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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Monday, May 18, 1942.

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The Advisory Committee met at 10:15 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

Gordon Dean

George H. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McLellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

John J. Burns

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P R O C E E D I N G S

The Chairman (Arthur T. Vanderbilt). Since our last meeting, gentlemen, the Subcommittee on Style, made up of Mr. Medalie, the Chairman, Mr. Wechsler, Mr. Dession, Mr. Dean, Mr. Youngquist, and Mr. Holtzoff, aided by Mr. Robinson and Mr. Tolman and Mrs.Peterson, has had several very lengthy and very arduous sessions, with the result that we have our fourth tentative draft before us.

Inasmuch as we are all familiar with the subject matter of most of these rules, I am going to suggest, if it meets with your approval, that we simply call the number of the rule and then call for comment on the rule, rather than call on the reporter to expound. If that plan meets with your approval, we shall turn to Rule 1.

I may say that I did not sit with the subcommittee, because I wanted to be in an absolutely impartial position, so that I would not become unconsciously the defender of their work, but would be in the same position as the other members of the committee with regard to that.

Are there any suggestions with regard to Rule 1? It will be tentatively passed.

Rule 2 (a).

Mr. Dession. Excuse me, Mr. Chairman. I have one question on Rule 1.

I do not think we cover anywhere, do we, Mr. Robinson, the circumstances under which a case would be removed from a state court to a Federal court?

Mr. Robinson. No. We decided not to do that. It is a constitutional question. You will find that discussed in your

notes.

Mr. Holtzoff. That is regulated by statute. That is really substantive law.

Mr. Dession. I know that. There is a further question, of course, as to how you do it when it is proper. I simply want to raise the question as to whether we want to place that here or not.

Mr. Robinson. The placing of it here is due to the action of the committee in dropping removal proceedings and requiring that this sentence, on line 4, beginning with, "and insofar as," should take the place of the old rule in the tentative draft.

The Chairman. You really raise the question at the moment, without making a motion?

Mr. Dession. That is right. I have no motion in mind.

The Chairman. All right.

Rule 2 (a). Are there any questions?

Rule 2 (b), subparagraph (1).

Mr. Longsdorf. Mr. Chairman, I would like to raise a question about the language in line 17 of Rule (b) (1). The same phrasing occurs in subsection (2):

> "Any Act of Congress locally applicable to and in force in the District of Columbia."

It contains a good many things that district courts in the United States as such have nothing to do with. I am not making a motion, either.

Mr. Holtzoff. I think the purpose of putting in that provision was to cover the District Code, because the District Code has in it a good many procedural provisions; and, of course, the provisions of the District Code will be superseded

by these rules, so that the District Court for the District of Columbia will have the same procedure as the other 84 district courts. That was the intention.

Mr. Longsdorf. Well, that is satisfactory to me, Mr. Chairman, but I mention it in this connection because the same language occurs over in subsection (2) under (b), and the situation is not quite the same, I think.

The Chairman. Can we hold that, then, until we come to (2)?

Mr. Longsdorf. It is line 29, over on the next page, if we are ready to take that.

The Chairman. Are there any further questions on subsection (b) (1)?

If not, we will go on to (b) (2). Will you raise your question, Mr. Longsdorf?

Mr. Longsdorf. Yes. I raised it before. I do not want to create a nuisance value for myself, but they have a lot of local laws up there that are really territorial laws. In some of these territories, in outlying possessions, those laws emanate from Congress, and in some from territorial legislators, and they cover a lot of minor local crimes that district courts of the United States as such will have nothing to do with.

The four district courts in Alaska, for instance, are courts of Alaska, but they are also district courts of the United States. There was some correspondence from up there, and I just want to feel sure that we have got that entirely cleared up.

Mr. Holtzoff. Here is the situation as to that. The district court in Alaska in that respect is different from a

2 district court in Puerto Rico. The district court in Alaska, and also in the Canal Zone,handles all criminal offenses just as the District Court in the District of Columbia. The rule as it is now framed would cover all offenses that are tried within those courts.

Obviously, it would be highly undesirable to have two sets of procedure in the same court, especially as sometimes in one indictment there might be a count for violation of a territorial statute joined with a count under an Act of Congress of general application, like the mail fraud statute, and so forth.

Correspondence shows that there is a difference of opinion among some of the folks in Alaska and the Canal Zone as to whether or not the new rules should be applicable there; and one advantage of putting the rule in as it is now is that after these rules have circulated, if there is any feeling in Alaska that they should be excluded, they will have an opportunity to bring forward their views on that point, whereas if we exclude Alaska, they will have no opportunity to bring forward their views on that point.

Mr. Longsdorf. There is a great deal of force in that point, but there may be--I know there are--a lot of crimes in Alaska which are not prosecutable by information. If we bring them under the umbrella of these rules, they will have to call a grand jury to indict them up there, and that would be extremely inconvenient up there.

Mr. Holtzoff. The grand jury provision of the Constitution is applicable in Alaska.

Mr. Longsdorf. Not for territorial crimes.

Mr. Holtzoff. Only crimes punishable by less than a year's

imprisonment, and if they are punishable by less than a year's imprisonment they are prosecutable by information in the States also.

Mr. Longsdorf. As I remember the criminal procedure of Alaska, having read it, you can use an information up there under the territorial laws in any case where you can use an indictment. You have got to watch out for that, I think.

The Chairman. We will undoubtedly hear from them.

Mr. Longsdorf. We undoubtedly will, and if we are sure to get it right by that means, I have no further objection to it.

The Chairman. Suppose we also note this point for consideration, but you do not make any motion, as I understand?

Mr. Longsdorf. I have made no motion.

The Chairman. Are there any further questions?

If not, we will turn to Rule 3.

Mr. Dession. Again, Mr. Chairman, this is a question of phrasing, I think. As I read it, we make the terms "judge" and "court" synonymous. I am thinking of line 26, "or a judge thereof."

Now, I am not quite sure whether that works right or not. As we go through our rules, a judge as a judge cannot do anything that a court as a court can do. I do not think we intend that, do we?

The Chairman. That is true in Rule 2 (b) (1) also.

Mr. Dession. I think it would be also applicable to that.

Mr. Holtzoff. No, because in Rule 2 (b) (1) we say a district court or district judge, whereas in line 21 we do not say "or a district judge."

Perhaps Mr. Dession's suggestion could be secured by inserting the words "or a district judge" in line 21.

Mr. Dession. You would still have the same problem. I was thinking of a judge who is not sitting as a court. Under the present practice I gather there are some things which he can do and some things he can do only as the court when the court is in session. Now, this would seem to wipe out this distinction and leave it entirely to a judge's discretion as to whether he would function on some things as a court.

Mr. Holtzoff. Rule 2 (b) (1) is an exact reproduction of a corresponding civil rule. If you insert the words "or a district judge," that same differentiation should be in Rule (b) (2). Wouldn't that cure your point?

Mr. Dession. I do not think so, because it reads,

> "Whenever in these rules reference is made to a district court of the United States, the reference includes the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands of the United States, or a judge thereof."

You can read that two ways.

Mr. Robinson. I think, before we take further consideration of it, for the time being we should insert, "or to a district judge."

3 Mr. Dession. That gets it part way.

Mr. Robinson. That will make it parallel to Rule 2 (b)(1),

and if that seems inadequate, after further study on it we will have to change it some other way.

TheChairman. In my State we have always had that as a matter of law. A judge may do anything a court can do, even in a Supreme Court.

Mr. Dession. That is our first problem: Is that what we want? This had just occurred to me. I have no conclusion on what we should want.

The Chairman. Should not we get away from the notion that a judge should be sitting on a bench before he can do those things? How do you feel about that, Judge McLellan?

Mr. McLellan. I should like to leave it just as it is.

The Chairman. Are there any practical disadvantages of that?

Mr. Dession. I do not have any in mind. All I am really concerned with right now is being sure that it says what we want. As it stands I think it gives you the result that you have in your State. I have no objection to that.

Mr. Burns. Are there any existing rules which limit the judicial power in cases where a judge is not actually sitting?

Mr. Holtzoff. Certain rules require certain things to be done in open court, so that is limited that way. For instance, we require that all trials shall be in open court and imposition of sentence shall be in open court.

The Chairman. Subject to those express provisions, there does not seem to be any reason why a judge should not do these things as a judge rather than as the court. I know that in the Judicial Conference in Boston last winter the district judges had considerable to say about the necessity of going

back to various floors and from their chambers to do almost mechanical things.

Mr. Robinson. I should like to add that there are rather extensive notes on Rule 1 and Rule 2 which have been prepared by Mrs. Peterson, with the help of some others, and those will be available this afternoon for further consideration in connection with these new rules. They are mimeographing them for me at this time.

The Chairman. Are there any further questions on any part of Rule 2?

If not, we will proceed with Rule 3.

Mr. Robinson. I would like to make one suggestion, having in mind the discussion I had with Mr. Holtzoff. On line 6, strike out, "to place him under bond," and substitute, "to admit him to bail."

I believe that is more consistent with the expression elsewhere.

The Chairman. Is there any objection to that?

Mr. Longsdorf. May I ask a question? Isn't there a provision in one of the later rules for taking a bond in the case of a summons, wherefor the word "bail" would be slightly inaccurate?

Mr. Holtzoff. "Bail" includes "bond."

Mr. Longsdorf. Yes. I am not quibbling on words, but I thought perhaps this was worded so as to include bail as well as a bond. I do not know whether a later rule provides for a bond when a summons is issued, or does it say "bail" in that rule?

Mr. Robinson. No distinction is made between the two.

"Bail", I believe, includes bond and recognizance and undertaking and cash.

The Chairman. Is there any objection to Mr. Robinson's proposed change? If not, it will be regarded as accepted.

Are there any further questions on 3 (a)?

If not, we will move on to 3 (b).

Mr. Robinson. I should like to suggest there that you consider whether or not "so far as applicable" should be stricken at the end, substituting for it "with respect to form, contents, and amendment."

The reason for the suggestion is that "so far as applicable" is a sort of catch-all clause and perhaps is not specific enough. I believe that what is meant is the matter of form and of content and of amendment.

The Chairman. What else could it be?

Mr. Medalie. The complaint would not be in the same form as the motion. The complaint would be in the form of an affidavit. If you will recall, before we broke up at our last session, it was suggested that provision be made, if I recall this correctly, for the filing of an affidavit setting forth the facts which would constitute a particular offense.

Do you recall that, Mr. Youngquist?

Mr. Youngquist. I know there was some discussion about it, but I do not know what the result was.

Mr. Robinson. With that discussion in mind, we drafted a specimen form for a complaint to be discussed.

Mr. Medalie. The word "complaint" would have a definite meaning to persons coming from States that have codes of criminal procedure. "Complaint" is defined in the terms as

being an affidavit setting forth the elements constituting the offense of knowledge or on information, giving the source of the information. Nothing appears here, and that is why I raised the point at our last afternoon's session. Others may not know that, because their States might not have such provisions.

Mr. Holtzoff. I am wondering whether we need (b) at all. I am inclined to think that we do not have to say anything about the form of the complaint. I have some doubt as to whether we can say "an information," because an information is just an accusation, whereas a complaint is an affidavit; but if that is so, I would go still further and be inclined to strike out the entire provision.

Mr. Medalie. I agree that (b) can go out in its present form, but I think there should be a definition defining "complaint."

4 The Chairman. I thought we agreed not to have any. Why would not form take care of that?

Mr. Medalie. You might have something about an affidavit that sets forth facts of knowledge. There is a practice in which someone makes an affidavit, using the language of the statute. I do not believe that anybody ought to be arrested on an affidavit in the language of the statute, where obviously the affiant cannot have the knowledge or does not profess to have.

Mr. Robinson. I would like to make reference to further parts of the rule bearing on this.

Mr. Medalie. All right.

Mr. Robinson. With regard to specifications on forms,

contents, and amendments, you will find that discussed in Rule 8.

You will recall that as to nature and contents, to help Judge Crane, we simply provided that the indictment or information shall be a plain, concise, definite statement of the essential facts constituting the offense charged. There has been some confusion in Federal cases, I think due to the inadequacy of complaints, merely to state the offense charged, and I thought it would be well to call attention to that to tighten up procedure with regard to complaints.

Mr. Holtzoff. I do not see howyou can have complaints, because a complaint is an affidavit. You cannot have an affidavit --

Mr. Robinson. You can reswear an affiant.

Mr. Holtzoff. You would have a new complaint.

Mr. Medalie. I think that presents no difficulty. I think it would be better if we said:

"The complaint shall on oath contain a plain, concise, and definite statement of the essential facts which constitute an offense."

Mr. Holtzoff. I move that we adopt that.

The Chairman. Let us get it clear for everybody.

Mr. Robinson. An Appendix of Forms, Form 3, is an effort to carry out what you are referring to in the discussion of affidavit. As I understood our discussion, it was that we have the affidavit in its body substantially the same as the body of the indictment or the information, which immediately precedes this form.

Mr. Medalie. When I read this I made up my mind that in

my old age if I got a job as a United States Commissioner and someone presented a complaint like this, I would decline to issue a warrant on it, on the ground that obviously he is stating conclusions and nothing of his own knowledge. By default, it is done that way.

Mr. Robinson. The point I want to call your attention to is that the body of that statement is exactly the same as the preceding provision. You feel a complaint could not be brought that way?

Mr. Medalie. I was brought up in the old school that you cannot do anything unless you knew of it as a fact.

Mr. Holtzoff. I move that we adopt the text suggested by Mr. Medalie.

The Chairman. Will you repeat that?

Mr. Medalie. "The complaint shall on oath contain a plain, concise, and definite statement of the essential facts which constitute an offense."

The Chairman. Would you like the words "set forth" rather than "contain"?

Mr. Robinson. Why not "shall be"?

Mr. Medalie. "And shall be on oath."

Mr. Holtz. "And shall set forth."

Mr. Medalie. Suppose the affiant makes a verbose complaint and you cannot dismiss the complaint for prolixity. What is the difference? Why plain and concise?

Mr. Youngquist. I think for the purpose of conformity we might as well have it in.

Mr. Medalie. It would be gesture, would it not?

Mr. Robinson. Worth making, I think.

Mr. Youngquist. Is the other any more than gesture?

Mr. Medalie. No.

Mr. Holtzoff. Will you read that again?

Mr. Medalie. "The complaint shall be on oath taken before the committing magistrate." Otherwise you come in with a complaint issued by the notary public.

Mr. Robinson. That is done under present law.

Mr. Medalie. That differs with what we do in every State that I know of. The way in which warrants are gotten is that somebody appears before the magistrate, and, theoretically,
5 the magistrate examines it. He used to, before we developed the clerical system. Then the magistrate writes out what the affiant has to say or the complainant has to say, and he prepares and affidavit and swears to it. There is a responsibility involved that the man has appeared. If you go to a notary public and get an affidavit and submit it to a magistrate, that responsibility for examination where it is indicated is dispensed with; and I do not think it ought ever to be dispensed with.

Mr. Holtzoff. I think the proper practice is to swear that the complaint is sworn to before the magistrate who issues the warrant.

Mr. Youngquist. I think we agreed in one of our meetings in New York that that should be the rule, whether it is or not.

May I suggest your statement, in a little different form, to read thus?

> "The complaint shall be a plain, concise, and definite statement of the essential facts constituting the offense charged and shall be sworn to before the

committing magistrate."

Mr. Medalie. That would meet everything I had in mind, including the gesture, which seems essential here.

The Chairman. Do we need all three adjectives?

Mr. Youngquist. The three adjectives are in the description of the information and indictment, Mr. Chairman. That is where I included them there.

Mr. Holtzoff. As a matter of fact, you do not need any one of the three, but it corresponds to the other rules.

The Chairman. I am just wondering how one distinguishes between plain, concise, and definite.

Mr. Holtzoff. I think there is more reason for putting in those words with reference to an indictment than there is with reference to a complaint, because complaints are informal and you do not take the time to make them concise.

The Chairman. I still do not see the reason for all the words. They all mean one thing.

Mr. Youngquist. I think we probably took the adjectives from the civil rules.

Mr. Medalie. I think the word "essential" meets all your needs, as a matter of fact:

> "The complaint shall be a statement of the essential facts constituting the offense charged."

If the district attorney or the post office inspector or the F.B.I. man wants to sit down and write an essay, that is another matter. He knows he does not need to.

Mr. Youngquist. Isn't that what we want to prevent by the use of those adjectives? My recollection of the earlier discussions in both the full committee and the subcommittee is

that we wanted to use admonitory language which might serve to abbreviate the unnecessary length of the documents that we sometimes have in criminal proceedings. We are not specifically saying that there shall be used a short form of indictment, but we are in effect admonishing the prosecuting attorney to be plain and to be brief and to be concise.

Mr. Longsdorf. How about substituting the definite article "the" for the indefinite article "a"?

Mr. Medalie. "Constituting an offense," without using the word "charged." Otherwise you imply that you name the offense.

Mr. Longsdorf. If the district attorney wants to --

Mr. Holtzoff. District attorneys do not draw complaints.

Mr. Longsdorf. But they draw informations.

Mr. Holtzoff. A complaint is frequently drawn by a person who is not a lawyer, and so long as it sets forth an offense, you cannot hold him down.

Mr. Longsdorf. Let us put it: "The complaint must charge an offense, but the information should charge the offense."

Mr. Holtzoff. The suggestion is we strike out the word "charged," and substitute "constitute an offense."

Mr. Longsdorf. And drop the word "charged."

Mr. Robinson. Would it be the same thing when we come to information?

Mr. Medalie. No.

Mr. Robinson. If you charge an offense, you charge the offense charged, stating the essential facts.

Mr. Youngquist. I think that is true, but perhaps in a complaint we are recognizing the lack of legal knowledge on

the part of the scribbler and give him a little liberty. If he charges an offense, it takes it in.

Mr. Robinson. It is still the same offense.

Mr. Medalie. There is nothing in there about its being in writing, and, of course, it ought to be. I would like to make this motion now.

Mr. Youngquist. Before you come to that, we do not have anything of that sort in our description of the indictment or information, which also, of course, must be in writing.

Mr. Holtzoff. Don't you think that that is understood?

Mr. Medalie. No.

Mr. Youngquist. I think it is superfluous.

Mr. Medalie. The practice indicates it is understood, but you do not say so.

Mr. Robinson. That is where the words, "plain, concise, and definite" come in.

Mr. Medalie. I would like to make a motion that Rule 3 (b) read:

> "The complaint is a written statement of essential facts constituting an offense and shall be sworn before the committing magistrate."

Mr. McLellan. I think "shall be" is better than "is."

Mr. Medalie. I had that in mind, too. I thought that "a" should be "the," and "the" should be "a." That is why I think a definition would be appropriate.

Mr. Waite. Mr. Chairman, I do not want to perpetuate this discussion, but one thing occurs to me. Why does it have to be sworn to before the committing magistrate? Can't it be sworn to before a magistrate?

The Chairman. May we have that read again?

Mr. Medalie. "The complaint is a written statement of essential facts constituting an offense and shall be sworn before a committing magistrate."

Mr. Youngquist. "Sworn to" would be better.

6 Mr. Medalie. All right, "sworn to."

The Chairman. Haven't we used the language "shall be" all the way through here?

Mr. Robinson. Yes, I agree with Judge McLellan on that. I think we should try to preserve some resemblance.

Mr. Medalie. I succumb to that.

The Chairman. Are there any further remarks on this motion?

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

The motion is carried.

As I understand it, that is a substitute for Rule 3 (b).

Mr. Medalie. I now move that (a) be transposed.

Mr. Robinson. I should like to say in that connection that effort has been made to follow the same order, which was the instruction of this committee at perhaps two or three previous meetings, as was followed in Rule 8 with regard to indictment and information.

We started out with the idea of definition first and then use, and we wound up with what I think is a very good rule and very well organized.

As you notice, Rule 8 has first accusation in district court. That is the use made of the information or indictment. So we have here, under complaint, in Rule 3, the accusation, the use of a complaint.

Then we go into the second part, which has to do with nature and contents.

It seems to me that where we are discussing in this rule on complaint the written accusation, the same points might well apply in this regard, as we adopted them in regard to the information.

The Chairman. It is a short rule. Nobody is going to get lost.

Mr. Medalie. What about the headings for (a) and (b)?

Mr. Dean. There should be a new one on (b).

Mr. Holtzoff. I am inclined to think that we ought to combine (a) and (b), they being so short, and make them just one paragraph. Strike out the subheading and then just keep the same heading of Rule 3.

Mr. Medalie. I think so.

Mr. Holtzoff. I so move.

Mr. Dean. I second it.

Mr. Longsdorf. In that event, both subheadings go out.

Mr. Dean. Both subheadings go out, and we have only one paragraph. We will have a paragraph of two short sentences.

Mr. Longsdorf. I suppose there would be no objection to paragraphing it when it gets into print?

Mr. Dean. I think it would be unwise to have paragraphs if you do not have separate headings.

Mr. Longsdorf. I did not ask for it.

The Chairman. The motion is to strike the subheadings of (a) and (b) and combine it in one rule under the title of Rule 3, The Complaint.

Are there any remarks? If not, all those in favor of the

motion say "Aye". Opposed, "No." Carried.

Mr. Youngquist. May I have the language of that? "All the essential facts"?

Mr. Medalie. "Of essential facts constituting an offense."

Mr. Youngquist. The offense which is charged?

Mr. Medalie. No. "Charged" is out. It does not matter what offense is charged.

Mr.Youngquist. I think "the" ought to be in. Whatever offense you do charge, it ought to have the essential facts constituting that offense. It is just a matter of English.

Mr. Medalie. I had the same thing in mind, and I thought we met that with a view to avoiding technicality in form. In other words, if the complaint contained a simple narration of facts and those facts were essential to an offense -- any offense -- that would make a good complaint.

Mr. Youngquist. I am not inclined to question it.

TheChairman. We move on to Rule 4. Rule 4 (a).

Mr. Robinson. Mr. Youngquist, I believe you have a suggestion on the first line, do you not? Mr. Youngquist made the suggestion that following the word "complaint" there be added "against a person not in custody."

Mr. Youngquist. I do not seem to have it here, but I recall what it is. The warrant may be issued, of course, upon filing a complaint, but oftentimes a defendant is arrested without a complaint having been filed. To meet that situation, I made the suggestion referred to by the reporter. I do not seem to have it here.

Mr. Robinson. It seems to me to be a desirable addition.

Mr. Youngquist. Where did that come in?

Mr. Robinson. At the beginning of line 2 insert "against a person not in custody."

Mr. Holtzoff. It is not line 2, is it? It is line 1.

Mr. Robinson. It is the same thing.

I believe you suggested that following the word "warrant" it would be well to have the word "thereon."

Mr. Holtzoff. I do not like the word "thereon."

Mr. Youngquist. You do not need it. I do not think that is particularly important. I made the suggestion.

Mr. Holtzoff. I have in mind that words like "thereon" are a little ponderous.

Mr. Robinson. Mr. Holtzoff suggested that in line 5 the word "other" be stricken out and the words "law enforcement" be substituted.

7 Mr. Seth. The same follows in 8, I imagine.

Mr. Robinson. Yes.

Mr. Medalie Is a postal inspector included in that?

Mr. Holtzoff. The words "law enforcement officer" are not words of art. They are generally understood to mean officers who are charged with the duty of investigating crimes and apprehending offenders. I did not like the word "officer" used without vast limitation, because lots of government employees have the status of officers who never had any power to make arrests and should not have any.

Mr. Medalie. Is the Comptroller General of the United States included?

Mr. Holtzoff. The Comptroller General is an officer. The Assistant Comptroller General is an officer. But there

are a lot of minor officials. Any person who holds a statutory position is technically an officer of the United States. There are thousands of people like that.

Mr. Seth. Would not the words "authorized officer of the United States" take care of that?

Mr. Robinson. How authorized, Mr. Seth? This is rather new, I think.

Mr. Seth. We have the words "any other officer of the United States." That certainly covers a multitude in this day and generation.

Mr. Medalie. I think a post office clerk or a letter carrier ought to be able to appear before a commissioner and swear a complaint and get a warrant that he can turn over to a marshal, ought he not?

Mr. Robinson. That is not what is said here. This has to do merely with issuance of a summons. You may recall our discussions on that point.

Mr. Medalie. What about representatives of the State Department?

Mr. Holtzoff. I perhaps differ from you on that point. I do not think you ought to encourage indiscriminate filing of complaints on the part of officers or government employees who are not charged with the duty of investigating crimes or making arrests.

Mr. McLellan. What has that to do with this?

Mr. Seasongood. This is issuing of summonses.

Mr. Holtzoff. This point does not relate to the making of a complaint, but only to issuing a summons or a warrant.

Mr. Medalie. But I can give you an example where an

employee or officer of the United States is not involved. Suppose you hit me in the nose in the Federal Court House or Post Office Building. I would have a right to have process issued against you, and I can go only to the Federal authorities for it. Why shouldn't I go before the committing magistrate? Why shouldn't he have the right, like a city magistrate, to say, "Well, it is a little difficult to say how it started, but to find out I will issue a summons instead of issuing a warrant"?

Mr. Holtzoff. That may be the orderly procedure. However, in the District of Columbia you go to the United States Attorney, and unless the United States Attorney will apply for process--

Mr. Medalie. Your nose remains unvindicated.

Mr. Holtzoff. Yes. In other words, take another district than New York. Here private prosecutions are not permitted. Anyway, as Judge McLellan pointed out, that is not on the point

8 involved here.

Mr. Medalie. Certainly, in the territories that might be very important.

Mr. Holtzoff. But, anyway, that does not relate to Rule 4 (a).

Mr. McLellan. It seems to me, Mr. Chairman, that it would not be a terrible thing if the magistrate himself had a discretion as to whether, instead of issuing a warrant, he should issue a summons. With that discretion, he is cut down by this by requiring that he may do that only upon the request of the United States Attorney or any other officer. That cuts down a discretion that some people think a magistrate should have,

anyway. So why not let it remain as it is?

Mr. Robinson. That was discussed, and the previous action of the committee was not to extend that to a magistrate.

Mr. McLellan. So you cut down the conditions under which he may do it when you do not give him absolute power to do it.

Mr. Robinson. That was the point that I think was decided by the committee before. If you wish to allow a magistrate now to issue a summons--

Mr. McLellan. Oh, I do not, but since there is some question about that, I do not see why this rule as it is it not all right.

Mr. Holtzoff. I was just afraid of the phrase "any other officer," because the word "officer" covers so many persons.

Mr. Youngquist. Do you think there is still any danger? It is still discretionary with the magistrate. He is not required to issue a summons, but he may.

Mr. Robinson. I think you are right.

Mr. Wechsler. Suppose we speak of the consent of the Government without specifying who may make the request? Then someone authorized to make the consent will have to consent to the issuance of the summons.

Mr. Holtzoff. That may be the solution.

Mr. Longsdorf. I do not see why we should commit to these other officers besides the United States Attorney authority to call on the magistrate to exercise that discretion to issue a summons.

Mr. Youngquist. I think the reason for it is that many complaints are filed without the interposition of the United States Attorney.

Mr. Longsdorf. All right, but why not let those proceed upon a warrant or else refer them to the United States Attorney? A lot of people want this summons business, but I do not believe in giving that to the--

Mr. McLellan. The magistrate does not have to do it.

Mr. Longsdorf. He does not have to do it. Why endow all these officers with authority to make him exercise that discretion?

Mr. McLellan. That is not the idea at all.

The Chairman. It does not make him do it.

Mr. Longsdorf. They cannot make him do it, but they can all ask him to do it.

Mr. Youngquist. Do you think there is any danger that the complaining officer will ask for a summons in a case where a warrant should be issued?

Mr. Longsdorf. Not much.

Mr. Youngquist. Don't you think that is a practical answer?

Mr. Holtzoff. I suggest that we leave the wording as it is now.

Mr. Wechsler. Suppose the complainant is not an officer? Must the magistrate get the consent of an officer to issue a summons?

Mr. Dean. Under this language, yes.

Mr. Wechsler. Is that desirable? The situation may be such that it is unnecessary to issue a warrant, and the complainant knows that and agrees to it.

Mr. Holtzoff. I do not believe in the Federal practice they entertain complaints of a private individual. I have

never heard of a United States Commissioner issuing a warrant on a private complaint.

Mr. Wechsler. He has jurisdiction to do it, has he not?

Mr. Seasongood. "An officer of the United States" is a term of indefinite meaning. There has been some case recently--I do not recall which it is--involving who is an officer of the United States.

Mr. Holtzoff. I think the meaning is entirely definite. There are questions occasionally arising as to whether a person is or is not an officer, but there is a definite definition of what constitutes an officer. It is a person who holds an employment under a statute, so that when his term has terminated it creates a vacancy which must be filled, as distinguished from an employee who is not appointed and does not fall in a statutory position.

Mr. Burns. If you are not determined to follow the state practice of permitting the interested party to be the moving factor in getting a summons, it seems to me you must limit it to law enforcement officer of some qualification in the definition, since "officer" includes trial examiners and thousands of people who have no relation at all with the problem of getting out summonses.

I think if you are not going to adopt the phraseology of "an interested party" you will have to limit "officer" by relating it to law enforcement or authorized officer or some such definition.

Mr. McLellan. We are still dealing with the question of whether it should be "warrant" or "summons."

Mr. Seth. Couldn't we limit that to "by the officer

making the complaint"? Let him be the one to ask for a summons.

Mr. Dean. Or the person swearing to the complaint, to cover both the private complainant and the law-enforcement officer.

Mr. McLellan. That would imply by implication that we are bringing in the right of private individuals to make complaints. I think we should keep it that way.

Mr. Holtzoff. I think we should keep away from that.

Mr. Youngquist. They have that right now.

Mr. Holtzoff. I do not think so. I think the time-

9 honored practice is to the contrary.

Mr. Wechsler. I think there ought to be a rule limiting the filing of a complaint to an officer, if we desire to perpetuate that practice. We have nothing to show who may file a complaint. Rule 3 would open it up to anybody.

Mr. Medalie. This discussion relates only to the summons, because nothing is said as to who may apply for a warrant or who may file a complaint. I think it would be better to leave it as it is.

If you do not give the magistrate discretion, then you leave the request for the summons to a responsible officer, whether he be a law-enforcement officer, as we lastly used that term, or the United States Attorney or the Attorney General. That is what it would mean. But we do not resolve the question, and should not, as to who may file a complaint. We leave that to development. It may be that that may become important some day. There is no reason to restrict that.

Mr. Wechsler. I would like to know whether there is a

legal provision that now restricts it to law-enforcement officers.

Mr. Medalie. I am sure there is not.

Mr. Holtzoff. There is no statute, but it is a time-honored practice. It is the practice followed in the District of Columbia, which is a Federal territory.

Mr. Medalie. Is that because of statute?

Mr. Holtzoff. No.

Mr. Medalie. That is simply because it is worked that way?

Mr. Holtzoff. Yes.

Mr. Medalie. Some day some judge in this District may decide that he recognizes a private individual without the intervention of a public official.

Mr. Holtzoff. The District of Columbia Code contains a provision that all prosecutions shall be by the United States Attorney or the Corporation Counsel's Office. That is assumed to mean that a private individual may not initiate it.

Mr. Medalie. That is not the law outside the District of Columbia, because there is no restriction of that sort anywhere else in Federal practice, and we ought not to restrict it any further as it has been restricted in this District.

Mr. Holtzoff. I think we ought to leave it as it is.

Mr. Youngquist. So do I.

Mr. Medalie. All you need is some language indicated by some members of this committee defining the words "any other officer of the United States." One suggestion--I think Mr. Seth made it--was "concerned therein."

Was that your suggestion, Mr. Seth?

Mr. Seth. My idea is that the officer initiating the

prosecution should be the one, other than the United States Attorney, not any officer.

Mr. Holtzoff. Why not say "officer making complaint"?

Mr. Medalie. You may get a private individual to make the complaint and he may be conducting the prosecution.

Mr. Seth. Isn't there a rule that the United States Commissioner cannot collect fees if they go ahead on the complaint of the private individual? Hasn't that been the deterring matter in preventing private individuals from prosecuting the matter?

Mr. Holtzoff. I am not sure whether that has been the deterrent or not, but I do know that the Federal practice is that an application for a warrant must be made by a law-enforcement officer.

The Chairman. Now, gentlemen, let us see if we cannot solve this.

Mr. Medalie. Can I suggest this language? "Any officer conducting the prosecution."

Mr. Holtzoff. He does not conduct the prosecution.

Mr. Youngquist. "Initiating the prosecution."

Mr. McLellan. To raise the question, I move that we leave this as it is.

Mr. Robinson. I second the motion.

The Chairman. Are there any remarks? All those in favor say "Aye." Opposed, "No."

Mr. Wechsler. No.

Mr. Seasongood. I think I will vote "No." I think whoever makes the complaint ought to waive the warrant or have the summons issued.

Mr. Youngquist. I think the choice of summons in place of a warrant is wholly for the benefit, or primarily for the benefit, of the defendant, and I should doubt whether that favor, you might call it, should be extended at the request of anyone other than an official.

Mr. Seasongood. It is still discretionary with the magistrate. It merely says he may. It is just discretionary to do it. Why not give him a broader discretion?

Mr. Holtzoff. I think that would be dangerous. I think it would be undesirable to authorize a United States Commissioner in his discretion to say, "I shall not issue a warrant, but I shall issue a summons."

Mr. Youngquist. It does not suggest that.

Mr. Seasongood. I said it is still discretionary with the magistrate. He may do it on the request of anybody filing complaint. You use "officer." I still say that is a word of uncertain meaning. There have been cases that hold that what is an officer in some circumstances is not an officer in other circumstances.

The Chairman. Why couldn't we say, "Upon the request of the United States Attorney or of the complainant"?

Mr. Seasongood. That is all right.

Mr. Dean. I think we should say "person swearing to the complaint." The complainant technically, I think, under our previous rule, is the United States Commissioner.

Mr. Youngquist. No. "Complainant" is a word of art in that connection.

Mr. Dean. It depends on the form. I did not see the form. We said that the complaint shall be a written statement

of essential facts constituting an offense and shall be sworn to before a committing magistrate. Does that contain an endorsement at the end of the affidavit?

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Mr. Holtzoff. The complainant is the man that swears to the complaint.

Mr. Dean. If that is what we mean, that is all right.

Mr. Holtzoff. Yes.

Mr. McLellan. It will read, "or of the complaint."

Mr. Holtzoff. "or of the complaint."

The Chairman. Is that raised by someone as a motion?

Mr. McLellan. Yes, I move that.

Mr. Seasongood. I second it.

Mr. Dean. I second the motion.

Mr. Wechsler. I second it.

The Chairman. Those in favor say "Aye." Opposed, "No." Carried.

Mr. Medalie. That takes out the words, "any other officer of the United States."

The Chairman. Right.

Mr. McLellan. Mr. Chairman, in the fifth line.

The Chairman. In the fifth line, yes. Now, what about line 8? Well, we have this other phrase.

Mr. Holtzoff. I do not think you can limit the phrase to the complainant, line 8.

Mr. Youngquist. I would suggest that in lines 7 and 8 we strike out the words "by the United States attorney or by any other officer of the United States."

The Chairman. Is that seconded?

Mr. Holtzoff. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No."

Mr. Youngquist. In line 7, the words "by the United States," right near the end of the line.

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The Chairman. Strike out that sentence on line 7 after the word "requested."?

Mr. Youngquist. That is right.

The Chairman. Is there anything further on Rule 4(a)?

Mr. Wechsler. Mr. Chairman, to bring the previous matter to a head I move that we go back to Rule 3 and insert a suection (c) on who may file a complaint, reading in substance as follows:

"A complaint may be filed by an officer of the United States authorized to do so or by a private person who has personal knowledge of the facts."

The Chairman. Is the motion seconded?

Mr. Robinson. I second it.

Mr. Youngquist. I should doubt the advisability of that. The filing of complaints is a very informal and very liberal proceeding, and it has, as I think Mr. Holtzoff suggested, been a matter of practice rather than of law. I am inclined to think that it would be in general advisable to follow the practice as it has been outlined by Mr. Holtzoff and let whatever changes may seem advisable grow up rather than for us to either restrict or extend.

Mr. Wechsler. My information is that there is no legal provision against the filing of complaints by a private person. I think we should either explicitly leave the law as it is now or change it. Since there is no disposition to change it, I am in favor of leaving it as it is now.

The Chairman. Professor, do we not accomplish that in Rule 4(a) in the revised form? Have we not left it perfectly open, that a private individual may have this right?

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Mr. Wechsler. I would infer from the text as it now stands that a private individual may file a complaint. Since that is the correct inference, apparently, I think the matter should be set forth.

Mr. Seth. Mr. Tolman called my attention a little while ago to some instructions which limit the right of the commissioners to issue warrants on the complaints of private individuals.

Mr. Youngquist. Is that prohibited, or is there any similar limitation?

Mr. Seth. Would you give that to us, Mr. Tolman?

Mr. Tolman. There is a requirement in the Internal Revenue Acts that the complaint be approved by the district attorney, and for that reason fees are not allowed commissioners when they issue warrants without that approval.

Mr. Seth. That is what I had in mind.

Mr. Holtzoff. We have a departmental rule, for example, that the F.B.I. may not file a complaint without the approval of the United States attorney, and that rule is followed religiously.

Mr. Wechsler. That is a matter of his personal duty to his superior.

Mr. Holtzoff. Oh, yes. I do not propose that that should be in these rules, but I only said that administrative practice is in support of my position that private prosecutions should be discouraged rather than invited, and also that the present universal practice, although there is no statute on the subject, is not to entertain complaints by private individuals.

Mr. Dean. Is it not possible, in view of that determined

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practice since time immemorial, not to permit private individuals to file complaints before United States commissioners--that plus the fact that we have not specifically authorized private individuals to do it--might not a judge, taking those two things together, say these rules really exclude them?

Mr. Holtzoff. I should like to see them excluded. I should not object to having that construction placed on it. In fact, I hope it will be.

The Chairman. If we do not do it. I hoped we would not do it.

Mr. Dean. Let us do it one way or the other. I think there is something in Mr. Wechsler's suggestion there. We ought to face it. Do we want it or do we not want it? If we do want it, let us put it in.

Mr. Wechsler. I might reply, it is deemed desirable as a matter of policy to preclude filing of complaints by private individuals. Presumably that will only occur in cases in which the United States attorney refuses to act.

Mr. Youngquist. I think it probably is grounded on the fact that practically all prosecutions under the federal laws come about as a result of the activities of one of the investigative agencies of the United States. That is not true in the state courts to the same degree, and I should be inclined to agree with Mr. Holtzoff that normally the complaint should be filed, or should be initiated at least, by one of the investigative agencies or an officer of the United States, whichever you choose to call it; let that be the general practice, and not encourage the filing of complaints by individuals by giving specific authority to do it, but still leaving it open, with

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Rule 3 as we have it now, for that to occur if occasion should ever arise.

Mr. Waite. I agree thoroughly with Mr. Wechsler that we ought not to stick our heads in the sand and hope that somebody will follow a practice we think ought to be followed. Now, frankly, I do not know whether the complaints ought to be issued at the request of a private person or not. Our own Michigan practice requires, as a matter of fact, the approval of the prosecuting attorney before the warrant will be issued.

Mr. Holtzoff. The objection to private prosecutions, of course, is that you might have persons improvidently arrested, especially as many commissioners are not lawyers; and here is a layman who might come in before a commissioner: a lay complainant comes in before a lay commissioner and swears, and between the two of them they make a complaint and a warrant. You will find that you are apt to get improvident arrests. You have a different situation in state crimes, because you have the type of crimes where there is always a private victim, and he wants to get the law in motion, but most federal offenses are not of that type.

Mr. Waite. I am afraid you missed what I said. In Michigan it does require the approval of the prosecuting attorney; and if it is desirable not to have them issued in the federal courts on private complaint, why can we not say that? My point is, I am agreeing with Mr. Wechsler that we ought to say one thing or the other. I am definitely open to argument as to what we should say.

Mr. Youngquist. I should much rather limit the right to file a complaint in the language that we use in 3, to an

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officer or employee of the United States, than to include the individual. That is the general practice, and the only reason I have suggested leaving 3 as it is is to meet the abnormal and unusual situation where it may be proper, and the federal prosecuting authorities refuse, to file a complaint.

Mr. Wechsler. Let us put it that way, then: require a private individual to go to the United States attorney first and preclude him from filing his complaint without first going to the United States attorney. Then the commissioner will know, if the complaint is filed by a private individual, that it is a case in which the United States attorney refused to act or refused to approve it.

Mr. Youngquist. That, then, would have the effect of precluding the right to file a complaint by a private individual except with the consent of the United States attorney.

Mr. Wechsler. No, I did not mean just cause, although that might be desirable. My suggestion was that a private individual be required first to lay his complaint before the United States attorney. If the United States attorney refuses to act he could still go to the commissioner, but the commissioner would then know that the United States attorney had determined against it, which would give the commissioner some protection with respect to the legal question involved but would still provide some relief in the case where the United States attorney refuses to act.

Mr. Holtzoff. I do not believe that that is good.

Mr. Wechsler. The general tendency is to require the complainant to go to the Department of Justice in Washington, which is now done occasionally, but it is a very cumbersome way

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of getting started.

Mr. Youngquist. If that were the rule you might find a situation like this in the districts with the larger areas: Someone up in Crookston, Minnesota, where there is a United States commissioner, and which is a point 300 miles from the office of the United States attorney, may have knowledge of the commission of a federal offense. If there is to be an arrest and a prosecution, prompt action must be had. It could not be had if he were first required to submit his case to the United States attorney's office in St. Paul. It is that kind of situation that I have in mind when I make the suggestion that I have made.

Mr. Holtzoff. Actually, as a practical matter, in a situation such as this the citizen notifies the investigative agency: if it is a liquor case, the nearest alcohol tax office, or the nearest F.B.I. office if it is an offense investigated by the F.B.I., and so forth.

Mr. Seth. Do they not have telephones up there, so that they could call up the United States attorney?

Mr. Youngquist. Well, what is the submission to the United States attorney?

Mr. Holtzoff. You would have improvident arrests, I am afraid, if you were to encourage private prosecutions, especially as you have so many laymen among commissioners.

Mr. Seth. You would have interference, too, with investigations being made by the F.B.I., some individual rushing in. I think it should either be left as it is or provision merely put in that the United States commissioner may refer to the United States attorney any complaint filed by a private

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individual before he issues a warrant on it.

Mr. Burns. Mr. Chairman, I think the rules should make it clear one way or the other. On the question of policy normally I would feel that it is desirable to have a method whereby a private person could initiate a prosecution where the government agency refuses to act; but when I think of the Government moving now through O.P.A. and other war measures into the day-to-day business routine of this whole country, I think that to give the private individual the power to initiate without any supervision far-reaching prosecutions--it may be only a simple case, but its implications may be more serious--I think under those circumstances I would be against, on the question of policy, giving the private individual the right to initiate prosecutions; and I think, therefore, we should spell out in these rules the limitations to the investigatory agency.

Mr. Longsdorf. Mr. Chairman, may I ask a question: Are we not talking about authority to institute a proceeding in the name of the United States? Can we give anyone that authority by rule? Is that procedure?

Mr. Wechsler. We are not talking about authority to institute proceedings in the name of the United States. We are talking about authority to file a complaint. Before prosecution can be had there must be an indictment by grand jury if it is the type of case in which indictment is necessary, or else there must be an information filed if that is permissible, and at that stage we can consider who may file an information; but in normal course of felony cases the control is still in the grand jury, and in case the grand jury fails to indict there is no prosecution. It is rather another method for bringing matters

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to the attention of the grand jury, that is involved here, other than through the instrumentality of the United States attorney. I am not clear on the policy either, but I do think we ought to resolve it one way or the other.

Mr. Dean. It will be especially true in the case of petty offenses, would it not?

Mr. Wechsler. Yes.

The Chairman. Is there any motion?

Mr. Wechsler. I made a motion, and it was seconded.

The Chairman. May we have it repeated, Mr. Stenographer?

Mr. Wechsler. The motion was that there be added section (c) to Rule 3, reading:

"A complaint may be filed by an officer of the United States authorized to do so or by a private person who has personal knowledge of the facts."

The Chairman. Mr. Youngquist, will you preside for just a minute? I have been called to the wire.

(At this point Mr. Youngquist assumed the chair.)

Mr. Burke. I thought we eliminated the second section from Rule 3 and combined it with 1.

Mr. Wechsler. I am sorry. Yes. It would not be 3(c); it would either be 3(b) or an additional sentence to 3, as I understand it.

Mr. Youngquist (acting chairman). Was the motion seconded?

Mr. Orfield. Yes, I seconded it.

Mr. Youngquist. The motion is that a provision be added to Rule 3 reading:

"A complaint may be filed by an officer of the United States authorized to do so or by a private person

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who has personal knowledge of the facts."

Is there any discussion?

Mr. Seasongood. I may ask, do you have to have "authorized to do so" in there? That is, you might have the question whether he had to be definitely authorized, but presumably it would be somebody who is authorized. We could follow that. I wondered whether it would not be just as well.

Mr. Wechsler. I was trying to make the point that was raised before in connection with section 4. Do you want to take out "authorized to do so"?

4 Mr. Dean. So far as it related to law enforcement officers could you not say "filed by any person having knowledge of the facts"?

Mr. Wechsler. That raises the question as to when an officer may file. Must he have knowledge of the facts?

Mr. Dean. I should think so.

Mr. Medalie. As the rule is drawn now he must have. If he has not he must supply the necessary proof by affidavit sworn to before the committing magistrate.

Mr. Holtzoff. Oh, well, he can swear on information and belief, giving the source of his information, the grounds of his belief.

Mr. Medalie. He would have to give it.

Mr. Holtzoff. Oh, yes. All the rule says is that he must make his complaint on oath, but he can make his oath on information and belief, supplying, of course, the source of his information.

Mr. Medalie. So can anybody else if he can.

Mr. Holtzoff. Yes.

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Mr. Wechsler. It was that differentiation that I had in mind, that a private complainant who merely has knowledge or information and belief ought not to be permitted to file a complaint, but a law officer might be permitted to file it on that basis.

Mr. Youngquist(acting chairman). Did you amend the motion by striking out the words "authorized to do so"?

Mr. Wechsler. Yes. I may say, Mr. Chairman, though I should vote for this in order to keep the issue alive, I would like to think about it some more myself. I am not clear on the wisdom of this formulation as distinguished from the very opposite of it: limiting the right to file to an officer of the United States; but I should not like to decide it merely on the basis of this discussion this morning. As far as I know, it is the only consideration that has been given to the subject.

Mr. Robinson. No; on that point there has been quite a lot of study given to the question. That may have been at one of the meetings of the subcommittee that you were not present at.

Mr. Wechsler. No, it was not discussed there; I have been through the transcript.

Mr. Robinson. It has been discussed in previous sessions of this meeting. Did you examine an old transcript of this committee's meetings too?

Mr. Wechsler. No. Well, that may be.

Mr. Robinson. There have been informal discussions, too, about this matter of personal knowledge. Mr. Holtzoff and I have had a somewhat intimate continuing debate on the subject.

Mr. Holtzoff. In view of the fact that Mr. Wechsler himself admits doubt as to the desirability, I am going to bring the

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matter to a head by moving a substitute for Mr. Wechsler's motion: that a complaint may be filed by the United States attorney or an officer of the United States authorized to do so.

Mr. Burns. I second that motion.

Mr. Youngquist. The question is now on the substitute motion.

Mr. Wechsler. I find it just as hard to vote for the substitute as to vote for my own with any conviction, Mr. Chairman.

Mr. Seth. Should that not be "with the approval of the United States attorney" rather than "by the United States attorney"?

Mr. Holtzoff. I do not think that we want to make that as a requirement. That is an administrative matter.

Mr. Seth. But your motion says by him.

Mr. Youngquist. I did not hear you.

Mr. Seth. The motion, as I understand it, says that the consideration is "by the United States attorney."

Mr. Youngquist. That is right.

Mr. Holtzoff. By the United States attorney or an officer of the United States authorized to do so.

Mr. Medalie. May I ask this: Take one of our public parks.

Mr. Holtzoff. Pardon?

Mr. Medalie. Take Yellowstone Park.

Mr. Holtzoff. Yes?

Mr. Medalie. Only the Federal Government has criminal jurisdiction; is that right?

Mr. Holtzoff. Yes.

Mr. Medalie. Suppose someone assaults you or gives you a

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bad check or picks your pocket or sells you stock or does something else that is fraudulent, and is about to leave and is getting on the bus. What do you do with them? Find the United States attorney or a public officer?

Mr. Holtzoff. I suppose a citizen has the right to make an arrest on a warrant.

Mr. Medalie. Of course he has. Now, then, he makes an arrest, and he brings the man before the magistrate. He brings him there. What happens? May he file a complaint or may he not? If he cannot find the United States attorney or a public officer, no complaint may be filed. The magistrate is helpless. The criminal escapes. He cannot hold him.

You do not want to leave the law in that state, do you?

Mr. Dession. Nowhere in these rules or anywhere else would the citizen be aware as to when he could make such an arrest without a warrant.

Mr. Holtzoff. Well, that is a rule under substantive law.

Mr. Medalie. It is, but what happens when he exercises that right, assuming he has it?

Mr. Dession. My point is that there is no substantive law on the Yellowstone Park.

Mr. Medalie. If he gives a bad check and it is found out, now, by telegraph or telephone that that account does not exist in the bank in which it purports to exist, then the victim knows he has been swindled, and the normal thing for him to do is to go to a policeman and have the man arrested or bring him in. He has that right. Now, there is no United States attorney, there is no marshal, there is no F.B.I. man, there is no one there. What do you do? The magistrate turns him loose as you have

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stated the rule. We do not want that.

Mr. Youngquist. We have, gentlemen, three alternatives: one is to limit the right to file a complaint to an officer of the United States; the second is to give that right to an officer or to a private individual; and the third is to leave the rule as it is. If there is no further discussion I shall put Mr. Holtzoff's substitute, which is the first alternative that I stated.

Mr. Medalie. That means, Mr. Chairman, that if we vote against these two amendments the situation is left as it is today.

Mr. Youngquist. That is why I stated the alternatives.

Mr. Medalie. Yes.

Mr. Waite. As it is today it is just vague; do I get that correct?

Mr. Medalie. No.

Mr. Waite. It is uncertain.

Mr. Medalie. They shall be sure that, there being no restriction, the citizen can have the remedy that would be denied to him by either of these amendments, because no interpretation of the law would be to the effect that you cannot vindicate the criminal law simply because the particular person happens not to be around.

Mr. Waite. Well, would not Mr. Wechsler's, then, be the law as it is today?

Mr. Medalie. No.

Mr. Waite. Wechsler's lets it be filed by a private person having knowledge of the facts.

Mr. Wechsler. I believe that is the law today.

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Mr. Youngquist. I think it would be, and I think the suggestion was made by some member a while ago--perhaps it was myself--that the only objection to it would be the encouragement of filing complaints by private individuals.

Mr. Holtzoff. That is one reason, of the three alternatives, why I moved the substitute, because if we are going to formulate a rule one way or the other I should rather have it in the form of a substitute, which I suggested in the form of Mr. Wechsler's motion.

Mr. Youngquist. Yes.

Mr. Holtzoff. But my preference is the third alternative.

Mr. Youngquist. You probably will vote against your own motion?

Mr. Holtzoff. I shall remain silent.

Mr. Seth. Would a motion to lay that motion and the substitute on the table bring the matter to a head?

Mr. Holtzoff. Yes, it would.

Mr. Orfield. I make that motion.

Mr. Holtzoff. I second the motion.

Mr. Waite. That would mean we just say nothing; is that it?

Mr. Youngquist. Yes, we leave it as it is. Is there any further discussion?

All in favor of the motion to lay the question on the table say, "Aye"; contrary?

May I have a show of hands, please? Those in favor? Seven. Those against, seven.

Mr. Holtzoff. You have to vote.

Mr. Youngquist. I vote Aye. The motion is carried.

Does that complete 4(a)?

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Mr. Holtzoff. I think it does. We have reviewed 4(a).

Mr. Medalie. No; there is something in 4(a) I want to call attention to.

Mr. Robinson. Pardon me, Mr. Medalie, just a second. I think I should add this: that in view of this close vote it seems to me to be clearly proper that the reporter's staff continue a study of the law as it is now and present that by a note or otherwise to the committee for any further action you may wish to take on this point.

Mr. Medalie. Yes.

Mr. Robinson. In fact, we have a study on that subject that I think bears out the position taken here to the effect that the law is fairly well established, sufficiently so; and further I should say that no complaints in regard to the operation of the present system have been received, no recommendations, by judges or bar associations on that particular point.

Mr. Holtzoff. The gentleman had something on Rule 4(a)?

Mr. Robinson. He wants to suggest.

Mr. Dession. I want to suggest, Mr. Robinson, in that same connection I have been thinking over the point raised by Judge Burns on that, and I am rather impressed by it the more I think of it. Take your gas rationing cards. I have noticed a considerable sensitivity on the part of the public to anybody who may be getting away with something. I can easily visualize, if that feeling grows a little, and the same may be true of a

6 lot of the other new regulations, quite a few irresponsible complaints on information and belief by private citizens or self-appointed private committees. There may be a real problem there.

Now, I want the private citizen to be able to make a com-

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plaint in a proper case--to cover your Yellowstone Park situation. I also want some brake on this business.

Mr. Medalie. That is the point I was about to raise with the language of 4(a). 4(a) says that the magistrate must issue a warrant or, in the appropriate case, a summons. Now, I have seen any number of examples in our busy criminal courts in New York, especially over thirty years ago when I was a young assistant district attorney of the county, where a person would swear to facts constituting a crime, and they refused to do anything for him because there was a doubtfulness as to whether he was telling the truth or they were privately convinced that he was a liar.

Now, this says the magistrate must issue a warrant. I think that is just exactly what we do not want to have done.

Mr. Holtzoff. Should we not change "shall forthwith" to "may"? That would meet your point.

Mr. Medalie. You ought to have something in there as to whether the magistrate is convinced from the complaint that a crime has been committed; if the magistrate in his own mind thinks that a crime has been committed by the person charged, against whom a charge is made, he ought to issue the summons or the warrant, as the case may be. But if he is not so satisfied he ought not to do it.

Mr. Seasongood. That is rather new, is it not? I do not know, but ought it not to be automatic? If you are going to swear to the proper thing you are going to have the magistrate determine whether he will issue a warrant in the first place, and of course then you have to go to mandamus, and you probably cannot do that. I do not know.

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Mr. Medallie. The experienced full-time magistrates in the large cities, certainly in New York City, do that kind of thing, and the district attorneys want them to do it that way.

Mr. Seasongood. Suppose he does not issue the complaint. What are you going to do?

Mr. Medallie. If he does not issue a warrant?

Mr. Seasongood. Suppose he likes the girl or the defendant or the accused.

Mr. Medallie. It is possible that he is corrupt, either mentally or otherwise, but--

Mr. Holtzoff. What would you do with lay commissioners, though? You see, in the federal system there is a lot of lay part-time commissioners. Very part-time.

Mr. Medallie. You have a practical difficulty where a public official comes and swears.

Mr. Holtzoff. No, you do not, because I think ordinarily the commissioner rules against an investigative agency.

Mr. Medallie. Yes, but where there is doubt, conscientious doubt or conviction that the crime was not committed by the person charged, I think he ought not to issue a warrant; otherwise he is a pure automaton instead of being a judicial officer.

Mr. Seasongood. Ordinarily if you file a complaint with a clerk or something, he issues the warrant, in the ordinary police prosecution.

Mr. Medallie. The clerk issues the warrant?

Mr. Seasongood. Yes.

Mr. Holtzoff. That may be local practice.

Mr. Seasongood. Yes.

Mr. Holtzoff. But it is not the common practice.

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Mr. Seasongood. What would you do if he would not issue the complaint? I do not think it is up to him to decide, really. I am just talking out loud. I do not know, but that is the way it strikes me.

Mr. Holtzoff. The practical solution would be this: If he believes the commissioner is unreasonable I think the officer would make the arrest without a warrant on probable cause, because an arrest on probable cause may be made without a warrant.

Mr. Seasongood. He would run a good deal of risk of a malicious prosecution suit, would he not, if he undertook to arrest when the magistrate would not give a warrant?

Mr. Holtzoff. Yes, that is so.

Mr. Medallie. He could then get the assistance of the United States attorney.

(The chairman assumed the chair.)

The Chairman. What are you going to do in those districts where you know that there are various commissioners who are influenced?

Mr. Seasongood. Surely. They will not issue the warrant.

Mr. Robinson. You have a good thought there.

Mr. Medallie. Another situation is that the person is arrested when he should not be arrested, and he probably sues, in actual operation.

Mr. Holtzoff. But in actual operation there is no problem today, is there? I never heard of any, and I think if we leave the rule as it is now phrased there will not be any problem.

Mr. Medallie. Well, supposing the case given by Mr. Dession: A private citizen falsely accuses another citizen of trafficking

7 with the enemy or getting more gas than he is entitled to, and

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the magistrate must issue a warrant. That is pretty serious, and these accusations, you know, fly around like wholesale.

Mr. Holtzoff. I think that then the commissioner would send the complainant either to the United States attorney's office or to the office of the appropriate investigative agency.

Mr. Medallie. This says he must issue the warrant and not send him there.

Mr. Burns. Why not limit the complainant?

Mr. Medallie. Limit it?

Mr. Burns. Limit it to an officer.

Mr. Youngquist. We are back to rule 3?

Mr. Medallie. That in effect makes the public officer the person who determines that a warrant shall issue. The magistrate makes no determination then except automatically and except also only to the extent that he says, "This paper says that a crime has been committed." I think there must be some brake on these things, even though we unfortunately have an awful lot of ignorant magistrates in our system.

Mr. Robinson. Mr. Medallie, may I ask this: Of course you are considering the law on malicious prosecution? That would still be in effect, and you are considering it? A mere arrest does not amount to much if you do not have a United States attorney ready to follow it through. You still have the power of the United States attorney to dismiss.

Mr. Holtzoff. I think a "mere arrest" amounts to a lot if you spend a night in jail.

Mr. Robinson. There is no question about that.

Mr. Medallie. Malicious prosecution does not do anything for a man who has been arrested on the complaint of a person who

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does not have a penny to his name.

Mr. Robinson. That is true, of course.

Mr. Dession. We are moving into a new situation; do you not think so, Mr. Robinson? Take the sabotage acts that we are hauling out now. There is no telling how enormous an increase there will be in the use of wartime acts.

Mr. Medallie. I remember the time when the Lindbergh kidnapping bill was passed. My district had nothing to do with it. We had more persons coming in who were sure they had personal knowledge as to who the kidnapper was. If they had gone directly to a magistrate and made a complaint in a moment of hysteria, an awful lot of nice people would have landed in jail.

Mr. Burns. But is that magistrate as well equipped to make the determination as the United States attorney?

Mr. Medallie. Well, he is as well equipped as some employee of a federal department who has previously had no experience.

Mr. Holtzoff. I do not think so. I think an investigative officer of the Federal Government is much more equipped than a United States commissioner. There are some competent and able commissioners; some of them are really able.

Mr. Medallie. Let us see how it really works here. In effect you are telling the official that he determines that a person shall be arrested. Is that not what you do? Why do you not give him that right, without having commissioners?

Now I give you the alternative: Why do you not tell him to make the arrest if he is so sure about it?

Mr. Holtzoff. How would you phrase this? What is the thought that you have in mind?

Mr. Medallie. If satisfied from the facts presented to him.

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I think there is some language in the New York code. I think so; I am not sure. Is there any in the model code?

Mr. Seasongood. He does not have to be satisfied. All he has to have is probable cause.

Mr. Burns. Cause, yes.

Mr. Holtzoff. If he is satisfied.

Mr. Youngquist. If it states the conditions.

Mr. Medallie. I believe he is satisfied there is probable cause, but it must exist in the mind of the magistrate.

Mr. Burns. Is it not true that in most states the committing magistrate is a substitute for the grand jury, and therefore he has to believe there is probable cause? I mean he is not a substitute, but for the smaller crimes, for lesser crimes, he fulfills the function of a grand jury.

Mr. Holtzoff. No; I think in the Northern States, which have done away with grand juries, the United States attorney or district attorney fulfills the function of a grand jury.

Mr. Burns. Yes, but I am thinking again of Massachusetts, where they have a grand jury system and also a committing magistrate, and the committing magistrate when he holds for the grand jury makes a determination solely on probable cause.

Mr. Holtzoff. Yes, but this relates to a stage in advance
8 of the commitment by the magistrate. This relates to issuance of the warrant, and after the person is brought in under the warrant then the magistrate holds the hearing.

Mr. Wechsler. The provision of the model code, Mr. Chairman, is this:

"When a complaint is made to a magistrate that an offense has been committed, he shall examine on oath

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the complainant and any witness he may produce, take their depositions and cause them to be subscribed by the persons making them.

"A warrant shall be issued, except as provided in section 12, for the arrest of the person complained against if the magistrate, from the examination of the complainant and the other witnesses, if any, has reasonable ground to believe that an offense was committed and that the person against whom the complaint was made committed it."

Section 12 referred to has to do with summonses.

Mr. Holtzoff. Well, we could shorten this considerably.

Mr. Medallie. I like the idea "expressly," and we must shorten it, of course, but that is the idea, and I think that is prevalent.

Mr. Holtzoff. You could say something like this: that if the magistrate finds that there is reasonable ground to believe that an offense has been committed and that the person named, against whom the complaint is made, has committed it, he shall issue a warrant.

Mr. Medallie. Some language like that would be all right.

Mr. McLellan. Well, would you get that result if you changed "shall" to "may"? I am not saying that I am for that.

Mr. Holtzoff. I think you would.

Mr. Youngquist. I should not do it that way, because there you put no rein on his discretion at all.

Mr. Holtzoff. That is it.

Mr. Robinson. May I read what some statutes of the various states provide on that, if you wish to see the law of the

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various states as it is contained in the commentaries in the American Law Institute Code, page 180. There is a wide diversity in the statutory provisions of the various states relating to the conditions on which a warrant of arrest is to be issued:

That a warrant shall be issued upon a complaint made: Colorado, Florida, Indiana, Louisiana, Missouri;

That a warrant may be issued on complaint made: Connecticut, Georgia, Iowa, New Hampshire;

That a warrant shall be issued if it appears that any offense has been committed:
Massachusetts, Michigan, Nevada, New Mexico;

That a warrant shall be issued if the magistrate sees good reason to believe an offense has been committed: Virginia, West Virginia.

And then more from Montana, Illinois, Arkansas, Alabama.

New York is placed under this heading: That a warrant shall be issued if the magistrate, from the complaint and any examination of witnesses made by him, is satisfied that the offense complained of has been committed and there is reasonable ground to believe that the person charged committed it.

That is the New York Code of Criminal Procedure, Section 150.

Mr. Medallie. That and the Institute code in substance run the same, do they not?

Mr. Robinson. No.

Mr. Burke. That is substantially the same as the portion Professor Wechsler read, is it not? The New York code is substantially the same?

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Mr. Medallie. I think we ought to be clear on this and make sure that we have made some such provision that the magistrate is not an automaton for any federal officer or private individual who just with a complaint drops a nickel in the slot and gets his piece of chewing gum in the form of a warrant.

Mr. Holtzoff. Are you making a motion?

Mr. Medallie. What?

Mr. Holtzoff. Are you making a motion now?

Mr. Medallie. No, I think I should like this done over. Let us do it over. Let us do it overnight so we do not hold things up. If it is agreed that that is the principle we ought to follow I should like to see some of us go to work on it and do it overnight.

I move that the principle set forth in the Institute code and as indicated by the New York statute be adopted here and that an adequate drafting be done overnight and submitted tomorrow morning.

Mr. Burke. Supported.

Mr. Youngquist. I second it.

The Chairman. Is there any discussion?

Mr. Seasongood. It is an important question of policy. I do not think we have decided that it is a question of policy. It is a question of undesirabilities. The one undesirability is that a magistrate, who is often an ignorant person--to say no worse--may not issue the warrant when he should issue it. The other is that an innocent person may be subjected to arrest.

Now, would not a better compromise be that one that was suggested, that it be an official prosecution? because then at

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least you have a very minimum idea of discretion and judgment. I think it is an important question, and I do not think we ought to resolve it just one way or the other without considering it very seriously. I think at the worst you would have lots of commissioners who would not issue a warrant when they ought to; and it has been in fact very much influenced by what Judge Burns said of these criminal offenses: you do not want everybody

9 rushing in there and filing a prosecution against you for spite or on a silly pretext, by a person of no responsibility. So I should think the happiest compromise would be just to say it has to be done by some kind of an official.

Mr. Burns. How about one other situation? As these bureaus multiply their powers increase. They follow a general pattern of seeking to extend their power, and frequently it has happened and it is happening on an enlarged scale that these bureaus are in conflict with the United States attorney. They want much aggressive action, they not having the background of preparation necessary for a successful prosecution and they, after all, being designated by some minor official, whereas the United States attorney is an appointee of the President and has been confirmed by the Senate; and in those cases it seems to me it is very important that the United States attorney be empowered to fix the policies of prosecution without being put in a box, as he may well be put in by the filing of complaints by these various agencies. And this, it seems to me, is a separate and I think a very practical argument in favor of limiting the power of initiating prosecution to enforcement officers of the United States.

Then it seems to me that even if you answer that question

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you still have left the problem, which is a very basic one, of not having the magistrate's office a sort of automatic push button affair. I think if we inserted something like "if he has reasonable ground to believe that an offense has been committed," you would not cut down at all on the operation of justice, and at the same time you do provide a reasonable basis upon which a magistrate can act as a magistrate and not just as an automaton. So I think both of them can be confined.

Mr. Medallie. May I add to this discussion this observation: If you run into an unreasonable magistrate or United States attorney or revenue agent or an F.B.I. agent, you simply go to another magistrate; the prosecution has not been killed. And you still have the right to make the arrest. Justice will not be frustrated.

Mr. Holtzoff. And you can go before the district judge if you have trouble with the commissioner.

Mr. Medallie. I am assuming you have great distances to go, and there are many magistrates available, including the justices of the peace of the village, the county, the city, and so on.

Mr. Seth. And the mayor too.

Mr. Medallie. And the board of aldermen.

Mr. Burns. It is a sort of ascending scale.

Mr. Medallie. There are plenty of magistrates. Justice will not be frustrated because of the act of a corrupt magistrate. In other words, suppose a commissioner in Newark, to be precise, --

The Chairman (interposing). Say Jersey City.

Mr. Medallie. All right. --unreasonably refused to issue

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a warrant. You have not far to go within that district to get a public official who is a magistrate or an officer of the state, county, or village or town to give you process if you are entitled to it.

Mr. Robinson. Yes.

Mr. Youngquist. As a matter of information and showing what the practice in the states is, it may be interesting to note that five states provide that a warrant shall be issued on complaint; four, that a warrant may be issued; and all the others provide, in varying terms, that a warrant shall issue if it appears or if there is reasonable ground to believe or if the magistrate is satisfied that an offense is stated, and so forth. So that 39 of the states do give the magistrate some discretion, four give him complete discretion, and only five require him to issue a warrant.

Mr. Wechsler. So far as existing law is concerned, Mr. Chairman, it is interesting to note that Section 591 of Title 18, which is the general section empowering magistrates, contains the words "agreeably to the usual mode of process against offenders in such State," so that there is apparently some reference in the basic provision to the state practice.

Then I notice also that in Section 594, which deals with violations of the internal revenue laws, the law is not that the complaint may be filed only by the United States district attorney or other officer; it is as follows:

> "upon the sworn complaint of a United States district attorney, assistant district attorney, collector, or deputy collector of internal revenue or revenue agent or private citizen; but no such

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warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney."

So that the requirement is the exceptional one of approval in that instance.

Mr. Seasongood. May I ask, what did you read there? Do those states say that "if it appears an offense has been charged" or "committed"?

Mr. Dean. Committed.

Mr. Medallie. You have that.

Mr. Robinson. Well, here are summaries from five or six states in what he said. The way you stated there, Mr. Seasongood, is the law in Illinois, Kansas, Minnesota, and Wisconsin: "if it appears that the alleged offense has been committed." Now, there are four other variations in there. Would you like to take it?

Mr. Seasongood. I just did not understand the great number of states where it was "if an offense has been charged" or "if it appears that an offense has been committed."

Mr. Youngquist. I thought it was "committed" in most states.

Mr. Holtzoff. Is it not "probable cause to believe" that it has been committed?

Mr. McLellan. No; "that the offense has been committed and that there is probable cause to believe that the defendant committed it" is what the New York code states. Four states, including Massachusetts, say "if any offense has been committed."

Mr. Medallie. Let us not have the technicalities as to what is charged, and that is what we have in mind in the 15

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section.

Mr. Robinson. Two states, "that an offense has been committed."

Mr. McLellan. What is the harm in having this written up so that we can consider it?

Mr. Medallie. Mr. Seasongood raises the point that he does not want to be committed to a policy in advance of writing this. Of course, my motion is to commit them to a policy.

Mr. Seasongood. I do not know what is the better.

Mr. Holtzoff. I offer the question, Mr. Vanderbilt.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." Something in writing, then.

Mr. Medallie. Will you take charge of appointing your own committee to write that up, then?

Mr. Robinson. Make you chairman.

Mr. Medallie. I do not want to be chairman. I will sit down and work with you for half an hour on it, assuming that I have Minnesota and the District of Columbia with me.

The Chairman. Now, that brings us, does it, to 4(b), or am I going too far?

Mr. Youngquist. May I make a comment on 4(a)?

The Chairman. Yes.

Mr. Youngquist. I think under the circumstances the additional words that I suggested, "against a person not in custody" should be eliminated, because this now applies to all warrants whether they were issued before or after arrest.

Mr. Holtzoff. You do not issue a warrant after arrest has been made if an arrest is without a warrant.

Mr. Youngquist. I mean it applies to filing complaints.

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Mr. Holtzoff. Oh.

Mr. Youngquist. Whether before or after the arrest is made. I misspoke myself. Those words "against a person not in custody" should be stricken.

The Chairman. All right.

Mr. Holtzoff. No, because this is only--

Mr. McLellan. (Interposing) I see what you say, but I do not understand.

Mr. Burns. Will that be taken care of by the committee?

Mr. Youngquist. Yes, I think it will be. It does not fit in that particular place. That is the point I am making.

Mr. Holtzoff. It does now, because they do not forfeit the complaint or warrant.

The Chairman. Well, consider that when you bring in the report on the other section.

Now we come to section 4(b) (1), beginning with line 13.

Mr. Robinson. May I suggest the saving of some words there; Mr. Holtzoff I believe suggested it: that "the name of the complainant and" be stricken out. Some of the forms of warrant contain it; some do not. We can get along without it, I think. After "contain" in line 13 strike "the name of the complainant and."

Mr. Youngquist. How can they do that?

Mr. Medallie. It is sometimes difficult for a man who has been stealing from many people to know just which particular victim is charging him.

Mr. Robinson. That is what I told Mr. Holtzoff, whom I talked to, Mr. Medallie.

Mr.Holtzoff. We did not have that before.

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Mr. Medallie. Or if a person is engaged in a number of neighborhood assaults, going from barroom to barroom, he would like to know just who isn't satisfied.

The Chairman. If there is no serious objection the word will be stricken.

Mr. Medallie. I object to it.

The Chairman. Seriously?

Mr. Medallie. Most seriously.

Mr. Holtzoff. Methinks you do protest too much.

Mr. Medallie. I stated it facetiously, but I am quite serious about it. That is a provision we have had in our law so long.

Mr. Holtzoff. No, the form of federal warrant does not contain the name of the complainant.

Mr. Medallie. Oh, in our states we have it.

Mr. Holtzoff. I know, but this is federal.

Mr. Medallie. Also, if it is something with which a particular public official is charging you then you know what kind of an offense you are charged with committing.

Mr. Youngquist. Is that not stated in the complaint, Mr. Medallie, and if there is an assault is not the assaultee named?

Mr. Holtzoff. You will find that the blank forms that you have used, as a United States attorney, do not contain the name.

Mr. Medallie. I never saw the warrants which I caused to be issued when I was a United States attorney.

Mr. Holtzoff. To refresh my recollection I looked at the federal form book, and I found it does not contain it.

The Chairman. Are there any other questions?

Mr. Medallie. Could you strike that, then?

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Mr. Holtzoff. Yes.

The Chairman. It seems to be.

Mr. Medallie. All right.

Mr. Waite. Mr. Chairman, I should like to call attention to what seems to me like an inconsistency here. In line 17 it provides that the warrant shall command the marshal to arrest the defendant. Then if you drop down to line 26 it says the warrant may be executed--which, I take it, means the defendant may be arrested--"by a United States marshal or some other authorized federal agent." So I would suggest that line 17 be altered to read: "It shall command that the defendant be arrested and brought before the magistrate," and then line 26 will take care of the person by whom it may be done.

Mr. Holtzoff. Yes, I second the motion.

Mr. Medallie. Yes, that is very sound, except that it kills the essential nature of the warrant, the historic nature of the warrant. I do not mind that; it is all right.

Mr. Waite. That is the provision in a great many states already.

Mr. Medallie. I think it is pretty sound. We are getting rid of many anachronisms here now.

Mr. Holtzoff. Warrants do not always read to marshals. More often they do.

The Chairman. How would it read then? "It shall command"--

Mr. Waite. "It shall command that the defendant be arrested and brought before the magistrate."

The Chairman. Is there any objection to that?

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The Chairman: Anything further on this section?

Mr. Burns: I am a little puzzled by the last sentence in 1, "or may be delivered and personal receipt returned by registered mail."

Mr. Youngquist. Where is this?

Mr. Burns. That is in (a)--no, it is in (c), on page 2 of Rule 4, line 29.

Mr. Youngquist. The same language occurs in (a)?

Mr. Burns. That is right. What is the intention, to make the service of summons by registered mail valid?

Mr. Robinson. Right.

While you are on that point, in that line 29, "personal receipt returned" I believe may be stricken out because provision is made elsewhere that I think is sufficient for that, the words "and personal receipt returned", because that is provided for in lines 44, 46.

Mr. Burns. There I also have a question. The words "by registered mail with return receipt signed by the defendant".

Mr. Robinson: Yes.

Mr. Burns: Suppose the defendant does not do it?

Mr. Robinson: Send a warrant for him.

Mr. Burns: Well, isn't it enough if you say, "registered mail with return receipt requested"?

Mr. Robinson: Well, I think not, Judge. It would be well to check up on whether or not the defendant is going to appear.

Mr. Burns. But the service of the summons ought to be determined by what the server does, not what the servee does. What you do, you make a service which is valid with a condition

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subsequent, and I think it ought to read, "with return receipt requested".

Now, if the summons does not work it may not work because he did not get it or because he did not want to come.

Mr. Robinson. Don't you think it would be an advantage if the magistrate or other officer issuing the summons might know right away that the servee is not going to honor the summons?

Mr. Burns: Yes, I think so, but I don't think we ought to put in our rules a condition that the defendant sign the return receipt. You define it by saying that you register it and request return receipt.

I do not think you ought to go beyond that.

Mr. Youngquist. I doubt if you need to ask for a return receipt.

I had a question on that rule as proposed before. It was provided only that they be served by mail, only.

I have two questions: to serve by ordinary mail; and the other question is, "at defendant's last known address".

Mr. Holtzoff. I want to raise a point that just dawned on me, if it is by ordinary mail the magistrate can use a frank envelope. He won't have funds for registering, because there are no funds for registered mail, and, after all, I do not think a registry ought to be required, because this is for the benefit of the defendant. If he does not show up, use your warrant.

In order to save him from arrest you serve summons instead, and so it seems to me it does not make any difference in what manner the summons is delivered.

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Mr. Dession. Well, aren't we going to have a summons enforceable by commitment?

Mr. Holtzoff. No, I don't think we should. If a person does not take advantage of the opportunity to appear in court without being arrested, then issue a warrant.

Mr. Youngquist. Then they will probably arrest him in the evening and keep him in jail overnight.

Mr. Robinson. I see no objection to this provision going out if that is the wish of the Committee. Of course in court we know how some other person is brought in and is accused of not having complied with court requirements; you know how loose it is sometimes.

If we are going to use a summons, why not have a little precision about it instead of just dropping it in a post office box and forgetting it?

Mr. Burns. I was wondering, Mr. Chairman, what proof there will be of service by simple mail delivery, and it is conceivable there might be half a dozen defendants, some of whom appear and others who might not.

The Chairman: Well, I suppose the theory is, if they do not get any answer to a letter they will get a warrant.

Mr. Robinson. You do not know a man is not coming until after the magistrate has set his preliminary hearing.

The Chairman. You have no assurance anyway that he is going to accept the invitation and you are not going to punish him for contempt. He is just here for consideration.

2 Mr. Holtzoff. I still would like an answer to my question as to whether the committee is going to take care of the money for buying the registry.

Mr. Robinson. Would you like this to read just by mail?

Mr. Holtzoff. Yes.

Mr. Robinson. All right. Line 11, strike out "by registered mail as hereinafter provided".

Mr. Medalie. Everything after the word "summons"?

Mr. Robinson. All right. Just end the sentence there.

Line 22, after "place" a period, and strike out the rest of the sentence, or two lines.

Line 29, strike out everything after "delivered" until "by", and then strike out "registered".

Mr. Medalie. Then, "The summons may be served by anyone authorized to serve summons in a civil action,"--

Mr. Robinson. "--or it may be delivered by mail."

Lines 44 and 45, after "by" strike out "registered", and after "mail" strike out the rest of the sentence.

Mr. Youngquist. That is a little too fast. Line what?

Mr. Robinson. 45. After the word "by" strike out "registered", and after "mail" put a period and strike out the rest of the sentence.

Mr. Youngquist. Leaving the word "mail"?

Mr. Robinson. Yes, "by mail."

The Chairman. Is there anything further on (b)(2)?

Mr. Medalie. There is only one little matter of keeping records.

The magistrate issues a summons and gives it to someone to serve. Where is his record of what he gave?

Mr. Holtzoff. Well, there is another general provision that the magistrate shall keep records. I think the administrative office discussed that.

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2 Mr. Holtzoff. I still would like an answer to my question as to whether the committee is going to take care of the money for buying the registry.

Mr. Robinson. Would you like this to read just by mail?

Mr. Holtzoff. Yes.

Mr. Robinson. All right. Line 11, strike out "by registered mail as hereinafter provided".

Mr. Medalie. Everything after the word "summons"?

Mr. Robinson. All right. Just end the sentence there.

Line 22, after "place" a period, and strike out the rest of the sentence, or two lines.

Line 29, strike out everything after "delivered" until "by", and then strike out "registered".

Mr. Medalie. Then, "The summons may be served by anyone authorized to serve summons in a civil action,"--

Mr. Robinson. "--or it may be delivered by mail."

Lines 44 and 45, after "by" strike out "registered", and after "mail" strike out the rest of the sentence.

Mr. Youngquist. That is a little too fast. Line what?

Mr. Robinson. 45. After the word "by" strike out "registered", and after "mail" put a period and strike out the rest of the sentence.

Mr. Youngquist. Leaving the word "mail"?

Mr. Robinson. Yes, "by mail."

The Chairman. Is there anything further on (b)(2)?

Mr. Medalie. There is only one little matter of keeping records.

The magistrate issues a summons and gives it to someone to serve. Where is his record of what he gave?

Mr. Holtzoff. Well, there is another general provision that the magistrate shall keep records. I think the administrative office discussed that.

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The Chairman: Is there anything further on (c), beginning on line 25?

Mr. Longsdorf. Are we through with (b)(2), Mr. Chairman? I want to make a comment.

The Chairman. All right.

Mr. Longsdorf. I have a pretty serious question whether we are not transgressing on the jurisdiction of the district courts. Congress has defined their jurisdiction by creating districts. A State may be one district or numerous districts.

Now, if the authority--

The Chairman. Isn't that covered in line 31?

Mr. Robinson. Line 20.

Mr. Longsdorf. Line 21?

The Chairman. 31.

Mr. Longsdorf. Am I proceeding ahead of the matter considered by the committee?

The Chairman. That is right; I think by about 10 lines.

Mr. Longsdorf. I thought we had gotten over here to (2) in subsection (b). I beg your pardon. I did not hear correctly.

The Chairman. I did call for questions on (2)(b), and that goes from line 20 to line 24.

Mr. Longsdorf. I pass on 24. I am not ready for that.

The Chairman. Are there any questions on (c)(1), from line 25 to line 30?

Mr. Robinson. Mr.Holtzoff suggests that "federal agent" is a pretty general term.

That has been used in some cases but probably not with strict accuracy, and his suggestion is that the line read, beginning at the first of the line 27, "marshal or some other

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officer authorized by law." Insert "by" after "or", insert "officer" after "other", insert "by law" after the word "authorized", strike out "federal agent".

I think that is proper.

The Chairman: If there is no objection that will be the course.

Anything further on that section?

If not, we will go on to (c)(2), lines 31 to 36.

Mr. Longsdorf. Now my question will be in order. I cannot help but have very serious doubts whether a district court can be authorized to send a process other than summons to a corporation outside of its district throughout the limits of a state which contains two or more districts, or outside of the state within 100 miles by a usual mode of travel.

Can we do that?

Mr. Holtzoff. You are right, but Congress amends this existing law by permitting that to be done.

These rules when promulgated by the Supreme Court will

3 have the force of an act of Congress.

Mr. Longsdorf. The Committee did not have the right to change the jurisdiction of federal courts?

Mr. Holtzoff. No. I think that is procedural.

The jurisdiction relates to the right to try that case. As to that, I agree with you that we cannot enlarge jurisdictions, but this merely relates to process, and the fact that this is regarded as procedural is found in this, that the civil have similar provisions, so that is an indication.

Mr. Longsdorf. I am not only willing but anxious to be convinced, but it is necessary to do so, so far as I am con-

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cerned.

Mr. Holtzoff. Well, that is the action of the Supreme Court by promulgating the civil rules.

Mr. Longsdorf. Well, I am interested in raising the question.

Mr. Holtzoff. Well, I have just a verbal change in line 31. The word "except" I think should be "other than".

Mr. Seth. In lines 34 and 35, "the place where the warrant or summons is returnable." Now, if you have made no provision in the form of the warrant making it returnable before any particular officer--

Mr. Youngquist. Isn't that in (d) in line 47?

Mr. Holtzoff. We provide that the warrant shall require the person arrested to be brought before the magistrate, and that would necessarily imply the place where the magistrate holds forth.

Mr. Seth. Well, the law is, you must take him before the nearest United States commissioner.

Mr. Holtzoff. Not on a warrant.

Mr. Seth. Take him before the nearest. That is the United States Commissioner practice.

Mr. Holtzoff. What?

Mr. Seth. Take him before the nearest one.

Mr. Wechsler. That is the present law, Alec. It shall be the duty of the marshal, his deputy or other officer who may arrest a person charged of any crime or offense to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction for hearing, commitment, or taking bail for trial.

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And the magistrate or officer issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused and return of the warrant with copy of the complaint attached shall confer jurisdiction on such officer as fully as if the complaint had been made before him.

Mr. Holtzoff. Ordinarily, of course, the way the thing operates is, the commissioner who issues the warrant is generally the nearest commissioner, and the warrant is returned before him.

Mr. Medalie. No.

Suppose in my district a warrant is issued out of the Federal Court Building, it may be served in Queens County or way up the Hudson River.

You can run down the river and find a few, in fact, quite a number.

When a certain warrant is issued for an offense committed in the neighborhood of the courthouse there isn't much sense in a man being arraigned out in some other county 140 miles away from the only place that is interested and where most of the witnesses will be found, where an officer or federal commissioner probably exists.

In other words, the statute as has just been read is a very impractical one and is probably constantly breached. I am sure it is.

Mr. Holtzoff. The question now is where the 100 miles should be measured from. That is what Mr. Seth refers to.

Mr. Seth. And if you are going to change the form of warrant you had better have it in there.

Mr. Holtzoff. Yes.

Mr. Seth. I think arresting an individual outside of the State where the warrant is issued is wrong. I do not believe under present conditions these warrants should run outside the State.

Mr. Holtzoff. Well, we have cases where a man may be arrested in Jersey City for an offense originating in New York and he may contest for several months taking him across the Hudson River, and it is that sort of situation this is intended to meet.

Mr. Seth. Well, why a hundred miles? Why not make it two hundred?

Mr. Holtzoff. The reason is that subpoenas in civil cases run a hundred miles.

Mr. Seth. I know that is the fact in civil cases, but if we are going to repeal the law why not make it effective?

Who is going to serve the warrant, the marshal in New Jersey or New York?

4 Mr. Holtzoff: Either one. It might be an F.B.I. man, or a Treasury agent.

Mr. Seth. What is the Constitution about it, entitled to a grand jury of the district, does that apply to the preliminary?

Mr. Holtzoff. No. The constitutional provision only applies for trial.

Mr. Robinson. In that connection I should place before you a proposal that has come through the committee which was appointed by the Department of Justice, although it has not had the action of that committee, to the effect that the procedure shall provide that duly issued warrants shall run with concurrent force and jurisdiction in all federal jurisdictions in the

United States.

Instead of limiting it to a hundred miles, your warrant to be effective throughout the country.

Mr. Seth. I favor that on a bench warrant issued through indictment, but we have here now the commissioner's warrants just on a complaint, and I doubt whether anybody on a commissioner's warrant could be taken out of a state and taken to another state or even to another district.

Mr. Medalie. Isn't the distance more important than the state boundary?

Mr. Seth. Oh, yes, of course.

Mr. Medalie. It seems to me there is more hardship involved in having a man arrested up in the Adirondacks to be brought down to lower Manhattan, than to bring him from Newark to the courthouse in Manhattan. I think distance is the real hardship.

Mr. Seth. Don't you think that is the reason for that provision in the law, the nearest United States Commissioner?

Mr. Medalie. Yes, that is the reason, but it has been completely ignored because it has been found impracticable.

The commissioner who gives full time to the job, as he does in our district and probably does in your district, is available to attend to the business of the disposition of the case and has the facilities for doing it, and the witnesses are near him and available to him; and if a person is to be brought to the nearest magistrate--let us assume commissioner, leave out the word "magistrate"--you will find a part-time commissioner somewhere in Albany or Troy or some other place like that, and he might not even be available.

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Mr. Seth. Well, we have a situation out our way, of course, that a man might be taken 400 miles to the commissioner that issued the warrant and put to a terrible hardship away from his witnesses and everything else.

Mr. Medalie. I think it is a choice between hardships.

Mr. Holtzoff. Well, how would it be to change this to provide so that the 100 miles distance be measured from the point where the warrant is issued?

Mr. Seth. I think we had better not try to change the existing law by these rules.

Mr. Robinson. Well, isn't there quite a waste of time and effort that serves no purpose?

Take the Southern District of New York, if you want to arrest a man over in the Eastern District you get a warrant from the commissioner in the Southern District.

You know he is over in the Eastern District but you have to get a return from the marshal in the Southern District.

Then you have to go through the process of notifying the United States Attorney in the Eastern District that you want this man, and that involves the business of having the man arrested; it involves that there must be a proceeding in the Eastern District; you have to bring the witness, one and maybe more, possibly the complainant, over to the Eastern District and get a warrant over there, and then on that warrant--on that complaint and that warrant then you have to arrest your man; then of course you go through the removal proceedings, all of which is being done in the same United States of America and just because you cross a district line, and you have to go through a lot of mechanical procedure which it seems to me we

ought to avoid if we can.

Mr. Medalie: I wonder if we can consider another practical point too, how much is there of arrests made on commissioners' warrants where the defendant has to be brought from a great distance? Does that represent a considerable number of cases or are those rare cases?

Mr. Holtzoff. I imagine that is the exception.

Mr. Medalie. It seems so to me.

Mr. Holtzoff. Except in the rural areas where there might be a couple of hundred miles between commissioners. That occurs in places like Montana or Idaho.

5 Mr. Longsdorf. Or San Bernardino County, California.

Mr. Wechsler: Wouldn't it be adequate to have the warrant run as provided here but retain the duty to bring it up before the nearest magistrate?

Mr. Holtzoff. Not the nearest magistrate.

Mr. Wechsler. Nearest commissioner.

Mr. Medalie. He may be a justice of the peace.

Mr. Wechsler. Well, under the existing statute, the nearest commissioner or judicial officer having jurisdiction, under existing law.

Mr.Holtzoff. Suppose today a man is arrested in Bronx County; the nearest magistrate is a city magistrate in the local Police Court.

Actually the prisoner will be brought down to the Federal Building before the United States Commissioner.

Mr. Wechsler. And that is in violation of law.

Mr. Medalie. We are violating it all the time.

Mr. Holtzoff. What?

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Mr. Medalie. That is one law I am sure we are violating.

Mr. Holtzoff. I think, if it is violated, we have an opportunity to change the law here and I think we should take advantage of it because it is better for all concerned that this prisoner should be taken a United States Commissioner in the Federal Building, and we can save defendant's rights by changing that to read, "brought before a magistrate as promptly as reasonably possible."

Mr. Wechsler. And that eliminates concern for distance as one of the defendant's rights. It is an asset to a defendant to be taken before a commissioner or magistrate where he is rather than somewhere else where the warrant was issued.

I think, as was said before, you have to make a choice here, but I do not think we can eliminate entirely concern for moving arrested persons around.

Mr. Holtzoff. Well, I thought we agreed on that in the subcommittee.

Mr. Robinson. Will this take care of this part--

Mr. Wechsler. I did not know about the statute.

Mr. Robinson. (Continuing) --in 5 (a) where we took up the matter of returning the arrested person to the magistrate, of course the provision in line 7, paragraph (a), does repeat the clause of section 591--or, the following sections, in regard to the nearest magistrate.

Mr. Wechsler. You have repeated this clause where he is arrested without a warrant.

Mr. Robinson. I understand. I was just going to ask you if you did not think it would be proper to provide that the return shall be before the nearest commissioner, if the arrest

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is made outside of the district in which the complaint is issued. We can put that in in line 5.

Mr. Wechsler. That is an arguable solution.

Mr. Medalie. Well, then, what will you do with your witnesses that will be, for their own convenience, available only before the magistrate issuing the warrant?

Mr. Robinson. Well, I am not saying I would favor changing it that way. It seems to me there are questions both ways.

If it is necessary to have any safeguard against the commissioner abusing this power of having his warrants served in other districts or other states, that might be one way to safeguard it.

Mr. Medalie. Well, don't we have a similar situation under existing state practices? A crime is committed in one corner of the state, the defendant happens to be in another corner of the state. The warrant may be issued by a magistrate and there are provisions for executing it in other counties and bringing it up before the magistrate who issues the warrant.

Mr. Robinson. Some states provide a justice of the peace cannot serve outside of the county.

Mr. Medalie. Then there are other officers.

Mr. Robinson. Yes.

Mr. Waite. Mr. Chairman, I ask for information now on this discussion. In view of the constitutional provision that a man can be tried only in the state or district where the crime was committed, would it be possible to arrest a man outside of the particular state or district where the crime was committed and, by virtue of that arrest, bring him back without any further removal proceedings?

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Mr. Holtzoff. It would be, because it is not required by the Constitution. There might be statutes. The Constitution merely provides the right to be tried in the district where the crime is committed. It does not go beyond the trial of the case.

Mr. Waite. So it would be possible, then, to arrest a man in California for an offense committed in New York, and bring him back for a preliminary hearing in New York.

I do not say it would be wise but it would be possible under the Constitution?

Mr. Holtzoff. Yes.

Mr. Wechsler. The statutory provision on that I think is only this, where an offense is committed in any other district, it shall be the duty of the judge seasonably to issue and the marshal to execute a warrant for his removal to the district where the trial is to be had.

Mr. Robinson. Yes, that is section 304 of Title 18?

Mr. Wechsler. 591.

Mr. Robinson. Section 604--

Mr. Longsdorf. What section did you show, Mr. Wechsler?

Mr. Wechsler. 591.

Mr. Seth. Mr. Chairman, I move, in line 34, you put a period after "state" and strike out the rest of the sentence. That will bring it down to the civil procedure rule. Let it be served anywhere in the state.

Mr. Waite. What would have to be done then if a man fled from New York State to Jersey City?

6 Mr. Seth. They could remove him.

Mr. Waite. How could he be arrested?

Mr. Seth. That is good all over there, based on New York's complaint.

Cut out the "100 miles". This is a subpoena rule rather than a service under the civil rule.

Mr. Medalie. Mr. Seth, in dealing with a situation where there is a large territory, don't you subject a man to less inconvenience if you state he may be arrested within 100 miles of the place from which the warrant is issued? That is, wouldn't there be greater inconvenience against that than if he could be arrested in the other corner of the state?

Mr. Seth. That may be true, but I do not think this committee should extend the scope of the criminal law, Mr. Medalie. That is the way it is done here. They can go clear across Rhode Island, two states.

Mr. Robinson. But you do feel, on indictment or information, you favor a warrant country-wide?

Mr. Seth. Yes.

Mr. Medalie. Which comes to the same thing. Particularly because of a man's ability to move around very quickly, a hundred miles is no great distance today.

The Chairman. We have a motion. Do I hear it seconded?

Mr. Medalie. A man can easily move over a border and be 25 miles away from the place where the warrant is issued.

Mr. Wechsler. Does this represent a change of the existing situation insofar as it affects the whole state?

Mr. Medalie. Yes.

Mr. Wechsler. Now it is just the distance?

Mr. Seth. Yes. I have made the statement in my--

Mr. Wechsler. As a matter of fact, the hundred miles at

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least should be defined.

Mr. Holtzoff. Well, if a person is charged in the state court at Dallas, Texas, with a state offense, and he happens to be in El Paso, at the other end of Texas, he would be arrested and transported back to Dallas.

Why shouldn't the federal courts have the same authority to that extent?

The Chairman. We have a motion.

Mr. Medalie. Can I take up something else?

The Chairman. Yes.

Mr. Robinson. Line 34, "state in which it is issued". That was your suggestion?

Mr. Holtzoff. Yes.

Mr. Robinson. If that is desirable we will, after "state" insert "in which it is issued".

I am not sure that is necessary, but you have reason for thinking it is, don't you?

Mr. Holtzoff. Well, just better English.

Mr. Wechsler. We have to do something with the word "returnable".

Mr. Robinson. "Issued." Is that satisfactory?

Mr. Holtzoff. Yes; "is issued" instead of "is returnable".

Mr. Robinson. Yes.

In line 35 substitue "issued" for "returnable".

The Chairman. Now,Rule 5--does the phrase "by a usual mode of travel" stand?

Mr. Robinson. Yes. That is the way it was worked out.

Mr. Holtzoff. Mr. Chairman, similar provisions exist in

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the civil rules with reference to service of subpoenas, and, by statute.

Mr. Seth. Is the airplane a usual mode of travel down there?

Mr. Burns. Not after the next two or three weeks.

Mr. McLellan. I move the words "mode of travel" be stricken.

Mr. Holtzoff. I do not think we need it. I second the motion.

The Chairman. Any remarks?

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

Carried.

Mr. Robinson. In the last line, Mr. Youngquist suggested that the word "may" be stricken out.

Strike out "may" and change "order" to "orders".

Mr. Medalie. How does that read now?

Mr. Robinson. That is line 36.

Mr. Medalie. How does the sentence read?

Mr. Robinson. As corrected?

Mr. Medalie. Yes.

Mr. Robinson. Mr. Youngquist suggested, "may be served wherever the court orders it to be served."

And I would like--in the following paragraph--

The Chairman. Well, is there anything further on (2)?

All right.

Mr. Medalie. I have some suggestions on (3).

The last sentence is unnecessary.

Mr. Robinson. That is right. That is, part of it is unnecessary.

Mr. Medalie. Well, all of the last sentence is unnecessary, "The summons shall be served in the same manner as summons in civil cases".

Mr. Robinson. What line?

Mr. Medalie. The last sentence of (3) on the very same page, "The summons shall be served"--"by anyone authorized to serve summons in a civil action".

Mr. Robinson. Well, that is the person, not the manner.

Mr. Medalie. Can't we get it all in in one place?

7 Mr. Robinson. Isn't it just as well to differentiate between them?

Mr. Medalie. All right. Withdrawn.

The Chairman. Have you some others?

Mr. Robinson. Line 39, Mr. Youngquist suggests that the word "the", the third word, we should strike out to and including the "a" and insert instead "causes of the arrest and of the fact that".

It will read then--after "arrest" strike the comma: "In making the arrest the officer shall inform the defendant of the causes of the arrest and of the fact that a warrant has been issued for his arrest".

Mr. Holtzoff. The cause of the arrest. It ought to be singular, I think.

Mr. Robinson. Right; "the cause of the arrest and of the fact that a"--the last word in the line--"warrant has been issued for his arrest".

The Chairman. What do you mean by "cause"?

Mr. Robinson. As I understand him, he thinks that that would be the ground upon which the complaint was issued or of

the fact that John Smith has filed a complaint against him.

Mr. Holtzoff. Does the officer have to go that far? I think the officer merely has to say, "I have a warrant for your arrest."

If it is a deputy marshal he may not know the nature of the complaint.

Mr. Medalie. We want him to know.

In other words, you don't want to take a man from El Paso and bring him to Dallas without at least telling him you are arresting him for running a still in Dallas.

Mr. Holtzoff. Well, if you have a warrant you show the defendant the warrant.

Mr. McLellan. Then you inform him of the cause of arrest.

Mr. Medalie. Well, he has to wait if the officer hasn't got it with him until it is practical.

Mr. Burns. What are the sanctions on failing to carry out the manner specified?

Mr. Holtzoff. I suppose the only sanction is a suit for false imprisonment against the officer. I don't think there is any other sanction for that.

Mr. Medalie. Well,responsible federal officials will take the pains, knowing the law, that there is a remote consequence involved, of telling the man he is arrested for mail fraud, selling stock in the XYZ Company.

Mr. Holtzoff. I was under the impression the present law is,the officer says, "I have a warrant for your arrest."

Mr. Medalie. But he hasn't got it with him.

Mr. Holtzoff. Well, I think perhaps if we are going to keep that next sentence, what Mr. Youngquist suggested may be

all right.

Mr. Burns. What is the practice? The United States Attorney mails the warrant, say, to Los Angeles. Is that it?

Mr. Holtzoff. No. Today a warrant only runs in the district. The warrant is turned over to a United States marshal and he delivers it to one of his deputies.

Mr. Wechsler. Isn't it really in the case of arrest without a warrant that this thing is important?

The F.B.I. learns that a man is wanted for a crime in New York. He is traveling in Oklahoma, and they learn that over the teletype or some other swift means of communication, and they make the arrest without a warrant, and that is where the thing is really necessary, isn't it?

Mr. Holtzoff. Yes.

Mr. Wechsler. To meet the modern development of nationwide police.

Mr. Holtzoff. Yes.

Mr. Wechsler. I do not see the real need for that for arrest with a warrant. Although many states do allow an arrest by an officer without a warrant in his possession if he has personal knowledge of its issuance.

Mr. Holtzoff. But the suggestion made is what the officer shall inform the defendant of. I don't suppose it is very important.

Mr. Wechsler. If the officer does not know what the crime is, he should not make the arrest.

Mr. Holtzoff. If he has a warrant?

Mr. Wechsler. If he has a warrant, the warrant specifies the offense.

Mr. Holtzoff. That is right.

Mr. Medalie. What if he does not have the warrant with him?

Mr. Wechsler. I say he should at least know what the warrant is issued for before he makes the arrest.

Mr. Holtzoff. I agree with that.

The Chairman. Mr. Tolman tells me lunch is ready.

Mr. Medalie. Couldn't we finish that one sentence?

The Chairman. I was thinking, because of Mr. Youngquist's interest in it, we might hold it back.

We will have lunch served across the hall.

(Thereupon, at 1:00 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

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A F T E R R E C E S S

The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.

The Chairman. We will come to order, gentlemen. Is there anything further on (c) (2), page 2, Rule 4?

Mr. Robinson. There is one further suggestion, Mr. Youngquist, that saves us two words, I believe. In line 43, at the end of the line, insert "may be"--that is,"as soon as may be." Then strike out in the next line "practicable after the arrest."

The net gain is two words saved.

Mr. Seasongood. Did we leave in the person making the arrest is supposed to tell the cause of the arrest, Mr. Chairman?

The Chairman. Yes.

Mr. Seasongood. I do not want to argue about it, but it seems to me to be a very dangerous situation. How can he state accurately the cause of the arrest? It has never been done before. I do not see why it is done now.

Mr. Robinson. Mr. Youngquist would like to be heard on that.

The Chairman. Suppose we pass that until Mr. Youngquist gets here.

Now, let us go to (d).

Mr. Seth. A somewhat similar question arises. The last two words are "the magistrate." What magistrate?

Mr. Robinson. It is based on the theory that it will be the magistrate by whom the warrant is issued.

Mr. Seth. You do not have to return it to the original

magistrate.

Mr. Holtzoff. You do not return it to the magistrate issuing the warrant.

Mr. Longsdorf. May I ask Mr. Wechsler to read what Section 594 says about that? Is there something in Section 594 about returning?

Mr. Wechsler. I think it does cover that, because the return should presumably be made by producing the prisoner at the time the prisoner is produced.

Mr. Holtzoff. I think perhaps the problem can be solved by omitting (d). I do not think it serves any substantial purpose. The only time you need a return is when you are unable to execute it. I move we strike out (d).

Mr. Robinson. Is it true that you never bother about a return except when you cannot execute it?

Mr. Dean. What about mailing the summons? Do you need a return on that?

Mr. Holtzoff. No, because if the defendant does not show up, you just issue a warrant for his arrest. The summons is for the benefit of the defendant.

Mr. Wechsler. I do not agree. I think the warrant should be returned when the prisoner is arrested and brought before a magistrate.

Mr. Burns. Isn't it the practice in Massachusetts to make a return on the process regardless of what happens?

Mr. McLellan. Absolutely. He sets forth on the back of it what he did about it.

Mr. Holtzoff. I only meant it is not of sufficient importance to require a rule, because the return itself consists

of the endorsement, and the important thing is the production of the prisoner before a magistrate.

Mr. Robinson. In Rule 11 there is an incorporation by reference of this part of Rule 4. I think the two rules belong together, and it would not be wise to strike out this clause without considering the other rule.

The Chairman. The words "to the magistrate" are ambiguous. What is the solution of that?

Mr. Holtzoff. This does not require a return when the warrant is executed. It is at least equally as important to make an honest return as to make a return where the warrant is executed.

Mr. Medalie. Why do you want the word "executed"? Dealing with both situations, the language could be:

> "The officer who receives the warrant or a person who receives the summons before service shall make return thereof."

That covers both cases.

The Chairman. Who is the magistrate?

Mr. Medalie. Whoever issued it.

Mr. Holtzoff. But if you bring your prisoner before a different magistrate, you do not return a warrant to the magistrate who issued the warrant.

Mr. Wechsler. You return it to the magistrate before whom you bring the prisoner.

Mr. Seth. Why not leave out the last three words?

The Chairman. That is the answer. What was the suggestion as to the earlier part?

Mr. Medalie. "The officer who receives the warrant or a

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person who receives the summons before service."

Mr. Seasongood. That won't be comprehensive enough for the mailing.

Mr. Medalie. If the magistrate himself does the mailing, then no one need appear before him to make a return, but the paper has been served, because he has mailed it and made a notation on it.

Mr. Holtzoff. Why not say"the person who receives the warrant or summons for service shall make return thereof promptly"?

Mr. Robinson. You execute a warrant and you serve a summons, do you not?

Mr. Holtzoff. I think the word "serve" is not wrong. You

11 either serve or execute a warrant. I have seen both words used interchangeably.

Mr. Burns. What is wrong with the present wording, striking out "to the magistrate"?

Mr. Holtzoff. Because it refers to executing the warrant. That implies it was executed. Suppose the officer has been unable to make the execution. He still has to make the return.

Mr. Burns. "The officer to whom the warrant has been issued."

Mr. Holtzoff. "The person who receives a warrant or summons for service shall make return thereof promptly."

Mr. Burke. I was wondering what type of return an officer could make of a summons sent by ordinary mail, without any knowledge on the part of the sender as to whether the person to whom it was addressed was within the jurisdiction and whether he is alive.

Mr. Holtzoff. I think the only return would be an affidavit that he mailed it.

Mr. Burke. It would then change the type of service to a warrant without any knowledge as to whether it had actually reached the hands of the person to whom it was addressed, which might be of some importance.

Mr. Holtzoff. The mailing would have to be done by the magistrate, so you would not need a return if the service was mailed, because the magistrate could make his own notation.

Mr. Burke. And then upon his failure to appear, if the alternative of a warrant should be made, without any knowledge on the part of the magistrate as to whether he had actually received it.

Mr. Holtzoff. Well, I do not think the defendant would be prejudiced under those circumstances, would he, because the summons is something for his benefit, and if the summons does not reach him or if he fails to respond to it, he is not really prejudiced by having the warrant issued, because the warrant could have been issued to him in the first instance.

Mr. Burke. I was thinking, if it was really of no substantial value to him, or if through no fault of his he failed to receive it--as happens sometimes--should he then be penalized because of having a warrant issued?

Mr. Holtzoff. I do not know how else you could get around that.

Mr. Robinson. I would like to make a suggestion about the wording of that:

"An officer to whom a warrant is delivered for execution by a person to whom a warrant is issued for

service shall make a return thereof promptly."

Mr. Holtzoff. My suggestion was to combine the two, thereby shortening it, by saying that the person who receives a warrant for service or execution shall make return thereof promptly.

Mr. Medalie. I am inclined to favor that. It is very simple. The word "return"has a definite meaning. We do not need to explain what "return" means.

Mr. Robinson. "For execution" is enough.

Mr. Medalie. Yes, a person who receives the warrant or summons for service. You serve a warrant.

Mr. Robinson. In Rule 4 (a) we provided that there might be more than one warrant or summons. Therefore, they could be put out and not all of them could be served. I think the first words should be, "An officer who receives or a person."

Mr. McLellan. Suppose a person who receives a summons is not an officer. Don't you want to change the word to "person"?

Mr. Medalie. The word "person" would include officer and person.

Mr. Holtzoff. I think Mr. Robinson's suggestion could be taken care of by saying "any person."

Mr. Medalie. Say "a person."

Mr. Holtzoff. "A person who receives a warrant or summons for service shall make return thereof promptly."

The Chairman. Is that seconded?

Mr. Medalie. I second it.

The Chairman. Are there any remarks?

All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

That takes us to Rule 5.

Mr. Seasongood. Before you come to that, I think that the Committee on Style could do something about this mailing summonses. Mr. Medalie says that the magistrate is to mail the summons. Is that right?

Mr. Medalie. Not necessarily, but he might, or he might give it to a person or officer to mail it.

Mr. Seasongood. I think that it should be the marshal just as much in one case as in the other.

Mr. Medalie. You cannot always get the marshal. He may be miles and miles away.

Mr. Seasongood. Well, then, somebody. It is just whatever you want to make it. It does not seem to me clear the way it says here in line 11 of 4 (a), where it says the magistrate shall deliver the warrant or he may mail the summons. If it means that, if that is the way it is done, that is all right.

Mr. Medalie. The magistrate mails it. It is his responsibility.

12 Mr. Seasongood. If that is what you want, all right. I do not know whether that is the thing to do or not.

Mr. Holtzoff. I think that is the simplest way.

Mr. Seasongood. Have the magistrate mail the summons?

Mr. Holtzoff. Yes.

The Chairman. We shall now go back to Rule 4 (c) (3), line 39. Mr. Youngquist's suggestion is that we strike, "fact that a complaint has been filed against him and," and substitute in place of it the words "cause of the arrest and the fact that."

Mr. Robinson. I am checking that with Mr. Youngquist to

verify that. It was either his suggestion or Mr. Holtzoff's.

Mr. Holtzoff. It was not mine.

Mr. Youngquist. That goes back to the language of tentative draft 3.

Mr. Chairman, I must confess that I do not recall having originated the suggestion. I note that it follows the language that was in tentative draft 3, and I think it better language, because, after all, the important thing is not that the complaint has been filed, but that the officer has a warrant for his arrest.

Mr. Holtzoff. Shouldn't that be limited to requiring the officer to notify the defendant of the fact that a warrant has been issued for his arrest?

Mr. Youngquist. I think that is enough.

Mr. Wechsler. That language is in the model code and it probably reached here by some roundabout method.

Mr. Holtzoff. I suggest that we omit "cause of the arrest" and have this read:

> "In making the arrest the officer shall inform the defendant of the fact that a warrant has been issued for his arrest."

Mr. Medalie. That is no news to him. He wants to know why he is arrested.

Mr. Holtzoff. Well, he can see the warrant.

Mr. Medalie. But he hasn't got it.

Mr. Holtzoff. Well, I do not think that a deputy marshal who is serving a warrant is required to know what it is about.

Mr. Medalie. If he has it with him he can show it to him.

Mr. Holtzoff. That introduces a new element.

Mr. Medalie. We have introduced it. Let us take care of it by informing the culprit with what particular offenses he is being charged or, if he has never had any other clashes with the law, what he is charged with.

Mr. Burns. If he has the warrant, he is compelled to show it, but if one is out and he does not have it, he should state what it is. I do not think the marshal or officer has any business making an arrest without knowing what the warrant is about.

Mr. Holtzoff. He has the warrant with him. I do not think he is compelled to know what the facts in the warrant are.

Mr. Burns. But he should be compelled to show him what the warrant is.

Mr. Holtzoff. I agree with that. Suppose the marshal has a half donzen warrants to execute in the same locality, as is frequently the case. He mightknow the general charge--

Mr. Medalie. Doesn't he keep a notebook or something or get a slip of paper from someone?

The Chairman. It would seem to me clear that if the deputy does not have the warrant the District of Columbia or somebody should at least give him a piece of paper which he could keep in his pocket with the name, John Jones, and what the crime is.

May I make the suggestion that perhaps a transposition of sentences would take care of it?

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

Then go down to the third sentence.

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Then go back to the second sentence, which says that if he does not have the warrant with him he should tell the defendant generally what the cause of his arrest is.

Mr. Longsdorf. Aren't there provisions in some of the state statutes requiring the officer to identify himself and disclose his official character?

Mr.Burns. That has relation to the privilege of using force. I think the corelative of that should be a duty on the part of the officer to show the warrant or to state that the warrant is in existence and state the general substance of it.

Mr. Youngquist. That would be covered by informing him of the cause of his arrest and the fact that a warrant has been issued.

TheChairman. Will the committee rearrange the sentences, then?

Are there any objections to the paragraph rephrased in that form?

Mr. Seasongood. In 3 (a) we are not going to say "the accused" instead of "the defendant"?

Mr. Robinson. He is the accused before a complaint is filed, but after criminal proceedings have begun he becomes a defendant, does he not?

Mr. Wechsler. I do not think he becomes a defendant upon

2-1 the filing of the complaint.

Mr. Youngquist. Well, he does upon issuance of the warrant.

The Chairman. If there is nothing further, we will go forward to Rule 5. Rule 5 (a).

Mr. Holtzoff. I want to make a suggestion about line 7.

The first sentence, of course, provides:

"The officer executing a warrant of arrest shall without unnecessary delay take the person arrested before the magistrate."

That ought to be "a magistrate."

I think the words "nearest or most accessible" ought to be omitted in line 7, because the usual practice is to take a prisoner before the United States Commissioner rather than the local justice of the peace, even though the local justice of the peace may be a little closer to the place of arrest, if a United States Commissioner is within a reasonable distance from the place of arrest, and I think it is a practice that we should perpetuate.

On the other hand, if the United States Commissioner is beyond a reasonable distance, you then take your prisoner before the justice of the peace.

For that reason I think you ought to strike out "nearest or most accessible magistrate, " in line 7, having in mind that the phrase "without unnecessary delay" in line 4 protects the defendant against being carted several hundred miles.

Mr. Burns. How does it protect him, Mr. Holtzoff?

Mr. Holtzoff. It says "without unnecessary delay."

Mr. Burns. I know,but how does it protect him? What is the sanction of it for the defendant's right not to be held unnecessarily?

Mr. Holtzoff. Of course, the only sanction, and not a very good one, would be an action for damages for false imprisonment; but the same sanction would apply to the phrase "nearest or most accessible."

You would be changing the existing practice in a detrimental way if you put in the words "nearest and most accessible" and expect it to be followed.

The Chairman. Why shouldn't you state it in the rule as you have argued it? He shall be taken to the nearest commissioner that can be reached, and if not, to the nearest and most accessible.

Mr. Burns. Within a reasonable distance.

Mr. Holtzoff. I will be in favor of it.

The Chairman. Then you would have a rule which you might reasonably expect the marshals to live up to.

Is that feasible, Judge, in your judgment?

Mr. McLellan. My experience is not enough to let me answer the question, but I agree with the suggestion.

Mr. Burns: We do not undertake in any way to pass judgment on what would be the effect on the defendant's rights of unnecessary delay.

Mr. Holtzoff. I think the only effect would be his right to sue the officer for false imprisonment.

Mr. Burns. Or possibly habeas corpus.

Mr. Wechsler. There is another sanction. The officer loses his mileage, under the statute. I do not know whether that is followed or not.

Mr. Holtzoff. Well, these rules will have the effect of statutes, so that it will be basic justification for mileage.

Mr. McLellan. Why has not the chairman answered the whole thing?

Mr. Holtzoff. I think he has.

The Chairman. We will ask the reporter to redraft this

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for us along those lines, if there is no objection.

Mr. Wechsler. Does that direction encompass the case where the arrest is with the warrant? We are back to the same problem again.

As things stand now, if the arrest is with a warrant, the man be taken before any magistrate.

Mr. Robinson. That would be inserted there in that first sentence--the same provision.

Mr. Wechsler. That is, the procedure would be the same whether it is with a warrant or without a warrant?

Mr. Robinson. The provision the chairman mentioned.

Mr. Wechsler. I think it should be the same whether it is with or without a warrant.

The Chairman. In other words, it would apply to the first and second sentences.

Is there anything further on (a)?

Mr. Seth. How about that delegation of power? A man arrests a man for another, for a felony in his presence. He says he cannot go to the commissioner and he may turn him over to another one to take him. That is dangerous.

Mr. Robinson. That is an existing provision, but I have got to find where it is.

Mr. Seth. I move that that next sentence be stricken out.

Mr. Wechsler. I second the motion.

Mr. Robinson. It arises this way. Suppose a private individual has arrested a defendant for some offense in a situation where the private individual has a right to make the arrest, and suppose in the arrest he is incapacitated from doing anything more about it. He calls a passing policeman or

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sheriff to take charge of the prisoner. Why should the private individual be required to be made to go to the magistrate to file a charge? Why can't he let the officer take care of him?

Mr. Wechsler. That is not delegation.

Mr. Holtzoff. The officer may take physical possession of the prisoner, but how can the officer be expected to make an oath to the charge?

2-2 Mr. Robinson. That is where we got into a discussion of knowledge and information and belief.

Mr. Holtzoff. The officer may not even have information and belief.

Mr. Robinson. Well, if the private individual tells him all about it, he has some information about it.

Mr. Holtzoff. Yes, but suppose the officer does not consider the private individual a creditable person. Suppose he does not know anything about his credibility.

Mr. McLellan. May I ask Mr. Seth if the sentence he suggests should go out begins with the words "If it is impossible"?

Mr. Seth. Yes. It is unnecessary.

Mr. Robinson. How is the problem met if it is impossible for the person making the arrest to go ahead to the nearest magistrate and make the complaint? Wouldn't this make it imperative that if the private person makes the arrest he must follow it through all the way?

Mr. Seth. I would think that the private person would turn him over to the first officer he came to, but he does not delegate any authority then.

Mr. Waite. I think this whole thing must be redrafted to

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bring our discussion down to an issue, because there seem to be two distinct ideas in this one paragraph. One is the right of a man to be taken before a magistrate promptly, and the other is the obligation of somebody to file a complaint against him. It seems they will have to be dealt with separately.

It would be quite unnecessary, I would suppose, for the man who made the arrest to take the man before a magistrate. It might be very unwise for him to leave his place of duty while he was doing that, and yet at a later time it might be very necessary for him to go around and make the complaint.

Couldn't we leave this to the committee to be reformulated, so that those two ideas would be separate?

Mr. Holtzoff. I am under the impression that there is a motion to strike out that sentence. Perhaps we might dispose of that.

Mr. McLellan. That was seconded.

Mr. Burns. The headnote of Rule 5 is not quite accurate, since down to line 11 it deals with procedures prior to bringing the defendant before the commissioner or magistrate.

Mr. Robinson. Is that true? The first sentence says that the officer shall bring the man arrested before the magistrate.

Mr. Burns. It is prior to the proceedings. The title is "Proceedings Before the Magistrate," not proceedings anterior, but proceedings in front of.

Mr. Seasongood. Isn't that the way you start proceedings before the magistrate--by bringing the person before him?

Mr. Seth. "Proceeding after arrest," it should be.

Mr. Waite. "Proceedings after arrest" and then "proceedings before magistrate."

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The Chairman. Let us see if we can clarify this situation. We have a motion pending and seconded to strike out the sentence beginning on line 9 running through line 11. Is there any discussion on that?

If not, all those in favor of that motion, say "Aye." Opposed, "No." It is carried.

Next we have a question raised as to the title. Is there any motion?

Mr. Holtzoff. I move that we change the title so as to read, "Proceedings After Arrest."

Mr. Robinson. That will cover all the rest of the rules.

The Chairman. We have a five-page rule here which is devoted substantially to proceedings before the Commissioner. Maybe we had better hold that question of dealing with the title of it until we deal with the whole five pages.

Now, the motion is made by Mr. Waite, and seconded, I believe, that Section (a) be referred back to the reporter for redrafting, keeping in mind separation of the physical fact of taking the defendant in custody and the further fact of appearing to make the complaint against him.

Mr. Waite. If we strike out that sentence, as was just done, then that eliminates the complaint preceding, so I do not know that it need be redrafted, so I withdraw the motion.

Mr. Holtzoff. We still have to redraft it to embody your suggestion, Mr. Chairman.

Mr. Burns. I suggest that 5 (a) down to "was arrested" on line 9 be made a part of Rule 4.

Mr. Holtzoff. That is a very long rule.

Mr. Youngquist. It is not as long as 5.

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The Chairman. Is that motion seconded?

Mr. Robinson. Seconded.

The Chairman. Are there any remarks?

All those in favor say "Aye." Opposed, "No." The motion is carried.

Are there any suggestions on the balance of Rule 5 (a)?

Mr. Wechsler. Lines 15 and 16, Mr. Chairman, the words beginning with "also" toward the end of line 15: I move that that go out to the end of the sentence and that there be substituted for it the following words:

"That any statement made by him may be used against him."

Mr. Dean. I second it.

Mr. Robinson. Would you consider an alternative, simply adding that after the word "should"?

Mr. Wechsler. I do not see why the magistrate should

2-3 advise the accused that he may make a voluntary statement to any person. It is inappropriate to the magistrate's duty, which is to advise him of his rights.

Mr. Holtzoff. I second Mr. Wechsler's motion.

The Chairman. I would like to ask, by point of information, what was meant to be covered by the words that are in question in Mr. Wechsler's motion.

Mr. Robinson. Some of the hypocrisy that exists now when you bring a man before a magistrate. Of course, it is common knowledge that he is questioned by officers--in fact, there would not be any convictions in three-fourths of the cases unless the defendant did talk. We all know that, as a matter of fact.

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Mr. Holtzoff. He is not questioned before a magistrate.

Mr. Robinson. No, but he is being questioned probably just after he has been to the magistrate.

Mr. Holtzoff. No. He is questioned before.

Mr. Robinson. All right, before. This privilege against self-incrimination is worked pretty hard to have the magistrate say nothing to the accused except, "Now, you don't have to talk," or "Any statement you make may be used against you," without saying to him, "If you wish to say something in proper defense," without letting him understand that he may if he wants to.

Mr. Wechsler. He is told that he does not have to open his mouth.

Mr. Robinson. It is just put in here for your consideration, and I have no objection whatever, of course, to Mr. Wechsler's suggestion, if that is the wish of the committee. I think that would take care of the situation.

The Chairman. Question: All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

If there is nothing further, we go on to 5 (b).

Mr. Medalie. May I point out that in 5 (b) there is a very fundamental omission? There is no provision made for admitting a defendant to bail or committing him pending the examination. The provision for commitment or bail is made only where the defendant is held to answer. Where a defendant has been brought before a magistrate and the examination set for a later date, he is entitled to bail, and then when he can not give it he has to be committed.

Mr. Robinson. You do not think that will be understood in line 25, "after postponement for a reasonable time"?

Mr. Medalie. No.

Mr. Robinson. Over in Rule 6 with reference to bail is there no provision that covers it? If it is not taken care of, of course it will be taken care of.

Mr. Holtzoff. Line 26 refers only to postponements at the defendant's request. I think we ought to have postponement's at the Government's request.

Mr. Robinson. That has been stricken out, but line 26, "at the defendant's request," should go out.

Mr. Holtzoff. Was that stricken out?

Mr. Robinson. We have not got to it yet.

The Chairman. Where would this bail provision begin?

Mr. Robinson. Either in this provision or the one with reference to bail, with a cross reference.

Mr. Medalie. I think it should come in here: "His bail or commitment pending examination."

Mr. Holtzoff. I think that ought to be covered in line 26.

Mr. Youngquist. Does not Rule 6 apply to bail fixed by the committing magistrate? If that is so, since that is the rule making the bail, should not we put it in there, rather than in 5?

Mr. Medalie. No, because you have a provision with regard to bail in Rule 5, page 2:

> "If it appears from the evidence that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall hold the defendant to answer and shall commit him or admit him to bail."

That is the only provision with respect to committing the

defendant or admitting him to bail. That is in Rule 5.

4 Mr. Holtzoff. There is another one on line 23, which takes care of the other contingency. It seems to me that your provision ought to go in at either line 23 or line 26.

Mr. Medalie. That seems to be the only omission in (b), and instead of stopping now, suppose, with the other assignment we have taken, we rewrite that.

Mr. Holtzoff. Yes. This is all part of the same rule.

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

Is there anything further on (b)?

Mr. Medalie. At the top of page 2, line 28, "If it appears from the evidence," and line 32, "If it appears that there is not probable cause."

That word "appears," as we found out from the other analysis on the issuance of the warrant, involves two ways of these things appearing. One is automatically and the other is by the conscience of the judicial officer being satisfied. I am in favor of providing that the conscience of the judicial officer should be satisfied and should not be an autonomy.

Mr. Burns. I think that is the fair inference here, but I do not think there should be any doubt about it.

Mr. Youngquist. I do not think it makes any difference. It is up to the magistrate to determine whether there is probable cause to him.

Mr. Medalie. If it appears that there is probable cause to believe.

Mr. Holtzoff. That means that the magistrate must find that it so appears.

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The Chairman. Let us put in, if there is any doubt about it, "If it appears to the magistrate."

Mr. Medalie. "If the magistrate is satisfied," or some such similar language as in the model code.

The Chairman. I would not go so far as to say "satisfied," because some magistrates would never be satisfied.

Mr. Waite. Are we striking out "from the evidence"?

The Chairman. No. "If it appears to the magistrate from the evidence."

I suppose that applies again to line 32?

Mr. Medalie. Yes.

Mr. Holtzoff. You could shorten line 32 by striking out line 32 and the first half of line 33 and saying, "otherwise the magistrate shall discharge him."

Mr. Orfield. Is it clear from Section (b) that the defendant can appear at the preliminary examination and testify? Is he guaranteed that?

Mr. Burns. Doesn't it say that he may cross-examine witnesses?

Mr. Orfield. I suppose it is implied there.

Mr. Seasongood. Is it clear that he can do that by counsel?

Mr. Robinson. The general rules say he has a right to counsel.

Mr. Seasongood. It says the defendant may cross-examine the witnesses.

Mr. Holtzoff. That means counsel. We have a provision later on that in every stage of the proceeding he shall be entitled to be represented by counsel.

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Mr. Robinson. Rule 13.

Mr. Burns. Is there any necessity to have a cross reference to the determination of bail throughout? Suppose you just said "admit him to bail" and said nothing about how it is fixed?

Mr. Medalie. You are doing it throughout all the rules.

Mr. Waite. Mr. Chairman, before we drop (b), in draft No. 3 there was a provision that the magistrate might interrogate the accused after informing him that he need not answer, and that if he did answer, the answers might be used against him, and the further provision that the magistrate shall also inform him that his refusal to answer might be used against him.

I notice that was stricken out, and we argued it pretty fully once before. I do not imagine there would be any value in proposing its reinstatement, but it does seem to me that we ought to have something in here getting away from the anarchistic idea that the magistrate cannot even ask a question.

I would like to move that we add to (b) something to this effect--I do not care about the precise language--:

> "Whenever any person has been brought before a magistrate and has been advised of his right to counsel and to a preliminary hearing as herein provided, the magistrate may interrogate him concerning his participation in the alleged offense and concerning his activities at the time thereof; but before so interrogating him the magistrate shall inform the person that he is under no obligation whatsoever to answer the questions, and that if he does answer, his answers may be used in evidence

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against him."

Then leave out any suggestion that his refusal to answer might be used.

The Chairman. Is that seconded?

Mr. Orfield. Seconded.

The Chairman. Is there any discussion?

Mr. Burke. I do not quite understand the point that is involved there, unless it is a change of that portion of Rule 5, lines 14, 15, 16, and 17.

Mr. Waite. No. It comes up this way. On occasion the magistrates, having informed the man that he need not answer and that his answers may be used against him, have perhaps incautiously asked him questions, and the man's answers have in fact been incriminating.

There has been question in the courts whether those admissions before the magistrate could be used in evidence. The New Jersey courts, if I remember rightly, have held they can be used in evidence. One or two others have held that they could not be.

It has always seemed to me rather absurd, when a man admitted something incriminating, after having been warned that he need not do so, so that he is under no compulsion, and
2-5 having been warned that it might be used against him, to say that it cannot be used merely because it came out in answer to a question of the magistrate.

Mr. Holtzoff. My conception, Mr. Chairman,--and I believe it to be the general conception of the purpose of a proceeding before a magistrate--is that it is merely to find out whether

there is probable cause for holding the defendant. It is really intended in the nature of protection of the defendant, to make certain that he is not being committed to prison or compelled to give bail without any probable cause.

I am strongly opposed to imposing another function on the magistrate and making him an inquisitorial officer. I think a good many persons would feel -- and I think with some justification -- that that is an unwarranted encroachment against the right of self-incrimination.

From the standpoint of the prosecution, it would gain nothing, because the average commissioner does not know the details of the crime. He is not equipped to examine or interrogate the prisoner. You gain nothing from a practical standpoint, so far as the prosecution is concerned, and a good many people think that you unreasonably weaken one of the most important privileges of the Bill of Rights.

I urge that his motion not be adopted.

Mr. Waite. I would agree with you on your first proposition that the function of this proceeding is to determine the quantum of evidence against the defendant. I would also agree with you that we ought not to thrust upon the magistrate the duty of interrogating. I have no suggestion of that sort.

But is there any real reason why, after a man has been warned, if the magistrate thinks he can learn something by questions, he should not ask him? It is not a compulsion to answer, because he has been warned that it is not necessary. Why shouldn't the magistrate have the privilege of asking the man questions, just as police officers and everybody else have a right to ask him?

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Mr. Holtzoff. I think it is none of the magistrate's business, in a sense. The magistrate is a judicial officer. He is neither a prosecuting officer nor an investigating officer, and I do not think it would be wise to give him a function to partake of the other two functions.

Mr. Waite. Isn't it just as much his duty to find out the truth of the situation, if he can find it by asking questions of the accused, as it is his duty to find out the truth by asking the questions of the witness?

Mr. Holtzoff. You might as well say that the judge at the trial shall interrogate the defendant, with the privilege to the defendant to refuse to answer.

Mr. Burns. It seems to me you do not settle this by saying it is a judicial function as against some other type of function, because the judge can ask questions in probing him at the trial.

Mr. Holtzoff. He cannot ask questions of the defendant unless he takes the witness stand.

Mr. Burns. Oh, yes, that is right.

Mr. Holtzoff. But this proposition goes further, as I understand it. Even if the prisoner does not take the stand, the magistrate should have the privilege of interrogating the witness, and it is that feature that I think is objectionable.

Mr. Waite. Since he is trying to find out whether there is enough evidence, and if he warns the man that he is under no obligation to answer, so that there is no compulsion, is there any real reason why, except a historical one, he should not ask questions?

Mr. Youngquist. The defendant may waive examination.

Mr. Waite. This would put him under no obligation to answer questions.

Mr. Holtzoff. It is the duty of the prosecution to produce sufficient evidence to warrant the magistrate to issue a warrant of probable cause.

Mr. Waite. I see that, but I do not see any reason why the magistrate should not be permitted, if he thinks it will ascertain the truth, to ask the questions.

Mr. Youngquist. His duty begins only when the preliminary examination is begun.

Mr. Dession. I am not sure of that. The magistrate does not have to accept a waiver.

Mr. Youngquist. That is true, but, at any rate, his duty of determining whether there is probable cause begins only with the beginning of the preliminary hearing. Suppose he refuses to accept the waiver?

Mr. Dession. As I understand it, Mr. Waite's question is not whether that is the way it is now. I think it is clear that is the way it is now. But should it remain that way?

Mr. Youngquist. I think it should, considering the function of the committing magistrate.

Mr. Burns. Isn't the committing magistrate a device for the protection of the defendant?

Mr. Dession. Yes.

Mr. Burns. He may waive it. It seems to me if he does not waive it, it may be a great temptation to an aggressive committing magistrate to turn his function from that of an impartial tribunal seeking to find probable cause to a prosecutor seeking to make a case for the Government.

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Mr. Holtzoff. You will find publicity seeking magistrates sending for reporters in a case that might attract public interest and conducting an interrogation of the defendant. I do not think it is fair to the defendant, and I do not think it will help the prosecution's case.

Mr. Waite. If you leave out the sending for reporters, I do not see why the magistrate cannot do it. I agree it is not his function to do it. I suggest that we should change it in the interest of ascertaining the truth and the effectuation of justice.

Mr. Youngquist. Wouldn't you be expanding his duties to those of an investigativeofficer?

Mr. Waite. I would not be expanding his duties at all. I would be expanding his privilege perhaps to that of an investigating officer, yes. It has been demonstrated time and

6 time again that when the magistrate does ask questions he often-times gets the truth in the answers, when at a later date the truth does not come out.

Mr. Youngquist. In view of the fact that we have been complaining so much of the administrative agencies lately, that they have combined the functions of investigator, prosecutor, and judge, I think it would be inappropriate for us to combine those functions here; but beyond that, it seems to me that, after all, if there is a preliminary hearing and the magistrate then sits as a judicialofficer, I do not think he should even be given the privilege to act in an investigative or even prosecutive, if that is the word, character, such as by interrogating the defendant before the preliminary hearing.

I think it would create a great danger to the adoption of

these rules if we put that in, because those opposed to it would say that we are sniping at the rights of the defendant, and you could make a fine oration about the poor defendant being brought before the magistrate, flanked on either side by armed policeman, and a judge in a black robe before him firing questions at him. What could a poor fellow do?

Mr. Waite. I am inclined to think that a better talker than I am could make a fine oration on the other side.

As far as the matter of adoption is concerned, my idea is that we ought to put through what we regard as the best rules, regardless of what lawyers may want.

My impression is that it would be helpful if it is adopted, because it will show that we have realized the progress of conditions and the necessity for such adoption.

Mr. Burns. Under present conditions the committing magistrate frequently conducts examinations of witnesses produced by the Government.

Mr. Holtzoff. Yes.

Mr. Burns. And frequently, when the defendant takes the stand to show that there is no probable cause and to show that he should not be charged, the magistrate is then free to ask questions.

Mr. Holtzoff. Yes, but 99 times out of a hundred the defendant does not take the stand before a magistrate, and I should hate to see the magistrate clothed with authority to interrogate the defendant if the defendant does not take the stand.

Mr.Burns. Isn't that such a broad change in policy, such a radical change in policy, that it ought not to be undertaken

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by this committee?

Mr. Holtzoff. I certainly think so. It would introduce the French inquisitorial procedure into our practice, which is foreign to our ideals. Maybe the French system is the best. I do not know.

Mr. Dession. This would not be the same.

Mr. Medalie. The interrogating officers are trained and skilled for that work and give it all their time.

Mr. Dession. There is another difference. There is no privilege under the French system. A man can be kept coming back for a year. The real abuse in France is not the fact that a man is questioned; the abuse is that sometimes a magistrate takes a year to conclude his investigation, and the man is in jail waiting for him all the time.

There is another thing here. Apart from the merits of this particular approach, to which I am rather sympathetic, it does bring up a problem that I do not think we have dealt with in any satisfactory way, and that is the whole problem of arranging for the questioning of an accused. At the present time you say it is an investigative function; it is for the police officers. We say here he is to be brought, without any unnecessary delay, right after arrest, before a magistrate.

Is this supposed to be a good excuse for delay?

Mr. Holtzoff. No.

Mr. Dession. Well, we are weaseling on it.

Mr. Wechsler. When is the accused to be interrogated by the prosecutive officers, or are we merely putting this in on the expectation that it will not be followed, as the existing law is not followed?

Mr. Youngquist. In what respect is the existing law not followed?

Mr. Wechsler. With respect to taking the arrested person immediately before a magistrate.

Mr. Holtzoff. I think the existing law is generally followed.

Mr. Wechsler. When is a man interrogated by the F.B.I., then?

Mr. Holtzoff. If he is arrested in the evening, he can be brought to court the next morning. If he is arrested Saturday evening, he cannot be brought to court until Monday morning.

Mr. Dession. Suppose he is arrested on Monday morning at 10:30.

Mr. Holtzoff. If he is arrested Monday morning at 10:30, he will be brought before a commissioner.

Mr. Dession. Even if it was Barker, the suspected kidnaper? You would rush him on to court?

Mr. Youngquist. We have a sheriff up in northwestern Minnesota. When he arrested an accused, if he got a statement or a confession at all, he got it on the drive from the place of arrest to the jail to the magistrate. That is when he is most likely to do his talking.

Mr. Holtzoff. I donot think as a matter of practice there are any violations of the existing law, because there are intervals that are reasonable between the time of arrest and the time of appearing before the magistrate.

Mr. Wechsler. The existing law does not contemplate that during convenient intervals the man will be interrogated by prosecutors, then?

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Mr. Holtzoff. The law does not contemplate that a man will be brought to a magistrate at midnight or on Sunday.

Mr. Wechsler. I am not sure about that.

Mr. Dession. The opportunity to question is an accident of time and not present at all times.

Mr. Dean. That explains a large number of Saturday night arrests.

Mr. Holtzoff. No question about that.

The Chairman. You have heard Mr. Waite's question. All those in favor say "Aye." Opposed, "No."

7 I am in doubt. All those in favor make a show of hands. Five. Opposed. Nine. The motion is lost.

Mr. Dession. May I raise one other question, going back a little ahead of that? I see that waiver of a preliminary examination is a right of the defendant, as we have it written. As I understand it, that is probably the existing law, but I am not sure.

Now, are there any situations where he would not be allowed to waive, even though he is proceeding to waive? In other words, does the Government have an interest in having a preliminary examination in any situation?

Mr. Robinson. I have never found any suggestion of it in the cases.

Mr. Dession. I do not recall any cases where the Government has asked for it.

Mr. Medalie. The Government has accomplished all it wants to when the man is held to answer. He is either in jail or on bail, awaiting the return of the grand jury or the filing of an information by the United States Attorney.

Mr. Youngquist. One purpose of the device of a preliminary hearing is for the Government to get its witnesses committed by their testimony. I am merely suggesting that as a possible reason for having a preliminary hearing. In some States that is taken care of by giving the magistrate the power to call any witnesses at the request of the prosecuting officer and having them interrogated on the particular subject, so that the same purpose is served. That is not so under the Federal law, so far as I know.

Mr. Robinson. We have that request made now. Do you think we should incorporate a provision of that sort, that the prosecuting officer be given the power to recall witnesses? They use it in New York; they use it here.

They have a notice which looks a good deal like a subpoena. By sending that to the man the United States Attorney wishes to consult or discuss a case with, they bring him in.

Mr. Holtzoff. I think that is a different point from the one Mr. Youngquist was speaking of.

Mr. Youngquist. No; I was speaking of the two. I was speaking of what the purpose of the preliminary hearing against the wish of the defendant might be, and, as an alternative, the provision that is found in the statutes of some States instructing the magistrate, at the request of the prosecuting officer, to examine witnesses. I have used that latter instance.

Mr. Burns. Does anyone know of instances where, in spite of a waiver by the defendant, the Government was able to hold a preliminary hearing?

Mr. Youngquist. I do not know of any.

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Mr. Burns. I think the Government has adapted the procedure of a preliminary examination to its ends byhaving witnesses produced by subpoena and then having them put under bond for their appearance, or sometimes put in jail; and some of the prosecutors I have known of have used the device of preliminary examination to have government witnesses identify the defendant. But that ought not to make any less valid the theory which is found in the cases and in practice that the preliminary examination is for the protection of the defendant and he may waive it.

Mr. Orfield. Section 40 of the model code gives the prosecution an absolute right to the preliminary examination. Section 40, subsection 2, provides:

> "Notwithstanding waiver of examination by the defendant, however, the magistrate, on his own motion, may, or on the demand of the prosecuting attorney shall, examine the witnesses for the State and havetheir testimony reduced to writing or taken in shorthand by a stenographer and transcribed. After hearing the testimony, if it appears that there is no probable cause to believe the defendant guilty of any offense, the magistrate shall order that he be discharged."

Mr. Youngquist. I do not think we ought to have what amounts to an examination of witnesses for the purposes of the prosectuion tied in to a preliminary hearing, the purpose of which is to determine whether there is probable cause for holding the defendant.

If we are going to do it, I think we ought to be frank

about it and provide an independent procedure for the calling in of witnesses in cases where the defendant waives preliminary examination.

Mr. Robinson. That is comparable, of course, to what is done in the grand jury. A grand jury is called and the power of subpoena is lost. Prosecuting attorneys examine witnesses in the grand jury room. There again it is a device that we might well consider supplanting some direct proceeding. The United States Attorney here, Mr. Curran, and his assistants, Mr. Margolius, and Mr. McCarthy, are quite willing to have that considered a possibility. I am pleased to prepare a submission of that kind.

The Chairman. Have we any motion?

Mr. Dession. I move that the section dealing with that be amended to permit the Government to hold a preliminary hearing, notwithstanding waiver by the defendant.

Mr. Medalie. On that occasion. Otherwise he can hold grand jury hearings--

Mr. Dession. I mean simply to hold a preliminary hearing.

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Mr. Medalie. That is, the defendant is brought in before a magistrate for examination.

Mr. Dession. That is right. He wants to waive.

Mr. Medalie. "Nevertheless," the district attorney says, "I want my witnesses examined now."

Mr. Dession. That is right. Maybe they are hostile; maybe they would not make affidavits. He wants to see what they will say under oath specifically.

Mr. Medalie. The district attorney has controlled that.

Mr. Seasongood. And the way you have it here in this line it says, "If the defendant does not waive a preliminary examination the magistrate shall proceed."

Mr. Medalie. But I mean that the proposal is that where the district attorney wants to proceed to take those depositions, even though the defendant has waived, on that occasion he may do it, but he will know whether or not it is a useful thing to do, not like when you get over comfortable.

Mr. Dession. No, ordinarily he will not do it, I admit.

Mr. Holtzoff. Very rarely that was not done.

Mr. Waite. He does not have to do it. All he has to do is issue a grand jury subpoena, even when the grand jury is not used.

Mr. Holtzoff. We have taken the position, with the United States attorney on one occasion, that he may not issue a grand jury subpoena except when a grand jury is in session.

Mr. Waite. That practice is not desirable, no.

Mr. Medalie. It is the law, of course.

Mr. Holtzoff. It is the law, and we have reprimanded or rebuked the United States attorney, at one time, for issuing

a grand jury subpoena when the grand jury was not in session.

Mr. Medalie. Where do you get the power to reprimand or rebuke the United States attorneys, who are Presidential appointees, and not me, et cetera?

Mr. Holtzoff. Well, the statute provides that Justice attorneys shall supervise the activities of the United States attorneys.

Mr. Medalie. Of course I can understand.

Mr. Holtzoff. And when I say "we" I mean the Department of Justice that rebuked the United States attorney.

Mr. Medalie. All right. There is a new breed of United States attorneys. Just leave that to us.

Mr. Holtzoff. The Department of Justice rebuked the United States attorney for using the grand jury subpoena when the grand jury was not in session.

Mr. McLellan. Was that motion seconded?

The Chairman. I do not know.

Mr. Wechsler. I second it.

The Chairman. Seconded.

Mr. Waite. Now, what is the motion?

The Chairman. Mr. Dession's motion is, in effect, that this section (b) be rewritten and provide for a preliminary examination even where the defendant waives it.

Mr. Seasongood. Permits it.

Mr. Medalie. With this sentence in, it is very easy.

The Chairman. That is his proposal.

Mr. Dession. If either the Government or the magistrate desires it.

Mr. Seasongood. Do you have to have the magistrate? Is

it not enough for the Government?

Mr. Dession. I do not feel strongly on that. With the Government, then. This is in Rule 5 (b).

Mr. Seth. I think it should be "request of the United States attorney only."

The Chairman. Do you accept that as an amendment?

Mr. Dession. Yes.

The Chairman. Is there discussion on the motion further?

(There was no response.)

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Let me get it, then. Those in favor of the motion, show your hands. Nine. Carried.

Mr. Youngquist. Mr. Chairman, I assume, referring back to that, that the provisions should be guarded so that the hearings held as a preliminary hearing would be held properly.

Mr. Dession. Oh, yes.

Mr. Youngquist. And in the presence of the defendant if he chooses to be present. I was doubtful about the vote, but assuming that those safeguards would be thrown about the proceeding I voted "Aye."

Mr. Medalie. That means also the "cross" is in.

Mr. Youngquist. Yes.

Mr. Dession. Yes.

Mr. Medalie. There cannot be any objection to that, because the purpose is to find out and nail down the truth.

Mr. Dession. Yes, to sift the case before it goes further.

Mr. Burns. Would you carry it further and put a prohibi-

tion on the United States attorney's investigating, examining, any witnesses in any other fashion?

Mr. Dession. I do not think I would want to do that unless we make some such change as the one Mr. Waite had in mind, because at the present time we believe any type of investigating officer can question a revenue agent of the Alcohol Tax Unit or the F.B.I. As long as they can do it I do not know any good reason to prevent a United States attorney from doing it, or his office. I would trust him more than any of the others.

Mr. Youngquist. Mr. Chairman, while we are on the same subject may I revert to line 28 of Rule 5? I think we are right there now.

2 The Chairman. Yes.

Mr. Youngquist. And suggest the use of language that appears in the third tentative draft, so it would read, "If from the evidence it appears to the magistrate that there is probable cause." I think that reads a little bit more smoothly.

Mr. Holtzoff. You mean shift the words around?

Mr. Youngquist. Yes. "If from the evidence it appears to the magistrate that there is probable cause."

The Chairman. Very good.

Mr. Holtzoff. Mr. Chairman, in line 34, while we are on this subsection, just an item there: I think the word "when" ought to be changed to "after".

Mr. Longsdorf. In what line is that?

Mr. Medalie. 34.

Mr. Robinson. Line 37 I think might well go out there. The papers in the case would include a copy of the order

discharging or holding the defendant.

The Chairman. Right. 37 is deleted.

All right. Section (c)(1).

Mr. Wechsler. Mr. Chairman, before we go to section (c) I am curious to know whether the vote on Professor Waite's motion constitutes the judgment of the Committee that we ought not to do anything on the whole subject of regularizing or regulating interrogation. You may recall that at an earlier session there was a proposal by Judge Crane, which I am advised is still under advisement, although it does not appear in this draft; and there was some discussion of it at that time. I do not believe that there is anything before us that we could act on at this time, but I do believe that unless the Committee is determined to forego looking into that subject some work should be done upon it.

And so, to bring the matter to a head, I might move that that question be referred to the Reporter for consideration and submission to the Court.

Mr. Holtzoff. I should like to ask a question of Mr. Wechsler, or rather make a suggestion: It seems to me that that would be beyond the scope either of the jurisdiction of this Committee or even of the rule-making power under the enabling act, because the enabling act and the charter of this Committee, so to speak, relates to rules of procedure in district courts and before United States commissioners. Now, administratively interrogations are no part either of the court procedure or of the procedure before United States commissioners.

Mr. Wechsler. You remember, Judge Crane avoided that problem entirely by casting his proposal in terms of the rule

of evidence, which is clearly within the jurisdiction of the Court.

Mr. Holtzoff. Oh, yes.

Mr. Wechsler. And within the jurisdiction of this Committee for recommendation to the Court. The proposal, as I recollect it, was that no statement made by the defendant should be admissible in evidence unless it had been taken in a designated way.

Mr. Burns. That would involve--

Mr. Wechsler: (interposing) --getting into it, if we want to get into it.

Mr. Burns. That would involve inferentially repeal of practically all the administrative statutes of the last 7 or 8 years that have conferred upon administrative bodies powers of interrogation and investigation. I have in mind the various acts that the Securities and Exchange Commission administers whereby they can compel answers under oath to written questionnaires, or they can hold hearings which are in the nature of grand jury investigations and require the production of records and the presence of witnesses, and they are empowered to compel answers and avoid the privilege against self-incrimination by virtue of the generally accepted statutory method. Now, are we prepared to formalize and regularize the diverse methods used by these agencies in getting at facts?

Mr. Wechsler. Judge Crane's proposal, Judge Burns, was limited to defendants in custody, so I do not think that it touches that.

Mr. Holtzoff. Limited to defendants in custody. I see no objection to facing the problem frankly. It seems to me that

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the defendant in custody is fully protected by the rule against duress and inducement. No, I think that it would not be satisfactory, and it certainly will not help the innocent--and that is what the privileges are for--it will not help the innocent, to provide that any statement that the defendant may make to a police officer or law enforcement officer shall not be admissible against him unless it is made before a magistrate. I remember that Judge Crane made that proposal. That rule of evidence was never enforced by the court of which Judge Crane was chief judge.

Mr. Wechsler. It never was the law of New York.

Mr. Holtzoff. No, but I suppose the Court of Appeals had the power to make it law if they so chose.

Mr. Wechsler. They never had the rule-making power.

Mr. Holtzoff. No. I mean that sort of thing could be case law, I suppose. I think it would be very unwise.

Mr. Wechsler. I think that is the weak part of your argument, by the way.

Mr. Holtzoff. I see the case law made in a more adequate fashion than that would have been. I am strongly opposed to any prohibition against interrogation by arresting officers, subject to the existing limitations, which sufficiently safeguard the accused.

I think we also ought to bear in mind this, from the

3 practical standpoint: I suppose those who advocate such a proposal have in mind the third degree practices. Third degree practices undoubtedly exist on the part of local officers. Even the Wickersham commission protected federal officers who had been indulging in third degree practices.

Mr. Medalie. An erroneous decision.

Mr. Holtzoff. What?

Mr. Medalie. An erroneous finding.

Mr. Holtzoff. I do not think that is so.

Mr. Medalie. They had specific evidence it was being done by the Secret Service in my district, and I had to have it stopped by unjustified means.

Mr. Holtzoff. You mean in counterfeiting cases?

Mr. Medalie. Yes.

Mr. Holtzoff. I do not think the Secret Service is indulging in it any more.

Mr. Medalie. The Wickersham commission, you know, came at a time when the practice was on.

Mr. Holtzoff. I do not think it will promote the administration of justice by just clamping down on interrogation by police officers, and it will not help the innocent.

Mr. Wechsler. I do not think the idea is to clamp down on interrogation by police officers if the process of interrogation is reasonable or necessary. The question is whether it shall be under any supervision or whether it shall be, as at present, under no supervision. Now, it does seem to me that you have a strange paradox in the whole legal system when you refuse, on the one hand, as modest a proposal as that made by Professor Waite in granting investigatorial power, although the defendant has a choice not to answer and is specifically warned by a quasi-judicial officer that he need not answer, and at the same time have complete freedom for anybody connected with the investigative phase of the prosecution to interrogate him at any time he can get to him, either before he brings him before

a magistrate if he made the arrest, since the sanctions are weak for failure to bring before a magistrate immediately, or even after he has been held, has been committed, if he can get access to him in the jail. I refuse to believe that there is not a pattern there that is subject to some reasonable regulation that will preserve the legitimate interests and right of the Government to investigate and the protection of the defendant against improper interrogation.

Mr. Waite. Am I right that your proposal would not necessarily delay the interrogation until this formal preliminary hearing?

The Chairman. Your proposition now is that a rule be drafted to that end or solution?

Mr. Wechsler. Unquestionably, yes. I am not prejudging what the rule should be, Mr. Chairman. It just seems to me that we have skipped this whole subject and I think have skipped it pretty much because of the feeling that it is not anything that is easy to talk about: it is a subject that is almost taboo. And I do not think it is taboo. I agree with Mr. Holtzoff that it is something that ought to be faced openly, and I think it would be a healthy thing to have considered what methods of interrogation are appropriate and what are not; and I believe that so far as our jurisdiction is concerned we reach it either because the defendant is in custody or because it might be approached through the drafting of a rule of evidence that Judge Crane proposed. I might conclude after study that the problem be left where it is, but I hate to see us submit a set of rules to the Court that do nothing about the problem.

Mr. Robinson. Really we have done a lot of work on it, Mr. Wechsler, and there has been a lot of discussion on it, you know, and it was quite thoroughly discussed the last time; and it seems to me--this is my conclusion, speaking for myself only--that the alternative is: either accept Mr. Waite's proposal as it was on our previous draft with full force, or the present system, not try to work out a compromise between the two. You remember as a practicing lawyer--and when I am

4 defending I do it, and when you are defending you will do it--he will tell a client, a defendant, "Now do not talk. If you are asked any question about this matter simply do not talk. Whether you are before a magistrate or whether you are somewhere else, just do not tell them a thing. They cannot make you talk, and on the trial they have to prove their case without your talking," and so on. You have that situation. There is no use of trying to finesse it somehow so that a man will talk and you will get information out of him without somehow going not strictly according to rules that you may write in a book about it.

Mr. Waite. Mr. Robinson, I sent you a copy of a Law Review article by Kauper.

Mr. Robinson. A very excellent article.

Mr. Waite. You remember he suggested something that might be intermediate between the police interrogation and this more formal preliminary hearing. If I remember rightly he provided that the man should be interrogated promptly and without the services of a lawyer to tell him what to say, but interrogated by an authorized agent rather than by the unauthorized police. You considered that, did you?

Mr. Robinson. Yes, but there you deprive him of counsel, do you not?

Mr. Waite. Oh, yes.

Mr. Robinson. And this complements the second provision, which you have just said we were utterly unwilling to accept, namely, that on the trial it be possible for the Government to introduce evidence that such and such a question was asked of this defendant and that he refused to answer.

Mr. Waite. Yes.

Mr. Holtzoff. I do not think, under the guise of the rule of evidence or in any other manner, even if we have technical jurisdiction under the guise of the rule of evidence, that this Committee should attempt to regulate the administrative activities of law enforcement officers and other administrative officers.

The Chairman. I do not quite see that, because we are concerned primarily, I take it, with seeing that justice is done on both sides, and that would be a means of doing it. As a matter of procedure I think we might make it our jurisdiction.

Mr. Waite. Mr. Chairman, I think Mr. Wechsler's motion was not seconded. I should like to second it and vote in favor of it, even though when the proposal is made I may violently react against it.

The Chairman. You have heard the motion, duly seconded. Is there any further discussion?

Mr. Dession. Just one point there. There are perhaps other approaches to this thing besides the evidential one and Mr. Waite's. Conceivably it might be the duty of the

magistrate, when a man is brought in, to require some kind of report under oath from the arresting officer as to time of arrest, where he has been in the meantime, whether he has been arrested, if so where and by whom, and let that be a matter of record.

Mr. Holtzoff. How does that become a part of the criminal proceedings?

Mr. Dean. Proceeding before a commissioner.

Mr. Holtzoff. What before a magistrate would require it?

Mr. Dession. If this was something the commissioner was supposed to do on the occasion of a man being brought in to him, I guess it would become part of the procedure.

Mr. Robinson. I should like to say one more sentence on this matter, going clear down to the roots of it. The big trouble is the question whether or not the privilege against self-incrimination is workable in the shape it is now in. Dean McCormick of the University of Texas a few weeks ago made an address raising the question that bears on avoidance of the privilege against self-incrimination, and as rapidly as it might become evident to us we will be willing to amend our constitutions; but that is another thing, and certainly it is beyond our jurisdiction to proceed toward putting our weight against self-incrimination as found in the Constitution. In neither way can you meet the deep-rooted difficulties that are due to an effort to apply that privilege to our present practical problems of law administration.

Mr. Dession. Well, we were trying to take that into account, Mr. Robinson, and my proposal would be both apparently and really designed to strengthen this privilege rather than

not to. I would simply be requiring a report from the arresting officer on just what has happened since the man was first taken into custody. What I have in mind is this: I think that when a duress question is raised at a trial and again on appeal, more often than not the appellate court has no way of finding out what the truth is. You have conflicting testimony. Judge Crane in open court, I recall, one time decided that maybe on the Mummiani case things were not as they should have been. They reversed. Mummiani then apologized to the police for saying the things he had said about them. That seemed to be a little hard on the Court of Appeals.

Mr. Waite. He remarked, if I remember, "Well, a man has got to have some kind of a defense."

Mr. Dession. Yes. I do not think the remedies we have for this thing are practical, and I am not a bit optimistic about finding an ideal solution. Even with a French examining magistrate you have a third degree, only there is a slang word for it in France, but I do think we might improve this situation a little bit.

Mr. Holtzoff. I call for the question.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No."

Those in favor, show your hands. Opposed.

Mr. Robinson. I would like to see the motion carried on the condition that Mr. Wechsler give us the benefit of his views on it and make us a draft on it so we can just see specifically what he has in mind. I would vote for it on the condition that that could come before this Committee for its consideration.

The Chairman. I think it is a very important subject. Would you do that?

Mr. Wechsler. Yes.

The Chairman. That is fine.

Mr. Seasongood. That means that we shall not finish at this session, does it not?

The Chairman. Oh, no. Professor Wechsler has been in that field before today.

Mr. Wechsler. I am not saying that I have pursued the initial problem to its conclusion.

Mr. Seasongood. Is it proper to ask if this is supposed to be a final meeting?

The Chairman. I think we can tell that better when we come to the end.

Mr. Burns. I should like to get an expression of sentiment about a proposal on the assumption that we, the Committee, have the power to issue a rule that any statement made by a defendant after he is arrested shall not be admissible against him at the trial.

Mr. Robinson. We had that up on a previous draft, you know.

Mr. Burns. Has there been anything recent?

Mr. Robinson. There is a statute on that.

Mr. Seth. Do you mean while he is in custody?

Mr. Burns. While he is in custody.

Mr. Holtzoff. What would be the purpose of such a proposal, Mr. Burns? Would it not be a shield to the guilty and no help to the innocent?

Mr. Burns. Of course, if I thought that, I should not

advance it.

Mr. Holtzoff. But let me put it the other way: I mean it seems to me it would be a shield to the guilty rather than a help to the innocent.

Mr. Burns. My feeling is that the prosecutor has made his case prior to the arrest and that in the case of a hardened criminal he gets no help because the criminal's first reaction is, "See my lawyer," and, "I am not talking." Now, in the case of a nonprofessional the Government has a great advantage because of the atmosphere of duress that, no matter how nice the surroundings are, is always present in the case of custody. So it seems to me that the innocent will be protected and the guilty will not have any great advantage.

Mr. Holtzoff. It seems to me that that is coddling the defendant a little too much, for this reason: You say that the professional criminal will say, "I am not talking. See my lawyer." Well, that is not always the case. But even if it were the case, you have the less hardened criminal who perhaps does not resort to that subterfuge or to that expedient. It seems to me that you would deprive the enforcement of the law of a very important weapon.

I was reading the other day an opinion of Justice Holmes in which he observed that under our modern practice it is much more likely that the guilty will escape than that the innocent will suffer. Coming from Justice Holmes that was, I thought, a rather important statement.

Mr. Youngquist. Would not Mr. Burns' suggestion be covered by the proposal that Mr. Wechsler is to submit?

The Chairman. I should think so.

Mr. Wechsler. It would be helpful, however, to me, Mr. Chairman, to have some discussion of it by the Committee.

Mr. Robinson: I would refer Mr. Burns to Rule 20 of the third tentative draft, line 32, as mailed to you. That had a provision that no confession made to an officer shall be admitted in evidence unless the defendant has first been taken before a magistrate, as provided here.

Mr. Holtzoff. Well, that was not passed upon, Mr. Robinson.

Mr. Robinson. No, but it was considered.

Mr. Holtzoff. No, it was not. You mean it was suggested by one member of the Committee. It was never considered by the Committee.

Mr. Robinson. Oh, no, but that is a proposal, Mr. Burns, for consideration.

Mr. Dean. As I understand, Mr. Chairman, Mr. Burns' proposal is even broader than that proposal which you just read dealing with confessions. He would make it apply as well to all admissions of statements of the accused.

Mr. Burns. That is quite right, Mr. Dean.

Mr. Dean. I should like to throw one little bit in if you will not hold it too much against me, and that is this observation: When Mr. Robinson was pointing out a moment ago he made the deduction, I believe, that if you required that no confession would be admitted unless it was made before a magistrate of some kind the men would not make these confessions before magistrates. That is the fear, is it not?

Mr. Holtzoff. For the magistrates have not the skill in

6 interrogating that a trained investigator has.

Mr. Dean. No, I am not thinking of the interrogation by

the magistrate, but the confession filed in the presence of the magistrate and signed by the accused. Now, if you had such a rule as that, I am not so sure that it would result in their not signing so many confessions.

Mr. Holtzoff. You mean the signature to the confession, not the interrogation?

Mr. Dean. That is right. In other words, some kind of a guarantee that it was in the light; that is all.

Mr. Holtzoff. What advantage would anybody get by having a written confession taken before a magistrate after it was made and having it subscribed in his presence?

Mr. Dean. The only advantage would be this: that you would have a guarantee that it was not taken under duress; you would also have the guarantee that it was taken or made by a man who had the advice of counsel.

Mr. Holtzoff. You mean that he would have advice of counsel before he signs it before a magistrate?

Mr. Dean. Otherwise, you see, the whole objection to it, it seems to me, proceeds on the assumption that if he had had the right to counsel you would never have the confession.

Mr. Holtzoff. Well, no.

Mr. Dean. Therefore you only get the confession when the man is without counsel.

Mr. Holtzoff. Now let us get this from a practical standpoint. The man is interrogated by an F.B.I. agent or by an Alcohol Tax agent, as the case may be, and he makes a confession, and they write out his confession; and then you say he should not sign the confession until he is brought before a magistrate. By the time he is brought before a magistrate he

gets a lawyer, and the lawyer says, "I instruct you not to sign that confession," and then the confession will never be signed. Now, as a practical proposition, is that not the result that will be reached by such a course?

Mr. Dean. I think you would have a certain percentage of that, but you would have the guarantee that none of them was secured under duress. And duress is a very difficult thing to prove. Assuming that it exists, it is extremely difficult to prove.

Mr. Holtzoff. No, it is not, because we know that juries are always prone to accept stories of duress on the part of prisoners, and sometimes, as in the case, for instance, that Judge Dession just mentioned, police officers are practically convicted of duress unjustly on such a statement.

Mr. Dean. I think that has happened.

Mr. Dession. That sometimes happens.

Mr. Holtzoff. Yes.

Mr. Dession. And the opposite sometimes happens. It is very hard to tell.

The Chairman. Have we a motion before us?

Mr. Dean. Simply to include this broader subject, is it not, in Mr. Wechsler's motion?

The Chairman. Yes. There was no motion before us, as I recall. If there is no motion I think we should proceed to section (c).

Mr. Robinson. I should say a word by way of introduction to section (c). You see, following the instructions of the Committee as best we could, we have tried to follow through in this Rule 5 a proceeding before the United States commissioner

or other magistrate, first taking up in (a) the bringing of the defendant before the magistrate and the proper preservation of the rights of the defendant, under (a).

Then, (b) preliminary examination before the magistrate, usually with the idea of committing the defendant for the action of some higher court.

And now in (c) we come to trial of offenses by United States commissioners. (c) is based on the rules of procedure for trials before commissioners, as promulgated by the Supreme Court on January 6, 1941, and as found in 18 U.S.C.A., following 576a.

Taking those rules, the effort has been made here to incorporate those rules as a code of procedure following somewhat the outline and style of expression of the rest of our rules. Therefore you will see that the problem in connection with this incorporation is much the same as our problem in connection with the incorporation of rules of criminal appeals. In both cases the advantage of such incorporation is the idea of having a unified set of rules, complete from beginning to end of a criminal proceeding. The disadvantage with respect to this provision, namely (c), and also with respect to our criminal rules, is, of course, that the Supreme Court's power to promulgate rules under these two heads is not restricted as it is with respect to promulgating rules under the statute under which we are acting, that is, the chief statute under which we are acting.

7 In other words, the Supreme Court's power to prescribe rules for trial of offenses by United States commissioners and to prescribe rules governing criminal appeals is such

that the rules are so prescribed as not to be submitted to Congress but can be promulgated by the court itself as soon as it is satisfied on them. So that is on the other side of the ledger.

And, therefore, my present suggestion is this: It seems to me that we can do with this matter, this subject of rules for trial before United States commissioners, what we have done with regard to rules for criminal appeals, namely: try to work them out so that they do form part of a complete set of rules, but at the same time preserve our tactical plans for later determination, deciding whether or not we wish these places to indicate that--for instance, here we would say: The trial of petty offenses before United States commissioners shall be governed by the rules promulgated by the Supreme Court under authority of the act of, whatever the date is. And so with our appeals rules. But in any event it seems to me desirable that we consider the present rules on the trial of petty offenses just as we also are considering the present rules with regard to criminal appeals.

Mr. Dean. Does this draft contain any changes from the present rules on petty offenses? Are there any departures from the present rules in this draft?

Mr. Longsdorf. I should like information on that too.

Mr. Robinson. There may be one or two additions. For instance, the first sentence is--

Mr. Holtzoff (interposing). There are substantive changes?

Mr. Robinson. No substantive changes whatever.

Mr. Holtzoff. It is matters of phraseology, is it not?

Mr. Robinson. That is all. I do not think of any change

of substance, with the only exception of this matter of not requiring a plea of guilty.

Mr. Holtzoff. Well, do you require a plea of guilty?

Mr. Burns. You do require a plea of guilty.

Mr. Robinson. Well, you do require a plea of guilty here in this case. I am thinking of (b) preceding.

Mr. Holtzoff. That is right.

Mr. Robinson. Yes, there is no change that I know of between these rules and the rules already promulgated except this: that the term "information" is used by the court, where we use the term "complaint." That has caused some discussion--the use of the term "information" in the court rules--but in these rules we say: "written complaint before the magistrate or before the commissioner."

Mr. Holtzoff. Outside of that?

The Chairman. Outside of that there is no confusion.

Shall we run over these?

Mr. Medalie. May I make some suggestions there: under (1) line 42, "forthwith issue a warrant or summons as provided in Rule 4". I do not think you need to include the words "as provided in Rule 4." There is no other way to do it under these rules.

Mr. Robinson. Just for convenient reference you do not think it is needed?

Mr. Medalie. I do not think it is necessary to be done, only when it is absolutely necessary to refer to another rule.

Mr. Holtzoff. I think the "shall forthwith" ought to be changed to "may."

Mr. Medalie. "issue a warrant or summons".

Mr. Holtzoff. "may issue".

Mr. Medalie. You have to have some process.

Mr. Robinson. Now, the Supreme Court's rule reads this way:

"Rule 1. A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged"--

So it says it shall be issued only on information.

Mr. Holtzoff. Well, I withdraw my suggestion.

Mr. Medalie. Nevertheless, the Supreme Court may not have in mind what we have just discussed this morning about being satisfied, the Commissioner being satisfied in his own conscience that the crime has been committed, whether there is probable cause to believe one has been committed. Either "shall" ought to go out or there ought to be the other provision, "if satisfied." This compels him again to act as an automaton, and we do not want to have that done.

Mr. Robinson. I think we used "may" before. We should use it here, Mr. Medalie. That is, I agree with you--

Mr. Youngquist. Redrafting 4 (a) will give the Commissioner that discretion.

Mr. Robinson. Yes.

Mr. Youngquist. I would suggest that we follow the same provisions in 5 (c).

Mr. Robinson. All right.

Mr. Medalie. We can say, "If it appears from a complaint

filed," and so on.

Mr. McLellan. Do you thinkin 4 (a) it would be sufficient to just substitute "may" for "shall" again?

The Chairman. I would think that there would be a natural reference back. I mean it seems to me it is tied up closely enough together without repeating language; do you not think so?

Mr. Medalie. Yes.

Mr. Youngquist. But should not we then say "as provided in Rule 4," to make it certain?

The Chairman. Well, maybe we should; it would be better than repeating a lot of language.

Mr. Youngquist. Yes.

Mr. McLellan. A change shall be made?

The Chairman. A change shall be made, to reinsert "as provided in Rule 5."

Mr. Medalie. All right.

Mr. Holtzoff. Leave out "forthwith." You do not need "forthwith."

Mr. Robinson. Change "custody" to "presence," probably.

Mr. Holtzoff. Yes.

Mr. Youngquist. Why not cut out "if necessary to secure the custody of the accused"?

Mr. Medalie. You do not need that.

Mr. Robinson. Well, if the accused is already under arrest you do not need any complaint.

Mr. Holtzoff. You do not need a complaint.

Mr. Robinson. You do not need any warrant.

Mr. Dean. Well, you have said "may."

Mr. Medalie. "the commissioner may".

The Chairman. We may eliminate that last clause.

Mr. Holtzoff. Well, if you do that, nine times out of ten or more in these petty offenses the arrest is made without a warrant.

Mr. Medalie. That is exactly what is not provided for here.

Mr. Holtzoff. That is not provided for. That is why it is thought.

Mr. Medalie. I was just coming to that in the other sentence, line 45: "is brought before the commissioner." He might be arrested without a warrant.

Mr. Holtzoff. But before youcome to that, in your first sentence you make it a duty on the commissioner, if you leave out that last clause, to issue a warrant or a summons whenever a complaint is filed. But the complaint might be modified.

Mr. McLellan. You have changed "shall" to "may."

Mr. Robinson. Yes.

Mr. Holtzoff. Oh, I see. That would be it, would it not?

The Chairman. "may issue a warrant or summons". Then I think you could strike that part from the beginning in the next sentence, could you not?

Mr. Medalie. "forthwith" is out.

The Chairman. Could you not just say, "When the defendant is brought before the commissioner"?

Mr. Holtzoff. Yes.

Mr. Youngquist. Yes.

The Chairman. Leaving out "upon execution of the warrant or service."

Mr. Robinson. Yes, I have it stricken out here.

The Chairman. Oh, have you it out already?

Mr. Robinson. "When the defendant is brought" insert "or appears," because on summons he just appears.

The Chairman. Why not say "appears"?

Mr. Robinson. Well, if he is arrested he may be appearing.

Mr. Holtzoff. He may be appearing by compulsion.

The Chairman. But he is appearing.

Mr. Robinson. "When the defendant"--

The Chairman. You can do a lot of things to make him appear.

Mr. Robinson. Would it not indicate that it was a voluntary appearance?

The Chairman. Not at all.

Mr. Holtzoff. I do not think so.

Mr.Robinson. "When the defendant is brought or appears".

The Chairman. There were various steps at common law by
9 which to make him appear. You were not before the court until you had been committed and entered your stipulation.

Mr. Robinson. All right. Then leave off the first sentence, all of it?

The Chairman. No. Let it read: "When the defendant appears before the commissioner and is informed of his rights as provided in Rule 5 (a), the commissioner shall further inform the defendant".

Mr. Holtzoff. No. In line 48 I suggested there be a period after the word "commissioner" and striking out the rest of that line.

Mr. Robinson. I do not think we should, Mr. Holtzoff. Of course you and I have discussed that before. It seems to me

that the Supreme Court Rules make that so important as a condition precedent to anything being done that we cannot stress it too much.

Mr. Youngquist. What was the suggestion, please?

Mr. Holtzoff. My suggestion is that in line 48 we put a period after the word "commissioner" and strike out the rest of the sentence. The only information that has to be given to the defendant is that he has a right to elect to be tried before the commissioner, and you do not need the rest of that.

Mr. Robinson. No.

Mr. Holtzoff. If he elects to be tried there, then the commissioner must procure his written consent.

Mr. Robinson. Let me read the last sentence of Section 576, under which these rules are drawn:

> "The commissioner before whom the defendant is arraigned shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner."

Mr. Youngquist. Is that not taken care of by the last sentence: "If he signs his written consent * * * the commissioner shall arraign"?

Mr. Robinson. Should he not first be informed by the commissioner of his right?

Mr. Youngquist. Then he is signed up?

Mr. Holtzoff. No. The statute as you read it says that the commissioner shall apprise him of his right to make the election.

Mr. Robinson. That is all that is provided here.

Mr. Holtzoff. No, no; you go further than that.

Mr. Longsdorf. Mr. Chairman, was not that language that we are at this moment discussing incorporated into the rule made by the Supreme Court for the very purpose of having written evidence that he elected to be tried?

Mr. Holtzoff. Oh, well, we provide; the next sentence provides.

Mr. Longsdorf. Or did the Supreme Court put that in for a specific purpose of frustrating somebody's quibble?

Mr. Holtzoff. No, the next sentence requires that he sign.

Mr. Longsdorf. Yes.

Mr. Holtzoff. All I am suggesting is the elimination of the repetition.

Mr. Longsdorf. Well, leave it where it is, and then change it if he signs his written consent, if he consents to be tried.

Mr. Holtzoff. I think it is better to follow the statute. The statute says that the commissioner must apprise the defendant of his right to elect to be tried before the commissioner; it does not say that he must apprise him of the fact that if he does so elect he will have to sign.

Mr. Longsdorf. Does the statute imply that? I have not read it for some time.

Mr. Youngquist. Just a minute.

Mr. Holtzoff. Well, we just had it read.

Mr. Longsdorf. I know, but there was a statute authorizing the Supreme Court to make those rules, and those rules were made under the statute. Now, as to the language "by signing his written consent to be so tried," does that occur in the statute

which authorizes the Supreme Court to make these rules and again in the rules that the Supreme Court made? Does it appear in one or in both?

Mr. Robinson. It appears in the statute. Now let us have it in the rules.

Mr. Holtzoff. Will you read the statute?

Mr. Robinson. Yes, the provisions of the statute on the requirement of the docket, in "Docket," Rule 3 of the Supreme Court's rules:

> "Docket. The Commissioner's proceedings shall be entered in his docket, which shall show: (1) The defendant's written consent to be tried before the Commissioner;"

That is the only reference in the rules to it.

Mr. Youngquist. That is taken care of by the last sentence.

Mr. Longsdorf. It is the same thing.

Mr. Robinson. Yes.

Mr. Holtzoff. In other words, neither the statute nor the rules say that in apprising the defendant the commissioner must apprise him both of his right to elect and of the necessity of signing.

Mr. Waite. That is what I want to know.

Mr. Holtzoff. It only requires him to apprise the defendant of his privilege of electing, and I think we should just
10 limit it to that.

Mr. Robinson. I thought I was just trying to be fair to the defendant, Mr. Holtzoff. Maybe I was over-fair, so we will let it go out.

Mr. Youngquist. Also strike out the words "by signing his

written consent to be so tried" in line 48, Mr. Robinson, would you say?

Mr. Robinson. All right, if that is the way you feel about it.

Mr. Holtzoff. Yes.

Mr. Seth. In lines 47 to 50 it is not clear what happens to the defendant if he has tobe tried in the district court. Does that mean the commissioner must bind him over without any evidence, or does the commissioner sit as a committing magistrate in that case?

Mr. Holtzoff. The last sentence answers that, if you will just read it.

Mr. Youngquist. No.

Mr. Seth. No, it does not.

Mr. Holtzoff. Does it not?

Mr. Seth. No.

Mr. Youngquist. It does not.

Mr. Seth. It says if he elects the commissioner shall hold him to answer in the district court.

Mr. Holtzoff. Oh, I see. I suppose the rule contemplates, although the statute is silent on the point and so are the Supreme Court rules, that the commissioner shall act as a committing magistrate.

Mr. Seth. I would think so.

Mr. Youngquist. I should not suppose so.

Mr. Holtzoff. Would you not?

Mr. Youngquist. Because he has his choice here to be tried immediately before the commissioner if he likes.

Mr. Robinson. Here is what the statute says:

"If any person charged with such petty offense shall so elect, however, he shall be tried in the district court of the United States which has jurisdiction over the offense."

The preceding sentence:

"For the purposes of sections 576-576d of this title the term 'petty offense' shall be defined as in section 541 of this title."

So if any person charged with such petty offense--in other words, the reference back does not qualify this sentence, and therefore it indicates, Mr. Seth, that he shall be tried.

Mr. Seth. I know, but what happens to him? Does he have to go to jail?

Mr. Robinson. Well, he can be put on bail.

Mr. Seth. Well, who fixes it? It does not say anything here. He may be brought before the commissioner on a summons, but here this rule says if he elects to be tried in the district court he has to be bound over to the district court.

Mr. Holtzoff. If he is bound over he can give bail.

Mr. Robinson. The Supreme Court rules do not even say that.

Mr. Seth. It says he shall be held to answer.

Mr. Burns. Does it not imply a bail process?

Mr. Seth. I do not know. That is what I was worried about in there.

Mr. Robinson. Do you think we should add a provision there of what the Supreme Court rules have?

Mr. Seth. Have they got this language?

Mr. Robinson. What is that?

Mr. Seth. Have they the language?

The Chairman. They have no bail provision at all in it.

Mr. Seth. But here it might be interpreted as making it mandatory on the commissioner to bind him over without evidence or without anything.

Mr. Robinson. That is the way the statute and the rules read.

Mr. McLellan. Mr. Seth, how would it be to say, "the commissioner shall if probable cause appears," before "hold him to answer in that court"?

Mr. Seth. Why not say "shall proceed as a committing magistrate"?

Mr. Youngquist. If I understand the statute as the reporter read it, it does not contemplate that there should be a preliminary hearing, and the theory of it, as I would see it, is that the defendant is given a choice of immediate trial before the commissioner--

Mr. Seth. Or go to jail.

Mr. Youngquist. There should be provision for bail, but if he chooses not to be tried before the commissioner and simply chooses to be tried before the district court and in that event no preliminary examination would be required, there should of course be provision for admitting him to bail.

Mr. McLellan. Of course that is all inferred, you see.

Mr. Robinson. I think that is true.

Mr. Holtzoff. I think it is inferred by the statement that the commissioner shall hold him to answer in the district court. That of course implies necessarily admission to bail.

Mr. Seth. I do not know whether it does or not.

Mr. Burns. Why not add "subject to the usual bail provisions"?

Mr. Youngquist. Where is that?

11 Mr. Waite. Lines 49, 50.

Mr. Holtzoff. I do not think I would agree.

Mr. Burns. I do not think you need it.

Mr. Holtzoff. Holding him to answer includes the right of bail, I think, by necessary implication.

The Chairman. I should like to suggest that the last two sentences be reversed.

Mr. Robinson. Reversed?

Mr. Holtzoff. I think so.

Mr. Robinson. All right.

The Chairman. All right. If there is nothing further we shall go on to (2) on the next page.

Mr. Dean. Should not we specifically provide how the case gets to the district court? I was thinking of a sentence possibly saying that if he elects to be tried in the district court the commissioner shall transmit the file in the case to the district court.

Mr. Holtzoff. I think that is purely administrative. He holds him to answer, and I do not think you have to have those administrative details included.

Mr. Dean. It is different than holding a man to answer, though, when you are acting as committing magistrate and holding him to answer to the grand jury. What you are doing is really sending up the original file in the case here upon which it will be tried. The complaint, for example, is your accusative document.

Mr. Holtzoff. Well, you are sending up your original file in the other cases also.

Mr. Dean. It is not your accusatory document on which the case proceeds from that point on.

Mr. Holtzoff. No.

Mr. Robinson. Do you want (2)? Did you want to make a motion?

The Chairman. Have we satisfied Mr. Dean on that point? Is there anything in the rules there about sending up the docket?

Mr. Robinson. No, sir, there is nothing. It just says under "Docket":

> "The Commissioner's proceedings shall be entered in his docket, which shall show:"

The Chairman. And it describes the record.

Mr. Holtzoff. No.

Mr. Robinson. That is all it says on the record.

Mr. Holtzoff. No. Mr. Chairman, as a matter of phraseology I should like to make some suggestions on the last sentence, which now becomes next to the last sentence. I should like it treated something to this effect: If he elects to be tried before the commissioner and signs a written consent to that effect the commissioner shall arraign him as provided in Rule 14. It does not change the meaning; it is just by way of change of phraseology.

The Chairman. Is not all of that implied by what we get up to when we say he has a right to elect to be tried before the commissioner? If he signs his written consent to be tried before the commissioner, the commissioner shall arraign him as in

the district court.

Mr. Holtzoff. I just thought of having parallel structure. You have "If he elects" in one sentence. It might be well to start the other sentence with the words "If he elects," just as a matter of parallel structure. And then "in the manner"-- if you can substitute the word "as" for "in the manner".

Mr. Robinson. You will notice on line 47, Mr. Holtzoff, it says "right to elect to be tried before the commissioner". You can go right on, "if he signs his consent to be tried before the commissioner in writing."

Mr. Holtzoff. All right. Change "in the manner" to "as."

Mr. Robinson. Yes, that is right. Strike out "in the manner" beginning in line 52, as I understand.

The Chairman. All right. Now (c)(2).

Mr. Robinson. Mr. Holtzoff and I have discussed the last all except--beginning with line 54, (2). We believe that "If the plea is guilty," can go out in that sentence and the next sentence also. But see what you think about it. It would read then, line 53:

> "(2) Plea. Upon arraignment, the defendant shall plead either guilty or not guilty."

Period. And the next would be "(3) Trial." line 57.

Mr. Burns. You have in Rule 15 a provision about entering a plea of not guilty when the defendant is silent.

Mr. Robinson. Yes.

Mr. Burns. Do you think there should be any reference to it here?

12 Mr. Robinson. That I do not know, Mr. Burns. I was trying to leave out nolo contendere and every other extra touch

here.

Mr. Holtzoff. What is the question?

Mr. Burns. Well, according to Rule 15 it provides that if the defendant is mute the plea of not guilty is entered.

Mr. Robinson. I will tell you how we will take care of that, Mr. Burns. In line 59, or beginning in 57, "(3) Trial.", just strike out the first three lines, and beginning just at the end of line 59 before "The trial" and insert this:

> "If the plea is not guilty or if the defendant does not enter a plea or does not plead, the trial shall be conducted by the commissioner without a jury."

Mr. McLellan. Does that mean you can proceed to trial without any plea being put?

Mr. Robinson. That is right. You are going to have to make a separate sentence, Judge, are you not? "If the plea is not guilty the commissioner shall enter a plea of not guilty"?

Mr. Holtzoff. How are you making paragraph 3 read?

Mr. Dean. Why do you not say, "If a not guilty plea is entered"? That would cover your mute situation.

Mr. Robinson. All right. That would save time. "If the plea is not guilty, the defendant's not-guilty plea shall be entered"?

Mr. Holtzoff. What?

Mr. McLellan. What is that?

Mr. Robinson. As I understood him. I am trying to please him.

Mr. Dean. No. "If a not-guilty plea is entered". That is by the court.

Mr. Robinson. "If a plea of not guilty is entered, the

trial shall be conducted by the commissioner."

Mr. Holtzoff. I do not like the phrase "the plea is entered". Why not say "the defendant pleads not guilty"?

Mr. Dean. Because we just raised the situation where he does not plead not guilty.

Mr. Holtzoff. "or if he fails to plead".

Mr. Robinson. Yes.

Mr. Dean. All right.

Mr. Youngquist. You had first "or the defendant does not plead". If you say "or if the defendant refuses to plead," would it not take care of it and then you go right on?

Mr. Robinson. Well, I like this last suggestion. "If a plea of not guilty is made or is entered"; would that include both?

Mr. McLellan. "is entered".

Mr. Robinson. "is entered".

Mr. Youngquist. But what provision do you make for the entry of a plea of not guilty in case of a refusal to plead?

Mr. Robinson. I would assume that the commissioner had that power.

Mr. Burns. Well, you give that power in Rule 15.

Mr. Seasongood. To the trial court.

Mr. Burns. To the trial court.

Mr. Seasongood. That is right.

Mr. Burns. And what about nolo contendere before a commissioner?

Mr. Youngquist. No.

Mr. Holtzoff. I do not think nolo contendere; they are mostly traffic-control violations.

Mr. Waite. That is where you find them.

Mr. Burns. That is where they have nolo contendere. This absolutely will be the place where you will have a lot of these X-card litigations.

Mr. McLellan. You do not want to give the commissioner the discretion to enter a plea of nolo contendere, do you?

Mr. Robinson. No.

Mr. Holtzoff. No.

Mr. Burns. I do not think so. I think it might be very well to leave out completely the one-to-infinity chance that somebody will be mute and you will have to enter before a commissioner a not-guilty plea.

Mr. Robinson. That is what we have done here.

Mr. Holtzoff. I think that is right.

Mr. Burns. I think that is the better way. I just read it because of the Rule 15 provision.

Mr. Robinson. Which would mean this: before "The trial," at line 59, after "desired": "If the plea is not guilty, trial--" Strike out "the". -- "trial shall be conducted".

13 Mr. Holtzoff. "the". We ought to leave out "the". "trial".

Mr. Robinson. All right. "the trial shall be conducted--" I would insert "by the commissioner". -- "without a jury as are trials of criminal cases in the district court."

Mr. Burns. It seems to me the present language in that respect, Mr. Robinson, is adequate.

The Chairman. Yes.

Mr. Burns. "the trial". That means there has been an issue raised by the pleadings.

Mr. Robinson. I am afraid that would be assuming too much. I would rather have "If the plea is not guilty". Are there others who will support that? Mr. Youngquist, what do you think about it? Of course what I am trying to do is to save two or three sentences.

Mr. Youngquist. I do not think it would be necessary. I think it would be all right to say simply "the trial".

Mr. Robinson. All right.

Mr. Youngquist. If you want to say, "Upon plea of not guilty trial shall be conducted"--

Mr. McLellan. Well, that is kind of assuming, is it not?

Mr. Youngquist. Yes; I think it is all the same.

The Chairman. Yes, I think so.

Mr. Youngquist. I do not think we need any.

Mr. Robinson. You think, do you, that lines 53 and 54 would be sufficient without the provision in there?

Mr. Youngquist. Yes.

Mr. Burns. I think that is quite clear.

Mr. Robinson. Therefore, (3) will read, as we drop out the first sentence and simply retain the second sentence:

> "The trial shall be conducted without a jury as are trials of criminal cases in the district court before a district judge when a jury is waived."

rather than "where".

Mr. Holtzoff. Should it not be simply "conducted by the commissioner without a jury"?

Mr. Robinson. That is what I just asked and got turned down.

Mr. Holtzoff. Oh, no, you did not get turned down on that.

Mr. Robinson. Some said they liked it, and some did not.

Mr. Medalie. After the words "without a jury" strike out the words "as are trials of criminal cases".

Mr. Robinson. I would take the exact language of the Supreme Court's rule on that. Now, whether you want it or not is up to you.

Mr. Longsdorf. I feel as though we ought to stick pretty closely to the language of the Supreme Court rules. Why should they be changed? What is wrong with them?

Mr. McLellan. Does the first sentence of (3) come out?

Mr. Robinson. Yes, sir, if that is agreed.

Mr. McLellan. All right.

The Chairman. Why is it necessary to say "as are trials of criminal cases in the district court before a district judge"? Who in the world would try them but a district judge?

Mr. Robinson. You would be interested to know that there is more redundancy than that in these rules. Let me read it to you.

Mr. Youngquist. Why not strike out the words "before a district judge"?

Mr. Robinson. Let me read you this sentence:

> "Trials shall be conducted as are trials of criminal cases in the district court before a district judge in a criminal case where a jury is waived."

Mr. McLellan. Why do you not stop with "jury"?

Mr. Dean. Right.

Mr. Holtzoff. Trial without a jury. I think we do not need the rest of it.

Mr. Medalie. You do not.

Mr. Robinson. What about your procedure, though. Are you sure the procedure will be understood?

Mr. Burns. Well, I raise a question that seems to be one of substance: Is there a provision in all the district courts that there shall be a record of the testimony by a stenographer?

Mr. Holtzoff. No.

Mr. Burns. You notice that on the record on appeal to the district court where a fellow has waived his right there is a consent. If he has consented in writing to a trial by the commissioner, he under these present rules will have great difficulty in raising substantive issues of law and in establishing them over the judge's objections. It is a very informal procedure that is intended to be created, but I think it may work out so that there is no method whereby he can establish what would be the equivalent of a bill of exceptions.

14 Mr. McLellan. That is something later, is it not, Judge?

Mr. Burns. Yes, but I wanted to find out now whether there was a provision requiring a stenographic report of the proceedings.

Mr. Seth. No.

Mr. McLellan. No, not even in the district court.

Mr. Burns. I should like to have that considered, because it seems to me it is important.

Mr. Seth. Appeal would not amount to anything.

Mr. Holtzoff. You know, there is no requirement for official stenographers, for stenographic reports of trials in Federal courts.

Mr. Burns. I think there ought to be.

Mr. Holtzoff. There is a proposal pending before the Judicial Conference of the Department of Justice, which has jointly cooperated on the bill that is now pending. It will take legislation to do it.

Mr. Burns. I think we ought to put it in the rules. Why would it take legislation?

Mr. Youngquist. We discussed that quite fully at previous meetings, and the conclusion was that we had better wait to see what the Judicial Conference does about it.

Mr. Burns. Well, now at this late date can you wait for that?

Mr. Youngquist. I mean to say nothing about it here, but to leave that for future action.

Mr. Robinson. That is it.

Mr. Holtzoff. It involves a heavy financial expense, and it involves the appointment of court officers, namely reporters, which is beyond, I think, the rule-making power.

Mr. Burns. I think we ought not to delude ourselves into thinking that an appeal from a commissioner is worth very much.

Mr. McLellan. Especially as they only allow the appeal to open up questions that could be opened up, come along, on a writ of error.

Mr. Burns. That is right.

Mr. McLellan. Without any of the evidence going up. And I thought we would dealwith that perhaps sometime later, but I noticed that just as you did.

Mr. Youngquist. Are we striking out the last?

The Chairman. Let us compromise and strike out "before a district judge," and then we will have a guide.

Mr. Youngquist. All right; in line 61.

Mr. Robinson. Now, how do you have that?

The Chairman. Just strike out those words, so that it will read: "shall be conducted by the commissioner without a jury as are trials in criminal cases in the district court," and so forth.

Mr. Robinson. Would you change "where" to "when"? "when a jury is waived"?

Mr. Longsdorf. Mr. Chairman, may I ask for the privilege that we go back for a moment? I should like to ask why Rule 1 of those rules drawn by the Supreme Court does not appear in here.

Mr. Robinson. Well, the substance of it does.

Mr. Longsdorf. Where are they?

Mr. Youngquist. What is Rule 1?

Mr. Longsdorf. Of the Supreme Court rules.

Mr. Robinson. It says this:

"Rule 1.--Information and Warrant

"A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged offense was committed and the place where it was committed and a description of the alleged offense."

The reason those words were omitted, Mr. Longsdorf, is that we have eliminated this catalogue, you know, elsewhere, and it seems as though our description in the complaint would include that.

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Mr. Longsdorf. Now, some of those particulars are put in there to fix in the complaint the fact that the offense occurred in a national park or federal reservation. Am I not correct in that?

Mr. Holtzoff. We defined a complaint in a previous rule this morning and that explanation is broad enough to comply with these proceedings and that does away with the necessity.

Mr. Longsdorf. Well, perhaps you may be right on that but can you be assured it would be implied that it must be committed in Yellowstone Park or was committed in Yosemite Park?

Mr. Holtzoff. Well, if you do not set that forth in your complaint will that be insufficient?

Mr. Robinson. Their words were, "The complaint shall be a written statement of the essential facts constituting the offense."

Mr. Longsdorf. Oh, the implication is possible, I agree to that.

Now, about the second paragraph of that rule,--

Mr. Robinson. If arrest is made on view.

Mr. Longsdorf. How do we cover that?

Mr. Robinson. The same thing.

Mr. Longsdorf. Do you thinkwe have covered that sufficiently by a prior rule?

Mr. Robinson. I believe so.

Mr. Longsdorf. Well, I want to know.

Mr. Holtzoff. I think we have.

Mr. Longsdorf. I am willing to go with the rest of the committee on that. I do want to ask the question, however.

The Chairman. All right, section (4).

Mr. Robinson. "If the plea is guilty or if the commissioner finds the defendant guilty"--may we insert, "If the plea is guilty or if the commissioner finds the defendant guilty, the commissioner shall impose sentence." I had better repeat, "the commissioner".

Mr. McLellan. I might say, "If the defendant is adjudged guilty". That will cover both.

Mr. Medalie. Well, another reason why I think Jim's line is better than that, and that is, if the commissioner understands what we mean; if we say "adjudged guilty," the commissioner probably would not know what we were saying. A lawyer would.

Mr. Robinson. Oh--

Mr. Medalie. You think he would? Well, the things that have been told me--

Mr. McLellan. I would rather he would go and find out, rather than put all those words in.

Mr. Youngquist. I can shorten it even more by saying, "If the defendant pleads or is found guilty".

The Chairman. "If the plea is guilty or the defendant is adjudged guilty, the commissioner shall".

Mr. Robinson. Then, in line 65, after the word "acquittal", Mr. Holtzoff and I discussed that line and decided we could put a period and strike out the rest.

Mr. McLellan. Say that again.

The Chairman. After "acquittal" on line 65, strike--

Mr. Robinson. Line 67, "The commissioner shall enter in his docket the record of his proceedings."

The Supreme Court rules have a long paragraph on that

enumerating what should be in the docket.

We have a provision that the administrative office of the United States courts may prescribe. I take it they may incorporate what the Supreme Court rules say.

Mr. Youngquist. Does that general provision relating to dockets cover petty offenses?

Mr. Robinson. I think it does.

Mr. Holtzoff. If that were so we could even go one step further and strike out--

Mr. Robinson. He gets instructions from the administrative office as to what dockets to keep, and we have a general rule authorizing the administrative officer to prescribe which records he shall keep.

Mr. Youngquist. Oh, yes. That covers it.

Mr. Holtzoff. I think we can strike out 5.

Mr. Youngquist. I so move.

The Chairman. Moved and seconded. Those in favor say "Aye." Opposed, "No."

The motion is carried.

Mr. Robinson. I have no exception to 77.

Mr. Medalie. Judge McLellan raised the question and I agree with him.

" * * the decision of the commissioner upon questions of fact shall not be re-examined by the district court."

Now, experience shows it is advisable that some court review the facts. That is consistently done throughout the country.

Mr. Robinson. That is statute, though.

Mr. Holtzoff. I think we can change it. This presents a

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real--

2 Mr. Youngquist. How does the rule read, or the practice, if there is anything in the practice?

Mr. Robinson. Well, the rule reads, "Only errors of law apparent from the record as certified by the commissioner shall be considered by the court."

Mr. McLellan. Well, suppose there is no substantial evidence to warrant conviction, not simply that the thing is wrong but there is no substantial evidence. Ought not that be reviewed?

Mr. Youngquist. Isn't that an error of law?

Mr. McLellan. But you say, "Only errors of law apparent from the record." That does not include the question as to whether, upon all the evidence--

Mr. Seth. And since the commissioner makes only one finding, that he is guilty or not guilty, it seems to me to be misleading.

It is not like a civil case where he finds facts A, B, C, D, and E.

In this situation it is either a conviction or an acquittal, and I think a defendant ought to be entitled, if he can establish the record,--and the establishment of the record is another problem--to have the district court review.

Mr. McLellan. You do not use those words, that are equivalent.

Mr. Medalie. If Judge Cramer were here he could tell you the great difficulty we had before the Constitution of New York was amended.

Errors of law, prior to 1926--I think that was the date--

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which the courts reviewed, were errors of law other than the sufficiency of evidence, so you are raising a question that is exceedingly difficult.

Judge Cramer could have told you all about that. That word "law" does not mean anything.

Mr. Holtzoff. But whether or not there is substantial evidence is a question of law.

Mr. Medalie. Well, that is exactly what the Court of Appeals of New York held was not a question of law, prior to 1926.

Mr. Holtzoff. But whether the evidence is sufficient is always a question, is that not a fact?

Mr. Youngquist. That I think is what was intended by this.

Mr. McLellan. When you say "apparent from the record" then you have the question of whether the testimony is part of the record, which traditionally it is not.

Mr. Youngquist. Could you pass on that question if the evidence was not included in the record?

Mr. Holtzoff. Judge, I wonder if that wouldn't be cured by letting the sentence read, "Only errors of law shall be considered by the court."

Mr. McLellan. Well, that improves it but I am afraid it is not quite adequate.

Mr. Seth. We have no procedure for establishing the record.

Mr. Holtzoff. You can bring your reporter.

Mr. Medalie. You mean there is no provision for his making a return as to what the evidence was?

Mr. Seth. Yes, but if you read "Record on Appeal" on

page 4, you will see that the record is whatever the commissioner has certified; and there is nothing in these rules which would give a party a way of showing the errors of a commissioner who, up to now, has been shown to be just a little above a high class moron.

Mr. McLellan. Of course the reason was that the evidence was not part of the record, could not have been used on a writ of error; and they developed a bill of exceptions to show what errors were made that were not apparent on the record.

Now, I don't know as you want to provide for a bill of exceptions but there ought to be some way of getting the evidence there so the judge can decide whether it has been supported by evidence at all.

Mr. Seth. But it may become very important from the standpoint of the administration of justice--you recall when the prohibition law caused almost a breakdown of the federal courts, it was suggested by Mr. Justice Frankfurter that they could find a way of handling these prohibition cases without the constitutional right of trial by jury.

Now, if you are going into a field where there may be hundreds of thousands of priority violations it may be to our interest to work out a procedure which will appeal to the average lawyer as getting a square deal, but if you have a situation where he is completely at the mercy of this commissioner, I doubt whether a lawyer would be wise in advising his client to assent to it.

Mr. Holtzoff. Well, this procedure is limited by law to petty offenses, with sentences up to six months.

Mr. Seth. I would anticipate that argument by saying that

when we do come to the business of prosecuting these violations of priorities and the rest of these new devices to win the war, I think it will be found that the very severe penalty will be a reason why juries will not convict, and we probably will have to reverse the process.

Now, it seems to me if we do that we ought to try to develop a procedure which might meet with general approval.

3 Mr. Holtzoff. I was about to say that most of the statutes to which you refer, even though the violations are of minimum character, have provided very severe maximum penalties. That is why I called attention to the six months' provision.

Mr. Longsdorf. May I also call attention that this cannot apply on only those offenses committed on a federal reservation--it cannot be extended to a multitude of petty offenses.

Mr. McLellan. Mr. Chairman, may I change a word in the last sentence to read, "Only errors of law, including among others a question of whether a conviction was supported by substantial evidence, shall be considered by the court."

Mr. Seth. In these remote cases like federal parks, there is no chance of getting a court stenographer to take these little petty offenses.

I think the only remedy is to let the district court try it de novo.

Mr. Robinson. That is a terrible situation if practically every petty offense is tried de novo.

Mr. McLellan. The question of whether the conviction was supported by substantial evidence should be considered by the court.

Mr. Dession. How could you determine that without some

record?

Mr. Medalie. I can conceive of a case where no record has been made, the commissioner is required to make what is called in some states a return.

Now, suppose two of us were in an automobile; one of us was driving, and he convicted both of us of speeding. His return shows the man driving; I was sitting alongside of you; and that was the only evidence he had.

It would be apparent from that, sketchy as it is, that there would be no evidence to warrant my conviction.

The Chairman. Well, you get it in about the same way as the average judges. They have no stenographer.

Mr. Medalie. Also if he has not made a correct record you could raise that question with the district court.

Mr. Holtzoff. After all, of course lots of criminal cases are tried in the federal courts without a reporter.

Mr. Seth. But not appealed.

Mr. Youngquist. While the fact perhaps should not influence us, I might call your attention to this, that these two sentences, lines 73 to 77, are verbatim the Supreme Court rule on the subject.

Mr. Medalie. Well, if we pointed out to them the reason for our suggestion for changing this, they might agree with us.

Mr. Youngquist. I say I am merely pointing that out. I am not suggesting that should restrict our operations.

Mr. Medalie. We can claim a wider experience with petty cases than they can possibly have; therefore we are in a position to advise them.

Mr. Robinson. We think along the line too that the

present trend of events is such that commissioners will try more offenses; their jurisdiction will be extended.

Mr. Burns. If you adopt Judge McLelland's suggestion, then it becomes apparent that the commissioner must take some notes in order to certify a question of law which may be raised, to wit, that there is no substantial evidence to support the conviction.

Now, if we go to "Record on Appeal to the District Court" and add to that a sentence that it shall be the duty of a commissioner upon request of a defendant to report so much of the evidence as is necessary to make clear to the district court the issues of law sought to be raised--

Mr. McLellan. Good. I knew that something would have to be done but I did not know what it was.

We have got to have some way of getting that up there.

Mr. Robinson. Well, the next paragraph is predicated on that.

The Chairman. We haven't finished with Judge McLellan's suggestion, have we?

Mr. Orfield. Couldn't you also add this, not giving the defendant the right to retrial, but permitting the district court to retry if it is thought it ought to be retried?

Mr. Robinson. Do you think that would be better than sending it back to the commissioner for trial?

Mr. Medalie. Why don't you leave that to the district court?

Mr. Robinson. That is an interesting thing about the Supreme Court rule, it does not say what to do, whether to affirm, reverse, or send it back for a new trial.

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Mr. Burns. They come miles to establish an appeal, and, if the court is not busy, perhaps it would be the businesslike way to dispose of it then and there.

Mr. Seth. I think we ought to leave the Supreme Court rules alone.

Mr. Robinson. Well, we have perhaps the same problem that they have to deal with, not on this particular subject, but--

Mr. McLellan. Well, I haven't ever run across a court that could try a man for a crime punishable by six months in jail where the defendant was not afforded the right to have the question raised of whether his conviction was supported by evidence. This is a departure from anything in modern times.

Mr. Medalie. Did you tell me that some parking offenses under federal law--did you tell me that parking offenses under federal law were punishable by 100 days imprisonment?

Mr. Holtzoff. Pardon?

Mr. Medalie. Parking offenses, 100 days imprisonment; that the court has the power, although it usually says only $2?

Mr. Holtzoff. All those local violations are punishable by state law. The state law governs in federal reservations.

Mr. Medalie. What else can come up in a national park?

Mr. Holtzoff. Well, violation of the Migratory Bird Act.

4 Mr. Medalie. Can you get 30 years for that?

Mr. Holtzoff. No.

The Chairman. Two dollars.

Mr. Seth. You may not have the duck's tail.

Mr. Robinson. That is not in the Supreme Court rules.

Mr. Medalie. Well, what I want to make sure is that we are not troubled by those things.

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The Chairman. I am satisfied with the Supreme Court rules. They have come through the wash.

We got a qualified permission to submit something very tentatively with respect to rules on appeal after verdict. I had three or four talks with the Chief Justice about that. The first one was he did not think that anything needed to be done.

Then I pointed out two or three things that we had discussed here, and he said of course those changes should be made.

Then at a later conference he told me that the situation had come up of an actual case in which the Court in its rules had made no provision at all. He was very much chagrined by that.

There has been nothing said about these rules at the other end of the spectrum. These are all more recent too than the appeals rules.

Mr. Robinson. They went into effect just two days before this Committee was appointed.

Mr. McLellan. I don't believe this question of what is really meant by "errors apparent on the record" could be covered, that is, the history of the thing. Perhaps it is but it is a very new thing.

The Chairman. It certainly is a light way of putting a man out of circulation for six months.

Mr. Medalie. Now, I want to be very sure, what are the offenses that are punishable by six months in prison? I don't want to be making a fuss about $8 fines.

Mr.Holtzoff. I think there are very few federal statutes with a maximum penalty as low as six months.

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I think, however, an offense committed on a federal reservation is punishable by the penalty prescribed by the state law.

It may be assault and battery.

If the state statute prescribes not in excess of six months and such an offense is committed on a federal reservation, it would be tried on these rules.

Mr. Medalie. What about offenses like vagrancy and other things that usually run up to six months?

Mr. Holtzoff. Yes. The majority of these cases will be traffic violations. He has a right to elect to be tried by the district court in the first instance.

Mr. Longsdorf. Mr. Holtzoff, if there are a multitude of park regulations--

Mr. Holtzoff. Yes.

Mr. Longsdorf. (Continuing) --feeding bears at the wrong time and place--

Mr. Medalie. But most people won't appeal from that kind of thing. It is only when someone does get six months or three months that there would be a little action about it. He would have to appeal. In the state courts there would be a county judge and he would examine the record to see whether it was justified.

The Chairman. Well, now, let's see.

Judge McLellan's motion is still pending.

As I recall it, that was to include in line 76 the words, "Only errors of law, including among others the question of whether the conviction is supported by substantial evidence, shall be considered by the court."

Are you ready for a vote on that question?

Mr. Seasongood. We can hardly grant an appeal in that if we don't have a bill of exceptions.

The Chairman. This goes to the substance of the method of getting the record.

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

Carried.

Mr. Youngquist. Do you strike "apparent from the record as certified by the commissioner"?

The Chairman. Yes.

Now, what was your suggestion, Judge Burns?

Mr. Burns. On page 4 of Rule 5, after the last sentence insert the following:

"The commissioner shall include in his certification a report of so much of the evidence as may be necessary to reveal to the district court the issues of law sought to be raised on appeal."

Now, that leaves completely open the question of how he will get that, whether by conference with the attorneys, from his own notes, or what.

Mr. Holtzoff. I did not get that.

Mr. Burns. Will you read that, please.

(Record read as requested.)

The Chairman. Are there any remarks on the motion?

If not, all those in favor say "Aye." Opposed, "No."

Carried.

Mr. Youngquist. That follows in line 92.

The Chairman. That is right. Now we go on to line 93.

Mr. Burns. Well, perhaps it ought to go on line 103,

the "Record on Appeal to the District Court."

Mr. Youngquist. Line 92 speaks of matters "certified by him"; you say, "The commissioner shall include in his certification".

Mr. Burns. Oh, yes, I think that is all right.

The Chairman. I think that is all right.

Mr. Holtzoff. Line 86--before you read that--the word "prison" should be "institution".

Mr. Youngquist. Or "place".

Mr. Holtzoff. Or "place".

And I think the next sentence might well go out. I don't
5 think you want the formality of assignment of errors, do you?

Mr. Medalie. Well, here is the difficulty; in getting up your record the commissioner does not know what record to get up. We are excluding it from appeal to the district court later and had in mind that we ought to exclude it here, but the proposal is, it sets forth the grounds.

Mr. Youngquist. That is right.

The Chairman. Is that a question on the paragraph beginning on line 93, or on the paragraph beginning on line 100, or on the paragraph beginning on line 104?

Mr. Medalie. Well, what provision is there for having the commissioner amend or amplify a record?

Mr. Longsdorf. On retrial of the case?

Mr. Medalie. Do you think it is implied?

Mr. Holtzoff. I think that is in here.

Mr. Burns. How about modifying? Does that mean--it would come up on an order of the commissioner, and if he has the power to modify, I presume he would say, "You may enlarge

this record."

Mr. Robinson. That is line 89.

Mr. Longsdorf. How about the words "in relation to the appeal", then.

Mr. Youngquist. What does the word "order" mean, then, as used in line 108? He does not really make an order except an order relating to bail.

Mr. Burns. Well, if you just add in "any order or certificate" it seems to me then he has the power to be referred back.

Mr. Seasongood. You provide that you have to have 5 days' notice of application for appeal in the district court.

Mr. Holtzoff. I don't think you need 5 days' notice.

Mr. Seasongood. No, I should think not. That is not the rule in the court of appeals.

Mr. Holtzoff. This does not require 5 days' notice for application.

Mr. Longsdorf. Well, is the order admitting to bail an order in relation to appeal?

Mr. Seasongood. It says here "any order for the granting of bail." You don't want that language relating to 5 days, in determining whether you can get bail or not.

Mr. Holtzoff. If we don't mind tinkering with the Supreme Court rules, I would like to strike out "5 days' notice".

Mr. Longsdorf. Upon notice, without specifying time.

Mr. Holtzoff. Well, I don't think you have got to say "upon notice".

Mr. McLellan. Strike out "upon 5 days' notice".

Mr. Holtzoff. Yes, if that is agreeable.

Mr. Burns. That is taken care of ordinarily by the

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district court's power to have special rules for procedure on appeals.

The Chairman. Anything further on this section?

Mr. Seasongood. "Five days' notice" is stricken?

Mr. Holtzoff. Yes.

Mr. Medalie. What about the district court electing to try the case?

Why not leave it to the district court either to retry the case or send it back?

Mr. Holtzoff. Well, I think we ought to take care of that in the last paragraph on this page.

Mr. Medalie. All right.

Mr. Holtzoff. Strike out the word "standing" in line 112.

Mr. Medalie. "Standing"?

Mr. Youngquist. I note in lines 110 and 111 you say, "Motions subsequent to the judgment of conviction shall not be entertained by the commissioner." And in the paragraph beginning on line 114 you say, "Within 60 days after conviction a defendant may move for a new trial".

Isn't that inconsistent?

Mr. Robinson. It is still a Supreme Court rule.

The Chairman. In line 111 why shouldn't it be "by rule"? "The district court may by rule not inconsistent with these rules".

Mr. Medalie. That is right. It could be done by rule.

The Chairman. It should be done by rule. Strike out "order" and just say "by rule".

Mr. Robinson. Haven't we done that in special circumstances, though? This is a general rule. "Order" would apply

to a specific case, would it not?

Mr. McLellan. The court has the inherent power to do that anyway.

Mr. Youngquist. What do you say about this new trial provision that would make it consistent with prohibition against motions?

Mr. Robinson. It does not make it consistent. The Supreme Court rules are inconsistent.

"Motions subsequent to the judgment of conviction shall

6 not be entertained by the commissioner."

Mr. Burns. "Within 60 days after conviction a defendant may move for a new trial on the ground of newly discovered evidence. The motion shall be in writing, addressed to the commissioner"--

Mr. Youngquist. I do not see how that can work because under these rules you must take an appeal within 5 days after judgment and conviction.

Mr. Robinson. That is stricken out now.

Mr. Youngquist. Not the appeal. That line 78, "An appeal shall be taken within 5 days after entry of judgment", on page 3.

Mr. Robinson. That is right.

Mr. Youngquist. Does this "newly discovered evidence" rule provide if he does not take an appeal he may, notwithstanding, within 60 days move for a new trial?

And if he does take an appeal the commissioner no longer has jurisdiction; so he cannot make the motion.

Mr. Robinson. Say "move in the district court", would you?

Mr. Longsdorf. The rule specifies it will be received by

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the commissioner and transmitted by him. Line 120.

Mr. Youngquist. That is intended only to apply if an appeal has been taken before. Because otherwise the case would not be in the district court.

Mr. Longsdorf. Mr. Youngquist, I do not so construe that paragraph. That applies whether or not an appeal has been taken.

Mr. Robinson. Right. Either way.

Mr. Youngquist. What would be the reason for transmitting to the district court a motion for a new trial on grounds of newly discovered evidence if no appeal has been taken to the district court?

Mr. Longsdorf. Because the commissioner's jurisdiction has ceased with respect to that particular prosecution.

Mr. Robinson. What is the difference?

Mr. Dean. The district court does not have the case though. Why would you make the motion?

Mr. Seth. What would the district court do? It would not know anything about the evidence that had been introduced before the commissioner.

Mr. McLellan. It could not know anything about the importance of the newly discovered evidence.

Mr. Robinson. There you have line 118.

Mr. McLellan. "* * * shall set forth * * the nature of the evidence", that is, the newly discovered evidence, not the nature of the trial.

Mr. Medalie. The district court is not helped much by what the commissioner transmits.

Mr. Longsdorf. How can a motion show it is newly

discovered without showing what the original evidence was?

Mr. Robinson. This Rule 5 states, "Within 60 days after conviction a defendant may move for a new trial on the ground of newly discovered evidence. The motion shall be in writing, addressed to the commissioner and shall set forth under oath the nature of the evidence and the reason it was unavailable at the trial. A copy of the motion shall forthwith be served upon the United States attorney. The commissioner shall transmit the motion together with a transcript of his docket entries to the district court. The court shall hear the motion and, if it deems a sufficient showing has been made, may vacate the judgment of conviction and direct the commissioner to re-try the case."

Mr. Medalie. Well, that rule left out getting the version of the evidence from the commissioner.

Mr. Youngquist. What did you say?

Mr. Medalie. This rule makes no provision for getting the version of the evidence from the commissioner.

Mr. Youngquist. No, that is the point that Mr. Seth just made. The only thing before the court is newly discovered evidence.

Mr. Longsdorf. I suppose you would have to show what the old evidence was in order to show that the other was new.

Mr. Medalie. Someone would have to answer. I suppose the United States attorney would appear and would get his information from the commissioner.

The Chairman. Gentlemen, I have my doubts whether we are touching on this situation.

Here we are setting up these rules for the district court

and proceedings before the commissioner preliminary to it, and we are trying to condense in a single rule the practice in a whole group of cases.

We are trying to write a justice-of-the-peace rule, and it cannot be done.

Furthermore, it only concerns a few isolated cases that have no general interest of the country at large.

It is a matter the Supreme Court itself has worked on the last year and a half.

While I am rash enough to tell them that something they did five years ago has been outmoded, I doubt if I am rash enough to say something they did the last term is already outmoded.

Mr. Youngquist. Mr. Chairman, I move that we strike 5 (c).

The Chairman. Is there a second? If there is, I shall be happy to put it.

Mr. Medalie. I second it.

The Chairman. Shall we assume to become experts on justice-of-the-peace matters?

Mr. McLellan. We don't have to do this if we don't want to.

Mr. Robinson. I don't think we have to.

I wish Judge Burns was still here.

The justice-of-the-peace situation in this country, as we know it, is a stench in the nostrils of justice and it is pretty generally known and there are indications that the minor court situation and the federal courts are moving along to some breakdown, inadequacy, and here in the federal courts I think

we should very carefully consider the matter before we say we cannot do anything about this same tendency here and now.

Now, there is a study being made through the Administrative Office, United States Courts, and Mr. John Hanna of Columbia University and others are engaged in that study.

There is litigation in Congress as you know to take care of the commissioner situation. And, altogether, it seems to me that we should at least keep the matter open, rather than just decide finally that we cannot do anything about it.

Now, if I am wrong about that I of course am glad to be overruled.

Mr. McLellan. May I ask the Chairman just one thing, because I shall not understand what it is about at all if I don't.

Now, am I to understand that while we are permitted to make a rule like this (c), we are not required to do so?

The Chairman. Well, I would take it, Judge, that our task was to bring in rules of procedure relating to the district courts generally.

We are not attempting to say what should be done in the district courts of the District of Columbia or the criminal courts of the District of Columbia. They have their police courts here, their traffic court, and this it seems to me is a specialized thing.

Mr. McLellan. Well, they have not asked for us to do this thing?

Mr. Robinson. Our statute specifically says "before United States commissioner".

Mr. Youngquist. Was it intended to cover the petty

offense procedure or the preliminary procedure?

Mr. Robinson. Those are the words of the statute.

Mr. Youngquist. Well, would that mean the law as to petty offense rules? That law does not require submission to Congress. I think as a matter of construction, proceedings before a commissioner would be held and limited to preliminary proceedings.

Mr. Holtzoff. I think so.

Mr. McLellan. Well, if there is any possibility of that construction I am heartily in favor of the motion.

The Chairman. Well, it seems to me we stand a good chance for stubbing our toes by trying to do just a little more than we have to. We can provide a set of rules with such few changes, I think our work is much more likely to find favor with the Court and with Congress than if we get into this situation of the petty cases where you are always confronted with one or the other horn of the dilemma, the desire for summary disposition, and for rendering an appeal, in effect, almost impossible on the merits.

You that in the states as well as in the federal courts.

And on the other hand is our normal human desire to do full justice to every defendant.

Mr. Holtzoff. Mr. Chairman, I don't like to have the statement in, I don't think the Reporter fully meant to say that the commissioner assists in breaking down.

Mr. Robinson. I did not say that.

The Chairman. The J.P.'s.

Mr. McLellan. He said it was on the way.

Mr. Robinson. There are indications of the weakening of it.

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Mr. Holtzoff. I think it may be improved but I think it is an exaggeration to say it is weakening or getting worse.

Mr. Longsdorf. Mr. Chairman, it seems to me we are taking pretty serious risks when we get into any of the special lines of procedure. They are too intricate. We haven't space to handle it or time to reach a conclusion.

I think we ought to keep out of that as much as possible and have a general code of rules for the general procedure.

Mr. Seth. Wouldn't the adoption of this motion require some slight modification of some of the rules we have already considered this morning? Because there are constant references to cases the commissioner may try, in some of the earlier rules.

The Chairman. It might, Mr. Seth. I wouldn't want to say.

Mr. Seth. I wouldn't want to stop now.

I am just making that as a suggestion to the committee on style.

Mr. Robinson. There are other statutes in which the commissioners have their trial powers. You have these national park cases. Every time a national park system is set up there is a new commissioner and a new statute to take care of it.

It looks like you might have some commissioner problems in connection with these territories. I wouldn't say we are not going to have to do anything about trial commissioners.

Mr. Youngquist. Are they charged now with the petty offense rules?

Mr. Robinson. No, not now.

Mr. Waite. Wouldn't you say this, if we are going into the procedure, we ought to go into it in more detail? What you have in mind would really create the abuses you have in mind.

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Mr. Robinson. I think this committee should come up almost to the completion of the thing. There are two questions, one has to do with the getting up of the record.

Judge Burns was getting that in shape. But the reports keep coming into the Reporter's office from the United States Attorney of the Southern District of New York and elsewhere, and I am told orally and by letter that the commissioner system has got to be improved; and it seems the people who write to us--many of them I can get the letters before you, copies of the letters--they feel we ought to do something about it. Whether we should or not is something for us to decide.

I think what has been here this afternoon is virtually the completion of arranging of whatever rules may be necessary.

Mr. Seth. In connection with Judge Burns' amendment, it seems to me it is a procedure now where the referee in bankruptcy makes a certificate of the facts.

Mr. Holtzoff. Don't they have a stenographer in proceedings before referees?

Mr. McLellan. Sometimes they do, sometimes they don't.

Mr. Seth. But the law requires, as I recall, that they certify the evidence or the facts.

Mr. Burns. We have had for years in our district a practice whereby a district court hearing without a stenographer may be the subject of an appeal to an intermediate appellate court and there the counsel confer with the judge and they reach an agreement as to what the essential facts were, or, the judge leaves it to counsel to agree; or, in case of dispute, he writes it from his notes and memory.

You have to have a certain degree of informality, but at

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the same time if you are going to have the essence you have to have some way, and some means of passing on the ruling of the

8 judge who is trying the facts.

The Chairman. You don't have the facts, do you?

Mr. Burns. No.

The Chairman. We have the same procedure, which means between the time their case is tried and they decide the facts the judge decides what the law is, and he fixes the facts, so there hasn't been one reversal in 50 years.

Mr. McLellan. We don't do that.

Mr. Burns. You either have to have the trial de novo or the essential elements of the trial procedure.

I think the trial de novo is very bad.

First, it makes the Government expose its hand. We have that trial de novo from the criminal courts and it works out pretty badly, and it seems to me if we can work out some minimum requirement so we can raise the issue of whether there was substantial evidence, that, plus other errors of law, like Mr. Medalie says, where two men cannot be convicted,--I think we have got enough.

Mr. McLellan. Judge, I agree with everything you said, but, while you were out of the room we were finding some other things, I think, the matter with the recent rules in the Supreme Court, and it got to be too much for the Chairman and so he has made a motion that we cut the whole business out; and that is the thing that is before us now.

Mr. Burns. I would like to make my remarks stand and be applicable to the motion.

Mr. Robinson. Mr. Chairman, I should think in the

forthcoming publication of the rules it would be well at this point to insert that trials before commissioners are dealt with by rules of the Supreme Court, with the citation of those rules; leaving the matter pending without killing it right now until we can see how this study of the commissioners comes up which is being made under the Administrative Office, and see whether later there might be something that this committee might do.

The Chairman. It seems to me what we are trying to do is to try to figure out what we hope will be a civilized, intelligent set of rules with an injection into it of another situation which is rather primitive and not up at all to the standards we are laying down.

I ask, inasmuch as the Supreme Court has done the job, why should we, a year and a half later, do it all over?

Mr. Medalie. I still would like to have it represented that we think there are some manifest injustices in their rules.

Mr. Longsdorf. Mr. Chairman, why can't we do like they did in the civil rules, not offer a rule but let them know we have considered this, and let them show whether they are very much interested in it? If they want us to go on and recast this rule they can ask us to do it, order us to do it.

I don't want to put the thing out of all further consideration but I am afraid of this rule.

Mr. McLellan. It seems to me as a practical matter that where this ground has been covered by the Supreme Court as recently as within a year and a half, and, while some of us do not fully understand the reasons for some of the things that they did, where they have not required us to go into this, that

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it is in the interest of the whole set of rules that we keep away from it.

Mr. Robinson. What is the situation in regard to some district judges who are simply refusing to entertain any jurisdiction at all of offenses which have been declared offenses by Congress?

You take the Migratory Bird cases and other cases which Congress says shall be offenses, then you have district judges saying, "We don't want those cases brought into our court." What is to be done?

Mr. McLellan. Well, the only thing to do is to take them and fine them $2.

Mr. Youngquist. There is no authority for the trial of those cases under the present law.

Mr. Robinson. Of course not. But something has got to be done about it.

Mr. Youngquist. Doesn't Congress have to act first?

Mr. Robinson. Sure.

Mr. Youngquist. Don't you think our job is big enough without that?

Mr. Robinson. The answer to all you say is, Yes.

Mr. Holtzoff. I think you are misinformed.

Mr. Robinson. I have been told by assistant United States attorneys that some of them are being thrown out.

Mr. Holtzoff. Well, some of the judges that don't sympathize with those cases, it does not mean they refuse to entertain them.

Mr. Youngquist. I accept as an amendment to my motion the suggestion made by the Reporter that there be a note that this

is now covered by the rules previously promulgated by the Supreme Court.

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

Mr. Longsdorf. Before you put the motion may I ask that Mr. Robinson's proposal is that these rules in our tentative report be merely referred to or set out at large in an appendix?

Mr. Robinson. The proposal is that they be referred to.

Mr. Longsdorf. All right. Nothing further.

The Chairman. That brings us down to Rule 6.

Mr. McLellan. Did you vote?

The Chairman. Oh, pardon me. Didn't I call for a vote?

Mr. Youngquist. No, you didn't. You cut off the ayes.

The Chairman. Opposed, say "No."

It seems to be unanimous. Carried.

9 Rule 6 -- Well, that deletes everything commencing with (c), on page 2 of Rule 5.

Paragraphs (a) and (b) stand.

Now we come to Rule 6. 6 (a).

Mr. Robinson. You will recall at a previous meeting there was a discussion of what items should be considered by the committing magistrate or the judge, the court, in fixing bail, and this 6 (a) incorporates the items which members of the Committee felt should be included in such an inquiry.

Mr. Seth. Lines 8 to 11 seem to contemplate that bail may be increased or new bail required without notice to the defendant. I think that is hardly according to Hoyle.

The Chairman. What was the reason for that?

Mr. Robinson. I am just trying to find that.

That is based on a statute or code. I will have to look up the source of it.

Mr. Holtzoff. I suppose under existing law at the present time the judge would have a right to increase bail without notice, have bail increased.

Mr. McLellan. Well, isn't it just as well not to invite him to do it without notice?

The Chairman. In other words, not adopt the sentence, the clause, "without notice to the defendant."

Mr. McLellan. Yes. That helps a little

Mr. Seth. Yes.

The Chairman. If there is no objection, the words on lines 10 and 11, "and with or without notice to the defendant", will be deleted.

Anything further on (a)?

Mr. Medalie. What do you delete? You leave that open, then?

The Chairman. Leave that out.

Mr. Medalie. Yes.

Now, the commissioner has no power to increase--

Mr. Holtzoff. Well, this is limited to the court as it is now framed.

Mr. Medalie. Well, isn't this a general provision for bail?

The Chairman. Yes. We are out of the commissioners.

Mr. Medalie. When you say "by the court or by a judge thereof" you are excluding the commissioner?

Mr. Youngquist. Yes.

Mr. Longsdorf. What about bail by a commissioner during a postponement?

Mr. Youngquist. We say in line 2, "as in the judgment of the court or committing magistrate will insure the presence of the defendant".

In line 9, speaking of increasing or reducing bail, that "may be required by the court or by a judge thereof".

Why do we refer here to a judge thereof, and may I not suggest that we substitute for that the words "or magistrate"?

Mr. Holtzoff. Why not omit this clause entirely?

Mr. Youngquist. That's right. Strike out "by the court or by a judge thereof".

Mr. Medalie. In line 4, do you need "or committing magistrate"?

Mr. Longsdorf. No.

Mr. Medalie. Well, shall that go out?

Mr. Burns. Well, in Rule 5 you have talked about the magistrate shall admit him to bail, and I suggest a cross-reference to Rule 6.

Now, you have no provision for bail before a magistrate. Should you make it applicable to both magistrates and court judges?

Mr. Medalie. Yes. But the word "committing" ought to be left out of "magistrate".

Mr. McLellan. Oh, yes. Just strike out the "committing". Don't strike out "magistrate".

Mr. Medalie. That is right.

The Chairman. "* * judgment of the court or the magistrate"?

Mr. Medalie. Yes.

The Chairman. Then the change is made at the end of line 9 which you have defined, strike out "by the court or by a judge thereof", and later in line 10 strike out "and with or without notice to the defendant".

Mr. McLellan. Does it end with the word "required"?

The Chairman. "* * at any time for good cause."

Mr. McLellan. "The amount of bail may be increased or reduced"--

The Chairman. --"or new or additional bail may be required at any time for good cause."

Mr. McLellan. I get it.

The Chairman. All right.

If there are no questions, we go on to (b).

Mr. Waite. I noticed in Draft No. 3 there was added to (b) provision that the officer shall refuse to accept any surety who does not appear to be qualified.

I am just curious as to why that was left out of this draft.

Mr. Youngquist. I think the reason for it was that that was assumed. I have no very definite recollection.

Mr. Waite. I remember we discussed it at the previous meeting and decided to put it in.

I haven't any preference as to whether it should go in or not, I am just curious about it, and wondered what the reasons were.

Mr. Medalie. The general provision for justification has all of the implications, doesn't it?

Mr. Youngquist. Yes, that is implied from the next

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paragraph.

Mr. Burns. Doesn't it require some finding by the magistrate, as to the worth of the affidavit as well as the worth

10 of the surety?

Mr. Medalie. It means that he has justified or has not justified, in the judgment of the magistrate or the judge.

I think the less we say about it the more care will be exercised.

For example, I can imagine the senior district judge in my district, where the surety did not really justify but he felt pretty sure the defendant would not run away--he had a wife and six kids--he just forgets about the full justification.

I think we must leave that to the judges pretty much.

Also it may be desirable to think the thing over a couple of days. Those are rare cases, but we ought to give the judges a little leeway.

Mr. Longsdorf. That is right.

Mr. Holtzoff. I think we could shorten this by leaving out the last two words in line 13, all of line 14, and the first six words of line 15.

The Treasury Department issues a list of approved surety companies.

Mr. Medalie. I second the motion. Strike out the words beginning on line 13, "and has filed evidence of such approval in the district court for the district where the bail is tendered"--down to the next comma on line 15.

The Chairman. Any objections to that?

So ordered.

Any further suggestions?

Mr. Robinson. Further, strike out "attached to" at the beginning of line 16. Just say, "filed with the bond".

Mr. Holtzoff. You don't need anything. The first six words of line 16 can be stricken out.

Mr. Burns. "* * shall justify by affidavit the bond or undertaking".

Mr. Seasongood. How does it finally read now?

Mr. Youngquist. What did we do with line 16, Mr. Chairman?

The Chairman. The suggestion was to strike out the words "attached to the bond or undertaking".

Mr. Robinson. Strike out the words "attached to", and instead of "attached to", "filed with".

Mr. Medalie. What do you mean by the provision of filing with? It becomes part of the record. An affidavit is not worth anything unless it is filed.

Mr. Burns. Well, what does he justify?

Mr. Medalie. If the bail is a thousand dollars he is supposed to show he has available funds which can be reached to the extent of a thousand dollars over and above his liabilities.

Mr. Burns. Then he justifies his undertaking as surety?

Mr. Medalie. Yes.

Mr. Burns. Don't you think we ought to say, justifies it is enough?

Mr. Medalie. The word "justify" is a term that is used. I don't think we need to say any more.

Mr. Longsdorf. Do you think we ought to say "justify" after he files the bond?

Under the statute under our Code of Civil Procedure we

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accepted the bond as filed--

Mr. Medalie. But that is a different procedure. Here the law requires justification. In ordinary civil procedure the justification is not necessary, but here the law requires it, so you don't need to say anything.

Mr. Burns. Isn't there usually an order of the court approving the surety?

Mr. Medalie. Yes.

Mr. Burns. Now, we say nothing about that.

Mr. Medalie. I don't think we need to.

Mr. Seasongood. Well, it is only the fact that it might appear after he signs the bond he files the affidavit. Shouldn't he do that before the court approves him as a surety?

Mr. Burns. Ought we to add "shall prior to approval"?

Mr. Youngquist. I don't think that is necessary. The justification of surety is really a part of the undertaking so far as approval of the bond is concerned, and the court approves the bond only upon a showing of justification.

I have no objection to it except putting in words that lawyers think are superfluous.

Mr. Medalie. I am quite sure that nobody in any federal court or state court will believe that a surety may justify after a defendant has gone out on the filing of that bond.

Mr. Burns. Then "justify" is the filing of an affidavit plus the finding of a judge?

Mr. Holtzoff. Yes.

The Chairman. No.

Mr. Burns. On approval of the judge.

Mr. Medalie. No; this only gives the order in which it

is done.

The Chairman. Justification is the act of a man who is about to become a bondsman.

Mr. Burns. Then it seems to me our rule is deficient.

Mr. McLellan. No. One of the conditions precedent to

11 the approval.

Mr. Burns. Well, we don't say anything about the approval in this rule.

Mr. Medalie. As it reads now, one might say that the minute he files a justification it requires no order, the warden must let him out.

Mr. Burns. If justification means he must show he has assets, then, although he may have made a false swearing, he technically has justified if justification does not include the element of judicial approval.

Mr. Seasongood. Well, in line 12, a "prospective surety," would that do it?

Mr. Youngquist. Well, I had in my notes, to add on (b) this language: "No bond or undertaking will be approved unless surety appears to be qualified."

Mr. Waite. I wondered why that was omitted here.

The Chairman. Something like that should be here, because the justification is only the surety's act, as I understand.

We want to convey the idea of judicial approval.

Mr. McLellan. Then would it be all right to say something a little different than Mr. Youngquist gave it, namely, "No surety shall take effect until approved"?

Perhaps that would not be it exactly.

The Chairman. You want to cover the idea that there must

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be judicial approval?

Mr. McLellan. Yes.

Mr. Waite. That brings up a problem. As it was before it was, "No officer shall accept one whose security does not qualify."

Your suggestion is, I gather, that the bonds shall not be effective until there has been this justification.

Mr. McLellan. No, until following the justification there is approval by the court.

Mr. Waite. It leaves it up to the court to approve one that did not qualify if he wanted to.

Mr. Holtzoff. Well, it seems to me that that would be necessarily implied, that if the judge should find it is not sufficient--

Mr. Waite. In that case I suggest it should be put back as it was, that the officer shall refuse to accept any surety who does not appear to be qualified.

The Chairman. Instead of "officer" why don't we say "judge or commissioner"?

Mr. Waite. I was just giving it as it was previously.

The Chairman. The court or magistrate is the way it was previously.

Mr. Seth. In actual practice, where a bench warrant issues and the judge fixes the bond on the bench warrant, he never sees the bond and the bond is accepted without the court's knowing anything about it. It should not be limited to the office of judge. It should be, "No officer shall approve".

Mr. Youngquist. I move, Mr. Chairman, that we add to the end of (b), "No bond or undertaking shall be approved unless the

surety thereon appears to be qualified."

Mr. Holtzoff. I second that motion.

The Chairman. Any discussion?

All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Seasongood. Why shouldn't you justify by affidavit? Why do you have to attach it to the bond?

Mr. Robinson. I think the reason for putting it this way, as I understood it, it was considered a good idea to have the bond and affidavit together.

The Chairman. It might very well happen that that could not be.

Mr. Robinson. The language of a good deal of this is statutory, but I don't have the statutes at the present time.

The Chairman. All right. We go to (c).

Mr. Seasongood. Is that stricken?

Mr. Holtzoff. That is out.

Mr. Youngquist. I notice that we in (c) for the first time use the word "recognizance".

Mr. Robinson. That is to go out. I think that should be stricken. Don't you?

Mr. Holtzoff. Yes.

The Chairman. If there is nothing on (c), we will proceed to (d).

Mr. Youngquist. Just a minute. "* * unless the court shall otherwise order". Do we need to refer to the commissioner there?

Mr. Seasongood. Why don't you say, "unless otherwise ordered"?

Mr. Holtzoff. "* * unless otherwise ordered". Yes.

The Chairman. Is that something a magistrate would order?

Mr. Seth. No.

The Chairman. That should go to the court, shouldn't it?

Mr. Longsdorf. Suppose he is bailed for preliminary examination.

Mr. Holtzoff. Why not say, "unless otherwise ordered"?

The Chairman. I am wondering if that is not solely the court's prerogative.

Mr. Seth. I think so.

The Chairman. What about that? Is that something a magistrate can do?

Mr. Longsdorf. How about his surrender to the magistrate?

Mr. Medalie. It says "is surrendered."

You have various conditions under which bail is given.

You have bail to appear for examination before a magistrate, as bail to answer. You give new bail, don't you, after defendant is held to answer?

Mr. Youngquist. It continues under this provision.

Mr. Medalie. That is right.

Now, under what conditions would the court otherwise order?

Mr. Youngquist. Suppose the matter is pending before the commissioner and he chooses to release the defendant on his own

12 recognizance?

Mr. Longsdorf. Suppose new bail is required and the court desires to release the old?

Mr. Holtzoff. I don't think we should give a commissioner authority.

The Chairman. Well, if we think those are matters that

are within the jurisdiction of the commissioner, we can say "unless otherwise ordered", but I was a little in doubt about it.

Mr. Medalie. We have given the commissioner the power to reduce bail. This will be a case when new bond is furnished or additional bond is furnished. When a new bond is furnished the old bond is discharged. That would be the order.

Mr. Burns. The bonding company may have gone broke. A new bond may be necessary.

Mr. Medalie. You may need a new surety.

Mr. Youngquist. It would not be any good to discontinue the old bond in that case.

The Chairman. I think we had better change it in line 24 to read "unless otherwise ordered".

All right. We will go to (d).

Mr. Medalie. Excuse me; I think there is a little error here. When you have bond to appear for examination and then a defendant is held to answer, new bond must be given, must it not?

Mr. Youngquist. I thought one of the purposes of (c) was to continue the bond. It says, "The bail shall continue in effect until judgment is rendered in the proceeding in connection with which it is given," and that cannot be rendered except in district court.

Mr. Medalie. Then bail to appear for examination would be bail also if held to answer?

Mr. Longsdorf. This does not say so.

Mr. Youngquist. I did not get what you said.

Mr. Medalie. If bail is to continue down, it would be bail also to continue down to the district court if defendant

is held. That I think would be your interpretation.

Mr. Youngquist. That would be my interpretation of this language.

Mr. Burns. What is the undertaking now? I think the average bond that I am familiar with is that he shall appear for examination; and when he appears the surety is no longer liable, and you have to have a new bond if you want to hold him for final trial on the merits.

Mr. McLellan. It all depends on the reading of the bond.

Mr. Medalie. That is why this cannot be correct language.

Mr. McLellan. You haven't any power to make that kind of bond.

Mr. Medalie. But when you give bail only for examination that bail cannot continue down to the day of judgment unless it is written to include to appear for examination and to answer to the district court should the defendant be held.

Mr. Youngquist. My recollection was that was the form of bond provided before commissioners. Have you something there?

Mr. Robinson. Yes. Here is a bond in which it is provided he will appear before the commissioner at a certain time and if he is held by the commissioner, will appear before the district court when required to do so from time to time, then this is to be void, otherwise to be in full force and effect--

Mr. McLellan. That is right. I have continued those bonds 25 times. But if it were written differently from that you could not continue it unless the contract provided for all the conditions, and that is the trouble with your rule.

Mr. Medalie. Well, we might need an additional provision in our rule where the bond to appear for examination shall carry with it bond to appear in the district court and be amenable to

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its disposition if held.

It would be describing the form of bond.

Mr. McLellan. In describing the effect to be given a given bond, but the bond shall be valid if given so and so.

There is danger of some surety company getting on to something here.

Mr. Youngquist. Are our rules going to have a form of bail bond appended to them?

Mr. Robinson. I think they should.

Mr. Youngquist. Of course the rule cannot hurt anything.

Mr. Longsdorf. Then you will have to have two forms of bail bond, one for those cases where he is indicted, and one where he is brought in on a bench warrant.

Mr. Youngquist. Yes. This rule would cover both classes of cases.

If the bond would call only for appearance before the commissioner I suppose it would be sufficient, to that extent.

Mr. Burns. Don't we need another subheading, "The Bond--What It Shall Contain"?

Mr. Robinson. Yes.

Mr. Seth. Shouldn't it be that bail for appearance in district court shall continue?

Mr. Robinson. What would it continue that to?

Mr. Medalie. Bail to appear for examination shall also provide that defendant shall answer to the district court, if held, and be amenable to its orders and judgments.

Mr. Seth. Well, aren't you fixing bail then before the commissioner has heard the case?

Mr. Medalie. Yes. He can change it.

Mr. Seth. Then he can change it and make new bond?

Mr. Medalie. Yes. But this provides the form of the bond where the defendant gives bond to appear for examination before the commissioner and where he is held.

Mr. Seth. I think we ought to limit this rule to bonds providing for the defendant's appearance before the district court, and then we are on safe ground; that is, the continuing

13 bond.

Mr. Holtzoff. I wonder if we ought to leave out paragraph (c) entirely.

The Chairman. I think the object of that was that bond be provided that carries clear through the proceeding, instead of having a bond for the commissioner and each term of the court. That was the object.

Mr. Holtzoff. Depending upon the surety, how far he was willing to go.

Mr. Burns. You may have a surety who will undertake that the defendant will appear for examination but not up to final judgment.

So if you leave out (c) you can ignore entirely the question of the range of the bond and leave that up to the existing practice which is already frozen and is already well understood.

Mr. McLellan. I second that.

Mr. Medalie. All sureties, with few exceptions, are surety companies. They take a fee which calls for going through the proceeding in all phases, with only one restriction, that it shall be paid annually.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Gentlemen, it is getting close to 5:30.

Mr. Medalie. Well, "Forfeiture and Remission." It is the same rule. Then we take a new chapter.

Mr. Youngquist. What do you do tonight? Do we meet?

The Chairman. Oh, yes, I think so. Don't you?

Mr. Youngquist. At what time?

The Chairman. About 8:00 o'clock shall we be back?

Mr. Dean. We could hold it out there if it is more convenient.

The Chairman. I think it would be better to come back here.

Mr. McLellan. And you had better indicate the time for us to come back.

The Chairman. Eight o'clock.

Mr. Medalie. We are coming back totalitarian style, aren't we? All together?

The Chairman. I hope each will be all together.

Mr. Medalie. Well, don't you want to take this last subdivision (d), then we will have a new chapter when we come back?

Mr. Waite. I have a question to raise about (d) which might take some time.

Mr. Medalie. All right.

(Whereupon, at 5:30 o'clock p.m., a recess was taken until 8:00 o'clock p.m. of the same day.)

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NJC
Advisory
Committee
5/18/42

EVENING SESSION

The proceedings were resumed at 9 o'clock p.m., at the expiration of the recess.

The Chairman. I think we were up to (d), Rule 6.

Does that mean that forfeiture is not automatic and that you have to get the surety in, and all that business?

Mr. Burns. What about on motion of the United States Attorney?

Mr. Holtzoff. The forfeiture is automatic, but you have to bring a proceeding to get forfeiture.

Mr. Burns. Should the court be required to be on top of all these things to make a declaration, or shouldn't you provide "shall declare it on motion of the United States Attorney"? Isn't it his job to look out for the assets of the United States?

Mr. Holtzoff. This is on the motion of the United States Attorney.

Mr. Burns. I think it should state, "The court shall on motion of the United States Attorney declare forfeiture of the bond."

Mr. Waite. I would like to ask why is it so different from the provision in Rule 52? Rule 52 (d) has eight or ten lines and this has five lines. It looks like much the same thing.

Mr. Robinson. 52 (d) applies to appeals, and this Rule 6 (d) is an effort to combine the comments that were made by members of the committee on draft 3, which had Rule 26 and alternate Rule 26, and this is the result of the comments

of the committee and the combining of them.

Mr. Waite. But they both have to do with forfeiture bail bonds.

Mr. Robinson. That is right.

Mr. Waite. And I would not suppose there would be any reason for a difference in procedure for bail bond on appeal than any other bond?

Mr. Robinson. Part of the problem is trying to keep the appeal rule separate from the rest of the rules, in view of the fact that we may wish to offer them separately. Your answer, I suppose, there would be that therefore the two should be just the same, although duplicated.

Mr. Waite. Why not then make Rule 6 like Rule 52? I would be afraid that it would be so perfectly obvious that there are different ways of dealing with the same problem that it would subject the whole thing to criticism.

Mr. Robinson. I never heard of an automatic forfeiture plan for an appeal bond, but automatic forfeiture for other bonds in other parts of the proceeding is possible and is known.

Mr. Youngquist. Rule 52 (d) does not relate to supersedeas bond, does it?

Mr. Waite. No, it does not.

Mr. Holtzoff. It relates to bail bond on appeal.

Mr. Youngquist. Yes, but not to supersedeas in the ordinary sense. You may have the same bond continuing through and to which both 6 (d) and 52 (d) might at different times be available. I imagine what happened was that the subcommittee got tired by the time they reached 52.

Mr. Holtzoff. I think the two rules were drawn by two

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different draftsmen.

Mr. Waite. I like No. 6 better than I do 52, but unless there is some reason for the difference, I think it would be well to have them alike.

Mr Holtzoff. I would like to say something about 52. 52 is taken from the civil rules, and it was considered quite a step forward. The advantage of 52 is that you have no difficulty in getting jurisdiction over the surety under the procedure outlined in 52 (d), and there is no reason why you should, because 52 (d) in effect provides surety on a bail bond on appeal, appoints the clerk of the court or his agent for the purpose of receiving service of the papers.

I would like to see 52 (d) carried back into 6.

Mr. Robinson. I think that would be desirable.

Mr. Holtzoff. I do not see any reason why they should not be.

Mr. Burns. I do not think, in any event, you should call for automatic forfeiture. Here you call for motion by the court.

Mr. Longsdorf. Is it necessary that the bond shall contain a recital that the sureties submit this to the jurisdiction?

Mr. Holtzoff. That is a question of drafting the bail bond.

Mr. Longsdorf. Is it necessary that the bond contain that provision as it does in a civil appeal bond?

Mr. Holtzoff. Yes.

Mr. Youngquist. If a bond is given pursuant to the rules, it would be subject to the procedure provided by the rule.

Mr. Holtzoff. To bring this matter to a head, I move we

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revise 6 (d) so as to include the provision of 52 (d).

Mr. Waite. I support that.

Mr. Medalie. Which provision? Jurisdiction of the court and appointing the clerk as his agent?

Mr. Holtzoff. Yes.

Mr. McLellan. And doing away with the necessity of an independent action?

Mr. Holtzoff. Yes.

Mr. McLellan. Do you want to wait to do it now or have somebody do it?

The Chairman. I think it should be referred back to the reporter.

Mr. McLellan. Yes.

The Chairman. It is moved and seconded. Are there any further remarks?

Mr. Youngquist. Yes, I have this remark to make. Sometimes bail is represented by property, security, and collateral, on deposit with the court. 6 (d) is broad enough to cover that. 52 (d) is not. Therefore, I would suggest that when Section 6 (d) is drafted it be made broad enough to include cash bail, as we call it.

The Chairman. Is that motion seconded?

Mr. Medalie. Seconded.

The Chairman. Are there any remarks?

All those in favor say "Aye." Oppose, "No." The motion is carried.

Now we come back to the rule that was distributed before recess, prepared by Mr. Wechsler, proposed Rule 5 (c). Has everybody a copy of it? If not I have copies before me.

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Mr. Burns. The rule as proposed would not commit the United States Attorney to take advantage of any statement made to him after the defendant has been released on bail. Now, it may be desirable to incorporate the generally accepted ethical provision that you do not talk to your opponent's client after an appearance has been filed and issue has been joined, but I think if we were to follow the general philosophy, it ought to bechanged to read, after "5 (a)," as follows:

"Or, after the defendant has been committed by a magistrate, if the interrogation occurs," insert:

"While the defendant is in custody in the absence of the defendant's counsel," and strike out:

"Or of a United States Commissioner," because after he has been committed the United States Commissioner is a stranger to the proceeding.

Mr. Wechsler. I accept that change, Judge Burns. I had in mind that the whole thing would apply only in a case where the defendant is in custody. The point about the United States Commissioner was to find some substitute in the situation where the defendant has no counsel.

The Chairman. Would you read it through, Judge, with the amendment you suggested, so we can all get it?

Mr. Burns. No change in the present proposal up to "in violation of Rule 5 (a)":

"Or, after the defendant has been committed by a magistrate, if the interrogation occurs while the defendant is in custody in the absence of the defendant's counsel."

Mr. Waite. I could go with it so far as the provision

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concerning interrogation while he is held in custody in violation of Rule 5 is concerned, but I am very skeptical of the wisdom of saying that you cannot use anything that is learned by interrogation after he has been committed.

I do not see why in the world we should not use it. The rule against undue pressure, and all that sort of thing, is perfectly sound and clearly accepted; but is there any real reason why, if a defendant makes an admission of guilt in answer to a question, that should not be used, merely because he has been in custody when the question was asked?

Mr. Wechsler. Mr. Chairman, I would like to answer Mr. Waite, but before doing so I would like to point out one general point about this formulation. Under no circumstances would this formulation exclude a voluntary statement by a defendant, whether in custody or not in custody. It is addressed only to the case of a statement made by the defendant in response to interrogation by an officer or agent of the Government.

Second, it does not preclude interrogation prior to commitment by a magistrate in the course of taking the arrested person before a magistrate or in the course of holding him prior to taking him before a magistrate, so long as there is no violation of Rule 5 (a)--that is to say, so long as he is taken before a magistrate within a reasonable time.

Now, it is drawn that way because it is not intended to strike an interrogation as such, but because it is intended to strike at prolonged interrogation or interrogation aided by prolonged detention without taking a man before a magistrate, both of which I think we would all agree constitutes an abuse.

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Now, in a case where the defendant has already been before a magistrate and has been committed to custody to await trial, it seemed to me that in that situation--he is now in custody--there is no longer any justification for interrogating him in the absence of his counsel.

Mr. Waite. Suppose the prosecuting attorney gets hold of some information which seems pertinent. I can't see any reason at all why he should not discuss that with the defendant and ask the defendant what he has got to say about it.

Mr. Wechsler. He can discuss it with him.

Mr. Waite. Well, only if he calls in the defendant's counsel, and you know what it means. It gives the counsel a

10 chance to tell him to keep his mouth shut, and I do not know why in the world we should have a man present to tell the defendant not to make any admissions of truth.

I would go with you the whole way in opposing improper interrogation, but I can't see anything improper in that sort of thing.

Mr. Wechsler. Well, I suppose the question is what you believe the right to counsel be intended for. Again I come back to what seems to me a basic paradox in criminal procedure. In the courtroom the man is surrounded with every conceivable right. He must be given counsel. The procedure against self-incrimination comes into play insofar as any interrogation may be directed by the court or insofar as there may be any compulsion to make disclosure; but as soon as he is taken out of the courtroom and taken back into jail he has no rights. It is a schizophrenic situation in the law in which, when we put full dress on, we play one type of game, and when we resort to mufti,

we play another type of game.

Mr. Waite. I should say there is a distinction there. His right to counsel in the courtroom is his right to advice as to law. Nobody originally conceived, I think, that he has a right to be told what to say and when to keep his mouth shut; and the only reason why he needs counsel is to advise him when he is in the courtroom.

Mr. Wechsler. I disagree with that. I think his right to counsel is a right to advice by counsel in every movement that he has to make. I do not think that means counsel is supposed to tell him what to say.

Mr. Waite. But you know that is what it really means. That is what the public is going to say. I revert to what Mr. Holtzoff, or Mr. Youngquist, I guess it was, said, and which I disagreed with then.

You said we must consider to some extent how the public is going to take this sort of provision, what the public--and I mean the legal public--reaction will be; and I think if we put a provision of that sort in it is going very definitely to hurt the adoption of the rules.

I am trying to be consistent. I think it ought not to go in because it is not a wise thing. I am not trying to keep it out because of what the public would put in.

Mr. Wechsler. I think the public would not be simultaneously on the side of the defense and on the side of the prosecution at the same time.

Mr. Burns. Isn't it a strange anomaly that if the plaintiff brought an action against the Government of the United States on a cause which is recognized by the Court of Claims,

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it is unethical for the Assistant Attorney General to seek out the plaintiff in the absence of plaintiff's counsel and interrogate him about any matter which may be of interest to the Government; and yet, in a criminal case, where his liberty is at stake, and possibly his life, it is not only not ethical but it is looked upon as a thing that is blessed for the Government to inquire at a time when the whole atmosphere is one that breathes duress and where the defendant particularly is at a disadvantage, because he is in jail?

Mr. Waite. Suppose we leave the prosecuting attorney out, because there we have the complication which grows out of the relationship between lawyers, the impropriety of going over your opponent's head to his client. So let us leave the prosecuting attorney out of it. Let us have some other official of the Government.

Mr. Burns. What other official has the right to interrogate?

Mr. Waite. It is not a matter of the right to interrogate. Suppose some other official does interrogate and gets information which is definitely conducive of the truth. I think it would be a reversion to the ideas of the past generation to say that that information could not be used because it had been gotten by asking the man questions.

Mr. Burns. I think our suggestion is progressive about the next generation, because, after all, you add to it is another lawyer provision. He may be in the guise of a marshal, but he is interrogating. After all, if a man makes a statement, even though he is in custody, that may be used; but interrogation connotes an attempt to examine.

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Mr. Waite. Well, unfortunately, it does not. Now, you have suggested a voluntary statement might be used, but you can't conceive of the accused calling the marshal in and saying, "I want to tell you something."

Mr. Burns. No, but I can conceive of a visit at the jail, and I think there are a number of cases where the Government has relied upon statements made to a relative.

Mr. Wechsler. Statements made to a fellow-prisoner were commonly used.

Mr. Waite. This does not preclude that, but I do not see any more reason why you should preclude it merely because it is an answer to the marshal.

Mr. Wechsler. But I think there is a valid answer to that, and the merit of the whole thing turns on this proposition, I think: The United States Attorney or an F.B.I. agent comes into the prison after a man has been committed by a magistrate and says, "I want to talk to you about this," and begins to ask him questions.

It seems to me inescapable that pressure is being exerted upon that man. Now, it may be the subtle pressure of the office held by the questioner or it may be an implication of greater pressure to come, but the fact is that, from the point
11 of view of the defendant, his antagonist is the prosecutor; and it is that situation that it seems to me justly lends itself to an ameliorative rule, and that is the only thing this is suggested to get.

Mr. Waite. You are not suggesting that that is apt to lead to untruth, like the third degree, are you?

Mr. Wechsler. Well, certainly not to the same extent as

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the third degree.

Mr. Waite. That would be the only justification that I could see for excluding it.

Mr. Youngquist. That is all the suggestion is aimed at, isn't it--an attempt to eliminate the third degree?

Mr. Wechsler. Yes, it goes further than that, and it clearly goes beyond the purpose of the confession rule, which rests upon the untrustworthiness of the confession. I agree that a statement made by a defendant in response to interrogation by the United States Attorney, in the absence of any other form of duress, is a statement that carries a reasonably high degree of trustworthiness. It is made against interest.

It seems to me that the defendant has a right--and this is as fundamental as anything else--that the Government be put to its proof. That is the underlying basis of the rule against self-incrimination.

Mr. Burns. Be put to its proof, which we assume it has before it has instituted its proceeding.

Mr. Waite. I believe the Government must be put to its proof, but I believe what you are trying to do is hamper reasonable efforts of the Government to get the proof. That is as I look at it. I agree with you that we ought not to allow the third degree. We ought to put a stop to real duress. But you can go so much further here.

I can go with you on the first part, because that is obviously duress. That is obviously wrongdoing. But it can't be wrongdoing for a marshal to ask a man questions.

Mr. Wechsler. If you have reached this point that I think you ought to consider from that point of view, you cannot have

a rule that requires proof of duress which is a rule that works in anything but exceptional cases, because in all but exceptional cases a defendant cannot prove duress.

A rule of this kind actually operates in part as a prophylactic rule, going beyond the situation in which duress can be proven, at least in part, for the sake of meeting that situation. I do not agree that it has no merit in terms of an objective of eliminating only duress.

Mr. Waite. I should hate to try to have to justify this before the public.

Mr. McLellan. Question.

The Chairman. The question has been called for by Judge McLellan. Is there any more discussion?

The question is on the rule as drafted by Mr. Wechsler and as amended by Judge Burns with Mr. Wechsler's consent. All those in favor say "Aye." Opposed, "No."

I call for a show of hands. Those in favor. Six. Opposed. The motion seems to be lost.

Mr. Wechsler. Mr. Chairman, may I move that that part which Professor Waite said he would agree with--

The Chairman. Suppose you restate it, if you will.

Mr. Wechsler. As written, with a period after "5 (a)."

The Chairman. Is that seconded?

Mr. Dession. I second that.

The Chairman. Is there any discussion?

Mr. Youngquist. I should like to ask a question. Is it clear what holding in custody in violation of Rule 5 (a) would be?

Mr. Seth. When does the violation of 5 (a) start?

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Mr. Wechsler. Rule 5 (a) imposes a duty on a person making an arrest to bring the arrested person before a magistrate within a reasonable time. That is the essence of it.

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Mr. Youngquist. Without unnecessary delay, it says.

Mr. Wechsler. It is subject to redrafting, as I understand it, but that is the principle of it; and this is intended to apply to those cases in which the person arrested is not brought before a magistrate without unnecessary delay. So that, in my view, it would apply to any detention after that reasonable time prescribed by Rule 5 (a) has passed.

Mr. Youngquist. And it would be necessary for the court, then, in each instance to determine whether any part of the period intervening between the time of the arrest and the arraignment before the magistrate constituted unnecessary delay?

Mr. Wechsler. That is right.

Mr. Burns. That is quite appropriate. At the time 5 (a) was being discussed question arose as to what sanction there was for that right, because it is described as a right of the defendant, when that right has been violated by unnecessary delay; and the answer was given, perhaps it was an arrest void ab initio, but he had his action against the officer, which I think is strictly a law school reply.

Mr. Waite. There have been a lot of cases of that character.

Mr. Burns. I still think it is a law school reply. The fact that a court must make a determination as to the exact period or the exact point when the unnecessary delay began does not seem to me to militate against our putting in a rule which would operate much more than a pious prayer.

Mr. Youngquist. That would hardly be a sanction, because they might hold them for days without asking them any questions at all. The purpose of the defendant's being produced before a magistrate without unnecessary delay is to give him an opportunity to call for his preliminary hearing or to apply for bail; but it seems to me a rather backhanded way to impose a sanction for a violation of the rule requiring that he be produced before the magistrate without unnecessary delay, by saying that any questions that he may answer in the meantime shall not be admissible in evidence.

If we are going to put sanctions on it, let us put a penalty on the officer who is guilty, rather than put a burden on the prosecution.

Mr. Dession. There is a penalty now, but it does not do any good.

Mr. Burns. I do not prefer to go into the law of officer and prisoner, but I venture to make a guess that in ninety-nine out of a hundred cases where there has been any delay it is due to the fact that the defendant has not come across, and it is tied up with the fact of a governmental agent seeking information.

Mr. McLellan. Who decides this question of unnecessary delay? Does the court decide it and then, if it is a question of fact, leave it for the jury to say?

Mr. Burns. Like all questions of fact, I presume.

The Chairman. May I go back and ask you what protection this gives to the prisoner when he most needs it, which is in the initial moments or hours of his confinement in the custody of the marshal?

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Mr. Wechsler. It does not give any to him, but I do not think that is an argument against this, because I do not think you can draft a rule that will do that, since any rule would necessarily be in terms of bringing the prisoner before somebody else.

You have a rule--as far as any rule can go--to bring the prisoner before somebody, to wit, a magistrate. Even that rule is violated, and when it is violated you have a question of unnecessary delay.

The Chairman. Why should it be a question of carting a person from the hills in some part of New Jersey down to Newark, on a mountaineering trip?

Mr. Wechsler. If you want to hit that, you should do it by retaining the existing law, which requires them to bring him to the nearest magistrate, instead of suggesting the modofication of that law which was suggested earlier today.

But I do not think that point bears on whether we should have this protection, assuming that there is to be that scope as to where he is brought. In other words, this whole rule was designed for a partial remedy of what I think is a difficult situation. I think the rule could have been lived up to. I certainly think this part of it is good.

Mr. Waite. It just occurs to me, in view of what Mr. Wechsler says, that we could send this back to be redrafted with a provision that he need not be taken before the nearest and most accessible magistrate if there is a commissioner within reach. I wonder if we ought not to pass further discussion of this until we see how that rule is going to be redrafted, because it might make a lot of difference.

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Mr. Robinson. It will be ready for you in the morning.

The Chairman. Suppose we pass this for the time being, with the motion pending on the first three and a half lines.

We move on to Rule 7, then, beginning Chapter III. I think most of you are quite familiar with it.

Mr. Holtzoff. I have just a probable suggestion in lines 2 and 3, "The grand jury shall consist," and so forth. Strike out the word "impaneled" and change "every" to "the."

Mr. Robinson. I believe it was suggested that the word "grand" be stricken. In line 5 strike out "grand" before "jurors" and make it "at least twelve."

Mr. Medalie. The heading takes care of that.

Mr. Robinson. Does it go out there?

Mr. Medalie. You mean in line 7?

Mr. Robinson. Line 5.

Mr. Youngquist. It occurs in a great many cases.

3-1 Mr. Robinson. Was it not the wish expressed by the committee, in talking about grand jury, to leave out the word "grand"?

It occurs in line 5; you can take out the word "grand." In line 10 you can take out the word "grand." In the middle of line 18 is the next one. I believe that is all on this page.

The Chairman. Is that wise?

Mr. Youngquist. I am wondering whether it is. I donot recall that that was our conclusion.

Mr. Holtzoff. It was the suggestion of the Committee on Style.

The Chairman. To eliminate the word "grand."

Mr. Youngquist. What rule was that in the third draft?

Mr. Robinson. In the second draft it was Rule 100.

Mr. Youngquist. I have it. It is Rule 80.

The Chairman. Are there any suggestions besides taking the word "grand" out where it occurs before the word "jurors"?

Mr. Waite. Somebody had a suggestion about line 2.

Mr. Holtzoff. I suggested that we change the word "every" to "the," and strike out the words "impaneled before any district court," so that the first few words of that sentence will read, "The grand jury shall consist of not less than," and so on.

Mr. Waite. Would it not be better to have it "a" rather than the definite article?

Mr. Holtzoff. Perhaps so.

The Chairman. What shall it be, gentlemen?

Mr. Youngquist. I like the definite article.

Mr. Robinson. I like "the" better.

Mr. Holtzoff. I like "the" better.

Mr. Waite. That indicates a particular grand jury, does it not?

Mr. Holtzoff. No. We speak of the court and the jury.

The Chairman. Referring to an institution.

What was the next change after that?

Mr. Holtzoff. Line 5, take out "grand" and in line 18.

The Chairman. Are there any other suggestions on this page?

Mr. Burns. I would like to raise a suggestion on line 19, "disclosed by a juror or witness except when required or permitted in the course of judicial proceedings."

As written, unless you interpret "when required in the course of judicial proceedings"--and even then I am not able to see how it can be interpreted to meet my objection--a witness who is subsequently indicted will not be permitted to acquaint his attorney with what he has testified to before the grand jury. As a matter of fact, this requirement literally interpreted would really make adequate preparation of a case for a defendant extremely difficult.

Mr. Robinson. That was my view on this, Judge, and I thought at the previous meeting of the committee it was decided that such secrecy should exist only during the pendency of the proceedings--that is, up until the indictment was found. At least, that was a strongly advanced view at one time in our session. After the indictment was found there was some expression of opinion that it should wait until the whole criminal proceeding was concluded. Then a grand juror or a witness could testify.

Mr. Burns. Well, I have no objection to a grand juror, to a stenographer, or to a district attorney being held down strictly to the present oath, which they must take to keep secret the proceedings; but when it comes to a witness, it seems to me you collide with the defendant's rights, and I do not think any great public disservice is done if the witness is permitted to tell, if he is not under oath.

I understand that the practice now is, in many of the Federal districts, to have the witness sworn and under oath undertake to have him not disclose what his testimony is. I think that operates very unfairly with the defendant.

Mr. Medalie. We went into this very fully in our meeting

of the Committee on Style. I imagine that since it is here, it is because those of us who held the views now expressed by Judge Burns were in the minority. I am glad to have it brought up again. I feel very hostile to this provision.

Mr. McLellan. Would it be all right to strike out the words "or witness"?

Mr. Burns. Yes.

Mr. Holtzoff. Should not the witness be required to maintain secrecy until an indictment is found?

Mr. Burns. Why?

Mr. Holtzoff. Well, it seems to me that there are two reasons. One is to prevent the possible defendant from escaping, and the other is to protect the prospective defendant if the grand jury decides not to indict him.

Mr. Medalie. May I give you a simple case? A man receives, assuming that the subpoena states the truth, a subpoena to appear in the case of United States against Joseph Brown, and he shows it to his wife, to his clerk, and to his partner. There is a complete disclosure that there is something brewing against Jopseh Brown. Everybody in town knows it. He may not state that he has appeared before the grand jury whatsoever. It is just an absurdity.

The Chairman. Would you have him tell what he testified to?

Mr. Medalie. He does it today, and I see no harm. I am wondering what the evil is that imagined, in view of the fact that until this furor started three years ago, when they began giving this unauthorized oath to witnesses, we got along so well without it and everybody who was a witness talked freely.

Mr. Holtzoff. The oath to which you refer is not of

recent origin.

Mr. Medalie. It may be ancient, but it was not used.

Mr. Holtzoff. It has been used in many districts.

Mr. Medalie. Only very recently.

Mr. Holtzoff. I do not think so.

Mr. McLellan. I would like to ask the question as to what happens to a witness who does disclose to a lawyer what took place before the grand jury, by virtue of anything in these rules.

Mr. Holtzoff. I suppose it is contempt of court, is it not?

Mr. McLellan. Contempt of court by virtue of these rules?

Mr. Holtzoff. That would be the effect, would it not?

Mr. Seasongood. Except there was a holding that it was held to be contempt where a witness was sworn to secrecy and he told about it.

Mr. McLellan. There the violation was based on the violation of his oath, but when you put anything in here it either creates an offense or it does not. It is not our business to create an offense of that kind.

Mr. Medalie. You have some simple situations that occur quite frequently. Someone in a business enterprise is the subject of a grand jury investigation. His partner is subpoenaed before the grand jury. His head bookkeeper, his outside accountant, everybody he knows is brought in there, and the pretense is made that we do not know they are going in there to testify about things they discussed before they went up.

Mr. Holtzoff. I would be willing to see the words "or witness" go out.

Mr. Dean. I do not think we decided on it this way in the Committee on Style.

Mr. Medalie. It did not seem to me that we did.

Mr. Dean. We had the situation of the vice president of a corporation, for example, who was brought in as a witness. He might not be the prospective defendant. He is naturally going to disclose that. It would be completely against human nature if he did not disclose that to the president of the corporation and the counsel for the corporation.

Mr. Burns. And every witness who is subpoenaed, who is an officer of the corporation, is able to know, from the questions of the district attorney and the questions of the grand jurors, that they appear to be pointing toward the indictment of the president.

Frequently, a man who knows he is about to be indicted can write a letter to the district attorney, and the practice is to let him appear, and very often the grand jury refuses to indict on the appearance of the president. All this is choked off, and for no very obvious public good.

Mr. Holtzoff. To bring this matter to a head, I move that we strike out the words "or witness" in line 19.

Mr. McLellan. I second the motion.

The Chairman. Is there any further discussion?

Mr. Longsdorf. I would like to ask a question. In what judicial proceedings may permission be given to disclose?

Mr. McLellan. Grand jury.

Mr. Medalie. I have done it myself, notwithstanding decisions to the contrary in another district--interrogation of grand jurors in preparation for a motion to quash the indictment

after everybody has been apprehended--and the decisions have supported that except this one that happened in the Ohio District.

The Chairman. That would be contempt in my State.

Mr. Medalie. That is what they decided, and they held otherwise in New York, Virginia, and elsewhere.

Mr. Dean. Impeachment of the witness I think would be the most usual one, where you are using the grand jury transcript to impeach him.

Mr. Medalie. There you have a judicial proceeding that is clearly a judicial proceeding, but I do not see why you eliminate preparation for other forms of judicial procedure than trials--a motion to quash, for example, which you cannot make without interrogation of the grand jurors--and if everybody is apprehended there ought to be no limitation on making the inquiry.

Now, in all the cases that have arisen up to date and which can be found on the books, and there are not very many of them, but there are a few of them, I cannot conceive how any harm was done to the administration of justice on that kind of interrogation of the grand jurors.

What we ought to say here is that after the defendants have been apprehended there is no restriction as to certain things which happened before a grand jury which are material to a motion to dismiss the indictment.

Mr. Longsdorf. How would permission be obtained to make such a disclosure as was made in the Smith case? That was not in a judicial proceeding or in the course of one. It was in preparation for a particular action to be taken in a judicial

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proceeding, not in the proceeding, however.

Mr. McLellan. Is the question whether the words "or witness" should come out?

Mr. Holtzoff. That is the motion. I call for the question.

The Chairman. Is there any further discussion?

If not, all those in favor of eliminating the words "or witness" say "Aye." Opposed, "No." The motion is carried.

You surprise me. If a grand juror ever disclosed anything in my State, no matter if the case has been tried and on appeal, he is subject to contempt. The same with any witness.

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The Chairman. All right. Are there any other questions on this section?

Mr. Longsdorf. If it is in order I should like to ask why the oath to be given by the Grand Jury, contained in the third rule, was omitted in this.

Mr. Robinson. By order of the Committee.

Mr. Holtzoff. We thought, some of us, that the text of an oath ought not to be in the rules, any more than the text of an oath to petit juries or to witnesses.

Mr. Longsdorf. I just wanted to know.

Mr. Robinson. One other matter in the transcript, going back a moment to a matter that is now not important, yet to correct the record should be mentioned: upon talking here with Mrs. Peterson and Mr. Tolman we are inclined to believe that at the last committee meeting when this was taken up the matter was not settled. It went into a discussion of whether or not at common law a witness was under a duty not to disclose what he had been asked about, testified to before the Grand Jury, and we were instructed to make a study of that, which we have done. Mr. Holtzoff, too, has given some assistance on that. Chitty puts it that the witness was under a duty not to disclose.

Mr. Holtzoff. We can dispose of that.

Mr. Robinson. Yes.

Mr. Longsdorf. What did you find about the common law? Was it permissible?

Mr. Robinson. As to a witness, there is some dispute about the interpretation, in my mind. In my mind I think that Chitty is pretty good, and Chitty says that there is a duty on a witness not to disclose, at least not before the return of the indictment.

2 Is that not the result of it?

Mr. Medalie. Did we not also find that that was for protection of the defendant?

Mr. Robinson. I am not sure about that.

Mr. Youngquist. In this memorandum?

Mr. Holtzoff. That rule gives it.

Mr. Youngquist. Yes. We have more rules on it.

The Chairman. All right. Now, is there anything further, gentlemen, by way of suggestions on (c)? If not, let us move on to (d) (1).

Mr. Medalie. Well, now you still make it impossible to find out how the defendant's rights were violated, as they sometimes are, before the Grand Jury. Motions to quash have been based on such considerations, and they have been disclosed by grand jurors. I do not see why they should not be.

Mr. Longsdorf. How shall an attorney be permitted to make inquiries and investigations like that? Who can give it to him? The foreman?

Mr. Medalie. Do they ask the foreman?

Mr. Dean. You can say "except when the disclosure is to be used in the course of a judicial proceeding."

Mr. Medalie. That would be all right.

Mr. Dean. That would cover that motion to quash.

Mr. Medalie. And provided everybody had been apprehended.

Mr. Youngquist. I do not think that a statement of the purpose for which the information is to be used would be an adequate safeguard.

Mr. Longsdorf. Gramatically this language does not forbid the elicitation of information that no witness whatsoever or any

3 evidence was produced. That is what they disclosed in the Schmidt case, or tried to.

The Chairman. Gentlemen, we have ruled on it, so unless there is a motion to reconsider let us go on to something else.

Mr. Longsdorf. I am speaking of the grand jurors. They were the ones interrogated there.

Mr. Medalie. I would reserve the right to bring it up again some day.

The Chairman. In other words, we move on to (d) (1). If there is nothing on (d) (1) may we proceed to (d) (2)?

Mr. Dean. Would it not be a little better to say in line 31 "is not legally qualified" instead of "is not qualified in accordance with law," just as speaking of disqualification?

Mr. McLellan. "in accordance with law" is already in.

Mr. Youngquist. Do you mean to put in "legally qualified" instead of "qualified in accordance with law"?

Mr. Dean. Yes, that is the suggestion.

Mr. McLellan. You would strike out, Mr. Dean, the words "in accordance with law"?

Mr. Dean. Yes, sir. It is either a legal qualification or it is a qualification by virtue of the fact that he has a state of mind that prevents him from acting impartially.

Mr. McLellan. May I suggest, that is better.

Mr. Wechsler. Why do we want "without prejudice to the substantial rights of the challenging party" in line 33? Is it not enough that he has a state of mind which may prevent him from acting impartially to the challenging party or with respect to the challenging party?

Mr. Holtzoff. As a matter of fact, you could end the sen-

4 tence with the word "impartially" and strike out the rest of it.

Mr. Burns. That is it.

Mr. Medalie. I think so.

Mr. Waite. In what line was that?

Mr. Burns. Line 33. Strike out all after that.

Mr. Medalie. "acting impartially." Period.

Mr. McLellan. Are jurors who are being questioned for the purpose of determining whether they are qualified and unprejudiced to be subjected to an oath?

Mr. Medalie. Well, you must come in there with knowledge; you cannot fish. It is the only way you can question.

Mr. McLellan. I did not say you could fish. I asked you whether you intended to provide that the jurors upon the voir dire should be sworn.

Mr. Youngquist. This is under (1)? Speaking of (1)?

Mr. McLellan. Any. Either one.

Mr. Medalie. The only way that I could conceive of a juror being sworn before the oath as a juror is administered to him is when he is testifying. Now, the only way a question can be laid which would require his testifying would be to file or present a challenge. Then the challenge is tried, and on the trial of that challenge he could be sworn.

Mr. Robinson. That is right.

Mr. Medalie. He could be sworn as a witness in the trial of a challenge.

Mr. McLellan. That is not the way I understand it at all.

The Chairman. Is not this directed to an attack by the District Attorney on the Grand Jury at the time it is impaneled?

Mr. Youngquist. Yes.

5 Mr. Medalie. Or by a defendant.

Mr. McLellan. I take it all back. You know, what I was thinking of was the other kind of a jury.

Mr. Robinson. A petit jury.

Mr. Burns. Voir dire.

The Chairman. That is where the District Attorney would do it, but where does the defendant's attorney do it?

Mr. Medalie. The same place.

Mr. Youngquist. If he has been bound over.

Mr. Dean. He does not know.

Mr. Medalie. Yes, he does. He has been held to answer.

Mr. Dean. That is the situation where he would know he has been bound over.

The Chairman. So where he does not know it he is just out of luck.

Mr. Youngquist. That is right.

Mr. Medalie. No, he is not. After he has been indicted he can challenge the array.

The Chairman. Oh, (2). I see.

Mr. Burke. How could you substitute, then, that the challenge shall be made before the administration of the oath to the jurors?

Mr. Medalie. I did not get that, Mr. Burke.

Mr. Burke. Does this have reference to the grand jurors -- the challenge?

Mr. Medalie. Only grand jurors.

Mr. Burke. How could he presuppose that he might have an objection to the jurors when he does not know he will be a defendant?

6

Mr. Medalie. When he has been held to answer.

Mr. Burns. When he has been held for the Grand Jury.

Mr. Youngquist. I suppose the word "grand" in line 29 should come out?

Mr. Medalie. No. "the Grand Jury"?

The Chairman. No.

Mr. Youngquist. This is all Grand Jury?

Mr. Robinson. No; we dropped the word "jurors," is all.

Mr. Medalie. "Grand Jury."

Mr. Youngquist. I am sorry.

The Chairman. I still have doubt as to the wisdom of that, gentlemen, because lawyers are going to be quoting this, and a judge might not have it right before him, and he might think it relates to petit jurors.

Mr. Medalie. Well, the heading is, "Objections to Grand Jury or to Grand Jurors." The title is, "Objections to Grand Jury or to Grand Jurors."

The Chairman. In other words, Mr. Pettifogger gets up and reads that to the Court in connection with something that deals with petit juries, and unless the judge is very much on his toes he will be misled.

Mr. Medalie. All the judge need do is read it.

Mr. Longsdorf. He might get into trouble in a state like California, where it has become settled law -- entirely too well settled -- that the headlines are no part of the statute and must not be regarded in construing the contents of it. Perhaps you did not think about that.

Mr. Medalie. Take (d) (1): the body of it refers to the Grand Jury.

7 The Chairman. I shall not press it. I shall withdraw it.

Mr. Longsdorf. I agree with you (addressing Mr. Medalie).

Mr. Medalie. This is rule 4.

Mr. Longsdorf. The judge cannot look at the headlines.

Mr. Medalie. Oh. Well, here the body of this covers it anyhow.

The Chairman. All right, gentlemen. Are we up to (d) (2)?

Mr. Youngquist. We say in (d) (2) that a motion may be made. Did we not mean a motion to dismiss? That is the only motion I suppose that could be made.

The Chairman. I should think so.

Section (e).

Mr. Youngquist. May I ask another question in connection with that?

The Chairman. Surely.

Mr. Youngquist. Suppose a defendant who has been held to answer to the District Court interposes a challenge to the array, and the challenge is found not true. Then in (2) we provide that the motion to dismiss may be made after indictment or based on objection to the array if not previously determined upon challenge. Is there danger that the determination of the challenge of the defendant held to answer would be controlling in the case of a defendant in some other indictment found by the same Grand Jury?

Mr. Holtzoff. No, I think this only relates to the decision of the defendant.

The Chairman. Of a mutual defendant.

Mr. Holtzoff. Yes.

Mr. Seasongood. As to the last sentence, I do not know whether that is sound law. I suppose maybe it is, but it does not

8 sound very good to me. That is, the idea is that the indictment is the result of the deliberation and not merely the vote, and if this man is disqualified he may have influenced the others who did return the indictment, to return it.

Mr. Holtzoff. Well, it is the present statute. It was the statute of 1934.

Mr. Seasongood. I do not think much of it, because the jurors are all supposed to have participated in the deliberations, and the bad one has doubtless influenced, or may have influenced, the others to return the indictment. I do not press it.

The Chairman. (e).

Mr. Waite. Mr. Chairman, before we take up (e) may I make another suggestion?

The Chairman. Yes, sir.

Mr. Waite. At the last time, if I remember correctly, we were all pretty much in agreement that a man who had pleaded to the indictment and been found guilty on the merits ought not to have the conviction reversed because of defects in the Grand Jury proceedings unless he had raised the question of the defect in the Grand Jury prior to the trial. My recollection is, we were pretty well agreed on that last time. I do not find it in any rule.

Mr. Youngquist. That is covered in another rule.

Mr. Holtzoff. That is covered in a different rule.

The Chairman. In 15.

Mr. Waite. I caught that in 15, but it seemed to me insufficiently covered there. 15 says:

"Defects in the institution of the prosecution and objections to the indictment or information other than that it fails to charge an offense or to show jurisdiction in

9 the court shall be raised only by motion and before trial."

That "and before trial" was just an incidental to something else, and it seemed to me it was so obviously incidental there that I am afraid it would not be accepted as applicable to this situation; so I would like to suggest that we have a (d) (3), the gist of which should be that no judgment of conviction on the merits -- after fair trial on the merits -- should be set aside unless the defects in the Grand Jury proceeding were called to the court's attention before the trial.

The Chairman. Why can we not do that in line 36 by saying, "After indictment but before trial a motion to dismiss may be made"?

Mr. Waite. We could if we feel sure that the courts would limit it that way. I should feel happier if it were stated explicitly that the judgment of conviction should not be set aside unless the motion were raised before trial.

Mr. Holtzoff. I think that would be a dangerous statement, for this reason: If you start enumerating here and there throughout the rules that a judgment of conviction shall not be set aside for this defect or that defect, then on the principle of expressio unius est exclusio alterius we are going to get into trouble: somebody will say, "Well, they did not say that this particular defect should not be considered as being sufficient to justify setting a judgment of conviction aside." I think you get into deep water if you start enumerating that way, and you would defeat your own purpose.

Mr. Youngquist. Why is not 15 (b) adequate? It says that it shall be raised "only by motion and before trial."

4 Mr. Waite. I think technically it is adequate, but it is

just stuck away.

The Chairman. It is broader; I do not know why you would add anything.

Mr. Waite. You see, it is stuck away and incidental to something else, and I am afraid it would be overlooked.

Mr. McLellan. What is the harm of putting in your suggestion that it be raised before trial?

Mr. Holtzoff. That is all right.

Mr. Medalie. That means stating it twice. It is so fully stated in rule 15, I do not think there can be the slightest doubt about it.

Mr. Holtzoff. I do not see any objection to the Chairman's suggestion.

Mr. Medalie. Yes, I think there is an objection as a matter of style.

Mr. Holtzoff. Oh.

Mr. Youngquist. You have the statement there.

Mr. Medalie. Well, you have to state it generally and so clearly as we have in rule 15.

Mr. Youngquist. I do not think there could be any misapprehension about it.

Mr. Holtzoff. I do not either.

Mr. Waite. You see, it is put in there in the conjunctive in 15.

Mr. Holtzoff. Let us strike out the word "and."

Mr. Youngquist. Strike out the "and."

Mr. Waite. It seems to be two ideas. If it could be made an independent sentence, "should be made before trial," that would be a different matter.

Mr. Holtzoff. If the word "and" goes out I think that emphasizes it.

The Chairman. The strongest words in the sentence are the last two words.

Mr. Waite. Oh, strike out "and" entirely? I did not get that.

The Chairman. Then that leaves it the place of honor.

Mr. Waite. Yes, that might take care of it.

The Chairman. All right.

Mr. Seasongood. If this second sentence is the statute why do you want to repeat it? What is the sense of putting it in?

The Chairman. The idea is to repeal the statute.

Mr. Seasongood. No.

Mr. Dean. So it is the exact language. I do not think this is the exact language.

Mr. Holtzoff. It is the exact thought.

Mr. Dean. Thought?

Mr. Holtzoff. Yes. It is a little briefer than the statute, a little more succinct and simple, but it is the exact thought of the statute.

Mr. Seasongood. What is the purpose of putting it in?

The Chairman. The object is, Mr. Seasongood, to get rid of a lot of statutes. That is what this is. This is final on defining criminal rules.

Mr. McLellan. Yes, but this is supposed to be in accordance with the statute, is it not?

Mr. Holtzoff. Yes.

Mr. Youngquist. Yes. Collected all in one place.

The Chairman. As are various other rules that we have all the way through, you know.

Mr. McLellan. The trouble is, with him and me, we both think the statute is a very mean statute.

Mr. Seasongood. Why is it not? What is the rule in an ordinary jury case if you find afterward that one of the jurors was disqualified? You are entitled to a new trial, are you not?

Mr. Holtzoff. Yes, but in an ordinary jury case you are required to have it unlimited.

Mr. Seasongood. Not in Ohio; you are not; you only need nine.

Mr. McLellan. But one disqualified juror sets the thing aside here?

Mr. Seasongood. I think so. I would not be positive, but I have seen statements that the judge says, "Now, you must all deliberate, and you must accept each other's counsel and opinion." And here is this fellow that is disqualified, who presumably has influenced the others to return the indictment.

The Chairman. Suppose his only offense is that he is sixty-five and a half years old instead of being sixty-five. I mean, really, you would not want to throw it overboard in that case.

Mr. Holtzoff. Why, that statute was enacted in 1934 and was supposed to be at that time according to form and do away with technicalities.

Mr. McLellan. Suppose, on the other hand, that he is under sixty-five and that he has a real financial interest to be served by procuring the indictment, and he is a cozy fellow there. He works for the others. I do not like it. It is the statute.

Mr. Holtzoff. Yes.

The Chairman. Well, we do not have to follow it because it is the statute.

Mr. Seasongood. If you adopt it you approve of it.

The Chairman. True, but I mean the fact that it is a statute is no reason for saying it must be in these rules; we can recommend a contrary rule, what we think wise.

Mr. Holtzoff. No; I only refer to the fact of the statute as an indication that this is not a novelty; it is a continuation of existing law.

Mr. Robinson. Is it not a matter of fact, Mr. Seasongood, that if you try to pick the man you are going to have to disclose how each juror voted and get into a difficulty both with respect to secrecy and with the complications of figuring it all out?

Mr. Seasongood. I should not think so. As I say, the indictment is the result of deliberation, and presumably all the jurors have entered into the deliberations.

Mr. McLellan. And there has been in the jury room a man who had no business there.

Mr. Seasongood. Well, if you do not get any support from anybody else I suppose it is not worth considering.

Mr. Burns. It is pretty clear that if a stranger were in the jury room the proceeding would be null and void.

Mr. Seth. Yes.

Mr. Burns. Well, this man is technically a stranger, is he not?

The Chairman. Of course he is a stranger.

Mr. Medalie. A snake in the gräss.

Mr. McLellan. What is that?

The Chairman. Described as "a snake in the grass."

Mr. Burns. He is an alien.

Mr. Seasongood. I shall make a motion that that sentence be stricken.

Mr. McLellan. I second it.

The Chairman. It is moved and seconded that that sentence be stricken. Is there any discussion?

All those in favor say "Aye." Opposed, "No." The motion
5 is lost.

Gentlemen, it is getting on, ten minutes after ten.

Mr. Medalie. Let us do a couple of rules.

Mr. Waite. Time to quit.

Mr. Seasongood. Let the Chairman get well by tomorrow if he wants to.

The Chairman. Do not bother about me; I can stand it. We put Judge Crane under the weather last time; we do not want to do it any more this time. All right.

Mr. Robinson. Go ahead.

The Chairman. (e). Why should the attorney for the Government be present during the deliberations of the jury?

Mr. Seasongood. He should not.

Mr. Medalie. Prohibit it.

Mr. Youngquist. The last sentence.

The Chairman. Line 46.

Mr. Medalie. I think we had better close up for the evening.

Mr. McLellan. There are two lines on the next page.

The Chairman. We will take those. Is there any discussion?

Mr. McLellan. They should not remain.

The Chairman. Are there any comments on (f)?

Mr. McLellan. May I ask if this is a general practice, that (f), according to your experience?

Mr. Medalie. No. It is handed to the judge normally, as I know of.

Mr. McLellan. That is what I have been used to.

Mr. Medalie. And that has been a nuisance pretty much and unnecessary.

Mr. McLellan. Well, I do not know. The foreman takes an indictment and leaves it with the clerk. Now, I have had a number of experiences where, being asked to go in to take a report of a Grand Jury, I have looked over the indictments and found as many as four or five of them, on occasion, improperly signed or not signed by somebody.

Mr. Robinson. That is right.

Mr. McLellan. And I always look them over.

Mr. Medalie. The clerk is more likely to do it.

Mr. McLellan. I think it is pretty good practice to have the indictment returned to the judge unless that is contrary to the usual practice.

Mr. Medalie. No, that is the usual practice, but I think the clerk is more likely to look at them than is the judge.

Mr. McLellan. But what can the clerk do about it? The judge says, "Why, I think you had better take those indictments back, gentlemen," and let it go at that.

Mr. Medalie. Well, the clerk would do the same; he would say, "I cannot take these. They have not been properly signed."

Mr. Robinson. Most clerks would not know enough law to find a defect in the indictment.

Mr. Medalie. Only a matter of signature. Defects in the indictment are none of their business.

Mr. Robinson. There may be other defects too. I have seen the judge have to tell the foreman to go back and sign it himself.

Mr. Medalie. That is what I am talking about, signing it. That is the only thing that you can mention that the judge or the clerk would have anything to do about.

Mr. McLellan. I think it is better to have the indictment returned to the judge.

The Chairman. Certainly he is entitled to that degree of formality.

Mr. Holtzoff. Judge, may I call your attention to a situation that sometimes arises: I remember we had a situation two years ago or a year ago in North Dakota where a resident judge
6 was away in Florida sick during the winter. A Federal judge from Minnesota was sent to North Dakota, and he impaneled a Grand Jury, went back to Minneapolis, the Grand Jury was in session without a judge for a week or two at a time, and at intervals the judge would come back. Now, would it not have been well --

Mr. McLellan (interposing). Yes, that is all right. That is one instance, but we always poll a Grand Jury too.

Mr. Youngquist. You do?

Mr. McLellan. Surely. They come into court and we poll them.

Mr. Seth. The present practice is open court, is it not, Judge?

Mr. McLellan. Yes, sir, open court.

Mr. Seth. That is what I think.

Mr. McLellan. And the first thing is to poll the Grand Jury

and see if they answer to their names.

Mr. Youngquist. On each indictment?

Mr. Seth. Oh, you call the roll?

Mr. Dean. Call the roll.

Mr. Holtzoff. What object is served by having them there and polling them and handing them a bunch of indictments?

Mr. Dession. It might be just this: maybe they have just found them without looking at them.

Mr. Seasongood. The Grand Jury reports to the court, and they ought to report to the court and not to the clerk, is my idea.

Mr. Robinson. The judge does not here require that the Grand Jury accompany the foreman. In other words, by this rule a foreman could walk into the clerk's office alone and hand the indictment to him.

Mr. Youngquist. That was my idea.

Mr. Robinson. Surely it should not say that.

Mr. Youngquist. Make it a subcommittee.

Mr. Robinson. Let the other grand jurors get away.

Mr. McLellan. Yes, and the foreman can come and say, "Here is an indictment, Mr. Clerk." That is what it says.

Mr. Youngquist. No, surely.

Mr. Medalie. That is what we meant.

Mr. Robinson. It is too brief.

The Chairman. That is too efficient.

Mr. Seasongood. Yes.

Mr. Medalie. Of course you know what usually happens: The Grand Jury, at least in our district, breaks into the part that is trying a criminal case. The judge is sitting on the bench, and the lawyers are buzzing around with excitement. The proceed-

ings are interrupted, and we get them out about as fast as we can. There is not even a pretense of formality any more, except that the judge nods to the foreman if he remembers them.

Mr. McLellan. Poll them, --

Mr. Medalie (interposing). They do not do that.

Mr. McLellan. -- they report the indictments, the judge looks them over. If there is some technical thing the matter he calls attention to it. If everything is all right he says, "The report of the Grand Jury may be received," and then, "The usual process may issue." I remember saying that before I knew what it meant.

Mr. Robinson. How would it be to reincorporate the words in Draft 3, "The indictment shall be filed by the foreman with the judge or the clerk in open court"?

Mr. McLellan. I do not like that either.

Mr. Seth. Leave the clerk out.

Mr. Robinson. "with the judge."

The Chairman. "in the presence of the Grand Jury."

Mr. Robinson. You want that in?

The Chairman. Yes.

Mr. McLellan. Why not let it be returned to the court? The judge is hired to be there.

The Chairman. Do they not have long poles with white on each end in these various jurisdictions?

Mr. Medalie. What?

Mr. Seasongood. That is the way it was in England. Nobody was allowed to touch it; it was handed on a long pole to the judge so nobody could tamper with it.

The Chairman. A long black pole painted white on each end.

Mr. Waite. It used to have a basket on each end.

Mr. Medalie. In capital cases.

The Chairman. Not less than ten years ago I have seen counsel sent home to put on black clothes and not wear white sports suits.

Mr. Medalie. They do not do that here any more.

Mr. Burns. In the interests of more pageantry I move that (f) be amended to read:

"The indictment shall be returned by the foreman to the judge in open court in the presence of the Grand Jury."

Mr. Seth. That is right.

Mr. Holtzoff. How is that again?

7 Mr. Burns. "The indictment shall be returned by the foreman to the judge in open court in the presence of the Grand Jury."

Mr. McLellan. If you strike out the words "by the foreman," I should like it better.

Mr. Medalie. As I get older, if I don't grow more pious, I get to regard ritual as more important.

Mr. Burns. It is a manifestation of internal poverty.

Mr. Medalie. That is all that is left, I suppose.

The Chairman. Judge McLellan says he would like it better if you had the return by the Grand Jury.

Mr. Burns. In open court. To the judge in open court.

Mr. Waite. I should like to ask, what is the present practice? Is it returned in the presence of the Grand Jury?

Mr. Youngquist. Surely.

Mr. McLellan. That is my limited experience.

Mr. Dean. Yes.

Mr. Medalie. They all come in together, looking at their

watches.

Mr. Seasongood. Well, that is all right.

Mr. Burns. In New York, keeping an eye on their overcoats.

Mr. Robinson. And watches.

The Chairman. You have heard the motion as amended. Are there any remarks?

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

(The motion was carried.)

The Chairman. I am glad to see, Mr. Burns, your interest in pageantry is growing.

Rule 8 (a).

Mr. Youngquist. The heading of 7 (f) should be "Return of Indictment," then, instead of "Filing of Indictment."

The Chairman. "Return of Indictment."

Mr. McLellan. I thought now you were going to stop, were you not?

The Chairman. I am willing to if anyone will volunteer with a motion.

Mr. McLellan. I move we adjourn.

Mr. Youngquist. I second it.

The Chairman. It is moved and seconded that we adjourn. All those in favor say "Aye."

Mr. Robinson. Until what hour?

The Chairman. What hour do you prefer?

Mr. Youngquist. 9:30.

Mr. Seth. 10 o'clock.

The Chairman. 10 o'clock.

Mr. Medalie. There is a subcommittee meeting tonight, is there not, Mr. Reporter?

Mr. Robinson. That is right.

The Chairman. We have a lot of work to do in three days.

Mr. Robinson. We meet at 10 in the morning.

Mr. Medalie. All right. That will be better.

The Chairman. What?

Mr. Medalie. Our subcommittee on redraft of rights before magistrates.

Mr. Holtzoff. How about having a subcommittee meeting right now?

The Chairman. All right.

Mr. McLellan. I should like to know to what time we adjourn.

The Chairman. 10 o'clock.

(Whereupon, at 10:25 o'clock p. m., an adjournment was taken until tomorrow, Tuesday, May 19, 1942, at 10 o'clock a. m.)

Mr. Tolman's Copy

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Tuesday, May 19, 1942.

MORNING SESSION

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Tuesday, May 19, 1942.

The Advisory Committee met at 10:10 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

Gordon Dean

George H. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McLellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

John J. Burns

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P R O C E E D I N G S

The Chairman. All right, gentlemen. Let us proceed.

Mr. Holtzoff. I believe we are on Rule 8.

The Chairman. We start with Rule 8, gentlemen. Are there any questions on Rule 8 (a) (1)? If not, we shall pass to (a) (2).

Mr. Holtzoff. Mr. Chairman, I am afraid I shall have to raise a question about (2) beginning in line 17. This is a provision to require that every indictment should give a statutory citation or the citation of the rule under which the prosecution is brought. I do not object to requiring the citation of the rule if the prosecution is based upon an administrative rule, because there are obvious reasons making that desirable. I do not believe that a statutory citation should be required. I have had the law examined to be sure of my ground, and the cases are unanimous today that all the indictment or information must do is to set out the facts constituting an offense. It is not necessary to cite the statute charged to be violated. Sometimes some prosecutors do mention the statutory citations. Some as a matter of facility of reference put it on the margin or on an endorsement. But certainly it ought not to be a requirement.

Now, the effect of this rule would be just to add a technicality which does not now exist. And there is a practical reason: we have all seen indictments sustained on appeal under a statute other than that on which the prosecutor relied in the court below, and certainly a defendant who has been convicted should not be turned loose merely because the prosecutor relied on the wrong statute, if actually a crime has been committed.

Mr. Dean. The last sentence takes care of that, I think.

Mr. Holtzoff. The last sentence does ameliorate the difficulty, but I do not think there should be even a requirement of the citation.

Mr. Burns. Would you change "should" in line 17 to "may"?

Mr. Holtzoff. I have no objection to that, sir, personally.

Mr. McLellan. Suppose you change it to "should preferably."

Mr. Longsdorf. I think that would be good.

Mr. Holtzoff. Change it to "should"?

Mr. McLellan. "should preferably," so as not to make a requirement.

Mr. Holtzoff. Yes.

Mr. Seth. Is it any hardship that the United States Attorney know the law under which he is prosecuting?

The Chairman. You are right.

Mr. Holtzoff. Mr. Wechsler just argued a case in the Supreme Court where he properly sought to sustain a conviction under a statute that the United States Attorney did not cite.

Mr. Youngquist. Why do you say "properly"?

Mr. Holtzoff. Because I think that was quite proper.

Mr. Wechsler. Quite proper.

Mr. Seth. I think in lines 22 and 23 there seems to be intimation that the United States Attorney might be convicted of an intent to mislead the defendant.

Mr. Robinson. That is marked out.

Mr. Seth. Is that marked out?

Mr. Robinson. Well, yes, I should like to suggest that it go out. In line 22 after "omission" strike "does not appear to have been made with intent to mislead the accused or if it".

Mr. Seth. That has covered my objection, but I do think that in this day and generation, where we are going to have laws and regulations, when we have to get a permit to take a drink or anything, why, we had better have them cite the statute.

Mr. Wechsler. There is one important distinction in this subject, Mr. Chairman, I think, between the case that comes up on direct appeal after a demurrer has been sustained to an indictment, and the case that comes up after conviction in the District Court. Where it comes up after conviction it is much easier to find respects in which defense counsel may have been privileged by having his attention focused to one rule of law rather than to another rule of law; but if there has merely been a demurrer and the demurrer has been sustained I cannot see any way in which defense counsel is worse off in the Supreme Court arguing the point of law on which the sufficiency of the indictment turns than if he had made that argument in the first instance in the District Court.

Mr. Holtzoff. In accordance with the suggestion that has been made, I move that we insert the word "preferably" after the word "should" in line 17.

The Chairman. Of course that goes far enough.

Mr. Dean. No.

The Chairman. Why should not the Government tell you what you are accused of and on the basis of what?

Mr. Holtzoff. It has never been the rule and it is not the rule today that an indictment must cite the statute.

The Chairman. That is true, but we are doing a lot of things here that never occurred before.

Mr. Holtzoff. Yes, but we are trying to simplify criminal

procedure.

The Chairman. Well, that is one thing we are trying to do, but we are trying to make it a square, honest game.

Mr. Dean. Another thing, whatever the precedents may be on the subject it seems to me that with this growing body of Federal legislation those precedents do not argue very much, to me, today.

Mr. Burns. There are a hundred agencies now that are minor legislators; they have the power to make new statutes which carry

2 very severe criminal penalties.

Mr. Seth. Why do you say "minor"?

Mr. Holtzoff. I agree that if the prosecution is based upon rule or regulation of an administrative agency there is good reason for requiring a reference to the rule in the indictment. But certainly that should not be the case if it were a statutory prosecution; and my recollection is that at the last meeting of this Committee the trend of the discussion was to limit this requirement to prosecutions based on rules and regulations. That was the concensus of opinion, but unfortunately no motion was made.

The Chairman. What is the hardship of citing the statute?

Mr. Holtzoff. Well, because sometimes you might seek to sustain a conviction on a statute other than that which you have cited.

The Chairman. But should you do it?

Mr. Burns. Why should you get away with it?

Mr. Holtzoff. Oh, I think so.

The Chairman. Oh, no. You indict a man for one thing, on one basis.

Mr. Holtzoff. Well, you indict a man for running a still

without paying a tax. Now, there might be two statutes, each with a slight variation in the phraseology, that that man might have violated. For example, if he ran a still without a license in Indian country he would be violating the statute relating to the Indian country, and he might be violating the Revenue Act. Now, there might be a slight difference in the phraseology of the two statutes.

Mr. Burns. This is the United States attorney, not a commissioner.

Mr. Seth. This is an expert now, presumably.

Mr. Holtzoff. This is not the United States attorney's case, after all; it is the Government that is interested in seeing justice done.

Mr. Youngquist. If the United States wants to see justice done I think it calls for the inclusion of the citation.

Mr. Wechsler. It is interesting in this connection: --

Mr. Holtzoff. I do not think so.

Mr. Youngquist. So far as I am concerned I would rather use the word "shall" instead of "may."

Mr. Seth. So would I.

Mr. Youngquist. But I am satisfied with the word "should" because I have faith that the United States attorneys will follow the admonition even though it be not a compulsion.

Mr. McLellan. But the effect of "should" there is in view of what follows in the next sentence, which is "shall," is it not? Or what? "shall"?

Mr. Seth. Yes.

Mr. Wechsler. Mr. Chairman, nobody questions the proposition that it is sound practice for the United States attorney to

do that, and United States attorneys do do that. They should do that. The question is what the penalty shall be if they fail to do it. Now, everybody agrees, if in consequence of the failure the case is tried on an erroneous theory, evidence is admitted that would not have been admissible on the other theory, or there is a failure to prove some essential point under the other theory, that a conviction cannot stand. But take a case where the proof is the same, where nobody has suffered from it: there I think it is clear that a conviction should be affirmed, and actually this rule would permit it to be affirmed.

Mr. Burns. That is quite right.

The Chairman. There is no harm done in an honest case.

Mr. Youngquist. Say, Mr. Wechsler, should there be included in the last sentence in line 20 after the word "ground" the words "for dismissal or for reversal"?

Mr. Holtzoff. Yes.

Mr. Youngquist. To cover the trial court as well as the appellate court.

Mr. Wechsler. The real point is that it shall not be ground for affirmance, I should think, in view of the trend of the discussion, because that problem always comes up not where a reversal is claimed on that ground but where an affirmance is claimed on that ground.

Mr. Holtzoff. Well, you do not want to change that second sentence, that sentence beginning in line 19?

Mr. Wechsler. No. As it stands I think it would meet my point.

Mr. Holtzoff. Well, I think the word "dismissal" --

Mr. Wechsler. I am not sure it would meet the point of

persons who take the other view.

The Chairman. Well, now, gentlemen.

Mr. Holtzoff. If the word "dismissal" goes in as Mr. Wechsler suggests, I think that would meet my objection on that.

The Chairman. Where does that go in, Professor? What line?

3 Mr. Wechsler. Line 20, before "reversal."

Mr. Seth. "dismissal or."

The Chairman. "or for."

Mr. McLellan. Well, you put in "for dismissal."

Mr. Robinson. Say "or for."

Mr. Medalie. "or reversal."

The Chairman. No. "for dismissal or."

Mr. Robinson. Put in the "or for reversal."

Mr. Holtzoff. "or for reversal." I see.

Mr. Wechsler. There might be something said for striking the last sentence, beginning on line 19, particularly if the word "preferably" goes in after "should" on line 17. Then it will be understood as a directory provision, and its legal consequences will be left to the court in particular cases -- legal consequences of failure to comply with this.

Mr. McLellan. All I thought about "preferably" was that it would be a little bit better than the more permissive "may."

Mr. Seth. The last sentence.

Mr. McLellan. But I am inclined to agree with those who think that there should be a requirement that the indictment state the statute, and so on; and if that is so I think that according to Mr. Youngquist's suggestion we should have "shall" for "should" in the seventeenth line.

The Chairman. Does someone move that we substitute "shall"

for "should"?

Mr. McLellan. I so move.

The Chairman. Is that seconded?

Mr. Youngquist. Seconded.

The Chairman. All those in favor of "shall" in line 17 in place of "should," say "Aye." Opposed, "No."

How many noes were there? (There was a show of hands.) The motion is carried.

Now, as I understand it, by consent in line 20 there is an introduction of words, "for dismissal or for reversal."

Mr. Wechsler. Just a moment. "of an indictment or reversal of a conviction."

Mr. Holtzoff. Do we need that?

The Chairman. I should think it makes better English.

Mr. Youngquist. Yes.

The Chairman. "dismissal of the indictment." "or dismissal of the indictment or for reversal of a conviction."

Mr. Youngquist. "indictment or information."

Mr. Robinson. "or information."

The Chairman. "or information."

Mr. Dean. The effect of this, I take it, so far as a proceeding in the district court is concerned, is to give you a right, probably through a bill of particulars if it is not in the indictment, to get it. That is really what we have in the way of penalty, if you call that "penalty."

The Chairman. Is there anything else under this section?

Mr. Medalie. Do we need the language, "does not appear to have been made with intent"?

The Chairman. That is out.

Mr. Medalie. That is out, is it?

The Chairman. Yes, from the word "does" in line 22 through the word "it" in line 23.

Mr. Youngquist. The pronoun "him" should be changed to "defendant" there at the end of line 23: "the defendant," because we do not previously refer to him in that sentence or in the preceding sentence.

Mr. Robinson. If you use the term "defendant" there you had better use it in other places here. In line 19 "accused" should be made "defendant," and in line 15 change "accused" to "defendant."

Mr. Medalie. Yes.

Mr. Youngquist. I thought we were using "defendant" throughout.

Mr. Holtzoff. We were. We are.

4 Mr. Youngquist. Yes. We should here then.

The Chairman. Those changes will be made.

Mr. Robinson. In line 10 "which constitute" should be "constituting." Is this your preference, Dr. Youngquist? "essential facts."

The Chairman. "essential facts constituting the offense charged"?

Mr. Youngquist. I think it is better. Better language.

The Chairman. It follows your thought closer.

Mr. Robinson. And then in line 16 I think we can save three or four words.

Mr. Youngquist. What is that?

Mr. Robinson. "and that he" strike out "may have." "and that he committed it in one or more" strike out "of various,"

leaving it "one or more specified ways"?

Mr. Youngquist. Yes.

TheChairman. All right. We shall proceed to (3).

Mr. Dean. Do we wish to make a similar requirement as to the complaint?

Mr. Holtzoff. We have a separate rule on complaint that a subcommittee is going to bring in later tomorrow.

Mr. Dean. I suggest that for the consideration of the subcommittee, then.

Mr. Holtzoff. What was the suggestion?

Mr. Youngquist. I doubt if we need it.

Mr. Holtzoff. We have a separate rule on complaint.

The Chairman. That will come in later.

Mr. Youngquist. Yes.

The Chairman. All right. (3) Surplusage.

Mr. Longsdorf. Mr. Chairman, how are you going to ascertain whether given words are surplusage without construing the indictment? And if you construe it wrong and strike out the supposed surplusage have you not amended the indictment?

Mr. Robinson. You remember our discussion on that, Mr. Longsdorf?

Mr. Longsdorf. Yes, I do.

Mr. Robinson. It is based largely on the recommendation of George Lindley of Illinois.

Mr. Longsdorf. I remember it.

Mr. Robinson. In which he pointed out that sometimes indictments and informations contain really scurrilous matter or slanderous matter, libelous matter.

Mr. Longsdorf. This is not limited to that.

Mr. Robinson. And it would be clear to the court in such a case what could go out, I should think.

Mr. Medalie. In almost every indictment there is a libel per se; that is true.

Mr. Robinson. To the defendant.

Mr. McLellan. Why give the court the power of its own motion to do it?

Mr. Robinson. Strike that out, Judge, beginning after "court"; strike out the rest of that line and the first two words of the next line, so you would say, "The court may strike surplusage from the indictment or information." That would make your objection still stronger, perhaps, but I think it may go out anyway.

Mr. Longsdorf. My remark was merely to bring that thought to the attention of the committee. I cannot answer it.

Mr. McLellan. I mean to give the court power upon motion, and only upon motion, and not let the judge splash around looking at an indictment and thinking something ought to go out.

Mr. Seth. "on motion of the defendant."

Mr. Youngquist. Strike out "or of its own motion"?

Mr. McLellan. It seems to me.

The Chairman. Is there any objection to that? If not, that will be done.

Mr. Youngquist. Mr. Longsdorf.

Mr. Medalie. Of course that takes care of ex parte Bane, does it not?

Mr. Youngquist. I wonder if your question might not be answered by the fact that if the court does strike that which

is not surplusage it is not stricken because he has no authority to do it?

The Chairman. (b) on page 2. (b) (1).

Mr. Seth. Ought not "person" in line 29 to come out?

The Chairman. I did not get that.

Mr. Burns. "A defendant".

Mr. Seth. Ought not "An accused person" be "A defendant"? Or at least "person' should come out.

The Chairman. Yes.

Mr. Robinson. "A defendant".

Mr. Burns. Is it the intention of (b) (1) to preclude the Government from proceeding by indictment after a waiver?

Mr. Holtzoff. "A defendant". I do not think so. For that reason I am going to suggest that the word "shall" in line 33 be changed to"may".

Mr. Medalie. Yes.

Mr. Burns. Why I raise that question, in the light of what I know about the Anti-Trust Division's practice, they have developed a certain unofficial hierarchy of sin. If you are
5 very bad you will be indicted, but if you are not so bad you may get an information; and frequently businessmen, regarding the traditional meaning--denotation--attached to "indictment," feel a lot better if they may get an information rather than an indictment. Now, under this rule as written they could drop a note to the United States Attorney or file a waiver in the court, and then immediately the United States Attorney would be precluded from proceeding by indictment, even though from his point of view as a prosecutor it may be desirable to proceed by indictment rather than by information.

Mr. Holtzoff. Well, changing the "shall" to "may" I think takes care of that, does it not?

Mr. McLellan. No.

Mr. Seasongood. No.

Mr. Dean. You would have no right to waive, as I take it, in the anti-trust case by virtue of any language in (b) (1), because it is a misdemeanor. This applies only to the prosecution of cases where indictment is guaranteed by the Constitution.

Mr. Wechsler. I think that should be modified, and I suggest a modification.

Mr. Burns. It does not say so.

Mr. Wechsler. A modification in the following terms: that (b) (1) be changed to read:

> "In any case not punishable by death a defendant represented by counsel may consent that the proceeding shall be by information instead of by indictment, and in that event the United States Attorney may file an information."

It seems to me there is no reason to limit the cases in which the indictment is guaranteed by the Constitution nor to require a determination of the scope of the constitutional guarantee.

Mr. Holtzoff. I think you are right. You have certiorari.

Mr. Dean. I second that motion.

Mr. McLellan. Do you think that a defendant, the Government being unwilling, should have the absolute right to waive an indictment and put upon the United States Attorney the right

only to file an information?

Mr. Seth. No.

Mr. Wechsler. No, and therefore I would change the word "shall" to "may" in line 33.

(At this point Mr. Youngquist assumed the chair.)

Mr. Youngquist (acting chairman). It reads, as I have it:

"In any case not punishable by death a defendant not represented by counsel may consent that the proceeding may be by information instead of by indictment, and in that event the United States Attorney may proceed by information."

Mr. Wechsler. Yes.

Mr. Seth. He said, "not represented by counsel."

Mr. McLellan. Yes, but even then--

Mr. Seasongood. You mean "represented." You said, "not represented."

Mr. Youngquist. Oh. "represented". Yes, of course. Thank you.

Mr. McLellan. Even then, are you not in some difficulty, possibly, that if he waives the indictment he cannot be indicted anyway, and then you make it permissive for the United States Attorney to file an information or not?

Mr. Burns. No; he consents to the information, but nevertheless, despite his consent, the United States Attorney may still proceed by indictment.

Mr. McLellan. Yes, but does the language used by Professor Wechsler do it?

Mr. Burns. Will you read it again?

Mr. Youngquist (acting chairman). (Reading):

"In any case not punishable by death a defendant represented by counsel may consent that the proceeding may be by information instead of by indictment, and in that event the United States Attorney may proceed by information."

Mr. Seth. Would it not be better to say plainly in there "with the consent of the defendant and the approval of the United States Attorney"?

Mr. McLellan. I think so.

Mr. Dession. I do not believe you need that. The only right the defendant has under the Constitution is not to be prosecuted except on indictment in certain cases. Now, he can waive that, but he cannot waive anything the prosecutor has. Suppose he does waive it.

Mr. McLellan. I still think so.

Mr. Holtzoff. Your point is that when he does not give his consent he does not file an information, so you do not have to provide for consent.

Mr. Robinson. What is the objection to having two sentences, leaving the last sentence the way it is?

Mr. Seth. Yes.

Mr. Youngquist (acting chairman). Make it "shall"?

Mr. Holtzoff. No, we do not want to make it "shall."

Mr. Robinson. No; we have already changed the "shall" to "may".

Mr. Wechsler. That would not change anything, to leave

the last sentence the way it is.

Mr. Seasongood. Why do you not have the last sentence read, "After the waiver the United States Attorney may file an information or proceed by indictment"?

Mr. Burns. Yes.

Mr. Dean. That is it.

Mr. McLellan. That is it.

Mr. Youngquist (acting chairman). That would be a little shorter.

Mr. McLellan. That does it, does it not, Mr. Seth?

Mr. Seth. I think so.

Mr. Youngquist (acting chairman). All right. If that is agreeable it will so stand.

We come then to (2).

Mr. Seth. That will have to be changed.

Mr. Seasongood. Yes.

Mr. Holtzoff. In (b) (2) I think that we could omit all of line 37 except the first three words, put a period after "district," and strike out the rest of that sentence.

Mr. McLellan. Of course, the first line becomes subject to criticism here.

Mr. Seasongood. Yes.

Mr. Seth. Yes.

Mr. McLellan. In view of the change made in the preceding one, "The court shall then arraign the accused upon the information".

Mr. Robinson. "upon the indictment or information".

Mr. Holtzoff. I wonder if we need (2) at all.

Mr. Wechsler. I do not think we do.

Mr. Holtzoff. I beg your pardon?

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

Mr. Holtzoff. I don't either.

I move to strike out (2).

Mr. Youngquist (acting chairman). Is there any objection to striking out (2)?

Mr. Seasongood. Can you do it now in any division of the district?

Mr. Holtzoff. You cannot do it in any division of the district except with the defendant's consent, but if the defendant consents you can do it; so you do not really need (2).

Mr. Robinson. Oh, just a second, Mr. Holtzoff. Remember that is based on the idea that even when the court is not sitting, or in places where the court is not sitting, if there is a defendant in jail you may provide that he may waive indictment, the information may be filed, and the court may act at that time and place even though it is not in term time, even though it is not at the place where the court regularly sits--I suppose any division.

Mr. Holtzoff. The defendant may consent to have the case heard in any place outside of the division, and if you get his consent you can do it; so I do not think you need that provision.

Mr. Robinson. Oh, no; this goes beyond consent. It gives the court power it does not now have.

Mr. Holtzoff. If you limited paragraph (2) just to that thought, I think that would be different.

Mr. Robinson. I think it should be limited there.

Mr. Longsdorf. Is not the intent of paragraph (2) directed to the powers of the court to enable the court to do something

that otherwise it would not do? It is not aimed at what the defendant is going to do at all?

Mr. Holtzoff. No, but that is covered by paragraph (1) the way we now have it, Mr. Longsdorf, is it not?

Mr. Longsdorf. I know, but paragraph (1) as it now stands does not go on and include what may further be done to expedite the case upon a plea of guilty if one is then made. That is what I was getting at.

Mr. Holtzoff. A plea of guilty then becomes the same as any other plea of guilty.

Mr. Youngquist (acting chairman). The only thing, as I see it, in (2) that we need to preserve is the taking of the plea in any division within the district.

Mr. Dean. Exactly.

Mr. Seth. That is right.

Mr. Holtzoff. Why not leave it substituting something to this effect for (2): "In such event if" --

Mr. Robinson. "if an information is filed".

Mr Holtzoff. "if an information is filed the plea may be taken and the case disposed of at any place within the district if the defendant so consents"?

Mr. Longsdorf. Then, if you do it that way, Mr. Holtzoff, why not combine (2) with (1)?

Mr. Seth. That is right.

Mr. Longsdorf. And make it one paragraph.

Mr. Holtzoff. I see no objection to that. I think that is a good idea, really.

Mr. Wechsler. Mr. Chairman, was there not discussion at the meeting of the subcommittee about a proposal to allow a

plea to be taken in other divisions and perhaps even in other districts?

Mr. Holtzoff. We have that under the removal rule. We adopted that in the subcommittee, and that is embodied in this draft, Mr. Wechsler.

Mr. Wechsler. I am wondering if we need any special provision here. Why, in other words, should the leeway on where the plea is taken be greater where an indictment is waived than in the case where there is an indictment?

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Mr. Dession. It should not.

Mr. Longsdorf. There has been considerable correspondence come in to the committee about the desirability of having a way in which cases of that sort could be disposed of properly where the sentence would be small: let the man serve his sentence if he wishes to, and get it cleaned up and avoid the delay that ensued in districts where the court did not sit frequently. There is a lot of that.

Mr. Holtzoff. Yes, we are all for that, but I rather agree with Mr. Wechsler that we do not have a general rule allowing that to be done, even where the defendant is indicted instead of being proceeded with by information.

Mr. Longsdorf. I would agree to that.

Mr. McLellan. Do you need any rule to accomplish that?

Mr. Holtzoff. I do not think you do. I think the defendant may always consent to have his case tried in a division other than that in which he is indicted.

Mr. Robinson. What about outside of term time?

Mr. Dession. Some of them are accustomed to doing it that way. I think it might be well to provide that it can be done.

Mr. Holtzoff. You provide a term ends the day before the next term commences. That is the legal concept of terms under the federal statutes. You do not have such a thing as outside of term time, actually, unless the judge adjourns the term, which a careful judge does not do. He always continues the term.

Mr. McLellan. Do you not abolish terms under the rule?

Mr. Holtzoff. We do not abolish terms; we say that terms

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shall not be used as in derogation of time.

Mr. Longsdorf. Yes, but, Mr. Holtzoff, it may happen that a judge will go up to another division to take care of the business there, and he will not be there to receive the plea and pass the sentence.

Mr. Holtzoff. That is right, but the defendant can consent to be brought up to the other division.

Mr. Longsdorf. Oh, all right; if you put it in somewhere else that way, then we shall have it covered.

Mr. Dean. He may consent, Mr. Holtzoff, but as a practical matter is he going to be taken out of jail and transported by the marshal over to another division of the district if he wishes to enter a plea, unless we write it in here? In other words, the practice is, I think, so much the other way that it would be rather revolutionary, and we want it made certain.

Mr. Holtzoff. Perhaps so, Mr. Dean, but I still think that that ought to be a general provision.

Mr. Dean. I agree.

Mr. Holtzoff. And not limited to that group of cases.

Mr. Dean. Yes, I agree.

Mr. Youngquist (acting chairman). That would come under chapter 5 that relates to arraignment and pleas.

Mr. Holtzoff. So I am going to make a motion at this time to strike out (2) if I may, Mr. Chairman.

Mr. Youngquist (acting chairman). Well, with the understanding that a like provision covering both indictments and informations shall be inserted in chapter 5.

Mr. Holtzoff. Yes.

Mr. Youngquist (acting chairman). Is there any objection?

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(There was no response.)

Mr. Youngquist (acting chairman). (2) is out.

Mr. Robinson. That has to be 5, do you think?

Mr. Holtzoff. I do not know.

Mr. Robinson. Chapter 5?

Mr. Youngquist (acting chairman). Chapter 5.

Mr. Robinson. Very well.

Mr. Longsdorf. What number would this other rule be?

Mr. Robinson. I do not know.

Mr. Longsdorf. It has no number yet.

Mr. Holtzoff. Let us pass that.

Mr. Youngquist (acting chairman). Just make a note of it.

Mr. Longsdorf. All right.

Mr. Youngquist (acting chairman). We come then to (3) of Rule 8(b).

Mr. Medalie. We go to 15.

Mr. Youngquist (acting chairman). 14 or 15.

Mr. Longsdorf. By "fine only," Mr. Chairman, you want to limit that amount or specify the amount. Do all fines come under that?

Mr. Holtzoff. All fines.

Mr. Youngquist (acting chairman). Yes.

Mr. Dean. Yes.

Mr. Waite. I should like to ask this: Why does it restrict amendment of the information to cases where the punishment is not more than a year, even though no additional or different crime is charged and even though substantial rights of the defendant are not prejudiced?

Mr. Holtzoff. I think perhaps I was partially

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responsible for that restriction, because a defendant might hesitate to waive indictment if he knew that any information that was filed against him was subject to amendment. An indictment is not subject to amendment, and if you prosecute a felony by information with the defendant's consent it seems equally responsible that the information should not be subject to amendment. I might say, actually, that the prosecution will not suffer. I checked with those folks in the Department who have active charge of prosecuting cases, and they have never had any real problem arising out of difficulty over amending informations.

Mr. Waite. You mean that they have amended them?

Mr. Holtzoff. I do not know that they have had many cases where it was necessary to. In other words, it is not a problem from a practical standpoint.

Mr. Waite. Well, then they are better than state prosecuting attorneys, because in Michigan where we file an information instead of an indictment they have to amend time and time again, and we have a provision permitting amendment instanter, with a delay in the case, of course, if the defendant has been surprised.

Mr. Holtzoff. Our people hardly ever amend informations, if they ever do; I suppose that sometimes they do.

Mr. Waite. They do not use informations, perhaps, quite as generally.

Mr. Burns. Increasingly.

Mr. Holtzoff. Of course, in your state you use grand juries very rarely. Informations in the Federal courts are only used for minor offenses.

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Mr. Waite. That is it, and if the Federal courts are going to use informations more I wonder if they will not find the right of amendment increasingly necessary. I dislike to see this limitation. If it is a desirable thing, it is a desirable thing in all cases, it seems to me.

Mr. Holtzoff. I know one thing: as I say, the prosecuting officers of the Government do not think the matter is of sufficient importance even to ask for it.

Mr. Waite. If it were not in here at all I should not mind. That would leave the matter open. I hesitate to see a specific limitation to that, because it means that if it is for more than a year then it could not be amended.

Mr. Holtzoff. The answer is, after that they can always file an information unless the statute of limitations has run.

Mr. Burns. I should like to move that the first clause be stricken. I move that (3) be amended by striking out up to the words "or both" on line 41, and beginning the paragraph with, "The court may permit an information to be amended".

Mr. Seth. That is right.

Mr. Seasongood. Why do you provide only before verdict? Why should it not be amended at any time before or after verdict if you are going to give a power of amendment?

(At this point the chairman resumed the chair.)

The Chairman. Suppose a vote be put. All those in favor of Judge Burns' motion say "Aye." Opposed, "No." Carried.

Now, what was your question, Mr. Seasongood?

Mr. Seasongood. Why the right to amend is limited to before verdict or finding of guilty. The usual amendment statute allows amendment at any time.

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Mr. Burns. Even in a criminal statute?

Mr. Seth. No.

Mr. Seasongood. Well, as to that, there is very little on the amendment of criminal statutes, isn't there?

Mr. Robinson. In case of information.

Mr. Burns. I do not know, but it seems to me that you could properly draw a distinction between the civil practice and criminal practice in that respect. I mean, too liberal power of amendment, it seems to me, might very well have a bad effect on the caution and care of a prosecutor. I think if he could amend after verdict it would give him a power which he really does not need.

Mr. Youngquist. Permitting the amendment of pleading in a civil action after the verdict is a pretty liberal rule, and I think it should not be extended to criminal cases.

The Chairman. Is there a motion? Do you make a motion on it?

Mr. Seasongood. No.

The Chairman. All right. Is there anything else on (3)? If not, we move on to Rule 9.

Mr. Robinson. We have got that.

The Chairman. Rule 9(a). Are there any questions on (a)?

Mr. McLellan. Yes. Not a suggestion but a search for information. Under (a) the consolidation of indictments or informations where the defendants are not necessarily charged jointly is permitted; is that right?

Mr. Robinson. That is right.

Mr. McLellan. Does the consolidation mean not an order for trial together, but they become in effect one case? And

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if they do, can you deprive, among other things, any defendant of his right to challenges, to make him join another defendant when he is not charged jointly with responsibility?

Mr. Holtzoff. There is no Constitutional privilege involved, is there, Mr. McLellan?

Mr. McLellan. No, but he is given a right to peremptory challenges. Do you want to deprive him of peremptory challenges and make him join with somebody else in his challenges when he is not charged with the joint wrong?

Mr. Dean. That is a good question.

Mr. Youngquist. I think the purpose of that provision, Judge, was this: In the first sentence we permit a joint indictment "if the offense arose out of the same act or transaction". So that the last sentence is intended merely to proceed by consolidation in the same manner as if they had been indicted together in the first instance.

The Chairman. It relates back, does it not, to the kind of defendants who are mentioned in the first sentence?

Mr. Youngquist. Yes, "If such defendants".

The Chairman. But could you not meet Judge McLellan's point by providing for consolidation for trial, which is different from consolidating indictments? So that you would preserve the right to challenges, and so forth.

Mr. Dean. I wonder if you would preserve it if you referred to consolidation for trial. I think you would almost have to have a specific provision in there.

Mr. Youngquist. I think the purpose, the intention of the subcommittee--at least, it was my intention--was to create by consolidation exactly the situation that would have existed

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had the defendants been jointly indicted in the first instance; and if it is that kind of situation I see no reason why the consolidation should not be complete for all purposes.

Mr. Holtzoff. The use of the word "such" immediately preceding "defendants" limits the last sentence to cases where the defendants might have been joined originally.

Mr. McLellan. Yes, if you are giving the power to join defendants where they are jointly charged, with joint wrong--which is all right--but you are giving the right to join them when there are two or more acts or transactions connected together.

Mr. Dean. That is true.

Mr. McLellan. I think Mr. Vanderbilt has hit it, although I do think that that word "consolidate" has had such a meaning attached to it that you would need some other word than "consolidate". Maybe it ought to be "order to be tried together," or something of that kind.

Mr. Waite. I was going to ask a question. Perhaps that answers it. I was looking at something else when the discussion started. Is the phrase "to consolidate an indictment" a word of art meaning "order two indictments tried jointly"?

Mr. McLellan. In my experience, which is very limited, a consolidation of indictments means making one case out of two cases.

Mr. Seth. Yes, that is right.

Mr. Waite. Well, that is what I thought.

Mr. McLellan. Different from an order that two cases shall be tried together.

Mr. Waite. And that is not the idea that we are trying

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to express here, is it?

Mr. Youngquist. That is the idea some of us were trying to express--at least I.

Mr. Burns. Mr. Holtzoff, from your experience is there any advantage through a technical consolidation that the Government would not have through a simple order of a joint trial?

Mr. Holtzoff. I do not know of any.

Mr. Seth. Could you join the challenges?

Mr. Youngquist. On challenges probably it makes a difference.

Mr. Holtzoff. Your question was limited to an advantage to the Government?

Mr. Burns. To the Government.

Mr. Holtzoff. I do not know of any.

Mr. Burns. Now let me put it the other way: Are there any disadvantages to the defendant apart from cutting down challenges? Is it not true also that he is bound more directly by what counsel for the other joint defendant may do if it is one case?

Mr. Holtzoff. I do not think so, because counsel representing one defendant does not bind other defendants, no matter whether it is one case or several cases tried together.

Mr. McLellan. I do not know about that. I think there is something in Judge Burns' suggestion.

Mr. Holtzoff. Is there?

Mr. Youngquist. Sometimes he does not.

Mr. McLellan. You take two men who are jointly indicted, A and B, and A puts in some evidence that cannot be used

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against B, even though it is in A's defense.

Mr. Medalie. Yes.

Mr. Holtzoff. But would that not be the case, Judge, if A and B were being tried together though on separate indictments?

Mr. Burns. I do not think so.

Mr. McLellan. I doubt if they would go that far. They are going some when they decide, as they do, that A's evidence can be used against B, but I doubt if they would extend it to a case where there are two separate indictments and ordered tried together. But that is for the future.

Mr. Burns. I have an impression from civil procedure that "consolidate" is really a word of art carrying a most significant result so far as the substantive rights of the parties are concerned, or potentially substantive rights, and certainly the procedural rights; and I also have an impression that consolidation is a technicality that has a little aroma of the antiquated procedure.

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Now, it seems, to me, from the viewpoint of convenience, that you would attain your substantial objective if you permitted trial together, and on that score I would leave the trial judge with uncontrolled discretion. But I am a little leery of consolidation, frankly, because I do not know what the implications are.

Mr. Medalie. Well, we have consolidation now.

Mr. McLellan. The implications are, I think, that it makes them for all practical purposes one case.

Mr. Medalie. Yes.

Mr. Youngquist. May I suggest, Mr. Chairman, that for the purpose of clarifying the situation we have an expression of opinion on the part of the Committee as to whether it desires that a consolidation of indictments shall, for all purposes, be equivalent to a joint indictment?

Mr. Medalie. It is that in effect, is it not, now?

Mr. Youngquist. If that is what we want, that is one thing, but if it shall be merely a joint trial then we ought to make the changes that have been suggested.

The Chairman. You have brought it here as if it were a joint indictment.

Mr. Youngquist. That is right.

Mr. Holtzoff. Yes.

The Chairman. Now the question is, do you want that view maintained?

Mr. Medalie. Is that not the situation now?

Mr. Robinson. I was just going to say that the words are exactly the words of 18 U.S.C., Section 557--that is the

joinder statute of 1853 or 1856--which concludes, "and if two or more indictments are found in such cases, the court may order them to be consolidated."

Mr. Burns. Does that include acts or transactions connected together?

Mr. Robinson. Yes.

Mr. Wechsler. No; the joinder provision is broader here than it is in the existing statute.

Mr. McLellan. I thought so.

Mr. Robinson. However, does that specify where, Mr. Wechsler?

The Chairman. In the common-transaction clause, is it not?

Mr. McLellan. Yes. Of course that is the very guts of it.

The Chairman. Which is taken over, I gather, from the civil rules.

Mr. Wechsler. My memory has slipped here. Does the joinder statute, the one that you were reading from, deal with joinder of defendants or with joinder of charges against the same defendant?

Mr. Robinson. Shall I read it?

Mr. Wechsler. Yes, if you please.

Mr. Robinson. (Reading)

"When there are several charges against any person for the same act or transaction, or for two or more 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 whole may be joined in one indictment in separate counts; and if two or more indictments

are found in such cases, the court may order them to be consolidated."

Mr. Burns. That is one defendant.

Mr. Youngquist. That is a single defendant.

Mr. Holtzoff. That is a single defendant.

Mr. Robinson. Yes, surely.

Mr. McLellan. Of course; now, I am going to keep still after saying one more thing about this: I would not myself willingly vote that there may be a joinder in a single indictment in a case where all that you have is two or more acts or transactions connected together.

Mr. Seth. I second the motion.

Mr. Wechsler. That is the real advantage presented by the rule.

Mr. Seth. I second it.

Mr. Longsdorf. I should like to add to the Chairman's remarks that on the civil side the consolidation very infrequently makes one case out of two or more, but usually merely tries them together. That is correct, is it not, Judge?

Mr. McLellan. That is not my experience. When we use the word "consolidation" we mean we unite those two cases and make one of them.

Mr. Longsdorf. No; I am speaking of what they actually do. Usually they merely try them together and do not attempt to make them one case.

Mr. McLellan. Often they order that they be tried together, which is not a consolidation order.

Mr. Longsdorf. No. They call it a consolidation, but it is only a union of trial.

Mr. McLellan. In the case of A and B, whose only connection was that a transaction of each of them arose out of two or more acts or transactions connected together, I should not permit those two to be joined in a single indictment.

Mr. Holtzoff. What is the present statute on joinder of defendants as distinguished from joinder of charges? The one that you read just now is joinder of charges.

Mr. McLellan. That statute does not mean anything, because it says, "where they may be properly joined".

Mr. Robinson. You remember our long discussion of that at a previous meeting, Judge. We found out that that is pretty much nullified by the decisions. It merely means that that is a sort of catchover or hold that the courts can use.

Mr. Holtzoff. But, anyway, that is joinder of the same defendant.

The Chairman. The statute covering joinder of defendants.

Mr. Robinson. That is just what I shall have in a minute. Go ahead with the discussion.

11 Mr. Dean. I think the case-law rule that comes out of this is this: that each defendant you join has to be jointly charged in every offense in every count.

Mr. Wechsler. That is right.

Mr. Dean. You cannot have a defendant charged on counts 1, 3, and 4 but not on the others. It is those matters; we were talking about them.

Mr. Holtzoff. That is right.

Mr. Wechsler. This provision goes beyond the existing law in the respect that it does not require the defendants to be jointly culpable so long as the other conditions are met.

Mr. Burns. And certainly "connected together" is a rather vague standard. Does it mean the acts or transactions connected in time or connected by some common denominator of culpability or related by some correspondence?

Mr. Wechsler. Mr. Chairman, I should like to speak in defense of this rule as it stands. The language certainly suffers from the ambiguity that Judge Burns just pointed out, but I think it was deliberately chosen in the light of that ambiguity. It is fairly traditional language in civil statutes, and the purpose here, as I recollect, was to broaden permissive joinder in criminal cases to all situations in which there is some common element in the charges against the various defendants that provides a just basis for trying them together.

The way to reach that, as a drafting matter, seems to be to make the basic joinder provision broad in these terms, requiring a connection, if you will, without defining what the connection must be, and then in subsection (c) to provide for a severance, for a separation, in the discretion of the court. That was intended to reach substantially the situation with respect to the scope of permissive joinder that you have in civil cases. Such acts are controlled by the court.

I do not believe that there is any formula short of this that can permit a broad initial joinder subject to that separation, though I believe we can go back to the common-law rule requiring joint liability, or perhaps get part of this by sticking to the "same act or transaction" clause and eliminating the "connected transactions" clause. I do not think that that would narrow this quite as much as the change might seem to indicate, because it would rather sharpen the problem for liti-

gation into what constitutes the same act as distinguished from connected acts; and, after all, there is no conventional symbol of identity there. The thing is extensible.

Mr. Burns. Mr. Chairman, would not the social policy which Mr. Wechsler is anxious to attain be reached if you provided that both for joinder of defendants and joinder of charges the joinder would be limited to situations where the offenses arose out of the same act or transaction, and then gave to the trial judge unlimited power of consolidation for purposes of trial wherever the acts or transactions were connected?

Mr. Holtzoff. I, for one, believe that we should have very liberal and broad rules on joinder of charges against the same defendant.

Mr. Burns. Yes.

Mr. Holtzoff. I am a little bit fearful of broadening the existing law as to joining defendants, because I do conceive that that may be a source of injustice at times.

Mr. Wechsler. Take the existing law in the situation where the Government charges a conspiracy against a large group of defendants--the commonest type of charge. Now, very frequently there may be a failure of proof of the conspiracy but an abundance of proof that all the defendants charged committed federal crimes in the course of a series of connected transactions. It seems to me that there ought to be permissive joinder in that situation: that failure of proof of conspiracy ought not to require dismissal as to the defendant who was not proved a conspirator where the proof does make out that he committed a crime tied into the general pattern.

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Mr. Burns. That result would be reached by my suggestion.

Mr. Wechsler. I do not think so, in the same aspect, Mr. Burns. There may have been 40 different stockholders, and the Government, in a corporation, brings everybody in on a conspiracy charge. I suppose the findings of conspiracies are made by juries of particular individuals where it would be impossible to convict them merely of the crime of maintaining a still; the finding of conspiracy would not be made.

Mr. Burns. Under my suggestion it would have an indictment of the whole group, an indictment for the separate offenses separately, and then on motion of the Government they would be consolidated together for trial, and then the not guilty verdict or the motion for a directed verdict which the trial justice would have to allow as to the conspiracy indictment, would not prevent the jury's passing on all the subsequent offenses even though they are all joined solely on the use of a still.

Mr. Wechsler. Well, then, it seems to me there is virtue in this suggestion. The Government in the first instance would charge all together, and it seems to me the burden ought to fall on the defendants.

Mr. Holtzoff. Well, where 40 defendants are charged with criminal conspiracy and the evidence does not show conspiracy, and all the 40 defendants ran the still, I think it would be gross injustice to allow the verdict to stand because the evidence may vary, and the jury, having the whole gang of forty, might convict them all, whereas, if they had been separately tried some of them might have been acquitted.

Mr. Wechsler. If you put a case where there is failure

of conspiracy of all 40, proof as to 35--

Mr. Holtzoff. Well, then, the other five I think ought to be dismissed.

Mr. Wechsler. Why?

Mr. Holtzoff. Because they are prejudiced in the eyes of the jury.

Mr. McLellan. Well, can those five who had nothing to do with the conspiracy and who are not themselves closely connected together, one runs one still and one another,--ought not have to go through a long trial?

Mr. Burns. I think we ought not lose sight of the fact that frequently prosecutors put in a charge to include counts of conspiracy because the judge cannot pass on it until the evidence is in connecting up the various elements.

Mr. McLellan. Why should we say a defendant who is not a conspirator should have to be subject to all the confusion in the minds of the jury that arises out of a rule of evidence as to the admissibility of statements by one conspirator to bind the others?

Mr. Medalie. Judge, I think there is a misconception about that that is prevalent.

A person charged alone with a subsequent offense may have offered against him evidence of the acts or declarations in furtherance of the objective of a commission of an offense by the persons who are not named as defendants.

I will give you a simple example of it--

Mr. McLellan. If they are charged to be conspirators.

Mr. Medalie. Even if they are not. If A is charged with robbery, and that alone is charged, evidence that B and D

aided him in that robbery may be offered, and, other acts in furtherance may be offered against him.

Mr. Burns. If you prove agency.

Mr. Medalie. Well, you prove it by common action. In fact, the declaration itself in furtherance of that objective itself establishes the connection.

Now, that rule of evidence--

Mr. McLellan. Is evidence of the connection?

Mr. Medalie. Yes.

Now, that rule is applicable even when a conspiracy is not charged and even when the co-conspirators are not named as defendants in the subsequent of

Mr. Wechsler. So i iracy is in fact charged.

Mr. Youngquist. No

I tried one man on th and charged conspiracy existed between him ntroduced evidence of acts and declarations on t s who were not named in the complaint at all, ved, of course, under the well-established rule

Mr. Burns. What you have sa that there is a conspiracy that has not been all

Mr. Youngquist. That is it.

Mr. Medalie. And the rule is, when you commit a crime, every agency connected with the commission of that crime is the subject of proof.

Mr. Burns. But frequently where the conspiracy has been charged the trial judge would admit testimony where there has been no attempt to connect up the action of the defendant.

Mr. Medalie. You need not deal with conspiracy. You take

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the ordinary mail fraud case where there is no conspiracy count. The case is complicated. The judge does not know the connection.

That is all there is to that. And he does not know what may develop. And he says, "I cannot at this stage of the case tell whether or not this will be connected. I can tell later after all the evidence is in and then I can give you a ruling as to whether or not there has been a connection."

In the meantime he says, "I must take it step by step."

Mr. Burns. You are talking about the Southern District of New York.

Mr. Medalie. That is universal. You take any complicated case, a case where there is elaborate conduct out of which you conclude that there has been concerted action by people who commit an offense; you cannot conclude that until the evidence

2 is in, so when the first piece of evidence comes in there is no connection. Later a connection develops.

Now, these remarks are made by judges frequently in connection with a conspiracy count, but they can be made just as well in connection with a subsequent offense where there is no conspiracy charge.

Now, there was a famous case tried in New York in the summer of 1938, not a federal case, where a famous politician was on trial, and in the first trial of that case the court said, "I cannot take that evidence. You have not established connection." And that happened from time to time.

Well, those of us who had had a wider experience in these more complicated federal cases knew the ruling was wrong, because the district attorney could not prove the connection completely in the first instance, by the first item of that

evidence; he had to go ahead and complete that.

You know the case I refer to.

Now, that is a common experience, and competent lawyers coming in to try a criminal case object to the evidence on the ground the connection has not been proved. The judge says, "I have to wait to establish the connection."

Mr. Burns. Oh, it seems to me it would require a showing by the district attorney as to what way he expects to make the showing, because a lot of the testimony is admitted when it does not turn out to be connected.

Mr. Medalie. Well, the way the district attorney can make the connection is by a reasonably frank opening to the jury. He says, "I intend to show certain acts," and he has done enough. He cannot do it all by putting all the evidence in at once.

Mr. McLellan. Well, Mr. Chairman, I understand the question to be under Rule 9 (a), whether you are going to permit the defendants to be charged together.

I move that not be adopted.

Mr. Burke. I second it.

Mr. Chairman, may I ask Mr. Holtzoff to repeat again the reasons he assigned as a practical matter?

Mr. Holtzoff. Well, I took the suppositious case that Mr. Wechsler had in mind. Suppose 40 defendants are indicted jointly on a charge of conspiring to violate the liquor law.

Now, conspiracy is established against 35 of the 40. It is shown that each of the other five ran a still independently of each other and independently of the conspiracy.

Now, I think it would be highly prejudicial to join the other 5 defendants and to permit them to be convicted on the

same trial of the offense of running an illegal still, even though the conspiracy has not been established, because the entire atmosphere of the trial, the evidence of the conspiracy, will naturally be damaging so far as they are concerned in the eyes of the jury, and, unfairly so.

Mr. Burke. Well, that impressed me, Mr. Holtzoff, and perhaps the case of still operators may be a far-fetched one, There are many other cases of even more serious import in which the rights of a man might be more seriously jeopardized.

Mr. Robinson. I would like to make a comment on that motion. If you adopt this motion of course you are reversing the action taken by the Advisory Committee at the first meeting.

At that time you remember we considered this Washington case, State v. Blakely, 70 Pacific (2d) 99, decided in 1937.

You recall in that case there was an indictment for manslaughter in which the defendant A had left a bus parked illegally on the highway.

Defendant B, driving while drunk, collided with the rear end of the bus, killing the deceased.

The question was whether A and B could be joined in the same indictment.

It seemed to me in discussing the case with the Committee that the conclusion of the Washington court that they could not be joined was not right.

In other words, I was agreeing with the position I understand that Judge McLellan is taking now, but the Committee seemed to be very strongly of the opinion that in such cases it should be possible to join defendants.

I believe some of the grounds stated were that here you

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have a transaction that involves substantially the same facts, if you try these men separately you have to have the same group of witnesses come at separate times and testify to substantially the same situation; and besides it was suggested that both of them were concerned in the death and therefore that the case should all be tried together by joining these two defendants.

I just suggest, if the reasons that appealed to you then appeal to you now, you are against the motion.

Mr. Holtzoff. Maybe it is a sober second thought.

Mr. Robinson. That is right.

Mr. McLellan. Well, doesn't Rule 9 (a) go far beyond the Washington case?

Mr. Robinson. In what way, Judge?

Mr. McLellan. "* * or if the offense arose out of the same act or transaction or out of two or more acts or transactions connected together".

Mr. Robinson. I don't believe so, Judge. Since that time you have left this 9 (a) in substantially this form, and the three meetings of the Style Committee also have gone through it and left it this way; and therefore I think we ought

3 to proceed with caution now.

And I believe it was the view of members of the Committee that the clauses which you read would be necessary to cover the Washington case.

Mr. Longsdorf. Mr. Chairman, may I prompt our reporter. After a good deal of research work had been done on this point didn't we arrive at the conclusion that this states substantially the existing law under section 557 as propounded by the courts? Is this not substantially a carrying forward of 557

into the rule?

Mr. Robinson. I would like to get the record correct on that. 557 applies to Rule 9 (b). It applies to joinder of charges.

Mr. Longsdorf. I know.

Mr. Robinson. Of course there are federal statutes in regard to joinders and the punishment of accessories, but it is mainly case law that 9 (a) is built on.

Mr. Wechsler. 9 (a) goes beyond any existing case law.

Mr. Robinson. I am not certain of that.

The Chairman. Is the point where it goes beyond the case law that clause where it starts at line 5?

Mr. Wechsler. I don't know of any case law that sustains the preceding clause unless the case in question also falls under the first clause, namely, joint participation.

Mr. Robinson. What about the Washington case?

Mr. Wechsler. I don't believe under federal practice joinder would be permitted in that Washington case.

Mr. Dean. I believe that is right. It is not now possible.

Mr. Wechsler. Right.

Mr. Dean. That is my understanding of it.

The Chairman. May we have a vote on the policy of the thing?

Mr. Seasongood. May I just mention here, I notice in the Ohio Code there are certain actions that may be joined, 11306, and it says, "The causes or actions united must not require different places of trial and except as otherwise provided must affect all the parties of the action."

Then when you come to consolidated actions in 11369, it is

only if the actions have been joined.

So I don't see why you want to bring in consolidation of different indictments and proceedings.

Mr. Wechsler. But this consolidation is only permissible if the defendants have been joined under the indictment, under the first part of 9 (a), so in that respect it follows the practice you just stated.

Mr. Robinson. Of course that first clause of 9 (a) is so obvious you really don't need to state it.

Mr. Seasongood. It says, if the offense grew out of the same transaction.

Mr. Wechsler. What is the basic joinder provision then, the one you just read?

Mr. Seasongood. This says for joinder you must not require different places of trial and it must affect all the parties to the action.

Mr. Wechsler. In that respect this is a broader provision than the one you read.

Mr. Seasongood. Well, if your civil actions only allow joinder in that limited class of cases, it does not seem to me that federal joinder should be broader.

Mr. Wechsler. But that is one of the narrowest in the country.

Mr. Medalie. In the type of civil litigation which has taken up considerable time in the courts, we have just that situation, derivative stockholders' actions, the directors, some of them liable on one item of waste, misappropriation, and so on; others liable on other items. Some liable jointly, sometimes liable together. But they are all put together in one

action. That is a common thing going on all the time.

Mr. Wechsler. I do believe there is a provision in what Mr. Seasongood read that should be in here, namely, that different places of trial are not required.

Mr. Burke. What was that, again?

Mr. Wechsler. In the code from which Mr. Seasongood read the joinder provision requires--the joinder provision does not apply if different places of trial are required.

And that should be in here.

Mr. Robinson. It seems to me the federal judge could be

4 trusted to sever wherever required, or, consolidate.

Remember we have paragraph (c) which provides that the court may order separate trials of defendants charged--

Mr. McLellan. But that does not confer any right on the defendant dragged in. He is submitted to the discretion of the judge.

Mr. Youngquist. Is that thought answered by the fact that an indictment must be tried in the district where it is found, and that indictment may not be found in a district unless the offense has been committed within its limits?

Mr. Wechsler. Yes.

The Chairman. To bring it to a head I suggest we have a vote on the first sentence of 9 (a).

All those in favor of the first sentence of 9 (a) say "Aye." Opposed, "No."

Show your hands, please.

Mr. Burns. If I may make a statement, the first sentence of 9 (a) says: "Two or more defendants may be joined in an indictment or information if they are alleged to have partici-

pated jointly in the same offense."

Mr. Wechsler. That is the first clause, but this brings in the whole business.

The Chairman. Maybe we had better vote again.

All those in favor of the sentence from line 2 to line 6 say "Aye." Opposed, "No."

Show hands for noes? One, two--six.

The motion is carried.

Mr. Waite. That does not necessarily prove anything because I don't know how to vote, and I am not voting either way. I am just completely stumped on the thing.

Mr. McLellan. This is revolutionary.

Mr. Seasongood. How do you know it is carried?

The Chairman. The ayes made an awful lot of noise.

Show hands from the ayes.

From the noes.

Seven to five.

Mr. Longsdorf. I wonder, Mr. Chairman, if the objections might be obviated by the suggestion that you yourself previously made, eliminating the phrase occurring in lines 5 and 6, "or out of two or more acts or transactions connected together."

Mr. Holtzoff. I would vote aye if that were out.

The Chairman. It seems to me that takes care of nine-tenths of your difficulties because if you get the rare case

5 where common offenses arise out of the same transaction, the protection of severance is enough to tide you over.

Mr. McLellan. I think that reaches a good deal, but that last thing about two or more acts connected together--my, I tell you--

Mr. Robinson. Would it not be well to strike out in that line above too, "the same act"?

Mr. Youngquist. No. That covers a much narrower field. Where you have a similar act, although they may not be combined together under the first clause, you have a quite different situation from that which arises when there are two or more acts or transactions in which they may have participated. It narrows it a great deal.

I have been a little doubtful right along about including two or more acts or transactions although I have supported it.

The Chairman. If we leave that out we are right back to the civil paragraph.

Mr. Youngquist. Well, I move that the phrase, "or out of two or more acts or transactions connected together", appearing in lines 5 and 6, be stricken.

Mr. Holtzoff. I second that motion.

Mr. Robinson. I thought the main objection was to the word "acts", and leaving in "transactions".

Mr. McLellan. Oh, that is a relief to me.

Mr. Robinson. You want the whole clause?

Mr. Youngquist. Yes.

The Chairman. All those in favor of this deletion in lines 5 and 6, say "Aye."

Unanimously carried.

The motion is to strike out of lines 5 and 6 the words, "or two or more acts or transactions connected together".

Mr. Youngquist. I moved that it be stricken.

Mr. Medalie. I dissented.

The Chairman. Do you want to vote?

Mr. Holtzoff. In line 4, Mr. Chairman, the word "offense" should be "offenses", I think.

The Chairman. What?

Mr. Holtzoff. In line 4, the second time the word "offense" occurs, that ought to be "offenses".

"* * if the offenses arose out of the same act".

Mr. Robinson. Are you sure about that?

Mr. Holtzoff. I am. It does not make sense to say "the offense".

Mr. Robinson. I think it does. In this Washington case it does.

Mr. Holtzoff. The same act but two offenses.

Mr. Robinson. No, the same offense.

Mr. Holtzoff. Then you do not need that clause.

Mr. Longsdorf. There were two offenses against the vehicle law but only one against the deceased.

The Chairman. We now come to the second sentence in 9 (a).

Mr. Wechsler. Mr. Chairman, may I interrupt you?

The Chairman. Yes.

Mr. Wechsler. In view of the last clause of the first sentence of (a), I wondered if it might be presumptuous to say that we might save part of that without controversy by formulating something that would be designed to produce this result:

That if substantially the same facts are alleged against each defendant, that then there should be a joint--that is to say, I would like to get the case where substantially the same evidence will be involved but where you may not have the same act or transaction within the indeterminate meaning of "act or transaction" in the second clause.

It may be the vote will decide that too. I don't mean to press it if it would.

Mr. Youngquist. Can you give us an example?

Mr. Wechsler. Well, take the case that has been talked about, that automobile accident case, it is substantially the same evidence, isn't it? It is all part of one picture. And I don't know whether it is the same act or transaction with respect to liability as the same act or transaction could be construed by a court, but I do know for purposes of proof that constitutes a single story and we also know there would be no unfairness to either defendant in allowing joinder in that case.

Mr. Youngquist. I suppose the situation would be so rare that it would be no hardship on the Government to prosecute them separately.

Mr. Dean. I think it is covered by this, "the same act or transaction".

Mr. Wechsler. Possibly so.

Mr. Waite. I would not think it was covered by that language. I don't know whether it ought to be or not, but I do not think it is.

The Chairman. May I have the question on the second sentence of 9 (a)? With this change, are we all agreeable to it as it is?

Mr. McLellan. Bear in mind the word "transaction" is a word of doubt.

Mr. Seasongood. It hardly would be as to defendants, would it? It refers to two defendants who are joined.

The Chairman. Or where the offenses arose out of the same act or transaction.

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Mr. Burns. I would like to make a motion on the last sentence, to change the language from "the court may consolidate" so as to read "the court may order such indictments or informations tried together."

Mr. McLellan. I second that motion.

Mr. Youngquist. That will hardly do, because we are speaking of a single indictment--"such indictments or informations"? What does that relate to?

6 Mr. Burns. If such defendants are charged separately the court may order.

Mr. Youngquist. Oh, I see.

The Chairman. Any discussion? If not, those in favor say "Aye." Opposed?

Carried.

Mr. Robinson. As a matter of expression, Judge Burns, may I ask why you say that?

Mr. Burns. Well, again I am a little gun-shy of the word "consolidated". Joinder of Offenses

The Chairman. All right. We come now to (b).

Mr. Waite. The same change, I think, Mr. Chairman, ought to be made in line 12 that we just made in line 6.

Mr. Youngquist. Before we come to that, ought we not strike out lines 9 and 10, "or out of two or more acts or transactions connected together"?

Mr. Burns. I don't think so, because the same objection is not apparent.

This is where two or more charges are against the same person.

Mr. Youngquist. I see.

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The Chairman. That I think is safe.

Mr. Youngquist. I misapprehended the meaning of it.

The Chairman. All those in favor of Mr. Waite's motion to make the sentence in line 12 conform to line 6, say "Aye." Opposed, "No."

Carried.

(c) is the next.

Mr. Robinson. We have some changes on that. I think Mr. Holtzoff and Mr. Youngquist agreed on this.

Starting with (c), "Separate Trials of Defendants on Charges. Whenever justice requires it, the court may order separate trials of one or more defendants jointly charged and may order separate trials of one or more counts of an indictment or information."

"or of a consolidated proceeding," since we dropped the word, that should go out.

Mr. Waite. You don't like the idea of separating a defendant?

Mr. Robinson. That was yours--

The Chairman. Will you repeat that sentence so we may all get it?

Mr. Robinson. "Whenever justice requires it"--

The Chairman. You do not need the "it".

Mr. Robinson. --"the court may order separate trials of defendants" or "of defendants jointly charged"--

Mr. Youngquist. Or "one or more defendants jointly charged", so we may group them.

Mr. Robinson. Well, that is what Professor Waite was objecting to.

Mr. Waite. No, I was just objecting to separating the defendant. I think it is hard on them.

Mr. Robinson. That is it. It is a separate trial of one defendant, and it is hard on them.

Mr. Youngquist. "* * may order separate trials of one or more of the defendants".

Mr. Robinson. "* * may order separate trials for one or more defendants jointly charged and may order separate trials of one or more counts of an indictment or information."

The Chairman. Is that an acceptable change?

Mr. Holtzoff. Yes, I think that is all right.

The Chairman. Any questions?

Mr. Seasongood. You see, there are two. You may join them, in (a), if the offense arose out of the same act or transaction. Then, if you join them, can you separate those two? Don't you have to put that in too?

The Chairman. Well, they would be jointly indicted, so you would separate the joint indictment for the purpose of trial.

Mr. Wechsler. I think the word "jointly" is bad there.

Mr. Robinson. "Charged together", would you say?

Mr. Wechsler. Yes.

Mr. Robinson. "Charged together" instead of "jointly charged". All right, "charged together".

The Chairman. We will get the motion read again. It is (c) you are revising. Will you read it again?

Mr. Robinson. "Whenever justice requires, the court may order separate trials for one or more defendants charged together, and may order separate trials of one or more counts of

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an indictment or information."

The same thing--"and may order separate trials"--no--

Mr. Holtzoff. That's right.

Mr. Robinson. How could you have separate trials on one indictment?

Mr. Holtzoff. You separate counts.

Mr. Robinson. Counts; that is right.

The Chairman. Any remarks?

All those in favor of the motion say "Aye." Opposed, "No."

Carried.

That moves us to Rule 10.

Mr. Robinson. It should apply to information as well as indictment.

After "indictment" in line 3, insert "or information".

Mr. Longsdorf. I suppose you can dismiss it only when more than one defendant is charged.

Mr. Robinson. I suppose.

Mr. Longsdorf. Somebody might contend for that.

The Chairman. I think you should have "if" in line 2 instead of "as", to make it conform in line 2.

Mr. Robinson. Well, another suggestion has been made, that the court shall; strike out "as justice requires".

7 Mr. Dean. "Whenever" is what you used before.

The Chairman. "Whenever." Is that what you had?

Mr. Youngquist. Yes.

The Chairman. Well, that should conform.

Any other suggestions on 10?

If not, we will go on to 11 (a).

Mr. Robinson. 11, I suppose, will need to be considered

with the rule on warrants or summons, Rule 4, which we considered in connection with the magistrate.

The instructions of the Committee were to provide that 11 be consolidated--that 11 incorporate by reference, so far as possible, provisions for warrant or summons as contained in Rule 4.

You recall Rule 4 applies to warrant or summons issued by the committing magistrate.

This provides for warrant or summons following indictment or information.

Of course the provisions for the two are largely the same.

So I take it, since you have referred to the subcommittee Rule 4 for reconsideration, the same would apply to Rule 11 after whatever discussion you make here.

Mr. Waite. You remember also, Mr. Robinson, we changed Rule 4 that it should not command the marshal--

Mr. Robinson. Miss Peterson has it as revised by your subcommittee this morning.

Mr. Holtzoff. It is a little different from the other.

A bench warrant is always served by the marshal, so it is not improper to provide that the marshal--

Mr. Waite. You mean that only the marshal can arrest under this--

Mr. Holtzoff. That is the usual practice. It is issued to the marshal. It is never issued to an investigating officer.

Mr. Waite. Suppose the marshal does not find the man but some other officer can find him?

Mr. Holtzoff. Another officer can make an arrest on probable cause for arrest, but ordinarily bench warrants run to

marshals.

Mr. Waite. Well, as a matter of fact you have it provided in Rule 11 that it need not be served by the marshal, because under (c) it says, "The warrant shall be executed and the summons shall be served as provided in Rule 4", and Rule 4 provided that the warrant be executed by the United States marshal or some other officer authorized by law.

Mr. Youngquist. I think that came, Mr. Waite, from the use of similar language in 4 without noticing the different situations.

Mr. Holtzoff. I know that invariable practice is to issue a bench warrant to the marshal and not to the investigating officer.

Mr. Waite. At any rate, either (b)(1) or (c) in 11 should be changed. They are inconsistent as they stand.

Mr. Youngquist. May I suggest, Mr. Chairman, that we now consider Rule 4 which deals with the same subject, and then we can conform Rule 11.

The Chairman. The proposition is really no problem situation because the marshal may deputize anybody.

Mr. Holtzoff. Surely.

The Chairman. All right. We will go back to Rule 4, which has just been distributed.

Mr. McLellan. By the way, in view of the fact that we have eliminated the petty offense, I think we should strike out the provision that in cases triable by the magistrate he may issue a summons--that occurs in line 7, all of line 7, and the first half of line 8.

Mr. Robinson. Do we have to ignore the fact that the

magistrate does have that power?

Mr. McLellan. Well, he does if he has had it specially conferred upon him.

Mr. Youngquist. We are not dealing at all with these rules with cases triable by the magistrate.

Mr. Robinson. If he has not had the power conferred upon him, line 7 would not apply; it would be one who has power to try.

Mr. Youngquist. That should properly appear in the petty offense rules, and not here.

Mr. McLellan. Have you moved that that be stricken out? If you do, I second it.

Mr. Youngquist. Yes.

Mr. Burke. Are the petty offense rules the only ones that apply to trials by commissioners?

Mr. Robinson. I think nobody knows. The law is so chaotic that no one knows.

The Department of the Interior has created one for most of the national parks, and there is something with regard to navigation offenses.

Mr. Longsdorf. That is not before a commissioner, that is before a court.

Mr. Robinson. What about the law in Alaska?

Mr. Burke. But do those rules which are called the petty offense rules cover all procedures before United States commissioners in all instances where they have trial jurisdiction?

Mr. Holtzoff. No; those rules are specifically related to trial jurisdiction of the commissioner conferred by the Act of 1940, namely, the jurisdiction to try petty offenses.

Mr. Burke. If that is the situation, should we strike this?

Mr. Robinson. I think not.

Mr. Youngquist. I thought we decided yesterday that the phrase "committing magistrate" related only to preliminary proceedings leading to the indictment or information.

Mr. Burke. I don't know that we concluded that. I think we used that as part of our rationale for abandoning the petty offense rules, but we do have this area of offenses over which commissioners have trial jurisdiction as to which they may need help, I don't know, but which are not covered by the petty offense rules.

8 Mr. Youngquist. Wouldn't we be in this situation:

First, we would be confronted with the necessity of setting up a whole set of rules for trials by commissioners not covered by the rules already adopted by the Supreme Court; then, second, the commissioners would be operating under two sets of rules, some applicable to those covered by the 1940 statute, and these cases covered by the rules that we propose?

Mr. Burke. I think we might.

Mr. Youngquist. I think it would be an impossible situation.

Mr. Burke. But this is in the interests of criminal prosecution. I wonder if the Supreme Court considered these other situations where the commissioners acted as trial judges.

Mr. Holtzoff. I don't know that they did, but I would like to supplement the answer I gave to that question long ago.

The rules relate only to trials before commissioners under the 1940 Act, but it seems to me that the 1940 Act really

supersedes the prior acts conferring jurisdiction on national parks.

There are specific statutes on national parks, then along comes the general statute authorizing the commissioners to try petty offenses committed on any reservation, so I believe the 1940 Act covers any--

Mr. Robinson. Just a minute on that. Isn't it true that since that act was passed there have been other national park acts passed?

Mr. Holtzoff. Yes, but that is really surplusage because the 1940 Act would apply as it was, and it is unnecessary draftsmanship. Nobody amended the bill as it went through.

Mr. Youngquist. Are there any offenses tried by commissioners other than those committed on federal reservations?

Mr. Holtzoff. No, except of course Alaska. In the continental United States, so far as I know, there is no trial jurisdiction vested in commissioners,--except petty offenses on federal reservations.

Mr. Youngquist. Then that seems to answer the question whether there are any offenses triable by commissioners that are not covered by the rules promulgated by the Court, and, that answer would be in the negative.

Mr. Dean. I wish I could be satisfied on that point. If that is the answer, it clears up the situation. If that is not the answer, it is a very unfortunate situation, it seems to me, to have your petty offense rules covering part of the trials, and not the other.

Mr. Holtzoff. What is it you have in mind?

Mr. Dean. I just don't know. I think the committee might

be furnished with something on this trial business.

Mr. Longsdorf. In the research work I made as careful a search of the statutes as I knew how to make to see whether there was any trial jurisdiction in commissioners except those cases characterized by the fact that the offense was committed on federal reservations, and therefore covered by the 1940 Act, and I could find nothing.

Mr. Robinson. That may be sufficient.

Mr. McLellan. The point of the question is whether we should strike out that sentence or let the whole thing go in.

The Chairman. That is right.

Mr. Robinson. We have no jurisdiction in regard to commissioners in the proceedings before them, at least in their dealings with petty offenses. Shouldn't we have a general clause on that, because otherwise our first two or three rules the commissioners might think apply to them?

Mr. Youngquist. I thought we were going to put in a rule on trials by commissioners of petty offense cases. Won't that clarify the situation?

Mr. Longsdorf. I understood that was to be done.

The Chairman. All right, now. Have we a motion?

Mr. McLellan. Well, Mr. Youngquist made one and I seconded it.

The Chairman. The motion is to strike line 7 and the first half of line 8.

Those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. McLellan. Now, I move the adoption of Rule 4 (a).

Mr. Holtzoff. I second the motion.

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The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

We now come to 4 (b).

Mr. McLellan. I move the adoption of 4 (b)(1).

Mr. Holtzoff. I second the motion.

The Chairman. Those in favor say "Aye." Opposed, "No."

Carried.

Mr. Holtzoff. In (b)(2) do we need the second clause beginning on line 21?

Mr. Youngquist. I think the purpose of that clause is to let the magistrate know whether the defendant is likely to come or not. If he does not sign the recognizance he may choose to issue a warrant for his arrest.

Mr. McLellan. I move the adoption of Rule 4 (b)(2).

Mr. Holtzoff. I second the motion.

9 The Chairman. I might suggest, it might be better to break it into two sentences.

Mr. Youngquist. All right. Strike out the word "and".

The Chairman. All those in favor say "Aye." Opposed, "No."

Unanimously carried, and we move on now to (c).

Do I hear a motion on (c)(1)?

Mr. Youngquist. I think the word "a" should be inserted between the words "serve" and "summons" in line 27.

I make that motion.

Mr. Holtzoff. I second the motion.

The Chairman. Those in favor say "Aye." Opposed, "No."

Carried.

(c)(2).

Mr. McLellan. I move the adoption of (c)(2).

Mr. Holtzoff. I second the motion.

Mr. Medalie. This just occurs to me. Why do we say "except a subpoena" in line 30?

Mr. Holtzoff. A subpoena runs throughout the United States.

Mr. Medalie. Why do we say "except" it?

According to this, someone just reading this might think you could not serve a subpoena within a hundred miles of the commissioner's office.

Mr. Holtzoff. This says, "any other process except a subpoena", because if you did not except a subpoena this might be taken as a limitation on subpoenas. You have another provision in the subpoena rule that they may be served anywhere in the United States.

Mr. Waite. In view of the fact that this is headed "Warrant or Summons" why do we need the phrase "or any other process"?

I think it ought to be stricken out.

Mr. Youngquist. Is a subpoena a process? That is a doubt that occurs to me.

Mr. Holtzoff. Is a search warrant a process? That is the only other thing I can think of.

Mr. Youngquist. I doubt it.

Mr. Holtzoff. I doubt it too.

Mr. Waite. Inasmuch as this purports to deal only with warrant or summons, I move that in line 30 the words "or any other process except a subpoena" be stricken.

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Mr. Longsdorf. I second that.

Mr. Holtzoff. Then you want to insert that in line 29, don't you, warrant or summons?

Mr. Waite. Yes.

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The Chairman. All those in favor of these amendments say "Aye." Opposed, "No." It is carried.

Is there anything else on this section?

Hadn't we stricken out "by a usual mode of travel"?

3 Mr. Holtzoff. Yes.

Mr. Dean. Did we determine the standard for that?

Mr. Holtzoff. The civil rules do not have any standard, and that has not been a source of trouble, so far as I know.

Mr. Robinson. We struck out "returnable" and put in "issued" yesterday, in line 35.

Mr. Dean. Yes.

The Chairman. All those in favor of striking out "by a usual mode of travel" and substituting "issued" for "returnable" say "Aye." Opposed, "No." The motion is carried.

Are there any further suggestions?

If not, all those in favor of (c) (2) as amended say "Aye." Opposed, "No." The motion is carried.

We now come to (c) (3).

Mr. Robinson. There again, Mr. Youngquist, you have made a change in line 38, striking "practicable" after "arrest" and inserting "as soon as may be." Do you want it this way?

Mr. Youngquist. I must have been out when those things occurred.

"As soon as may be"?

Mr. Robinson. Yes.

Mr. Youngquist. Do we need the words in line 40 "for his arrest"? We have the word "arrest" two or three times in that sentence.

Mr. Holtzoff. It would be for his arrest, I suppose.

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Mr. Youngquist. If at all, yes.

The Chairman. Why do you need it?

Mr. Holtzoff. We do not need it at all.

Mr. Youngquist. Strike out "for his arrest."

Mr. Robinson. The officer is notifying the defendant of the fact that a warrant has been issued for his arrest.

Mr. Medalie. You do not need "for his arrest."

Mr. McLellan. I move the adoption of (c) (3).

Mr. Youngquist. I second the motion.

Mr. Seasongood. I thought we had some question about "the officer shall inform the defendant of the cause of the arrest."

Mr. Youngquist. It is in there.

Mr. Seasongood. There was a good deal of a question about whether he should be informed.

Mr. Holtzoff. I think we agreed to adopt that.

Mr. Seasongood. Did we?

Mr. Holtzoff. I raised the question.

Mr. Dean. We agreed that that was particularly necessary in the case where we had no warrant, but whether it applied to the other was in question.

The Chairman. I think it should be changed to that. Where he shows the warrant, there is no need of making a speech.

Mr. Seasongood. That was my recollection of what occurred.

The Chairman. Why can't that sentence in line 39 say, "but where the officer does not exhibit the warrant at the time of his arrest, he shall inform the defendant"?

Mr. Seasongood. "Where the officer does not have the warrant in his possession at the time of the arrest, he shall."

The Chairman. That is better.

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Mr. Youngquist. May I call attention to the fact that this rule relates only to warrant or summons. I am simply pointing out for consideration whether or not that provision should come in this rule or elsewhere.

Mr. Dession. If it comes in here, it probably would not apply to arrest without a warrant. We are leaving that untouched.

Mr. Holtzoff. That is where the warrant is not in the officer's possession.

Mr. Youngquist. Will you read that?

The Chairman. "Where the officer does not have the

4 warrant in his possession he shall inform the defendant."

Mr. Robinson. "When the officer."

The Chairman. Yes, that is better. All those in favor of (3) as amended say"Aye." Opposed, "No." The motion is carried.

We come now to (4).

Mr. McLellan. I move the adoption of Rule 4 (c) (4).

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Now, what will we do with Rule 11, in the light of what we have just done with Rule 4? Refer it back to the committee?

Mr. Holtzoff. I do not think that is necessary.

The Chairman. Isn't it necessary?

Mr. Holtzoff. I think it is probably all right as it stands.

I want to make a suggestion on Rule 11 (a). In line 5 I think "or of any other officer of the United States" should go out. That phrase is in Rule 4 because there we are dealing

with commissioners. Here we are dealing with a bench warrant upon indictment or information, and in that event the United States Attorney should have sole control and no other officer should share it with him.

Mr. Medalie. That is right. You are now in the court and you have a responsible representative of the Government.

TheChairman. Those words will be stricken.

Mr. McLellan. What line is that, please?

The Chairman. Line 5.

Mr. Longsdorf. Mr. Chairman, before we pass line 4, if the defendant is already in custody, of course no bench warrant would need to be issued, and would not be issued. Do you want to put something in to cover that?

TheChairman. Isn't it implied?

Mr. Longsdorf. Beginning on line 2, it reads:

> "The clerk upon the filing of an indictment or information shall forthwith issue a warrant as required for each defendant charged therein."

Mr. Medalie. "And not apprehended."

Mr. Longsdorf. "And not in custody."

Mr. Dession. "As required" covers it.

Mr. Holtzoff. I think the words "as required" cover that.

Mr. McLellan. I move the adoption of Rule 11 (a).

Mr. Holtzoff. I second the motion.

Mr. Youngquist. May I ask a question about that? Weren't we going to conform Rule 11 to Rule 4, or not?

The Chairman. I thought we were, but the suggestion was made that it seemed to be implied.

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Mr. Holtzoff. We ought to strike out the requirement of registered mail in line 11.

Mr. Youngquist. The mailing of the summons should come down to (c), because all the clerk does is deliver it to the marshal or officer authorized to serve it. That is what we did in Rule 4.

The Chairman. The motion is to take the last sentence of Rule 11 (a) and drop to the end of (b) (2).

Mr. Youngquist. Not quite. To strike out, in lines 10 and 11, the words beginning with "or he may mail."

Mr. Longsdorf. Before we pass on, let us add to that motion a motion that the word "such," the fourth word in line 7, be taken out, because it does not make sense.

Mr. Dean. It refers back to line 4.

The Chairman. Yes, it refers back to line 4.

Mr. Youngquist. "Direction of the court."

Mr. Longsdorf. Yes, but the direction before is to issue a summons, and the direction here is to issue more than one warrant or summons.

Mr. Holtzoff. I do not think you need "such" there.

Mr. Longsdorf. I do not think "such" does any good.

Mr. Youngquist. What is intended is "direction by the court"--

Mr. Longsdorf. "Similar direction or request," or "likewise upon direction or request, he shall issue more than one warrant."

The Chairman. What is your pleasure with Rule 11 (a)?

Mr. McLellan. Are you sure it is desirable to strike out "or he may mail the summons" andput it down below?

Mr. Youngquist. The reason is that all that (a) relates to is the duty of the clerk to deliver the warrant to the marshal or the officer, and then in (c) we provide that the marshal or the officer may either serve the summons--

Mr. McLellan. You do not want to give the clerk the power, instead of delivering the summons to the marshal, to mail it himself?

Mr. Youngquist. That is right. Leave that up to the officer whose job it is to either serve it in person or serve it my mail.

We do not need the words "United States," do we, in line 9?

Mr. Robinson.. No.

Mr. Youngquist. Question.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

Now we come to 11 (b) (1).

Mr. Waite. On that I want to ask this. Suppose the warrant is issued commanding the marshal to make the arrest and the marshal hands it over to a deputy marshal, by whom the arrest is made. Could there be any question of the validity of the arrest being made by somebody other than the person commanded?

Mr. Youngquist. Other than the marshal himself, you mean?

The Chairman. Yes.

Mr. McLellan. It is directed to the marshal or his deputy.

Mr. Waite. It says here "shall command the marshal to arrest." That is what I am worried about. Suppose the marshal does not arrest. I think it would be a serious question of the validity of the arrest under that warrant.

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Mr. Youngquist. I had always supposed that any act that may be done by an officer may likewise be done, and with the same effect, by his deputy, even though the warrant is directed to the marshal.

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Mr. Holtzoff. Actually there is no problem, because if the defendant has been indicted, he can be taken into custody with or without a warrant. So even if a warrant is void or served in an illegal manner, the arrest is legal.

Mr. Waite. That unfortunately is not true, because there is one definite case that I know of, and two others bearing on it, where the arrest was made by virtue of a warrant, and it was held that that was unlawful because of a defect in the warrant; and the defense was then made that the warrant was not necessary, that the arrest could have been made on a felony charge. The court said, "No. Having made the arrest by virtue of the warrant, you cannot now change your ground for arrest."

Mr. Holtzoff. Is that a Federal case?

Mr. Waite. No; it was a state case.

Mr. Holtzoff. I do not believe any Federal court will hold that.

Mr. Waite. Well, you cannot tell. Have there been any cases on it?

Mr. Youngquist. Pardon the interruption, but your statement brought my mind to the fact that in (a) we provide for the delivery of the summons to the marshal or other officer authorized by law to execute it, whereas in (b) the only command is the one given to the marshal.

Mr. Holtzoff. I think that probably was incorporated from Rule 4 (b) and should not be here.

Mr. Waite. I think we should play safe and make it read the same as in Rule 4. It was meant to read, "command that the person shall be arrested." Then we are safe.

Mr. Youngquist. That is good. Then we should go back there and strike out from lines 9 and 10 the words "or other officer authorized by law to execute it."

Mr. Waite. We do not need to do that if we change (b) (1) to conform to Rule 4.

The Chairman. Should line 15 read, "command that the defendant be arrested"?

Mr. Waite. Yes.

Mr. Holtzoff. I think the rest of that line should be changed. The warrant, in fact, does not read that the defendant be held subject to the order of the court. It should be changed to read, "and to bring him before the court."

Mr. McLellan. "Be arrested and brought before the court."

The Chairman. Are there any further changes in (b) (1)?

If not, those in favor say "Aye." Those opposed say "No." The motion is carried.

(b) (2).

Mr. McLellan. I move the adoption of (b) (2).

Mr. Youngquist. We do not have in (b) (2) the acknowledgment of service provision that we have in Rule 4.

Mr. Holtzoff. Do you need it, because you have an incorporation by reference?

The Chairman. It carries it over.

Mr. Youngquist. Well, the summons shall be in that form. Rule 2 says that the summons shall be as provided in Rule 4. Then we say, in Rule 4, it shall be accompanied by a form of

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acknowledgment.

Mr. Holtzoff. Don't you think that is carried there by necessary implication?

Mr. Youngquist. It is not necessary at all. I was just looking for consistency.

The Chairman. All those in favor of Rule 11 (b) (2) say "Aye." Opposed, "No." The motion is carried.

11 (c).

Mr. Seasongood. That seems to be a duplication of (c) (4) of Rule 4.

Mr. Youngquist. Yes.

Mr. Seasongood. Rule 11 (c) seems to be a duplication of our new Rule 4.

Mr. Robinson. Execution of service is included in (c). It is not merely the return but includes the execution of service.

Mr. Seasongood. It says that the person who receives the summons or serves it shall make return thereof promptly.

Mr. McLellan. Is it the same as Rule 4?

Mr. Holtzoff. It is a lot of surplusage.

Mr. Seasongood. It seems to be.

Mr. Robinson. The first two lines relate to execution and service.

Mr. Seasongood. "Or other person shall make return of the warrant or summons promptly to the clerk."

The only difference is that in one case you say "make return promptly" and in the other one "promptly to the clerk."

Mr. Robinson. In other words, "return" is included in execution and service.

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Mr. Seasongood. Yes.

Mr. Dean. It is the fourth subdivision of (c).

Mr. Robinson. Very well.

Mr. McLellan. Do you care very much--I think it is probably nonsense--to add after the words "the warrant shall be executed" the words "and returned," and after the words "the summons shall be served" the words "and returned"?

Mr. Youngquist. Do we have a provision for return?

The Chairman. Wouldn't it be held to carry back to the warrant shall be executed and the summons shall be served and returned?

Mr. Holtzoff. Why not say "the warrant shall be served and returned as provided in Rule 4"? You do not need the two

6 clauses.

The Chairman. Do you speak of serving the warrant?

Mr. Seasongood. "The warrant and the summons shall be served, executed, and returned."

The Chairman. That is better.

Mr. Robinson. Did you say "warrant and summons" or "warrant or summons"?

Mr. Seasongood. "The warrant and summons shall be executed, served, and returned."

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

We move on to Chapter IV, Rule 12.

Mr. Seasongood. Service by mail is rather summary. All you seem to say in Rule 4 (3) is that it shall be served as a summons or by mail. You are establishing a new method of summons, which I am very much in favor of, but is it

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sufficiently defined as to how service shall be made? Don't you have to have some address to the residence?

Mr. Youngquist. Those were the questions that were raised yesterday--the last known address, for instance--but the action taken, if any action was taken, by the committee was simply to provide that it be served by mail, and the reasons given were that it would always issue a warrant.

Mr. Seasongood. But as long as you are providing for service by mail, you ought to make it in some intelligible form, I suppose; and also, if service is complete when mailed or received is important.

Mr. Holtzoff. The only purpose of a summons is an accommodation to the defendant--

Mr. Seasongood. Yes, but let us say you mail it to his business address and he is not there.

Mr. Holtzoff. Then you arrest him.

Mr. Seasongood. If you are giving him some benefit by mail, why shouldn't you give it to him?

Mr. Dean. Isn't it conceivable that he may be cited for contempt?

Mr. Holtzoff. No.

Mr. Dean. Why not?

Mr. Holtzoff. You might as well say that a person is subject to contempt proceedings if a person receives a petition in a civil proceeding and he fails to file an answer.

Mr. Dean. This is from the court, and it is in the same category as a subpoena to the witness.

Mr. Youngquist. It was in line 20 where it said that the summons shall command him to appear.

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Mr. Holtzoff. If he does not comply with the summons, you arrest him.

The Chairman. If he does not get it, what are you going to do?

Mr. Holtzoff. Serve a warrant.

The Chairman. But you cannot send him to jail.

Mr. Dession. We do not say anywhere that it is not an enforceable matter.

Mr. Burke. If there should be five summonses sent to five defendants and one did not get to one of the defendants by mail, would you arrest just the one?

Mr. Dean. As long as it is a command by the court to appear, it seems to me it is enforceable by contempt. If that is the situation, it seems to me we ought to have in here more than the mere mailing of it.

Mr. Holtzoff. If there is danger that he is going to be cited for contempt, you ought to provide against it, because I think the serving of a summons is an accommodation to the defendant. Perhaps you ought to provide that if a defendant fails to appear, a warrant may be issued. If there is a danger left by implication--I do not think there is--we ought to provide against it.

I do not think we ought to have a procedure whereby a defendant shall be punished by contempt for failure to obey a summons. When you get a ticket you do not get punished for not showing up.

Mr. Dession. It depends on what the purpose is. A summons has conveniences for both prosecution and defense. If you are perfectly sure that a man will obey the summons and he

won't run away, why bother to go through the rigmarole of an arrest? That does not mean you do not want him there.

Mr. Dean. It is the nearest thing to a subpoena that I can think of.

Mr. Seasongood. You say you are accommodating the defendant. Then, accommodate him. You do not prescribe how it shall be sent. It should be sent to the last known place of residence.

Mr. Youngquist. I suggested yesterday the last known address.

Mr. Seasongood. Otherwise the attorney will say, "Where shall I mail this? To his business address or to his home?"

Mr. Youngquist. I make two suggestions, Mr. Chairman: One, that we add to line 43 in Rule 4, "or it may be served by mailing to his last known address.

Would that cover what you have in mind?

Mr. Seasongood. Yes.

Mr. Youngquist. Strike out "by mail," and make it: "or it may be served by mailing to his last known address."

Mr. Robinson. Of course, that does not necessarily mean he gets any word about it.

Mr. Seasongood. There is a presumption, ordinarily, that if you address a letter and pay the postage he receives it, according to the cases. It is up to him to show that he has not received it. That is the rule in ordinary communications.

7 Mr.Youngquist. My other suggestion is that in Rule 4, line 20, in order to obviate the danger of contempt of court--and I am not sure that there may be that danger--we change the word "command" to "advise." That is a pretty soft word.

Mr. McLellan. Then you are going to have the summons read

that way?

The Chairman. "Direct" is a little softer.

Mr. Youngquist. I think it is just as effective as "command."

Mr. Medalie. There is no dignity to a summons if you are just asking, "Do you care to come?

Mr. Dession. It seems to me the problem is what we are trying to accomplish here, Mr. Chairman. The purpose of putting in "summons", I think, is that it is not always necessary to use arrest to bring a man in. When it is not necessary to have him arrested, this is objectionable, but we would still want him to come in.

Mr. Seasongood. Notify him that unless he appears he will be arrested and brought in.

The Chairman. That may be the answer--an intimation that if he does not answer, a man will come after him.

Mr. McLellan. I do not think you need an invitation to invite him to skip out.

Mr. Seasongood. Why not say, "commanding him, under penalty of arrest, to appear"?

Mr.Holtzoff. If you say, "under penalty of arrest," somebody might construe that that failure to appear requires punishment.

Mr. Medalie. It is not a penalty; it is an alternative.

Mr. Dean. Judge McLellan, if you had the word "command" in here, would you cite a man for contempt for failure to appear?

Mr. McLellan. No. I would say, "This is all nonsense. Go get your man."

Mr. Dean. I think that is what would happen in practically all the cases, too. You would issue a warrant.

Mr. Medalie. I think you would find some judicial officers who would feel terribly affronted and wreak vengeance on a man who ignored his summons and put him in jail for contempt.

Mr. Holtzoff. Why couldn't we cover this by a note indicating that the purpose of summons is to save the defendant from arrest; and if he fails to appear, then he would be subject to having a warrant issued? That would make it clear that we do not intend that contempt proceedings may be invoked. You do not have to have it in the rules.

Mr. Dession. You would have an additional charge against him if he was held in contempt.

Mr. Youngquist. Wouldn't it be taken care of by providing at the end that if he failed to appear you would issue a warrant for his arrest, to obviate the intention of a contempt arising?

Mr. Holtzoff. Why wouldn't a note take care of it?

Mr. Youngquist. I think it would.

Mr. Dession. The difference between us is what we want this to achieve.

To bring that to a head, I will move that it is the sense of the committee that the summons shall be enforceable by contempt. I am not moving that we have that in the rule. I want to find out what we intend.

Mr. Waite. I notice that the Institute Code provides: "If the person summoned fails, without good cause, to appear as commanded by the summons, he shall be considered in contempt of court, and may be punished by a fine of not more than twenty dollars."

Mr. McLellan. Is that referring to witnesses?

Mr. Waite. No; this is referring to the kind of summons as a substitute for arrest.

The Chairman. Is there any provision for service by mail?

Mr. Waite. There is no provision for service by mail.

Mr. Dession. I think there should be something with reference to mail if it is to be a compulsory process. If it is not to be, then it is all right.

Mr. Longsdorf. If you are going to make a contempt out of that, which kind of contempt is it going to be when you get to it? A criminal contempt, attended with punishment for a contempt, in addition to what may be falling to the offense, or will it be an enforcive contempt? We are going to get that later, but it might be all right to consider it here.

Mr. Holtzoff. This could not be contempt, because it is not committed in the presence of the court, under the Nye case.

Mr. Dean. There is another section that the Nye case did not deal with.

The Chairman. The motion made by Mr. Dession is that the sense of the committee be that the summons shall be an enforceable process.

Mr. Dean. I will second it.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is lost.

Mr. Medalie. I move that the word "command" be substituted by the words "call upon," so that instead of saying it shall command the defendant, it shall call upon the defendant.

Mr. McLellan. So the summons will read, "X defendant shall be called upon to do so and so"?

Mr. Medalie. I realize the weakness of language.

8 Mr. McLellan. You command him to come, and then, by your note, you provide that he is not in contempt, but the danger of a warrant is there.

The Chairman. That will be the understanding.

Rule 12, Chapter IV.

I think Mr. Dean has some lingering doubt on that subject?

Mr. Dean. I do not think we take a sensible position when we say, "We command you to appear," and then in the footnote we say that, notwithstanding the statute which makes it punishable, we do not want this to be contempt. It seems to me that is a foolish viewpoint for us to take.

I do not know whether the word "notify," which I regard as a little bit of a weasel word, would cure the situation.

Mr. McLellan. I do not want to interrupt you. May I ask you whether you would be satisfied to have in the summons, "You are summoned to appear," instead of "commanded"?

Mr. Medalie. I think that might do it.

The Chairman. Knowing how we all treat traffic summonses, these defendants will understand just what it means.

Mr. Seasongood. I do not want to be contentious, but when you are summoned to appear, if you do not appear you are in contempt.

The Chairman. You are in default.

Mr. Seasongood. If you are summoned to appear.

Mr. McLellan. That is a subpoena.

Mr. Dession. Isn't it the result of different rules in different districts?

Mr. Seasongood. The subpoena says you are summoned under

penalty of law.

Mr. Holtzoff. No. The subpoena has the word "command."

Mr. McLellan. Some read one way and some the other. If he does not obey one, he is not in contempt. There is a lot more to it.

The Chairman. You have heard the motion to change "command" to "summon." All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Dession. I vote "No" just on the ground that it is ambiguous.

The Chairman. The motion is carried.

Now, we are on Rule 12.

Mr. Robinson. Mr. Youngquist, you made suggestions here.

Mr. Youngquist. Read them.

Mr. Robinson. On line 1, instead of "shall be entitled," insert the words "has the right." The defendant has the right to be present at the arraignment.

In line 2, after "arraignment" insert a comma, and strike out "and."

In line 3, just before "verdict," insert "return of the." After "verdict," insert a comma.

In line 6, may I ask the wish of the committee with regard to using the term "capital case"? There is some feeling that we should use "a case punishable by death" rather than "capital case." I think we have done that in our indictment and information rule.

Therefore, to be consistent there, I would suggest that we strike out, in line 6, "in other than capital cases," and insert, "cases not punishable by death," insert a comma, and

strike out "his," the next word, and insert "the defendant's."

In line 8, the third word, change "continuation" to "continuing."

Mr. Holtzoff. You would strike out the second word, "the"?

Mr. Robinson. Do you think so?

Mr. Holtzoff. Yes.

Mr. Robinson. If you do, you would have to strike out the "of" also.

Mr. Holtzoff. "Continuing" is not a noun.

Mr. Robinson. Strike out the "the" and strike out "of."

In line 9, after "appear," strike out "and plead."

Following "counsel," insert "for all purposes."

At the end of that line, strike out "misdemeanor."

In line 10, after the first word, "Cases," insert "punishable by fine or by imprisonment for not more than a year, or both."

Mr. Dean. Where does that go in?

Mr. Robinson. In line 10.

Strike out the rest of the line after "cases" and insert "punishable by fine or by imprisonment for not more than a year."

Mr. Holtzoff. "For not more than one year."

Mr. Robinson. "For not more than one year." That is right.

Then, at the beginning of line 11, insert "the court may, with," and go on with the written consent.

At the end of line 11, strike out "the."

At the beginning of line 12, strike out "court may."

Mr. Seasongood. Couldn't you have that typewritten?

Mr. Robinson. I am almost through.

20

In line 12 strike out "the" before "arraignment," and after the word "have" insert "and."

In line 13 strike out the comma after "entered" and the word "and", and substitute "or the trial to be conducted."

Insert "conducted" after "be," and strike out "commenced and continued."

Now, if you wish, I will read it the way it is:

9 "Rule 12. Presence of Defendant. The defendant has the right to be present at the arraignment, at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. The trial of a misdemeanor will be commenced and continued in the absence of the defendant on the express consent of the defendant or his counsel. In cases not punishable by death the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In cases punishable by fine or by imprisonment for not more than one year, or both, the court may, with the written consent of the defendant that counsel shall act for him, permit arraignment to be had and a plea of not guilty to be entered or the trial to be conducted in the absence of the defendant."

Mr. Medalie. There is one thing I would like to ask here. You speak, in line 4, of a misdemeanor; and, beginning with line 10, you speak of cases where the penalty does not exceed imprisonment for one year. Don't you mean the same in both cases?

Mr. Robinson. I am not sure of that.

Mr. McLellan. A conspiracy is described as a misdemeanor and is punishable by two years.

Mr. Medalie. Two years, yes. So is the offense of embezzling funds of a national banking association. It is a five-year offense.

Mr. McLellan. Is it necessary?

Mr. Robinson. In other words, you think that the expression used in line 10 should also be used for"misdemeanor"in line 4?

Mr. McLellan. Yes.

Mr. Robinson. That can be done, yes, sir.

Mr. Longsdorf. I think that word "misdemeanor" ought to be restricted, in view of the divers meanings it has in the statutes, or else we are running one thing into another.

Mr. Medalie. Isn't the second sentence, line 4, surplusage?

Mr. Youngquist. I thought the reason for putting that in was Mr. Dean's suggestion with respect to the anti-trust cases, which are called misdemeanor, but the punishments in which may exceed one year.

Mr. Dean. No. They fall in the regular definition. They may not exceed one year.

Mr. Medalie. Under the circumstances, can't we strike the second sentence? Isn't it covered by the last sentence?

Mr. Holtzoff. Yes. It is repetitious.

Mr. Youngquist. I think it is all covered by the last sentence.

Mr. McLellan. I think you are dealing with something that should be typewritten.

Mr. Robinson. Very well. You will have it this afternoon.

Mr. Longsdorf. Weren't there cases that decided that voluntary absence in a misdemeanor case could be passed over, and in those cases there was no attempt or intent to consent? You are talking about written consent down here, and that is a different type of case, with different situations and different conditions.

Mr. Medalie. You mean you can stop a trial in the case of a defendant who does not show up?

Mr. Longsdorf. In a misdemeanor case.

Mr. Medalie. You have that covered in the third sentence. That covers everything but treason and murder.

Mr. Longsdorf. The last sentence relates only to where written consent appears by counsel.

Mr. Medalie. Where the penalty is a year or less. If he walks out of the courthouse, you can go on in any case except a capital case.

I press the motion to strike out the second sentence.

Mr. Youngquist. I second the motion.

The Chairman. May we have your motion again?

Mr. Medalie. I move to strike the second sentence.

The Chairman. Beginning on line 4 and ending on line 6?

Mr. Medalie. That is right, beginning on line 4 and ending on line 6.

Mr. Youngquist. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Youngquist. This is to be rewritten and submitted to

us after lunch?

The Chairman. Yes.

Rule 13.

Mr. McLellan. I would like to ask, with reference to 13, what is to be done when the defendant does not want counsel.

Mr. Holtzoff. That contingency is not foreseen here. It ought to be.

Mr. Youngquist. This infers that it is only when he is unable to engage counsel that the court assigns one to him.

Mr. Holtzoff. Suppose he is able to and does not want to?

Mr. Burns. How about inserting after the word "defendant" "if he so desires"?

Mr. Robinson. Who is going to mention the McCann case?

Mr. Seasongood. I think it would be better to say, "The court shall assign counsel to him, unless he desires not to have counsel."

Mr. Dean. Or "if he is unable to engage counsel and desires counsel."

Mr. Seasongood. That would mean that he has to want him, and the other is better, that you assign him one unless he says he does not want one.

Mr. Orfield. What does the word "proceeding" mean in line 2?

Mr. Youngquist. It is intended to be all-inclusive, from the commissioner on. Does that include the appellate proceeding, too?

Mr. Holtzoff. I think so.

Mr. Robinson. It is intended to.

Mr. Youngquist. He is entitled to it, if he can get there.

The Chairman. What is your suggestion for covering this omission, Judge McLellan?

Mr. McLellan. "If he does not waive counsel and is unable to engage counsel," or something like that.

10 Mr. Medalie. I do not think he has to waive counsel.

Mr. Wechsler. I think Mr. Seasongood's suggestion is good.

Mr. Medalie. He can be without counsel without waiving counsel.

Mr. Seasongood. Unless he states he does not desire to have counsel.

Mr. Waite. I second the motion.

Mr. Robinson. In the McCann case he stated to the court he did not want to have counsel.

Mr. McLellan. Then, the question is still open as to whether he will waive counsel.

Mr. Medalie. McCann had plenty of money, didn't he? It was not a question of his being a pauper.

Mr. Holtzoff. The question in that case was entirely different. The question was whether the judge could accept a waiver of a trial by jury in the absence of the defendant's being represented by counsel. The defendant said he wanted to represent himself. Then he waived a trial by jury.

The Circuit Court of Appeals for the Second Circuit held that the waiver should not have been accepted, in view of the fact that the defendant chose not to be represented by counsel. So I do not think that that case has any bearing upon the question of assigning counsel.

Mr. McLellan. I do not want to prolong the discussinn, but I can conceive of a situation where a man may say that he

does not want counsel, but the circumstances be such that it could be found, nevertheless, that he did not waive the right to counsel. That is why I mention it, but I do not care.

Mr. Dean. Is there a motion pending?

The Chairman. I do not think we have any motion.

Mr. Medalie. There is a deficiency in this second sentence, and a very practical one. A man sometimes finds himself without counsel at a stage of the case later than the pleading. He ought to have counsel or the opportunity to have him. This does not provide for that.

Mr. Youngquist. Don't you think that would be implied?

Mr. Medalie. I think not. "Upon his arraignment and before he is called upon to plead." Thereafter he is without counsel. Counsel, let us say, is a person who has another engagement.

Mr. Dean. Does not the first sentence take care of it?

Mr. Medalie. He is entitled to counsel, but he won't get it unless the court gives it to him. When you say he is entitled to counsel, that means he is entitled to pick his own lawyer.

Mr. Robinson. The clause "upon his arraignment" was inserted for a reason there.

Mr. Medalie. That is the time to find out, normally. That is the reason. Also, because he does not know what an indictment is. He could not read it if you gave him eighty copies of it. If he could not read it, he could not understand it.

Mr. Robinson. There was a discussion of it, and it was suggested that there should be a provision for counsel down before the commissioner. I think it was agreed that that would

be too wide a requirement, to allow U. S. Commissioners to appoint counsel.

Mr. Medalie. That is a different proposition.

Mr. Robinson. I know it is a different proposition. In dealing with time, you want it at arraignment and at each time after arraignment.

Mr. Medalie. Just say "and thereafter."

Mr. Youngquist. You cannot do that, because the idea was that counsel shall be appointed before he was called upon to plead.

It would be better to add after the word "plead" something to the effect, "to assist him throughout the trial," or something of that sort, together with the suggestion made by Mr. Seasongood, "unless he states that he does not desire counsel," but I think that should stay as it is, Mr. Medalie.

The Chairman. "To assist him throughout the trial." That sounds like good language.

Mr. Medalie. This has to do with the time of assignment. Assume the Court has assigned counsel to him before he is called upon to plead.

The Chairman. This line added, "to assist him throughout the trial" --

Mr. Medalie. It has nothing to do with the time of assignment. The court has already fully discharged his obligations by assigning counsel to him, who is to assist him throughout the trial.

The Chairman. Suppose counsel secured permission to walk out. Under this phrase, the court would have nothing to do with it. I think you ought to have some language, as Judge

McLellan suggests, to say that the defendant may waive his right to counsel.

That was your language, was it not, Judge McLellan?

Mr. McLellan. Something like that.

Mr. Medalie. Let us see if we can do this: "Or to assist him upon the trial," and then add, "but the defendant may waive his right to counsel."

Mr. McLellan. Where are you suggesting that?

Mr. Medalie. At the end of line 4, put a comma, and add, "or to assist him upon the trial."

Mr. McLellan. "Or to"?

Mr. Medalie. "And to." You see, that should relate to the assignment.

Mr. McLellan. You do not want the "and."

The Chairman. Just say "Assist him throughout the trial," and then it is clearly implicit that when counsel number one walks out, the court still has the continuing power and the duty--

Mr. Wechsler. How about the appeal?

The Chairman. I think that is included in the second line, "at every stage of the proceeding."

Mr. Wechsler. I mean the last line, "throughout the trial."

The Chairman. "Throughout the proceeding" is better.

Mr. Holtzoff. How are you making this?

The Chairman. I suggested something to somebody: "To assist him throughout the proceeding."

Mr. McLellan. Is that going to go after the words"called upon to plead"?

The Chairman. Yes, at the end of the rule as now written.

Mr. Wechsler. How does it read as changed?

The Chairman. "If he is unable to engage counsel, the court shall assign counsel to him upon his arraignment in court and before he is called upon to plead, to assist him throughout the proceeding."

Mr. Holtzoff. I suggest that you leave out "his" and "in court." Just say "upon arraignment."

The Chairman. "But he may waive."

Mr. Holtzoff. "But the defendant may waive"?

The Chairman. No. "But he may waive his right to counsel."

Mr. Burns. Why not put that after the word "proceeding" in the second sentence:

> "A defendant is entitled to have the assistance of counsel for his defense at every stage of the proceeding, unless he waives this right."

Mr. McLellan. That is a little better.

Mr. Youngquist. That is a little different.

Mr. McLellan. After "throughout the proceeding" put "unless the right to counsel is waived."

Mr. Seasongood. If you introduce that, can there be a waiver, unless he states he does not desire counsel and waives the right to counsel?

Mr. Holtzoff. Isn't that repetitious?

Mr. Seasongood. No, because what amounts to a waiver under the Supreme Court decisions is a matter of difficulty. They want you to say that he is absolutely entitled to it unless he states he does not desire counsel.

Mr. McLellan. Don't we have to leave to judicial decision what constitutes waiver?

Mr. Burns. That is why it seems to me it is better not to

say anything about waiver, but simply to prescribe the practice as we think it should occur; and then in cases where the practice is not followed, let the courts decide whether there was a waiver in the sense of a surrender of the right.

Mr. McLellan. The trouble with something of that kind is that you are telling the judge to assign counsel, and he must assign counsel, if you leave it this way, even though the defendant has said he does not want any lawyer and waives it.

Mr. Burns. I was not defending this text.

Why doesn't Mr. Seasongood's suggestion take care of it?

"The court shall assign counsel to him upon his arraignment in court and before he is called upon to plead, to assist him throughout the proceeding, unless he says he does not desire counsel."

Mr. Longsdorf. I think it better to put in the "unless" clause at the end of the first sentence.

Mr. Youngquist. No. This relates to assignment of counsel.

Mr. Holtzoff. Why not put the "unless" clause at the beginning of the second sentence?

Mr. McLellan. "Unless he refuses or waives counsel."

Mr. Wechsler. Mr. Commissioner, may I suggest this as a resolution?

The Chairman. Surely.

Mr. Wechsler. The first sentence as it stands. A new second sentence, which reads:

"The court shall assign counsel to any defendant who is unable to engage counsel, unless the defendant elects to

manage his own cause."

A third sentence, which will read:

"Such assignment shall be made upon arraignment and before the defendant is called upon to plead."

Mr. Holtzoff. Shouldn't you use some other word than "manage"?

Mr. Wechsler. I believe the District statute which deals with the subject speaks in terms of management. There is a statute that gives him the right to remand--

The Chairman. It sounds like an impeachment proceeding to me.

Mr. McLellan. You say, "Do you want a lawyer?" You do not say, "Do you want to manage your own case?"

The Chairman. "Try his own case" is the popular phrase.

Mr. Medalie. There is another situation, where he may want to sit around there and sulk.

Mr. Seasongood. He may want to conduct his defense in person.

12 Mr. Medalie. He may not want to conduct any defense. He may just want to sit around.

Mr. Seasongood. He may say, "So far as I am concerned, you can dismiss this."

Mr. Wechsler. "Unless the defendant elects to proceed without counsel."

Mr. Burns. The provision I have here reads: "Before the defendant is arraigned on a charge of felony, if he is without counsel, the court shall, unless the defendant objects, assign him counsel to represent him in the cause."

Mr. Burke. The language of the former rule is that if the defendant voluntarily, and with knowledge of his rights, waives the assistance of counsel.

Mr. Wechsler. The difficulty is that it purports to define when a waiver may occur. As was suggested earlier, that is a conflicting subject under the decisions. I think waiver may sometimes occur when the defendant did not have any knowledge of his rights.

The Chairman. Professor, will you read your suggestion again, with something in place of "manage"?

Mr. Wechsler. "The court shall assign counsel to any defendant who is unable to engage counsel, unless the defendant elects to proceed without counsel."

I would like to eliminate at least two of those three uses of the word "counsel," but that is the sum and substance of it.

Then I think there should be a further sentence that indicates that the assignment shall be ordinarily made upon arraignment. I do not think it should foreclose assignment later in the rare cases where that is desirable. That ought to be the regular point at which it is done, as it is.

Mr. Holtzoff. "Upon arraignment and before the defendant is called upon to plead"?

Mr. Wechsler. Yes.

Mr. Longsdorf. I feel, in view of the recent decisions of the Supreme Court, that whatever the defendant does in the way of rejecting counsel or retaining him, it ought to be made positive and explicit, and I have heard that other cases may be pending that also touch the same subject.

The Chairman. Suppose we have this redrafted.

Mr. Longsdorf. I would like to see this done.

The Chairman. All right. We will adjourn for lunch at this point.

Mr. Waite. Before we do that, may I make one suggestion to the redrafters? In view of the Glasser case, I am a little afraid of the expression, "if he is unable." That may raise a question of whether he is or is not.

I would like to suggest that it should be made to read, "If he asserts that he is unable to engage counsel."

Mr. McLellan. That is contrary to my experience, that they will assert it when they are perfectly able to.

Mr. Waite. I want to avoid all question of the court's failure to appoint on the ground that he is able and the question being carried up. As a matter of fact, whenever he says he is unable, the court does appoint counsel for him, and I think we might as well say that explicitly.

Mr. Seasongood. "If the court finds he is unable."

Mr. Waite. I am afraid even of that, because then he has a chance to appeal on the ground that the court's finding was wrong. I think if he asserts it, it is enough.

The Chairman. We will adjourn for lunch, until about twenty minutes of 2.

(Thereupon, at 1:05 o'clock p.m., a recess was taken until 1:40 o'clock p.m.)

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Tuesday, May 19, 1942.

AFTERNOON SESSION

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1 AFTER RECESS

The proceedings were resumed at 1:40 o'clock p.m., at the expiration of the recess.

The Chairman. All right, gentlemen. We proceed to Chapter V, Rule 14.

Mr. Seasongood. Mr. Chairman, everybody is in a good humor. May I go back a minute? I am not going to hurry you with this Rule 7.

Mr. Robinson. Rule (c).

Mr. Seasongood. But I just want to call your attention to what I had in mind. It was in the back of my head that there was a case, and Mr. Tolman helped me to find the one that I meant. This was a case in 121 Fed. 2d, 235, and in that case a member of the Labor Relations Board--it was Mr. Smith--had taken an active part in attempting to boycott someone before he sat on the case; and the court of appeals ordered that the case be sent back to determine whether he was disqualified. Now, they say, at page 239:

> "The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

So it seems to me to be in point for the proposition that if a grand juror has participated in the deliberations and induced the others to return the indictment you ought not to leave this as we have it here. It ought not to be written in. I am

not going to say any more about it, but it does seem to me to be a case in point.

The Chairman. Well, do you want to make a motion?

Mr. Seasongood. I did, and it was voted down.

The Chairman. Oh.

Mr. Seasongood. I do not know whether this case will induce anybody to ask for a reconsideration or not.

Mr. McLellan. You and I were pretty lonesome on that.

Mr. Seasongood. No; we jad Judge Burns with us.

Mr. Burns. Was that in the Third Circuit?

Mr. Seasongood. Yes, that was in the Berkshire Knitting Mills case.

Mr. Wechsler. I was with you.

Mr. Seasongood. What?

Mr. Wechsler. I voted with you.

Mr. Seasongood. Oh; one more.

Mr. Holtzoff. Of course, that case does not apply to the law as it now stands, because there is a statute on jurors that would make that case inapplicable to grand juries.

Mr. McLellan. Yes, but the trouble with us is that statute.

Mr. Seasongood. There is no reason for promulgating the statute if we would disapprove of it.

Mr. Holtzoff. Yes.

Mr. Dession. How could we re-word the thing in order to take care of that? Now, the jurors' votes will not be recorded, will they?

Mr. Seasongood. Yes, they are to be recorded, according to this rule.

Mr. McLellan. Only on voting for the names.

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Mr. Dession. If we get around that, I guess there will be no trouble with it.

Mr. McLellan. Yes.

Mr. Seasongood. The point is that it is not merely the vote, but this is the whole subject here. You cannot measure quantitatively the effect.

The Chairman. Your position is that one rotten apple spoils the basket?

Mr. Seasongood. Yes.

Mr. Holtzoff. But suppose you have a grand juror who is only legally disqualified, not for bias but because he is of the wrong age or a resident of the wrong district.

Mr. McLellan. Over 65, as the book shows.

Mr. Holtzoff. Yes, or suppose he resides across the line in the adjoining district, or something of that sort. Surely you should not invalidate the indictment.

Mr. Seasongood. Would it do, then, to say, "No indictment need be dismissed on the ground": that is, does not have to be, but it might be?

Mr. Medalie. I like the idea of letting judges make up their minds as to whether an injustice has been done.

Mr. Seasongood. After all, all you have to do is to indict him over again; that is not so hard.

Mr. Holtzoff. Unless the statute of limitations has run.

Mr. Medalie. If they indicted him so late that the statute has run, there is no harm in throwing it out on any technicality.

Mr. Holtzoff. Well, the federal statute of limitations is rather short, shorter than those of many of the states.

Mr. Medalie. That is wrong in most states.

vcb

Mr. Dession. The court could take that into account in deciding it, I should think.

Mr. Medalie. That is right. He could.

Mr. Seasongood. Yes. In other words, I would rather leave it to the court to say; not to say that it shall. You make it positive that no indictment shall be dismissed on that ground.

Mr. McLellan. We cannot get much from these gentlemen, Mr. Seasongood, but I wonder if we could not get that word "shall" in the 38th line of that rule changed to "need".

Mr. Seasongood. Yes, we could say "an indictment need".

Mr. McLellan. "No indictment need be".

2 Mr. Seasongood. Oh, yes.

Mr. Waite. After all, the indictment is not a conviction; it does not do anything more than to indicate that there is enough evidence to justify putting a man on trial, and I do not think it is a serious matter if there was a slight objection of that sort to it. I do not think I would vote even for "need be". I think I would leave that mandatory.

Mr. Seasongood. I cannot agree with you that it is not a serious matter. I think it is a very serious matter.

Mr. McLellan. In order to take a hopeless shot at it, I move that "shall" in that line shall be changed to "need".

Mr. Burns. I second it.

Mr. Waite. What line is that?

Mr. McLellan. That is line 38.

The Chairman. Line 38, Rule 7, page 2.

Mr. Dession. That is an improvement, I think.

The Chairman. Is it seconded?

vcb

Mr. Seasongood. Yes.

The Chairman. Are there any remarks? All those in favor say "aye". Opposed, "no". The motion is carried.

Now, we have a re-draft.

Mr. Seasongood. That is the advantage of taking things up after lunch.

The Chairman. A re-draft of Rule 12 is before you, gentlemen. Are there any suggestions?

Mr. Youngquist. I move to adopt it.

Mr. Robinson. I will second it.

The Chairman. It is moved and seconded. All those in favor say "aye". Opposed, "no". Carried.

Now, I think we are on Rule 14.

Mr. McLellan. I move the adoption of Rule 14.

Mr. Holtzoff. I second the motion.

Mr. Robinson. May I make the suggestion, Judge: on line 4 would it not be desirable to strike out "or copies": that is, "A copy of the indictment"?

The Chairman. Yes.

Mr. Robinson. And then after the word "request" strike out "or upon order", so that the sentence would read, "A copy of the indictment or information shall be delivered to him upon his request."

Mr. Seasongood. I was going to move to strike out "upon his request". I do not see why you have to request it. It seems to me if you get an ordinary summons they leave a copy of it with you. Why do you have to request it? You may not know enough to request it. I think you should give a copy of an indictment.

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Mr. Robinson. What if he does not want it, just like having a lawyer if he does not want a lawyer?

Mr. Seasongood. What?

Mr. Robinson. Like if it is a long indictment.

Mr. Seasongood. Why do you give a man a copy of a summons and leave them with him?

Mr. Robinson. That is to get him to do something.

Mr. Dean. You do not have to leave it for him; get it back.

Mr. Seasongood. I do not think he ought to have to request it. He may not have sense enough to request it.

Mr. Holtzoff. Nine times out of ten he does not want it; he does not get it and he does not want it because the charge is stated to him in open court, and the judge asks him if he wants a lawyer, and he says, "No, I don't. I'm guilty," and he gets a better comprehension of what he is charged with by the statement made in open court than he would by reading the indictment if it was handed to him.

Mr. Burns. How about saying a copy shall be made available to the defendant?

Mr. Robinson. That is about the same thing, is it not, Judge?

Mr. Burns. Except that you do not have to go through the formality of actually handing it to him.

The Chairman. No, because that does not mean he would have it; he may just be given the right to look at it.

Mr. Robinson. That is right.

Mr. Medalie. Nobody will ask for it except those who know the rules, which means that only one of these fool lawyers will ever ask for it.

vcb

Mr. Waite. If we would provide that it shall be given to him, would we not also have to provide that subsequent convictions should not be reversed if it were not given to him? I would be afraid of a provision that it must be given to him unless we had some such safeguards there, because it would be appalling if convictions were reversed on that ground.

I notice that the Institute Code has this language:

"He shall be furnished with a copy 24 hours before he is called upon to plead thereto. A failure to furnish such copy shall not affect the validity of subsequent proceedings against the defendant if he pleads to the indictment or information."

The Chairman. If we leave it in its present form you avoid all of those difficulties.

Mr. Waite. Yes, so I should rather have it as it is.

Mr. Medalie. All right.

Mr. Wechsler. Mr. Chairman, I move that the sentence beginning on line 3 and ending on line 4, "He may waive," be stricken, because, in the first place, I think that would be the law without the sentence; and in the second place, I do not think a man ought to be arraigned without having a charge stated to him. I agree about reading the indictment, but I do not think--

Mr. Robinson (interposing). Well, Mr. Wechsler, you know how commonly lawyers for defense will say, "The defendant waives the reading of the indictment, and the Court may enter a plea of not guilty".

Mr. Holtzoff. Ordinarily, indictments are not read, and nobody worries about it.

Mr. McLellan. The charges speak.

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Mr. Holtzoff. Yes, the charges speak.

3 Mr. Medalie. This provides for it.

Mr. Holtzoff. Yes.

Mr. Wechsler. The first sentence indicates that the indictment need not be read; it is enough under the first sentence if the charge be stated.

Mr. Holtzoff. That is right.

Mr. Robinson. Again, sometimes a lawyer does not even care to have it stated.

Mr. Medalie. Why do you need a formal waiving of the statement?

Mr. Wechsler. It is not a problem, Mr. Robinson, and it seems to me that to make it one is wrong.

Mr. Medalie. I second the motion to strike the second sentence.

The Chairman. Are there any remarks? All those in favor say "aye". Opposed "no". Carried.

It is moved and seconded that the rule as amended with the changes also in the last sentence be adopted. All those in favor say "aye". Opposed, "no". Carried.

Rule 15.

Mr. Robinson. Mr. Youngquist needs to be heard on that, and he is not here.

Mr. Seasongood. Here he comes.

Mr. Robinson. Just in time.

Mr. Holtzoff. Do you want to be heard on 15?

Mr. Seasongood. You are in contempt for not answering the summons.

Mr. Holtzoff. Do you wish to be heard on 15?

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Mr. Youngquist. I do to this extent. Has this re-draft been distributed?

Mr. Robinson. There is a re-draft, the second copy of 15, that has been distributed, so be sure you are not using the first draft. You can tell whether or not you have the substitute draft by reading the title. The title of Rule 15 of the draft that has been substituted, which you need to have then, is, "Pleas and Motions; Demurrers and Special Pleas Abolished."

Mr. Seasongood. We are just getting it; it is just being distributed to us.

Mr. Robinson. That is the second draft, (indicating).

Mr. Youngquist. I should say, Mr. Chairman, that this is the substance of what the committee agreed upon in New York, but it was just with some rearrangements; that is all. No change at all in 15 (a).

Mr. Robinson. No, sir.

Mr. Youngquist. Of the draft that is being distributed.

The Chairman. Are there any questions on 15 (a)?

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. It has been moved and seconded that 15(a) be adopted. Are there any remarks?

(There was no response.)

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

Mr. Youngquist. All we have in (b) is, I suggest, that the last sentence be thrown down below where it more properly belongs, it seems to me.

Mr. Holtzoff. Yes.

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The Chairman. You mean to throw it from where it is now?

Mr. Youngquist. Yes.

Mr. Robinson. The second draft.

The Chairman. Oh, the second draft is all right, I take it; is that what you mean?

Mr. Holtzoff. Yes, the second draft is all right.

Mr. Youngquist. Oh, yes.

Mr. Holtzoff. This has all been taken care of in the second draft.

Mr. Robinson. There is no need to pay any attention to the first draft because there is a rearrangement of the same.

Mr. Youngquist. All right.

The Chairman. Are there any questions on (b)? Do I hear a motion?

Mr. Holtzoff. I move its adoption.

Mr. Robinson. I second the motion.

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

Mr. Seasongood. I do not want to be hypercritical, but is there a general issue in a criminal case?

Mr. Robinson. A plea of not guilty raises a general issue, does it not?

Mr. Youngquist. Yes. That, I think, is a word of art.

Mr. Seasongood. Is it?

Mr. Youngquist. In criminal procedure.

Mr. Seasongood. All right.

Mr. Youngquist. The general issue; is that raised by a plea of not guilty?

Mr. Burns. Would "on the merits" be any better?

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Mr. Seasongood. Yes, I think so.

Mr. Robinson. It would not be--pardon me.

Mr. Seasongood. Well, if it is perfectly definite, all right.

Mr. McLellan. Does everyone agree to "on the merits"?

Mr. Seasongood. I do not know. I do not pretend to know, but I never heard "the general issue" in a criminal case. "Trial of the merits", is that?

Mr. Burns. I will offer a motion.

Mr. Robinson. May I say a word about it, Mr. Burns?

Mr. Burns. Yes, sir.

Mr. Robinson. I hope I am not in error on it.

Mr. Holtzoff. Are we on (c)?

Mr. Robinson. No, we are on (b).

The Chairman. Line 11.

Mr. Robinson. "the general issue" there means: it is used here, as Mr. Youngquist has said, to apply to anything that is up for trial after a plea of not guilty. Now, that is different from saying "on the merits", because, as we noticed before in criminal pleadings, almost anything can be brought up under the general issue. Maybe a defendant will plead not guilty, and his only defense will be former jeopardy, something like that, which I do not think could be on the merits, although it is a general issue; and our idea was, and the result of all the work we have done on this rule in the Style Committee and in the General Committee meetings was, to have all matters that are capable of determination through the trial of the general issue rather than before trial by motion.

Mr. McLellan. Does the general issue cover the issue of

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former jeopardy?

Mr. Robinson. Yes.

Mr. Youngquist. Yes, it does.

Mr. Robinson. It covers about everything, judge. Of course there is great diversity among the districts on that.

Mr. McLellan. That is just it.

Mr. Burns. Suppose you just said, "capable of determination before the trial".

Mr. Dean. I think that is all you need.

Mr. Youngquist. Then you should say, "the trial of the indictment or information," because there may be a trial of the issue of former jeopardy, for instance, which would be a trial.

Mr. Waite. Would the phrase "before the trial of the general issue" leave any doubt? If it is dubious we ought to change it. If it is not dubious it seems to me we get ourselves into difficulty trying to change it.

Mr. Dean. The difficulty is, the word of art in civil cases has been applied to criminal cases. I think it is more a matter of style. I do not think it would leave any doubt.

Mr. Waite. It is more common, I think, in criminal cases.

Mr. Medalie. Mr. Dean, I think Blackstone applied it in criminal cases.

Mr. Dean. Yes.

Mr. Holtzoff. I think it is a word of art in criminal cases, is it not?

Mr. Dean. I do not think it would leave any doubt in anybody's mind as to what we meant if we left it in there.

Mr. Waite. I wonder, in view of the fact that we have 60 rules to cover and we have done 14 so far, if we ought not to

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leave to the Committee on Style, questions of verbiage that do not raise any question of policy at all.

Mr. Longsdorf. May I add the suggestion to that: Would the members of the committee, after we rise from this meeting, look these rules over carefully, if they have time and can squeeze it out, and send in any questions of that kind to be determined by the Committee on Style, and if the committee be continued or convened for the purpose of ruling on things like that, would that be in order?

Mr. McLellan. I do not want to be obstinate, but I am going to move that the words "of the general issue" be stricken, as the promptest way of raising this question.

Mr. Seasongood. I second it.

The Chairman. Seconded? Was it seconded?

Mr. Seasongood. Yes.

The Chairman. Are there any remarks?

Mr. Medalie. I should like to amend that amendment by providing that the words "general issue" be "the indictment or information".

The Chairman. Is that seconded?

Mr. McLellan. You strike out the words "of the general issue," according to your amendment still, and then you say what?

Mr. Medalie. "of the indictment or information," as Mr. Youngquist suggested.

Mr. McLellan. "the trial of the indictment or information"?

Mr. Youngquist. I suggested that as an alternative to what Mr. Burns proposed. I like this language better. It serves the same purpose.

Mr. Longsdorf. Would it do if we were to say "before the

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trial of facts upon the general issue"?

Mr. Youngquist. I do not think that would help any.

Mr. Longsdorf. I do not know whether it would. It would not help me.

Mr. Robinson. Question.

The Chairman. Mr. Medalie is not seconded.

Mr. Seasongood. I second it.

Mr. Youngquist. It was accepted by the mover.

The Chairman. Was it? All right. Then the motion is on Judge McLellan's amendment as amended by Mr. Medalie. All those in favor of the amendment say "aye". Opposed, "no".

I call for a show of hands, all those in favor. Five. Opposed? Seven. Lost.

Mr. McLellan. So you are going to leave in the words "of the general issue"?

The Chairman. It seems so.

Mr. McLellan. Yes.

The Chairman. The motion on the section as it stands: All those in favor of (b) in its present form say "aye". Opposed, "no". Carried.

Mr. Dean. I should still like to raise this question: We have "trial of the general issue", and then we have "trial" following it. Is that apt to make any confusion? Do we mean something different there? If we do not, why do we not say, "trial" in both places?

Mr. McLellan. That is what I thought.

Mr. Longsdorf. Because the words "general issue" are qualifying words in this connection and are not needed in the others. That is my view.

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Mr. Dean. Is it not there qualifying?

Mr. McLellan. It is not clear to me that the phrase "general issue" is a word of art as applied to criminal cases; that is, it was not until Mr. Holtzoff told me the contrary.

Mr. Holtzoff. No. I raised the question. I did not mean to make a positive statement. I asked the question for information. I do not know.

Mr. McLellan. Well, I do not know. Of course, I think Mr. Dean is right about it.

The Chairman. All right. I move that the reporter be asked to look into this question to see whether it is a general word of art.

Mr. McLellan. All right.

Mr. Dean. If it is, let us use it in both places.

The Chairman. What?

Mr. Dean. If it is a word of art, let us use it in both places.

The Chairman. All right. With that understanding we pass on to (c) (1).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

(c)(2).

Mr. Seasongood. Have you adopted this rule that the questions of phraseology should not be brought up? I mean in (1), "The motion" you have referred to, and you said, " Motions", and so you have now "The motion". It ought to be "A motion"; should it not be?

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Mr. Holtzoff. Yes, that ought to be "A".

The Chairman. In (1).

Mr. Youngquist. It is in (b), Mr. Seasongood, "motions shall be used in their place."

Mr. Holtzoff. There is a line 13.

Mr. Seasongood. It is (c). In (c)(1) you have "The motion". You said, "Motions" and "The motions", and we have no motion before referred to.

The Chairman. "A motion".

Mr. Holtzoff. Say, "A motion".

Mr. Seasongood. All right.

Mr. Burns. In line 19 does "motion before trial" mean before trial of the general issue?

Mr. Youngquist. Yes.

Mr. Seasongood. What line is that?

The Chairman. It must mean that.

Mr. McLellan. Do you want to get that put in there again?

Mr. Burns. I shall refer that to the Committee on Style.

Mr. Holtzoff. The next few words indicate that, I think.

The Chairman. All right. If there are no other questions we shall take a vote on (c)(2). All those in favor say "aye". Opposed "no". Carried.

(c) (3).

Mr. McLellan. You are all satisfied with that, are you?

Mr. Holtzoff. Yes.

The Chairman. With (2), Judge?

Mr. McLellan. Yes. "All other objections with respect to the indictment or information shall be made by motion before trial and before or after or with the plea". I am not sure about that.

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The Chairman. Why was that tie put in there? I ask the committee: "and before or after or with the plea but within such reasonable time as the court shall fix"?

Mr. Robinson. I think the idea was to simulate it to the civil rule, and that you can bring up objections preferably together.

Mr. Medalie. If you choose, at the time that you plead not guilty, you may also plead double jeopardy by motion.

Mr. Robinson. That cannot be done, of course.

Mr. Holtzoff. At the present time you have to make your motion.

Mr. Medalie. Draw your plea.

Mr. Robinson. That is a source of frequent delays in the trial, it seems, preparatory to trial: file one motion today and get it ruled on next week, and another motion, and another motion. The idea here is to move the thing along by having the objections heard at the same time so far as practicable and fair.

Mr. McLellan. Well, do you regard double jeopardy as an objection with respect to the indictment--

Mr. Youngquist. No.

Mr. McLellan. --or information? Or to the institution of the prosecution?

Mr. Youngquist. No.

Mr. Medalie. Well, you do to the institution of the prosecution.

Mr. Seasongood. Yes, I think so.

Mr. Burns. Yes, certainly.

Mr. Youngquist. Yes, of course.

Mr. McLellan. Then do you mean that that must be heard

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before trial?

Mr. Medalie. No. If you choose you can have it at the trial.

Mr. McLellan. It says "shall" here.

Mr. Medalie. Trial of the general issue. That sufficiently covers it.

Mr. Burns. Doesn't that mean the "trial" in line 19 has a different meaning than "trial" used in (b) where motions are mentioned?

The Chairman. I am having difficulty with that "and" in line 19. I do not see how you can have a motion before trial and also have it "and before or after or with the plea".

Mr. Youngquist. Well, a man is arraigned, and under this he may make his motions before he pleads, or he may make his motion at the time he pleads not guilty, or he may make his motion after he pleads. It was intended to give considerable
6 latitude with respect to making of motions but at the same time require that all motions that are to be made shall be heard together for the purpose of avoiding delay. That is what we were discussing in New York, and that is what this embodies.

Mr. McLellan. Yes, but you require him to raise these objections by motion, do you not?

The Chairman. Yes. "before trial" they say.

Mr. McLellan. That was before trial; and may some of those be of such a character as to raise an issue of fact? If so, are you going to have two jury trials?

Mr. Robinson. It is possible.

Mr. Medalie. What was intended there was rather that you be permitted to make such motions, but if you made the motion.

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Mr. McLellan. It says "shall".

Mr. Dean. Yes, it says "shall".

Mr. Holtzoff. I think what was intended by the phrase "institution of the prosecution" were such matters as you now bring up by a plea in abatement.

Mr. Robinson. That is right. I do not know that I agree.

Mr. Holtzoff. Rather than by plea in bar. I do not know whether the language is sufficiently felicitous to convey that thought, but that was the sub-committee's purpose, to substitute a motion for a plea in abatement.

Mr. McLellan. That, we have already done.

Mr. Holtzoff. I beg your pardon.

Mr. McLellan. We have already done that.

Mr. Holtzoff. Well, but we have abolished pleas in abatement.

Mr. McLellan. Yes.

Mr. Holtzoff. And this is an affirmative provision requiring such motions to be made before the trial but permitting them to be made after pleading guilty or not guilty, although in that way changing the practice, which requires you today to raise these points before the plea of guilty or not guilty. I can conceive that perhaps the phrase "institution of the prosecution" might not be accurate there.

Mr. McLellan. It just seems to me that something should be done by way of a re-writing of that in some way.

The Chairman. Judge, I do not see how a motion can be required to be made before trial--

Mr. Dean (interposing). Double jeopardy.

The Chairman. --and then go on to say, "and before or after."

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Mr. Robinson. "plea"?

Mr. Holtzoff. Instead of "and before", it might have been clear if you said "either before or after plea".

Mr. Robinson. But it comes with "or with". We have three alternatives.

Mr. Holtzoff. We wanted to get away from the present requirement which provides that you must raise these points before you plead, and you get an extension of time to plead for the purpose of making these motions.

The Chairman. Yes.

Mr. Burns. Well, if you had said "shall be made before or after or with the plea but by motion before trial," and then have it clear what you mean by "trial", which it seems to me from the context means the trial on the merits.

Mr. Holtzoff. That is right.

Mr. Robinson. It would be all right to insert "trial of the general issue", would it not, Mr. Youngquist, again?

Mr. Holtzoff. I do not know.

Mr. Robinson, Why not, if they insist. I do not think it is necessary, but if he wants it.

The Chairman. I think if you revise the order as Judge Burns now suggests you would clarify that line 19 considerably. Ifthere is no objection we shal ask the committee to do it.

Mr. Medalie. Now let me get that again. I want to make sure. How is that?

The Chairman. "shall be made before or after or with the plea but before the"--

Mr. Burns. "but by motion before trial".

The Chairman. "but by motion before the trial".

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Mr. Robinson. It would still have to be "by motion before or after or with the plea".

The Chairman. Yes, "but before the trial".

Mr. McLellan. What does "the plea" mean there?

Mr. Youngquist. Guilty or not guilty. Not guilty.

Mr. Medalie. Plea of not guilty.

Mr. McLellan. Are you going to permit these things to be heard after the man has been found guilty?

Mr. Robinson. Oh, no.

Mr. Holtzoff. No.

The Chairman. This is his pleading. He is pleading guilty or not guilty.

Mr. Dean. It is limited to that, then. I think the judge has a point, because our pleas include the plea of guilty up above. This only contemplates a motion in the event that the plea is not guilty.

The Chairman. That is right.

Mr. Holtzoff. Yes, in order to say there "after plea of"--

Mr. Youngquist. It may be made before the plea.

Mr. Holtzoff. Before or after?

Mr. Youngquist. Yes.

Mr. Holtzoff. No.

The Chairman. No.

Mr. Youngquist. And if the defendant intends not to plead not guilty he would naturally make his motion before the plea, as he may under this rule.

The Chairman. I take it we are all agreed on what we want to accomplish here. May we pass it to the committee and then move on to (c)(3)?

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Mr. Dean. Did we agree on former jeopardy, Mr. Chairman?

Mr. Medalie. You mean as to whether or not you can dispose of the issue of double jeopardy by a motion?

Mr. Dean. Whether you must.

Mr. Robinson. Just a little bit further, now, if you will notice here, the next clause provides that if the request is denied for trial by jury he shall have the right to withdraw the motion. Now, perhaps there will be certain defenses raised by plea on which there should be a specific right to withdraw the motion. I am mentioning that in connection with the question that I think is in the back of your mind. If you are entitled to trial by jury on the issue of double jeopardy, you find in the next clause there, at lines 26 and 27, that he shall have the right to withdraw the motion if he wants a certain issue tried by a jury, which means then he will have the right to trial by a jury at the trial of that issue--of the whole issue.

Mr. Holtzoff. I think the subcommittee will have to work on that.

Mr. Dean. That is not at all clear from this. As this reads now, you could--you must raise by motion double jeopardy, as I read it.

Mr. Holtzoff. I do not think so. It was not so intended, although there may be that view.

Mr. Medalie. As he reads it.

Mr. Dean. I know it was not intended that way. I know that.

Mr. Youngquist. There is danger of that.

Mr. Medalie. Yes.

Mr. Youngquist. The committee was thinking only of the objections to the indictment itself.

Mr. Medalie. And also got itself in a jam because it would not use the words "in bar or abatement."

Mr. Holtzoff. Yes.

Mr. Medalie. And that is why it used those words that cause us more trouble than ever: "or to the institution of the prosecution".

Mr. Robinson. That is right.

Mr. Medalie. Had we stuck to good old language and said, "in bar or abatement," we would have had less trouble.

Mr. Longsdorf. Yes.

Mr. Youngquist. That is right. I join in the contention.

The Chairman. Are we moving on to (c)(3)?

Mr. Medalie. We shall have to re-do (2).

The Chairman. All right. Let us go on to (c)(3). Are there any questions on (c)(3)?

Mr. Burns. I should like to find out whether or not it is intended that where a defendant has a right to trial by jury the court is given by this rule the power to dispense with it.

Mr. Robinson. No, the answer is clearly no, Judge, because if he thinks he has a right to trial by jury and the court thinks he has not a right to trial by a jury, and the court denies it, he may still withdraw his motion, whereupon it comes under the plea of not guilty, and he gets a trial by a jury at the trial, so he not denied the right to trial by jury.

Mr. Medalie. Let us put it this way: He makes a motion to dismiss on the ground of double jeopardy. The court says,

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"I will try that issue, but if you want a trial of that issue I will try it without a jury."

He says, "No. I want a jury trial."

The court says, "All right. I will not hear it. It can be tried at the trial of the general issue."

Mr. Robinson. That is it.

Mr. Longsdorf. Do you not think we ought to meet that?

Mr. Medalie. But if he is willing to he can go ahead and try it without a jury on that issue of double jeopardy, and if it is decided against him he is through.

Mr. Robinson. That is right.

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

Mr. Burns. Yes, I have another question.

The Chairman. All right, Judge.

Mr. Burns. Is it true, Mr. Robinson, that any issue as to which a defendant has a right to trial by jury under the Constitution may now be raised by a plea of not guilty?

Mr.Medalie. We had no doubt about that.

Mr. Robinson. Yes. I do not think so. I do not know of any.

Mr. Burns. Well, I do not, because otherwise this next clause may raise some difficulty.

Mr. Seth. I should think so.

Mr. Longsdorf. I think the common-law right of trial by jury is extended to trial on special pleas in bar: former

8 acquittal or conviction.

Mr. Burns. Why not say, "Under a plea of not guilty, when any motion before trial raises an issue of fact as to which the defendant is entitled to trial by jury, it shall be tried by a

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jury or by the court if the defendant consents, but if he does not consent he shall have the right to withdraw his motion"?

Mr. Robinson. The only difficulty raised by your question, Mr. Burns, is, automatically you are assuming what the practice is in the various districts with regard to what can be proved under a plea of not guilty. Now, there is no answer to that because there is great variety.

Mr. Burns. It seems to me it may well raise a difficult question, then, for the reason that we do, by the manner in which this is written, make the distinction between issues of fact triable under a plea of not guilty and all other issues of fact.

Mr. Robinson. That is right.

Mr. Burns. And we allocate a constitutional right to trial by jury on the first group and not the second.

Mr. Robinson. No, it is not our doing it. It is leaving it to the judge to do it. That was the action of the committee. They said, "That is a question. We had better not try to decide it." The only other way would be to try to decide it by a catalog of enumeration, which would be deadly, of course. Let the judge decide it when it comes up, whether or not it is an issue that raises a right to trial by jury. Is that not satisfactory.

Mr. Burns. Well, except it may be subjected to the criticism that you are apparently giving the court the power to try an issue of fact.

Mr. Robinson. That is not possible.

Mr. Burns. With or without a jury, regardless of constitutional right.

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Mr. Youngquist. No.

Mr. Robinson. That is not possible under this provision. The defendant always has his right to trial by jury.

Mr. McLellan. In order that I may understand this and see in my own mind whether we ought not to have some more work done on it, I should like to ask a question: We have provided that matters that formerly could be raised by a plea in abatement may be raised on motion. Now, if a thing had to be raised by a plea in abatement, it now has to be raised on motion. Do you take care of a defendant who wants his jury trial upon the motion which is the equivalent of a plea in abatement by providing that he may withdraw his motion? When it is withdrawn can he then raise, under what you are pleased to call the general issue, a matter which had to be pleaded formerly in abatement?

Mr. Robinson. Do you want to answer that?

Mr. Medalie. Matters raised by plea in abatement could not be raised at the trial of a general issue.

Mr. Robinson. I do not think so.

Mr. Medalie. Matters that could be raised by plea in bar could be raised by trial of the general issue.

Mr. McLellan. Well, but I am talking about abatement. Are you going to deprive a man of his motion which is the equivalent of a plea in abatement--

Mr. Robinson. (Interposing) It is elastic.

Mr. McLellan. (Continuing) --by saying that he may withdraw his motion if he wants his jury trial and then, without saying that he may raise it upon what you please to call general issue, deprive him of what at common law would be his plea in

abatement?

Mr. Holtzoff. Is the defendant entitled to a jury trial on a plea in abatement?

Mr. McLellan. If a question of fact is involved he is.

Mr. Seth. Yes.

Mr. McLellan. He is with us.

Mr. Youngquist. Is he?

Mr. Robinson. When a juror is disqualified? A grand juror?

Mr. McLellan. Certain pleas in abatement that raise an issue of fact are triable by jury, as I understand it. Do you not so understand it?

Mr. Medalie. I am not sure about that.

Mr. Waite. Mr. Robinson, in this clause (3) you had the matter stated about the way Judge Burns wanted it.

Mr. Robinson. That was before the Committee on Style, Mr. Waite.

Mr. Waite. Do you remember why you changed that?

Mr. McLellan. I think it was changed because there was something the matter with it.

Mr. Robinson. I think on the whole this is a great improvement.

Mr. Waite. You do not remember why you changed that?

Mr. Robinson. I expect I can get it if you want it.

Mr. Waite. No, I am not particular.

Mr. McLellan. Then you are satisfied with this rule as it is?

Mr. Robinson. Yes, I am.

Mr. McLellan. Are you satisfied that you do not deprive a man of his right to raise by motion matters that theretofore

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he could have raised by a plea in abatement? I think you are depriving him.

Mr. Youngquist. And have a jury trial, you mean?

Mr. McLellan. Yes.

Mr. Youngquist. On pleas in abatement would a defendant be entitled to a jury trial?

Mr. McLellan. Any plea in abatement that involves the proof of facts.

Mr. Youngquist. Such as Mr. Medalie suggested, disqualification of a juror? I was of the impression, as Mr. Medalie said, that you had a right to trial by jury on pleas in bar but

9 not on pleas in abatement.

Mr. Holtzoff. I think the subcommittee--

Mr. McLellan. Well, but I have always been taught, because that is our Massachusetts practice, that on any plea in bar, in abatement, involving an issue of fact, either party is entitled to trial by jury.

The Chairman. Judge, would you turn back to the original draft of 15 under (c) (3) and see if it is not covered in that? It seems to me it is there.

Mr. Wechsler. I think that meets the problem, Mr. Chairman.

The Chairman. What?

Mr. Wechsler. That meets the problem.

The Chairman. In other words, turn to your original draft of (c) (3):

"When a motion in advance of trial raises an issue of fact, the defendant is entitled to a trial by jury if the issue could properly be raised at the trial under a plea of not guilty. All other issues of fact raised on

motions in advance of trial may be tried as the court shall direct by affidavit or otherwise and with or without a jury."

Does that cover what you want?

Mr. McLellan. Yes.

The Chairman. (Reading:)

"When an issue has been tried and determined in advance of trial, the determination shall control the subsequent course of the proceeding."

Mr. McLellan. No, sir, it does not. It very distinctly does not, because I am talking about a case where there is a motion the equivalent of a former plea in abatement, where an issue of fact is involved, and neither the old rule nor the new rule includes that.

Mr. Medalie. Do you understand that on a plea in abatement which has to be decided before trial it is triable under the general issue?

Mr. McLellan. Yes.

Mr. Medalie. That a defendant has a constitutional right to jury trial?

Mr. McLellan. I am not ready to put in the word "constitutional," but in practice he is afforded, with us, a trial of an issue of fact upon plea in abatement, and we have got so far in the old practice in Massachusetts as to saying that if he wants to take that bite of his cherry it may be the only bite that he will have.

Mr. Holtzoff. I think the subcommittee proceeded in its draft on the opposite assumption, and maybe the subcommittee was wrong, but in the subcommittee we assumed that there was

no right to a jury trial on a plea in abatement.

Mr. McLellan. Did you ever see any authority to that effect?

Mr. Holtzoff. I personally have not. I do not know.

Mr. Youngquist. Judge, would not No. (3) of the old draft meet it?

Mr. McLellan. No, because it says there, "the defendant is entitled to trial by jury if the issue could properly be raised".

Mr. Youngquist. I see.

Mr. McLellan. (Continuing) "at the trial under a plea of not guilty."

Mr. Youngquist. Yes.

Mr. McLellan. Now, matters of abatement could not be so relied upon.

I hate like the deuce to hold you up this way.

Mr. Youngquist. That is all right.

The Chairman. These are important.

Mr. Holtzoff. This is an important point.

Mr. Youngquist. May I make a suggestion?

The Chairman. How am I to dispose of it? Let us see if we can get it.

Mr. McLellan. Well, if I am wrong on the matter of jury trial on a plea in abatement that involves questions of fact, we will go on.

Mr. Robinson. I should like to ask this question, Judge, on that: Do you read this to provide that a defendant can be deprived of trial by jury just automatically by the rule, or do you not understand that it is still within the power of the

trial judge to grant him a trial or not grant him a trial, as the judge thinks the law requires?

Mr. McLellan. Oh.

Mr. Robinson. Therefore this question comes before you.

Mr. McLellan. Yes, but the right to a trial by jury is not a permissive; it is an absolute right.

The Chairman. He either has it or he has not.

Mr. McLellan. Yes, that is it.

Mr. Youngquist. I will make a motion, Mr. Chairman.

Mr. Robinson. All right. Go ahead.

Mr. Youngquist. I move, Mr. Chairman, that (c) (3) be re-referred to the committee for study in the light of the--

The Chairman. --discussion.

Mr. Youngquist. --suggestions that have been made.

Mr. McLellan. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." Carried.

Mr. Seth. Does not the Government want a right to trial by jury on some of these issues?

Mr. McLellan. I think that is a very pertinent suggestion. Sometimes they do.

Mr. Seth. They ought to have the right. They have a right to trial by jury, do you not understand?

Mr. Robinson. Again, that would be in the power of a judge under the rule, not the United States attorney.

Mr. Seth. I say, would not the Government want to try some of these issues--is it possible the Government may want to try some of these in advance by jury?

10 The Chairman. Yes.

Mr. Holtzoff. Yes.

Mr. Seth. Ought not that to be taken into consideration in the redraft?

Mr. Robinson. It was taken into consideration in the redraft. I think I am speaking for all members of the subcommittee; there are eight, I think.

Mr. Seth. Where does it show you?

Mr. Robinson. It is up to the judge. The judge may do it.

Mr. Seth. But maybe the Government does not want the judge to do it.

Mr. McLellan. That is no answer when you are dealing with this kind of thing, as to what the judge may in his discretion do.

Mr. Robinson. No, it is not that; it is for the judge to interpret what the law is in his jurisdiction at that time, and if he thinks that there is a right to a trial by jury on a plea in abatement or if he understands the United States attorney to wish to have a trial by jury. I do not think the Government has a right to trial by jury at any time, does it?

Mr. McLellan. Oh, yes, indeed. It is not a constitutional right, but they have it.

Mr. Dean. The right of trial by jury on this plea in abatement, if there is a right of trial by jury, would not vary with the districts.

Mr. Seth. No.

Mr. Dean. It seems to me that our research must go into the question of whether or not we have a constitutional right to a trial by jury on a factual issue raised by the plea in abatement, and I think if that can be disposed of--I do not know

that there are decisions on it.

Mr. Waite. I found something about that in the Institute commentary. The Institute's provision is: "All issues whether of law or fact which arise on a motion to quash shall be tried by the court." And then there is a footnote that says, "In states, if any, in which this section would be unconstitutional as to issues concerning former jeopardy or pardon or immunity"--

Mr. Robinson. Now, that is exactly the point.

Mr. Waite. In states, if any, in which this section would be unconstitutional in those respects, then you have to change it.

Mr. Dean. That will not vary among the federal districts.

Mr. Robinson. Oh, yes, it does, in districts where they are apparently influenced by the state practice.

Mr. Dean. That will not vary among the federal districts.

Mr. Holtzoff. Well, this whole matter has been referred to the subcommittee.

Mr. McLellan. It is the same question in every district, only they may decide it right in one district and wrong in another.

Mr. Dean. Exactly. There is only one Constitution, in other words.

Mr. Robinson. That still leaves the decisions varying.

Mr. Dean. If they do, I do not know what the status of it is, and I would proceed on the assumption--

The Chairman. All right. It is referred back.

Now let us go on, gentlemen, to (c) (4) on page 2.

Mr. McLellan. Well, then there is authority that it must be tried by jury.

Mr. Holtzoff. I move the adoption of (c) (4).

The Chairman. Seconded?

Mr. Waite. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." Carried.

Rule 16.

Mr. Waite. I want to ask a question about that. We have abolished pleas except plea of guilty or not guilty and nolo contendere, and then line 2 says, "In pleading an official document".

Mr. Holtzoff. I think that refers to the indictment or information.

The Chairman. Are there any questions on 16 (a)?

Mr. Holtzoff. I move its adoption, Mr. Chairman.

Mr. Dean. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

(The motionwas carried.)

The Chairman. 16 (b).

Mr. Seasongood. Phraseology there in (b): you refer to a judgment or decision or order, and then you say "sufficient to aver the judgment or decision". It ought to be--

Mr. Youngquist. --"or order".

Mr. Holtzoff. "or order".

Mr. Seasongood. Yes. And isn't that a little summary, to say, "aver" a judgment? "aver rendition of the judgment, decision, or order".

Mr. Burns. "allege," you mean.

Mr. Seasongood. Sir?

Mr. Burns. "allege".

Mr. Seasongood. I did not get that. What is it?

Mr. Burns. "allege"; isn't that the word?

Mr. Seth. Rather than "aver".

Mr. Burns. Than "aver": "allege".

Mr. Seasongood. Yes.

Mr. Burns. I should like to raise a question, merely because Professor Waite and I were put off the track a bit by the title, "Pleading Special Matters." That carries an inference that there are special pleas of the defendant. We think of some headnote that will not carry that connotation.

Mr. Youngquist. I have noted here on my notes, "Pleading Judgments and Official Documents." That is rather lengthy, though.

Mr. Holtzoff. You could say "Alleging".

Mr. Burns. Yes.

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Mr. Burns. Yes.

Mr. Holtzoff. Or "Allegation".

Mr. Burns. "Allegation of Special Matters."

Mr. Holtzoff. "Allegation of Special Matters."

Mr. Medalie. Yes.

Mr. Youngquist. I move that 16(b) is altered and approved.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye". Opposed, "No." Carried.

Mr. Medalie. The word "aver" is changed to "allege" in both (a) and (b); is that right?

The Chairman. That is right.

Rule 17. 17(a). Is there any question on (a)?

Mr. Holtzoff. I move its adoption.

Mr. Seth. I second it.

The Chairman. All those in favor say "Aye". Opposed, "No." (The motion was carried.)

17(b).

Mr. Seasongood. Could any of these be served by mail, and is it sufficiently covered if they are? "may be served by mail"?

Mr. Medalie. The manner of service is as provided in civil cases, which means you can make a motion by mailing your notice of motion and affidavits.

Mr. Seasongood. Can you always do that, in all cases?

Mr. Medalie. I am quite sure any motion may be made in a civil case by mail, yes.

The Chairman. Are there any remarks on (b)?

Mr. Holtzoff. I move its adoption, Mr. Chairman.

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Mr. Burns. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

(The motion was carried.)

The Chairman. Are there any remarks on (c)?

Mr. Holtzoff. I move its adoption.

Mr. Medalie. I second it.

Mr. Youngquist. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." All of them carried.

Rule 18. Consider first the first paragraph up through line 9.

Mr. McLellan. I assume, in the first place, that this so-called pretrial procedure is of such a character that under a formal rule the defendant is entitled to be present; am I right about that?

The Chairman. There is no doubt about that, is there?

Mr. Holtzoff. Oh, the defendant? No.

Mr. Youngquist. The last sentence provides the rule shall not be invoked in case of any defendant who is not represented by counsel. Would that cover it?

Mr. McLellan. Yes, but you said before that at every stage of the proceeding the defendant is entitled to be present.

Mr. Youngquist. Oh.

Mr. McLellan. Now you have this language. Now, which do you mean, that he may be present or he need not be?

Mr. Holtzoff. No, I do not think that he would be entitled to be present under that presence rule, because that

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relates to every stage of the trial, Judge.

Mr. Youngquist. "proceeding," it says.

Mr. McLellan. It says, "proceeding."

Mr. Holtzoff. That was not as we had it.

Mr. McLellan. And if admissions are to be made on his behalf at a pretrial hearing why should not he be entitled to be present?

Mr. Holtzoff. No; it says "at every stage of the trial," and the Rule 12 relates to presence of the defendant, and as the rule is now framed it would not relate to pretrial.

Mr. McLellan. I thought we had the word "proceeding."

Mr. Youngquist. That was in connection with attorneys.

The Chairman. Rule 12 will be revised; we have not got it back yet.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. Yes.

Mr. Holtzoff. And we adopted it.

The Chairman. In its revised form.

Mr. Robinson. Yes.

Mr. Holtzoff. Judge, we had in mind this: the defendant is not entitled to be present in court on the argument of a motion.

Mr. McLellan. I know that.

Mr. Holtzoff. But you think he should be entitled to be present at the pretrial?

Mr. McLellan. I certainly do if admissions are to be made on his behalf by his counsel, if you are going to have pretrial in criminal cases.

Mr. Holtzoff. I think so.

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Mr. Burns. An order will be issued that will preclude him from raising defenses.

The Chairman. That is right.

Mr. McLellan. Yes.

Mr. Seth. He must be present.

Mr. McLellan. "If." If pretrial is advisable.

Mr. Medalie. Without pretrial the district attorney and the defendant may enter into a stipulation concerning the conduct of the trial and the dispensing with proof of certain things or accepting substitutes for proof. It is done regularly; sometimes instigated by the defendant, especially in long cases. In some of these long financial cases it is not unusual to enter into a stipulation that no evidence shall be given as to the accuracy of certain books, and that no evidence be given to lay a foundation for the admissibility of those books, or that these books named so-and-so, so-and-so, and so-and-so, shall be deemed in evidence. If you do not have the defendant around he does not even know the admission was made. I do not see any danger if the defendant is not around when counsel enters into an arrangement of that sort.

Mr. Seasongood. The danger is that he may say--it is an infraction of his constitutional rights, for instance, to limit the number of expert witnesses and character witnesses. That is a right he would have to waive himself, I think, under the Constitution, as part of his proof of facts.

Mr. Burns. It is my opinion that the pretrial procedure developed in civil causes because of the long delay between the filing of a proceeding and ultimate trial, which was due, I know in Massachusetts, largely to automobile litigation, where

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a lot of valuable time was wasted. At one time there was a lapse of four years between the entering of a suit and reaching it for trial, which was in many cases a substantial denial of justice, and they embarked upon a pretrial procedure that has worked very well: clearing up such questions as to whether it was a public highway and getting agreements as to experts and the like; and I think it is peculiarly adapted for thetrial of civil causes. I have very serious doubts as to whether it is adaptable for the trial of criminal causes, and I do not know whether there exists any such clogging of the docket as would make it advisable for us to tinker with a situation that may affect the liberties of an individual quite seriously. A lot of it is done anyway, as Mr. Medalie pointed out, by stipulation; a lot of it is done in chambers with the trial judge. But I query if we want to put any official imprimatur upon the practice.

Mr. Holtzoff. Well, Judge, I should like to say something about that. I know it has been tried on a criminal docket. After the civil rule was adopted, a judge in the eastern district of Virginia thought that he would, just on his own motion, adapt to criminal cases the pretrial procedure as prescribed by the civil rules; and he describes how in one instance by a pretrial session of a day or so he cut down to about a day and a half's trial a conspiracy case that was expected to take several weeks to try.

Now, the pretrial rule just is not mandatory, just as the pretrial rule in the civil rules is mandatory. I would agree with you that we should not have a mandatory rule, but this is a step forward. There is a lot of sentiment in favor of it,

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and so long as we leave this safeguard, first, that it is permissive, and second we provide--

Mr. McLellan (interposing). He means permissive for the defendant.

Mr. Youngquist. No.

Mr. Holtzoff. For the judge. Well, for both.

Mr. Seasongood. We use the word "invite". We changed the word to "invite".

Mr. Holtzoff. And we also provided in the last sentence that the rule shall not be invoked in the case of a defendant not represented by counsel, so as to avoid the very danger which you point out.

Mr. McLellan. He may invite them now, may he not, without any rule?

Mr. Holtzoff. Yes, but could not that same thing have been said about the pretrial rule in the civil rules? They could have done it, but there was that impetus that was created.

Mr. McLellan. But under the civil rules they have to come.

Mr. Medalie. Yes.

Mr. Holtzoff. Oh, yes, but I mean so far as the district courts are concerned the civil rule is optional.

Mr. Burke. Mr. Chairman, there is not much to change in this and the previous rule except in this one particular:

"The court may, although all the attorneys do not consent, make such order not violative of the legal or constitutional privilege, for discovery and inspection, and for such other aid to the expeditious conduct of the trial as may be just."

That is not in the original draft, and we discussed quite

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at some length even the invitation feature of this pretrial procedure. I think that would nullify to a considerable extent the merit of the original rule.

The Chairman. In other words, this makes it really involuntary.

Mr. Burke. Well, the question of its being involuntary is not of so much importance as the right.

Mr. Burns. It is the kind of party to which you are invited.

Mr. Holtzoff. I should be glad to second the motion to strike the sentence out because I have been against it.

Mr. Medalie. What sentence?

Mr. Holtzoff. The sentence beginning on line 12.

Mr. Youngquist. What happened with respect to that, Mr. Chairman, was that the rule as originally drawn provided for discovery, and the subcommittee thought it should not appear in that form, and the matter was referred to a sub-subcommittee, and this sentence was evolved to supplant the discovery provision in the rule as originally drawn? Is that it?

Mr. Holtzoff. That is accurate. I was the sub-subcommittee. I put it in under instructions of the subcommittee, and I made a stylistic revision, although personally I do not think there should be any discovery in a criminal case.

Mr. Dession. Well, I am going to second your motion, not because I do not agree with the latter part of that, but because I do not think it belongs in here.

Mr. Holtzoff. I have not made the motion; I did not feel free to make it. But if somebody makes it I shall vote for it.

Mr. McLellan. I am going to make a motion, if I may, that

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may save time, though I suspect it will not: I move that Rule 18 be not adopted.

Mr. Burns. I second the motion.

Mr. Robinson. May I add just at this point, before it goes to a vote: It happens that a lawyer was in my office just two days ago. He has been an assistant United States attorney for a great many years and was also a state prosecuting attorney and has tried a great many important cases in the Middle West, and he is over here now assisting a Senator in some work here. He saw this rule, and he said, "I wish we had had it in the case involving some illegal paving allegations, misuse of Government funds in connection with the paving of some streets in a certain subdivision." He said, "For two or three days in the federal court there we had to sit by while records were introduced of the plats and various other real estate matters that nobody paid any attention to, including the jury. It just killed that much of our time and the jury's time." He said, "If we had had a rule like that it would have given something of an impetus and something of an opening for us to get together with the judge and get some stipulation."

Mr. Medalie. Why did not the judge call them up and say--

Mr. Robinson. I am not arguing with you about it. I am just telling you. That is just what the man said.

The Chairman. There is the answer, Mr. Medalie. Many judges will not do it.

Mr. Robinson. Surely.

The Chairman. There are many judges who are still bucking against pretrial procedure in civil cases, and unless you have something that the district attorney can point to, or even

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defense counsel, there are many district judges who will not make any advance.

Mr. Waite. It strikes me that this is a rule that might easily do some good and could not conceivably do any harm, so I am all for having it.

Mr. Medalie. I think this rule is useless unless you strike out the word "invite" and say "require".

Now, the reason for that is this: You invite a lawyer to come. He does not have to come. I have seen district attorneys refuse to attend when the judge is inviting or when he is giving them a direction he did not like, when some kind of hostility was on. If the lawyers must come--they are not compelled to make an agreement, but they must attend the session, and if a lawyer does not have to come in person: he can send anybody from his office, but then you have a conference. Now, whether it should be had depends on whether the matter is brought to the attention of the court by either side enough to induce him to say you ought to hold this kind of conference.

Mr. Robinson. You presented the point, did you not, Mr. Medalie, in one of the former meetings of the Advisory Committee, and we voted it down; and you think probably it ought to require reconsideration?

Mr. Medalie. No; only the word "invite".

Mr. Robinson. You are still against it?

Mr. Medalie. I would rather have that in opposition to this rule than to have nothing.

Mr. Holtzoff. I call for the question.

Mr. Waite. Will you phrase the question so we will know which way we are voting?

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The Chairman. Yes, sir. The question is on Judge McLellan's motion to strike the entire rule.

Mr. Medalie. My amendment is that the word "invite" be stricken, the word "require" be inserted, and that the rule be adopted in that form.

The Chairman. Is the amendment seconded?

Mr. Seasongood. Why do you not wait and see whether they want the rule or whether they do not?

The Chairman. That is simpler.

Mr. McLellan. That was my purpose in putting it, I thought.

The Chairman. All right. Let us vote on Judge McLellan's motion to strike the entire rule 18. All those in favor say "Aye." Opposed, "No."

Let us have a show of hands. Those in favor of the motion? Opposed?

(There was a show of hands.)

Mr. McLellan. That is what I suspected.

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The Chairman. 3 to 11. I hate to call for hands, but some of you gentlemen have such good voices.

All right. Mr. Medalie has made a motion to strike the word "invite" in line 2 and substitute the word "inquire".

Mr. Burke. It carries, of course, an element that has no place in this.

The Chairman. That was the decision of the committee originally, but everything is tentative until we sign on the dotted line.

All those in favor of the motion say "Aye." Opposed, "No."

I would say the motion is lost.

Mr. Holtzoff. I think Mr. Burke had a motion to strike out the sentence on line--

Mr. Burke. Yes; I should make the motion that the word "The" on line 12, and extending to include the word "just" in line 15, be stricken.

Mr. Dession. I will second that.

Mr. Seasongood. That is the sentence, "The court may," isn't it?

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Unanimously carried.

Mr. Burns. I have a comment on line 7.

In some of these mail fraud cases the trial develops into a battle of parades.

The defense parades a number of character witnesses, and it is my experience that the judge pretty quickly puts a stop to it, but the Government has a parade of its own which is very

effective, and that is a parade of victims, the widows and orphans, so I would like to insert in paragraph (3), "The number of expert witnesses, complaining witnesses, and character witnesses."

Now, that is really taken care of by the clause, "Such other matters", but in view of the fact character witnesses have been pointed out I think it would be well to put in "complaining witnesses" too.

Mr. Youngquist. Won't the court take [illegible]t?

Mr. Burns. They take care of th[illegible]s.

Mr. Youngquist. I have had [illegible]ourt took care of complaining witnesse[illegible]

Mr. Burns. And I [illegible]ere they didn't.

Mr. Dean. I second [illegible]

Mr. Medalie. Do you me[illegible] complaining witnesses" the ones who are described as victims?

Mr. Burns. Yes. I put victims in, because that has become a work of art.

Mr. Waite. Mr. Chairman, in line 13 do I understand that is to be put in somewhere else?

The Chairman. No.

Mr. Waite. Well, unless they are to be put in somewhere else I want to vote no on the motion.

Mr. Burns. It is just a more accurate way, on the point I made, to say "expert witnesses, character witnesses, or other witnesses who are to give testimony of a cumulative nature". Because that is the real objection to it.

Mr. Dean. That's right.

Mr. Holtzoff. I don't think that is the objection to it.

I think the objection to it is--

The Chairman. Is the motion seconded?

Mr. Dean. Seconded.

The Chairman. All those in favor say "Aye." Opposed?

Carried.

Mr. Seasongood. I would like to move to insert in line 3, after the word "conference", the words "at which the defendant shall be present".

The Chairman. "* * at which the defendant may be present", giving permission, not compelling him.

Mr. Seasongood. All right.

Mr. Holtzoff. I second it.

The Chairman. Any remarks?

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

Carried.

Rule 19.

Mr. Robinson. May I say a word about that, Mr. Chairman, a brief word?

The Chairman. Surely.

Mr. Robinson. The question is whether or not these rules should have something on continuance.

Of course there are arguments both ways.

The reason for it is--one consideration, I think, the American Law Institute Code, which is a rather complete code of criminal procedure, has quite a bit of attention given to it, and I think this is the only subject in which we have not made some provision in connection with this set of rules which is not--this would be the only omission we would make. That is, I think we have touched everything in this set of rules which

is touched in the American Institute Code.

I suppose the delay in federal courts due to improper use of continuances is not very great.

You may wish to vote the rule out. It is just here for your consideration.

On the other hand, if there is now or may be a desire to avoid delays due to the improper requests for continuances, it may be considered.

The strongest recommendation we have comes from here in the District of Columbia.

We are told that in moving the calendar along the United States attorney is continuously met by the objection, "Oh, this
2 is the first time it is up." If defendant's counsel move for a continuance on account of an absent witness, defendant's counsel feel they are entitled to one continuance anyway, even though the jurors are present, all the witnesses are present, and the court's trial may be interfered with by such a motion.

The only other point that might be noted is lines 14, 15, 16, and 17 , which is the statute that is used in a good many states.

It is designed to accomplish two or three things, the particular one being--the active one, I think--to permit the judge to arrange his calendar.

Suppose there is a motion on account of a witness absent on account of illness. The statutes require in several states that there be a statement by a physician stating when the witness will be available, permitting the court to adjust the calendar properly and to avoid a misuse of the purpose of the continuance.

That is all I have to say.

Mr. Holtzoff. This rule was not acted on by the Committee on Style?

Mr. Robinson. No.

Mr. Holtzoff. Now I am going to move that this rule be not adopted for the reason that the question of continuance, it seems to me, should be left to the discretion of the district judge; whether he should require a certain kind of certificate or affidavit is something that a judge can determine without being told by rule.

Now, as the Reporter said, there hasn't been a great deal on continuances.

Now, it is a fact that some of the judges in the district courts are very liberal. Now, this rule is not going to stop liberality.

I don't think matters of detail which ordinarily are disposed of by the judges should be put into the rules and I move that this rule be not adopted.

Mr. Longsdorf. I second the motion.

The Chairman. Any discussion?

Mr. Seasongood. I had thought to move to strike out the first sentence. That seems obvious. Why doesn't this place some limitation on the right to ask for a continuance that would help the judge?

Mr. Holtzoff. Well, shouldn't you leave that authority to the judge's discretion or to local rules?

The Chairman. Any further discussion?

Mr. Medalie. There is one other thing in connection with this section that I think is very, very bad, and that is that

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if because of the absence of a witness a continuance is asked, an admission that the witness would testify a certain way is enough to cause a denial of that motion.

Mr. McLellan. Even to require denial of it.

Mr. Seasongood. It says he may be impeached too.

Mr. Medalie. Of course if the district attorney asks for a continuance on the ground that his witness is away, can you get an adjournment?

Mr. Robinson. This is a very common statute and I know it operates very effectively in state courts.

Mr. Holtzoff. There is no such statute now in the federal courts to require opposing parties to accept an admission rather than evidence.

You can kill a case by admitting certain facts.

Mr. Robinson. In some states it is worse than that. If the party opposing wants to admit the truth, not that the witness will testify--

Mr. Holtzoff. No. You destroy the force of my testimony.

If one of my witnesses was ill and you deny me a continuance, you admit that if that witness was present he would testify so and so, why, that does not make any impression on the jury. And you can destroy the testimony.

Mr. Robinson. Sometimes you do and sometimes you don't. There are arguments both ways.

Mr. Waite. I think this is a very effective rule in stiffening the backbone of the judges and giving them something they can rely on when otherwise they do not like to oppose the attorneys before them.

Mr. Longsdorf. If we throw it out we don't have to have a

discussion on it. If we leave it in, then we can deal with statutes, can't we?

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

There is a motion to strike Rule 19.

Opposed, "No."

Mr. Robinson. May we ask whether we cannot have a vote--

Mr. Longsdorf. We haven't had our vote yet.

Mr. Robinson. (continuing) --on continuances; whether we have any rule on continuances?

The Chairman. Let us finish getting the vote on this. This is a motion now to strike Rule 19 (a).

Now, all those in favor show hands.

One, two, three, four, five, six, seven, eight.

Opposed? One, two, three, four, five.

The motion is carried.

Mr. Wechsler. I think there ought to be a rule. This is a condition on which the votes might differ, that there be a rule that provides for the contingency of continuance.

Mr. Medalie. I think you cannot have provision unless you have provision for the automatic condition of the calendar. And the calendar depends on whether the district attorney controls it or the court controls it.

If the district attorney controls it you cannot have this kind of thing.

Mr. Holtzoff. It is a matter that varies from district to district.

The Chairman. If there is no further motion we will go on to 19 (b) of which we have a second draft that has just been furnished.

Mr. Robinson. This is drawn in accordance with the vote of the Committee, not unanimous vote but substantial vote, that there should be a rule, which I think is based in part on the requests that have come before this Committee for a rule.

A careful check has been made of United States Attorneys by Douglas McGregor.

Out of 52, 39 answered that there should be in these rules some provision in case of alibi. 13 say no.

United States Department of Justice Committee says that the Committee has decided in favor of a rule to give the prosecutor notice of alibi.

The Post Office inspectors are overwhelmingly in favor of a rule requiring defendant to give notice of alibi.

And we have a discussion from Judge Duffy of Wisconsin of a case in which the lack of alibi was the cause of a miscarriage of justice.

We have other authority on that and that is the reason for including it. It is for your consideration.

Mr. Medalie. What did the United States attorney for New York say?

Mr. Robinson. Let us see what he says. (Examines papers.)

New York did not answer, according to this poll.

Mr. Medalie. I will speak very briefly. There are two kinds of alibi notices.

One is the case in which the district attorney initiates the proceeding. He moves that the defendant furnish a statement to the effect that he was not present at the place charged in the indictment at the time stated, that he was elsewhere, and the names of the witnesses by whom he intends

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to prove it.

The other method is that the defendant before he offers proof shall initiate something, that is, he shall give notice that he intends to prove an alibi; he must give the place and time and the names of the witnesses.

Those are the two methods.

Mr. Robinson. The first is New York only, and the other is the other 13 states--14 have it, and the others are different.

Mr. Medalie. I believed for some time that it was futile. I had a change of heart and told the Reporter I would ask the district attorney of New York, where there are more cases dealing with alibi than any other place in the country. It cannot be otherwise.

Mr. Holtzoff. More than Chicago?

Mr. Medalie. More than Chicago.

Mr. Burns. That is civic pride.

Mr. Medalie. It is pride.

The Chairman. We will forgive you for boasting.

Mr. Medalie. In view of the fact that that has been, by common acceptance, an efficiently run office during the past few years--

The Chairman. Some time back it was.

Mr. Medalie. I took the matter up with that office and I asked if its experienced trial assistants who had had experience in that matter would have a conference with me, and it was so arranged.

They said that it is not worth bothering with in more than one case in fifty.

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The assistant in charge of what is called the General Sessions Bureau, the member that tries jury cases, he says he advises not to bother with it, it is not worth while, a good job can be done by good cross-examination.

Mr. Robinson. It is a poor statute, is it?

Mr. Medalie. No, it is a good statute. They don't get much good out of it.

I checked up further with the head of another bureau who is a very scholarly man who has had occasion to see what the results are. He does not see any very substantial advantage to it.

Mr. Holtzoff. Have you had a chance to check with Michigan and Ohio?

Mr. Medalie. No. In all my travels I have gone no farther than New York City on it.

Mr. Dession. All New York people do that.

Mr. Medalie. One of the assistants thought there was some good in it but admitted he never used it.

Now, I see from these statistics we are getting in answer to questionnaires, the indications are that we ought to have such a statute, but I have been unable to find enough evidence from answers to questionnaires that it actually did much good.

Mr. Burns. Of course you never could find out, because its real worth would be in the alibi defenses that were not raised.

Mr. Robinson. That is right. It is preventative.

Mr. Waite. There is one case in our county where it worked well, and I know of at least one case in Ohio where it worked well.

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Now, as Judge Burns says, how many fraudulent defenses it warded off, we have no way of knowing.

Mr. Medalie. Well, they seem to offer alibi defenses in those States where you have it.

Mr. Waite. This won't stop it.

Mr. Medalie. If this does not do much good, in view of the large amount of debate it will create, I should not like to see the adoption of our rules endangered.

Mr. Holtzoff. Well, wouldn't it be a good thing to have this rule go out in preliminary draft so it might be commented on? We can withdraw it if the comments are adverse, before we submit it.

I think that is one of the purposes of submitting a preliminary draft.

Mr. Waite. And if we do not put it in we will be criticized for being entirely too conservative.

Mr. Medalie. How about those two examples? I don't find many.

Mr. Holtzoff. Isn't it a fact--

4 Mr. Medalie. Don't divert me from seeking specific examples.

Mr. Holtzoff. But we don't know how much perjury has been eliminated.

Mr. Longsdorf. May I ask a question?

I am not indicating that I am against the rule, but the first one is a simple rule: May the Government compel a defendant to say where he was at a given time?

Has the defendant the right to decline to state where he was at the time?

Mr. Holtzoff. I think he has.

Mr. Longsdorf. That is what I wanted to know first.

Mr. Medalie. They cannot prohibit him from testifying. They can prohibit him from calling the witnesses under the statute.

Mr. Longsdorf. He has a constitutional right to decline to state where he was at the time of an offense. And if he has that right, can you take it away from him indirectly by providing that if he does not file a motion stating where he was, that he cannot at the trial show that he was not at the scene of the crime?

Mr. Waite. On what did he perhaps predicate his right not to say where he was? Of course he can say he cannot be compelled to incriminate himself but does he have a right to refuse to say where he was if that is not incriminating?

Mr. Holtzoff. Well, I think this would require him to give notice that he was at a certain place if he intends to give evidence on it.

Mr. Longsdorf. But your rule provides that he must in particular state where he was.

Mr. Dean. That will be binding on him if he does.

Mr. Seasongood. What?

Mr. Dean. That will be binding on him if he does.

Mr. Seasongood. It will either be binding on him or against him.

The Chairman. Wouldn't a good man be helped by this?

Mr. Longsdorf. I am not answering whether he would be helped but whether a man can be compelled to state where he was--now, can you provide a condition that he shall do that?

Because that is what your rule does.

The Chairman. Well, you could have a requirement that his plea must state his position exactly, as we do in a civil case, couldn't you? You could have a system of required pleas.

Mr. Longsdorf. I doubt if you could have one that would make it necessary for him to furnish evidence.

Mr. Burns. Well, if there is any compulsion, isn't there compulsion to furnish evidence which will not incriminate him but save him harmless?

Mr. McLellan. Well, of course you are getting off into a line of cases where they held that, even though a man was compelled to state that he was at a downtown hotel, that they may incriminate him as to an offense that took place up in Harlem.

Mr. Holtzoff. Judge, are you considering this--

Mr. McLellan. All I am doing is trying to learn something.

Mr. Holtzoff. I have had nothing to do with drafting this particular rule.

As I construe it, they wanted to require the defendant, if he intends to offer evidence, to state in advance what it is going to be--in other words, if he does not intend to divulge where he was--he does not do it in advance, he intends to do it at the trial.

Mr. Longsdorf. The rule says he must state where he was.

Mr. Dean. Shouldn't the requirement be changed around a little and require first that the Government furnish proof of the exact place of the commission of the offense?

Then if he wishes to raise the defense of alibi, then he

must state where he was at that time.

Now, this is put in reverse. In other words, if he wants to raise the defense of alibi he asks the Government to specify, but at the time he asks that he must first state where he was.

I can conceive of the Government's changing its specification to agree as to where the offense took place, to correspond with where he was.

Mr. Holtzoff. Can't you see the defendant doing the same thing if the Government moves first?

Mr. Dean. I grant that, but the Government should state where that offense took place.

The Chairman. Wouldn't he be able to get that anyway by a bill of particulars?

Mr. Youngquist. That is what this provides for.

The Chairman. But what Mr. Dean is suggesting is that that should come first, the Government should state where it lays the crime.

Mr. Dean. They ought to do it in the indictment anyway.

Mr. Holtzoff. Doesn't that go into the details of the rule rather than the basic question of whether we ought to have a rule?

Mr. Dean. I think it is more than a detail.

Mr. Medalie. Your indictment says January 1. Why should the defendant have to make up his mind until the Government states where it was? Suppose he tells where he was on January 1 and the Government says, "Oh, excuse me, we mean January 8"?

The Chairman. Is there any objection to the proposition that the Government should state the time and place first?

Mr. Wechsler. What is the consequence of that statement,

Mr. Chairman? Is the Government held strictly to prove that time and place?

Mr. Medalie. The time must come when the Government can be justly required to make up its mind, just as the time must come when the defendant can be justly required to make up his mind.

Mr. Dean. The law can be changed by saying the defendant shall then testify as exactly as possible the time and place where he was at the time specified.

Mr. Wechsler. Well, will the rule hold the Government specifically to the time specified by the Government?

Mr. Burns. It does not say so.

Mr. Medalie. May I say one other thing in this connection: Most defendants are in no position to get anything started because they are not really represented by counsel, except on paper.

If the Government is really interested in finding out where the man was or wants to prepare for that kind of thing, it should indicate which particular place is concerned.

When it doesn't, it ought to initiate the proceeding and should initiate it by calling defendant's attention to the fact that it claims a crime was committed at the time and place which it now specifies, and require him to give the place that he was at at that particular time.

Then he is called upon to move, instead of having a lot of time wasted in matters in which the Government has no concern at all.

That is the New York idea and I think it is a sound one.

Mr. Holtzoff. I would suggest, Mr. Chairman, we take a

vote on the principle of whether we should have that alibi rule first.

Mr. Medalie. That sounds very logical but it is not, because if one alibi rule is sound and the other is not, I don't think you can indicate by the adoption of any principle.

Mr. Longsdorf. Unless they vote against.

Mr. Medalie. I move the New York alibi rule as a basis of discussion.

Mr. Longsdorf. I think it is desirable to see whether the majority want an alibi rule.

The Chairman. The motion is that we favor an alibi rule in principle.

All those in favor of the rule say "Aye." Opposed, "No."

The ayes raise hands, please. One, two, three, four--

Opposed? One, two, three--

Seven to three.

Mr. Medalie. Several of us not voting.

The Chairman. Obviously.

Now the question is, what alibi rule?

Mr. Medalie. I move that we consider the adoption of the New York alibi rule requiring the district attorney to initiate the proceedings.

Mr. Dean. I second that motion.

Mr. Robinson. May I speak on that?

The Chairman. Surely.

Mr. Robinson. We have made a careful study of every alibi rule in the United States.

There are 14 statutes.

We summarized all that in your second draft. Not the

details, but the principles of law.

We included a copy of the New York statute, a copy that came from the District Court Committee in Oklahoma which seemed to be based largely on the Oklahoma statute, and you have also had for consideration the Indiana statute.

Now, we have examined the New York statute. It is different from all other statutes, the Ohio statute and the Michigan statute, the Indiana statute, and the rest of them. And it requires that the thing be started out--with due respect to my colleague, Mr. Medalie, here--backed by the opinion of those who have examined those statutes--that somehow the Government has to smell it out before it starts an investigation.

The district attorney otherwise is going to have to wait and get along without it, apparently, without any notice of alibi.

I suppose one way he could do it would be if he would just print a form and say to each defendant, "Now, if you are going to prove an alibi you will have to tell me about it." Otherwise the United States attorney or state's attorney will think there is likely to be an alibi and he will inquire about it.

I think that is the only reason why New York is the only state which has adopted the statute, and I think perhaps that is the reason why the New York statute is a failure.

Mr. Medalie. I did not say it was a failure. You have a first-class district attorney's office that has established its competence, and it finds that the use of an alibi statute does not work.

That does not mean that this one is effective because of

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its procedure.

Mr. Robinson. I am saying this as to Mr. Dean's suggestion there about studying the New York statute, the Style Committee have considered the statute. We have exhausted the possibilities, and to move a thing of that kind is simply to move a reconsideration of something that has been dropped by us.

Mr. Dean. In the first place, I don't think that we have exhausted anything because the New York statute has never been in a draft for our study.

Mr. Robinson. Yes, it was.

Mr. Dean. Oh, then I missed it.

Mr. Medalie. The New York statute was proposed in the last afternoon of the meeting of our subcommittee.

Mr. Dean. And the draft was to be based principally on that.

Mr. Medalie. Yes.

Mr. Robinson. The New York statute was distributed.

Mr. Dean. We didn't have it here.

6 Mr. Robinson. I think you did in your first draft or second draft. I can take time to look it up.

Mr. Seth. It is in the third draft, Rule 51 (e), based on the New York Code.

Mr. Dean. Well, I did not recall that we had turned down the New York procedure or really considered it.

Mr. Holtzoff. We considered it but reached no conclusion on the statute if my recollection serves me right.

Mr. Medalie. You are right.

Mr. Dean. I think in your alibi situation it is not a

question of the Government smelling out an alibi or not smelling it out and playing safe by distributing advance copies of the request. I think if the Government has got a case and has plenty of witnesses who know just where the fellow was, that is, has three or four cops to testify, it is not going to worry about an alibi.

Mr. Holtzoff. It is going to worry about a fake alibi, because it is always used at the last day of the trial. It has to prevent an alibi at a time when it is unable to meet it.

I recall that we had before us Mr. Alexander from one of the Illinois districts, telling where they had to bring witnesses by airplane across the country.

And sometimes the prosecution may not be fortunate enough to locate witnesses of that type at a moment's notice.

So I do not see what harm there is to a defendant who is not going to introduce a perjured alibi--how such a defendant, if he is required to give notice in advance so the Government will check the alibi--with an honest defendant the chances are the United States attorney will nolle pros the case.

Under the New York rule it really deflates or reduces to zero really the idea of alibi notice because it requires the prosecution to start first by saying, "Well, we are going to prove that the crime was committed at such and such a time. Are you going to claim you were somewhere else?"

That practically invites an alibi.

Mr. Medalie. It is invited anyhow by the indictment or information, isn't it?

Mr. Holtzoff. I can conceive of only one thing--

Mr. Medalie. Unless you are assuming the Government does

not mean what it says in the indictment when it fixes the time and place.

Mr. Holtzoff. Well, I can see one advantage to the defendant, because a poorly represented defendant may not be aware of his rights, but I think provision should be made in the rule where that is the fact, that he shall suffer no consequences.

Mr. Dean. Well, since our motion is not carried to adopt the New York pattern, might it be well to proceed with this draft and see if we can switch it around so that the Government must give exact notice of the time and place?

The Chairman. Give us your suggestion.

Mr. Dean. That would be an amendment of line 32 by striking out the words "in the motion" and insert "the defendant shall then specify".

The Chairman. 32 or 31?

Mr. Dean. 32--"the defendant shall then specify", and go on, using line 33, and then knock out in line 34 "alleged in the indictment or information", and simply say "specified".

Because there you are speaking of a specification in the notice from the Government rather than the allegation placed in the indictment or information.

The Chairman. Will you read it as it will be?

Mr. Dean. "The defendant shall then specify as exactly as possible the place where he proposes to prove that he was at the time specified."

Mr. Holtzoff. Specified by the Government?

Mr. Dean. Specified by indictment or information.

Mr. Longsdorf. I did not hear what you said last.

"Specified by the Government", I think will do it.

Mr. Holtzoff. Then it may be we could omit the next sentence, in the light of your amendment, on which I am in full accord.

The Chairman. The long sentence beginning on 35?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "Upon a hearing of the motion"--that line 35.

Mr. Holtzoff. I don't think you will need any further sentence if Mr. Dean's amendment is adopted.

Mr. Dean. I don't think you will need the sentence.

Mr. Longsdorf. I would like to suggest that--

The Chairman. Wait just a minute, Mr. Longsdorf. I think Mr. Dean has an amendment.

Mr. Longsdorf. I beg your pardon. I did not hear it.

7 Mr. Holtzoff. I think the rest of it is all right, is it not, Mr. Dean?

Mr. Dean. The defendant does not exactly--yes, he does too. I think probably it is.

Mr. Longsdorf. Well, Mr. Dean, don't you want to have something in at the end of the first sentence about there having been a compliance with the defendant's motion for specification?

Mr. Youngquist. Wouldn't it be better to say, "When the Government has complied with the order the defendant shall"?

Mr. Dean. Yes, better.

Mr. Medalie. Where is this?

Mr. Dean. Line 32.

Mr. Holtzoff. "When the Government has complied with such order", you want to say.

The Chairman. "* * defendant shall".

Mr. Medalie. You are dealing with an order?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "* * the defendant shall specify".

Mr. Holtzoff. You don't need the word "then".

Mr. Seth. What happens if the Government does not comply?

Mr. Holtzoff. Then the defendant would not be required.

Mr. Medalie. You are going to compel the defendant to do certain things and if he does not do them he suffers certain disabilities, but the Government may go ahead and ignore the request.

Mr. Longsdorf. I don't think it may, because the Government--if the court requires the Government to speak, it must speak or be in contempt, I would say.

Mr. Wechsler. Well, must the Government issue this order?

The Chairman. I think we are getting this in shape. I will entertain a motion that this be referred to Mr. Dean as drawn.

Mr. Holtzoff. I so move.

Mr. Seth. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Motion carried.

The next is Rule 20 (a).

These we had apparently well agreed upon, had we not?

Mr. Holtzoff. Yes, we had. And they were very carefully studied by the Committee on Style.

The Chairman. Would you like the Committee to be advised?

Mr. Holtzoff. We think so. So far as this rule is concerned, anyway.

Mr. Seth. In 20 (c), if that is in order, should the Government be permitted to use a deposition because a witness is more than 100 miles away from the place of trial?

Mr. Holtzoff. No, it should not. We were going to strike that out. That crept in by error.

The Chairman. May we stick to (a) for a minute?

Are there any questions on 20 (a)?

That is a long rule. It will take time to read it.

Mr. Longsdorf. I move the adoption of the Rule 20 (a).

Mr. Holtzoff. I second the motion.

The Chairman. Those in favor say "Aye." Opposed, "No."

Carried.

20 (b).

Mr. Seth. 20 (b) does not seem to make provision for the expenses of the defendant not in custody.

Mr. Longsdorf. How about expense of attorney for defendant not in custody?

Mr. Seth. That is my idea exactly.

Mr. Holtzoff. I think the last sentence covers it. I know it was intended to.

Mr. Medalie. Pays the expenses, not fees.

Mr. Holtzoff. I mean the sentence beginning on line 34. I know the intention was to cover that item.

Mr. Wechsler. Well, suppose we say, "defendant and defendant's attorney". The line will apply when the defendant is in custody and not in custody.

Mr. Holtzoff. Yes.

Mr. Seth. How about an attorney for the defendant in custody, then?

Mr. Medalie. That is what this includes.

Mr. Holtzoff. An attorney for the defendant in custody?

Mr. Seth. Yes.

Mr. Holtzoff. That's right.

Mr. Wechsler. It should read, "shall pay in advance to a defendant not in custody and to defendant's attorney".

Mr. Holtzoff. Yes.

Mr. Wechsler. Which will cover the attorney for the defendant who is in custody and not in custody.

Mr. Seth. You would strike that out in line 35?

Mr. Wechsler. No; after that, instead of "his attorney" say "and to the attorney for the defendant".

Mr. Longsdorf. You don't pay the expenses of the defendant in custody because he would be taken there anyway?

Mr. Seth. That is right. It is a free ride.

The Chairman. That sentence might be a little clearer if you would put defendant's attorney first, and "defendant not in custody" second.

Mr. Longsdorf. Yes. Yes, sir.

The Chairman. Are there any other suggestions on (b)?

If not, all those in favor of (b) say "Aye." Opposed, "No."

Carried.

On (c) I believe there is a correction, is there not?

Mr. Robinson. Yes. On line 40, "100" is to be stricken out and "500" placed there.

Mr. Holtzoff. No. No distance at all.

Mr. Robinson. No distance. As in the civil rules?

Mr. Holtzoff. No. Criminal procedure runs across the

country. We will strike out everything after the first four words on line 40. That is, strike the rest of that line; and strike out the first seven words on line 41--or, six words, I mean to say.

Mr. Medalie. Which?

Mr. Holtzoff. "* * the witness is outside of the United States".

Mr. Medalie. What about the 100 miles, and, where dead?

Mr. Holtzoff. "* * * dead, or that the witness is outside of the United States".

And strike out everything relating to "a greater distance than 100 miles".

The Chairman. Are there any other questions on (c)?

Mr. Holtzoff. I move its adoption.

The Chairman. Second?

Mr. Seth. I second it.

The Chairman. Those in favor say "Aye." Opposed, "No." Carried.

We now come to (d). Unless there is objection that will stand approved.

Mr. Longsdorf. There might be some objection. "* * in the manner provided in civil cases." Civil cases of course provide for taking of depositions on notice. May be it is not necessary to more than call attention to that, and that is all I intended to do. "The manner provided in civil cases." That means the manner of taking.

Mr. Dean. One question on (c).

You might have a witness who was very much alive and within 100 miles and still outside of the United States.

Mr. Holtzoff. We leave the words "outside of the United States."

The Chairman. It reads, "or is out of the United States."

Mr. Wechsler. Mr. Chairman, I do not understand the provision beginning on line 46, "or, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

I have some question about that, particularly in view of the broad use to which depositions may be put under (c), although you will observe that under (a) the taking of depositions is limited to the case where the prospective witness may be unable to attend, where it appears that he may be unable to attend or prevented from attending.

That (c) contemplates a situation where that expectation proves to be wrong, the witness who was not expected to be able to attend does attend, and (c) goes so far as to allow the deposition to be used as independent evidence testified to in the deposition, even though the witness is there.

Mr. Holtzoff. That language was taken from the civil rules.

Mr. Wechsler. I know it.

Mr. Holtzoff. That is the reason it is there.

Mr. Wechsler. I move it be stricken.

Mr. Holtzoff. I have no objection to striking it.

Mr. Longsdorf. Might there not be circumstances--I cannot think of any at the moment--but might there not be circumstances in which the court would think it proper that

depositions be used?

Mr. Dession. You cannot do that now, I think.

Mr. Holtzoff. That is from line 46 to line 49; is that right, Professor?

Mr. Wechsler. Yes.

Mr. Medalie. Is there a motion to strike that?

The Chairman. Yes. All those in favor say "Aye." Opposed, "No."

Carried.

Now we are back to (d), which I believe has been approved.

Mr. Youngquist. May I raise one question?

The Chairman. On (d)?

Mr. Youngquist. (b)--(c).

The Chairman. Yes.

Mr. Youngquist. Suppose a deposition has been taken and the defendant, having caused it to be taken, has served a subpoena on the witness who gave the deposition. The witness fails to appear in response to the subpoena.

Should the defendant not be obliged to use the deposition notwithstanding?

Mr. Holtzoff. That is, because the party has been unable to procure the attendance of the witness.

Mr. Youngquist. Is that broad enough--well, perhaps it is. All right.

The Chairman. All right, (d), gentlemen.

Mr. Longsdorf. What was the change in that?

The Chairman. In (d)?

Mr. Longsdorf. Yes.

The Chairman. I think there is no change so far.

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Mr. Longsdorf. Well, I don't know what it means.

Mr. Holtzoff. It means that the machinery for taking depositions shall be the same as in civil cases.

Mr. Longsdorf. That does not mean you can take them on oral interrogatories, of course.

Mr. Seasongood. We have a paragraph (f) which deals with written interrogatories if the defendant is taking the deposition.

Mr. Longsdorf. All right. The deposition may be taken as provided in civil cases.

The Chairman. I think it needs clarification. We know what it means.

Mr. Longsdorf. Might it be well to say, "In the taking of depositions, the manner provided in civil cases shall be followed"?

We don't want to give the idea that you can take them on notice without order of the court.

The Chairman. Can you say, "Where a deposition has been ordered," so it does not create that idea?

Mr. Longsdorf. Yes.

Mr. Medalie. Now may I ask another question: Lines 15 and 16, what do you mean by "the particular class or group to which he belongs"?

Mr. Longsdorf. 15 and 16?

Mr. Medalie. Of Rule 20.

Mr. Holtzoff. I think we had that up in the subcommittee.

Suppose you want to take a person whose name you do not know but whom you can describe, for instance, the janitor of a particular building.

Mr. Medalie. What about "the particular class or group to which he belongs"?

Mr. Holtzoff. It applies. Suppose it is the crew of a particular vessel, you don't know their names.

Mr. Youngquist. Or the officers of a corporation.

Mr. Longsdorf. Mr. Chairman, you get into an awful mess--well, he has to be identified, anyhow, doesn't he?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Then why not strike out the "class or group to which he belongs"?

Mr. Holtzoff. "* * * or, if the name is not known, a description sufficient to identify him".

Strike out the rest?

Mr. Longsdorf. Is that in the civil rules?

Mr. Holtzoff. This is taken from the civil rule.

Mr. Medalie. You are going to have the deposition of somebody in that crew, you don't know who; is that what it means?

Mr. Holtzoff. Yes.

9 Mr. Medalie. How can you take such a deposition?

The Chairman. It is very common in civil cases.

Mr. Medalie. A member of a crew, without knowing who he is?

Mr. Longsdorf. They have to find him to take his deposition, don't they? Then why don't they go find him?

Mr. Holtzoff. I have no objection to having those words go out, "or the particular class or group to which he belongs".

Mr. Medalie. I move to strike those words.

Mr. Waite. Seconded.

The Chairman. Moved and seconded that the words "or the particular class or group to which he belongs" be stricken.

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

Carried.

What is your pleasure with (d) as amended? All those in favor say "Aye." Opposed, "No."

Carried.

Go to (e).

Mr. Holtzoff. I move the adoption of (e).

Mr. Medalie. Written interrogatories when--

Mr. Youngquist. You are on (e).

Mr. Longsdorf. I move the adoption of (e).

Mr. Holtzoff. Seconded.

The Chairman. Those in favor say "Aye." Opposed, "No."

Carried.

Now, what was your question?

Mr. Medalie. This says the deposition of defendant to be taken on interrogatories.

Mr. Holtzoff. The compensation rule prevents the taking of interrogatories--

Mr. Longsdorf. I move the adoption of (f).

The Chairman. Does this rule give the defendant that option? That should not be, should it?

Mr. Youngquist. No.

Mr. Medalie. The defendant--the court may direct--

Mr. Longsdorf. If the defendant so moves.

Mr. Holtzoff. At the defendant's request.

Mr. Seasongood. Why do you say the court should not have the right--it is at the instance of the defendant. Maybe he

would like to get out of jail for a while, but why shouldn't the court say, "It is enough for your purposes to take it on oral interrogatories"?

Mr. Longsdorf. Oh, I think if he wants the benefit of a written examination that that is good.

Mr. Holtzoff. I was thinking of a situation where the witness was at a different place and it was being used as an excuse for a continuance.

Mr. Longsdorf. It is all in the discretion of the court, even if the defendant requests.

Mr. Holtzoff. Suppose he does not request and the court says, "We can send written interrogatories by air mail instead of giving you a continuance"?

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Advisory
Committ.

Mr. Dession. The difficulty is that this may be a rather stupid person, so that he does not understand written interrogatories.

The Chairman. Written interrogatories are unsatisfactory to the most intelligent witnesses, largely because you cannot anticipate what the answers willbe.

Mr. Holtzoff. I had in mind the possibility of this being used as a means of dilatory tactics.

Mr. Medalie. I move to strike out the words "in its discretion" in line 63.

Mr. Holtzoff. How is that amended, now?

The Chairman. "May at the defendant's request."

Mr. McLellan. May I ask whether this matter of taking depositions is at all discretionary with the court?

Mr. Holtzoff. Yes. Take the first sentence of the rule, the word "may."

Mr. Medalie. At present you can go up to Nova Scotia to take a deposition of the defendant, and he must give it to you.

Mr. Holtzoff. At present it is discretionary.

Mr. Medalie. Is it?

Mr. Youngquist. No.

Mr. Holtzoff. It is discretionary.

Mr. Medalie. It used to be on account of you that we used to go all over the world to take depositions.

Mr. Seth. Line 5 says the court may.

Mr. Holtzoff. In a criminal case, if the defendant wants to take depositions,he makes application to the court. He cannot take them on notice, as I understand it.

Mr. Medalie. That is right.

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Mr. Holtzoff. That makes it discretionary.

Mr. Medalie. No. The defendant finds he needs a material witness or that he is necessary. The court has no right to deny the motion.

Mr. Holtzoff. He has a right to deny it if he thinks it is not made in good faith.

Mr. Medalie. Yes. That is different.

Mr. McLellan. I think this rule is good in that it leaves it to the discretion of the court.

The Chairman. I suggest that we have about a five-minute recess.

(A short recess was had, after which the following occurred:)

The Chairman. Rule 21 (a).

Mr. Dession. Mr. Chairman, before we leave the last section, the one on depositions, the one on written interrogatories, I gather the civil rule referred to there is Rule 31, which in general seems workable, but there are one or two things in it that would not make too much sense.

It starts off, "A party desiring to take the deposition of a person upon written interrogatories shall serve upon every other party, with a notice stating the name and address of the person, the name and descriptive title"--a lot of that is going to be in the order which he has already obtained--the names of the respective people to be interrogated, the addresses, and the officer before whom it is to be done.

According to Rule 31, all this has to be done in a notice that he serves to the other party. It would not do any harm, but --

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Mr. Holtzoff. Your order merely grants you permission to take the deposition of John Smith in Timbuktu before you serve notice that you are going to take the deposition on such and such a date in such and such a building before such and such a person.

Mr. Dession. But under the civil rules he would first serve this to the other party. In criminal practice he first goes to the court and he gives him the order. Maybe he gives notice before that, maybe not.

Mr. Holtzoff. I think it will work in criminal procedure.

Mr. Dession. I think it can be made to work.

The Chairman. Do you suggest that we evolve our own, in preference to this suggestion?

Mr. Dession. I think it would sound better.

Mr. McLellan. Would it be better to change the word "taken" in line 62 to the word "ordered"?

The Chairman. In line 62, substitute "ordered" for "taken" in Rule 20.

If there is no objection, that will stand.

Coming back to Mr. Dession's suggestion, do you think there is enough to be gained by evolving our own rule to make it worth while, rather than refer it back--

Mr. Dession. There is stylistic point I mentioned.

Let me see if the matter of the time limits is workable with an ordinary defendant:

> "Within ten days thereafter a party so served may serve cross-interrogatories upon the party to take the deposition. Within five days thereafter the latter may serve redirect interrogatories upon a party who is

served cross-interrogatories. Within three days after being served with redirect interrogatories, a party may serve recross interrogatories."

That is the civil set-up.

Mr. Waite. What are you reading that from?

Mr. Dession. This is the civil rule which we have just incorporated in our set-up.

Mr. Holtzoff. I do not see why that set-up would not be applicable to written interrogatories and depositions in criminal cases. There should be no difference.

Mr. Dession. My question is whether you like the time limit. If you do, it is applicable.

The Chairman. Five days is standard.

Mr. Holtzoff. Yes, and it can be extendedby the judge if it is too short.

Mr. Youngquist. The cross interrogatories are served after ten days. Then the defendant serves redirect after five days. Isn't that it?

Mr. Dession. That is it.

Mr. Holtzoff. But the judge has discretion to grant longer time if need be.

The Chairman. 21 (a). Is there any question on that?

Mr. Robinson. That is Civil Rule 40.

Mr. Medalie. That again raises the question of the practice where the district attorney makes up his own calendar.

Mr. Holtzoff. In those districts where the United States Attorney makes up his own calendar, if I thought that this rule took that authority from the United States Attorney I would

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object to it very strenuously, but I thought that the rule was

2 so general that it was not intended to work that change. If you think it might be so construed--

Mr. Robinson. In all our previous drafts we tried to have that in mind.

Mr. Medalie. You have two situations. One is in the large districts, where you have more than one part of the court operating at a time and a particular part of the court given over exclusively to criminal business. The other is where one part of the court or one term of the court operates for all business. This would seem to be applicable to the court operating for all business in one term in one part of the court.

Mr. McLellan. Would there be any harm in changing the word "shall" to "may," so that it reads:

"The district courts may by rule or otherwise provide for placing criminal proceedings upon appropriate calendars," so as to leave it up to the large districts to permit the general practice that is now in vogue to be continued?

Mr. Holtzoff. I would like to see that change. If there is any doubt about the construction of this rule, I would like to make certain--

The Chairman. That would meet your objection?

Mr. Medalie. What is that?

Mr. McLellan. "May by rule."

Mr. Medalie. You have added nothing.

Mr. Seasongood. What is the sense of the first sentence? Why do you need that?

Mr. McLellan. Except that you have something below that is desirable.

Mr. Seasongood. You can leave that in, but the first sentence is something he has a right to do.

Mr. McLellan. All it does is that it calls the matter to the judge's attention. Some of the district attorneys think that they have a legal right to decide what they will try and get up their own calendars. This gives the court the power to do the contrary, but does not require him to do it.

Mr. Seasongood. How can there be any question that the court has a right to assign the order of business?

Mr. McLellan. I do not think there is any question about it, but I think that would be a good thing for some district attorneys to read.

Mr. Burns. Isn't it true, Judge, that in case of a conflict the district attorney may announce that he has no more cases to present at this session and the judge can do nothing about it?

Mr. McLellan. I am not willing to say that that is so. I am not at all sure that he may not say to the district attorney, "But there is the case of United States against X that ought to be disposed of.

I had an experience like that once, where I was for the defendant, and the United States Attorney said he would not try it until so and so, and I said, "I do not see why you should not try it next week." The judge said, "I don't, either."

Mr. Burns. But that is the power of the judge to dismiss the case. If you look at it as a judge in a two-party controversy, if the district attorney does not desire to bring it forward I do not think the judge has the power to bring it forward.

Mr. McLellan. There is a little difference of opinion on that.

The Chairman. In my district, in the last two weeks, a judge said to a district attorney, when there was a breakdown of the calendar, that there might be worse district attorneys than there was there, but he had not been able to find out, from investigation here at Washington, where that was. Next week he had a calendar of fifty cases ready for trial.

Mr. Holtzoff. About a year ago a Federal Judge in Chicago who was holding criminal court sent for all the prisoners who had been in jail for a certain time and said to the United States Attorney, "You will try a case today or I will discharge the prisoners," and he discharged a half dozen prisoners.

We thought that was drastic. He should have given the United States Attorney some leeway and some notice, but I do not think he was lacking in power to do it.

Mr. McLellan. Anyway, what is the harm in saying that the district courts may by rule or otherwise provide for a calendar? If they have not the power, ought not they to have it?

The Chairman. The next sentence troubles me more. Suppose you have single judge districts and you have a large number of criminal trials. Does that mean you are going to go term after term without trying the civil cases?

Mr. Holtzoff. There is a principle now that all judges follow in single judge districts. They put the criminal cases at the head of the list. It actually does not work any trouble.

Mr. Youngquist. I thought we had the words "as far as practicable" at the end of that.

Mr. Holtzoff. I thought we did.

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Mr. McLellan. "Shall as far as practicable."

Mr. Holtzoff. Now that you mention that, it recalls it to my mind.

Mr. Robinson. I do not know how that got out, if it did.

Mr. Youngquist. At the end of the second sentence.

The Chairman. After the word "shall" insert the words "as far as practicable."

If there is no objection, those changes in the first and second sentences will be regarded as accepted.

All those in favor of (a) as amended say "Aye"--

Mr. Youngquist. "May by rule or otherwise"?

The Chairman. That is right.

Mr. Seth. Why not leave out "rule or otherwise"? Why not say "may provide"?

Mr. McLellan. I think that is better.

3 Mr. Medalie. The calendar is either a general calendar or a special calendar for criminal cases, is it not?

The Chairman. Yes.

Mr. Medalie. What is provided for?

The Chairman. It is a mild declaration of the court's right to be the boss of the institution.

Mr. McLellan. It might prove helpful at times.

I move that it be adopted as modified, if it has not been done.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

(b).

Mr. Robinson. Mr. Youngquist, don't you have a suggestion by which some words can be saved?

Mr. Youngquist. Is that a general question or a specific one?

Mr. Robinson. A specific one. I believe you indicated to me that you can drop a couple of lines there.

Mr. Youngquist. It is not of sufficient important to stop for it.

Mr. Holtzoff. I move we adopted 21 (b).

Mr. Robinson. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Waite. I notice in the beginning of the books, under "Notes," there is a note suggesting that the Advisory Committee considerrecommending that the Administrative Office seek from the Judicial Conference an authorization along the following lines.

That is a proposal that I made last time. It was a proposal that was in the new court act. My original proposal was that the judge should require a report of the status of each criminal case begun, and it was suggested that that was not wise, in view of the activitiesof the Administrative Office.

I would be perfectly satisfied--it seems to me it is a wise thing--that we should ask the Administrative Office to plan out some provision for a report of the status of various cases, so that the judge may know what is being tried and what is not being tried.

Mr. Holtzoff. Why shouldn't you leave this to the Administrative Office and to the Judicial Conference, which is a sort of board of directors to which the Administrative Office is responsible?

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Mr. Waite. What did you ask?

Mr. Holtzoff. Why shouldn't we leave this whole subject to them? Why should we take any action?

Mr. Waite. You say why should we not leave it to them?

Mr. Holtzoff. Yes, why should we not leave it to them, instead of taking any action on it ourselves?

Mr. Waite. I think it would be desirable to suggest to them that we think it is wise. Now, they may not agree with us, but there cannot be any objection, if that be our opinion, to our expressing our opinion to them.

Mr. Youngquist. I should hesitate to omit 21 (b). After all, it is certainly within the province of the court to see that criminal cases that are pending in his court shall be brought on for trial expeditiously.

Mr. Waite. This is not a proposal to omit 21 (b). This is a proposal to supplement 21 (b) by suggesting that the Administrative Office ask the Judicial Conference for some procedure by which the judge may know what the status of the case is, so that he can insist on its being tried.

The Chairman. That is the note at the beginning of the volume.

I wonder if we can hold that until we come to the notes?

Mr. Waite. I am perfectly willing to hold it.

Mr. Seasongood. In 21 (b) don't you have to give notice to the judge before whom the case is pending? It seems to me a pretty arbitrary thing to go in there and take it out of his hands in advance of any notice to him.

Mr. Holtzoff. I think he has a right to do it, because the senior circuit judge has certain administrative powers.

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Mr. Longsdorf. Mr. Chairman, I do not know how this 21 (b) may impinge on the activities of counsel. They might have something to say about this.

The Chairman. They would, but it could not conflict with this.

Mr. Longsdorf. I do not think it would. They are not supposed to interfere with district judges. Sometimes they get their feelings hurt and think it has been done, but I do not think it is true.

Mr. Seasongood. This is a very drastic provision. You go right over the head of the judge before whom it is pending and you provide notice to the United States Attorney and to the defendant's attorney, but say nothing about the judge before whom it is pending.

The Chairman. Yes, but, as a matterof fact, Mr. Seasongood, he will in every case you can imagine consult with the district judge.

Mr. Holtzoff. I move we adopt 21 (b).

Mr. Youngquist. We did.

The Chairman. Yes, we did.

22 (a).

Mr. McLellan. Do you need to provide any rules for change of venue?

Mr. Holtzoff. There is no such thing as a change in venue under existing practice, and there never has been, so far as I

4 know, in the Federal courts. This is an innovation, and a rather radical innovation, but I must confess that I think there is some merit in it.

Mr. Dean. I think it is an important change. At the

present time the only remedy that you have is to file an affidavit of prejudice possibly against the judge and then to get a new judge for that same district. That is an awful job. This is the only way you can get a case into another district from a district where the community may be hostile.

Mr. Holtzoff. I must say that when the idea was first broached some time ago I was rather appalled about it, but I have thought about it since and I am inclined to think that it has a good deal of justice to it, and I do not see how the Government would be prejudiced.

Mr. Waite. Do you mean that it cannot be done now?

Mr. Dean. No.

Mr. Waite. I am all for it.

Mr. Dean. The big obstacle is the constitutional provision which requires that the trial be in the district where the offense was committed, so this is apparently drawn on the assumption that when the motion is made by the defendant that constitutes a waiver of that right.

Mr. Holtzoff. That constitutional guarantee is a privilege.

Mr. Waite. Our courts have even held that you can get a change on the motion of the prosecution.

Mr. Seth. Our statute provides for it.

Mr. Waite. So does ours, but the Constitution says it must be in the county.

Mr. Holtzoff. I want to move to strike out the second sentence, beginning on line 10.

Mr. Seasongood. I second the motion.

Mr. Medalie. Before you get to that question, may I take up one question?

Beginning on line 6, after the semicolon, "or if the indictment or information shows that the offense charged was committed in more than one district, the court may on motion transfer the proceeding to any other district," et cetera. It does not state on what ground.

You have provided for prejudice. The other is convenience.

Mr. Longsdorf. It can only be done on defendant's motion.

Mr. Holtzoff. "The court may on motion."

Mr. Youngquist. That construction is wrong.

Mr. Holtzoff. That ought to be "on defendant's motion."

Mr. Medalie. I am assuming that, but why should the defendant's motion be granted except on grounds we recognize?

Mr. Holtzoff. In the interest of justice.

Mr. Medalie. What is that?

The Chairman. I read the two clauses together; else why are they in the same sentence?

Mr. Dean. I do not think you need the clause at all, because the only event in which you want one transferred from one district to another is when you cannot get an impartial trial in one district, regardless of the fact that it was committed in more than one district.

Mr. McLellan. Suppose all the available witnesses are in the other district and the other district has jurisdiction because the offense was committed there. Wouldn't that be convenience?

Mr. Medalie. Yes; the convenience of witnesses, the saving of expenses.

Mr. Holtzoff. Do you want to enumerate all possibilities, because you cannot exhaust them? You ought to have a general

formula. Otherwise you will have a restricted enumeration.

Mr. Medalie. Do you want to say "in furtherance of justice"?

Mr. Holtzoff. Yes.

Mr. Longsdorf. If you are going to change the place of trials for convenience of witnesses and you restrict the right to make a motion on that ground to a defendant, it is not going to work properly. The Government has already chosen the district for purposes which it deems are right and correct. Now, are you going to let the defendant move that it be transferred to some other place because he thinks it should be?

Mr. Medalie. The judge decides. He says, "As I am informed, the prosecution has one hundred witnesses who live in Madison, Wisconsin."

Mr. Holtzoff. I think we can leave that to the judge's discretion. I think it is a fact that he does do that where there is a continuous offense, like mailing a letter, which may involve a district many hundred miles away from home, because that is where the letter was delivered.

The Chairman. What was the suggestinn on this? Was there any specific change recommended?

Mr. Holtzoff. "In the interest of justice," in line 8.

Mr. Medalie. Say, "where required in the interest of justice."

It will read, "The court may on defendant's motion, where required in the interest of justice."

Mr. Holtzoff. "If required."

Mr. Medalie. "If required in the interest of justice."

We won't put it on grounds of convenience.

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Mr. Youngquist. Wouldn't it be better to put it at the end of the sentence?

Mr. Medalie. Anywhere you want it, so long as some ground is stated.

Mr. Holtzoff. You have it too far away.

The Chairman. Someone is going to make a motion addressed to line 10. It seems to me that sentence must stay in if you are going to transfer from one circuit to another, because there is a very high degree of etiquette involved in that situation.

Mr. Holtzoff. The reason I was planning to move to strike

5 out that sentence is this. Here is a judge who expects to pass on a motion. Why should the senior circuit judge participate in passing on that motion? That might disqualify him from hearing the appeal later on.

The Chairman. I do not think so. Why should that disqualify him?

Mr. Holtzoff. If he has sat on a motion in a case wouldn't that disqualify him from hearing the appeal?

Mr. McLellan. Not on that kind of motion.

The Chairman. No. It has nothing to do with the merits. I do not think cases any more than judges should be shunted around from district to district.

Mr. Holtzoff. My objection is not very strong. I shall not press it, Mr. Chairman.

The Chairman. Are there any other remarks?

Mr. Longsdorf. I would like to be heard on this. I question the policy of making rules on this subject until we know more about it, until we have information on how badly it is needed and how often it is needed, and how frequently these

conditions occur that call for this remedy. I think we are stepping a bit in the dark. This is the first appearance of this to my knowledge, but I am afraid of this.

Mr. Medalie. Mr. Chairman, I would like to point this out. Provisions for change of venue in the state practice are rarely invoked. They may be invoked once or twice in the large jurisdictions in the course of a year,perhaps not at all in the course of a year; and yet occasion may arise where in the interest of justice it will arise in important cases. Though used seldom, the fact that there is a use for it is enough to justify the continuance of the statute.

Not infrequently I have been asked, not only by laymen but by lawyers who do not have much to do with practice either in Federal courts or in criminal courts at all,"Can't this Federal case be transferred to another district?"

They assume that it can, because the natural assumption is that such a transfer or change of venue has been provided for. It is really shocking that, in the sense of justice, there is no provision made for it.

The Chairman. And the cases where this arises are very important cases.

Mr. Medalie. Yes. Now, for example, you may have a case where the local prejudice is strong so that it includes the judge. Nevertheless, today you have no basis for doing anything about it, but if you had this provision, then you could make your motion, state your grounds, not having them seriously contested except as a matter of form, and then if he denied your motion you would have something on which to go up, and which would not be a frivolous ground for a reversal.

Mr. Holtzoff. I want to say this: that I took the liberty of talking to some of my associates in the Department of Justice, and we informally, without dissent, all thought that this was a desirable innovation, because we do recognize that sometimes an injustice is done to defendants, unintentionally, to be sure, but sometimes it is done or hardship caused, in view of the fact that in many instances the Government has a choice of venue where the crime might have been committed in two or three districts.

If an injustice is done, like indicting a person in Alabama who is a resident of Chicago and may have mailed a piece of obscene literature to Alabama, and he is to be brought to Alabama for trial, I can see that there are situations where justice might be promoted by such a rule. It will all be within the control of the court, of course, so that if there is any attempt to abuse this provision, the courts will control it.

Mr. Youngquist. Are you referring to the Anti-Trust Division?

Mr. Holtzoff. I was not referring to the Anti-Trust Division.

Mr. McLellan. I move the adoption of Rule 22 (a) as modified.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

22 (b).

Mr. Dean. On 22(a), I think we ought to change the wording in line 3 to conform to the wording in line 8, and say "defendant's motion." That is just a minor change.

Mr. Holtzoff. In line 17 you can strike out, I think, the

first five words. You do not need the statement "under seal of the court."

I move that we adopt 22 (b).

Mr. Youngquist. (a) as it now reads is, "The court may on defendant's motion" the same as down in line 8?

Mr. Holtzoff. Yes.

The Chairman. All those in favor of 22 (b) say "Aye." Opposed, "No." The motion is carried.

Mr. Waite. I just want to ask a question, not to raise a discussion. As it originally stood, it provided the trial might be in any district in which the offense had been committed. The court could move from one district to another. Do I understand it has now been changed so that the court has no power to move it from one district to another except on defendant's motion, even though it was committed in both districts and could have been tried in either district?

Mr. Youngquist. The Government chose its district, so it has no complaint.

Mr. Medalie. Of course, that means that the tobacco cases would have been moved from Lexington to somewhere in North Carolina, where there was a large number of tobacco growers.

Mr. Holtzoff. Provided the judge would have granted the motion. Do not overlook that proviso.

Mr. McLellan. Is the effect of 23 to take away from the Attorney General or the United States Attorney the right to nolle pros without stating his reason?

Mr. Holtzoff. It does, and I am dubious about that.

Mr. McLellan. I am dubious, and I am dubious about whether it brings about that result.

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Mr. Seasongood. We had a considerable discussion on whether you could dismiss without permission of the court. It was resolved this way.

Mr. McLellan. That he can do it, but can he do it now in the light of this rule, if we pass it, without stating his reasons?

5 Mr. Holtzoff. I am afraid if this rule is adopted in the present form he cannot do it without stating his reasons.

Mr. McLellan. It might be so construed.

Mr. Holtzoff. I think so. Personally, I voted against requiring him to state his reasons, and I am still of the same opinion.

Mr. McLellan. I move that we strike Rule 23.

The Chairman. We all have now copies of Rule 23.

Mr. Holtzoff. The first paragraph is not changed. I am wondering whether you want to restrict your motion to stating the reasons thereof, because there should be some provision of the rules that nolle pros would be entered.

Mr. McLellan. That would exist if you do not have any rule about it.

Mr. Holtzoff. I presume so.

The Chairman. You think that the Attorney General or the district attorney should have the right to dismiss without any reasons being given?

Mr. McLellan. I do, although I am familiar with the view to the contrary in statutes in some jurisdictions requiring the reasons to be stated.

Mr. Robinson. Do they ever dismiss without giving reasons now?

Mr. McLellan. Oh, yes.

Mr. Holtzoff. That is the usual practice.

Mr. Robinson. I will modify my question: Where there is quite a bit of public interest. I am thinking of those cases in Indianapolis where the Attorney General stated his reasons--

Mr. Holtzoff. It is done sometimes, but those are the exceptional cases.

Mr. Robinson. This apparently follows the state practice in many States.

Mr. Waite. Is there any reason why the prosecuting attorney or the United States Attorney should not file his reasons for dismissal?

Mr. Longsdorf. There were reasons in the Southern District of California, that Mr. Holtzoff can state better than I can, because he is familiar with it.

Mr. Holtzoff. That is a very good example.

Mr. Waite. That does not explain it to me.

Mr. Longsdorf. Mr. Holtzoff is more familiar with the facts than I am. There were reasons of state why one should be nolled and one should be prosecuted. The reasons of state could not be disclosed in court and could not be made of public record.

Mr. Medalie. Do you remember what was stated in the nolle? You did not draw the nolle?

Mr. Holtzoff. No, I did not.

Mr. Longsdorf. In the Ninth Circuit Conference last summer it was taken up, and it was understood there that if the reasons had been given they would not have been substantial ones that motivated the action.

The Chairman. I am troubled as to why the Attorney General not to mention many district attorneys, should nullify the work of the grand jury without stating the reasons. I thought there was a good deal of shedding of blood over that.

Mr. Holtzoff. If you refer to the English practice, I would like to refer to the fact that that power rested only in the Attorney General.

The Chairman. Without giving reasons?

Mr. Holtzoff. Without giving reasons.

Mr. McLellan. That has been the general practice until recently in some States. By reason of local abuses, they passed statutes.

Mr. Holtzoff. Wasn't that due to the fact that the local prosecutor is generally an elected official?

Mr. Medalie. And constitutionally independent.

Mr. Holtzoff. And constitutionally independent, but as United States Attorney, as the statute provides, he acts under the supervision of the Attorney General.

Mr. Medalie. The President can remove him.

Mr. McLellan. Don't you think, Mr. Medalie, that it is better that the old practice should continue of letting the Attorney General dismiss?

Mr. Waite. I am satisfied that dismissal ought not to be made without reason, and if there is a reason, I do not see why in the world it should not be stated.

Mr. McLellan. Sometimes it is rather difficult to state it.

Mr. Seasongood. This represents a compromise. When we discussed it before there was a considerable number, including

myself, who stated there should be no dismissal without the consent of the court.

Mr. McLellan. The trouble is the court does not know anything about the case.

Mr. Seasongood. You make a showing to the court why you want it dismissed, and the court says all right. That is the practice in our court.

The prosecutor says, "I want to dismiss this case." The Court says, "No. I have something to say about it. You go ahead with the case."

Mr. Medalie. Generally speaking, throughout the country in our Federal cases there are practically no nolles without a statement of the reason,practice has developed.

Mr. Holtzoff. That is not correct. That may have been so so far as you yourself as United States Attorney--

Mr. Medalie. I never nolled without giving the reason.

Mr. Holtzoff. What happens is that a nolle is filed. For example, a United States Attorney filed a nolle in the Davis case. I do not think he stated the reasons.

Mr. Youngquist. It was in the newspapers.

The Chairman. What is the Department of Justice going to say about giving this power to the district attorney?

Mr. Holtzoff. The district attorney has power today. Of course, administratively we are requiring the district attorney to get power from the Attorney General--

Mr. Medalie. Our district excepted.

Mr. Holtzoff. There are two exceptions, the Southern District of New York and the District of Columbia.

The reason for the exception in the District of Columbia

is that they have relatively minor cases that elsewhere would be tried in the state courts.

I would assume that if this rule were adopted, or any rule were adopted, giving authority to the United States Attorney to nolle pros, that would not deprive him of the administrative provision or deprive the Department of Justice of the right to control this.

Mr. Medalie. Nobody ought to ask the Attorney General personally to give a reason.

Mr. Holtzoff. That is right.

Mr. Medalie. And signed personally by the Attorney General or the Solicitor General, "No reason is necessary." That will take care of cases involving state or public reasons.

Mr. Holtzoff. We do not want to have the order or nolle pros itself signed in Washington in every case.

The Chairman. If you gentlemen who have had experience with it are sure it is all right--Judge McLellan, Mr. Medalie, Mr. Burns, Mr. Seth, and the others here--

Mr. Waite. I think (b) takes care of that. If there are reasons of state, then the court has power under (b) to order it dismissed in the furtherance of justice. No reason needs to be given.

Mr. Longsdorf. It was not in the interest of state that that Russian was nolled down in California.

Mr. Holtzoff. What happens is this: that practically in every case the Attorney General would endorse the order and would say, "Reasons: Insufficient evidence to convict," or something of that sort, because the usual reason why it is nolle prossed--

Mr. Medalie. Just a minute on that. I might be willing, if I were United States Attorney, to nolle an indictment for reasons of state, stated to me through the Attorney General's Office, on a representation made by the State Department, knowing that I had a perfectly good case; but I do not think I would be willing to state that I had no case when I had a case.

Mr. Holtzoff. I was not referring to that case and I was not suggesting that you would, but I said in the average case when a nolle pros is entered, it is entered because the United States Attorney finds he cannot make out a case. Either a witness has died or, on subsequent investigation, some element of the case falls down and he enters a nolle pros. That is the reason for nolle prossing cases ordinarily when they are nolle prossed. So the only statement of reasons you would have would be that the United States Attorney has insufficient proof.

Mr. Medalie. That would not be a reason; that would be a conclusion.

Mr. Holtzoff. You would not expect him to write an essay?

Mr. Medalie. No. He states briefly that the case against this man depended on witnesses so and so and so and so, who claimed to have seen him in the vicinity of the bank. Two of them cannot be found and the other one is dead.

The Chairman. I think we ought to understand the rule.

Mr. Burns. It seems to me that this is one of the largest powers lodged in any single individual, although not quite as great as the power of the President to pardon. It apparently has worked out fairly well, but I take it that a district

attorney would follow the policy of stating it,for his own protection, on the record, because nolles have been the subject of political overturns and charges of corruption. Certainly in Massachusetts corruption was the reason why the statutory change was made, requiring a statement of the reason being endorsed on the paper.

We ought to look upon it as though we were dealing with a code of conduct, and it is little enough to require of the district attorney or the Attorney General to state, when he exercises this extraordinary power, what are the factors that motivated it--that is, so far as the merits are concerned.

I am a little bit disturbed by the use of the term "dismissal." Is that a word of art in Federal cases?

Mr. Holtzoff. No. We use that as an English synonym for "nolle pros," in an effort to get away from Latin expressions.

The Chairman. We have been asked to keep away from unnecessary Latin.

Mr. Waite. To bring the matter to a head, I move that 23 (a) be adopted.

Mr. Holtzoff. There is a motion by Judge McLellan.

Mr. McLellan. I will withdraw that.

Mr. Youngquist. I second the motion.

Mr. Longsdorf. I think we ought to qualify that motion to read that the district attorney ought to be saved the necessity of giving reasons.

The Chairman. Do you want to move to strike that line out, to raise that issue?

Mr. Longsdorf. Since it is a custom to state the reason in practically all cases, why not delete "with a statement of

the reasons therefor"?

Mr.Holtzoff. I second the motion.

The Chairman. Let us get that issue disposed of.

Mr. Waite. This is a motion?

Mr. Longsdorf. This is a motion to amend.

Mr. Robinson. I do not think we can move on that without considering (b). I think Mr. Waite stated that where there are good reasons the court can consent. You might amend (b) by striking out line 8.

Mr. Holtzoff. I do not think the court has a right to dismiss a case on general grounds. He can only dismiss on well-recognized grounds, like want of prosecution, insufficiency of evidence, or something of that sort. Otherwise a judge could dismiss a case because he objects to a particular law.

Mr. Medalie. You mean you would like to strike out "in the furtherance of justice" as being meaningless?

Mr. Holtzoff. Yes, but I do not want to make that motion yet, because we have not reached that paragraph.

Mr. Seasongood. I feel on this (a) that it is something not only that should do justice, but that should have the appearance of justice. I think it creates a very bad impression on the ordinary person to have a solemn accusation which has been made just dismissed without ever knowing what the reason was for it. I know of instances where the dismissal has been very improper.

Mr. Holtzoff. You mean in the state courts?

Mr. Seasongood. No, sir. I mean in the Federal courts, where there have been election frauds and where there have

been income tax frauds, and somebody got those cases dismissed. That is a fact.

Mr. Waite. In the Glasser cases, too.

Mr. Youngquist. I have prosecuted for many years, and I am not aware of any case that I moved the dismissal of without stating the reasonfor it.

8 Mr. Seasongood. It is good practice.

Mr. Youngquist. And it is well to state the reason for it.

Mr. Seasongood. Because you are a good prosecutor. It should be done.

Mr. Medalie. I recall one case when in the interest of justice a nolle was filed without a reason stated. Some years ago, when Colonel Cathey was United States Attorney in our district, he was not ready with a case, and very eminent counsel appeared for the defendants, and the district judge, who later was a very distinguished circuit judge--not naming him--ordered it for trial, set a date, and said, "You be ready to try your case on Monday." Thereupon, at Colonel Cathey's direction, the Assistant United States Attorney nolled the case, without giving any reasons, then re-indicted, and in due course of proper preparation, tried and convicted the defendants.

Mr. Seasongood. You can have the statement, "with reasons, unless the court shall order that the same shall not be stated."

The Chairman. The question is first on Mr. Longsdorf's motion to delete the words "with a statement of the reasons therefor," in line 4.

All those in favor of that motion say "Aye." Opposed, "No."

The ayes please show hands. The noes. That motion is defeated.

Now, the motion is to adopt (a) in its present form.

All those in favor say "Aye." Opposed, "No." It is carried.

Now we come to (b).

Mr. McLellan. Do you want in (a) to make it perfectly explicit that the power to nolle pros is taken away from the Attorney General unless he does it and accompanies it by his reasons, or is that clear enough, anyway?

Mr. Youngquist. This is the only authority to dismiss. This provides how he may dismiss.

The Chairman. Do you think the Attorney General should have a different rule applied to him than to the district attorney?

Mr. McLellan. No, I do not, but does this clearly enough take away, because that is what you intend to do, the old right to nolle pros a case?

Mr. Holtzoff. I am inclined to say I think it does.

Mr. McLellan. One more thing, and then I will stop. Is there any reason for making a different rule in the case of an indictment than in the case of an information?

Mr. Youngquist. There is, of course, a difference in source. The indictment is found by the grand jury. The information is found by the United States Attorney. But I do perceive any reason on that ground for distinguishing between the two. Each is of equal dignity.

The Chairman. He would make less mistakes than a grand jury. He should.

Mr. McLellan. All right.

The Chairman. What about (b)?

Mr. Holtzoff. I move we strike out the last six words, "or in the furtherance of justice."

Mr. Waite. I second it.

Mr. Holtzoff. It is so general that I do not think anybody knows what it means. If it means what it purports to mean, that would confer a plenary power on the court which it does not now possess and which I do not think it should have--dismiss an indictment for whatever reasons he sees fit.

Mr. Robinson. Should we limit the power of a judge to dismiss solely for want of prosecution?

Mr. Holtzoff. There are a lot of other grounds.

Mr. Robinson. Why not strike out everything after "information"?

The Chairman. Why do we have the words "any proceeding"?

Mr. Holtzoff. You do not dismiss a proceeding; you dismiss an indictment.

Mr. Youngquist. Do we need (b)?

Mr. Seasongood. I do not see why you need it. (a) relates to the power of the prosecution to dismiss.

Mr. Robinson. I believe the request made by some member of this committee was that if you do not recognize that the court has the power expressly, it might be assumed that the rule means that only the United States Attorney can dismiss.

Mr. Holtzoff. The judge can set the case for trial, and if the United States Attorney is not ready, he can dismiss or direct a verdict.

I move we strike out (b).

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Mr. McLellan. You move we strike out (b)?

Mr. Burns. And then change the rule to read "dismissal by the Attorney General or the United States Attorney."

Mr. Medalie. I do not understand that. If the district attorney is not ready and the defendant has been waiting around and cannot get a trial and the judge wants to dismiss, that dismissal would arise from want of prosecution.

Mr. Youngquist. I was going to suggest, if it be necessary,and I am not at all sure it is, we should give the reason for dismissal as want of prosecution.

Mr. Longsdorf. How are you going to insure a speedy trial?

Mr. Youngquist. I think it is inherent in the court, because of the constitutional provision for a speedy trial. I do not think we need (b) at all; but if it serves any purpose, it should merely provide dismissal of the motion for want of prosecution.

Mr. Burns. The difficulty is that if you deal with the court's power simply from the point of view of want of prosecution, it may be taken that you have stated by your silence that there is no other power of dismissal residing in the court.

Mr. Youngquist. I move that (b) be stricken.

Mr. Waite. I second the motion.

Mr. Medalie. There are other powers. There are motions to quash.

Mr. Waite. In view of what Mr. Robinson says about the fear that by giving certain power to the attorney to file we may be thought to be taking it away from the court, I move that we adopt as a substitute for (b) a section (b) to read

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as follows:

"Nothing in these rules shall be construed to limit the power of the court to dismiss an indictment or information."

Then that power, whatever it is now, will continue, neither limited nor increased.

Mr. Holtzoff. I would rather see the whole paragraph go out, because I cannot see the necessity for a provision of that kind.

Mr. Waite. Well, I do not see it, but in view of the fact that some people do think that we might be deemed to have limited the court's power, I think we had better play safe.

Mr. Burns. Is it fair to say that where you have dealt with the power of the United States Attorney to dismiss you have dealt with the power of the court to dismiss?

Mr. Waite. No, but some people think so.

Mr. Holtzoff. It does not belong in this rule.

Mr. Youngquist. If we had said that a prosecution may be dismissed by the Attorney General or the United States Attorney, that might be exclusive of other means, but we merely provide here that the United States Attorney or the Attorney General may file a dismissal.

Mr. Medalie. I do not think we have an inclusive set of rules if we do not deal with the court's power to dismiss.

Mr. Holtzoff. You mean for want of prosecution?

Mr. Medalie. Yes. That is an old established code, is it not?

Mr. Holtzoff. I thinkthat ought to go in a different rule.

Mr. Medalie. It does not matter. You can put them in two separate rules if you want to.

Mr. Longsdorf. That is under dismissals, and that comprehends all kinds.

The Chairman. Well, we have a motion, gentlemen, to strike (b). Is there anything further to be said?

Mr. Waite. Was my amendment seconded?

Mr. McLellan. Yes. I seconded it.

Mr. Waite. I move a substitute motion to strike--

The Chairman. May we have that repeated?

Mr. Waite. The substitute motion was to adopt (b), reading: "Nothing in these rules shall be construed to limit the power of the court to dismiss an indictment or information."

Then whatever that power is, we let it stand.

Mr. Holtzoff. That might be construed to be a source of power. That is what bothers me.

Mr. Youngquist. No; it could not be construed to be that.

The Chairman. It creates nothing.

Mr. Youngquist. It is simply a statement that whatever power there is is limited.

Mr. Holtzoff. I think that is the correct construction, but there is another construction.

Mr. Youngquist. I made my motion to strike the entire rule because I think it is not necessary.

The Chairman. You have heard Mr. Waite's substitute motion. All those in favor say "Aye." Opposed, "No."

All in favor show hands. Four. Opposed, eight. The motion is lost.

Now the motion to strike (b): All those in favor of the

motion to strike say "Aye." Opposed, "No." It is carried.

Rule 24 (a).

Mr. Holtzoff. I move that it be adopted, Mr. Chairman.

The Chairman. It is moved and seconded. All those in favor say "Aye."

Mr. Longsdorf. We have been informed that the attorney issues subpoenas in some of the States, and that probably is true, but as to one of the States it appears to be the law that the clerk hands out a package of blanks, already signed--the signature is printed, of course--and the attorney sends them out. They can be served. It cannot be said that he issues them.

Mr. Holtzoff. We discussed this at the last meeting of the full committee, and subsequently the language was revised very carefully by the Committee on Style.

Mr. Seasongood. Did we decide that the attorney could issue the subpoenas?

Mr. Holtzoff. Yes.

Mr. Seasongood. Overwhelmingly?

Mr. Holtzoff. I do not recall whether it was overwhelmingly.

10 Mr. Longsdorf. Is there anything except the printed signature to give it dignity?

The Chairman. The seal of the court.

Mr. Holtzoff. What happens in the States where they issue subpoenas is that law stationers print forms that the attorneys buy, and the subpoenas have all the dignity and solemnity that is necessary.

Mr. Longsdorf. I suppose it is all right.

Mr. Youngquist. The vote on that proposition was nine to seven.

Mr. Seasongood. I thought it was not overwhelming.

Who signs them?

Mr. Holtzoff. The attorney signs them. There has been no trouble with that in New York. I know New York has had that practice for a long time.

Mr. McLellan. What do the civil rules provide about this?

Mr. Holtzoff. The civil rules do not provide for the issuance of the subpoena by the attorney.

Mr. McLellan. It is issued by the clerk?

Mr. Holtzoff. It is issued by the clerk.

Mr. McLellan. I move that from (a) there be stricken, in the fourth line, the words "or by the attorney for one of the parties."

Mr. Seasongood. Seconded.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

All those in favor raise their hands. Five. Opposed, four. The motion is carried.

Mr. Holtzoff. An attorney is an officer of the court.

The Chairman. There is no harm done. Each district will do what has been done according to the state practice. Mr. Seasongood can go back to Ohio, knowing that the subpoena process in his State is safe.

Mr. Seasongood. I do not think it is of enough importance to start a controversial issue. A lot of people to whom this is totally unfamiliar will say, "How are you going to have attorneys issue subpoenas in Federal cases?"

Mr. Medalie. Don't we issue subpoenas in civil cases?

Mr. Holtzoff. Not in the Federal courts. The civil rules provide that the clerks shall issue them.

Mr. Medalie. All I know is that when I have a trial my witnesses are there. I do not know how they were brought there.

Mr. Seasongood. They will say, "Why should you have something special in the criminal rules that is not in the civil rules?" That is another reason for questioning it.

The Chairman. (a) has been adopted.

Now we got to (b).

Mr. Holtzoff. I move that (b) be adopted.

Mr. McLellan. I second the motion.

Mr. Medalie. Referring to line 11, with reference to the motion to quash, I think the words "in any event at or before the time specified in the subpoena for compliance therewith" are an unnecessary restriction.

Mr. Seasongood. It may be very unjust, too. You might have a forthwith subpoena.

Mr. Holtzoff. It does not say before the time. It is at or before the time.

Mr. Medalie. I know, but you may not be able to get half started to examine the list that is in the subpoena duces tecum.

The Chairman. General Motors Company subpoenaed me, on five hours' notice, to produce all the books of practically every industry in Linden. I could not possibly get my papers in shape to get there. I got an associate to appear and tell them that I could not do it. He said, "Tomorrow you come before the district judge and I will tell you why." It would have been truckloads of stuff.

Mr. Medalie. Then, the civil rule is a bad rule.

The Chairman. There is one case where I could not have complied with it. Of course, the judge would have relaxed the rule, but why should we have a rule that requires relaxation?

Mr. Medalie. You postpone the time, and in the meantime you move to quash.

Mr. Holtzoff. Yes. Of course, I do not think any harm would be done by striking out that clause in lines 11 and 12.

Mr. Burns. I second the motion. Question.

The Chairman. From the word "and" in line 11 to the word "therewith" in line 12. All those in favor of the section as thus amended say "Aye." Opposed, "No." The motion is carried.

Are there any questions on (c)?

If not, all those in favor of (c) say "Aye." Opposed, "No." The motion is carried.

(d) (1).

Mr. Seasongood. The United States does not have to tender mileage under existing practice.

Mr. Holtzoff. It does not have to. It pays when the witness shows up.

The Chairman. Are there any questions on (d) (1)?

If not, all those in favor say "Aye." Opposed, "No." The motion is carried.

(d) (2). All those in favor of (d) (2) say "Aye." Opposed, "No." The motion is carried.

(e) (1). All those in favor of (e) (1) say "Aye." Opposed, "No." The motion is carried.

Mr. Youngquist. I have a question. What about subpoena duces tecum? I suppose this covers it?

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Mr. Medalie. Yes, it does.

The Chairman. And (e) (2).

Mr. Seasongood I suppose that means something, but not to me. I suppose you ought to know what that means, but I do not.

The Chairman. It is a civil rule.

All those in favor of (e) (2) say "Aye." Opposed, "No." The motion is carried.

(f). All those in favor of (f) say "Aye."

Mr. Longsdorf. What is the use of that? You do not need to declare whatis a contempt of court.

Mr. Holtzoff. It is in the civil rules.

11 Mr. Youngquist. I think something has been omitted there. At least, my idea was that it should have been deemed a contempt of the court out of which a subpoena issued.

Mr. Robinson. That is the language of the civil rule as you stated. I think it should be made to conform.

Mr. Seasongood. Why do you say "may be deemed"? It is, isn't it?

Mr. Robinson. That is the civil rule language.

Mr. Seasongood. I can't help that.

Mr. McLellan. You summon the witness. He does not appear. You go to the judge and you want the man adjudged in contempt. If the judge finds that the witness was in a position to give no material testimony, he does not adjudge him in contempt.

Mr. Dean. This says "without adequate excuse." If he is without adequate excuse--

Mr. Burns. And without adequate testimony.

Mr. Holtzoff. This is the civil rule, and it seems to me it would be rather strange to have a different rule on the

consequences of a witness' failure to appear in criminal cases.

Mr. McLellan. If you have "may" it is all right, but what do you add to a contempt of court in order to get it up to the civil rule?

Mr. Youngquist. My idea was that what we needed it for was to say which court you would deem it to be in contempt of in the case of a deposition, for instance. Therefore, I have suggested that there be added at the end of line 47 the words "out of which the subpoena issued." That is the civil rule.

Mr. Longsdorf. May I offer an amendment by suggesting that the word "deemed" be altered to read "prosecuted as"? The deeming is going to be done when the prosecution is conducted.

Mr. Holtzoff. I do not like the word "prosecuted" there.

Mr. Longsdorf. I do not like the word "deemed."

Mr. McLellan. Why depart from the civil rules?

Mr. Orfield. Isn't this a matter of substantive law rather than procedural law?

Mr. Holtzoff. Why not have the same rule as the civil rule?

Mr. Youngquist. I move that there be added after the word "court," in line 47, the words, "from which the subpoena issued."

The Chairman. Is that seconded?

Mr. Holtzoff. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

All those in favor of (f) as amended say "Aye." Opposed, "No."

All those in favor show hands. Six. Opposed, four. The

motion is carried.

Mr. Dean. May I go back to something that bothers me a little bit, Mr. Chairman, on Rule 24 (b), lines 16, 17, and 18? We provide that the court may order an inspection of the documents prior to the time when they are to be produced in response to the subpoena duces tecum and to determine the admissibility in evidence of the documents.

I do not think "admissibility" is the word, because I do not see how the court can determine on their admissibility. That would depend in many cases on what witness is on the stand, and so forth.

I think what we need is "their relevancy to the cause or to the case generally," if it means anything.

The Chairman. Their relevancy as evidence?

12 Mr. Burns. Why not take away that power? After all, its relevancy is going to be determined by how the trial develops. It seems to me that this has to do with inspection rather than passing on the relevancy.

Mr. Dean. It could only be relevant to the case generally. It could never be relevant to the particular issues. I know we do not mean "admissibility."

Mr. McLellan. Can we say "relevant to the proceeding"?

Mr. Burns. Is there any procedure whereby relevancy is determined in advance. I think it is quite proper to consider the availability of documents to both sides. That is just a question of mechanics, but to pass on legal questions in advance of trial would seem to me to be a concept that does not have any basis on the needs of the defendant or the Government.

Mr. Youngquist. What was sought to be done here was to permit examination of the documents under subpoena before they were offered in evidence and at the same time to safeguard against fishing expeditions.

Mr. Burns. Yes, but this is really part of a pretrial procedure.

Mr. Dean. It is only one part of it.

Mr. McLellan. What do you suggest going out?

Mr. Burns. I move that it be stricken so that it will read, in line 17, "and may permit the documents or portions thereof to be inspected by the respective parties and their attorneys."

Mr. Dean. Where did this come from, Mr. Reporter?

Mr. Holtzoff. We had it in the Subcommittee on Style. One of the members of the Subcommittee on Style suggested it and I am sure--

Mr. Dean. I do not recall this question of admissibility.

Mr. Dession. I do not, either.

Mr. Holtzoff. Not the question of admissibility, but this provision.

Mr. Medalie. We were certainly dealing with the idea of getting relieved of the oppressive character of a subpoena, of calling for the production of several carloads of books, papers, and records which the other side was going to keep in the courthouse.

Mr. Dean. I remember the general problem of getting the documents and looking at them, but the determination of the admissibility is something new to me.

Mr. Youngquist. The fact is we did not discuss that part

of it, according to my recollection. I, and I think the rest of us, assumed that there should be some safeguard against a fishing expedition, and therefore we had to fix some standard that the court could follow in form.

Mr. Dession. My recollection is that was the feeling, but we did not fix this standard, because this is not workable.

Mr. Medalie. We have some kind of standard here when we provide for quashing or modifying if compliance is unreasonable or oppressive.

The Chairman. Judge Burns, will you repeat your amendment?

Mr. Burns. Beginning line 17, "evidence and may upon their production permit the documents or portions thereof to be inspected by the respective parties or their attorneys."

Mr. Medalie. "documents or objects".

Mr. Burns. Yes. "such books, documents, or objects, or such portions thereof."

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

We have come to a new chapter, so I suggest that we adjourn until 8 o'clock this evening.

(Thereupon, at 5:35 o'clock p.m., a recess was had until 8 o'clock p.m.)

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Tues.

EVENING SESSION

The proceedings were resumed at 8:10 o'clock p. m., at the expiration of the recess.

The Chairman. All right, gentlemen; I think we have a quorum. We start with Rule 25.

Mr. Robinson. Trial by jury.

The Chairman. (a). Are there any questions?

Mr. Orfield. Does that include summary offenses? Are there not some cases --

Mr. Longsdorf. What are we on?

Mr. Orfield. 25 (a). Should not all cases be tried by jury no matter how petty they are?

Mr. Holtzoff. Well, in the District Courts, all the cases, all criminal cases, including all Federal cases. All criminal cases.

Mr. Longsdorf. There is an obscure statute down in Title 33 of the United States Code that provides for summary trial. I do not think it is used very much, but if this is universal in its application that will be wiped out. I do not think anybody will ever discover it.

Mr. Holtzoff. I was not familiar with the statute providing for jury trials.

Mr. Longsdorf. Very few people are, and I discovered it only by accident. Anyway, it is there.

Mr. Robinson. It is in the navigation offenses, Mr. Longsdorf?

Mr. Longsdorf. Yes, in the navigation section.

Mr. Youngquist. Is it used?

Mr. Holtzoff. No, I do not think people know what its exis-

2 tence is.

Mr. Youngquist. Why should you not repeal it?

Mr. Longsdorf. I find two cases only reported under it.

Mr. Youngquist. It might be well for the Reporter to make a note of that and show that it is repealed.

Mr. Robinson. Repeal the statute?

Mr. Youngquist. Do you want to make a note of its repeal?

The Chairman. All those in favor of 25 (a) respond "Aye." Opposed, "No." Carried.

Mr. Longsdorf. Consent of the defendant?

Mr. Youngquist. I suppose that the consent of the government must be required before there may be a waiver of jury trial. I am objecting to that.

Mr. Robinson. You are against it.

Mr. Longsdorf. Well, in that statute I spoke of the consent of the government is given by Congress, and the defendant consents by -- he does not have to consent either, so that is all right.

Mr. Youngquist. In view of the reversal here this afternoon on another matter, I am just calling attention to it now.

The Chairman. 25 (b). That looks easy. All those in favor say "Aye."

(There was a chorus of ayes; the motion was carried.)

The Chairman. 25 (c). All in favor say "Aye."

Mr. Longsdorf. Should not "may" be changed to "shall"?

Mr. Medalie. No.

Mr. Holtzoff. No. Oh, we do not want to make it compulsory.

Mr. Longsdorf. No, I think not, but I just asked.

The Chairman. I declare the rule adopted in toto.

3 Rule 26. (a).

Mr. Seasongood. This was the subject of discussion, was it not, and I suppose represents the prevailing opinion? My own feeling was that the defendant ought to have the right to examine the jurors himself.

Mr. Medalie. This is so well established now in Federal practice, we have all accepted it and seem to be able to live under it. If we go across the street to the state court we do the other thing.

Mr. Longsdorf. I do not believe the district judges would like to accept this if it was worded in the way that Mr. Seasongood intimates.

Mr.Seasongood. I think it is a serious deprivation not to have the right to examine the jury, myself.

Mr. Medalie. It really is not serious.

Mr. Longsdorf. I do not think they will deny the privilege.

Mr. Medalie. I do not think it is serious.

Mr. Holtzoff. I move the adoption of 25 (a).

Mr. Seasongood. Now wait. If you are going to adopt it, it says "or the attorney for the government." "may permit the defendant or his attorney or the attorney for the government to conduct."

Mr. Medalie. If you give it to the one, give it to the other.

Mr. Seasongood. Say "or."

Mr. Longsdorf. "or" to "and" in line 5.

Mr. Medalie. Yes.

Mr. Youngquist. Yes, "and". In line 3?

Mr. Seasongood. Yes.

4 The Chairman. And in line 5.

Mr. Medalie. Only in line 5.

The Chairman. Why not 3?

Mr. Medalie. Oh, that is right; it should be in line 2 and in line 5.

The Chairman. No. He said "or his attorney."

Mr. Holtzoff. "and the attorney."

The Chairman. "and the attorney for the government" in line 5.

Mr. Medalie. All right. I get it.

The Chairman. All in favor of 26 (a) say "Aye." Opposed, "No." Carried.

26 (b).

Mr. Burke. Does that represent any change, Mr. Chairman?

The Chairman. What? (a) or (b)?

Mr. Burke. (b).

Mr. Holtzoff. Yes, I think it does.

Mr. Robinson. It does considerable. It raises the number of preemptory challenges in misdemeanors from three to six, for one thing.

Mr. Longsdorf. Do you want to reword line 10?

Mr. Robinson. Wait a minute. Where is that change?

Mr. Medalie. No.

Mr. Longsdorf. "each side." "each defendant"?

Mr. Holtzoff. No. "each side."

2 Mr. Longsdorf. "each side." All right.

Mr. Wechsler. Well, it reduces the number of preemptory challenges, does it not?

Mr. Holtzoff. No.

5 Mr. Wechsler. Where there are joint defendants?

Mr. Burke. In misdemeanor cases.

Mr. Robinson. No; there are just 3.

Mr. Wechsler. 3 to a defendant or 3 to a side?

Mr. Longsdorf. What does the next to the last sentence mean, then?

Mr. Seasongood. 3 to a side?

Mr. Holtzoff. I think that raises the number of preemptory challenges, does it not?

Mr. Youngquist. From the present law or from the rule, you mean?

Mr. Holtzoff. From the present law, does it not?

Mr. Longsdorf. What is the result of the fourth sentence compared with the first?

Mr. Dean. 3-3 in misdemeanor.

Mr. Medalie. You mean in all cases except capital cases if there is more than one defendant the defendants should be jointly entitled to 10 preemptory challenges and the government to 6?

Mr. Holtzoff. Yes.

Mr. Medalie. That is what we left out there. We gave it all to the defendants and gave nothing extra to the government.

Mr. Longsdorf. Suppose there were 3; they get 30, and in a capital case only 20?

Mr. Medalie. No, no. "jointly entitled to 10."

Mr. Longsdorf. Oh, yes.

Mr. Medalie. I think you have to add at the end of line 16 that in that case where the defendants jointly get 10 the government gets 6.

Mr. Holtzoff. No, because that is covered by the second

6 sentence.

Mr. Youngquist. That includes your misdemeanors too, Mr. Longsdorf.

Mr. Longsdorf. Yes.

Mr. Youngquist. Where the government has only 3 I do not think you need to make any omission, because the preceding sentence will control the number of challenges to the government.

Mr. Longsdorf. Yes.

The Chairman. Why the peculiar change in phraseology in the second sentence as distinguished from the first and third? In the capital case each side has 20, and in the misdemeanor case each side has 3, and when you come to felonies you say 6 to the government and 6 to the defendant. I mean why did you change your language, instead of saying there again "each side shall have"? Just a matter of style.

Mr. Youngquist. Oh.

Mr. Robinson. I have changed that. I wonder if I might ask you about it and see if this reads right, striking out "In a capital case" and say, "If the offense charged is punishable by death each side shall have 20 preemptory challenges." All right. "On the trial of all other felonies the government shall have 6 preemptory challenges and the defendant 6."

The Chairman. Well, why not "each side have 6"?

Mr. Youngquist. Yes.

Mr. Robinson. All right, "each side have 6".

Mr. Medalie. No, no.

Mr. Youngquist. That is right.

Mr. Medalie. The idea is that if you have your one defendant in a felony case he gets 6 challenges. If you have two or

7 more defendants then the challenges are joined, and they have 10.

The Chairman. That is covered later.

Mr. Robinson. That is later, yes.

Mr. McLellan. But is not 10 a great many challenges in a misdemeanor case?

Mr. Medalie. This is a special provision they have made on account of their anti-trust cases.

Mr. Youngquist. Here is an inconsistency, though, and it arises out of the fact that in the previous draft that we had there were 6 preemptories in misdemeanors as well as in felonies other than capital offenses. The giving of defendants jointly 10 preemptory challenges in all cases not punishable by death results in giving each defendant 5 challenges in a misdemeanor. That is the effect of it.

Mr. Dean. If there are two?

Mr. Youngquist. I mean if there are two of them, whereas they would have the right only to 3 each if they were tried alone or separately.

The Chairman. Can we agree on the substance of it and then let the form get fixed up later?

Mr. Robinson. Yes, I have the form here.

The Chairman. Let us not take time on it. 20 in capital cases; is that agreeable?

Mr. Robinson. That is right.

Mr. Holtzoff. Yes.

The Chairman. Any consent?

Mr. Seasongood. I know it is just form, but why can you not strike out "All challenges shall be tried by the court"? Who else

8 could possibly try them?

Mr. Youngquist. Yes.

Mr. Holtzoff. In some states they have triers to try them.

Mr. Youngquist. They do in our states. The court appoints three men as triers, and they try challenges to the individual jurors.

Mr. Seasongood. It is not in the civil rules.

Mr. Longsdorf. Is there any other state that clings to that, Mr. Youngquist?

Mr. Youngquist. I do not know.

Mr. McLellan. In Mr. Medalie's state I think the clerk does it.

Mr. Medalie. What is that?

Mr. McLellan. Is not the jury examined before the clerk without the judge present in your state?

Mr. Medalie. Oh, no. Well, that is in civil cases.

Mr. McLellan. Yes.

Mr. Medalie. The judge says, "Examine your jury before the clerk," but if you insisted that you did not want it that way you could examine the jurors before the judge.

3 Mr. Longsdorf. No, but in Minnesota they appoint other triers.

Mr. Dean. Do you ever have triers of fact except where the challenge is for cause?

Mr. Youngquist. I beg your pardon?

Mr. Dean. Do you ever have triers of fact except where the challenge is for cause, and does that not raise the question whether it is appropriate here where we are speaking of preemptory challenges?

9 Mr. Youngquist. No, I do not think it should be here.

Mr. Dean. Yes, that would be my suggestion, that we take it out here.

Mr. McLellan. I think so too.

Mr. Longsdorf. Yes, only the challenges for cause were tried by triers.

Mr. McLellan. Yes, that is right.

Mr. Medalie. Yes, but the judge has to make a ruling on a preemptory challenge.

Mr. Youngquist. No.

Mr. Medalie. For instance, whether you have any left, whether your challenge is preemptory or for cause.

Mr. Youngquist. That would not be a trial of the challenge, Mr. Medalie.

Mr. Medalie. That is right.

Mr. McLellan. I move we strike out the last sentence in (b).

Mr. Youngquist. I second the motion.

Mr. Dean. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." Carried.

Are there any other challenges in this section?

Mr. Holtzoff. We have not agreed on the substance yet.

The Chairman. I understood it was 20 in capital cases, 6 in felonies, 3 in misdemeanors, and then for the defendants when there are more than one 6 in capital cases, 10 jointly.

Mr. Holtzoff. That would not do in misdemeanor cases.

Mr. Medalie. No.

Mr. Holtzoff. Because, suppose you have two defendants in a misdemeanor case. If they are tried jointly they get 10 chal-

10 lenges; if they are tried individually they get 3 each. There is something wrong with that.

Mr. Medalie. Give them 6 in misdemeanors. Give the defense having more than one defendant 6 in misdemeanors and 10 in felonies.

Mr. Holtzoff. That is all right.

Mr. Dean. That would be right.

Mr. Longsdorf. Yes, but some of those anti-trust cases that we are talking about are misdemeanor cases with felony punishments.

Mr. Medalie. No, not felony punishments; that increases the number of their challenges from 3 to 6.

The Chairman. All right. Are we all agreed on that, so we can have a motion?

Mr. McLellan. I am not. I should like to strike out the last sentence remaining and not do anything with plurality of defendants at all.

Mr. Medalie. That is not practicable.

Mr. Holtzoff. What is the present law?

Mr. McLellan. Well, that is the present law.

Mr. Dean. That is the present law.

Mr. Youngquist. No. The present law is this: Where there are several defendants the parties on each side -- I beg your pardon. The present law is that they shall be deemed a single party for the purpose of all challenges.

Mr. McLellan. That is the present law, and why should it not be? Of course I know about your anti-trust cases, but if you make a special provision, a change in your law, a general change to cover those, you get plurality of defendants, each

11 defendant getting more in a misdemeanor case than the others would.

I move to strike out that last sentence.

Mr. Youngquist. Well, we propose to limit the joint challenges in misdemeanor cases to 6, in any event, so they could not possibly get more than if they were tried separately.

Mr. McLellan. Oh, you are going to change it from 3 to 6?

The Chairman. Yes.

Mr. Youngquist. No. According to the law as it now stands there would be an aggregate of 10 challenges in the felony cases and an aggregate of 6 in the misdemeanor cases.

Mr. Longsdorf. And under the last sentence if there are 3 defendants or less they would get more than was their due.

Mr. Youngquist. Not now.

The Chairman. No.

Mr. Youngquist. Not with this change that we are talking about.

Mr. Dean. They would get less.

Mr. Longsdorf. May I have the change again?

The Chairman. There are 3 when you are alone, and when you are with more than one there are 6. If there are only two of you you cannot get more than 3 apiece. If there are three you are down to 2, etc., so they have not gained anything.

Mr. Longsdorf. I suppose you would say in the last sentence, "In all except capital cases if there are more than three defendants."

Mr. Robinson. That is too far.

Mr. Longsdorf. Well, that would equalize that with the second sentence.

12 Mr. Robinson. What is the section here now at the present moment?

Mr. Holtzoff. What are we agreeing on?

Mr. Youngquist. That change.

Mr. Holtzoff. 6 in misdemeanor cases for joint defendants, 10 in felonies.

The Chairman. That is right.

Mr. McLellan. I have to ask one thing: On the trial of a misdemeanor each side shall be entitled to 3 preemptory challenges, does that stand?

The Chairman. That is right.

Mr. McLellan. In all except capital cases -- which would include misdemeanors, of course --

Mr. Dean. That is right.

Mr. McLellan. -- if there is more than one defendant the defendants shall be entitled to 10 preemptory challenges?

The Chairman. We are limiting that, as I understand it, to felony cases.

Mr. Medalie. 6 for misdemeanors.

Mr. Youngquist. No.

Mr. McLellan. To be rewritten.

Mr. Medalie. 6 for misdemeanors, 10 for felonies.

The Chairman. 10 where there are joint defendants and 6 in misdemeanor cases.

Mr. Dean. Where there are joint defendants?

The Chairman. Where there are joint defendants.

Mr. Youngquist. That is right.

4 The Chairman. All those in favor of that motion as thus amplified, say "Aye." Opposed, "No."

13 Mr. Medalie. 6 in misdemeanors, 10 in felonies, where there are more than one.

The Chairman. We shall proceed. Alternate jurors.

Mr. Longsdorf. Where there are multiple defendants.

Mr. Medalie. Yes, where there is more than one defendant.

Mr. Robinson. That is a small change of style, striking out that "shall."

The Chairman. Yes.

Mr. McLellan. You are holding an alternate juror until the verdict is rendered?

Mr. Robinson. That is right.

Mr. McLellan. That is the California practice. I think they ought to be discharged when the twelve men retire.

The Chairman. We had a two months' trial in the City Commissioners of Newark. After the jury had retired one of the jurors developed an acute appendix and was taken to the hospital. We had to do the whole job over again.

Mr. McLellan. Yes, but the deliberations of a jury are supposed to be joint, and if you add somebody after they have been deliberating for a while you are treading on dangerous ground.

Mr. Longsdorf. The California court had that up on constitutional questions.

Mr. McLellan. And they let it by.

Mr.Longsdorf. More than twice, and there the conclusion was that it was the ultimate conclusion of the jury that constituted the deliberations, and hence there were only twelve there when the verdict was rendered, and that the deliberations had up to the time when the sick juror retired were not a part of the deliberations that entered into the verdict. That was the atti-

14 tude of the California courts when this precise constitutional question was raised.

Mr. McLellan. I know it.

Mr. Longsdorf. That the deliberations were participated in by twelve jurors.

Mr. McLellan. Well, if everybody likes it I will not change it.

Mr. Youngquist. Attention should be called to the fact that we provide that not more than four alternate jurors shall be called. That is an increase over the number that was proposed at the last meeting of the Advisory Committee.

Mr. Robinson. I move the adoption of the section.

The Chairman. Why was four agreed on?

Mr. Youngquist. That was your suggestion, George.

Mr. Robinson. Your suggestion.

Mr. Holtzoff. No; I think it was Mr. Dean's suggestion.

Mr. Dean. No, it was not, but I went along with it. Why limit it to two, in other words? The present statute says two.

Mr. Longsdorf. Well, they are not required to call four. They might, but they do not need to.

Mr. Dean. They may. What can you lose? The average judge would not call four unless the case were exceptionally long.

Mr. McLellan. I think that is all right.

The Chairman. Do you think it is all right to have four?

Mr. McLellan. Yes.

Mr. Robinson. Yes.

The Chairman. All right. All those in favor of the section say "Aye." Opposed, "No." Carried.

Mr. Waite. Mr. Chairman, before we drop this may we go back

15 to (b)? I want just to raise this question. Line 13 says, "On the trial of a misdemeanor each side shall be entitled to 3 preemptory challenges." Now, obviously that word "misdemeanor" is one of distinctly uncertain connotation. There is the general connotation that a misdemeanor is an offense that is punished in a minor way. There is the statute that says that such and such offense is a misdemeanor and punishable by up to five years in the penitentiary. It seems to me we have got to be precise in line 13, because I doubt if we mean that where a man can be punished by five years imprisonment he is to have only 3 preemptory challenges.

Mr. Holtzoff. I think that is the present law.

Mr. Dean. That is the present law.

Mr. Holtzoff. There is only one such offense --

Mr. Medalie. You have 6 in the group.

Mr. Holtzoff. He ought to have 6 then.

Mr. Wechsler. Why would it not be better to change this to use the formula that we have always used when this problem was up, namely: "punishable by not more than a year of imprisonment," and abolish the phase of the existing law that distinguishes between felonies and misdemeanors?

Mr. Robinson. The federal statute, section 541, is quite plain in definining felonies and misdemeanors.

Mr. Wechsler. You mean the general definition.

Mr. Robinson. That is right.

Mr. Medalie. But there are specific provisions.

Mr. Wechsler. But there are specific designations.

Mr. Waite. I notice that in other cases we changed from "misdemeanor" to make it read "in cases where the penalty is so

16 and so and so and so."

Mr. Holtzoff. I agree with Mr. Waite that that would be better.

Mr. Waite. I suggest that this be left to the Reporter to change accordingly.

The Chairman. Is there any objection?

Mr. Longsdorf. Punishable by fine and imprisonment of less than one year.

Mr. Dean. If we do this we are going to take care of the situation where it is labeled a misdemeanor in the statute and yet a misdemeanor under our definition would not be a felony.

Mr. Wechsler. Well, we are not going to define "misdemeanor."

Mr. Holtzoff. There would be a change there also.

Mr. Dean. How are you going to define "felony"?

Mr. Wechsler. More than a year.

Mr. Dean. Felony is more than a year. Oh, I see.

5 Mr. Youngquist. You would not use either label, "felony" or "misdemeanor."

Mr. Robinson. That is the statutory definition.

Mr. Dean. Neither "felony" or "misdemeanor": you would use neither term?

Mr. Wechsler. Yes, that is right.

The Chairman. All right. We turn to Rule 27.

Mr. Waite. Mr. Chairman, before we come to that I want to propose something that I do not think will get very far, and I shall not argue it, but which I should at least like to have proposed go into the record. We all know what a tremendous amount of trouble the state courts are having with the taking of

17 photographs in the court rooms and the broadcasting of proceedings, and that sort of thing. I wonder if anybody here saw that movie, "Roxy Hart"?

Mr. Dean. I did.

Mr. Waite. It was one of the most delightfully ironic presentations of a criminal procedure imaginable, and there they had the reporters rushing up and taking pictures, and the judge would hop up on the bench and stand up and pose in front of the cameras and then go back and sit down, and they had a broadcaster working. And you know, of course, that the Chicago Bar Association has worked for years and finally got the Chicago judges to adopt a rule prohibiting that sort of thing. I am perfectly well aware that we do not need any rule for the federal judges, but I think it would be a very good thing if we could put a rule in here as an example to the state courts: that we could take the leadership and that the state courts will adopt it.

So at least for the sake of the record I should like to propose an additional section -- it would be 26 (a) -- reading essentially as follows; I do not care about the language:

Conduct of Trial.

The taking of photographs in the court room or in chambers while judicial proceedings are being held therein shall not be permitted, nor shall any radio broadcasting of such proceedings or parts thereof be permitted.

I move that such a section be included in the rules.

Mr. Youngquist. I think we have enough to do with the rules governing federal courts, Mr. Waite.

Mr. Waite. Well, as I say, I did not expect to get anywhere with it. I think it would be a very desirable and appropriate

18 rule, but I will not spend time arguing it.

The Chairman. Has there ever been a case where the district court has violated the proprieties in this respect?

Mr. Waite. Not that I ever heard of.

Mr. McLellan. In 1932 when I went over there to the Federal Building one of the judges came to me and said, "There is a man here who wants to take your picture in the court room, and I told him it is all right."

I said, "You can go and tell him something different. It can't be done."

Up to that time whenever anybody wanted to take a picture of a judge I think he took it. It has not been done since. But now, such is the desire for having pictures taken that they say, "Court is adjourned," and then they all stand up and have their pictures taken, and I walk out before the camera man gets to me.

Mr. Holtzoff. But you would not want to have a rule on the subject?

Mr. McLellan. I do not think it belongs in the rules. Let the individual judge do as he is amind to, I think.

Mr. Waite. You do not really mean that you would be willing to have a judge permit the taking of photographs during the proceedings, and broadcasting from the court room?

Mr. McLellan. I should be very sorry if he did it, but I am not sure that I should want, if I had the power, to prohibit him from doing it.

Mr. Holtzoff. It seems to me you might as well have a rule that there shall be no boisterous conduct in the court room. It is not the sort of subject that should be treated of in rules of procedure.

19 Mr. Waite. That is not an analogy at all, because the Chicago Bar Association worked for years to get that through,

6 and yet there has always been the rule that there should be no boisterous conduct in the Chicago courts.

Mr. Youngquist. While I agree with your aim, I think it is an admonition among all courts as they have been doing, but I do not think it comes quite within the scope of our job here, because it is not known in the federal courts.

Mr. Waite. As I say, the Massachusetts courts set a good example in that way, but I am not pressing it.

The Chairman. All right. Now we have this rule on evidence.

Mr. Robinson. I should like to hear from Mr. Youngquist. I understand he has just talked about this matter with Mr. Morgan.

Mr. Youngquist. This rule on evidence troubled the committee up in New York a great deal and has been troubling me ever since. As you know, the civil rules -- Rule 43, which appears at the bottom of the page -- make admissible all evidence which may be admitted under the statutes or in equity suits or under the rules of evidence applied in courts of general jurisdiction of the state in which the court is held, and they favor the rule that is most liberal toward the admissibility of the evidence in effect.

Under the conformity statute the trial of criminal cases in federal courts is not governed by the rules of evidence in the state in which the court sits, as I understand it.

Mr. McLellan. As of some century ago.

Mr. Robinson. Yes.

Mr. Wechsler. Subject to modification under the Funk case.

Mr. Youngquist. Yes, from time to time. There was proposed

20 the rule that appears at the top of the page, which in effect leaves it wide open to be governed by the principles of the common law as interpreted and applied by the federal courts in the light of reason and experience. The trouble with that seemed to be that it just furnished no guide at all, either to the court or to counsel in the preparation of his case, or on the trial of the case.

Mr. Holtzoff. It gives the federal courts a chance to develop their own common law, does it not?

Mr. Youngquist. Yes.

Mr. McLellan. Which they are doing anyway.

Mr. Youngquist. But in the meantime everybody would be in a very difficult situation over a long period of years, probably. Last week I was at the American Law Institute in Philadelphia. I tried to get there in time to listen to the discussion of Professor Morgan's code of evidence, but I did not. However, I got hold of Professor Morgan the day afterward, the day I was there, and talked the matter over with him. They had a somewhat simpler problem in the civil rules because they already had some body of rules relating to evidence in equity cases, and equity cases are not under the conformity statute, and he recognized that there were very serious difficulties.

Finally, in the course of the discussion one or the other of us suggested that, after all, evidence is evidence whether it is in a criminal case or in a civil case; and, since the civil rule has worked out pretty well -- Mr. Mitchell tells me so and Professor Morgan tells me so -- there seemed to be no reason why we could not adopt, either by statement or by reference, the civil rule with respect to the admissibility of evidence, and

21 I made that proposal not as a motion yet, but I lay it on the table for discussion.

Mr. Holtzoff. May I ask a question about that: If you follow the civil rule what happens then to the federal rule excluding illegally obtained evidence in those states in which the state courts admit that kind of evidence? Would you do away with the federal rule on that point?

Mr. Youngquist. As I understand it, we have taken care of that in our rules here.

Mr. Holtzoff. How?

Mr. Youngquist. By search warrants, searches and seizures.

Mr. Holtzoff. Oh, I see.

Mr. Youngquist. We have taken care of that by a separate rule.

Mr. Holtzoff. I see.

Mr. Waite. You would not have that problem anyhow, because there it is excluded under the theory that the federal constitution makes it inadmissible, and that being an interpretation of the federal constitution they could not admit it simply because some state court interprets its state constitution differently.

Mr. Holtzoff. Yes, but --

Mr. Medalie (interposing). Let me read you something interesting in the New York statute, code of criminal procedure, section 392:

"The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code."

A good working rule.

Mr. Longsdorf. The same thing in California.

Mr. Holtzoff. Well, I think that would do it, because our

22 search warrant rule, as you know, takes care of that.

Mr. Medalie. "except as otherwise provided."

The Chairman. How much does that advance you in view of the fact that the civil rules do not define "evidence"?

Mr. Wechsler. Mr.Chairman, they do. Civil Rule 43 does. That is on the first page of Rule 27 in the old tentative rule.

Mr. Longsdorf. Mr. Chairman, at an appropriate time I should like to be heard in opposition to Mr. Youngquist's proposal before a motion is made.

The Chairman. All right.

Mr. Youngquist. Will you read me that language, Mr. Medalie?

Mr. Medalie (reading).

"The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code."

Of course you are dealing with the corpus delicti.

Mr. Wechsler. Mr. Medalie, may I point out one defect in

7 that proposal which seems to me clear? This is the Chairman's point. If you had a code of civil evidence in the federal system comparable to the set of rules which you have in the State of New York, I think there would be something to be said for it, but you have not got it. What you have got is a general rule favoring admissibility. So that your proposal would be practically the same as the adoption of Civil Rule 43. It would mean that the general rule favors admissibility unless in these rules some rule of exclusion or incompetence were prescribed.

Now, I would bitterly oppose any general rule in these rules in favor of admissibility because it seems to me that the considerations in civil proceedings which argue strongly in favor of a system of almost free proof -- which it seems to me is the under-

23 lying premise of the civil rule, to get as close to a system of free proof as you can -- just do not apply in criminal proceedings, where there is a constant struggle to reconcile those limiting factors making for exclusion -- protection of the defendant -- with the general rational argument in favor of admissibility. I think if we wanted to draft a code of evidence, which we obviously cannot do, that we would have to go through the whole field of evidence and decide when the general principle that all relevant evidence should be admitted should yield to some special rule of exclusion for the protection of defendants. We simply cannot do that, but the rules of evidence as a whole do do that to a considerable extent in connection with the whole field of criminal evidence.

If we leave the thing in something like the status of this first proposed rule, we at least invite the court to make that judgment in the light of traditional principles as the particular occasion arises. Similarly, if we adopted a rule of conformity we would at least incorporate the state resolution of that issue, that abiding issue in criminal cases; but if we revert to civil rules or to a general rule favoring admissibility we are just throwing that consideration out of the window.

Mr. Medalie. I think not. May I answer that?

Mr. Youngquist. I should like to say something on that.

Mr. Medalie. If you don't mind.

The Chairman. Just a minute, gentlemen. One at a time.

Mr. Medalie. May I answer that?

I think, Mr. Wechsler, your argument overlooks a reality. I have tried a fair number of federal criminal cases in recent years, and if anybody will tell me there are rules of evidence

24 that are based on any other theory than, "We'll take the evidence and see what it is," I should like to hear it. I know for all practical purposes anything that can shed any light on a case is normally received, and when received the doubt is resolved by the circuit court of appeals in favor of its reception.

Mr. Wechsler. How about the confessions rule?

Mr. Medalie. That is a specific thing applicable to criminal cases. I will tell you what I have in mind, and I think that is why the civil rule is good. It permits the federal courts to develop by judicial decision a set of liberal rules of evidence, the rule of exclusion operating only in cases of obvious injustice. Now, there are so many things with respect to the admissibility of evidence that relate to things that are supposedly prejudicial, for instance, that you can fairly trust the courts to make a judgment which could not be determined by any rules that you can draw up; and if you took the rules, let us say, in the second circuit of New York or of Connecticut or Vermont you would get a variety of specific applications of rules and a judgment as to their application, rather than any definite principles.

Now, if we said that the rules of evidence in civil cases are applicable also to criminal cases, in so far as they are applicable, you would have all that you needed, and the rest would be left to judge-made law, which is good enough law. When it comes to the privileges involved in testimony -- lawyer and

8 client, doctor and patient, et cetera,-- there must be some standard that ought to be applicable to both the classes of cases, and you cannot have one set of rules in civil cases and another in criminal cases. When it comes to hearsay -- or what

is commonly taken for hearsay -- and the exceptions to the hearsay rule, or the so-called exceptions, there should be uniformity. The number of cases where you have a specific rule applicable to criminal cases really could be counted on the fingers of one hand.

Mr. Wechsler. But the point of my disagreement with you is this: Certainly one could take the confessions rule and the accomplices rule and the conspiracy rule and a few other special rules that are supposed to have primary applicability to criminal cases, and we could formulate such rules. It seems to me that under your formulation you would have to do that, because otherwise --

Mr. Medalie (interposing). You would not. You have federal decisions that are pretty well worked out.

Mr. Wechsler. No, but the trouble is this.

Mr. Medalie. On confessions, for example, or bargains with the district attorney -- like the whiskey cases in 99 U.S. where the district attorney made a bargain with the defendant, and things of that sort -- all of those things have been decided by judge-made law developed in the federal courts.

Mr. Wechsler. Let us consider what your present judge-made law is; I do not mean on the specific point, but Judge McLellan pointed out here a while ago, except where statutes provide otherwise the basic rule, as I understand it, is that the state law governs, as of some earlier date, be it the date of admission of the state to the Union or some other arbitrarily defined date. Except under the Funk and the Wolf cases the situation given as of that earlier date may be modified by the Supreme Court applying general principles of common law envisaged in the light of reason and ex-

perience. That is about as close as I can come to stating what I understand the present general rule to be.

Mr. Medalie. Would you not want it that way?

Mr. Wechsler. That is all it is, but if you really closely analyze existing decisions, they vary depending upon the state law and moreover depending upon the state law as of the time the state was admitted, unless the court purports to exercise its exceptional power to modify under the Funk and the Wolf cases.

Now, that is a tremendously abstruse standard that nobody sees any merit in, but it is the standard in the light of which you should read existing federal decisions on points of evidence. I know they are not read that way, and I know that the courts do not always proceed in the light of that underlying rule, but when it gets to a close question it is articulated in those terms. I think we ought to junk that because it is much too complex. It is impossible to follow.

Mr. Medalie. It is not complex; it is vague, because you are leaving it all to the court, if you will, to say what is a fair rule of evidence that will aid in the administration of justice, instead of adopting a rule. Now, the fact is that today the rules of evidence are not the rules of evidence that I studied, either in the law school or that I thought I knew as a young lawyer when I looked up all the cases.

The Chairman. Mr. Medalie, may I interrupt a minute? As I gather, there is no report from the committee on style.

Mr. Robinson. No, there is not.

Mr. Medalie. That is right.

The Chairman. We are starting out without any help from that august group.

Mr. Robinson. Yes.

The Chairman. We are back now on the same general problem that confronted the civil rules committee.

Mr. Wechsler. Mr. Chairman, if I may add one thing, I think there is one other body of help that we ought to have that we have not got: I think we ought to have a report on what the existing statutory rules of federal evidence are. Now, there are such statutory rules.

Mr. Holtzoff. Not very many.

Mr. Wechsler. Not very many, but there are such, and I do not think that we are actually in a position to make anything more than the most tentative determination of the general principles here until we know what is now in the existing statutes, because those statutes, if they represent nothing else, represent those situations in which there has been a congressional policy formulated on the general idea of conformity.

Mr. Holtzoff. I think the principal federal evidence statute is one that relates to the admissibility of documentary evidence.

Mr. Medalie. That is a formulistic rule.

Mr. Dean. There are several.

Mr. Holtzoff. Formulistic regulations may indicate rights of persons. It is a statute passed about five or six years ago.

Mr. Medalie. Well, we hardly want to change that.

9 Mr. Wechsler. It is a very important statute.

Mr. Holtzoff. There are only a half dozen statutes relating to evidence.

Mr. Robinson. Not over that; none of them very extensive.

Mr. Medalie. I favor leaving the rules of evidence in an

extremely uncertain state.

Mr. Holtzoff. I do too.

Mr. Medalie. And that is because in the last few years -- that is, the last twenty years and certainly in the last ten, and still more in the last five or six -- the courts have begun to deal with evidence in a more realistic way because they found all this twaddle about evidence has not gotten them anywhere. They have not found any more truth as a result of it, and they are prepared to scrap their learning on it and deal with it as they go along, to see how things work.

Mr. Holtzoff. Are you going to make a motion to adopt it?

Mr. Medalie. Yes, I was just going to move that Civil Rule 43 be adopted.

Mr. Orfield. I second the motion.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. I ask to be heard before that is done, if you please, Mr. Chairman.

Mr. McLellan. I hope that will not be done easily.

Mr. Longsdorf. When the federal civil rule was adopted the statutory provision of the Judiciary Act of 1789 made the local law the rule of decision in the federal courts, and that has been very much strengthened by the decision in the Erie Railroad case. So there was a sound reason for following the local rules in some instances, as laid down in Civil Rule 43.

In other words, the substance of the cause of action or defense in a civil case more or less required certain proof according to the laws of the state which provided the substance of the cause of action. I think there was a sound reason for putting that language into Civil Rule 43. Now, there may have been, at

any rate.

Now, there is no similar reason that underlies the federal criminal law, because the local laws in no sense or degree pervade the criminal law of the United States. So that if we followed the local rules of evidence pervaded in that manner by the local laws, we would have some unfit rules. I think for that reason that we ought not to make the local laws of evidence applicable in federal criminal proceedings except to the extent that the courts might adopt them if they were proper and fitted to the case.

It seems to me that this Principal Rule 70 of Tentative Draft 3 leaves it open to the courts to do just that thing. I know it is vague, but unless you have a code of evidence it necessarily will be vague, broad in terms.

I think the best thing we could do would be to adopt this rule at the top of the page on which Rule 27 begins and let all the rest of it go. Sometime perhaps we shall have a perfected code of evidence. We do not have it now. If we drag in the local rules of evidence of the different states, as is done in Civil Rule 43, we shall presently have a set of rules of evidence just as reverse and confusing as the practice was under the old conformity act of 1872, and we tried for twenty-five years to get rid of that.

Mr. Holtzoff. Mr. Chairman, in order to bring this rule up for consideration I move as a substitute for Mr. Medalie's motion the first paragraph under Rule 27, entitled "Principal Rule, Rule 70 of Tentative Draft 3."

Mr. McLellan. I second that motion.

Mr. Youngquist. As a substitute motion?

Mr. Longsdorf. Will that motion be repeated, please?

Mr. Youngquist. May I say a word, Mr. Chairman?

The Chairman. Mr. Youngquist.

Mr. Longsdorf. Will you please repeat that motion?

Mr. Youngquist. It will be very short.

The Chairman. The motion made by Mr. Holtzoff is a substitute for the pending motion. The pending motion is to adopt Civil Rule 43. Mr. Holtzoff's substitute is to adopt Rule 70 of Tentative Draft 3.

Mr. Longsdorf. I shall have something to say on that.

The Chairman. Mr. Youngquist.

Mr. Youngquist. I wanted to say only this: I think there is no distinction -- save in the cases with respect to search and seizure and entrapment and a few things like that that can be taken care of by special rule -- between the evidence in civil cases and the evidence in criminal cases. Both purposes have just one end, that is, to ascertain the truth; and when you have that end in mind there can be no distinction between the admissibility of evidence in the civil cases on the one hand and criminal cases on the other. Those special instances where special protection is needed are supplied by what we already
10 have in the first instance in our search and seizure rule. Furthermore, I think it would be most unfortunate, now that the civil rules have been adopted and the criminal rules of procedure are about to be promulgated, if the federal courts should be laboring under the burden of trying cases under two separate sets of rules of evidence, when the one thing that they are seeking in both classes of cases is the fact and the truth.

Mr. Wechsler. I think there is one flaw in the position

there, and that is that you never can go simply at the truth without taking risks of making errors that may fall one way or the other, and that really is the essence of my point. A wise judge in making his decisions in a criminal case will, it seems to me, make them with a view far more to protection of the defendant than a wise judge in a civil case having to make the same judgments will favor avoiding risks to one side rather than to the other. But it seems to me that we are in judicial administration, and if you just ask yourself when otherwise relevant evidence should be excluded on the ground that it is unduly prejudicial and consider how you would make that judgment in a criminal case and in a civil case and how you might make it differently in the two types of cases, I think that I shall have illustrated my point.

Mr. Youngquist. I think that the judge's attitude is not going to be very much influenced by whichever rule we adopt. He is going to receive it under circumstances that it will stand up on appeal, or he is going to reject it. But I wonder how the rule here proposed -- that is, the principles of common law interpreted and applied by federal courts in the light of reason and experience -- is going to serve as a bar in any fashion to a judge of the latter class that we speak of, who should be restrained, perhaps, from receiving too much evidence in a criminal case.

Mr. Wechsler. I do not think this is ideal, but I do think that the common-law principles of evidence constitute a fairly fertile system and by and large a fairly instructive system. That, of course, is a real question, but I do not think it is a destructive question because I have in mind, when I speak of the common-law principles of evidence, a tradition of two hundred

years, the rational side of which is embodied in a treatise like Duncan's Treatise on Evidence, and the authoritative side of which is embodied in a treatise like Wigmore's Treatise on Evidence; and I think by and large, if you look at either of those volumes, works, that there is material to work on there, and the kind of material that will focus the chief attention on the real interests it is his job to safeguard. I do not think it is ideal, but if forced to make a choice between it and the alternative principle of favoring admissibility and pointing toward free proof, I have no doubt which choice I would make.

Mr. Holtzoff. I should like to see the federal courts have an opportunity to develop in the course of years a unified body of evidence. That is why I am intrigued by this first rule.

Mr. Youngquist. That is a laudable object, but I think we would be in a terrible situation while that process is going on.

Mr. Holtzoff. I do not think it holds any terrors for us.

The Chairman. Gentlemen, have we not canvassed the situation pretty fully? I mean there are two schools of thought, and you cannot belong to both on the same subject.

Mr. Longsdorf. Mr. Chairman, may I have leave to give Mr. Youngquist an illustration of where his theory would lead us to? I think a little pragmatics will not hurt us. In California a wife cannot testify in a criminal case against her husband; either for or against him. That is in diametric conflict with the Funk rule. Now, which are you going to follow if you adopt Civil Rule 43?

Mr. Dession. Well, you will follow the equity rule in California.

Mr. Holtzoff. I call for the question, Mr. Chairman.

11 The Chairman. The question is on Mr. Holtzoff's substitute motion to adopt Rule 70 of Tentative Draft 3. All those in favor of that motion, substitute motion, --

Mr. Wechsler. What is the motion? To adopt Rule 70?

The Chairman. To adopt Rule 70 of Tentative Draft No. 3, the one printed at the top of our page. All those in favor of that motion say "Aye." Opposed, "No."

Let us have a show of hands.

Mr. Medalie. I am changing my mind. I will go along with those that fear that neither will be adopted.

The Chairman. Eight. Opposed? Three. Eight to three. It is adopted.

Mr. Medalie. Of course, by voting for this I withdrew my insistence on the other.

Mr. Holtzoff. There are some verbal changes in it.

Mr. Medalie. I prefer to have one of these rather than something different.

The Chairman. Than nothing.

Mr. Holtzoff. Mr. Chairman, there are some verbal changes in it that are needed, but I think they can be left up to the subcommittee on style.

The Chairman. All right. Now does this take us into the remaining parts of Civil Rule 43?

Mr. Holtzoff. No.

Mr. Medalie. No. That is out.

The Chairman. "Scope of Examination and Cross-Examination." "Record" --

Mr. Holtzoff. I do not think we need that any more.

The Chairman. Professor Wigmore.

Mr. Wechsler. That raises another point, now that this good start has been made.

The Chairman. Ah, you are sneaking up on us with the second motion.

Mr. Wechsler. The next point is this: Rule 70 as it now stands perpetuates any existing federal statute. There are a number of existing federal statutes which in turn send us back to the states for the governing rules, that would be perpetuated under this draft. I am not sure that this committee, seeing those rules, would want to be sent back to the state for the governing rule. I think, for example, that that is the rule on competency generally, is it not, that it is determined by state law?

Mr. Dession. It is, although abrogated by the recent cases--for a while.

Mr. Wechsler. And therefore I renew my proposal of earlier that there be prepared a complete statement of existing statutory rules and that it be considered with a view to determining how many of those rules should be perpetuated in their present form and how many of them, because they are treated separately now, should be treated separately in the rules but in some different way than the present statute.

The Chairman. How many should be recommended for repeal.

Mr. Wechsler. Yes.

Mr. Longsdorf. If that is a proposal for research and further consideration, I should like to second the motion.

Mr. Youngquist. And further consideration?

Mr. Longsdorf. By this committee.

Mr. Holtzoff. We have already acted on this general rule.

Mr. Longsdorf. I know, but Mr. Wechsler's proposal is a

supplement to this rule.

Mr. Robinson. Mr. Longsdorf, you recall that while we were making all this study of federal statutes on evidence I placed in your hands and returned to you the address of Judge Wilbur made in California.

Mr. Longsdorf. I recall, yes.

Mr. Robinson. Calling attention to points that have been made here this evening, and I asked you at that time to select the very type of thing that Mr. Wechsler is talking about.

Mr. Longsdorf. Yes.

Mr. Robinson. And I understood you to say that you did not find any opportunity for such selection.

Mr. Longsdorf. Because Judge Wilbur's perplexities grew out
12 of the fact that not a single state within the ninth circuit was admitted at the time that the Judiciary Act of 1789 was passed.

Mr. Robinson. Well, I do not know.

Mr. Longsdorf. And consequently they adopted common-law rules of each state dated from the time that state was admitted, and the diversities of rule that grew out of that were simply confusion.

Mr. Robinson. I am not trying to talk about Judge Wilbur, but I am trying to talk about your research study of federal statutes on evidence and the opportunity for doing what Mr. Wechsler has suggested, namely, picking on details which the Congress --

Mr. Longsdorf (interposing). Well, there were specific rules.

Mr. Robinson. Just a second if you want me to state it.

Mr. Longsdorf. All right.

Mr. Robinson. -- which Congress has passed special statutes on with respect to evidence. To begin with you found those statutes very fragmentary and very few, did you not?

Mr. Longsdorf. Yes.

Mr. Robinson. And you were not able to find any federal statutes or federal rules that could be used as a definite supplement to Rule 7; is that not true?

Mr. Longsdorf. There were specific rules, but there were no general rules that had a datum point capable of reduction to generality of statement.

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Mr. Holtzoff. All that Mr. Wechsler wants is that a summary be made of all of the federal statutes dealing with the rules of evidence, and I think that is a very reasonable request.

Mr. Robinson. Certainly, I am not disputing that, but I am just saying the study has already been made. We can draw together in a very short time the points Mr. Wechsler speaks of, but I must suggest, in the light of Mr. Longsdorf's research study and the study of the research staff, that there is very little of that kind.

Mr. Holtzoff. Well, let us have the little that there is.

Mr. Robinson. Yes. I don't suppose you want any--I have to check it up tonight.

Mr. Longsdorf. Question on Mr. Wechsler's motion.

The Chairman. The question was for the collection of these rules to see what there is for scrapping.

Mr. Wechsler. My point is that we should do something about it.

Mr. Longsdorf. I can state this, Civil Procedure Rule 44 contains, with respect to evidence or proof of public documents, a great number of those federal statutes.

In addition to that there has been enacted recently by Congress another rule providing for the kind of proof they will admit for a composite document offered in evidence, like books of account made up by many different entry men.

Now, that rule does not need any aid from this Committee, and the aid that needs to be given to the other existing statutes has already been provided in Civil Rule 44, which I think is a good one.

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I don't know that we need carry that recent rule about composite documents into this code.

I do think, however, that it would be a fine idea to make a note perhaps which would await those evidence statutes.

Mr. Holtzoff. I call for the question on Mr. Wechsler's motion.

The Chairman. You were arguing for Mr. Wechsler's motion?

Mr. Longsdorf. I am simply illustrating what the aim was.

The Chairman. All right. Those in favor say "Aye." Opposed, "No."

Carried.

Mr. Medalie. I wonder if we could consider for a moment one possible amendment of the old rule, and that is on line 5, "except when a Federal statute", add parenthetically "(except a statute in conformity with state rules)".

That will avoid much of our difficulty.

Mr. Youngquist. I understood the search that was to be made would incorporate that.

Mr. Medalie. No.

Mr. Holtzoff. There is an act of Congress which is independent of state rules.

The Chairman. Can't we wait, gentlemen, until we have the statutory material before us to talk about instead of guessing about it?

Mr. Robinson. You can have it tomorrow.

Mr. Longsdorf. That is good.

Mr. Medalie. That is good.

The Chairman. Rule 28.

Mr. Holtzoff. In the light of the action that we took in

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adopting Rule 70, I think that Rule 28 (a) will have to go out.

Mr. Youngquist. 28?

Mr. Holtzoff. 28 (a).

Mr. Youngquist. All the rest of 27 goes out?

Mr. Holtzoff. Yes.

The Chairman. 28, paragraph (a).

Mr. Medalie. Let us deal with that when we get to it.

The Chairman. We are here. Rule 28, paragraph (a).

Mr. Medalie. Haven't you rule 27, paragraph (b)?

Mr. Robinson. It does necessarily follow that (b), (c), (d), and (e) should go out just because (a) does.

The Chairman. That was the question I asked.

Mr. Robinson. I would like to have Mr. Youngquist's answer on that.

Mr. Longsdorf. I did not mean that Civil Rule 43 (b), (c), (d), and (e) should go out.

Mr. Holtzoff. I doubt where you would need that, because

2 that has become surplusage since the rule we have just adopted is sort of a blanket rule.

Mr. Robinson. I beg your pardon. I have studied this just as carefully as I could for a good many months. I may be wrong, of course, but it seems to me what we have adopted compares only to 43 (a). Now, 43 (b), (c), and (d)--

Mr. Longsdorf. Mr. Chairman, the rules were aimed at (a).

The Chairman. Let us go back.

Mr. Medalie. 27 (b). Is that right?

The Chairman. That is right.

Mr. McLellan. I move that Rule 43 (b) be not adopted.

Mr. Wechsler. Seconded.

Mr. Dean. Can I inquire whether that is part of the civil rules?

Mr. Robinson. Yes.

May we have your reasons, Judge?

Mr. McLellan. Because I think that 70 sufficiently covers the situation.

Mr. Holtzoff. Another point is, this relates to calling an adverse party.

In a criminal case you do not call an adverse party, so that paragraph would not be suitable.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No."

Carried.

43 (c).

Mr. McLellan. I move that 43 (c) be not adopted.

Mr. Medalie. That is 27.

Mr. McLellan. 43. 43.

Mr. Medalie. We have it here as 27 (c).

Mr. Longsdorf. We had better make the record straight. This is 43 (c) as it appears appended to 27.

The Chairman. We all know we are talking about lines 23 to 33. The motion is to strike.

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

Carried.

Mr. Medalie. Isn't (d) the law?

Mr. Robinson. I move it be stricken.

Mr. Holtzoff. Seconded.

The Chairman. It is moved and seconded that (d) be stricken.

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

Carried.

All those in favor of striking (e) say "Aye." Opposed, "No."

Carried.

Now we are cutting out 43.

Mr. Holtzoff. I move to strike 28 (a) because that is also getting at the general rules of evidence.

Mr. Robinson. 28 (a) is the American Law Institute Code of Evidence, Tentative Draft 2, and it is based, I think to some extent, on this Funk case that has been discussed.

Mr. Medalie. But we are not drawing up rules of evidence. I move to strike it.

Mr. Longsdorf. I see no reason why we should not add this as complementary.

Mr. McLellan. I would like to know what Mr. Wechsler thinks about striking 28 (a).

Mr. Wechsler. I am sorry. I have been inattentive.

Mr. Holtzoff. Wouldn't this rule about husband and wife, physician and patient, and so on--it makes all of them qualified witnesses.

Mr. Medalie. They are qualified as to some evidence. They may be disqualified as to other things.

Mr. McLellan. Delete that rule?

Mr. Wechsler. I would be in favor of striking it.

Mr. McLellan. All right.

The Chairman. Is there a motion.

Mr. Medalie. I move to strike.

Mr. Wechsler. Seconded.

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The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Medalie. The same motion as to (b).

Mr. Holtzoff. I second the motion.

Mr. Robinson. (b) and (c) may go out like the rest of them, but it is based on a letter to Chairman Vanderbilt by Judge Van Buren Perry in which he suggests we consider it as to how they shall administer the oath.

Mr. Youngquist. He has that right, anyway, doesn't he?

Mr. Holtzoff. I move we leave it to the district judge.

Mr. Medalie. Seconded.

The Chairman. All those in favor of striking (b) say "Aye." Opposed, "No."

Carried.

Mr. Robinson. Now, Rule 43 (d) is based on the American Law Institute Code of Evidence which has been endorsed by the American Law Institute.

I suppose that is based on state law.

Mr. Longsdorf. Have we passed (c)?

The Chairman. Yes.

Mr. Robinson. The section is considered desirable as a means of aiding the court, and in preparing in advance of trial.

In this way such preparation may be done with less surprise and with less partisanship on the part of witnesses.

Mr. Medalie. How does that get into the civil rules.

Mr. Robinson. It is not the civil rules. That is the American Law Institute. It is just now being considered at Philadelphia this past week.

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Mr. Longsdorf. I don't see anything in that pertinent to the power of the court to limit the number of experts who may be called.

The Chairman. That is covered in pre-trial practice.

Mr. Longsdorf. Suppose it was not covered in pre-trial and the judge gets tired of the parade.

The Chairman. I don't think we ought to try to cover that rule.

Mr. Robinson. That is one way he can stop it. The judge may appoint one or more expert witnesses of his own selection.

Mr. Medalie. How often do you have expert witnesses in criminal cases in federal court?

Mr. Holtzoff. You very often have ballistics and handwriting experts, F.B.I. experts from their laboratory frequently testify in criminal cases.

Mr. McLellan. Handwriting.

Mr. Medalie. Handwriting, yes.

Mr. Waite. Insanity cases.

Mr. Medalie. Insanity rarely.

Mr. Waite. I will quote you, Mr. Medalie, it might come up very rarely indeed, but when it does come up it is important.

Mr. Medalie. This is no great calamity. An expert witness is no calamity.

Mr. Waite. But the right to call even partisan witnesses is extremely important.

Mr. Medalie. The trial might take a little longer and be a little more grotesque.

Mr. Waite. This goes further than that. It allows the court to call the witnesses himself.

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Mr. Robinson. It provides that parties on each side may agree and recommend such expert to the court.

Mr. McLellan. Who is going to pay him?

Mr. Dean. That is not in the rule.

Mr. Holtzoff. Mr. McLellan raises a question as to who is going to pay this expert.

Mr. Medalie. Well, he is tremendously flattered and it gives him great pride.

Mr. Longsdorf. Mr. Chairman, the same judges will try these criminal cases who have tried patent cases, and they know all about experts.

Mr. Youngquist. I would like to ask a question about it.

If an expert is appointed by the court, may the parties offer as witnesses their own experts?

Mr. Medalie. Oh, yes.

Mr. Robinson. Oh, yes. That is provided in lines 23 and 24.

I am familiar with the practice under this type of statute. I have handled it. It has been quite successful.

The Chairman. Who pays for it?

Mr. Robinson. The state courts pay for it.

Mr. Waite. The witness would have to tell anyhow if you subpoenaed him.

Mr. Youngquist. He would have to tell what he knows but he would not have to educate you.

Mr. McLellan. If he has an opinion he must give it, if the court is mean enough to make him, but he cannot study the facts.

Mr. Medalie. Is there a move to adopt this?

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Mr. Youngquist. I move it be adopted.

Mr. Medalie. I would like to change the title, then, to "Expert Witnesses" instead of "Witnesses", at the top.

"Rule 28. Expert Witnesses."

Mr. Holtzoff. I would like to suggest a change before this motion is voted on, that very last sentence, I think we can strike out everything after the middle of line 24. Strike out the rest of it.

The rest of it would require each party to submit a list of his expert witnesses.

Mr. Robinson. I think Professor Morgan makes a very good report. Have you read his report?

Mr. Holtzoff. No, I have not.

Mr. Robinson. I understand you, Judge, and a good many others disagree with it, but this part of it is really a part that should have support.

It is not just Professor Morgan's report either, it is really part of the uniform act.

Mr. Holtzoff. I do not believe you should be required to give the names of your witnesses in advance.

Mr. Robinson. Well, each side gives the other. The Government gives the defendant its witnesses.

Mr. Holtzoff. I don't believe either of them should give his witnesses.

Mr. Robinson. What you say does not seem consistent in view of your pre-trial procedure.

Mr. Holtzoff. Pre-trial procedure does not exchange the names of witnesses.

Mr. Robinson. But it is preparation in advance to find

the truth.

You recognize the fact that in the heat of a trial you cannot find out all there is to be found out about an expert or some of the witnesses.

This is designed to call off the present threat to scientific investigation by the fake expert.

I have seen some of their work, many of you have, no doubt, and when they come into a courtroom that is the first time the State has seen them; the first time the Government has seen them.

A little advance notice of who this person is is a great help in getting ready to cross-examine and in helping otherwise.

Mr. Holtzoff. I don't think we have any trouble, as a practical matter, with that.

Mr. Longsdorf. If there has been a pre-trial proceeding imposing limitation on experts, this sentence has no office.

If there has been no pre-trial proceeding, then you would like to be informed.

Mr. McLellan. The pre-trial proceeding provides only for limiting the number. This provides for giving the names to the adverse party.

The Chairman. Why shouldn't we let the bench and bar of the country have a whack at this to find out whether they like it or not?

Mr. Robinson. That's right. Give them a chance.

Mr. Holtzoff. I would like to see stricken out that last provision.

Mr. Waite. If the bar does not like it they will have a chance to strike it out.

gll

Mr. Seasongood. I don't think we ought to make a suggestion that is not practical if there is no money to pay these experts.

The Chairman. Very often you can get a criminal to pay costs. That is the way it is handled in England.

In civil cases the parties are required to agree on expert witnesses and share the cost, and I understand they do it by practical agreement in many of their criminal proceedings.

Mr. Youngquist. I do not think there would be much trouble getting Congress to appropriate money because this would expedite trials.

4 Mr. Holtzoff. I disagree with you there.

Well, Mr. Chairman, I move to strike out the last clause beginning on line 24 after "selected".

I am in favor of this rule with that stricken out.

Mr. Waite. There is a motion to amend.

The Chairman. The amending motion is to strike from line 24.

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

The motion is lost.

The motion now pending is to adopt Rule 28 (d) as drafted.

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

Carried.

Mr. Longsdorf. But, Mr. Chairman, that is no longer 28 (d).

The Chairman. It becomes 28. (a), (b), and (c) are out.

Rule 29.

Mr. Waite. Mr. Chairman, here comes the Bolshevik again, but this time I really hope to get somewhere.

g12

The Chairman. "Proof of Official Record." Is that the one?

Mr. Waite. No; I want to suggest either an addition to this rule, or another rule to this effect, that the trial court shall have power in its discretion when the necessities of justice so require to call witnesses to the stand, to interrogate witnesses called by either party, and, on its own initiative, to exclude testimony which is clearly inadmissible.

Now, as a matter of fact most of those things are already the federal rule.

It has been held that the court can exclude testimony on its own initiative, and it has been held that the court can interrogate witnesses.

And there are a number of federal cases holding that the court can call a witness.

But a while ago a case came up before Judge Tuttle in Detroit that had been tried for six weeks.

There were two witnesses, a man and his wife, in the courtroom. There was real reason to believe that they could throw light upon the whole case and clarify it very remarkably, but for some reason each side was afraid to call them. Neither side wanted them called, and Judge Tuttle, believing that he should produce the truth to the jury more clearly if they were called than otherwise, did call them, and their testimony undoubtedly led to the final decision by the jury.

That case went to the Court of Appeals and was reversed, which was in conflict with the apparently well established federal rule.

Now, unfortunately, before I came here I could not find

the citation of that case but Mr. Burke bears me out that the case did occur and, inasmuch as there is that somewhat uncertain situation, I think we ought to clarify it by the rule.

Mr. McLellan. Was this a criminal case?

Mr. Waite. What is that?

Mr. McLellan. Was this a criminal case?

Mr. Waite. No. That was a civil case.

If the rule is as I have stated it here, then there certainly cannot be any objection to putting it in the rules.

If it is not clear, then there is definite wisdom in putting it in the rules.

Mr. Holtzoff. It is a little difficult for me at the moment to conceive of a situation where in a criminal case this might be applicable.

Mr. Youngquist. I can give you an example in Minneapolis within the past month, a murder case.

There had been an autopsy conducted by two physicians.

The State called one physician, did not call the other, who was pathologist at the University of Minnesota.

The defendant was prodding the prosecution all through the trial to call that witness, Dr. McCarthy.

The State did not and the defense did not, both afraid to call the witness, just the situation which you described.

Mr. Holtzoff. The testimony of that state pathologist would have been unfavorable to the prosecution?

Mr. Youngquist. The jury convicted.

Mr. Holtzoff. I am kind of afraid of a situation where a judge would overrule counsel, so to speak, and call a witness.

Mr. McLellan. You are doing too much for the wisdom of

the judge. The lawyers ought to know.

Mr. Waite. Is there any objection to the power of the judge to call the witness if he thinks it will elicit the truth?

Mr. Medalie. Well, this Michigan case held that a judge has no power to call a witness? Did it make that general rule?

Mr. Waite. I cannot find out.

Mr. Burke, you probably know more about it than I do.

Mr. Burke. The type of case.

Mr. Waite. They ruled the court had no power.

Mr. Medalie. But Wigmore says the judge may call a witness.

Mr. Waite. Yes, may call a witness, exclude undesirable evidence, or may take a view of a place or thing. Lack of this power will never be denied so long as the bench retains its true sense. Courts have sometimes been led astray, however, by the no-comment, no-manifestation-of-opinion rule.

Mr. Holtzoff. Well, the judges frequently ask questions, of course. And the only thing is, I sort of hesitate to see an invitation in these rules to a judge to call his own wit-
5 nesses.

The Chairman. Will you read that proposed rule again and let us have it clause by clause?

Mr. Waite. Yes. "The trial court shall have power in its discretion when the necessities of justice so require to call witnesses to the stand, interrogate witnesses called by either party"--

The Chairman. Let us stop on that one.

I think the only way to do is get a vote on each of these broad spots.

Mr. Medalie. No. I think not.

I think the question is whether we want to vote on that kind of a question or not, or, let the courts run things their own way, because we know from the conduct of cases that rules including those of the appellate courts, vary according to the circumstances of the case.

I don't think we ought to attempt to formulate in detail any portion of the rules of evidence simply because here and there some court makes a cock-eyed decision.

Mr. Waite. After all, this is a rule of procedure, I should say, and not a rule of evidence.

Mr. Medalie. That is the same thing.

Mr. Waite. It is no more a rule of evidence than the one we just adopted.

Mr. Medalie. If we attempted to cover every situation where the court goes off a little, and to correct it, we would be publishing a code.

Mr. Waite. We have just adopted one rule which gives the court powers that it did not have before.

I am suggesting now that we make explicit another rule which makes certain the powers.

Mr. Medalie. I think that is a detail, and if we go into details of that kind we are going to get ourselves into a mass of detail which we ought to avoid.

Mr. Waite. Well, now, the very fact that the proposal is disputed here indicates that the bar should have some opinion on it, and, gentlemen, we will make a great mistake if we put nothing into this except that which we wholeheartedly approve.

If we put in matters which we can approve, that will give the bar a chance to criticize or take them out, but if we do not

put things in it will be much more difficult for them to put in things the bar wants and which we ought to put in there.

I think we ought to err on the part of putting in proposals rather than leaving them out, and I think we are going to be much more criticized for what we leave out than for what we put in.

Mr. Wechsler. Mr. Chairman, I would like to add an amendment to Mr. Waite's proposal and add that any witness so called may be cross-examined both by the Government and by the defendants.

Mr. Waite. I accept that.

Mr. Medalie. Isn't that the law as you understand it?

Mr. Wechsler. Yes.

Mr. Medalie. Why do you want it in?

Mr. Wechsler. Because I view Mr. Waite's proposal as declaratory of existing law.

Mr. Medalie. If you are going to put everything that is in existing law in, you are going to have an awful mess.

Mr. Wechsler. That is a special situation and we ought to have it complete on that situation.

Mr. Burns. I would like to make a point that even though it is declaratory of existing law, it strikes me it sins against symmetry.

The question will arise, Why have you picked out a lot of other details?

Mr. Medalie. I agree, Mr. Chairman.

The Chairman. The question is, Mr. Waite moves the adoption of his rule.

All those in favor of the motion say "Aye." Opposed, "No."

g17

The motion seems to be lost. The motion is lost.

Rule 29.

Mr. Robinson. That started out as Rule 44 of the civil rules, in an effort to see how much of the civil rule would be applicable to criminal cases, and this is what is left.

Mr. Medalie. I move to strike it.

Mr. Holtzoff. I second the motion.

Mr. Medalie. That is the law, in all probability.

Mr. Dession. It is. There is no difference.

Mr. Holtzoff. With the rule we adopted, it seems to me that Rule 29 becomes no longer necessary.

Mr. Medalie. Let me tell you something--

Mr. McLellan. Didn't you move something?

Mr. Medalie. Let me tell you something; in a case in my district, if you recall, the Circuit Court of Appeals of my circuit, just out of its head and with a wealth of experience, went on to tell us how you can put in a lot of evidence about book entries and corporate evidence without breaking your neck and having to call a million witnesses.

In other words, you trust our Circuit Court of Appeals. There may be one or two who won't do it from time to time. It should be a practical matter without going through a lot of useless ritual.

6 Now, I will trust the courts to put this thing through without rules, statutes, or anything else.

Mr. Youngquist. In view of what we have adopted, however, it would be inconsistent to have the rule in.

The Chairman. The motion is to strike.

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

Rule 30.

Any suggestions on (a)?

Mr. Robinson. This is very carefully worked over by two or three of the committee.

Mr. McLellan. That does not mean anything.

Mr. Robinson. I found that out.

Mr. Medalie. Well, the reason is, if a jury does not do what the court tells them to do--of course juries do what the court tells them to do. If we did not need the jury, it should not go to the jury.

Then, after the government's evidence is finished, the court says, "There is no evidence whatever to convict, therefore I enter verdict of acquittal."

The Chairman. Therefore you move the adoption?

Mr. Medalie. I move the adoption of (a).

Mr. Dean. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

The next is (b). It is just supplementary to it.

Mr. Medalie. Yes. (b) is one of the most sensible things that has ever been put in and is used in New York in just this way.

Mr. McLellan. I move it be adopted.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 31.

Mr. Burns. I would like to ask a question:

g19

Does 30 (b) change the existing law?

Mr. Holtzoff. 30 (b) is the verdict--non obstante veridicto in criminal cases.

The Chairman. Any questions on 31?

Mr. Holtzoff. I move its adoption.

Mr. Medalie. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

32.

Mr. Medalie. I move its adoption.

Mr. Robinson. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Mr. McLellan. May I ask one question?

The Chairman. Certainly.

Mr. McLellan. Rule 32, "When the verdict is rendered * * the jury may be polled at the request of any party".

Would it be well to add, "or at the court's own motion"?

Mr. Dession. Or should it be "shall"?

Mr. McLellan. I would not make it "shall".

Mr. Medalie. I think that is the rule for polling juries. It must be done if a party requests it. That is the present rule.

Mr. McLellan. I don't so understand it. I think it is discretionary.

Mr. Medalie. But they always accede to the request, which makes it, in effect, a mandatory request.

g20

The Chairman. Shall we add "on the court's own motion"?

Mr. McLellan. I say, "of the court's own motion".

The Chairman. "of the court's own motion". That is better.

Mr. Medalie. That is after "party" in line 3?

Mr. McLellan. "or of the court's own motion".

The Chairman. Mr. Waite has a question?

Mr. Waite. If you allow me to orate at this time, I assure you I haven't another question during the meeting.

Mr. McLellan. Everybody likes to hear you.

Mr. Waite. Well, you have at least got to admit that I have endeavored to liberalize the rules.

This one, for the sake of the record--I think it has been discussed before, but I want to relieve my own conscience now by proposing it. I am offering it here. I don't know quite where it should go. I don't suggest any particular place where it should go:

"If the defendant takes the stand as a witness in his own behalf he may be cross-examined like any other witness concerning any testimony so given by him but he shall not be interrogated by counsel for the prosecution concerning his previous criminal record nor concerning other matters affecting his personal credibility.

"The fact that the defendant does not take the witness stand to testify in his own behalf may be considered by the jury and may be commented on by the judge, the prosecuting attorney, or the counsel for the defense."

Now, I might say that that provision was fought out in one of the American Law Institute meetings, discussed in all

all its angles, and the vote was two to one in favor of it; so it would scarcely be true to say the bar does not want it, that the bar has repudiated it, because I think the Institute generally is a fair cross-section of the bar, and, I might say that those who opposed it were not opposed to the comment as such.

There were various propositions. Some people thought that the judge ought to be allowed to comment but that the attorneys should not; and of the group who opposed this broader motion, many of those would have been willing to allow some sort of comment.

So I think it is fair to say that the vote for allowing comment was three or four to one, to those opposed.

7 There came before the Institute meeting--one of the objections before the Institute meeting was that what kept the defendant off the stand oftentimes was his fear that he would be interrogated as to his past criminal record, and so I thought we might take care of that by this first draft or provision that if he does take the stand he cannot be interrogated as to matters adversely affecting his personal credibility, and therefore he has not got that excuse for not taking the stand, and upon that basis, the whole idea of compulsion seems to me to fall out.

Mr. Medalie. Of course that carries out part of the English view on that subject.

My experience has been, although I have indulged in it rarely, that defendants are kept off the stand even when they have no criminal records but are otherwise perfectly respectable persons. They too have been kept off the stand.

Now, this deals only with a special privilege to professional criminals to stay off the stand, or, to go on the stand, rather. I misspoke.

I mean special advantage in professional criminals' going on the stand.

Now, a perfectly respectable man, other than the fact that he has committed this particular offense, who deems it advisable not to go on the stand, is subject to comment which the professional criminal might avoid.

I do not think that is a practical thing. The idea that people who stay off the stand are only criminals previously convicted is not correct.

Mr. Seasongood. We have had this up before. We discussed it very elaborately.

Mr. Waite. I am making the motion only pro forma, as a matter of fact. I am making it chiefly because when this matter comes before the public I want to feel perfectly free to criticize, so far as I am able, what I consider the lack in the rules as proposed.

The Chairman. The question is called for.

Mr. Waite. It was not supported.

Mr. Orfield. I will second it.

Mr. Burns. Is it true that you would not advocate the first clause if it were not for your advocacy of the second?

Mr. Waite. Perhaps that is true. I had not thought that through.

Mr. Seasongood. There is a very serious constitutional question involved.

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

g23

Opposed, "No."

The motion seems to be lost. The motion is lost.

Rule 33.

Mr. Holtzoff. I think we have a revised draft that has been laid on the table before everyone.

The Chairman. It was distributed yesterday.

Mr. Holtzoff. There is no difference in the phraseology--I mean there is no difference in the substance but only a difference to simplify phraseology.

Mr. McLellan. How about another district in the same state?

Mr. Holtzoff. I think the reason that has not been covered here is because now that we have made it possible for a warrant to run throughout the state, no removal proceeding will be necessary so long as it is in the same state.

The Chairman. Now may we look at (a) and see if there are any questions on the redraft of (a)?

Mr. McLellan. I move the adoption of 33 (a).

Mr. Robinson. I second it.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Now 33 (b).

Mr. McLellan. I move the adoption of 33 (b).

Mr. Holtzoff. I second the motion.

Mr. Youngquist. I have one question.

In the latter part of 33 (b) it is provided if the defendant pleads not guilty the clerk shall transfer the papers back to the court in which the proceeding is commenced, and be

restored to the docket of that court.

In line 23 we say he may waive the right to be tried in the district where the information was filed and consent to be tried--wait a minute; I am sorry. I misread it.

The Chairman. Any further questions on (b)?

If not, all those in favor say "Aye." Opposed, "No."

Carried.

Rule 33.

Mr. Holtzoff. We had 33. 34.

The Chairman. Pardon me. 34.

Mr. Burns. I would like to ask a question about 33 (b).

The Chairman. 33 (b), Judge?

Mr. Burns. If he desires to plead guilty or nolo contendere he may waive the right--"in writing waive the right and consent to be tried in the district"--

Mr. Youngquist. The words "and consent" should be stricken out.

Mr. Holtzoff. That was a typographical error and some of the copies did not have it stricken out.

Mr. Burns. "waive the right".

Mr. Youngquist. "waive the right to be tried in the district in which the crime is alleged to have been committed and consent to disposition of the case in the district in which he has been arrested".

Mr. Burns. In the last clause--in case he runs out on his bargain, is it? If the defendant pleads not guilty?

Mr. Holtzoff. He does not have this privilege if he pleads not guilty.

Mr. Burns. Oh, it is transferred only after he desires

g25

to plead guilty?

Mr. Holtzoff. That is right. Then suppose he changes his mind.

Mr. Burns. Is that the part in the last sentence, in case he changes his mind?

Mr. Holtzoff. Yes.

8 Mr. Burns. Can some improvement be made so he will be bound?

Mr. Wechsler. Suppose we change the language, "if the defendant subsequently desires to plead not guilty"?

Mr. McLellan. Well, on that you are giving him inferentially the right to withdraw a plea of guilty.

He can do that only with the consent of the court.

Mr. Youngquist. I move that the last four lines be stricken.

Mr. Burns. I mean, it starts out as though you are dealing with a particular kind of individual who wants to stay put, and then you provide for an alternative where he has actually played ducks and drakes with the prosecution.

Mr. Holtzoff. What I had in mind was this: Suppose he notifies all concerned that he is going to plead guilty and asks that the case be transferred.

The case is transferred, he is then arraigned and he says, "I plead not guilty."

Mr. Medalie. It seems to me--I reread this today--that once a defendant has actually written, "I plead guilty," and acknowledged it, I would not have the records of the court passing across the country and back again if he changes his mind or gets new lawyers, or whatever else.

Mr. Burns. This would be just another technicality to put the Government to great expense.

It might not advantage him in the end but it may take months sometimes.

Mr. Holtzoff. I have in mind it may be used in minor cases where a man might be a resident of a place far away from the place where the proceeding is instituted, and he says, "Well, I am going to plead guilty anyway. I would like to plead guilty here instead of having to go half way across the continent."

Mr. Medalie. Suppose he can get a year for it. That is also a minor case, but a year is a long time if you are not used to it.

Mr. Wechsler. Can it be made to read, "The defendant may plead guilty," instead of having all this language, "if the defendant desires"?

He would have to say, "I want to plead guilty." He would be brought into court and plead.

Mr. Burns. Isn't there something in Mr. Medalie's position, that before you start this unusual process you ought to have it in writing?

Mr. Youngquist. Can't we provide that the district court in which he is may accept his plea of guilty?

Mr. Holtzoff. We don't want to do that unless the district attorneys agree.

Mr. Medalie. If he wants to change, you can poke the plea under his nose, from California, in New York.

Mr. Holtzoff. Even though he is going to plead guilty and stick to his plea, this is the thought, that he can do this

only with both United States attorneys' consent, because we don't want to run up against a situation where a defendant runs where he expects to get a lawyer and then pleads guilty there.

Mr. Medalie. Let us say the man is indicted in New York and that he is picked up in California.

His lawyer figures out it costs a lot of money to go to New York; he would rather get the fee--put it on the worst basis you want to--and then he is 3,000 miles away from home.

Now, all he has to do is file a paper which says he is guilty.

Now, then, either we succeed in accommodating him, as we probably will, by having it disposed of out there in California, or, at the worst, the same thing happens to him by having to go back to New York, but he cannot get all the papers sent on from New York and then say, "I changed my mind. I don't like the judge who is sitting today. I will not plead guilty."

The Chairman. Your motion is to send this back for redrafting in line with your discussion?

Mr. Medalie. Yes.

Mr. Longsdorf. Mr. Chairman, can a man plead guilty by writing something on a piece of paper and mailing it to a distant court?

Mr. Burns. No, but he can make an admission in writing.

Mr. Medalie. That is what I had in mind. That is enough.

The Chairman. It is moved and seconded that this particular subsection be submitted to the subcommittee for rewriting.

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

Carried.

Now, Rule 33.

Mr. McLellan. 34.

The Chairman. Pardon me, 34. I have a double section here.

Mr. McLellan. I move the adoption of Rule 34 (a).

Mr. Holtzoff. I second that motion.

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

Mr. Longsdorf. Mr. Chairman, I want to suggest a slight amendment in line 2 which now reads, "In cases in which a warrant of search and seizure is authorized by law".

I would like to have substituted for the word "cases" the words "criminal prosecutions".

It is quite possible, I think, that there might be search warrants issued when no criminal prosecution was contemplated.

The Chairman. Why not say "Where" or "When"?

Mr. Longsdorf. Either one; "When a warrant of search and seizure is authorized".

I don't want to extend this into a general rule.

Mr. Holtzoff. Oh, search warrants are very frequently issued where there is no criminal prosecution.

9 Mr. Longsdorf. That is what I want to avoid.

The Chairman. Subject to that change, the motion is to adopt.

Substitute in line 2, in place of "In cases in which" the word "Where".

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

Carried.

Mr. Longsdorf. I have in mind that line in section 33, Title 28, which limits that particular chapter and preserves all existing federal laws.

I don't want to supersede that because I don't know what it means if we would do that.

Mr. Medalie. What are we superseding?

Mr. Longsdorf. That search warrant in the Act of 1917.

Mr. Burns. Well, isn't it fair to say this clause is applicable in its contents only to criminal cases?

Mr. Longsdorf. I think so.

Mr. McLellan. It could not have any effect except in criminal proceedings.

Mr. Longsdorf. I want to leave the law as to when a search warrant may issue, out of this rule.

The Chairman. Have we a motion on (b)?

Mr. Holtzoff. I move it be adopted.

Mr. Robinson. I second that motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Now, (c).

Mr. Waite. Before we vote on that I would like to ask a question about it.

As I interpret that first sentence, if officers should seize a boatload of heroin or a batch of time bombs under a defective warrant, the court would have to order the return of the property to the person from whom it is received.

Is that correct?

Mr. Medalie. Yes. But I pity the fellow who took it back.

Mr. Holtzoff. I think that is existing law, as I understand it.

Mr. Waite. It is the law in Michigan also, and our Supreme

Court wishes to Heaven they had never thought about it.

The Chairman. All those in favor of (c) say "Aye."

Mr. Longsdorf. Before we vote on (c) I want to suggest something, Mr. Chairman.

There may be motions to suppress evidence which has not been obtained by means of an illegal or an unwarranted search warrant.

I don't suppose that this subsection (c) should be construed to deny the right to make a motion to suppress that kind of evidence.

Mr. Youngquist. That is taken care of by lines 45 and 46, "or if the seizure was made without a warrant that the property was illegally seized."

Mr. Longsdorf. Suppose it was evidence in violation of the wire-tapping law, there would not be any search warrant there. You can move to suppress that.

Mr. Holtzoff. You just object to its introduction.

Mr. Longsdorf. All right. I want to see that that right is preserved. I want to be sure that the construction of this is going to be all right.

Mr. Youngquist. Mr. Longsdorf, this relates only to property.

Mr. Longsdorf. Only to property obtained with a search warrant.

Mr. Youngquist. Or seizures.

Mr. Longsdorf. I see, "illegally or if the seizure was made without a warrant".

Mr. Youngquist. That is covered.

Mr. Longsdorf. All right.

The Chairman. All those in favor of this motion on (c), say "Aye." Opposed, "No."

Mr. Wechsler. Is this a vote on (c)?

The Chairman. Yes.

Mr. Wechsler. I am sorry. There is one point on (c), the sentence on lines 41 and 42, "A defendant may on like grounds move to suppress any evidence procured thereunder."

I understand that that sentence could considerably enlarge the existing law as is declared in decisions of circuit courts of appeal, there being no authoritative Supreme Court decision, although the matter is discussed in a recent decision under the wire-tapping statute.

The question is whether the motion to suppress may only be made by the person who had possession of the property illegally seized and whose rights were violated by the seizure, or, whether the motion may be made by any defendant.

I am not sure what I think the law should be but I thought I would call attention to the fact that there is a change as the law is now indicated under the decisions.

Mr. Youngquist. I thought that was the purpose of our subcommittee at New York. You may not have been there.

Mr. Wechsler. That is the one I missed.

It was broadened in this way?

Mr. Youngquist. To give any defendant the right to move to suppress.

That may be too broad. It is broader than existing law. It is only where defendant's right has been interfered with with reference to his property that he can have the evidence suppressed.

Mr. Wechsler. That is the existing law as I understand it.

g32

Mr. Youngquist. Yes. But that goes beyond it.

Mr. Medalie. Suppose there is unlawful search and seizure of my room in the hotel and they find there a letter from you to me telling me how I may blow up the Capitol, or something of that sort, and your handwriting is proved.

Ought you to have any right to suppress that evidence?

Mr. Youngquist. It is illegal search and seizure, and the Constitution broadly prohibits unreasonable searches and seizures.

My thought is that evidence obtained by violation of the
10 Constitution should be susceptible of suppression.

Mr. Medalie. But by violation of the rights of the person who is concerned. You have no right, in my property. I am the only one who has.

Mr. Holtzoff. It is a personal privilege.

Mr. Youngquist. I am taking the border view.

Mr. Holtzoff. I move we strike out the sentence beginning on line 41.

Mr. Medalie. I second it.

The Chairman. It is moved and seconded.

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

Carried.

Rule 35.

Mr. Youngquist. Some changes will have to be made elsewhere in the rule by reason of this elision.

Mr. Burns. Is there any motion here to suppress evidence?

Mr. Youngquist. This was broad enough to cover it before. I think it was all included in that one sentence.

Mr. Burns. Is a motion to suppress a prerequisite to

offering an objection to its use in a trial?

Mr. Holtzoff. We have that, beginning on line 51. My understanding is that sentence embodies the existing law.

Mr. Youngquist. What I had in mind, Mr. Burns, was that this would have to be rewritten in part to state the proposition you speak of.

Mr. Dean. Does it say that a motion to suppress evidence is a prerequisite or is a condition to objecting to the admissibility on the trial?

Mr. Medalie. I understood that you really agreed with the proposition as I put it, that is, when my property is illegally seized from me and it is used against you, you agree that I can make a motion but that you cannot?

Mr. Youngquist. No, I did not. I put my decision on the border ground, that everything that is obtained as evidence in violation of the Constitution should not be used.

Mr. Medalie. Used against anybody?

Mr. Youngquist. Anybody--

Mr. Burns. Can a defendant move to suppress the evidence?

Mr. Holtzoff. He can move for return of the property.

Mr. Medalie. If we haven't it by this deletion, we ought to have it.

Mr. Holtzoff. We haven't interfered with it. The only limitation we have made by the deletion is the one you have mentioned.

Mr. McLellan. I think that ought to go to the subcommittee. If the right is not preserved by reason of that deletion, it should be restored.

The Chairman. So ordered.

Rule 35 (a). Any question on (a)?

Mr. Medalie. The Reporter suggests I make a brief statement.

The Chairman. Let us not, unless somebody questions your handiwork.

Mr. McLellan. I move the adoption of 35 (a).

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. The only question I have in mind is whether that is limited too closely--well, suppose a scurrilous and libelous paper is filed in court and it is under the eye of the court with a file mark on it, and one of counsel in court or some person calls attention to it.

Now, he sees and hears that and he knows from the files that it is there.

Mr. Medalie. He does not.

I can take the back that you use to back up your legal papers. I am a vicious person that wants to pin something on you, and I put in some scurrilous remarks about the judge, put it back, and, on the basis of that, you get 60 days, according to what you are proposing there.

Now, the judge did not see anything but the paper and he did not see you do it.

Mr. Longsdorf. I thought someone called attention to it.

Mr. Medalie. And the judge saw it. That comes under this rule (a).

Mr. Burns. Suppose a particularly vicious ruling is made by a judge, and counsel comments openly.

The judge, being a little hard of hearing, does not get it, but is told by the bailiff.

Under the present law may the judge, to vindicate the courtroom presence, impose a contempt forthwith?

Mr. Wechsler. Not without a finding that the defendant made the statement.

Mr. Burns. And he must have a hearing.

Mr. Wechsler. Yes.

Mr. Medalie. You don't need a hearing if the judge knows it to be a fact and he certifies that it is a fact of his own knowledge, but when he does not know it but only infers it, the defendant is entitled to a hearing.

The Chairman. The motion is on 35 (a).

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

Carried.

We now go to 35 (b).

Mr. Wechsler. I have got a lot of questions about 35 (b), Mr. Chairman.

Mr. Longsdorf. I have a few, and Mr. Seasongood too, I think.

Mr. Wechsler. I would like to ask Mr. Medalie the following first:

What is the meaning of the limitation on line 7, "prosecuted by the court to assert its authority"?

And I would like to know, secondly--

The Chairman. Well, let us get one at a time.

Mr. Medalie. Well, now, wait a minute.

We went back to Rule 107--is it, the old rule?

Mr. Youngquist. 87, I think it was.

May I ask, was this drafted at a subcommittee meeting?

Mr. Holtzoff. No, it was not. I don't think so.

Mr. Medalie. I do not recognize the language.

11 Mr. Holtzoff. The language, "to assert its authority"--

Mr. Robinson. I would like to have Miss Peterson make a statement.

Miss Peterson. That old section (b) was left to be redrafted in the Reporter's office and so it was redrafted on the basis of McCann v. United States, 80 Federal (2d) 11, and the language is in that case, and it is--the case to which Mr. Wechsler referred at the first meeting of the committee--and the whole purpose of the change here is to provide a device by which the defendant can be assured that he is being prosecuted for a criminal and not civil offense.

Mr. Holtzoff. That may be all right for a court opinion but it is a different thing to put it in a rule.

Mr. Medalie. Would you like to strike out the rest of the line?

Mr. Burns. Why not say "any criminal contempt"?

Mr. Medalie. I think we are in agreement on that.

Mr. Holtzoff. There are some criminal contempts which do not come under (a) but which do not require notice.

Mr. Wechsler. Which are they?

Mr. Holtzoff. I think you brought that question up in the McGovern case.

Mr. Medalie. No. That is something else. McGovern had his notice, although he did not have it in writing.

The district attorney said to the jury, "The Government presents," and so on, and McGovern heard it.

Mr. Holtzoff. This will require summons in the McGovern case, if you continue to read on.

Mr. Medalie. I think they are talking about the first sentence in (b).

The first sentence in (b) is entirely consistent with the McGovern case.

Mr. Holtzoff. You have to read it with the context. It says, "the notice provided herein," which requires a summons.

Mr. Medalie. Unless the defendant dispenses with it in some way, as he did in the McGovern case.

Mr. Dean. Well, it would have been simple anyway, wouldn't it, to have made a written one anyway?

Mr. Medalie. Yes. His lawyer was waiting around to see what would happen in the grand jury, and when we got through with the grand jury we all walked down before Judge Wilson.

Mr. McLellan. I hate, Mr. Chairman, to take the time on this, but I am ignorant on it.

Do you mean to indicate here that every kind of a criminal contempt other than that mentioned in (a) requires that the defendant may have a jury trial?

Mr. Wechsler. No.

Mr. Medalie. No.

Mr. McLellan. Haven't you said so?

Mr. Medalie. That is stated, and I have it marked as something I don't agree to.

The Chairman. May we agree on your objection to lines 6, 7, and 8 first?

Mr. Youngquist. I move the words "prosecuted by the court to assert its authority" be stricken in line 7, and in line 8 that the words "proceeded against" be stricken and the word "prosecuted" inserted.

Mr. Holtzoff. I second the motion.

Mr. Medalie. I agree with that.

Mr. Wechsler. I third it.

The Chairman. Judge Burns suggested we start the sentence with "A criminal contempt except as provided in section (a)".

Mr. Longsdorf. I thought Judge Burns suggested "Any criminal contempt." I like that better.

Mr. Wechsler. "Any criminal contempt except as provided in section (a)".

The Chairman. That is right.

All those in favor of this motion say "Aye." Opposed, "No."

Carried.

Now, Mr. Wechsler?

Mr. Medalie. On line 9 shouldn't it be changed to "make"?

Mr. Wechsler. On this sentence starting on line 9, if that is up for discussion, all of this changes existing practice, including the practice which is specifically provided under the Clayton Act which allows such prosecution on information filed by either the United States attorney or by a private person.

Mr. Holtzoff. Isn't that taken care of in (c)?

Mr. Wechsler. No. (c) should go out entirely. I think that will be clear when we come to it.

Now, I understand what Miss Peterson meant with this sentence in adopting the rule of the McCann case.

The point is briefly this, in contempts which involve disobedience to a court order there is inherent ambiguity in the nature of a contempt proceeding as to whether it is for

civil or for criminal contempt.

That problem came up acutely in the Gompers case, and it has come up again ever since, and when it comes up it requires usually after the event an examination of the proceedings from all angles to discover whether it was a proceeding for criminal contempt or whether it was a proceeding for so-called civil contempt which would be purged by compliance with the order and which might allow a compensatory judgment to the private party prosecuting.

Since he had that problem, the judge in the McCann case decided it would be a fine thing if the defendant knew in advance whether it was intended to be civil or criminal.

It was a fine idea and he suggested that it be met by requiring that the court enter an order when it was the intention to prosecute criminally for the contempt, as distinguished from

12 a civil proceeding based on the contempt.

He did not of course intend to modify the rule under the Clayton Act where there is a statutory provision expressly allowing a private individual to file an information, but he was addressing himself to some other cases.

I noticed there was a decision subsequent to the McCann case which loosened up the rule a little bit.

I am not clear what we should do about it, and my suggestion that the McCann case be examined was not that the rule laid down should be adopted, because I don't know whether it should be adopted or not.

Mr. Burns. Don't you have three cases of contempt, where the judge saw or heard; second, where it involved disobedience to a court order; and, third, when it would include the

procedure under the Clayton Act?

Mr. Wechsler. But it is decidedly in the court order that the ambiguity exists.

I think when you have a case of misbehavior other than a violation of a court order there is never any ambiguity. If it is punishable under a statute, it must be a criminal case.

Mr. Burns. Isn't it true that you have the ambiguity principally in connection with violation of a court order?

Mr. Wechsler. Exclusively.

Mr. Burns. Exclusively. Whether civil or criminal.

Mr. Wechsler. Right.

Mr. Burns. Well, there is nothing we could do.

Mr. Wechsler. Well, we might say where the contempt is based on violation of a court order, then this proceeding in line 9 may exist.

Mr. Burns. And then leave the Clayton Act unchanged.

Mr. Holtzoff. You don't mean for contempt in violation of a court order?

Mr. Wechsler. I am talking about those violations of a court order which constitute contempt, which is governed by law.

I think the thing is complicated enough, Mr. Chairman, so that it ought to have more attention before being considered here.

I don't think we could quite act on this text.

The Chairman. The motion is to refer it back to the committee.

Mr. Medalie. Let us see what we have done with it before it goes back to the committee.

Mr. Longsdorf. Might I make an explanation which I think would enable us a little more intelligently to re-refer it?

Now, I think the underlying trouble here was that the Clayton Act, which dealt with injunctions only and the disobedience thereof, they attempted in that to provide a method of distinguishing those disobedient contempts which were also criminal acts.

The difficulty with that statute was that it did not constitute all of the contempts constituting a crime.

Then, apparently to save themselves from something--I don't know exactly what--the Clayton Act provided in section 387 of Title 28 that that should not apply to government cases.

For the government cases wherein there was a disobedience contempt constituting crime, the Congress provided they should be according to the prevalent uses of courts of equity. I am not certain about law.

Now, the disobedience contempts, many of them had no punitive authority in the judgment of the court.

Well, now, those different kinds of contempt have become pretty badly scrambled, as Mr. Wechsler pointed out, and I think our principal task is to disentangle the procedure imposed by the Clayton Act from the solid law of contempt proceedings.

Mr. Wechsler. You would not change the jury act?

Mr. Longsdorf. No.

Mr. Holtzoff. I think Mr. Medalie had a suggestion.

Mr. Medalie. I may have lost it.

What I would like to do on this is what the folks here would like to have done. Then I think we can do the writing. But if we want to debate what the rules ought to be, we ought

to take a month to do it.

Mr. Wechsler. May I make a substitute proposal as to what this rule should contain?

First, it should continue the existing law insofar as the existing law permits the prosecution for criminal contempt to be instituted on information filed by a United States attorney or by a private party interested in the case.

Second, the jury trial provision of the Clayton Act should be retained.

That is as controversial a matter as was ever passed through Congress involving labor relations and it ought not to be changed by this committee.

Third, that in cases involving a violation of a court order, where there is this inherent ambiguity as to the nature of the proceeding, we want to adopt something that recognizes that when the proceeding is intended to be for criminal contempt, it be so designated.

13 I do not think we need to go so far as to require a court order under the second circuit rule, but I do think if there is an information filed and an affidavit and an order to show cause issued thereon, that certainly by the time you reach the "show cause" stage, the order ought to state; not merely that he should be punished for a contempt, which perpetuates the ambiguity.

Those are the things I think that ought to guide the redrafting of this rule.

Mr. Longsdorf. May I add to that--and I wish Mr. Wechsler would notice this and object if it is wrong and give me his reasons--I would like to add to that language which will draw

in those excepted cases now found in 387 if that contempt is also a crime, and subject them to the same kind of procedure.

The Clayton Act requirements I think are strictly procedural, and I don't see any reason why they should be made an exception.

Mr. Wechsler. I don't remember the jury trial provision of the Clayton Act well enough to know if it is limited to contempts in violation of orders which also constitute crime.

Mr. Holtzoff. Don't let us try to enlarge or narrow the jury trial provision.

Mr. Longsdorf. That is just the point--

Mr. Youngquist. Mr. Chairman, might I suggest that Mr. Wechsler and Mr. Longsdorf assist the chairman of the subcommittee to redraft the rule for presentation tomorrow?

Mr. Longsdorf. I will be glad to.

Mr. McLellan. There is a sentence near the end of (b) which reads, "Trial shall be without a jury unless the person charged demands a jury trial."

I think that should be changed by the addition of the words "is entitled to and", so that that sentence will read: "Trial shall be without a jury unless the person charged is entitled to and demands a jury trial."

There are numerous cases where he is not entitled to a jury trial which do not come within subdivision (a) of Rule 35.

Mr. Medalie. I agree with that.

Mr. Longsdorf. I agree with that.

The Chairman. Well, the motion, which I take it is consented to, is that the matter be referred back to the subcommittee. And will Mr. Medalie, Mr. Wechsler, and Mr.

Longsdorf assist the subcommittee?

Mr. Medalie. How many special draft jobs have I between now and tomorrow morning?

The Chairman. This is the only one, I think.

Mr. Robinson. We will relieve you of the rest.

The Chairman. This brings us to a break and a new chapter, so I think we had better adjourn.

Mr. Longsdorf. Mr. Chairman, can't we dispose of (c)? Mr. Wechsler thinks that ought to be thrown out.

Mr. Wechsler. (c) has no place here, Mr. Chairman.

I understand it to refer to the crime of obstruction of justice, which covers certain kinds of contemptuous behavior not included within the criminal contempt statute, particularly as that statute was defined in the Nye case.

There are certain kinds of obstructions which, after the Nye case, were considered to be contempts, but they still constituted breaches of the law.

Mr. Holtzoff. I agree with Mr. Wechsler, (c) should go out.

Mr. Wechsler. So there is no need for it in those cases. It is just an excuse for a prosecution of a crime.

The Chairman. If there is no objection we will adjourn until tomorrow morning.

What time shall we meet?

Mr. Orfield: Ten?

The Chairman. Well, we have quite a lot of work if we are going to get through tomorrow. We have covered eleven rules tonight.

The rules which come on now are general in nature until

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they come on to the appeal rules.

14 Mr. Medalie. For a three-day session we are five rules behind schedule on the assumption that we meet tomorrow night.

The Chairman. Well, the only reason I am presenting the question is I know that some of the members would like to get away tomorrow night, and I thought to make sure of that we might start at 9:30.

That seems to be against the constitutional privileges of the members of the New York bar.

Mr. McLellan. Make it 10:00 o'clock, Mr. Chairman.

The Chairman. All right. We will make it 10:00 o'clock sharp.

(Thereupon, at 10:40 o'clock p.m., a recess was taken until the following day, Wednesday, May 20, 1942, at 10:00 o'clock a.m.)

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.,

Wednesday, May 20, 1942.

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Wednesday, May 20, 1942.

The Advisory Committee met at 10:00 o'clock a.m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt, presiding, pursuant to adjournment from yesterday.

Present:

Arthur T. Vanderbilt, Chairman

James J. Robinson, Reporter

Alexander Holtzoff, Secretary

Leland Tolman, Assistant Secretary

George J. Burke

Gordon Dean

George H. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McLellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

John J. Burns

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Com.

P R O C E E D I N G S

The Chairman. All right, gentlemen, we will start will Rule 36. Any questions? Rule 36, paragraph (a).

Mr. Holtzoff. I move it be adopted, Mr. Chairman.

Mr. McLellan. May I just ask a single question? Does that mean the clerk's office is open Saturday afternoon?

The Chairman. Yes. During business hours. In many districts Saturdays are half holidays.

That is taken from the civil rules, I believe.

Mr. McLellan. I second the motion.

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

Opposed, "No."

Carried.

36 (b).

Mr. Youngquist. I move it be adopted.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 37 (a).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Youngquist. I move the adoption of (b).

Mr. McLellan. You don't want to put the word "lawful" before the word "manner"?

Mr. Youngquist. I wouldn't think so.

Mr. McLellan. I don't think it is necessary. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 38.

Mr. Longsdorf. I suppose those files rules will be judicially noticed by the appellate courts all the way through, won't they?

The Chairman. They always have been.

Mr. McLellan. I move the adoption of 38.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 39.

Mr. McLellan. With hesitation I move the adoption of 39.

Mr. Youngquist. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 40.

Mr. McLellan. Is that taken from the civil rule?

Mr. Holtzoff. Yes, sir.

Mr. McLellan. I move its adoption.

Mr. Seth. Seconded.

Mr. Seasongood. Well, just a matter of phraseology, "at the time the ruling * * * is made".

"before", isn't it?

Mr. Youngquist. In line 4?

Mr. Seasongood. Yes; "at the time"--

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 41.

Mr. Youngquist. I move its adoption.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Rule 42 (a).

Mr. Waite. I just have this question:

What is a holiday under the federal rules?

Mr. Youngquist. I have raised that question before.

Mr. Waite. Did you get an answer?

The Chairman. I have heard it said there are no federal holidays but we follow the rule of the state law.

Mr. Longsdorf. I think the holidays are defined by the state law and that has to be followed on the civil side, and I guess we might as well.

Mr. Holtzoff. This is the same rule as the civil rule.

Mr. McLellan. I move its adoption.

Mr. Youngquist. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

42 (b).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of adopting 42 (b) say "Aye." Opposed, "No."

Carried.

42 (c).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

42 (d).

Mr. McLellan. I move its adoption, sir.

Mr. Holtzoff. I second it.

The Chairman. All those in favor say "Aye,"----

Mr. Medalie. There is only one trouble with that--no, there is not.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

42 (e).

Mr. Longsdorf. There is only one question in my mind about 42 (e) and that is whether the time is sufficient where the notice would be transmitted across the continent. If you do not have air mail, 3 days and 3 days is not enough.

Mr. Medalie. Why don't you leave that to the court, say "unless otherwise provided"?

The Chairman. We already have an enlargement of time provision.

Mr. Youngquist. I move its adoption.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

43.

Mr. Youngquist. I have a question about the phraseology of that. It may be more than phraseology. "The forms contained in the Appendix of Forms are intended to be illustrative and sufficient but not mandatory."

What is the meaning of "intended to be * * sufficient"?

Mr. Robinson. I would suggest we substitute for "intended to be", substitute "presented as".

The Chairman. Why not leave out all of it?

Mr. McLellan. Well, you want to leave the words in, "and sufficient".

Mr. Youngquist. Yes.

The Chairman. Why do you need to do that? You surely would not be accused of having no intention. Why not say, "The forms * * * are illustrative but not mandatory"?

Mr. Youngquist. All right. That is fine. I move its adoption.

Mr. Holtzoff. Seconded.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Rule 44.

Mr. Medalie. That should be the last rule, whatever the last rule is.

I think the number of that would become 60, wouldn't it?

Mr. Robinson. We have the same problem, Mr. Medalie, about the matter of keeping the appellate rules separate from the other rules.

Mr. McLellan. I move the adoption of 44.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Mr. Youngquist. We have given up the idea of trying to find an abbreviation.

Mr. Waite. It is a good thing.

Mr. Wechsler. Mr. Chairman, is this a good time to refer to 37 (b) before getting to the appellate rules?

I understand 37 (b) was adopted as it stands, and yet it seems to me self-evident that 37 (b) cannot be adopted as it stands, because what it does is to supersede every statute of the United States in cases not covered by the rules.

Mr. Robinson. I think that should be taken care of by adding after "rule" "or by statute"; and at the end of line 8 insert the words "or statute".

Now that Mr. Dession is here I would like to refer that to him.

Mr. Dession. Yes. I am not sure we would want to perpetuate all of the statutes. That is the difficulty.

Mr. Medalie. Of course it is possible that this would be enacted, with procedure after the adoption of these rules.

Mr. Holtzoff. Judge McLellan had a suggestion, I believe, to insert the word "lawful" after the word "manner".

Mr. McLellan. Preceding the word "manner".

Mr. Holtzoff. Preceding the word "manner".

Mr. Wechsler. I wonder if that would not introduce a criterion as to what the manner of lawfulness was to be.

Mr. McLellan. I think very likely. I think that I said it just to say something, perhaps, but I think it would improve it.

The Chairman. I would rather doubt it.

Mr. McLellan. What?

The Chairman. I rather doubt that you said it just for that purpose.

Mr. Dession. Well, here are some of the statutes this might seem to repeal.

First, you have a conformity act according to the usual mode of process, and so on.

Then you have a similar condition dealing with the Philippines. I guess we don't have to worry about that for the moment.

Then you have a statute as to selection of jury lists.

Then we have a few rules of evidence.

Those are the main ones. Broadly, there are a good many things we have not touched within these rules, of a procedural nature.

So we preferred to leave existing law as it was in a good many instances.

This repeals that existing law, or could be so read, which leaves a vacuum, and the district court would seem to be invited to do as it chose.

You will get a great lack of uniformity on some of those things.

Now, my feeling is that we might be better off without this section, because as it stands--I think all we are trying to do with it is to suggest to the court that it work out some practical method of handling any detail which these rules do not extend to.

In other words, to apply these rules in a practicable way.

I think that is all we meant, isn't it?

Now, I don't think we need a rule to tell them to do that. The court has to do that with any set of rules.

Mr. Holtzoff. I was going to suggest that we might add at the end of line 8, "not inconsistent with these rules or any applicable statute."

Mr. Dession. Well, that I think would be entirely safe but as a matter of draftsmanship it seems to be an unnecessary admonition, because all it boils down to is asking the court to use common sense and realize we have not spelled out every detail that could arise.

Mr. Wechsler. I wonder if it is as simple as that.

There are statutes in large matters which are not touched. Presumably we either want to change those rules, let the rules stand, or set the court free in individual cases to follow them or not follow them as the court chooses, and it is not clear to me what choice we want to make, at least without considering what the statutes are.

In other words, this rule really puts at issue the scope of the total set of rules and unless you think the total set is wrong, it seems to me you hesitate unnecessarily in making up your minds about this rule, but the safe thing to do is to perpetuate all the statutes which you do not know about.

That seems to me preferable than repealing statutes which you don't know about.

Mr. Dession. I think that is right.

Mr. Wechsler. I don't think either course is right--

Mr. Holtzoff. May I make a motion?

I move that at the end of line 8 the following words be added, "or any applicable statute."

Mr. Waite. Supported.

The Chairman. Do you think that covers the point you had in mind, Mr. Dession?

Mr. Dession. That covers it provided that a complete check of all statutes is made.

Mr. Holtzoff. For this purpose we would not have to make a check of statutes. It would apply wherever there is a gap in these rules.

Mr. Dession. We want to make sure what we are perpetuating before we get through.

The Chairman. That is true.

Mr. Wechsler. Well, is it true that it is in rough conformity with state practices, incomplete, but in principle it guides the court? It does in rough principle conform.

Now, one thing that you want to decide is in the hiatus where there is no statute, whether you want to continue the principle of conformity or set the courts free to depart from conformity.

I am not clear but I think that is another angle.

Mr. Holtzoff. Wouldn't that be covered by inserting in the rule which advocates the statute, the conformity statute?

Mr. Wechsler. There is no conformity statute on the

criminal side.

Mr. Holtzoff. There is--

Mr. Seth. Not on the criminal side.

Mr. Holtzoff. Oh, yes, there is.

Mr. Wechsler. What section number?

Mr. Holtzoff. I don't recall the section number.

It is worded in a very general way but it has been interpreted as a conformity statute. It is in Title 18.

In civil procedure the courts cut forth entirely from conformity and I venture to say it is better to do that on the criminal side.

Now, if the amendment I suggested is adopted it will accomplish your object, I think; it will unshackle the courts from any conformity.

Mr. Wechsler. Well, on the other side it will perpetuate.

Mr. Youngquist. If we advocate that statute, it will be out of the way.

Mr. Robinson. (a) and (b) as we have drawn them are substantially, if not exactly, the same in their results as Rule 83 of the district courts, that is, the civil rules, and they in turn, as Mr. Tolman informs me, are based on Rule 84 of the Admiralty Rules, which was originally formed just a hundred years ago, 1842.

It seems to me we can report on 37 (a) and (b) and it would not be any source of difficulty.

Mr. Dession. Well, if by "difficulty," Mr. Robinson, you mean litigated points on appeal, I think it is quite probable that we might not get a wealth of those, we might not find any evidence of difficulties, in that sense.

But I think this does leave a district court without any particular policy guide.

Mr. Robinson. Don't you think, Mr. Dession, this is a situation where the rules from time to time come into play, that is,--

Mr. Dession. It can change the procedure to do so. But under the Admiralty Rules or Civil Rules--

Mr. Seth. It seems to me we are going to trust the district courts on a good many other things, and why not on this one?

Mr. Robinson. Right.

Mr. Longsdorf. Mr. Chairman, I think our policy should be to make our rules so that the courts and the lawyers will gravitate toward local rules wherever they are conformable to principle, but we ought not to put any of our federal criminal procedure under bondage to local laws.

That is what was the trouble with the conformity act of 1872.

Mr. Holtzoff. Question.

Mr. McLellan. May I ask one question, hold you up for a minute?

Suppose the district court under this rule has proceeded in a way not inconsistent with the rules, not inconsistent with any applicable statute, but a court of appeals thinks that their way of proceeding is inconsistent with established cases, would they have the power to reverse, or, are you leaving the whole thing to the district court?

Mr. Youngquist. I suppose they would have power to reverse if the departure resulted in depriving a defendant of due

process of law.

Mr. McLellan. Well, suppose it does not, but it does just a foolish thing--the judge does--and they do some awfully foolish things--don't you want the word "lawful" before"manner"?

The Chairman. It would not do a bit of harm.

Mr. Holtzoff. I am in favor of it.

Mr. McLellan. It might be a substantial change.

Mr. Medalie. Being the motion as amended?

Mr. Holtzoff. Yes.

The Chairman. Now, the suggestions are, we insert in line 7, before the last word "manner", the word "lawful", and that we insert at the end of line 8, "or any appropriate statute."

Mr. Youngquist. "applicable statute."

The Chairman. "applicable statute."

Are there any further suggestions?

Mr. Seasongood. It is a little different than the civil

4 rule, "district courts may regulate their practice in a manner not inconsistent with these rules."

Mr. Wechsler. Well, the civil rules were really intended to set the courts free.

Mr. Seasongood. The civil rule says the courts may regulate their practice.

Mr. Holtzoff. That is just a difference in phraseology.

The Chairman. I understand the committee had in mind to phrase these rules so there would not be an invitation to the district courts to make a multiplicity of rules.

The first set was an open bid to the district courts to make local rules, and some of them did, in a very extensive way.

You have heard the motion. Those in favor say "Aye."

Opposed, "No."

Mr. Orfield. No.

Mr. Wechsler. No.

The Chairman. Well, now, for my own light, will you tell me what is the reason for the opposition?

Mr. Wechsler. Because it is an unanalyzed problem.

Mr. Orfield. I think we are covering the most important points of our rules, and, what we don't cover, I want to trust to them.

The Chairman. Now we pass to Rule--

Mr. McLellan. Was that passed?

The Chairman. Oh, beg pardon. Motion carried.

Rules 45 to 60 are all rules dealing with appellate proceedings.

I take it there had to be appellate rules.

Mr. Robinson. Yes.

The Chairman. And may we have some indicate as we go along as to where they depart substantially from the present appellate rules?

Mr. Holtzoff. 45 (a) is the same as the present appellate rule.

The Chairman. Well, do you move it?

Mr. Holtzoff. I move its adoption.

The Chairman. It is moved and seconded that we adopt 45 (a).

Mr. Youngquist. Do we have a second?

Mr. Holtzoff. That is the same as the criminal appellate rule. The new matter is in (b), (c), and (d).

Mr. McLellan. Second the motion.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

45 (b) is new matter?

Mr. Dession. I don't think those people are going to know what a "presentence"--I did not know what that was, but I see it is a presentence.

Mr. Burke. Isn't that the practice now in many jurisdictions?

The Chairman. I did not hear that.

Mr. Burke. Isn't that the practice now?

Mr. Holtzoff. It is.

The Chairman. It is the practice now in a good many districts, I am sure.

Mr. Holtzoff. And it is an increasing practice.

Mr. Robinson. I second the motion.

The Chairman. All those in favor of 45 (b) say "Aye." Opposed, "No."

Carried.

45 (c) is new.

Mr. Holtzoff. Mr. Chairman, I want to make a motion to strike out a sentence beginning on line 30, to 31, which reads, "The reports of presentence investigations shall be kept confidential."

I think each district court and district judge should handle that matter in his own discretion.

I personally am of the opinion, although I am told it is contrary to the sociological point of view, that defense counsel should have access to all information the judge has.

Be that as it may, I think at any rate it ought to be left to the district courts, or the judges, and I move to strike out that sentence.

Mr. McLellan. One point is that you just don't want them to be locked up tight, at the same time you do not want it made a public record.

Mr. Holtzoff. That's right. I leave that to the district court.

Mr. Youngquist. Is that taken care of in the next following sentence?

Mr. Holtzoff. If it is taken care of, then this sentence is unnecessary.

Mr. McLellan. What he means is, it is taken care of with that sentence in there.

Mr. Youngquist. Yes. "Keep the report confidential"--after that.

Mr. Longsdorf. Just like an indictment is kept on secret file until the time comes.

Mr. Robinson. I would like to agree with his motion and suggest that the other sentence go out, or the remaining sentence, for the reason that this is a matter I think we can trust with the district courts themselves.

Mr. Holtzoff. I accept the amendment.

Mr. Medalie. If the district courts do nothing about it, then the reports are not confidential. They are simply made available to such persons afterward as the court cares to give them to, but in the meantime they are not confidential. The giving of them is a matter of discretion, but there is nothing confidential about it. That confidence ought to be preserved.

Mr. Holtzoff. But the district court can determine that.

Mr. Medalie. The district court may never even think about it.

Mr. Youngquist. I am not willing to leave it to that uncertain end.

Mr. Medalie. Well, I think we have debated it. Let us vote them down.

Mr. Youngquist. There is a motion.

Mr. Holtzoff. That motion is to strike out the last two sentences.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

The motion is lost.

Mr. Youngquist. I move the adoption of (c).

Mr. Robinson. Seconded.

The Chairman. You mean it is voted as is?

Mr. McLellan. May I go back to (b) for just one moment?

The only discretion you leave with the judge as to presentence investigation is he may dispense with it or cut it down where it may interfere with the work of the probation office.

He ought to have discretion, I think, in a case which does not lend itself to investigation, to dispense with it.

Mr. Medalie. Why do you want a presentence investigation? You know all about it.

Mr. Seasongood. I was going to raise the same point. I don't think it is practical to have presentence investigation of every person who is sentenced.

Mr. Holtzoff. There are some districts where that is

going to be done.

Mr. Seasongood. We ought to say you can do it. A man is found guilty and is sentenced, or he pleads guilty and is sentenced.

I think you place a terrible burden on the court.

The Chairman. You have got to exclude the well-known persons and the migratory birds.

Mr. Seth. And drinking two cups of coffee.

Mr. McLellan. Why not express the view that they should be conducted except in cases where it seems to the trial judge they are not advisable?

Mr. Burns. Why not say, "unless otherwise ordered"?

Mr. Holtzoff. Yes.

Mr. Youngquist. I think what was in mind in adopting these words was Professor Glick's idea.

Mr. McLellan. I was sitting in his chair.

Mr. Youngquist. To make sure that everything was being done that should be done and yet leave the judge some measure of discretion.

The Chairman. Couldn't we accomplish that in line 17 by saying, "the district court may direct"?

Make it permissive.

Mr. Holtzoff. Well, if you want to make it strong that the judge should do it, you can accomplish that by Mr. Burns' suggestion to put in there, after the word "court" on line 18--

Mr. Burns: I don't purport to know anything about this, myself, but I have heard Glick's talk about it to a considerable extent and I can guess what he would say if he were here, that he does not want to give that discretion to the judge, that

that is one of the great troubles, that the judge is apt to think he knows, and therefore he ought to be required to find out, and, in a case that the probation department is capable of handling--

Mr. Medalie. Suppose you have a calendar of food and drug cases--and they are looked to with a lot of terror by the average district attorney, he does not know what the cases are, half the time. He has filed informations at the request of the Department, and the Department agent comes around and whispers to the assistant what he thinks ought to be done as to a sentence, it is usually done immediately.

Many of them are practically police ordinances where there is no intent to commit an offense--I don't think the judge certainly should even take the trouble to mumble, "I don't want to undertake this investigation."

Mr. Burns. Many times this would require a presentence investigation of the Pennsylvania Railroad.

Mr. Medalie. I know how those run, simply arrange with the Interstate Commerce Commission and the railroad company in advance what the fine shall be.

You sit down with the lawyer. You say $30,000. He says $20,000, and you agree on $25,000.

Mr. Burns. In the type of cases he has in mind, felony cases, and, problems of rehabilitating the individual, you either have to give the discretion to the judge or else you have to spell out in a very complicated formula those cases which are within the presentence and those cases which are not.

Mr. Robinson. These words which are here are the result

of a very long study by Professor Glick, of the Probation Service of the United States Courts, and by this committee. Each word has been checked with extreme care over many months, and it seems to me, before stepping in here and changing words, which I think all lawyers and judges are very careful about doing, that we should make a longer study than we are making at this moment.

Mr. McLellan. But is there any doubt that the judge should have discretion as to whether a charge is of a type to warrant a presentence investigation?

The Chairman. A corporation; birds; we don't need to do it.

Mr. Robinson. Why did Mr. Chappell of the Probation Service pass on it?

The Chairman. That is the only justification for having a large committee.

Mr. Burns. Mr. Chairman, in addition to your list of railroads and birds, I think you would have to add all those commodities frozen as of March.

Mr. Youngquist. It seems to me to be the sense of the committee that the latter part be stricken entirely, that the court be given discretion, and the only question in my mind is whether the presentence investigation should be made unless the court directs that it be not made, or that he directs the cases in which it shall be made.

Mr. McLellan. May I make this suggestion--

Mr. Youngquist. I was going to say this: From my own viewpoint I would be inclined to encourage presentence investigation, and it seems to me that inserting in line 18 "unless the court otherwise directs" would serve the purpose, because

6 otherwise the court could direct the classes of cases to be not investigated, such as the Migratory Bird Act, Food and Drug Act, and other offenses.

Mr. McLellan. May I make one suggestion, having in mind what Judge Burns suggested, and Mr. Holtzoff?

I think it will give rise to much difficulty in the future if you do it in this way, so I suggest that in line 22 you add, after the word "release","or is otherwise not feasible".

And if you add at the end of the paragraph the words "or is feasible."

Mr. Holtzoff. I was just wondering, Judge--"investigation might be feasible"--

Mr. McLellan. We differ upon the use of the word "feasible."

The Chairman. Doesn't Judge Burns' suggestion rather cover all of that by just inserting those words in line 18?

Mr. McLellan. I dare say, but that--has he got to make an order in each case?

The Chairman. Oh, no, no. It could be done in a few cases, it could be a standing order.

I take it what is desired is to put the burden on the court to do it where it should be done, and if those words were inserted in line 18 and if a district judge did none of them, the Administrative Office would soon make it known and it would come to the attention of the Circuit Court of Appeals, and he would soon begin to learn by the grape-vine that he was falling down.

Mr. Burns. I suggest it be by amendment to line 17, after the word "probation", "unless the district court otherwise

orders".

Strike out "district", leaving it, "the probation service of the court shall make a presentence investigation."

"unless the district court otherwise orders".

Mr. Holtzoff. Wouldn't you rather have "directs"? The word "orders" implies formality.

Mr. Burns. "the district court otherwise directs".

Mr. Youngquist. "shall make a presentence investigation and report." Stop there?

Mr. Holtzoff. Yes.

Mr. Seasongood. That would be satisfactory to me.

The Chairman. But I wonder if we could please Professor Glick.

Would it be fair to say the court should ask the probation department to investigate, and then leave the other sentences?

Mr. Medalie. You see you are not limited to the probation service making investigations. It is there to determine the sentence and where the man goes.

For example, there are some special penitentiaries for youthful offenders, aren't there?

Mr. Holtzoff. Yes.

Mr. Medalie. And then there are places where you can treat narcotic addicts.

Mr. Holtzoff. I can conceive of minor cases where it would not be necessary.

Mr. McLellan. Now, I would like to find fault with Judge Burns because I think he knows much more than I do, but the trouble is that those who want presentence investigation will say that that means that the court has the power to order that

there by no presentence investigation in any case, and so I suggest, in place of the word "unless", "save in cases where the district court otherwise directs".

It is a little different than giving him the power to say that they shall not--he won't have that system in his court.

Mr. Burns. That is agreeable.

Mr. Holtzoff. "save in cases in which the district court"?

Mr. McLellan. "save in cases where".

Mr. Youngquist. Would that be inserted in line 17?

Mr. McLellan. Yes. It means more words but has a little different meaning.

The Chairman. Any further remarks.

Mr. Seasongood. Should you have a hyphen in "presentence"?

Mr. Holtzoff. I think you should.

I thought we were going to stop at the word "court".

Mr. Robinson. We made Professor Glick a special member of this committee and we can very well insert his words.

Judge, in migratory bird cases, don't lines 22, 23, and 24 take care of that?

Mr. McLellan. No. That relates back--

Mr. Robinson. This much does finally put it in the court's power.

Mr. Youngquist. But he may have to give a wrong reason.

Mr. Robinson. Let the clause stay in but put in a saving

7 clause such as Judge McLellan has recommended.

Mr. McLellan. I don't think it is needed. I think it is clearly redundant.

Mr. Youngquist. First you give complete discretion and then you say you give discretion in a limited situation.

Mr. Burns. I would like to make a suggestion that the Chairman or the Reporter get in touch with Professor Glick and acquaint him with this change. Point out to him the other alternative of Judge McLellan, "or is otherwise not feasible", since that would enlarge the exception clause of Professor Glick and at the same time would meet substantially the problem of judicial discretion, and if it becomes important because of trial conferences with the experts on probation, that we keep lines 20 to 24--and I think we should consider taking the alternative of Judge McLellan, "or is otherwise feasible"--

Mr. Holtzoff. We ought to have some action now.

The Chairman. I think we are all of the opinion that some leeway should be given. Why can't we have a motion that either we take Judge Burns' suggestion on line 17 as modified by Judge McLellan's addition of introductory words, or Judge McLellan's original motion relating to the later lines involving the use of the word "feasible" or "not feasible", whichever in the opinion of Professor Glick will accomplish the job he has in mind?

Those men are experts; we want to take advantage of their experience.

Quite obviously, if we are right, they have gone a little too far.

Let us take the language which will accomplish the alternative.

Is that feasible?

Mr. McLellan. I think it is.

I might say I like Judge Burns' suggestion better than my own but I think perhaps mine more nearly meets what Professor Glick has in mind.

Mr. Burns. I think Professor Glick will like Judge McLellan's better than mine.

The Chairman. Do you make it a motion?

Mr. Burns. Yes.

The Chairman. You second it, Judge McLellan?

Mr. McLellan. Yes.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Now, (c).

Mr. Holtzoff. I thought we adopted (c).

The Chairman. Yes. We will now go on to 45 (d).

Mr. Seasongood. Now, you give a general right to request, on determination of the guilt, presentence investigation, which apparently can be had any time before determination of guilt.

Might there not be a serious interference with the trial?

Suppose while the trial is going on he says, "I would like you to determine this."

Mr. Holtzoff. No, I think the purpose of that is to aid the probation service.

Ordinarily, if the probation service may not start its investigation until after conviction it may be worse in some cases than it would to start its investigation immediately after the defendant is held by the magistrate, which would spread over the work of the probation service and it could handle more.

Now, as a safeguard to the defendant it may not start until after conviction unless he consents.

Mr. McLellan. I move, in line 37, the word "requests" be changed to "consents".

Mr. Holtzoff. I second the motion. That was really the thought back of--

Mr. Orfield. This same thing has been done in England right along, hasn't it?

Mr. McLellan. I move the adoption of (d).

Mr. Holtzoff. I second it.

Mr. Seasongood. Well, you still have--well, that would probably take care of it. I mean, the way it is written, practically any time, but now it would be by consent, so it is all right.

The Chairman. Those in favor of the motion say "Aye." Opposed, "No."

Carried.

Rule 46 (a).

Mr. Holtzoff. That corresponds to the civil rule.

Mr. Youngquist. I thought we made a lot of changes in that.

Mr. Robinson. The Style Committee took the instructions of the Committee, and after a very careful study this is the result of their work.

Mr. McLellan. As it is written here in full?

Mr. Robinson. Yes.

The Chairman. This is not part of the appellate rules.

Mr. Holtzoff. In a sense it is.

The Chairman. I mean the start of it.

Mr. Holtzoff. No; it is the civil rule in substance.

Mr. McLellan. I move the adoption of 46 (a).

Mr. Holtzoff. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Mr. McLellan. I move the adoption of 46 (b).

Mr. Holtzoff. I second the motion.

The Chairman. Those in favor say "Aye." Opposed, "No."

Carried.

Rule 47.

Mr. Holtzoff. I move the adoption of Rule 47.

Mr. Medalie. Did we check all the words?

Mr. Holtzoff. I checked that with the criminal section. I worked it out with them.

Mr. Wechsler. May I ask if Rule 47 is intended to apply to a case where sentence is excessive?

Mr. McLellan. What was that question, Professor?

Mr. Wechsler. I asked whether Rule 47 is intended to apply to a case where a sentence is illegally excessive as distinguished from too large.

Mr. Holtzoff. No; I think if it is illegally excessive it is always subject to correction.

Mr. Wechsler. Suppose there is no appeal.

Mr. Seth. Habeas corpus.

Mr. Holtzoff. Yes. It is void.

Mr. Wechsler. It isn't as simple as that.

Mr. Medalie. It is void only as to the excess or as to the whole sentence?

Mr. Holtzoff. I think there would have to be a resentence.

Mr. Wechsler. That is required. It is void only as to the excess. There are Supreme Court decisions on that. And it raises a serious problem on habeas corpus.

Since the sentence is voided only as to excess, the man is lawfully in custody so long as the legal sentence has not run.

Accordingly, habeas corpus is not valid as a remedy.

Accordingly, the time in which he is eligible for parole will be estimated by the department in the light of the sentence that was imposed rather than in the light of the sentence

8 that could lawfully have been imposed.

Now, my understanding of the position taken by the Department is that in such a situation the prisoner must make a motion for correction of the sentence, that such a correction can be made by the court at any time, and, unless that motion has been made and the correction made, that prisoner is out of luck, and I don't think we ought to indicate a rule which in any way suggests he may not make that motion.

Mr. Medalie. You want us to make a rule where an illegal sentence has been imposed, the motion for its correction may be made at any time?

Mr. Burns. Suppose you make it read, "A motion for reduction of sentence addressed to the discretion of the court".

It would indicate that you were not dealing with where the motion for reduction was based on the illegality of the thing.

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Mr. Medalie. I thought we could leave it as it is, and then add the extra sentence dealing with the legal sentences, and then put no time limit on the other.

Mr. Wechsler. That would be one way. The other would be as Mr. Seth says--leave it out altogether.

Mr. Seth. You had better make it before the sentence expires.

Mr. Holtzoff. How would it do to insert in line 2, after the word "sentence,"the words, "except if the application is on the ground that the sentence was illegal."

Mr. Burns. I would like to object to that, Mr. Holtzoff, on the ground that it confuses a very important and a very well written rule.

I move now that there be a (b) along the line of suggestion of Mr. Medalie, which would take care of the point raised by Mr. Wechsler.

Mr. Youngquist. We could make it as a separate subdivision or merely as a separate sentence. I move that it read:

> "A motion for a correction of a sentence imposing a penalty in excess of that permitted by law may be made at any time."

It should be a correction rather than a reduction.

Mr. Burns. I would like to raise a question on Rule 47. Suppose you have a situation where A and B are both indicted, both convicted, and both sentenced. A chooses to appeal; B does not. A's appeal is successful and a new trial is ordered. That is more than 60 days after B's sentence. Is there any way in which B may move? The time for a motion for a new trial

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has passed.

That occurred in your district, Mr. Medalie.

Mr. Holtzoff. I do not think that is taken care of.

Mr. Medalie. It is not. The judges would like to take care of that.

Mr. Burns. I think they would, too, because they have learned their lesson, so to speak, from theCourt of Appeals decision; but I understand that in one case at least they were powerless, despite their feeling that justice in a sense had been miscarried.

Is there a way we can provide for that?

Mr. Youngquist. I think that would be rather dangerous.

Mr. Medalie. It can be done by the President.

Mr. Holtzoff. Yes, and there have been cases where that was done, where the Department of Justice recommended pardon.

Mr. Burns. If that were a valid answer, we could save a lot of pages here.

Mr. Holtzoff. I do not say it is a complete answer. It is a partial answer.

Mr. Youngquist. The defendant always has remedy by appeal. We are not foreclosing his appeal.

Mr. Burns. I do not press it, and I do not think the cases are very numerous, and it would raise a very difficult question of draftsmanship. I just call it to the attention of the committee.

Mr. Medalie. I had a situation like that about twenty years ago in a state court, where two men were convicted and one appealed. The reversal followed, and on the retrial, which I had--I did not have the first trial--the man was acquitted.

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Thereupon the Governor pardoned the other man.

The Chairman. You have the amendment as made by Mr. Youngquist, to be added to line 7. What was that again?

Mr. Youngquist. "A motion for a correction of a sentence imposing a penalty in excess of that permitted by law may be made at any time."

Mr. Seasongood. There are some instances where the punishment is illegal, for instance, where they impose both fine and imprisonment. Would that be included in that?

Mr. Youngquist. One or the other would be the excess.

Mr. Medalie. Why don't you say "an illegal sentence"?

Mr. Holtzoff. You can say "in excess or other than permitted by law." For instance, only a fine is permitted by law, and the judge imposes a jail sentence.

Mr. Medalie. Wouldn't "illegal sentence" cover it?

Mr. Youngquist. I think it would. "A motion for a correction of an illegal sentence may be made at any time."

I so move, Mr. Chairman.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

The heading should be corrected to read, "Motion for Reduction or Correction of Sentence."

Mr. Robinson. You are speaking of cases which have accumulative counts, and the sentences should be concurrent sentences and not consecutive.

Mr. Holtzoff. That can be covered.

Mr. Robinson. Yes, but you had it for a while.

Mr. Seasongood. Line 1 should not be "A motion for reduction or correction of sentence"?

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Mr. Youngquist. No.

The Chairman. 48 (a).

Mr. Medalie. I still have something here before we come to that. I am not so sure whether Chapter 10 is a good arrangement, "Judgment and Appeal." I think matters that are appellate should be entirely separate. Matters that relate to judgment should be separate.

Mr. Holtzoff. Our appellate rules take in--

Mr. Medalie. It is a historical reason. That is another reason.

The Chairman. No. It is more than that. We have another difficulty to meet there. The rules in Chapter 10 do not require the consent of Congress.

2 Mr. Medalie. Nevertheless, we can have two chapters. "Judgment and Appeal," for proper arrangement, would be better broken up into one chapter for judgment and its correction and another chapter for appeal.

Mr. Burns. I so move.

Mr. Holtzoff. I second the motion.

Mr. Youngquist. What you mean is that Rules 45 to 48 should be in one chapter?

Mr. Medalie. I think so.

Mr. Youngquist. And from 49 on should be in another?

Mr. Medalie. That is right.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Medalie. Then Chapter 11 starts with Rule 49.

Mr. Holtzoff. That is right.

The Chairman. Rule 48. Are there any questions on 48(a)?

Mr. Holtzoff. I move its adoption.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

48 (b).

Mr. McLellan. Under that how would a motion for a new trial now be? Is it sufficient that a defendant moves for a new trial because a new trial is desired?

Mr. Medalie. He would have to have an affidavit that sets forth facts.

Mr. Burns. Should we have a rule requiring him to do that?

Mr. Holtzoff. I suppose he would have to support his motion either by a memorandum--

Mr. McLellan. I know, but we have the old-fashioned way--against the evidence and against the weight of the evidence--and now are you going to change all that and give him the power to order a new trial whenever he thinks a new trial is in the interest of justice?

Mr. Holtzoff. Isn't that the existing law? I was of the impression that the district court did have authority today to grant a new trial if the judge thought there was a miscarriage of justice. Am I right in my conception?

Mr. McLellan. The truth is that I do not know. I thought there were well-defined grounds for a motion for a new trial.

Mr. Holtzoff. I was reading somepapers recently on motions for a new trial in another connection, and I noticed that in some cases a judge may grant a motion--

Mr. McLellan. I do not care for that. I will withdraw it.

Mr. Youngquist. Just as a matter of location, should the

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provision in (a) for a withdrawal of a plea of guilty and nolo contendere be in this set of rules? That really belongs in the earlier section, pleading in the trial court before conviction.

Mr. Holtzoff. It is in the civil appellate rule now.

Mr. McLellan. You already have the conviction.

Mr. Youngquist. I beg your pardon. This is after the plea is entered. That is probably all right.

Mr. McLellan. Is there any motion on (b)?

The Chairman. No motion yet.

Mr. Youngquist. I move it.

Mr. McLellan. I second it.

The Chairman. It has been moved and seconded that we adopt 48 (b). All those in favor say "Aye." Opposed, "No." The motion is carried.

We come now to 48 (c). Is there any motion on (c)?

Mr. Holtzoff. I move its adoption.

The Chairman. Does anybody second it?

Mr. McLellan. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

We now come to 48 (d).

Mr. Robinson. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

We now come to 48 (e).

Mr. Waite. I want to ask a question about that. Is that purposely intended to make a motion for retrial on newly discovered evidence available any time?

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Mr. Holtzoff. Yes. That was thrashed out at the last meeting, Mr. Waite. And it was voted unanimously, I believe on Judge McLellan's motion, that there should be no delay.

Mr. Seasongood. Just a minute. There is a difference in that (e) and the rule before the magistrates, on page 5, Rule 5. Did you mean that?

In this case you can only make it if you have a remand. If an appeal is pending, you can only make a motion to remand. In other cases you allow it before the justice.

Mr. Holtzoff. We struck out all the rules relating to trials of petty offenses, anyway.

Mr. McLellan. Would you not rather have "entertain" on line 21 rather than the word "allow"? That is giving the judge the right to hear the motion, but not to allow it until you get the case back.

Mr. Youngquist. We could go a step further and say, "but if an appeal is made, the motion shall be made only on remand of the case."

3 Mr. McLellan. As a practical matter, there is a case up in the Circuit Court of Appeals, a clear case of newly discovered evidence. Why not say the appellate court? In the necessity of deciding the case, let the motion be entertained, but not allowed until a remand of the case.

Of course, I am familiar with the rule that once a case is out of the court, ordinarily you cannot do anything with it; but, as a practical matter, I think it would be desirable to let that be heard.

Mr. Holtzoff. You mean, "shall be allowed"?

Mr. McLellan. No. "but if an appeal is pending, the

court may allow a motion only on remand of a case."

Mr. Holtzoff. He can hear it on remand and then ask it after remand.

Mr. McLellan. I think that is a desirable change.

Mr. Holtzoff. I am sure it is.

Mr. Seasongood. I am not sure that it is, with great deference. The appellate court has its calendar arranged, and the trial court starts to hear something and the appellate court says, "Well, we had better pass this until he decides the motion for a new trial."

Mr. Holtzoff. There is no harm in that.

Mr. Seasongood. But it is their calendar and they are supposed to expedite it.

Mr. McLellan. I do not care much, but if I saw a case for a new trial where there was really something to it, I would like to hear it.

Mr. Seasongood. All you would have to do is to make a showing to the appellate court that there is enough of a showing to send this back to the trial clerk and let them go ahead.

Mr. Holtzoff. No. Under Judge McLellan's amendment, before the motion is granted the case would have to be remanded, but the district court would be permitted to hear it in the meantime. Am I correct on that?

Mr. McLellan. Yes. I think that is a practical thing to do.

The Chairman. Can we use the words, "may grant the motion"?

Mr. McLellan. That is better.

Mr. Seasongood. That is a deviation from usual practice,

is it not?

Mr. McLellan. Yes.

Mr. Seasongood. You take an appeal from a labor relations case. The court of appeals may order it, but I do not think the Board itself can go ahead while it is pending for enforcement in the court of appeals, can it?

Mr. Burns. It has been held that it can.

Mr. Holtzoff. The Supreme Court has held that the Board may reopen the case.

Mr. Burns. While the appeal is pending.

Mr. Holtzoff. I move the adoption of (e) as modified by Judge McLellan.

The Chairman. Change the word "entertain" to "grant"?

Mr. McLellan. Yes.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

48 (f).

Mr. Holtzoff. I move its adoption.

Mr. McLellan. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 49.

Mr. McLellan. I move the adoption of 49.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

Rule 50 (a).

Mr. Orfield. It seems to me that lines 7 to 10 will invite too frequent appeals. I should imagine a good many

defendants without counsel would want to take an appeal where it was not justified at all.

Mr. Holtzoff. Well, this relates only to appeals by the Government.

Mr. Youngquist. No.

Mr. Holtzoff. I thought you were talking about Rule 49. I beg your pardon.

The Chairman. Rule 50, lines 7 to 10.

This is off the record.

(There was a discussion off the record, after which the following occurred:)

Mr. Youngquist. I move that 50 (a) be adopted.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 50 (b). This is taken verbatim from the present appeal rules.

Mr. McLellan. I move its adoption.

Mr. Longsdorf. Before we proceed to vote on that, Mr. Chairman, I want to make known some information I received which might bear on this. With respect to the printing of the testimony in the record or in the briefs, I was informed that some attempt would likely be made to amend civil procedure Rule 75 with respect to the reporter's transcript and with respect to the printing of it.

The Chairman. That would not come up under this section, would it?

Mr. Longsdorf. But a part of the proposal to amend was this: that with the notice of the appeal should be filed a

specification of the points relied on for reversal--not these repetitious assignments of error, but a general specification--so that with the notice of appeal might be served a precipe for parts and not all of the record, to diminish the record. Then when the reporter's transcript is sent up in diminished form, with part of the testimony left out that the appellant does not deem necessary, the courts could pass upon the propriety of that designation, whether it would be sufficient or not.

The point is to keep them from overloading the record with excerpts of testimony or with the full record of the testimony where it is not needed.

Mr. Holtzoff. But the notice of appeal has to be filed within three days or five days, and it is impossible for the attorney to have his points.

Mr. Longsdorf. I realize that objection.

Mr. Holtzoff. That can all be done in the preparation of the record at a later stage.

Mr. Longsdorf. I know, but the proponents of this measure want to get it done sooner. I do not know that they want to limit the time for taking appeal quite so shortly as is provided.

Mr. Holtzoff. That was fixed by the Supreme Court back
4 in 1933, in order to shorten the time. To have the lawyers required to have a statement of points ready in five days is an injustice to defendants as well as a hardship to lawyers.

I think the rule in its present form is fair to everybody. After all, the appellant makes up the record. By that time he may know what to raise.

Mr. Longsdorf. I am neither pro nor con on the merits of this thing, but what I give you the information for is this:

We do not want to proceed and get our rules here out of conformity with the civil methods of appeal any more than is necessary.

Mr. Holtzoff. This is in accordance with the civil rules.

Mr. Longsdorf. I know.

Mr. Holtzoff. If the civil rules should be changed three or four years from now, then these would be.

Mr. Longsdorf. Just so we do not get out of step with the civil side of the court.

The Chairman. You have heard the motion on (b). All those in favor say "Aye." Opposed, "No." The motion is carried.

All those in favor of 50 (c) say "Aye." Opposed, "No." The motion is carried.

I suppose the form on the following page is all right.

Mr. Seasongood. Why do you put it at this point rather than in the appendix?

Mr. Holtzoff. It will eventually be in the appendix. I think it was for the convenience of this committee.

The Chairman. It should go in the appendix.

Mr. Seasongood. It is out of place there.

The Chairman. Rule 51 (a).

Mr. Orfield. Isn't it necessary to add to Rule 50 the last sentence in Rule 49? Doesn't that cover simply prosecution appeals and not appeals by the defendant?

Mr. Medalie. I think that would be very desirable, would it not? One of the worst frauds that was ever invented was the assignments of error.

Mr. Orfield. I believe that the original criminal appeal rules contained this provision.

Mr. Holtzoff. Yes, but the civil appellate rules, which came five years later, eliminated the assignments of error, and this will put criminal appellate procedure in step with the civil appellate procedure.

Mr. Medalie. Mr. Warfield's point is that he wants the last sentence of Rule 49 to go into Rule 50, so it will apply to a case of the supreme court to the circuit court of appeals. There would be no question about that.

Mr. Holtzoff. There is no question about it, because there is no provision for it. It is necessary in Rule 49 because they are abolishing an existing practice.

Mr. Medalie. Why not put it in anyway?

The Chairman. Where would that go?

Mr. Orfield. At the end of 50 (b), I would think.

Mr. Holtzoff. You cannot transfer that into 50 (b), because the sentence reads, "Petitions for allowance of appeal, citations, and assignments of error in cases governed by this rule are abolished."

They have been abolished before in all cases except direct appeals, and that is why it is necessary in Rule 49 and would be out of place, I think, in Rule 50.

Mr. Longsdorf. We abolish it by saying it shall be taken by filing a notice. It is abolished by those words.

Mr. Holtzoff. I agree with you that it is surplusage. I would not object to striking it out entirely, but it should not be transferred to the other rule.

Mr. Orfield. I think the original appeal rules contain that provision.

Mr. Holtzoff. No. They contain a provision for a state-

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ment of grounds of appeal in a notice of appeal, but they did away with grounds of appeal and citations and assignments of error.

The Chairman. Would not the motion really be to eliminate the last three lines of Rule 49 as no longer needed?

Mr. Holtzoff. I think so.

Mr. Seth. Aren't they needed in appeals to the Supreme Court now? Is there anything abolishing them on direct appeals by the Government to theSupreme Court of the United States? You have got to have it in if you have it abolished there.

Mr. Holtzoff. The purpose of that is to abolish this requirement in those direct appeals by the Government.

Mr. Seth. It had better stay in.

The Chairman. If there is any doubt, you had better leave it in.

Mr. Medalie. You could take that sentence out of 49 and put it in somewhere else where it is applicable to both 49 and 50.

Mr. Holtzoff. I do not like to see it made applicable to 50, because the way it is worded it is only applicable to those cases where the requirement now exists, and you are abolishing it; but to abolish it in the other cases where the abolition took place in 1933 would seem to me to be somewhat incongruous.

Mr. Medalie. Well, you could have something that is very simple. Strike out, "cases governed by this rule." Wouldn't that do it?

Mr. Youngquist. I think that Rule 49 should be self-

5 contained. It is a special proceeding--an appeal to a different court from that to which a defendant may appeal--

and if we do anything, I think we ought to leave this one as it is and put in whatever language may be necessary in the rules that relate to appeals to the circuit court of appeals.

Mr. Orfield. This is the language of criminal appeal Rule No. 3:

> "Petitions for allowance of appeal and citations in cases governed by these rules are abolished."

Mr. Holtzoff. Exactly, but that was in 1933. For us in 1942 to insert that sentence would seem to me to be somewhat incongruous.

Mr. Youngquist. If we are enacting them, would not the omission of that statement possibly be taken to be a reinstatement of the old practice?

Mr. Orfield. We have repealed all the old rules later on in these rules.

Mr. Longsdorf. I think we ought to read the rules of the Supreme Court which regulate the taking of direct appeals to the Supreme Court.

Mr. Holtzoff. We have read them in preparing and drafting this.

Mr. Longsdorf. Then you would see why this was put in here, and you would find out also that in the civil rules direct appeals to the Supreme Court are not regulated. Therefore, it had no place in the civil rules--there was no need for it--but there is a need for it here in Rule 49.

The Chairman. Let us get the question to a head. Is there a motion?

Mr. Orfield. I move that we take this last sentence of

Rule 49 and add it to 50 (b).

Mr. Seth. I second the motion.

Mr. Holtzoff. You mean to transfer it?

Mr. Orfield. To keep it in 49 and repeat it in Rule 50 (b).

Mr. Seasongood. Has Mr. Orfield read that? The rule there did not say "assignments of error," did it?

Mr. Orfield. No, it did not contain that language, that is true.

Mr. Seasongood. Where you have "assignments of error are abolished," that is not in the rule as it exists.

Mr. Orfield. Not in the criminal appeal rules.

Mr. Seasongood. It is not in the criminal appeal rule as it exists. Do you want it in?

Mr. Holtzoff. No.

Mr. Youngquist. We do want to abolish asignments of error.

Mr. Holtzoff. We abolished it in 1933.

Mr. Youngquist. As he read it they are not abolished.

Mr. Holtzoff. Rule 3 of the criminal appeal rules,which were promulgated in 1933, provides: "Petitions for allowance of appeal and citations in the cases governed by these rules are abolished."

Mr. Seasongood. We are talking about assignments of error.

Mr. Medalie. I began feeling silly, because I began thinking of a few cases in our office with those grotesque assignments of error.

Mr. Youngquist. I second the motion.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

Now we have Rule 51 (a).

Mr. Youngquist. You could now shorten the headings a good deal, now that you have a separate chapter.

The Chairman. Is there a motion on 51 (a)?

Mr. Holtzoff. I move that we adopt it.

Mr. Orfield. I would like to see added to Rule 51 a provision that the circuit court of appeals shall have the power to hear new evidence, in other words, review the facts. I donot believe that they have that power at the present time.

Mr.Youngquist. That is, to call witnesses and to hear them before the circuit court of appeals?

Mr. Orfield. Yes. I would leave it to the discretion of the circuit court.

Mr. Youngquist. Why?

Mr. Orfield. In order that the criminal defendant might have a hearing on the merits and that he might get a review on the facts as well as thelaw.

Mr. Seasongood. He would have to be tried by the jury, under the constitution, in certain cases, and he has to be there.

Mr. Orfield. It is the defendant who is taking the appeal, so he is not injured.

Mr. Longsdorf. That is under the jurisdiction of the circuit court of appeals, and we cannot do it.

Mr. McLellan. Wouldn't it be desirable to pass upon (a) first and take the matter of additions later?

The Chairman. All those in favor of 51 (a) say "Aye." Opposed,"No." The motion is carried.

Now, 51 (b).

Mr. Seasongood. I would like to make the same point in behalf of the languishing prisoner--that he does not need five days before bail can be furnished. He does not have to do it under existing practice.

Mr. Holtzoff. I agree with Mr. Seasongood. I do not think the five days have to be made mandatory.

The Chairman. Your motion is to strike out "upon five days' notice"?

Mr. Seasongood. Yes.

Mr. Youngquist. That five days' notice requirement applies also to a motion to dismiss the appeal.

Mr. Seasongood. All courts of appeals have rules providing the time within which you have to serve motions.

Mr. Youngquist. I thought that your suggestion related only to an order on bail.

Mr. Seasongood. No. I would like to strike out the "five days' notice," because each court of appeals has rules as to the number of days' notice they require for filing the motion.

Mr. McLellan. Don't you want the Government to have some kind of a notice to dismiss an appeal?

6 Mr. Seasongood. They require that. All courts of appeals rules require you to give notice.

The Chairman. Isn't there an advantage in uniformity?

Mr. Holtzoff. I am wondering whether this is not the sort of detail which might be left to circuit rules, because the period of time might vary with local conditions. I can conceive of a longer time being required in the Ninth and Eighth Circuits than perhaps in the First and Second Circuits.

Mr. Youngquist. I second the motion.

The Chairman. The motion is to strike "upon five days' notice" in line 8. All those in favor say "Aye." Opposed, "No." The motion is carried.

The motion now is to adopt 51 (b) as modified. All those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 52 (a).

Mr. Waite. Are we going to discuss Mr. Orfield's suggestion?

The Chairman. I beg your pardon.

Mr. Orfield. I will put that in the form of a motion. I move that we add subsection (c) to Rule 51 (a), permitting the defendant to have an appeal on the facts, permitting the circuit court of appeals to hear new evidence, to call any witnesses, in the discretion of the circuit court.

I would not give the defendant that right--not an absolute right--but I would leave it simply in the discretion of the appellate court. That is the situation in England at the present time. The appellate court in its discretion may review the facts. The defendant has no absolute right to have the court review the facts.

Mr. Holtzoff. Do you mean to review the facts or to hear new evidence?

Mr. Orfield. That is somewhat broader--to hear new evidence--that is true.

Mr. Medalie. Do you want to carry out the idea of the English Criminal Appeals Act?

Mr. Orfield. Yes.

The Chairman. Will you separate your motions and make separate motions as to reviewing the facts and also as to

hearing new evidence, because I think you have different problems?

Mr. Orfield. If they were permitted to hear new evidence, that would impliedly allow them to hear facts.

Mr. Holtzoff. I would favor giving that power to review facts. I should hesitate giving them any broader authority.

The Chairman. That is what is running in my mind.

Mr. Wechsler. Is there any question of jurisdiction?

Mr. Youngquist. That came up while you were out.

Mr. Wechsler. I am sorry.

Mr. Youngquist. I am commending you for remembering it.

Mr. Wechsler. Is it answered?

Mr. Youngquist. No.

Mr. Orfield. The appellate court is given a certain amount of power to review the facts, is it not?

Mr. Holtzoff. Yes, it may review facts, but not hear new evidence. I think there would be a great deal of justice perhaps in a similar rule in criminal cases.

Mr. Youngquist. I am rather puzzled by what "review of the facts" means. Does it mean that the court will determine whether there is substantial evidence to support the conviction, or does it mean that the court shall determine from the evidence whether it is satisfied--that is, whether the court is satisfied--beyond a reasonable doubt that the defendant is guilty? Those occur to me to be the only two.

Mr. Holtzoff. No. The equity rule is different.

Mr. Orfield. It would be a question, it seems to me, of weighing the evidence or balancing the evidence.

Mr. Youngquist. Doesn't that bring you right down to a

duty in a circuit court of appeals, then, to determine whether the defendant is guilty or not guilty?

Mr. Orfield. I would give them that power. I would not compel them to exercise it. I would leave it to their discretion.

The Chairman. Aren't you aiming at the power of the English Criminal Appeals Rules? They determine whether or not they, sitting as a jury, find that the evidence sustains or does not sustain a conviction. They put to themselves the same question as we put to a jury.

Mr. Wechsler. There is allowance for the jury having heard the witnesses.

The Chairman. They also revise sentences up and down.

Mr. Holtzoff. The equity rule does not go as far as you perceive this provision would go. My understanding of the equity rule is that the court of appeals may set aside the sentence as contrary to the weight of the evidence, but only if it deems that it is clearly and overwhelmingly so. It does not mean that the appellate court must be convinced beyond a reasonable doubt. The only question it will determine is, Is the weight of the evidence so overwhelmingly against the verdict of the jury that the verdict is erroneous?

There are many States where local procedure permits that. That is the New York procedure, I believe. The appellate court or the appellate division may review the weight of the evidence, and I can see a great deal of merit to it.

Mr. Seasongood. There is a great deal of merit to it, but isn't there some kind of statute that they cannot review evidence?

Mr. Holtzoff. But, of course, these rules would have the effect of repealing the statutes.

Mr. McLellan. It is taking away from the Government its non-constitutional right to trial by jury.

Mr. Wechsler. Mr. Chairman, may I call attention to Section 2 of the Act which relates to appellate rules? It is as follows:

"The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules may, as herein authorized, prescribe the times for and
7 manner of taking appeals and applying for writs of certiorari and preparing records and bills of exception and the conditions on which supersedeas or bail may be allowed."

Mr. Seasongood. Is that as far as it goes?

Mr. Wechsler. Yes. It is the second section, and in a sense it is a limitation on the first and more general authorization.

It seems to me that there is some basis in this second section for feeling that the rules were not supposed to touch appeals except as to the matters therein specified, namely, the time for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exception.

Mr. Orfield. Might you not say that this goes to the manner of taking the appeal, the scope of appeal? It goes to the manner of taking it.

Mr. McLellan. I think, Mr. Chairman, that we would do well to leave to Congress any such change as this motion

contemplates.

Mr. Seasongood. I think you would have objection from the court of appeals. They feel that they are overworked as it is. I think it would be a fine thing if it could be done, but there seem to be limitations.

The Chairman. Can you have the motion separated?

Mr. Holtzoff. Mr. Chairman,may I offer a suggestion?

I do not read that as a limitation, Mr. Wechsler, because the first section of the Act gives authority to the Supreme Court to promulgate rules in respect to any and all proceedings after verdict, and so on; and the second section provides that the rule may prescribe those matters which you referred to. But do you construe that provision as a limitation on the first clause?

Mr. Wechsler. There would be no point to it otherwise, because, as you just said, the first section covers all proceedings after verdict, which I suppose includes appeal; and I think the point of the second section was to be sure that the rule did not in any way tamper with a man's right to appeal.

Mr. Holtzoff. This does not tamper with it.

Mr. Wechsler. It is perfectly true that Mr. Orfield's motion enlarges the fruits of an appeal, but I would want to see the legislative history of that rule in detail.

Mr. Seasongood. How about our own charter? Are we limited to anything that we are to do? Of course, we had rules in the district court. Later on they were enlarged. Does anybody have our scope?

The Chairman. It was enlarged rather informally by saying that we might submit any changes that we thought should be made

in the appeals rules to bring them in line with the developments of the last five or six years, brought about largely by the improvements in the civil rules.

Mr. Seasongood. There was an order of the Court, which I have seen.

Mr. Youngquist. On the appellate rules?

Mr. Seasongood. I think so.

Mr. Seth. Wasn't the order in criminal contempt cases?

Mr. Holtzoff. That was the statute.

Mr. Youngquist. Was there an order on the appellate rules?

Mr. Robinson. It was in the second motion.

Mr. McLellan. I would like to have the motion stated, so I can know what it is.

Mr. Orfield. The motion is that Rule 51 (c) shall read, "The appellate court in its discretion may review the facts."

Mr. Holtzoff. Wouldn't you add: "shall not pass judgment unless clearly erroneous," to embody the concept of the equity rule?

Mr. McLellan. Do you really mean that, Mr. Orfield? You want to adopt the equity rule rather than give the court of appeals the power to look the evidence over and to determine whether upon that evidence it would have come to a conclusion of guilt? I would like to know which you want in your motion.

Mr. Orfield. Maybe I do not have the equity rule clearly in my mind.

Mr. Seasongood. That is the ordinary equity rule. The court can always review the evidence in an equity case.

Mr. McLellan. "but reverse and come to a different

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conclusion only when the court was clearly wrong."

Mr. Seasongood. Yes.

8 Mr. McLellan. As I understood Mr. Orfield, he wanted something more than that--power on the part of the court to look the thing over and decide whether upon the evidence they would have concluded that the defendant was guilty.

Mr. Holtzoff. I would like to go along with the equity rule, but I should hesitate to go further.

Mr. McLellan. Therefore, we ought to know what we are voting.

Mr. Seasongood. We ought to have the statute which we are repealing. I have in the back of my mind that you cannot review under an existing law.

Mr. Seth. The Constitution limits it.

Mr. Seasongood. But there is a statute that the appellate court shall not review questions of fact.

Mr. McLellan. It says the court of appeals has jurisdiction of certain things, which does not include deciding a case upon evidence heard below, except in equity cases.

Mr. Seasongood. Has only appellate jurisdiction.

Mr. McLellan. That is it.

Mr. Orfield. I move that this question be referred back for study.

Mr. Youngquist. I think we ought to decide it now.

Mr. Holtzoff. I think we ought to decide the policy and then study the phrasing.

Mr. Dession. There is more than phrasing involved. I am interested in two things. First I am interested in the merits of the proposal. I am troubled by, first, the question to

what extent would this involve changing the jurisdiction of any of the appellate courts?

Now, I am not sure that it would, but I think we would have to study that. We would have to study the statutes which define that jurisdiction now, and we would probably, after doing that, have to find out what content the word "appeal" can be given that is most broad.

We have the further point of the statutes conferring rule-making power.

As Mr. Wechsler said, the legislative history that he urged would be pertinent on that. I would hate to come to the conclusion that we cannot touch this at all, but I am not sure that we can.

Mr. Waite. I consider this as an extremely important problem, but one I have not thought about, even, and I would not feel qualified to give a sound judgment on it. I could not vote for or against it with any feeling of assurance on it. I would like to study it.

Mr. Holtzoff. I have the statute here, if you want to refer to it.

Title 28 of the Code, Section 225, relates to the appellate jurisdiction of circuit courts of appeals, and all it says that is germane to the question here is this:

> "The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions -
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court."

There is no jurisdictional question involved.

Mr. Seasongood. Isn't there another section that there shall not be a review of questions of fact?

Mr. Longsdorf. There is another jurisdictional question arising out of the Act which does not appear in Section 225 here. I think the section occurs around the 800-sections in Title 28. I remember that a very material part of that was omitted by paraphrasing when the U.S. Code was compiled.

Mr. Seasongood. Mr. Youngquist has the order of the Court there. He can comment on it.

Mr. Youngquist. The order of the Court authorizes the committee to make such recommendations as may be deemed advisable respecting amendments to the rules promulgated by this court--that is the appellate rule.

It occurs to me that the Court would be shocked if we should propose this as an amendment to the rules that had been made and also that it would be rather presumptuous on our part to propose so drastic a change. It is more than an amendment. It goes into a new field.

I would have no objection to the committee's studying the problem and perhaps making an informal recommendation to the Court later, but I should doubt very much the advisability of permitting that study to delay the action of the committee on the work that is clearly committed to it.

9 Mr. Wechsler. The essence of the problem really is, Mr. Chairman, I think, this, and it goes to some extent to the district court rule. Can we make any recommendations that go to matters which have heretofore been regarded as matters of

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power of the court as distinguished from the way in which the court shall exercise its power under the governing rules of procedure?

I do not mean that that formula makes that clear distinction, but, rather, is a way of stating the problem. I am very dubious on anything that touches power. I certainly think that we can propose no better reform than to bring sentences within the scope of appellate review in cases of abuse of discretion.

I rather believe that the court might hold that it has that power, if the appellate court permitted the issue to be argued, but even then I have doubt about moving beyond our mandate.

Mr. McLellan. Mr. Chairman, I think our rules ought not to be held up by this kind of investigation, however desirable the investigation may be.

I think I will call for the question.

The Chairman. May we have the motion repeated, because I am afraid I lost it?

Mr. Waite. The motion was to refer it for a further study to the Reporter and his staff.

The Chairman. The motion, then, is to refer the question raised by Mr. Orfield's motion to the Reporter's staff for further study. All those in favor say "Aye." Opposed, "No."

All those in favor show hands. Five. Opposed, six.

The motion is lost.

Mr. Seasongood. I would say that we should perhaps view this in some form as a matter for consideration, but not in our assigned work.

Mr. Robinson. It has been under consideration, largely

based on Mr. Orfield's book, in which the English practice has been observed. We have decided that some results obtained by that English practice cannot possibly be obtained in this country under constitutional restrictions.

The Chairman. That is why I asked Mr. Orfield to separate it. We know that in a court of criminal rules appeals in England the defendant is present. He is never present here. It seems to me that that fact alone would make a difference on the matter of taking testimony.

Might we have a motion that might bring these topics as topics to the attention of the Court, where we could say that we consider they are outside our province, but matters that we think require consideration? Is that presumptuous?

Mr. Seasongood. Why not wait until after the Chairman sees the Chief Justice and sees whether that is all right.

The Chairman. If it is, would it be the sense of the meeting that some memorandum be submitted to the Court broaching the topics but not attempting to pass upon them?

Mr. Seasongood. Including the ability to increase sentence.

Mr. Holtzoff. Not increase sentence. That would be unconstitutional.

Mr. Seasongood. That is the English practice.

Mr. Holtzoff. Yes. Ex parte Lang holds you cannot increase a sentence once it is passed.

Mr. Robinson. But the defendant could waive that as a condition of his appeal.

Mr. Seasongood. If that was a condition of his appeal, you could do it that way. There is a decision of the Supreme Court

where in a state court they allowed an increase of sentence. They held that that was constitutional. I am quite sure there is a decision of that kind in the Supreme Court.

Mr. Youngquist. I second the motion.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No." It is unanimously carried.

Mr. Wechsler. If the line of approach is the power of approach, how do we get a thing like waiver of indictment? I simply want to get the sense of the definition with regard to jurisdiction clear. Perhaps my question was not clear.

Mr. Youngquist. Yes, it is clear.

Mr. Seasongood. Is it the same in a district court as it is in appellate jurisdiction?

Mr. Wechsler. I think the language of the statutes is about the same, except one says before verdict and the other says after verdict.

Mr. Holtzoff. Yes, but the words of limitation are not in the other statute.

Mr. Wechsler. What words of limitation?

Mr. Holtzoff. You construe section 2 of the appellate statute as words of limitation?

Mr. Wechsler. Well, I suggested that they might be, but I did not pass on the point.

The Chairman. Rule 52 (a).

Mr. Waite. Are we discussing 52 (a), Mr. Chairman?

The Chairman. Yes.

Mr. Waite. It seems to me that there is an alternative which has not been considered. It says, "A sentence of imprisonment shall be executed unless an appeal has been taken

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and the defendant has elected to remain in detention."

Suppose he does not elect to remain in detention, but has taken an appeal and has asked for bail?

Mr. Holtzoff. That is taken care of in another paragraph later on, in paragraph (c).

Mr. Waite. Well, even so, (a) as it stands simply says that unless he has elected to remain in detention, the sentence shall begin. It does not leave any alternative there for (c).

10 We ought to have something in there which will protect him after he has asked for bail under (c).

The Chairman. May we hold that until we get to (c), and we will take them together? Suppose we just pass (a) for a moment, then, and let us go on to (b).

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Mr. Holtzoff. That is the present rule.

Mr. Seasongood. It says, "A sentence of imprisonment". Do you not want "of imprisonment" out? Suppose it is a fine.

Mr. Holtzoff. Well, (b) takes care of a fine.

Mr. Seasongood. Stay of execution of sentence to pay a fine. Well, you do not say it is executed, the sentence; the fine is executed unless you stay it.

The Chairman. (a) is "Stay of Execution - Imprisonment." (b) is "Stay of Execution - Fine." Separate the two.

Mr. Seasongood. Oh, yes. "The trial court". It merely relates to stay of execution. Of course, I suppose it is obvious that sentence is immediate if it is a fine. You say if it is imprisonment it shall be executed, but you do not say that if it is a fine he has a right to execute it. (b) is just relating to the stay.

Mr. Holtzoff. Well, (b) is the present criminal rule the way it now reads.

Mr. Seasongood. That is all right, yes, but whether you should not leave out "of imprisonment": "A sentence shall be executed". You may have a sentence probably of fine, and that is not covered.

The Chairman. Your thought is to leave out in line 2 the words "of imprisonment"?

Mr. Seasongood. Yes.

Mr. Youngquist. Well, you would have to make other changes, though, in that.

Mr. Seasongood. Yes.

Mr. Burns. And in the case of a sentence of imprisonment.

Mr. Youngquist. Of course, you have a different situation.

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I suppose it would be taken care of if we should say in (b), "a sentence of a fine shall be executed unless the court stays it."

Mr. Seasongood. Yes. Well, refer it to the Committee on Style to fix it up if you want to.

The Chairman. I did not get that.

Mr. Seasongood. I say, let the committee fix it up or not, as they think right.

Mr. Holtzoff. Yes.

Mr. Seasongood. But it seems to me that you have enough to say that a sentence to pay a fine is executed immediately. It may be unless he stays it.

Mr. Holtzoff. That is in the present criminal code.

Mr. Medalie. Well, the heading of (a) is "Imprisonment," is it not?

The Chairman. That is right.

Mr. Youngquist. I beg your pardon?

Mr. Medalie. The heading of (a) is "Imprisonment."

Mr. Seasongood. "Stay."

Mr. Medalie. And that is all we deal with there. Then in (b) we are dealing with stay, and the heading is "Fine."

Mr. Holtzoff. I do not think you need any change.

Mr. Seasongood. Well, all right.

Mr. Medalie. I do not think so, in view of the content and heading.

Mr. Waite. Mr. Chairman, before we pass that I want to renew my suggestion that in line 5 there be added the phrase, "or has been admitted to bail".

Mr. Medalie. That would be complete.

Mr. Seasongood. I think so.

Mr. Burns. I move that.

Mr. Youngquist. Just a moment. I should like to think about that a little bit further.

Mr. Holtzoff. I think there is no objection to that.

Mr. Seasongood. Surely; you execute the imprisonment.

Mr. Holtzoff. Unless he is admitted to bail.

Mr. Seasongood. Unless he is admitted to bail.

Mr. McLellan. I think there is not only no objection to it, but it is entirely desirable.

Mr. Youngquist. Yes, this expresses it.

Mr. Holtzoff. I think that is a desirable addition.

The Chairman. That is moved and seconded. Now, all in favor of the amendment in line 5 say "Aye." Opposed, "No." Carried.

All in favor of (a) as amended, say "Aye." Opposed, "No." Carried.

All those in favor of (b), say "Aye."

(There were a number of ayes.)

Mr. Youngquist. I should like to make the suggestion with respect to that that it be written to conform to (a) in its beginning.

Mr. Holtzoff. And leaving it to the Committee on Style?

Mr. Youngquist. Yes.

Mr. Holtzoff. All right.

Mr. Medalie. What is that? I missed that. What was that?

Mr. Youngquist. To conform the first part of (b) to the form of (a), leaving that to the Committee on Style.

Mr. Seasongood. Let us see. In (b) you recite

execution of a sentence to pay a fine, but you do not refer to it in (a).

Mr. Medalie. Can't. We do not do that now.

The Chairman. It would be best, perhaps, to proceed leaving it to the Committee on Style.

2 Mr. Medalie. Why have a meeting of the Committee on Style when it takes us two minutes to do it now?

The Chairman. Well, not at the moment, Mr. Chairman of the Committee on Style. We are plowing along while we still have a quorum, and shall come back in a few minutes.

All those in favor of the motion say "Aye." Opposed, "No." Carried.

Now, we go on to 52 (c).

Mr. Robinson. Perhaps you can explain all this.

Mr. Holtzoff. The rule is practically the same as the criminal appellate code except that it is in a little more detail. I do not think that the bracketed portion is necessary, and I am going to suggest that we omit so much of this as commences with the bracket in the middle of line 18 and goes down to line 26, because that matter can be taken--

The Chairman. (Interposing) Line 23.

Mr. Youngquist. It is line 23.

Mr. Holtzoff. Well, I think the next sentence does not go out, because it is rather a drastic--

Mr. Robinson. Well, it is all taken care of in Rule No. 55.

Mr. Holtzoff. It is taken care of in another rule, Rule 55.

Mr. Robinson. Based on the circuit rule.

Mr. Wechsler. Have Justices of the Supreme Court now the power to admit to bail a defendant who is appealing to a circuit court of appeals?

Mr. Holtzoff. I think so, because the Justice of the Supreme Court is a circuit justice, and I think sitting as a circuit justice he has that authority, does he not, Judge?

Mr. McLellan. If I answered either way I would be lying, because I do not know.

Mr. Robinson. On the advice of counsel, do not answer.

Mr. Wechsler. Although I am not ordinarily timid in these matters, I think I would object to taking from a Justice of the Supreme Court any power that he now has.

Mr. Holtzoff. Well, I would too, sir. I understood that he would have that authority under this rule.

Mr. Youngquist. I should doubt it.

Mr. Holtzoff. It says, "if the appellate court * * * by any judge thereof". A circuit justice.

Mr. Youngquist. Yes.

Mr. Holtzoff. A Supreme Court Justice is competent to sit in the circuit court of appeals.

Mr. Youngquist. Yes, but he is still a circuit justice, circuit judge.

Mr. Dean. Why mention the Supreme Court Justices?

Mr. Holtzoff. Why not say "circuit justices"?

Mr. Dean. No.

Mr. McLellan. Well, do you mean a justice who has been assigned to a particular circuit?

Mr. Burns. Suppose he is ill.

Mr. Youngquist. Instead of "by any judge" do you want to

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say in line 18, "by any judge or justice thereof"?

Mr. Wechsler. I do not think it ought to be amended.

Mr. McLellan. Well, do you understand that a Supreme Court Justice, where he has not a given circuit in charge, is deemed a judge of the court of appeals?

Mr. Burns. Of course.

Mr. Seasongood. I think so. I think there have been cases. I know there is one case where Judge Anderson refused bail in an appeal, and Chief Justice Taft allowed it.

Mr. Burns. It was in the First Circuit, was it not?

Mr. Seasongood. Sir?

Mr. Burns. In the First Circuit?

Mr. Seasongood. No, not in the First; it was in the Seventh.

Mr. Seth. Is he not just as much a judge of the district court as he is of the circuit court of appeals?

Mr. Wechsler. No.

Mr. Holtzoff. The phrase "circuit justice" is used in the present criminal rules. You see, the subcommittee on style made this a little more definite, but the present rule merely says bail may be granted by the trial judge or by the appellate court or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Mr. Youngquist. That should be in. I did not know we had dropped that out.

Mr. Holtzoff. Apparently you did. I was not present when you were working on this.

The Chairman. You move to put it back in?

3 Mr. Youngquist. I move that it be restored, "or by the

circuit justices".

Mr. Medalie. What line is that?

Mr. Youngquist. Line 18.

Mr. Longsdorf. And add the words "circuit justice" after the "or circuit judge".

Mr. Youngquist. "and by the circuit justice".

Mr. Holtzoff. "or by the circuit justice".

Mr. Longsdorf. "the circuit justice" or "a circuit justice"?

Mr. Holtzoff. Yes, that is the way the rule reads.

The Chairman. "the circuit justice".

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

Now, the motion is to delete the second half of line 18 through the first two words on line 26.

Mr. Youngquist. That was inserted, I think, at the suggestion of one or more district judges who complained of the fact that the defendant went over their heads and went to the circuit court of appeals for bail, where it was granted without their knowing anything about it.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. He shopped around among various justices.

Mr. Holtzoff. I do not think that that is any great deal of harm.

Mr. Robinson. But the point is that that is worded in Rule 55 as a separate rule. Rule 55 is a rule of the First Circuit, as you see.

The Chairman. If we adopt 55 we do not need these lines.

Mr. Holtzoff. You do not need those.

Mr. Robinson. They will go out.

Mr. Youngquist. I second the motion.

The Chairman. All in favor of the motion to strike say "Aye." Opposed, "No." Carried.

Mr. Youngquist. That is the bracketed matter?

Mr. Holtzoff. Plus the sentence that follows,

The Chairman. Plus down to 26.

Mr. McLellan. Down through the first two words in line 26.

The Chairman. All those in favor of (c) as amended, say "Aye."

Mr. Youngquist. That ought to be, "The court or judge or justice," though.

The Chairman. Opposed, "No." Carried.

Mr. Youngquist. Do you not have to put that, "The court or judge or justice"?

Mr. Holtzoff. In the last line.

The Chairman. In line 26.

Mr. McLellan. You had better call him "circuit justice," because that cuts him down to one.

Mr. Holtzoff. What is that? "The court or judge or circuit justice"?

The Chairman. That is right.

52 (d).

Mr. Holtzoff. That is in the civil. That is taken from the civil rules.

Mr. Waite. I do not want to raise an argument, Mr. Chairman, but I again call attention to the fact that 52 (d) differs quite materially from Rule 6. That is more a matter of style than anything else, I think.

Mr. Holtzoff. Well, we voted last night, yesterday, if

you will recall, if I may refresh your recollection, on your motion--I thought it was your motion--to transfer Rule 52 (d) into Rule 6; and last night after this committee adjourned, the subcommittee did that very thing.

Mr. Waite. Oh, yes. All right.

Mr. Youngquist. And where is that form?

Mr. Robinson. We have it here. It has been typed. It was prepared for distribution later, and at that time I think it would be well to consider the comparable provisions.

Mr. Youngquist. All right.

The Chairman. All right. We pass 52 (d) for the moment.

Mr. Holtzoff. Well, no, Mr. Chairman; I think--

Mr. Medalie. (Interposing) Rule 52.

Mr. Holtzoff. I think we go from 6 to 52 (d). Rule 6 is a separate matter.

The Chairman. Well, your question?

Mr. Youngquist. Well, we have to change it.

Mr. Medalie. If you are through with Rule 52, I should like to say that the first sentence of (b) has been revised now, and I can read it.

The Chairman. 52 (b).

Mr. Medalie. (Reading:)

"A sentence to pay a fine or a fine and costs shall be executed, unless an appeal has been taken, upon such terms as the district court or the circuit court of appeals may deem proper."

I think that meets what was asked, does it not?

The Chairman. It does, I think.

Mr. Youngquist. Will you read that again?

Mr. Medalie. (Reading:)

"A sentence to pay a fine or a fine and costs shall be executed, unless an appeal has been taken, upon such terms as the district court or the circuit court of appeals may deem proper."

Mr. Youngquist. No. Unless the court has stayed.

Mr. Holtzoff. Stayed.

Mr. Youngquist. The execution.

Mr. Medalie. All right. Then, after the words "an appeal has been taken"--

Mr. Youngquist. "unless stayed by the trial court or the circuit court of appeals". That is all you need.

4 Mr. Medalie. Well, you want the terms in there too.

Mr. Youngquist. That is in the second sentence.

Mr. Medalie. All right. "unless stayed". "stayed by the district court or the circuit court of appeals".

Mr. Youngquist. And the second sentence takes care of all the terms.

Mr. Medalie. That is right. I shall re-read it:

"A sentence to pay a fine or fine and costs shall be executed, unless an appeal has been taken and unless stayed by the district court or the circuit court of appeals."

The Chairman. Is the motion seconded?

Mr. Youngquist. I second the motion. I think perhaps we can improve the phraseology.

Mr. Seasongood. Yes, transpose some thoughts.

The Chairman. All those in favor of the motion as to 52 (b) say "Aye." Opposed, "No." Carried.

I am told that we may proceed to 52 (d) now because the change of rule has been made effectual under 6 rather than

52 (d). So may we direct our attention to it: 52 (d).

Mr. Holtzoff. That is taken from the civil rules.

The Chairman. That in turn is taken, I am told, from the civil rules.

Mr. Robinson. Civil rules?

Mr. Holtzoff. Yes, that is in the civil rules.

I move its adoption.

Mr. Youngquist. This does not take care of the cash bail, but we were told by Mr. Holtzoff last night that they are so few that they need not be considered.

Mr. Holtzoff. There are very few cases.

Mr. Youngquist. I am not entirely sure of it, but I am willing to go along.

Mr. Medalie. No; we ought to take care of cash bail.

Mr. Holtzoff. Beg pardon?

Mr. Medalie. You ought to take care of cash bail.

Mr. Youngquist. Cash bail.

Mr. Holtzoff. Cash bail on appeal?

Mr. Medalie. Of course there are few, but it is there. It is a right.

Mr. Holtzoff. The only purpose of this paragraph is to make it possible to get a judgment against a surety without having to do so by an independent suit. So that cash bail is not a factor.

The Chairman. Yes, but why can we not have the same provision here as to cash bail that you have in the prime code?

Mr. Youngquist. That was my suggestion last evening.

Mr. Robinson. Last night, yes, that is right; you suggested too, Mr. Youngquist, something to the effect that the cash bail

shall be deemed to be the property of the defendant. Is that the same?

Mr. Youngquist. Yes. The purpose of that was to make it available for the execution of any sentence.

Mr. Robinson. Right.

Mr. Youngquist. By way of fine or costs.

Mr. Longsdorf. Cash bail will include government bonds put up as collateral in cash?

Mr. Robinson. We do not need to define that, do we?

The Chairman. Well, all those in favor of 52 (d) say "Aye." Opposed, "No." Carried.

Now may we have a motion that this section or a new section be provided to cover cash bail in the same way as we did in connection with bail in the trial court?

Mr. Holtzoff. I so move.

Mr. Burns. I second the motion.

The Chairman. All those in favor say "Aye." Opposed, "No." Carried.

Rule 53.

Mr. Holtzoff. Now, the bracketed portion beginning in line 11 is not necessary, because that will be covered if we adopt Rule 55. So I move to strike it out.

Mr. Youngquist. I second it.

Mr. Orfield. Second.

The Chairman. It is moved and seconded that line 11, the latter half, through line 15, be stricken. All those in favor say "Aye." Opposed, "No." Carried.

Mr. Orfield. I move to strike out all of the second paragraph, on the ground that it will promote delay: that the trial

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court or the appellate court should not have the discretion to extend the time in any unlimited way, on the ground that in the past, both in federal courts and in state courts, that has been one of the chief points in the criminal proceeding at which there has been delay.

Mr. Waite. To bring it up, I shall support the motion.

Mr. Holtzoff. Would you take away the entire power? Anybody's power to extend time?

Mr. Burns. I think that would be most unfortunate.

Mr. Holtzoff. Suppose you have a very long record.

Mr. Seth. You cannot get the transcript.

Mr. Burns. Or suppose there is disagreement as to the content of the record, and there is an attempt to establish it.

Mr. Orfield. I might compromise by giving the additional period of 40 days, but I would not permit the trial court to fix it for an unlimited time.

Mr. Holtzoff. But suppose you have a trial, as frequently is the case in federal courts, where the trial has lasted two or three months, and you certainly could not get the record ready in 80 days. I think you have to have a residue of power and trust the court.

Mr. Youngquist. The Doheny oil case took three months to try.

Mr. Burns. Suppose the trial judge is sick, which is common in the federal courts.

Mr. Holtzoff. Yes.

Mr. Burns. Suppose the trial judge is sick; suppose the counsel is sick.

Mr. Holtzoff. Well, you do not need the trial judge.

Mr. Burns. Well, you may. You may very well need him in some dispute.

Mr. Holtzoff. No, because under this provision, under these appellate rules, each side puts in the record whatever it wants. We are trying to assimilate it in the civil rules.

Mr. Medalie. Yes, but that might not be approved; we may change our minds on that.

Mr. Holtzoff. Oh, yes.

5 Mr. Medalie. Circuit judges.

Mr. Holtzoff. I certainly think there ought to be residual power in the courts to extend time.

Mr. Burns. To what extent is delay in this field in the federal courts the subject of criticism?

Mr. Holtzoff. Well, delays were reduced to a very large extent by the rules of 1933. Prior to that there was a lot of criticism, and just criticism. But I think this, and I make this statement because a senior circuit judge called my attention to the fact that frequently delays occur because the United States attorney does not make a motion to dismiss. If he pressed the matter, the defense counsel, in cases where they were apt to be indolent or dilatory, would be more energetic. So I think that it is a matter of administration rather than a matter of court procedure, and certainly it would be most unfortunate if you put a distinct limitation of this kind.

Mr. Burns. Suppose you put in "any judge thereof, may for a good cause shown," to indicate that it is not to be uncontrolled and arbitrary.

Mr. Holtzoff. That is all right.

Mr. Youngquist. After the word "may" in line 9?

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Mr. Burns. That is right.

The Chairman. Is the motion seconded?

Mr. Seasongood. I second it.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." Carried.

Professor Orfield, do you want a vote on your motion?

Mr. Orfield. I believe not. I do not believe it was seconded.

The Chairman. All those in favor of the adoption of this rule as amended, say "Aye." Opposed, "No." Carried.

Rule 54.

Mr. Youngquist. In Rule 53 why do you say the extension may be granted by the district court with respect to 42 (b)?

Mr. Longsdorf. Mr. Chairman, with respect to that matter which I referred to a while ago, there would be great dissatisfaction in the Ninth Circuit if the printing of records, the brief, was made a uniform rule. The Fourth Circuit looks at it from the other side.

The Chairman. The Fourth, the Third, the First, and the District of Columbia now all use it.

Mr. Longsdorf. I know, but we have been using it for 30 years and we are about to change it in the state courts quite radically. The experience in the state courts is against it. In fact, they did not do it in criminal trials at all in the state courts. They did it in the state courts in civil appeals, and the result of it is that we get the record presented by excerpts in the brief in a disjointed and discontinuous form. The appellant will pick out what he wants and stick it into his brief from various points in the record, and then the appellee

will put in other parts interposed between--if it was in order--and the judges do not like to read it.

Besides that, some attorneys are quite inexpert in choosing the parts that should be printed as excerpts. In criminal cases in the courts of California they have sent up the complete reporter's transcript if that was desired, or parts of it if that seemed sufficient, and it is now proposed out there in the state courts in criminal appeals to send up an original and two carbon copies.

Mr. Holtzoff. They send up the whole typewritten transcript?

Mr. Longsdorf. An original and two carbon copies of the reporter's typewritten transcript.

Mr. Holtzoff. The whole typewritten transcript?

Mr. Longsdorf. Well, now they propose to send up three, so each judge of the reviewing court will have one to read if he wants it. One is not enough for three men.

Mr. Holtzoff. Yes, but it costs an awful lot of money; it costs more to do that than it does to print an appendix to the brief.

The Chairman. Does not sending up three ignore the realities? because I do not believe that in any court of three appeal judges they all three read that record page by page.

Mr. Longsdorf. Perhaps not, but now the clerk of the Ninth Circuit tells me that by reducing the amount of the record that is printed, as they do under that section 865, his printing costs are less than they are in the Fourth Circuit. At any rate, I am telling you how they feel about it out there.

The Chairman. That is not involved in (a). Let us see if

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we can dispose of (a) first, if we may.

Mr. Wechsler. I move an amendment to (a) that after the last word there be inserted "or by the rules of the circuit courts of appeals."

Mr. Seth. Yes.

Mr. Longsdorf. I second that motion.

The Chairman. What would be the effect of that, Professor?

Mr. Wechsler. It would allow the circuit court of appeals to make rules with respect to preparation and form of record.

The Chairman. Well, that in effect would nullify (b), would it not?

Mr. Holtzoff. I think so.

Mr. Wechsler. Yes, but I intend to vote against (b), so that I am consistent in my purpose.

Mr. Robinson. Just slipped up on it.

6 Mr. Longsdorf. I must protest. It might make (b) a single purpose, but it would nullify --the Fourth would be at liberty to do it their way, and the Sixth would be at liberty to do it their way.

Mr. Wechsler. As a matter of fact, it would not nullify (b) because it says, "except as otherwise provided in these rules."

The Chairman. All those in favor of Professor Wechsler's amendment, say "Aye." Opposed, "No."

Mr. Medalie. Wait. Let me understand. What is the amendment.

Mr. Youngquist. No.

The Chairman. I am in doubt. All those in favor of the amendment say "Aye."

Mr. Medalie. Wait. What is the amendment?

The Chairman. The amendment is to insert at the end of line 5 "or rules of the circuit courts of appeals", having for its purpose leaving each circuit to adopt (b) or not adopt (b).

Mr. Burke. Does that not, Mr. Chairman, operate to prevent uniformity?

Mr. Holtzoff. Yes.

Mr. Youngquist. Yes.

The Chairman. It would.

Mr. Burke. I mean the adoption of this amendment.

Mr. Holtzoff. Yes.

Mr. Burke. Would that not have the effect of preventing the uniformity that you are seeking to accomplish?

The Chairman. Very obviously.

Mr. Wechsler. Well, it would not have that effect within the confines of any area of uniformity prescribed by these rules; and if (b) is retained, then no circuit could make a rule inconsistent with (b), since (a) reads "except as otherwise provided in these rules"; but within the area in which there is no provision in these rules I think the circuit court ought to have the power to make rules of their own.

Mr. Waite. Does not your amendment add "except as otherwise provided in these rules or by order of the circuit courts of appeals"?

Mr. Wechsler. "or by rules of the circuit courts of appeals".

Mr. Waite. So that the circuit court of appeals could depart from (b) if it wanted to?

Mr. Robinson. That is right.

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Mr. Wechsler. No, I do not think it could, because the circuit court cannot make rules inconsistent with these rules. There may be a drafting problem there, but that is not my purpose, really, to set aside (b), but to make clear that the circuit court can fill in the gaps.

Mr. Youngquist. But here in this case, while it may not make rules inconsistent with these rules, we would in (a) be giving them specific authority to make a rule different from that prescribed by (b).

The Chairman. That is right.

Mr. Youngquist. And the whole purpose of (a) that we arrived at after full discussions previously was to make the practice uniform throughout the country.

Mr. Wechsler. I see.

Mr. Longsdorf. We do not want to confuse the printing of the record with the preparation and form of it otherwise. Now, the preparation and form of it--when I seconded that motion, on further thought I can see that we might want to get uniformity in the preparation of the record and in the form of it, but not uniformity in the manner of printing it. Now, that is a matter that belongs to each circuit for itself, and I think we ought to let each circuit have it its own way, whichever way they think will facilitate work.

Mr. Wechsler. I think my motion is misconceived, Mr. Chairman. I withdraw it.

The Chairman. You withdraw the motion?

Mr. Wechsler. Yes.

The Chairman. All those in favor of 54 (a) as printed, say "Aye." Opposed, "No." Carried.

54 (b).

Mr. Holtzoff. I move its adoption.

Mr. Robinson. I second the motion.

Mr. Medalie. I should like to know about costs in criminal cases on appeal.

Mr. Longsdorf. I should like to propose an amendment now.

Mr. Youngquist. What is it.

Mr. Longsdorf. In line 7 it now reads, "it shall not be necessary to print the record on appeal except that". I should like to change that and say, in place of "except that", "but if not printed the appellant shall print, as an appendix to his brief". That would enable the court to have the record printed in its own way, but if it was not done that way it would be printed some way in the brief.

Mr. Holtzoff. Mr. Longsdorf, the reason we were heartily in favor of (b) is that it makes it possible for a litigant of modest circumstances to appeal, to get an appellate review. Today, without this rule, the cost of printing is sometimes so prohibitive that it becomes impossible for a defendant who is unable financially to bear the cost of printing the record to secure an adequate appellate review; and that is the reason, and the only reason, why we were heartily in favor of (b).

Mr. Wechsler. Is that not covered by the forma pauperis proceeding?

Mr. Holtzoff. Yes, it is, but the answer to that is this: There are lots of defendants who are not so poor that they can prosecute an appeal in forma pauperis but yet have not sufficient funds to print a big record, or they may have sufficient funds but they may become impoverished in doing it. The forma

pauperis proceeding only takes care of the man way down at the bottom of the scale. I have in mind the persons in the middle bracket.

Mr. Longsdorf. All right.

Mr. Wechsler. Well, you speak as if it were a requirement in all cases to print the full record. It is not, is it? The defendant and the Government may agree on the deletion of parts of the record, and that of course is the result of the present bill-of-exceptions practice. I should like to retain that practice as it is.

So far as I can see, the only effects of this proposal are two:

First of all, it puts a little burden on the Government if it wants to be onery about the size of the record. Of course, that is not a substantial difficulty for a United States attorney, since he does not pay the costs of printing a record out of his own salary. Therefore, there is a distinction between the civil and criminal situation here so far as concerns the burden that is imposed upon the appellee.

The second consequence of this is that it divides up the parts of the record and achieves a dissipation of costs.

Now, I am very much impressed by the point that that division of the record is by and large a bad thing because I like criminal proceedings on appeal to present, insofar as possible, a full picture of the proceeding below. There are many cases in which the plain-error rule comes into operation where the court has the benefit of the record or a larger record--a continuous record--in finding reasons for reversal that not even the appellant's counsel assign. So it seems to me

it creates an abstract method of handling appeals, as distinguished from a concrete method.

The Chairman. But, Mr. Wechsler, you have always got that there in the typewritten record, and I assume that the judge who writes the opinion in the circuit court of appeals will refer to that typewritten record. I should be very much inclined to doubt, in the ordinary case, that the other two judges would. They are more likely to be content with the briefs and the excerpts. I cannot bring myself to believe that in the average case that is disposed of in circuit courts of appeals all three judges read all records. It just isn't so.

Mr. Wechsler. I am not suggesting that, but under the other practice there is an indication to do it, and that is effectively destroyed here.

Mr. Longsdorf. They may want to refer to parts of it without reading it. It is all in one paper. Somebody else is busy with it.

Mr. Wechsler. Do not forget, this is something that a circuit court of appeals is now free to do of its own rules, and I am not suggesting that the court forego doing it if its experience pointed that way; but this is taking a practice that is used in a few circuits and making it mandatory in the whole country, without, in my view, adequate reasons for doing it.

Mr. Holtzoff. Is not the reduction of the cost of appeal to the defendant a very important objective to be attained in appellate procedure, and does not this rule attain it?

Mr. Wechsler. I doubt that it would attain it appreciably, Mr. Holtzoff.

Mr. Longsdorf. There is one more advantage that our method has that I want to call attention to: When we print the record we print 60 copies of it. It costs but a trifle more to print 60 than it does to print 25; and then if the appellant fails in his appeal and wants to ask for certiorari he has the printed record already at hand to use.

Mr. Holtzoff. You are not thinking of the man who pays the bill.

Mr. Longsdorf. He may not get the certiorari, but he has got to send the record up.

Mr. Holtzoff. You are not thinking of the man that has to pay the printing bill, Mr. Longsdorf.

Mr. Longsdorf. I am thinking just exactly of him. If he comes to the point where he wants to petition for certiorari he is going to be up against a printing bill anyway.

Mr. Wechsler. How does the certiorari practice now work where this rule is enforced?

The Chairman. It may come up on the excerpts. I had a case that I argued in March where the record was one of about 8,000 pages, and I agreed with the Government on a record of about 1,100 pages, and we had time extended on both sides for the argument; and there was only one little question that the Court wanted light on, and they asked us to bring an additional single page of the record to give them two references. Now, it was the difference between having a book like that (indicating) and having seven books like that.

Mr. Longsdorf. Unless you can file the briefs above, the Supreme Court cannot tell always what the circuit court of appeals is deciding upon. The excerpts will be printed in the

briefs, but if the briefs are not filable as part of the record upon a certiorari, then you do not know what moved the circuit court of appeals.

The Chairman. Well, those all go up on that.

Mr. Longsdorf. They do?

The Chairman. Surely.

Mr. Longsdorf. The rule covers that as now made for the Fourth Circuit, does it? The briefs go up as part of the record?

The Chairman. No; the excerpts go up.

Mr. Longsdorf. Do you take them out of the brief?

The Chairman. No, they are printed separately in the brief.

Mr. Holtzoff. The Fourth Circuit has that rule, the First Circuit, the District of Columbia, and the Third Circuit.

Mr. Longsdorf. Yes, I know.

Mr. Seasongood. This seems to me to be an admirable rule. It is a saving of expense, which is something you want to accomplish, and a saving of time. I have had instances where you fuss around about what should be printed, and the other person makes you print a lot of stuff that is purely vexatious. You do not want to ask in the circuit court of appeals to have the costs assessed against him for making you print it, but it has happened that way, and the circuit courts of appeals have

8 been rather slow themselves in approving procedure. They were very insistent in our circuit, for instance, on retaining the old narrative form of bill of exceptions, which was, I thought, always absurd and involved an amount of work and cost entirely disproportionate with the idea of printing in question-and-

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answer form.

I think this is a good provision and that we ought to go ahead with it.

Mr. Longsdorf. Now, Mr. Chairman, I do not know whether we can evolve any method of dealing with this matter, in the light of what I am about to say, or not, but there is a very great deal in this rule that ought to be considered at the forthcoming conference of senior circuit judges. Can we devise any way of leaving this stand open until we know how they feel about it?

Mr. Youngquist. Would not the effective way be to suggest it to them and let them shoot at it?

Mr. Longsdorf. I know what the effect of waiting would be.

Mr. Holtzoff. I think the effective way would be to include this in the mimeograph of the rules that goes to the public--the legal public, judges--and see what kind of reaction it arouses.

Mr. Longsdorf. Your proposal, then, would be to pass this and of course see that it is brought before the conference of senior circuit judges, and if they object to it--

Mr. Holtzoff. Well, the senior circuit judges will all have copies of the preliminary draft. They will be asked to comment on that.

Mr. Longsdorf. That is what I am thinking of. And if they comment with sufficient adversity it goes out?

Mr. Youngquist. That depends upon what we did.

The Chairman. Surely. It depends upon what the Supreme Court does.

Mr. Longsdorf. I say, with sufficient adversity.

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Mr. Wechsler. In any case in which a defendant appeals from conviction and assigns as one of his points that the evidence was insufficient to sustain the conviction, he would have to print the whole record, would he not?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Since this is in the appellate rules and not in the district court rules and we are only proposing amendments within the terms of our authority, I think the senior circuit conference ought to have something to say about this as well as the Supreme Court.

The Chairman. This is one thing expressly that the Chief did mention should be agitated.

Mr. Longsdorf. We are agitating it.

The Chairman. Yes, sir.

Mr. Waite. Public agitation.

The Chairman. I mean, in my conference with him I mentioned this as one of the points on which there had been an advance in the practice since these appellate rules were promulgated about eight years ago. He did not commit himself one way or the other, but he did say that this was a point.

Mr. Wechsler. Do I understand this correctly in another respect, that the appellant may print the whole record if he wants to?

Mr. Holtzoff. Oh, yes.

Mr. Seth. Surely.

Mr. Wechsler. There is no penalty on him for printing an excessive record?

Mr. Holtzoff. No.

The Chairman. No; I mean, there is no saying to the

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litigant, "You cannot print."

Mr. Longsdorf. No, I do not see anything to that effect; he can have it printed if he wants to.

Mr. Holtzoff. The advantage is that he can print as little as he wants to or as much as he wants to.

The Chairman. And the court may order it printed.

Mr. Longsdorf. Yes.

Mr. Youngquist. That is what I have been concerned about. We who are so valiantly battling for this new rule may be adopting a rule that can be nullified by any circuit court of appeals by reason of the first clause in (b).

Mr. Seasongood. Yes.

Mr. Youngquist. "Unless ordered by the appellate court, it shall not be necessary to print". There would be nothing to prevent any circuit court of appeals from making a general order that all records shall be printed in full.

I confess that I have heretofore overlooked the significance of that clause, and I shall now move that it be stricken.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. You may want to make it mandatory not to print.

Mr. Holtzoff. No.

Mr. Youngquist. "it shall not be necessary to print the record on appeal except that the appellant shall print, as an appendix", and so forth. That is what, as I understand it, we are trying to save.

Mr. Holtzoff. Yes.

Mr. Longsdorf. Well, really, if you are going to strait-jacket all of them in one rule that is the way it ought to be,

but I do not think it ought to be done.

Mr. Youngquist. That is it.

The Chairman. I gathered--and I must confess I read this rule with particular care--I thought that meant specific cases, and if it does not I would much prefer, rather than striking it out, to say, "unless specifically ordered by the appellate court": to take out any general rule but to say that the court could in a specific case.

Mr. Burns. The advantage, however, Mr. Chairman, of starting out, "it shall not be necessary to print", ought not to be lost. Would it not be better to put at the end, "in specific cases, for good cause shown, the appellate court"?

The Chairman. That is right.

Mr. Burns. "may order printing of the entire record"?

The Chairman. I agree with that.

Mr. Seasongood. You can put that in in 15 and 16 there: "if the appellate court is of the opinion that the appellant has failed to print so much of the record".

Mr. Burns. Except that that would have to do with the imposition of costs.

Mr. Seasongood. Well, you can add here that it may itself order parts or the whole of the record to be printed or may impose costs against him.

9 Mr. Longsdorf. Judge Burns, you want to take away the power of the circuit courts of appeals to provide by standing rules that the record shall be printed in the manner provided by sections 864 and 865 of 28 U.S.C.; right?

Mr. Burns. That is right.

Mr. Holtzoff. That is right.

Mr. Seasongood. Let us move to strike out this first, "unless ordered by the appellate court," and you have got the idea, and insert it somewhere else, so it will be, "in a particular case the court may order".

Mr. Burns. I second it.

The Chairman. All right. You have heard the motion. All those in favor say "Aye." Opposed, "No." Carried.

Mr. Youngquist. I suppose this rule--I mean the addition to be made--will require the court to make an order in each individual case.

The Chairman. "unless specifically ordered," or something.

Mr. Wechsler. Mr. Chairman, I find myself slowly being persuaded on this point, but I should like to ask one question that occurs to me. When we get right down to it, I have only one reason for drawing back from it, and that is the discontinuate record. It seems to me, from the point of view of costs, that is bad and can be avoided. I wonder if exactly the same result as that here sought might be achieved without introducing a discontinuate record, this way:

The appellant would mark those parts of the record that he intends to print. He would then transmit the manuscript to the Government. The Government would mark those supplementary portions of the record that it desires to print. The record would be printed as requested by the appellant and by the Government combined. The costs would be distributed in accordance with the request of each side, subject to the judicial control that this rule allows: that is to say, costs for improvident omissions would be assessed against the appellant.

That, it seems to me, would get exactly the same result

and still get the book printed as a continuous book instead of disjointedly.

The Chairman. There is only one possible objection to that, and that is the objection of the delay in working out the brief. When a man has to print his excerpts and file them with his brief he goes about it in a businesslike way, and so does the respondent, but when there is this conferring process it always results in delay.

Mr. Wechsler. But there would not be any conferring process under the procedure as I have stated it. Each side would designate its part, and it would go to the printer.

The Chairman. Well, that clearly is an advantage.

Mr. Wechsler. There would be no subject for discussion at all.

The Chairman. And I may say, it is my understanding that it is a practice in the Fourth Circuit and these others, when matters come up to the Supreme Court, to consolidate your excerpts in just that fashion, so that you take the two and weave them together, just as you have suggested.

Mr. Wechsler. To bring the matter to a head, may I move as a substitute that the rule be redrafted in those terms.

Mr. Holtzoff. I do think that that would insure considerable delay in the process, as in this rule, and that is why I would hesitate.

Mr. Seasongood. Then it would introduce a different practice, as I understand it, in all these different circuits from a practice that is already fairly well crystallized.

Mr. Holtzoff. Yes, the Fourth Circuit--

Mr. Seasongood. And, also, you are not apt to print as

much if you do it in connection with your brief. You get sensible when you write your brief, whereas the other way the fellow says, "Well, I want this in, and this in, and this in," which he really does not need in.

Mr. Youngquist. I should very much prefer to see it submitted in the first instance in the form in which it now is. We shall get plenty of suggestions about it.

The Chairman. May I just observe this: Another indirect advantage in this plan is that when they read appellant's brief and they have a reasonably short excerpt from the testimony accompanying that brief there is a much greater chance that they will read the testimony than that that they will if they have a big, fat book. I mean I have always been impressed by that fact. I knew a man once who was a victim of that. He spent literally five months preparing a narrative for the Third Circuit Court of Appeals. Some months afterward, having lost his office copy, he went down to see if he could borrow one from the clerk, and they could not find it anywhere, but finally a bright young lady in the office said, "Oh, I know where they are," and they found all the extra copies of the narrative still in the original package. The case had been decided by the court without any member of the court having a copy of the record before him.

Mr. Wechsler. The narrative is out in this, is it not?

The Chairman. Yes, but I cite it from the fact that the very size of a volume of testimony precludes the court from even opening it.

Mr. Wechsler. I may have been corrupted, Mr. Chairman, by undue practice in the Supreme Court as distinguished from the

courts of appeals, but I have a sense that the record as a unit is important in getting the whole sense of the case.

The Chairman. There is another great advantage if the court, as in at least two of these circuits, reads the briefs in advance and becomes at all familiar with the excerpts of testimony on which you are relying.

Mr. Longsdorf. They all are.

The Chairman. And the argument becomes something rather live and vital, as distinct from the mumbo jumbo of talking to a court that is not aware of the issues until it is informed by counsel, and is then mentally struggling to relate it to its preexisting learning on the subject.

Mr. Holtzoff. In the Fourth Circuit every one of the three judges reads the brief and the appendix before argument; whereas it would not be so easy to do that if you have a good-sized record.

Mr. Medalie. May I ask a couple of questions?

The Chairman. Surely.

Mr. Medalie. First: Where the appellant in a criminal case sets forth an insufficient amount of the record, that puts on the Department of Justice the expense of doing a considerable amount of printing. It is prepared to do that, is it?

Mr. Holtzoff. It will have to be.

Mr. Medalie. I know it will have to be, but is it prepared to do it?

Mr. Holtzoff. Oh, yes, because it does it in civil cases now.

Mr. Medalie. Yes. All right.

Now, what is the idea of costs on appeal in criminal cases?

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Mr. Holtzoff. Well, I guess that provision would be in effect if I would--

Mr. Medalie. Let us take it out.

Mr. Wechsler. Is there not a statutory provision on costs in criminal cases?

Mr. Holtzoff. Oh, yes, but I suppose what Mr. Medalie means is that you could very rarely collect the costs.

Mr. Medalie. I never saw a judgment for costs in a criminal case.

Mr. Holtzoff. Oh, yes.

Mr. Seth. Is there not a rule in all circuit courts of appeals that they shall assess costs neither for or against the United States?

Mr. Youngquist. I did not get Mr. Seth's question.

Mr. Seth. I say, is there not a rule of the Supreme Court and the circuit court of appeals that no costs are assessed where the United States is a party?

Mr. Seasongood. Yes.

Mr. Holtzoff. No, but you are speaking of costs against the defendant.

Mr. Seth. On appeal.

Mr. Medalie. Yes, and what good does it do to assess costs against the Government when you cannot collect them?

Mr. Longsdorf. Or against a defendant who hasn't anything?

Mr. Youngquist. Well, is there any provision for assessment of costs?

Mr. Burns. Yes.

Mr. Youngquist. Against the Government?

Mr. Burns. No.

Mr. Youngquist. I mean in this rule.

Mr. Robinson. None.

Mr. Medalie. Only against the appellant.

The Chairman. That is right.

Mr. Medalie. And the Government may sin without penalty.

The Chairman. Well, it does have a very real penalty because if it annexes a lot of junk to its brief its chances of having it read by the court in advance of the argument are lessened to that extent.

Mr. Youngquist. And besides, there is this, Mr. Medalie:--

Mr. Burns. Well, is not the implication of dividing costs that you are not going to divide them against joint defendants alone, but you divide them against the parties? And that will run against the established rule that you cannot assess costs against the Government.

Mr. Holtzoff. I thought we could well afford to strike out the costs. That would begin on line 15 and end on line 20. Well, it would mean striking out everything after the word "appellee" in line 15.

The Chairman. To 19?

Mr. Holtzoff. Well, 22.

Mr. Youngquist. Yes, thatall relates to costs.

Mr. Holtzoff. All the rest of the rule, Mr. Chairman.

The Chairman. Oh, I think you need that. I think you have got to have something to hold counsel in line.

Mr. Holtzoff. Actually it is a fact that a judgment for costs against a defendant in a criminal case is very rarely collected.

The Chairman. Yes, but in the cases where they are most likely to sin it is collectible.

Mr. Holtzoff. Oh, yes, that is right.

Mr. Youngquist. This would permit a defendant to throw on the Government the burden of printing the appellant's record. I think it is all right.

The Chairman. The Government might outsmart them. If I represented a defendant I should not feel that I dared to do that. Suppose you had a smart district attorney who said, "All right. We will go up on your little point of the record."

Mr. Youngquist. I should assume that the appellant would print only that which is distinctly favorable to him.

Mr. Holtzoff. I do not think any terrible harm would be done under those circumstances. It would cost the Government a little bit more than it does today.

Mr. Medalie. Have you checked with the Department. Are they willing to do that?

Mr. Holtzoff. I have not checked it with the Department, but I think it is one of those things that they would not oppose, because they have never opposed the civil rule, and they have more civil appeals than they have criminal appeals.

Mr. Medalie. Yes, that is right.

Mr. Youngquist. Did we adopt (b), Mr. Chairman, as amended?

The Chairman. No.

Mr. Medalie. What is the amendment? What is going on? All on costs?

Mr. Youngquist. We struck out "unless ordered by the appellate court".

Mr. Burns. The question comes on the amendment, motion to
11 strike out, then, does it not?

Mr. Youngquist. Oh, I thought the amendment to strike out those words had been adopted.

The Chairman. Yes, at the beginning of line 6.

Mr. Burns. Oh, yes, but we are talking about line 15.

The Chairman. Oh. Well, you press that, Mr. Holtzoff?

Mr. Holtzoff. No, I do not press it. I was just willing to concede that if it was necessary.

Mr. Youngquist. "in specific cases".

The Chairman. All right. Then the motion is to adopt (b) as amended.

Mr. Wechsler. Well, there is one other motion, Mr. Chairman. How about lines 19 to 21? What is the point of "that parts of the record have been printed unnecessarily"? Why should that be in? Why should not a fellow be able to print unnecessarily if he can pay for it?

Mr. Youngquist. That is for the protection of the court.

Mr. Wechsler. But then does that not make it mandatory to reduce the record?

The Chairman. That has been carried into all these different circuits from the Fourth Circuit. The purpose of that, as expressed in the address on the subject by the clerk, is to have a constant reminder to counsel that the court does not want them to print unnecessary stuff: as, for example, printing tremendous exhibits, where all you want to refer to is a line or two in the exhibit, and all that sort of thing.

Mr. Longsdorf. Send up the original.

The Chairman. What?

Mr. Longsdorf. Send up the original exhibit; you don't need to print anything.

Mr. Youngquist. That is what they should do, but they don't always.

Mr. Wechsler. I do not think there ought to be any suggestion that an appellant at his peril must decide precisely what is needed.

Mr. Holtzoff. I think that penalty would be invoked in very extreme cases anyway.

Mr. Youngquist. It is admonitory, I think, more than anything.

Mr. Holtzoff. Yes.

Mr. Youngquist. But I should like to see it in.

Mr. Medalie. Well, have costs been taken out now completely?

The Chairman. No.

Mr. Medalie. You want to leave them in?

The Chairman. I think they should be in.

Mr. Medalie. Leave it in?

Mr. Youngquist. Yes.

Mr. Medalie. What part have you taken out?

The Chairman. We have not taken anything out yet.

Mr. Medalie. Divide costs?

The Chairman. No, we have not touched that.

Mr. Medalie. Can you leave that?

The Chairman. Why not.

Mr. Holtzoff. You cannot divide costs.

Mr. Medalie. How can you divide costs with the Government?

Mr. Youngquist. Well, you can divide costs, but you cannot collect from the Government; that is all.

The Chairman. You divide them. That part is simply uncollectible. That is very often the case in business transactions.

Are there any further questions?

Mr. Wechsler. I move that that sentence beginning on line 19 go out.

The Chairman. The motion is that the sentence beginning "If" on line 19 and ending "require" on line 21 be deleted.

All those in favor say "Aye." Opposed?

Let us have a show of hands. All in favor of the motion raise hands. Five. Opposed? Five. The motion is carried.

Mr. Seasongood. What was the vote?

The Chairman. What was that?

Mr. Seasongood. I say, what was the vote?

The Chairman. Six to five.

Mr. Youngquist. You said five on a side.

Mr. Medalie. What about the special order in each case?

The Chairman. That has been carried already.

Mr. Medalie. Where does it appear?

The Chairman. We strike it out at the beginning of the first five words that come out, and it comes in there as part of the first sentence, "Unless the appellate court shall specifically order otherwise". I thought that was understood.

Mr. Youngquist. I thought we left that with the Reporter.

The Chairman. It was left with the Reporter, yes.

Mr. Holtzoff. The Committee on Style.

Mr. Medalie. No.

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The Chairman. Now, all those in favor of 54 (b) as thus amended, say "Aye." Opposed, "No." Unanimously carried.

Mr. Youngquist. May I merely make a suggestion on 53, Mr. Chairman?

Mr. Longsdorf. On the final report I want to vote no. I was not unanimous on proposing that. I am unanimous on having it considered by somebody.

The Chairman. All right. Then it is not unanimous. It is carried.

Mr. Youngquist. That we strike out the sentence in lines 10 and 11.

The Chairman. On 53?

Mr. Youngquist. 53. "The extension may be granted by the
12 district court pursuant to Rule 42 (b)." That. I pointed that out to Mr. Holtzoff, and he says there is no need for it.

Mr. Holtzoff. Surplusage.

The Chairman. Surplusage. Is that it there?

Mr. Youngquist. Exactly, surplusage.

The Chairman. All those in favor of that motion say "Aye." Opposed, "No." Carried.

Rule 55.

Mr. Burns. I move its adoption.

Mr. Robinson. I second the motion.

Mr. Holtzoff. The words "circuit justice" should be inserted in line 2 after "circuit judge," in line with what we have done before.

Mr. Burns. "or a circuit justice".

Mr. Longsdorf. "the circuit justice" you used the other time.

The Chairman. All those in favor of the motion as thus amended, say "Aye." Opposed, "No." Carried.

Rule 56.

Mr. Holtzoff. I move the adoption of the alternate rule, because the first rule is too detailed and is not suitable to every circuit.

Mr. Burns. I second the motion.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." Carried.

Rule 57.

Mr. Holtzoff. I move its adoption. That is the present rule.

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

Mr. Wechsler. Is that the present language?

The Chairman. Is it the present language, Mr. Holtzoff?

Mr. Holtzoff. I am not sure as to the present phraseology, but it is the present provision. That is what we adopted in New York, Mr. Youngquist. I think it is the present language, but I am not sure. But it is the present substance.

Mr. Wechsler. It is the present substance, yes. Here is the present language:

> "Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within 30 days after the entry of judgment in that court."

Mr. Holtzoff. This seems to be simpler.

Mr. Seasongood. According to this 56 preferably alternate rule, you can give these criminal cases priority over some civil cases. The enforcement of labor relations has special

priority.

Mr. Medalie. Yes.

Mr. Seasongood. And also I think appeals from some other things are to be heard immediately.

Mr. Youngquist. We added to the provision in the trial court. As far as practicable you would have to do that.

Mr. Seasongood. I think you would have to do that, yes, because they have priority too.

The Chairman. If there is no objection that will be ordered here.

Mr. Seasongood. Did you pass 57? because you have to have a provision for extending the time. A justice may extend the time under the law even after the time has expired.

The Chairman. Is there anything in the present rule about that?

Mr. Holtzoff. No, the present rule is silent on the subject.

Mr. Wechsler. It is the statutory time in criminal cases, the time of petition. I feel the justices themselves feel without power to grant under the statute.

Mr. Seasongood. In criminal cases?

Mr. Wechsler. In criminal cases. The criminal appeals rule in opposition is not textually decisive of the point, but I know that in at least two instances a justice felt he was without power.

Mr. Seasongood. I do not see why that should be, because the statute is general for allowance of writs of certiorari, and I think it is in the statute that a justice may extend the time, and he may extend it even after the 90 days has expired,

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because one of them did it to me. Just recently he did.

Mr. Burns. Judge, does that mean that the justices conceive themselves without power even if the application is made before the 90 days expire? Well, I think we ought to do something about that if we have the power.

Mr. Youngquist. That was never the rule in my day.

Mr. Seasongood. I cannot see the difference. It is really one rule of certiorari, no matter what kind of a case.

Mr. Burns. I move, Mr. Chairman, that a (b) be put to 57: in substance, that on application to the Supreme Court for an extension of the time within which certiorari may be filed, a Justice of the Supreme Court may for just cause extend not more than 30 days additional.

Mr. Seasongood. Now, you had better look out for that, because there is some kind of statute on it.

Mr. Youngquist. Yes. Ought we not better first find out what the statute is?

Mr. Seasongood. Let us find out what the statute is.

Mr. Wechsler. Well, the criminal appeal rule is a limitation on the statute. The statutory time is 90 days, but the Court by rule cuts the 90 days to 30 in criminal cases. So that there is not any sense of lack of power individually to extend the time in criminal cases. It is on the ground that the power was recognized by the criminal appeal group. So that Judge Burns is right in making the motion, I think, and it is within the realm of the modification.

Mr. Burns. Modification, and I would think it ought to be to the balance of the period permitted by the statute, which is not more than 60 days. It seems to me 30 days is rather

short. I supplement that motion by saying it be referred to

13 the Reporter to draft appropriate language to bring about that result.

Mr. Youngquist. May I suggest, to dispose of it now, the addition to the same sentence of the words, "but the Court or a justice thereof may for good cause shown extend the time not more than 60 days", did you say? Thirty days, I think, would be better.

Mr. Burns. Not more than 90 days after the entry of judgment.

Mr. Youngquist. Would you want it that long?

Mr. Burns. Yes. That would be a total of 90 days, you see; not 90 days after the 30, but 90 days after the entry of judgment in the lower court.

Mr. Youngquist. Can we not do it by simply saying "not more than 60 days": that is, the extension is not more than 60 days?

Mr. Seasongood. Why do you want to place any limit there? They know the object is to expedite matters. Why not? They may extend the time. Let them fix the time.

Mr. Youngquist. I think that is all right.

Mr. Longsdorf. Mr. Chairman, I did not hear. Perhaps it was made specific, but in line 3 of Rule 57 we have the word "judgment." Of the circuit court of appeals, of course.

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

Mr. Longsdorf. I think probably we do not need it.

Mr. Holtzoff. Yes.

Mr. Longsdorf. But--

Mr. Holtzoff. We purposely made it simple.

Mr. Medalie. What judgment is it?

Mr. Seasongood. There would not be any other.

The Chairman. There couldn't be.

Mr. Longsdorf. There is only one that it could be.

Mr. Dean. Except the judgment which you seek to review.

Mr. Seasongood. You cannot have a petition for certiorari except from the judgment of the court of appeals.

The Chairman. Did we agree on the language? And if so may we have it restated?

Mr. Youngquist. Add in line 3, "but the Court or a justice thereof may for good cause shown extend the time."

Mr. Seasongood. Oh, excuse me.

Mr. Wechsler. I should like to know, Mr. Chairman, on the merits of it, whether there is in this group any experience that leads to the view that such an extension provision is desirable. If the lower court proceeded on the theory that in a criminal case an extension were permissible it would be taken advantage of, and it would be very difficult ever to deny applications for an extension where counsel said he could not get ready. I think the experience has been that counsel who could not get ready always did get ready, so long as the rule was in its present form.

In the absence of some experience indicating that the rule has worked hardship, I should be reluctant to recommend to the Court that it be changed.

I know in some cases at the last term, involving tremendous records, where there very able counsel, I felt it was a real hardship for them to have to come through, but they did, and in good shape.

Mr. Medalie. It takes a long while to prepare some of these records.

Mr. Holtzoff. I agree with Mr. Wechsler on that.

The Chairman. I mean if the Court had felt that something like this was needed, they doubtless would have recommended it.

Mr. Wechsler. It is a thing within their most immediate experience, much more than it is within ours, and they seem to be satisfied with it. It is a thing that I think they would have changed on their own motion if they had felt there was any need for change.

Mr. Youngquist. I am afraid it might work a hardship in a case where it is physically impossible--

Mr. Holtzoff. (Interposing) But it doesn't work hardship.

Mr. Youngquist. --to do what is required in a period of 30 days. We have 90 days for a petition in civil cases. Here we have a third of the time.

Mr. Holtzoff. But, Mr. Youngquist, nobody has ever complained that the rule works hardship today, and they have had this since 1933.

Mr. Wechsler. Well, I always complain before the petition goes to the printer.

Mr. Holtzoff. Yes.

Mr. Youngquist. May I ask this: Has the Court not in any case granted an extension of time for the filing of a petition in a criminal proceeding?

Mr. Wechsler. I can only tell you this: that in the Shushin case at the last term--a large and complicated case--I think counsel had as just reason for asking an extension as counsel ever could have. An application was made to Mr.

Justice Black, who granted it. The Solicitor General's Office did not oppose the extension but felt that it was their duty to call to the attention of Justice Black that there had been a suggestion of lack of power, and upon that he revoked it.

Mr. Burns. Under those circumstances I think I shall press the motion. It seems to me that where the record indicates that counsel opposed and asked for an extension and did not secure it, but nevertheless under great stress was able to file the petition, you have a situation that puts in sharp relief the difference between a civil rule and a criminal rule. After all, this is usually the last step, and 60 days additional that is granted subject to the showing for good cause does not seem to me to be so important as to militate against the chance of one miscarriage of justice where the petition is not able to be procured in time. And then there is a question, that the very language and the attractiveness of a petition to the Court determines very frequently whether or not they are going to grant it, and if you prepare it under stress it is
14 not likely to be so good a document as if you had some reasonable time.

Mr. Holtzoff. Yes, but it would be very difficult for the Court to refuse such an application in a criminal case where the defendant might be under a heavy sentence; whereas, if there was no opportunity to get an extension, lawyers would get together and have their record in.

Mr. Burns. Well, that is like saying, "I can't bear to see him drown; I think I will close my eyes."

Mr. Seasongood. You see, if you are adopting this new rule, the question was raised by Mr. Wechsler about printing

the record for certiorari. Now, you may have complications in printing your record for certiorari which would make 30 days a frightfully difficult thing to do. You have to print your record with your petition, and I do not think you could do it in 30 days in some instances. Presumably the Court is only going to allow it on a showing and for a very short time. However, I will say in this labor relations case the showing was that one of the counsel was on maternity leave.

Mr. Burns. Of course, isn't that a well recognized exception, an act of God?

Mr. Seth. Public enemy.

Mr. Seasongood. I think you ought to give the Court the right to extend the time. You are not to presume that they are going to do anything improper.

Mr. Holtzoff. No.

Mr. Seasongood. They want speed in everything as much as everybody else does, but you do not want somebody hurt.

Mr. Holtzoff. Even if the defendant is on bail, he of course would be very anxious to postpone the evil day, and this would be one way of getting a postponement, and it may be, Mr. Wechsler, that that is one reason why the 90-day period was cut down, to do away with the scandal that existed prior to 1933 of convicted defendants walking the streets for years after sentence had been passed.

Mr. Seasongood. After all, whether you are applying 30 days or 60 days is not so terrific.

Mr. Wechsler. I would be in favor of giving the Court power, if the Court wanted the power, but the situation is a little different than that. I do not think they want it.

Mr. Burns. Should not we make our distinction as to whether it is desirable?

Mr. Wechsler. Yes, I think we should.

Mr. Youngquist. I call for the question.

Mr. Longsdorf. Mr. Chairman, the certiorari rules of the Supreme Court gave an enlarged time to cases coming from the far western states. Is this rule designed to call for that exceptional condition?

Mr. Holtzoff. They do not give that in criminal cases, though, Mr. Longsdorf.

Mr. Longsdorf. Well, they give it in civil cases.

Mr. Holtzoff. Yes.

Mr. Waite. No. Thirty days was just as long as we had to extend the time, if I recall the rule correctly. I am not sure that I do.

Mr. Youngquist. Well, is there any need for that any more, with the transportation that we have?

Mr. Seasongood. We haven't got any.

Mr. Burns. We do not have any. What we had.

Mr. Seasongood. It is wiped out.

The Chairman. Well, now you have the amendment. We had better have it re-read.

Mr. Youngquist. Add after the word "judgment" in line 3, "but the Court or a justice thereof may for good cause shown extend the time." Period.

The Chairman. Period. All those in favor of the amendment say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I have to raise another question in connection with this: The writ of certiorari need not be granted

after final order. I was wrong when I said that before. It can be taken in at any time before decision.

Mr. Longsdorf. Yes, that is correct.

Mr. Seasongood. So you do not want to change that.

Mr. Holtzoff. Well, this is the present rule. I think in criminal cases you only get it from final judgment.

Mr. Seasongood. They have decided that: the certiorari statute now says that the Court may take it at any time in advance of opinion of the court of appeals.

Mr. Holtzoff. That is right.

Mr. Wechsler. The criminal rule does not bar that, because the criminal rule says that it must be within 30 days after judgment. If there is no judgment--

Mr. Seasongood. Now, "within 30 days after judgment" means, to me, the beginning and the terminus are judgment and 30 days thereafter.

Mr. Wechsler. I think the criminal rule only prescribes the end rather than the beginning. At least I think that is true of the existing rule, is it not?

Mr. Longsdorf. "Within" means "not later than".

Mr. Burns. The time begins after the entry of judgment.

Mr. Seasongood. Yes, which is not the rule in certiorari. They may be made if it is certiorari after judgment.

Mr. Holtzoff. That is the rule now.

Mr. Burns. How about "not later than"?

Mr. Seasongood. Yes, that would be all right.

Mr. Holtzoff. "not later than"?

16 Mr. Burns. Yes.

Mr. Seasongood. Yes, that is better.

g50

The Chairman. If there is no objection that change will be made.

I believe lunch is awaiting us across the hall.

Mr. Burns. I think we probably could take Rule 58?

The Chairman. You know, it is these little rules that get us in trouble. Let us let it wait.

(Thereupon, at 1:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

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AFTERNOON SESSION (2 p.m.)

(The Committee convened before the appointed time and in the absence of the shorthand reporter.)

The Chairman. Mr. Stenographer, will you note that we have adopted Rule 58, inserting after the word "appeals" in line 1, the words "relating to criminal appeals"; and that we have adopted Rule 59, striking the first word "These" and inserting after the word "Rules" "45 to 49 shall".

Mr. Longsdorf. Not 49.

The Chairman. "45 to 59 shall".

And at the end of line 4 add these words "trict courts of the United States and".

I don't think that we have had a vote on this particular rule yet.

All those in favor of Rule 59 as thus amended say "Aye." Opposed, "No."

Carried.

Rule 60.

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

Carried.

Mr. Wechsler. Mr. Chairman, again on Rule 49, "Appeal from a District Court to the Supreme Court."

This rule makes provision for appeals by the Government. I think there are some cases in which the defendant has direct appeal, and that has to be checked. We cannot find Title 18 to check it with. It ought not to be regarded as passed without checking that question.

Mr. Holtzoff. I do not recall a situation in which a

defendant can appeal direct to the Supreme Court.

Mr. Wechsler. There was such an appeal in capital cases. I don't remember whether it was repealed or not.

Mr. Holtzoff. Oh, no, it does not exist any more.

The Chairman. Well, we should have that checked.

Now, we have had it distributed. Did we vote on 60--yes.

Now do you want to run over the forms, gentlemen, of which we have three here?

Any suggestion on Form 1?

Mr. Robinson. This is a form that was taken out by the Committee on Style.

We took a form and cut it down to what seemed to them to be comparable to the civil forms so far as reductions are possible in needless words, and Form 1 you see is the indictment form; 2 the information form; 3 the complaint.

Form 3 of course is subject to change in view of the discussion in the Committee, principally by Mr. Medalie, yesterday.

But Form 1 and Form 2 are offered as specimens of what the Committee on Style thinks would be useful as forms in the respective proceedings.

The Chairman. Any suggestion on Form 1?

Mr. Longsdorf. You say "in which it was charged". Is "charged" as good a word there as we could get?

Mr. Robinson. This is just the words of the actual indictment. We did not change the words.

Mr. Longsdorf. The law does recite it. I guess it is all right.

Mr. Dean. We did change this considerably, didn't we?

Mr. Robinson. Yes, this is the result of considerable

change. The way you can tell the change, you can look in Tentative Draft 2 and at the Appendix of Forms that was distributed with the previous draft, and you will see just what words have been stricken out.

Mr. Holtzoff. I don't suppose, Mr. Chairman, it is necessary for us to take a vote on forms, because they are supposed to be only illustrative anyway. We struck out the provision, "they shall be sufficient."

Mr. Youngquist. We ought to know what is in them.

Mr. Holtzoff. Yes.

Mr. Dean. Did you strike that out this meeting, "they shall be deemed sufficient"?

Mr. Holtzoff. They shall be illustrative.

Mr. Dean. I will not renew my previous arguments. I think it is useless.

The Chairman. It isn't as bad as it sounds with that naked explanation.

Now, we have certain revised rules here, gentlemen.

Suppose we take them up in numerical order.

The first is 5.

Mr. Robinson. There are two that have "5" on them.

The one which is the result of the work of this subcommittee last night and perhaps yesterday morning is the one which contains the three sections, (a), (b), and (c).

Another one marked "5" apparently was dictated by some member of the committee to show only what should be in (b), 5 (b).

You may compare the two (b)'s and see which one you prefer.

Mr. Holtzoff. Does that mean we can get only this half sheet?

Mr. Robinson. No; I am just saying you can compare them.

Mr. Holtzoff. I think this was a mistake.

Mr. Youngquist. No, it is not a mistake. You have in lead pencil 5 (a).

Mr. Robinson. 5 here as we have it is the lead pencil typed.

Mr. Youngquist. As we have it where?

Mr. Robinson. In this draft.

Mr. Holtzoff. This 5 is the one we agreed upon in the subcommittee last night.

Mr. Youngquist. Yes.

2 Mr. Holtzoff. I think this is a mistake. This should not have been distributed. This is a preliminary draft.

Mr. Robinson. I don't know where it came from.

Mr. Holtzoff. I think it should be collected up and not distributed.

Mr. Robinson. You mean this one with the blank at the top?

Mr. Holtzoff. Yes.

Mr. Longsdorf. The (b) which appears on the sheet with the other two is the one?

Mr. Holtzoff. That is right.

The Chairman. All right. Now may we proceed with 5 (a)?

Mr. Waite. I question in 5 (a) whether we should absolutely require the person making the arrest shall file the complaint.

It may be that the person making an arrest is acting in

an official capacity under a request from somebody else.

I wonder if it should not be "If the arrest is made without a warrant the person making the arrest, or some other person having knowledge of the facts, shall file a complaint"?

Mr. Robinson. That was discussed, Mr. Waite, in substance, and we decided to leave it pretty brief in this way.

Mr. Waite. The trouble now is it requires the person making the arrest to file it and it is possible he cannot make the complaint and somebody else could.

Mr. Robinson. That was stricken out by the Committee in 9, 10, and 11, "if it is impossible for the person making the arrest, he may delegate these duties to someone else".

Mr. Holtzoff. The person making the arrest would not have the right to make a complaint unless, of course, he could do it on information and belief.

Unless he is in position to make a complaint he has no legal right to make an arrest.

Mr. Waite. But it does not seem that he should have the right when the one instigating the arrest is present.

So I would like to have inserted, "or some other person having knowledge of the facts", to be inserted in line 7.

Mr. Robinson. That is all right.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Holtzoff. I move the adoption of (a) as just amended.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Wechsler. Mr. Chairman, may I move an amendment to (a) which does not change its existing shape but adds a sentence to it?

It is the point of the motion of mine that was tabled earlier, that there be added to 5 (a), "No statement made by defendant in response to interrogation by an officer or agent of the Government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

Mr. Burns. I second the rule.

The Chairman. Where would that be inserted?

Mr. Wechsler. Right here (indicating).

The Chairman. At the end of (a)?

Mr. Wechsler. Yes.

Mr. Waite. Will you read that again, please?

Mr. Wechsler. It is the same language that was distributed. It is the first part of that proposal, the second part of which was accepted by the Committee and the first part tabled.

Mr. Youngquist. It was then designated "5 (c)."

Mr. Wechsler. That is right, but I think it ought to be a part of this rule rather than 5 (c) because it is a sanction to enforce this rule.

Do you want me to read it again, Mr. Waite?

Mr. Waite. No. I see I have it here.

The Chairman. Any discussion on the motion?

If not, all those in favor of it say "Aye." Opposed, "No."

I call for a show of hands. All in favor raise their

hands. One, two, three, four, five, six.

Opposed? One, two, three, four, five, six--

Mr. Youngquist. Did Mr. Robinson vote?

Mr. Holtzoff. Yes.

The Chairman. I was busy writing out another motion. I haven't the slightest idea what this was.

Mr. Robinson. I would like to ask Mr. Wechsler, how does that differ?

The Chairman. Would you read it again, Mr. Wechsler?

Mr. Wechsler. Yes. It is intended as a sanction to enforce the duty to bring an arrest person before a magistrate.

That duty has been considerably relaxed by the amended 5 (a).

The language of it is that "No statement made by defendant in response to interrogation by an officer or agent of the Government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

I would like to say, since the vote is so close in support of this, what its precise scope is.

It does not include voluntary statements made by the defendant at any time; that is to say, statements which are not made in response to interrogation by an officer or agent of the Government. It does not exclude statements of a defendant in response to interrogation by someone other than an agent of the Government, no matter when that interrogation occurs.

Third, it does not exclude statements made in response to interrogations by agents of the Government if there is no violation of the duty to bring him before a magistrate.

g8

He may be interrogated on the way to take him over to the magistrate; he may be interrogated while he is held overnight in cases where, under Rule 5 (a), it would be permissible to hold him overnight; but what it would exclude is extensive interrogation before a man is taken before a magistrate; and those are the cases, precisely, where the real abuses occur.

Mr. Dean. I don't see how you could sanction a statement made in response to questions by an agent when they are made in violation of this provision.

The Chairman. I vote in favor of the motion, to break the tie.

Now we go on to 5 (b).

Mr. Holtzoff. I move the adoption of 5 (b).

Mr. Burns. I second the motion.

The Chairman. Any remarks? If not, those in favor say "Aye." Opposed, "No."

Carried.

5 (c).

Mr. Medalie. There has been an omission here that I thought we approved yesterday morning, and that is admitting to bail pending examination.

Mr. Holtzoff. It is in here. It is line 19. We put that in.

Mr. Youngquist. Line 15.

Mr. Holtzoff. At line 15.

Mr. Youngquist. "may admit him to bail."

Mr. Medalie. Yes. All right.

The Chairman. 5 (c).

Mr. Holtzoff. I move the adoption of 5 (c).

Mr. Burns. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

We now turn to the revision of Rule 6.

Mr. Medalie. I think we left something out of 5. Didn't we agree that we would provide for examination of witnesses by the Government even if the defendant waived?

Mr. Youngquist. Last evening while we were working over this rule--Mr. Holtzoff, Mr. Robinson, Mr. Dean, Mr. Dession, and I--we came to that provision.

The vote as I recall it was a fairly close one. Both Mr. Dession and I had voted for it.

We both came to the conclusion that we should have voted the other way and decided to recommend to the Advisory Committee that the provision be not included.

Mr. Medalie. I am satisfied.

Mr. Waite. What provision is that?

Mr. Youngquist. That is giving the Government a right to conduct their preliminary examination even though the defendant waives the preliminary examination.

Mr. Dean. The decision I think was based on the fact, largely, that we could not think of any illustrations where the Government would want to do it or where it presented any problems because they could not.

Mr. Waite. I think a better way, anyway, would be to give some official power to examine under oath witnesses.

Mr. Dean. Some provision for the preservation of testimony on a showing where it would be otherwise lost.

g10

The Chairman. Have you any other motion?

Mr. Medalie. No.

The Chairman. 6 (a).

Mr. Wechsler. Mr. Chairman, I would like to ask why--

Mr. Youngquist. Just a moment.

We passed on all of (6) except 6 (d).

Mr. Holtzoff. Oh, yes. I am sorry.

Mr. Youngquist. It was only 6 (d) that was to be revised.

Mr. Holtzoff. Yes.

The Chairman. (b) was to be revised, wasn't it? "Justification of Sureties"?

Mr. Youngquist. (c) as it originally appeared was stricken entirely, so that (d) becomes (c) and has been rewritten.

And I would like to call the Reporter's attention to the fact that in rewriting (a) some of the changes that were made yesterday were not shown.

(a), I think it is.

Mr. Holtzoff. Well, the way this is recopied is before our revision of yesterday's meeting.

Mr. Youngquist. We should strike out 6 (a) in the new draft because that is different from the one we adopted yesterday and we already have our notes of the change.

Mr. Holtzoff. We adopted it finally. We did not omit that.

The Chairman. The question is on 6 (b).

Mr. Youngquist. 6 (b). There was no revision to be made in that. That too can be stricken.

The Chairman. 6 (c).

gll

Mr. Wechsler. Mr. Chairman, under the rule there are two provisions in the Code that I know about, specifically dealing with appeal sections 596 and 597 of Title 18.

Section 596 is a general provision.

Section 597 is a special bail provision for capital cases. It allows bail in capital cases but provides that it may be taken only by the Supreme Court, district court, justice of the Supreme Court, and circuit judge or judge of the district court, who shall have discretion.

I am wondering whether 596 and 597 should not be made a part of this rule.

I am wondering further whether we have not modified 597 by our previous rule, inasmuch as we have authorized commissioners to take bail.

4 Mr. Holtzoff. Mr. Wechsler, you will recall that we referred in our provisions relating to admission to bail--we use the words "as modified by law," do we not?

Mr. Wechsler. No.

Mr. Youngquist. Not always.

Mr. Holtzoff. Well, I think we always should in order to incorporate existing law on the subject.

Mr. Wechsler. I don't think we should.

I think we should take existing law if we don't want to change it. It seems to me a foolish thing to leave on the books a couple of provisions as to when bail can be had, which is a really important thing, and putting in the rule only procedure relating to getting it.

The provisions are not complicated and I make those suggestions that the existing law be changed.

My suggestion is that they be embodied in the rule.

The Chairman. Your motion is that we embody in appropriate sections the existing law now when bail may be had?

Mr. Wechsler. Yes.

Mr. Burns. Doesn't that involve the rule permitting magistrates to fix bail?

Mr. Dean. It does.

Mr. Burns. Well, I am in favor of having magistrates fix bail.

Mr. Wechsler. I had not thought about the substance.

Mr. Holtzoff. Under existing law the magistrates fix bail in the ordinary run of cases.

Mr. Wechsler. But not in capital cases.

Mr. Longsdorf. Those statutes referred to by Mr. Wechsler I think are substantive law, inasmuch as they give the right to be admitted to bail, and, of course, our rules would only take up the procedure on part of them.

Mr. Holtzoff. I don't think that is substantive law. I think that is part of the procedure in the case.

Whether an offense is bailable or not, I don't think is substantive law; do you?

Mr. Medalie. Yes.

Mr. Holtzoff. I should think that was procedural.

Mr. Waite. The Constitution makes certain offenses bailable.

Mr. Wechsler. Well, I do not call that substantive.

Mr. Waite. I call that substantive.

Mr. Holtzoff. Most of the provisions of the bail rights are procedural.

Mr. Youngquist. I should think that bail was procedural.

The Chairman. Was Professor Wechsler's motion seconded?

Mr. Holtzoff. I second it.

Mr. Wechsler. It seems to me the title of Rule 6 has the essence of propriety.

It ought to be in Rule 6.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

The matter is to be referred to the Committee on Style.

Mr. Holtzoff. With power to act.

Mr. Youngquist. All you need to do is to say, "Defendant may be admitted to bail as provided by law."

Mr. Robinson. Let us do it now.

The Chairman. That is not what is wanted.

Mr. Wechsler. My motion is that the law be put in the rule. I made no motion that the law be changed.

The Chairman. The motion is to incorporate in appropriate sections the existing statute law.

Mr. Waite. Mr. Chairman, if you get back to 6 (b), I think you said what you did not mean, 6 (b) as it is stated in this new draft is the way it was adopted and approved before.

Mr. Seasongood. No, it is not.

The Chairman. I understand not. As adopted it is set forth in the original draft as modified, which struck out several lines.

Mr. Waite. All right.

Then we also add this provision. I had in my notes that we added a provision for no bond or undertaking unless the

surety seems to be qualified.

The Chairman. It was as adopted in the old draft.

Mr. Waite. All right. I just wanted to make clear that point.

The Chairman. Now we come to (c) in the revised form.

Mr. Waite. That is just as we approved it, isn't it, in the other later rate?

Mr. Robinson. That is right.

Mr. Seth. I move its adoption.

Mr. Waite. Seconded.

The Chairman. All those in favor say "Aye." Opposed, "No."

Carried.

Now we proceed to the revision of Rule 19 (b).

Mr. Wechsler. Mr. Chairman, may I ask a question about 19 (b)?

The Chairman. Surely.

Mr. Wechsler. The question is, how is it envisaged that this rule would apply, if it would apply, to cases including charges of continuing offenses, such as conspiracy, scheme to defraud?

Mr. Holtzoff. I don't think it would apply to the type of offense.

Mr. Dean. It certainly should not apply to the type of offense.

If it is not made clear enough I think we should make it clear.

The Chairman. Well, isn't it clear that it relates solely to the type of evidence that is definitely located in time and

place?

Mr. Waite. That is about all you have an alibi on.

Mr. Youngquist. Yes.

Mr. Medalie. This is a very ineffective provision.

What prosecutors are interested in is getting the names of the witnesses.

Mr. Robinson. There is very serious opposition to that requirement, of course, Mr. Medalie.

Your New York statute has that requirement,hasn't it?

Mr. Medalie. Yes.

Mr. Robinson. And that is the source of opposition to it.

It was the feeling of the committee--that was the work of the subcommittee last night, I believe--Mr. Dean, Mr. Youngquist, Mr. Holtzoff, and I, I believe, were appointed to consider it--to just leave it as we examined it yesterday and amended it, not requiring names.

Mr. Holtzoff. After all, the purpose of alibi is to give the Government an opportunity to investigate the fake alibi or to prepare to meet it.

It does seem to me that perhaps it might be asking too much of the defendant to give the names of his witnesses.

Mr. Medalie. They do in all of the alibi statutes I know of. Don't they?

Mr. Holtzoff. No.

Mr. Medalie. The New York one does.

Suppose you are charged with a particular time and place and the notice said you were on the Brooklyn Bridge--

Mr. Holtzoff. Another thing is this: It might be unwise for the Government to disclose its witnesses, because an

unscrupulous defendant might obstruct the witness from being produced at the trial.

Mr. Dean. I think it is important also, Mr. Medalie, to know what witnesses you may call.

Mr. Medalie. It is. That is one of the objections to the whole procedure. And if it is to have any value, they want the names of the witnesses where there are witnesses.

Mr. Dean. Would you be precluded from using a witness if you did not specify in your notice?

Mr. Robinson. It was thought the parties might get together and exchange further information, but I will go along on this draft on the point--of course, Mr. Medalie, if you ask for witnesses you do have opposition from those who claim you thereby force the defendant to disclose his case.

Mr. Medalie. You say there are 13 alibi states?

Mr. Robinson. Fourteen.

Mr. Medalie. How many have the witness requirement?

Mr. Robinson. I think I can give the answer now if you want to wait.

Mr. Burns. If the defendant has sought to make the Government particularize as to the time and place of offense, he may invoke this rule, and then, when the Government has complied with it, he may then rest and refuse to tell the Government. And the only way he could be taken care of would be in the sentence.

Mr. Dean. I think that is a definite possibility that might happen.

Mr. Robinson. It was not possible under the one that this supersedes.

Mr. Holtzoff. No, but there is another section.

If defendant does not serve notice, Mr. Burns, then he would not be allowed to introduce evidence unless he shows good cause.

Mr. Burns. Why not?

Mr. Dean. Mr. Holtzoff, he has already asked the court for the order. He has gotten the order. He has gotten the Government's information.

Judge Burns is talking about where, at that point, the defendant does not give the Government the information.

Mr. Holtzoff. If he files at the time--

Mr. Youngquist. He makes the motion but he does not carry through.

Mr. Dean. It is a loophole.

Mr. Youngquist. That should be closed.

Mr. Holtzoff. It should be closed.

Mr. Waite. Why isn't he entitled to know what time and place?

Mr. Burns. He is, but I am assuming he has been turned down on a bill of particulars, which is not uncommon.

I am not saying it is a loophole which is not desirable.

Mr. Dean. I think the defendant will pay quite a penalty if he should pull that stunt.

Mr. Burns. Oh, yes. He would have to be fairly desperate to make the representation that "I am going through with this alibi procedure."

Mr. Holtzoff. What penalty would he pay?

Mr. Dean. I think he would pay about a year more.

Mr. Holtzoff. I don't think the judge ought to penalize

him for the tactics of his counsel.

The Chairman. He is very likely to, however.

Mr. Wechsler. What is the consequence if the proof does not conform to the specification?

Mr. Dean. The Government's proof?

Mr. Wechsler. Each side.

Mr. Robinson. In an Ohio case where they did not conform to the proof he was sent to the penitentiary for several extra years.

He has perjured himself.

Mr. Burns. If you are going to look upon it as analogous to a bill of particulars--I don't think there is any sense in proceeding on any other basis--

Mr. Youngquist. I think it is binding on the Government as to the time and place.

Mr. Burns. I think it ought to be binding on the defendant too.

Mr. Holtzoff. I think we ought to amend line 35, and I so move, so as to insert, after the word "rule" in line 35, "or if he fails to give the notice"--or, "if he fails to give such notice"--or, "such indication", that should be.

Mr. Dean. That does not meet it.

Mr. Robinson. I made a draft this morning that I thought you could add.

Would you be willing to have your draft amended to provide that at the time the Government gives the defendant specification as to time and place, then the defendant in turn shall give the Government specific time and place?

Mr. Dean. If you feel that is necessary, I have no objec-

tion to putting it in. I didn't think it was necessary.

Mr. Youngquist. It says "shall".

Mr. Robinson. "at the same time". I don't think the Government should give its information one day and the defendant never give his information.

Mr. Holtzoff. I think the Government has to claim the particular time and place he was.

Mr. Youngquist. If you simply say, "he shall promptly specify as exactly as possible"--

Mr. Holtzoff. You couldn't have it simultaneously.

Mr. Robinson. It could be substantially at the same time.

Mr. Holtzoff. No. The Government says the crime was committed at such and such a time--

Mr. Robinson. But you are approving, I think, that it

6 requires something in the nature of pre-trial conference.

Mr. Waite. The defendant has to have time to figure out where it would have been nice for him to be at that time.

Mr. Longsdorf. If one specifies where he was, he cannot specify anything else, or, is afraid to.

Mr. Wechsler. Then he cannot give evidence.

Mr. Burns. I suggest, following Mr. Holtzoff's indication, that you insert a clause somewhat like this after the word "rule" on line 35, "or if he fails without good cause to specify the place where he proposes to prove that he was at the time specified by the Government".

That takes care of the point I raised.

Now, on the point of being bound by the specification, the clause should be added: "At the trial neither the Government nor the defendant shall be permitted without a showing of good

cause to controvert the specifications which they have filed pursuant to this rule."

Mr. Dean. I second both of those motions.

The Chairman. You have heard the motion Any discussion? If not, all those in favor say "Aye." Opposed, "No." Carried.

Mr. Wechsler. Shouldn't there be a similar modification on line 40, that if defendant fails to make the motion or fails to specify, he has got to show cause why?

It does not say that if he fails to show good cause the court may exclude the evidence.

Mr. Burns. I think that should follow.

Mr. Wechsler. So there should be something in there to say that unless good cause is shown, the evidence should be excluded.

The Chairman. What line do you suggest?

Mr. Seasongood. I am not sure it should be excluded, because you raise a constitutional question.

Mr. Wechsler. "may be excluded".

Mr. Seasongood. I mean, ought you go that far, or don't you raise, unnecessarily, constitutional questions?

Mr. Holtzoff. I don't think there is any constitutional prohibition against requiring a defendant to give notice of evidence that he is going to offer.

Mr. Dean. Well, it is partly cured by this draft because it starts out, "If the defendant proposes to offer evidence". Then he makes the first move.

If we need a waiver, I think this draft contains it.

Mr. Burns. And it carries with it, I think, the implication

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that if he does not make a good case, then it shall not be admitted.

Mr. Dean. That is what was intended, that it should be excluded if he did not meet the condition without good cause.

The Chairman. Now, is there a motion on this last point?

Mr. Wechsler. Well, I think Mr. Dean is right, that the reference to a condition meets it substantially.

I would prefer, as a matter of drafting, to have it read, "The court may require him to show cause why he did not make the motion and, unless good cause is shown, may exclude the evidence."

Which would put it beyond peradventure of doubt that the court has the power of excluding. But I think it would mean the same thing, wouldn't it?

Mr. Burns. I think so. I have no objection.

Mr. Dean. I have no objection either but I think this contains it.

Mr. Youngquist. The second point, the last point you made, Mr. Burns, to make the condition rest not only upon the making of the motion but to giving specification, should be taken care of by inserting in line 39 the words "or give the specification". That would meet the case where he does make the motion but fails to specify.

Mr. Burns. Yes. You might make that the first point.

Mr. Holtzoff. That should be in addition to the insertion on line 35?

Mr. Youngquist. Yes. You see, the first one, line 35, gives the case--is the preliminary statement. That is, if he does not make the motion or give the specification but then at

the trial he offers the evidence, the court may require as a condition that he show cause why he did not make the motion.

And here we insert "or give the specification", to make the thing complete.

Mr. Burns. I think that is right.

The Chairman. Do you make the motion?

Mr. Youngquist. Yes.

Mr. Dean. It seems to me you have a pretty good statement of the matter as it appears here without the necessity of something which might possibly result in more confusion.

Mr. Burns. Well, the court right now, I would say, is not empowered to exclude alibi testimony which is offered by a defendant who has gone through the motions of saying he is going to offer an alibi and then stops in the middle.

So that rule should be fixed up on that point.

Now, there is nothing in the present law which permits a judge to exclude evidence offered by a defendant in contravention of the specification which you give pursuant to this rule, so, in order to make it certain "the specification" are words of limitation and in effect part of the pleadings of the parties, we have to add that second provision.

Mr. Dean. As well as the provision limiting the Government.

Mr. Burns. That is right.

Mr. Seasongood. Does the Committee have any time in mind when this should be done? Do they mean it can be done at any time?

Mr. Robinson. Mr. Dean?

Mr. Dean. I think it is very difficult to specify time in

advance. You may not know. I was afraid of a 3, 4, 5, or 6-

7 day period before trial. You can be sure, if the defendant proposes to take advantage of this, he makes it early, because by it he gets the time and place from the Government.

Mr. Burke. What other advantages does he have in this rule up to that point? Isn't he entitled to it anyhow?

Mr. Youngquist. I don't think there is any. But I think a specification of time and place is very important in view of the rulings permitting proof of a different time and place in the allegation, and of a wide area as to place,--

Mr. Burns. It is a limitation of the Government, a definite time and place, which is a great advantage, but I think we should approach this from the viewpoint that this fundamentally was considered as a way of meeting a difficulty from the prosecution's point of view.

Mr. Wechsler. What happens in a case like this:

A bank robbery is charged. There are multiple defendants.

The indictment is drafted in the usual form charging that A and B at this time and place robbed a bank.

The actual purpose of the Government with respect to C is not to prove that he was there at all.

They are going to prove that he was a party to a conspiracy to rob the bank, some time before the robbery, attempt to hold him responsible as a conspirator. But under the existing law the indictment may not indict him, and ordinarily does not indict him.

Now, the basis of the conspiracy charge is that the three men met at a certain place and planned the robbery.

The defendant, if he knew where it was that the Government

claimed he met and joined with the co-defendants, might believe that he had evidence of an alibi.

He does not know that, and the only notice he has is that it is charged that the robbery occurred at a particular place.

Mr. Burns. Well, I would imagine the district attorneys in following this rule would be just as vague as the court would permit, so it is not likely that this will work very advantageously to the defendant.

Mr. Dean. On the other hand it is impractical to say that we shall specify exactly the time and place, because that won't work.

It is very hard to fix your standard of specification.

Mr. Wechsler. In the case I put would the defendant have to make any motion?

Mr. Dean. I would think not.

Mr. Wechsler. He does not know he is charged as a conspirator.

Mr. Dean. Let us assume he is an accessory before the fact.

The time and place is really the bank robbery, as alleged in the indictment.

Mr. Wechsler. That is right. And it is absolutely irrelevant so far as the defendant is concerned, but he would attempt to prove that he was not at that place. That would be his case.

He would make the motion and then he would get a specification from the Government. What kind of a specification would he get from the Government?

Mr. Burns. If he were indicted as an accessory?

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Mr. Wechsler. He is not, though.

Mr. Dean. If that is the Government's theory of the prosecution, it seems to me in the Government's specification they would be compelled to indicate that his participation was as an accessory and that therefore the time and place as to him was prior to the bank robbery.

Mr. Wechsler. So that he would gain something.

Mr. Dean. He may. Otherwise I don't think that would be a very practical disclosure.

Mr. Burns. You should not take away the power of the Government to keep him in the dark.

There are all kinds of strategy in the criminal game of getting behind the bars or staying out.

Mr. Wechsler. I am wondering--the important thing to the defendant there is to know the time when and the place where the Government charges he became an accomplice to the crime.

Mr. Dean. The Government will attempt to prove, rather than "charges".

Mr. Wechsler. Yes.

Mr. Youngquist. Well, Mr. Wechsler, you are speaking of a man who was not present at the place of the commission of the offense.

Mr. Wechsler. That is my case.

Mr. Youngquist. That would not have any application at all, would it?

Mr. Wechsler. We are debating that, and Judge Burns thinks it would, and I think he is right. He is going to prove that he was not present at the bank. He does not know whether he is charged as accessory or principal.

He makes a motion. Then the point is, what would the Government do?

Should the Government specify only where the bank robbery occurred?

Mr. Burns. Wouldn't the Government do nothing and permit him to establish his alibi?

The Government will say, "We won't answer."

This is a condition for restricting the privilege of alibi defenses.

Now, if the Government determines not to go along, it merely means that the limitations of this rule do not apply and the defendant is exactly as he was if this rule were not in effect.

Mr. Wechsler. You say that, but the rule says, "the defendant shall apply for an order," and I assume an order is something for the Government.

Mr. Burns. That is right, but what are the sanctions if the Government does not comply with the order?

Mr. Wechsler. Well, there are none provided, unless it would be contempt.

Mr. Youngquist. I don't think you need to worry about that, because if the court requires the Government to do it, it will be done.

I call for the question, Mr. Chairman.

The Chairman. Question.

Mr. Youngquist. Question.

The Chairman. Call for the question on the motion as amended. All those in favor of the rule as amended say "Aye."

8 Opposed, "No." Carried.

Mr. Longsdorf. May we have a complete redraft of it?

The Chairman. Surely.

Mr. Dean. If it is any help about the question of continuing conspiracy and situations of that type, it might conceivably be wise to make a reference in the footnote.

Mr. Youngquist. Yes.

The Chairman. We have a telegram from Judge Crane in which he reg rets his inability to be here by reason of illness, but he makes a suggestion as to Rule 25 (b) that I would like to call to the attention of the Committee.

The question is whether in a capital case, even by stipulation, there should be a jury of less than twelve.

Mr. Holtzoff. I think Judge Crane must have in mind a very old New York case where it was held that in a capital case the defendant may not waive jury trial or consent to be tried by a jury of less than twelve.

In that case one of the jurors either died or became incapacitated in the course of the trial.

The defendant consented to go on with eleven jurors.

He was sentenced to death, and the conviction was reversed.

Now, that case has been disapproved, as I recall it, in many other states, and it was also, if I mistake not, disapproved by the Supreme Court of the United States.

Mr. Medalie. It is a different rule.

The federal courts consider that procedural.

Mr. Waite. It was disapproved.

The Chairman. Now may we turn to Rule 35?

Mr. Medalie. Will you please strike out subdivision (c)?

The Chairman. On the redraft?

Mr. Medalie. Yes.

The Chairman. With pleasure. We will strike out all we can.

35 (a). Any questions there?

Mr. Medalie. That was approved yesterday.

The Chairman. That was approved yesterday. All right.

35 (b).

Mr. Medalie. That is the part that is done over and includes the original of (c).

Mr. Holtzoff. Mr. Medalie, is it necessary to limit it to an order to show cause? It is notice, you know--

Mr. Medalie. The notice must really come from the court. The individual cannot start this.

Mr. Holtzoff. All right.

Mr. Longsdorf. Mr. Chairman, I see what I deem to be a slight verbal error there in line 7: "in an action" I think should be "in any action".

Mr. Medalie. It doesn't make any difference, does it?

Mr. Longsdorf. It might not, but I think it is stronger.

Mr. Wechsler. Why shouldn't those words go out, "in an action or proceeding"?

Mr. Longsdorf. Yes, I agree to that.

Mr. Medalie. All right.

Mr. Burns. How about "an attorney especially assigned therefor" instead of "an attorney assigned thereto"?

Mr. Medalie. That is all right. I don't think it makes any difference. You want "especially", do you?

Mr. Burns. Yes. It emphasizes the fact that the private individual, an attorney on his own motion, cannot--

Mr. Youngquist. He would not be assigned.

Mr. Medalie. He cannot do it unless he is assigned.

Mr. Youngquist. "assigned thereto" I think is the correct statement.

Mr. Holtzoff. I move the adoption of this.

Mr. Youngquist. Just a moment.

Mr. Holtzoff. All right.

Mr. Burns. You have the McGovern case in, Mr. Medalie?

Mr. Medalie. Yes.

Mr. Youngquist. "such" in line 8, and, paraphrasing, "such notice constituting the time and place of hearing shall be given by information filed by the United States attorney".

I think there should be a provision, Mr. Medalie, for the service of the notice.

Mr. Robinson. In all cases, other than the one where it was given by the court in open court.

Mr. Holtzoff. Well, you don't serve the information, do you?

Mr. Youngquist. No, no. That is the point. I say there should be service of the notice.

Mr. Wechsler. What happens now where an information is filed? Doesn't an order to show cause issue based on the information, and the defendant have a chance to answer?

Mr. Seasongood. Yes.

Mr. Youngquist. If you said in line 8, "prosecuted on notice served on the person charged", that would take care of all of those things.

In the next you specify what constitutes the notice, the order to show cause, the information.

Would that do it, Mr. Medalie?

The Chairman. There seems to be some gap here, doesn't there? "Notice * * * shall be given by order to show cause, information filed by the United States attorney or an attorney assigned thereto".

Mr. Burns. Should it read "by an order to show cause based upon an order of the court, information filed by the United States attorney"--

Mr. Holtzoff. The order to show cause is an order of court. It is the order of court which gives him the right--

Mr. Burns. Yes, but it is an order for notice.

Mr. Holtzoff. You don't give notice by information.

Mr. Medalie. No, there must be a document transmitting the information.

The Chairman. May I suggest it would be easier if you brought the last part of your sentence up toward the beginning?

Mr. Medalie. How would you do that?

The Chairman. "Such notice stating the time and place of hearing shall be given by the court in open court in the presence of the defendant or"--then bring in all the rest of this, "by order to show cause", and so forth.

Mr. Youngquist. The trouble is, you don't provide this service of any of these instruments embodying a notice on the person charged.

The Chairman. It says, "shall be given by order to show cause".

Mr. Youngquist. It is on the order to show cause, but it is not on the information.

The Chairman. Why do you have to have an information?

Why isn't the service of the order to show cause all you need?

9 Mr. Burns. It ought to be clear from the rule that this kind of information can be instituted by the United States attorney.

Mr. Medalie. You can take an information out and put it elsewhere.

The Chairman. Why isn't an order to show cause filed by a United States attorney, put in on an information? Doesn't that cure it all?

Mr. Holtzoff. In some cases you might not have an information. I think you will have to make the allowance for that.

Mr. Wechsler. The court should not issue an order to show cause unless an affidavit has been filed or unless the court has personal knowledge justifying the issuance of the order and not justifying summary punishment.

There are cases of that kind.

Mr. Holtzoff. I have in mind where the court has personal knowledge but it is necessary process to bring in the defendant.

The court can appoint an attorney to prepare an order to show cause.

Mr. Medalie. The court has personal knowledge to issue the order provided for in (a). It is the only kind of personal knowledge a judge can have.

Why do we really need an information?

Mr. Holtzoff. I didn't think we did.

Mr. Wechsler. There are places where cases are instituted by it.

Mr. Medalie. We have a substitute for it. The United States attorney can do it by an order to show cause.

Mr. Wechsler. Where does he get the order to show cause?

Mr. Medalie. By affidavit.

Mr. Wechsler. Why does he get it?

Mr. Medalie. Why should a private person proceed by information? Why shouldn't he proceed by an order to show cause?

I think we ought to exclude that, then, shouldn't we, "person assigned thereto", in connection with information, ought to go out?

Mr. Wechsler. The word "information" is misleading because sometimes it has to be sworn, in which case it is an affidavit.

The Chairman. The information should go out?

Mr. Medalie. The reason it is in there--

Mr. Holtzoff. Why not say "order to show cause issued on application by the United States attorney"?

Mr. Burns. How about this: "Such notice may be in open court or an order to show cause issued by the United States attorney"?

Mr. Holtzoff. I would suggest "on application made by the United States attorney".

Mr. Burns. And then have the separate one, "Criminal cases may be instituted on information filed by the United States attorney"?

Mr. Youngquist. Why not have a single procedure, the filing of affidavit, issuance of order to show cause?

The Chairman. You haven't brought in yet the order of arrest.

Mr. Holtzoff. It ought to be "order to show cause or

bailable order of arrest filed by the United States attorney or by an attorney assigned thereto by the court".

Mr. Medalie. Let us start in all over again.

"by the court in open court".

Next, "by order to show cause".

Now, let us see what the order to show cause is based on.

Mr. Holtzoff. Issued on application by the United States attorney or an attorney assigned thereto by the court.

Mr. Medalie. An attorney ought to be able, on filing an affidavit, to get that order to show cause.

What does he need the assignment for?

Mr. Holtzoff. I think you don't want "an attorney of his own motion", do you?

Mr. Medalie. Why not? He cannot start it without the court signing an order to show cause,--

The Chairman. Wouldn't the proper sequence be--

Mr. Medalie. --then the court signs the order to show cause. Which means the court has permitted the institution of this proceeding by him.

Mr. Burns. If that is permitted, Mr. Medalie, won't it be almost permissive for any attorney to be the moving party?

Mr. Medalie. Yes.

Mr. Burns. If this rule reads the way you suggest, it would be almost automatic.

Mr. Medalie. It would be if the judge agrees.

Mr. Holtzoff. You know a lot of orders to show cause are signed with very little information.

Mr. Medalie. That is the proceeding in our state courts today.

You fail to obey an order directing you to do something; you are in contempt. If you wish to say automatically that you disobeyed an order of the court and ask the court to issue an order to show cause--

Mr. Holtzoff. That is a coercive remedy, isn't it?

Mr. Medalie. Yes.

The Chairman. Mr. Medalie, after your "order to show cause" there, you ought to bring in there, or at some other point, "or by bailable order of arrest".

Mr. Medalie. All right. That is all right.

Mr. Holtzoff. Then comes "issued on application", and so forth.

Mr. Medalie. "Issued upon application of the United States attorney or"--

Mr. Holtzoff. --"an attorney assigned thereto by the court".

Mr. Medalie. Where are you going to get the assignment? You are complicating the proceedings.

The Chairman. It is not complicated. It is just two lines in the order to show cause, "Further ordered, John Jones is especially assigned to prosecute this matter."

Mr. Medalie. You say, "or an attorney assigned thereto" in such order?

Mr. Holtzoff. It does not have to be in such order.

The judge might sometime say to an attorney, "I want to appoint you a committee to institute a contempt proceeding against Mr. so and so."

The Chairman. I don't think there is any difficulty there.

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Mr. Medalie. All right.

The Chairman. Are you ready for the question?

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

Carried.

Any other sections?

Mr. Seasongood. I suppose you mean 6 (c), and I just raise the question, if a contempt is also a crime it has to be tried as a crime.

Mr. Holtzoff. It does not have to be.

Mr. Seasongood. That is what it says.

Mr. Holtzoff. (c) was taken out.

Mr. Seasongood. Then I want to raise one more question, whether you want to put in anything about a judge should assign another judge to hear the contempt.

10 Mr. Medalie. That would depend.

If the contempt stated in writing something about the judge it may be that should be done; it may not.

Mr. Seasongood. Well, the Supreme Court said, where there is any personal element, and I think we should make that a rule.

Mr. Seth. Isn't that a provision in the Clayton Act?

Mr. Seasongood. In the Clayton Act there is, but that is of limited application.

Mr. Wechsler. Yes.

Mr. Seasongood. They have said in a number of cases that where there is anything in the nature of a personal affront to the judge it is better practice to have some other judge sit in the case.

They have just said it is better practice.

Mr. Longsdorf. The statutes providing for substitute judge are not sufficient to take care of that.

Mr. Seasongood. No. The bias statute does not apply to contempt.

Mr. Wechsler. Mr. Chairman, I move that this section go back to the Reporter for further work.

There are a lot of kinks that ought to be looked into.

Mr. Robinson. It is a very fine special committee that has been working on it.

Mr. Youngquist. I think there are some kinks but I don't think it should go back to the committee.

Mr. Seasongood. I think the courts have said they ought not to consider it.

Now do you want to say anything more?

Mr. Wechsler. I would second a motion that something be incorporated to give effect to that policy.

Mr. Seasongood. Well, I will make that motion.

Mr. Medalie. The only point, I understand, that is being raised now is whether the judge should disqualify himself.

It is almost impossible to define the conditions under which he ought to disqualify himself.

If you call the judge names I can understand why it would be in order, the filing of this affidavit of prejudice.

Mr. Seasongood. You cannot file an affidavit of prejudice.

Mr. Medalie. This is only for trial.

Mr. Seasongood. The district courts have so held.

Mr. Holtzoff. Do you think that is a correct statement of existing law, that an affidavit does not apply to contempt?

I doubt that, myself.

You say it is only a district court decision?

Mr. Seasongood. What they have said goes even further than an affidavit of prejudice.

In the Cook case and those others they said if it is an affront against the judge personally or in which he may think that his personal dignity is involved, he should assign it to another judge.

Mr. Medalie. It would be difficult to define this in a rule.

Mr. Seasongood. No. They have said that definitely.

In those cases they defined the circumstances under which it is preferable to assign it to another judge.

Mr. Medalie. But they did not make any rule.

Mr. Seasongood. Well, in the Schmidt case they reversed for the judge having heard it.

They said he should not have done it, should not have heard the case.

Mr. Holtzoff. Why should we have a rule on a judge disqualifying himself in a contempt proceeding unless we have a rule on judges disqualifying themselves generally?

Why should we have a special rule?

Mr. Dean. Well, we have done something like that in our venue proceeding.

Mr. Wechsler. But it is an acute problem in contempt.

Mr. Seasongood. Yes. They reversed in this Schmidt case on account of his having sat when he shouldn't have sat.

Mr. Medalie. If the Schmidt case is an authority on that we don't need to transmit that into any part of the rules.

In other words, we cannot put in all the law of criminal contempt in one procedural subsection of the rule.

Mr. Seasongood. Well, I don't care whether you put it in or not.

Mr. Medalie. I think it would be better not to put it in, particularly since a judge would be disqualified by judicial decision which covers it.

Mr. Wechsler. There is a provision in the Norris-LaGuardia Act, I think it is sections 11 and 12, but I don't know whether it covers other than labor cases.

Mr. Seasongood. Probably not.

Mr. Dession. Probably not, no.

Mr. Medalie. If it is a case where the judge ought not sit, we have got to trust the appellate courts, and they can make up their own laws as they go along on that.

They have made it already, apparently satisfactorily.

The Chairman. Did you want to make a motion on it, Mr. Seasongood?

Mr. Seasongood. No, I do not care one way or the other. I think it would be appropriate.

Mr. Wechsler. It would be appropriate--

The Chairman. To have such a rule?

Mr. Wechsler. That was my understanding.

The Chairman. May I have the motion restated? I must confess I did not get it.

Mr. Medalie. A judge affronted may not sit.

That is the substance. Is that it?

The Chairman. No. I thought you were referring to a motion made by Mr. Seasongood.

Mr. Medalie. That is what I thought.

11 The judge who has been affronted will find words for it.

The Chairman. All those in favor say "Aye." Opposed, "No."

Show hands. One, two, three, four, five.

Opposed? One, two, three, four, five, six--

Give me the show of hands on the ayes again, will you?

One, two, three, four, five.

Opposed? One, two, three, four, five, six, seven.

Lost. Five to seven.

Mr. Orfield. I might raise very briefly a related question, trial by jury.

I think there ought to be trial by jury in all contempt cases if defendant desires it.

Historically there was trial by jury in criminal contempt cases.

Most cases of criminal contempt procedure are similar to our contempt procedure.

Mr. Burns. Would you go so far on that as where the judge may be hit by a brick?

Mr. Wechsler. I think so.

The Chairman. His motion is for contempt to be tried by jury.

Mr. Youngquist. May I ask a question?

The Chairman. Yes.

Mr. Youngquist. In what cases is contempt entitled to trial by jury?

Mr. Wechsler. The Norris-LaGuardia Act.

Mr. Youngquist. It is a statutory act.

Mr. Longsdorf. Yes.

Mr. Medalie. The Norris-LaGuardia Act.

Mr. Dean. The Clayton Act.

Mr. Seasongood. Is there any reason why it should be in one case and not in another? As Mr. Orfield said, historically they were always tried by jury.

Mr. Orfield. It would not apply to (a).

The Chairman. It would not apply to (a)?

Mr. Orfield. No.

The Chairman. Then we will consider the motion limited to the contempts not heard or seen by the court.

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

I call for the showing of hands.

All those in favor raise their hands. One, two, three, four, five, six, seven.

Opposed? One, two, three, four, five, six.

Carried.

Mr. Medalie. Then this: "The person charged shall be entitled to a trial by jury unless waived."

"entitled to a jury trial unless waived."

Mr. Holtzoff. You don't need "unless waived".

Mr. Medalie. I would take no chance.

The Chairman. That applies to (b)?

Mr. Wechsler. One of the provisions covered by our said rule (b) and which is merely punishable under the statute, there now must be a jury trial?

Mr. Burns. Right.

The Chairman. Last night there was a call for the various evidence statutes. Those materials are being mimeographed and

will be available in about half an hour.

I am wondering if we may now consider what the next step should be to be taken by the Committee with respect to our work.

Mr. Youngquist. I should like to hear the Chairman's suggestion.

The Chairman. Well, I should much prefer to have it discussed by the members of the Committee generally.

Mr. Seasongood. I move that on completion of the work by the subcommittee or perhaps on submission to the whole Committee, that it be then submitted to the Court.

Mr. Holtzoff. I wonder if we need another submission to the whole Committee?

Mr. Seasongood. I don't mean a meeting of the whole Committee, but there may be something to go back to the Committee on Style, some little verbal change.

Mr. Seth. Would it be well to submit it to the bar--

The Chairman. I talked to the Chief Justice perhaps five or six weeks ago and I told him at that time of the meeting of the Subcommittee on Style and of the prospect of a further meeting of the whole Committee during this month.

I also told him that there was a strong probability that there would be various matters that would have to be gone into further before the rules were finally submitted to the Court; I mean for ultimate approval.

And I showed him the form of letter of transmittal that was used in the case of the civil rules under which the Court merely authorized the circularization of the proposed draft to the bench and bar without the Court taking any responsibility for it.

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He indicated to me that if the Committee made that recommendation that he thought that would be the course that the Court would pursue with respect to our submission.

He did state, and I will try to state it as accurately as I can, that undoubtedly the Court would feel much more confident in acting upon the matter if the report of the committee were unanimous or substantially so.

And that is just about the substance of our conversation.

I may say that as the result of conversations had a couple

12 of months ago, Professor Dession has agreed to obtain a release from the Department of Justice of his obligation to be there during the summer, and, now that his law school is closed, to be available during the entire summer with just a day or two off as occasion may require, to go into any matters in which he can be of help in collaboration with Professor Robinson and his staff.

That is about the way the matter stands so far as the Court is concerned.

Of course I have not discussed it with anybody in the Court except the Chief Justice.

Mr. Waite. What will Mr. Robinson and his staff be doing this summer?

The Chairman. One difficulty I think we have had is that by one accident after another, like an attack of appendicitis, and so forth, Mr. Robinson's staff has been rather less than he would have liked, and I have to ask Professor Dession's committee to augment them, and also with the hope that he may be able to get one or two or possibly three of his associates from the Department of Justice over here working during the

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summer.

Now, if these rules are circularized and if the same thing happens in this case that happened in the civil rules case, a very large number of communications will be coming in from bench and bar. Some of them will be very good ideas and will have to be considered. Others will be futile and will have to be considered before they are rejected.

But it is going to take a very considerable amount of work to see what merit there is to the various notions that are advanced.

Mr. Holtzoff. You will have a bar committee in most any district, and they will write in.

The Chairman. We have had various letters come in, many of which have been distributed in mimeographed form to our Committee.

Mr. Waite. Then you summarize what seems wise in the way of suggestions and then send it out to us?

The Chairman. I think we will want to do what was done in the civil rules.

Those communications were distributed to the Committee with a note from the Reporter and his staff.

Mr. Waite. All the communications?

The Chairman. I think that is correct.

Mr. Tolman. Yes.

Mr. Seasongood. Did they comment on every communication?

Mr. Tolman. No, not every one.

Mr. Longsdorf. May I ask in what form those communications were transmitted to the members of the committee? Did you condense them or did you arrange them according to

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substance and break them up?

Mr. Tolman. They were copied exactly as they came in.

Mr. Longsdorf. They were. And then were they arranged according to the rule affected by the comment?

Mr. Tolman. After they came in. When we were getting ready for a meeting we abstracted them for consideration at a meeting.

Mr. Youngquist. We have had that in these proceedings. We have been getting the copies and then, in Draft 2, I think it was, we had a summarization of the comments.

The Chairman. That is right.

Mr. Longsdorf. I think it is pertinent to inquire, but I don't know whether the Chairman or anybody else can give us a forecast of how long it will take to get these rules into print after it is decided to print.

The Chairman. I think Mr. Tolman can answer on that.

Mr. Tolman. It is pretty hard to say.

Mr. Holtzoff. A couple of weeks' time, would you say?

Mr. Tolman. I suppose that is feasible.

Mr. Longsdorf. Now I would like to add this:

I think the members of this Committee, all of us, probably have in mind persons to whom we are anxious that those copies would be sent.

I think all of us, if we have any particular persons in mind, ought to send in a list with addresses. That could go on the mailing list.

The Chairman. In addition to that we would want to call attention to its availability in the Federal Register.

Mr. Longsdorf. Yes.

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The Chairman. And the American Bar Association Journal and every state bar association journal, and all the law reviews.

Mr. Longsdorf. And all the daily court journals.

Mr. Holtzoff. And to every member of the Committee.

The Chairman. And to every federal judge.

Mr. Youngquist. What is necessary in order to get authorization before the summer recess?

The Chairman. The Chief Justice said he thought the Court would be sitting certainly until the first of June, probably until the 8th, and possibly until the 15th.

I understand in talking with the Marshal it now looks like June 1 would be the last day that the Court would sit.

He also said that if the report were coming along, even though it might not be complete, and the decision to submit were unanimous, or substantially so, that he would put the matter up to the Court in advance and undertake to obtain permission to circularize even if the Court had adjourned, but there was, I think, rather a preference on his part to see the document before.

Mr. Youngquist. Would it be possible then to get this in such form that it might be submitted to the Court by the first of June?

Mr. Holtzoff. I should think so, if the Subcommittee on Style would have a final meeting within the next day or two.

We could have mimeographed copies ready.

Mr. Youngquist. There wouldn't be any opportunity for resubmission to the members of the Advisory Committee?

I don't mean at a meeting.

Mr. Holtzoff. I wonder why that would be necessary?

Mr. Youngquist. If the rules were to be presented to the Court before the summer adjournment, I don't think it would be necessary.

The Chairman. That is really not feasible.

Mr. Burns. Mr. Chairman, it seems to me what we ought to do is to get an expression of opinion here as to whether we
13 think they ought to be circularized as finally polished on the basis now, or, should we wait until the polishing on the work of Mr. Dession and Mr. Robinson during the summer.

And then I think Mr. Robinson should report on the expression of the Chief Justice.

Mr. Holtzoff. I think Mr. Robinson and Mr. Dession should collate and publish the suggestions.

Mr. Burns. I don't mean polishing, but it is going to be critical work.

Mr. Holtzoff. I suppose the rules will undergo changes anyway after they are circularized.

Certainly it was true under the civil rules.

The Chairman. Mr. Mitchell made it clear to me that as the result of the circularization of the rules they had many changes to make.

Mr. Youngquist. We have had what, four meetings?

The subcommittee has had three, I would say, extensive meetings, and I suppose we could keep on meeting from now to doomsday and keep improving the work all the time, or at least think we were improving the work.

We find ourselves, as I find myself, voting one way and then the other; so the possibilities of change are illimitable.

After all, we are undertaking to do what was done with respect to the civil rules, present something to the bar and to the people for suggestions.

I think, although there are differences of opinion as to whether this kind of provision--I mean, this principle--should be stated, or a different principle should be stated; we have threshed out all of those questions.

There is no likelihood of closer agreement in the future than there is now, perhaps.

We have all been apprised of the principles upon which each of these provisions rests and have given study to them.

I do not think it would be profitable for us, either for the purpose of further discussion or for the purpose of improving the form of submission or arranging to make any further revisions--they are not so bad, when we read them over. It looks fairly respectable, and I think they look respectable enough, will look respectable enough to the bar, to justify the Committee and the Court in having them circularized in their present form with a little touching up that is to be done on the assignments given.

I would therefore second Mr. Seasongood's motion--I don't think I seconded it before--yes--but with the, well, suggested qualification, if I may, that there be no further circularization among the members of the Committee before the presentation to the Court.

The Chairman. Well, I would like to have a very frank discussion by the members of the Committee on the motion, because I think it is of very considerable importance to be sure that we are following the right course.

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Mr. Dean. Mr. Chairman, may I inquire about the notes that will go out with these rules, what form they will be in?

I think they are a very important part of the rules in explaining to the bar what the changes are that we have made, because they obviously cannot go through the extensive research that the Committee and the Reporter have gone through, as to why we made the change, and so forth.

Is it contemplated that the notes shall go out to the bar at that time?

Mr. Robinson. We have quite a lot of notes now that you are free to look at when you are free to do so.

We have been too busy to go into the matter of notes.

Miss Peterson, Mr. Tolman, Mr. Dession, and I have been working on them, and I think you can see just what the style is.

You probably have seen a copy of a letter from Mr. William Stewart of Chicago?

Mr. Dean. Yes.

Mr. Robinson. It follows that style.

Therefore I believe that we will be able to meet your wishes in respect to the utility of the notes to the bench and bar.

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The Chairman. Well, if you have these here why not distribute them to everybody?

Mr. Robinson. Yes, I will.

Mr. Youngquist. Shall we just look at them and return them to you now?

The Chairman. Yes. I mean, just to get the style.

Mr. Longsdorf. I think we all remember that the Civil Rules Committee published more than one tentative draft.

The Chairman. As I recall it, they sent out two successive submissions, did they not, Mr. Tolman?

Mr. Tolman. There were two submissions, and then a final report, which was just circularized for the information of the bar.

Mr. Robinson. We have a good many more forms to be put in. Your Committee has kept us busy working on rules. Naturally, the notes come afterward.

Mr. Burns. May we keep these notes?

Mr. Robinson. Certainly. In one or two cases some of them are based on one or two earlier drafts, Mr. Tolman suggests to me, and it is based on experience.

It would be rather difficult on our committee, as it was on the Civil Rules Committee, to have all the notes of this type prepared the week after next, say, or something like that. It might take a good deal of time, but there will be an average coverage for the purposes at hand. In other words, the last word on rules and notes will not be spoken by this Committee for some months to come.

Mr. Holtzoff. You mean not until we get the reaction of the people who receive the drafts?

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Mr. Waite. Mr. Chairman, I am bothered by a problem that did not occur to me before at all. It did not occur to me and would not have occurred to me perhaps, except for a little incidental remark of yours a while ago. I would like to know what the Committee thinks about it.

There are several things that I think ought to have been included in the rules that are not included, and I venture to say that that is the case with other members of the Committee. I am not expressing my own desires at all, because I do not know. Would there be any desirability or impropriety in my attaching to what goes out, not exactly a dissenting opinion, but a suggestion that I think it would be desirable to have the bar's opinion with regard to this, that, or the other proposal?

The Chairman. I see no objection to that. On the contrary, I see a rather substantial possibility of gain.

Mr. Waite. I do not know that I want to do it or to work that hard.

Mr. Dean. I was going to say there is no reason why Professor Waite should necessarily make a list, but I think that in any list that went out representing various subjects, his suggestions could be included as things that came to our minds that might conceivably be in the second draft submitted to the bar, as things thought about but not referred to.

Mr. Burns. Refer to it in the notes and refer to it in the Appendix.

Mr. Dean. In that form it would not take the position of dissenting it to the rules, but it would indicate to the bar that these problems were there, that we were aware of them, that we chose in some cases to abandon them, but had not made a

determination on all of them. In that way we might invite comments on some of these unexplored fields, like this pre-trial coverage, exchange of evidence on both sides before trial, and many other situations. We might invite comments that would be very helpful.

Mr. Waite. What would be the mechanics of that for me or you or the other fellow who has some such idea? To send it to the Reporter with a request that it be included?

Mr. Dean. I think the Reporter right now, with perhaps a few other suggestions, could make a list of such matters that we had suggested.

Mr. Holtzoff. I think it would be better for any individual member who wanted to have any particular suggestion included in the submission to the public to send it in, and that could be put in an appendix.

Mr. Robinson. It would be the best way to answer some of the problems that we have worked on at each session.

Mr. Seasongood. It would be impersonal. You could say, "The following question was presented but not deemed proper for inclusion."

Mr. Longsdorf. Mr. Chairman, I dare say that each and every one of us will be interrogated or invited to say something at some time about these rules. Is there any restraint that we should impose upon ourselves as to how much we shall say and what?

Mr. Youngquist. I would say no.

Mr. Robinson. I would like to say with regard to what Mr. Waite says that I have some proposals I would like to put on the list, because I have been turned down on some

suggestions.

Mr. Youngquist. I think it might be well to withhold, however, how the vote stood on any particular proposition--that is, that it was 7 to 6, or 12 to 3, or something like that.

Mr. Medalie. Do not say that. All you have to do is say, when you are brought into an argument and getting the worst of it, "That is what I thought, but the other fellows thought it should be this way."

11 Mr. Youngquist. That is the perfect answer, but I do not think we should divulge the details. We should be like the jury in that respect.

Mr. Longsdorf. May I say that I have been overruled at the ration of 16 to 1 here, so I would be in favor of that.

Mr. Wechsler. Mr. Chairman, on the motion before the house, I shall have to vote in the negative, and I would like to state my reasons very briefly. I think it would be a great mistake to lose the benefit afforded to the bar of the work that they plan would have been done during the summer by Mr. Dession and others, working with Professor Robinson.

I do not have sufficient assurance in my own mind that these rules can possibly get in Congress before the opening of the session to let me feel justified in sending the rules out for comment without the benefit of all the work that can be done on them.

I think it must be kept in mind that the literature on this subject is very thin; that the Reporter had to start with substantially no literature to go on; whereas in the case of the civil rules there was complete literature to constitute the basis for the initial thought.

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Having to choose between sending out something that I think is less than our best, for the sake of speed, and, on the other hand, losing a year in submission to Congress at a time when the country is at war, I have no difficulty in making a choice against submission. I do not think this is a particularly propitious moment to gain the attention of the bar for these rules in the way that I would like to see their attention gained.

Secondly, I do not think that it is the best way to get consideration by the bar to send out simply a set of rules which represents our comments on the basis of what happened to be our particular experience, rather than to send out the finished job which from our viewpoint represents our own best view on the subject as represented by the criticism that comes in. I think the best job is to be given to the Committee on Style to do anything on the matters that have been referred between now and the date when they have to go to press for distribution--

Mr. Seasongood. Practically all that work has been done and submitted and passed on by the Committee.

Mr. Wechsler. I have no clear recollection of how many things there were referred that have not come back.

Mr. Holtzoff. Have you overlooked the fact that there are many bar associations meeting in the summertime and that there is an advantage in having their criticism at that time?

Mr. Wechsler. I would rather get it next summer, when I trust they will meet again.

Mr. Dession. I can see the advantage in point of time in getting it this summer, and I have been trying to persuade

myself that it was ready for that, but I think you are optimistic. I think it needs testing for completeness and testing for coherence, and a general checking over before I would feel comfortable in submitting it to the Court for release.

The Chairman. I have the very unhappy feeling that if we work on it for another year and we then submit it to the bar you are going to find so many things suggested that you will have to change these other suggestions coming in, and you will be in exactly the same position that we would be in if it went out this summer. I cannot see why the work of checking and rechecking could not go on this summer simultaneously with the submission to the bar and the incoming suggestions from the lawyers of the country.

Mr. Dession. It could. The only difficulty is, if I am right in thinking that it is not tested to a point that would make me comfortable before we submit it, is that the bar won't have to react to what we want them reacting to, and to that extent we will get less help from their reactions, I think, than we would otherwise. I wish I felt it was ready, but I just do not.

Mr. Waite. I cannot think of anything in these rules that I would vote otherwise on, merely by knowing what the decisions are and what the law is. My distress about all of them has been that I know so little about the practical ends of the matters and the practice and what the bar thinks. So that my own impression is that if I had another year to work, I really would not have any better basis for determining than I have now; but what I really want is what the bar thinks and what their experience has led them to believe is wise.

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Mr. Orfield. It seems to me that if we wait another year, the war will be taking more of our attention than it is taking now.

Mr. Seth. Mr. Chairman, I have to leave, but I would like to go on record as favoring their submission in their present form and authorizing you to submit them to the Court in such manner as seems necessary and appropriate.

The Chairman. Well, is there any other discussion? We might be able to take a vote before Mr. Seth leaves.

All those in favor of the motion say "Aye." Opposed, "No."

Let us have a show of hands, because it is a very impor-
12 tant motion. All those in favor? Eleven in favor. Opposed? Three. Eleven to three.

Judge McLellan, I know, is in favor of submitting them, and I have a telegram here from Judge Crane that says he is, but I doubt that it is proper to vote them in their absence.

That leaves me, gentlemen, very much in a quandary as to what we should do.

Mr. Dean. How was the letter to the bar worded, so far as explaining how tentative the civil rules were?

The Chairman. It was made very clear that they were submitted without approval of the Supreme Court and solely for the purpose of obtaining suggestions which would lead to changes in a future revision.

Mr. Waite. I am right, am I not, that they would be submitted by this Committee and not by the Court?

The Chairman. That is correct. The Court simply authorizes us to release them without even a blessing.

Mr. Dean. I wonder if it is indicates that it is simply a tentative draft of this Committee?

The Chairman. That was done, I believe, by the Civil Rules Committee.

Mr. Dean. It is the first attempt on our part, on which we want the bar's view before further work is done on it.

The Chairman. Of course, it means if we do not do something like this we will not be able to submit the rules to Congress until January, 1944.

Mr. Dean. I notice in this submission it states that the draft has not been presented to the Court, but that permission to print and distribute has been given, and it incorporates a letter from the Chief Justice relating to that.

The Chairman. Yes. The Court is absolutely spared any responsibility for it.

Mr. Youngquist. And I think the Committee would be protected to the extent that it needs to be protected by the statement that it is a tentative draft distributed for examination and comment and suggestion.

Mr. Dean. I think that should be done with as strong words as possible, for the reason that what we have to submit is not a finished job, but because, I think, as we stand now, we are in a little bit of a rut. We have gone over it and over it and over it, and we have not got the fresh viewpoint that we may get after the treatment from the bar. What I look for is a revival of ideas.

Mr. Burke. That represents my views. It seems to me we have nothing to lose and possibly we may gain something in the way of suggestion or advice or criticism. Since it is submitted

in that fashion, it seems to me entirely appropriate in the line of work we have done, because if we meet here in three-month periods from now until next year, we will be precisely where we are now. I could not disclose how I voted on these from memory, when it comes to that.

Mr. Youngquist. If we were to continue the work, I would have a little difficulty in deciding where I could go from here on the rules, because, as Mr. Dean says, we have threshed out every problem that has been presented and we have reached a conclusion as to what should be in and what should be out.

Perhaps some of the provisions could be a little more adequate and polished up some, but that is not going to interest the bar. I would feel quite differently about it if this were to be the final draft.

Mr. Burns. Mr. Chairman, in the first submission of the civil rules did it contain notes?

The Chairman. Substantially in the form of these which have been distributed here.

Mr. Dean. Here is a copy of them, if you would like to see the form.

Mr. Burns. Yes, I would.

Mr. Robinson. Of course, the final notes accompanying the civil rules were made after their adoption. Mr. Tolman had quite a good deal to do with that, didn't you? You worked on the notes in the civil rules after they had been adopted and promulgated?

Mr. Tolman. Yes.

Mr. Youngquist. Weren't the notes that went out in the tentative draft to the public different from the notes that

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appear now?

The Chairman. Very different. This is a preliminary draft (indicating), with the rules in bold print. You will notice that these notes are rather brief.

Mr. Holtzoff. Both the rules and the notes were considerably changed between the preliminary draft and the final draft, as I understand it.

Mr. Robinson. I would like to raise this question. I happen to be on the firing line, so to speak, between the bench and bar. I receive many communications and recommendations from the bar associations wanting to know when the rules are going to be distributed. I got a letter from a prominent lawyer in Chicago wanting to know when he is going to receive a copy of them.

There might be a question that the bench and the bar are going to wonder if we are keeping good faith with them if we do not publish them.

Mr. Youngquist. All these bar committees have done quite a good bit of work in trying to help us, and if we let them run too long their organizations may not be functioning in as effective a way as they are now.

The Chairman. Maybe this will be helpful. The notes were not published until after the civil rules were adopted. General Mitchell wrote this foreword to the notes, which tells the story pretty much of their history. He says:

> "Notes to the Federal Rules of Civil Procedure were prepared by the Reporter, Dean Clark, and his staff, in order to show the source of each rule, and to aid the Advisory Committee in framing their recommendations; to

assist the members of the profession in their study of the Committee's preliminary drafts; and to aid the Supreme Court in its consideration of the Committee's report.

"Notes were first published with the Committee's Preliminary Draft of May 1936. They were revised and published with the Committee's Report of April 1937, and have been revised again to conform to the Committee's Final Report of November 1937, and to the rules as approved by the Court, December 20, 1937, both of which included some rearrangement and renumbering of rules.

"The notes in their revised form are now published by the Committee in order to preserve for the use of the profession material which the Reporter has so industriously gathered during the two and one-half years of the Committee's service. The notes show the background in Federal or State statutes and judicial decisions, in the Federal equity rules, or in the British system, of the procedure recommended by the Advisory Committee."

So you will see there that the notes as actually given out were three times revised.

1 (2) I do not think we have anything to be ashamed of if as a result of this submission we find it necessary to revise our notes again next fall.

Mr. Longsdorf. I think Mr. Youngquist's suggestion that there is considerable eagerness on the part of these committees and these other people ought to be considered.

Mr. Robinson. I have 20 letters from bar committees and from Mr. Margolius and Mr. McCarthy, local assistant United States attorneys, who told me a few days ago, "If you will

please send us a copy of the draft, then we will know how to direct our comments. As it is now, we do not know what to aim at or what to say."

Mr. Holtzoff. Many of the members of the bar committees are going into the service, and you are going to have your bar committees as appointed a while ago gradually dissipated, which will be very unfortunate.

The Chairman. Is there anything else we can take up at this session, gentlemen?

I take it there is a motion--I think it was made some time ago--to leave the matters of detail to the Subcommittee on Style. That is the only thing that I can recall that needs further attention.

Mr. Burns. Just a question on this Rule 35. I have an impression, probably erroneous, that certain criminal contempts are not bailable; is that true?

Mr. Holtzoff. I think they are all bailable.

Mr. Burns. What is the issue on review where a judge certifies that he has been hit in the head with a brick, which is the usual ground?

Mr. Holtzoff. There are valid facts to constitute contempt. You can always review that. You can review the certification of the judge on the facts.

Mr. Burns. Can you review the sentence?

Mr. Holtzoff. I am not sure. I believe so. I believe in a contempt case the circuit court of appeals may modify the sentence, but I am not absolutely certain of that.

Mr. Seasongood. Yes. There is a decision, Judge Burns, where they did modify the sentence--in fact, they did it in the

Gompers case, did they not?

Mr. Burns. Yes, but that was on a contempt not committed in the presence of a court, a violation of a court order.

Mr. Seasongood. Ordinarily you would think they cannot review the sentence. They can in a criminal case because it is excessive, but there is a case that says they can review the sentence.

Mr. Wechsler. Is the issue on whether the sentence is reviewable?

Mr. Seasongood. Yes.

Mr. Wechsler. In some of the cases the sentence was weak.

Mr. Seasongood. But there is a case where the appellate court reduced the sentence.

Mr. Wechsler. I do not remember it.

Mr. Seasongood. Well, it is cited.

The Chairman. Rule 13 as revised has just been distributed. May we have your examination of that, gentlemen, before we adjourn?

Mr. Youngquist. I move that it be approved.

Mr. Seasongood. I second it.

The Chairman. All those in favor say "Aye." Opposed, "No." It is carried.

Is there anything else, gentlemen, before we adjourn?

Mr. Longsdorf. Of course, it is not possible to forecast in the slightest degree when we will have to come back here again?

The Chairman. It won't be before fall.

Mr. Longsdorf. It won't be before fall?

The Chairman. No.

Mr. Longsdorf. I feel sure of that.

The Chairman. The Subcommittee on Style may have a session or two before that.

Do I hear a motion to adjourn?

Mr. Youngquist. Mr. Chairman, do I understand that with the vote as it stands the draft will not be submitted to the Court for authorization for circulation?

The Chairman. I think I must take it up with the Chief Justice and consult with him as to what he would desire to be done in the situation.

Mr. Youngquist. And if the Chief Justice should want it circulated now, then it would be circulated, I suppose?

The Chairman. I think so. I think we will have to leave it that way.

Mr. Medalie. What will we do about recording the revisions?

Mr. Holtzoff. I think the Subcommittee on Style should

2 meet in the next day or two. If you could stay over another day, perhaps we could meet tonight or tomorrow.

Mr. Youngquist. What has that committee to do?

The Chairman. Relatively small items. I do not think it would take more than a couple of hours of intensive work for the committee to do it.

Mr. Youngquist. I could spend an hour and a quarter right now at it. We ought to be able to finish it in that time. As I said a while ago, most of the work has been done.

Mr. Medalie. I do not think it can be done in quite that way. A particular section to which there had been amendments will have to be rewritten first before we took a look at it.

Then if we found it was all right--that is, that it meant what the full Committee decided--we would say, "All right. Mimeograph that."

Mr. Holtzoff. Could we have another meeting in a few days, then?

Mr. Medalie. If there is a considerable amount of typewriting to be done before we could meet--

Mr. Youngquist. But there is not. There is very little. I do not think there are more than three or four rules to be done over.

The Chairman. Gentlemen, we are getting into the work of the Subcommittee on Style. I think that in order to have the garden variety committee members adjourn, someone should move to adjourn.

Mr. Dession. I move that we adjourn.

Mr. Waite. I second it.

The Chairman. It is moved and seconded that we adjourn. All those in favor say "Aye." Opposed, "No." The motion is carried and the Committee stands adjourned.

(Thereupon, at 4:05 o'clock p.m., the Committee adjourned sine die.)

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