth. It is understood, I take it, that the last three lines, 45, 46, and 47, are to be retained in principle?

Mr. Wechsler. Yes.

The Chairman. Now we come to (3). Will you read that.

Mr. Robinson. (reading)

"Amendment of Information by Adding a Defendant. The court is authorized to amend the information at any time before trial, upon cause shown by the United States attorney, by adding a defendant or defendants."

I take it that as a matter of style you would wish to make the same suggestion Mr. Youngquist made a minute ago, and say, "The court may amend"?

Mr. Holtzoff. No, I think it ought to be, "The court may permit the information to be amended." It would be counsel that does the amending, I think.

Mr. Medalie. That is right. Why limit it, in the case of informations, or to adding a defendant or defendants, in view of the fact that an information is exactly of the same nature as a complaint in a civil action?

Mr. Robinson. Would you wish to add "complaint" there?

Mr. Medalie. No, I don't mean that. I mean, why not permit any legitimate amendment of an information which you would admit

of a pleading in a civil case? because your information is practically of that character. It is not the act of a grand jury which gives it sanctity.

Mr. Robinson. I would be willing, but I thought you or the other members of the Committee would not be willing to go that far.

Mr. Youngquist. I think we should also include the complaint with the information.

Mr. Robinson. Yes.

Mr. Medalie. My point is that we deal with this the same as if it were a pleading in a civil case.

Mr. Glueck. There being no obstacle, let them add anything.

Mr. Medalie. Anything that is just.

Mr. Dean. Strike out everything after the comma in 50.

Mr. Holtzoff. No, I think we should strike out the words of line 50, as well, because the occasions might arise making amendment desirable during a trial.

Mr. Youngquist. Yes.

Mr. Robinson. I think the Committee turned that down at the September meeting.

Mr. Dean. That is pretty late notice to a man that he is going to be--

Mr. Robinson. I think the record shows that you turned that down, but if you are going to change your mind on it now it is all right with me.

Mr. Holtzoff. I think we might reconsider it. Hope so, anyway.

Mr. McClellan. You could not amend the information by adding a party defendant at the trial.

Mr. Burke. That is pretty late notice, I think.

Mr. Holtzoff. No, but if you are going to have general permission to amend, it seems to me you ought not to limit it to before the trial.

Mr. Glueck. Why not say, "by adding a defendant or defendants, before or during trial"?

Mr. Holtzoff. Why not just run 49, standing alone, and strike out lines 50 and 51? Why would that not be sufficient?

Mr. Glueck. I suppose so.

Mr. Holtzoff. The court could permit the information or complaint to be amended at any time.

Mr. Dean. But the word just before, I think, has to do with parties, that you can amend by adding a party. Do you want to amend it at any time?

Mr. Holtzoff. You can leave that to the discretion of the court.

Mr. Seasongood. The court would not amend after the trial has begun, by adding a party.

Mr. Holtzoff. No, I couldn't conceive of any court doing that.

Mr. Robinson. Might try it!

Mr. Longsdorf. Mr. Chairman, if there are going to be new defendants, they might claim the right to be indicted. They have not waived anything. I do not know that we ought to take care of that in this rule, but I would like to call it to the attention of the Committee.

Mr. Holtzoff. No, I do not think this would permit the addition of a person to an information where the information charges an infamous crime.

Mr. Longsdorf. I do not, either.

Mr. Robinson. This rule is based largely on a New York case. Mr. Wechsler has a book with the citation in it. It is a Strewl case, you will recall, in which there was a conspiracy charge against two defendants named, and the statement made that there were three unknown conspirators. The statute of limitations was about to run, and the other conspirators were discovered, and so the United States attorney was faced with the difficulty of getting all of them joined in the same indictment or for the same trial, and the opinion was by Judge Hand, in which he pointed out that the United States attorney had made a mistake in dismissing, or trying to dismiss, the first indictment against the original two named conspirators, in order that he might join them with the three, later discovered.

I am stating the facts just to show what confusion can result in cases of that kind where you cannot join defendants. The conviction was sustained, but it caused a good deal of difficulty in court, clear on up to the Circuit Court of Appeals. I just refer you to the opinion, as the courts say, rather than try to state it more exactly, but I would like to call attention to the fact that this possible joining of defendants is a provision that ought to be in our rules.

The Chairman. We agree that it is going to be restricted to just joining defendants?

Mr. Medalie. No.

The Chairman. That is the point?

Mr. Holtzoff. No.

Mr. Medalie. My proposal is that the power to amend shall be as broad as it is in civil cases.

The Chairman. That is another matter, isn't it?

Mr. Robinson. Yes.

The Chairman. Yes.

Mr. Robinson. Either another clause or a second sentence.

Mr. Holtzoff. I would like to move that we amend (c) (3) so as to read as follows:

"The court may permit the information or complaint to be amended at any time except that an amendment adding a defendant or defendants may be made only before the trial."

I think that would meet Judge McClellan's point.

Mr. Medalie. How do you amend a complaint, which is an affidavit? Somebody swears that certain facts are true.

Mr. Holtzoff. The information is sworn to, too.

Mr. Youngquist. He would make a supplemental complaint, wouldn't he?

Mr. Holtzoff. Yes.

Mr. Youngquist. Wouldn't that serve the purpose?

Mr. Medalie. I guess that would be the answer.

Mr. Holtzoff. Yes.

The Chairman. You have heard the motion. Is there any other discussion as to this subdivision (3)? Those in favor of the amendment as proposed by Mr. Holtzoff please say aye.

(The motion was duly AGREED TO.)

The Chairman. Now, (d), we come to, "Dismissal."

Mr. Seasongoed. Excuse me, did you insert something, now, about variance in here?

Mr. Holtzoff. I think the rule on "harmless error" takes care of that, does it not?

Mr. Medalie. I think it does.

Mr. Medalie. I think it does.

Mr. Robinson. Well, I might say to that, Alex, it is taken care of in chapter V, on Pleas, Motions, and so forth, or perhaps on trial. At any rate, I think that can come up later, Mr. Seasongoed.

Mr. Seasongoed. All right.

The Chairman. Now we come to the Dismissal, subdivision (d). Would you mind reading it?

Mr. Robinson. (reading)

"Dismissal. The court may dismiss the written accusation upon the motion of the United States attorney, or after hearing evidence in support of the motion to dismiss or of the written accusation."

That is of course one of these subdivisions that are set up for the committee's discussion; that is, to start on. I realize that the time for dismissal or nol-pros needs to be worked out more fully than that. I simply want your views on it. I take it that first clause is clear. That amounts to nol-pros.

"The court may dismiss the written accusation upon the motion of the United States attorney\* \* \*"

Mr. McClellan. That's it.

Mr. Medalie. No. I would like to say something on that. The United States attorney files a nolle, and it is no longer any of the court's business. I know that here and there, there are some district judges who tell the clerk, "Now, don't you file this, until I pass on it," but the conduct is absolutely illegal. Today, the Government may dismiss any indictment by the filing of a nolle, and the judge has nothing to do with it.

This rule abolishes that right of the Government.

Mr. Robinson. The question is whether we abolish it. The State practice in many of the States is to require that a nolle pros cannot be granted except by consent and approval of the court.

Mr. Medalie. That is true, and that is certainly the law in New York.

The Chairman. May I interrupt you?

Mr. Waite, ~~we strike~~ out subdivision (2) on which you made suggestions to amend subdivision (b), by adding what you read, and we have dealt with it in this way. Subdivision (2) is to be rewritten, taking into consideration everything that has been said, and I would like to have you, if you will, submit to the Reporter for his consideration what you read to us.

Mr. Waite. I will read it, and the stenographer will take it, is that it?

Mr. Robinson. To save time, just write it out and hand it to us.

Mr. Waite. All right, I will do it that way.

The Chairman. Is that satisfactory to you?

Mr. Waite. Yes.

Mr. Robinson. Now, what is your suggestion?

Mr. Medalie. The nol-pros situation is this. The United States attorneys, with the possible exception of one district, today, do not file nolle pros without the approval, theoretically, of the Attorney General. Actually, whoever happens to be in charge of the particular bureau that has charge of that particular class of indictments. That is correct, isn't it?

Mr. Holtzoff. That is correct.

Mr. Medalie. My time, and that of my predecessors, is filed with nolles, regardless of Washington, and it was so understood. The reason of course is that it is a large, responsible office, and you can't stop and have other people, who do not know anything about it, go and veto the details--the conduct of a going business that is operating on a large scale.

Furthermore, the kind of people who deign to be United States attorneys in the southern district would not let anybody veto it if they wanted to do it! Is that still the rule?

Mr. Holtzoff. The rule is that, in the Southern District of New York, and in the District of Columbia. The United States attorney is not required to get authority of the Department to nol-pros.

Mr. Medalie. All right.

Mr. Holtzoff. And that is due in part at least to the large volume of business in the two districts.

Mr. Medalie. Yes. The reason in the Southern District was something else, and make no mistake about that. Well, we go on from that point.

Mr. Youngquist. Shall we leave?

The Chairman. Yes.

Mr. Medalie. As a general proposition, there is no problem, no abuse.

Mr. Holtzoff. No.

Mr. Medalie. --no lack of control; and I have never heard a scandal in connection with nolles anywhere in this country, in any administration.

(Whereupon, at 11:55 a.m., the Committee recessed until

Pendell  
ends 1:30 p.m. of the same day.)

1:30  
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AFTER RECESS

(The Committee was called to order at 2:45 o'clock

p. m., Mr. Crane acting as Chairman.)

THE CHAIRMAN: Gentlemen, shall we continue. I think we were dealing with Section D.

MR. HOLTZOFF: I move that we strike out the rule.

MR. MEDALIE: This says "After hearing evidence in support of the motion to dismiss."

THE CHAIRMAN: What do we need this section for?

MR. MEDALIE: The court may dismiss it because of motion which appears, that the indictment does not cause a crime. There are still other situations. The court may say there is no use wasting three weeks trying this case, you haven't got a case, we will just dismiss it, on motion made by the defendant. Then you have another case where an indictment has not been tried for about four years.

MR. HOLTZOFF: There is a rule, for example, about dismissing an indictment if the evidence is insufficient.

MR. MEDALIE: So there are situations covered.

THE CHAIRMAN: Any objection to striking it out?

MR. SEASONGOOD: Mr. Chairman, this raises an important question of policy; that is, whether it shall be necessary to get the approval of the judge before the indictment may be nolleed. I understand in many States it is necessary to get the consent of the judge. I have seen cases nolleed which in my opinion should not have been nolleed. I have seen some cases nolleed after intercession from Washington; also some gross income tax fraud cases.

Now, what is wrong with having the prosecutor get up and

say in open court why he wants the case nolle and letting the judge decide whether it should be nolle?

There is no doubt in my mind that your existing law is that the prosecutor may just nolle the case and the judge has nothing to say.

THE CHAIRMAN: State law?

MR. HOLTZOFF: It is just common law.

MR. SEASONGOOD: So it would be within the scope of the rules to change that if we had a mind to.

MR. HOLTZOFF: I believe that the present system has worked on the whole very well without any particular abuses because, as Mr. Medalie has pointed out, the federal prosecutor is not an independent officer, he is under the supervision of the Department of Justice, and the practice of the Department is that its consent must be obtained by the United States Attorney before any nol-pros is entered, with exception of two districts, but the Department would have the right to change the practice in those two districts if desirable; so you don't have the system of independent prosecutors who have no one to control them.

THE CHAIRMAN: I think the practice almost uniformly throughout the State courts is the indictment cannot be dismissed without the approval of the court.

MR. HOLTZOFF: Well, the federal system has worked well enough. There is no particular reason for changing it if the situation has not been abused.

MR. MEDALIE: In New York it may be dismissed only on motion made and on order of the court. You have as many independent district attorneys as there are counties. In other words, you

haven't got a Government. Over and above Government you have a lot of these officials aided and abetted by our Constitution that gives you a government without a head. You have to do it. Because some little fellow with about 3,000 votes in his county has all the power of the United States. There is no government.

MR. YOUNGQUIST: You would have those cases in the federal courts.

MR. MEDALIE: They are rare. You see, this is the part of responsible government. The district attorney is supervised, not theoretically but actually, and very generally, and is responsible to the Department of Justice. If that Department goes wrong the President has to deal with it, and if it is serious enough he gets the blame from the press and the people. You have responsible government even though it seems to be removed from the people; whereas, in the counties, for instance, in New York, you have the burdens without having a particular government. You have to have a rule like that in New York because you don't have the responsible government you have in the federal courts. It will be corrupt at times; it has been; and the people knew it.

MR. YOUNGQUIST: I had 3½ years' experience, and in thousands of cases it is open to abuse, but I think the dangers of abuse are not sufficiently great to require taking away from the Department of Justice--that is the way it really works out--the right to file a nol-pros without the consent of the court.

THE CHAIRMAN: Those in favor of striking this provision out say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary, "no."

(There was a chorus of "nays.")

THE CHAIRMAN: To make sure, suppose those in favor hold up their hands.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven. Those opposed?

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven.

MR. WAITE: Mr. Chairman, I missed a part of the discussion this morning. What would be the substitute if D is stricken out?

THE CHAIRMAN: The point is this, that the Attorney General has the right to discontinue any prosecution without the consent of the court. That is what they have been talking about. That has been the practice, the custom. They say it is the law. And the court does not now have to approve. They can dismiss it or not prosecute it without the judge's consent. Now, they say this changes the whole system, that they cannot dismiss without the court's consent.

This does not apply to motions made at the end of the case on the evidence. That will be taken care of.

MR. WAITE: I notice a great majority of the State statutes require the consent of the court.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think Mr. Medalie explained very clearly the difference between the State and the federal rule. In the federal system you have your prosecutor supervised actively, not only theoretically.

MR. GLUECK: To what extent is that so? To what extent do you review the equities? Mr. Youngquist speaks of thousands of cases. He could not possibly review thousands of cases.

MR. YOUNGQUIST: This is 3½ years. First, it was reviewed by my staff, and then it came to me.

MR. MEDALIE: How do they do it in England? The Crown prosecutes, or it discontinues the prosecution. The judges have nothing to do with it.

THE CHAIRMAN: But now things are turned about. Instead of us going back 250 years to find what they did, they are coming over here now to find out how we do.

MR. GLUECK: Mr. Chairman, one of the ways of controlling the abuse in State practice has been--and I don't think it has worked very well in our State--to require the district attorney to note on the back of the indictment the reasons for the nol-pros.

As you might expect, those reasons quickly fall into rather mechanical routine statements such as "insufficient evidence." There is nobody there to check up on whether there is sufficient evidence.

Now, one of the reforms suggested for that was to assign, say, one of the judges to the job, say, of checking up on the abuse of discretion in this matter of accepting a nol-pros, etcetera.

Now, when we turn to the federal situation here again, the question arises whether this new office of the Administrator of the Courts, which is a sort of superintendent of justice, is not in a position, together with the assistants of the Attorney General's office, to guard against abuse of this thing on

anywhere near the scale that has occurred in certain counties.

Now, we have run into that problem in several of these rules. We must not forget that we now have a federal agency whose job is to look after the processes of judgment and see whether or not certain abuses cannot be avoided. So I would like to know practically whether that new office has done anything, or would contemplate doing anything, with reference to keeping sort of a check-up on the exercise of discretion.

MR. HOLTZOFF: The jurisdiction of that office is confined solely to what might be called the business side of the courts, not to the exercise of discretion either by counsel or judges, because that would be an infringement into the judicial field.

MR. GLUECK: Well, what about the Attorney General's office in actual practice?

MR. HOLTZOFF: Well, in actual practice before the United States Attorney nol-proses a case he submits the matter to the Attorney General's office and requests permission.

Now, that is not perfunctory. He submits a memorandum summarizing the case giving his reasons, and if the reasons are not sufficient there is a check-up, so, after all, isn't this a fact, we want to change existing practice in those matters in which existing practice has developed evils or abuses or defects? There is no system of abuses or evil that has developed on any important scale so far as nol-pros in the federal court is concerned. After all, the people are afraid of giving that authority to the prosecutor in the State court because the prosecutor might be subject to improper influence. That is the only reason. And that is due to the fact that the average county prosecutor is steeped in politics in the first

place, and, in the second place, no one has any control over him. You don't have that same situation here.

MR. YOUNGQUIST: You don't have it to the same degree, perhaps.

MR. HOLTZOFF: Justice Holmes said difference of degree is sometimes equivalent to difference in principle.

THE CHAIRMAN: May I suggest that the practice of resting the power with the Attorney General has existed for a long time, and still exists, that if we are going to do it we ought to do so with the pretty firm conviction that it needs changes; and the vote here is about equally divided. Would you advocate a change under those circumstances? I suppose if you felt there was any real reason for changing it and requiring the consent of the court, that we might put this in dual form, one, the present practice, and suggest the other requiring the consent of the court, so they will open it for discussion either by the judges of the court, when we submit this to him, or by those of the bar associations who may have had experience such as stated here; or by members of Congress when submitted to them. If you were going to change the practice which has existed for so long a time, and which may meet with the opposition of the Attorney General in Congress, is there any harm in submitting both ways?

MR. ROBINSON: Well, I wonder whether we are distinguishing the difference between supervision of United States Attorneys by the Attorney General. I think we are all agreed that that has been a wise provision. Therefore, we are not considering the abolition of that plan. The only question is whether after the Attorney General has approved the nol-pros whether or

4 not the judge then shall have the power to pass on or dis-  
approve the recommendation which the United States Attorney  
then makes in his court. I am not sure yet what the federal  
judges' attitude will be. I would like to hear from Judge  
McLellan on that. I want to say that the Committee has not  
received recommendations that the present rule should be  
changed in not requiring the approval of a judge for dismissal  
or nol-pros.

As I stated to you in September, and as I stated to you  
in this letter, one of the governing principles we have  
adopted is to place full confidence in the trial judge as well  
as full responsibility. Now, if the matter of dismissal of  
prosecution is not to be left in the hands of the trial judge  
we are departing from that policy. If there is good reason  
for that departure, I think that is all right, but if we are  
departing from that rule we need to do so on full considera-  
tion.

THE CHAIRMAN: Mr. McLellan, why don't you tell us what  
you think about it?

MR. McLELLAN: I think what Mr. Robinson has so carefully  
stated is not to be applied to a situation where we are dealing  
with something started by the Government, and the question is  
whether the Government should be permitted to drop it. We  
have had this federal practice for all time. So far as I know,  
it has not been subjected to extended abuse, and if it were to  
be abused, the power to nol-pros, I don't know of any more  
effective way of bringing about such abuse than to require that  
the judge shall lend his support to a nolle prosequi. We know  
perfectly well in dealing with the United States Attorney

you become acquainted with him, you don't know the evidence on which the indictment is founded. He comes in to see you, if we have such a rule as this, he says "I would like to nol-pros this case, but the rule is that I must get your consent." Wouldn't you say to him, "What is the reason for it?" Yes, I think we would all say that. Well, he says, "Well, the evidence is insufficient. When the indictment was returned we had some evidence, but we found out that that evidence is really not to be trusted." Or if some other reason. The ordinary judge--and, we have to deal with the ordinary judge--would say, "Well, you are in a better position to deal with that than I am. I think I will give my consent to it." And so he gets it.

Then he nol-proses a case that perhaps he would not have had the courage to nol-pros except for the fact he could share the responsibility with the judge.

I think we ought to be very, very careful of changing this long-established practice. Because I think the province of the court would in many instances become perfunctory.

**THE CHAIRMAN:** Now that we have heard more discussion on this, more reasons, shall we vote again on it?

**MR. ROBINSON:** May I ask one other question.

As Mr. Medalis has said, this matter of dismissal runs all through the proceeding. If we have a general rule about it--if we strike it out here we don't have a provision on it that is as general as this provision, and my question is if we strike it out what are we going to do for a substitute? Mr. Holtzoff said there is another rule or two where nol-pros is permitted. I wish you would cite these rules.

**MR. HOLTZOFF:** I didn't say that. There are rules as to

different types of dismissals. I think the first question is, shall we strike this out, and then we can take up what shall we substitute for it.

THE CHAIRMAN: Mr. Dean.

MR. DEAN: Mr. Chairman, on the question of substitute, in view of the very realistic remarks made by Mr. Justice McLeellan, I would like to suggest this as a substitute:

A written accusation may be dismissed upon motion of the United States Attorney providing the reasons are made known at the time of dismissal. A dismissal may be made by the court at any stage of the proceeding upon good cause shown.

MR. WAITE: Would you state the reasons therefor should be entered in the record?

MR. DEAN: Well, they would be.

MR. WAITE: If "made known" means "entered on the record," I would be glad to second your motion.

MR. DEAN: That is what I mean.

MR. HOLTZOFF: I don't like the idea of the reasons being stated because that seems to insert into the rules an expression of suspicion that there might be wrongdoing, and I don't think we ought to have a statement of that kind in the rules.

MR. GLUECK: I don't agree with that. We have shown that abuses have existed.

MR. HOLTZOFF: I don't know that they have.

MR. YOUNGQUIST: I don't know of any.

MR. GLUECK: But you have not investigated all prosecutions from time immemorial.

THE CHAIRMAN: When they come in and recommend that indictments be dismissed, I require a written statement from the

district attorney of the reason so it would appear there, and it was written on the indictment and filed. Now, when anybody else came around to find out why an indictment was dismissed it saved a great deal of trouble for the district attorney or the judge. All they had to do was to send and look at the record. It was all public. It was filed right on there. And I did that.

MR. DEAN: It was protection to the prosecutor.

THE CHAIRMAN: It was protection to the prosecutor.

Because as time goes on you have that statement right there.

MR. WAITE: In addition to that it is very desirable, as a matter of statistics. I don't think it is casting any aspersions in inquiring of the district attorney the number of prosecutions that have been dismissed, and the reasons why they are dismissed.

MR. ROBINSON: I think it is protection for the Attorney General. We have just had this situation about the W.P.A. out in Indiana. Mr. Dean knows about it. So does Mr. Holtzoff. My only suggestion would be I think the United States Attorney General has had his position strengthened greatly by the fact that the reasons were stated for the dismissal. So apparently he does it anyway.

MR. HOLTZOFF: I believe the reasons should be stated in those cases, but I don't know why we should make them required rules. I don't object to having the reasons stated, but to make that a requirement is another thing.

MR. MEDALIE: I nolleed many cases, most of them inherited cases, because my predecessors nolleed only current cases, so I had a tremendous accumulation. There wasn't one of them in

which my own nolle was not attached to a paper called a recommendation, signed by one of my assistants, setting forth the facts or the law, or whatever the reason was, with fair details.

The federal nolle runs a page and a half, including, for example, the nolle of the case of the United States against Fritz von Papen, and things of that sort, giving the reason, stating where we had looked for evidence, even attaching letters showing whether the State Department had anything, the Justice Department had anything, the F.B.I. had anything. Consistently we did that.

Now, it is done anyhow.

MR. YOUNGQUIST: May I ask, was that statement filed with the court?

MR. MEDALIE: Oh, yes. Always filed with the court. And with my assistant's signature, on whom I relied. Obviously, I could not know everything. Because I had 65 assistants.

MR. HOLTZOFF: Would you make the situation compulsory?

MR. MEDALIE: Let me give the New York statute. The court may either of its own motion or on motion of a district attorney order an indictment to be dismissed. In such a case a written statement of the reasons therefor shall be made by the court and filed as a public record.

MR. YOUNGQUIST: By the court?

MR. MEDALIE: Yes. All the court need do is say, "On the district attorney's recommendation," which states all the reasons.

THE CHAIRMAN: The court states it for the record.

MR. WAITE: I have here the statute of 14 different States,

which reads this way:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order any action after indictment found or information filed to be dismissed; but in such cases the reasons of the dismissal shall be set forth in the order, which must be entered on the minutes."

THE CHAIRMAN: If the reason is given anywhere, it may be connected with the indictment.

Now, that motion by Mr. Dean--would you read it again?

MR. DEAN: The only difference between mine and the one Mr. Medalie read for New York, and Mr. Waite read for 14 States, is that under this one the district attorney, if he entered a nol-pros, would not have to get the approval of the judge. And it reads, "The written accusation may be dismissed by the court at any stage of the proceeding upon good cause shown."

MR. HOLTZOFF: Should it not say, "The United States Attorney may dismiss"?

MR. DEAN: That would be better.

MR. LONGSDORF: I don't want to prolong this and propose a rule for the exceptional case, but I have a case in mind. There was a case in the Southern District of California where several men were indicted, I think for some espionage or violation of that kind, and one of them apparently was a diplomatic agent, or semi-diplomatic agent, for a foreign government, and the district attorney nolleed the prosecution against that one and continued it against the other one, and he did not want to give any reasons why he did it, but the intimation was very, very strong that it was because of some information that came through the Department

of State. And there was a prolonged discussion at the conference over that very thing, and I think the predominant sentiment of the conference was that reasons of that kind ought not to be disclosed.

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THE CHAIRMAN: I happen to know the situation in this case. The United States Attorney was directed by the Department of Justice to nol-pros an indictment against the foreign agent. This in turn was done at the request of the State Department, and the reason the State Department was anxious not to prosecute was that the defendant had pleaded not guilty, and in order to prove the case against the defendant it would be necessary to reveal certain secrets to the defense, which would have gone to the foreign government whom the defendant represented, and the State Department felt that if the foreign government did not know these secrets they would rather forego punishing this particular defendant rather than have the information transmitted to the foreign government.

Now, all these reasons could not be stated in the nol-pros. The United States Attorney just entered the nol-pros at the direction of the Attorney General. He was confidentially informed, of course.

So there are exceptional cases where it would not be practical to enter the reasons on the record.

Now, I don't know whether you want to legislate for an exceptional case. I don't see why in a case of that kind they could not simply state the fact, for reasons of state.

MR. DEAN: The question is how fully you are going to state the reasons.

THE CHAIRMAN: Yes. It could almost appear on the face

of the indictment as to that.

MR. SEASONGOOD: May we have the advantage of hearing from the American Law Institute on it? Mr. Waite?

MR. WAITE: The rule provides both for consent of the court and the reasons of the court; either on application of the prosecuting attorney or upon its own motion it may, in its discretion, for good cause, order that a prosecution by indictment or information be dismissed. The order for dismissal shall be entered of record with the reasons therefor. No prosecution by indictment or information shall be dismissed, discontinued, or abandoned, except as provided in this chapter.

THE CHAIRMAN: Power given to the court instead of the Attorney General.

MR. WAITE: Either on application of the prosecuting attorney, or upon its own motion.

THE CHAIRMAN: Here the reasons shall be given by the Attorney General.

MR. WAITE: Mr. Dean, I understand, contemplates that the reasons shall be entered of record.

MR. HOLT ZOFF: May we have a motion?

MR. MEDALIE: May I make a comment on this dismissal by the district attorney without the consent of the judge?

I do want to point out that if a judge is corrupt or politically influenced he can do all the things the district attorney is doing, or is suspected of doing.

THE CHAIRMAN: Will you read it again?

MR. DEAN: The written accusation must be dismissed--here is the way it should read, I guess: "The written accusation may be dismissed by the United States Attorney provided the

reasons for such action are made known at the time of dismissal. The written accusation may be dismissed by the court at any stage of the proceedings upon good ground shown, good cause shown."

MR. SEASONGOOD: Is that accurate? The court enters an order, doesn't he, on the nol-pros?

MR. HOLTZOFF: No. No. The United States Attorney just files a nol-pros.

MR. YOUNGQUIST: Strictly speaking, that is the way we ought to describe it.

MR. HOLTZOFF: I wonder if you wouldn't word it, "The United States Attorney may file a nolle prosequi"?

MR. YOUNGQUIST: A statement of the reasons for such action shall be filed. Is that it?

MR. GLUECK: I think so.

THE CHAIRMAN: You could vote on it.

MR. MEDALIE: I want to see what we are going to vote on.

THE CHAIRMAN: Yes. Well, now, if we get the substance on that--

MR. HOLTZOFF: It seems to me the wording can be left to the Committee on Style.

MR. DEAN: The United States Attorney may at any time enter a nolle prosequi providing a statement of the reasons for such action are filed with the court. The written accusation may be dismissed by the court at any stage of the proceeding upon good cause shown.

MR. HOLTZOFF: It seems to me that second sentence is very ambiguous. Does that statement mean the judge may dismiss an indictment because he thinks there should be no prosecution?

MR. YOUNGQUIST: For good cause shown.

MR. HOLTZOFF: I think the second sentence ought to be out.

MR. DEAN: Suppose we just leave the first one there and I won't submit the second one for the moment.

THE CHAIRMAN: And do you understand it now?

MR. MEDALIE: I do now. My difficulty was the second one.

MR. GLUECK: May I ask the first sentence?

MR. DEAN: The United States Attorney may enter a nolle prosequi providing a statement of the reasons for same are filed with the court.

MR. McLELLAN: Would it be permissible to have added to that something to the effect that that statement shall be a part of the permanent records of the court?

MR. WAITE: That was the condition on which I seconded the motion, that it would be.

MR. MEDALIE: Haven't you language in there that makes it of record by saying "filed"?

MR. GLUECK: And made a part of the record.

MR. MEDALIE: Well, if it is filed, it is part of the record.

MR. GLUECK: Do you think it is implied in the language?

MR. MEDALIE: Oh, yes.

MR. McLELLAN: I dare say it was all right as it was.

THE CHAIRMAN: All in favor say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary minded?

(No response.)

THE CHAIRMAN: Carried.

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Now, when we come to the power of the court, there, of course, as far as I am concerned, I am up against the federal practice, of which you all know so much more about it than I do, and you will have to make suggestions on what you want to do.

MR. McLELLAN: There is a situation that Mr. Medalie called to my attention where the United States Attorney left a case stand along for years and the defendant, seeking a trial, cannot get it. I think that probably under those circumstances the court should be given the power to dismiss for want of prosecution, but that he should not have the general power to say, "I don't like this case, and it may be dismissed." I don't like the judges to have that power.

MR. GLUECK: Well, now, in the case you put, Judge, wouldn't that occur under the first part of this that we have already passed?

For instance, the United States Attorney would make out a list, say, of 200 old cases and after each one he would put, say, "Prosecution begun 8 years ago. Witnesses died or disappeared."

MR. MEDALIE: Suppose he doesn't? Suppose he just doesn't want to dismiss, he just doesn't like the defendant. That is the case the judge refers to.

MR. DEAN: It is getting more frequent, too. He makes a motion to dismiss the case. He makes a motion to set it or dismiss it. And then he can go to the C.C.A. and get a mandamus if it is not submitted. And it is frequently done now. My motion was where circumstances might arise that overlooked some

situation such as that. And it argues, possibly, for a general statement--

MR. HOLTZOFF: Well, I move at the proper place there be inserted a rule to be drafted by the Reporter to dismiss for want of prosecution if the defendant is pressing for trial and trial has been denied him.

MR. WAITE: I might say I have a specific proposal on that when we get around to it.

THE CHAIRMAN: Why don't you do it now?

MR. WAITE: I remember that the Code Committee was working on that and found a good deal of difficulty with precisely that matter. A man would be put in jail and an indefinitely long time would pass before any information was filed against him, and there was no specific provision to protect him. And in other cases he would have been indicted, and he could not bring the matter to trial. He might be out on bail, or he might be in jail, or there was no procedure, and, after a good deal of discussion, this provision was formulated:

"When a person has been committed to answer for an offense if an indictment is not found or an information filed against him for the defense within blank period after his commitment, or, when a person has been indicted or informed against for an offense, if he is not brought to trial for that offense within blank period after the indictment has been found, or information filed, the prosecution shall be dismissed upon the application of such person or the prosecuting attorney or on the motion of the court itself unless good cause to the contrary is shown, or unless the case has not proceeded to trial by defendant's consent."

MR. HOLTZOFF: I think it is a dangerous thing to set a definite time.

For instance, we have one district where you get grand jury sessions only every six months, in other districts you have it continuously. I think the defendant's rights should be safeguarded by a provision that if he is pressing for trial and a trial is denied him for a reasonable length of time, the case may dismiss the indictment.

THE CHAIRMAN: Maybe you want to have just the general statement.

MR. WAITE: This goes further. This says if an unreasonable length of time has passed, or a fixed time has passed, it must be dismissed on motion of the accused.

THE CHAIRMAN: Sometimes you cannot get a witness, sometimes you are holding off for a decision of the United States Supreme Court.

MR. WAITE: Well, if the time is made along enough--

THE CHAIRMAN: I think it should be left to the judges on that. I suggest the court have power to dismiss an indictment for failure to prosecute within a reasonable time.

MR. HOLTZOFF: I move we adopt the judge's statement as a rule to be inserted at the proper place.

THE CHAIRMAN: Not exactly in that language.

MR. HOLTZOFF: No, in a general way.

THE CHAIRMAN: With all of the criticism of the judges all of the time, really the judges in America--leave me and my court out now--I have known them all, and it is my belief they have done remarkable work. They can be trusted. Some are slow. Some are not. Some may not know much law. Some may be

irrational. But I don't know a judge that has not tried to do the right thing according to his own lights. Now, there are exceptions. Once in a great while there are exceptions, but I think the judiciary of this nation measures up to any other profession or to any other nation. Why don't we trust our judges?

MR. WAITE: I don't trust some of them, but I am perfectly willing to go along with you as far as the federal judges are concerned.

MR. McLELLAN: Would you be willing to cut the right of the judge to dismiss for want of prosecution down to cases where the defendant moves for dismissal upon that ground?

THE CHAIRMAN: Oh, yes.

MR. McLELLAN: I don't like throwing this thing around in a way that a judge can walk into a criminal case and do what he wants.

THE CHAIRMAN: Oh, yes. The defendant must move for it.

MR. NEDELIE: In connection with the dismissal of prosecutions, where no accusation is filed, there are many defendants who, as Mr. Waite has pointed out, would languish in jail and not even know what their rights are, not even have any counsel interested in them. I think there ought to be a way of safeguarding that sort of thing, and protecting those people, and the only way you will get it if the district attorney does not act is if the judge has the power to assume that responsibility, and, it ought not to be taken from him.

Now, there is another thing to be considered. In a particular district an enormous list or calendar of criminal cases may accumulate, and the district attorney do nothing about it,

and the defendants have been forgotten, some of them, but they have been under indictment. And that has happened.

Now, I think the judge should have the right and the duty to make sure that his calendar be cleaned up. If defendants' attorneys make motions, you are going to have a scandalous condition because of the failure of the judge to act because of lack of power.

MR. HOLTZOFF: But you do not have scandalous conditions today. We didn't have any scandals when you were United States Attorney.

MR. MEDALIE: There was a reason.

MR. HOLTZOFF: As a practical matter, if a criminal languishes in jail we get a memorandum from the director of the Bureau of Prisons calling attention to the fact that here is John Smith, a prisoner, in such and such a prison; he is not under indictment. He has been there so and so long, and the criminal division immediately gets on the job, and we have had two or three situations of that kind in one or two districts.

THE CHAIRMAN: They have these statistics from the Bureau of Prisons. They will follow that up, I take it.

MR. MEDALIE: But why should we write all of these rules on the basis of the presence excellence of the Department of Justice?

THE CHAIRMAN: We don't have to. We have just said there the court has power to dismiss indictments which have not been prosecuted within a reasonable time.

MR. MEDALIE: And also where there has been no indictment filed.

THE CHAIRMAN: That should be included. That will be a

separate section right in here (indicating).

MR. ROBINSON: Do you think this is the right place for it?

THE CHAIRMAN: I think this is the right place.

MR. WAITE: At the last meeting I made a motion that there be periodical reports of the prosecuting attorneys as to the status of every case. I understand there has been opposition to that from the office, the business office, the administrator of the courts.

I want to ask the Reporter, was that proposal for reports by the district attorney omitted from this draft because of the opposition? I don't find it anywhere in this draft.

MR. ROBINSON: No. There was no opposition whatever. I am trying to remember where to locate it.

MR. TOLMAN: It is in Rule 58. The provisions are drafted there. There is an alternate draft there which represents the views of the administrative office.

THE CHAIRMAN: We will come to that a little later on, Mr. Waite.

MR. WAITE: Yes. That has a direct bearing, it seems to me, on this whole matter of dismissals, because of delay. If we have such a provision the judge is in a position to know.

THE CHAIRMAN: All in favor of drafting a rule in some such form as I have stated, by the Reporter, giving the power to the court to dismiss an indictment or information that has been delayed, or any accusation that may be not prosecuted beyond a reasonable time, if you are in favor of that, say "aye."

Any objection?

MR. SETH: The objection I have is, is that the only

ground you are going to give the court? I think the broadest power should be given to the court. I have seen all kinds of judges, and I have confidence in the judges, and the judge should have control of the administration of justice in his court. I don't believe we should limit him to dismissal for want of prosecution.

THE CHAIRMAN: We have gone that far. We have to go piecemeal on it. Otherwise, we just get in general conversation. We have one rule on delay.

MR. SETH: I think the latter part of Mr. Dean's motion, I would make that as a motion.

THE CHAIRMAN: Read that again. You have read the first part of it there, Mr. Dean.

MR. DEAN: The written accusation may be dismissed by the court at any stage of the proceedings upon good cause shown.

MR. HOLTZOFF: Well, that language is so broad that it would seem as though the judge could dismiss a case merely because he thinks the case should not be tried.

MR. DEAN: Shouldn't he?

MR. HOLTZOFF: No.

MR. DEAN: If there is good cause why a case should not be tried, why shouldn't he dismiss it?

MR. HOLTZOFF: He hasn't got that power today. He has to try every case that is brought before him.

MR. DEAN: He can dismiss it two minutes after it is started.

MR. HOLTZOFF: Under that, he might dismiss because he doesn't believe in the statute.

MR. DEAN: It is broad.

MR. HOLTZOFF: It is much too broad.

MR. DEAN: Don't you have two alternates, to list the various instances in which you are going to give the judge the power to dismiss, and, on the other hand, is the other alternative making a broad conference of power upon the court to dismiss.

MR. HOLTZOFF: Today the judges have no such power.

MR. DEAN: How is that?

MR. HOLTZOFF: Today the judges have no plenary power to dismiss a case.

MR. DEAN: No, but the judge has power to dismiss it in many stages.

Don't you have two alternatives, with such limiting language--I am just thinking outloud.

MR. HOLTZOFF: If you give him plenary power, you are changing the existing law. Before changing the existing law we have got to see that there is some particular evil that we want to cure, but it seems to me that it would be a terrible thing to confer plenary power on a court to dismiss any prosecution at any time for anything that the court deems to be good cause.

MR. MEDALIE: Mr. Crane, in that connection, do you doubt that the judge has the power to effectively dismiss any prosecution without any rules? All you can say about his order dismissing the case is that he should not have made it, he had no legal authority to make it, but the order is effective, that indictment is out.

MR. McLELLAN: Is it?

MR. MEDALIE: I am sure it is.

MR. McLELLAN: Do you mean a single judge of a court by saying "This indictment is dismissed," do you say that does dismiss?

MR. MEDALIE: Oh, yes. That order is effective. That order is not a nullity.

MR. YOUNGQUIST: I don't think it ought to be.

MR. MEDALIE: I agree with you. We are not conferring plenary power with this.

MR. CRANE: A judge should be honest. No judge is going to do a thing of that kind.

MR. DEAN: A judge sometimes <sup>dismisses</sup> a case at the end of the opening statement, he sometimes dismisses a case at the opening of the government's case, he sometimes dismisses a case at the conclusion of the entire case; he sometimes reserves a ruling on a motion, then turns around and dismisses the indictment. Sometimes he will dismiss for the reason assigned by Mr. Medalie, and the thing your proposal covers, namely, that the prosecution has been delayed and the person is entitled to a speedy trial--I am anxious that we not overlook any of those good reasons.

We have an alternative, of listing them.

MR. HOLTZOFF: Well, to take care of these various contingencies, which you have eliminated, I think it is an undesirable thing to add plenary power in addition to those various contingencies. Because, after all, the experience of several hundred years of criminal cases has evolved various contingencies under which a judge can dismiss an indictment. All of those contingencies I think are now in the rules.

THE CHAIRMAN: The principal one is delay. The other one

is the fact that a case has not been made out by the prosecutor. Now, there are a lot of incidental matters, I suppose--you wouldn't call it dismissal, but a motion can be made, for instance--I don't know about the federal practice, but it would be the State--if the Attorney General should happen to be in the grand jury room while they are voting. That is a matter that can be brought before the court to set aside that indictment.

Now, if all those things are taken care of, I guess we can hold up on that general power.

Now, we come back to that Rule D. That is taken care of and Rule D is out.

MR. HOLTZOFF: Yes. And a substitute in its place.

THE CHAIRMAN: That will be the substitute. D goes out. Is that right, gentlemen? And a substitute adopted?

MR. SETH: I would like to have a vote on that general power of dismissal, Mr. Crane.

THE CHAIRMAN: Just read it again, Mr. Dean, please.

MR. DEAN: The written accusation may be dismissed by the court at any stage of the proceeding upon good cause shown.

THE CHAIRMAN: I want a vote on that.

Those in favor of that general power being given to the court, say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary minded, "no."

(There was a chorus of "nays.")

THE CHAIRMAN: Well, we have to show our hands again. Those in favor of that power being given to the court please hold up your right hand.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven.  
Now, those opposed.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven--  
where are you on this?

MR. ROBINSON: I voted the other time.

THE CHAIRMAN: It is not adopted. Seven to seven.

MR. YOUNGQUIST: Mr. Chairman, may I suggest in lieu of that, that the power be requested to see that the rules take care of all possible causes of dismissal of written accusation, in the proper place. We are discussing here merely the written accusation itself. When we get down to the point of trial then we have other causes for dismissal suggested by Mr. Dean, on the opening statement, at the conclusion of the Government's case, at the conclusion of the entire case.

THE CHAIRMAN: We are simply submitting this for the approval of three bodies, first, the bar, then the Supreme Court judges, and then the Congress, and we are divided here seven to seven. What do you think of the idea of having it put in some dual form to submit for discussion by the bar? The Reporter thinks perhaps it would be a good idea.

MR. SETH: I so move.

(The motion was seconded.)

THE CHAIRMAN: Those in favor, say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary, "no."

(There was a chorus of "nays.")

MR. MEDALIE: May I say a word on that, Judge?

THE CHAIRMAN: Wait.

Those in favor of having this put in dual form, hold up the right hand.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven, eight nine.

Well, we don't have to count the others. We will do that. And then that is perhaps a little fairer to those who feel that way about it.

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Rules on  
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Mr. Glueck. You mean, Judge, that in the final draft that we issue certain of these sections are to be drafted in the alternative?

Mr. Crane. Yes.

Mr. McClellan. My understanding is that we are doing that simply for the purpose of further discussion, and that is why I voted for it.

Mr. Medalie. If that is in, you may record me as voting "Yes." I voted "No."

Mr. Crane. You cannot put that in the final draft. I take it that we put it in for final discussion. I do not know whether it would be possible to put it in for discussion or just send it down to the bar.

Mr. McClellan. Let us see how we get along with it, first.

Mr. Seasongood. In the American Law Institute they put in "we raised this question," which they send to the bar, and I rather think that is a frank way to do it. This has been discussed, and this is the thought of the committee.

Mr. Youngquist. We have this difference: This is approved tentatively by the Supreme Court before it goes out at all.

Mr. Seasongood. As I understand it, we are going to submit it to the bar, first.

Mr. Youngquist. Only after the Supreme Court has reviewed it, not finally.

Mr. Holtzoff. The Supreme Court, my understanding is, will give permission to circulate the preliminary draft. That does not mean it approves the text of the rules, but it has to be good enough to give tentative approval or permission for

its circulation.

Mr. Crane. However it is, it will be brought up again.

Mr. Robinson. I do not think there is any doubt that we will have another meeting before even the permission of the Supreme Court is asked to circulate this.

Mr. Holtzoff. I know that in this preliminary draft the civil rules committee framed several rules in alternative form. Of course, in the final draft they had to have just one rule, but when the preliminary draft was circulated several rules were framed in alternative form. I remember a number of them specifically; for instance, the one about the service of the summons.

Mr. Crane. May I call attention to the fact that rule 48, dismissal without prejudice, of the rules of civil procedure was submitted to the bar in dual form, first as rule 48 and then as alternative rule 48, just about as long. I suppose it was because of the discussion.

Mr. Seth. They also submitted in alternative form, Judge, whether we would adopt in the federal courts your New York hip-pocket practice of not starting a suit by filing a complaint with the court. That was submitted in alternative form in the civil rules.

Mr. Crane. Let us go to (e) Waiver of indictment. Would you like to read that?

Mr. Robinson. Line 56 of rule 30, (e), Waiver of indictment:

"The accused may waive accusation by indictment in the case of a non-capital but infamous offense and may consent to have the proceeding conducted by an information.

The accused shall inform the court both in writing and in person that he is making a waiver upon the advice of named counsel, and the court shall accept the waiver only after the court is convinced that the accused is fully aware of his constitutional right and of the meaning and consequences of the waiver. The waiver may be made by the accused, and it may be accepted by the court, either in term time or in vacation. The attorney for the government may thereupon file an information against the accused and the court may arraign and accept the plea and proceed to dispose of the case, either in term time or in vacation, with jurisdiction as complete as if the proceeding had been by indictment."

2 Mr. McClellan. I have to ask a question, because I hardly know what is meant by "either in term time or in vacation" in a federal court.

Mr. Robinson. Some federal courts have terms, as I understand it, Judge.

Mr. McClellan. Well, we have terms in New York, but they go throughout the year.

Mr. Holtzoff. A term in a federal court continues until the date when the next term starts. There are no vacations.

Mr. Robinson. I suppose that the meaning there would be at times when the court is not sitting. Perhaps this approaches the discussion we had yesterday on open court, whether or not the court is conducting court only when in the court room.

Mr. Youngquist. Take, for instance, a state like Minnesota. We have six different divisions. The court is permanently located in two. Does the term in each of those

divisions continue until the beginning of the next term of that division?

Mr. Holtzoff. Yes, it does. Of course, the actual session of the court may last a week or two or three days or two weeks, but the court is open until the beginning of the next term.

Mr. McClellan. We have a provision to the effect that court is always open. I think we ought to avoid "term time" or "vacation."

Mr. Robinson. Our purpose is to say just what we want to say. At the present time, Judge, as I understand the procedure, it is that you cannot have a criminal case disposed of while the court is not in session at a particular place and time, but this rule would permit the defendant to come in and waive indictment and be charged.

This is based in part on the address of Mr. C. C. Baron made in Chicago two weeks ago, a member of the Attorney General's Committee assisting us, and he pointed out at that time how frequently a defendant will be left in jail at some place where the court is not sitting and is not available to hear his plea.

I think there is no way by which a man can be allowed to plead guilty and begin serving his term under the present procedure. So our question here is simply one of terminology.

Mr. Medalie. It means either during a stated term or at any other time.

Mr. Robinson. Yes.

Mr. Seanson. Why can't you just say "at any time"?

Mr. Medalie. That won't have reference to term, and someone will raise a question that it means at any time during a term.

Mr. Dean. Why not say "while court is in session"?

Mr. Seth. Or "at any place in the district."

Mr. Dession. That is your real problem -- finding a place where they actually are.

Mr. Robinson. As I understand, the recommendation is that this rule be modified to permit waiver and disposition by the court at any place in the district and at any time, whether or not the court is in session at that time.

Mr. McClellan. I do not see any necessity for that. If you say he may do it, he has to appear personally before the judge, anyway, under the terms of the rules.

Why not strike out line 65 where the words "term time or in vacation" appear?

Mr. Robinson. Would that satisfy the minds of counsel and the court that the court would be proceeding with jurisdiction?

Mr. Holtzoff. I would like to have the words "at any time," in order to emphasize that thought.

Mr. Robinson. At what point? At what line?

Mr. Crane. "By the court at any time."

Mr. Holtzoff. I suggest striking out "either in term time or in vacation" and substituting the phrase "at any time or at any place within the district."

Mr. Robinson. Line 65, then, following the word "court":

"The waiver may be made by the accused and it may accepted by the court at any time and at any place within the district."

Mr. Holtzoff. Yes.

Mr. Seth. I think that is largely covered, Mr. Reporter, by rule 11 (b), as we agreed on it yesterday -- what the court

can do.

Mr. Robinson. Rule 8 (c) I think is probably a bit closer, is it not, Mr. Seth?

Mr. Seth. 8 (c) and then 11 (b). "Terms" does not amount to anything.

Mr. Holtzoff. I think 11 (b) and 8 (c) probably cover this, but I thought, for the purpose of emphasis, it might be well to have it in.

Mr. McClellan. Then, is it desirable to strike out "either in term time or vacation" in lines 68 and 69?

Mr. Holtzoff. Yes.

Mr. Seth. Yes.

Mr. Medalie. You do not think we ought to put anything else in?

Mr. Crane. Is it our intention always to have the advice of a lawyer? It says that the accused shall inform the court, both in writing and in person, that he is making waiver on the advice of named counsel. Suppose he has no counsel?

Mr. Medalie. Then the court appoints one.

Mr. McClellan. He cannot give up this right without counsel.

Mr. Medalie. It is pretty much like the arrangement in the arraignment part in the Kings County Court. Persons are brought up for pleas after indictment. Many of these defendants want to plead guilty. They know they are guilty. Nevertheless, the judge in charge of these arraignments will not take a plea unless some lawyer has talked this over with him, even for five minutes, to see whether or not he ought to take a plea, and the judge picks one out of a multitude of lawyers that are around,

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and he says, "Mr. So-and-So, talk to this defendant. See if he will plead guilty. He wants to. I won't take a plea until he does talk with you."

Mr. Holtzoff. I wonder if that should be applicable to a plea of guilty, whether that should be required for a waiver of an indictment by a grand jury and consenting to prosecution by information?

In the rural districts they get a raft of liquor cases. Many of the defendants are repeaters and many of them are anxious to waive indictment and get sentenced so as to start serving their sentence. Under those circumstances should there be an affirmative requirement that counsel be assigned before there is a waiver of grand jury indictment?

Mr. Medalie. Yes.

Mr. Robinson. I think a short answer to that is that I do not believe you can get the rule through without it.

Mr. Holtzoff. I do not agree with that, because we have various circuit conferences, bar committees, all recommending a rule on waiver of indictment, and the majority of them do not suggest that there should be a requirement of advice of counsel before indictment is waived.

Mr. Medalie. Many of them do.

Mr. Robinson. Many of them do.

Mr. Holtzoff. What?

Mr. Medalie. Many do.

Mr. Holtzoff. Some do, undoubtedly.

Mr. Medalie. That is the sentiment in New York.

Mr. Holtzoff. I know that is the sentiment in New York, but New York is not a typical district.

Mr. Medalie. No, but I just give you a very large membership, that is all.

Mr. Robinson. You may notice that in the appendix of the book that you have there is a special study on waiver of indictment, showing the legal basis of this rule.

Mr. Holtzoff. With regard to the practice that you speak of in Kings County, you know that in most federal courts -- certainly that is true throughout the West and the South, or was true until the Supreme Court case of Johnson v. Zerbst -- there was not even an assignment of counsel until after the defendant pleaded.

Mr. Glueck. Is that desirable?

Mr. Holtzoff. I think that is very undesirable, and of course it is no longer permissible.

Mr. Medalie. Encourage people to think in terms of lawyers.

Mr. Glueck. I think it is desirable on its own bottom. The more we provide for the provision of counsel as far back as possible in the process, the better the rules will be, particularly in view of the temper of the times. I think these rules ought to take those protections of individuals very much into account wherever we get a chance.

Mr. Holtzoff. But this rule is in favor of the defendant and it is for the purpose of helping the defendant, rather than for the purpose of helping the court.

Mr. Crane. Is there any further discussion on (e)?

Mr. Dean. I have one suggestion, Mr. Chairman, at line 57, where it refers to "non-capital but infamous" crimes. As I read the whole section, you could not waive indictment in a

non-capital, non-infamous case.

Mr. Holtzoff. You can be prosecuted by information.

Mr. Dean. That is not the question. You provide here for information, don't you?

Mr. McClellan. What line is that, sir?

Mr. Dean. This is on line 57. Why shouldn't it be made to apply to all cases, in other words?

Mr. Holtzoff. Because this rule provides a method of waiving a constitutional right. A constitutional right to a grand jury indictment exists only in the case of infamous crime.

Mr. McClellan. I want to find out what "infamous" crime, as used here, means. Do you mean where the imprisonment is more than a year?

Mr. Holtzoff. I think the Supreme Court has described an infamous crime as a crime punishable by imprisonment in a penitentiary.

Mr. McClellan. I did not know they had defined "infamous crime." They had defined a felony.

Mr. Crane. I wanted to know about that earlier in the hearing yesterday, but I hated to expose my ignorance, so I kept quiet.

Of course, in the states we have felony and misdemeanor. A felony, which I suppose corresponds to infamy, is understood by us to be a crime for which the defendant is sent to a state prison. In a penitentiary you go for a year or longer. We made that distinction quite clear.

Mr. Glueck. I think that in the Moreland case the United States Supreme Court defined "infamous crime" as one punishable

by hard labor.

Mr. Holtzoff. That has been superseded, because the words "hard labor" are no longer used in modern statutes, and the more recent definition is "any crime punishable by sentence in a penitentiary."

4 Mr. McClellan. I have been all through it and had all kinds of trouble with it -- the question as to whether a witness to a will was disqualified because he had been committed and had been convicted of a certain crime. I think it would be much safer, not knowing much more about it, if you would make it "felony" and not "infamous crime."

Mr. Holtzoff. I wonder if you will consider the fact that the Constitution uses the phrase "infamous crime" relating to grand jury indictment?

Mr. McClellan. What else?

Mr. Holtzoff. It does not use the word "felony."

Mr. McClellan. Felony or other infamous crime.

Mr. Dession. It is the grand jury section, "infamous crime" is the only expression.

Mr. Medalie. Mr. Longsdorf found the section, 541, old Criminal Code Section 335:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies" --

exactly what you say.

Mr. McClellan. And the Constitutional provision refers not to infamous crimes primarily but to felonies.

Mr. Robinson. We have made a careful study of this, if I might get a word in here. We tried to go clear to the roots

of this, and the Constitution says "infamous crime." In every prosecution for infamous crime the defendant is entitled to indictment by grand jury.

Further, in the Moreland case and other cases it has been definitely decided that any crime punishable by hard labor is an infamous crime. Therefore, as Mr. Alexander says here, even 30 days at hard labor is an infamous crime.

Mr. Holtzoff. There is one crime which is punishable by imprisonment in a penitentiary and which is designated a misdemeanor -- embezzlement, misappropriation of funds in a bank. That is punishable by five years in the penitentiary. The statute calls it a misdemeanor.

Mr. Medalie: Isn't this what we are trying to get at? Wherever a case now can be prosecuted only by the filing of an indictment, if it is not punishable by death, we would like to arrange for this waiver.

Those are the terms in which we seek, and we can avoid getting mixed up with "felony" and "infamy."

If we speak in terms of offenses which at this time, the time of the adoption of these rules, would be punishable only if prosecuted by indictment, then the indictment may be waived, unless it is a capital offense. Then we will have no trouble about words.

Mr. Glueck. I was going to suggest that the familiar way to do these things is to refer to them as indictable offenses.

Mr. McClellan. The trouble with that is that the smaller crimes are not indictable. There are many crimes for which you can return an indictment and in which an information is all right.

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Mr. Crane. You can say "prosecuted by indictment."

Mr. Medalie. "All crimes except for the waiver herein provided for must be prosecuted by indictment, may be waived."

The judge is right.

Mr. Crane. Offenses which must be prosecuted by indictment. The defenses may be waived. But we have got other provisions here. Yesterday, when we used that word "infamous," if I did not know what it meant, why, possibly somebody else in the United States might not know, and it would not be a bad idea to have a definition.

Mr. Glueck. The Supreme Court has defined it authoritatively.

Mr. Dession. No, because there have been statutes since which complicate that. It will be ironed out.

Mr. Holtzoff. There is a fairly recent case which defines it as punishable by imprisonment in a penitentiary.

Mr. Youngquist. I am a little troubled, if I may ask a question. The Constitution, as I understand it, requires that all capital offenses and infamous crimes be prosecuted by indictment.

Do we propose to provide for waiver of indictment in infamous crimes?

Mr. Seth. Yes.

Mr. Medalie. With the consent of the defendant.

Mr. Youngquist. Oh, yes. I forgot that. I am sorry.

Mr. Dean. Why don't we say "in non-capital offenses," and leave out "infamous"?

Mr. Holtzoff. I do not like "non-capital."

Mr. Robinson. We have looked that up in the latest

Webster's unabridged. "Noncapital" is a well recognized, established term, without the hyphen. If you wish to use a term that is strictly correct, it is all right.

Mr. Holtzoff. Why don't we say "in non-capital cases"? Then it includes infamous crimes for which you have to prosecute by indictment and crimes which you do not have to prosecute by indictment.

Mr. McClellan. There is no use providing for waiver in there.

Mr. Holtzoff. No, but there is no use of putting the word "infamous" in there.

Mr. Robinson. We cannot change the Constitution.

Mr. Holtzoff. We do not use it. I do not see how we can get in trouble by leaving it out -- just in non-capital cases.

Mr. Robinson. I have a case, United States v. Moreland, which holds that a crime is infamous if punishable by imprisonment for more than one year, either with or without hard labor, or by imprisonment with hard labor. That is United States v. Moreland, 258 United States 433, in 1922. That is the latest statement of the Supreme Court on the subject.

Mr. McClellan. It seems to me that Mr. Medalie has put his finger on what we want.

Mr. Crane. Shall we leave the word "infamous" in or take it out?

Mr. Medalie. I would like to move that the provision for waiver in this subsection be in terms of crimes which are required to be prosecuted by indictment, except, of course, capital cases, and leave the language to the Committee on Style.

Mr. Holtzoff. I second the motion.

Mr. Crane. Those in favor say "Aye." The motion is carried.

Mr. Holtzoff. Mr. Chairman, I want to raise a question about the second sentence. Apparently that second sentence, the sentence beginning on line 59, contemplates that the waiver must be both in writing and oral, in person. It seems to me it would be hardly necessary to require both.

Mr. Seth. It means, I take it, that when he is brought into court he has to be questioned about the written request that he has already sent in.

Mr. Crane. I think that was discussed by us last time, and we took that view of it.

Mr. Holtzoff. If he waives in open court, why should he also waive in writing?

Mr. Youngquist. What happens -- at least up in our state -- when an information is used is that the prisoner files with the court a petition that the court direct or authorize the prosecuting attorney to file an information, and ordinarily the prosecuting attorney already has his information present, so he appears before the judge with the accused, the accused presents his petition, and the court may then inquire of him concerning it. The court then takes his order for the filing of an information, and the information is filed.

Mr. Crane. I take it it is something like an acknowledgment to a deed. You sign it and also appear in person and acknowledge it before a notary.

Mr. Robinson. That is right.

Mr. Crane. So here he signs the waiver and appears in person and acknowledges that to be his signature.

Mr. Medalie. I think it works this way, Judge. First, the judge is satisfied that the man knows what he is doing and knows what he is talking about. Then, because he has signed, he has a record.

Mr. Robinson. It takes care of Johnson v. Zerbst.

Mr. Holtzoff. I was wondering why an appearance in open court would be necessary if you had it in writing.

Mr. Medalie. It is safer. Then the man can't run out on you and deny it.

Mr. Crane. Is there any further comment on section (e)? If not, we will vote on it.

Mr. Seasongood. There is, but it is purely mechanical. You have again in line 58 "either in term time or vacation."

Mr. Crane. That has been taken out.

Mr. Seasongood. I beg your pardon.

Mr. Crane. Those in favor of section (e) as it now stands say "Aye." It is carried.

Mr. Waite. Before we pass on, there is another matter which I think ought to be added to rule 30.

Mr. Crane. I beg your pardon?

Mr. Waite. I think another matter ought to be added to rule 30, before we move on to the next rule. It is what I think is the conventional practice on the part of the courts, and it certainly ought to be the practice if it is not, and it ought to be embodied in a section of this rule.

So I propose that we add to rule 30 a provision substantially as follows:

"No judgment of conviction shall be set aside, nor shall a new trial be granted, because of any defect or

insufficiency in the written accusation or because of any variance between the written accusation and the evidence adduced, unless the court is satisfied that the judgment of conviction was not justified upon the merits of the case."

This does not have to do with appeals. I believe there might be something in appeals later. This has to do with the trial court setting aside the judgment or ordering a new trial.

Mr. Holtzoff. Rule 5, I think, covers the first part of your rule. It does not cover variance, which you also cover, but it covers the first part. That is rule 5, which we adopted yesterday.

Mr. McClellan. Isn't it broad enough to cover variance?

Mr. Waite. That is more to cover appellant procedure.

Mr. Holtzoff. No. It covers the entire field. We could perhaps insert a rule on variance in rule 5. That would be the logical place for it.

Mr. Waite. I must say that I do not think that rule 5 is expressed as emphatically as I should like to see it expressed. Rule 30 is a sort of catch-all section. It is covering all sorts of phases and aspects of the accusation. We have something about the contents, something about the form, something about dismissal, something about waiver.

That is the logical place to put in a proposition that these various possible defects shall not be ground for setting aside the judgment unless they affect the merits. I think it might very appropriately go in there specifically.

Mr. Crane. Would the last sentence of rule 5, be sufficient, do you think, Mr. Waite?

"The court shall at every stage of the proceeding disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Mr. Waite. Well, I can see that it might do so. I still think, however, that as long as we have so much in rule 30 -- all these different aspects -- it would do no harm to have that specific proposition, and have it in rule 5 in more general language.

Mr. McClellan. If you start specifying in rule 5, you  
6 have to be careful that the specifications are complete.

Mr. Holtzoff. It seems to me that rule 5 is so broad that it does not need any amplification.

Mr. Crane. Have you all looked at rule 5?

Suppose you read that again, and we will vote on it.

Mr. Waite. This would be subsection (f) under rule 30:

"No judgment of conviction shall be set aside, nor shall a new trial be granted, because of any defect or insufficiency in the written accusation or because of any variance between the written accusation and the evidence adduced, unless the court is satisfied that the judgment of conviction was not justified upon the merits of the case."

That is limited, you see, to the trial judge's activities and limited to the matters contained in rule 30, which has specifically to do with written accusation.

Mr. McClellan. Professor Waite, rule 5 is not limited to the appellate court, is it?

Mr. Waite. Rule 5 is very general and covers the whole thing, but it seems to me that as long as we are talking about

these particular matters here, it would be desirable to have a particular specification in respect to the trial judges' activities.

Mr. Holtzoff. Don't you weaken the general statement if you begin to specify following the general statement?

Mr. Waite. I would say no, when it is expressed in that form.

Mr. Holtzoff. My observation is to the contrary.

Mr. Crane. Those in favor of Mr. Waite's proposal say "aye."

Mr. Burke. I would like to ask a question. Just what phase of Rule 5 do you feel is insufficient to cover what you seek to cover by this?

Mr. Waite. I do not suggest that Rule 5 as interpreted might be insufficient, but I am afraid it might be considered as a direction to the appellate court; and here I have in mind particularly the action of the trial judge in setting aside the judgment or granting a new trial. But Rule 5 will be considered as applying after the trial judge has got through with his activities.

Mr. Crane. Have you anything else to say, Mr. Burke?

Mr. Burke. No, that is all.

Mr. Crane. All those in favor of Mr. Waite's motion say "aye."

I am getting deaf, Mr. Waite.

Mr. Waite. I said "aye," at any rate.

Mr. Crane. Well, I guess it is lost.

Mr. Waite, before we go to 31, would you want us to take up what you proposed yesterday?

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Mr. Burke. That was on 20.

Mr. Waite. That is away back.

Mr. Crane. Or shall we go ahead and wait until

Mr. Vanderbilt comes?

Mr. Waite. Go ahead.

Mr. Crane. We will go ahead to Rule 31. Do you want to read the first part?

Mr. Robinson. This is based on Rule 20 of the first tentative draft. According to your instructions at the September meeting, you wanted to combine joinder of defendants, joint or separate trials of defendants, joinder of offenses, and joint or separate trial of offenses.

Beginning at line 1, Rule 31:

"Permissive Joinder of Defendants and of Offenses.

"(a) Permissive Joinder of Defendants. 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 jointly in the same offense, whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together or from two or more acts or transactions involving the same class of crimes or offenses. If such defendants are accused in separate written accusations, instead of being accused in separate counts of the same accusation, the court may order the written accusations to be consolidated for trial."

Mr. Holtzoff. I would like to ask a question of information. What is intended to be conveyed by the phrase "same

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class of crimes or offenses?" I am not clear as to that.

Mr. Robinson. That is Section 557 of Title 18 of the United States Code. This rule is based on the old 1853 Act of the United States Code, 18 U.S.C. 557.

Mr. Holtzoff. But these rules are intended to stand on their own feet, and I am just wondering what is meant by "the same class of crimes."

Mr. Robinson. I think the way of getting these rules to stand on their own feet is to incorporate at this point this Federal statute, which has worked so successfully and which has been interpreted by the courts through all these years, and that expression "the same class of crimes or offenses" is borrowed from the language of the statute.

I asked the same question of United States Attorney  
7 McGregor of Houston, Texas, and he told me of a situation in Texas which he felt represented that classification in 557.

He said there were three defendants who, at three different places in the State of Texas, engaged in fraudulent transactions with regard to taking or getting from farmers their cotton gin receipts, and McGregor joined in one indictment all three of those transactions, on the ground that they were of the same class of crimes or offenses.

In other words, "the same class of crimes or offenses" does not necessarily mean that they all have to be felonies or that they all have to be misdemeanors and some infamous and some not infamous; but the interpretation of 557, as I understand it, by the courts would support the instances given by Mr. McGregor.

Mr. McClellan. Suppose A files a false income tax return

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and B, living within the district but in a different town, files a false income tax return. Could you join those two under the language here?

Mr. Robinson. No, sir.

Mr. McClellan. What does the language say?

Mr. Robinson. Not under this language as interpreted in 557. That is one advantage of staying within that language interpreted by the courts.

Mr. McClellan. There you have two or more transactions involving the same class of crimes or offenses.

Mr. Robinson. Yes, but isn't it true that every provision and every statute is subject to certain general qualifications and exceptions, and here I think it must be fundamental that you can't join different defendants in the same indictment. You can't have count one against A and count two against B? That is fundamental.

Mr. McClellan. But this would put into one count those two.

Mr. Dean. It is fundamental, but this language would permit it.

Mr. Seasongood. I do not think so, because this says if they are alleged to participate jointly in the same offense.

Mr. Dean. That modifies it.

Mr. Robinson. Yes.

Mr. Medalie. Answering Judge McClellan, this is conceivable: Two bootleggers who are in partnership in the bootlegging business separately make an income tax return, but each helped the other fix up the books and fake the written evidence. Both could be indicted together in one indictment: First count, A

and B filed a false return as to A; second count, A and B filed a false report as to B.

Mr. McClellan. I concede the error of my ways, because I did not carry the last part of that language to the words "participating jointly."

Mr. Holtzoff. I think we ought to have an explanation as to what we mean by the rather ambiguous statement, "same class of crimes." What is meant by "same class of crimes"?

Mr. Medalie. A and B had committed joint burglary 1, burglary 2, and burglary 3. Those can be put together. But if A and B commit a burglary, a robbery, an arson, a murder, those may not be put together.

Mr. Holtzoff. I am not questioning that. I am questioning the language of this rule. I think we ought not to use the phrase "the same class of crimes," because that requires an explanation.

Mr. Medalie. I think the examples I give you cover that.

Mr. Holtzoff. What is meant by "the same class of crimes"?

Mr. Medalie. I will tell you what I mean. You can indict acts: False return, 1936; false return, 1937; false return, 1938; false return, 1939; plus perjury for each of those returns.

Mr. Holtzoff. What is "the same class of crimes"?

Mr. Medalie. You mean it means more than the same offense?

Mr. Holtzoff. To what does that extend? What is the meaning of the term "class" as used in this connection?

Mr. Robinson. Mr. Chairman, may I ask permission at this time to introduce to you an assistant United States Attorney who has drawn a good many indictments under this

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## Section 557?

Mr. Alexander is the Assistant United States Attorney in the Southern District of Illinois, assistant to Mr. Howard Doyle, who is president of the National Association of United States Attorneys. At my request Mr. Doyle had Mr. Alexander come with us for some two or three weeks.

He has had many years of experience as Assistant United States Attorney, and some of his indictments have been before the Supreme Court on various occasions.

The Department of Justice told me, when I had Mr. Alexander with me, that we could not have a better man from the field, and I am introducing him because I know that you may have questions from time to time that you would like us to refer to him.

At my request he has been here in the room, and I would like for him to take Mr. Holtzoff's question, for example, and tell us what has been his practice with regard to this clause-- what he considers to be offenses belonging to the same class of crimes.

Mr. Holtzoff. I should like very much to have that statement, but I would like to add this for Mr. Alexander's guidance, perhaps. I think we ought to work out some language for the rules explaining what we mean by the term.

Mr. Medalie. When he tells us what he means by the term, then if the language is inappropriate, we will change it.

Mr. Alexander. The meaning is indefinite, but the thing about it is that the Federal Courts have interpreted that so often that the law is well and definitely settled. Now, I could not tell you what the term means, but I can pretty nearly

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tell you if two offenses ought to be joined.

Mr. Crane. Give us an example.

Mr. Alexander. Take all the Internal Revenue offenses that have reference to liquor. They can all be joined in one indictment. Wherever you can show joint action, you can join a number of defendants -- anyone who has jointly participated.

Take counterfeiting. That is the same class of crime. There are probably twenty different crimes of counterfeiting. They are of the same class.

Mr. Medalie. For example, you have one crime that is called counterfeiting. That is making the bad money.

Mr. Alexander. That is what counterfeiting is.

Mr. Medalie. Then you have another crime that is passing the bad money.

Mr. Alexander. Then you have counterfeiting paper currency and counterfeiting coins. There is no reason why you should not join the two, if a defendant is committing both offenses at approximately the same time.

That statute is rather old, so that wherever a word is used that has a different legal meaning, that, it seems to me, is the word that should be used.

Mr. Medalie. Can you give us some examples in connection with the liquor traffic, such as forged stamps?

Mr. Alexander. You have a bootlegger here. He is making liquor. You can charge him with operating a distillery without a bond. You can charge him with operating a distillery without filing a notice with the Collector of Internal Revenue. You can charge him with operating a distillery without having a notice posted. You can charge him with keeping liquor in a

container that does not have the proper stamp on it.

I venture to say that there are fifty of them that you can join.

Mr. Holtzoff. Mr. Alexander's statement clarifies my difficulty entirely.

Mr. Youngquist. Form No. 6 is such an indictment.

Mr. Holtzoff. Instead of "the same class of crimes or offenses," I suggest that the rule ought to read, "involving crimes or offenses of the same class."

Mr. Medalie. Let us keep the hallowed words.

Mr. Holtzoff. That is for the Committee on Style.

Mr. Medalie. I move that it be excluded from the Committee on Style and that we accept the language as set forth.

Mr. McLellan. Suppose you have an indictment like that and it is alleged in the indictment that they did this jointly, and you prove that they both did it but that they did not do it jointly, and there is no evidence that they did it jointly. Does the judge have to order a verdict for the defendants?

Mr. Robinson. May I answer that in this way, Judge? At our meeting in September that question was considered and, in the light of that meeting and our discussion, I should like to suggest that at line 4 the word "jointly" be stricken out, and in line 5, after "offense," I would insert "whether they were acting jointly or independently."

The reason I would do that is this. I think that represents what the Committee wanted me to do at the September meeting, and I think the stenographic record bears me out. You remember that your instructions were based on the Washington case of State v. Blackley, in which the facts were that

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the defendant A had illegally parked a bus so that it partly covered the highway. Defendant B came along, intoxicated, and driving in such a way that he struck the bus and killed the deceased who was coming from the other direction.

In the Blackley case the indictment joined the defendants A and B, charging them with manslaughter of the deceased. In that case the Court, by a majority in which there was a strong dissent, held that the joinder was proper.

I presented that case to this Committee, and the Committee felt that that decision was right, and instructed me to draft the rule in a way that action by the defendants, whether they were acting jointly or independently, would be sufficient basis to join them as defendants in the same indictment.

Mr. McLellan. But you are citing a case where you can fight as to whether it is joint or not, but you have got to show that the two wrongs are concurrent.

Suppose you have a case where they are neither joint nor concurrent. You allege that they are joint, and that is not proved, though the two distinct crimes are clearly shown. Haven't you got the Government into a pretty fix? Aren't you in a situation where the verdict should be ordered for the defendants?

Mr. Robinson. How about the expression "in the same offense"? They are alleged to have participated in the same offense.

Mr. Seasongood. It spoils it if you take it out.

Mr. McLellan. If you do that, you face a trial difficulty.

Mr. Dean. Isn't it "alleged to have," so if it is alleged, whether the truth later supports joint action or not, it has

9 been sufficient for the purpose of joinder?

Mr. McLellan. It is rather tough to try two separate offenses together that have no connection with each other, just because they deal with the same type of crime.

Mr. Dean. I think it might be tough.

Mr. McLellan. I do not feel at all sure of it.

Mr. Robinson. That is just the difficulty. Just how would you state the Blackley case?

Mr. McLellan. You are stating the case of a concurrent action.

Mr. Crane. Shall we try to state a case to meet every particular fact and circumstance? How do we know what that will be?

Mr. Robinson. This Committee wanted me to do that, as I understood it.

Mr. Crane. I do not think so.

Mr. Robinson. That is not a fair statement. With due deference to you, that is not quite a fair statement of what the Committee was trying to get me to do in the last meeting. It was not to meet a rare case, but it was to meet a situation which the Committee felt was typical; namely, they did not want to require that the defendants must have acted -- I think they used the word "mutually" -- jointly -- but they did say that they would like to have the rule provide in cases of that sort -- not in just that particular case, but in cases of that general type -- that there be joinder permitted, on the ground that the evidence would be substantially the same; that there could not be prejudice, or, at least, if there was prejudice against either A or B, the Court could order that the joinder be changed

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and that separate indictments be brought.

I am simply trying to do what I understood to be the wish of the Committee.

Mr. McLellan. Even if they agreed with it, you are putting a case where the acts of the two defendants concurred in bringing about the result, but you have a rule that covers all kinds of separate cases if you take out the word "jointly," and if you leave it in --

Mr. Crane. Do you think it is a good thing to take out the word "jointly"?

Mr. Robinson. I am offering that for your consideration.

Mr. Crane. If you take out "jointly," it reads, "if they are alleged to have participated in the same offense."

Mr. Robinson. And then insert "whether" --

Mr. Crane. Why do you want to insert it?

"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 in the same offense."

Now, if they participated in the same offense, they certainly can be joined.

Mr. Medalie. You have two situations. One is acting in concert, which is covered by "jointly." The other is not acting in concert and perhaps acting jointly.

Let me give you an extreme example, which you can visualize. A and B set out to kill X, each separately, not knowing of the other, and each with a different grievance. One does not know the other. Each gets himself an ax and waits in a place where X will show up, and simultaneously and in the dark, each at the same instance chops at him, and he dies.

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There has been joint but not concerted action. I think you would make a case that could go to the jury where both could be convicted.

Let us say that there were pistols instead of axes and they were a distance of a hundred yards apart, A and B never having met. I think they could be convicted on a charge of killing with a joint action.

Mr. Crane. That is not excluded.

Mr. Medalie. No. "Joint" covers all that.

Mr. Crane. "Two or more defendants may be accused jointly in one count \* \* \* if they are alleged to have participated."

Do you leave that "jointly" in there?

Mr. Medalie. Yes. "Joint" is more inclusive than "acting in concert."

Mr. Crane. "Participated jointly in the same offense."

Mr. Holtzoff. In your case they were not joint; they did not participate jointly.

Mr. Robinson. That would not cover your case.

Mr. Crane. What harm does it do? If they participated, they did act to a certain extent jointly. Whether they intended to act jointly or not, they did. I think it is refining it a little too much to take it out.

"Participated jointly in the same offense, whether the offense arose from the same act or transaction, or from two or more acts or transactions \* \* \* involving the same class of crimes or offenses."

What is the matter with all that?

Mr. Medalie. You want to know whether "participated in the same offense" covers it. Suppose you leave out the word

"jointly."

Say, two of us, each not knowing what the other is doing, pours arsenic into a man's coffee or beer. We will make it beer, because that is a Court of Appeals case. The man died because of the poison given by each. He did not die twice; he died once. One grain of arsenic from me is as good as a grain of arsenic from Mr. Holtzoff. We both participated in the act or transaction. The act or transaction is the act or transaction by which the man died. His dying is the important thing.

Mr. Holtzoff. The word "jointly" should go out.

Mr. Medalie. I do not think the word "jointly" is necessary, but they participated in the same act or transaction.

Would that cover your Washington case?

Mr. McLellan. When you get "jointly" out, then read your last three lines.

Mr. Crane. "whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together or from two or more acts or transactions involving the same class of crimes or offenses."

Mr. Holtzoff. Under that last contingency you could join two defendants, each committing, say, a separate forgery, a separate act of counterfeiting, with no connection between the two.

Mr. Crane. "Two or more defendants may be accused jointly in one count of an indictment \* \* \* if they are alleged to have participated in the same offense."

What is the object of all the rest of that, whether the offense arose out of the same act or transaction or two or more acts or transactions? If they participated, it does not

make any difference.

Mr. McLellan. But when you qualify the same offense by the last clause in the sentence, I am afraid you are getting into trouble.

Mr. Holtzoff. Why not stop after the word "offense" at line 5, and strike out the rest of the sentence?

Mr. McLellan. Will you say that again?

Mr. Holtzoff. Strike out everything after the word "offense" in line 5, and put a period after the word "offense."

Mr. Madala. Can we check that with 557?

Mr. Robinson. I have been wanting to get a word in about 557, because I think it is quite material. 557 really applies to the joinder of an offense in (c), but the same language has been applied in 31(a), with the idea that the application on joinder of offenses would be equally applicable. If it is not necessary, I think we should leave it out.

Mr. Madala. Somebody else is looking at the book now, but let me ask a question with reference to the words after "offense." Are they in 557 in any form?

Mr. Robinson. Yes. In other words, the language of 557 begins, as you see it down in (c) --

Mr. Madala. I am talking about (a).

Mr. Robinson. Let me refer to (c), because that is the answer to your question. (c) is 557 exactly:

"When there are several charges against any person for the same act or transaction," et cetera.

557 also includes (d), beginning at line 21.

All that is changed from 557 in 31 (c) is the addition of

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the words "or information" in line 19 and in line 20, because the old section 557 applied only to indictments and, in view of our extension of the use of informations, we should, of course, add "informations."

Mr. Holtzoff. Is 557 limited to joinder of offenses and not to joinder of defendants?

Mr. Robinson. We just get through saying that.

Mr. Medalis. Where do you have joinder of defendants in the existing statute?

Mr. Robinson. 557.

Mr. Medalis. Both for (a) and (c)?

Mr. Robinson. There is no statute on joinder of defendants. I misunderstood you.

Mr. Medalis. There is no statute that provides for joinder of defendants?

Mr. Robinson. There is no statute; it is common law.

Mr. Crane. Why can't we stop with "offense" and take out the rest of that sentence?

Mr. McEllan. May I ask one thing, and then I promise to keep still?

I do not see any harm, instead of putting the period after "offense," in making the rule a little more far-reaching by putting the period two lines farther down, after the word "together," and leaving out everything afterward.

Mr. Crane. I do not see that it adds anything to it.

"whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together."

If they are connected together, it must be the same

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offense.

Mr. Robinson. I favor the Judge's suggestion, because I do not think most lawyers or judges would take Mr. Medalie's case, the two-as case, for example, and say that such a case would be included up there in lines 4 and 5.

Mr. Holtzoff. I think that perhaps would be an improvement.

Mr. McLehlan. I think that makes it a little better.

Mr. Crane. "whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together."

Mr. Holtzoff. Shouldn't that be "out of" instead of "from"?

Mr. Robinson. There again we are using the language of 557.

11 Mr. Holtzoff. The civil rules use the language "out of."

Mr. Crane. Is that satisfactory? To keep the words down to "together"?

If we get rid of this section, we will then adjourn.

Mr. Holtzoff. I suggest that we just say "a written accusation" in line 3.

Mr. Crane. Why not leave it "indictment or other written accusation"?

Mr. Youngquist. The Committee on Style can take care of that.

Mr. Crane. Those in favor of the phraseology of subsection (a) as it reads down to the end of the sixth line, ending with the word "together," and the word "jointly" being taken out on line 4, and striking out the rest of the sentence, say "aye."

It is carried.

Can we get rid of the rest of the section? All in favor of that, say "aye."

Mr. McLellan. There is one trouble with that. In the last sentence you have "in separate counts," and up above we have been talking about joining in one count of an indictment.

Mr. Seth. Why not strike out all of line 9 except the last word?

Mr. Crane. "If such defendants are accused in separate written accusations, the court may order the written accusations to be consolidated for trial."

I think that is all right.

Mr. Youngquist. The same language in line 19.

Mr. Crane. Well, we will take that up later.

All right, gentlemen. That disposes of subsection (a) of Rule 31. We will stop there.

Does anybody want to continue?

Mr. Holtzoff. I move we adjourn until 8 o'clock.

Mr. Crane. I will come at 8 o'clock if you all promise to be here.

(Thereupon, at 5 o'clock p.m., a recess was taken until 8 o'clock p.m.)

EVENING SESSION

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(The Committee reconvened at 8 o'clock p. m., upon the expiration of the recess.)

The Chairman. Shall we start, gentlemen, or wait just a minute or two more?

Mr. Glueck. It was 8 o'clock that we were scheduled to resume.

Mr. Robinson. Mr. Wechsler was very much interested in this Rule 31, that we were on.

Mr. Seasongood. We can go ahead now and come back to that later.

The Chairman. What is our next item?

Mr. Robinson. We can leave that. We can pass 31 until Mr. Wechsler comes, and in the meantime start with 32.

The Chairman. Did we approve all of 31?

Mr. Robinson. No.

Mr. McLellan. Just 31-A.

Mr. Burke. I move that Rule 32 be adopted.

The Chairman. It is suggested that we pass Rule 31 until Mr. Wechsler gets here and that we move on to Rule 32. Is there any comment on Rule 32?

Mr. Robinson. My question about that is whether the Committee feels that since this deals with dismissal, it should be placed with Dismissals, or should we leave it because it deals, too, with misjoinders. Perhaps it should be a subsection under 31.

The Chairman. Suppose we concern ourselves, Mr. Robinson, in the first instance, with the contents of it. Is there any criticism of the content?

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Mr. Longsdorf. I should like to make an observation corresponding to one I made a while ago or this afternoon.

This reads:

"Defendants may be dropped, or in proceedings by information defendants may be added, by order of the court."

Again, if the information was the result of a waiver, the additional defendants might not be willing to join in the waiver. I don't know whether or not that needs a saving clause. I am just suggesting it for consideration.

Mr. Robinson. Mr. Longsdorf and I have discussed that point, but so far neither of us has been able to convince the other on it.

Mr. Longsdorf. That is why I am asking for consideration.

Mr. Robinson. At present I feel that we have the question taken care of. The point goes back to what has been said about the Bayne case and other cases with regard to the changing of indictments or amending of indictments. An information, on the other hand, being the act of the United States Attorney, can be amended, as we agreed on previous rules this afternoon.

That amendment may take the form, in the case of informations, of adding or joining defendants. The first line reads:

"Misjoinder of defendants is not ground for dismissal of a criminal proceeding."

I think that is generally acceptable. It incorporates what is in the American Law Institute Code to the same effect.

In the next line -- "Defendants may be dropped" -- I take it that that is clearly within the power of the judge at any time. He may dismiss the proceeding as to one or more defen-

3 dants. Or if he proceeds by information, defendants may be added. Of course, you can't add defendants to an indictment.

Mr. Burke. Hasn't that been covered by Rule 30, at the bottom of the page? We redrafted that rule today which provides for the addition of defendants. It seems to me that it is repetitious to that extent.

Mr. Robinson. Perhaps you are right. What would go out?

Mr. Burke. The second sentence.

Mr. Robinson. Did we?

Mr. Burke. Yes. If the amendment is the way I recall it, it would provide for any amendment.

Mr. Longsdorf. I do not think the saving clause would save the right to indictment. The constitution would do that. It might save our faces.

Mr. Burke. As I recall the amendment down here -- I don't have it here -- the substance of it was that you could amend the information or complaint at any time as to any matter except as to adding or subtracting defendants.

Mr. McLellan. Except as to adding.

Mr. Burke. Was it only adding?

Mr. McLellan. That is all.

Mr. Burke. Then, it must be done prior to the trial.

Mr. Holtzoff. The text said that the court may permit the information or complaint to be amended at any time, except that an amendment adding a defendant or defendants may be made only before the trial. That is the one that we adopted earlier today.

Mr. Dean. If we are going to have anything about adding, should it not be in one place instead of in two rules?

4 Mr. Holtzoff. In view of that other rule, this seems to be repetitious. The second part of that second sentence is repetitious.

Mr. McLellan. Now the United States Attorney has the power to nolle pros. Do you want to put in that defendants may be dropped? He can nolle pros as to certain defendants, can't he, under the other rule?

Mr. Robinson. Yes. I suppose the reason for our placing it here would be that we are trying to consider the correction of misjoinder, which follows in the first sentence, suggesting expressly to the Court that if there has been misjoinder, while he may not dismiss, still he may drop a defendant or defendants who have been improperly joined.

Mr. McLellan. Then, why not put a period there and drop the rest of the sentence?

Mr. Robinson. In other words, put a period after "dropped"--

Mr. Holtzoff. I don't think you need that there, because it is covered by the prior rule.

Mr. Robinson. I was just about to read what goes out.

Mr. Glueck. What goes out?

Mr. Robinson. May we take care of Mr. Youngquist's suggestion?

The heading of Rule 32 is:

"Misjoinder and Non-Joinder of Defendants."

In that case you can't say you will drop the defendants.

Mr. Youngquist. Is there such a thing as non-joinder of defendants in criminal proceedings?

Mr. Holtzoff. There is not.

2 Mr. Youngquist. It seems to me that that could apply only

5 to failure to include necessary parties in a civil suit. I think that that "non" should come out.

Mr. Robinson. What else? We would still have the problem of what to do about dropping a defendant.

Mr. Holtzoff. I don't think you need that, because the dropping is a part of other rules. I think you can dispense with that whole second sentence.

The Chairman. What other rule covers it?

Mr. Holtzoff. The rule as to nolle pros. We adopted a rule on nolle pros this afternoon.

Mr. McLellan. In this repetition it calls attention to what you can do about misjoinder. It has that advantage.

The Chairman. Might we not in the interest of brevity, if it has that purpose, cover it in a note and refer to the other rules?

Mr. Robinson. I suggest you put a period after "added" and say:

"Any proceeding against a defendant may be severed."

Mr. McLellan. I don't know what that means. What do you mean by "severed"?

Mr. Medalie. To be tried separately on the same indictment.

Mr. McLellan. If that is what it means, that is all right. I guessed that was what it meant, but I don't know whether you could do something by way of severance.

Mr. Medalie. Except give them separate trials.

Mr. Holtzoff. Haven't you another rule on separate trials?

Mr. Robinson. Yes. I think when we come to that, we can see. At the present time, I don't think we should say we should

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drop this.

Mr. Youngquist. I would suggest that the title read:

"Misjoinder and Severance."

I would strike out "of defendants."

Mr. Medalie. There isn't any such thing that anybody can be agreed about in connection with non-joinder.

The Chairman. Well, this reads:

"Misjoinder and Non-Joinder of Defendants. Misjoinder of defendants is not ground for dismissal of a criminal proceeding."

Is there any objection to it thus far?

(There was no response.)

The Chairman. Going on:

"Defendants may be dropped \* \* \*"

Whether that is necessary will depend on another rule.

Mr. Robinson. Perhaps so.

Mr. Medalie. That is something else. A may object to being tried with B. B may object to being tried with A. Nevertheless, if they have not been properly joined, each may be tried separately. Therefore, with the exclusion of the second sentence you have a particular situation -- and very particularly where you safeguard the defendant's right in another section -- to require a severance in the interest of justice.

Mr. Holtzoff. You mean you cannot drop a defendant in a criminal case.

Mr. Youngquist. Dismiss as to him. That is what you really do.

Mr. McLellan. You just nolle pros, if you want to, or

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you can hold him and try him later.

The Chairman. Is there a motion to strike the second sentence?

Mr. Heltzoff. I so move.

The Chairman. It has been seconded. All those in favor say Aye; those opposed, No. It is unanimously carried.

What about the last sentence? The question is whether that does not come in some subsequent rule.

Mr. Robinson. Mr. Medalie suggested that it was not covered by a later rule because it is covered here.

Mr. Medalie. In other words, where there has been misjoinder, the Court can cure the error by giving the man a separate trial rather than by taking action against the accusation.

The Chairman. May I suggest, for the Committee on Style, that as to the last sentence it be recast in the active voice?

Mr. Dean. And that it refer to the subject of misjoinder. As it is now stated, it is pretty broad.

Mr. Robinson. And to say, "may be granted a separate trial by the Court."

Mr. Medalie. The word "severed" covers it.

Mr. Robinson. I know it covers it, but it is technical.

Mr. Medalie. But everybody who practices Federal criminal law knows the meaning of the word "sever." That is, he is not tried with other defendants and expects on the basis of statistics that he will never be tried, but he may be.

The Chairman. On the rule as amended, are there any further remarks? If not, all those in favor of the rule as amended will say Aye; those opposed, No. It is carried unan-

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imously.

We will now go back to Rule 31. I understand that Mr. Wechsler had some question about Rule 31(a).

Mr. Wechsler. My question, Mr. Chairman, related to the words in line 3, "in one count." It seemed to me that there was no reason why the accusation of more than one defendant in the same written accusation should have to be put in one count, and I don't know whether it was the Reporter's intention to limit this permissive joinder to the case where you were dealing with one count, or whether it was his intention to permit it for one count and a fortiori for several counts, but I think it should be made clear.

Mr. Glueck. In a single count.

Mr. Wechsler. There are really two separate problems: joinder in one accusation, and secondly, joinder in one count. I am not sure we need even address ourselves to joinder in one count.

Mr. McLellan. Why not call it "in a single count"?

The Chairman. Does that meet what you have in mind, Mr. Robinson?

Mr. Robinson. Not quite. The difficulty there was, you will see, in trying to use very few words in expressing this idea that you might have an indictment in which there is only one count. That is, it is not called one count; nevertheless it would be just one indictment. Certainly in that case you would wish the defendants to be accused jointly.

Then, if you have an indictment which has two or more counts, you likewise would wish to provide that in either of those counts or in both of them you could join two or more

9 defendants.

After talking to Mr. Wechsler about this two hours ago, I thought that possibly this would take care of it.

3 Mr. Wechsler. Two or more defendants may be accused jointly in -- You can't say "a single indictment" or "an indictment having only one count," because that is difficult; that is not quite what you mean.

Mr. McLellan. "In a single count of an indictment."

Mr. Wechsler. Would that cover, Judge, an indictment that had only one count?

Mr. McLellan. Yes.

Mr. Seth. Why not leave it out altogether or else say "alleged jointly to have participated"?

Mr. Robinson. Would the reader understand that we meant that they could be joined either in one count of the indictment or in a single count?

Mr. Waite. "Two or more defendants may be accused jointly in an indictment or in any other written accusation, or in any count thereof."

Mr. Robinson. If you make it that long, I might join with someone to use "written accusation" at this point.

Mr. McLellan. That would not cover putting two defendants in a single count.

Mr. Robinson. I believe it does, as I understand Mr. Waite.

"Two or more defendants may be accused in a written accusation or in any count thereof."

Does that help, Mr. Wechsler?

Mr. Wechsler. Yes, that meets my point.

10 Mr. Robinson. Your second point had to do with the use of the term "jointly."

That raises the question, Mr. Chairman, in this type of case where you have parties acting in such a way that their joint action constitutes a single offense, but they do not intend to cooperate in bringing about that offense. There are numerous instances of that.

You will remember the case that I spoke of at our September meeting, the Pacific Highway case, reported in 70 Pacific Second, 799, a case in the State of Washington in 1937, where one of the defendants was driving along the Pacific Highway, stopped, failed to get his bus off the highway, and illegally left it so that it projected out or covered a large part of the traveled portion of the pavement.

Then the second defendant, whom I shall call B -- the first one I will call A -- drove up from the rear -- he was driving while intoxicated -- and recklessly struck the bus.

Through the illegal act of A and the illegal act of B, C, who was driving from the opposite direction on the highway, was struck and killed.

In that case -- the Blakeley case -- the Supreme Court permitted a joinder of A and B.

I tried to use a term mutually expressive, because in its opinion the Supreme Court used the language that "They acted mutually or participated mutually in the offense."

That went out, and I think properly so, after discussion by the Committee, so in this draft, in line 4, the term "jointly" is used.

Just before the evening recess the question was raised

11 whether we could not get along without "jointly." Judge McLellan suggested that if they participated in the same offense, they would have to be participating jointly.

Am I putting it correctly, Judge McLellan?

Mr. McLellan. Not exactly, but I will not take the time to go over that discussion again.

Mr. Youngquist. But not in concert.

Mr. Waite. Has anybody objected to striking out "jointly"?

Mr. McLellan. We struck out "jointly" in the third line. Now you are talking about it in the second line?

Mr. Robinson. No, it was in the fourth line.

Mr. Crane. It is not necessary where you had to participate in the act.

Mr. Holtzoff. In that Washington case they did not participate jointly.

Mr. Youngquist. As I understand it, the reason why we struck out "jointly" was to preclude the possibility of it being thought necessary that they be acting in concert.

Mr. Crane. Yes. I thought we struck that out pretty well.

Mr. Youngquist. I think it is all right.

The Chairman. Is there any motion addressed to Rule 31(a)?

Mr. Crane. We carried it.

The Chairman. All right. 31(b).

Mr. Robinson. That reads:

"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."

Mr. Holtzoff. I move that we strike out the last seven

12 words as being surplusage:

"For each defendant and for the Government."

Put a period after the words "fair trial."

Mr. Robinson. I put them in -- of course, they may go out, if you wish -- but I put them in with due deliberation. I felt that all too often it might be that in the argument on the point, the whole thing would be argued as though it were only the defendant who was concerned, whereas my own experience has been that in matters of that sort the Government interest is involved as much as the defendant's.

Mr. Holtzoff. I agree with you, but I thought the words "fair trial" meant fair to everybody.

Mr. Robinson. They do, but in the actual combat in the court room I am not sure that the defendant would realize that the Government is entitled to as much consideration in this matter of joint trials as the Government really is.

Mr. Waite. I think the Reporter is right. I think it is a very wise bit of propaganda.

Mr. Medalie. We do not want propaganda in the rules.

Mr. Waite. Of course we do. That is what nine-tenths of the rules are.

The Chairman. Are there any further motions addressed to Rule 31(b)?

Mr. Medalie. I move that "for each defendant and for the Government" be stricken.

Mr. Holtzoff. That was my motion.

The Chairman. Is there any further comment on that motion? If not, all those in favor of the motion say Aye; those opposed, No.

13           The Chair is in doubt, having voted loudly himself. All those in favor will please raise their hands.

The Chair is no longer in doubt. The motion is carried.

4           Mr. McLellan. I now move that as thus deleted, (b) be approved.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of the motion say Aye; those opposed, no. The motion is carried.

Rule 31(c).

Mr. Robinson. That is: "Permissive Joinder of Offenses."

This is the exact wording of the Act of 1853, which is now in the United States Code, Title 18, Section 557:

"When there are several charges against any person for the same act or transaction, or for two or more" --  
Now, the word "acts" here has been left out in the Mimeographed sheets and should be added --

"-- acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments" --

The only change from the old Section 557 is to add: "or informations" at that point, because the old statute refers only to indictments --

"-- the whole may be joined in one indictment or information in separate counts."

The Chairman. Are there any suggestions?

Mr. Youngquist. I suggest the excision in line 19 of the phrase "instead of having several indictments or informations," in order to conform to the action we took in line 9 of Rule

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31(a).

Mr. Robinson. I do not see any connection there.

Mr. Dean. It is the same language as is used in line 9.

Mr. Holtzoff. It is surplusage.

Mr. Robinson. Here is what I really should say: I should say that I think the reason for retaining it here is just the same as it was in line 9: namely, that you do have the words of a statute there which have received almost eighty years of adjudication in Federal courts, and I do not see just why we should change that language without having some reason other than a change of style.

Mr. Holtzoff. I think that that is a very poorly worded statute.

Mr. Robinson. It has worked awfully well.

Mr. Holtzoff. I know, but there are two or three other things in the statute that I think require clarification.

In line 18 I want to address myself to the clause "which may be properly joined."

Mr. Robinson. That is right.

Mr. Holtzoff. I think that is sort of begging the question. There is no statement of what may be properly joined. That assumes something back of this rule. After all, I do not think we should perpetuate an old statute in these rules. These rules are supposed to be a statement of the entire procedure as it is going to be, and I think we ought to clarify or explain what may be properly joined.

Mr. Robinson. I should like to have the permission of the Committee again to call upon Mr. Alexander, because I know that Mr. Alexander has given very careful thought to the inclusion

15 of that clause "which may be properly joined."

Mr. McLellan. Of course, we want to hear from Mr. Alexander, but when you leave this in here, all you say, in substance, is that they may be joined if they may be properly joined.

Mr. Robinson. That is right. That is the argument that has been made about that statute for eighty years.

Mr. Holtzoff. I think we ought to state what the rule is-- what may be properly joined.

Mr. Glueck. Hasn't that now been adjudicated?

Mr. Robinson. The result of it is to say -- I think Mr. Alexander will bear me out -- that these words are not harmful; they are recognized and accepted.

Mr. Holtzoff. I don't think they are harmful. I claim that they should be explained. The mere fact that the words have been construed by a long series of decisions is no reason for not stating what the words mean, because the function of the rules is to contain within one set of covers, in so far as it is possible, a code of Federal criminal procedure.

Mr. Youngquist. It occurs to me that the preceding language, in 31(c), sets out the rule which may properly be used. We do not need any further explanation, because the preceding language itself defines that which may be joined. 31(c) is on Offenses, Mr. Chairman.

Mr. Glueck. My question was whether lines 15 to 18 really exhaust the possibilities. I agree with Mr. Holtzoff that, if possible, the rule should exhaust all the possibilities. I am just wondering whether others have arisen and been adjudicated.

Mr. Holtzoff. I think this probably exhausts it.

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Mr. Youngquist. We might ask Mr. Alexander about that.

Mr. Alexander. I think it covers everything. It has been very workable. We faced an argument on that language, the words "which may be properly joined."

That is simply a statement that you can join such offenses as would be joined at common law and has given the words no meaning in the interpretation of the statute. They said there was language in the statute and that Congress must have had something in mind, so they paid no attention to that.

Mr. Holtzoff. I move that it be stricken out.

Mr. Medalie. I second the motion.

Mr. Alexander. Although it has been interpreted as Mr. Robinson's stated.

Mr. Wechsler. Has there been an interpretation of the phrase "which may be properly joined" as distinguished from an interpretation of the statute as a whole? If there has, it seems to me we ought to know what we are throwing out before we throw it out.

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If there has not been -- if the words are mere surplusage or simply tautology -- then I think they can properly go. It occurs to me that the language might mean, in the absence of some reason why the joinder would work injustice in the particular case, a kind of general qualification. If that is so, it might be well to put such qualification in, although I would rather see one that said that in so many words.

Mr. McLellan. It looks to me -- I don't think I understood it; it was clear before -- that you are leaving in there language which says, "They may be joined if they may be joined," which, no matter what Congress has done, looks foolish for us.

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Mr. Glueck. It might mean "which for other reasons may be properly joined."

Mr. Medalie. It means that in the category recited up to that language you may have a joinder, provided over and above that mere statement of category there is some reason why they can be properly joined.

If those categories are correct, then you need nothing more. You do not need "which may be properly joined," because you provide for joinder under those conditions.

"The same act or transaction"; "two or more transactions connected together"; "two or more acts or transactions of the same class of crimes or offenses"; three cases where there may be joinders.

The Chairman. May we request the Reporter and his staff to look that up and see whether there are any other cases than those covered in lines 15 to 17, and then, subject to the report, may we proceed to vote on this motion tentatively to strike out "which may be properly joined"?

Mr. Robinson. We have already looked it up, and I might just refresh your minds on it now. There really has not been much adjudication of it, though there is a Missouri case, *Dolan vs. United States*, 137 Federal, and *Kidwell vs. United States*, 38 Appeals District of Columbia 12.

In this section, which authorizes that paragraph "When there are several charges against any person for the same act or transaction, or for two or more transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined," it is not intended by the whole phrase to limit the joinder or

18 the consolidation to charges which might have been joined at common law, but merely to vest the trial court with discretion to refuse to permit a joinder or a consolidation where it would prevent a fair trial or be an injustice to the defendant.

Mr. Wechsler. That is precisely my point. The phrase can be given the meaning of a discretion on the part of the trial court to forbid the joinder where, in the circumstances of a particular case, it may work injustice.

It is easy to think of an example of that sort. Suppose you have a series of forty or fifty charges against a particular defendant. They are all of the same class of crimes or offenses, but the thought of getting a fair trial on all of them, in view of the number, is simply fantastic under those circumstances.

Mr. Holtzoff. Does not the severance provision take care of that -- the provision as to severance or trial?

Mr. Wechsler. What do you sever?

Mr. Medalie. Mr. Wechsler has made a good point.

Mr. Holtzoff. I think it is a good point, too, but I think it is taken care of by the rule on severance.

Mr. Medalie. It depends on how sensible and capable the trial judge is. You have got to allow him to show some ability and some practical judgment.

In 1936 the State of New York adopted a statute more or less like the thing we are now discussing. The ablest criminal judge around New York, who retired a year ago, was Judge Knott, a very practical, sensible judge, who had had long experience. He would get an indictment with about forty, sixty, or ninety counts in it.

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Then, Judge Knott would say, "You have enough; you don't need to prove the other counts; in fact, I won't let you."

Knott was what was generally considered a convicting judge, nevertheless a fair one. You may still be a fair judge although a convicting judge -- a convicting judge of guilty persons.

Or if evidence was given as to many of the counts, he would say, "Now, in going to the jury, I am going to submit your six counts out of ninety-three."

In other words, what is provided here -- "which may be properly joined" -- in so far as it applies to the cases is that the discretion as to what is fair to a defendant, so as not needlessly to overwhelm, so as to be convicted of everything, is left entirely to the trial judge, even though that is not included.

As I remarked this afternoon, I do not care what we put into these rules; I know what the judge's part is in the case.

Mr. Holtzoff. If we want to convey that thought --

Mr. Medalie. Why convey it? Why don't you allow some exercise of good sense on the part of capable judges of experience, who want to be fair?

Mr. Holtzoff. "Which may be properly joined" does not convey the thought you have in mind, Mr. Wechsler?

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Mr. Wechsler. You have a clerical problem in the matter of drafting here. I agree with Mr. Medalie. This is an important problem in the way of criminal procedure. It is going to work all right. What we have to do is take the existing job and either retain it or change it. If we drop out that phrase, "which may be properly joined," if the phrase has had the meaning of vesting discretion in the trial court, then, in strictly

20 legal terms, if our action means anything, it may be taken to evince an intention to destroy discretion, which, it seems to me, is productive of litigation which won't amount to anything in the end, or it is not the right way to proceed.

Mr. Holtzoff. If we want to continue discretion -- and I do not object to that -- I think we ought to change the phraseology, so as to cure an ambiguity in that clause. I certainly think it should not stand as it now is. It should either go out or else be amended.

Mr. Wechsler. I agree with you.

Mr. Holtzoff. We are turning over a new leaf; we do not want to perpetuate poor phraseology and poor draftsmanship in these rules.

The Chairman. We are conversing around it, but we are not progressing.

Mr. McLellan. There is a motion to strike out the words "which may be properly joined."

Mr. Dean. I have one suggestion which will take care of Mr. Wechsler's problem; that is, to have Section (a); then to have Section (c) labeled (b); then take (b), which deals with "Joint or Separate Trials of Defendants," and so reword it that it covers also separate trials of the same defendant where that defendant is charged with more than one offense, which, as we have the language now, "shall be conducive to a fair trial."

Mr. Wechsler. I agree with you. That will meet the problem entirely.

The Chairman. Now, will you state that in the form of a motion?

Mr. Dean. I should like to make that in two motions:

21 First of all, that (c) be labeled (b) and that it be amended to read, in line 18, after the word "Offenses,"

"Such charges may be" --  
striking out the rest of line 19 --

"--joined in one indictment or information in a separate count."

The Chairman. All right. Now let us have your other motion.

Mr. Dean. Second, that the present (b) be labeled (c) and be amended to read, after the words "separate trials" in line 19:

"Separate trials of the same defendant, where the defendant is charged with more than one offense."

Mr. Medalie. I think what you really want to get is this--

The Chairman. Are we addressing ourselves to Mr. Dean's substitute motion?

Mr. Medalie. Yes. That, of course, deals with the original and any other alteration that may be made there?

The Chairman. That is right.

Mr. Medalie. If a man is charged in ninety counts, properly joined, according to the three categories set forth in (c), before you get to the words "which may be properly joined," and it is not fair to try him on ninety counts and he ought to be tried on only twenty-seven counts, give the Court the power in his discretion to take such action as he thinks fair in the way of cutting down the number of counts.

Now, actually the judge does not know, and he won't know until there is a trial, and only at the trial can he make that reduction. Now, if you wish expressly to give him the power

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that you know he has anyhow to cut them down, then give him the power, at the trial or otherwise, to cut down the number of counts on which a defendant has to go to trial. If we mean that, we ought to say that.

Mr. McLellan. When you cut down the number of counts, what becomes of the other counts? Are they retriable or tried later?

Mr. Medalie. That all depends.

Mr. McLellan. No defendant would stand for that. He would rather go on his whole ninety counts.

Mr. Medalie. No. I will answer that as to the legal proposition and then as to the practical one.

As to the legal proposition, if he severs all counts before testimony is taken, then there is no jeopardy. Those counts stand, and he is to be tried, if they ever try them on another occasion.

Practically, we know, as I said before, on the basis of statistics, that if there is a severance, he has one chance in a hundred of ever being tried on what remains. He will not be tried unless there is great public necessity for trying him, at least in the opinion of the prosecutor.

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Mr. Dean. Isn't that one of those instances where we want to give the trial judge power to dismiss?

Mr. Medalie. The thing I can't understand is how the trial judge, even if you gave him power, could soberly exercise it with competentness and the correctness of his judgment without knowing all about that case.

Mr. Dean. He could not; but if you gave him power to dismiss it at any time in the proceedings for good cause shown--

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Mr. Medalie (interposing). In the trial. The trial started, jury empaneled, witnesses sworn; and if either before the case goes to the jury or when it goes to the jury the judge withdraws certain counts from the consideration of the jury, there is a dismissal.

Mr. Dean. That is right.

Mr. Medalie. Whether he acted rightly or wrongly, fairly or unfairly, that is an end of those counts for all time. He has that power, even if you do not put it in here.

Mr. Holtzoff. If there is an acquittal, can't the defendant be tried on the other counts?

Mr. McLellan. No, because the trial started.

Mr. Medalie. If you want to make it specific and clear, so that there will be no question about it, though I think there is no necessity for it, you may make a provision here, by a single sentence, that, in the interest of justice or of fairness, the judge may withdraw certain of those counts, even if proved. That is what you can do. But good judges will do that anyhow, whether you put it in or not.

One of the reasons for doing it is that a judge who has tried many cases will say, "How on earth is that poor jury going to pass on ninety counts? I will make it easy for them, or I will be fair to the defendant, and submit only eight counts."

Mr. Glueck. Why can't this rather depend on "separate" in line 8? Or, "which may in fairness to the defendant be properly joined"? Or, as Mr. Youngquist has it, "which may in the judgment of the Court be properly joined"?

The Chairman. I think we should take some action on this now.

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Mr. Medalie. I think this is an important question, Mr. Chairman. I really think it is an important question, and I would like to answer the point raised by Mr. Glueck.

The Chairman. All right.

Mr. Medalie. When you ask the court to pass on what is fair in the joinder of counts in a single indictment, the court does not have the information on which to pass on it. He cannot do it unless he is at the actual trial.

As Mr. Wechsler pointed out, we are dealing with a question of what is good pleading. In dealing with good pleading, you can't decide this question of fairness in advance of the trial. Therefore, you should make no provision for it.

Mr. Youngquist. But aren't you always deciding the question of severance before trial, and doesn't that have the same character as what we are talking about?

Mr. Medalie. Yes, but when you decide the question of severance, you are not deciding the question of pleading.

Mr. Youngquist. Such pleading is all right in either case. The only question is whether it is proper under these particular circumstances to have the two counts tried together or whether they should be tried separately.

Mr. Glueck. That is right.

Mr. Holtzoff. That practice of Judge Knott's is never followed in the Federal court. Take an indictment of fifty counts. I don't understand that any Federal judge would withhold any counts from the jury, no matter how confusing it may be to leave fifty counts to the jury.

Mr. Medalie. I think Harry Anderson used to do practical things like that.

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Mr. McLellan. I don't think any judge has the right or has the power to do it. He can in a single case, when the evidence is overwhelmingly in favor of the Government, order a verdict for the defendant, and nobody can do anything about it. But he has no right to do it, even though he has power; and he has no right to say to the Government, "You have fifty counts here, but the jury, though there is evidence on all of them, will be permitted to return a verdict on one or two or three."

He is exercising a power, but he is not exercising that power rightfully, any more than he is when he orders a verdict for the defendant when he knows that there is abundant and substantial evidence for the Government against the defendant.

Our conceptions are entirely different. I have to proceed on that notion.

Mr. Robinson. As a matter of practice, Mr. Medalie has mentioned ninety counts. In *People vs. Luciano*, in an opinion affirmed by Judge Crane, there were ninety counts, and there was conviction on sixty counts. The sentence was from thirty to fifty years, which nobody thought was too much.

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Mr. Glueck. I move to amend Mr. Dean's motion, if it is possible to so move, by inserting in line 18, after the word "may," the words "in fairness to the defendant."

Mr. Holtzoff. There is still my motion ahead of that to strike out "which may be properly joined."

The Chairman. We will record each of these as substitutes, if the Committee is willing.

I will call for a vote, first, on Mr. Glueck's motion, which is to amend the latter half of line 18 to read:

"Which may in fairness to the defendant be properly

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joined."

Are you ready for the vote on that motion?

Mr. Medalie. How do you decide that?

Mr. Glueck. In the judgment of the trial court.

Mr. McLellan. We are talking about a series of indictments. Now, if they put in too much, and the judge says, "I don't think that is fair to the defendant to have so many counts," what does he do?

Mr. Glueck. It is for the purpose of avoiding a clumsy trial, as I understand it.

Mr. Holtzoff. But what is the penalty for joining too many counts under this provision?

Mr. Crane. May I say something, Mr. Chairman?

The Chairman. Yes.

Mr. Crane. I think I understand all that is being talked about: that this provision contains exactly the words of the statute. There is a question as to whether or not it is wise to continue with the words as they are. After this discussion, from which it is apparent that nobody knows what it does mean or what they want, I think it would be wise for us to continue it just as it is.

Mr. McLellan. Because we don't know what it means?

Mr. Crane. Because we can't agree.

The Chairman. Eventually you will want to vote on Mr. Holtzoff's motion.

Mr. Crane. Eventually I should like to see it just as the Reporter has it. I think after all this discussion, when no one seems to agree with anyone else as to what should go in and what should go out, and we have heard as an example what

27 some judge did with ninety counts, and we don't know who he is or why he did it, I think it is wise to let the thing stand as it has been in the law for a long time, because there must have been wiser men before we came here. It has stood for a long time, and the courts have worked under it, and worked well. Now we are talking about changing it, and we can't agree as to how we should change it.

The Chairman. There are two other possible motions that might be made. One is to refer it back to the Reporter to prepare a memorandum to be circulated to the Committee. The other is to leave it to the Committee on Style. Nevertheless, we have Mr. Glueck's motion.

Mr. Medalie. Mr. Chairman, will you indulge me for a moment? Perhaps my statement will affect one of the motions or the gentleman who made the motion.

We may accomplish what we want if after striking out the words following "which may be properly joined," say, "The court may in the interest of fairness to the defendant," to which you can add the words, "for the simplification of trial, before trial sever the counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would be satisfied with the first part, but I would not want to confer on the court the power to withdraw counts.

The Chairman. The question, as I understand it, is on Mr. Glueck's motion, which is to amend line 18 to read:

"Which may in fairness to the defendant be properly joined."

All those in favor of the motion say Aye; those opposed,



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defendant before trial sever counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would vote for that motion.

Mr. Youngquist. Will you read that again?

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Mr. Medalie. "The court may in the interest of fairness to the defendant before trial sever counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would vote for that motion if you left out the authority to withdraw counts at the trial.

Mr. Medalie. The reason I put that in was that it was pointed out to me, when I thought it could not be done, that just as you could get a severance of persons on evidence submitted to the court before the trial, so in the same way conceivably you might get a severance of counts. That is why I included that.

Mr. McLellan. That is the equivalent of ordering a verdict on certain counts.

Mr. Medalie. At the trial.

Mr. Crane. I will substitute an amendment that we leave the section prepared as it is by Professor Robinson.

The Chairman. Will you hold that a while, Judge?

Mr. Holtzoff. I move to amend Mr. Medalie's motion by striking out the authority to withdraw counts.

Mr. Medalie. At the trial.

Mr. Holtzoff. For this reason: that as Judge McLellan has so pointedly remarked, for a judge to withdraw counts is equivalent to his directing a verdict or an acquittal.

I do not believe that that should be done, because suppose the jury finds the defendant not guilty on the counts that are

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left with the jury. Yet it might have convicted the defendant on the counts the judge chose to withdraw. I think it would be arbitrary to have a judge withdraw counts from the jury when the prosecuting attorney --

Mr. Medalie. Very unrealistic.

Mr. Glueck. Do you think that the proper remedy for that-- and I take it Judge McLellan thinks so, too -- is a motion for a directed verdict?

Mr. McLellan. No, you could not have a directed verdict because there is evidence on those counts, but if you let him, in a circuitous way, direct a verdict for the defendant --

Mr. Medalie. How can you take from the jury a count on which there is evidence?

The Chairman. Do you accept Mr. Holtzoff's amendment?

Mr. Medalie. No, I don't. Nevertheless, as a practical matter, you are dealing with trials, and when there are so many counts as to be overwhelming, the judges do not take things away from the jury unless it is practical, where there is evidence enough on plenty of counts, to take away the counts that are more troublesome.

Mr. Holtzoff. The United States Attorney will consent if that is the reasonable thing to do.

Mr. Robinson. There is another point of information on Mr. Medalie's motion. He is apparently repudiating the New York statute 229-A, and I think our discussion has been unrealistic to the extent that we have not talked about an election.

Mr. McLellan. An election has nothing to do with it where there are separate offenses.

Mr. Medalie. The Court says to the District Attorney, "You

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on  
cyl.

have forty counts, so let us make it ten. Which ten would you like me to submit to the jury?"

Mr. Holtzoff. Under your rule, the judge could do the selecting.

Mr. Medalie. Practically the judge asks the district attorney, but why don't we put it in? Don't you trust the judge any more?

Mr. Robinson. Your point would not be possible in New York under 229-A. You think the restriction on the Court, which forbids the Court to require an election on more than one count, is a bad provision?

Mr. Medalie. Not bad; unnecessary. It can be done anyhow by the judge saying to the district attorney --

The Chairman (interposing). The question is called for on Mr. Holtzoff's amendment to Mr. Medalie's motion to strike from Mr. Medalie's motion that part which would give the judge power to withdraw counts.

All those in favor of the amendment to the amendment will say aye; those opposed, no. The amendment is lost.

The question is now on Mr. Medalie's motion. All those in favor of the motion, say aye; those opposed, no. The motion is lost.

Mr. Crane. I now move that we adopt (c) as it is written, because it is the only thing, apparently, that we can all read and understand.

Mr. Glueck. I do not think this states an amendment, but I would like to suggest that in the commentary of the cases Mr. Robinson report any such other cases as may be relevant to that clause "which may be properly joined."

Mr. Robinson. It will be done.

The Chairman. Are you ready for Judge Crane's motion?

All those in favor will say aye; those opposed, no.

The Chair is in doubt. All those in favor of the motion will raise their hands.

Nine.

Now those opposed.

Six.

Nine to six; the motion is carried.

Mr. Waite. I wonder if much of the trouble has not been due to the fact that there has been no provision for compulsory election between counts or severance of trials on different counts. If we do that thing, then I venture to say that this thing would be clarified.

Mr. Robinson. That is the next thing, Mr. Chairman. Provision is being made for election and has the effect of acquittal on single count.

The Chairman. We will go on to 31 (d).

Mr. Holtzoff. I suggest that at the end of line 24, in section (d), we add the words "for trial."

"the Court may order them to be consolidated for trial."

Mr. Robinson. That again is the wording of this statute of 1853.

Mr. Holtzoff. I think the statute is so old it should be changed.

Mr. Seth. Should not the letter in line 23 be "c" instead of "a"?

Mr. Robinson. Yes, that is true. That correction should be made.

Mr. Holtzoff. I move that we add the words "for trial" at the end of (d).

The Chairman. All those in favor of the motion will say aye; those opposed, no. The motion seems to be lost.

All those in favor will show their hands. All those opposed will now show their hands.

The motion is lost by a vote of four to seven.

We will now proceed to Rule 40, gentlemen.

Mr. Robinson. The point about that rule that needs to be settled or taken under consideration, first, by this committee is whether or not the provision for counsel should be emphasized by placing it in a separate chapter.

In a letter that was sent to you under date of January 8, 1942, attention was called to the point in these words:

"In regard to the proposed chapters, one question which requires the attention of the committee at the forthcoming meeting is the advisability of having a full chapter assigned to the subject of Counsel for the Defendant (Chapter IV), and another chapter assigned to the Trial Jury (Chapter VI). These two subjects are generally regarded as so essential to the preservation of individual liberties, especially in these days, that they are entitled at least to consideration for such emphasis in a Code of Federal Criminal Rules."

I am not taking sides either way, but I do wish that the committee would express itself as to the feasibility and desirability of making separate chapters for those two subjects.

Mr. Holtzoff. Don't you think that that is a matter for the Committee on Style -- the arrangement of chapters?

Mr. Robinson. The Committee on Style may well be advised

by the full committee.

The Chairman. Do you make a motion that there be such a chapter?

Mr. Robinson. There might be more than one rule on each subject. I ought to explain this further or again.

Counsel for the defendant comes into the case, as you know, or may come at various different stages, and sometimes different counsel come in at different stages. Therefore, it is difficult to follow the chronological order, the procedural order, which you specified for this draft, and place counsel in a proper consecutive or procedural point.

Therefore, it would seem that a general chapter containing as many rules as you care to provide on Counsel for the Defendant and, likewise, on Trial Jury, which does have more of a procedural point, should be separated into separate chapters, so that they would apply to the whole proceeding, and not have in it some rather arbitrary points.

That argument is not as strong for Trial by Jury, but I think the point of emphasis is just as strong for that.

In other words, it will give Congress the feeling that we can streamline these rules considerably if we will protect defendant's rights by seeing that he does have representation by counsel and, further, that trial by jury in full vigor is made available to him.

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THE CHAIRMAN: Mr. Robinson's motion is that the matter be set apart in separate chapters of the rules. All those in favor of the motion say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Opposed, "no."

Carried.

Now, on Rule 40 we have alternative rules. Do you want to outline them, Mr. Robinson, before we proceed with the consideration of either of them?

MR. ROBINSON: Rule 40, the first rule, that is an effort to qualify--you may call it that--Johnson v. Zerbst, and also Walker v. Johnston.

You will recognize the fact that as an alternate we also provide for Johnson v. Zerbst in Rule 30(E) so far as waiver of indictment is concerned. This goes a little bit further, though, than 30(E), as you will see.

It seeks to provide for counsel earlier in the proceeding than 30(E) does.

Now, alternate Rule 40 goes still further with regard to providing counsel for the defendant. In fact, you will notice it provides an alternate Rule 40(A), that it shall be the duty of the United States Commissioner acting as a committing magistrate to furnish to every person imprisoned or bailed by him for trial, copies of appended forms A and B. Failure to do so, however, shall not invalidate subsequent proceedings against the accused in the district court of the United States.

The idea that originated that recommendation came to the Committee including an article by Justice Miller, who was our host at noon, and also following those recommendations on

drafting, that was done by Mr. Alexander while here, further working with the committee, and also by further work by Mrs. Peterson of our research staff.

Now, I don't know how this plan strikes you or whether you wish to have it or not, but, briefly, the present law is, as we have experienced it in most of our average courts, that the first time counsel is mentioned is when he stands there on arraignment. The judge asks him whether he has any lawyer. The judge very effectively tells him, "If you wish to have counsel the court will provide counsel for you if you are unable to provide it for yourself," or words to that effect, or, sometimes the judge will say to some member of the bar, "You will just step outside with the defendant so you can confer with him as to what his plea should be," followed very often by the prompt return of counsel and defendant.

Now, the view that Justice Miller and the others advanced was that that is a little bit too late in the game for defendant to be getting the assistance of counsel, and that problem is placed in your hands with the suggested alternate Rule 40 with the effect that as soon as defendant has been arraigned before the United States Commissioner, if the Commissioner, acting as committing magistrate, bind him over, the Commissioner shall give him forms, which are appended here, Form A and Form B, by which the defendant may proceed at that time to inform the court of his need for counsel, or take whatever action seems proper.

The whole thing is explained in the comment on the alternate Rule 40, page 4 also.

Mr. Waite: Will you explain one thing further that I didn't get. I don't see how Alternate Rule 40 accelerates the time at

which he gets counsel appointed. That provides that counsel shall be appointed after the arraignment.

MR. ROBINSON: Yes, his arraignment before the Commissioner.

MR. GLUECK: Strictly speaking, arraignment is not before the Commissioner.

MR. ROBINSON: That is right.

MR. DEAN: How would you suggest that he be informed -- as I get it now, he would be informed after the Commissioner has bound him over.

MR. ROBINSON: In Rule 40, we do use arraignment. In Alternate Rule 40, we do not use the term "arraignment." I probably misused the word "arraignment."

MR. WAITE: Paragraph D says before the court.

MR. ROBINSON: Well, that is before the court.

MR. WAITE: That is when the court has to appoint counsel. D also says the court will assign him counsel.

MR. ROBINSON: That is on Line 21.

MR. WAITE: Yes.

MR. YOUNGQUIST: The way the Alternate works is that before the Commissioner he is merely advised of his right to have counsel. When he is arraigned before the court, he is not only thus advised but also offered counsel by assignment by the court if he is unable to engage one himself.

MR. DEAN: I don't read A that he will be advised prior to appearing before the Commissioner.

MR. SETH: Rule 20 takes care of that.

THE CHAIRMAN: Does it?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I do not see anything more in Rule 20 than

that he will be advised of his right to counsel and I should like to see Rule 40 as originally drawn with some changes that are not important that I have noted here, adopted, because you can get too much machinery.

THE CHAIRMAN: Your motion then would be to favor the principle of Rule 40 as distinguished from the Alternate Rule 40?

MR. YOUNGQUIST: That is right.

MR. HOLTZOFF: I second it.

THE CHAIRMAN: Is there any discussion on the general principle involved without getting to the exact language of Rule 40? Do you have anything further, Mr. Robinson?

MR. ROBINSON: I am not sure I understand Mr. Youngquist's reasons.

MR. YOUNGQUIST: My reason is only this, that for practical purposes it is sufficient that the committee magistrate advise the accused at the outset that he has a right to counsel. For instance, there is no obligation under the statute or otherwise for the Government to furnish counsel at that stage. That arises only at the time of the arraignment and that, too, is a really important time for him to have counsel.

MR. CRANE: It is a very salutary rule, especially if there is a law providing for compensation, but it also has abuses.

There were four men charged with murder in the first degree. Counsel had an allowance of a thousand dollars for the defendant, paid by the State of New York, whereupon the judge assigned three counsel to each of the four defendants, twelve counsel in the case, all of whom tried to examine the jury, which took about two or three weeks.

MR. HOLTZOFF: There is a bill pending now for a public

defender.

THE CHAIRMAN: You have a motion favoring the principle of Rule 40 as contrasted to Alternate Rule 40.

Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. MEDALIE: Mr. Chairman, I have some suggestions as to Rule 40.

MR. YOUNGQUIST: May I make mine first?

MR. MEDALIE: Certainly.

MR. YOUNGQUIST: I mentioned it a moment ago, that is why I would like to be first.

In Line 5, after the word "counsel" insert a comma, strike out the words "and of the advisability of having counsel, and the court shall" so it will read, "his right to counsel, give him the opportunity to obtain counsel of his own choice," strike out the word "court," and say "and inform him also that the court will assign counsel" and to the end of the paragraph.

MR. WECHSLER: Should it not carry through to the actual assignment?

MR. MEDALIE: And afterward appoint.

MR. HOLTZOFF: That is what I was going to suggest.

MR. MEDALIE: Three of us thought of it all at once.

MR. HOLTZOFF: I have some language here.

MR. MEDALIE: Let us get the point and deal with the language later.

MR. YOUNGQUIST: Before we come to that, that I think should follow after the next paragraph.

I would suggest that the next paragraph read -- and I will not ask you to take it all down -- "a defendant shall not be deemed to have waived counsel unless it shall be shown that the foregoing requirements have been fulfilled."

After that we can put in the provision for counsel.

THE CHAIRMAN: So that we do not get too much before us, is there any comment on Mr. Youngquist's suggestions?

MR. WAITE: There are several combinations I don't get.

THE CHAIRMAN: The motion is to strike from Lines 5 and 6 the words "and of the advisability of having counsel."

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: The motion is carried.

That was the first substantial change, I think, was it not?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: The rest are matters of style. The second paragraph seems to stand.

MR. WAITE: Mr. Chairman, before we get to the second paragraph, I should like to see stricken out the words "is not financially able to engage counsel." That, it seems to me, ought to come out for two reasons; in the first place, I think the counsel should be assigned if a man wants counsel, regardless of his financial responsibility, but more particularly, I do not see how the judge is ever going to determine a man's financial responsibility.

MR. HOLTZOFF: They do now.

MR. SETH: He takes his word for it.

MR. WAITE: Here is one man that has a hundred dollars a week and no family. Here is another man with a hundred dollars a week and five children. The judge would have to hold a trial to determine whether they can have counsel or not.

MR. CRANE: We have always had that. We have always asked him if he was able to pay counsel and then take his word for it.

MR. WAITE: That seems to me a rather silly proposition. If he is an honest man he may say, "Yes," although he cannot do it. Otherwise he may say "No," when he can. If you are simply taking his word for it you might as well strike the matter out. So it seems to me this ought to read something like this:

Line 9 would read: "assign counsel to represent him without expense to him if he does not desire to engage counsel for himself."

It is one step toward the public defender who does defend a man free of charge regardless of finance.

MR. HOLTZOFF: Oh, no. He only defends a man who is not able to hire counsel.

MR. WAITE: That is not what has been behind the advocacy of the public defender.

MR. HOLTZOFF: Certainly he would not assign free counsel any more than free hospitalization.

MR. GLUECK: You are wrong. Justice for the poor. That is the idea. And besides the public defender's office makes an examination of the person's financial status.

MR. WAITE: That is true but it has never been demonstrated that a man is unable to pay before he can have counsel.

THE CHAIRMAN: Is Mr. Waite's motion seconded?

MR. WAITE: It is a good motion.

MR. ROBINSON: He seconds it.

MR. DEAN: It is still a good motion.

MR. WAITE: I might say that now that that motion is over, as a matter of fact that provision was approved in principle by the American Law Institute last May.

MR. YOUNGQUIST: Well, I would not be willing as a member of this committee to approve it.

MR. WAITE: The matter was brought up and approved on that basis.

THE CHAIRMAN: Is there any discussion on the first paragraph? Any on the second?

MR. YOUNGQUIST: I have a change in the second.

THE CHAIRMAN: Yes, the change was that no defendant shall be deemed --

MR. YOUNGQUIST: "The defendant shall not be deemed to have waived counsel unless the record shows that the foregoing requirements have been fulfilled."

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: May I ask one question of Mr. Youngquist. Have you studied the language of Johnson versus Zerbst as to what the Supreme Court said should be done with regard to counsel?

MR. YOUNGQUIST: Not specifically. What I have done is take the last paragraph of Alternate Rule 40 except the statement that it must appear that the defendant voluntarily and with full knowledge of his rights waived the assistance of counsel. I do not see how the record can show that.

MR. ROBINSON: Well, don't you think it should follow pretty well the words of the court? That record has come to us.

MR. YOUNGQUIST: But here we have set out in the first para-

graph what the requirements are; the court has informed him that he has the right to counsel, has given him an opportunity to obtain counsel of his own choice; or he shall assign counsel for him.

My suggestion two says that he shall not be deemed to have waived counsel unless these prerequisites appear in the record.

Now, so far as the last word is concerned, "and further that the defendant voluntarily and with full knowledge of his rights waived the assistance of counsel," I think it is wholly impractical because you can never show that by the record. That leaves open the entire question and defeats the purpose of the record that you previously provided for.

THE CHAIRMAN: On Mr. Youngquist's motion to amend the second paragraph --

MR. LONGSDORF: Mr. Chairman, before that motion is put, may I invite Mr. Youngquist's attention and the attention of all of the committee to Rule 12, which specifies what entries must be made in the record, and perhaps Mr. Youngquist's sentence may prove to be unnecessary. Rule 12-A.

MR. YOUNGQUIST: That rule went out.

MR. LONGSDORF: It did?

MR. HOLTZOFF: Rule 12 refers only to the docket. This entry is not a docket. This is a minute.

MR. LONGSDORF: Was it intended that the docket be also a record?

THE CHAIRMAN: You will get no help from that, Mr. Longsdorf, because that was deleted.

The question on Mr. Youngquist's paragraph --

MR. WECHSLER: What is the motion?

THE CHAIRMAN: Read it again, Mr. Youngquist.

MR. YOUNGQUIST: That the second paragraph, Rule 40, shall read:

"A defendant shall not be deemed to have waived counsel unless the record shows that the foregoing requirements have been fulfilled."

THE CHAIRMAN: All those in favor of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now, there is a third paragraph suggested by Mr. Medalie.

MR. MEDALIE: Well, it was suggested by several people.

MR. HOLTZOFF: Mr. Youngquist and I have some matters here.

MR. MEDALIE: Very good. Then I will have another one.

MR. HOLTZOFF: To add the following paragraph:

"If the defendant requests the court to assign counsel to represent him or if he fails to waive the right of counsel, if it appears to the court that the defendant is unable to retain counsel, the court shall designate one or more members of the bar to act as counsel for defendant."

MR. MEDALIE: Designate counsel?

MR. HOLTZOFF: Shall designate counsel for the defendant.

MR. MEDALIE: Counsel, that says.

MR. ROBINSON: Why have "the defendant"?

THE CHAIRMAN: Read that in its amended form.

MR. HOLTZOFF: "If the defendant requests the court to assign counsel to represent him or if he fails to waive his right of counsel, and if it appears to the court that the defendant is unable to retain counsel, the court shall designate counsel."

MR. SEASONGOOD: Is unable financially.

THE CHAIRMAN: That business about being able financially is a third proviso tied up with the first section of the rule.

MR. HOLTZOFF: I thought, too, this ought to tie up ahead of the last paragraph.

MR. CRANE: What do you mean by "waive the right"?

MR. HOLTZOFF: The Supreme Court thought unless a defendant affirmatively waives the right of counsel, if he stands mute, counsel must be assigned for him.

MR. WAITE: Regardless of his financial ability to pay?

MR. HOLTZOFF: Well, if he is unable.

MR. WAITE: Well, if he stands mute --

MR. CRANE: Must he waive the right to counsel before he can have one assigned?

MR. HOLTZOFF: No, no. Unless he waives the right of counsel the court cannot go on without counsel.

MR. CRANE: But if he waives the right of counsel.

MR. WECHSLER: Mr. Dean, do you think there is anything in Johnson versus Zerbst about ability to pay?

MR. HOLTZOFF: No.

MR. WAITE: Then how can he be said to waive if he stands mute? He has only got the right to counsel if he asks for it on the ground of financial inability to pay.

MR. CRANE: All you have to do is ask him "Are you able to get counsel?" And he says, "No."

MR. HOLTZOFF: This may not be conclusive, but after the decision in Johnson against Zerbst, the department issued instructions to every United States attorney and every defendant is asked in open court whether or not he wants counsel, and unless

he affirmatively waives, they are to see that counsel is appointed for him.

MR. CRANE: What does he waive?

MR. HOLTZOFF: Waives the right of counsel.

MR. CRANE: He does not waive the right of counsel. He wants counsel. He does not waive the right to counsel. He wants counsel. He waives the right to get his own counsel, if that is what you mean, but certainly he does not waive the right to counsel when you try to get one for him.

MR. WECHSLER: Mr. Chairman, may I make a suggestion?

THE CHAIRMAN: Certainly.

MR. WECHSLER: It seems to me this rule suffers to some extent with an undue preoccupation with waiver of counsel rather than obtaining counsel.

MR. CRANE: That is the point.

MR. WECHSLER: The initial problem for us ought to be to devise a procedure calculated to provide counsel for defendant if he has not got counsel of his own choice.

Now, the waiver problem is a problem which is lumped much in departmental procedure because of the habeas corpus procedure in the past years, and I do not think the rules ought to conform to that situation. The only point certainly with respect to waiver that is involved here is that the Department has suggested the desirability of the record noting that the defendant was apprised of his rights, and the record should note that the defendant was apprised of his rights, and the rules, I suppose, should provide that the record should note that. But I do not see any necessity other than that for defining what is a waiver of counsel, or for determining when the constitutional right to counsel has or has

not been infringed. There is a terribly complex constitutional issue.

MR. CRANE: The only thing he waives is his right to hire his own counsel.

MR. HOLTZOFF: Mr. Waite, don't you agree that under Johnson against Zerbst that the court must appoint counsel unless there is a waiver?

MR. WAITE: I think it is the duty of the court to advise defendant of his right to have counsel and to provide him with counsel. The defendant may say, "I choose to appear here alone." Having been told of his rights, that procedure is valid. The record should show the judge advised the defendant of his rights.

THE CHAIRMAN: Could we secure the situation by inserting at the end of paragraph 1 the words: "and in that event the court shall assign counsel unless the defendant shall waive counsel," and then go on with our final language that he shall not be deemed to waive it unless the record shows?

MR. CRANE: Mr. Chairman, I cannot see -- maybe I am stupid about it -- the defendant waives the right to get his own counsel but if he does want counsel or does not want counsel, he does not waive counsel.

Why do we use such language as that? I do not care what the Supreme Court says. What does it mean? What do you mean by such language?

MR. HOLTZOFF: He waives his constitutional right to be represented by counsel.

MR. CRANE: Which means he cannot get his own counsel.

THE CHAIRMAN: It goes beyond that. He says, "I haven't got counsel, I haven't got the money to get one." And the judge

says, "All right, I am going to appoint one." He says, "I don't want him."

Isn't that the issue? It happened one day when I was in court in the early days. The judge said, "I will appoint Senator So and So to represent you." He said, "I would rather have a lawyer."

MR. CRANE: It happened in court once that the defendant looked at the lawyer and said, "Is he going to defend me?" They said "Yes." He said, "All right, I plead guilty."

I never heard a man say he did not want counsel, unless he was crazy, and we had to put him in the Lunatic Asylum.

MR. WAITE: If Johnson versus Zerbst said what counsel said it said, if he does not choose to engage counsel himself, I think I ought to remove my motion because with these words in, it is not in accordance with Johnson against Zerbst.

MR. CRANE: I think we ought to look at that case. So many things are included in an opinion -- you do not write an opinion with the idea of writing rules for everything. Lawyers so often think that the judge, in an opinion, means more than he really says.

MR. YOUNGQUIST: Mr. Chairman, is there a motion pending?

THE CHAIRMAN: Yes, there are two. There is the Youngquist-Holtzoff motion and the Chairman's alleged improvement of it.

MR. MEDALIE: Why don't you accept the Chairman's amendment?

MR. HOLTZOFF: Mr. Youngquist and I will accept that.

MR. YOUNGQUIST: I will accept that, yes.

THE CHAIRMAN: All right, the suggestion is, at the end of Line 10, it shall say: "In that event shall appoint counsel unless the defendant shall waive."

MR. SEYM: Would not the wording "refuse" be better?

THE CHAIRMAN: Would refuse?

MR. YOUNGQUIST: I think we ought to leave it to the committee on style.

THE CHAIRMAN: Yes. Unanimously to the committee on style. We all know what the problem is there. It is a matter of language now.

MR. CRANE: This means he waives the right to get his own counsel, that is all that means. It could not mean anything else. He waives his right to have counsel of his own.

THE CHAIRMAN: What else, Mr. Medalie?

MR. MEDALIE: This not infrequently happens that the counsel who originally was retained, or supposedly retained for the defendant, at the time of the arraignment has not been paid or has been dropped, or the counsel assigned for him, if he should be an irresponsible person does not show up at the trial. It is important that the trial go on if possible with counsel. I think the court ought to have the power -- I think it has anyhow, but it should be stated in the interest of completeness, --  
6 to designate counsel for the trial. It is done anyhow.

The case comes up, the defendant says he hasn't got a lawyer, he dropped him. Well, you have to go on. There shouldn't be any adjournment. There should not be any doubt he has the right to do it. The case should not be delayed unnecessarily for lack of counsel.

THE CHAIRMAN: Should that be in the rules?

MR. MEDALIE: I am not sure, because I think the court has the power, anyhow. The court has assigned counsel, counsel does not show up. The defendant is entitled to a trial with

counsel where he has been victimized by the negligence of counsel, he did not show up or was unable to, or the assigned counsel has forgotten about the case.

MR. CRANE: I think the rule we now have would answer.

MR. MEDALIE: No, it is only on arraignment.

MR. CRANE: If the assigned counsel did not appear, would not the power be in the court to assign other counsel?

MR. MEDALIE: Yes.

MR. CRANE: In the Federal court does defendant have a right, not being a lawyer, to defend himself?

THE CHAIRMAN: Yes.

MR. CRANE: What are you going to do about this, he says, "I don't want a lawyer." How can you make him take one if he wants to defend himself?

MR. HOLTZOFF: There is a provision there if he waives counsel.

MR. CRANE: Counsel has to be admitted to the bar. He waives counsel.

THE CHAIRMAN: We provided for waiver in our rule.

MR. SETH: There is one thing I want to ask, Mr. Chairman. I have not heard, but that bill that is pending for official reporter, that contemplates that all these matters will be taken down and made part of the record in all proceedings of this kind, does it not?

MR. HOLTZOFF: I did not hear it.

THE CHAIRMAN: The question of stenographer.

MR. SETH: That will become part of the record?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Are you sure about that?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Do you mean a stenographic reporter will take down all that? It might not pass that way.

MR. YOUNGQUIST: We have taken care of it anyway.

MR. ROBINSON: I think we have to carry our rules along through the year and watch Congress, and if the rule is completed, coordinated.

MR. CRANE: It should not be merely taken down by a stenographer but the clerk ought to make an entry in the case.

THE CHAIRMAN: I think that is contemplated.

All right. Rule 50, gentlemen.

MR. ROBINSON: We have changed Chapters here, moving into Chapter V, which has to do with arraignment, pleas, motions, and notices, and other proceedings preparatory to trial.

I believe we should take up 51. Rule 51-A.

THE CHAIRMAN: Rule 51-A, all right.

MR. SETH: That applies only to the District Court.

MR. ROBINSON: That is right.

MR. SETH: Should it not specify we abolish pleas to the United States Commissioner?

MR. ROBINSON: Did we not say District Courts?

MR. WECHSLER: Why do we say "stated" or "read."

MR. ROBINSON: That was to take into account the discussion at a former meeting. This instance has occurred, Mr. Wechsler, where a defendant in a case in which the indictment is some fifty pages long in an obstructive mood has demanded that the whole thing be read to him in toto in open court, and I suppose if he insist on that he can get it, but the rule has been provided for some recommendations that have been made on the subject to

provide that it shall be read to him, so the stated "or" is put in there to expressly provide that the court or the United States attorney can simply state to him the contents.

I think that is commonly done now, is it not?

MR. CRANE: The way we do it, we say, "Do you waive the reading of the indictment?" And counsel will say "Yes."

THE CHAIRMAN: It has been suggested though that there may be some reading.

MR. YOUNGQUIST: I think this rule should require that he be given a copy of the indictment or information.

MR. HOLTZOFF: I have never heard an indictment read, the charge is stated to the defendant and he is called upon to plead.

MR. CRANE: Is he not asked whether he waives the reading of the indictment?

MR. HOLTZOFF: Well, in many cases they don't even do that. I suppose they should. Would you insert, then, Judge McLellan, in line 3, "and should be read"?

MR. MC LELLAN: No, because I think your rule is better than the practice.

MR. MEDALIE: Say he is charged with passing counterfeit of \$3. He is charged with 13 counts.

Try to describe a particular mail fraud in a statement, if you can.

MR. WECHSLER: Mr. Chairman, may I move an amendment?

THE CHAIRMAN: Yes.

MR. WECHSLER: I move that instead of "stated or read," the word "read" be used.

MR. YOUNGQUIST: That would be worse.

MR. DEAN: I would like to put in an amendment, to have a

copy of the indictment given <sup>to defendant.</sup> / It seems to me he is entitled to that.

MR. HOLTZOFF: Well, I do not think in all these cases. Where the defendant pleads guilty, you do not want to go to the extra trouble of handing him an indictment. He does not want it.

MR. DEAN: He can give it back.

MR. HOLTZOFF: But why make it required?

7 MR. WECHSLER: I do not think a man should plead until he understands what the charge is.

THE CHAIRMAN: Isn't it fairly comprehended in the word "stated"?

MR. CRANE: Can't you trust the judge?

MR. MEDALIE: We are really fencing about words when we have in mind the reality. The reality is that any man going into court pretty well knows what he is brought there for. Now, if he does not know, of course he ought to have an opportunity to be told. We are measuring off abstractions against what we know to be the reality.

MR. YOUNGQUIST: But I think he should have a copy of the accusation.

MR. MEDALIE: It is simple enough. If I happen to be retained in a criminal case, I telephone up to the District Attorney and say, "Have you a copy of the indictment for me?" And the answer is "Yes, I am having it copied. I will see that you get one."

MR. HOLTZOFF: You take some of the courts where there might be thirty or forty liquor cases, the defendants probably all but one or two will plead guilty, and they do not want copies of the

indictment.

THE CHAIRMAN: We have two motions but neither one has a second.

MR. MEDALIE: Is there a motion to pass the rule?

MR. WECHSLER: I substitute Mr. Dean's motion as a substitute for mine, and second it.

THE CHAIRMAN: Mr. Dean's motion is that defendant be given a copy.

MR. DEAN: I think there ought to be some provision in these rules saying a man is entitled to a copy of the accusation against him.

MR. MEDALIE: Why not say "the defendant shall upon demand made to the District Attorney be furnished with a copy of the indictment." It is the District Attorney who furnishes it, not the clerk.

THE CHAIRMAN: I do not think that he ought to have to demand it.

MR. MEDALIE: He must ask for it.

MR. HOLTZOPF: Do you want that in the rules?

THE CHAIRMAN: The maker and seconder of the motion seemed to think so.

MR. MEDALIE: I accept your language.

MR. ORFIELD: The Federal statutes make provisions in certain cases.

MR. YOUNGQUIST: They ought to have that in all cases.

THE CHAIRMAN: Well, you have heard Mr. Dean's motion seconded, which is a substitute for Mr. Wechsler's motion. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No." Carried.

Is there a motion on the Section A as amended? -- It is moved and seconded that 51-A be adopted as amended. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Section B.

MR. SEASONGOOD: Do you want to cover an arraignment of a corporation? You have done it in 50. Is there any need to have it in 51?

THE CHAIRMAN: I thought we were going to go through with 51, first. Is that right?

MR. ROBINSON: Yes.

THE CHAIRMAN: May we go on to B, then?

MR. ROBINSON: B is on counsel, as you see, and is alternative to a separate chapter on counsel, and indicates we may have to have a clause of this kind.

THE CHAIRMAN: We have covered that.

MR. HOLTZOFF: This goes out, then.

THE CHAIRMAN: It is moved and seconded that this be deleted. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ROBINSON: Next, Line 14, the defendant may be arraigned, he may enter his plea, not guilty, guilty, or nolo contendere.

MR. MC ILLAN: Are you going to give him the right to plead nolo contendere?

MR. ROBINSON: That is the next clause. The court may refuse to accept a plea of nolo contendere.

MR. MEDALIE: If the defendant stands mute, a plea of not guilty shall be entered of record.

MR. SETH: He may ask for more time, but, does he get it?

MR. DEAN: That is my question. Either we should authorize the court to grant it -- in which case I do not think it belongs here --

MR. ROBINSON: It is only stated as a matter of emphasis. I will be very glad to strike it out, may enter his plea not guilty, guilty, nolo contendere -- very well. Strike it then.

MR. CRANE: Strike out what?

MR. ROBINSON: Beginning Line 14 after "arraign" strike out from there down to "may enter as his plea" in Line 16.

MR. HOLTZOFF: I like "plead" instead of "entering a plea," because it saves two words. "May plead not guilty, guilty, or nolo contendere."

MR. ROBINSON: I could say "may enter a plea of not guilty, guilty, or nolo contendere."

MR. HOLTZOFF: I like "plead."

MR. MEDALIE: The defendant does not enter that plea.

THE CHAIRMAN: No. He pleads.

MR. ROBINSON: All right. Do you wish to change that to "plead"?

THE CHAIRMAN: I think so.

MR. ROBINSON: "The defendant may plead not guilty, guilty, or nolo contendere." That is enough, is it not?

MR. HOLTZOFF: I want to ask a question, Mr. Chairman. This provides that the court may accept a plea of nolo contendere.

Now, shouldn't the plea of nolo contendere be accepted only with the consent of the United States attorney? I believe that is the usual practice, that both the court and the United States attorney must consent.

8 MR. MC LELLAN: In Massachusetts the practice is as you have stated but I have always supposed that the court could, whether the District Attorney was willing that that be done or not, permit the defendant to plead nolo contendere, but the general practice is not to do it unless the United States attorney consents. Sometimes he asks for it and the court won't do it.

MR. HOLTZOFF: That is what I understood to be the practice. It seems to me it might be well to have that practice embodied in these rules.

MR. ROBINSON: Mr. Alexander might tell us about it.

MR. ALEXANDER: It has always been my understanding that it has to be acceptable to the prosecutor. That is the practice in our courts. And it is rarely accepted.

MR. DEAN: It is usually the result of a bargain between the District Attorney and defendant's counsel.

MR. HOLTZOFF: Well, I move that Paragraph 2 be amended requiring the consent of the United States attorney to the acceptance of a plea of nolo contendere.

MR. YOUNGQUIST: I accept it with the purpose of arguing against it. I do not see why that should lie in the power of the United States attorney. There may be reasons for it, but I think there are better reasons against it. So long as the statutes permit a plea of nolo contendere, I see no valid reason why the making of that plea should not lie with the court rather than with the United States attorney. Of course, as I understand

the history of that plea, it was only made after conference with the court and an understanding of what the penalty, usually applied, should be. It may be true that a United States attorney, or the prosecuting attorney, cooperated and participated in the negotiations, but after all, if the court sees fit under the circumstances to accept the plea of nolo contendere, I do not think it should be placed in the power of the United States attorney to prohibit the court accepting the plea which the defendant is willing to make.

MR. CRANE: I suggested here the last time we were together, that it be put for further consideration that the plea be wiped out altogether as being inconsistent and inadequate, that the man is either guilty or not guilty, and to plead that he won't make any defense, don't want to plead guilty, but he does not want to make any defense, and the court can sentence him as though he had pleaded guilty, and then it imposes sentence, and the only reason I ever found for preserving it is this question of res adjudicata in some states; whereas, if he put in the plea, they could not receive it, as res adjudicata, in some civil proceedings.

Now, that seems to me to be pressing res adjudicata beyond anything I ever heard. Something must be wrong with the law when a man refuses to plead guilty and yet you use a word, just a sign, to get away from it, and treat him as though he were guilty, just one of those fictions that we have preserved because we are afraid to come out and state the facts as they are.

MR. YOUNGQUIST: That may be so, but the difficulty is that that is the law and we cannot change it.

MR. CRANE: Why can't we change it? We have been changing

it here right along.

MR. YOUNGQUIST: We cannot change the question in a civil action of whether a plea under our rules may be res adjudicata.

MR. SEASONGOOD: In anti-trust cases if he is guilty you treble the damages, and this is one way of not tripling the damages.

MR. MC LELLAN: There is one way -- a young man comes in who has committed an offense and the judge feels that he is not too bad after all, and the judge feels it would be too bad if in the next five years he were called as a witness in a civil proceeding and has faced that conviction as affecting his credibility; and in Massachusetts the law is that a nolo contendere plea does not result in the kind of a conviction that can be used against the defendant in any other proceeding of any kind, and there are quite frequently cases of the type where it is fair to the defendant not to encumber him with a record that can be used against him elsewhere.

In other states, there are decisions that it is a conviction, not only for the particular case.

MR. CRANE: In a case in our courts, on a man's third offense they took the man's plea in Pennsylvania and that meant the fourth, and he went to jail for life.

You can ask him if he is a witness, call him as a witness in court, you can ask him if he hasn't been sentenced, can't you?

MR. MC LELLAN: You can't in Massachusetts.

MR. CRANE: Can he defeat the plea?

THE CHAIRMAN: I think there are matters beyond our control in this.

MR. CRANE: I think there are. But I do not want to ac-

quiesce in it, I just want to get it cited here because it is all I can do. I think it is time we cleaned out on a lot of these fictions.

MR. MC LELLAN: May I ask one question. You say that he may plead not guilty, guilty, or nolo contendere. Why isn't the place to put that, not guilty "or with the court's consent, nolo contendere"?

MR. ROBINSON: It was put there first, Judge, and then we dropped it to 2, because 2 deals with the court's consent with regard to accepting a plea of guilty.

THE CHAIRMAN: I was going to suggest if you follow "nolo contendere" with the word "or" indicating it is tied with the next paragraph, and then go on, "the court may refuse to accept a plea of nolo contendere."

MR. MC LELLAN: That's it.

THE CHAIRMAN: What about this question of the District Attorney in the plea of nolo contendere? I suppose the Department of Justice thinks it is necessary and that defendant's counsel thinks it is, too.

MR. MC LELLAN: I think the court should have the power in a propose case to accept a plea of nolo contendere. I do not think that he should have to get the consent of the United States attorney.

MR. SEASONGOOD: The plea is to the court and it seems to me the court ought to have the say.

THE CHAIRMAN: It seems so to me.

MR. MEDALIE: I am not a District Attorney and have not been for eight years, so I have no prejudice. Suppose we take it up from the technical viewpoint of pleading. When you plead nolo contendere, or offer to, you are offering the Government less

than it asks for, namely, a plea of guilty, and you are offering less than the Government asks for because the Government has the right to ask for certain consequences of that plea. The consequences unfavorable to the defendant on a plea of nolo contendere are less than the consequences unfavorable to the defendant on a plea of guilty. In other words, if the court may accept the plea of nolo contendere without the approval of the counsel for the Government, that is, without the approval of the Government, then you are in the equivalent position of the court being able in a civil case to compel the plaintiff to take less than he asks for.

Now that, obviously, is bad in principle.

Now, I need not labor the point by pointing out that the consequences of a plea of nolo contendere are less harmful to a defendant than the consequences of a plea of guilty.

THE CHAIRMAN: I cannot accept your premise that the Government is a plaintiff and entitled to what it asks for. It seems to me that that analogy falls.

MR. MEDALIE: Oh, there are other consequences. The consequences with respect to the plea of guilty, let us say, in an anti-trust case, are entirely different from the consequences in an anti-trust suit of a plea of nolo contendere.

MR. YOUNGQUIST: The Government has no interest in that, has it?

MR. MEDALIE: It has when it is the plaintiff in an equity case, for an injunction, for other things in connection with anti-trusts.

MR. YOUNGQUIST: Why should it not be required to prove its case, then?

MR. MEDALIE: Well, one of the advantages it has under the present law is that if it has a plea of guilty, it does not have to prove its case under certain circumstances.

MR. YOUNGQUIST: But why should there be a civil remedy as a result of criminal prosecution?

MR. MEDALIE: Well, there have always been civil consequences as the result of conviction; for example, loss of the right to vote.

MR. YOUNGQUIST: Yes, but the Government asserts something which normally it is required to prove. Why should it have the benefit?

MR. MEDALIE: Well, it is required to prove less if the defendant has pleaded guilty. It is getting less than it seeks when it seeks a plea of guilty or a conviction.

MR. YOUNGQUIST: I think the answer to your argument is that we should eliminate the plea of nolo contendere.

MR. MEDALIE: If the Government sues.

MR. HOLTZOFF: I ask a thousand dollars. A defendant says "I offer \$750." The court cannot say, "You take the \$750." I say I will take my chance of getting the thousand.

THE CHAIRMAN: I cannot follow your analogy.

MR. MEDALIE: There must be some flaw in it, if you will point it out.

THE CHAIRMAN: Well, I do not think the Government is in the same position in a criminal case as in asserting a claim in a Civil action, any more than a decree of divorce for adultery should be used against the defendant and made the basis of proof of adultery on an indictment. One does not follow any more than the other.

MR. MEDALIE: It does follow because the Government has an interest in the consequences usually which affect the defendant. For example, he may not be able to hold office.

MR. MC LELLAN: Well, I am against criminal prosecution or a civil remedy anyway.

MR. MEDALIE: Well, the people said that is all right.

THE CHAIRMAN: When did they say that?

MR. MEDALIE: In '36 and '40 when they ratified the things that had been done in the preceding four years. I am afraid we will have to accept it even if we do not like it.

MR. DEAN: Why don't we find, Mr. Chairman, that the conviction in a criminal case is not a prima facie case when a third party brings the suit?

MR. MC LELLAN: But the plea of guilty can be used as an admission, can't it? That has been held quite a number of times, I think, that a plea of guilty can be used as an admission, just as a man's statement outside of court.

THE CHAIRMAN: Well, we have the issues pretty clearly before us. All those in favor of the motion to amend Paragraph 2 to provide that the District Attorney must confer in the plea of  
10 nolo contendere, say "Aye." Opposed "No."

(There was a chorus of "Nayes.")

THE CHAIRMAN: The "No's" seem to have it.

MR. MEDALIE: They have.

MR. MC LELLAN: Well, we did something to it anyway.

THE CHAIRMAN: Are there any suggestions on sub-paragraph 3?

MR. MEDALIE: Wait a minute -- all right.

MR. MC LELLAN: Have you voted on 2? We voted on one aspect of it.

THE CHAIRMAN: Well, I think we have not. All those in favor of 2 as amended say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No." Carried.

All those in favor of 3 --

MR. YOUNGQUIST: It was not amended.

THE CHAIRMAN: As not amended. Pardon me. Not amended.

All those in favor of 3 --

MR. MEDALIE: Did you pass two?

THE CHAIRMAN: Yes.

MR. MEDALIE: I favor an amendment. The court shall hear the grounds therefor. We do that anyway.

MR. CRANE: We do that anyway. It is just a rule. It will be no trouble in practice at all. It will never be done if the attorney-general objects to it.

THE CHAIRMAN: You had a word on 3, Mr. Glueck.

MR. GLUECK: No, I was merely referring to your use of "but" in Line 18. Do you remember that?

THE CHAIRMAN: It was at the end of Line 17.

All those in favor of 3 say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried. Any suggestions on 4?

MR. MEDALIE: Yes, sir.

MR. DEAN: Yes, sir, plenty.

MR. MEDALIE: I want a chance to read the indictment and confer with my associates and get some facts and not get caught right in the court room. That is no reflection on anybody, but I think it is pretty raw.

MR. ROBINSON: The reason for that is this: it has been represented to our committee that that is the practice in some courts, that the judge will simply say when the defendant files his plea count, "Well at this time you may file any motions which you have with regard to any further proceedings in the case, and of course you may withdraw, it is understood that the plea may be withdrawn at any time."

Now, the object is to avoid a practice of a defendant coming in and filing a request for a bill of particulars and having<sup>that</sup> heard and then filing a demurrer to the indictment perhaps, and having that heard, and so on, a succession, series of motions which when properly nurtured by a defense counsel, so the objection has come to us, can succeed in delaying the proceedings indefinitely. This probably should be fixed in such a way that no right of a defendant shall be invaded, at the same time that no premium shall be allowed to the procedure to indefinitely delay the trial of the case or the disposition of it, by a succession of motions.

MR. HOLTZOFF: Well, as a matter of fact, you make your motions before you plead.

MR. ROBINSON: This rule will change that. This rule can take care of that. It can say that you can plead and file your motion. We are abolishing the demurrer, are we not?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Let us see what the fair thing is.

MR. ROBINSON: Yes. That is what you must do.

MR. MEDALIE: You get an indictment, let us assume it is only forty pages long, I think the defendant is entitled to have a person allegedly learned in the law read it, and also have a person whom he retains make an inquiry into the fact of a number of things.

Now, certain motions can be made within a reasonable time thereafter. One is a motion to dismiss the indictment for reasons of insufficiency; other motions can be made and those things can be done, say, within ten days, a motion for a bill of particulars. Those things may be extremely important or they may not, but they are matters which ought to be determined and counsel ought to have a fair opportunity to prepare. I do not like to suggest that a particular time be fixed for all cases or all decisions. You must trust the judge to be fair. So the judge will determine whether he is treated unfairly, but the court ought not to be precluded by the word "shall" from giving the defendant time in which to do these things.

Now, there are other motions which ought to be made with respect to the trial. I am not sure whether that is applicable here, but frequently after extended preparation and after a considerable lapse of time, defendant might want to have depositions taken, and, very properly.

Now, time must be given for all of that.

Now I think we can cover that the defendant pleads not guilty, he shall file any motions "within such reasonable time under all the circumstances as the court shall fix."

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MR. ROBINSON: You see, part of the trouble is by striking out part of Lines 5 and so on, you strike out part of 4, "shall have the advice of counsel," the theory being he had counsel before this time came.

MR. MEDALIE: Practically, you know too, you were told to come to court. Suppose the defendant is not arrested. Let us say, respectable defendants, bank presidents, important merchants, and so on. Counsel is told "Your client has been indicted.

He will be arraigned on Monday,"and on Monday or Tuesday you probably will get a copy of the indictment. There is no time to do these things.

MR. GLUECK: I second Mr. Medalie's motion if he puts it in the form of a motion.

THE CHAIRMAN: Before you do it, I would like to get the reaction on that.

MR. SETH: My idea is that it is a place where we should encourage a local rule.

MR. MEDALIE: But the provision should be made that the time is reasonable.

MR. SETH: Unfortunately --

THE CHAIRMAN: In framing your motion, if you could keep in mind that there are places where the judge only sits for a week and then won't be there for half a year,

MR. MEDALIE: Let me suggest this situation, a defendant is arraigned and is called on to plead on a particular day, that being the last day the judge will be at that particular place for holding court and he won't get back for two months. Well, it stands to reason that the judge will arrange for a time and place that those motions can be heard, or you can wait until the judge gets back if he won't arrange it. Let us say the judge sits in three different places within his district, a large territorial district. He can state to counsel, "No, I will be in Spokane," or wherever the place is, "ten days from today, or two weeks from today. You can make your motions returnable before me there and I will hear you there."

MR. HOLTZOFF: They do not do it that way, though, in many rural districts.

MR. MEDALIE: What do they do?

MR. HOLTZOFF: You take the northern district of Texas which covers from Dallas to the Texas Panhandle. There may be a term at Wichita Falls or Lubbock once or twice a year. If a case is pending in one of those two districts, the motions will be heard there, because it is 250 miles.

MR. MEDALIE: Well, the judge sits some place.

MR. HOLTZOFF: He sits in Dallas, 250 miles away.

MR. MEDALIE: It is certainly of great inconvenience to counsel to come down to Dallas and talk to him there.

MR. MC LELLAN: I thought you were talking about the time of filing the motion. The judge does not have to be there for that, does he?

MR. MEDALIE: He has to dispose of them.

MR. HOLTZOFF: On the first day of the term all indictments are found and the second day the trial begins.

MR. SETH: That is too fast.

MR. MEDALIE: Let me put this to you, if I may: the Government in certain so-called crimes, that is, business practices on a large scale, usually in the anti-trust division of the Department of Justice, can pick any place in the United States for the filing of the indictment, and it picks from the viewpoint of the defendants some very strange places. Now, there is no reason in the world why a defendant's rights should be abrogated or diminished to any extent by reason of that practice, of the court's judge sitting in a particular place for a day or two, with the case requiring a considerable initial debate on the defendant's rights under the indictment, particulars, or anything else -- we just ought not to have that kind of thing. It is wrong.

THE CHAIRMAN: Could we get before us what Mr. Seth's motion would be on this?

MR. SETH: I am merely wanting to amend your motion to such reasonable time as is fixed by the court and by local rule.

MR. MEDALIE: If the local rule is fair, but if the local rule says the motion should be made in two days --

MR. SETH: It would not be reasonable.

MR. MEDALIE: It might be reasonable in an income tax case but not in a mail fraud case.

MR. YOUNGQUIST: Shouldn't we say "or within such reasonable time as the court may allow"?

MR. SETH: That may be true but I think we should encourage local rules on a thing like this.

MR. MC IELLAN: May I say, in order that there may be no difficulty in those large territorial districts, it might be well to put in something like "tendays and such further time as the court may allow."

MR. HOLTZOFF: It would not work in some of those districts, Judge.

MR. MEDALIE: It would not work because on certain cases you can do it the next day.

MR. MC IELLAN: You ought not to have to do it the next day.

MR. GLUECK: I think if you designate a reasonable time then the local rules will designate more aptly.

MR. YOUNGQUIST: Conditions vary so much in the different districts.

THE CHAIRMAN: Will you state your motion, Mr. Medalie.

MR. MEDALIE: Strike out the words "at the same time," and say "file any motions within a reasonable time fixed by the court

under the circumstances of the case."

MR. SEASONGOOD: Fixed by the court, isn't it, if it is a reasonable time?

MR. MEDALIE: The defendant cannot fix his own time.

12 MR. YOUNGQUIST: The word is "reasonable."

MR. MEDALIE: Strike out "at the same time file any motions with the reasonable time fixed by the court --"

MR. SETH: "Shall within a reasonable time."

MR. MEDALIE: "Shall within a reasonable time fixed by the court."

MR. SETH: Was that put in there with any idea that all motions shall be filed simultaneously? Was that the intention of the word "same"?

MR. ROBINSON: Really this rule was sketched in here for the consideration it is receiving right now, and at the same time had this in mind, Mr. Seth, that a plea of not guilty and a demurrer to the indictment might be filed at the same time.

MR. SETH: Well, ought not all motions, ought not they be required to file all motions in one document or at the same time?

MR. MEDALIE: Can I finish what I wanted to put in there?

THE CHAIRMAN: Yes.

MR. MEDALIE: "asking the court" is not necessary, because motions all ask the court.

MR. ROBINSON: But in your meeting last September you decided every motion should simply be expressed in that way, you would not allow us to call it a motion to dismiss, or anything else, but just put "motions which shall ask the court for whatever relief."

MR. HOLTZOFF: You mean, strike out those words?

MR. ROBINSON: Just a second. "Whatever relief or order would be proper under the circumstances."

MR. MEDALIE: You do not need the words "ask the court."

MR. HOLTZOFF: Why not just say "orders with respect to the written accusation"?

MR. MEDALIE: Yes, I agree.

MR. ROBINSON: Would everybody understand this?

MR. HOLTZOFF: It is broad enough to cover.

MR. DEAN: Will all of the motions at that time be with respect to the written accusation? I was thinking of a motion to suppress the evidence, search warrant.

MR. ROBINSON: Yes.

MR. MEDALIE: I do not think there is any necessity for fixing the time as to that any more than the taking of depositions. It is tinkering with the indictment that you want to get out of the way. Now you know what you are going to try, you ought not to delay that determination. Bringing the case on for trial, you do not need it.

MR. ROBINSON: I disagree with that.

MR. MEDALIE: You do. I am probably wrong and you are probably right.

THE CHAIRMAN: It can be made a year later. Why fix the time?

MR. ROBINSON: There you get an order or orders that do one of two things, throw the case out of court by dismissing the indictment, or there would be orders which would be designed to bring the case on to trial. Those are the alternatives. You cannot name the order in which it is to be, like a demurrer, or bringing it on for trial. It seems to me it should go in.

MR. MEDALIE: A motion to bring the case on for trial can be

made at any time. It can be made six years after the indictment was filed. Why should the person have to make a motion of that kind at that time?

MR. ROBINSON: I do not agree with your interpretation of bringing the case on to trial. I would include in that any motion or any order requesting the court which would do something with the case other than throwing it out, disposing of the indictment.

MR. DEAN: I can think of only one, in the interests of a speedy trial, the thing has been delayed so long, but you would not be making that so soon after the arraignment.

MR. MEDALIE: You would be restricted only to the time when you would be likely to be getting a speedy trial.

THE CHAIRMAN: I think Mr. Robinson means in matters which have to do with preparing for trial. I think it is a question of language.

MR. HOLTZOFF: Like a motion to take depositions.

MR. MEDALIE: You can make that any time. You ought not to be restricted because you won't know until your case is very thoroughly prepared. You ought not to have to make your motions like that immediately.

MR. ROBINSON: It is within reasonable time.

MR. MEDALIE: You do not know if you require depositions until you have worked on it half a year.

MR. ROBINSON: I still think your reasonable time would govern.

MR. MEDALIE: The court fixes that time.

MR. ROBINSON: For each motion.

MR. MEDALIE: If you make a motion with respect to the

to the indictment, that is a motion the court ought to get out of the way early so you know your issues; to dismiss indictments, to dismiss counts, to sever, and so on, those motions ought to be gotten out of the way. That includes the bill of particulars, of course. But the other things, you won't know until there is a long investigation. There ought to be no restrictions on it.

The court can determine then whether there has been undue delay. It is decided on a different theory all together.

MR. MC IELLAN: I would like to know -- that is 5 -- what the defendant must do with respect to applying to the judge. May he sit still, or must he immediately ask the judge to fix the time?

MR. HOLTZOFF: Unless a local rule fixes the time.

13 MR. MC IELLAN: But the application to have the time set?

MR. SETH: The court can do it on its own motion.

MR. ROBINSON: I wish Mr. Medalie now would take the constructive side. I have tried to do what I understood your wishes were, so how should it be worded to move the matter along without a successful series --

MR. MEDALIE: Everything is out of the way except the language that I think ought to remain in there because the only things that remain have to do with the facts, deposition, or suppression of evidence, matters which you find only after considerable work on the case. You may not know that any necessity exists.

MR. HOLTZOFF: Are you moving to strike out the words "or bring the case on for trial"?

MR. MEDALIE: Yes.

MR. ROBINSON: Yes. Mr. Medalie says the only thing you can do at this time is something with respect to the written accusation, which I suppose would amount to a demurrer.

Proceeding from that point then, when will you move the next thing? Where are you going to write that in?

MR. MEDALIE: Do you mean by that motions to take depositions or suppress evidence?

MR. ROBINSON: I include everything.

MR. MEDALIE: You include that in your language which is not clear. I think there ought not to be any time limit except that which goes with the ordinary rule that you shall do those things with due diligence.

MR. YOUNGQUIST: Won't that all take care of itself, whenever the motions are required to be made, will not the court then set the case down for trial and will that not necessitate the defendant's taking all his preliminary actions before that date?

MR. ROBINSON: Well, that is the point. The language we want there in Lines 26 and 27 in place of that which is about to be stricken out, I would think it takes care of the motions, beginning at Line 43-D with counter motions, hearing or trial on these counter motions, notices, if there be any, of insanity or alibi, all of those are here included with the idea of bringing the case on to trial.

MR. GLUECK: You are after abolishing undue delay, I understand. Now the chief reason for undue delay seems to be all sorts of motions for continuance, further continuance, and so on.

MR. ROBINSON: No. There would be the matters I mentioned a minute ago of asking for bill of particulars, and motion for examination of the Grand Jury minutes which comes up in some

districts.

.. MR. GLUECK: I mean, what is the real force of the abuse we are trying to remedy here.

MR. ROBINSON: Well, so many of them. Take the one of the attacks on the indictment itself. In a good many districts, I do not know how general it is, but in a good many districts it is true you have a demurrer filed to the indictment, or you have a plea in abatement filed, or you have some special plea in bar filed, not concurrently, but strung along. As United States attorneys explained it to me, there will be a date set for a hearing, then a motion, then another hearing, then another motion filed, and another hearing.

MR. GLUECK: Is not that all covered by what has already been written in here, within a reasonable time fixed by the court?

MR. ROBINSON: No. You see, that only applies to a request to the court.

MR. GLUECK: All that remains is the delay of the court in acting on the motion. Is not that right?

MR. ROBINSON: I do not believe so.

MR. YOUNGQUIST: Isn't this what happens under the language proposed by Mr. Medalie, that this covers all of the motions which may be made relating to the accusation itself?

MR. ROBINSON: Mr. Alexander is familiar with this. I would like to call on him, if I may.

MR. ALEXANDER: Under the common law, when a man came in and pleaded not guilty, he waived all those motions. Now the practice has grown up in our court where everybody could come along and plead not guilty. Then we go along and set the case for trial. The morning of trial the attorney will come in and

he says, "I ask leave to withdraw the plea of not guilty and file a demurrer."

Well, you have a jury there and the lawyer may raise a good point and you have to go out and spend a couple of hours.

MR. MEDALIE: Doesn't this take care of it? It has to be done within a reasonable time.

MR. ALEXANDER: Do you mean those motions which cite the case ready for trial?

MR. GLUECK: Which are those?

MR. MEDALIE: The demurrer, plea in abatement, double jeopardy, and that about covers it. Bill of particulars should be in there by all means.

MR. SETH: What was your language, Mr. Medalie?

MR. MEDALIE: Well, as it reads now, according to my motion --

THE CHAIRMAN: Read 4 as you have revised it.

MR. MEDALIE: "If the defendant pleads not guilty he shall, within a reasonable time fixed by the court, file any motion for orders with respect to the written accusation."

THE CHAIRMAN: Are you ready for the motion? All those in favor of the motion as amended, say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried.

Section 5.

MR. ROBINSON: Section 5, "The Arraignment and Plea shall be entered of record."

Now, the arraignment and plea arraigned in sequence beginning at Line 13 brings the matter to a conclusion and states what probably would be understood anyway but other provisions have

provided that the arraignment and plea shall be entered of record, therefore we copied it, and having done that it seems necessary to state the rule to the effect that even if you fail to enter on the record the arraignment and plea, that is not reversible error.

MR. WECHSLER: Well, I do not think we have to state the rule in that case so long as the rule is that way. If it were the other way, I think you might have to change it.

MR. ROBINSON: You move to strike after record?

MR. DEAN: Seconded.

MR. HOLTZOFF: I move to strike out after Paragraph 5. I do not see the need of the whole paragraph.

THE CHAIRMAN: We have the motion to strike Paragraph 5. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. SETH: We have another rule requiring all this talk about counsel to appear of record.

THE CHAIRMAN: Well, now, that is an exceptional situation, is it not?

MR. SETH: No. In every case where he hasn't counsel of his own, he will be there. It will have to be.

MR. WECHSLER: I have my doubts as to whether that should be in the rule, too.

THE CHAIRMAN: Section 3 --

MR. WECHSLER: Or have I abolished -- now, what to call that motion is something for us to decide. Apparently, we have to go a little further -- requesting the court to make an order--

MR. HOLTZOFF: Is a demurrer a defense? I did not understand that it was.

MR. ROBINSON: It raises defenses. By demurrer, you can raise defenses if the indictment on its face shows it is repugnant or there is lack of jurisdiction.

MR. DEAN: Why don't you simply say, "All matters heretofore raised by demurrers"?

MR. ROBINSON: All right. Then what are you going to put under defenses?

MR. MEDALIE: There is a little amendment I have there.

MR. ROBINSON: We can close this. All matters heretofore raised.

MR. SETH: The civil rules say "All claims for relief." They include demurrers.

MR. ROBINSON: Maybe we should copy the civil rules on that. Although I believe they were stricken out.

MR. LONGSDORF: Yes. It was inapplicable.

MR. SETH: Somebody said a demurrer was not a defense. The civil rule says it is.

MR. MEDALIE: I think the main thing is to get rid of the demurrers.

THE CHAIRMAN: Any questions on the first sentence?

MR. MEDALIE: I want to move as to that so it will read "demurrers and all other pleas than the plea of not guilty,"

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: Demurrers?

MR. ROBINSON: And all pleas.

MR. GLUECK: That is superfluous.

THE CHAIRMAN: The first sentence as amended seems to be

accepted by consent.

Now, Line 37 starts off: "All matters heretofore raised by demurrer," and so forth. Are there any other changes in that sentence?

MR. ROBINSON: Would you leave out the words "of defendants"?

THE CHAIRMAN: Yes.

MR. ROBINSON: Very well.

MR. HOLTZOFF: I suggest we strike out the rest -- heretofore asserted by motion. And, strike out the rest.

THE CHAIRMAN: Any objection to that? If not, that stands.

I think it would be shortened by saying, "demurrers and all other pleas other than," cutting out all this reference to pleas in bar.

Let us have a motion to adopt Paragraph D as thus amended. Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. MEDALIE: I have another motion. I move we recess until ten o'clock.

THE CHAIRMAN: May I make a suggestion, then. Why have you members been slipping up to me and telling me you have various appointments at divers places?

MR. ROBINSON: Will 9:30 be all right?

MR. MEDALIE: I will be late, but I am perfectly willing if the others come at 9:30.

THE CHAIRMAN: Quite a few have said they have to go.

MR. MC ILLAN: I am staying over.

THE CHAIRMAN: Oh, you are staying over, Judge.

MR. MEDALIE: The matters we take up tomorrow are matters I would like not to miss. Now, if you want to start earlier and go over to something else, I will appreciate it as a personal indulgence.

THE CHAIRMAN: Shall we start at ten?

MR. MEDALIE: When shall we finish?

MR. GLUECK: Tomorrow night.

THE CHAIRMAN: The Chair will have to be a lot tougher than he has been.

They have wanted to take eight and one half million dollars of property away with just one of those little orders.

Well, it looks as if we are inevitably set for ten o'clock. But we may consider decreasing our recesses and sandwiching or something like that in an effort to make some progress tomorrow.

(At 11:00 o'clock p. m., the meeting recessed until 10:00 o'clock, a. m., of the following day.)

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Washington, D. C.

Wednesday, January 14, 1942.

ADVISTORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT.

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GEO. L. HART  
EDWIN DICE  
LLOYD L. HARKINS,  
OFFICE MANAGER

**HART & DICE**  
**SHORTHAND REPORTERS**  
416 FIFTH ST. N. W.  
SUITE 301-307 COLUMBIAN BLDG.  
WASHINGTON, D. C.

TELEPHONES  
NATIONAL 0343  
NATIONAL 0344

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

- - -

Wednesday, January 14, 1942.

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: Same as previously noted.

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The Chairman. Gentlemen, we will come to order.

Rule 52 (e).

Mr. Robinson. This is where Mr. Medalie said he wished to be present, and he is not here.

Mr. Glueck. He advised us to go ahead with something else and come back.

The Chairman. Suppose we pass it and go on to Rule 52.

Is there anything special on that?

Mr. Holtzoff. I move we adopt it.

Mr. Youngquist. I had, on the second line of (b), just a suggestion for clarity. We say "judicial or quasi-judicial tribunal, or of a board or officer."

I wonder if it would not be better to say, instead of "or," "decision or order of an administrative agency."

Would that be clearer?

Mr. Holtzoff. I do not think it makes any difference.

The Chairman. What difference is there between a judicial tribunal and a court?

Mr. Holtzoff. They are the same thing.

Mr. Robinson. I am trying to find whether this is just the way we adopted it at the other meeting or not. What was the number of this rule in the former draft? I have a chart here, but that does not seem to cover that.

Mr. Youngquist. It comes from 9 (c) of the Civil Rules, if that helps any.

Mr. Holtzoff. I hope Mr. Youngquist will not withdraw his suggestion, because I think it will clarify it.

Mr. Robinson. In the first draft there must have been a request to prepare 9 (d) and 9 (e). Mr. Seasongood made the suggestion, and he is not here this morning yet.

The Chairman. Can anybody think of a judicial tribunal that is not a court?

Mr. McLellan. I can't.

Mr. Holtzoff. I think the two are synonymous.

The Chairman. The term "administrative agency" has come to include boards, officers, commissions, and so on.

Mr. Youngquist. I notice that (b) is identical with 9 (e) of the Civil Rules.

Mr. Robinson. 9 (d) and (e) were requested to be drafted for this draft -- that is, a rule for criminal procedure which would compare to Civil Rule 9 (d) and (e), and so we have taken those words exactly here.

Mr. Holtzoff. I think we can improve on the civil rule in this case.

The Chairman. It seems so to me.

Mr. Glueck. I wonder if they had in mind including both the court and the judicial tribunal?

Mr. Holtzoff. I think they are synonymous.

Mr. Glueck. Do you think they are?

Mr. Longsdorf. Perhaps because we had "foreign court" in there it was deemed by the Civil Rules Committee better to put in the additional words to indicate the scope.

The Chairman. The motion by Mr. Youngquist is to delete the words "judicial or quasi-judicial tribunal, or of a board or officer," and substitute the words "or administrative agency."

Mr. Crane. Isn't the Interstate Commerce Commission a quasi-judicial body?

The Chairman. But there are many more than that. You need to include the Secretary of State, the Secretary of Agriculture, the Secretary of the Treasury, the Tariff Commission, and a great many more, and the words "administrative agency" have been accepted to cover commissions, committees, individual officers, or special appointees.

Mr. Youngquist. The language I had was this: "In pleading a judgment" -- omit the words "or decision" -- "a domestic or foreign court, or decision or order of an administrative agency."

2 That is sufficient. I do not know whether that is inclusive or not.

Mr. Holtzoff. I second the motion. I think it is inclusive. The words "administrative agency" cover every one of these bodies, as well as individual officers.

The Chairman. Are there any remarks on the motion?

Mr. Glueck. There may be -- I can't think of any changes -- an agency which is designated a quasi-judicial tribunal --

Mr. Holtzoff. Quasi-judicial tribunals are included under the term "administrative agency."

The Chairman. All those in favor of the motion say "aye."  
Opposed, "no." The motion is carried.

Then we have a motion covering the entire rule as amended.

All those in favor of Rule 52 as amended say "aye."  
Opposed, "no." The motion is carried.

Rule 53.

Mr. Robinson. I do not believe any comment is required there except to say that on 53 (a) it is apparent that there already has been part at least of this same ground covered. At the same time it is desirable to have the views of the committee on the language of 53 (a) in order that we may use your views in whatever consolidated rule finally is drafted on this point.

Mr. Holtzoff. I think Rule 30 (c), paragraph 3, which we adopted yesterday, and the language to which we agreed, covers the entire subject matter and the entire substance of the rule.

If I am right on that, then I think that 53 (a) might well be deleted. I can understand why, of course, it is here -- because you presented it in alternative form. I think we might--

Mr. Robinson. With due respect, I do not think your statement is quite accurate. They are equally extensible. There is a clearer statement of it here, on which I should like to have the views of the committee.

There was discussion yesterday, for example, about amending an indictment. We did have a statement with reference to correcting clerical errors, but the Bain case, which Mr. Medalie has mentioned, has made some courts very nervous about correcting even clerical errors, apparently.

Here is our surplusage point again.

It seems to me there is ground for thinking that the express

statement that the Court may correct clerical errors ought to be considered.

Mr. Holtzoff. We did adopt a rule on surplusage. That was 30 (c) (1), so the new matter is the correction of clerical errors in an indictment. I am not sure that perhaps the Bain case goes so far as to correct clerical errors in the indictment. I am not certain whether it does or not.

Mr. Youngquist. Could we, Mr. Reporter, incorporate the contents of 53 (a) in 30 (c) (1)?

Mr. Robinson. Yes. That was my original suggestion, Mr. Youngquist -- that you give us your ideas on the way 53 (a) runs, so that I may incorporate or consolidate a rule in 30 (c) which would include our recommendations here.

The Chairman. Is there any doubt as to the soundness of the rule on the merits?

Mr. McLellan. Do you want to let the Court amend either an indictment or an information on its own motion?

Mr. Seasongood. I thought you might strike out the words in lines 4 and 5: "Upon motion of the Government, of the defendant, or upon its own motion."

Mr. McLellan. I rather like it, "upon motion of the Government or the defendant." I do not like the idea of the Court itself doing it on its own motion.

Mr. Crane. Didn't we thrash this out pretty well yesterday?

Mr. Holtzoff. We did.

Mr. Crane. On clerical errors?

Mr. Holtzoff. Not on clerical errors.

I am afraid of the constitutional question. I am wondering whether the constitutional bar goes as far as correction of

3 clerical errors, on the theory that, after all, the indictment is the action of the grand jury and even a clerical error should not be corrected except by the grand jury.

Mr. Robinson. Even the error of the clerk in writing up what the grand jury did?

Mr. Holtzoff. The clerk does not write it up after the grand jury acts. The grand jury approves the text of the indictment and the foreman endorses it, and if he endorses it with the errors in it, that is the action of the grand jury. I hope the constitutional rule is the other way, but I am afraid of it.

Mr. Dean. Are not most such errors covered by the harmless error statute? Misspelling would not be regarded as an error harming the rights of the defendant. Rather than risk the possibility of tampering with the indictment, which is rather a constitutional question, if clerical errors are going to be corrected, aren't they going to be corrected in that way?

Mr. Robinson. I do not believe so. I do not think that is specific enough to meet this, and I am basing my statement partly on state statutes which have this provision.

I know several States that have statutes to the effect that the court may correct clerical errors, and I have felt that the courts on state benches have dealt with that effectively.

Mr. Holtzoff. It says, "No indictment or information shall be deemed insufficient by reason of any defect or imperfection in form only and which shall not tend to prejudice the defendant."

Mr. Robinson. It does not authorize correction.

Mr. Holtzoff. No, but it means that you can ignore the error.

The Chairman. I think it is more effective.

Mr. Robinson. I disagree, with respect to all this weight of authority here, but I do not think it is more effective in view of the attitude just as Mr. Holtzoff suggested here. For example -- I am sorry to have to take this time, but I guess we will have to go into detail about it -- I can give you citations to a case in which there was an error in the date. It was a printed form, used at Evansville, Indiana. The form started out with "Nineteen Hundred" spelled out, and then there was a blank which the assistant prosecuting attorney was to fill in with just "29"; but instead of just filling it in with "29," he filled in "1929." So the date left was "Nineteen Hundred 1929," and the Supreme Court of Indiana reversed. They said that was an impossible date; therefore the indictment was bad.

The Chairman. In face of the harmless error statute?

Mr. Holtzoff. I do not think the Appellate Court of --

Mr. Robinson. Wait. Let me finish the story and give you the happy ending.

The Legislature of Indiana passed a statute which provided that the court could, upon its own motion, strike out clerical errors of that sort, and since that time courts have exercised that authority. I have heard lawyers cite that statute as authority to do it.

The Chairman. Wouldn't that be covered in a harmless error statute?

Mr. Robinson. It would not, because there is nothing in the harmless error statute that says a correction may be made.

Mr. McLellan. You just disregard the error in the trial.

Mr. Glueck. What do you need the correction for?

Mr. Robinson. The harmless error statute is used with regard to errors committed in the court below. It gets up to the higher tribunal, where the courts, in the Federal appellate divisions, say, "This error perhaps was an error, but it was a harmless, and therefore will not be considered."

Mr. Youngquist. I think I see the point in the matter of the date given. The vice was that there was no date at all, an impossible date; and therefore no date at all.

Mr. Robinson. Yes, I think so.

Mr. Holtzoff. Our harmless error rule covers more than the ordinary harmless error statute. It contains the additional sentence that any imperfection of the indictment in form only shall be disregarded, and the last sentence of the harmless error rule says that that may be done at any stage of the proceeding.

Mr. Robinson. That what may be done?

Mr. Holtzoff. Disregard the error or defect.

The Chairman. "The Court shall at any stage of the proceeding disregard any error or defect \* \* \*."

Mr. Robinson. The argument of defense counsel is that it would affect the substantial rights of the defendant to have a date corrected which is bad.

Mr. McLehlan. Then it is not a mere detail that can be corrected?

Mr. Robinson. No. It is a fatal defect, and for you to make an indictment good which was bad is affecting the substantial rights of the defendant.

Mr. Bean. If it does affect the substantial rights of the defendant and the defendant can so contend with some persuasion, then you cannot change it by this rule which would correct the

error in the indictment.

Mr. Robinson. The point is that it takes up the time of the court by saying it affects the substantial rights. That is taken care of if it is expressly stated that the court may make that change.

Mr. McLellan. I would rather take my chances, if I were for the defendant, of arguing that the court did not have any right to change the indictment than hoping to get away in the face of the harmless error statute.

Mr. Robinson. In the higher court, you mean?

Mr. McLellan. Any court.

Mr. Moltzoff. I move that we strike out 53 (a), Mr. Chairman.

Mr. Crane. I thought that rule 30 covers most of this. We have the surplusage amendment to written accusations.

Mr. Dean. It covers everything except the harmless error provision.

Mr. Crane. Why don't we complete it under Rule 30 --

The Chairman. That is a thought, Judge. 53 (a) is covered by 30 (c) (1), except this provision about clerical errors, which some of us seem to think is covered by the harmless error provision, Rule 5.

Mr. Crane. If it is covered by one of the others, I think it ought to go out here.

Mr. Glueck. I was going to suggest that perhaps we could add "including clerical errors" at the end of line 10, but I notice that line 11 refers to proceeding.

At line 10, Rule 5, if we would add "including clerical errors" to that, would that be one way of handling it?

Mr. Holtzoff. I think perhaps that would be undesirable, because you take away from the general character of Rule 5, which is one of its principal merits.

The Chairman. And it would certainly include clerical errors, if it includes anything.

Mr. Longsdorf. I think we ought to read Rule 91 of Title 28, I think it is. When that was amended not so many years ago, as I understand it, precisely to take care of this kind of a situation, it read this way. I will read the second sentence, which embodies it. That was added either in 1919 or 1926. I am not sure which of those it was.

"On the hearing of any appeal, certiorari, or motion for a new trial in any case, civil or criminal, 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."

Now, the effect of that was to reverse the old presumption that an error was harmful and established one that was harmless, and you cannot reverse on an error unless the harmfulness of it appears.

Mr. Youngquist. Isn't that applicable only to appellate proceedings?

Mr. Longsdorf. No, because it mentions new trials. New trials are also specified.

The other statute, 377, takes care of that, and they have been combined in our harmless error rule.

Mr. Holtzoff. Those statutes, of course, will be super-

seded by our rule. Our Rule 5 takes care of it entirely.

Mr. Longsdorf. I said 377. It was not 377. I can find it, I think,

Mr. Robinson. I think the will of the committee is indicated to the effect that this may well be taken care of with the caveat, perhaps, in making the new draft, that we be sure that what we did in Rule 31 does cover everything that the committee desires to remain from 53 (a).

Just for the sake of the record -- and that is about all that losing counsel here is able to do -- I think I ought to put this in, too: that many States have both a harmless error statute and a clerical error correction statute. Now, the fact that States have both should not have a lot of weight with us, I suppose, but it is something that we may consider.

Mr. Longsdorf. And also some of them have relaxed constitutions which permit an indictment to be changed in that way.

The Chairman. Unless there is objection to the suggestion of the Reporter, we will go to Rule 53 (b).

Mr. McLellan. Are you leaving anything out with reference to information?

The Chairman. That is all taken care of in Rule 30 (c)(1).

Mr. Holtzoff. Mr. Chairman, with regard to Rule 53 (b), I cannot visualize any use for supplemental pleadings in a criminal prosecution. I do not think that, once a prosecution has been commenced, it would be appropriate to permit the prosecuting attorney to bring in additional charges or offenses committed subsequently to the start of the prosecution.

Mr. Robinson. Before you spoke I said to the Chairman that I felt that 53 (b) should be passed over or stricken, because of

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the fact that what is urged in there is covered in other rules, and I asked that we come to the real rule covering that.

The Chairman. 53 (b) is stricken.

Rule 54.

Mr. Robinson. Mr. Holtzoff is our service man on Rule 54, so we will now let him take the plaintiff's side instead of the defendant's.

Mr. Holtzoff. I do not think this needs much of an explanation. It just relates to the technical methods of service and filing of papers after the prosecution has started, and is based very largely on the corresponding civil rules. In fact --

Mr. Robinson. It was Rule 5 in the first draft, and I think what Mr. Holtzoff's work has been is to take Rule 5 and supplement it by your instructions at the September meeting, and that leaves it in this form, Rule 54 now.

Mr. Holtzoff. I move that we adopt Rule 54.

Mr. Glueck. I second the motion.

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

Mr. McLellan. May I ask a question about (b)? "Service by mail is complete upon mailing."

Do you have a provision somewhere about allowing the time for the mails to operate?

Mr. Holtzoff. Yes. There is a provision in an earlier rule -- perhaps you may recall it -- adding three days to the time for anything that needs to be done, on the strength of a paper served by mail.

Mr. McLellan. That stayed in, did it?

Mr. Holtzoff. That stayed in.

Mr. Youngquist. I had a question as to whether mailing it

and, more particularly, whether leaving notice with a clerk is sufficient service, not from the legal viewpoint but with regard to doing justice to the party.

Mr. Holtzoff. You have the same rule in your civil rules. Take a lawyer who is practicing both civil and criminal cases. I think it would be very confusing to have different rules as to the mode of serving papers in the two types of cases.

Mr. Youngquist. That is entirely true. I am in agreement on that.

Is leaving notice with the clerk service at all upon a party? There is no duty imposed on the clerk of advising him that the notice has been left with the clerk. How shall the adverse party get knowledge of that?

Mr. Holtzoff. That seems to be in the civil rules.

Mr. Youngquist. I am conceding that.

Mr. Crane. In the big offices you never find him there.

Mr. Youngquist. What is that?

Mr. Crane. I say, in the big offices --

Mr. Youngquist. But this means leaving it with the clerk if the address is not known.

The Chairman. He refers to line 13, and I think it is salutary. If the party does not leave an address and you cannot find him, service is not prevented, any more than the failure of the defendant to sign a deed would prevent specific performance.

It is in the civil rules. It is just designed to cover those cases where a party leaves no address. If he does not leave his address on the paper, he does not deserve much notice, does he?

Mr. Holtzoff. I do not know what else you can do.

The Chairman. All those in favor of Rule 54 say "aye."  
Opposed, "no." The motion is carried.

Mr. Dean. With regard to 54 (a), I notice you have  
"written pleas." Didn't we abolish those?

Mr. Holtzoff. No.

Mr. Dean. Didn't we?

Mr. Holtzoff. That is right. Anything that would be in a  
written plea would hereafter be raised by motion. I think you  
are right about that.

The Chairman. By consent, in line 3, the words "written  
please" are stricken.

Rule 55.

Mr. Robinson. Mr. Holtzoff will present that.

Mr. Holtzoff. That is, with one or two changes, the pre-  
trial rule that is in the civil rules and as we agreed upon it  
at our September meeting.

I left out, in revising this rule, the provision which is  
contained in the civil rule in reference to amendments, because  
amendments do not play an important part in criminal procedure.

Now, the only other important change is the addition of the  
last sentence, namely, that the rule shall not be invoked in  
case of any defendant who is not represented by counsel.

It seemed to me that that might meet the sort of objection  
that Mr. Burke suggested at the September meeting, namely, that  
the pretrial might be used to bring pressure upon a defendant,  
and it also might meet any outside criticism.

The Chairman. It is purely an invitation matter, and  
there is no compulsion on either the Government or the defendant

to attend and accept the invitation.

Mr. Holtzoff. That has been successfully used in some long criminal cases, and therefore it is a very desirable provision, I think.

The Chairman. Is there any discussion of the rule?

If not, all those in favor say "aye." Opposed, "no." The motion is carried.

Rule 56.

Mr. Crane. May I ask a question? "This rule shall not be invoked in case of any defendant who is not represented by counsel."

What about assigning counsel?

The Chairman. He has counsel.

Mr. Crane. That does not prevent assigning counsel?

The Chairman. The purpose is to prevent unrepresented defendants from the fear of being coerced.

Rule 56.

Mr. Holtzoff. I am responsible for this, but I move to strike out Rule 56. I drafted it because the committee directed at the September meeting that there be such a rule. I do not think there is any reason for a rule on discovery in a criminal proceeding. Certainly there cannot be any discovery on the part of the prosecution against the defendant, because the Constitution precludes that, and I do not see why there should not be a compulsory discovery in favor of defendants against the Government.

Therefore, I move to strike this rule out.

Mr. McLellan. I second the motion.

Mr. Dean. I think we ought to reconsider that without

going over it too quickly. I wonder if we should not have a rule with regard to pretrial wherein the prosecutor should be required to allow the defendant to examine certain exhibits such as a revolver, a broken safe, something like that?

Mr. McLellan. Wouldn't he get that without a rule?

Mr. Dean. He gets it depending largely on how he gets along with the prosecution, and then it is done very informally.

Mr. Crane. Hasn't the defendant a right to apply to the Court for permission to see papers and books before the case goes to trial. Suppose the district attorney won't show them?

Mr. Holtzoff. I do not know of any cases arising where the district attorney refused to show documents in his possession where these documents are needed by the defendant.

The Chairman. Should it be a matter of grace to get the consent of the district attorney for something the defendant should have as a matter of right?

Mr. McLellan. It is not a matter of grace. The Court has the right to do that. The question is whether you want the discovery rule in a criminal proceeding.

Mr. Crane. I think the defendant should have that right. We treat a judge as though the judge had to be checked up on everything. We are fighting in these rules for the mediocre man, and I do not see why we should consider the Attorney General or the District Attorney as a super-man, and I think we should make rules that give the defendant that right.

Mr. Youngquist. I think we should have a rule -- not in the discovery rule -- which gives the defendant a right to inspect any books or documents in the possession of the Government when it is necessary for the preparation of his defense.

Mr. McLellan. By motion to the Court, for that reason.

The Chairman. I thought Mr. Dean made the suggestion that this might require a rule in pretrial practice and work it in there. That seems to me to be a good idea.

Mr. Seth. This ought to be a matter of right, not an invitation matter like pretrial.

Mr. Seasongood. The other merely invites the party.

The Chairman. Shouldn't this rule be referred back to the reporter to be restated?

Mr. Dean. There are two or three cases that raise confusing questions, and I think we ought to have that before us before we attempt to redraft it. There is one written by Judge Cardozo. I think it is People against Lemon.

The Chairman. The motion is to refer the rule back to the reporter for redrafting, in light of the discussion.

All those in favor say "aye." Opposed, "No." The motion is carried.

Rule 57.

Mr. Holtzoff. Rule 57 is the rule on depositions. In its structure it follows the Civil Rules, but it is much more circumscribed. It does not permit any depositions on notice; it only permits depositions by order of the court, because depositions play much less part in criminal cases than they do in civil cases and are the exception rather than the rule.

(a) is the general provision <sup>to</sup> as/when depositions may be taken in criminal cases, and the second sentence relates specifically to a witness who has been committed for inability to give recognizance.

Cases of that type are not very frequent in the Federal

courts, but when they do occur they cause hardship to the witness, and that provision would give the witness the right to have his deposition taken so that he could be discharged from custody.

Some States have similar statutes.

Mr. Youngquist. That is why you use the word "shall" in line 8?

Mr. Holtzoff. Yes.

The second part of 57 (a) is just as to the contents of the notice, which is issued on the basis of a court order, and the civil rule is followed as to that.

Mr. Glueck. May I inquire as to what the expression "particular class or group" in line 16 refers to, usually?

Mr. Holtzoff. Suppose you want to examine a member of a group that you can identify but you do not happen to know the man's name.

The Chairman. Members of Union No. 670, for instance.

Mr. Seth. That is the civil rule.

Mr. Holtzoff. That is the language of the civil rule.

Mr. Longsdorf. May I suggest for Mr. Holtzoff's consideration, in line 11, "the party at whose instance a deposition is allowed and directed to be taken," so as to keep someone from thinking that this is to be taken on notice like a deposition de bene esse?

Mr. Holtzoff. I think it is a good suggestion: "the party at whose instance the deposition is ordered to be taken."

The Chairman. That correction will be made, if there is no objection.

All right, will you go on, Mr. Holtzoff?

Mr. McLellan. May I ask one question, because we want to finish what we can? Do all of you think that it should be provided that a witness must be released when he is held as a material witness if his deposition is taken? May there not be circumstances in which the presence of the witness might well be required and a deposition not be substituted?

Mr. Holtzoff. You would change "shall" to "may"?

Mr. McLellan. I am only wondering about that.

7 Mr. Seasingood. The same question occurred to me. It might be very important to have the witness personally present. A deposition loses a great deal of force as compared with the personal attendance of the witness.

Mr. Youngquist. That was in my mind, too.

Mr. Seth. Leave out "forthwith" also.

Mr. Holtzoff. Personally, I think it is always a grave injustice to a witness who is at no fault at all to be kept in prison for a number of months just because he happened to see a particular crime.

Mr. McLellan. They do not exercise it except when they need to, and there may be circumstances where his personal presence is necessary for trial purposes.

Mr. Youngquist. I suggest that we change "shall" to "may."

The Chairman. And strike out "forthwith."

Mr. Waite. That matter was very definitely considered by the American Law Institute. There have been a number of cases in which witnesses have been held longer, as a matter of fact, waiting to give their testimony, than the defendant was held after he was convicted and sentenced, and there was a thorough-

going agreement that that was a danger, a menace, which ought to be changed.

The Institute Code reads that a witness may be held for two days and then released if he gives security for his appearance, and then there is the provision:

"When, however, it satisfactorily appears by examination on oath of the witness or any other person that the witness is unable to give further security as provided in Section 57, the magistrate may make an order finding such fact, and the witness shall be detained, pending examination, for his conditional examination. Within three days from the entry of the order last mentioned the witness so detained may be conditionally examined on behalf of the State," and so on. "At the completion of the examination the witness shall be discharged, and his deposition may be admitted in evidence."

I should myself be very loath to perpetuate the present system of making it possible to keep a witness indefinitely awaiting trial.

Mr. Holtzoff. Of course, in the Federal courts witnesses are not committed anywhere near as frequently as the case in state courts, because of the difference in nature of the Federal prosecutions.

Mr. Waite. That may be. It is quite possible that they do not happen, but we should recognize that they might happen and make a rule taking care of that.

Mr. McLellan. I move that in the tenth line of Rule 57(a) the word "shall" be deleted and the word "may" inserted.

Mr. Youngquist. Isn't it the eighth line?

Mr. McLellan. I thought it was the tenth line, sir.

Mr. Seasongood. No; it is the eighth.

The Chairman. No; it is the tenth line.

Mr. Youngquist. My proposal was directed to the eighth line. That is the heart of your statement.

Mr. Glueck. But that refers to taking of the deposition, which is always allowed, and the other refers to the discharge.

Mr. Youngquist. Do you mean you could take his deposition and still keep him in jail?

Mr. Glueck. You might. You could change your mind. He might get killed.

The Chairman. Shouldn't the Court have the right to protect the man, Mr. Waite?

Mr. Waite. If we give the Court the discretion as to whether he should release the man or not, that leaves the rule exactly as it is today, and today it has been demonstrated to have been abused time and time again. You might just as well have no rule in there if we are making it just what the present rule is.

Mr. Crane. It would cover cases like we used to have that involved the Black Hand. One witness got on his knees before me when I was on the bench and begged me <sup>not</sup> to discharge him, and I had no power to keep him, and he was killed the next day.

Mr. Holtzoff. It seems to me that this does not perpetuate the present practice, because by providing for the taking of the witness' deposition you are more apt to get the discretion of the Court in favor of the witness.

Mr. Waite. I had not thought of it as an absolute obligation to discharge a man who did not want to be discharged.

Mr. Dean. It must be done on his application, in the first place.

Mr. Waite. That is my understanding -- that he shall be discharged only if he wants to be discharged; but that if he wants to be discharged, then he must be discharged.

Mr. McLellan. That does not cover the case where it is important to have the person's testimony. It might be a rare case.

Do you think you would want to have the rule so that the Court could in a proper case discharge a man?

Mr. Waite. That is precisely where the abuse has occurred, where the Court thinks that it is important to have the witness and has held him despite his protest. It makes it a criminal offense ever to have seen an occurrence that might itself be criminal.

Mr. Holtzoff. Do you know of any such abuses in Federal cases? I do not know of any myself. I was wondering if any had come to your notice arising in Federal courts.

Mr. Waite. No, not in Federal courts.

Mr. Holtzoff. If you say there is no abuse in the Federal courts, why should we legislate here for that?

Mr. Waite. I do not say that there is no abuse in Federal courts. I say I do not know of any. I happen to know of a great many cases where it has occurred in the state courts.

Mr. McLellan. I do not know of any, but I do know of cases where we discharged from custody witnesses who were held by state courts because they were holding really a party

under the guise of his being a material witness for an unreasonable length of time.

Mr. Seasongood. Those are all instances of where you would either hold him or his testimony is lost, but if you have a provision that you may take depositions, then the reason for it would not be so great.

Mr. Waite. Exactly.

Mr. Seasongood. Therefore, it should be discretionary with the Court.

Mr. Waite. No. If the Court can preserve his testimony by taking deposition, then the reason for holding a man indefinitely ceases to exist.

Mr. Seasongood. Not always. I think Judge McLellan would say that sometimes the personal attendance of the witness at the trial is very important.

Mr. McLellan. I can add nothing to what you have already said. I agree entirely with you.

The Chairman. We have a very definite conflict of opinion here.

Judge, should not your motion with respect to "may" and with respect to "shall" also take with it the word "forthwith"?

Mr. McLellan. I think so.

Mr. Seasongood. Is the amendment to change "shall" in line eight?

Mr. McLellan. Line ten.

The Chairman. The motion is to strike in line ten the word "shall" and "forthwith" and substitute the word "may" for the word "shall."

Is that correct, Judge?

Mr. McLellan. That is right, sir.

Mr. Seasongood. I would like to amend it by saying that "may" shall be substituted for "shall" in line eight.

The Chairman. May we take one motion at a time? I think we perhaps can clarify it.

Mr. Seasongood. Very well.

The Chairman. All those in favor say "aye." Opposed, "no." It seems to be carried. The motion is carried.

Now, Mr. Seasongood moves to amend the word "shall" in line eight to "may." Is that seconded?

Mr. Youngquist. Seconded.

The Chairman. It has been moved and seconded. Is there any discussion?

Mr. McLellan. I have a feeling, Mr. Chairman, that there is not quite as much reason for making that change as the other, because I think it rather probable that the witness should have the right to have his deposition taken, so that, the deposition being in existence, that can operate upon the exercise of the Court's discretion, given in line ten, to discharge the witness or not discharge him; but if others see it the other way, I shall vote with them.

Mr. Seasongood. One thing that occurs to me is that it may tend to delay the trial.

Mr. Robinson. You might save a life.

Mr. Seasongood. It might be a long distance away and it might be a means of delaying the trial. I think the Court should be allowed to do it in proper cases. You can trust the Court, if nothing is lost by it, but he should not be allowed to do it in all instances.

Mr. McLellan. I feel that the witness should have the right to have his deposition taken so as to make out, in the ordinary case, a case for discharge, leaving to the court the power, however, after the deposition is taken, of discharging or not discharging the witness; but I am not strong on it.

Mr. Robinson. I am wondering about the case you mentioned, Judge Crane, and the reason for that Black Hand party not wishing to be discharged. Was he a witness?

Mr. Crane. He had confessed against his confederate and was to be used and detained by the district attorney.

Mr. Robinson. In other words, a provision like this would probably have saved his life.

Mr. Crane. It was after the trial, of course, when I had no power to hold the man, but he was shot and killed the next day.

Mr. Robinson. In the Capone cases in Chicago I know that there were times there where I think witnesses' lives would have been saved. I think there were fourteen or fifteen killed-- at least that many; it may have run past twenty -- and I think that even the gangsters, in a good many of those cases, would realize that the witness' deposition is on record and, in case of his death, it could be used against him anyway. I think that that is just one factor to be considered in deciding that a witness' deposition shall be taken.

Mr. Burke. Mr. Chairman, I am wondering if by any possible interpretation of this provision as it stands at the present time it could be construed as placing a premium upon a certain type of testimony to be given, with possible discretion that if the testimony given was what the authorities considered

satisfactory he would be released, otherwise not? It might happen to a witness that --

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Mr. Robinson. This provision might help to secure the release of some witnesses who are being held, too, because the deposition showed that the witness would not testify to what the prosecutor's office felt he was going to testify.

The Chairman. Mr. Burke's point is to the contrary -- that the witness might be released if he gave testimony desired by the district attorney. Otherwise he might not be. But that, of course, presupposes a weak judgment in the hands of the district attorney.

Mr. Burke. I am not indicating that it would ever happen, but the possibility of the rights of the witnesses, as we all well know, could be made the subject of a fishing expedition to determine what he might or should testify.

Mr. Robinson. I know of a case like that, Mr. Burke, but I think that perhaps that would be rather rare, because, after all, there is a law against perjury. Here is a witness putting himself down in black and white.

The Chairman. Subject to checking up between that date and the date of the trial.

Mr. Waite. It would certainly occur to the witness to forget a great deal when he was giving the deposition in order that his testimony would seem so valueless that he would be released.

Mr. Robinson. That would not necessarily follow.

Mr. Waite. That would not necessarily follow, but it might encourage the witness to do it.

Mr. Crane. A man can be sent to jail for perjury for

forgetting. A man was sent to jail for ten years in New York because in the third trial he had forgotten all he said in the first.

Mr. Waite. That is all right, but if I had to stay in jail for eight weeks, as one chap had to do in New York, waiting for my testimony in a minor case, I would risk perjury rather than remember what happened in that particular case.

Mr. Holtzoff. I call for the question on the motion.

The Chairman. The question on the motion with respect to the word "shall" in line 8 as made by Mr. Seasongood. All those in favor say "aye." Opposed, "no." The motion seems to be lost.

If there is nothing further on (a), will you tell us what differences there are in (b)?

Mr. Holtzoff. (b) relates to depositions taken at the instance of the Government. Of course, at the present time there is no such provision, but many States have provisions for depositions at the instance of the prosecution, and there are many situations in which such a provision is necessary.

The rule as it is now drafted contains a safeguard guaranteeing the confrontation privilege.

I would like to say that in the light of the discussion at the last meeting, the confrontation rule has been construed by the Supreme Court as not meaning that the witness has to be confronted by the defendant at the trial, but merely that he has to have an opportunity at some stage of the proceeding, or other, to see and cross-examine the witnesses. This rule is drafted on that theory.

The Chairman. And the matter of expense is taken care of

in the last part.

Mr. McLellan. Yes, but is that sufficiently done, Mr. Chairman? Should there not be some provision that they should be advanced prior to their being incurred? When you are dealing with this delicate subject of using a deposition against the defendant, should not the means of getting to the place be supplied to the defendant and his counsel in advance?

Mr. Holtzoff. Shall we change the word "paid" to "advanced" in line 30? "shall be paid in advance." That is in line 30. I second the motion.

The Chairman. Is there any objection to that? It is adopted by consent.

Mr. Seth. Does this rule sufficiently protect the defendant? I mean, is it definite that before a deposition of this kind is taken he has had the opportunity to employ counsel and has been advised by the court that he can have counsel of his own selection or that one will be appointed by the court?

10 The Chairman. I think that is covered by a rule on counsel.

Mr. Seth. I know, but may a deposition be taken before that is done?

Mr. Holtzoff. You do not take depositions before a plea is made.

Mr. Dean. At any event, I was going to suggest the insertion "and the attorney for the defendant" in line 23, so that it reads:

"The officer having custody of such defendant and the attorney for the defendant shall be notified."

The Chairman. Will you read that again? In what line is that?

Mr. Dean. Line 23, after the fourth word.

Mr. Holtzoff. I think grammatically that cannot be worked in at that place. I think that ought to be in a separate sentence, Mr. Dean.

Mr. Youngquist. Wouldn't that better come in the preceding section, with reference to the time and place, in lines 11, 12, and 13?

Mr. Holtzoff. I think that the first sentence covers that point.

Mr. Youngquist. No, it does not.

Mr. Holtzoff. Perhaps it does not.

The Chairman. Rule 40 provided that this matter of counsel is taken up at the arraignment. What we are now dealing with could not happen before the arraignment, could it?

Mr. Dean. That is true, but it is just a question in my mind if this is one of the proceedings of the trial to which we referred. I do not think there should be doubt that it is the taking of the deposition.

The Chairman. Your motion is that provision be made that the defendant's counsel be notified?

Mr. Dean. I do not care about the style.

The Chairman. All those in favor say "aye." Opposed, "no." The motion is carried.

The proper wording will be produced.

Mr. Crane. You say it is compelled that the defendant is not necessarily confronted with the witnesses at the trial. Can that be carried further to say that the testimony taken at

the preliminary hearing will be admissible if the witness dies?

Mr. Holtzoff. It has been applied to two types of cases: One, testimony given in a preliminary hearing, and the other at the trial, and the witness died in the meantime.

The reason for the court's permitting such testimony to be introduced was that, as against the confrontation rule before, the confrontation rule does not mean that the witness must be produced at the trial, but merely means that at some stage in the proceeding -- and it is not limited to any specific stage --

Mr. Crane. It seems to me that it might be made to look very ridiculous if you say that a defendant locked up in Washington should be taken to Hawaii or Alaska or San Francisco, with expenses paid.

I do not want it to seem that I am opposed to it. I want to go along with any advance. But we do not want to look absurd. It seems to me that that constitutional provision means that he shall be confronted by the witness at some part of the judicial proceeding of the trial. There may be a hearing before a magistrate or a judicial office. It is "quasi," as we call it. I have never known the authorities to go further in the decisions than to day that when a witness has appeared there -- where he testified at the preliminary hearing -- cross-examination was permitted. I do not think any authorities have gone further than that.

Mr. Holtzoff. Many States have the confrontation requirement, and yet they have provisions for taking depositions by the Government, and the two have not been held inconsistent.

Mr. Crane. It has never been tried out.

Mr. Holtzoff. I do think that the Supreme Court interpre-

tation of the confrontation rule goes perhaps a little further than the rule that you expressed.

Mr. Robinson. I do not know about that. In view of Judge Crane's request at a previous meeting, Mr. Strine, of the research staff, did prepare a study of that. It is in the back of the book. You might look at that.

Mr. Crane. What was the result of it?

Mr. Robinson. Just about what you say as to how far the Supreme Court has gone.

Isn't that right, Mr. Strine?

Mr. Strine. Yes, my views are just about what Mr. Holtzoff has expressed.

Mr. Crane. As to how far the Supreme Court has gone, what does it show?

Mr. Strine. The Supreme Court has not gone beyond depositions taken at a preliminary hearing, but I think the reason might well apply to other depositions.

Mr. Crane. I think we ought to be a little slow to go beyond what has been held.

The Chairman. Doesn't it often result in a gross miscarriage of justice if you cannot examine the witness outside the jurisdiction?

Mr. Crane. There might be some process by which you can get to the court.

Mr. Dean. You can now.

Mr. Holtzoff. You can't from Europe or South America.

Mr. Dean. You can from anywhere in the United States.

Mr. Crane. Are you going to put in a rule here where there are some things impossible? Sometimes you cannot unearth

a crime, but are you going to take a deposition down in South America or Europe to discover that?

Mr. Moltsoff. Suppose the witness is in the hospital. The subpoena does run throughout the United States. The witness may be in the hospital. He may be bedridden at home.

I would like to add this observation. Several years ago a bill was introduced in Congress embodying the substance of this provision, and it passed one House. It was not acted on. It was not defeated in the other House; it just was not acted on. But it passed one House.

Mr. Crane. I think if they got that far and they would not adopt it you ought to go slow about getting in the back door.

Mr. Dean. One question I have about this whole section, Mr. Chairman, is that the only test by which a deposition may be taken, unlike most depositions, is in order to prevent delay and injustice.

Mr. Moltsoff. That phrase is borrowed from the existing statute.

Mr. Dean. You mean the Civil Rules?

Mr. Moltsoff. No; the deposition statute in the Judicial Code.

Mr. Crane. If you will excuse the expression -- I do not mean to be critical at all -- we are going to be laughed at. I have spoken to two or three judges with regard to where the defendant is given the right, at the expense of the Government, to travel in some foreign country to take a deposition.

Is there any harm in speaking to Judge Reed or Judge Frankfurter and asking them what they think about it?

Mr. Holtzoff. Perhaps Judge McLellan, a former Federal Judge, could tell us his experiences about that.

The Chairman. How about the oil cases, where some of the people fled to Paris?

Mr. Crane. One of them had a house not so far from me, in GardenCity. He died of a broken heart. He tried to get back, and he could not get back. That poor fellow died in misery. There is justice.

There are some things we can do, but let us not do ridiculous things.

The Chairman. It does not set well with the common people to think that just because a man has millions on which to live in Paris in the old days he can get away with it.

Mr. Crane. There are some things we have to leave to the vengeance of the gods.

Mr. Youngquist. This provision for the payment of expense applies only when it is at the instance of the Government.

Mr. Crane. Yes.

Mr. Holtzoff. You are going to leave it to the Department of Justice and the United States Government.

Mr. Crane. I am speaking only of this. There may be nothing in it. Maybe I am wrong. But whenever you have this sort of thing going forth, they will pick out the absurd thing and the ridiculous thing, and it harms everything else.

If this is going further than the Supreme Court of the United States has gone -- but you say you think it was not even the intent of their language -- I say you ought to consult them. They will talk to you about it. Go up and ask them.

Mr. Holtzoff. The Supreme Court has never had occasion to

pass on the validity of the present situation, because there has never been a provision for it.

Mr. Crane. It is not the validity of it; it is the ridiculousness of it. You are going to pay the expenses of a lawyer for traveling three or four thousand miles.

Mr. McLellan. It is permissive only.

Mr. Crane. But what is the good of it if you are going to limit it by saying, "Well, of course, the judge won't allow one to be taken at Boston or San Francisco or Mexico"?

We have got just those things to face.

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The Chairman. For instance, let us take a scene in the Hall-Mills case in New Jersey, where they took this Pig Woman from the courthouse in a stretcher. They had a perfect vaudeville show.

Mr. Crane. Even the taxicab driver talked about that from the station Sunday afternoon. He wanted to know when they were going to have another trial like that -- it was a good show.

I am not criticizing New Jersey. We have had them in New York. The <sup>than</sup> Daves case and the Patrick case were a disgrace.

Mr. Holtzoff. Wouldn't this rule avoid that type of situation? You can take depositions in the hospital.

Mr. Crane. How can you prevent a judge from getting in the newspapers in a case that is spectacular? You cannot change that.

I will go along with it. I am simply telling you what I think about it. I have spoken to two or three people about it, and they laughed about it. It seems absurd on its face.

Mr. Robinson. I wonder if you could put a clause in there calling attention to the fact that it would be purely optional

on the part of the Government?

Mr. Crane. This is a case where concededly we are going beyond anything that has been done and that has been justified by the courts, and we are agents of the court.

You know some of the judges, and so do I. Why not go in and talk to them about it? Mr. Vanderbilt could do it, with extreme good taste. He is born with that.

Mr. McLellan. Would you let me ask one question, in order that I may know how to vote? I would like to ask the question of Mr. Holtzoff.

Have you adequately and specifically enough provided for the right of the defendant himself to cross-examine or have his counsel cross-examine him?

The Chairman. That is in (c).

Mr. Holtzoff. I thought it was, but I would be glad to have it strengthened or emphasized in any way.

Mr. McLellan. It says, "examination and cross-examination of deponents may proceed as permitted at the trial."

The Chairman. I think it should be "in accordance with the practice at the trial."

Mr. Holtzoff. I used the phraseology of the Civil Rules, but I do not know why we should be wedded to it.

The Chairman. May we, with regard to Section (b), consider whether or not you want to take it in its present form or whether you want to limit it to the use of witnesses who cannot be brought to court by reason of illness, or something like that? I think to that extent nobody could question the use of it, could they?

Mr. Holtzoff. Paragraph (d) limits it.

Mr. Wechsler. It limits the admissibility of the deposition, but it does not limit the taking of the deposition. I think it is a sound idea to limit the taking of the deposition where it would not be pertinent to the case. I think that would meet Judge Crane's point.

Mr. Holtzoff. I have no objection to that.

Mr. Seasongood. I suppose it is temerity on my part, after what Judge Crane said, but I call attention to the fact that there is no similar privilege given to the defendant.

Mr. Holtzoff. Rule 57 (a) gives that privilege to the defendant.

Mr. Wechsler. Before putting the question, I would like to say a word about Mr. Seth's point of some time ago, which seems to me a valid point. Under 57 (a), the general provision, the court may order a deposition to be taken at any time after the filing of an accusation. Under the previous rules that have been considered, the counsel provision does not become operative until the time of arraignment.

Mr. Seth. We amended it by putting "counsel" in there.

Mr. Wechsler. I would like to know what the sense of that amendment is. I missed it.

Mr. Dean. Simply that counsel shall be notified.

The Chairman. Notice shall be given not only to the defendant but to defendant's counsel

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Mr. Wechsler. That does not meet the point, it seems to me. Suppose he has not got counsel?

The Chairman. Then you cannot operate, because the notice must be given to counsel.

I think the point is well taken. Why not, in lines 3 and

4, make the provision that it shall be after arraignment?

Mr. Holtzoff. I was just wondering. Suppose a witness is infirm or sick and dangerously ill and about to die. You might want to take his deposition at an earlier stage.

Mr. Wechsler. I think that is true. I think the way to meet it is that, if that situation arises and if the defendant is not a fugitive, he be given the benefit of counsel at that time.

Mr. Holtzoff. I agree with that, and if it is the sense of the committee, I will be very glad to recast the rule so as to include a provision to that effect.

Mr. McLellan. I am enough afraid of this rule so that I would like to have it apply only to a situation where the defendant has already pleaded, instead of having anything in advance of the parties' being at issue because of the notice. That would cut out that time situation that you had in mind.

Mr. Holtzoff. Yes.

Mr. Wechsler. May I ask on that point, Judge McLellan, whether there might not be situations where the defendant is a fugitive and where it is desirable to permit the Government to take a deposition? In that case you could not do it.

Mr. Seth. You could not do it anyhow, unless you had the defendant present.

Mr. Wechsler. Well, it occurred to me, in my statement before, that perhaps it ought to be permissible, where the defendant is a fugitive and where his game may be to stay away until a sick witness dies --

Mr. McLellan. Then he does not have a chance to confront the witness.

Mr. Wechsler. It is arguable, I think, that if he were a fugitive he would forfeit his right and forfeit it fairly.

Mr. Robinson. In this connection, this point should be brought up, I think: that in the Southern District of New York Mr. John T. Cahill and also his successor, Mr. Correa, have told us that they have difficulties there with depositions being used by defense counsel for obstructing cases. They mentioned one case where a defendant --

Mr. Medalie. They took him to South America and to France and did not use the deposition.

Mr. Robinson. To Timbuktu, also.

Mr. Medalie. Counsel retained to try the case would have nothing to do with it when he learned about it and declined to use the deposition.

Mr. Robinson. Maybe this is still another one.

Mr. Medalie. That is just one case.

The Chairman. May we go back to the question raised by Mr. McLellan and Mr. Wechsler? As it stands now, it is any time after the filing of an accusation. You think that is unsafe, Judge?

Mr. McLellan. I could not give a very good reason for it, but when we are doing something as new as this and as valuable, I think, in view of all that has been said here, it might be well to confine the taking of depositions to cases where the parties are at issue.

The Chairman. Particularly as up to that time you would not have the defendant in court and he could not be given notice so he could confront the witness.

If you proceed on the fugitive theory, Mr. Wechsler, don't

you think we are getting out on new territory, where the court might not be willing to go along with us?

Mr. Wechsler. I see the point. You have got to face the question, I think, to what extent you are prepared to have witnesses locked up, if the arraignment is a long distance off, when a procedure of this kind might operate to get them released. I myself do not feel I have the practical knowledge to make the choice, and I certainly would not oppose limiting it to the arraignment.

Mr. Holtzoff. Maybe we would be more cautious if we adopted Mr. McLellan's judgment, because this is a step forward and this is an advance, and maybe it is better to make a little advance at a time.

Mr. Waite. I wonder if a good deal of the trouble is that in this section we have an unhappy confusion of two things. We have the problem of taking the deposition of a witness who is somewhere else; and also the problem of taking a deposition of a witness who is incarcerated, with the idea of releasing him.

So far as taking the deposition of a witness who is somewhere else, I fully agree that that should not be done until after arraignment and appointment of counsel.

So far as taking the deposition of a witness who is incarcerated and ought to be released, I think it would be absurd to keep him there until after arraignment, because arraignment, if you cannot find the defendant, may not take place for six months.

I suggest that the whole matter be referred back to the reporter, with the suggestion that he divide those two

objectives so that we can discuss them more readily.

Mr. Dean. I second the motion.

The Chairman. All those in favor of the motion say "aye."  
Oppose, "no." The motion is carried.

I think that is a very happy suggestion.

Mr. Crane. I vote for that.

The Chairman. (c) was to be strengthened. "shall proceed in accordance with the usual practice of trial," or some such language.

Mr. Medalie. Did you approve of (a)?

Of course, I must apologize for my lateness.

Mr. Holtzoff. We made a change in line 10.

The Chairman. Changing "shall" to "may."

Mr. Medalie. What did you do to prevent a failure or delay of justice?

Mr. Holtzoff. That is taken from an existing statute that has been in force many years.

Mr. Medalie. In criminal cases?

Mr. Holtzoff. It is a general statute, and that is the statute under which the defendants take depositions in criminal cases.

Mr. Wechsler. You will recall, Mr. Chairman, that I suggested that instead of that language, the reasons which would justify the admissibility of a deposition be incorporated in 57 (a), or whatever is the equivalent general provision. I think that would meet Mr. Medalie's point.

Mr. Dean. I second that motion, so that we have that clear.

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

Opposed, "no." The motion is carried.

Mr. Seth. But that restriction ought not to apply to the case of a witness in custody.

Mr. Holtzoff. No.

Mr. Seth. That ought to apply only to those at large.

Mr. Holtzoff. We would differentiate it.

Paragraph (d) is just the usual provision --

Mr. McLellan. Have you got through (c)?

The Chairman. (b) has gone back to the reporter; and, with regard to (c), we were considering using such language as "shall proceed in accordance with usual practice of trial."

Mr. McLellan. "and the right to cross-examine shall be preserved," or something like that.

The Chairman. All those in favor of such amendment to (c) say "aye." Opposed, "no." The motion is carried.

Now, (d).

Mr. Holtzoff. (d) is with respect to contingencies in which depositions may be used -- namely, that the witness is deceased or is unable to attend trial.

Mr. Seasongood. Couldn't you strike out "because of age, sickness, infirmity," and so forth? Suppose he is testifying in another court?

Mr. Holtzoff. Then the trial can be continued.

Mr. Medalie. Suppose he is on the stand indefinitely. That has happened.

Mr. Seasongood. He may be kept in another court for days or weeks. Doesn't that limit it?

Mr. Glueck. He may be in the military service.

Mr. Holtzoff. I did not have military service in mind.

Suppose we strike out "because of age, sickness, infirmity, or imprisonment."

Mr. Glueck. That would then affect the point that Mr. Wechsler made.

The Chairman. No. The impression I got of the point that Mr. Wechsler made was that we should have a recitation of the circumstances under which the deposition shall be available for use at the trial. If it is to be incorporated in (a), I have no objection to its going out here, but we want it in somewhere.

Mr. Holtzoff. We want it in, but my understanding is that Mr. Seasongood's suggestion is that it should not be limited.

Mr. Seasongood. That is, to strike out "because of age, sickness, infirmity, or imprisonment," because that is an illustration of the limitation, and the word "unable" is sufficient. Suppose he is in the military service. That would not be covered by those enumerations. There might be other causes of inability which the court would determine.

Mr. Youngquist. We have two situations. (a) relates to a situation which permits the taking of the deposition. (d) permits the use of the deposition.

The Chairman. Your motion, Mr. Seasongood, is to strike out from the beginning of line 39 through the word "trial" in line 41?

Mr. Seasongood. No; "because of age, sickness, infirmity, or imprisonment."

The Chairman. "or by procurement of any defendant has avoided the service of process or has otherwise been prevented from attending the trial."

Mr. Holtzoff. I think that should stay.

The Chairman. That should stay?

Mr. Holtzoff. Yes.

Mr. Medalie. Why shouldn't the word "disability" be used in some way? "Disability" is generally recognized by law.

Mr. Holtzoff. "is unable to attend the trial" is broad enough to cover that.

The Chairman. And more.

Mr. Medalie. Do you think so?

The Chairman. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. What I have in mind there is that a deposition in a criminal case should not be used unless you just cannot get the witness

Mr. Holtzoff. "is unable to attend the trial" covers that.

Mr. Youngquist. Why couldn't you do this: "unless his attendance at the trial cannot be procured," or something like that?

Mr. Seth. That is in somewhere.

The Chairman. Mr. Seesongood's motion is to strike out line 39 through the word "imprisonment."

All those in favor of that motion say "aye." Opposed, "no."  
It is carried.

Is there any further motion addressed to this section?

Mr. Holtzoff. There is a misprint in my copy.

Mr. Medalie. In line 41 it says "or has otherwise been prevented."

Mr. Holtzoff. That is limited by "procurement of any defendant."

Mr. Medalie. No. "has avoided the service of process."

Mr. Holtzoff. It was certainly not intended by the draftsman --

Mr. Medalie. If he has been prevented -- in line 41 -- by the defendant or his procurement, we ought to say so. Otherwise it means otherwise prevented. Perhaps his mother-in-law got married again and he had to attend the wedding.

Mr. Holtzoff. I must confess that apparently it has not been made clear. The phrase "is unable to attend the trial" is applicable to both --

Mr. Medalie. I think the repetition is permissible there, for clarity.

The Chairman. That will be recast for clarity.

Mr. Youngquist. Wouldn't it be better to say "party" rather than "defendant" there?

Mr. Seth. I think the Government might hold him out.

Mr. Medalie. It might. It has been done.

Mr. Seth. Absolutely.

The Chairman. The word "party" in place of "defendant" in line 40 is accepted.

Lines 39 to 41 are to be recast to meet the objection raised by Mr. Medalie.

Is there anything else?

Mr. Holtzoff. Line 47 contains a misprint. The word "changes" goes out.

Mr. Medalie. I move that everything in line 43 after the period and the balance of the subsection be stricken as unnecessary, "Any deposition may also be used," and so forth.

A deposition or any part of it can be used in accordance with rules of evidence. You need nothing else.

Mr. Holtzoff. The only reason I put that in is that it is in the Civil Rules, and I was afraid that somebody might say that because it is in the Civil Rules --

Mr. Crane. I do not think it is fully understood by the judges to mean that.

The Chairman. I think there is enough dispute to leave it in.

Mr. Holtzoff. It may be that in the Southern District it is clear.

Mr. Medalie. We do not know any more law in the Southern District than the other districts know.

Mr. Holtzoff. I did not mean that in any sarcastic sense, but it may be that they use it more.

The Chairman. Do you press the motion?

Mr. Medalie. I do. I do not propose to be hypnotized by errors in the Civil Rules.

Mr. Dean. I second it.

The Chairman. All those in favor of Mr. Medalie's motion to strike out lines 43 to 48 say "aye." Opposed, "no." The motion appears to be lost. The motion is lost.

All those in favor of section (d) as previously amended say "aye." Opposed, "no." The motion is carried.

Mr. Holtzoff. Mr. Chairman, (e), (f), (g), (h), (i), and (j) are purely formal and technical provisions as to the manner of taking and recording depositions, and they are largely --

Mr. McLellan. You mean objections, don't you?

The Chairman. Objections.

Mr. Holtzoff. Yes, beginning with that. That paragraph and the paragraphs following, to and including (j), all relate

to the matter of taking and recording (c) depositions, and these provisions are taken entirely from the Civil Rules, somewhat condensed.

Mr. Crane. You have not anything there about the defendant crossing the ocean on a steamer?

Mr. Holtzoff. No.

Mr. Seth. I would like to refer to page 4, lines 78 and 79. Isn't that language, "or is financially interested in the action", out of place in a criminal proceeding?

Mr. Holtzoff. Yes, you are right.

Mr. Seth. It is in the Civil Rules.

Mr. Holtzoff. You are quite right.

Mr. Robinson. Strike out the word "financially," you mean?

Mr. Holtzoff. "financially interested in the action."

Mr. Robinson. Strike out the word "financially" and leave in the rest of it.

Mr. Seth. Just leave out "financially." I guess that is sufficient.

Mr. Holtzoff. I see.

The Chairman. If there is no objection, "financially" will be stricken.

Are there any further suggestions as to these provisions which have just been referred to?

(Does (k) come within that same category, or is that new matter?)

Mr. Holtzoff. (k) is new matter. (k) relates to depositions and written interrogatories to be taken at the instance of the defendant.

The Chairman. May we pass on the other?

If there is no objection, may we have a vote on (g), (h), (i), and (j)?

Attig  
fls  
11:30 am

hs

atbig  
fls.  
cincy  
11:30  
1/14  
Advis.  
Com.

Mr. Medalie. First, I would like to be informed, How do you compel testimony? By the same process as you have in civil cases?

Mr. Holtzoff. Yes.

Mr. Medalie. What happens when the officer taking the deposition excludes testimony that is offered, say, by the defendant? Where is that? He excludes testimony. The defendant wants to get something in.

Mr. Youngquist. That is in lines 90 and 91. I think the second sentence should read:

"Evidence objected to shall be taken subject to objection being renewed at the trial."

Mr. Holtzoff. This is from the civil rules.

Mr. Medalie. Yes, that is the usual practice.

Mr. Youngquist. Doesn't that take care of what you have in mind?

Mr. Medalie. Yes, of course, that is the way these things usually run. Very often immaterial things are asked, and it usually becomes a fishing expedition, and it is only when someone advises the witness, "It is immaterial; don't answer the question," that the question comes up.

Mr. Youngquist. That is something you can't avoid.

Mr. Medalie. Even the rules can't handle that.

The Chairman. All those in favor of the motion say aye; those opposed, no.

Now (k).

Mr. Holtzoff. (k) relates to written interrogatories, but only at the instance of the defendant. It is taken very largely from the civil rules.

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Mr. Medalie. Does this mean that if the defendant wants them taken on written interrogatories, the Court may so order? But if the defendant wants to take oral depositions, has the Court the discretion to direct that they be taken by oral interrogatories?

Mr. Holtzoff. No.

Mr. Medalie. It reads that way now.

Mr. Holtzoff. I think you are right as to your interpretation.

Mr. Medalie. We don't want it that way, do we?

Mr. Holtzoff. No.

The Chairman. I thought the question really was covered by the first section, (a). This is only an alternative.

Mr. Holtzoff. Yes, but the alternative should be only at the defendant's election.

The Chairman. If the defendant requests the taking of depositions by way of written interrogatories. In other words, that change, I take it, is by common consent?

Mr. Holtzoff. I suggest that we change the word "any" to "every." That was poor draftsmanship in my part.

I move we adopt it.

The Chairman. In line 31 "any" is changed to "every."

Mr. Medalie. Suppose you have 126 defendants and they have managed to assort themselves among a handful of counsel-- say 26 counsel. That is an awful lot of serving to have to do.

The Chairman. If he does that by serving counsel, and he serves one copy on the counsel to cover all of his defendants?

Mr. Medalie. Yes, but I point out to you that even in the case I gave, of 126 defendants and only 26 counsel, you have an

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awful lot of serving to do on 26 people.

The Chairman. I do not see how you can avoid it.

Mr. Heltzoff. I think it should be done, because every counsel is entitled to cross-examine the witnesses.

Mr. Medalie. That is true.

The Chairman. Where there are 126 defendants, there probably are some good fees.

Mr. Medalie. This is only because they are written interrogatories. On the other hand, isn't it a fact that it is provided for here -- and I assume it is -- that interrogatories are returned by the officer taking the deposition and filed with the clerk of the court and are available to anybody who wants to read them?

Mr. Seth. Yes.

Mr. Medalie. Why should it be necessary to go to that expense?

Mr. Heltzoff. You have to give the people an opportunity of defraying the cost of the interrogatories.

Mr. Medalie. You are talking about proposed interrogatories?

Mr. Heltzoff. Yes.

Mr. Medalie. All right; withdrawn. Practically there will be no hardship, because rarely does anyone undertake a process like that, only a capable official.

The Chairman. All those in favor of Section (k) say Aye; opposed, No.

Mr. Seasongood. Before you leave this, this idea of taking depositions is not a novel thing, as has been intimated. On the contrary, it is provided for in the constitution of the State

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of Ohio, in Article 1, Section 10, which says:

" \* \* \* but 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, always securing to the accused means and the opportunity to be present in person and 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. 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 made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

That amendment was adopted in 1912. The privilege is provided in Sections 1344-11 and following for the defendant to be paid his compensation and that of his counsel when he takes the deposition.

Mr. Youngquist. If he is financially able.

Mr. Seasongood. It does not make that provision. It says that when either party wants to take a deposition, the defendant and his counsel have a little junket and can take it at the expense of the State.

I don't suppose you want to go that far, but I am just calling your attention to the fact that that is the Ohio law. I suppose the idea is that both the State and the defendant shall be treated equally.

Of course, if the defendant is impecunious, or counsel has been appointed by the court --

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Mr. Crane. We might add to our rule that it is for the

5 duration of the war. He can't take a trip to Europe.

Mr. Dean. I might just state that you have given the Government the privilege and the defendant not the same privilege. If the defendant takes the testimony, he waives the right to that extent to be confronted in court by the witnesses he calls. But in the Ohio statute or constitution they treat the defendant exactly the same as the Government and give him the privilege of taking these depositions, if the Court so orders, at the expense of the State.

Mr. Youngquist. But, Mr. Seasongood, should we not provide in (b), where the deposition is taken at the instance of the Government and requires, of course, the attendance of the defendant and his counsel, that the defendant's expense should then be paid by the Government, whether the defendant is financially able or not?

Mr. Crane. I think that is there. All I am saying -- and what my contention is -- is this: that it has never been done. I have stated my reasons before; I shall not do it again.

Mr. Wechsler. I should like to have a chance to second Mr. Seasongood's motion, if it was a motion.

Mr. Seasongood. You mean that the defendant should have the same privilege as the Government?

The Chairman. Did you make a motion?

Mr. Seasongood. I am not sure that I did. I just mentioned the Ohio law. The defendant is entitled to there; but if he calls witnesses himself, doesn't he waive the privilege of having them brought into court, if he calls them by way of deposition?

Mr. Wechsler. Suppose the defendant is indigent, as most

6 defendants are, and there is a witness who will testify in his behalf who is inaccessible, who is likely to be unavailable at the trial. It seems to me that the procedure -- the principle of the procedure, if valid -- ought to carry to making some provision for helping a defendant in that situation. I understood that to be Mr. Seasongood's suggestion, and I would like to support it if he thinks it should be in.

Mr. Holtzoff. The rule permits a defendant in those circumstances to take a deposition.

Mr. Seasongood. But he does not get the expenses of his counsel.

Mr. Wechsler. He has the privilege of sleeping on the park benches, which is open to the poor and the rich alike.

Mr. Crane. I am sorry that I have caused so much trouble.

The Chairman. I have no motion. I don't want to shut off any discussion.

Mr. Holtzoff. I think a provision should be made along this line, safeguarded by the discretion of the Court.

Mr. Seasongood. I think so, because you have a better chance. Otherwise you are going to have the argument made, "You give the Government the right, but you don't give the impecunious defendant the right."

The Chairman. Do you make the motion?

Mr. Seasongood. I move that in the case of an impecunious defendant, he be allowed to take depositions subject to the approval of the court, whenever the court orders, and that on the taking of such depositions the reasonable expenses of himself and his counsel in attendance at the place be defrayed by the Government.

7 Mr. Crane. Before we adopt that, how many lawyers in New York do you think would immediately find witnesses in the winter time out in California or down in Florida?

Mr. Seasongood. I agree with you. It is subject to great abuse. But if you say that the court has the say as to whether this is really just a means of getting out to Sunny Palm or is in the interest of justice, then you are protected.

Mr. Crane. Seriously, you must remember this: We can never get a thing perfect. We can never cover every instance in the law. We don't in many of our decisions. Both in college, teaching it, and in our decisions we are always taking the lesser of two evils. It is never a question of right or wrong, good or bad, perfect or imperfect; it is the lesser of two evils.

I say it is better, perhaps, that a prosecution fail in some very rare instances than it is to have a general provision that the Government or the defendant can take depositions in far off climes, with expenses to be paid to carry the defendant and his counsel there.

On the face of it it seems absurd, and it is only necessary because of our constitutional provision. It is better in one or two instances that the prosecution fail than to have such a provision which is absurd.

Mr. Seasongood. How can we say it is absurd when the great State of Ohio has had it embodied in its constitution for thirty years?

Mr. Crane. No, that is not so. It would not apply to New York or to Texas, because there are reasonable limitations to traveling; but it is not so when you take a steamer and go to Honolulu, China, or the Philippines.

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The Chairman. We trust the judges.

Mr. Crane. That is the trouble; you have all distrusted the judges.

The Chairman. Now we are trusting them. Despite what Judge Crane says about human nature, I have a bookkeeper who gave me a chart showing that my associates always have to go south on important business matters in the winter and north and west in the summer time.

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I do think there is something to Mr. Seasongood's suggestion to get this in before Congress, or else we will be accused of putting through a lopsided rule. If we trust the judge, what is the harm?

Mr. Crane. Ask your associates.

Mr. Youngquist. We might suggest, Mr. Seasongood, a change to eliminate the payment of the expenses of the defendant, who need not be there.

Mr. Seasongood. I am agreeable, but I am referring to the Ohio provision.

Mr. Holtzoff. Is not that Ohio provision limited to the confines of the state? I don't think you should allow the defendant to go outside the jurisdiction and then come back.

Mr. Seasongood. Will the Reporter examine the Ohio provision and see how far it is applicable? Of course, there is more reason for such a provision in the state than in the United States, because the United States Government can subpoena witnesses anywhere within the United States. The state does not run outside the state. There is more reason and more sense in the state than in the Federal.

The Chairman. You have heard the motion. Allthose in

9 favor say Aye; all those opposed, No. The motion is carried.

Mr. Crane. If you are going to adopt the other one, I am for it. But I am against the whole thing in principle.

The Chairman. Rule 58.

Mr. Robinson. On Rule 58, the Committee will recall that your instructions to Mr. Tolman were that he call upon the Administrative Office for its assistance on matters having to do with calendars, dockets, and other details connected with the administration of the District Courts. So, Mr. Tolman has worked out these rules with the assistance of the Administrative Office, for your consideration.

Mr. Tolman.

The Chairman. There is an alternative rule?

Mr. Robinson. Yes.

Mr. Tolman. Rule 58 is here in two forms. The rule is supposed to deal with the problem of arrangement of calendars and with the action that judges may take to advance cases or to arrange them so that they may be promptly disposed of.

The first rule you have is drafted in the form which the Committee instructed should be followed. The second alternative rule, which appears three or four pages later, is the form in which the Administrative Office would like to have the rule appear.

The difference between the two is that the first one contains a provision -- subdivision (b) -- for the listing of all pending cases, and the alternative contains no such provision. That is really the only difference between them.

The Chairman. The alternative is preferred by Mr. Chandler's office?

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Mr. Tolman. Mr. Chandler prefers the alternative.

Mr. Glueck. May I ask why that is preferred?

Mr. Tolman. Well, a statement has been prepared on the subject, but I can tell you briefly what it amounts to. He thinks it is going to be a great big practical job to list cases quarterly for the District Courts, and the amount of labor involved will not be worth what could be accomplished, and he feels particularly so because he thinks that the Administrative Office already has the power and is set up to bring cases that are long overdue to the attention of the judges.

Mr. Waite. Does the District office have its fingers on that sort of thing? Does it know the status of all the cases?

Mr. Tolman. I think most District judges do not know the status of the criminal calendar -- do not know what the pending cases are.

The Chairman. You said "District office." Did you mean that?

Mr. Waite. Your office.

Mr. Tolman. At the present time I do not think we could fairly say we do know the status of the calendar, but I think there is a good possibility that we will. We require reports from the judges now on civil cases pending before them. We have not yet gone into the field of criminal cases, but Mr. Shafroth, I know, intends to do it, and we are now starting, this year, a system of statistical reports on criminal cases filed and terminated in the District Courts, which ought to be a source from which we can get the statistics at any time.

Mr. Waite. My opinion is that somebody ought to know what is being done -- whether certain cases are grossly delayed or

11 not. If your office knows, that would be enough for me.

Mr. Tolman. I do not want to say that we do know now, because I do not think I could fairly say that. But I think we hope we will know.

The Chairman. Don't you know what districts are most in arrears?

Mr. Tolman. Oh, we know what districts are most in arrears. We can tell you that.

The Chairman. Don't you know, in the districts that are most in arrears, just what the extent of the trouble is?

Mr. Tolman. Generally we do. If we cannot tell from the statistics, we send someone out to find out what the trouble is.

Mr. McLellan. I can answer your question. Every year, as I am informed, a detailed statement is by statute required and made to the senior circuit judge, in duplicate, and he forwards a copy of that report to the Administrative Office. So, once a year it is known just about how many cases -- criminal cases -- there are pending and why they have not been disposed of.

Mr. Tolman. And how long they have been pending.

Mr. McLellan. And how long they have been pending. There will be a great many pending by reason of the defendants being fugitive.

Mr. Holtzoff. The Department of Justice has a double check on that, because we have a requirement that every United States attorney must semi-annually submit a list of every one of the cases in his office which have been pending more than a certain length of time, and he must state the reason why it has been pending that long. Those lists are checked very carefully.

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Mr. Tolman. As I recall it, the Committee wanted this particularly because it had some word about the length of time people were being detained before trial. Mr. Wechsler, I think, was particularly interested in that.

In order to supply you with information on that subject, I asked the Bureau of Prisons to give us information for the fiscal year ending June 30, 1941, as to the length of time defendants were held before trial, and I have here statistics on the subject, by judicial districts, and if you are interested, I can give them to you.

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The Chairman. I think they have been distributed.

Mr. Tolman. I gave them to those who asked for them, but I did not distribute them generally, because I did not know whether they would be wanted. But I would be glad to let you look at them.

As Mr. Holtzoff says, I think it is the policy of the Bureau of Prisons to call the attention of the Attorney General to any case which seems long overdue, and they do keep current check on all jail populations.

Mr. Medalie. Most good district attorneys do that.

Mr. Tolman. I think they do.

Mr. Medalie. I know that in my district I used to get a report from the head of the criminal division once a week as to how many people were in jail, breaking it up into those under indictment and those awaiting indictment, and how long they had been there. In other words, we were operating under the permission ofoyer and terminer and general jail delivery. That was the first order of business -- to clear the detention house of people who were there. I think that practice

13 is generally followed.

Mr. Tolman. I think it is the duty of every district attorney to keep track of his district.

The Chairman. In view of the fact that the Administrative Office has the jurisdiction to handle these matters, and in view of Mr. Chandler's expressed preference for the alternative rule, I am wondering if that is not the one we should adopt.

Mr. Seth. I move that we adopt it.

Mr. Holtzoff. I second the motion.

Mr. Seasongood. Of course, I am afraid to suggest anything that disagrees with Mr. Chandler and his office, but I don't believe that this 58(b) would be workable in our district, because senior judge would mean senior in point of time.

Mr. Tolman. Yes.

Mr. Seasongood. The Southern District of Ohio has a judge in Columbus -- that is, the Eastern Division of the Southern District -- and it has a court in Dayton, which is the Dayton Division; and it has a Cincinnati court.

I am quite sure that no single judge would undertake to interfere with the calendar of the judges in those other cities. I think that that would be completely unworkable. He would not do it, and they would object very much to his doing it.

Mr. Tolman. There is a question about that.

Mr. Seasongood. How could he inform himself of the situation in Dayton and Columbus and say that his colleagues were not attending to business?

Mr. Tolman. There is a question about it, and undoubtedly this giving of authority to the senior district judge is rather a new idea. We have found that there are districts in the

14 United States where there is no judge who has any control over the general run of business in the district, and it does cause a great deal of difficulty.

A number of senior district judges and other judges have suggested that it would be desirable to obtain legislation giving the administrative responsibility for each district to the senior judge of that district.

I believe Judge Knox, of New York, although he has had great success in the arrangement of the business of the Southern District of New York, feels that quite often he is limited in what he can do to improve the efficiency of the court, by reason of the fact that he has no authority, no real power, to tell judges what they shall do, and to keep track of the administrative problems.

Mr. Medalie. He is admittedly a very good judge and is highly respected by his colleagues. His influence is tremendous.

Mr. Tolman. That is very true. But there are other districts where it is not successful. Chicago, notably, is a place where it is not successful. Chicago has practically six separate district courts.

The Chairman. Is your problem involved in the alternative rule?

Mr. Seasongood. Yes, it requires the senior circuit judge to find out what is the state of the calendar and to make rules for expediting it. They will not do it.

I know in the matter of the appointment of a referee, it is supposed to be left to one judge. Both are supposed to do it, but he defers to the one, whether it is in Cincinnati or

15

Dayton.

The Chairman. Must there not be a voice in every court that has more than one judge?

Mr. Seasongood. In our case the judge in Dayton is the senior judge. He would say, "Well, I am busy with my own calendar. How can I say what the judge in Cincinnati ought to do and what the judge in Columbus ought to do? They are as able to determine that as I am, and I just won't do it."

I am quite sure they would not.

Mr. Medalie. It may be that in some districts that situation arises. It may be, also, that in many districts either that situation will not arise, or else the senior district judge, under the authority given here in subdivision (b), will be strong enough to exercise that authority.

Even though we fail in some districts, I think we ought to make it possible for this to work in whatever districts it is workable.

The Chairman. He has certain rights now. For instance, he picks the clerk of the court in the event of a vacancy.

Mr. Tolman. And disagreement, too.

Mr. Glueck. This imposes an additional burden of work.

The Chairman. But they are getting used to that by reason of the fact that they have to attend the judicial conference in their circuit once a year, and they see that the senior circuit judge presides twice a year over the conference. The idea that a judge, if he is a single judge, is responsible to nobody in the world but God and his conscience is obsolete. There has got to be a voice. There may be districts where there will be a revolution, but still I do not think that that militates

16 against the desirability of the rule.

Mr. Medalie. This is permissive. He gets power but is not required to exercise it.

Mr. Tolman. It is an empowering section, not a mandatory section.

Mr. Dean. What is the definition of "senior judge"?

Mr. Tolman. The oldest.

If you are willing to leave the senior judge this way, there will have to be a provision made for the District of Columbia, where there is authority in the chief justice. I thought that might be taken care of in the rule on definitions. For the District of Columbia we could say "The chief justice of the District Court of the United States for the District of Columbia."

5 It is so hard to see what individual personalities are involved or what particular problems arise in each district. What we wanted to do was let the judges know, some how or other, that they have this power.

The Chairman. Do they have the power unless you say "shall"? In other words, here is a judge who has two or three cantankerous colleagues. They think he is trying to set himself up.

He calls for information, and they say, "You don't have to do this. This just says that you can. If you want to be disagreeable, go ahead and do it."

If it said "shall," he would say, "Boys, I have no choice; I have to go to work on this problem."

Mr. Youngquist. You would have to change that around entirely, because he may require this information with respect

17 to any criminal case. Or do you have in mind a wholesale report to him on all cases?

Mr. Tolman. I am afraid that would be impractical. I am afraid the United States attorneys might resent being asked the procedural status of every criminal case.

Mr. Youngquist. It occurs to me that since we are again moving on somewhat fresh soil, trying to expand the powers of senior district judges, it would be wiser to leave it as it is and probably obviate an attack, covertly or otherwise, by the district judges.

Mr. Glueck. What would move the senior district judge to request such information in any single case? For instance, if some well known defendant were being prosecuted, and three or six months have passed since the point of arrest, and the papers are after him, writing editorials? Is that the thing you have in mind?

Mr. Tolman. That might be the sort of thing, or we might call attention to a long delayed case and say to the district attorney, "Would you find out the reason for the long delay?" He would find out better if he had a rule.

Mr. Seasongood. At the present time does not the administrative officer look into these other things?

Mr. Tolman. He looks into them, yes, but he cannot tell the judges what to do in individual cases. The responsibility is theirs, and they resent it very much if we should tell them what to do. We are in no position to tell them what to do. We are in Washington and have no knowledge of what the background is. All we can do is call it to their attention.

Mr. Wechsler. These statistics seem to me to show, unless

18 my practical judgment is wrong -- that the trouble spot probably arises after two months of detention. Here you have a total of 35,000 defendants, roughly. As you would expect, almost half are disposed of in under ten days. But you have well over 1,000 of that total detained for two months or more.

Now, I wonder if that may not suggest some clue to a solution. I am not sure just what the rule should be, but if there were machinery whereby the senior district judges were informed of cases after a certain minimum period of detention, that, it seems to me, would place the responsibility on the senior judges. It would also give them some clue as to how to exercise responsibility.

I hate to suggest any departure from the proposal of the administrative office, but I wonder if the administrative office might not view some such more modest proposal with greater approval.

Mr. Glueck. Would not that involve a great deal more work, because statistically it would involve a great many cases?

Mr. Wechsler. It seems to me that the United States attorney would have to do what many now do -- keep track of his jail cases. It would mean, judging from the statistical table, that the number of cases with which he would be confronted would be relatively small, because he would only be concerned with the cases in two months. Then he would be under the duty, if not the requirement, to report that to the judge, and the spotlight would be focused on those cases. It seems to me that that would be a desirable result, unless he misses something in the picture.

Mr. Glueck. I have not seen the table, but did you say

19 that over half the cases were in two months or longer?

Mr. Wechsler. No, half of them are disposed of in under ten days. There are only between 4,000 and 5,000 out of 33,000 where the period of detention is longer than two months, which seems to me to indicate a natural reduction in the number that would involve attention. I simply accept the statistical norm indicated by these figures, taking into account all variations. Most cases seem to be handled in under two months.

The Chairman. Do you make any motions, or do you prefer to refer it back to the administrative office and request that they attempt to formulate some rule that will cover that situation?

Mr. Wechsler. I would rather put it that way -- not with the direction to the administrative office but with the request for their consideration of that proposal and their recommendation.

The Chairman. All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Then, I think we will withhold the completion of discussion on Rule 58, but are there any further suggestions as to change, we will say, in the alternate Rule 58?

Mr. Seth. Is not the last sentence covered by a previous rule?

Mr. Tolman. That last sentence? I am not sure about that. I don't know whether or not it ought to be there.

Mr. Seth. See if it is not already covered.

Mr. Robinson. Yes, that is covered.

Mr. Tolman. Then, we will take it out of here.

Mr. Waite. Will you eliminate my ignorance, Mr. Tolman,

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concerning one matter? This provides that

"The district courts shall by rule provide for the placing of criminal proceedings upon appropriate calendars."

When does a matter become a criminal proceeding?

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Mr. Tolman. I assume it becomes a criminal proceeding at the time when it is commenced, whenever that may be. The Committee has not decided that.

Mr. Waite. One thing that has worried me about this whole matter is the interval between arrest and indictment -- formal accusation.

Mr. Tolman. Yes.

Mr. Waite. If it does not become a criminal proceeding until the accusation has been filed, then this rule would not cover that particular problem. But if it becomes a criminal proceeding as soon as an arrest is made, then it covers it.

Mr. Tolman. I drafted that rule with the original rule on the commencement of a criminal proceeding in mind, and my thought was that it would include cases that had been referred to the court and where no indictment had been returned.

Mr. Waite. I suggest that you and the Reporter look into that and make it explicit in the next draft.

Mr. Glueck. May I advert to the point Mr. Wechsler and I were discussing before? On this table, you take, for instance, Ohio, Northern District, and Ohio, Southern District. I add up that in the Northern District about ninety-six cases were pending two or more months, and that in the Southern District there were 163.

Now, it seems to me that if all those cases have to be analyzed with reference to what is wrong with them or why the

21 delay, it might cause complications, although I admit that that is highly desirable. I don't know what the machinery would be. But I am just wondering whether judges, who have other work to do --

Mr. Wechsler. I do not imply that this period of detention is wrong; I am willing to assume that it is justifiable under the circumstances. That was only to focus attention on the problem.

Mr. Tolman. You really think it is the sort of thing that could be taken care of by rule of court?

Mr. Wechsler. It occurs to me that a rule might strengthen the administrative office and strengthen the senior district judge. I have no fear that when you get into it, you will handle it, but I would be quite content to see no rule if on further consideration that is still the judgment of your office.

Mr. Tolman. Well, I would be glad to ask that it be reconsidered.

The Chairman, I think we have voted on that motion. That brings us now to Rule 59.

Mr. Holtzoff, will you report on that please?

Mr. Holtzoff. That is a rather long rule, but it does not contain startling provisions. It has the usual provisions regulating the issuance of subpoenas, subpoenas duces tecum, and the service of subpoenas. It is taken almost verbatim from the civil rules, only somewhat condensed.

Mr. Seth. Why in lines 3 and 4 do you authorize the attorney for one of the parties to issue a subpoena? That is not in the civil rules.

Mr. Holtzoff. That is not in the civil rules, but that is

22 something that we adopted at the last meeting on motion of Mr. Medalie, because in the State of New York -- and I daresay perhaps in other states -- attorneys issue their own subpoenas. They are issued in the same form as the court subpoenas. They are signed or attested in the name of the court, but the attorney as an officer of the court issues them instead of having the clerk or other officers of the court issue them.

Mr. Medalie. As a matter of fact, when the clerk issues a subpoena, he issues anything the attorney asks for.

Mr. Seth. He issues them in blank.

Mr. Medalie. Yes.

Mr. Seth. I think they ought to be in a form --

Mr. Dean. He does not send a piece of paper that looks like a promissory note and call it a subpoena.

Mr. Medalie. Let us take it as it actually works. I think the administration of justice works very well and very practically in New York.

Mr. Dean. But this will be new to people in many sections of the West.

Mr. Medalie. Yes, but it was new in New York when it was first adopted.

Mr. Dean. In New York you know that you can go down to the clerk's office and get a stack of subpoena forms. You go back to your own office, and you --

Mr. Holtzoff. In New York you go to a stationer and you buy a pad of blanks.

Mr. Dean. Anyway, you use a regular form.

Mr. Medalie. Except that when you serve a subpoena duces tecum with a large number of items, you actually typewrite it,

23 although it looks like a bill in equity. It looks very formidable.

The Chairman. I do not think there is any real danger there, because you just give them a little slip of paper in the form of a promissory note, and the witness comes in for contempt proceedings and says, "I didn't think this was a subpoena; it didn't look like one." No judge is going to hold him.

Mr. Dean. I was going to suggest saying "on a form provided by the clerk."

Mr. Robinson. Don't you think that is a good suggestion by Mr. Dean?

Mr. Holtzoff. No, because it might give rise to the condition that attorneys deviate from the form prescribed by the clerk.

The Chairman. You get into trouble when you have one of those long subpoenas to produce documents, where you have to have just page after page.

Mr. Holtzoff. New York experience shows that there is no difficulty arising.

Mr. Dean. I know. We do the same thing in the Southern District of California. But there are many places where it is not done.

Mr. Holtzoff. This will be a new form in places where it is not now done.

Mr. Dean. I think you miss my point. I think it ought to look like a subpoena.

Mr. Medalie. Practically, you can count on it that lawyers will have subpoenas on printed forms. It works that way. In other words, the point you are raising is one that is not likely to come up. It conceivably can come up, but it just does not

24 come up. It is not the convenient way of doing those things.

Mr. Holtzoff. Of course, we could have a subpoena form in the appendix. That might help.

Mr. Medalie. All right.

Mr. Holtzoff. I move that we adopt 59(a).

Mr. Seasongood. I move that we strike out "attorney for one of the parties."

The Chairman. We have adopted it once.

All those in favor of the motion/<sup>to</sup>strike out the words "or by the attorney for one of the parties," say Aye; those opposed, No.

Mr. Seasongood. You had better have a division.

The Chairman. Yes, I am in doubt. All those in favor of the motion, raise their right hands.

Seven.

Those opposed please raise their right hands.

Nine.

The motion is lost.

We go now to 59(c).

Mr. Holtzoff. That relates to subpoena duces tecum.

Mr. Medalie. I would like to ask Mr. Dean something about that. You were at the tobacco trial in Lexington?

Mr. Dean. Yes.

Mr. Medalie. Did not the Government get hold of all the company records prior to trial and have them brought down to the court house at Lexington?

Mr. Dean. Yes.

Mr. Medalie. Wasn't there abuse there?

Mr. Dean. We are assigning it as one of the errors in the

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Appellate Court.

Mr. Medalie. You are dealing with it practically.

Mr. Dean. I think there could easily be an abuse.

Mr. Medalie. Do you think in view of your experience that we ought to reconsider this provision at the end of (b)?

Mr. Dean. Yes, possibly.

Mr. Medalie. Let us get his view on this, Mr. Chairman. He has had an experience, and perhaps a horrible one.

Mr. Holtzoff. But I thought you were against him.

Mr. Medalie. I am showing you I am a broadminded fellow.

Mr. Dean. To get the facts on that thing, first they ordered the documents in on subpoena duces tecum, and then they moved the trial date three or four months over. Then we resisted inspection of all those documents -- about 250 boxes -- really on the theory that we were discommoded and could not prepare our case. The court overruled us, writing a short opinion saying that they had the right.

I think there might be real abuse.

Mr. Medalie. There is another form of that abuse under legal pretense, and that is when the Grand Jury is in session, prior to trial but after indictment and plea. The United States Attorney or the Attorney General will subpoena things like that on some theory or other, and the same thing happens.

Mr. Dean. They get things like that in the office, and is very difficult to get them back.

Mr. Youngquist. Before you came this morning, Mr. Medalie, we amended Rule 56 to provide that the defendant shall have the right by order of the court to inspect documents in the possession of the Government that are necessary for the preparation of

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the defense. That answers it in part.

Mr. Medalie. Both get it?

The Chairman. No.

Mr. Youngquist. Practically, under the provisions of the last sentence of subdivision (b) of 59, the Government gets that discretion.

Mr. Holtzoff. So does the defendant.

Mr. Medalie. Yes. Now the defendant gets the additional right. That has been put into 56.

Mr. Holtzoff. Yes. This is for the benefit of the defendant who subpoenas a third party, as well as for the benefit of the Government.

Mr. Medalie. But you know what the Government subpoenas in anti-trust cases. It subpoenas the corporate defendant's records.

Mr. Dean. It means the defendant, for all practical purposes.

Mr. Medalie. It is not a very terrible thing. You just don't like them to have it when you are on the other side.

Mr. Dean. That is right. In this case they have all been seen before anyway. The only point was to avoid having a trial that would last a year and a half.

The Chairman. The motion is to adopt Rule 59(b). All those in favor will say Aye; those opposed, No. The motion is carried.

Mr. Holtzoff. 59(c) provides that

"A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party."

That is the same provision as the provision in the civil

27

rules.

Mr. Youngquist. Does the civil rule contain "eighteen years of age"?

Mr. Holtzoff. I believe so.

Mr. Seth. Should that one day's fee be in there where the Government subpoenas, unless demanded? You require the payment of one day's fee whether he is in attendance or not. Where the Government subpoenas, that ought not be.

Mr. Holtzoff. In the first draft a provision was made that the Government need not tender the money to the witness in advance. The civil rules provide that the Government need not tender money in advance.

The Committee in its last session struck out the provision, with a view to putting the Government on a par with other parties. In drafting this, I drafted it in accordance with the directions of the Committee, but I want to suggest reconsideration of the action taken.

I therefore move that 59(c) be amended so as to include the provision contained in the civil rules, exempting the Government from the necessity of tendering witness fees and expenses in advance.

Mr. Seth. Unless demanded.

Mr. Holtzoff. There is really a reason for that. The reason why a private party is required to pay a witness in advance is that nobody knows whether the private party is financially responsible. But there is no question of the Government making payment at the proper time. What happens is that after the witness arrives and after he has testified, the marshal pays him his fees and his mileage.

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Mr. Medalie. Under a certificate of the district attorney, who makes an endorsement on the subpoena, and sometimes holds it up if he was not satisfied with the testimony.

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Mr. Holtzoff. There are instances where you have an impecunious defendant or defendants who have no money to pay their carfare. What happens then is that the marshal informally advances the money and credits the defendant when he later pays him. Otherwise you would<sup>have</sup> a considerable waste of Government funds in the light of the large volume of Government criminal cases, because sometimes a case may be continued, and the witness is notified not to come. In the meantime he has had his mileage, and when he is resubpoened, he has got to be paid again.

I don't know whether or not it is of interest to this Committee, but I know that it will create a great deal of burdensome, additional, and difficult work in the marshal's office. They have to make those payments.

Mr. Medalie. The long and the short of it is that the system that now exists, by which the Government gives you a subpoena and you collect later, works very well.

Mr. Seth. Very well.

Mr. Youngquist. I think we ought to restore it.

Mr. Medalie. I think so.

The Chairman. You have heard the motion. Is there any comment?

Mr. Holtzoff. To add a provision to the last sentence, that in case of Government subpoenas --

Mr. Youngquist. When a subpoena is issued on behalf of the United States or an officer or agency, the fees and mileage

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need not be tendered.

Mr. Dean. I ran into one embarrassing case. I was trying a case down in Arkansas, where I had sixteen Negroes, and I had to go out and rake them up by myself, because the marshal never would get them. I had to pay out of my own pocket for a truck to go down into Southern Arkansas and get them.

Mr. Holtzoff. You were not getting proper cooperation from the United States marshal.

Mr. Dean. I didn't want to fuss with it. I paid for their expenses for the first night, which looked like barratry or maintenance, or something.

Mr. Holtzoff. On the whole, I know the defendant would hate to have a change made in this present practice, because it would create a lot of difficulty and more expense in allowing each deputy a considerable amount of currency to hand the witness.

Mr. Seasongood. Are you making the defendant pay this and not the Government?

Mr. Holtzoff. The Government pays after the event.

Mr. Seasongood. I think if you make the defendant pay them --

Mr. Holtzoff. This would continue the existing practice.

Mr. Youngquist. I think that is common practice in the states.

The Chairman. All those in favor will say Aye; those opposed, No. The motion is carried.

Mr. Seasongood. I just want to go on record as objecting to the service of subpoena by anybody other than a marshal or his deputy. As it is now, the return is prima facie. If you

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get some other person, and there is a question whether the subpoena was served or was not, there is trouble. That probably will not have weight with the brethren, but I object to it.

Mr. Holtzoff. We have no trouble in New York. This is similar to the New York provision and is also similar to a provision in the civil rules. There has never been any trouble about it.

The Chairman. Mr. Seasongood's objection will be noted. We now go on to (d).

Mr. Glueck. May I ask one question, so that I may understand this? Do you have in the rules anywhere anything as to the requirements -- something in lieu of the marshal's return, by way of a certificate or service of process upon a witness, such as they have in New York?

Mr. Holtzoff. There is a provision in one of the earlier rules with reference to the proof of service.

Mr. Youngquist. Is that by others than the marshal?

Mr. Holtzoff. Yes.

Mr. Dean. Should there not be a provision for a form for proof of service on the back of the subpoena. That is usually done in the case of service of a civil complaint, where you want to prove that it was served, so that you can take judgment by default. In California we always make a return on every paper, including subpoenas.

Mr. Medalie. Do you think that is necessary?

Mr. Holtzoff. Think of the additional burden it involves. If the witness shows up, why bother showing the service on the subpoena? The only time that case comes up is when you want to punish him for not showing up.

31 Mr. Dean. Then you make an affidavit saying he did not show up.

Mr. Holtzoff. (d) relates to the service of subpoenas to be used in connection with the taking of depositions, and it follows the practice used in the civil rules, namely, that the clerk of the district court for the district where the deposition is to be taken issues a subpoena.

In this case the subpoena that is provided shall be issued by the clerk, because we want to hedge the taking of depositions with considerable limitation. We also provide that a subpoena duces tecum shall not be issued without a court order.

Paragraph 2 incorporates the provision of the civil rules as to how far a witness may be subpoenaed for the purpose of having his deposition taken. It provides, as you know, that he may be subpoenaed only in the county in which he resides or in which he transacts business.

The second sentence also provides that a non-resident may be required to attend in the county wherein he is served or within forty miles from the place of service.

9 Mr. Glueck. Why do you use "county" as the geographical unit here?

The Chairman. That is what is used in the civil rules.

Mr. Holtzoff. It is arbitrary, and we could use some other unit; but the county is the most convenient.

The Chairman. It is customary even in state practice.

If there are no questions, all in favor of Rule 50(d) will say Aye; those opposed, No. The motion is carried.

Mr. Holtzoff. Section E-1 continues the existing practice in the Federal courts.

32

Mr. Glueck. Will a subpoena issued on behalf of a defendant run anywhere in the United States?

Mr. Holtzoff. Oh, yes, anywhere in criminal cases.

Mr. Glueck. Then, these lawyers in New Mexico can issue a subpoena on somebody in New York; is that the rule?

Mr. Youngquist. If they pay the fee.

Mr. Holtzoff. They have to pay the fee and actually do. There is no control over the matter, because the clerk issues the subpoenas in blank.

Mr. Seth. I did not think the defendant could ever get anybody outside the district under the present law. The Government can't, I know.

Mr. Holtzoff. My understanding is that any subpoena to a criminal case runs all over the United States. It certainly should. I think the defendant should be on a par with the prosecution.

Mr. Seth. I do, too.

Mr. Wechsler. So far as service goes, if I get a subpoena to appear in California, I would certainly feel a lot better if it were served by somebody from the court than by somebody over the age of eighteen years.

Mr. Seasongood. That is why I was objecting.

Mr. Wechsler. I supported you before. I wondered if we might not prevail if we distinguished between service in the district and service outside the district.

The Chairman. I do not see how you get into trouble, because if there is going to be service at a long distance, you are presented with a subpoena fee. No man is going to pay mileage just for the fun of it. No boy of eighteen is going

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to serve that just as a trick.

Mr. Waite. Is there a provision in here that subpoenas served on behalf of a defendant must be accompanied with an offer or a tender of mileage?

Mr. Holtzoff. Yes, we just passed that. That is paragraph (c), Mr. Waite.

The Chairman. Line 24.

Mr. Waite. I misunderstood that. I thought that had to do only with subpoenas coming from the state.

Mr. Dean. Didn't we strike out the last --

The Chairman. That was about Government witnesses -- merely the tender there.

The next section, Mr. Holtzoff.

Mr. Holtzoff. Section (f) is merely the customary provision that failure to comply with the subpoena is in contempt of court.

Mr. Longsdorf. Do we really need (f)?

Mr. Holtzoff. We do not. It is in the civil rules.

Mr. Longsdorf. But isn't it the process of the court?

Mr. Holtzoff. I was afraid that in view of the fact that it is in the civil rules, somebody might point to the distinction.

Mr. Medalie. Yes, there is that danger.

The Chairman. May we now go back to rule 51(e), Motions?

Mr. Medalie desires to be heard on that.

Then we will go back to Rule 20(e), on which Mr. Waite desires to be heard. Then, I think, we shall have mopped up our rules.

Mr. Medalie. I assume that we have disposed of everything

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else in Rule 51 except (e)?

The Chairman. Did you have any particular point?

Mr. Medalie. I had something in mind. I will look at it again.

The Chairman. Do you want us to go on to something else?

Mr. Medalie. Yes.

The Chairman. Let us go on to Rule 20(e), which is the one Mr. Waite was going to bring up. I think it came up at the end of the evening session on Monday, and he was going to renew his motion on that.

Mr. Waite. Yes.

The Chairman. It was a new section, to be called (e).

Mr. Waite. The suggestion was that as at present conducted the preliminary examination is simply and solely an examination of the evidence of the prosecution; it has no bearing whatsoever in getting at the sum total of the trouble. The proposal is that the magistrate be allowed to ask the same kind of questions as the police officers ask. My idea is that eventually we may be able to get to a point where we can eliminate the third-degree sort of proceeding.

I think that we have got to get at it gradually, step by step, and if we begin by allowing the magistrate to interrogate the defendant, with a clear explanation to the defendant that he need not answer, we have made a beginning along those lines. Many a defendant is willing to spill the beans if he is only asked about it, and there should not be a preclusion of the magistrate asking him, when the police and everybody else are permitted to ask him.

Mr. Holtzoff. Don't you have an additional provision that

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his refusal to answer may be used against him?

Mr. Waite. That is part of the fact picture and therefore ought to come into the picture, so far as use is concerned.

Mr. Youngquist. I object to his declination to answer being used against him.

The Chairman. Do you want to read that provision?

Mr. Waite. I should be pleased if half a loaf goes through, although I should prefer to see the whole thing adopted. The provision as suggested is this. I have in mind only the substance, of course, and not the form.

"Whenever any person has been brought before a committing magistrate, as provided in Rule 20, and has been advised of his rights to advice of counsel and to a preliminary hearing as provided in Rule blank, the magistrate may interrogate him concerning his participation in the alleged offense and concerning his whereabouts and activities at the time of the alleged offense. Before the magistrate does so interrogate the defendant, he shall inform the defendant that he is under no obligation whatsoever to answer the magistrate's questions, but that if he does answer, his answers may be used in evidence in subsequent proceedings, and that if he declines to answer, the fact of his refusal may be used in so far as the rules of evidence permit."

The Chairman. Have you any objection if we separate it and withdraw this last clause? I think we could probably have unanimous agreement here on the last clause.

Mr. Seth. I don't think so.

Mr. Waite. Let me make my motion that it be adopted without that last clause. I will offer the first clause and then

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will bring the last clause up later.

Mr. Glueck. May I inquire, Mr. Chairman, how that would differ from what we already have in Rule 20(c), except that this is more specific. I like Mr. Waite's greater explicitness, that the magistrate shall proceed promptly to hear the case.

The Chairman. There is nothing there about examining the witnesses.

Mr. Waite. Convention has limited him to examining the state's evidence.

Mr. Seth. And it should remain so, in my judgment.

Mr. Holtzoff. I think so. I do not think the committing magistrate should be authorized to interrogate the defendant, even if the defendant has a right to refuse to answer.

Mr. Waite. Why not? The police do.

Mr. Holtzoff. I do not believe there is anything inherently unfair in allowing this, but I think we must be, in certain matters, bound by tradition, and certainly we would be departing from our traditions as old as this republic if we permitted committing magistrates to interrogate defendants.

The Chairman. Isn't it a matter of fact that the English magistrates do it?

Mr. Waite. I have heard so.

Mr. Dean. The French do.

The Chairman. Then, it does not help much if the French do. That sets my argument back.

Mr. Glueck. I wonder, Mr. Waite, if the very real evil is not the abuse of power of interrogation by the police and whether you do not have in mind, in the remedy that you suggest,

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the idea that interrogation by the police should be in the presence of a magistrate.

Mr. Waite. I have that in mind ultimately, but we are not yet prepared to do that. We could not make it practical. I think this might be an approach to it.

One of the most cogent arguments I have heard against this proposal was put up by the late Mr. William S. Forrest. His argument was that it is unfair to a certain type of defendant; that the expert criminal knows enough to keep his mouth shut or to lie cleverly. An inexperienced criminal does not know how to tell lies. You get the inexperienced criminal, but you do not get the expert criminal, and that is not fair to criminals.

Mr. Seasongood. There seems to be a further objection to it. If the magistrate interrogates the defendant, and the defendant refuses to answer, the magistrate will say that there is probable cause. He will draw an inference against the defendant for refusing to answer.

Mr. Waite. That is just a matter of not trusting the magistrate.

Mr. Seasongood. Well, I don't.

Mr. Waite. Why not let him have an opportunity to get at the truth if he can.

Mr. Holtzoff. It seems to me that a magistrate's function is merely to determine whether or not a defendant shall be held to answer.

Mr. Seth. Or whether the Government has made a case.

Mr. Holtzoff. Or whether the Government has made a case. If the Government has made a case, he commits the defendant. If the Government has not made a case, that ends the matter, and

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the magistrate should release the defendant.

Mr. Waite. You are quite right; that is the function. But my idea here is that this Committee ought to make the best rules that it can -- the best rules from the point of view of public policy, the effectuation of a fair trial, and discovery of the truth. We ought not to base rejection on the ground that it has never been done, but on the question of whether it would be wise.

Mr. Holtzoff. I agree, but I do not think it would be wise -- that is, it would not be wise as measured by our traditional point of view toward the rights of the defendant. I think it certainly would deprive the defendant or embarrass the defendant in the exercise of his right against self-incrimination. It does not deprive him of it, of course, but it embarrasses him.

Mr. Dean. If the purpose of the principal proposal is to dispense with the interrogation of the defendants before they have an opportunity to get counsel, why didn't we provide a rule for all such interrogations to be before a committing magistrate, which seems to me to be different from this one here but going to the same objective?

Mr. Waite. I would like to see such a rule formulated. I am not ready to formulate it and put it through, but in the absence of that I can't see any reason why the committing magistrate should not ask the man, "Did you commit this crime?" "Where were you?"

Mr. Youngquist. Don't you convert him from a judicial officer to an investigating officer?

Mr. Waite. Well, he is an investigating officer in that

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he is investigating to find out what the fact situation is. Conventionally he has been confined to finding out what the state already knows, but his purpose is to determine whether there is enough evidence to justify holding the man; and if it is possible to have a fair method to find out from the defendant himself whether there is evidence to justify holding him, I see no earthly reason why that should not be done.

Mr. Holtzoff. The holes in the prosecution's case, if any, may be filled in by the interrogation of the defendant.

Mr. Waite. Quite so.

Mr. Holtzoff. Instead of the defendant being released.

Mr. Waite. Quite so.

Mr. Holtzoff. According to your plan, after the Government rests the defendant is to be interrogated by the magistrate before the magistrate decides the case.

Mr. Waite. Yes. After all, this is no game. We are trying to find out at that hearing whether or not it is justifiable to put the accused on trial, and it seems to me that any fair method of finding that out is something we should use.

Mr. Holtzoff. But the privilege against self-incrimination is worth something. I think you will whittle it away.

Mr. Waite. No, I maintain that, at least with that last clause stricken out, we are not abusing the privilege against self-incrimination.

Mr. Holtzoff. You are not infringing on it as a matter of law, but you are making it more difficult for him to assert it.

Mr. Wechsler. I see no point whatsoever to the insistence on the privilege against self-incrimination at the preliminary hearing in the terms in which Mr. Holtzoff now insists on it.

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So far as the situation exists, and as we know it to be, the police do the job rather than the committing magistrate. That is the evil against which any proposal of this sort is directed, and it seems to me it is a sufficient problem to warrant the attention of this Committee.

You will remember that yesterday Judge Crane proposed one method that has been thought of to meet the situation, namely, to render confessions inadmissible in evidence unless taken before a magistrate. Now, I do not think we are in a position to pass on Mr. Waite's proposal without relation to Judge Crane's, nor indeed to pass on Mr. Waite's proposal separately. But it does seem to me that that problem is a problem that ought to command our attention. Therefore, the way to act at this stage is to refer that problem, together with Judge Crane's proposal, Mr. Waite's proposal, and anything else that may be thought about it, to the Reporter for consideration as to whether or not action with respect to that problem is feasible.

I may say that I do not think there is anything in these rules thus far adopted that really amounts to very much in the way of criminal procedure. But any genuine attack on that problem would constitute real accomplishment. It seems to me that we ought to concern ourselves, at least in part, with the real problems in criminal procedure.

The Chairman. Mr. Dean made some suggestion in that same sphere.

Mr. Dean. I think we view it in the same light. I agree with everything Mr. Wechsler has said.

The Chairman. Do you agree to Mr. Wechsler's motion, Mr. Waite?

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Mr. Waite. That is a motion I am happy to accept.

Mr. Medalie. What is that motion?

The Chairman. The motion is to refer this present motion of Mr. Waite's and the suggestion of Judge Crane, that no confession shall be permitted in evidence unless taken before a magistrate, and Mr. Dean's suggestion --

Mr. Dean. That they may not be divorced.

The Chairman (continuing). -- to the Reporter for preparation of a rule.

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Mr. Waite. Before we drop that matter, there is one thing in addition I should like to bring up for possible reference to the Reporter in that connection.

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Under our rules as they now stand, if the defendant chooses to waive preliminary examination, nothing more is done. In the Code there is a provision. I do not myself pretend to be a proponent of it, and I frankly do not know much about the merits of it, but I think it is something that might be considered. It would be Section 40 of the Code, Subsection 2, and it reads as follows:

"Notwithstanding a waiver of examination by the defendant, the magistrate on his own motion may, or on the demand of the prosecuting attorney shall, examine the witnesses for the state and have their testimony reduced to writing or taken in shorthand by a stenographer and transcribed. After hearing the testimony, if it appears that there is not probable cause to believe the defendant guilty of any offense, the magistrate shall order that the defendant be dis-

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charged."

In other words, it really permits the magistrate to go ahead with a preliminary examination, even though the defendant chooses to waive. That is Section 10, Subsection 2.

The Chairman. May we now proceed to Rule 51(e)?

Mr. Dean. I think that is a pretty important rule, and it would be helpful to have it read.

Mr. Wechsler. Before proceeding to this different matter, there is one problem, it seems to me, that is very closely related to the one we just discussed and which is not now covered by rule. It is the question of the duty to bring an arrested person before a magistrate. There is no rule on that subject now.

You recall that we gave some attention to the question whether we had jurisdiction to formulate a rule on that matter, the issue being whether there is yet a proceeding within the meaning of the enabling act and rule. After some consideration of that, I think it is sufficiently arguable that it is within our jurisdiction, and this court might so hold, to propose that in the consideration of this other phase of the subject, a rule on that subject be formulated as well.

Mr. Holtzoff. I think that arrest is part of the substantive law.

The Chairman. I think it might well be covered.

Mr. Youngquist. Yes, I think it should.

Mr. Dean. I think that if the court is willing to view it in that light, that is the answer to it. If we would defend the court by doing it, we should not do it; but when it is arguable, I think there is something to it.

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The Chairman. The motion is to refer this subject to the Reporter for the preparation of a tentative rule?

Mr. Wechsler. Yes.

The Chairman. All those who are in favor of the motion will say Aye; those opposed, No. The motion is carried.

We will now go to Rule 51(e).

Mr. Robinson. Rule 51(e) follows 51(d), which is "Demurrer and certain pleas abolished; motions substituted."

I read beginning at line 44:

"(1) Form and Content. The motion"

Strike out "of defense" because we struck it out in the preceding paragraph --

"-- shall be in writing signed by the defendant or by his attorney. It shall be verified if it alleges matters as being in the personal knowledge of the defendant or of his attorney. It shall specify distinctly the ground of defense or of objection relied on and the court shall hear no objection other than that stated in the motion. It shall specify also the order or relief which the court is requested to provide, but the court shall make such order as it considers to be just."

Mr. Holtzoff. I think the clause beginning in line 49

"-- and the court shall hear no objection other than that stated in the motion"

is too rigid. In the first place, it is not necessary.

Mr. Medalie. It departs from the normal practice, especially where you want to have a full hearing of everything the parties want to say.

Mr. Robinson. That comes from a proposal that has been

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made or recommended to the advisory committee by one of the Federal court committees, as I recall. That is one source of it and was placed in here for that reason.

Mr. Holtzoff. I would rather see it stricken out in fairness.

Mr. Medalie. I think what you have there is this: You bring the district attorney and the defendant in. The court hears them. Something calls the court's attention to the situation, and the court decides that it will hear anything that affects the substantial rights of the parties. I think we ought to strike it.

Mr. Robinson. By consent, does everybody feel that that may go out?

The Chairman. All right. That will go out by common consent, unless there is specific objection.

We will proceed now to (2).

Mr. Dean. I have one other question on this general subject. We have specified in 51(d) that certain pleas are abolished. We said that those particular pleas shall be substituted by motion. Are there other motions, or are we restricted to these motions listed above?

Mr. Robinson. No.

Mr. Dean. Does (e) refer only to the motions in (d)?

The Chairman. Oh, no; motions in general, including the motions which arise from the abolition of pleas. Isn't that the general intent?

Mr. Medalie. Yes.

Mr. Dean. I hope that is clear.

The Chairman. Now, (2).

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Mr. Robinson. "(2) Grounds. The motion --"  
Strike out "of defense" --

" -- may specify one or more of the following grounds of defense, but no other legal ground of defense is barred because it is not enumerated herein: that the written accusation was not prepared, filed, or prosecuted according to law; that it does not charge the defendant with the commission of an offense" --

The Chairman. And the rest of it.

Mr. Youngquist. What does the word "prosecuted" there mean?

Mr. Robinson. Followed through after it had been filed in court. I know that it refers to some distinct possibility there.

Mr. Dean. It might be that it was not prosecuted speedily under the constitution.

Mr. Robinson. What would be a better word than "prepared"?

Mr. Youngquist. Preparation of the docket.

Mr. Medalie. You mean presented to the Grand Jury.

Ex.2  
cyl.1

Mr. Youngquist. The presence in the Grand Jury room of any unauthorized persons.

Mr. Medalie. "Obtained."

Mr. Robinson. I do not like that. We want a better word.

Mr. Medalie. "Presented."

Mr. Robinson. No. The Grand Jury is present. Persons who should not have been there.

Mr. Holtzoff. I think "Obtained" is all right. The word "presented" is a little ambiguous.

Mr. Medalie. All right.

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Mr. Dean. Why don't you say, "evidence before the Grand Jury was not presented"?

Mr. Youngquist. Leave it to the Style Committee.

The Chairman. All right.

Mr. Robinson. We say:

"Does not charge the defendant with the commission of an offense; that it misnames the defendant; that it misjoins defendants or offenses; that it contains allegations which are surplusage or duplicitous or repugnant" --

Mr. Holtzoff. I think that "surplusage" is not a ground of defense.

Mr. Medalie. We do not call it a motion of defense any more.

Mr. Seth. We leave out "of defense."

Mr. McLellan. We again strike out the words "of defense," in the second line.

Mr. Robinson. We are getting everything clear off the ground if we strike out everything having to do with grounds of defense.

Mr. Dean. A moment ago I asked whether (e) applied to all motions that might be filed during the course of a criminal proceeding. If it does, (2) should not apply to motions for criminal defense but should apply to all motions.

Mr. Holtzoff. Surplusage is not a defense.

Mr. Wechsler. May I ask what the purpose of this enumeration is anyhow? As I understand the object of the proposal, it is simply to abolish pleas and substitute motions as a form. There is no purpose to alter the preexisting law as to what is available under plea of not guilty as distinguished from special

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plea. Under those circumstances, it can all go out. If there were some purpose to alter the preexisting definitions, then it would be some point to retain.

Mr. Robinson. This suggestion I was going to make as soon as I could complete the enumeration. It is up here for your consideration whether or not the bench and bar -- particularly the bar -- will understand just by a motion that each of these things can be raised. If they do, all right; it saves us that much work.

The Chairman. I think it would be better to put it in a note.

Mr. Wechsler. May I ask, referring to the same line, if it is the Reporter's judgment that no attention should be devoted to the preexisting law, except what is available under the plea of not guilty, and what requires a formal special plea or motion? Is it your judgment that the existing law is sound? That whatever was available under the plea of not guilty should be taken to be available under that plea? Whatever heretofore required the motion or special plea should now require motion?

Mr. Robinson. That is right; everything comes under "Motion."

Mr. Dean. We had no ground of motions, and we add no ground of motions?

The Chairman. Yes. The question of surplusage was never a matter of defense, was it?

Mr. Holtzoff. Adopting Mr. Wechsler's suggestion, which I think is sound, they go back to (d), which refers to anything that could be raised by a plea in abatement.

The Chairman. Then, you put a note there that it goes be-

48 yond those things.

Mr. Youngquist. There is a difference here, in that (d) refers to a form of plea, whereas (e)2 refers to the objection raised by that means, so I don't think (1) is a substitute.

Mr. Holtzoff. If we strike out (2) we just leave the existing law with the change that we raise the point by motion, which we now raise in one of those other points.

2 Mr. Youngquist. I think it is all right. I was just pointing out the distinction between the two sections.

Mr. Robinson. How should that read?

Mr. Dean. If we are going to leave the existing law as it is now and not change it in any respect, adding or subtracting, I move that (2) go out completely and that the items in there be listed, since they are in a footnote.

The Chairman. In a footnote only?

Mr. Dean. Yes.

The Chairman. It has been moved and seconded that 51(e)2 be deleted and the observations made in our discussion be included in the footnote to 51(e)1.

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Mr. Robinson. (3) becomes (2).

Mr. Holtzoff. What is a counter motion?

Mr. McLellan. I know one fellow who files them all the time. I don't see any sense in a counter motion.

The Chairman. Before we go on with that, I have been advised that our lunch is ready and that we will be served in the next room.

(At 1:05 o'clock p. m. a recess was taken until 1:30 o'clock p. m. of the same day.)

Pendell

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1-14-42

A F T E R      R E C E S S

The recess having expired, the Committee reconvened at 1:35 p.m., and proceeded further as follows:

The Chairman (Arthur T. Vanderbilt). Gentlemen, we will please come to order.

Mr. Youngquist. Mr. Chairman, may I return to (e) (2)?

The Chairman. Yes, indeed.

Mr. Youngquist. I supported the elimination entirely of (e) (2), but it occurs to me that we should perhaps somewhere define the ground that the motion which we now create is to cover, and I suggest that the Reporter consider the inclusion in (d) of rule 51, whereby we abolish the demurrer and all pleas other than guilty, not guilty, and so forth, and substitute for the motion, and to incorporate in that section in some form of statement the particular kind of defenses that the motions will cover, so that he who reads the rules may know what we are trying to accomplish.

The Chairman. Wasn't that about the sense of what we did, which was to provide in a note for (e) (1), stating what these various ones were, with the thought that if we have perhaps missed one, the fact that it was in the note would not weigh against us?

Mr. Youngquist. We have a general statement of (d), now, in the abolishing of pleas--any plea other than a plea of not guilty, and so forth.

Mr. Holtzoff. Well, don't we in effect provide that any point that was previously raised by a demurrer, plea in abatement, and so forth, shall now be raised by motion? Isn't that a specific indication, so far as the rules are concerned? and

then the notes will make the explanation.

Mr. Youngquist. All we say now is that demurrers and all pleas, except the three that are permitted, are abolished.

Mr. Holtzoff. No, but look at line 37 on page 2 of this rule.

Mr. Youngquist. Line 37? Yes, that is the one I am reading. I am reading line 36.

Mr. Holtzoff. Doesn't that cover your point?

"All matters heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by a motion\* \* \*"

Mr. Youngquist. Wait a minute.

Mr. Holtzoff. You haven't got the same page, have you?

Mr. Youngquist. Page 2.

Mr. Holtzoff. Oh, yes.

Mr. Youngquist. I hadn't quite come to 37.

Mr. Holtzoff. Well, that sentence beginning on line 37, I think covers your point.

Mr. Youngquist. Yes, but how does that read, now? I have that stricken out.

Mr. Holtzoff. No, that reads, now-

"All matters heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by motion."

The Chairman. And striking the rest?

Mr. Holtzoff. No, we struck out only lines 41 and 42.

Mr. Youngquist. I think we revised that, at Mr. Dean's suggestion.

Mr. Dean. All I was anxious was to make it clear that all other motions were abolished.

Mr. Holtzoff. We didn't make any further changes on that.

Mr. Robinson. Let me state what one part of the point I think is, that Mr. Youngquist is getting at. It is this: We are providing that the defendant shall do one of two things, as I see it. He may either plead one of these three pleas that we have now made possible, guilty, not guilty, or nolo contendere, or he may file a motion, otherwise nameless--just a motion--which would set up any other defense which he has.

Now, in order to show what that motion would include, I have tried to enumerate in 51 (d) and 51 (e) (2) what would be involved or what might be raised by the motion.

Now, as we went out of the room for lunch, Mr. Dean and Mr. Wechsler said to me, "What do you propose to leave under the plea of not guilty?" Well now of course that is a subject I have tried not to get into, because it is terrifically indefinite and rather antiquated. I have before me Blackstone, here, IV Blackstone 332, in which he goes into what a defendant may do, and under the general issue on plea of not guilty he may do just about everything, really. There may be a plea to the jurisdiction, there may be a demurrer to the indictment, there may be a plea in abatement, special pleas in bar--all of them are of very limited application--and then under the plea of not guilty, as Blackstone lays it down, a defendant can raise just about anything, including a good many of the points that we

wanted to raise under our motion.

Mr. Glueck. For instance?

Mr. Robinson. Pardon me just a second. Therefore, it seems to me it would be impossible to enumerate what can be pleaded under not guilty, under this revised rule we are trying to set up, and also to fail to enumerate what defenses may be raised under a motion and yet be specific in drawing a line between what a defendant may raise by a plea of not guilty or by this general motion.

Now if you are going to strike out enumerations under the general motion, you have got to enumerate under not guilty what is going to be included under it. That is part of the difficulty.

Mr. Wechsler. Jim, let me ask you this: There are some things which are defenses which under present federal practice you can raise by special plea if you want to.

Mr. Robinson. Certainly--demurrer.

Mr. Wechsler. You can raise them by motion if you want to.

Mr. Robinson. Right.

Mr. Wechsler. Or on the other hand you can wait until the trial and raise them there. Now, is that option preserved to counsel for the defense under this rule?

Mr. Robinson. As I understand your question, you are just asking virtually what I was trying to explain. I do not believe that your question could be answered Yes or No, because to begin with your question is rested on a very indefinite line.

Mr. Wechsler. Jim, I can make it just as precise as a razor blade.

Mr. Robinson. You can't do it, because under the present

practice it is absolutely undetermined what can be raised, in certain districts at any rate, on, say, demurrer.

Mr. Wechsler. Yes.

Mr. Robinson. Or certain pleas in abatement or pleas to the jurisdiction, or whatever pleas may be drawn. In some places, in order to make an answer to an indictment, to raise a defense against an indictment, the defense counsel will file both a demurrer--

Mr. Wechsler. --and a motion to quash.

Mr. Robinson. --and a motion to quash. Those two, in several districts, are filed because they cannot be sure which is needed.

Mr. Wechsler. I understand that. I will put my question again, and I think it is precise. Do you mean to alter the existing law as to what must be raised in advance of trial by some form of special pleading or motion as distinguished from what the defendant at his option can raise at the trial after a plea of not guilty? Now, if you do not mean to alter the law on that point--if you mean to let it stand so that where under the authorities a defendant could in advance of trial raise double jeopardy by plea--didn't have to, but could--then under this procedure he can make a motion in advance of trial-- doesn't have to but may--if that is what you want to do, then I am not certain that your language on line 40 accomplishes that purpose.

Mr. Robinson. You can stop there. Yes, you can stop there, because I think that what we want to do is just what the majority of the committee wants to do--is to compel the defendant to raise it by this motion.

Mr. Holtzoff. That is not the way I construe the rules.

Mr. Wechsler. That is just what I want to get at, Jim. Now, if that is so, you have got a very real problem.

Mr. Robinson. This is good.

Mr. Holtzoff. I construe the rule as we have adopted it as merely substituting a motion for pleas in abatement, demurrers, and so forth, but not making any other change.

Mr. Wechsler. That is not the Reporter's interpretation as just given.

Mr. Robinson. You do not have to take my interpretation.

Mr. Wechsler. I say, that is not the Reporter's interpretation as just given.

Mr. Holtzoff. No, that doesn't seem to be his interpretation.

Mr. Robinson. It is our task here to see what interpretation we should take, and whatever one we wish to take is the one that will be the simplest way around.

Mr. Wechsler. Right. Now, in order to bring the matter to a head, I move the language be in such form that the option of defense to raise the matter in advance of trial or to wait for the trial, the option that exists under present law, be retained.

Mr. Holtzoff. I second the motion.

Mr. Robinson. Now, do you think you can deal with that before you get to these matters of notice, insanity, and alibi-- those matters we are going to require?

Mr. Wechsler. Except any specific modifications later made.

Mr. Robinson. Don't you think it would be well just to complete this consideration of rule 51?

Mr. Wechsler. I do not press for the order.

M

Mr. Robinson. And then consider the whole thing as the problem that I have tried to put before you?

The Chairman. We will hold it in abeyance, then.

Mr. Wechsler. Certainly.

The Chairman. All right. Will you remind me of it, if I overlook it?

Mr. Robinson. Line 68. Mr. Medalie was objecting to the word "counter", which therefore may go out, and maybe the rest of it is unnecessary, "motions by Government".

Mr. Holtzoff. I move to strike it.

Mr. Robinson. Just a minute, let's see what Mr. Medalie wishes.

Mr. Medalie. I do not think we need it. I was going to ask you what you thought ought to come in under "Counter motions by Government".

Mr. Robinson. Well, since we are setting up what, to many at least, will be a very novel method of handling a criminal defense, the idea was we might say, or expressly state what I suppose would be obvious, at least, to us, in this consideration now, that the Government in turn may, instead of, say, demurring, to a motion, may itself then file a motion.

Mr. Medalie. You mean if I file a motion--

The Chairman. Or counter affidavits?

Mr. Robinson. Or a counter affidavit.

Mr. Medalie. Well, that isn't a motion.

Mr. Dean. That is not a motion.

Mr. Robinson. Well, all right, add it.

Mr. Medalie. Because under established practice, as required by the rules, whenever one party files an affidavit, the

other may answer by affidavit or any other form to which it is susceptible.

Mr. Holtzoff. Or if you are just raising a question of law, you go up and argue, and maybe you do not file anything.

The Chairman. Should not the right to file counter affidavits be included as part of it?

Mr. Holtzoff. I think it is so obvious.

Mr. Robinson. That is just a question, whether it is obvious to others.

Mr. Holtzoff. Well, in my opinion it is, and I move--did you move to strike this out?

Mr. Medalie. No, I would not.

Mr. Robinson. Oh, you do not need a motion. We won't argue about it. If you do not want it, it will go out.

Mr. Medalie. If you think there is any doubt on this subject as to whether the Government has the power or has the right to file affidavits or submit other proof, put it in.

Mr. McLellan. Where is the provision for affidavits in support of the motion?

Mr. Dean. There isn't any so far, unless it comes later.

Mr. Robinson. Oh, yes--the verification.

Mr. Medalie. That again depends upon the form in which you move. Now we are accustomed in our district, and also in the New York practice, when drawing up a paper, a notice of motion, to have it signed by the attorney, stating he will move for certain relief at a certain time and place, and he signs his name, and it is addressed to his opponent. Then that notice of motion also makes specific reference to what it is based on, informing you that he has, we will say, objection to the indictment

proceedings heretofore had, and the affidavit of John Smith, verified May 1, and so on and so forth.

Mr. McLellan. I haven't got an answer to the question as to where there is a provision for affidavits in support of motions.

Mr. Seasongood. Line 46, "shall be verified".

Mr. McLellan. That is only where the matters of fact are within the knowledge of the defendant.

Mr. Seasongood. That is true.

Mr. Holtzoff. I think today they do not use that on motions quite to the same extent as they use it in New York. In New York, nobody makes a motion without attaching an affidavit to it, except in exceptional circumstances, but the opposite is the practice in many districts.

Mr. Wechsler. May I ask a related question?

Mr. Robinson. Certainly, certainly. I don't guarantee I can answer it.

Mr. Wechsler. Suppose under the practice a defendant makes a motion for acquittal, on the ground of immunity, and in support of the motion sets forth the facts which defendant believes establish immunity. Now, that raises an issue of fact of the sort previously raised by special plea--that previously could be raised by special plea.

Now, the Government denies those facts, and thus an issue of fact is created. Must the Government file a counter motion, now, which consists of denials? Is that what is substituted for the replication?

Mr. Robinson. To begin with, Herbert, I don't understand that your motion would be a motion for acquittal.

Mr. Wechsler. What would it be?

Mr. Robinson. I was just starting to say, it would seem to me that we want that taken care of; whether that is something we can attain or not is another question, by dismissing the indictment, dropping it, letting the matter be brought in before trial by motion to acquit. I assume you mean at trial?

Mr. Wechsler. Oh, no, no; in advance of trial.

Mr. Robinson. Motion to acquit, in advance of trial? How can you have a motion to acquit in advance of trial?

Mr. Medalie. To dismiss.

Mr. Dession. To dismiss the indictment or quash it.

Mr. Wechsler. Motion to dismiss, or to quash.

Mr. Robinson. Yes.

Mr. Wechsler. I am simply seeking the equivalent of the old verbiage, that is all, under this procedure. Under the practice, you could raise the question of immunity in advance. You get a trial on an issue of fact. If you prevail, whatever you called the defendant's status, he is acquitted of the charge. Now, I want to know what happens if an affirmative defense of that sort is raised. Is there a counter plea, or an answering plea, or a motion by the Government, creating an issue? Are we going to call that a "counter motion"?

Mr. Heltzoff. Well, paragraph 4 answers that.

Mr. Robinson. I was just trying to say that, Alex. My answer would be, paragraph (4), Herbert, but have you read that, to consider whether that meets your question, or how it can be made to answer your question?

Mr. Wechsler. Certainly, but the error of paragraph (4), if I may say so, is that it presupposes the creation of an

issue of fact by an affirmative defense, by two moves, alone-- by the indictment, and by the motion. If that is what is intended--that is to say, if there is to be no answering plea by the Government when an affirmative defense is raised--then I simply want to know it. If on the other hand it is contemplated that the Government will now make some other move to make an issue, or that the plea or that the motion will stand granted on confession if the Government does nothing else, then again it seems to me we ought to make it clear.

Mr. Robinson. Oh, I can see, now. The Government has filed an indictment, now, or its information?

Mr. Wechsler. Right.

Mr. Robinson. That is, a charge against the defendant?

Mr. Wechsler. Right.

Mr. Robinson. Here comes a defendant and files a motion in which he sets up immunity, as you suggest?

Mr. Wechsler. Right.

Mr. Robinson. Isn't that an issue?

Mr. Wechsler. It is an issue, if the Government denies the facts constituting the basis for the claim.

Mr. Youngquist. I would like to say that I think, on the motion presented and on the facts presented in support of it, that it must determine whether immunity exists.

Mr. Dean. Isn't it conceivable though on a collateral question of that kind, that the Government will wish to file a response to it?

Mr. Youngquist. Oh, yes; yes, indeed. I had assumed that that would relate only to facts, however, and that it would be in the form of a responsive affidavit, the filing of which I had

assumed would be permitted as a matter of course, without a rule.

Mr. Holtzoff. It has been abolished.

Mr. McLellan. Well, you have a rule on it; as Mr. Tolman has already pointed out, (8) (d) covers that.

Mr. Youngquist. (8) (d)?

Mr. McLellan. It provides for the service of opposing affidavits not later than one day before the hearing.

Mr. Youngquist. Then we have taken care of that?

Mr. McLellan. I should not have known it if Mr. Tolman had not told me.

The Chairman. Now, what have we done with 51 (c) and 51 (e) and 51 (e) (3)?

Mr. Robinson. If I may make a suggestion on this, Mr. Chairman, I think our problem here is a unit problem to the extent that we try to take it up as such rather than piecemeal.

The Chairman. All right. Suppose you run over all of them. Suppose you outline the whole thing from here on.

Mr. Robinson. At least, until you see some reason for changing that procedure.

The Chairman. We will follow through. That is correct.

Mr. Robinson. Now, as I take it, lines 68-71 are designed to meet the point at least in part that Mr. Wechsler mentioned. If the Government did wish to file some additional motion or supplementary memorandum or something of that kind, this would expressly provide for that. Now, if we strike that out, our problem still is to provide for the point Mr. Wechsler raises, I think, on that particular point.

Mr. McLellan. Why not by affidavit?

Mr. Robinson. By affidavit?

Mr. Youngquist. Isn't that taken care of by (8) (d)?

Mr. Dean. (8) (d).

Mr. Robinson. All right. You think the filing of an affidavit under (8) (d) is sufficient?

Mr. Youngquist. Yes.

Mr. Wechsler. Suppose the motion is insufficient in law, which sets forth the claim of immunity, and is insufficient on its face; would that be handled by affidavit?

Mr. Holtzoff. I think you can argue that as a question of law, just as, under the civil rules, you no longer are required to reply to an affirmative defense, but you can raise all these questions on the argument.

Mr. Medalie. You know it is not all quite so simple as this. As Mr. Youngquist pointed out, defendant moves to dismiss the indictment on the ground of immunity, and he sets forth that he appeared before the grand jury and was questioned and thereby obtained immunity, in that class of cases where, when they are questioned, unless they waive that right, they obtain immunity. Now, he said something about a grand jury proceeding.

The case cannot be determined simply on his representation, version, or belief as to the meaning of what happened before the grand jury or the questions that were asked him. He may have omitted some. Well, the district attorney then would have one of two remedies. The court certainly is not bound to accept what the defendant says. Even if the District Attorney said nothing, the court ought to make an inquiry, in any event.

The district attorney's opposition may be nothing more than a request that if there is a stenographer in the grand jury he

be heard, or the transcript be taken, or that the grand jurors be heard. Now, he may ask the court to have a jury trial. In other words, he may put in nothing but a denial, without having much formality to it, and without giving all of the details.

There are cases which a court cannot decide on affidavits. It is sufficient to indicate generally that the court cannot decide that on affidavit, and for that reason I assume that you have preserved the right of trial by jury in matters which formerly could be raised by plea in bar or by plea in abatement, where the jury trial was appropriate.

Mr. Robinson. That is provided.

Mr. Medalie. Now, in other words, you do not need a counter motion.

Mr. Robinson. No.

Mr. Medalie. Any piece of paper that shows what you want, with that affidavit verified or not depending on the local practice. In other words, the motion is answered in whatever way the opposition to the motion cares to answer it, in accordance with the existing local practice, which we do not and should not regulate.

Mr. Robinson. And which in turn tends to show that the Committee was clearly right in striking out (3), lines 68-72-- the effect of what you said.

Mr. Youngquist. Mr. Chairman, I was recalling the practice in our State, and Mr. Tolman calls attention to rule 43 (e) of the civil rules with respect to motions, which reads thus:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct

that the matter be heard wholly or partly on oral testimony or on depositions."

I wonder if it might not be advisable in this rule relating to motions to insert a provision of that sort. That would clear up some of the questions that have been raised by the members of the Committee. That would not, however, preclude the trial by jury of issues of the kind that Mr. Medalie suggests.

Mr. Longsdorf. Mr. Chairman, might I suggest a re-wording of that rule 51 (e) (3)?

The Chairman. All right.

Mr. Longsdorf. To read like this. Instead of "counter motions by Government, "opposition by Government". Then continue:

"Counsel for the Government may file or make opposition to the motion of defense; if the opposition contains allegations of fact, it shall be verified."

Mr. Holtzoff. I do not think that the United States Attorney ought to be required to verify by oath a pleading of that kind.

Mr. Longsdorf. That should stay out, too.

Mr. Medalie. He should not verify what by oath?

Mr. Youngquist. Verify what?

Mr. Medalie. What should he be excused from verifying?

Mr. Holtzoff. Mr. Longsdorf suggests a pleading verified by the Government, setting forth matters that should be verified by oath.

Mr. Youngquist. Why not?

Mr. Medalie. He was not referring to pleadings.

Mr. Youngquist. Any facts presented to the court in a situation of that kind should be verified.

Mr. Medalie. Surely, they should be verified.

Mr. Holtzoff. No, because if there is a hearing on the issue, you present the evidence at the hearing. Why should the United States attorney have to swear to his reply?

Mr. Medalie. Well, if he files a reply that contains a statement of fact, he ought to swear to it the same as the rest of us do.

Mr. Robinson. That was the idea, Mr. Holtzoff, because you see we require the defendant to verify in a similar situation, so why not require the United States attorney to verify?

Mr. Holtzoff. Well, we don't.

The Chairman. Gentlemen, I am wondering if we won't get through faster if we go through this whole batch of "motions". We are taking it up piecemeal again and we are not getting along very fast. Suppose the Committee hear the Reporter on the whole of the "motions", and make note of your comments, but reserve them to the end.

He reminds me that the rule as prepared was prepared as the result of our discussions in September, and apparently we are back-tracking on it.

All right, go ahead, Mr. Reporter.

Mr. Robinson. (reading)

"(4) Hearing or trial. The court shall hear a motion"-- strike out "of defense", because we have decided to get along without that, and without your right.

"--in which the issue is an issue of law immediately upon its being made, unless, upon request of counsel for

the government or for good cause shown, the court postpones the hearing. If the motion"--  
strike out "of defense".

--"raises an issue of fact, a jury may be had upon request of the defendant or of the government or upon the court's own motion.

"(5) --"

Mr. Medalie. You did not want us to stop you there?

Mr. Robinson. No, just make a check, draw a little "tombstone", and mark it.

The Chairman. Go ahead.

Mr. Robinson. (reading)

"(5) The order or other action on a motion by the court. If a motion"--  
strike out "of defense".

--is based on an alleged defect in the written accusation which can be cured by amendment which it is within the power of the court to make, the court shall order the amendment to be made and shall overrule the motion."

By way of explanation, that is misjoinder and other similar matters, John, which you have listed in the American Law Institute Code.

Mr. Wechsler. Yes.

Mr. Robinson. 84:

"If the hearing is by the court and the motion is sustained the court shall make such orders as it considers to be just."

Now, these last four lines or last five lines are sketchy, because I am wanting you to help fill in the procedure, what

should follow if the court does sustain the motion, or if it does not.

86:

"If the motion is tried before a jury, the court likewise shall make such order as it considers to be just either disposing of the accusation or bringing the case to trial."

Then that brings us to the matter of matters which may be pleaded in advance, and then we close this rule, because as you will recall your outline required getting our chapter heading here-

"Arraignment and other proceedings preparatory to trial, pleas, motions, and notices."

The effort now has been to take up each one of those things in order, the pleas, the motions, and now the notices.

"Insanity."

This is section 235 of the American Law Institute Code.

Mr. Medalie. May I suggest--

Mr. Robinson. Yes, sir.

Mr. Medalie. --that in dealing with insanity, alibi, and so forth, we can leave that as a separate subject, and even two, and consider the rest of our section without having to go over that.

Mr. Robinson. I think you are right on that, George.

The Chairman. All right, let us go back.

Mr. Robinson. But just remember we do have these provisions for defenses which we wish to have raised by notice in advance of trial.

Mr. Medalie. A "notice" is one thing, a "motion" is another.

Mr. Robinson. Exactly.

The Chairman. Now, we are talking about motions, sections (3), (4), and (5).

Mr. Medalie. Now, I understood that section (4), without writing language in there, -- it would take too much time for us to write what we want to say--that provisions shall be made by subdivision (3) for the filing of proof or the setting forth of the claim by the Government in answer to these motions.

Mr. Robinson. Yes, sir.

Mr. Holtzoff. I would like to ask you this: In the civil rules, if the defendant pleads an affirmative defense, no reply is required, as it is under the New York civil code. Do we want--

Mr. Medalie. (interposing) None is required under the New York civil code.

Mr. Robinson. That is right.

Mr. Medalie. You file a reply only to a counter-claim and to other matters that are affirmative--affirmative defenses. Only on motions for special hearings.

Mr. Holtzoff. I stand corrected. Now, I wonder whether we ought to make the criminal procedure on this point more and more complicated than the civil procedure. Should we require the United States attorney to file any document in response to a motion for example raising the former jeopardy or immunity?

Mr. Medalie. It is not suggested that he is to be required to. He is given the right to do it.

Mr. Holtzoff. Oh, well, that is all right.

Mr. Medalie. He is not required to do anything.

Mr. Youngquist. I think all we need is a provision giving

the right to file counter affidavits.

Mr. Medalie. I once made a motion to dismiss an indictment, in the County Court of Richmond, which was at Staten Island, on the ground that the term of the court had expired, where the grand jury was still sitting, before whom the alleged perjury was committed, and I made the motion. The Attorney General came in and said, "That's right." Out it went. There was nothing for him to submit. We don't require anybody to submit anything, but if he has anything to submit, then he submits it.

Mr. Holtzoff. No, but I am trying to say this--that if he is going to deny the allegations in the motion, he should not be required as the basis for his denial to file a pleading.

Mr. Medalie. If he doesn't file a pleading, how in the world is he going to know whether the attorney and his witnesses and the affidavits and so forth have correctly informed the court or have correctly conceived the facts?

Mr. Holtzoff. Well, how do you know in the civil case whether the plaintiff admits the averment of affirmative facts?

Mr. Medalie. Those are pleadings. That is another thing. That is what you were telling me.

Mr. Waite. I think the matter is 43 (e) of the civil rules, isn't it?

Mr. Holtzoff. Isn't it when any matter comes up on motion, permitting supporting affidavits, there may be counter affidavits?

Mr. Medalie. Yes.

Mr. Youngquist. And the court could take oral testimony if he liked. It seems to me that is all we need, for the purpose of what is now (3) here, don't you think so, George?

Mr. Medalie. These are not pleadings, that is.

Mr. Holtzoff. I agree with that.

The Chairman. Is it your motion, then, that we substitute for this rule (e) (3) something comparable to the language of civil rule 43 (e)?

Mr. Youngquist. I so move.

Mr. Wechsler. I support it.

The Chairman. All those in favor say aye--

Mr. Longsdorf (interposing). There is a question about that, Mr. Chairman. Are we going to abolish the right of jury trial on special pleas in bar?

Mr. Medalie. No, that is the next section.

Mr. Longsdorf. I just wanted to know if we were.

Mr. Dean. I would like to suggest that in framing that provision, whether by using the exact language of civil rule 43 or not, that we might consider the use of the phrase "response to the motion".

Mr. Medalie. Yes.

Mr. Dean. I think it would cover any motion that you wanted to accompany with affidavits.

The Chairman. I did not call for the No's on that motion, yet. Those opposed, No. The motion is carried.

(The motion was duly AGREED TO.)

Mr. Medalie. I would like to make another suggestion. (3) doesn't belong here, does it? Doesn't it belong in the same place as (1)?

Mr. Robinson. The effort was, you see, to follow along with the following procedure as far as possible.

Mr. Medalie. That is not very important.

Mr. Holtzoff. Leave that to the committee on style.

Mr. Medalie. Is it new, there?

Mr. Dean. I would like to make a suggestion that (8) (d) is certainly not satisfactory to cover it.

Mr. Youngquist. No.

Mr. Dean. Because it comes under an early rule dealing with time computations alone.

Mr. Youngquist. That is right.

Mr. Glueck. And it is only incidental.

The Chairman. That is another question for the committee on style.

Now we go on to (4).

Mr. Medalie. Aren't you necessarily saying that the court shall pass on the questions of law raised by the motion, immediately, or later? That is exactly what the court always does.

Mr. Dean. I do not think you need it.

Mr. Robinson. Yes, the issue is "immediately".

Mr. Medalie. I think we are doing a lot of pious things here that are meaningless. Either the court will hear it immediately, if he is an expeditious judge, or put it off, if he feels it is too much for him, and send it to another judge.

Mr. Robinson. After all, George, piety has its place, sometimes.

Mr. Medalie. Well, we are accomplishing nothing. Every judge knows he ought to hear a motion immediately. If he doesn't, he has either got a good reason for it or he is not attending to business. Are we going to put in here that every judge shall attend to his business? That is what in effect we are saying.

Mr. Dean. I think we should strike the first sentence.

Mr. Holtzoff. I think we should strike the first sentence.

Mr. Robinson. Do you think this would be understood that this does not change the present procedure by which, when a demurrer is filed, the court says, "Well, we will hear your argument next week--or 10 days--or on a certain day"?

Mr. Medalie. That depends on local practice.

Mr. Robinson. This, again, is brought in from the recommendation of a district court committee.

Mr. Medalie. What district is that?

Mr. Robinson. That does not make it sacrosanct or anything like that.

Mr. Medalie. No.

Mr. Robinson. But I just wanted you to know it has been thought out by lawyers out in the districts, and they felt there is too much delay now--contrary to your "pious" assumption, perhaps, or optimistic assumption,--and for that reason they wanted the word put in here requiring that "immediately" something be done.

Mr. Medalie. You mean my assumption with respect to piety.

Mr. Robinson. All right.

Mr. Waite. It is another illustration of the thing called "propaganda" that they are using, isn't it? Again, I think it is good propaganda.

Mr. Robinson. "Emphasis", I believe the chairman said.

Mr. Medalie. I do not think we ought to have anything in here that is really futile and is not a rule.

Mr. Holtzoff. I move we strike out the first sentence.

Mr. McLellan. Second the motion.

The Chairman. Any remarks? -- It is passed, with two

votes in the negative.

(The motion was duly AGREED TO.)

Mr. Medalie. The second sentence, Mr. Chairman, was designed to meet a situation to which Mr. Robinson referred and to which Mr. Wechaler referred. That is, that there exists today a right of trial by jury of an issue raised for example by pleas in bar, and it is not our intention, and we would not succeed if we attempted, to take away the right of trial by jury, and the purpose of this provision is to see to it that if either the judge or the district attorney or the defendant wants a trial by jury he shall have it.

Mr. Youngquist. George, should however that not be limited to the cases where the defendant is now entitled to a trial by jury? Under the language of this sentence it applies to every motion.

Mr. Dean. And should we not specify?

Mr. Medalie. I think that is in any motion, civil or criminal, where there is no constitutional right to trial by jury, the judge can if he chooses to, try an issue of fact by a jury to advise him, so that he can get the angle of the common man on the state of facts as represented by the evidence.

Mr. Youngquist. Surely.

Mr. Medalie. Now, you do not need to make provision for that, at all. Judges have that power. Now, the one thing we want to make sure of is that we have not attempted by these rules to abrogate the existing right, and that is all we need to put into the rules.

Now, what we are putting in, if this has the broad meaning, as it undoubtedly has, is the provision that on all motions the

court has the power if it chooses to try all or any issues of fact, all or any part of the issues of fact on the motion, by trial to a jury, and using, of course, necessarily, accepting or rejecting the jury's verdict. I think it is unnecessary.

Mr. Waite. I would like to ask a question apropos of that statement. Suppose the defendant moves to dismiss on the ground that there was no evidence whatsoever before the grand jury on which to support the indictment? That is a question of fact, obviously, but it is not a question of fact on which he has an existing right to jury trial, whether there was or was not evidence before the grand jury.

Mr. Medalie. Or any right.

Mr. Waite. If I understand this last sentence correctly it gives him a right to a jury trial on such an issue of fact as that, and I think that would be a great mistake.

Mr. Medalie. I am sorry, Mr. Waite, that you chose that example, because I do not believe that a defendant has any right to make a motion on the basis of the grand jury evidence.

Mr. Waite. Well, he has made it, in New York, and got away with it.

Mr. Medalie. Oh, well, in New York they are made because of a very peculiar situation. Our Code of Criminal Procedure expressly forbids the inspection of grand jury minutes, so the courts worked out this doctrine--no man may be indicted except on evidence--this is his constitutional right--except on evidence which the grand jury actually received.

If he can circumstantially show that the grand jury did not have such evidence, as for example the affidavits of the witnesses who appeared before the grand jury, then the court

may order an inspection of the grand jury minutes to determine whether he was indicted on insufficient evidence, and though prohibited by the Code of Criminal Procedure, they claim that to that extent the provision of the code is void, because it takes away from him a remedy for enforcing a constitutional right to be indicted by a grand jury.

Mr. Waite. That really does not answer my question.

Mr. Medalie. But that is a peculiar situation in New York. Does it exist anywhere else?

Mr. Waite. Yes, in various States it has been set up.

Mr. Medalie. Now, come to your point.

Mr. Waite. And the point I want to raise is this--That would be a question of fact that he has raised by his motion to dismiss. I think it would be a great mistake, I think we all agree on that, to give him a right to jury trial on that point.

Mr. Youngquist. Yes.

Mr. Medalie. Yes.

Mr. Waite. If I understand this sentence correctly it does give him a right to trial by jury.

Mr. Holtzoff. I do not think that ground arises in the federal practice.

Mr. Youngquist. Take any other ground.

Mr. Medalie. Let us assume it is a ground in connection with a motion as Mr. Waite indicates, where the right to trial by jury is not now guaranteed. Mr. Waite says that he does not want the defendant to have a jury as of right to pass on that issue of fact, and I agree with him completely.

Mr. Holtzoff. This is not a trial as of right.

Mr. Dean. This gives it to him if he asks for it.

Mr. Medalie. It does?

Mr. Youngquist. If he asks for it, he gets it as a right.

Mr. Glueck. It may be had upon his motion.

Mr. Holtzoff. It ought to be modified.

Mr. Medalie. Well, to bring this to a head, Mr. Chairman, I move that the only provision with respect to juries, in subdivision (4), be one that applies only to those cases where a defendant is now entitled by plea in bar or in abatement to a trial by jury.

Mr. Youngquist. Second the motion.

Mr. Medalie. And that he may have it, on his request, on the request of the district attorney, or by order of the judge.

Mr. Youngquist. Second the motion.

The Chairman. Is there any discussion?

Mr. Dean. I wish we could formulate the instances. This is not going to be of much help to the practitioner. When he gets through, he has got to go back all through it.

Mr. Medalie. The practitioner has got to know a little law.

Mr. Dean. I know, but the very question we have been talking about is not so well settled as you suggest, if I may suggest it. In some jurisdictions in the federal courts you can go in and make a plea in abatement based on the fact that there was no competent evidence before the grand jury, and if you know that one witness went in there and only one, and that he could not have given competent evidence, you can have a trial on that issue of fact. I had one last summer out in St. Louis and it lasted a week.

Mr. Youngquist. As a right?

Mr. Medalie. He is not guaranteed that, either. The

Constitution guarantees no such trial as that.

Mr. Youngquist. No.

Mr. Dean. Granted; but can we specify the ones where he does and where he does not have the right?

Mr. Medalie. No. I think it is enough if we wish to let the court decide on the question of what the constitutional guarantee is, by saying-

"In those cases where by a plea other than a plea of guilty he is entitled to a trial by jury on the issues so raised he shall have that right"

Then what you have left is a question of constitutional law, and we ought not to write constitutional law into rules of practice.

Mr. Dean. The difficulty in specifying those cases is that we might go over the line into something where there is a guarantee.

Mr. Youngquist. Yes.

Mr. Dean. And we are not sure of the guarantee.

Mr. Medalie. Or give it where there isn't one?

Mr. Dean. Or give it where there isn't one.

Mr. Medalie. Yes. I think we are safer to let it stay just where it is guaranteed by the Constitution.

Mr. Dean. All right.

Mr. Holtzoff. The same way, under the civil rule.

Mr. Medalie. I think my motion is understood.

The Chairman. The motion is pending.

(The motion was duly AGREED TO.)

Mr. Medalie. And that is to be redrafted?

The Chairman. Yes, to be redrafted.

That brings us to section (5).

Mr. Wechsler. May I ask a question on the last motion, Mr. Chairman?

The Chairman. Surely.

Mr. Wechsler. Does that mean that the court is without power to try the issue before a jury in cases where there is no constitutional right to jury trial?

Mr. Medalie. My answer is that that is still a matter for the court itself to decide for its own convenience as it may.

Mr. Wechsler. Yes. I just wanted to be sure that was the view.

Mr. Dean. It may.

Mr. Wechsler. It may?

Mr. Medalie. You do not need to say anything about it. It has that power at any time.

Mr. Glueck. The verdict, however, would be merely advisory.

Mr. Medalie. May I give an instance like this. A man has been served with a subpoena, or it is claimed he has been. A motion to punish for contempt is filed, and he claims he was not served with the subpoena. The court could if he wanted to have a jury trial on it, but neither party is entitled to such a jury trial.

Mr. Wechsler. May I say one further thing on this resolution, Mr. Chairman? I am not sure this is a real difficulty, but it may be worth looking into. There may be some instances under the existing practice where precisely the same point can be raised in the defendant's discretion on motion or by plea-- by special plea in bar. If raised on motion, under the existing practice, there would be no right to a jury trial.

Mr. Medalie. That is right.

Mr. Wechsler. If raised by plea, under the existing practice, there would be a right to jury trial.

Mr. Medalie. That is correct, I think.

Mr. Wechsler. Now, if that is a correct statement of the law, think of the dilemma the court and counsel are in in deciding whether or not when raised by motion under this procedure there is a constitutional right to jury trial.

Mr. Medalie. I do not think that that can arise, because we have taken away from the defendant the right by plea to get a jury trial, so we preserve to him the right to get that same jury trial where he asks for the same relief by motion.

Now, he can decide for himself, as he does now. If he does not want a jury trial, he makes a motion; if he does want a jury trial, he files a plea. We we have it now, he makes a motion and then requests a trial by jury, if he wants one, so we have fully preserved all the rights and the choices.

Mr. Wechsler. It might be that the drafting problem could be met by speaking of where he had a constitutional right to trial by jury, if the issue were raised by plea. I am not sure that is necessary.

Mr. Medalie. I think it is.

Mr. Wechsler. You think it is?

Mr. Medalie. Yes.

Mr. Wechsler. At any rate, that would meet the difficulty.

Mr. Glueck. You mean whether the issue was formerly raised by plea?

Mr. Wechsler. Yes.

Mr. Glueck. Before these rules?

Mr. Wechsler. Yes.

The Chairman. Do you offer that as a motion, Mr. Wechsler?

Mr. Wechsler. I think so.

Mr. Medalie. I think you and I are in agreement on this.

Mr. Wechsler. We are. It is just to get the thing clear for the drafting job that I raised the point.

Mr. Longsdorf. Do I understand this correctly? Does he have to ask for the jury trial when he makes a motion which functions as a plea in abatement, and that he does not have it unless he asks for it? Or does he get it whether he asks for it or not on such a motion?

Mr. Medalie. As I have stated it here, he is to get it only if he asks for it.

Mr. Longsdorf. All right.

Mr. Medalie. I do not think he has lost anything, because the construction would be that he had waived it.

Mr. Robinson. Do you think we had better state it, Charlie, that he may waive the jury trial?

Mr. Longsdorf. As long as we have got a waiver of jury trial in here, why not make that waiver apply to a motion?

Mr. Medalie. It would dispose of any doubt on the subject if we follow what Mr. Longsdorf suggests. I will move to have that adopted.

The Chairman. Will you hold that a minute? We have Mr. Wechsler's motion, which I would like to have him read again, if he will.

Mr. Wechsler. My motion is that the rule when finally drafted make it clear that the defendant on these affirmative motions is to have a right of jury trial in cases where formerly

he would have had a constitutional right had the issue been raised by special plea.

Mr. Medalie. I thought that was covered in what I suggested should be in the rule, but I am willing it be again put in.

The Chairman. It is merely adopted for clarification.

Mr. Wechsler. Yes.

(The motion was duly AGREED TO.)

The Chairman. Now, Mr. Longsdorf's motion.

Mr. Longsdorf. My motion is that the rule be so worded that he gets a jury trial without request, but may waive it, in the same manner as in a former rule provided.

Mr. Medalie. Do we need to go as far as that? He can waive it at any time, can't he?

The Chairman. He may waive it in the same manner.

Mr. Medalie. But why have that "manner"?

The Chairman. What is that?

Mr. Medalie. He can waive it in his motion, or when the court comes to set it down he may say, "We don't need a jury trial."

The Chairman. He may waive it?

Mr. Longsdorf. He may waive it in his motion.

Mr. Medalie. Or any other time.

Mr. Longsdorf. Yes.

Mr. Medalie. He can change his mind.

Mr. Longsdorf. My point is, he should be made to waive it, instead of being made to request it.

Mr. Robinson. That has been our general policy.

Mr. Longsdorf. All right.

The Chairman. You have heard the motion.

(The motion was duly AGREED TO.)

The Chairman. Now we come to (5).

Mr. Medalie. That has been read, hasn't it?

The Chairman. That has been read.

Mr. Medalie. Now, I made some notes here. You have two situations with respect to the indictment, where there are defects in the indictment, and one, where the court has the power to order an amendment. There are other defects in the indictment not curable by amendment.

I think it would be a serious loss if an indictment having curable defects, but not curable by amendment, resulted in complete dismissal or discharge of the defendant and the discharge of his bail. Now, I think what ought to be done under the second possibility is for the court to dismiss the indictment, because it must, provide for the continuance of bail, and fix a time for the district attorney's resubmission of the case to the grand jury to cure that defect by a new indictment.

Suppose he left out the word "wilfully" and could show that he could supply the word "wilfully" by proof, he would have to dismiss the indictment. That is a defect. Suppose there were the omission of a jurisdictional allegation, he forgot to say "in the Southern District of New York."

Mr. Glueck. That is a good idea, I think, Mr. Chairman.

Mr. Robinson. Of course, that would not be a written accusation that could be cured by amendment as stated by rule 81.

Mr. Holtzoff. No, you would have to call them over and represent it to the grand jury.

Mr. Youngquist. We have a statute to that effect in

Minnesota.

Mr. Medalie. And we have, in New York.

Mr. Robinson. What is your proposal, George?

Mr. Medalie. That in cases where there is a defect which in the opinion of the court can be supplied by proof so that the indictment, a correct indictment, can be obtained, either by merely rewriting it and getting the grand jury to vote it again, or by resubmission, to supply the proof to the grand jury so they can vote it; that though the indictment is dismissed the bail shall not be discharged, and the time set by the court for the resubmission of the case to the grand jury and the filing of a new indictment.

Mr. Holtzoff. I second that motion.

The Chairman. Is there any discussion?

(The motion was duly AGREED TO.)

The Chairman. Are there any other suggestions with respect to paragraph 5?

Mr. Holtzoff. Mr. Chairman, I think that the last two sentences beginning with line 84 are unnecessary. They practically say that if the court hears a motion, he shall make such orders as are just. I think that is implied, of course.

Mr. Medalie. That is right.

Mr. Holtzoff. I move the last two sentences be stricken out.

Mr. Medalie. I second the motion.

The Chairman. Is there any discussion?

(The motion was duly AGREED TO.)

The Chairman. Now we come to the three special defenses.

Mr. Robinson. May I ask Mr. Medalie or any other member

of the committee whether you feel now that this is a complete treatment of this matter of the motions which we propose to establish, plus the hearing?

Mr. Medalie. I think it is, and the small amount of home work I shall do and that I have noted I must do is a careful reconsideration of this, and if anything occurs to me, of course, I will communicate with you.

Mr. Dean. Mr. Reporter, have we taken care of the problem that was raised a little earlier about those matters which may be raised by motion, and those matters which are available under the general issue?

Mr. Robinson. I do not think so, have we, George?

The Chairman. That was something Mr. Wechsler was to make a motion on when we came to the end, but I thought we were going to hold that until we came to the end of this whole section.

Mr. Dean. All right.

The Chairman. We still have "insanity" and "alibi", and so forth.

Mr. Dean. I thought we were at the end of this part of it, but I will be very glad to wait until we are through with the "insanity" and "alibi".

The Chairman. Let us go on with this.

Mr. Seth. May I make a suggestion that this last section (5) will necessitate an amendment of 26, on that continuing bail. The bail terminated on judgment in the earlier one. It ought to be corrected.

Mr. Medalie. That was "except as provided in 51," and so forth.

Mr. Seth. That is right.

Mr. Robinson. Now, (f), beginning at line 89 on "Notices", the draft on "insanity" is just the same as in the American Law Institute Code. The two big questions on these notices that we have been trying to work out together have been, how much the notices should contain--for instance, that is particularly true in the alibi notice, whether or not there should be a certain place named, and whether or not there should be certain witnesses named. That does not apply to insanity particularly, but you do have this question of giving both insanity and alibi notices in advance.

That is, what shall be the effect if the defendant fails to give the notice in advance of trial? Shall the court then be given the power to exclude the evidence if offered without previous notice having been given--that is, with proper protection, such as in lines 98-99, for good cause, for failure to file a notice, if the defendant has made an offer, then the evidence may be admitted; or should some other method of dealing with the situation be proposed? Should another method be devised?

The members of this Committee have of course split at least two ways on that. Some feel that it would be violating a constitutional privilege of a defendant to exclude evidence which he offers in his defense on the trial merely on the ground that he had failed to give advance notice in regard to that evidence, say on "insanity" or on "alibi". Others of the Committee feel that it would not be a breach of the constitutional provision against self-incrimination; that is where it is usually based.

In order to get that question squarely before us, we have prepared alternate drafts on the subject of alibi. The plan followed here has been this. On "insanity," that is taken from the American Law Institute Code, we have copied the American Law Institute Code exactly. Then on the alibi, we have prepared the first alternate draft; that is, beginning at line 101; squarely on the basis of the Institute Code provision on insanity, substituting matters relative to alibi in this draft at the place where matters relative to insanity were placed in the American Law Institute draft.

Then as a second alternative, or the alternative draft on alibi, beginning at line 112, we have prepared a draft which is based on the present statute in Oklahoma, the only State that has such a provision. In brief the Oklahoma provision is that if the defendant fails to give the notice of alibi in advance of trial the court during the trial when the defendant offers evidence of alibi may provide a continuance or recess, during which, then, the Government may have a chance to check up on the alibi.

The advantage of that Oklahoma draft, for your consideration, is that it avoids the constitutional difficulty that some feel, and at the same time, it takes away from the false defense of alibi the element of surprise, because it permits the trial to be recessed on a motion of the United States attorney during the time necessary for him to investigate the basis for the defense.

That statute was enacted in Oklahoma in 1935, and this report from a district court committee for the Eastern District of Oklahoma incorporates that part of their State statute, with

which I assume that the United States attorney and other members of his committee are familiar.

I think that is all I have to say on that.

Mr. Holtzoff. Mr. Chairman, I was under the impression-- perhaps I am wrong--but I have a hazy recollection that at the last meeting we voted not to require notice in advance, of insanity. Of course, I realize that that does not bind us, but I personally do not believe that that should be required, and I would like to add that in other recommendations submitted the other day by a committee organized in the Department, they recommended that no notice of the defense of insanity be required.

The situation is entirely different in the case of alibi, because an alibi, sprung at the trial, may leave the prosecution at a great disadvantage, but I do not think that is true in the case of the defense of insanity. Therefore, I move to strike out the provision requiring notice of the defense of insanity.

(Seconded.)

Mr. Robinson. Judge, I suppose that calls for a brief statement. You may consider that insanity provision set in here just merely to show the source of the alibi provision.

Mr. Holtzoff. Yes.

Mr. Robinson. That is, the alibi provision<sup>is</sup> based on the American Law Institute Code for insanity. I think Mr. Waite has told me that the matter of requiring notice of alibi came up in the American Law Institute Code deliberations, but they decided not to provide for alibi notice, although they did provide for insanity notice, so in their thinking they took just exactly the contrary position to what we did.

Mr. Holtzoff. I might add this, that in federal cases the defense of insanity does not arise nearly so frequently as it does in state cases, because of the different nature of the average federal offense, and I do not think that any particular object would be served by making the requirement of a notice in advance, of insanity, and therefore I move to strike out the requirement.

Mr. Glueck. There are many mentally ill people in St. Elizabeth's, and many of them plead irresponsibility by reason of insanity, which, by the way, is the technical--

Mr. Holtzoff. I do not see why they should be required to give notice in advance.

Mr. Glueck. I would like to hear Mr. Medalie on that. Now, frankly, we were at a disadvantage, as to this. That is, where you do not have notice. Did you have cases where they sprang it on you at the last minute?

Mr. Medalie. No.

Mr. Glueck. With some fake experts, or something of that sort?

Mr. Medalie. No, and the fact is that in no criminal case that I know of, in and around New York, in the state courts, where this is more likely, was a district attorney to my knowledge ever taken by surprise.

Mr. Youngquist. I have had two experiences with the insanity defense in murder cases in our state court. In one, the defense of insanity, or evidence in support of the defense of insanity, was introduced at the trial. We did not know of it in advance, but it happened that the evidence adduced in support of the defense was such that we did not find it necessary to

introduce evidence against it. In the other, we expected that the defense of insanity would be introduced and had two experts of our own present during the two weeks' trial, and the trial ended without the defense being asserted at all, although I learned later that defense counsel had intended to assert that defense, but the development of the case was such that they found it inadvisable. I am merely citing those experiences without making a suggestion one way or the other, for the information of the Committee.

Mr. Medalie. You know, there is one thing to be said about insanity in all criminal cases. There has been a lot of newspaper hullabaloo based on a paucity of incidents, to the effect that all you have to do is commit a crime and then spring a defense of insanity, and out you go! That myth is utterly false, and there is practically no record to sustain it.

Now, there are persons who have put in the defense of insanity in crimes commonly called "crimes of passion." You know it in advance, everybody knows it. The defense is a fake and has nothing to do with insanity. It is usually a way of telling a story otherwise irrelevant but nevertheless known.

There is another aspect of insanity, and that is, we have a legal definition--perfectly absurd--recognized by the medical profession as absurd, and largely ignored by juries, notwithstanding the court's instructions.

There is another phase of this. That is, what happens to insane persons who are acquitted on the ground of insanity, or found "guilty but insane", where it is so provided by special statute? That is another question altogether, but so far as the element of surprise is concerned, I think experience indicates

there is virtually no surprise. Where it is possible that the defendant is insane; that is, where it might be plausible to assert that he is, the prosecutor and the law enforcing officers know enough about the defendant to be able to anticipate that that might be the defense, or that it might be the fact.

Mr. Youngquist. I think that it would be convenient to the Government to have notice of the defense of insanity, but I do not think it is essential.

Mr. Medalie. No.

Mr. Holtzoff. The Department of Justice--

Mr. Medalie (interposing). Alex, if you don't mind. The great trouble here is that there seems to be doubt as to the federal government having the right to make preliminary inquiries, which are provided for in all state procedures, where a defendant is insane. Then, after it finds he is insane, there is another doubt as to whether the federal government has any power to do anything with a man simply because he happens to have been a defendant in a criminal case.

Mr. Dean. There is no place to send him afterward?

Mr. Medalie. No power to send him.

Mr. Seasongood. You move to strike this out?

Mr. Holtzoff. Yes.

("Question.")

The Chairman. The question is called for on the motion to strike out (f) (1).

(The motion was duly AGREED TO.)

The Chairman. That leads us to the two alternative statements of the alibi rule. What is your pleasure with respect to that.

Mr. Dean. In the interests of playing safe, I suggest we take the Oklahoma draft, which simply calls for the postponement.

Mr. Seth. Mr. Reporter, don't these alibi provisions generally contain some provision whereby the government shifts the date, does not undertake to prove the date alleged in the indictment?

Mr. Robinson. You will recall in our former rule we tried to take care of that by a bill of exceptions. You will notice in this draft we have not mentioned bills of exceptions. It is a matter for this committee to consider, and there is no specific provision for that. Our assumption has been--perhaps we anticipated a motion to strike out, by Mr. Seth--the power exists in the court, and that the court, by pre-trial procedure or otherwise, may be expected to restrict the State or the Government to the date it alleges in the indictment. If it alleges some other date, of course, the statute surely should be applied--or the rule.

Mr. Seth. I think we have got to put something in there, if this goes out to the public.

Mr. Robinson. Maybe so.

Mr. Seth. If we are to have this notice of alibi, we have got to protect the defendant against that 3-year provision, "any time within 3 years."

Mr. Youngquist. Pardon me, what was the number of that rule in the first draft?

Mr. Robinson. There were two or three provisions with regard to bills of particulars. There was nothing specifying the trials, of course.

Mr. Holtzoff. It seems to me we should have a provision in whichever one of these alternatives we select, that if after the notice of alibi is given the Government offers proof that the crime was committed on some other date, that the defendant then would not be bound by his notice of alibi and could offer a defense of alibi if he wished, without a notice.

Mr. Seth. And be given time to get his witnesses, and to show a different place. The Government is not hurt.

Mr. Holtzoff. Yes, he needs that, of course.

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

Mr. Seth. Yes, I think so.

Mr. Robinson. Do you consent to that?

Mr. Holtzoff. I think so.

I want to make a suggestion that in either of the alternative drafts we should not state a definite period of time. Now, "10 days before the trial" or "4 days before the trial" may be all right in some districts, but may be entirely too long in other districts where a trial may take place very shortly after the indictment.

I think we ought to make it a reasonable time, and let the local rules or local practice fix the exact number of days.

Mr. Glueck. I second that.

The Chairman. You have heard that motion with respect to the number of days' notice. All those in favor--

Mr. Youngquist. May I ask a question?

The Chairman. Yes.

Mr. Youngquist. Is that liable to give us trouble before Congress? I am just raising the question.

Mr. Holtzoff. Well, certainly not the second alternative.

Mr. Youngquist. You mean the Oklahoma rule?

Mr. Holtzoff. I don't think the Oklahoma rule would ever cause trouble before Congress.

Mr. Youngquist. No.

Mr. Holtzoff. I am not so certain as to the first. Although in principle I approve the first rule, I am going to vote for the Oklahoma rule, for that reason.

The Chairman. I would like to ask the men who try cases for the Government whether the second rule would not be very awkward in practice?

Mr. Medalie. Any rule is awkward in practice.

The Chairman. Leaving a jury suspended or hanging for a half a day, a day, or a week? What are they going to do-- lock up the jury?

Mr. Medalie. Well, the juries are not ordinarily locked up. Sometimes counsel gets sick.

The Chairman. What's that?

Mr. Medalie. Sometimes counsel gets sick. I walked out of a criminal trial, with the permission of the court in New York, to come down to this building to argue an appeal, and I stayed away three days. Nothing happened to the jury. Nobody was worried about the jury in my absence.

The Chairman. That trusting disposition is commendable.

Mr. Holtzoff. I think juries are locked up very rarely in criminal cases.

Mr. Medalie. Very.

Mr. Dean. Very.

Mr. Medalie. The jury is not likely to be locked up in a burglary or robbery case.

Mr. Seasongood. Well, the jury has not been empaneled if the court continues the case.

The Chairman. That would be right.

Mr. Robinson. May I add one word of explanation or addition rather to what I said a moment ago. I said that there was no compulsion under the Oklahoma statute. Mr. Longsdorf shows me the two lines, 123-124, which show that the court may in its discretion--

Mr. Seasongood. Refuse to permit an alibi?

Mr. Robinson. --put the defendant on trial and refuse to admit the introduction of evidence tending to establish such alibi. I do not think that is the Oklahoma rule, though. That was a decision of this district court committee.

Mr. Longsdorf. Yes.

Mr. Robinson. So the question becomes a little more complicated, than as I stated a moment ago. Shall the discretion be left to the trial judge to say whether the trial of the case shall go on, in case he has a jury there--that ~~he thinks~~ could not safely be separated or dismissed, or not dismissed, but the case adjourned temporarily? Should the court have a discretion there to compel the trial to go ahead?

Mr. Holtzoff. In the light of that last law, there isn't any substantial difference between the two drafts.

Mr. Robinson. Well, we can straighten that out. That is all I am saying now.

Mr. Holtzoff. Yes.

Mr. Robinson. If that former action was taken on a basis that there should not be even a discretionary alternative of compulsion by the court, I would move that line 122 go out.

Mr. McLellan. Then if you take it out, will you have anything left except that the court may in its discretion, in the absence of the defendant's having done something, grant the United States attorney time within which to meet the situation?

Mr. Robinson. That is about all that is left, Judge.

Mr. Dean. Nothing else.

Mr. McLellan. Would he do it?

Mr. Robinson. I never heard of a court granting a continuance merely because an alibi defense was raised, and if this rule expressly recognizes that such a continuance would be proper, wouldn't that add a little bit to the protection of the public generally against alibis--defenses that have become so notorious that 14 States now have provided specifically for the defense of alibi, and most of the States put the compulsory clause in it?

The Chairman. Why are we afraid of the first part of the rule? Why do we shy away from that?

Mr. Robinson. Personally, I am not afraid of that.

Mr. Medalie. There are two ways in which this job is done. That is apart from the fact that I do not believe in this alibi provision or any kind of alibi provision, and I know it is not applicable to most of the important cases tried in the federal court, where the indictment alleges that "beginning with January 1 1923 and continuously down to the date of the filing of this indictment, the defendant contrived devices," and so forth, and so forth, all over the lot, and all over the Southern District of New York.

Mr. Robinson. It is not applicable in that kind of case, of course.

Mr. Medalie. Not applicable?

Mr. Holtzoff. No, but when the increase of federal reservations there are more common-law-crime cases in the federal courts, occurring on a federal reservation, such as robbery.

Mr. Medalie. You say there are many?

Mr. Holtzoff. Yes.

Mr. Medalie. Ever since Theodore Roosevelt tried to indict Pulitzer for libel?

Mr. Holtzoff. No, no, you don't get many of those cases in the Southern District of New York, but in a district like Virginia, rape on the Mt. Vernon boulevard. We had a case like that recently. Or a robbery on Quantico reservation.

Mr. Medalie. I know one of those cases was defeated because the surveyor had incorrectly stated the federal bounds.

Mr. Holtzoff. No, but I mean we have an increase in the type of cases such as were formerly tried in the state courts.

Mr. Medalie. All right. Let us assume there are such cases. All right.

Mr. Dean. Alex, you have just convinced me, though, on the insanity cases, that we do not have those cases, just a moment ago, that the federal cases are of such nature that you do not get that kind of defense. Now, if we are getting rapes on Mt. Vernon Boulevard and homicides on federal reservations, I think we ought to reconsider the insanity.

Mr. Holtzoff. No, because we have got the burglary and robbery cases on federal reservations.

The Chairman. May we get a tentative vote on each of these alternative forms, as to which one we want?

Mr. Medalie. Before you do that, the one provides for

compulsion of the defendant. That is the Oklahoma draft.

Mr. Youngquist. It provides what?

Mr. Medalie. The defendant must give notice that he is going to prove an alibi.

Mr. Youngquist. Yes.

Mr. Robinson. Yes, in the alternative, discretionary with the court.

Mr. Medalie. In other words, these two subdivisions (2) and (3) are alibi alternatives, providing for the defendant's giving notice. He is the person who does it.

The Chairman. That is right.

Mr. Medalie. Now, you will have a different New York statute, which Mr. Longsdorf said he couldn't find, because it undertakes to get a bill of particulars. That provision was conceived and drawn by my associate George Sylvester as a member of a special committee of the New York County Lawyers Association, and the committee reported it to the American Bar Association, and it was adopted by the New York legislature in 1935.

That provides that the district attorney may make a motion in an appropriate case for a bill of particulars from the defendant on that subject, with the consequence that if he does not comply with the order for the bill of particulars he is precluded from giving proof on that subject. That was not considered, was it?

Mr. Robinson. That was at our previous meeting I believe, George. I am just trying to find what rule that was under. I will get it in just a minute. Do not wait for me, though, go right ahead.

Mr. Medalie. I think we ought to consider, if you are going

to have an alibi provision--which I shall vote against, anyhow--but then after you have it, I will decide. I know you are all eaten up by this clamor on alibi changes.

Mr. Robinson. Oh, not a bit, George.

Mr. Medalie. No?

Mr. Robinson. Not "eaten up."

The Chairman. Let us have this. All those in favor of an alibi rule--not specifying what rule it is--will say aye, so we can see where we are at.

Mr. Youngquist. To what?

The Chairman. In favor of a rule providing for alibi notice, will say aye. The chair is in doubt.

(There was a show of hands, 8 ayes, 8 noes.)

Mr. Wechsler. Perhaps we could discuss that question, Mr. Chairman. It would seem to me more important than the form of a rule. I am opposed to it. I would like to state my reasons at the appropriate time.

The Chairman. All right, now is the time.

Mr. Seasongood. Well, it has failed, hasn't it--there is to be no alibi notice?

Mr. Wechsler. Oh, I am sorry.

Mr. Seasongood. If it is equally divided, the motion fails.

Mr. Seth. I think the question ought to be discussed where we have an equal division like that.

Mr. Seasongood. All right.

Mr. Seth. I would like to hear the reasons against it, myself.

Mr. Seasongood. All right.

Mr. Wechsler. I have no passion to state my views.

Mr. Waite. Go ahead.

The Chairman. Well, if it has failed, that is all there is to it.

Mr. Robinson. I suppose the Reporter ought not to fail to put before you the fact that the alibi notice rule is the one that has received the greatest support from all over the country.

Mr. Seth. Absolutely.

Mr. Robinson. It is almost unanimously recommended by the United States attorneys, and almost unanimously recommended by the bar committees, who have sent a request to us. Whether that amounts to anything, to us, of course, we ought to do it with our eyes open.

Mr. Seasongood. That ought to be reframed all through and fixed up, Mr. Wechsler.

Mr. Robinson. The only proposal they recommended this Committee adopt, with any greater uniformity, was the waiver of indictment. The next was the alibi notice. They have sent us in a long list of cases in which the Government has lost a good many thousands of dollars because of fake alibi notices throughout the country. I just want that in the record.

Mr. Orfield. Mr. Chairman, I am going to change my vote, and vote in favor of alibi.

Mr. Robinson. If that is close, we do not need much debate about it.

The Chairman. That is nine. The motion for an alibi rule has prevailed.

Mr. McLellan. I want to say that in nine years, trying criminal cases for some time, I have never seen an alibi defense

succeed.

Mr. Glueck. How many, roughly speaking, Judge, have you had?

Mr. McLellan. I could not answer that; but "some."

Mr. Glueck. "Some"?

The Chairman. Somebody mentioned at the last meeting--I think it was Mr. Seth--about an alibi being pleaded and having to send away down to Texas at an expense of \$900 or \$1,000 to the Government to pull up some witnesses--how many thousand miles? Maybe it was Mr. Dean. Somebody brought it up.

Mr. Medalie. "Not guilty." That was because it came so suddenly. They can spend money so lavishly. Or weren't they able to get the witnesses?

Mr. Robinson. No, George, the facts were, the defendant waited until the last day of the trial, about a 2-weeks' trial, to bring up the alibi defense. Dustin McGregor, of Houston, Texas--that is one of the letters I referred to.

The Chairman. They had to get them by airplane, and all that sort of thing?

Mr. Robinson. Other district attorneys say that is a common experience and that it happens frequently now.

Mr. Holtzoff. Mr. Alexander has had a similar experience.

The Chairman. Just state it, Mr. Alexander.

Mr. Alexander. We brought three witnesses by airplane from California to Illinois just two years ago in that mine bombing suit where one defendant tried to prove an alibi. I have had cases in the last four years where we were surprised by the defense of alibi in the evidence, and we did not lose any of the cases, but they were pretty close. We brought witnesses from

St. Louis overnight in one of the cases.

Mr. Medalie. You won them all?

Mr. Alexander. Yes, we did not lose them.

Mr. Medalie. Yes, that has been my experience.

Mr. Alexander. But we did have more larceny cases and bank robbery cases and stolen property cases than ever before, within the last eight or ten years.

Mr. Medalie. I want to ask Mr. Alexander a question. The New York provision--did you follow it?--provides that the District Attorney may make a motion directing the defendant in an appropriate case to file a bill of particulars with respect to alibi, if he has such a defense. Of course, he does not know that he has, but in the case of bank robbery, burglary, and so on, cases where you suspect that there might be an alibi defense, you then make your motion.

Now, the reason it is put this way in the New York statute I would guess is that the average defendant in a criminal case, even if he has an alibi defense, doesn't have his case properly prepared, until the last minute. He hasn't much money with which to get competent counsel, and he doesn't always get competent counsel. The day before the trial, he has a talk with his lawyer, who just hears the case is going on, or meets him in the court room on the day of the trial; the district attorney starts proving his case, and by night-fall the attorney is informed as to who the witnesses are to be.

I think that is the normal procedure in most ordinary criminal cases. Therefore, the defendant is not required--and you must be fair to the defendant--not required to think of doing these things which are provided for either by code or by

statute or rule, and in those cases where the district attorney thinks it is appropriate, there is no difficulty in his sharply bringing it to the attention of the defendant, as provided in the New York statute, and requiring of him a bill of particulars.

Mr. Alexander. I think that would be satisfactory.

Mr. Medalie. And it would be fair, wouldn't it?

Mr. Alexander. And it would take care of that matter of the date in the indictment, because you could provide that the United States attorney should specify the time that the offence was committed.

Mr. Medalie. This is the language of the New York provision with respect to the contents of the bill of particulars:

"\* \* file a bill of particulars, which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and the places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time and place of commission."

Mr. Holtzeff. I do not think the defendant should in his notice be required to disclose names.

Mr. Medalie. Well, leave that out.

Mr. Seasongood. I would like to hear Mr. Wechsler's argument on the general proposition.

Mr. Medalie. I did want to get Mr. Alexander's view.

Mr. Seasongood. I can see an objection to that. It delays the trial, and if you file a bill of particulars, then the court has to hear it, grant it, and give them time in which to comply with it.

Mr. Robinson. I am afraid if we leave the record in this shape now we do not have the whole story from Mr. Alexander. As I recall the way he told me the account of bringing those witnesses from California, it was only by the grace of God and good luck and speedy work and the expenditure of government money they were able to meet that alibi. Is that true?

Mr. Alexander. Oh, that is true. We had to use the long distance. We had a night and a day in which to do it, and we managed to bring three boys who were at the scene of a certain affair.

Mr. Robinson. How late in the trial was it before you knew the defense was to be alibi?

Mr. Alexander. We didn't know it until the trial was about over. The defense concluded the next day, and the court gave us a recess beginning about 3 o'clock, until the next morning, in which to produce our witnesses.

Mr. Holtzoff. George, in mail robbery cases and bank robbery cases, the defense of alibi arises. You had your mind directed to the type of offence that involves a mail fraud or a bank--

Mr. Medalie (interposing). No, that's out. By agreement, that's out. We are talking now of the kind of cases that are susceptible of alibi notices and alibi particulars. I am talking of robberies, burglaries, assaults, and murders.

The Chairman. Why shouldn't a defendant be willing to tell where he was?

Mr. Seasongood. Mr. Wechsler has some views on it that I would like to hear.

Mr. Robinson. I would like to hear them, too.

The Chairman. All right.

Mr. Wechsler. The argument doesn't merit all this build-up. It has been made in large part by Mr. Medalie, in what he says. I emphasize primarily the fact that in criminal prosecutions most defendants are not now well represented, or will not be well represented, or represented by counsel, at all. It seems to me that is unavoidable, and that no matter how much the Supreme Court, or we following in their trail, attempt to build up the assignment of counsel, that situation will in practice continue for the most part.

Now, to put any burden on a defendant who may be in that situation seems to me to be a priori unwise, particularly when on the other side--I do not know--I may be wrong on this--but I do not know of any serious number of miscarriages of justice by reason of surprise proof of alibi. There may be some expense in consequence of it, but the Federal Government has the assistance of a national investigative agency in the Federal Bureau of Investigation. It is able instantly to be in touch with law enforcement officers anywhere in the country and almost anywhere in the world.

It seems to me this is a terribly important fact which distinguishes the federal situation from the state situation, and I am not terribly concerned that in particular cases it may have been necessary to fly witnesses from California or Texas. The important point is that that can be done, and the cost of it in financial terms is a very small item in the total budget for the administration of federal criminal justice.

These are my reasons in substance. I add the fact that the whole alibi defense and notice seem to me inapplicable to the

great bulk of federal criminal prosecutions--a point which was made--and finally I hold the view that reforms like alibi notice derive their strength as much from simple contagion as from anything else. I had occasion once to make a study of the proposals in the field of reform of criminal procedure, and these few ideas which are in the standard arsenal of reform are copied to a very considerable extent.

You get a committee together and you ask, "What shall we propose?" And you go to the bar association recommendations and the other standard sources, and it is perfectly clear what to propose--"alibi notice," "comment on failure to testify," and so on down the line--things which in my view really do not matter in the administration of criminal justice, but they are very significant in appraising the weight of popular recommendations such as the recommendations that have come to us from the various local committees.

I can't believe that this alibi situation represents a real abuse and that there is a real problem there that needs to be met. It seems to me it is liable to work a hardship in the very cases that I confess are my special concern. Federal criminal law is not administered, with the Solicitor General of the United States representing the prosecution and John W. Davis representing the defense. That is an unusual situation to get that kind of litigation.

For the most part, the men are poor, they are dragged in, they appear without counsel or with incompetent counsel, their address is the local jail and their destination is the penitentiary. I think we ought to recognize then that that is so.

Mr. Waite. I would like to make an answer if I may to one

point of Mr. Wechsler's argument. I think you overlook one provision in the statute. You suggest that a defendant may not be properly represented by counsel. It has been our insistence that he shall be, and therefore you want him to file the notice, but the provision itself specifically provides that for good reason shown the court may permit the defense to be entered even though there was no notice, and I cannot imagine a judge so unreasonable as not to allow evidence to be given despite lack of notice, but it turned out a man didn't have counsel, or was not properly represented by counsel; and on that matter, the suggestion that surprise was not successful in the case where the Government spends several hundred dollars in getting its witnesses up here--that is not the point.

The great matter was the opportunity to investigate. The man sets up an alibi at the last moment, it may be sound, and it may not. If you know it is not sound you can get some witnesses up there, but if you do not have time to investigate, you may not be able to find who the witnesses are and to get them; and then my final reaction. I must say I started listening to this discussion without any predilection at all one way or the other, but I feel very definitely this way. I do not know a blessed thing about this situation, and when the attorneys throughout the country say that it is important to have that provision put in there, I do not like myself, out of the depth of my ignorance, to sit up here and reject it.

Mr. Seasongoed. Is nobody disturbed by the constitutional argument that you cannot make a fellow put on his case in advance or give notice of what his defense is?

Mr. Holtzoff. The constitutionality of the state statutes

has been sustained.

Mr. Seasongood. It has been sustained?

Mr. Holtzoff. In the various States. I do not think it has ever come before the Supreme Court of the United States.

Mr. Robinson. We had a full brief on that in the appendix to the book.

Mr. Seasongood. The way the Court is going in reference to other constitutional principles it is very doubtful whether they would sustain that.

Mr. Holtzoff. But I do not think the constitutional provision is invaded by this.

Mr. Youngquist. The provision against self-incrimination?

Mr. Holtzoff. No, this is not self-incrimination.

Mr. Youngquist. That is the only one I can think of.

Mr. Holtzoff. This is a question of what evidence you are going to offer in support of your denial.

Mr. Longsdorf. Mr. Chairman, I do not wish to take up time or prolong this, but I have a suggestion to make that I think is not at all irrelevant. These rules, when we get them into condition, are going to go out before the bar of the United States. We have many proponents of improvements in matters now. The opposition won't develop until they see what we have done. Maybe the demand for alibi notices will be far outweighed by the storm of protest that will arise when we send this out over the country; and that applies to other innovations as well. I do not think we ought to forget that.

Mr. Youngquist. Don't you think we ought to invite those "storms"?

Mr. Seth. Yes.

Mr. Youngquist. Let's get the views. That is the only way in fact that we can I think get the views and the general sentiment, whether for or against proposals of this sort.

Mr. Longsdorf. Then I think our draft when it goes out ought to intimate in some way that we were not in complete agreement on this thing.

Mr. Youngquist. Oh, that would be all right.

Mr. Robinson. All right.

The Chairman. That would be understood. Any group of lawyers in the United States who get a draft submitted by 17 or 18 lawyers will know without being told that it is not a unanimous product.

Mr. Medalie. Mr. Chairman, I move the Reporter be instructed to prepare a subsection on alibi substantially in conformity with the New York provision, section 295 (L) of the New York Code of Criminal Procedure.

Mr. Seth. I second the motion.

The Chairman. And may I add--

Mr. Medalie. That is notwithstanding my opposition to the whole alibi.

The Chairman. Do I understand that he is to draft these other two in such forms as he wants to submit them for circularizing among the members and for a vote taken by mail, so we can use one in our next draft?

Mr. Medalie. I do not think much of votes by mail. I think we had better meet again.

The Chairman. We are going to meet again and have another vote on it, but I think we ought to know substantially where we are headed on as many of these things as we can; but I won't

urge it if you do not wish it.

Mr. Medalie. If you think it ought to be done.

The Chairman. I think it might help.

(The motion was duly AGREED TO.)

Mr. Holtzoff. I understand that motion does not exclude these others.

The Chairman. It includes them.

Mr. Holtzoff. It includes them?

The Chairman. It includes them, in such revised form as the Reporter may desire to submit them.

Rule 60. Mr. Wechsler had a general observation on the whole matter of motions. We go back to that.

Mr. Wechsler. I can bring my difficulty to a head I think by a very simple amendment. In rule 51 on line 40, the troublesome word is the word "shall".

"All defenses heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by a motion\* \* \*"

I think that word introduces an ambiguity, though I confess it is only an ambiguity, as to whether in the case of matters which heretofore could have been raised either by such pleas or the plea of not guilty, the defendant is required to raise them by motion. I simply suggest that that language be reconsidered by the Reporter. I think that is the simplest way to bring it about, to avoid that difficulty.

Mr. Robinson. Mr. Wechsler, that has been a troublesome point for us. I agree with you, and I think that that is well

taken--that is, that clause-

"or by any plea other than the plea of not guilty" especially, and then the word "shall", following it--I will be glad to take that up with the committee on style, certainly.

Mr. Holtzoff. Wouldn't your point be met, Mr. Wechsler, if the word "shall" is changed to "may"?

Mr. Wechsler. Well, I thought it would, at first, but on second thought I am not so sure that that would not involve other difficulties. It might be construed to mean that there is permission to use a motion. I suppose that might do it.

Mr. Youngquist. That probably would do it.

Mr. Dean. At least you abolish the other pleas.

Mr. Youngquist. You abolish the other pleas.

Mr. Wechsler. Yes, the first sentence I suppose makes the peaceful solution.

The Chairman. The motion is, in line 40--

Mr. Dean. 40.

The Chairman. --to change "shall" to "may". Are there any remarks on the motion?

(The motion was duly AGREED TO.)

The Chairman. We will now move on to rule 60.

Mr. Orfield. With respect to line 4--

The Chairman. Of rule 60?

Mr. Orfield. Yes. I would omit the words "of the government", there.

Mr. Youngquist. So would I.

Mr. Orfield. It seems to me there is no real right to waiver if the government has to consent to the waiver. It seems to me it ought to be a right of the defendant alone.

Mr. Holtzoff. No, I think the Government ought to have the right to insist on a jury trial, and it ought not to be sufficient for a defendant to waive it, if the United States attorney prefers a trial by jury. I know that jury trials are occasionally waived now in criminal cases, but only when the United States attorney joins, because trial by jury is the normal method of trying criminal cases; unless both parties are willing to waive it, I think the case should be tried by the jury.

Mr. McLellan. That is established practice, now, isn't it?

Mr. Holtzoff. Yes. Wasn't it, in your court, Judge?

Mr. McLellan. Yes. It took three to waive a jury trial-- both parties, and the court.

Mr. Holtzoff. Yes.

Mr. Burke. It is not the practice in all the state courts.

Mr. Waite. That was the decision in *People versus Scornavache*, in Illinois. You remember the point was raised with great vigor that the defendant had a right to be tried without a jury if he wanted to, and the court said emphatically that that was not true; he had a privilege of being tried by a jury, which he could waive, but no constitution or statute in Illinois gave him a right to be tried the way he wanted to be tried, that that was a matter for legislation, of course. I think he ought to have the power to insist on being tried without a jury, if he wants to.

Mr. McLellan. I move rule 60 be adopted.

Mr. Wechsler. I support it.

Mr. Seasongood. I wonder whether we ought not to have in there how it is waived, whether in writing, or on the record, or waived in open court, or how? It used to be you had to waive

in writing.

Mr. Robinson. What do you think about it, Judge?

Mr. McLellan. Well, I think it well, lest there be any question about it, that in practice, no matter what your rule says, the waiver should be in writing and signed by the government, by the defendant, and the approval of such waiver endorsed thereon and signed by the judge.

The Chairman. Shall we say, "with the approval of the court in writing" the waiver may be made?

Mr. Holtzoff. I do not think it has to be in writing, if made in open court and recorded in the minutes.

Mr. McLellan. I had always felt it was a pretty good thing before we start a trial where the jury is waived--and we have a good many of them--to get the papers all signed, so that there won't be any misunderstanding about it, and all three of the persons concerned sign it.

Mr. Medalie. You have practiced it that way?

Mr. McLellan. Oh, yes; and I won't start a jury-waived trial until they get the papers signed.

Mr. Seasongoed. It is a solemn matter and there ought to be some real evidence that it is waived. Well, that is the motion.

Mr. McLellan. I may be too fair about it.

Mr. Dean. I second it, if it has not been seconded.

The Chairman. What is the general practice? Is that the general practice?

Mr. Medalie. I have seen cases triable by jury tried without a jury, where counsel gets up and says, "I am willing to waive a trial to the jury," and the district attorney nods

and says "Yes," and the court says, "Well, go ahead with the evidence."

Mr. McLellan. Without even asking the defendant, first?

Mr. Medalie. Just asking the counsel. Counsel makes the statement.

Mr. Seasongood. What's the trouble with getting a little writing?

Mr. Medalie. They might forget to do it.

Mr. Seasongood. Oh, no; they won't.

Mr. Medalie. Now, just a minute. Don't be impatient. You might forget to do it. And everybody is satisfied. It is recorded, and the trial starts. The reporter is present. Counsel gets up and makes a statement that gets right on the minutes. The district attorney says "Yes," and the court says "All right." Now, suppose that happened, and you had this provision, what would be the net result? The trial is had, the defendant is convicted. Two, three, four, five, or six weeks may be spent on it. New counsel comes in and says "This is all void." I don't think it should be. They just forgot, because they were treating each other like gentlemen, to write a piece of paper.

Mr. McLellan. But you see we do not have stenographers. Maybe you are going to have hereafter, but we do not have stenographers in most criminal cases, and that is one reason that heretofore I have always wanted the thing signed and approved by the judge in writing.

Mr. Robinson. Would you have that done in connection with the next sentence of 60, Judge? Could there be a combination of that provision--that is, requiring that that writing be filed

before the date set for trial?

Mr. McLellan. I should think so. All that I was doing was to state what the practice was, in the limited time--

Mr. Robinson. What was your practice in regard to the amount of notice before the date set for trial, of the jury waiver? Was there any?

Mr. McLellan. No. The thing has always transpired in my experience that we would be sitting with the jury, and the lawyers would come up and say "We think this type of case can be better tried without a jury, will you hear it?" And I usually say "Yes." I tell them, "But we won't start until you get the papers signed." And they go and get the papers signed.

Mr. Youngquist. I think a notice might well be required in advance, though.

Mr. McLellan. An advisory notice?

Mr. Youngquist. Yes.

Mr. McLellan. But it should not cut off that kind of thing, which saves a lot of time.

Mr. Medalie. Suppose the suggestion just comes to you at the last minute. It can happen, and that is how things run in trials, most of your stipulations. I am talking now of the busy man, the trial lawyer. He makes most of his stipulations and agreements the very minute that the court starts trying the case, and I think that in most instances if you are going to get waivers you will get them just about the time the trial starts.

Now, very often those things are discussed the night before. In one case I tried a year and a half ago, it was a long case, counsel for other defendants suggested he would like to dispose of the jury. He made the wrong guess, because we tried that

case and there was an acquittal. I am glad we did not take his advice--we had a convicting judge. But that thing would not have been decided, if I had agreed with him, until the last minute--the very meaning of the trial, and I think that is when most of the decisions are made. I do not think there ought to be a provision for notice.

Now, the last sentence, here, is another futile sentence. It does not compel anything to be done or require anything to be done. This is a piece of advice:

"A defendant who plans to waive jury trial shall notify the court\* \* \*"

Well, suppose he doesn't?

"\* \*at his earliest opportunity preceding the date set for trial."

Suppose he doesn't?

Mr. Robinson. You see what it is, of course, Judge, as a practical matter; that is an effort to hit a happy medium between your position and Mr. Youngquist's--not very happy, perhaps, but--

Mr. Medalie. Well, if we are agreed that a man has a right to waive a jury trial, if the Government agrees, the very minute that they start trying the case--

The Chairman. And the judge.

Mr. Medalie. --and the judge--then what do you need this for?

Mr. Holtzoff. As a matter of fact there is no penalty for not giving this advance notice. It is purely hortatory.

Mr. McLellan. No--and he won't give it until he knows who the judge is.

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Mr. Holtzoff. That is right.

The Chairman. And maybe not until he has had a chance to look at the jury.

Mr. Medalie. What jury?

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ends  
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MR. YOUNGQUIST: Take for instance in country districts you have a jury there and only one judge there. He sits perhaps for a week or two weeks with that jury. The Government is ready to try this case as the first case on the calendar. Well, the judge is not going to let that jury loaf around and try this one case. The Government has its witnesses there, the judge is going to put that case to the foot of the calendar, and, for the purpose of avoiding the inconvenience and expense to which the Government is put in that situation, I think it is a very reasonable thing, at least, to advise the defendant by rule that he ought to give advisory notice.

MR. MEDALIE: I want to be agreeable, but I have to say to you that that is not the way we have done it. If the witnesses are there, and they waive a jury trial, they turn to the jury and say, "You may be excused until tomorrow."

You save expense to the jurors by letting them stay at their homes while you are trying that case.

MR. YOUNGQUIST: Don't you pay the jury just the same?

MR. MEDALIE: We do not pay the jury when they do not come.

MR. YOUNGQUIST: In Fergus Falls, Minnesota, for instance, the jurors are called for considerable distances. They cannot go home.

MR. MEDALIE: We send them home. Just as soon as we know we do not need a jury, or the supernumeraries, we send them home.

MR. YOUNGQUIST: Well, sometimes they may come from a distance of a hundred miles.

MR. MEDALIE: Well, most of them go home anyway at the end of their day's work.

I said only advisory. I meant that is as far as I would go.

Darrow  
Allo-2

MR. YOUNGQUIST: That is what I would suggest.

MR. MEDALIE: I do not like a provision in the rules that does not have any effect.

MR. HOLTZOFF: There is no sanction back of it.

MR. MEDALIE: That is just it. And also neither the defendant nor his counsel have violated any duty.

THE CHAIRMAN: May we have a motion?

MR. MEDALIE: I move that the last sentence be stricken.

MR. YOUNGQUIST: Seconded.

MR. HOLTZOFF: Seconded.

THE CHAIRMAN: Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

It seems to be carried. It is carried.

There was another suggestion of requiring that waiver to be in writing.

MR. SETH: Mr. Chairman, in Civil cases, as you may remember, the statute used to require that a waiver of jury be in writing. The books were full of cases where counsel neglected to file a written waiver and the courts would refuse to review. The statute was amended in the last seven or eight years to be either in writing or by record entered by the court. By providing writing, you just lay a trap, I think. They had to amend the Civil rule to do away with the stipulation waiving jury.

MR. MC ILLAN: There is a little difference, it seems to me in a criminal trial. It would not do any harm to have it in writing, but, I do not feel strongly about it.

MR. SEASONGOOD: The reason for it under the Zerbst case, they said, "I didn't know we were waiving a right to trial by

D.a.3

jury."

MR. MC LELLAN: The agreement is not signed by counsel, it is signed by the defendant himself, that he is giving up a constitutional right.

THE CHAIRMAN: There is no motion on it.

MR. SEASONGOOD: We might have it voted on so as to be a matter of record.

THE CHAIRMAN: Then it is moved and seconded that there be a provision inserted requiring that the waiver be in writing.

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(There was a chorus of "Nays.")

THE CHAIRMAN: The Chair is in doubt. All in favor raise hands.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven, eight.

Opposed?

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six.

Carried. Eight to six.

All those in favor of Rule 60 with these two amendments say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 61.

MR. ROBINSON: 61-A is a blank spot because of the fact that

D.a.4

there is a great deal of activity now with regard to the proper selection of panels on juries. Under this rule you have extended comment on the situation beginning at Rule 61, Page 3.

MR. DEAN: Would this A cover the legal disqualification of jurors or would the present statute which is now on the books leave it to State law? What is the proposal in that respect?

MR. ROBINSON: Under A? There is no proposal.

MR. HOLTZOFF: That is just a reference.

MR. ROBINSON: Nothing to be done with it.

MR. DEAN: On legal disqualification of jury?

2 MR. ROBINSON: Yes. 61-B, examination of jurors, the court may permit the defendant or his attorney, or the attorney for the Government to conduct the examination.

I presume it is not necessary to read it.

MR. HOLTZOFF: That is the same as the Civil rule, is it not?

MR. ROBINSON: Yes.

MR. SEASONGOOD: I made the same objection to it the last time. You mean "and", "defendant and his attorney or attorney for the Government"?

MR. ROBINSON: I think that should be "and".

MR. SEASONGOOD: And that line then puts some value to being able to interrogate the jury.

MR. HOLTZOFF: The sentence beginning Line 12?

MR. SEASONGOOD: Yes.

MR. DEAN: I do not think that covers it. In the provision in that second sentence the judge who will not let you ask questions anyway, will probably deem the questions you do submit to him, improper questions.

MR. HOLTZOFF: Is there the possibility of our bringing in

the evils in State courts of interminable examination of juries?

MR. SEASONGOOD: I do not think it happens very often.

MR. DEAN: What B does is take away the right to examine jurors.

MR. MC LELLAN: It does give him the right to indicate the questions that he wants to have put.

MR. DEAN: Yes.

MR. HOLTZOFF: This is not the same as a Civil rule.

MR. DEAN: That is not the question. The people are going to decide some day that the criminal rules do something.

MR. SEASONGOOD: It is only the questions the judge thinks are proper that are put.

MR. MC LELLAN: In my district, you hand up to the judge a handful of questions. He puts them to the jury. If he is nice about it, he lets you ask one or two supplemental questions. What usually happens is, after he gets through, they say, "Will your Honor ask him so and so?" He lets you ask him one or two questions.

Of course, those examinations are unsatisfactory in the minds of counsel but not unsatisfactory in fact.

MR. DEAN: This is one place where there is a terrific variety of practice. Some judges will let you ask any number of questions and in other places they won't let you ask any.

MR. MEDALIE: In my court they just keep counsel as quiet as possible. You cannot ask a juror a question that will warm him up to your side. That is really the objection to the practice.

MR. MC LELLAN: I move the adoption of 61-B.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(There was a chorus of "Nays.")

THE CHAIRMAN: Three voting in the negative.

MR. MEDALIE: I know it is not parliamentary when I vote "No" to ask for reconsideration, but may I make a remark or two about the second sentence?

This practically compels the court to permit counsel to do some more questioning, does it not?

MR. MC LELLAN: No. That says "shall itself submit to the respective jurors."

MR. MEDALIE: The court may permit the defendant's attorney -- in the latter event -- the attorney for the Government conducts the examination or may, itself, conduct the examination.

Now, if the court conducts the examination the court shall permit the defendant, and so forth, to examine.

MR. YOUNGQUIST: No. The last four words.

MR. MC LELLAN: It leaves it all up to the judge.

MR. MEDALIE: All right. My motion to reconsider is withdrawn.

THE CHAIRMAN: C.

MR. ROBINSON: C has to do with the number of alternates.

THE CHAIRMAN: This we passed on the last time.

MR. ROBINSON: The only difference, the change in present law thus provided for -- beginning Line 21 -- the defendant has six peremptory challenges instead of under the present law it would be ten. If there is more than one defendant, and so forth.

I think that represents the vote of the committee at the last

meeting.

THE CHAIRMAN: We spent a lot of time on this before.

All in favor of C say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ROBINSON: D provides for the alternate jurors.

MR. MEDALIE: That is practically the statute, isn't it?

MR. DEAN: The parenthetical material is unnecessary, isn't it?

MR. ROBINSON: That is my question. I put parentheses around it to see whether or not you thought it should be retained.

MR. DEAN: It seems to me it is fully covered in Lines 42 to 50.

THE CHAIRMAN: Do you move to strike?

MR. DEAN: I do.

MR. MEDALIE: Is that in that statute?

MR. HOLTZOFF: This changes the statute in that it requires the alternate juror to remain until the verdict comes in instead of discharging the alternate juror at the time the jury retires.

MR. DEAN: I do not so read it.

MR. MC LELLAN: That is no good, is it? He cannot go in and consider with the twelve. He has been excused from consideration.

THE CHAIRMAN: We had a case involving the city commissioners of Newark and after seven weeks' trial, one of the jurors after deliberating a few hours developed an acute appendix and there wasn't anything to do because our statute discharged the alternate juror at the time it went to the jury.

MR. MC LELLAN: But if you change it this way, can you properly change it so that you can add a juror who was not present at the trial?

MR. ROBINSON: That is the holding in the California cases.

MR. MC LELLAN: You can do that?

MR. ROBINSON: Yes. You will find it in your notes there.

THE CHAIRMAN: Take that case in Connecticut that involved the Lieutenant Governor and the Mayor of Waterbury. One of the jurors had an appendix case. It would be a pretty serious thing for both the state and the honest defendants if they could not find some way of ending the case.

MR. HOLTZOFF: What bothers me is the alternate juror has not had the benefit of the first part of the case.

MR. MC LELLAN: He has not participated.

MR. MEDALIE: I move to strike the sentence on Lines 39 to 42.

THE CHAIRMAN: We have another motion first, if I may -- on the matter on 32 to 35 in parentheses.

All those in favor of striking that say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

What was the second motion?

MR. MEDALIE: That the lines 39 to 42 be stricken.

MR. LONGSDORF: I would like to be heard on that.

THE CHAIRMAN: You may.

MR. LONGSDORF: That precise question arose in California, or the California law was considered in that precise statute, and the statute was sustained.

The conclusion of the court was that when the alternate juror was substituted after deliberations had begun but before they were concluded, that the verdict represented a verdict of twelve jurors and there was no constitutional denial of the jury of twelve.

THE CHAIRMAN: Just like a man going in a foot-ball scrimmage.

MR. LONGSDORF: Exactly.

MR. MEDALIE: May I ask, Mr. Longsdorf, whether that was a case that arose on that precise situation?

MR. LONGSDORF: Yes.

MR. HOLTZOFF: I am going to vote for Mr. Medalie's motion. I think, as a matter of record, I ought to state that we have had correspondence with Judge Ben Harrison of the Southern District of California who strongly urges the proposal that is now in the rules.

MR. DEAN: Judge Hart in New Jersey had a case that lasted four months in which he used up his alternate jurors and they returned a verdict but had to re-try it.

THE CHAIRMAN: That is the case I am speaking of.

MR. SEASONGOOD: I thought the objection was to the words "shall remain in the custody of the Marshal." Why should you do that? Why should he not be discharged?

MR. ROBINSON: The California case that you have, Rule 61, Page 4, in your comment, that the alternates may not retire with the principal jury and sit passively in the case. They must be then in the custody of the marshal rather than with the jury because the view of the Supreme Court of California was that if you have twelve men serving as a jury at each moment of the trial, you have the constitutional twelve man jury.

MR. YOUNGQUIST: That motion also goes to the next following sentence which provides that the alternate juror may take the place of a juror discharged for illness at any time.

MR. ROBINSON: The argument that you men, several of you, made in the committee when we adopted this proposal at the September meeting, was to the effect that the present rule, both the present Federal statute and the present Civil rule 47-B, by providing for the discharge and dismissal of the alternate jurors just at the time the case is submitted to the jury and before they begin their deliberations really throws away the advantage of the alternate juror at the most critical time of all.

That was the argument before.

MR. HOLTZOFF: I am in hearty sympathy with this proposal as it now stands but I cannot get away from the fact that the alternate juror under those circumstances would not hear all of the deliberations in the jury room.

THE CHAIRMAN: What of it?

MR. MC LELLAN: That he has not participated in it.

THE CHAIRMAN: In many trials one figure of the twelve is to be added up and then divided by twelve. I do not know just how they carry on in criminal trials. Well, you have the motion to strike sentence 39 to 42.

All in favor of the motion say "Aye."

Opposed, "No."

(There was a chorus of "Nays.")

MR. MEDALIE: We lost.

THE CHAIRMAN: Did we? The motion is lost.

Are there any other suggestions?

MR. SEASONGOOD: I think it is for the committee on style to consider whether it would not be better to say, "Shall remain subject to call" rather than putting in in the custody of the marshal.

THE CHAIRMAN: That will go to the committee.

Are you ready for the motion on Section D? All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 70.

6 MR. ROBINSON: I would like to suggest, Mr. Chairman, that this Chapter VII on Trial is concerned mainly with evidence, and in the interest of time, I would suggest that we not spend any time in discussing it at this time.

In other words, I am suggesting that the whole problem of evidence and the extent to which we, in these criminal rules, should provide for evidence is in a state of great uncertainty, due partly to the fact that the American Law Institute is now engaged in drafting what could be called a "Model Code of Evidence." I talked to Mr. Morgan, the draftsman, in Chicago two weeks ago. He told me then that he expects to submit his final draft of that code to the American Law Institute at its meeting this spring, and I assume that we all feel it would be rather wise for us to defer, so far as possible, consideration of the subject of evidence until that time. It is merely my suggestion. If you wish to go into each of these rules that have been proposed, just sketching in certain portions of the chapter, of course, we would be pleased to have your views, because it has been a

very difficult question.

THE CHAIRMAN: So that we skip through to 70?

MR. ROBINSON: Well, 72 -- I wonder if Mr. Tolman agrees with me on that? That was assigned to him.

THE CHAIRMAN: If there is no objection we will skip 70 and 71 tentatively. All right, Mr. Tolman. 72.

MR. TOLMAN: I have no feeling of any difference in Civil and Criminal cases.

THE CHAIRMAN: This follows the Civil rule?

MR. TOLMAN: This follows the Civil rule.

THE CHAIRMAN: Any suggestions?

MR. LONGSDORF: In Line 12, I think it should be specified that the officer making the certificate should be the custodian of the record certified.

MR. MEDALIE: Did you skip 71?

THE CHAIRMAN: We skipped it temporarily.

MR. HOLTZOFF: I think this rule should be exactly the same as the Civil rule so there should not be two different rules as to authenticating the documents.

MR. LONGSDORF: You may be right about that.

MR. HOLTZOFF: I move we adopt 72.

MR. YOUNGQUIST: Seconded.

MR. MEDALIE: May I make a remark about these rules on evidence?

THE CHAIRMAN: Certainly.

MR. MEDALIE: The New York rule provides the rule in criminal cases shall be the same as the Civil rule unless where specially modified. I think that is a pretty good rule and I think we ought to do it.

MR. HOLTZOFF: We cannot say that because the rule in Civil cases is that such evidence shall be admissible as is admissible either under the State or under the Federal rule, whichever is more liberal. Now, if we adopt that rule for criminal cases, we get in great difficulty because of the rule excluding illegally obtained evidence in the Federal courts.

THE CHAIRMAN: Rule 73.

MR. MC LELLAN: Have we adopted 72?

THE CHAIRMAN: All those in favor of Rule 72, say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. MEDALIE: No. Because I am opposed to the rules of evidence --

THE CHAIRMAN: This is a rule for authenticating documents.

MR. MEDALIE: I do not know why we should have a separate rule in criminal cases.

THE CHAIRMAN: Rule 73.

MR. ROBINSON: Mr. Holtzoff has that rule.

MR. HOLTZOFF: I drafted this rule pursuant to the directions of the committee at its September meeting. I think the recent Supreme Court cases that passed on the validity of the Civil rule by vote of 5 to 4 upheld the validity.

I must confess that I drafted this rule because the committee so directed. I have a great deal of misgiving about it, and for that reason, I amended the second paragraph.

"No such order shall be made if the defendant interposes an objection on the ground that the proposed examination may tend to incriminate him. No such order shall be made in respect to any defendant who is not represented by counsel."

Personally, I think there ought not to be any rule on this subject.

MR. ROBINSON: I would rather not have any rule than have those lines 6, 7, and 8.

MR. MC LELLAN: I move Rule 73 be omitted.

MR. HOLTZOFF: I second the motion.

MR. WECHSLER: May I ask what the present law is?

MR. HOLTZOFF: There is no rule.

MR. WECHSLER: Does that mean that there cannot be any examination?

MR. HOLTZOFF: I do not think there can be.

MR. ROBINSON: Oh, yes. There can be physical examinations.

MR. MEDALIE: The FBI can examine him before he is arraigned before a Magistrate. The FBI can examine him physically before he gets into court.

MR. MC LELLAN: You are talking about Civil rules of criminal procedure. I move that be omitted.

THE CHAIRMAN: All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 74.

MR. HOLTZOFF: Well, now, this is "Motion for Directed Verdict." A is the same as the Civil rule. It expressly provides that by moving for directed verdict at the close of the prosecution's case the defendant does not move or waive the right to offer evidence if the motion is denied as he does today in certain states.

And I also changed the phraseology of the last sentence so

as to make it clear that although a motion for a directed verdict must state specific grounds, failure to make such motion and state the grounds therein does not deprive the court of the right to direct a verdict of acquittal if the evidence plainly fails to sustain the charge set forth in the accusation.

MR. MC LELLAN: Why not strike out the word "plainly"?

MR. HOLTZOFF: I think it should be stricken out.

THE CHAIRMAN: By consent that will be done.

MR. HOLTZOFF: I move we adopt 74-A.

MR. SEASONGOOD: The rule now is, as I understand it, that if you make a motion at the close of the plaintiff's evidence and offer evidence, you waive your motion. You can renew the motion at the end of all the evidence; that is, you can make another motion at the end of all the evidence, but you waive the motion if you offer evidence.

MR. SETH: That is right.

MR. SEASONGOOD: Now, do you mean that we are continuing this way? I mean you waive your motion for directed verdict after the Government's evidence is closed, by offering evidence?

MR. HOLTZOFF: So far, it seems to me that if later on in the case additional evidence is adduced which makes out a prima facie case for the Government, certainly defendants ought not to be allowed to insist that the court should have directed verdict at an earlier stage of the case merely because the evidence is developed later. That is the present law.

MR. SEASONGOOD: I am just raising the point if you want to continue the existing law, have you waived that motion?

MR. HOLTZOFF: You do not waive the motion except so far as the evidence of the defendant may be --

MR. DEAN: I think you will find the cases are the other way. That you waive that motion.

MR. HOLTZOFF: Oh, yes, you waive that motion.

MR. DEAN: You renew at the close of the case.

MR. HOLTZOFF: Yes.

MR. MC LELLAN: But the matter is raised after the evidence is produced on both sides.

THE CHAIRMAN: All those in favor of 74-A say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

B.

MR. HOLTZOFF: Now, B, in substance, although not in phraseology, is the same as the corresponding Civil rule. It preserves the form of a verdict non obstante veredicto, but it does it in a different form.

That was done as a result of the September meeting, a point that was then raised by Judge Crane, I believe. It provides that the judge may submit the case to the jury subject to a motion to direct a verdict, and may direct a verdict for the defendant even after the jury comes in, or after it agrees, if it does agree. Then it provides that if a motion is denied and the case is submitted to the jury, the motion for directed verdict may be renewed afterwards and considered as though made and determined prior to the time of the jury's retiring. That is in effect a motion for judgment non obstante veredicto.

MR. MC LELLAN: Do you think it is desirable to give the judge, under those circumstances, the right to order a new trial, or direct the judgment?

MR. HOLTZOFF: Well, I can see new sides to that. That particular point is contained in the Civil rules. You know under the Civil rules, under those circumstances, the judge can do either one or the other. He is not obliged to direct a verdict.

MR. ROBINSON: Isn't this a scheme to let a weak judge let the case go to the jury, and, if the jury does not do what he thinks they should have done, at a belated hour, do what he should have done all the time?

MR. MEDALIE: It can work that way and sometimes it does.

... MR. ROBINSON: What is the opposite of that?

MR. MEDALIE: This is what happens. If a judge is in doubt as to what are the facts that constitute a crime or make out a case for damages, as the case may be, and he grants a motion for a directed verdict, -- well, in a Civil case, you get this situation: if he is wrong, then if it goes up and the jury has not given a verdict, you must have another trial. If there has been a verdict and it goes up and he is wrong, why, then, of course, it can be set aside.

In other words, there is a saving of time in Civil cases.

In criminal cases, that reason does not apply.

MR. HOLTZOFF: There is another reason in addition to the one mentioned, Mr. Chairman. Under the existing practice, if the judge, after further consideration, reaches the conclusion today that he should not have let the case go to the jury, the only thing he can do today is to grant a new trial, because it is too late to direct a verdict; whereas, under this plan, the judge can reopen the judgment and without having to direct a new trial, he can direct the verdict that he feels he should have directed before the jury retired.

It seems to me, too, that that is nothing but the judgment non obstante veredicto of the common law and I think it is a desirable implement.

MR. LONGSDORF: Mr. Chairman, there is a reason that has not been mentioned. Congress, some years ago, enacted a law giving the Government the right to appeal on criminal cases where constitutional cases were involved. Congress was a bit stingy about that. That law was designed to provide a method of review which would be advisory in future cases, so at least I understand. That law also contains a provision that such an appeal cannot be taken if the accused has been put in jeopardy.

Now, when you let him go on trial, the trial begins, he is in jeopardy. If you make a motion for directed verdict and reserve decision on it, it also goes to verdict and you completely frustrate the Government's right of appeal. And that is precisely what happened, as I understand it, in those Wisconsin Oil cases; and I also understand there was a good deal of protest in high places about the predicament the Government was put into.

I do not think we ought to render that law giving the Government the right of appeal abortive.

MR. DEAN: How could they appeal at that point?

MR. LONGSDORF: They did appeal on the ground they had no right to enter a verdict after the jury returned a verdict of acquittal, and the jury verdict stood.

MR. HOLTZOFF: It seems to me this procedure gives the trial judge an opportunity if he wants to first deliberate, which he does not always have time for if the question is at all complicated where there is a jury sitting and he has to decide with considerable promptness whether the case should go to the jury; and it

also gives him an opportunity to correct an error if he feels he made one in denying the directed verdict in the first instance.

Now, it does not put the Government in any worse position than it is today on acquittal. The Government can appeal, and from that standpoint, it is immaterial whether it was directed before or after verdict.

MR. LONGSDORF: But if the trial court rules the other way, the right of appeal is left to the defendant but it is not left to the Government.

MR. HOLTZOFF: That is not changed by this rule.

MR. MC LELLAN: And it helps the judge, weak though you may call him, in a case where he ought to have directed the verdict and did not; the jury acquits; and nobody ever knows anything about his mistake.

THE CHAIRMAN: Suppose the jury acquits, and he says, "I made a mistake and I have not been fair to this defendant," and he reverses himself?

MR. MC LELLAN: He orders a verdict of acquittal?

THE CHAIRMAN: Yes. Does that improve the administration of justice?

MR. DEAN: If he had the power to do it before, and if he made a mistake, he should correct it.

MR. HOLTZOFF: I think it would provide an opportunity for correction of errors.

MR. ROBINSON: In the Thurman Arnold report, what is it he protested so bitterly against?

MR. HOLTZOFF: Well, of course, he is a party litigant who exercises --

MR. MEDALIE: Go on.

**MR. SEASONGOOD:** Mr. Chairman, I think with the Supreme Court having divided so sharply on this issue, -- I do not know whether it is decorous for us to undertake to do this thing. The judge reserved decision, refused to direct an acquittal, the jury convicted, and then he entered a verdict of acquittal, and the Government took exceptions and claimed he had no right to do that, and the court divided four to four, I think, an even number.

**MR. YOUNGQUIST:** The question was whether it could be done under the law as it then stood.

**MR. DEAN:** That is the question.

**MR. YOUNGQUIST:** We now have the question whether that should be the law, and I think it should.

**MR. HOLZFLOFF:** We can draw the conclusion from that, that the Supreme Court believes in this type of practice.

**THE CHAIRMAN:** Are you ready for the vote on 74-B? All those in favor of the motion say "Aye."

(There was a chorus of "Ayes.")

**THE CHAIRMAN:** Opposed, "No."

Carried - B.

**MR. WESHLER:** Mr. Chairman, before you go to 75, may I ask one question that relates to 74, generally?

**THE CHAIRMAN:** Certainly.

**MR. WESHLER:** It always seems to me that these requirements which relate to motions that mean nothing where the defendant is well represented, mean something occasionally in the case where the defendant is not well represented. Every year the Department of Justice in opposing petitions for certiorari makes the point that motions were not renewed at the appropriate time.

This rule in 74-A seeks to meet that situation to some extent by reiterating the rule that the trial court has the right to direct if the evidence plainly fails to support the charge.

MR. HOLTZOFF: The word "plainly" is out now.

MR. WECHSLER: That was stricken?

MR. HOLTZOFF: Yes.

MR. WECHSLER: I was just wondering whether it might be helped if we put it in these terms, that at the end of the prosecution's case, the trial court shall consider whether a case has been made, whether there is a case for the jury, stated in terms of the time when those questions shall be determined, whether or not the motion is made, if that is what this means. I am not sure that the rule in 74-A means the court is under the duty. It is likely to be argued that it is a power of court rather than an obligation. Therefore, I suggest for a consideration of the Reporter, consideration here, a redraft in terms of automatic consideration of the questions at the appropriate time.

THE CHAIRMAN: Any comments, Mr. Holtzoff?

MR. HOLTZOFF: This is just a suggestion for consideration by the Reporter.

MR. WECHSLER: I shall put it in the form of a motion at the next meeting.

THE CHAIRMAN: What is that?

MR. WECHSLER: I suppose I should, and I might put it as a motion now.

THE CHAIRMAN: Will you make the motion?

MR. WECHSLER: I do so move.

MR. SEASONGOOD: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(There was a chorus of "Ayes.")

MR. SEASONGOOD: That is, that the Reporter shall consider it.

THE CHAIRMAN: Yes. Opposed, "No."

Carried.

Rule 75.

MR. HOLTZOFF: Rule 75 is practically the same as the corresponding Civil rule with exception of a change that was made on Mr. Medalie's motion at the last meeting of the committee. "At the close of the evidence or as soon thereafter as the court may direct."

The Civil rule was a little tighter as to the time when instructions should be submitted, or requested, rather. It required at the close of the evidence, or such previous time as the court may direct.

MR. YOUNGQUIST: Such earlier time.

MR. HOLTZOFF: Such earlier time.

MR. MC ILLAN: Before you pass on the whole thing -- "such time as the court reasonably directs." I would not give the court the power to order or direct the filing of requests or presentation of requests before the evidence is completed.

MR. DEAN: I move it be stricken.

MR. MEDALIE: Seconded.

MR. HOLTZOFF: Now it reads "at the close of the evidence or as soon thereafter."

MR. MC ILLAN: Or at such earlier time as the court directs. Those are the words.

MR. HOLTZOFF: That is in the Civil rules.

MR. YOUNGQUIST: He is referring to the original 75. You are referring to the Alternate 75, are you not?

MR. HOLTZOFF: I see.

MR. YOUNGQUIST: You will find the Alternate Rule, Judge McLellan, omits that language.

MR. MC LELLAN: Oh, good.

MR. STRINE: There is a difference also in the third sentence.

MR. ROBINSON: You might explain that, Mr. Strine.

MR. STRINE: The first rule is exactly the same as the Civil rule except for the words Mr. Holtzoff just referred to, "or as soon thereafter as the court may direct."

This Alternate Rule is about the same except for the sentence starting at Line 6. The phraseology of that sentence is a little less peremptory than the Civil rule, and our first rule, in order to make it clear that the Appellate Court can consider a plain error even though it was not excepted to --

MR. WECHSLER: Are you referring to the sentence at Lines 8 to 11, Mr. Strine?

MR. HOLTZOFF: Are you speaking of the Alternate Rule, Mr. Strine?

MR. STRINE: Yes.

THE CHAIRMAN: Why shouldn't we adopt the first rule -- striking out in Lines 2 and 3, "or at such earlier time during the trial as the court reasonably directs"?

MR. MC LELLAN: May I say just one word? I would like the rule better if it were that "at the close of the evidence unless further time is granted by the court."

I think that is better.

MR. MEDALIE: Much better. Much better. "Unless further time is granted."

THE CHAIRMAN: By the court.

9 MR. MEDALIE: Who else can grant it?

THE CHAIRMAN: I take it, it is accepted.

MR. WECHSLER: There is another issue, Mr. Chairman. There is an issue on the sentence upon which the Alternate Rule differs that I would like to have considered.

MR. HOLTZOFF: It omits the sentence about assignment of error, but I will say this, the first sentence provides, "No party shall assign as error the failure to give instructions unless exception is taken."

That will not conflict with the rules of the Circuit Court of Appeals. This is merely to the effect that a party has no legal right to assign error. It does not conflict with the discretionary power of the Circuit Court of Appeals.

MR. WECHSLER: I think it ought to go out, anyhow. It seems to me, as I recollect, that there is a general duty defined in an earlier rule, the number of which I do not remember, to object. That general duty applies with respect to the charge as well as to other matters.

MR. HOLTZOFF: No, there is no rule setting forth the duty to object. I am wondering if you are not thinking about the rule which abolishes exceptions.

THE CHAIRMAN: Just abolishes the taking of exceptions.

MR. WECHSLER: Well, by implication the objection is required. And since the objection is generally required, I do not see any reason for legislating specially on this point. As a matter of fact, it does not seem to me to be right that if there is a plain

error in the charge, the plaintiff should not be permitted to assign the error. It does not make for sound practice, in my mind. The proper rule is the rule of plain error; that is, that the judge ought not reasonably to make, even if it is not called to his attention.

MR. YOUNGQUIST: Does not the Alternate Rule take care of those things?

MR. NECKSLER: Yes.

MR. HOLZFOFF: I am wondering if the conclusion that you are arguing might not give opportunity to astute counsel to gamble with the verdict?

MR. MEDALIE: Astute counsel never did that. These things only arise when counsel is not astute. Astute counsel takes no chances there, and if he overlooks anything he knows it is not worth wasting time on and he wants the court's attention concentrated on things he wants attention on.

MR. SEASONOOD: There has been language in Appellate opinions in which they say give reasons why, because they say if you do object, the courts might make the corrections. They do make that point because they say the court might have corrected the mistake if you had called it to its attention.

MR. MEDALIE: In that connection, giving the ground of the objection is introducing a very new practice. I would like the Chairman to follow this, because he has had plenty of experience.

Now, we have put in here -- take the second Alternate -- the Alternate that I am looking at now. We did not use the word "exception," we used the word "objection."

The practice today in order to raise a point with respect to instructions, either an additional request to charge or a

specific instruction made by the court, is to say, "I except to your Honor's failure to charge as requested in No. 23," or, "I except<sup>to</sup> that portion of the charge in which your Honor tells the jury so and so." That is the exception and that calls the error to the Court's attention.

The present practice does not permit you to stop and argue the point and give your grounds.

MR. YOUNGQUIST: On the exception?

MR. MEDALIE: Yes. Or on the objection.

Now, here you provide that first, the time shall be taken up in expounding what you now call an objection and which heretofore has been called an exception.

Now, without making much point about the words, the courts do not want you to argue those points in connection with exceptions.

THE CHAIRMAN: We have in New Jersey just the opposite rule. If we take an exception to the court's refusal to charge as requested by counsel and do not state briefly the grounds for the objection, the objection is worthless. The point is not to argue but to give the court a distinct notice of what you are trying to do and unless you do that, our courts say it is of no value.

MR. MEDALIE: They do not let us do that in our district.

MR. HOLTZOFF: Your court is an exception.

THE CHAIRMAN: What is your rule?

MR. SEASONGOOD: That is the Federal rule, generally. They won't pay any attention to an exception.

MR. YOUNGQUIST: May I ask, Mr. Chairman, if the Civil rule departs from the criminal rule in that respect?

THE CHAIRMAN: Yes. Mr. Tolman just tells me that that rule, 8 to 11, was put in there at the request of Judge Chestnutt,

admittedly one of our best district judges.

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MR. YOUNGQUIST: What is the rule in Massachusetts?

MR. MC LELLAN: The grounds must be stated unless the grounds are perfectly obvious.

THE CHAIRMAN: That is different from arguing it, you just state it, one, two, three, four.

MR. MC LELLAN: We do not let them argue it.

MR. WECHSLER: Under Rule 6 that would be the requirement, because an exception was heretofore necessary on these matters. The exception is abolished provided that the objection is made and the grounds stated, so that there seems to be no need to repeat it in Rule 75.

The rule on instructions ought to be the same as on other matters, and therefore I press my motion to strike the sentence.

THE CHAIRMAN: May I make this suggestion, that there is such a diversity in state practice that it may be misleading if that statement does not stay in there. Logically, I think you are correct in your suggestion. I am suggesting a practical argument.

MR. LONGSDORF: The words "no party may assign as error" -- other words may be substituted, and I suggest that it be referred to the style committee. I note the alternate leaves it out.

MR. DEAN: What don't we start with alternates?

THE CHAIRMAN: Well, now, we have Mr. Wechsler's motion on sentence beginning on Line 8 and running through to Line 11.

MR. MC LELLAN: Will you state what that motion is?

THE CHAIRMAN: His motion was to strike it on the ground that it is already covered by Rule 6, abolishing exceptions. I did urge a contrary argument that there is so much diversity of

state practice that we really ought to put them on guard here.

MR. MEDALIE: Well, do we not really need all this if we adopt the alternate in the first statement of the rule?

THE CHAIRMAN: Then we run into the trouble on the alternate.

MR. YOUNGQUIST: I withdraw the suggestion on the alternate.

THE CHAIRMAN: All those in favor of the motion to strike say "Aye." Opposed "No."

(There was a chorus of "Nays.")

THE CHAIRMAN: The motion is lost.

MR. MEDALIE: I move as an alternate that the corresponding sentence in that alternate rule be adopted.

MR. WECHSLER: Seconded.

THE CHAIRMAN: The sentence on Line 6.

MR. MEDALIE: That is Line 6, "objection to the giving," and so forth.

MR. YOUNGQUIST: That is a departure from the civil rule.

THE CHAIRMAN: Any discussion?

MR. MC ILLAN: You would not want, would you, gentlemen, "stating distinctly the matter to which the objection is directed and the grounds of the objection"?

Now, perhaps it is because I have sat there so many times and heard exceptions taken to charges I think of that, but suppose the judge has stated a proposition of law, and you say you object to that, must you add "because it is not a correct statement of the law"?

MR. MEDALIE: What other ground could you give?

MR. MC ILLAN: I do not know of any, but should your objection be invalid because you do not do that?

MR. MEDALIE: I am used to practicing the way you state and

when I think it is an obvious proposition, I simply except.

MR. MC LELLAN: Why couldn't you add there the obvious grounds of the exception in the ninth line?

MR. YOUNGQUIST: That is nothing that is not in the Civil rule. Do you think it is necessary?

MR. MC LELLAN: I do not press it.

MR. MEDALIE: I would like to press it for you. When the judge states a bald proposition of law, if you wish to contest if the verdict goes against you, how do you state your exception and the ground?

MR. YOUNGQUIST: You mean in his instruction to the jury?

MR. MEDALIE: Yes. The court has made a statement in a single sentence which you believe to be incorrect.

MR. YOUNGQUIST: Your exception in such a situation would be simply be on the ground that that is not the law. What other way would you do it?

MR. MEDALIE: Well, of course, I have a way of doing it in another way, "I ask your Honor to charge another way," and I state what I believe to be the law.

MR. YOUNGQUIST: I believe what Judge McLellan has in mind is -- what shall I say -- no, that does not relate to instructions to the jury. You said sometimes an exception is made without stating the ground which is so obviously valid that you would sustain it without the stating of the ground?

MR. MC LELLAN: Yes. And if it is not sustained and it ought to have been, the objection is good the no ground be stated if the ground is obvious.

MR. YOUNGQUIST: Exactly. But does not that apply in case of instructions to the jury?

MR. MC LELLAN: You are up there with a long charge, you do not want to have to say over and over again "I object to that proposition of law and my reason for the objection is that you stated it wrong, that is not the law."

I would not want to have to state that over and over again. Because it is perfectly obvious that it is the ground of the objection.

MR. YOUNGQUIST: I think a mere statement that that is not the law is stating the ground. I have in mind, Judge, conformity with the Civil rules as far as practicable.

MR. GLUECK: I would like to know, Mr. Chairman, what would be the effect if you do not state the grounds, of this Rule 75. Would that mean that you could not use it as a basis of error, or what does it mean? What is the purpose of it?

MR. MEDALIE: There is a reason. It has been stated on cases that the court is not bound to consider anything not very specifically raised and called to the attention of the court below, either in the admission or exclusion of evidence, or instructions to the jury, or refusal to charge the jury as requested.

THE CHAIRMAN: The court is entitled to the help of counsel.

MR. MEDALIE: Yes. And if the court does not get that and the matter was not raised in this way, then the C. C. A. may refuse to consider it. And there have been occasions when they have considered matters not raised below or raised below where the assignment did not cover it.

THE CHAIRMAN: The Chairman suggests that perhaps we can do better work if we take a ten minute recess. Is that accepted or is it not?

MR. MC LELLAN: Of course it is.

(There followed a short recess.)

THE CHAIRMAN: All right, gentlemen.

MR. MEDALIE: I want to raise another point, if I may. I wish you would tear up those civil rules.

MR. YOUNGQUIST: What rule is that?

MR. MEDALIE: All of them.

THE CHAIRMAN: May I quote a rule Mr. Tolman has just shown me, Supreme Court Rule No. 8:

"The judges of the District Courts in allowing bills of exceptions shall give effect to the following rules:

No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions."

MR. GLUECK: Suppose he states one ground and after thinking it over, in his brief, states another ground? Does that mean they won't consider the other ground?

THE CHAIRMAN: You state you are excepting as a provision of law. Then you argue the point of law.

MR. GLUECK: You have jumped the hurdle to get to the Appellate Court.

THE CHAIRMAN: As I understand, you are not submitted to that rule.

MR. MEDALIE: The Supreme Court uses the word "exceptions," but I won't press that.

I come to another point that I wanted to raise. Before you started your summation you have submitted to the court a set of

written requests, it might be a dozen or it might be two dozens. The court has had a chance to look them over. He does not charge any of those requests.

Do you follow me?

Now, do you need to do more than to say, "I except to your Honor's refusal to charge as requested in Request No. 3"?

Why should you need to do more than that?

MR. YOUNGQUIST: I do not think you do. You state distinctly the matter to which you object and under the language here, the matter to which you object is the failure to give an instruction.

MR. MC LELLAN: How about the grounds of the exception?

MR. MEDALIE: You must give grounds.

MR. MC LELLAN: You must put in the words "unless obvious."

MR. YOUNGQUIST: It seems to me that can apply only to the giving of instructions to which you object.

MR. MC LELLAN: No, it includes failure to give instructions.

MR. YOUNGQUIST: That is the language, but I do not see how that can apply to failure to give.

MR. MEDALIE: It says so. And if there is a doubt about it, if you fail to except to any specific number of requests before the charge, or at the summation, that is, at the close of the evidence, if it requires a statement of the grounds, why shouldn't we make that clear? And that is the accepted grounds today. I never heard of anybody giving a reason for failure to except to a particular charge. Let us protect that.

MR. HOLTZOFF: New Jersey requires it.

MR. MEDALIE: Is that the general practice? I know it is not our practice. Mr. Youngquist states it is not his practice.

THE CHAIRMAN: Well, what do you do? Do you just state you

object?

MR. MEDALIE: I do not know.

MR. YOUNGQUIST: You have the exception. You merely except to the failure of the court to give instruction No. 3.

MR. MEDALIE: That is all you have to do.

MR. YOUNGQUIST: Do you in New Jersey say why the court was in error in failing to give a requested instruction?

THE CHAIRMAN: Yes. The court in failure to charge that rule has committed error.

MR. MC LELLAN: I move that there be inserted in the ninth line after the word "objection," the words "unless obvious."

THE CHAIRMAN: That is in the alternate?

MR. MC LELLAN: This is in the alternate rule.

MR. SEASONGOOD: That injects an element of uncertainty, doesn't it, what is obvious and what is not? I have thought lots of positions were obvious which the court felt were obvious the other way.

MR. HOLTZOFF: I second the motion.

MR. GLUECK: Now, you say --

MR. YOUNGQUIST: There is a motion up.

MR. GLUECK: Aren't we allowed to discuss a motion?

THE CHAIRMAN: Up until six o'clock.

MR. GLUECK: I think that is a different situation from objecting to an erroneous instruction.

MR. MC LELLAN: This refers not only to the objection to the giving, but also the failure to give?

MR. MEDALIE: Yes, and that is the point we are all concerned with, and you feel the same way, I gather.

MR. GLUECK: Yes.

MR. YOUNGQUIST: What I would like to say is this, regardless of the rule or practice in one district or another, to get a rule that will help properly to inform the court as to counsel's position, it does two things. It makes it possible for the court to correct an error either in instructing the jury or in refusing to instruct the jury as requested. And also to adequately protect the defendant after the trial in getting him to change the instruction, or on appeal to protect the defendant's right.

12 Now, I think you can do it in two ways. One is that where requests have been submitted in writing and separately numbered it is sufficient to except to the failure to give that instruction, without saying more. The court is not misled and it requires neither debate nor argument.

Next, where the court gives an instruction of his own, I think it is sufficient to point out specifically what it is in his instructions to which you except, stating the substance of it; and, offering what you believe to be the correct instructions.

Now, that is the New York practice and it flows into the practice of lawyers in the Second Circuit.

THE CHAIRMAN: You do not object to that. I am trying to make it clear that it differs from both the alternate rule and the first rule which used the words "ground of objection."

Now that is what you want to get rid of.

MR. MEDALIE: Yes.

THE CHAIRMAN: Now, this rule is drafted very obviously having in mind states where the judge does not give the charge but the charge, if you will look at this, is the result solely of instructions handed up by counsel. There should be nothing in

there covering the judge's own handiwork that is lacking now.

MR. MEDALIE: I think both should be covered.

THE CHAIRMAN: Well, they are not covered there.

MR. MEDALIE: In those jurisdictions, I do not know the practice, you hand up written requests and the judge picks out what he thinks is all right and throws away what he thinks is not all right, my first suggestion, that failure to charge, the number is sufficient.

THE CHAIRMAN: You accomplish that by striking out the words "the ground of the objection."

MR. MEDALIE: No.

MR. YOUNGQUIST: I think what you want to do is to strike out the words "and the failure to give." This is merely a limitation on the right to assign. If this were not here, you would have the right to make all assignments and to assign all errors to which you made objections.

MR. MEDALIE: Providing you do it in a certain way. Notwithstanding what I said about our Circuit, the fact is, -- and our own Court of Appeals -- it is not enough that you take exception to the judge's actual instruction, you must present what you think is a correct alternate. You must point out to him what you think is the correct thing to charge.

When you hand that out in writing you have done that.

I would like to get away from this language. Because when you start re-writing language that does not meet what you are thinking about, you do not get by revision what you really wanted to say, and I think we ought to rewrite that.

MR. HOLTZOFF: It is wise to have two sets of rules, Civil and Criminal?

A lawyer might be trying a civil case today and a criminal case tomorrow. Would it not be confusing to have two sets of regulations?

MR. MEDALIE: I agree with you. Does not the civil rule, if there is one covering it, does it cover the two things that I would like to have covered, and is it limited to those two things?

MR. HOLTZOFF: Well, the civil rule is substantially the first alternative of 75. This is copied substantially from the civil rule and the only thing that is bothering me is whether or not it is desirable, on a matter such as this, to have one rule for civil cases and another rule for criminal cases.

MR. MEDALIE: All right. I will tell you what the answer to that is, if the civil rule does not adequately and realistically and practically meet the situation, then it calls for a better rule, and then attacking that question with those responsible for the civil rule. Let them, if they can, make the change conformable to our judgment, if we are right.

MR. HOLTZOFF: Well, the civil rules have been in effect all of three years now, and I do not think any trouble has been found with that rule.

MR. YOUNGQUIST: Mr. Chairman, I think we have agreed upon what we want. Can't we dispense --

THE CHAIRMAN: May I have a motion to refer back to the Reporter?

MR. MEDALIE: Well, may I ask that my views be adopted in principle? I can restate them. Shall I restate them?

THE CHAIRMAN: No.

MR. MEDALIE: All right.

MR. HOLTZOFF: Suppose we refer to the reporter without taking a vote?

MR. MEDALIE: No, we want to do the thinking for the reporter around this table. I think that is what our business is. We are called upon to do that. We must think of our lines.

MR. HOLTZOFF: Won't you state your motion?

MR. MC LELLAN: I would like to withdraw my motion, if I may have unanimous consent to do it.

THE CHAIRMAN: Judge McLellan's motion is withdrawn.

MR. MEDALIE: I would like to state my views that the ground of the objection need not be stated. Secondly, that where there is a written numbered request previously handed to the judge, failure to charge as requested may be excepted to without further statement.

Let me finish. I want you to listen to it.

Next, that where the court has given its own instruction to the jury, exception to that portion of the charge which is deemed erroneous is sufficient if counsel then states what he believes should be the correct instruction.

MR. WECHSLER: Seconded.

THE CHAIRMAN: Gives his reasons, in other words.

MR. MEDALIE: That does not give reason. That simply states what the correct instruction is without argument or reason.

MR. BETH: He may refer to what the correct exceptions are.

MR. MEDALIE: "I except to what your Honor said on fraud and I ask your Honor to charge as in Instruction No. 3."

MR. DEAN: It will only really apply to requested instructions as distinguished from a charge.

THE CHAIRMAN: It does not cover his own handiwork at all.

MR. MEDALIE: I do not quite get that. The Judge's own handiwork is covered, as I have submitted.

THE CHAIRMAN: But not by the rule as written.

MR. MEDALIE: I think we would have a better rule than as written.

MR. HOLTZOFF: It leaves the present rule on this to the giving of an instruction.

MR. DEAN: The giving or failure to give an instruction, to my mind, means the failing or the giving of the one you ask for or the giving of the one that your opponent asks for.

MR. YOUNGQUIST: You do not say requested instruction, you say the court's instruction.

MR. DEAN: I would like to have Mr. Medalie's distinction.

THE CHAIRMAN: The motion is to have it committed to the Reporter. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

We will now move on to Rule 76.

MR. MC ILLIAN: Well, I do not understand that by voting that it goes to the Reporter, we vote in favor of a rule such as has been stated. Or, do we?

THE CHAIRMAN: All of these votes, Judge, are tentative. We disagree with many things we argued violently for in September. I suppose that will have to continue until the last day. So it is open, and we will go to work again.

Mr. Strine will take Rule 76.

MR. STRINE: The right to have the jury polled is recognized in the Federal courts and we found that exactly half of the

forty-eight states have statutes on the subject. Most of the statutes are substantially similar and this one is based on the New York statute. It is submitted for your opinion as to whether you want the rule.

MR. MEDALIE: Does the judge take the poll, or does he ask the clerk to take the poll? I do not like to have a judge keep on repeating the same formula to twelve men and women. The clerk ought to do that.

MR. SEASONGOOD: The clerk does it with us.

MR. SETH: "The judge shall order the clerk to poll the jury."

THE CHAIRMAN: Yes, I think that is the practice, that the clerk polls the jury under the direction of the court.

MR. MC ILLIAN: Yes. In some jurisdictions it is discretionary.

THE CHAIRMAN: With that modification, is there any objection to the rule?

MR. HOLTZOFF: I was wondering if there was any necessity for having a rule on that subject. What is the change?

THE CHAIRMAN: "The judge shall direct the clerk."

MR. MEDALIE: Why don't we use the New York language, "The jury may be polled on the requirement of either party"? Or we can say, "of any party." And "if any one answers in the negative, the jury must be sent out for further deliberation."

Now, that takes it away from the judge. He does not have to do it. Whatever is the accepted practice can be left to the district.

MR. SEASONGOOD: That can be referred to the committee on style.

MR. MC LELLAN: It does not send them back.

MR. MEDALIE: If the jury disagrees they can be sent back.  
They must announce they are unable to agree.

MR. GLUECK: It does not state who shall send the jury back.

MR. MEDALIE: There is only one person who has power to send the jury back.

I move Rule 76 be rewritten in accordance with the language of the New York Criminal Code procedure, Section 450.

THE CHAIRMAN: Well, I do not fancy that language. Let it be taken under consideration but let us not follow it exactly.

MR. MC LELLAN: Is the word "clerk" substituted for "judge" in the third line?

THE CHAIRMAN: Yes.

MR. MC LELLAN: I move the adoption of that.

MR. MEDALIE: I withdraw my motion and favor yours.

THE CHAIRMAN: All those in favor of the motion to adopt that change in Line 3 say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Carried.

Rule 80. Mr. Holtzoff.

MR. HOLTZOFF: This rule relating to new trials is substantially in accordance with the direction of the committee at its last meeting. It has also been combined with Rule 2 of the Criminal Appeals rule because that rule covers part of the ground of this motion. The two have been combined into one.

Now A is taken from the criminal appeals rule verbatim and comes within the language of the Supreme Court. I presume the court would want to have that continued, namely, it is indicated as the desire of the Supreme Court that the motion shall be

returned promptly.

B is the same as the Criminal Court Appellate rule; and so is C.

Now D, however, it relates to motions for a new trial, has been changed in accordance with the direction of the committee at its last meeting. At the present time a motion for a new trial on newly discovered evidence has to be made within sixty days except in capital cases. This time was changed on the direction of the committee to one year, and, because the committee so voted the last time, I inserted that one year as the time. I must say, however, -- I want to recall the fact that we had a discussion as to whether or not there should be any limit whatsoever. That question was voted on and the right to bring it up again was reserved, and so I want to amend -- I want to move to amend D so as to abolish any time limit on the motion for a new trial on newly discovered evidence.

14 MR. MEDALIE: You are making a motion on D before we have had a chance to do anything on the other subdivisions.

MR. HOLTZOFF: Oh. Yes.

MR. MEDALIE: If there is no motion to be made on B, I would like to say something about C.

MR. SEASONGOOD: I would like to move to strike out A. It seems to me superfluous.

MR. HOLTZOFF: I would like to myself, but it is in the Supreme Court rules so I hesitated.

THE CHAIRMAN: It was prepared by the justices, themselves, and I do not think we should tinker with them any more than we need to, to bring them up to the same degree of efficiency as the Civil rules.

MR. LONGSDORF: Mr. Chairman, there is one improvement I think we could make. The title of the section in Line 1 is simply the words "New Trials." I think we ought to add "Arrest of Judgment and Withdrawal of Plea" so that the searcher would catch that in looking through the rules.

MR. SETH: That would be motions after verdict.

THE CHAIRMAN: Is that a better term, "motions after verdict"?

MR. LONGSDORF: "New Trials, Motions After Verdict." That would be all right.

MR. SEASONGOOD: Let the Reporter get a suitable caption.

THE CHAIRMAN: The Reporter will tackle the matter of captions.

MR. LONGSDORF: I do not want to press the argument.

THE CHAIRMAN: Someone had a motion going to C.

MR. MC LELLAN: What have we done about A and B?

THE CHAIRMAN: Tentatively. I was going down and adopt the whole rule if we could.

MR. SETH: B is not in the present rule.

MR. HOLTZOFF: It is in the present Appellate rule.

MR. SETH: The grounds are not stated.

MR. HOLTZOFF: I think it --

MR. MC LELLAN: Is it an Appellate matter only?

MR. ORFIELD: B was a matter of the committee at the last meeting. It was not passed on the old rules.

MR. MC LELLAN: Is it a motion for a new trial in the trial court?

MR. SETH: Yes.

MR. MC LELLAN: It would not be in the Appellate rules.

MR. SETH: They are called Appellate Rules but they are rules

covering everything after verdict.

MR. YOUNGQUIST: B is not in the present rule.

MR. HOLTZOFF: It was in the rule that we adopted at the last meeting. That is right. I was mistaken. Now C is in the present rule.

MR. MEDALIE: Well, I think there is an addition that needs to be made. Of course a motion for arrest of judgment. Lawyers know how to state the formula so that it covers everything once, both on arrest of judgment and for new trial; but sometimes those motions -- the court may require them to be made more elaborately, at least, the motion for a new trial; and if the court wants to give an opportunity to hear one of those motions and instead of taking down by the stenographer, he is given power to do so -- I would like to suggest here in the interest of efficiency to give the defendant a hearing if he wants one "unless the time is extended."

MR. HOLTZOFF: I did not understand it was on the hearing.

MR. MEDALIE: I addressed myself to the making of the motion where the court indicates he wants the motion made with more elaboration. The court may say, "I am troubled about this. Will you prepare a set of papers or be prepared for a more elaborate discussion of the motion, and I will set it down for some day next week, or within the next two weeks."

We ought now to make that possible so that it may be three days after verdict or finding of guilt, "unless the time is extended."

MR. MC LELLAN: Do you want to have the time extended within the three days? Do you want the rule made so that the motion may be made after the three days or within the three days?

MR. MEDALIE: The extension of time would be granted within the three days or unless within that time further time has been granted; something of that sort.

MR. LONGSDORF: I thought we had a rule that provided for that.

MR. MEDALIE: Of course, if we are sure about it, I won't press it.

15 THE CHAIRMAN: It must be extended within three days. Unless within that time further time is granted.

Fix that language up.

MR. ROBINSON: All right.

THE CHAIRMAN: Anything else on C?

Anything on D?

MR. HOLTZOFF: I move that D be changed, or modified, rather, so that a motion for a new trial solely on the ground of newly discovered evidence may be made at any time.

I want to say that the Department of Justice Committee is recommending such a provision.

It has also been recommended by the Pardon Department attorney.

We have had an occasional case now and then where there has been newly discovered evidence. One of them, by the way, have involved an alibi in which it appeared that the wrong person had been convicted of the offense charged.

And those things are likely to turn up not shortly after the trial. They develop sometimes considerably later. Today the only way they are taken care of is by the pardoning power.

Well, there are two objections to that. In the first place, the pardoning power is not a matter of right. The pardon does not wipe out the judgment or conviction even if the defendant

is innocent.

And there is a practical objection. There have been instances where we would much rather have taken the verdict of another jury with the new evidence before the jury instead of having to recommend a pardon. But in view of the circumstances we had no alternative but to recommend a pardon.

Now, the only objection that has been urged against such a change is that it would burden the court with numerous motions for a new trial.

Personally, -- well, none of us in the Department is afraid of that contingency because the ordinary motion for a new trial on newly discovered evidence does not receive much consideration.

MR. MEDALIE: The language is worthy of scant consideration and is treated accordingly.

MR. HOLTZOFF: Yes. So there are very few of those motions that are worthy of serious consideration, and when they are worthy of serious consideration, you can be sure the cases are rare, but when those rare cases arise, there should be a remedy.

MR. MEDALIE: You wrote that out, didn't you?

MR. HOLTZOFF: Yes, I did.

MR. MEDALIE: Propaganda.

THE CHAIRMAN: Judge, would that be a burden on the trial judge?

MR. MC LELLAN: I don't think so.

MR. MEDALIE: I would like to say very few motions are made even in the very busy place of the Southern District of New York on the ground of newly discovered evidence. I should be surprised if more than three such motions are made in two years.

MR. YOUNGQUIST: Isn't there a danger, though, if the time is left open indefinitely, that some newly discovered evidence will be cooked up and presented?

MR. MEDALIE: I think Mr. Waite suggested at the last meeting that if you waited long enough you could move on grounds of retraction.

MR. YOUNGQUIST: Thinking of the Mooney case, for instance,

MR. HOLTZOFF: After all, newly discovered evidence involves more than a retraction. Every case we have had was more than a retraction of testimony.

MR. MC LELLAN: I move the adoption of 80-D after there has been substituted for the words "within one year," the words "at any time."

MR. ROBINSON: Well, Mr. Holtzoff, is it true that you always want a new trial or an expungement of the whole record? These cases you give of erroneous convictions indicate the defendant needs not a new trial but what he needs is expungement of the whole record.

MR. HOLTZOFF: No. The court grants a new trial and the United States attorney nol-proses the case if he is convinced.

MR. LONGSDORF: That is right.

MR. GLUECK: I move to amend the Judge's motion and substitute the words "within a reasonable time."

MR. HOLTZOFF: Well, suppose the evidence is not discovered within a reasonable time?

MR. MC LELLAN: Then he would accept it and say that is a reasonable time.

MR. GLUECK: Sure. I think it is half way between the specified one year and leaving it absolutely open.

MR. YOUNGQUIST: That rule was adopted at the last meeting and contained the one year's limitation but provided also that there should be no limitation in capital cases until the judgment was executed.

I also call attention to the fact that the criminal appeal rules put a sixty day limitation on all motions for new trials for newly discovered evidence.

16 MR. HOLTZOFF: Here you have the prosecuting committee recommending that there be no time limit. It seems to me that is pretty strong evidence of the desirability.

MR. GLUECK: That is why you left out capital cases.

MR. LONGSDORF: Mr. Chairman, are not these rules going to go before the Supreme Court merely as recommendations and not of anything else? In any matter that was in the criminal appeals rules, are we going to submit anything other than recommendations?

THE CHAIRMAN: That is all we do in any case.

MR. LONGSDORF: This is a recommendation for them to change this rule.

THE CHAIRMAN: Well, but we have here the backing of the Department of Justice, which certainly has never shown any disposition to let offenders go loose.

MR. LONGSDORF: No.

MR. ORFIELD: I might say, in England you can take an appeal at any time.

THE CHAIRMAN: Without limitation?

MR. ORFIELD: Yes, sir.

MR. ROBINSON: Of course, there is this matter, the Court of Appeals may increase the sentence as well as reduce it.

MR. MEDALIE: Also you do not get a new trial. It is final

disposition one way or the other and then you are out.

MR. ROBINSON: One opinion shows there are so many factors of a negative nature that they do not have too many petitions for new trial. Another is, defendant does not have to stay in prison while the appeal is being considered.

MR. ORFIELD: They do not have a new trial. They have a criminal appeal.

MR. MEDALIE: All that happens if you win is that you get a new trial.

MR. ROBINSON: I think I get a good part of that from your book.

MR. MEDALIE: I want you to understand I own that book, too.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: The question is called for on Judge McLellan's motion. Was that seconded? The motion made by Judge McLellan was to change in Line 15 "within one year" to "at any time." And Mr. Glueck made a motion to change that to "within a reasonable time," but I did not hear a second.

MR. ORFIELD: I second Judge McLellan's motion.

THE CHAIRMAN: The vote then is on Judge McLellan's motion to adopt section D--

MR. MEDALIE: I would like to bring up first a question about a case that is in the Appellate Court. Shall I wait until you have voted on Judge McLellan's motion?

MR. HOLTZOFF: That should come later, I would say.

MR. MEDALIE: That is what I suggested because the motion, as put, was that we adopt this section with an amendment.

THE CHAIRMAN: D is the one.

MR. MEDALIE: I am talking about D.

THE CHAIRMAN: I will put it solely on the amendment. The motion is to strike "within one year" and substitute "at any time."

All those in favor of the amendment say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Now, anything further?

MR. MEDALIE: I would like to have it explained again, without regard to the time when judgment was entered, unless appeal was taken --

MR. HOLTZOFF: I think that language has to be modified and I suggest in Line 17, the words "has been taken" may be stricken and that there be substituted therefor the words "is pending."

MR. MEDALIE: Well, how would that read?

MR. HOLTZOFF: That would read "unless an appeal is pending and in that event the trial court may entertain the motion only on remand of the case by the Appellate Court for that purpose."

MR. MEDALIE: Why do you say "for that purpose"?

MR. HOLTZOFF: Because you make a motion in the Circuit Court of Appeals asking the court to remand the case to the District Court for new trial, and you do not wait until the appeal is disposed of. That is the present practice, that you do not make a motion for a new trial until after the appeal is taken.

MR. MEDALIE: Suppose the court does not remand?

MR. HOLTZOFF: There would be no practical difficulty. It is only to meet the administrative difficulty in a case which is pending in the higher court.

MR. MEDALIE: "Unless an appeal is pending." Is that your language?

MR. HOLTZOFF: Yes.

MR. MEDALIE: "The trial court may entertain the motion" -- the event is that the appeal is pending. When the appeal is out of the way, then you may make your motion.

MR. MC LELLAN: I move the adoption of D as amended.

THE CHAIRMAN: All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Any suggestions on E?

MR. MC LELLAN: I move its adoption.

MR. MEDALIE: There is no time limit.

THE CHAIRMAN: No. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ORFIELD: B sets out the grounds for a new trial but there is no ground for arrest.

MR. HOLTZOFF: I think that is covered by present criminal appeals rule.

MR. MEDALIE: Motions and arrest.

MR. ORFIELD: The criminal appeals rules do not state the grounds.

THE CHAIRMAN: Will the Reporter make a note of that point?

MR. ROBINSON: Will you give me the statute?

THE CHAIRMAN: In the meantime, may we go on to F?

MR. ORFIELD: Doesn't F set out to brief period? Isn't

ten days too short a time?

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MR. MEDALIE: It is.

MR. HOLTZOFF: That is in the criminal appeals rule now.

MR. ORFIELD: But shouldn't it be modified?

MR. SEASONGOOD: There is a case in our district where a man had been convicted and withdrew his plea.

MR. ORFIELD: I think ten days is pretty short.

MR. MC LELLAN: Why not let him do it at any time before sentence is imposed?

MR. HOLTZOFF: I do not see why not. I hesitated to suggest it.

MR. MEDALIE: It probably arose out of one scandalous claim maybe which was widely flung around in the newspapers, that the defendant made false claims as to what he understood and some Grand Jury got all excited; and the chances are it happened in New York.

MR. YOUNGQUIST: There is no exception to the ten days.

MR. HOLTZOFF: Before sentence.

MR. ROBINSON: Of course, this may operate in favor of the defendant. I do not know of any other time after plea of guilty in which sentence may be imposed and sometimes it might be desirable.

MR. MC LELLAN: In the interest of progress, I move that the words "within ten days" be stricken out.

THE CHAIRMAN: The motion is "a motion to withdraw a plea of guilty may be made at any time before sentence is imposed."

MR. MC LELLAN: After entry of such plea and before sentence is imposed.

MR. HOLTZOFF: I second the motion.

MR. MEDALIE: Assume it is an ignorant defendant who did not understand what he was leading to, willing enough to go to thirty days for speeding, and finds he is convicted of manslaughter; he won't realize it until he got six years.

MR. ORFIELD: This is the provision of the American Law Institute:

"The court may, in its discretion, at any time before sentence permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside such judgment, and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty."

That is Section 230.

MR. ROBINSON: Don't you think that is too long?

MR. SEASONGOOD: We had an actual case not far back where a fellow pleaded guilty and was sentenced, and the judge refused to let him withdraw his plea of guilty, and he took it to the Court of Appeals and they allowed him to plead not guilty, directed him to plead not guilty, and then the case was not prosed.

THE CHAIRMAN: All those in favor of the motion as amended say "Aye." Opposed, "No."

MR. MEDALIE: No. The ground for my opposing is that you don't give a man a chance to make that motion after he has been sentenced.

THE CHAIRMAN: Well, do you want to suggest the language that the Reporter might consider on that?

MR. MEDALIE: "At any time that may be deemed just."

MR. ROBINSON: You say that may be deemed just.

MR. MEDALIE: You do not even need that. At any time a man is entitled to withdraw his plea, when it is evident to the court --

MR. MC LELLAN: You mean after he has spent ten years of his sentence?

THE CHAIRMAN: Remember these are rules already adopted.

MR. MEDALIE: Well, I think that ten day provision was a little severe.

THE CHAIRMAN: Well, we have modified that.

MR. MEDALIE: Well, really, I do not think these questions come up until after the sentence has been pronounced.

MR. ORFIELD: Ten states provide this way:

"The court may at any time before judgment permit a plea of guilty to be withdrawn and plea of not guilty to be substituted."

MR. MC LELLAN: You let him gamble with his sentence. He pleads guilty and knows he is and then he does not like the sentence and you let him withdraw it.

THE CHAIRMAN: Rule 81. Suppose we have a motion on the entire rule 80. All those in favor of the entire Rule 80, as amended, say "Aye."

Opposed "No."

Carried.

Rule 81.

MR. HOLTZOFF: On the criminal appeals rule, as it now stands, we sort of brought it up to date by provision for nolo contendere and for judgment for acquittal. But Mr. Glueck has a very elaborate and I think a very able, very well written rule, on the question of sentence. I want to make one or two comments

about it.

I notice Prof. Glueck is out of the room.

THE CHAIRMAN: Shall we pass that until he comes back?

MR. MEDALIE: I think so.

THE CHAIRMAN: We will pass that then until he comes back.

May we go on to 82?

MR. HOLTZOFF: 82 is pretty much the same as the Civil rule on the subject, permitting the court to correct clerical mistakes in its judgment, and so forth, to relieve -- to permit the court to relieve a party of any judgment taken against him by mistake, and so forth.

Now, I think Paragraph D would be applicable, for example, where a judgment is taken against a surety on bail bond. It is very largely the same as the Civil rule on the subject.

MR. MEDALIE: Which are you talking of?

MR. HOLTZOFF: Both.

MR. MEDALIE: Well, just take one at a time.

MR. HOLTZOFF: Well, A would have you empower the court to correct a clerical error.

MR. MEDALIE: That is a different kind of error. I will agree that there are errors that ought to be corrected.

Now, let us take up the errors that are made in the court room by the court staff, and then the errors that are made by the parties.

I do not think anybody disagrees that errors ought to be corrected. I want to bring up something else.

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MR. MC ILLAN: Is it B or A?

MR. MEDALIE: You have got the language "arising from oversight or omission." Why do you need to qualify those errors?

MR. HOLTZOFF: Well, you don't. Strike that out.

MR. MEDALIE: I so move.

MR. HOLTZOFF: I copied that from the Civil rules.

MR. MEDALIE: I am glad to find that the Civil rules have excess language, "arising from oversight or omission."

MR. HOLTZOFF: I move we adopt A with the amendment suggested by Mr. Medalie.

THE CHAIRMAN: All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No." Carried.

B.

MR. MEDALIE: That is all right. Now, if you strike out that withdrawal of plea and let it work under B, I think you would have a just rule.

MR. HOLTZOFF: I do not get your point.

MR. MEDALIE: B covers a mistake, surprise, excusable neglect made under misconception of some kind or other. Is a mistake made by a party?

MR. HOLTZOFF: I do not think so. I think B would be more applicable to judgment taken by default on a surety.

MR. MEDALIE: It is applicable to that, but under this language it is applicable to everything.

MR. HOLTZOFF: I do not think it would be applicable to a plea of guilty under misapprehension.

MR. SEASONGOOD: Is surety the legal representative of the party? You say you want to cover the surdy.

MR. HOLTZOFF: Well, suppose the surety is dead.

MR. SEASONGOOD: How do you get the surety?

MR. HOLTZOFF: He is a party.

MR. SETH: I would leave out "party or his legal representative." "May relieve from a judgment."

THE CHAIRMAN: Strike out the words "a party or his legal representatives"?

MR. HOLTZOFF: I think we ought to strike out the words "against him" in Line 10.

And the words "his" following that.

MR. ORFIELD: Would you say that Section B of Rule 82 is intended to be a substitute for the writ of error?

THE CHAIRMAN: I am not sure that the writ might be broader. Same Line, "taken against him."

MR. MEDALIE: "Taken against him" goes out and the word "his" before "mistake."

MR. LONGSDORF: So it reads "from a judgment, order or proceeding through mistake, inadvertent, surprise, or excusable neglect."

MR. MEDALIE: Now, just to explain the applicability of this, the court may relieve from a judgment; that is within six years and twenty-nine days, through mistake.

That covers exactly your case of a person who has erroneously entered a plea and been sentenced.

Now, as you have it with sub-division B here, and the change of plea -- of course, the change of plea is an exception to this -- if that were not there that would be as it is in sub-division B of 82.

MR. HOLTZOFF: We have there to show that the plea was entered by mistake.

MR. MEDALIE: The defendant is entitled to that if it is only ten days. I don't think they let him change his mind even when

the ten days -- even with the ten day limit, now existing, unless it is shown he was imposed upon. And I do not think he should be relieved --

MR. MC LELLAN: Is there any danger that that kind of case will be brought in under B?

MR. MEDALIE: No, there is not. That is the reason I would like to bring this up, that we get rid of the provision for time limitation other than this, the withdrawal of the plea. This sub-division B of 82 gives the only ground on which a plea can be withdrawn, if this is the only rule.

MR. MC LELLAN: Then solely to raise the question, I move the adoption of 82-B as modified.

MR. SETH: Seconded as amended.

THE CHAIRMAN: Have we passed on 82-A?

MR. SETH: We have.

THE CHAIRMAN: The vote on 82-B as amended. Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. MEDALIE: This is very unparliamentary, but in view of what I have said about 82-B, I move that we reconsider and delete the provisions of --

THE CHAIRMAN: 80-F?

MR. MEDALIE: What was that?

THE CHAIRMAN: 80 -F.

MR. MEDALIE: -- motion to withdraw a plea of guilty, 80, sub-division F.

THE CHAIRMAN: "A motion to withdraw a plea of guilty shall

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EVENING SESSION

(The Advisory Committee reconvened at 7:30 o'clock p.m., at the expiration of the recess.)

The Chairman. The committee will be in order.

Mr. Wechsler suggested that he had some thoughts on the subject of appeal, Rules 90 to 95, so for the moment we will pass this, until he returns, and go on to Rule --

Mr. Seasongood. Mr. Chairman, may I go back a minute to Rule 83?

The Chairman. Yes, indeed.

Mr. Seasongood. "A motion for reduction of sentence may be filed within 60 days from the date on which the sentence was imposed, \* \* \*. A motion filed pursuant to this rule shall be acted upon by the court within thirty days from the date on which it was filed."

That seems to be the only instance where we have tried to make the court do something within a limit of time.

In our State we have a statute requiring motions for new trial must be passed on in a certain time, and the courts habitually disregard the statute. They say that the statute cannot tell them in what time judicial action should be taken, and I do not see why we should single this particular thing out for a time limitation.

The Chairman. Here it would be the upper court telling the trial court what to do, a somewhat different situation, would it not?

Mr. Seasongood. No, I do not understand it that way. It says, "A motion for reduction of sentence may be filed."

be made within ten days after entry of such plea and before sentence is imposed."

MR. MEDALIE: This states not the grounds on which it can be made but only that it can be made. Now 80-B, if 80-F does not exist, makes it possible for the motion to be stated only on the ground stated by 82-B and only for six months.

MR. HOLTZOFF: They do not over-lap.

MR. MEDALIE: That is not the reason. I am simply proposing a juster rule, and the juster rule is 82-B; and my reason is that the real ground for withdrawing a plea will not be evident until sentence is pronounced.

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I do not believe in letting the defendant withdraw a plea when he understood what he was pleading guilty to.

THE CHAIRMAN: Well, he is sentenced and then it appears he made his plea by mistake.

MR. MEDALIE: No. You place a limitation under 80-F. One minute after he is sentenced, he has no right to withdraw his plea, and the court has no right to entertain the motion.

THE CHAIRMAN: I concede according to the facts of your case 80-F is out. Sentence has been imposed. Then I am his counsel and I turn to 82-B and I say, "Well, was there any surprise or neglect?"

MR. MEDALIE: 80-F covers it. I do not think any man should make a motion to withdraw his plea unless it is for such grounds as appear in 82-B.

MR. HOLTZOFF: But I think such motions are granted for other than these narrow reasons.

MR. MEDALIE: I do not think they should be.

MR. MC LELLAN: If he changes his mind before he is sentenced--

MR. MEDALIE: I would like to give him time if he has been mistreated.

THE CHAIRMAN: Do you make a motion on it?

MR. MEDALIE: I move that 80-F be stricken.

THE CHAIRMAN: Is it seconded?

(No response.)

MR. MEDALIE: What a futile effort.

THE CHAIRMAN: 83.

MR. STRINE: This rule is also recommended by the Department of Justice Committee. They had a case where sentence was entered for ten years. At the end of the year, the term was extended again, at the end of that time it was extended again. At the end of three years, the court had changed the motion and produced it to the time served.

That is the purpose of this, to obviate such situations.

MR. HOLTZOFF: Well, Mr. Strine, we do not want to take away from the district the right to reduce a sentence, do we, after the Appellate Court has affirmed his conviction? I would hate to see the district courts acquire that power -- I am for the rule as it stands now, but I think there should be this qualification added, "within sixty days after sentence was imposed or affirmed."

MR. MEDALIE: Be careful of the use of the word "affirmed." What do you mean by that?

MR. HOLTZOFF: Affirmed by the court.

MR. MEDALIE: When was it affirmed? You are either in the C. C. A. or the court. When is it affirmed? What date is it? Is it the date of the order of affirmance?

MR. HOLTZOFF: I would say it is the date of the order of

affirmance.

MR. MEDALIE: If you are clear about that, it is all right. It may not be affirmed until it does down to the district court again.

MR. HOLTZOFF: I think an affirmance is when the Appellate Court hands down its judgment.

MR. MEDALIE: It does not hand down its judgment. It makes an order.

MR. HOLTZOFF: Well, hands down its order.

MR. MEDALIE: Then something has to happen to an order. It has to reach the District Court. Suppose, for some reason, it does not reach the District Court for sixty days? What has happened to it? All your kindness has then evaporated.

MR. HOLTZOFF: Well, is the date the mandate is received by the District Court the governing date?

MR. MEDALIE: Yes.

MR. HOLTZOFF: I won't object to that.

THE CHAIRMAN: Let us get that.

MR. HOLTZOFF: In Line 3, after the word "imposed" insert the following: "or on which the judgment was affirmed or on which the mandate was received by the District Court" -- no, that is not good language.

MR. MEDALIE: The language you want to get it in is "sixty days after the District Court is empowered to deal with the case again."

MR. HOLTZOFF: Is that right?

THE CHAIRMAN: How about leaving it to the Reporter?

MR. HOLTZOFF: I move Rule 83 be amended so as to contain a provision, the substance of which would be to empower the

District Court to entertain such a motion for sixty days after a mandate is received from an Appellate Court affirming the judgment of conviction.

Is it seconded?

MR. MEDALIE: Sixty days from the filing of the mandate from the Appellate Court in the District Court.

MR. ORFIELD: Seconded.

THE CHAIRMAN: All those in favor of the purpose of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried.

All those in favor of the Section as amended --

MR. SETH: In view of the broad language of 8 (C), have you safeguarded the language?

THE CHAIRMAN: 80 (C)?

MR. SETH: 8 (C). It gives general power to extend the time, with certain exceptions, of which this is not one, -- 8 B, I should have said.

THE CHAIRMAN: 8 B, yes.

MR. HOLTZOFF: You can add a Line 22 clause covering motions to extend sentence.

MR. SETH: Yes, Rule 83.

THE CHAIRMAN: If there is no objection that will be done.

MR. MEDALIE: Let me understand that.

MR. SETH: You cannot extend time.

MR. MEDALIE: 8 (B) provides that when these rules are in order requires an act to be done -- allows it to be done at or within a specified time -- now, you do not want it extended

beyond the time fixed.

MR. SETH: That is right.

MR. MEDALIE: Then you would have to add a provision that the provisions of 8 (B) are not applicable.

MR. HOLTZOFF: No, you add those at the end of 8 (B) because there is a clause at the end of 8 (B) that the court may not enlarge the period for taking certain actions.

MR. MEDALIE: That would make it correct enough but Rule 8 is a general rule with respect to time and I think it is bad arrangement to put in a specific provision where you have only general provisions.

MR. SETH: But you have 80 in here already, -- no, 8 (B) -- "not enlarge the period for taking any action on the rule 80." You might as well put 83 with it.

MR. MEDALIE: I see. All right.

MR. SETH: How long is the Chairman going to keep us here? Shall we adjourn, or must we just walk out?

THE CHAIRMAN: The Chairman thinks this is a very good time.

MR. MEDALIE: We have the man up to conviction, and now we leave him.

MR. MC LELLAN: What time will we adjourn to?

THE CHAIRMAN: 7:30.

(Whereupon, at 5:50 p. m., the meeting recessed until 7:30 p. m., of the same day.)

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Darrow.

2bb

The Chairman. You said that in your State the Legislature told the court what to do.

Mr. Seasongood. That is true.

The Chairman. Here it is the Supreme Court telling the District Court what to do.

Mr. Medalie. It does not make any difference, I do not think.

Mr. Seasongood. There is a difference, to the extent that one is by state statute and one is the Supreme Court telling the lower court what to do.

Mr. Medalie. You have the rules, and they are simply equivalent to the act of the legislature. It does not matter who makes the rule.

Mr. Seasongood. Well, I move to strike it, and take the opinion which has been expressed.

Mr. Medalie. I second the motion. The motion is to strike the last sentence.

The Chairman. Are there any remarks?

Mr. Seasongood. The chairman has some doubt, I judge.

The Chairman. No. I am trying to figure out whether this is one of our own creation or one of the Supreme Court rules.

Mr. Holtzoff. That is one of our own.

The Chairman. Are there any remarks on the motion?

If not, all those in favor say "aye." Opposed, "no."

The motion is carried.

Now, may we go on to Rule 100? I do not seem to have any.

Mr. Holtzoff. We do not have any.

The Chairman. Rule 101. We are making progress.

3bb

Mr. Holtzoff. This relates to removal, and I would like to discuss first alternate rule 101, the adoption of which I would suggest.

The Chairman. We will turn to alternate rule 101.

Mr. Holtzoff. The first part, down to line 10, is practically the same except for purely stylistic changes.

The existing statute provides a hearing before a commissioner or the district court, and upon the finding that there is reasonable cause, an issuance of a warrant for his removal.

The last two sentences, beginning on line 10, are not now contained in any statute or rule. They deal with the question as to how much must be established in order to justify a removal.

There is a lot of divergence, both in practice and reported cases -- in fact, considerable confusion -- as to the extent to which the Government must make out a prima facie case and the extent to which the defendant may go into the merits of the case. In fact, there are some districts where the defendant is allowed to offer evidence in proof of innocence, which enables the judge of another district practically to review the action of the grand jury in finding an indictment, although the judge of the district in which the grand jury sat could not do that.

So in those two sentences we propose this rule, that if the removal is based on an indictment, a certified copy of the indictment should be conclusive proof of reasonable cause.

Of course, proof of identity would also have to be added.

In the second of the two sentences I suggest that if the removal is based on a complaint or information -- in other

4bb

words, no quasi judicial agency has intervened before the prosecution was instituted -- that the Government should adduce proof of reasonable cause, and the defendant may controvert such proof.

The Chairman. Are there any remarks on the rule?

Mr. Longsdorf. Did we keep the provision requiring leave to file an information? I was wondering whether an information filed with leave might take on a little higher character of probative value than one filed without leave.

Mr. Moltzoff. I feel this way: Leave ordinarily is granted perfunctorily.

Mr. Longsdorf. I do not think it makes any difference.

Mr. Moltzoff. I do not think it makes any difference.

The Chairman. Are there any further remarks?

Mr. Moltzoff. I move the adoption of Rule 101.

Mr. Medalie. I second it.

The Chairman. All those in favor say "aye." Opposed, "no." The motion is carried.

Rule 102.

Mr. Moltzoff. Rule 102. We also have an alternate draft on that rule, and I suggest the alternate.

This rule relates to the procedure that should govern removed cases. You will recall, of course, that certain government offices, when they have prosecuted cases in state courts, may remove to a Federal court.

Alternate Rule 102 provides that in such instances the procedure after removal should be the procedure prescribed by those rules in the Federal Court. Of course, the state substantive law would govern as to the substantive part of the

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prosecution.

Mr. Medalie. Why don't we say that?

Mr. Holtzoff. The alternate rule.

Mr. Medalie. I am looking at the alternate rule.

Mr. Holtzoff. "These rules apply to criminal proceedings removed" --

Mr. Medalie. We say that. We do not say anything about the state government. We do not have any business to.

It is all right. My suggestion was wrong.

Mr. Longsdorf. What is the need of the last sentence: "Repleading is not necessary"? What occasion is there for repleading?

Mr. Holtzoff. Suppose the indictment was drawn in accordance with the provisions of the state law. We say that the federal procedure shall apply after removal, in order to prevent some judge or lawyer from thinking that you have to find a new indictment in accordance with the federal court. This provision was put in for that reason. There is a similar provision in the civil rules.

Mr. Longsdorf. There is a place for it in the civil rules. Why don't you say, "Reindictment is not necessary"?

Mr. Holtzoff. It may be "reinformation."

Mr. Longsdorf. And "reaccusation."

Mr. Medalie. It is not necessary.

Mr. Longsdorf. I wonder if that has any utility?

Mr. Medalie. If there has been an indictment, there would not be a new indictment in the federal court.

Mr. Longsdorf. We would not remove --

The Chairman. Could you cover it by saying, "after

removal, but no new accusation is necessary"?

Mr. Holtzoff. I think perhaps that would be an improvement: "but no new accusation is necessary."

Well, suppose the defendant had pleaded. Would he have to replead?

The Chairman. Would he plead before removal?

Mr. Holtzoff. He would not ordinarily.

Mr. Medalie. Why do you need that?

Mr. Longsdorf. Just a minute, until I look at that statute. I think that will answer the question.

Mr. Holtzoff. The statute does not cover this particular thought.

Mr. Longsdorf. What is the time for removal in these criminal cases?

Mr. Tolman. Any time before trial.

Mr. Longsdorf. Any time before trial? Can the defendant be removed before he leaves?

Mr. Holtzoff. Ordinarily they are removed right away, but they would have the right to remove after a plea.

Mr. Longsdorf. If he is removed after a plea the issues are all made up and there is no occasion for repleading.

The Chairman. "Repleading" leads one to think that you are addressing it to the plea.

Mr. Holtzoff. Yes, you are right.

The Chairman. "No new accusation is necessary." I think that is better.

Mr. Holtzoff. I think that is better.

I move the adoption of alternate rule 102 as amended in accordance with the Chairman's suggestion.

7m

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 103.

Mr. Holtzoff. That rule relates to what is technically known as rendition or interstate extradition and would be applicable in the District of Columbia and the territories, because those jurisdictions are called upon to surrender fugitives to the states.

Mr. Medalie. Here is what I do not understand. I think the principle is all right, but why do you limit the activity to the chief justice of the district court? Suppose he is sick. Why does he have to be there?

Mr. Holtzoff. There is a provision in the last sentence that an associate justice may have authority.

Mr. Medalie. Why can't any judge have that?

Mr. Holtzoff. This is the existing provision of the District of Columbia Code. It has been in existence for years, and the chief justice, in interstate extradition cases, acts as the governor of the state.

3 Mr. Longsdorf. Do we want this in the criminal rules? Isn't this a political procedure?

Mr. Holtzoff. No. That is quite a judicial procedure.

Mr. Longsdorf. If the governor of the state had to do with it, it would not be.

Mr. Holtzoff. He issues a warrant and he conducts a hearing --

Mr. Glueck. I think it is part of the criminal procedure.

Mr. Holtzoff. I think it is, and it is in the judicial sections of the District of Columbia Criminal Code.

Now, (b) embodies the existing statutory provisions in reference to the surrender of fugitives by territories to the states and to other territories.

Mr. Glueck. You say that is just the way the existing statute is, Mr. Holtzoff?

Mr. Holtzoff. Yes. I made some stylistic changes and have gotten away from some obsolescent language, but substantively the provision is the same.

I move the adoption of rule 103.

The Chairman. Are there any remarks?

All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I will vote for it, if you think it is necessary to have something. If it is in the statute, as you say, you do not need to say anything.

Mr. Holtzoff. These rules will supersede the statutes.

The Chairman. The statutes will probably be repealed. The idea is to get the whole body of procedural law in one spot.

Mr. Longsdorf. Is this going to take out of federal statutes only those interstate rendition rules which apply to these particular courts?

Mr. Holtzoff. Yes.

Mr. Longsdorf. You are not going to venture into interstate rendition at all?

Mr. Holtzoff. Absolutely not, because that is not a matter that is part of the federal judiciary.

Mr. Longsdorf. I may say that that was in our book, but I never understood why Mr. Nichols put it in.

The Chairman. Rule 104.

Mr. Holtzoff. Rule 104 is the third and last phase of extradition, namely, extradition from the United States to foreign countries.

Now, certain phases of extradition are Executive and are carried on by the State Department. No attempt is made to embody that in this draft.

Mr. Medalie. You perpetuate the horror, as appears on lines 19 to 20: "Commit the person so charged to the custody of the United States Marshal, pending the final disposition of the matter by the Secretary of State."

He cannot get bail. It is a very bad business.

Mr. Holtzoff. Read on, beginning on line 21: "If the person so committed is not delivered and conveyed" --

Mr. Medalis. After staying in the jug for two months? Oh, no. If a person happens to have a fight with the political authority of a foreign country and they want to make it disagreeable for him and charge him with something -- it may be a political offense; it may not -- the fact remains that the person stays in jail under the existing extradition rules, without bail --

Mr. Holtzoff. Until the State Department --

Mr. Medalie. Yes. That is a long, long time. I think people ought to get bail, and that has been one of the outrages of our extradition laws.

Mr. Holtzoff. My understanding is that it is international practice in all countries not to grant bail in extradition cases, because of the duty that one government owes to another.

10m

Mr. Medalie. That is right. Hitler doesn't like you, or Mussolini doesn't like you, and that settles it -- or, if you wish, Stalin doesn't like you. I don't care who you put in.

Mr. Holtzoff. These are used for the extradition of criminals, such as bank robbers --

Mr. Medalie. There is no reason why there should be a distinction between a bank robber, or someone charged with that offense, and the president of a bank who was wanted for something. Is there any difference because he is French or Russian or Turkish than because he remains an Englishman?

Mr. Holtzoff. If he becomes a fugitive we answer to the other government, whereas if he is indicted in this country, it is under our laws --

Mr. Medalie. If a man is here --

Mr. Holtzoff. I should hate to act on this certainly without the acquiescence of the State Department, because we would be treading on international relations.

Mr. Medalie. You embarrass the State Department by asking the State Department if it would agree to bail.

Mr. Holtzoff. I would have no hesitancy about asking the State Department.

Mr. Medalie. I move that there be added at line 20: "except that he may be admitted to bail in accordance with the usual practice in other motions."

Mr. Holtzoff. Because this involves foreign relations, I do not think we ought to adopt this motion -- certainly not without consulting the State Department.

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Mr. Medalie. I would not consult the State Department, because you cannot get any action out of the State Department

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here.

Mr. Holtzoff. I will get a response --

Mr. Medalie. You will get a response, but not the kind of response we want.

The Chairman. Off the record, Mr. Reporter.

(There was a discussion off the record, after which the following occurred:)

Mr. Medalie. This is an act of the legislature. If this is an act of the legislature, you know perfectly well that the Congress can override the State Department, and I do not think that the amenities between the State Department and the other departments have any application to this work.

Mr. Holtzoff. Congress would not override the State Department in a matter of this kind if the State Department made representations on a point just as this.

Mr. Medalie. You mean, generally speaking, about Chinese, Japanese, Englishmen, Malaysians, and Turks?

Mr. Holtzoff. I am talking about matters not involving great public interest.

Mr. Dean. It is time they did.

Mr. Holtzoff. If there is any question about the desirability of the provision as it now exists, I would like an opportunity, if it is agreeable to the committee, to consult with the State Department and get their reaction, because I do not think we ought to insert a provision for bail which would change a practice that has existed in foreign extradition cases since our government was established and it affects foreign relations. I would not want to see --

Mr. Medalie. You mean they started it in 1789? This Code

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makes 1789 look silly.

Mr. Holtzoff. We ought to consult the State Department as a matter of courtesy. They do not have to follow it. They may say, "We do not care one way or the other."

Mr. Medalie. Let them tell us after we pass the rule.

The Chairman. I do not think it is wise to ask them.

Mr. Glueck. I think we ought to hear the argument.

Mr. Dean. You won't hear the argument. You will hear "Yes" or "No."

Mr. Glueck. We will know where we stand then.

Mr. Holtzoff. I would like to ask the State Department.

I would rather see the provision stand in its present form, but if there is any thought about inserting a provision as to bail, I do think we should consult the State Department.

Mr. Medalie. Let us take a simple example. An American swindler gets bail pending his extradition, but if he is a Frenchman --

Mr. Holtzoff. An American swindler in England does not get bail while we are asking for extradition. An American swindler in Canada does not get bail.

Mr. Medalie. It is about time we did start a new pattern.

Mr. Seasongood. We are only talking about 60 days.

Mr. Medalie. It is a long, long time, if you are doing 60 days.

The Chairman. Especially in Washington in the summertime.

Mr. Glueck. We have plenty of Americans now in jail for 60 days.

Mr. Medalie. I press my motion, Mr. Chairman.

Mr. Longsdorf. Mr. Chairman, I simply want to say that I

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think that this is so entangled with political questions that we ought to leave it out entirely. I think Congress has to do with the job, not we.

Mr. Holtzoff. We are the agents of Congress.

Mr. Longsdorf. We are, for limited purposes.

The Chairman. The motion is made and seconded.

If there are no further remarks, all in favor of the motion say "Aye." Opposed, "No."

The Chair is in doubt.

All in favor make a show of hands. All those opposed. It is seven to four.

Mr. Glueck. I want to record, however, that I am wholly in sympathy with the comment of Mr. Medalie. What I object to is passing it without exploring it with the State Department.

Mr. Medalie. I move that the State Department be asked for its opinion and that further action on this particular provision be held in abeyance.

Mr. Glueck. I second the motion.

The Chairman. All in favor say "Aye." Opposed, "No."  
The motion is carried.

That brings us to rule 105.

Mr. Holtzoff. Rule 105 has to do with search warrants. This, with some stylistic changes of language, embodies the present statutory provisions on search warrants.

There is some slight change, and that is (b), in line 19. The present law requires the search warrant particularly to describe the property and place to be searched. I am changing that to "identifying the property and the place to be searched."

Mr. Medalie. What line?

Mr. Holtzoff. Line 19.

The reason for the change is this. The reporter called attention to a case in which the District Court vacated a search warrant that suppressed evidence obtained by its means because the search warrant described the house by an old number, which had been changed, and although everybody knew what premises were intended, the Court held that that was not a sufficient description, because it did not particularly describe it.

Mr. Medalie. That was during prohibition days.

Mr. Holtzoff. No; recently.

Mr. Medalie. Recently?

Mr. Holtzoff. Yes.

Mr. Medalie. What a hangover!

Mr. Holtzoff. Exactly. That is why I suggested changing  
5 the language to "identify."

Mr. Medalie. Fine.

Mr. Holtzoff. Aside from that, the rest of this is all in the present statutes.

Mr. Medalie. I want to ask one question there with reference to lines 27 to 31, regarding daytime and nighttime.

Mr. Holtzoff. This is the substance of the present statute -- that a search warrant may be served only in the daytime unless the issuing officer endorses that it may be served at any time of the day or night, and he may put such an endorsement on only if it positively appears that the property to be searched for is on the person or in the place to be searched.

If the affidavits are made on information and belief, then

the search warrant may be executed only for the daytime.

Mr. Medalie. This means, then, if it is itinerary property, not on a person?

Mr. Holtzoff. Suppose a premise is to be searched, and they are not positive that the property is there. The premise is to be searched only in the daytime.

Mr. Medalie. You mean that this property shows up only at certain hours and in a particular place?

Mr. Holtzoff. No. Under existing law, which this rule continues, if you have a search warrant to search certain premises for certain property listed in the search warrant, you may execute that search warrant only in the daytime, unless there is an affirmative direction on the warrant made by the commissioner or judge issuing the warrant that the warrant may be executed at any time of the day or night.

Mr. Medalie. I am talking about what the affidavit states.

Mr. Holtzoff. Such a direction may be made, however, only if the affidavits positively show that the property to be searched is to be located in the premises that are to be searched. If the proof is not positive, but still sufficient to justify the issuance of a search warrant, the search warrant may not be executed in the nighttime.

Mr. Medalie. I wish you would tell me the difference between one that positively states that the article to be searched for is on the property and one that sufficiently establishes that it is.

Mr. Holtzoff. If your affidavit establishes a probable cause to believe that the contraband to be searched for is on the premises, that is sufficient for the search warrant to be

issued for the daytime. That is not established positively, and therefore it is not to be issued for the nighttime.

Mr. Medalie. What is the difference? Is that a genuine difference?

Mr. Holtzoff. Yes, and it is the existing law, and it always has been the existing law.

Mr. Medalie. But is it a genuine difference?

Mr. Holtzoff. Yes.

The Chairman. The difference between "may be" and "is."

Mr. Medalie. If it is "may be," it should not have a search warrant.

Mr. Holtzoff. Oh, yes. You can have a warrant for arrest on a reasonable ground to believe, and you can have a search warrant on a reasonable ground to believe.

Mr. Medalie. If you can have a warrant that deprives a person of his liberty on that ground, then you ought to have a search warrant on that ground.

Mr. Holtzoff. Yes.

Mr. Medalie. You can execute a warrant at any time of the day or night that will deprive a person of his liberty, but you are more solicitous about property.

Mr. Holtzoff. I think that there is a good deal in what you say, that a search warrant should be permitted to be executed at any time of day or night. It is the sort of change which would cause an antagonism on the part of those --

Mr. Medalie. I think it would create more of an antagonism by not explaining what you mean by "unless the affidavits are positive. A daytime search if not positive; a nighttime search if positive."

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Mr. Holtzoff. If you can convince them that you are continuing a rule of law that has been in existence for a century --

Mr. Glueck. Is there any reason for having this beyond that distinction?

Mr. Holtzoff. Yes.

Mr. Glueck. Is it because when you are positive you go directly to the place without causing disturbance and trouble?

Mr. Holtzoff. No.

Mr. Glueck. What is it?

Mr. Holtzoff. Of course, a search in the nighttime is naturally much more distressing than a search in the daytime, and you ought not to be permitted to cause that additional disturbance unless you are absolutely certain that the property is to be found on the premises.

Mr. Glueck. That is what I said.

Mr. Dession. Isn't it because of the urgency of making the search?

The Chairman. That is undoubtedly the rationale of the thing.

Mr. Dession. It seems to me that you should not make a search at night unless there is a reason to be in a hurry. If there is a reason to be in a hurry, it might be all right. I do not see that being positive about the place has anything to do with whether you are in a hurry or not.

Mr. Holtzoff. I think this is one of those things where it pays to adhere to the law that has been in existence --

Mr. Dession. Our function is not to continue existing law. That is not our function?

Mr. Holtzoff. It is not our function, but I say this is one of those things where that should be taken into consideration.

Mr. Medalie. Who gets excited about the service of search warrants at night?

Mr. Holtzoff. The Civil Liberties Union.

The Chairman. I think Mr. Holtzoff will back me up on this. The majority of the Judiciary Committee of the house will get wildly excited over a thing like this.

Mr. Medalie. Well, if you put it on the ground that that does not make a distinction without a difference, I am willing to go along, but you are making a distinction without a difference, the difference being between probable cause and positive cause.

The Chairman. For a very obvious purpose. That language, when you rationalize it, is to discourage searches at night. They apparently could not think of any language which would say, "Don't search at night unless it is terribly important."

Mr. Medalie. I can think of language.

The Chairman. So this is apparently the accepted formula.

Mr. Medalie. We can get a better formula that will satisfy our consciences and our minds by saying that "no search warrant shall be executed in the nighttime unless a special direction therefor is made upon special circumstances shown."

Mr. Holtzoff. That would give the issuing officer broader authority than he has under existing law to permit searches at

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night.

Mr. Medalie. No. The difference between "probable cause" and "positive" means nothing.

Mr. Holtzoff. That language would convey such an impression.

The Chairman. I have not been in favor of considerable delay and argument on a number of changes that we have made. I think I more or less move faster than most of you on some of these things, but this is one thing with regard to which I can see wisdom in getting legislative consent.

Mr. Medalie. Let me put it in the form of a motion.

I move that the sentence running from line 27 to 31 be deleted and that in place thereof there be inserted a provision that the warrant shall be served in the daytime unless it contain a direction for service in the nighttime, which shall not be made unless the affidavits or depositions establish some special circumstance requiring that provision.

Mr. Holtzoff. I hope the motion will not prevail.

Mr. Medalie. I know that.

The Chairman. Is the motion seconded?

Mr. Dession. I will second that.

Mr. Longsdorf. Before we go to the motion, I would like to make this as a suggestion. This statute on search warrants is comparatively recent, 1917, and, by its own terms, applies only to search warrants authorized by this chapter. It is section 611 of Title 18, and in the concluding section it says:

"Nothing contained in these sections of this title shall be held to repeal or impair any existing provisions of law relating to search and the issue of search warrants."

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Now, what are those other provisions of law? I think we should reserve consideration of this until we have time to look into them and find out what they are. I do not know what is lurking around in those. I hunted for them. I know there are a whole lot of searches under the provisions of the statute, but I have not had time to look into all of them. There is a multitude of them.

I would be a little afraid of venturing into that subject on the basis of this comparatively recent statute. There must have been a lot of search warrants before this statute was passed in 1917.

Mr. Holtzoff. But this language was not new in the 1917 statute.

Mr. Longsdorf. Oh, no. There are plenty of cases which hold that this is an attempt to codify the common law of search warrants. I will concede that.

Mr. Holtzoff. Do you want to put the question, Mr. Chairman?

The Chairman. All those in favor of Mr. Medalie's motion say "Aye." Opposed, "No."

The Chair is in doubt. All in favor make a show of hands. Five. Opposed, six. The motion is lost.

Mr. Holtzoff. Now, I move we adopt rule 105 as it now stands.

Mr. McClellan. Seconded.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

Mr. Dession. May I ask one question before we leave, Mr. Reporter? Why is the issuance of search warrants limited to articles used in committing felonies, in section (a)? I

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realize that most of your federal crimes are felonies, but is there any reason for that limitation?

Mr. Holtzoff. There is this reason and only this reason: The existing search warrant contains that. It contains no provision for searching for property used in the commission of a misdemeanor.

Mr. Dession. I know that.

Mr. Holtzoff. And in drafting that --

Mr. Dession. I knew that that was the old statute, but the fact remains that in all state practice that I know of you have no such limitation, and I see no reason to write it in unless there is a reason for it other than historical.

Mr. Holtzoff. The reason is one of sentiment. People are very touchy on the subject of search warrants. I thought that it would be very unwise policy to extend the scope of search warrants, especially in the light of certain sentiments in certain quarters.

Mr. Dession. You have no limitation on searches without a warrant. They are apt to be more abusive than searches with a warrant.

Mr. Holtzoff. The law does not permit searches without a warrant except as an incident of arrest and in the presence of the arrested person.

Mr. Dession. Are you sure of that?

Mr. Holtzoff. Oh, yes. I have lectured on the subject of search and seizure in the Department.

Mr. Dean. You know how broad that "search incident to arrest" is.

Mr. Holtzoff. I know.

Mr. Dean. You walk in the door. You want the man. You go through every room in the house and upstairs, too. It is the sort of thing that calls for a search warrant, if anything ever did.

Mr. Holtzoff. The point is that the traditional rule of law permits that search without a search warrant, but I do not believe it is good policy for us to carry it further and extend the scope of the law of search and seizure.

Mr. Dean. If you have ground to arrest the man without a warrant, you could do everything at the time of the arrest that you could do with a search warrant.

Mr. Holtzoff. In his presence and at the time of the arrest.

Mr. Dean. You can haul him upstairs and you can go through the house and take out every dresser drawer.

Mr. Holtzoff. I can see a very good, logical argument in favor of Mr. Dession's suggestion to extending it to all searches and seizures. As a matter of policy, I am opposed to doing it.

Mr. Dession. What is the policy? We are not opposed to obtaining evidence of crime in a proper fashion?

Mr. Holtzoff. By "policy" I mean so far as getting these rules adopted. I think if we make the law of search and seizure any more stringent and any more extensive than it now is, we will create objection to these rules.

Mr. Dession. I am very sensitive to that problem, and wherever I felt that we were writing in something that I felt would hamper the objectives of the rules, I would not go along with that, but I still have the feeling that some of the<sup>se</sup>

historical accidents are not as popular as we may think.

The Chairman. What would the misdemeanors cover? They would be the other class. Would they cover migratory birds and things like that?

Mr. Dession. I am not prepared to submit a list.

The Chairman. Isn't the difficulty with the classification of crimes?

Mr. Dean. Yes, it is.

The Chairman. Some things are called misdemeanors that should be classed as felonies.

Mr. Holtzoff. Any crime punishable by less than a year and a day in prison is a misdemeanor. In addition to that, certain very severe offenses, though punishable by longer terms, are denominated misdemeanors by statute.

Mr. Medalie. What are we on now?

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Mr. Dession. To save time on this, I do not have before me a list of all federal misdemeanors.

I will merely move that the question of whether those crimes which are classed as misdemeanors are sufficiently different or unimportant for our purposes to warrant leaving this in the form as it is. It may be covered by later discussion, if it be advisable.

?

The Chairman. We will consider the motion passed.

May I ask a question? I think it is connected with that point.

I would like to ask Mr. Holtzoff, speaking about section 612 of Title 18 of the statute, What would be the effect of our passing a rule like 105 (a), which just takes what might be called the headlines from a statute? Will the rule then be

considered as supplementing the statute or would there be any possibility of its being subject later to repealing it?

For instance, on the point that Mr. Dession is making, you have the top line, "When the property was used as the means of committing a felony."

The statute goes on to clarify that: "In which case it may be taken on the warrant from any house or any other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

Mr. Holtzoff. I studied that language. A lot of it is repetitious. So far as the substance of the meaning is concerned, everything that is in the statute is carried into rule 105, but the language is condensed and made more succinct.

Mr. Robinson. I hope you are right.

Mr. Holtzoff. I will be very glad to have you check it.

Mr. Robinson. Those words I have just read I think go a little further than what you go in this section.

Mr. Holtzoff. I do not think they do.

Mr. Robinson. As a general proposition, what is the relationship between our rule and a statute where the rule covers what might be considered some of the essential portions of the statute? Are the remaining essential portions of the statute still in effect?

Mr. Holtzoff. I think not. I think that if we cover a topic by rule, that rule would supersede the statute on the same subject, even though the statute is more complete and more detailed.

Mr. Robinson. I rather think that that is true.

The Chairman. Do you move for a repealer of these various statutes?

Mr. Holtzoff. They never did that in the civil rules.

Mr. Dean. I think the Reporter has raised a pretty fundamental question, particularly when we repeal in part and it is not clear as to whether we have repealed the whole of the statute. Wouldn't it be wise to consider whether we should have a special section specifically repealing or whether we should cover it in footnotes, saying that it is regarded by the committee that such and such a section is considered repealed?

Mr. Holtzoff. I would rather see it down in the footnotes

Mr. Dean. If we do not do it rather specifically, I think there will be some question as to whether the statute has been repealed.

Mr. Holtzoff. There has been no trouble of that sort with respect to the civil rules, although the same situation exists there.

The Chairman. Rule 106.

Mr. Holtzoff. Rule 106 covers motions to quash search warrants and suppress evidence.

The first part is substantially, with some condensation and stylistic changes, the existing statute on the subject.

The latter part codifies and, I hope, clarifies the existing practice on the question of motions to suppress evidence. I think that there is no change in the law or the existing practice in any part of this rule.

Mr. Medalie. You have one difficulty in language.

Mr. Holtzoff. I beg pardon?

Mr. Medalie. You have a difficulty of language.

Mr. Holtzoff. That is always open to improvement.

Mr. Medalie. Talking about persons making motions where the property was seized pursuant to warrant, in line 11: "Such person" -- that is, a person whose property was seized pursuant to a warrant -- "may also move to suppress evidence and for return of the property seized, on the ground that such warrant was served illegally or that the property was illegally seized without any search warrant issued therefor."

Now, that has two implications. One is that under a warrant -- acting under a warrant -- the officer seized more property than was authorized to be seized by the warrant. The other is that without any warrant at all the officer seized property.

Mr. Longsdorf. And the third is that a third person's property was seized and he is not the defendant and cannot suppress the evidence.

Mr. Holtzoff. The only person who can move for return of property illegally seized is the person who is entitled to the possession of the property.

Mr. Medalie. Suppose there was no warrant. Let us put the three together that Mr. Longsdorf and I are talking about. One: a warrant; excess seizure. Two: a warrant; person not named. Three: no warrant.

Mr. Holtzoff. Well, I think perhaps your criticism of that sentence is well taken, Mr. Medalie. If we change the language from "such person" so as to read that any person from whom any property has been seized --

Mr. Medalie. With or without a warrant.

Mr. Holtzoff. With or without a warrant, may also move.

Mr. Medalie. I think those are rights that are to be protected against unlawful search and seizure.

Mr. Holtzoff. That language would meet your thought?

Mr. Medalie. Yes.

Mr. Holtzoff. "Any person whose property has been seized, with or without a warrant."

Mr. Longsdorf. May move to suppress evidence? Suppose he is not a defendant?

Mr. Medalie. He might be a defendant.

Mr. Longsdorf. He might not be.

Mr. Medalie. A warrant may issue against you, as a result of which I get indicted, and it might be my property and not yours, or I am indicted because I am seized at a railroad station where a post office inspector, without a warrant, either searched or seized off my person.

Mr. Youngquist. I want to ask a question. The rule reads, "a person against whom a search warrant has been issued." Is a search warrant necessarily issued against a person?

Mr. Medalie. It is not. Concerning whose property?

Mr. Youngquist. Suppose you know there is contraband property in a place. Do you not issue a warrant for the search of that place and the seizure of the property without regard to whose it is?

Mr. Holtzoff. Yes, I think you are right about that.

Mr. Medalie. "A person whose property has been seized under color of a search warrant."

"A person whose property has been seized under color of a search warrant"  
would cover the first two of the situations that I mentioned.

Mr. Youngquist. I was directing myself more particularly to the propriety of the phraseology that we have in the section.

Mr. Holtzoff. In the light of the remarks that have been made, I am of the opinion that this phraseology should be modified, and I will be very glad to have an opportunity/phrase to re-modify this, and perhaps we could adopt it now, subject to being rephrased in matters of style.

Mr. Longsdorf. Mr. Chairman, may I make a suggestion to Mr. Holtzoff that might simplify it?

The Chairman. Certainly.

Mr. Longsdorf. Why not transpose this second half, which I find no fault with outside of that "such person," over into a rule designed to cover all phases of motions to suppress evidence? They may reach into other things than search warrants.

Mr. Glueck. I have that in mind, too, Mr. Chairman. What about wire tapping, for instance?

Mr. Holtzoff. I do not think we had better deal with wire tapping.

Mr. Longsdorf. That is another thing, but there are other ways of obtaining property than by illegal search warrants. Why not put them all together.

Mr. Robinson. Perhaps in our chapter on proceedings preparatory to trial, such as motions, pleas, and so forth.

Mr. Longsdorf. Yes.

Mr. Medalie. May I suggest that we ought not to consider that now until we get the principles settled, and then ask for the transposition?

Mr. Longsdorf. That is agreeable.

Mr. Medalie. May I then make a motion?

The Chairman. Yes.

Mr. Medalie. I move that the language in lines 11 to 14 in rule 106 be substituted by the following:

"A person whose property has been seized under color of a search warrant, or a person whose property has been seized without authority of a search warrant, may move for the suppression of the evidence and move for the return of the property seized."

Mr. Robinson. Such as returning property obtained incident to arrest?

Mr. Medalie. Yes. You make the motion on the basis of your simple constitutional principles, which we are not attempting to define here; but a person from whom property has been seized, either on his person or in his home, has certain rights. That involves a lot of complications, which we do not decide.

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Mr. Holtzoff. I think that is all right.

Mr. McLellan. Suppose A is indicted and B's property is seized under a searchwarrant. Has A any right to have that evidence suppressed?

Mr. Youngquist. No.

Mr. Medalie. Suppose he is a defendant.

Mr. McLellan. Suppose he is not a defendant. Read your language.

Mr. Medalie. We can add something there to make sure it applies only to persons who are the subject of criminal prosecution.

Mr. Holtzoff. No; whoever has the right to the possession of the property.

Mr. Youngquist. You have got to divide them into two classes. The man who has the right to the return of the property on the one hand may or may not be the same as the person in the other class, the man who has the right to suppress the evidence. Isn't that your idea?

Mr. McLellan. Yes, but that didnot make that distinction.

Mr. Dession. Under the existing practice only a person with interest in the property has a standing to make such a motion; isn't that true?

Mr. Holtzoff. Yes.

Mr. Medalie. Mr. Longsdorf has made a good suggestion. The language would read:

"A person whose property has been seized under color of a searchwarrant, or a person whose property has been seized without authority of a search warrant, may move for the return of the property, and, if he be a defendant, for

the suppression of the evidence."

Mr. Youngquist. What about a defendant to whom the property does not belong? Can he move to suppress?

Mr. Holtzoff. No, because his rights have not been invaded.

Mr. Medalie. This says "a person whose property has been seized," and the only one who can move for the suppression of evidence is a defendant if it is his property.

Mr. Holtzoff. I think I would like an opportunity to recast this rule, in the light of the observations that have been made in the last few minutes.

Mr. Longsdorf. I move that the consideration of this section be reserved for redrafting by the reporter, with the assistance of Mr. Holtzoff.

The Chairman. You have heard the motion --

Mr. Medalie. And that I be consulted.

Mr. Holtzoff. We will be glad to have you.

Mr. Longsdorf. Yes; add that to the motion.

The Chairman. All those in favor of that motion say "aye."  
Opposed, "no." It seems to be unanimously carried.

Mr. Dean. I would like to make one suggestion in connection with that recasting. Whereas one of the grounds you specify is that the warrant is insufficient on its face, does that cover the situation where the officer who makes the seizure is exceeding the authority granted by the search warrant? I do not think it covers that situation.

Mr. Holtzoff. Well, line 12 covers the contingency that you have in mind: "on the ground that such warrant was served illegally."

Wouldn't that language cover that contingency?

Mr. Medalie. Let us stop debating this one. We are going to do it over.

The Chairman. Rule 107.

Mr. Holtzoff. That relates to criminal contempts and it codifies, in a condensed form, what I understand to be the present practice as embodied in the existing statute.

Mr. Medalie. I think you make one error.

Mr. Holtzoff. What is the error?

Mr. Medalie. There are two kinds of contempt: One that can be purged and one that cannot be purged. In other words, if you call the court a name, you are guilty of contempt that cannot be purged. In the other case the court issues an order requiring the person charged to show cause why he should not be punished for contempt, and you either conform to the original order of the court, which purges you of the contempt, or you are punished for contempt for not doing so.

Mr. Holtzoff. I used the language of the existing statute on the subject.

Mr. Medalie. If the existing statute has lame language, we are supposed to fix it up.

11 Mr. Holtzoff. I agree with that. I am always open to improvement.

Mr. Medalie. When it gets down to lines 18 and 19, "The alleged contempt is not sufficiently purged."

Mr. Holtzoff. I must say that there I copied exactly the language of the existing statute. I agree with you that the language might be clarified a little bit. I will be glad to do it.

Mr. Medalie. If you clarify that, I can go to sleep.

Mr. Holtzoff. Then, I move, subject to that clarification, that Rule 107 be adopted.

Mr. Youngquist. Just a moment. Can a corporation be guilty of contempt?

Mr. Holtzoff. I believe so.

Mr. Longsdorf. It can be guilty of disobedient contempt.

Mr. McLellan. The corporation itself may be guilty.

The Chairman. A corporation may be guilty and punished by fine.

Mr. Holtzoff. That is the present statute.

Mr. Longsdorf. May I ask a question for information? I do not know. Is it possible, in the case of disobedient contempts, for a court in any way to combine a civil enforcing contempt proceeding with a criminal punitive contempt proceeding?

The Chairman. It cannot be done at common law.

Mr. Longsdorf. I know it cannot be done at common law.

Mr. Holtzoff. Ordinarily coercive measures are used for civil contempts.

Mr. Medalie. Also in criminal contempts. If you will allow me, I will give you an example of it. At the end of 1932 I was attempting to prosecute for violation of our Federal laws with respect to elections. I attempted to get the basic information. That is, I subpoenaed the chairman of the New York City Board of Elections to produce certain election books.

I happened, incidentally, to be a very good friend of that person, but he was advised by the powers that be that we had no authority to do so. He was brought before the grand jury

and declined to produce the books.

Thereupon I moved, before Judge Cox, to punish him for contempt. Judge Cox was satisfied that there was a contempt -- that is, disobedience -- and he sentenced him to sixty days in jail, as he put it, correctly, coercive but not punitive.

Mr. Justice Stone refused to give a stay.

One night after that I met him and he said to me, "I thought you were a friend of mine, but Judge Cox told me this about you. I asked him why did he give me sixty days. He said, 'I don't know. George Medalie told me that that was the thing to do.'"

Mr. Wechsler. Mr. Chairman, on this issue, I think that before voting on this section we ought to consider the rule of the McFann case in the Second Circuit. I do not remember the citation of that case, but it is an attempt by the Second Circuit to address itself to one of the realities of criminal contempt proceedings: Namely, the difficulty that often arises in determining whether a contempt proceeding is criminal or civil; and, secondly, the question as to the degree of supervision that should be exercised by the court over the institution of criminal contempt proceedings.

The substance of the second circuit ruling is that where the proceeding is intended to be criminal in purpose the proceeding shall be instituted not by the filing of an affidavit of some credible person, as is here provided, but by information filed by the United States Attorney or by some person specially designated by the court to prosecute.

I think there is a great deal to be said for that procedure.

Mr. Holtzoff.. But the statute is otherwise. The statute

is the same as this rule.

Mr. Wechsler. The statute, as I recollect it -- and I speak with diffidence -- does not distinguish at this phase between civil and criminal contempt.

Mr. Holtzoff. No, but this particular statute relates only to criminal contempt -- that is, the criminal contempt statute which permits proceedings to be instituted by a private party as well as by the United States Attorney.

Mr. Wechsler. Well, I am not impressed by the fact that the statute may so provide, even if it does, because I still think we have the power to change it and might well consider changing it.

Mr. Holtzoff. Oh, no doubt.

Mr. Wechsler. At any rate, I should not want to vote to approve this without considering that.

Mr. Medalie. By the way, there is another thing that I think we ought to consider. One of the most important cases on criminal contempt is the case of a person who gave evasive answers before a grand jury and was punished for contempt.

Mr. Robinson. The Finkle case.

Mr. Medalie. No; another one that happened in my time. I cannot think of the name.

There the court proceeded on an informal oral presentment in open court before the grand jury. Afterwards, of course, the defendant had an opportunity to be heard and present witnesses; but here, instead of being able to proceed and dispose of it summarily, it would have been necessary for me, under this rule, to have filed an information.

Mr. Holtzoff. I think so.

Mr. Medalie. Of course, that would have taken another day and the preparation of a great amount of material. What we did was that the grand jury came to the courtroom, with the United States and the witness, and then a statement was made by the United States Attorney in behalf of the grand jury: "The grand jury wishes to present Mr. So-and-So for contempt for giving evasive answers as follows," and then I called the stenographer of the grand jury to read the testimony.

If I had to draw it according to this, I would have lost a day or two or three.

Mr. Holtzoff. That is covered by paragraph (a) of this rule.

Mr. Medalie. It would not appear clearly that that was a contempt committed in the presence of the court, although I believe it was.

Mr. Holtzoff. The grand jury is part of the court.

Mr. Longsdorf. The judge does not know it of his own knowledge.

Mr. Wechsler. Section 387 of Title 28, to which Mr. Holtzoff referred, applies only in a single type of contempt. It is one of the sections of the Clayton Act, and it applies only in the case referred to in section 386:

"Namely, the case where there is willful disobedience of an order or process where the thing so done is of such a character as to constitute also criminal offense."

So that it does not apply throughout the whole scope of criminal contempt under present law and, as a matter of fact, applies to a relatively rare case in the field of criminal

contempt.

I appreciate the force of the position that the same procedure may properly apply in other cases as well, but that involves, it seems to me, weighing of the position taken by Judge Hand in the case in the Second Circuit to which I referred.

I myself see great merit in the position taken by the Second Circuit. I do not think we ought to reject it without considering it.

Mr. Waite. What is your proposed change?

Mr. Wechsler. The substance of the Second Circuit is that when you are dealing with true contempt the procedure is either by information filed by the United States Attorney or by affidavit filed by some person specially designated by the court for the purpose.

Mr. Waite. It would change this phrase: "by the filing of an affidavit of some credible person."

Mr. Wechsler. Precisely.

Mr. Dean. What is the case?

Mr. Wechsler. I know it is the McCann case. I do not know whether it is United States or some other party, but I can easily give you the citation.

Mr. Holtzoff. I can say this: that in the Department for years we have been declining applications on the part of persons injured by criminal contempts to institute prosecutions on the ground that they can go ahead and institute their own prosecutions under this statute.

Mr. Longsdorf. Mr. Chairman, there is another question I would like to ask, of which I am also ignorant. When a

general contempt proceeding is instituted upon information for a contempt which was done in the presence of the judge and of which he knows, but which he was disinclined to pursue in a summary way, what can he do then? Can he proceed on that information to try the question summarily on his own knowledge or must he call in witnesses to tell him what he already knows?

Mr. Holtzoff. If he proceeds by information, he has got to give a regular trial.

Mr. Longsdorf. I think so, and I was reminded of that question by reading the Toledo newspaper case, where he seems to have done just exactly the other thing. It would have been sufficient ground for reversal, but it was not the one.

The Chairman. Where do we stand on this rule?

Mr. Wechsler. My motion was that it be held for further consideration, rather than adopted.

Mr. Longsdorf. I second the motion.

The Chairman. It has been moved and seconded.

All those in favor say "aye." Opposed, "no." The motion passes.

Now, what does that mean? That somebody is going to submit ideas? Are the reporters to do something with it?

Mr. Dean. I would like to make two suggestions: One, that the McCann case be looked at; and the other, that Mr. Seasongood be consulted, because he is particularly interested in that subject, and he had to run out before we reached it.

The Chairman. Very good.

Mr. Medalie. Considering subdivision (a), may I make a suggestion, as a tentative thing, that we amend that to read: "In the presence of the court or the grand jury"?

The Chairman. Yes.

Mr. Medalie. I move that after the words "the court" in line 5 there be inserted " or of the grand jury."

The Chairman. It has been moved and seconded.

All those in favor say "Aye." Opposed, "no." The motion is carried.

Mr. Youngquist. It says "while the court is in session."

Mr. Holtzoff. Yes. You ought to say, "while the court or the grand jury are in session."

Mr. Youngquist. "while in session."

20 Mr. Holtzoff. Sometimes the grand jury is in session and the court is not.

The Chairman. Rule 108.

Mr. Holtzoff. This rule relates to habeas corpus.

Although I drafted it, I have this misgiving about it. The subject of habeas corpus, although it hinges on criminal proceeding from a practical standpoint, is really within the jurisdiction of the Civil Rules Committee, because a habeas corpus proceeding is a civil proceeding and the Civil Rules do refer to habeas corpus. All of them say that, except for purposes of appeal, the old procedure shall continue, while appeals shall be governed by the rules governing appeals in civil cases.

So in the comment that I attach to this draft of the rule, I suggest that if we want to deal with the subject at all, we ought to make our recommendation to the Civil Rules Committee.

Mr. McLellan. I do not think it is our job.

Mr. Holtzoff. I do not think it is our job, either. I drafted it because this was one of the topics that was to be covered.

Mr. Longsdorf. May I correct you, or try to do so?

"In the following proceedings appeals are governed by these rules but are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States."

Perhaps not all of the procedure in habeas corpus is set forth in the statutes of the United States -- in fact, it is not all set forth there.

Mr. Holtzoff. Then, the Civil Rules simply, in effect, merely continue the preexisting procedure, whatever that procedure was.

Mr. Longsdorf. I think the habeas corpus rules at the present time consist of the habeas corpus statutes and the civil appeal rules and any part of the civil procedure rules which apply and are not contained in the habeas corpus statute, the way I read it.

Mr. Holtzoff. And also such rules of the common law relating to habeas corpus on points which cover the statutes.

Mr. Longsdorf. For that reason I think we can adopt habeas corpus rules without undertaking to amend the rules of civil procedure. I do not think we ought to try to do it.

Mr. Holtzoff. I agree with that.

I move that we dispense with Rule 108 or any other rule on the subject of habeas corpus.

Mr. Longsdorf. I second the motion.

Mr. Dession. I would like to suggest this. It may well be that we need no change in the existing civil rule, but I think we should consider whether the present procedure on habeas corpus is satisfactory in all the respects in which that

procedure is used in connection with criminal proceedings. If we conclude that it is, no change is needed. If we conclude that it is not, then I think we should consider what, if anything, we should do on that.

My suggestion is to take care of criminal procedure. Habeas corpus is used mostly -- not entirely, but mostly -- in connection with criminal procedure, and the fact that it is not a criminal proceeding in theory is historically and theoretically true, but it is not functionally true.

Mr. Holtzoff. It is also used to a very large extent in deportation proceedings.

Mr. Dession. Nevertheless, it is used more in connection with criminal cases.

The Chairman. In view of the fact that the Supreme Court has, just in the last week or two, referred the Civil Rules to the Civil Rules Committee, why wouldn't it be a proper thing to refer this matter to them?

Mr. Dession. We can, except that we cannot expect them to worry about criminal procedure.

The Chairman. They said the problem arose, and we felt it was on their side of the house.

Mr. Wechsler. May it not be relevant to know why the Civil Rules Committee did nothing about the habeas corpus rule? I asked one of the members about it. They felt that the whole habeas corpus procedure was a pretty sanctum sanctorum affair and that it would be needless to touch it without a need for it which did not exist.

So I do not think we would be referring to them a subject which they overlooked, but, rather, a subject on which they had

a firm view. Therefore, I do not think we ought to refer it to them unless we had a concrete suggestion to make, and I know of no concrete suggestion, at least that is embodied here.

Mr. Glueck. Mr. Chairman, I think Mr. Dession's point is well taken, and I was wondering whether it would be proper to have a little survey made as to the actual operation of habeas corpus so far as impinges on criminal proceedings in the Federal courts. Is that feasible?

Mr. Dean. Couldn't Mr. Gottschall get you up that material in the Department of Justice?

The Chairman. Could we not get a memorandum from somebody?

Mr. Holtzoff. Oh, yes. I can have somebody in the Criminal Division get it.

Mr. Dean. There are people who work on it every single day, like Mr. Gottschall.

Mr. Glueck. I think we ought to have a memorandum on these headaches that you talk about.

The Chairman. The motion is that we request aid through Mr. Holtzoff and the Department of Justice on that.

All those in favor of the motion say "aye." Opposed, "no."  
The motion is carried.

Now, may we go back to Rule 81, which we held until Mr. Glueck arrived.

Mr. Glueck. This rule is drafted at the suggestion of the chairman as the result of some correspondence --

2-2 The Chairman. May I ask which is your rule? The one on page 2 or the one on page 3?

Mr. Glueck. Page 3, and also a little farther down, on page 8.

The Chairman. It commences on page 3.

Mr. Glueck. Yes. It deals with presentence investigation to be made by probation officers.

The Chairman. This is Rule 81, page 3.

Mr. Glueck. There is the question of the scope of this investigation and whether it should be applied to all offenders or only certain classes. There is the problem of the procedural stage at which it should be made. There is the question of whether it should be confidential or not, and several related problems.

We are dealing here essentially with the manner in which, to my mind, theory and policy point on the whole in one direction, but certain practical considerations may point in another.

As you will observe on page 3, the way it is drafted is, first of all, that the investigation should be made after a period of continuance and after conviction. Now, it has been recommended by Mr. Chappell, who was in charge of probation in the Office of Administrative Reports, that that investigation should be made at an earlier stage, because of the fact that several agencies had large territories, and probation officers cannot get this investigating done in time.

My objection to that is, of course, that the accused is presumed to be innocent until proven guilty, and I do not think it is proper for probation officers to investigate his home and his employment, and so on, because he may ultimately be acquitted. I understand that many defendants do not seem to object to that.

Then there is the question of the scope of this investigation. Theoretically, of course, the investigation should cover everything that may perform a twofold purpose: First of

all, aid the judge in imposing sentence; and, secondly, serve as a sort of plan of supervision and correction in the case of those men who are put on probation.

You will observe that I have expanded its possible use also to the case of men who are sentenced as a result of the court's considering his investigation reports. I do not think there ought to be a duplication of these investigations, once by the probation officer and the court and then again by the investigators attached to the various penal institutions.

Now, one of the practical difficulties involved is that a thoroughgoing investigation takes time, and certainly in some regions if the convict cannot be released on bail pending the completion of this investigation, he has to languish in very bad jails that we all know. That is one of the difficulties we must face if we accept this provision for a continuance for a reasonable period in order to make this investigation.

You will observe also that I provide for the investigation of the prior criminal record in all cases and in such cases as the court or judge shall designate. I provide for a thoroughgoing social case history going into the make-up and background of the offender.

That is done because at present, as you all know, there are not enough probation officers, but it is hoped that ultimately there will be enough so that at least the first time a man is up for sentence in any court a thoroughgoing investigation into the kind of man he is and what makes him tick and why he committed the offense and the possibilities of his reformation and the like may be obtained.

In order to compensate a person for the time it will take

to make this investigation, I provide that the time shall be deducted from the ultimate sentence, that a week or two weeks or even three weeks cannot make much difference in the long run so far as the correctional and penal treatment is concerned, and is a sort of reward that I believe the accused is entitled to.

Mr. McLellan. Is that whether he is under bail or subject to confinement?

Mr. Glueck. No; only where he is detained.

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Mr. Glueck (continuing). Now, there was another problem which was raised in this exchange of correspondence in reference to the confidential nature or otherwise of the investigation report. There are many reasons why it ought to be confidential. I think if you read this correspondence you will see some outstanding abuses, as where one judge is accustomed to read this confidential report to the court room before imposing sentence.

On the other hand, I think it ought to be permitted to make this report available to the defendant, certainly where his counsel asks for it. That does not occur very frequently in real life, but it seems to me to be a right that we ought to provide for. So that, roughly, is the rule as drafted.

Now it seems to me that our job is to determine on these matters of policy in the light of the practical limitations set forth in this exchange of correspondence.

Mr. Holtzoff. I would like to suggest, about line 5, in the light of your remarks and in the light of what I believe to be the situation in many courts, where it is wise to have the mandatory "shall" instead of "may". I am visualizing the court in a small rural district where court sits for a week or two. Now, if he is required to continue the case for an investigation, the case goes over the term, and the judge may not be back there for three or six months.

Now, suppose the defendant is in custody all this time, he has not given bail, he has to be continued in custody. Suppose eventually he is placed on probation. In the meantime he will have served an additional three or six months' time in jail. Now, I think all that matter ought to be left to the good sense and the discretion of the judge; and I therefore suggest--or,

I want to ask you how you would feel about changing the word "shall" to "may"?

Mr. Glueck. Well, if the practical difficulty is as you say, I suppose we should do that.

Mr. Holtzoff. I feel sure it is. I think the difficulty might be helped if, in the discretion of the judge, we permitted investigations to commence immediately after the prosecution has started, but I think the whole thing can be cured by using the word "may", and you will leave the whole subject in the discretion of the judge. I am in complete sympathy with pre-sentence investigations, but I do not want them to become a hardship for the defendant.

The Chairman. Isn't that open to this objection? You might have probation facilities that are fairly adequate in the district, and one judge may avail himself of them and another judge may totally neglect them.

Mr. Holtzoff. That is exactly what has happened.

The Chairman. And shouldn't it be provided that wherever the facilities of the probation officer will permit, the judge "shall"? Then you avoid getting Judge A, relying on the probation reports, and Judge B, absolutely ignoring them.

Mr. Holtzoff. Yes, but the change covers more ground than that. This is a provision that the judge shall order the continuance of the case for a reasonable period for the purpose of an investigation.

Mr. Glueck. But that also says that the investigation in some cases need consist of only the check-up on the prior criminal record.

Mr. Holtzoff. Yes.

Mr. Glueck. Wouldn't that be covered in those regions where this time element would come in?

Mr. Holtzoff. Well but the point is, suppose there is a 1-week session; this particular case is tried on the last day of the week. You wouldn't want to have the case passed for three or six months until the court sits again in that division?

Mr. Dession. I am not sure that would be necessary. We have provided in cases like this, here, that either you have got a conviction or plea of guilty or nolo, but that the sentencing may be done anywhere in the district. In another connection we provided that, in order to cut down this delay. Now, wouldn't that mean, then, that as soon as your probation investigation was over your man could be taken to whatever court was in session in that district at the time, whatever division it might be, for sentence, there?

Mr. Holtzoff. That can only be done with his consent. Of course in some districts there are no statutory divisions. There may be a half a dozen places of holding court, without separate divisions. I think that is true of the district of Massachusetts.

Mr. Dession. That is right.

Mr. Holtzoff. So that any action of the court can be performed in any place in which court is held; but in a great many districts there are statutory divisions.

Mr. Dession. That is true.

Mr. Holtzoff. And without the defendant's consent everything in that proceeding has to be done in the division in which it was done.

Mr. Dession. Well, that is true, but if he doesn't consent,

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then I would not worry about him too much in this connection. I think he will, most of the time.

Mr. Holtzoff. I do not like to put it up to the defendant, who is not represented by counsel, to do any consenting.

Mr. Dession. If it is explained to him that the difference between consenting and not consenting is spending the next four months in the county jail, I think he will usually consent, unless he thinks he has some reason not to, and if he would rather play it that way, why worry?

Mr. Holtzoff. But another thing is this. Do we want to carry prisoners, say, 250 miles, from one division or point to another, as you would have it, in the Northern District of Texas to the Western District?

Mr. Dession. Yes, I want to, if it is his alternative of waiting for the court to come to town, for four months.

Mr. Holtzoff. Well, it is these problems that led me to the thought that there ought to be a lot of discretion left in the district court on this whole question.

Mr. Glueck. Well, that puzzled me, frankly, because in this kind of section you really come up against a basic difficulty in the federal system, where you have on the one hand crowded regions and cities, and on the other hand you have these vast territories and infrequent sessions.

Mr. Holtzoff. This is an ideal rule for a big metropolitan center.

Mr. Dession. Well, there is this difficulty, though, and that is, if you do not do it in this way, I think the probation investigation, which I am very much interested in, will be a dead letter on paper to the majority of courts--not all, but in

a majority. Now, I am not interested in dead letters. If we want this kind of investigation I think we ought to try to work it out so that it can be done. That is the only way I can see.

Mr. Holtzoff. I think it can be done perhaps if you authorize such investigations to be commenced at any stage of the proceeding. You see, the way the rule is now framed, the investigation cannot be commenced until the conviction. Now, I see no harm in having the probation officer conducting the investigation even before that time.

Now, I think the difficulty that I suggested--and I think it is a very serious one--could be very largely obviated if we omitted the prohibition against commencing an investigation prior to conviction.

Mr. Glueck. Well, I see lots of harm in that. I do not think it is a fair procedure, and besides, it is wasteful, because it entails the investigation of numerous cases that will later be acquitted.

Mr. Holtzoff. Well, there are only five percent acquittals or something like that--six or seven percent acquittals in the federal courts. I wouldn't worry about that in the least.

The Chairman. Isn't there a great deal that it would be harmful for the district attorney to know?

Mr. Holtzoff. Well, the attorney wouldn't know. That is for the probation officer, and the district attorney wouldn't have access to the probation officer's report.

The Chairman. He would not?

Mr. Holtzoff. No, not until conviction. He shouldn't.

Mr. Wechsler. The harm that I see in it is to the trying to build up confidence that should exist between the probation

investigator and the defendant before the defendant has been convicted. It seems to me it is destructive to sound probation work, because the defendant speaks, or thinks he speaks, at his peril; and more than that it is a procedure that is clearly susceptible of abuse.

Mr. Holtzoff. I am not convinced we should permit such investigation before conviction, but if we do not, we cannot make it mandatory to have such an investigation in every case, because the only sufferers from such a mandate would be the poor defendants who might be kept in jail for three or six months. I do not think it would always be practical to cart defendants from one division to another.

The Chairman. You could certainly make it mandatory in those divisions and districts where the judges do not move about, at that one place.

Mr. Holtzoff. Oh, there--yes, yes.

The Chairman. And if necessary you could have a rule that said that, couldn't you?

Mr. Holtzoff. Yes. That is why I said this is an ideal rule for a big metropolis.

Mr. Glueck. Is that the rule in different courts?

The Chairman. Yes. I do not see how you can escape it. I mean, the problems are so directly different.

Mr. Seth. In New Mexico, Mr. Chairman, we have lots of illegal entries--coming across the line from old Mexico. They are held in the jails in the southern part of the State, down close to the border, and about once a month the judge goes down there and they round them up, sometimes 20, sometimes 50. They all plead guilty. They go to Latuna, there, close to El Paso,

and the immigration officers put them across the line after they have served the sentence; and the next day they are probably back; but there is no use having this kind of investigation in that class of cases.

Mr. Holtzoff. No, there is not.

Mr. Seth. There must be a wide discretion given to the district judge.

Mr. Holtzoff. As a matter of fact, most of those Mexicans apply for sentence to that Latuna farm, because Latuna Farm affords them a type of life that is much better than that they have been used to.

Mr. Seth. They used to call it the "Bootlegger's Country Club" at Latuna.

Mr. Holtzoff. I was told that a consul at El Paso visited Latuna and said to the immigration authorities, "Well, how do you ever hope to suppress illegal entries so long as you are running such a fine jail?"

Mr. Seth. They have a radio in every cell.

The Chairman. A radio in every cell?

Mr. Seth. A radio in every cell. Quite a place!

Mr. Wechsler. How much would it help if this were limited to felony cases?

Mr. Glueck. I thought of that and decided that is the way to word it, as I did in lines 9-10--

"in such cases as the court or judge shall designate" meaning by that, either as a matter of general policy or certain individual cases.

The Chairman. Might it not be the misdemeanor cases where most good could be done by probation?

Mr. Seth. Yes.

Mr. Glueck. That is what I had in mind, as against that simple division. Of course, that might be a beginning; you might arbitrarily draw the line between a felony and a misdemeanor.

Mr. Wechsler. I can't think it would be much good in misdemeanor cases, Mr. Chairman, because the punishment alternatives are not large enough to permit of much more than a rough judgment.

The Chairman. Up to a year in the Hudson county jail,-- That is in Jersey City, just to identify it,--would be worse for a man than some long terms in federal prisons. I am concerned about that, because they learn more bad things over there than they probably would in a federal prison.

Mr. Waite. You are right about a great many local prisons being worse than federal jails.

Mr. Wechsler. I am not against probation in misdemeanor cases. I just wonder about the necessity for an extensive investigation, because it seems to me it is used to so great an extent in such cases simply on the ground of the triviality of the offence--and rightly so, I think.

Mr. Glueck. I think Mr. Means had a record of felonies behind him, too.

Mr. Holtzoff. I would like to ask you a question as to why you include an investigation of the prior criminal record by the probation officer? What actually happens is that the district attorney has the F.B.I. record of prior convictions. That is a simple matter. You do not have to refer that subject to the probation officer.

Mr. Glueck. But in practice it is put into the probation report.

Mr. Holtzoff. Well, the probation officer gets it from the F.B.I. You do not have to have an investigation.

Mr. Glueck. It is much harder in states. I did not realize that.

Mr. Holtzoff. The United States attorney always has the F.B.I. record in a case in which he is going to trial.

Mr. Medalie. Does the F.B.I. have the state records?

Mr. Holtzoff. Oh, yes; the F.B.I. has everything.

Mr. Medalie. I know our probation officer himself makes an investigation as to state offences.

Mr. Holtzoff. The F.B.I. record covers all arrests where<sup>as</sup> fingerprints are taken, irrespective of whether they are federal or state.

Mr. Dession. The F.B.I. record does not always include juvenile institutions. Sometimes when they hear about it, it is there, and sometimes when they don't, it is not.

Mr. Holtzoff. It doesn't include any institution that does not take fingerprints. It is a fingerprinting institution.

Mr. Dession. That is right. So the probation officer sometimes gets these from the defendant himself.

Mr. Waite. I wonder, Mr. Holtzoff, if you can get this-- that is, if the officer, even in districts where the court is sitting more or less continuously, where the court can take care of it--do they have a probation service sufficient to make an investigation in every case?

Mr. Holtzoff. They haven't. I do not know of any district where they have enough probation officers to make it possible to

investigate them in every case.

Mr. Waite. That is a matter that should be of importance to the district judge.

Mr. Holtzoff. Now, of course, that is their difficulty. They are trying to get more money every year to add to their staff, and I hope that before long they will reach that point, but my understanding is today that they have<sup>not</sup> got a force with which to carry on the pre-sentence investigation in every case, especially since the probation officer performs two other functions as well. He supervises defendants who have been placed on probation by the court, and he also supervises the prisoners released from federal institutions on parole.

Mr. Glueck. Yes, but their aim is to get more, and I think if we had this kind of rule they would be aided in getting more probation officers.

Mr. Holtzoff. I think it would, but yet you can't make it mandatory unless you are sure the facilities will be present.

Mr. Glueck. It is mandatory only in the cases that the court or judge designates as requiring this more intensive investigation.

The Chairman. Mr. Tolman says there are ten or twelve districts in which pre-sentence investigations are now made in every case.

Mr. Holtzoff. Are there that many?

Mr. Tolman. Yes.

The Chairman. I know in my district the probation officer says he is doing that, but it keeps his men working practically five or six nights a week, and they work all day and work all evening to get it done, but he has got to be that state of

enthusiasm about it, and it seems to me our rule ought to be predicated on the fact that such is going to be forthcoming. I do not think it ought to be built on the theory that the probation department is going to be undermanned.

Mr. Wechsler. Moreover, if Congress should approve the rule, they would probably provide the funds.

The Chairman. It certainly would lead to it.

Mr. Wechsler. It certainly is not an objection to the rule that the funds may not exist.

Mr. McLellan. In the districts where the judge does not sit in one place only, why shouldn't he go to the place when he is needed and where he is needed, after a probation report has been furnished, for the purpose of sentencing the defendant?

Mr. Holtzoff. I suppose he could, Judge, though taking a district like the Eastern and Western Districts of Kentucky, in each of those districts there are six or seven places of holding court, and by the time the Judge makes the rounds, the time has come for him to start making another round. In other words, it is pretty difficult for him. He does so much traveling, any way, to keep his statutory terms, that he might find it difficult to make additional trips in between times.

The Chairman. Or the single judge of the Eastern and Western District of South Carolina.

Mr. Holtzoff. Yes, that is another one.

Mr. McLellan. I am just asking. I do not know.

Mr. Holtzoff. In some districts he can do that.

Mr. Youngquist. There are consecutive terms in various divisions that keep the judges going from one to another, up in our State.

The Chairman. Of course, the cure for that, in the days of automobiles, will be when Congress gets around to the point of abolishing some of these terms and places where court is merely held because of some statesman's birthplace.

Mr. Holtzoff. The Judicial Conference has advocated the abolition of the statutory divisions.

Mr. Seth. That is what ought to be done. They ought to abolish divisions.

Mr. Holtzoff. Yes, then the judge would be free to go around his district without being required to hold statutory terms in specific divisions; but I am not particularly sanguine about that statute passing, because there is a jealousy on the part of local chambers of commerce, local bar associations, if you please, and so forth.

Mr. McLellan. Then under those circumstances you have got to distinguish between judges that sit in one place, and those that travel about, unless you are willing to say "may" instead of "shall".

The Chairman. I hate to see us go to the "may". I think where it is possible it should be the "shall".

Mr. Glueck. Do you think it is feasible to draft it according to that suggestion--that is, having two different procedures set out in the rule?

Mr. Holtzoff. I imagine it is.

Mr. Glueck. Is it?

The Chairman. Might it be possible to predicate it on some principle that in such districts in a circuit, "as the judicial council of the circuit shall designate"? so that you will have it left to the Council of Circuit Judges to decide

that there is enough manpower in the probation office in a certain district to do it, and in others, that it must be progressive.

Mr. Waite. That ought to be good.

Mr. Youngquist. Wouldn't you run into the danger of finding a Council that would not require it in any case?

The Chairman. I do not think so. I think the Senior Circuit Judges who preside at these conferences are in the main men who are intensely interested in this sort of thing.

Mr. McLellan. Well, why not leave that to the Reporter and Professor Glueck to work out something on that?

The Chairman. May we do that? I really think we cannot decide it tonight.

Mr. Medalie. Before you do that, I want to make a suggestion of law on 81. It is really not of very much importance.

The Chairman. Yes.

Mr. Medalie. Rule 81, line 5, "sentence shall be imposed without delay." That doesn't mean anything. That might mean he should impose it the same day.

The Chairman. You are reading where?

Mr. Glueck. What line are you talking about?

Mr. Medalie. Rule 81.

The Chairman. Now, turn to page 3. We are dealing with the alternative rule.

Mr. Medalie. Have you disposed of that?

The Chairman. No.

Mr. Holtzoff. Right there I might say the present 81 is the Criminal Appeals Rule, but if the alternative rule is adopted, that would supersede 81, I think.

Mr. Medalie. Would it? Only in part.

The Chairman. We will hold it in abeyance.

Mr. Medalie. Hold the old 81 in abeyance, and the alternate rule?

The Chairman. Now, are there other parts of your alternate rule which you want to comment on, Mr. Glueck, or have you covered it?

Mr. Glueck. I was wondering about this matter, from line 22 down. Some people have objected, beginning with line 26, on the ground, as some probation officers claim, it would create a lot of difficulty for them. Once it got around that the defendant could see this report, it might get them into all sorts of trouble, because they might have recommended certain things to the judge or made certain statements about the prisoner's wife, and all that sort of thing.

Mr. Youngquist. What is the purpose of permitting the accused to see the report?

Mr. Glueck. I thought it was part of fair play.

Mr. McLellan. I do, too.

Mr. Holtzoff. I think it is fundamental in due process that a person should not be sentenced on information that he does not know exists.

Mr. Medalie. "Due process" does not apply here.

Mr. Glueck. Not due process, but it is fair play.

Mr. McLellan. I do not think it is fair that one side should know something that the other side does not know.

Mr. Glueck. Do you think, Judge, in practice, it would get around to the point where every lawyer and every defendant would say, "Let me see that report"?

Mr. McLellan. No; and in practice, Professor Glueck, so far as my own personal observation goes, if in our district counsel for the defendant wants to look at the probation report, he does that, and he will talk on matters, in sentence, about the contents of the probation report, and the judge has it right there, and so far as one of them is concerned he reads it before he sentences, and he also listens to what both sides have to say about it; but there are places where the probation report is not seen by counsel for the defendant, and he should have the privilege of seeing it, I think.

Mr. Glueck. Now, let me ask you this--would it be just as well, in order to meet the objection of these probation officers, to limit this to counsel? That is, the defendant would be protected through his counsel, and it might avoid individual defendants insisting on seeing these reports.

Mr. McLellan. I think that might be all right. I think that might be all right.

Mr. Longsdorf. Doctor Glueck, is there any possibility of withholding the names of informants and giving out only the information?

Mr. Holtzoff. That can be done in the framing of the report. The probation officer can withhold the names of informers from it.

Mr. Glueck. That would cause a complication. The way the case histories are written up, they are supposed to give the names of the informants.

Mr. Longsdorf. I know there are other statements.

Mr. Glueck. And to make statements as to their reliability, too.

Mr. Longsdorf. Yes.

Mr. Glueck. And your suggestion would make necessary a digest of that--one more step, if that is to be done.

Mr. McLellan. There is not much trouble over the lawyers seeing it.

Mr. Dession. I am afraid if you did allow the defendants to see it in all cases, it is somewhat like the problems you have in trying to serve papers on some persons. It includes part of the document. He reads, here, he is "crazy", or something.

Mr. Medalie. May I make a practical suggestion? In rule 81, page 8, you refer to the defendant as a "convict".

Mr. Glueck. That is the other 81.

Mr. Medalie. That is your 81, page 8, rule (3).

Mr. Glueck. Page 8. What was your comment, there?

Mr. Medalie. (reading)

"It shall not be lawful to sentence a convict."

The Chairman. "A defendant."

Mr. Medalie. It should be "a defendant".

Mr. Glueck. It is all right with me, but by that time, he is convicted.

Mr. Medalie. We never call him a "convict". We are all agreed to let it go?

Mr. Holtzoff. We don't even call him a "convict", though he is in prison.

Mr. McLellan. There is something the matter with rule (3) in my judgment. I think it is controversial, but I do not know how you can pass it up and leave it just to the Reporter. I have had cases--maybe it is by reason of my misconduct that this

rule exists--where I thought it was not right to let a man go entirely free from a jail sentence, that the interests of justice would be served if he got just a taste of imprisonment, and that would not be enough for him, because he ought to be watched for a considerable period of time; so I have sentenced him to say three months on the first count, and on the second count, provided for a year's probation, or two years' probation, and I think there are certain kinds of cases, cases where the men are young, that that is a very desirable power; and when you are considering such a rule as that you have to bear in mind, don't you, that where there are two counts on which the defendant is convicted, you can sentence him on each count and make the sentences consecutive?

There is something about that. There must be some abuse that you had in mind, Doctor.

Mr. Glueck. Well, you see the letter right above that, Judge? Mr. Tolman brings out the evil. He says that transforms probation into a sort of policing rather than a rehabilitative measure. What you have in mind, in other words, while desirable, ought to be done as part of parole rather than probation.

Mr. Holtzoff. But the parole law only comes into operation if the sentence is for longer than a year.

Mr. Glueck. That may well be, but I am merely saying it ought to be done.

Mr. Medalie. You have any number of sentences on that theory. There are many cases where a man gets two years or even five years on the first count, or a number of counts, that run concurrently, and then the judge reserves another count and gives him five years more, suspended after the service of the sentence

on the first count.

Mr. McLellan. Well, I think it is desirable; he ought to have that power. It does not need to be exercised always.

Mr. Medalie. There is a tendency for the cases to be uniform in my district, and I suspect, in most other districts.

The Chairman. Mr. Tolman suggests to me that Mr. Chandler, when he read this rule, doubted whether rule 3, paragraph (4), was within the rule-making power.

Mr. Medalie. You mean it fixes sentences?

The Chairman. Yes.

Mr. Glueck. I think that, too. It was merely one of the topics referred.

The Chairman. Well, will the Reporter consider the whole rule, and keep what Mr. McLellan and Mr. Chandler have said in mind?

Mr. McLellan. I did not want to delay you by it.

The Chairman. I think that is important.

Mr. Glueck. What about rule 2 on page 7?

Mr. Holtzoff. I want to say a word about rule 2. It provides that it shall be the duty of the court to give careful consideration to the probation officer's report. I do not think we ought to make such a statement. You might as well provide or have a rule that it shall be the duty of the court to give his careful consideration to the evidence in the case.

Mr. McLellan. And yet there is need for that.

Mr. Holtzoff. You think it is?

Mr. Glueck. Why, certainly it is needed, yes.

Mr. McLellan. I do not want to be preaching about judges, but I am afraid some of them don't pay much attention to it.

Mr. Glueck. I think there is a difference. They are accustomed to giving careful consideration to evidence that is offered, but they are not accustomed to giving careful consideration to matters of this kind. That is about all you can say.

Mr. Holtzoff. I know they need something of the sort. I am wondering whether it would be wise to put it into the rules. I am through with my judging.

The Chairman. But you can't forget that you were on the bench?

Mr. Wechsler. Mr. Chairman, do I understand that the action was, to refer this whole matter back?

The Chairman. To the Reporter and Mr. Glueck.

We have left, the six rules dealing with appellate matters. That commences with rule 90? I wonder if we may take just a few minutes to glance through them and get some word as to wherein they differ from the previous rules.

Mr. McLellan. May I raise a question of personal privilege? I should like to have it understood that I was speaking in a very general way only when I referred to judges sometimes not paying very much attention to probation reports.

Mr. Glueck. I'll say they don't--and you can leave that in the record.

Mr. Holtzoff. Rule 90 is the same as the corresponding civil rule on this subject. It relates to direct appeals from the district courts to the Supreme Court. The only direct appeal that I know of under existing law in criminal cases is the appeal by the Government from a decision on a demurrer or similar ruling on a question of law, where there is a constitutional question involved or a statutory-construction question

involved.

Mr. Wechsler. How about where there is a judgment sustaining a special plea in bar, does that language apply?

Mr. Holtzoff. Well, it is the same.

Mr. Wechsler. We have abolished special pleas in bar.

Mr. Holtzoff. There is a direct appeal in those cases also if there is a constitutional question involved.

Mr. Medalie. We can't provide as to when a person has a right of appeal.

Mr. Holtzoff. No, but I am just explaining in answer to Mr. Wechsler's question.

Mr. Medalie. Well, I move it be approved.

Mr. Longsdorf. Second the motion.

(The motion was duly AGREED TO.)

Mr. Holtzoff. Now, rule 91--

Mr. Robinson (interposing). I have a question, there, Alex. Pardon me. I am seeking to go back. But this assignment of errors, in the Southern District of New York, the judges there and others have protested vigorously against continuing the assignment of errors.

Mr. Holtzoff. That is for the Supreme Court.

Mr. Medalie. The Counsel have. I think you were present when they protested at the Circuit Session with the bar.

Mr. Holtzoff. This relates only to appeals to the Supreme Court, and the Supreme Court still requires it.

Mr. Robinson. The question was whether there would be the same point applicable here.

Mr. Holtzoff. I don't think so.

Mr. Medalie. It might be a good idea if we were in some

way to memorialize the Supreme Court, if it is responsible for the continuance of the requirement of filing assignments of errors in criminal cases, to have it do something to abolish it, because it is a fraud and a nuisance.

Mr. Holtzoff. We do not provide for assignment of errors in any other instance, except on direct appeals to the Supreme Court.

Mr. Medalie. You guarantee you are abolishing assignments, now?

Mr. Holtzoff. I beg pardon?

Mr. Medalie. You guarantee you are abolishing assignments of error in the appeals to the C.C.A.?

Mr. Holtzoff. Well, if these rules are adopted.

Mr. Medalie. Where do you abolish that?

The Chairman. Later on.

Mr. Medalie. You do?

The Chairman. Yes.

Mr. Medalie. Good! Good!

The Chairman. Why not here? Let us press Mr. Robinson's question a minute.

Mr. Holtzoff. The only thing is this. My understanding is, and Mr. Tolman will correct me if I am wrong, that the civil rules Committee hesitated to abolish assignments of errors, in respect to direct appeals to the Supreme Court, because they felt that touched the internal administration of the Supreme Court, and the rules of the Supreme Court provide for assignments of errors, and so they made no suggestion on that.

The Chairman. We suggested to the Court that there were certain anachronisms in the appellate procedure, and the Chief

Justice said, "Well, point them out to us. We don't see how they could exist." And I related three or four of them to him, and he said, "Why, they manifestly should be changed." So I take it that we are permitted to make suggestions.

Mr. Holtzoff. Well, if that is so, I would like opportunity then of revising rule 90 so as to abolish petitions for appeals as well as the assignment of errors, and permit such appeals to be taken by mere notice, as appeals are taken to the Circuit Courts of Appeals.

The Chairman. Why not?

Mr. Dession. I second that motion. I think it is a very good one.

(The motion was duly AGREED TO.)

Mr. Holtzoff. I am glad you raised the point.

Now, rule 91 relates to making up the record on appeal to the Circuit Court of Appeals, and it represents one of the two or three changes in the present Criminal Appeals Rules. The present Criminal Appeals Rules perpetuate the old-time bill of exceptions. The Civil Appeals Rules, which came about four years later, abolished bills of exceptions. Rule 91 abolishes bills of exceptions, and makes the procedure for that purpose the same in criminal appeals as it is in civil appeals.

Mr. Seth. Mr. Holtzoff, is this intended to be complete, or merely to change the Criminal Appeals Rules in some particulars? The reason I am asking that is, you do not specify in this any time for taking the appeal, do you?

Mr. Holtzoff. Oh, well, the time for taking the appeal is not a procedural matter.

Mr. Seth. It is specified in the Civil Appeals Rules.

Mr. Holtzoff. Oh, yes, your appeals--civil appeals, and all those questions.

Mr. Seth. You take rule 3 of the appeals rules.

Mr. Holtzoff. I am not suggesting any change on that score.

The Chairman. Then ought it not to be all incorporated here as one complete set?

Mr. Holtzoff. Perhaps so.

Mr. Youngquist. Mr. Chairman, I have been wondering for some time whether the Court wants incorporated into these rules of criminal procedure that we are preparing the suggestions for changes in the Criminal Appeals Rules, or whether they want that in a separate communication?

The Chairman. Well, I am not altogether clear on that, but I gathered from my talk with the Chief Justice that they wanted one complete report with a definite indication from us on where we were recommending changes in the appeals rules.

Mr. Holtzoff. Well, I am bothered by the fact that under the Criminal Appeals Act, the Supreme Court may make rules without referring them to Congress, whereas under the 1940 act, rules have to be referred to Congress.

The Chairman. I do not see anything to worry about in that. They are not going to lose their control over appeals rules by submitting the whole block to Congress; and, after all, they are not dealing at arm's length.

Mr. Holtzoff. I had the thought that maybe the two groups of rules should be in two separate documents and all that part of it which is covered by the 1940 act submitted to the Congress.

Mr. Wechsler. Why don't we wait until we get congressional sustaining?

The Chairman. Yes. The Court should inquire at least whether or not they are sensitive on that point; but I am afraid, practically speaking, that if the appellate rules were submitted, and these were held away from Congress, why, those Congressmen would go up in the air. They would say, "Well, we will pick these to pieces, boys, just to show you what we can do!" you know; but that is up to the Court.

Mr. Longsdorf. Mr. Chairman, that prompts a question that has been in my mind for some time. Should we--are we authorized to--submit these appeals rules as a part of the criminal procedure rules, or have they been referred to us merely for suggestions of changes or amendments to be made in the Criminal Appeals Rules, with the expectation that the Criminal Appeals Rules will stand as a separate code of rules? I do not know.

Mr. Robinson. It seems to me, Mr. Chairman, that our task simply is in the drafting of the rules to see to it that there is as distinct a line as possible, on the one side of which would be rules which we draft clearly under the power of our statute, and on the other side of that line, as clearly as possible, rules which are beyond the particular scope of our statute; and if we will do our drafting with that in mind, then I think we will have to let those other problems take care of themselves as we come to them.

Isn't that about as well as we can do?

The Chairman. In other words, do you want to make it so they can be submitted or be used as a complete system?

Mr. Longsdorf. Of course I understand these numbers are merely working numbers. For our present consideration and working out, and are not at all indicative of what the final numbers

will be.

Mr. Glueck. But if they are not meant to be a part of an entire system of criminal procedure, does your Chapter IX cover all the problems in the field?

Mr. Robinson. No, it does not. In other words, Chapter IX is obviously incomplete, and I agree with the recommendations that have been made here, and, Alex, I think no doubt agrees with the recommendations made here, that the appeals chapter should be drafted now in the light of whatever recommendations the Committee makes, and combined with the Criminal Appeals Rules, so that they will be harmonious.

Mr. Holtzoff. Yes, I agree to that.

Mr. Glueck. To be presented as a separate document entirely?

Mr. Robinson. When the time comes.

The Chairman. Suppose we leave that open to further instructions.

Mr. Holtzoff. In answer to Mr. Seth's question as to the time for appeals, that is taken care of by Criminal Appeals Rules, by one of the rules as to which I am not suggesting any change.

Mr. Seth. But you said this was intended to be complete, this is a set. That is what I was worried about.

Mr. Holtzoff. Perhaps I spoke too rapidly. This, plus the Criminal Appeals Rules.

Mr. Robinson. Adapting the two to each other.

Mr. Holtzoff. And they are to be dovetailed one with the other.

Now, rule 91 is the rule which does away with the bills of

exceptions and provides for a simple record in its place.

Mr. Dean. I do not think you allow enough time in rule 91. 40 days is the maximum that you can get.

Mr. Holtzoff. That is the time fixed in the civil rules, and there is no reason why in a big civil case--

Mr. Dean. It is not the time in criminal appeals as it stands now, though you can get any amount of time in some cases. If you have got a complicated record, you are going to need more than 40 days in order to take it to the Court of Appeals.

Mr. Medalie. It says:

"but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal."

Mr. Holtzoff. The Circuit Court of Appeals can grant him another extension.

Mr. Medalie. We had better preserve that specifically, because there is much confusion if you do not say it specifically.

Mr. Dean. There is much confusion now because there are certain of the Circuit Court of Appeals rules which specify the time, and whereas the criminal rules now give the judge the privilege of setting the time, within the first 30 days, in which to file a bill of exceptions, he would be inclined to set say 150 days, whereas the Criminal Court of Appeals has already fixed the time in its rules. We should take care of that.

Mr. Medalie. What would happen to your tobacco case?

Mr. Dean. Very much!

Mr. Medalie. I have seen the record, and it could not be

printed within that time. It would be physically impossible.

Mr. Dean. You could not do it.

Mr. Holtzoff. Is this problem different from the problem in civil cases?

Mr. Medalie. Where is the discretion vested in the court by this rule to give a time that is reasonable?

Mr. Seth. The present rule gives a discretion.

Mr. Medalie. I thought we were going to exclude that.

Mr. Seth. It ought to be.

Mr. Holtzoff. The district court may grant a 90-day extension, or an extension up to 90 days from the date of the notice of appeal, and I think there is another provision that the Circuit Court of Appeals can grant another one.

Mr. Medalie. Where is that?

Mr. Youngquist. The last line.

Mr. Medalie. The district court gives 90 days, and I am wondering what would happen in the tobacco case we were talking about, where it is physically impossible for them to print that record in that time. What is it--30 volumes, now, without exhibits?

Mr. Dean. More than that.

Mr. Holtzoff. The printing comes later. This is only the time for settling and filing.

Mr. Medalie. But they cannot do that.

Mr. Dession. It could not be done in that time, though.

Mr. Glueck. What do you propose, George? How would you allow that to be more elastic?

Mr. Seth. The present rules allow the district court to extend it indefinitely, within the first 30 days.

Mr. Dean. I think that is where it ought to be, because the district court, as no other court, knows what the case is about, and the size of the record.

Mr. Medalie. That is why it is a distinction without a difference. Mr. Longsdorf points out to me that the record shall be filed. That means you can file the transcript. That is right. So it also is a distinction without a difference, if you have only one copy of the record.

If you have only one copy of the record to file with the clerk of the appellate court, how are you going to get that stuff to the printer? Obviously you must have two records, so unless there are two copies of the minutes made through the trial, you would have to sit down and copy it again.

The Chairman. You take the court's record and send it to the printer, and keep your own record.

Mr. Medalie. The court has no record necessarily. Usually they do not.

Mr. Dean. Not unless it is given as a gift by the people who pay for it.

The Chairman. I thought that was something every district court had.

Mr. Medalie. No, that is not.

Mr. Youngquist. Wouldn't the Circuit Court of Appeals allow you to withdraw the record for that purpose?

Mr. Medalie. It might or might not. Why shouldn't he be required--

Mr. Dean. Some of the rules provide now that you can only withdraw a copy, and one must be left there.

Mr. Medalie. You see, if you have only one stenographic

record, and you file that in the appellate court, your job then in order to get this to the printer is first to copy the record that you are going to file in the appellate court. Well, the copying of that record is almost as big a job as having it printed.

Mr. Seth. Just about.

Mr. Dean. Yes.

The Chairman. Of course, the easiest thing to do, obviously, I would say, would be to get two copies.

Mr. Medalie. Yes, but suppose you didn't?

The Chairman. That would indicate that someone in the defendant's counsel's office ought to learn how the mechanics of the case should be run.

Mr. Medalie. I know, but suppose he didn't? Suppose he is limited in his disbursements, or he could only get disbursements for appeal after conviction, which is a normal situation any way?

The Chairman. I should think he could appeal and then get the record back from the C.C.A.

Mr. Medalie. I do not think that would be so easy.

Mr. Dean. I think there is one basic question underlying all these appellate sections, and that is whether we are purporting to adopt a procedure that is followed in the Fourth Circuit and the Court of Appeals of the District, and, I think, in the Third Circuit.

The Chairman. And the First.

Mr. Holtzoff. That is provided in the older rule. I have that here.

Mr. Dean. If it is, have we provided for review by the

Supreme Court in that set-up? because I think they have run into real difficulties where you only have one copy of your original transcript filed in the Circuit Court of Appeals. The Supreme Court has nothing to review, unless it takes the digest of the transcript which accompanies the brief.

The Chairman. Well, that is no problem. I have a case that is coming up next month, in which the record is 7,000 pages.

Mr. Dean. That is, if counsel on the other side stipulate that that shall be the record.

The Chairman. The original record has been filed with the Court, and there are being printed as appendices to the two briefs about 600 pages of testimony. Now, if the Court handles that 600 pages, it has got all that is pertinent. If they conceivably want to find anything in the 7,000 pages, it is there, but the issues which are being raised in the Supreme Court do not involve the other 6,500 pages approximately, and it is perfectly foolish to let the court be burdened with the physical weight of carrying that about.

Mr. Dean. I agree with you, and I think it is a very expeditious way of bringing a case up to an appellate court; but will the Supreme Court, as it is now constituted, or under its present rules, look at the transcript of testimony, or will it only look at such parts of the transcript as are set forth in the appendix to your brief?

The Chairman. We would stipulate that the entire original record filed with the clerk is the record in the case and may be referred to by the counsel in the argument if desired, and by the Court. Now, whether the Court will do it or not, I do not know.

This is a form of stipulation suggested to me by counsel for the T.V.A., and he says that is the way they have regularly done it in appeals coming up from the Fourth Circuit.

Mr. Dean. Now, you have a problem, don't you, assuming that the court will look at that as your record? Suppose counsel on the other side will not stipulate that that is the record? And I understand that that has arisen in several cases. What do you do then?

The Chairman. I was interested in another case that involved about 5,000 pages, where counsel would not do that, and they printed the whole record on an application for certiorari-- and it was denied. I don't know anything about it, but it struck me as the most foolish thing a man could ever do.

Mr. Dean. It was foolish, and that was probably one of the reasons it was denied!

Mr. Longsdorf. Mr. Vanderbilt, have you had experience with the opposing counsel making additional excerpts in the brief, on the contention that yours were not enough?

The Chairman. That is done now in the C.C.A.

Mr. Dean. That is done in the Fourth.

The Chairman. I mean, each side presents his own appendix to his brief.

Mr. Longsdorf. All he wants?

The Chairman. Yes. And in this case, we have also stipulated that if either of us has left out of our printed excerpts of the record in the appendix, we can add it in our briefs.

Mr. Longsdorf. We do that in California, and we do not use those stipulations.

The Chairman. We are stipulating out of an excess of

caution.

Mr. Longsdorf. Well, that is all right.

Mr. Youngquist. That is provided for by these rules.

The Chairman. Yes; and really, from the standpoint of the judges of the Circuit Courts of Appeals, they just "eat it up", because it strips the record of a lot of stuff which from their standpoint is just surplusage.

Mr. Longsdorf. For a long time in the Ninth Circuit we have been doing the same thing in a different way. The record is printed under the supervision of the clerk of the Circuit Court of Appeals, but only so much is printed as is designated by the parties to be printed. It is selected in about the same way, and a short record goes up, and it is all in one book, and there are ample printed copies left over to be sent up to the Supreme Court in case there is a petition for certiorari.

The Chairman. I did not know the Ninth did it. If they do, then you have practically half the Circuits doing it.

Mr. Longsdorf. Well, they don't--I say, we print the record there in a separate book, and that is filed as the printed record. The transcript is there, too, but not all of the transcript is printed, and the record is printed under the supervision of the clerk of the Circuit Court of Appeals and not under the supervision of the judge of the district court--the transcript.

Mr. Holtzoff. Mr. Chairman, may I revert to a question Mr. Medalie raised a few minutes ago, namely, an extension of time within which to file the record. True, the district court is given only up to 90 days, but the corresponding civil rule from which this is taken has been construed as not depriving

the Circuit Court of Appeals of the inherent power to grant a greater extension, only you have to apply for another extension to the Circuit Court of Appeals instead of to the district court.

Mr. Medalie. It does not appear in the rules, does it?

Mr. Holtzoff. No, but the Circuit Courts of Appeals have so construed the corresponding civil rules.

The Chairman. Is there any reason why it should not do so?

Mr. Holtzoff. I see no reason why it should.

Mr. Medalie. I think that should say so.

The Chairman. Do you so move?

Mr. Medalie. I so move.

(The motion was duly AGREED TO.)

Mr. Holtzoff. With that amendment, I move the adoption of rule 91.

Mr. Dean. I would like to amend it again, and that is to place no limitation on the district court. It seems to me the Circuit Court of Appeals has no basis for determining whether the extension should be granted. The district court is the court that knows how long a record is and the difficulties of getting it up for appeal purposes, and if you go into the Circuit Court of Appeals and make your representation, you can only at the most make certain superficial arguments about the length, and so forth.

Mr. Medalie. That is all they need to know, isn't it-- that, plus the exhibits, and the character? That is not difficult to establish.

Mr. Dean. How are you going to get relief from the C.C.A. though if the district judge, who knows all about it, turns you

down?

Mr. Medalie. You have limited his power. It isn't that he is turning you down.

Mr. Dean. That's what I mean.

Mr. Medalie. This rule gives him a limited power.

Mr. Dean. That's what I mean.

Mr. Medalie. In view of his limitation, it would be a question of getting relief only from the Circuit Court of Appeals, which is the only court now, sometimes.

Mr. Dean. If I were sitting on the Circuit Court of Appeals and they came up to me, and the district judge had turned them down, or at least had said, "Gentlemen, I can only give you so many days," I would have no way of knowing whether it should have been more, because I would not have as much knowledge as the man who had tried the case.

Mr. Medalie. Right you are--if the district court turns you down--but under rule 91, the district court can't give you more than 90 days even if he thinks you are entitled to nine months.

Mr. Dean. We make him turn them down, is what you are saying to me.

Mr. Medalie. That's right.

Mr. Wechsler. I second Mr. Dean's motion, anyhow, to give the district court power to grant the extension.

Mr. Dean. That's it.

Mr. Holtzoff. I don't like the idea of having a different practice in civil cases from that prevailing in criminal cases, on the same point.

The Chairman. Is the problem here any different from what

it is on the civil side?

Mr. Dession. Yes.

Mr. Wechsler. One thing, Mr. Chairman--appeals in criminal cases come very frequently in cases of a different sort than you get on the civil side. It may be a matter of simple convenience and necessity not to go further than the district judge in making the application in civil litigation where you have got to appeal; you have got a solid issue, and it is a lot easier to regularize the practice in terms of knowing the Circuit Court.

It seems to me it may still be burdensome in criminal cases to have to do that, the argument of symmetry making it prevail, because of the real issues that may be involved.

Mr. Dean. I would really like to see the present rule for criminal appeals retained; that is, which gives to the district court the opportunity to fix the time at which your bills of exceptions should be filed, and I think the same thing should apply here with reference to your notice of appeal and the filing of your appellate record.

Mr. Holtzoff. I would like to call attention to 8 (b), which gives general plenary power to extend the time, and it is under this provision that Circuit Courts of Appeals have been extending the time in civil cases for the filing of the record. The corresponding civil rule is 6 (b), I think.

The Chairman. Now, you have the motion by Mr. Dean, seconded by Mr. Wechsler.

(The motion was duly AGREED TO.)

Mr. Dean. Don't limit the district judge.

Mr. Holtzoff. I move we adopt rule 91, with the amendments

that have been approved.

Mr. Youngquist. What was the first amendment, now?

The Chairman. The first amendment was to give the C.C.A. power to extend, and the second one is an amendment to give the district court power to extend. The only man who doesn't have the right to grant the extensions is the defendant!

Mr. Medalie. If the district court turns you down, you ought to have a right to go to the Circuit Court of Appeals.

The Chairman. You have got it, under our motion.

Mr. Youngquist. They both apply.

The Chairman. All those in favor, say aye.

(The motion was duly AGREED TO.)

Mr. Medalie. Mr. Chairman, isn't it a fact that the balance of these rules with respect to an appeal, except the rule with respect to liability on a bond, deal with this Fourth Circuit practice?

Mr. Holtzoff. No. All of rule 92, to and including paragraph (k) is the same as the civil rule. Paragraph (L) is the Fourth Circuit practice on printing the record.

Mr. Seth. Well, you do away with the bills of exceptions in these rules?

Mr. Holtzoff. Yes, we did that in rule 91.

Mr. Youngquist. I was looking for it. I do not see it. I do not see the elimination of the bills of exceptions in 91, except and unless it may be inferred from the mere fact that you file the record.

Mr. Wechsler. It is in rule 90, isn't it?

Mr. Holtzoff. Rule 92.

Mr. Seth. That is the Supreme Court.

Mr. Wechsler. Oh, you are right.

Mr. Seth. I don't see where it is done away with.

Mr. Youngquist. Unless it is by implication.

Mr. Holtzoff. By implication, and also is included in our rule 92, which describes how the transcript shall be made up, and there is no rule or provision for bills of exceptions, but the new provision is paragraph (L), which is in substance the Fourth Circuit Court.

The Chairman. (L), 92.

Mr. Longsdorf. Now, with respect to (L), I am obliged, on behalf of the Ninth Circuit, to protest against passing that in this way. They would not like it out there, and it is not their way. The clerk of the Circuit Court of Appeals has the record printed there, and I know I am speaking correctly when I say that that is satisfactory. We do it differently in the state courts of California, and just as Mr. Vanderbilt said, the difficulty is in getting transcripts enough to handle your appeal.

Mr. Vanderbilt has said "Two." My own experience is that three are hardly enough, because each party to the case wants one of the transcripts on which to make his discussions, and one has got to be filed, and even then, the printer is left out in the cold. Now, the way it is done in the Ninth Circuit is, when that transcript is filed, the parties then designate what parts of the typewritten transcript filed as the record on appeal are to be printed, and when they have made those designations, the appellant designates his, then the appellee designates what additional he wants if any, or they may stipulate, and then the clerk in the Circuit Court of Appeals takes that

down to the printer and supervises the printing.

Then the C.C.A. judges have all the record that they need to read contained in one book, and there are ample copies to go around. Sixty of them are printed, and there are enough left over to file in the Supreme Court if you apply for certiorari. The thing works, and they do not want it changed.

Mr. Dession. Well, it works very well if your parties can print a record, but when you have to publish books at the rate of anywhere up to a hundred thousand on some appeals in order to have an appeal, it becomes a little bit silly, I think.

Mr. Longsdorf. You don't print the entire transcript. You reduce it, just as you do by excerpting it in the briefs, but you get enough copies.

Mr. Glueck. Suppose you can't get the parties to agree as to how much they put in?

Mr. Longsdorf. They say how much they want printed, and if they want too much, they have to pay for it.

The Chairman. The Circuit Court rule is, the moving party prints what he wants; hence, if he prints too much, he has either to pay the cost of it or get called down by the court, or both. Now, if he doesn't print all that the respondent needs, the respondent prints what he wants.

Mr. Longsdorf. We have been doing that thing in California for years.

The Chairman. And it saves all that interminable business of counsel getting together and figuring out what shall be printed.

Mr. Longsdorf. I know.

The Chairman. Or having to go in to the judge and having

the judge necessarily decide.

Mr. Longsdorf. I know that.

The Chairman. And getting the judge so sore at you on account of the nuisance of making him do it that when your case comes up you have already got two strikes against you before you go to bat. It is just nonsensical from that standpoint. That is relieved by this.

Mr. Youngquist. Do we not have a duplication between (a) and (L)? (a) provides for designation of the parts of the record to be printed, and (L) provides that either party may print the record.

Mr. Holtzoff. No. (a) is a designation of what is to be included in the record to be filed.

Mr. Youngquist. To be filed--I see.

Mr. Holtzoff. So you don't reach any of that part of it there, Mr. Youngquist.

Mr. Dean. Why shouldn't the entire record be filed?

The Chairman. It is.

Mr. Dean. Then why do you have to have a designation as to what portions of it shall be filed?

Mr. Longsdorf. No, we don't file the entire transcript, unless it is necessary.

Mr. Holtzoff. Suppose you go up on a question of law?

Mr. Dean. Don't they, in the Fourth Circuit, file an entire copy of the transcript?

Mr. Seth. Yes.

Mr. Dean. Beginning with the selection of the jury, right on through to the last?

The Chairman. The whole thing.

Mr. Longsdorf. There are plenty of appeals that go up in California without a word of transcript, where it is only on the law and the pleadings.

Mr. Dean. Should not (a) therefore be re-worded?

Mr. Holtzoff. The civil rules do not require the entire transcript to be filed. They provide that only those portions shall be filed which counsel designate. Then under the Fourth Circuit rule, when it comes to printing, as I understand it, each counsel prints in the appendix to his brief so much of what has been filed as he wants to.

The Chairman. I have struggled through the old method that we have had in the Third Circuit, the traditional method of printing everything, and I have also struggled through the days when you reduced everything to narrative form.

Mr. Longsdorf. That was worse.

The Chairman. And when this Fourth Circuit thing was devised, the judges in the Third Circuit couldn't see it at all. They only adopted it after the Court of Appeals in the district had; and within the last year it has been adopted in the First Circuit, and the judges in every circuit that has it prefer it because it reduces the amount of their paper work.

Mr. Longsdorf. We prefer it to the old system, but I think the way they print the record in the United States Circuit Court of Appeals in the Ninth Circuit accomplishes the same result, and is still more convenient.

The Chairman. That is all right if you are both in San Francisco, but suppose one is up in Portland, Ore., and the other is down in Los Angeles, it isn't so easy, is it?

Mr. Longsdorf. Well, you have got to exchange praecipes

designating the parts you want included.

The Chairman. I have gotten into more bull-fights over what records shall be printed than I have in the course of all the trials I have ever been in.

Mr. Seth. Mr. Holtzoff, aren't 92 (L) and 93 a duplication?

Mr. Longsdorf. Yes, more or less.

Mr. Seth. 93 seems to be much more complete than 92 (L). They look like the same thing.

Mr. Holtzoff. 93 is a little more detailed. I think (L) of 92 covers everything.

The Chairman. On 92 (L), Mr. Dean, the clerk of the Fourth Circuit, has published an address that he gave at some one of their judicial conferences.

Mr. Dean. I read that.

The Chairman. And they are really grateful, and from the standpoint of the litigants it cuts down their printing bills to about one fifth or one sixth of what they normally would be. It is certainly worth saving.

Mr. Dean. Oh, I agree with you absolutely. I read that, and the only question I had was when you got to the Supreme Court, whether you ran into any difficulties.

The Chairman. Well, I asked Judge Parker about it, and he said they never had had any complaint from the Court, and these two cases that I have had from the Fourth Circuit seem to have worked out all right.

Mr. Longsdorf. I might add that the whole process of appellate procedure in California is under revision by court rules at the present time, and I do not know what they are going to do about it. I tried to find out, but I couldn't get any

inkling.

The Chairman. Is that in the Ninth Circuit?

Mr. Longsdorf. No, no, in the state courts.

The Chairman. Oh, in the state courts.

Mr. McLellan. There is one thing in these rules taken from the civil rules that I think is perhaps of some consequence, but it may be merely personal to me. The rule gives the district judge among others the right to call the attention of the Court of Appeals to misstatements in the record, either early, or after the case has been entered in the Circuit Court of Appeals. There is no provision however for the judge seeing the record.

About three or four weeks ago I had the experience of a lawyer who was filing his brief thinking that he would send a copy of it to me, and he sent a letter saying that he enclosed it, but unfortunately for me, he sent the record instead of his brief, and it was just as full of errors and misstatements as it could possibly be. Both sides had agreed to it. The punctuation in the judge's charge was such that it was utterly senseless, and under that rule, because I happened to see it, I called the attention of the court to it, and counsel, who made all the changes that I suggested.

Now, I do not believe that a judge should have any power-- the trial judge--with reference to the record, as he did in the case of a bill of exceptions, but I think you serve the interests of everybody if the rule provided that he shall have a chance to see the record before it goes up, and the stipulation as to what should be a part of the record, to the end that he may suggest to counsel that the errors therein be corrected in the early stages, instead of having to do it through printing the changes later in

case the judge happens by chance through somebody's mistake to see it, and to see some misstatements in the record.

I think that is one of the defects in that rule, but it may be just because I am always anxious to see what somebody says that I have said.

Mr. Dean. I think that is rather important, since we are abolishing bills of exceptions.

Mr. Robinson. Certainly.

Mr. Dean. That is, the procedure under which they were filed with the district judge.

Mr. Robinson. Yes, and signed by him.

Mr. Dean. And since the errors are often errors of law made largely by the trial judge, it seems to me he should have some opportunity to glance at it.

Mr. McLellan. Yes, not to say what should go up, but to see it, to the end that he may act under the rule, if the lawyers won't correct the misstatement, and of telling the Circuit Court of Appeals what the errors are.

The Chairman. You make that as a motion, Judge--some such provision?

Mr. McLellan. Yes, I do, the language to be left to the Reporter.

Mr. Dean. I second it.

Mr. Longsdorf. May I interrupt for a question? You are leaving the provision of paragraph (g) in this rule (92), the record to be prepared by the clerk and certified?

Mr. McLellan. Yes, but I refer especially I think to (h), which provides that the parties or the district judge, either before or after the record is transmitted to the appellate

court--

Mr. Longsdorf. Yes.

Mr. McLellan. That the appellate court, on proper suggestion, or of its own initiative, may direct that an omission or misstatement in the record be corrected.

Mr. Longsdorf. Under this similar practice that we have in California, the judge certifies the reporter's transcript, just as he did a bill of exceptions.

Mr. McLellan. Well, he doesn't do that here.

Mr. Holtzoff. The civil rule to which you refer, Judge, is it not the provision in (h)? Isn't that the same as the civil rule?

Mr. Youngquist. Yes, that is what he said.

Mr. McLellan. Yes, but how is he going to know about the misstatements, unless he sees the record?

Mr. Longsdorf. The clerk certifies it and sends it up, and that is the end of it. He doesn't see it at all.

Mr. McLellan. No, he doesn't see it at all; and he ought to have the opportunity, because he sometimes can help counsel and be perfectly willing to correct his misstatements.

Mr. Youngquist. By the way, the clerk prepares the record, under (g), and I suppose the judge could arrange with the clerk to see the record before it goes up. Would that be sufficient protection for the judge?

Mr. McLellan. No, I do not think the judge wants to go around asking for the privilege of looking at a record.

Mr. Youngquist. No.

Mr. McLellan. I think it should be made a part of the rule that it should be submitted to him, though not passed upon by him.

Mr. Youngquist. I did not mean that, but simply to give the clerk instructions to submit all records to him, in view of the contents of (h), which gives him the right to suggest the record.

Mr. Longsdorf. The practice under (g) corresponds to the California practice. The clerk simply certifies the record, not the reporter's notes. The clerk certifies that, then the reporter's notes are certified by the reporter, and the clerk sends the whole thing to the judge.

Mr. McLellan. We don't know anything about it.

Mr. Holtzoff. To bring it to a head, may I move that rule 92 be approved as it is in the draft, with the addition of an amendment to cover the point suggested by Judge McLellan.

Mr. Robinson. Second.

Mr. Longsdorf. Now, just wait a minute. I want to add something else. I think there is an error in (g) here that I should have called to your attention sooner. Rule 92, page 2, paragraph (g)-

"but shall always include, whether or not designated, copies of the following: the material pleadings\* \*"

That is a little bit uncertain, or ambiguous.

"--without unnecessary duplication"

Then -

"--the judgment;"

Nothing about the defendant's plea, or the verdict, and that ought to go in. You can't have a complete record without that.

Mr. Holtzoff. Well, the judgment shows what the verdict was, of course.

Mr. Longsdorf. How's that?

Mr. Holtzoff. The judgment shows what the verdict was, of course.

Mr. Longsdorf. Well, how about the plea?

The Chairman. It is part of the pleadings.

Mr. Holtzoff. It is part of the pleadings.

Mr. Longsdorf. Well, is it a pleading?

The Chairman. Yes.

Mr. Medalie. No, no, that ordinarily goes in. The clerk sends in the minutes. That shows everything that happens in the case.

Mr. Holtzoff. They do not do that in all districts.

Mr. Medalie. They do not?

Mr. Holtzoff. They do in some.

Mr. Dean. After all, this is only a matter--

Mr. Medalie. You see, you are going up on the judgment roll, and you want to have everything that happened. These appeals are appeals on the judgment roll, because it includes every intermediate step, and there is no appeal on any of the intermediate steps, until you have the judgment roll.

Mr. Longsdorf. How have we got a record of what the verdict was?

Mr. Medalie. I move the minutes, certified by the clerk, be included.

Mr. Holtzoff. They are not included in the civil rule.

Mr. Medalie. Well, of course, I know they are not, but it has been the custom in many many jurisdictions to include them, because your appeal is on the judgment roll.

Mr. Holtzoff. I have no objection.

Mr. Medalie. I move they be included.

Mr. Holtzoff. I will make that as part of my blanket motion.

Mr. Medalie. All right.

Mr. Holtzoff. That we include the minutes.

The Chairman. All right, Mr. Holtzoff accepts that, and we have Judge McLellan's motion. All those in favor of the motion to amend 92, say aye.

(The motion was duly AGREED TO.)

The Chairman. 93 has been covered by 92 (L).

That brings us to 94.

Mr. Holtzoff. That is similar to the corresponding civil rule, and just makes it easier to enforce a simple procedure.

Mr. Medalie. All right, where is your procedure for the supersedeas bond?

Mr. Holtzoff. That is contained in the Criminal Appeals Rules. I am only including those appeals rules which I am suggesting be changed, rather than carrying them all.

Mr. Longsdorf. May I call attention to a difference here between 92 (L) and 93? 93 reads:

"Unless ordered by the circuit court of appeals it shall not be necessary to print the record on appeal in any criminal proceeding."

92 (L) reads:

"Unless ordered by the court it shall not be necessary to print the record on appeal."

Which court are you talking about in 92?

Mr. Holtzoff. You want to change that? That ought to be "circuit court". Of course, it was intended to be "circuit court".

Mr. Longsdorf. Well, I thought so.

Mr. Holtzoff. Shall we change it by consent?

Now, we are up to rule 94, Mr. Chairman, which relates to the simple enforcement of supersedeas bonds.

Mr. Longsdorf. What became of 93, may I ask?

The Chairman. It is out. It is a duplication of (L).

Mr. Holtzoff. That is out.

Mr. Longsdorf. Out?

Mr. Youngquist. And in 94, line 3, "the court", by notation. Is that the Circuit Court of Appeals or the district court, or is that dealt with in a preceding rule that does not appear in this volume?

Mr. Dean. I assume it is the district court.

Mr. Holtzoff. I think it would be whichever court takes the supersedeas. That is my opinion.

Mr. Longsdorf. Which court clerk is the agent?

Mr. Holtzoff. Whichever court takes the supersedeas, I will say.

Mr. Medalie. Why don't we say it, and make it clear?

Mr. Dean. Doesn't the judge of the district court ordinarily take it?

Mr. Holtzoff. Ordinarily, the district court takes the supersedeas, but sometimes the Circuit Court of Appeals will.

Mr. Medalie. Why don't you say the clerk of whichever court takes the supersedeas bond?

The Chairman. The jurisdictional court accepting the supersedeas.

Mr. Longsdorf. The judgment ought to be entered by the clerk where the case started, and that would be the district

court. When it goes back the minute can be entered, "Judgment on the motion by summary judgment."

Mr. Seth. 94 would not have to cover both bail and supersedeas bonds. The Circuit Court of Appeals rules limit the supersedeas bonds to fines. They designate the appearance bail in separate rules pending appeal. Ought not this to cover both?

Mr. Longsdorf. You mean bail on appeal?

Mr. Seth. Bail on appeal, yes.

Mr. Holtzoff. Well, the supersedeas bond is equivalent to bail pending appeal, isn't it?

Mr. Seth. Well, look at rule 6. It is distinguished. The trial court may stay the execution of any sentence of fine or costs, and it may require the defendant pending appeal to pay the fine, submit to an examination of his assets, or give the supersedeas bond.

Mr. Holtzoff. Well, if he does not give a supersedeas bond, the defendant stays in jail.

Mr. Seth. This relates only to the fine.

Mr. Longsdorf. The appeal stays the execution of the sentence. There is nothing to supersede there.

Mr. Holtzoff. No, but the supersedeas bond is so, as I understand it, if the defendant is to be released from custody pending appeal.

Mr. Dean. That is a bail bond.

Mr. Seth. The trouble here is, the supersedeas is used to stay the execution of the fine.

Mr. McLellan. Why don't you cover both?

Mr. Seth. That is what I say--"supersedeas or bail bond."

Mr. Holtzoff. Yes, sir, I think we should.

The Chairman. All right, a motion is made to include bail bonds as well as supersedeas bonds on appeal, in rule 94.

Mr. Dean. I second it.

(The motion was duly AGREED TO.)

MR. HOLTZOFF: I move, with that amendment, the rule be adopted.

Mr. Medalie. At whichever court he happens to file the bond in. I think that the provision, however, ought to be for his filing the bonds only in the district court. The circuit court isn't going to.

The Chairman. Well, we define "court" to mean the district court, so that is all right.

Mr. Medalie. Well, is it clear that the supersedeas and the bail bond are both filed in the district court? If it isn't, it ought to be so, because the clerk of the circuit court can't go around to the various districts enforcing bail bonds or supersedeas bonds and collecting fines.

The Chairman. Subject to a check-up on that, may we have a tentative acceptance?

Mr. Medalie. Yes, sir.

The Chairman. All those in favor of the motion say aye.

(The motion was duly agreed to.)

Mr. Holtzoff. Now, rule 95, "Definitions," really duplicates in a sense the general definition section of these rules, in part, not in whole, of these rules, and I think if we are going to have just one set of rules, you do not need rule 95.

The Chairman. It can be combined with rule 1.

Mr. Holtzoff. Yes, I think so.

Mr. Robinson. I think so.

Mr. Medalie. Computation of time, lines 11-13. If you give somebody 40 days or 90 days, and the time is extended, and you give them nine months, or let us say 180 days, why should you exclude Sundays and legal holidays? That is no place for excluding them.

Mr. Holtzoff. Well, that is the President's rule.

Mr. Medalie. It is a poor rule.

The Chairman. If the last day on which you happen to act happens to be Sunday or a holiday--isn't that right?

Mr. McLellan. Yes, or when the time is less than seven days.

The Chairman. Yes.

Mr. Medalie. Well, you have no such time here. The time is specified in the foregoing rules.

The Chairman. We have got an earlier rule on that.

Mr. Holtzoff. Rule 8 (a) covers that, and I think this second paragraph becomes unnecessary.

Mr. Medalie. All right, I move to strike it out.

Mr. Seth. It is taken from the present appeals rules, this part.

Mr. Robinson. That is right.

Mr. Longsdorf. If this is all part of one whole system of rules and one complete whole, then the foregoing rules, occurring on page 95, overlap the rule we have got away up in front of this.

The Chairman. That's right.

Mr. Longsdorf. If these rules apply only to the chapter on Appeals, then they should be so worded, so as only to apply.

The Chairman. We can't do that yet, until we know what

the court wants us to do with the situation. It is our problem, so we will have to get a very tentative approval of this, knowing that it may or may not be combined with rule 1, with rule 8, or possibly may be made separately.

Now, as I understand it, the last paragraph is the only new part.

Mr. Holtzoff. That is right.

The Chairman. So far as the criminal appeals rules are concerned?

Mr. Holtzoff. Well, no, only the last clause of the last paragraph is new, including proceedings to punish for criminal contempt of court. That is to cure the defect pointed out in the Nye case.

The Chairman. I see.

Are there any other questions on this rule?

Mr. Holtzoff. I move it be adopted, Mr. Chairman, with the omission of paragraph 2, and subject to consideration of its being combined with rule 1.

Mr. Youngquist. Yes.

Mr. Longsdorf. And the correction of the rule, and permitting in this other unforeseen rules that might be misleading.

Mr. Holtzoff. That is a matter for the committee on style.

Mr. Longsdorf. Yes, I think so.

The Chairman. All in favor of the motion, with this amendment and modification, say aye.

(The motion was duly AGREED TO.)

The Chairman. I cannot think of any rule we have not covered.

Mr. Medalie. There may be a few odds and ends we will

want to put in--for example, stating what is to be done on a motion in arrest of judgment.

Mr. Holtzoff. We have no rule on arrest of judgment, and no rule on grand jury, as yet.

Mr. Medalie. Also such things as viewing the premises, as to which there ought to be specific authority.

Mr. Longsdorf. Indeed there ought.

The Chairman. I would like to suggest this--that the Secretary write a letter to each member, which would reach him probably as soon as he gets home or be there waiting, asking him to suggest any topics that he thinks of that should be included that we have not touched so far.

Mr. Longsdorf. If that is a motion, I second it, and I hope it will be worded broadly enough.

The Chairman. Let us proceed to the rest of the program. I think any of the matters that we have covered today that seem to be controversial so far as the members of the Committee are concerned, as soon as they are redrafted, should be sent out to all the members of the Committee, so that we can see whether the third redrafting embodies a meeting of the minds. I do not mean by that, if you are on the losing side of a motion, that you should argue it over again, but to see whether or not the rule expresses the sense of the meeting.

Mr. Longsdorf. The same questions will be open as on a motion for rehearing on appeal?

The Chairman. No. 3: That as soon as we get a return or an expression of opinion on those things, that the Committee on Style start to operate, and as fast as they can get the matter in shape, that another tentative draft be sent out to all the

members of the Committee, and we will arrange for a final meeting before the report is submitted to the Court. I take it, after that it will be for the Court to determine whether or not it is to be printed and circularized to the bench and bar, and then, from then on.

Mr. McLellan. Are you deciding whether to hold the meeting in Washington or some place else where the hotel accommodations are more suitable?

Mr. Medalie. Thank you for that. I was about to put it.

The Chairman. Chief Justice Hughes expressed the desire that our meetings be held here. I do not know whether that commandment continues or not under the present conditions. Perhaps I may talk to Chief Justice Stone about it. I take it your favorite meeting place is Atlantic City?

Mr. McLellan. That is it.

Mr. Seth. Hoboken, we figured on!

The Chairman. Well. Why dissent from anything in Hudson county?

Mr. Holtzoff. How about Essex county?

The Chairman. Oh, that is all right. We will see you are well treated in the hotels and clubs.

Does that general program meet with the approval of the committee? If it does, we will consider it accepted tentatively.

Mr. Longsdorf. Can we have any forecast about when the next gathering will be?

The Chairman. That, I should think, would probably depend on the reporter.

Mr. Robinson. And Mr. Holtzoff, and all of our staff, and how fast we can work.

Mr. Waite. I understand the Reporter is to sail for Singapore on a battleship. I do not know whether the war will be over by then, or not.

The Chairman. I think the Chief Justice ironed that out with the Secretary of the Navy.

If there is nothing more, gentlemen, I think we can adjourn and notify everybody of course at the earliest possible moment when it is likely that we will have another committee meeting.

That is all. I think a motion to adjourn is in order.

(The motion was duly AGREED TO.)

(Whereupon, at 10:30 p.m., the Committee adjourned.)

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