MINUTES OF MEETINGS

OF

ADVISORY COMMITTEE ON RULES

OF CRIMINAL PROCEDURE

New York, New York,
February 19, 1943.

STENOGRAPHER'S MINUTES.

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New York, New York,
Friday, February 19, 1943.

The Advisory Committee met at 10:30 a. m. in Room 1904, United States Court House, Foley Square, New York City.

Present:

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

Mrs. Elizabeth Peterson,
William Holloran.

THE CHAIRMAN: We are still short three members from the West, but Mr. Burke says those western trains have a way of being anywhere from three to eight hours late; so I think we had better go ahead. Does anybody have a different idea?

(No response.)

THE CHAIRMAN: Well, I would suggest that we start with Rule 1 and give everybody a chance to make any comment that they want on it; and as soon as we have exhausted that rule we will move on tothe next one.

Does anybody desire to be heard on Rule 1?

MR. HOLTZOFF: Mr. Chairman, I move we adopt Rule 1 in its present form as it stands in the Reporter's draft.

MR. WECHSLER: I would like to ask a question about it, Mr. Chairman: How about the problem of proceedings before State magistrates now provided by the Executive Code? I would like to know what the status is. That jurisdiction is preserved, I believe.

MR. HOLTZOFF: It seems to me that in view of the fact that the rules are silent on this point, therefore these proceedings do not apply to State magistrates. Isn't that a necessary difference?

MR. DESSION: Wasn't this our thought, Mr. Reporter, that we did not want to encourage the use of

State magistrates? We were not clear that we could abolish their existing power, and so the thought was that the rules would be drawn without reference to them until we came to a last definition section somewhere, and where there could be an indication notewise that, of course, there is the statute.

MR. ROBINSON: That is right. And then you find that is done in Rule 52 (a) too. I suppose while we are thinking of 52 it should be understood that that blank in Rule 1 is to be filled inwith "52," because that is the rule that takes care of it.

MR. WECHSLER: In other words, we preserve that section of the Code that deals with that?

MR. HOLTZOFF: That is right.

MR. WECHSLER: That answers my question.

THE CHAIRMAN: Are there any other questions or comments on Rule 1 before the motion is put?

(No response.)

THE CHAIRMAN: If not, are you ready for the motion? All those in favor of adopting Rule 1 as printed and inserting the figures "52" in line 4, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

I take it if there are any comments on the notes as to a particular rule that we should dispose of them at the same time.

Are there any comments on the notes to Rule 1?

(No response.)

THE CHAIRMAN: If not, we will pass to Rule 2.

MR. HOLTZOFF: Mr. Chairman, I would like to move that we adopt the corresponding rule of Tentative Draft 5, which reads: "These rules shall be construed to secure the just, speedy and inexpensive disposition of criminal cases." It seemed to me that that was simpler and briefer than either the present Rule 2 or the alternative Rule 2.

MR. ROBINSON: In other words, those are the words of the Civil Rules, Alex. You think they should be carried over here as they are there?

MR. HOLTZOFF: Yes. We adopted them in Tentative Draft 5, and I thought they were pretty good.

MR. ROBINSON: There was some objection to the word "speedy." It was thought in criminal matters, as I remember the discussion, as the transcript shows - it was felt that the talk about speedy justice might lead some people to say that we are fixing up a streamline railroad to the penitentiary, and that would not be a fortunate word to use in this connection, although it might be all

right for Civil Rules.

MR. HOLTZOFF: But the Sixth Amendment to the Constitution uses the word "speedy." It states that the defendant shall be entitled to a speedy trial; so it seems to me that would answer that objection.

THE CHAIRMAN: Does the language you suggest parallel the language of the Civil Rule?

MR. HOLTZOFF: Yes, Mr. Chairman.

MR. CRANE: What is particularly wrong about this one?

MR. HOLTZOFF: Well, I would like to say this with respect to the other wording we adopted at our meeting the last time: My thought was that it had two advantages; first, it had the advantage of being briefer than this one, and it also had the advantage of paralleling the Civil Rules. Now, it seems to me that the aim of the administration of justice should be the same on the civil side as on the criminal side, and, therefore, this is one of those instances where it seemed logical and desirable to have the same type of rule for both civil and criminal.

MR. CRANE: Except in civil cases, of course, you can do many things by the consent of the parties which you cannot do in criminal. For instance, as to the elimination of unjustifiable expense and delay, unjustifiable expense may be eliminated by the consent of

the parties. You cannot justify that in criminal procedure. In fact, they do not provide for any expense at all when you print your record on appeal. Why don't we leave it in?

THE CHAIRMAN: That is covered, Judge Crane.

MR. CRANE: I am saying, why isn't the rule as it is now good?

MR. MEDALIE: It is too good. In the fifth draft you had everything in there without having two sentences. For example, your first sentence in your sixth draft deals only with the word "just." And here you put in the word "just" in one sentence along with the rest.

THE CHAIRMAN: The rule that Mr. Holtzoff was thinking about is on page 2 of the notes that were recently distributed. It is down at the bottom of the page.

MR. McLELLAN: Mr. Chairman, I move the adoption of Rule 2 as it appears in the fifth draft.

MR. MEDALIE: I second the motion.

MR. ROBINSON: May I make a comment, Mr. Chairman, please? I would like to have this clear to the Committee that the effort has been made by those of us working on this draft to incorporate only what was in the fifth draft unless modified by the Court's Memorandum of June 10, 1942, or by some definite action of the Committee.

Now, I do not have the transcripts here. But I think the transcript showed that there was quite a bit of opposition to that sentence. In fact, I myself argued for it just in accordance with Judge McLellan's motion, but the Committee at its last meeting took a position that was contrary to the present motion, and I have not had a chance to modify Mr. Holtzoff's remarks this morning. But I want to say in connection with this rule that the Reporter's office has made it rule number one not to change anything in the fifth draft except by the order of this Committee or as suggested by the Supreme Court's Memorandum of June 10, 1942. So that no change has been made except in line with the suggestions made by this Committee.

Now, I think, too, there was some comment in the Court's Memorandum. If you will just delay things a minute I think I can find it.

MR. WECHSLER: There is nothing on this rule in the Court's Memorandum.

MR. ROBINSON: Therefore the rule is in this present shape as indicated in the transcript of the comments made by this Committee. As I stated on page 2 of the Reporter's memorandum - "The Reporter has studied the transcript of the Advisory Committee's extended discussions of Rule 2, T. D. 5, and of preceding drafts of the rule. Rule 2,

T. D. 6, is offered as an effort to meet what seems to be the wishes of most of the Committee, both for a rule of construction which gives promise of having some favorable effect upon the adoption and the interpretation of the criminal rules," and for other reasons stated. So I have no objection whatever to the motion.

MR. HOLTZOFF: It seems to me that the wishes of the Committee were represented in the motion that was passed last time in adopting the rule as it was framed in Tentative Draft 5.

MR. ROBINSON: That is where I have a query.

MR. HOLTZOFF: It seems to me the majority must have voted for it, otherwise it would not have been adopted.

MR. ROBINSON: There was so much discussion about it, it must have been one of those referred back to the Reporter's office for consideration.

MR. CRANE: You are only expressing something that is just a matter of opinion. It does not mean much anyway. The courts will function just the same, and I do not see what the objection is to this. There is nothing vital about it. It is here, and you have other things which are more important than this.

THE CHAIRMAN: We have before us Judge McLellan's motion, which is to accept the language of the fifth tentative draft that is set forth in the middle of page 2

of the memorandum, reading: "These rules shall be construed to secure a just, speedy and inexpensive disposition of criminal cases."

Are there any further remarks? If not, all those in favor of the motion say "Aye."

(Chorus of"Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: We will have to have a show of hands.

(After a show of hands the Chairman announced the vote to be 5 in favor; 7 opposed.)

THE CHAIRMAN: The motion is lost.

MR. WECHSLER: I move the adoption of Rule 2 as it stands.

MR. CRANE: I second it.

THE CHAIRMAN: You have heard the motion. Are there any remarks?

MR. SEASONGOOD: I wonder if in line 4 you could not say "to lessen" instead of "the elimination of unjustifiable." There are so many words there.

MR. CRANE: May I suggest if you do that you still leave the part in which is unjustifiable.

MR. SEASONGOOD: What?

MR. CRANE: "to lessen" still leaves the part

which is unjustifiable. You do not have it all out. If it is unjustifiable it ought not to be there at all.

MR. YOUNGQUIST: Strike out "unjustifiable," too.

MR. ORFIELD: I think this was the statement the Reporter was seeking a minute ago. This is from the Court's Memorandum, Rule 2 (reading from Court's Memorandum). That is in the last part of the Court's Memorandum.

MR. GLUECK: I think, Mr. Chairman, that means that the rule, as suggested by Mr. Holtzoff, does not say very much. It just uses the familiar expression of "just, speedy and inexpensive disposition," whereas, certainly, the alternative Rule 2 sketches in the details of the meaning of those phrases.

MR. HOLTZOFF: But the civil rule which was approved by the Supreme Court just uses "just, speedy and inexpensive." Apparently it was found satisfactory by the Supreme Court in connection with the Civil Rules.

MR. ROBINSON: Mr. Chairman, may I make a suggestion: I would like to have Mr. Seasongood make his suggestion of how he thinks it should be changed and let us submit that later. The motion has been made and carried.

THE CHAIRMAN: No.

MR. HOLTZOFF: It has not been carried.

MR. ROBINSON: Mr. Wechsler's motion is still pending?

THE CHAIRMAN: Yes. There is a motion to which Mr. Seasongood interposed an observation.

MR. HOLTZOFF: I think it was in the nature of a motion to amend, was it not?

THE CHAIRMAN: I did not get that. Was it?

MR. SEASONGOOD: Whatever you call it. I was just suggesting whether it would be an improvement to say on line 4, "and to lessen expense and delay" instead of saying "and the elimination of unjustifiable expense and delay."

MR. CRANE: May I say a further word about that? I think the time is coming when you are going to increase the expense of criminal prosecution. You are not going to put all the burden upon a man to print, or have him stuck with the cost. I have weighed all these questions. All we do is eliminate that which is unjustifiable. If it is unjustifiable it is unjustifiable. There is no use of lessening it.

THE CHAIRMAN: As I get it, Mr. Seasongood's motion is to amend Rule 2 by striking the words "the elimination of unjustifiable" and to substitute in place thereof the words "to lessen." Is that correct, Mr. Seasongood?

MR. SEASONGOOD: Yes.

MR. HOLTZOFF: I wonder if the words "to reduce" would not be better than "to lessen."

MR. CRANE: To reduce what; the expense or unjustifiable?

THE CHAIRMAN: No; "unjustifiable" is eliminated. It would then read "to reduce expense and delay."

MR. YOUNGQUIST: Mr. Chairman, may I suggest it would be necessary to strike out the comma and insert the word "and" after "procedure."

MR. HOLTZOFF: Yes.

THE CHAIRMAN: I take it that would be so.

Are there any remarks on the motion to amend?

(No response.)

THE CHAIRMAN: If not, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

(After a show of hands the Chairman announced the vote to be 5 in favor; 6 opposed.)

THE CHAIRMAN: The motion to amend is lost.

We are now back to the original motion to adopt

the rule in its present form. Are there any remarks?

MR. GLUECK: Mr. Chairman, is it in order at this stage to consider alternative Rule 2?

THE CHAIRMAN: Yes, indeed.

MR. GLUECK: I would like to hear Mr. Dession on his alternative Rule 2.

THE CHAIRMAN: Rule 2 is on page 4, the alternative rules.

MR. DESSION: I think the only difference is that the alternative Rule 2 is designed to try and say a little more, and particularly to highlight such major changes as these rules make in existing procedure. I feel that the choice in a matter of this kind is between, say, a brief statement which in its context is relatively meaningless, and an attempt to really say something. That is about all there is. I think beyond that it speaks for itself. It is just a question of which sounds better.

MR. HOLTZOFF: I call for the question, Mr. Chairman.

THE CHAIRMAN: If there is no further discussion, all those who are in favor of Mr. Wechsler's motion to adopt Rule 2 say "Aye."

(Chorus of "Ayes.")

Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. CRANE: May I ask what that was, Mr.Chairman?

THE CHAIRMAN: That is for the adoption of Rule 2 as is.

That, I take it, brings us to Rule 3 unless there is some discussion of the note.

Is there any comment on Rule 3?

MR. HOLTZOFF: Mr. Chairman, it seems to me that perhaps as a matter of phraseology, in line 1 the words "shall be" should be "is." I notice in the civil rules the present tense is used throughout rather than the future, and I think stylistically ~~realistically~~ it is better. It is a minor matter, of course.

MR. ROBINSON: One factor to consider there, Mr. Chairman, is that in Rule 7 we were talking about the indictment and the information which, I take it, to some extent is comparable to the complaint as a statement of the offense; at least to this extent it is comparable. We have "Offenses shall be prosecuted in the district court by indictment"; and the thought is that possibly some parallelism might be desirable so that you would have "The complaint shall be a written statement of the essential facts."

MR. MEDALIE: Excuse me for interrupting, but Rule 3 is definition.

MR. HOLTZOFF: Yes.

MR. MEDALIE: The other is not definition.

MR. HOLTZOFF: Definition should be in the present tense. I move we change "shall be" to "is."

MR. MEDALIE: I second it.

MR. YOUNGQUIST: The first "shall be"?

THE CHAIRMAN: Yes, in line 1. The motion is to change the words "shall be" in line 1 to "is." Are there any remarks? If not, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. HOLTZOFF: Mr. Chairman, I move we strike out the last five words of this rule, the words "and filed with the commissioner." I think that is a detail that is not necessary.

dz MR. WECHSLER: Where would it be filed?

MR. HOLTZOFF: This is a definition. The filing is no part of a definition. We there define what a complaint is. The filing is no part of the definition of what constitutes a complaint. That is the reason I am suggesting that those words be stricken out.

MR. MEDALIE: You do not want to get rid of the provision because it is important that the defendant or

his counsel have a chance to read the complaint when they come around. They ought not to be told it is not in the commissioner's office. You can meet that by putting a period after the first word in line 4 - "commissioner," and then going ahead and saying, "It shall be filed with the commissioner."

MR. ROBINSON: Mr. Youngquist sent in a suggestion along that line, George, which was - and Mr. Youngquist, you check me on this quotation - as I remember it, strike out "a commissioner" in line 3-4, so you would say, "be affirmed before and filed with the commissioner," instead of no expression on the subject.

MR. HOLTZOFF: No, but that does not meet the point.

MR. ROBINSON: I appreciate that, Alex.

MR. HOLTZOFF: Mr. Medalie's suggestion would meet my point. I just did not want to see filing being a part of the definition.

MR. WECHSLER: If there should be favorable consideration for proposed Additional Rule 3, on page 4, Note to Rule 2, which is something that the Committee would have to pass on anyhow, then this problem would be eliminated because that states that the complaint shall be filed with the commissioner. It might be helpful to consider that issue first and then come back to this.

On page 4, Note to Rule 2, there is a Proposed Additional Rule 3, which I believe is submitted by Mr. Dession.

MR. HOLTZOFF: I do not think I have it.

MR. DESSION: It is on page 4, Note to Rule 2. This would be inserted between the present Rules 2 and 3.

You will remember we originally had a rule like this which spoke in terms of commencing a proceeding. We took that out of, I think it was, the first part of, or early in the proceedings, because there were some fears and justifiable, I think, that if we spoke in terms of commencing, we would be directly affecting the question of the statute of limitations, the question of when jeopardy attaches, and so on. We were not, as I recall, prepared at that time to determine just how we would be affecting those questions and just what we wanted to do if we did affect them.

Now, since then there has been a little discussion on that. I think in the light of the looking into this question that the Reporter and I have done since, and the substance of that is embodied in the notes following this proposed new rule, that we could safely speak in terms of initiating a prosecution. We avoid the term of "commencing a proceeding," which is the real hazard, and it is a hazard, and I think if we do this we may be confident that

we are not affecting any of those problems; that we simply explain at this early point the various ways in which prosecutions may get under way, and it serves as an introduction of what is to follow. Its chief point is to indicate at the outset the types of moves, if you will, which are possible under the rules. That is its purpose.

MR. LONGSDORF: Mr. Chairman, it seems to me those words "and file with the commissioner" are definitive in their nature and purpose. An unfiled complaint would not be a complaint.

THE CHAIRMAN: May we, so we do not get confused, address ourselves first to this Additional Rule 3 because, as Mr. Wechsler points out, if that is to be adopted, then we have another problem with Rule 3. So may we address ourselves first to a consideration of Additional Rule 3, which appears on page 4 of the Note to Rule 2?

MR. HOLTZOFF: Mr. Chairman, I want to call attention to the fact that we had, as Mr. Dession mentioned, a good many discussions, rather detailed discussions, on the question of whether we ought to have any rule at all on how a criminal proceeding is begun, and we voted not to have any.

I am just wondering what advantage is gained by this new rule? While I appreciate the fact it does not use the word ~~he wants~~ and, therefore, he gets away from

the technical word of art, even so, I am wondering whether any advantage is gained by having this rule as to the Initiation of Prosecution?

MR. GLUECK: I think there is a definite advantage to state at the outset the various ways in which you can get the wheels moving, and the whole rule amounts to just four and a half lines. I think there would be a definite advantage.

MR. WECHSLER: It seems to me it fits in with the scheme of the whole job, Mr. Chairman. It indicates the branches that subsequently spread out and receive detailed treatment.

MR. HOLTZOFF: I am afraid that on this question of the statute of limitations some people might successfully argue that the word "initiate" means the same thing as "commence," and I have that same problem.

MR. MEDALIE: Take it at the worst: Suppose the effect of this rule is that the statute is tolled by filing a complaint before a commissioner?

MR. HOLTZOFF: I have no objection to that.

Mr. MEDALIE: Would there be any objection?

MR. HOLTZOFF: I would not have any objection, but I want to call attention to the fact that it comes back to that same point.

MR. MEDALIE: I think our difficulty was that we

did not feel that we had the authority to determine when the statute of limitations should be tolled and that would be a dangerous question, to be worked out on the basis of an interpretation of the statute, but if this changes the result any of that statute, I have no feeling against it.

MR. DESSION: We have something of a precedent on this too, as noted here in the A. L. I. restatement of the law of torts. They were worried about this very problem, and they adopted the same formula which we are proposing here.

MR. YOUNGQUIST: Worried about the problem of the statute of limitations?

MR. DESSION: Exactly; and they finally adopted this particular language formula which we are advocating here. In the commentaries to those rules you will find discussion on that.

MR. ROBINSON: At our discussion in the last meeting, one factor which entered into your decision this way, I believe, was that the civil rules had not quite taken the responsibility of stating when a civil proceeding commenced.

MR. HOLTZOFF: Yes, there is a civil rule about that. It says that the statute is ~~commenced to be~~ tolled by the filing of a complaint.

MR. ROBINSON: That is, it was felt that there

could not be a comparable provision for that. That is the reason, and because of certain factors you mentioned, some of which we put in the notes.

MR. YOUNGQUIST: This proposed alternative or Additional Rule 3 is really descriptive rather than substantive, isn't it?

MR. DESSION: That is its purpose, I should say, descriptive.

MR. YOUNGQUIST: I was wondering whether we would be justified, for the purpose of describing the proceeding, in putting in a rule that might, by any possibility, even raise the question as to when a prosecution has been commenced.

MR. DESSION: I do not think there is much danger, really, because some of your statutes of limitations explicitly say that the proceeding is commenced by the filing of an indictment, and so on. We have case law to the effect that the filing of a complaint does not commence the tolling of the statute.

MR. HOLTZOFF: Yes, but these rules will change the case law that is inconsistent with them and they will change any statute which is inconsistent.

MR. YOUNGQUIST: That is what bothers me, whether a rule is going to drive the courts and the lawyers to the cases to find out whether there has been a change. I would

have no objection to the description of how this proceeding is started, or initiated, or commenced. I should not like to see us do anything that might, by any possibility, raise a question.

THE CHAIRMAN: But might it not be well to have one or two rules that we could refer to when we get before Congress, to show we were giving the prisoner a break?

MR. HOLTZOFF: I do not see how this gives the prisoner a break.

THE CHAIRMAN: This would be interpreted immediately as tolling the statute. I have no doubt of that.

MR. HOLTZOFF: It would be, perhaps.

MR. WECHSLER: It would be debateable as to whether we had a right to change the language of the statute of limitations.

THE CHAIRMAN: We can say we have not done it, but I am convinced that the first district court that has a chance to deal with this rule will say that we have.

MR. LONGSDORF: Mr. Chairman, doesn't the Committee think that the danger that this may be construed as altering the statute of limitations is a little bit exaggerated? I do not think we are going to touch the statute of limitations, in connection with criminal matters - and they require the filing of an indictment --

MR. WECHSLER: What is the language of the statute of limitations?

MR. LONGSDORF: (Continuing) -- with any such construction as this.

MR. HOLZTOFF: It takes an indictment to toll the statute.

MR. LONGSDORF: No; usually it commences once the indictment is filed, within three years.

MR. WECHSLER: It seems to me that is an explicit answer to the problem. It does not speak --

MR. HOLTZOFF: It is, if it is really substantive law; but if it is a rule of procedure, then that statute might be deemed to have been changed by this rule, because all inconsistent procedural statutes will be superseded by these rules.

MR. MEDALIE: You would have to assume the statute of limitations is purely procedural before you could change the statute of limitations.

MR. HOLTZOFF: There is no dispute but that it is is procedural.

MR. MEDALIE: Of course, by definition, you are right, but even definitions fall before common sense, don't they?

THE CHAIRMAN: Or congressional prejudice.

MR. YOUNGQUIST: They fall before Congress. I do

not think we dare touch it.

MR. HOLTZOFF: I mean, for some purposes, the statute of limitations is considered to be substantive; for other purposes, procedural.

MR. MEDALIE: We call the statute of limitations procedural, but you know how essential they are and what they mean to the right on the part of the Government to do something to somebody.

MR. HOLTZOFF: They are procedural rules.

MR. MEDALIE: You can call it procedural, but we are really legislating on a matter that is none of our business. So all I can say then is that although I cannot answer you on the point of definition, there must be something wrong with the definition.

MR. HOLTZOFF: If that is so, aren't we safe in not adopting this language?

MR. MEDALIE: I think we had better keep our hands off anything that affects the statute of limitations.

MR. WECHSLER: Is there anything to prevent us putting in the commentaries a statement that we proceeded on the assumption that the statute of limitations was outside our jurisdiction and would not be affected by this; that this is purely a descriptive rule to indicate the way to get the machinery moving?

MR. HOLTZOFF: What is the advantage of advocating

the rule?

MR. WECHSLER: Communication of information; that is all.

MR. CRANE: May I ask a question? This provides in Rule 3 for a complaint, states what a complaint is and where it is filed. You have in the rules also what an indictment is, haven't you?

MR. ROBINSON: Rule 7.

THE CHAIRMAN: Yes, Rule 7.

MR. CRANE: All through our rules we state the process.

MR. HOLTZOFF: This is surplusage really, isn't it?

MR. CRANE: I do not think this adds anything to it. You have the complaint and you have the indictment stated, and also when one can be used instead of the other in district courts. What else is there to add?

MR. DESSION: Mr. Reporter, do our rules make it clear that a prosecution may be actually begun by indictment without going through these earlier stages? I raise that question because I am not sure, offhand, whether they do or not.

MR. HOLTZOFF: I think they do.

MR. DESSION: Or is it only by implication?

MR. WECHSLER: I do not think the rules indicate

what the function of each of these three documents is, although it is known.

MR. CRANE: I think we could obtain a far-reaching effect if we got rid of this mass of decisions on when a prosecution is commenced or, at least, the statute of limitations begins to toll. There ought to be something definite in the law regarding it, but I do not know as we can do that. If we do it, I think we ought to do it openly.

MR. HOLTZOFF: I should like to direct attention to Rule 7 (a), the first sentence. That indicates that the procedure is as Judge Crane has just stated.

MR. DESSION: It seems to me Alex, that it does that only by implication and that no one would necessarily draw that implication unless he was very familiar with existing practices and took it for granted we were not changing it because we were expressly so providing, but it does not say here this may be the first move.

MR. HOLTZOFF: I do not think you have to spell it out quite that much.

MR. DESSION: Well, I don't know.

MR. YOUNGQUIST: Oftentimes, in both Federal and State courts, the indictment is the first move. In fact, in some districts, that is a more common way of procedure, and it seems to me that the provisions with respect to

complaint and hearing before the commissioner resulting, as they do, under Rule 5, in the commissioner holding the accused, if necessary, in the district court, makes it quite clear that while the function of the complaint and the preliminary hearing is either the discharge of the accused or his being held over, nevertheless, a trial system - in the first sentence of Rule 7 - that provides that offenses shall be prosecuted in the district court by indictment or information, makes it entirely clear that the preliminary hearing is not a prerequisite. And then too, I think, that the common understanding of the bench and the bar, and that is really the normal way of doing it, is that the practical purpose of having a preliminary hearing is to have a defendant available when the indictment is returned or information filed. In view of that, we could be pretty sure there would not be any misunderstanding about that.

MR. DESSION: I think the odds are that way.

MR. WECHSLER: Perhaps some point would be made by qualifying Rule 3 as it stands by a clause analogous to that in Rule 7 (a), "Proceedings before a United States commissioner shall be initiated by a complaint, setting forth the essential facts constituting the offense charged made upon oath or affirmation." I think, really, it is stylistic matter. It is not a matter of substance in any

sense at all.

THE CHAIRMAN: I think that is preferable, and that would eliminate Rule 3 (a).

MR. HOLTZOFF: Yes.

THE CHAIRMAN: It gives you a rule, then, that is a rule of action rather than mere definition.

MR. HOLTZOFF: Yes, I think that would be better.

MR. SEASONGOOD: Will you restate that, Mr. Wechsler?

THE CHAIRMAN: So that we we can get it in tentative form for voting on it, if that be the wish of the meeting.

MR. WECHSLER: It would begin, "Proceedings before a United States Commissioner shall be initiated by a complaint."

MR. HOLTZOFF: Wouldn't you say "A proceeding" rather than "Proceedings"?

MR. WECHSLER: "A proceeding," yes; "setting forth the essential facts constituing the offense charged made upon oath or affirmation" period.

MR. LONGSDORF: I think you left out "written" there.

MR. WECHSLER: "In writing."

MR. HOLTZOFF: I do not think you need that "oath or affirmation." There is a definition later on,

in the definitions, that "oath" shall include "affirmation".

THE CHAIRMAN: That is correct.

MR. WAITE: Mr. Chairman, I confess I am lost on this discussion. As I gathered it, first Rule 4 uses the word "complaint"; "When a complaint is filed." Now Rule 3 purports to define the term "complaint". Do I gather that the objection is that we ought not simply to define it but we ought to say that that is the way of starting a prosecution? If so, that certainly affects the statute of limitations.

MR. HOLTZOFF: No.

MR. WECHSLER: We ought to show that the complaint is the document to get things moving before a United States commissioner. We ought to indicate what the function is.

MR. WAITE: If all we want is a definition of the word "complaint" as that word is used in Rule 4, I do not see what is wrong with Rule 3 as it is there.

MR. HOLTZOFF: I would like to say this, Mr. Waite, that Mr. Wechsler's formula meets the objection that we might be unintentionally affecting the statute of limitations, because if we say, "A proceeding before a United States commissioner may be initiated," nobody can say that that constitutes the tolling of the statute of limitations.

The way the Additional Rule 3 is phrased there

might be that danger, because it is phrased, "A prosecution may be instituted by the filing of a complaint."

MR. WAITE: I was talking about original Rule 3, which is nothing in the world but a definition.

THE CHAIRMAN: I think this started before you came in. We commenced a discussion of original Rule 3. Then the question was raised as to whether we should not give consideration, before we did that, to Proposed Additional Rule 3, which is on page 4 of the Note to Rule 2, and that is how this discussion came about.

MR. WAITE: I understand the discussion is whether we shall adopt Additional Rule 3 rather than original Rule 3?

MR. DESSION: No.

THE CHAIRMAN: No; that would be 4. The last suggestion now is that we can eliminate the adoption of Additional Rule 3 by making Rule 3 as here stated in the form of something more than a definition, making it a rule of action, and indicating that proceedings do not have to be started by complaint, but when there is a complaint before a commissioner it shall take the form of a written statement of the essential facts, and so forth.

MR. HOLTZOFF: I wonder if we could have Mr. Wechsler state his proposal again.

MR. WECHSLER: I would do it this way: "A

proceeding before a United States commissioner shall be initiated by written complaint, setting forth upon oath the essential facts constituting the offense charged."

THE CHAIRMAN: That seems to be complete. If everyone is willing, we have the last five words. Is there any question as to whether or not they should stay in? If so, may we dispose of that particular question of the filing with the commissioner? Is that regarded by anybody as essential?

MR. CRANE: Are you going to eliminate it altogether?

THE CHAIRMAN: That is the question, whether or not we should. It is not in Mr. Wechsler's motion.

MR. WECHSLER: I thought it was implied by the language, Mr. Chairman.

MR. CRANE: What is the harm in having it in?

MR. DEAN: Couldn't it be changed, "by filing a written complaint"?

MR. WECHSLER: Yes, I accept that; "by filing"; "shall be initiated by filing a written complaint."

MR. YOUNGQUIST: May I raise a question? Must the complaint under this language be sworn to before the commissioner?

MR. HOLTZOFF: No, not under this language.

MR. YOUNGQUIST: Should it not be?

MR. HOLTZOFF: Why should that be indispensable, so long as it is a sworn complaint?

MR. YOUNGQUIST: A complaint sworn to before a notary public and brought before the commissioner for action would be, I think, a very novel procedure.

MR. HOLTZOFF: It would be novel, but I do not see why it could not be.

MR. YOUNGQUIST: I do not think we ought to introduce novelties of that sort, because the complaining witness ought to appear before the commissioner in person and make his complaint and swear to it.

MR. DEAN: I think your point is well taken.

MR. WECHSLER: So do I.

MR. DEAN: Informalities.

MR. YOUNGQUIST: You cannot introduce such informalities as a complaint sworn to before a notary public.

MR. LONGSDORF: Mr. Chairman, how are we going to take care of the procedure which follows an arrest without a warrant and the taking of the prisoner before a commissioner?

MR. HOLTZOFF: There is another rule on that.

MR. LONGSDORF: Is that covered?

MR. HOLTZOFF: Yes, that is covered by another rule.

MR. LONGSDORF: Yes, I remember, that is covered.

MR. WECHSLER: There the proceeding would be initiated by complying with the rule and filing the complaint.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Are there any comments on Mr. Wechsler's motion?

MR. WECHSLER: I think Mr. Youngquist's point is a good point and we have to meet it.

MR. YOUNGQUIST: Don't you think we ought to have that sworn to before the commissioner?

MR. WECHSLER: Yes; I did not mean to vary that.

MR. CRANE: I do not mean to delay you, and I do not want to talk too much, but I don't quite understand the emphasis placed upon the procedure. What is the necessity of our stating when a proceeding commences?

THE CHAIRMAN: We are eliminating that now, Judge, under this proposed rule. This rule would take the place of Rule 3, and I take it also do away with the necessity of Additional Rule 3. So we save all that motion.

Might we have that re-read?

MR. WECHSLER: "A proceeding before a United States commissioner shall be initiated by filing a written complaint, setting forth upon oath the essential facts

constituting the offense charged."

Now, that at least has to be revised to meet Mr. Youngquist's point.

THE CHAIRMAN: Oath taken before a commissioner.

MR. DEAN: Can't it be revised by adding after the word "complaint", "a written complaint sworn to before the commissioner"?

MR. WECHSLER: Yes.

MR. DEAN: "and setting forth the essential facts".

MR. CRANE: Is there some other matter before the commissioner that would result in arrest? That is not a proceeding. What I am getting at is, I cannot see what we are talking about. You file a complaint. I agree, it should be on oath before the commissioner, and it may result immediately in the man being brought in by a summons or something of the kind. Is there anybody in doubt that is a proceeding?

What is the use ofcalling it a proceeding, or initiating a proceeding, or getting into dispute on what a proceeding is? A complaint is filed, and we describe the complaint, and it states an offense, and we state everything that follows - that is all stated in our rules - and the same applies to an indictment. Why should we go back to try to define what a proceeding is; whether it is

or whether it is not a proceeding? If a man is brought in and he cannot get bail, he will understand it is a proceeding.

MR. WECHSLER: The thought was, Judge, to get away from a merely definitive rule about what a complaint is and get a rule which speaks in terms of the action to be taken.

MR. CRANE: Why describe it and call it an action? It is an action if it results in somebody moving; something is done on the strength of it; and it simply is not a description; it is a statement that that is a complaint, and we state what the complaint is - it is a statement charging an offense, sworn to before the commissioner, and after that the commissioner issues process as provided for by these rules.

THE CHAIRMAN: Isn't one of the reasons for inserting it to show that not every criminal proceeding shall start with a complaint?

MR. CRANE: I did not understand.

THE CHAIRMAN: Wasn't that one of the objectives in mind?

MR. DESSION: Yes.

THE CHAIRMAN: That language suggested by Mr. Wechsler would indicate that all criminal proceedings do not commence with a complaint.

MR. CRANE: That may explain it to me. I am only asking for information. I wanted to understand it; that is all.

MR. WAITE: Mr. Chairman, I am still lost. I do not see the purpose of this rule. I do not see any objection to it as it is formulated, but I do not see the purpose of it.

THE CHAIRMAN: As I gather - I am only interpreting, and that is a very dangerous thing - the Additional Rule 3 was designed to be a guidepost, indicating possible methods by which criminal proceedings might get under way; complaint, indictment or information. It was then suggested that we might eliminate the necessity for Additional Rule 3 if we had appropriate language in Rule 3 itself indicating, with respect to complaints, what we have clearly indicated with respect to indictments, the method of commencing a proceeding and, further, that it was not the only method of commencing a criminal proceeding.

MR. WAITE: I think Rule 3, as it stands as a definition, is innocuous. Frankly, I do not see any point in saying that it may be started in this way. I do not think we get anything, and we do seem to cause a lot of trouble by it.

MR. MEDALIE: Do I understand, Mr. Waite, you do not think that either the complaint should be defined or

the initiation of the proceeding described?

MR. WAITE: No, I do not say it should not be defined. I just say I do not see any point in saying that the proceeding is initiated by a complaint. That seems to me to raise questions as to what it means, and there is no point in putting it in. I do not think we ought to put it in.

MR. MEDALIE: I think you agree, don't you, that it is necessary to set forth the requirements of a complaint?

MR. WAITE: I am going to suggest later on --

MR. MEDALIE: That is, the essential facts, for example, instead of the language of the statute?

MR. WAITE: Even if we define complaint, it leaves this question in my mind: I frankly do not know whether a complaint in the Federal courts has to be on information and belief or on an allegation of fact. I just do not know that, but it seems to me if we are going to define complaint we ought to say specifically that it shall be one way or the other.

MR. MEDALIE: That is what we do in Rule 3, in whatever form it takes.

MR. WAITE: No, I do not see it in Rule 3.

MR. MEDALIE: We require a statement of the essential facts on oath.

MR. SEASONGOOD: "Oath" is a word within definite meaning. It may be either a positive oath or on information and belief.

MR. WECHSLER: Isn't that a separate problem we have to resolve?

MR. SEASONGOOD: Yes.

MR. WAITE: I am just answering Mr. Medalie's question.

MR. WECHSLER: In answer to you, I would like to state my purpose in suggesting this language. I would like Rule 3 to be more than just a definition of a complaint. I would like to have it state what the function of a complaint is. We do that with indictment and we do it with information, and it seems to me we have a definite need for Additional Rule 3 because no place is there a definition of complaint stated. We are not doing it merely to state a term, but to make our rules stylistically uniform in describing what the paper involved is and what the different purpose in the proceeding is.

MR. MEDALIE: There is one problem I find here, while I like your idea. We say a proceeding is initiated before the Commissioner when the complaint is filed and we define what we mean by complaint. The fact is a prisoner is brought before a commissioner; he has been arrested; there has not been a complaint. Now, it is the

commissioner's duty to hold some kind of proceeding in the drawing up of a complaint, and during that proceeding he acts as a judicial officer and has certain authority. For example, as is known in the State codes, and is the common law, the magistrate proceeds to interrogate the prisoner; he has to sign the complaint; and he has authority to interrogate him and put him under oath preliminarily.

Now, we do not go into all that detail, but while that is going on the commissioner is functioning, and yet by the alternative that has just been proposed there is no proceeding pending before him, which is not the fact, and we do not intend that to be the fact.

MR. YOUNGQUIST: Mr. Seasongood and I were just discussing that between ourselves, and it seems to me that the proceeding is begun, initiated, or commenced, or started, or whatever the word is that we want to use, when the complaint is filed. Until that time there is no proceeding. The matter of arrest would not be a prosecution.

However, Mr. Chairman, I think that before we are through, we will probably revert to this principal Rule 3 as it is, with a few changes to make it a little more readable.

MR. CRANE: I move we adopt it as it is.

THE CHAIRMAN: Now, we have several unseconded

motions, of course.

MR. MEDALIE: I do not think we want to rush this and I do not think we want to delay it. I think our trouble is that we are trying to provide for too much. There will be many gaps if we adopt Rule 3 - the gaps are implicit - but if we adopt Rule 3 as restated, we have deliberately created a gap, that is, we have provided that the commissioner has no jurisdiction over the thing necessarily before him before the complaint is drawn. By the alternative proposal that was suggested by Mr. Wechsler, I think we are creating a defect in the magistrate's power, which we ought not to deliberately create, and I think, defective as it may be, because of gaps - casus omissus - that necessarily come into the preparation of rules, it is better to leave it as it was originally.

I move the adoption, if it has not been moved yet, of Rule 3 as originally stated.

MR. CRANE: I just moved it.

MR. MEDALIE: I am sorry.

MR. HOLTZOFF: I move a couple of verbal amendments, which you will probably accept. Change "shall be" to "is".

THE CHAIRMAN: That has already been done.

MR. HOLTZOFF: And leave out the last five words

and make a separate sentence of that, "It shall be filed with the commissioner."

THE CHAIRMAN: Should we not also strike out "shallbe" in the third line?

MR. YOUNGQUIST: Yes, "and shall be".

MR. HOLTZOFF: Yes, "and shall be"; and strike out the words "or affirmation".

MR. SEASONGOOD: How is it going to read then?

THE CHAIRMAN: It will read, "The complaint is a written statement of the essential facts constituting the offense charged made upon oath before a commissioner. It shall be filed with the commissioner."

MR. WAITE: I wonder, Mr. Chairman, if voting in favor of that motion, as I am ready to do, would preclude further amendment providing whether it shall be on information and belief or on specific assertion of knowledge?

THE CHAIRMAN: No.

MR. WAITE: I haven't any idea which it ought to be, but I think the rule should state one way or the other.

THE CHAIRMAN: I think we ought to cover that separately.

MR. MEDALIE: I think it could be considered separately, and if it is to be covered, it can be covered --

MR. WAITE: I meant "considered".

MR. MEDALIE: I have some ideas too, because we have had some principles in our various State courts resolved by decision rather than by statute.

THE CHAIRMAN: May we get a vote, if we can, on the motion as is and then proceed to Mr. Waite's problem?

The motion is to adopt Rule 3 in this form: "The complaint is a written statement of the essential facts constituting the offense charged made upon oath before a commissioner. It shall be filed with the commissioner."

MR. WECHSLER: Mr. Chairman, was there no second to my motion?

THE CHAIRMAN: I think not.

MR. MEDALIE: You say "made upon oath with the commissioner"?

THE CHAIRMAN: No; "made upon oath before a commissioner."

MR. DEAN: You are leaving out "or affirmation" as necessarily implied?

THE CHAIRMAN: It is covered by definition subsequently anyway. "It shall be filed with the commissioner" is the concluding sentence.

Are there any further remarks on the motion? If not, all those in favor say "Aye"; opposed "No."

Two in the negative; all the rest in the affirmative. The motion is carried.

Now may we proceed to a discussion of the question raised by Mr. Waite as to whether or not the words "upon oath" mean upon direct oath or upon information and belief under oath?

MR. HOLTOZFF: I would like to make a motion to clear up the matter by suggesting that we add a sentence to this rule to read as follows, "The oath may be made upon information and belief."

MR. MEDALIE: Without saying more about it?

MR. HOLTZOFF: Yes.

MR. DESSION: It seems to me that would aggravate your problem.

MR. HOLTZOFF: Yes, it would. It should set forth the source of the information and the grounds of the belief.

MR. MEDALIE: I will assume the motion was seconded and address myself to the general subject. We will have some other motions before we get through on the subject matter, I am sure.

There are some things we had better leave to the courts, to their experience and their practical judgment. You cannot cover everything.

In New York we do not define information and

belief in criminal cases. It causes the courts some trouble, and the trouble that was caused in this State, which has a large experience with criminal procedure, arose out of John Doe proceedings. Mr. Jerome, whom you may recall as having been the first of the great district attorneys around here, was quite busy with John Doe proceedings until someone defied one of the subpoenas. A John Doe proceeding was simply a proceeding against nobody in particular, and it was all on complaint filed on information and belief. The Court of Appeals of this State - that was People ex rel Livingston v. White, I think it was, 186 New York, comparatively ancient, but that is only 1904 or 1905 - said that you must name the person; if you don't know his name, you must describe him. They did not say you cannot have information and belief but they indicated that you ought to set forth the sources of your information, the grounds for your belief and the specific data.

Now, that is all right, that can be defined, therefore, but the way to define it is by judicial experience. I think we ought to leave it alone. Today some men come in, Government agents, and make an affidavit and either they say positively, in terms of the statute, that the defendant committed a crime, which they give in statutory language, or they say on information and belief

that he did so or that he did a specific act on information and belief, and set forth nothing further. If we want to cover the whole subject, and all the variations that are possible, I think we are taking on an immense job. I think we ought to leave it alone.

If some day one of us wants to raise the question, we will tell a witness not to appear, and he will be punished for contempt, and we will test it. I did that for Controller Travis about 20 years ago when, after testifying, he was asked a question or about to be asked a question which I knew that he would be wise not to answer. He declined to answer on the ground that the magistrate had no jurisdiction to inquire. Then there was an order to punish him for contempt, and there was a habeas corpus, and the Appellate Division said that there was no proceeding, the complaint was insufficient to give the magistrate jurisdiction.

The courts will find out as they go along. You cannot define it, I think. We ought not to attempt to define it all.

MR. HOLTZOFF: Of course, it does lead to frustration, doesn't it? You go on for weeks and then all of a sudden you find that all you have done has gone for naught.

MR. MEDALIE: You can draw up rules and make

definitions and if, after a few weeks, you decide there is a flaw in the proceeding, the same thing will happen, and you will have to test it.

MR. HOLTZOFF: I think so.

MR. WAITE: I am worried about something more immediate than what Mr. Medalie is suggesting. Suppose when we get these rules done I should be before a bar association - and I hope to heavens I never shall be - and they say to me with respect to the complaint, may it be on information and belief or must it be on a specific statement? And I say, "Well, gentlemen, the Rules Committee thought it was not well to decide that and, therefore, we don't know. That is going to be left to the courts to decide some other time." Aren't they going to say, "What in thunder were you doing when you drew up these rules?"

MR. WECHSLER: Isn't there something of an answer to that, John? The complaint must show probable cause - that is always the test - and in so far as a magistrate is given any instructions, he is not to do anything unless he is satisfied there is probable cause. On some occasions allegations, even sworn to on information and belief, would not constitute probable cause, speaking of probable cause non-technically. In other situations they would.

And isn't that what George means by leaving it to

be worked out judicially?

MR. WAITE: Am I not right that in some states an information to the effect that the complainant is informed and does believe that John Doe did this, that and the other thing, is invalid and ineffective?

MR. WECHSLER: Yes.

MR. WAITE: In other states that is perfectly valid. Now, it seems to me that we have got to choose one or the other. I should hate to stand up before young people and say, "Yes, I know that there are these two diametrically opposite rules, I know in Michigan it is one thing and in Ohio it is another thing, and we just did not like to decide which it should be, so we left that to the courts to decide."

MR. HOLTZOFF: Mr. Waite, I am just trying to figure out whether that is the kind of question that is apt to be asked in a bar association.

MR. WAITE: It is the first thing that occurred to me when I considered this proposal and sent it to Jim.

MR. CRANE: You do not know the Bar Association of New York City. You cannot answer half of their questions and no one attempts to.

MR. SEASONGOOD: It is not a question of what the bar associations ask. I made this same suggestion to the Reporter and evidently it did not find favor, but we are

supposed to bring about rules that operate for uniformity. That is one of our great objects. Now, why should you have it in one state one way and in another state another way, and leave it indefinite, when you can resolve the situation? There were certainly old cases where information and belief alone was not sufficient. You had to state the grounds of your information. I do not see any objection to resolving that ambiguity and not having it operate one way in one place and another way in another place, and thus leave the question open.

MR. ROBINSON: Mr. Seasongood, you referred to sending in a proposal like Mr. Waite's. I think that requires a word of explanation.

MR. SEASONGOOD: You did not have to adopt every suggestion I made. Most of them were wrong, I am sure.

MR. ROBINSON: No. On that point, you see, again I felt bound by Draft 5. I want it raised here; and I raised it this way with Mr. Holtzoff, and Mr. Holtzoff opposed inserting it. I am glad it is being brought up here. I would like to state my personal opinion, for what it is worth. I agree with what you say and Mr. Waite says. I have raised the same point. I think it is unfortunate. I think you will notice in new Rule 3, page 2, it is stated at the bottom of the page, "Some states permit the complaint to be made on information and belief;

others require personal knowledge," citing Mr. Longsdorf's book there as authority for that.

It seems to me that this is a place where diversity in State procedure should be resolved in favor of uniformity and, therefore, it seems to me it ought to be definitely answered. And I think Mr. Holtzoff, or someone who is familiar with present practice, told me that sometimes a Federal investigating officer will make the complaint as though it were on personal knowledge, although, as a matter of fact, he does not have personal knowledge. In other words, there is some evasion, some indirectness. Now, that I think we should correct, and personally I would like to see in the rules, though, of course, my opinion is just one of eighteen, I would like to see a provision that a complaint may be filed on information and belief.

I think the Ruroede case, George, from your jurisdiction, is an example of the unfortunate results that follow when a Federal judge - who was it; Judge Augustus Hand? - of course, he was not the judge in the district court, but he decided the Ruroede case on appeal --

MR. HOLTZOFF: That was decided by Judge Ray.

MR. ROBINSON: Yes.

MR. MEDALIE: So it does not belong in this district.

MR. HOLTZOFF: He was sitting down here.

MR. ROBINSON: It was really a miscarriage of justice, I think, because New York State followed him. I think it is unfortunate because the decision was to the effect that there must be direct information, personal knowledge. And I too feel that Mr. Holtzoff's suggestion is unfortunate - that it would be necessary or desirable in a complaint to set out the source of your information - because we all know as a practical matter that an investigating officer frequently receives information for which he cannot disclose the source without a gross breach of faith and miscarriage of justice.

MR. MEDALIE: Let me answer that.

Mr. ROBINSON: On the other hand, if he, as an officer, says he has been reliably informed and believes that John Smith did commit a certain offense, then signs that and swears to it, if we give him any standing at all as an officer, why shouldn't we accept his word on that without requiring that you must have anybody come in from out in the gutter somewhere, and if he willswear to the thing as firsthand knowledge, then we accept his complaint and prefer that type of initiatory complaint to the other type, namely, having a responsible Federal officer say, "I am informed and believe"?

MR. MEDALIE: It is a long question and I do not

know whether I can answer it.

MR. HOLTZOFF: May I state my motion?

MR. MEDALIE: Please, before I forget this, I want to ask you one question, Jim. At the conclusion of a hearing before a magistrate, can he make a finding of probable cause on information and belief? The answer obviously is no.

MR. ROBINSON: No; the answeris yes, under State practice. John and I are both familiar with that.

MR. MEDALIE: You mean you make a finding after a hearing?

MR. ROBINSON: Yes.

MR. MEDALIE: You mean witnesses have been called and they have testified to information? Is that what you mean?

MR. ROBINSON: We are talking about the complaint.

MR. MEDALIE: No, no; I am talking about a hearing.

MR. ROBINSON: Yes, sometimes that is true.

MR. MEDALIE: Oh, no, that cannot be.

MR. HOLTZOFF: No.

MR. MEDALIE: No, that is not true.

MR. ROBINSON: It is true.

MR. MEDALIE: No, not a hearing. On a hearing, look, I will give you what I think about this, on a hearing

the magistrate may not hold except on the testimony of witnesses, obviously witnesses who tell what they saw and heard and what they know. A witness cannot appear before a magistrate, any more than he could before a judge, and say, as effective testimony, that Alex Holtzoff told me so-and-so. That does not go.

If It does not go for the purposes of holding him, establishing the probable cause, I do not see why it should go for the purpose of issuing a warrant.

Let us see practically how it operates --

MR. HOLTZOFF: And there is another thing --

MR. MEDALIE: Let me tell you how that operates, first, that is, how we operate in New York.

MR. ROBINSON: George, you are talking about the hearing. I am talking about the complaint.

MR. MEDALIE: Yes, I know.

MR. ROBINSON: You are off the point I am talking about.

MR. MEDALIE: I am testing your complaint by what you must work with at a hearing because --

MR. ROBINSON: Well, let me say --

MR. MEDALIE: Wait a minute. Wait just one minute, and I will show you.

MR. ROBINSON: All right, all right.

MR. MEDALIE: Please. You are worried about

disclosure by an agent of confidential information?

MR. ROBINSON: Oh, no, that is just part of it.

MR. MEDALIE: To the extent that you are worried about the disclosure by an agent of confidential information, you know you cannot hold a person if the agent has no personal knowledge at all; he cannot even testify. So what have you accomplished? You have held a man, you have arrested a man, and you don't dare hold a hearing.

MR. ROBINSON: Oh, yes, you can.

MR. MEDALIE: Why, how can you hold a hearing if he cannot disclose who it is who gave him the information?

MR. HOLTZOFF: Let me interject this suggestion. It is a well-recognized practice, and approved practice, for agents to obtain warrants on information obtained or secured by them from confidential informants. Now, a requirement in this rule stated that if the complaint is made on information and belief it must set forth the source of the information and the grounds for the belief. I made the motion, and I certainly do not construe that requirement as meaning that the name of the informant must be stated. I think that, say, an alcohol tax agent in his complaint may state that, "I was informed by a confidential informant that" --

MR. MEDALIE: Do they say that?

MR. HOLTZOFF: (Continuing) -- "the defendant is operating a still on a premises."

MR. MEDALIE: My goodness, then, I have practiced wrongfully for the 30-odd years that I have been at the bar. I always thought that when you said "on information and belief" you had to give the name of your informant.

MR. HOLTZOFF: Oh, no.

MR. MEDALIE: We have practiced under the wrong rules, haven't we?

MR. HOLTZOFF: If you abolish confidential informants.

MR. MEDALIE: I would like to abolish them but we have no letters of -- what do they call them, for the Bastille?

MR. HOLTZOFF: Letters of cachet.

MR. MEDALIE: Letters of cachet.

MR. HOLTZOFF: Oh, but you frequently have to act on information received from a confidential informant, and certainly it will be very bad for the administration of justice if you cannot.

MR. MEDALIE: It would be very bad for the administration of justice if you could lose your liberty on information that comes from confidential informants.

MR. HOLTZOFF: Only for a warrant to be issued.

MR. MEDALIE: Only a warrant? That is pretty

serious.

MR. HOLTZOFF: No, I think that much less is required for the issuance of a warrant than is required for holding a person at a preliminary hearing.

MR. ROBINSON: That is right.

THE CHAIRMAN: Let us see if we cannot get that motion.

MR. CRANE: I agree with him, and I do not want to do a lot of talking, but we have been talking about that down here.

MR. BURKE: I just suggested the hope that we would still function with fairly competent judges who would have some understanding of some of the problems that we are not creating de novo.

MR. CRANE: I was thinking along that line. Aren't we trying to put the judge — he ought to be competent, coming out of all these law schools where these professors sit; he must be a very competent man, I should think, at least he would have some common sense -- aren't we trying to put the judge in a straitjacket? I do not want to put him in a straitjacket. I should say that he might consider the information and belief, knowing who the man was, what his function was, and other things, perhaps sufficient to create a probable cause, as the phrase has been used here.

It would be ridiculous to require a man who knows the facts to state them on information and belief. If a man says, "I was walking along the street with my wife and somebody assaulted her, on information and belief," you would think he was crazy, because that is a case where he would have stated the facts, and there must be cases where he must have, and would be expected to state, the facts.

On the other hand, there may be cases where an officer will state the facts and it would not be wise, perhaps, to give all the names, all the information he had, but yet the information would be such that the magistrate would know that it would justify his issuing a summons or warrant.

I should think we ought to leave it to the judge, if we can.

THE CHAIRMAN: May we have a motion?

MR. YOUNGQUIST: I am going to make a motion.

THE CHAIRMAN: Mr. Youngquist.

MR. YOUNGQUIST: May I preface it with the remark that I think the question should be divided into two parts, first, whether a complaint on information and belief should be permitted; second, if it be permitted, then whether anything more than the oath on information and belief shall be required.

I move that provision be made for complaint on information and belief as well as upon direct knowledge.

MR. MEDALIE: Seconded.

THE CHAIRMAN: You heard the motion, which is a matter of principle, with the language still to be reduced.

MR. YOUNGQUIST: True.

THE CHAIRMAN: Those in favor of the motion?

MR. GLUECK: Mr. Chairman, before voting, I should like to ask George, what is the difference in degree of proof required in getting a complaint and proof for binding over? Where would you draw the line?

MR. MEDALIE: Notwithstanding what has been said, there is no difference because, as tested by habeas corpus, the simple way that comes up: A man is arrested and the warden makes his return and produces the complaint. If the complaint does not set forth a crime on oath and, in New York, on knowledge --

MR. GLUECK: Personal knowledge of the facts?

MR. MEDALIE: (Continuing) -- the man is turned out. In any event, you must always establish the prima facie elements that constitute the offense, whether for a holding or for an arrest.

MR. GLUECK: Then what is the purpose of the preliminary hearing? Is it to review the action of the

official who issued the warrant?

MR. MEDALIE: Assuming that the warrant is based on sufficient affidavits, that is, setting forth prima facie to the commissioner an offense, the essential thing, as indicated by all the procedures, is that you may by examining the witness show that he is wrong.

MR. GLUECK: A little more thorough inquiry.

MR. MEDALIE: Yes, you might find out it is not so.

MR. HOLTZOFF: Well, I am inclined to differ with that for this reason: The warrant may be issued on reasonable grounds to believe that the defendant has committed the crime with which he is charged. Now, at the preliminary hearing, musn't something more be established than just that?

MR. WECHSLER: No.

MR. MEDALIE: I will show you why that is incorrect.

MR. WECHSLER: Our rules provide just that.

MR. MEDALIE: It depends on this --

MR. WECHSLER: Mr. Chairman, let us have the question -- go ahead, George.

MR. MEDALIE: Suppose you went and made an arrest, or an agent made an arrest; he did not see the act which constitutes the crime; someone told him so; but

what this person told him comes to information of facts, detailed facts, on someone's knowledge.

MR. HOLTZOFF: Yes; but under the rules of evidence that would not be admissible.

MR. MEDALIE: No.

MR. HOLTZOFF: That is different.

MR. MEDALIE: No.

MR. HOLTZOFF: That is why it does not take as much to get a warrant.

MR. MEDALIE: You are going too fast now. In other words, the test is always that someone knows that the particular crime has been committed.

MR. HOLTZOFF: That is right.

MR. MEDALIE: That is so whether an arrest is made; that is so whether a warrant is issued; and that is so when a holding is made; is that right? You always come to the same thing.

MR. HOLTZOFF: I cannot answer your question yes or no.

1z MR. GLUECK: How about reasonable grounds for believing that a felony has been committed?

MR. MEDALIE: Even without a warrant the officer making the arrest must have had information, even though he does not personally know, which establishes that the crime was committed. Now, the reasonable ground is

that he does not know himself, but he has the reasonable grounds because someone told him so.

MR. HOLTZOFF: But to get a warrant he does not have to present competent evidence, whereason ~~to hold~~ the preliminary hearing the rules of evidence apply, and he has to present competent evidence to establish probable cause.

MR. MEDALIE: The point about the issuance of a warrant is that it does require competent evidence in the form of a deposition.

MR. HOLTZOFF: But it may be hearsay. The rules of evidence do not apply.

MR. MEDALIE: The hearsay is allowed because of the information and belief rule. The only possible protection that you may then have is that at least you would have reliable hearsay. For hearsay to have any value, the hearsay itself must be as reliable as evidence.

MR. HOLTZOFF: But even the reliable hearsay would not be admissible.

THE CHAIRMAN: Gentlemen, we are not getting anywhere.

MR. YOUNGQUIST: Mr. Chairman, may I speak to my motion?

MR. GLUECK: May I have it stated?

THE CHAIRMAN: The request is that you state your

motion.

MR. YOUNGQUIST: The motion is that provision be made for complaints on information and belief. Practically all, or at least a great many, of the prosecutions under the Federal rules are initiated subject to and after investigation by a Federal authority. Their information is upon belief rather than upon knowledge when they come to file a complaint and seek a warrant. We can be fairly sure, I think, that their information would be reliable before they do seek a warrant. If we do not have a provision for the issuance of a warrant on a complaint sworn to on information and belief, I think the processes of prosecution are going to be pretty badly stalled in a great many instances; so as a practical matter I think it necessary; and the question before us now is whether we are going to adopt the New York rule as espoused by Mr. Medalie, or the rule which is prevalent in a number of other states, which permits the issuance of warrants on complaints sworn to on information and belief. We have got to make our choice between the two.

And since it is the established practice, at least in some jurisdictions, to permit the making of the complaint on information and belief, I think that there is even greater reason for adopting that in the Federal procedure because the fact that almost invariably prior

investigation by a duly authorized Government representative has been made before a warrant is sought at all. That is the basis for my motion.

MR. WECHSLER: Mr. Chairman, may I convert the question I was going to put to Alex? On the one hand you have got an organization in the Federal law for arrest without a warrant. Its scope was defined by Sheldon a while ago. I am troubled by this consequence if we make too tight the rule for getting the warrant that you simply force the bureau and other law-enforcing agencies to make an arrest without a warrant. That does not seem to me a net gain. But the obverse of the difficulty is this: Since our rules require that a man arrested on a warrant be brought right in and be given a preliminary hearing, what is the advantage of authorizing his arrest upon a basis which will not authorize his binding over? That is George's point.

Now, coming to the specific thing that Alex talked of, the confidential informant problem, if a man won't be bound over because of what a confidential informant told an agent, then, speaking specifically of the bureau, Alex, what is the advantage of a procedure which authorizes his arrest on the basis of the information supplied by a confidential informant?

MR. HOLTZOFF: Because between the time of arrest

and the time of the preliminary hearing other evidence may be procured.

MR. WECHSLER: But under these rules that is forthwith.

MR. HOLTZOFF: Yes, but the preliminary hearing may be continued, and sometimes it is. But if there is no possibility of arresting a person, he may become a fugitive. You can get your complaint on information and belief, file an information and belief, get your warrant, and by the time the hearing is held you will get additional evidence.

Now, I still want to make my point, and although the substantive requirement or the rule of substantive law for getting a warrant may be the same as that required at the preliminary hearing, actually there is a difference, because the agent cannot testify to hearsay at the preliminary hearing. But in his deposition or complaint on which the warrant is issued, hearsay, if it is deemed reliable by the magistrate, may be accepted. There is that very important feature.

MR. WECHSLER: But isn't the confidential informant's part of it really a small part of it?

MR. HOLTZOFF: Of course.

MR. WECHSLER: The big part is that if an agent in Kansas City may get information on a teletype which

indicates he will have to make an arrest, he will have to make the arrest with or without a warrant, and by and large, it seems to me preferable to have it made with a warrant.

MR. HOLTZOFF: Precisely.

MR. WECHSLER: But that will give him a day or two days or five days if the hearing is adjourned to bring the witnesses on in order to bind the man over.

MR. HOLTZOFF: Yes.

MR. WECHSLER: That is the point?

MR. HOLTZOFF: That is the point.

MR. WECHSLER: In those terms it seems to me sound to authorize it on information and belief.

MR. YOUNGQUIST: One of the two primary purposes of a warrant is to get the accused arrested.

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: And if that process were to be delayed by the bringing before the magistrate persons who have personal knowledge of the facts constituting the offense, the delay might result in the defendant's getting away.

MR. HOLTZOFF: Mr. Youngquist, why don't you put your motion in the form of exact phraseology? Then we can kill two birds with one stone.

MR. WECHSLER: Actually, responding to what you say, you ought to allow information and belief when there

is a danger of the man being a fugitive, and not allow it otherwise.

MR. YOUNGQUIST: You can't discriminate between cases as a practical matter.

MR. WAITE: Herbert, let me give you a practical illustration: Here is a Detroit city detective. He investigates and finds a dozen people, no one of whom alone can specifically determine the criminal. But out of the dozen he knows who the criminal is, but he can't find that man and go out and arrest him forthwith. He wants to get a warrant issued. Now, what happens is that he goes before the magistrate, and on information and belief he repeats what he got from the dozen people. If he had to bring all those twelve people in before he could get the warrant issued, it would be a bit of an absurdity. But he goes in with his information and belief; the warrant is issued; the man is brought in; and then before he can be held, each one of these twelve people has to be brought in.

MR. MEDALIE: Would you be satisfied if a detective appeared before the magistrate and simply in general terms told him he had information to the effect that X committed a particular crime?

MR. WAITE: Oh, no. He must set forth the details and his specification, but he sets it forth on information and belief.

MR. MEDALIE: Assuming we are prepared to adopt an information and belief basis for warrants, why shouldn't this motion make provision for setting forth the sources of the information and the grounds for belief?

MR. WAITE: That is Mr. Youngquist's second motion. He wants to get the preliminary matter disposed of first.

MR. MEDALIE: This second motion is really more important than the first.

MR. YOUNGQUIST: I move that Rule 3 read as follows: "The complaint is a written statement of the essential facts constituting the offense charged, made upon oath before a commissioner and filed with him. The oath may be made upon information and belief."

MR. HOLTZOFF: We have already disposed of the first sentence by splitting it in two. You don't want to change that, do you?

MR. YOUNGQUIST: Yes, I do, because otherwise it would make a very awkward construction.

Mr. WAITE: Can't we let the style go for the moment and decide your last several words, "The oath may be made upon information and belief"?

MR. YOUNGQUIST: That is the gist.

MR. WAITE: Just so we won't get off on a question of style at this moment.

THE CHAIRMAN: Now, we have had a long discussion of it.

MR. MEDALIE: May I move an amendment?

THE CHAIRMAN: Yes.

MR. MEDALIE: That the language read: "The oath may be made on information and belief" and also say, "The complaint shall set forth the sources of the information and the ground for the belief."

THE CHAIRMAN: Is the amendment seconded?

MR. DEAN: I second it.

THE CHAIRMAN: Any remarks on the amendment?

MR. SETH: Mr. Chairman, aren't these complaints supposed to be made under the penalty of perjury?

MR. HOLTZOFF: Of course.

MR. SETH: Now, on information and belief I don't think you could ever prosecute anybody for perjury.

MR. HOLTZOFF: They are made on information and belief constantly.

MR.GLUECK: Or imagination.

MR. HOLTZOFF: In most Federal courts they are not made by private complaints. The agent almost invariably has to make it on information and belief.

MR. SETH: What does the Constitution say, on oath?

MR. HOLTZOFF: On oath.

MR. SETH: I believe in standing with the Constitution a little bit.

MR. HOLTZOFF: It is still on oath. That is still in compliance with the constitution.

MR. DEAN: As a practical problem, it probably never occurred.

MR. YOUNGQUIST: This motion of Mr. Medalie's, as I understand, would require setting forth in the affidavit the names of the persons from whom the information is obtained.

MR. MEDALIE: And the substance of the information.

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: Mr. Medalie --

MR. YOUNGQUIST: Just a minute. That, it seems to me, would be a very serious handicap to prosecutions.

MR. MEDALIE: That is the least that we require in an ordinary motion for a bill of particulars; and if you are not going to require that much when you arrest a man I think you are throwing all processes out.

MR. WAITE: Mr. Medalie, I wonder if you haven't got two things confused there. I certainly would go the whole distance with you that it must set forth the facts which he believes and is informed of; but if you mean that he has got to set forth the particular individuals from

whom he got that statement of facts, then I do not go along with you. I would have to vote against your motion.

MR. HOLTZOFF: How about a confidential informant?

MR. MEDALIE: There is no such thing. That is a fiction created by public officials who were scared to death that somebody was going to kidnap their witnesses or shoot them. That is one of the things which we are met with so often. That is an excuse for putting more and more arbitrary power in the hands of public officials who are not going to tell what we ought to know about judicially. I do not think that is a good argument. It is overdone.

MR. HOLTZOFF: I think that is pretty dangerous.

MR. SEASONGOOD: Mr. Chairman, I would like to ask, would that amendment reverse existing practice?

MR. HOLTZOFF: I think it would reverse existing practice in most jurisdictions.

MR. ROBINSON: I do not think so.

MR. HOLTZOFF: Most Federal complaints are on information and belief without disclosing the sources.

Mr. ROBINSON: In the states now the Federal district court follows the State practice.

MR. YOUNGQUIST: What is the State practice in general on this question of whether complaints may be made upon information and belief, and if they be so made that they set out the sources?

MR. ROBINSON: I would say that that practice predominates over the other type.

MR. YOUNGQUIST: Which?

MR. ROBINSON: That is on information and belief. They do not require the source to be stated.

MR. YOUNGQUIST: The prevailing practice is that complaints may be made upon information and belief without setting forth the sources?

MR. HOLTZOFF: I know that is the prevailing Federal practice.

MR. SEASONGOOD: That is why I asked. If you are going to reverse that, you will have a lot of controversy and trouble.

MR. WAITE: That is the conventional practice now.

MR. MEDALIE: I would like to know how you would deal with this other suggestion that has been made. A complaint must be made on oath, obviously, because if it is false you can prosecute for perjury. Now, how can you prove perjury if you do not even know what the claim is as to how the information is gotten? This oath would be just a joke. On information and belief John Jones committed the crime of kidnpapping on such-and-such a date and place, of such a person. That is all it says.

MR. HOLTZOFF: That is the predominant practice.

MR. MEDALIE: It is a terrible practice.

MR. WAITE: How would you prosecute for perjury in the prevailing jurisdictions now? It is getting along perfectly satisfactory.

MR. MEDALIE: You are calling it "prevailing." I do not think it can be prevailing. But where you do require the setting forth of the source of your information, then you can at least call someone who might say, "I never told this man any such thing."

MR. WAITE: I do not recall any jurisdictions that require that.

THE CHAIRMAN: May we have a vote on Mr. Medalie's amendment to Mr. Youngquist's motion?

MR. McLELLAN: Mr. Chairman, I do not want to delay you, but I do want to understand something before I vote on it. My understanding is that there are some jurisdictions where a complaint must be made on personal knowledge. There are other jurisdictions where it may be made upon information and belief where the sources of the information and belief are stated, and there are other jurisdictions where it may be made simply upon information and belief. My difficulty with Mr. Youngquist's original motion is that when you state that it is sufficient if a complaint is made upon information and belief, that that rule will be subject to different interpretations in

different jurisdictions. One jurisdiction will interpret it as meaning upon information and belief by the source of the information as stated; in another jurisdiction where the rule has been the other way, it will be interpreted as it simply states, information and belief, without giving the sources. So if you pass the original motion to amend on Mr. Youngquist, you will then be in a position where you have one practice in one jurisdiction and another in another.

On the other hand, if you cure it, as Mr. Medalie suggests, you will interfere quite seriously with the admistration of justice in criminal matters. I had a little experience along those lines myself, and I know perfectly well that there are quite a number of cases where it is not practicable for a prosecuting officer to divulge the information which he had received from some source. If he does it, he won't get any information from that source again or other like sources. That is the reason - and I like to have some reason for what I said before - that I fear, lonely as I may be, I shall have to vote for the Rule 3 substantially as originally drafted in Draft 6. It is a real problem that you are facing when you say that the complaint must state the sources of the information. And if you do not say that, then you have got two interpretations in different jurisdictions according to

whether you are in a district or state where they think information and belief means information and belief stating the sources of the information.

I hope I have not delayed you.

THE CHAIRMAN: Not at all.

MR. WAITE: Judge McLellan, is there any jurisdiction that you know of that requires the sources to be stated? I do not know of any.

MR. McLELLAN: I think so. I think if you asked me to state the particular jurisdiction, I think there is a general feeling that there are numerous jurisdictions where it is held that a bill in equity on information and belief, or a complaint on information and belief, means the stating of information and belief and the sources of that information.

MR. HOLTZOFF: That is in the New York rule.

MR. WAITE: In criminal procedure?

MR. HOLTZOFF: In criminal procedure too.

MR. McLELLAN: They are all mixed up in it.

MR. GLUECK: Is the administration of Federal criminal justice any worse in New York than in other jurisdictions because of this requirement of the statement of the sources?

MR. HOLTZOFF: I think I can answer that question by saying that while that is the requirement

of the New York State law, it is frequently not complied with in the Federal courts in New York.

MR. DEAN: How about the State courts? Does it work in the State courts?

MR. HOLTZOFF: That I do not know.

MR. MEDALIE: It works very well in the State courts, and the requirement is very rigid here.

MR. ROBINSON: There are more witnesses assassinated in New York, and in Chicago, of course, than anywhere else.

MR. MEDALIE: No, that is not so.

MR. McLELLAN: I think the problem is different than a state problem, as Mr. Holtzoff well knows from his familiarity with it.

MR. HOLTZOFF: The problem is different because Federal prosecutions are almost always ~~invariably~~ started on the instigation of a Federal investigating officer; whereas the average State prosecution is started on the complaint of a private person, and there it is only proper to hold the private person to a greater degree of proof.

MR. MEDALIE: May I make one comment about the assassination of witnesses? Witnesses have usually been assassinated in New York, Chicago and in smaller communities where only an indictment has been filed and the names have not been given. In other words, the man who was accused of

crime knows who the witnesses are or are going to be. You do not have to give him a list of witnesses to tell him who are going to testify against him.

MR. WAITE: Tom Dewey had to keep them pretty well hidden.

MR. ROBINSON: He had to take two floors of the Woolworth Building to keep them safe.

THE CHAIRMAN: The question is on Mr. Medalie's amendment. All those in favor of Mr. Medalie's amendment say "Aye."

(Chorus of "Ayes.")

All opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The issue is in doubt. All those in favor raise hands.

(After a show of hands the Chairman announced the vote to be 5 in favor; 9 opposed.)

THE CHAIRMAN: Lost, 5 to 9.

The question is now on Mr. Youngquist's motion: All those in favor --

MR. SEASONGOOD: Excuse me. What will that be then? You won't say anything about information and belief? Just information and belief, but it won't state what constitutes it?

THE CHAIRMAN: That is correct.

MR. HOLTZOFF: Then we have the objection made by Judge McLellan that that might be subject to interpretation.

THE CHAIRMAN: And that becomes a factor in voting on this motion.

MR. SEASONGOOD: Would it do any good to state generally the sources of information?

MR. DEAN: Another possibility is to state the grounds of belief without stating the sources of information. That cuts it in half.

MR. SEASONGOOD: That might be a good one.

MR. MEDALIE: You are going to have an awful lot of trouble in explaining that away.

MR. WAITE: I would like to second Mr. Dean's motion, to read "stating generally the grounds of belief."

MR. CRANE: May I ask a question?

THE CHAIRMAN: Mr. Crane.

MR. CRANE: I was going to ask this: Has anybody experienced in all the prosecutions throughout this country in the Federal courts - I do not know about the State courts - has anybody experienced any difficulty with matters as they stand? Who has found that it has worked badly just as it is now? Why not leave it alone?

MR. YOUNGQUIST: The difficulty is, as I understand it, in some states like New York, for instance, the practice is one way, and under the present Federal procedure that

practice is supposed to be followed. In other states the practice is different; it is the other way.

MR. CRANE: I am asking, has any criminal escaped because of it, that you know of, or because of that suffered any harm?

MR. DESSION: I believe the answer to your question is no, Judge.

MR. CRANE: Then why bother with it, on a practical question that you can't deal with? We have got to let it be worked out by the different communities.

MR. WAITE: I would suggest this, Judge Crane, that these rules are supposed to indicate to district attorneys and commissioners what they shall or shall not do. Now, Judge McLellan's very argument makes that point, it seems to me. He is afraid to say "on information and belief," because it will leave a problem for the courts to determine. If we just do not say anything, we leave for the courts a much greater problem for them to determine; and any district attorney reading this rule as it is now phrased is not going to know that it must be made on oath specifically, or on information and belief. One way or another, we ought to tell the district attorney or the commissioner what the rule is.

MR. CRANE: I agree with you and, logically, there is no answer to it, of course; but thereare many

things in actual practice that you cannot formulate a rule for or put in the form of a rule; and I am afraid you are going to have trouble whichever way you go.

MR. WAITE: But you do have rules existing in the states.

MR. YOUNGQUIST: Did Mr. Dean make a motion?

MR. DEAN: I thought it was out of order. Yours was still pending.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: We have pending Mr. Youngquist's motion. If there is nothing further, let us proceed to a vote on it. All those in favor of that motion say "Aye."

(Chorus of "Ayes.")

Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be lost.

MR. WAITE: I would like to make a substitute motion.

MR. SEASONGOOD: I think the idea was that we should first have Mr. Youngquist's motion and then decide whether we want to go further. That is the way I understood it.

THE CHAIRMAN: Mr. Youngquist's motion came as an amendment to Rule 3 as adopted.

MR. HOLTZOFF: I understand this vote to mean

that we shall be silent on the question?

THE CHAIRMAN: We revert back to Rule 3 as adopted.

MR. YOUNGQUIST: I would move, Mr. Chairman, that there be added to Rule 3 this language: "The oath may be made upon information and belief, stating generally the grounds thereof."

MR. SEASONGOOD: Seconded.

THE CHAIRMAN: All those in favor of that motion say 'Aye.'

(Chorus of "Ayes.")

Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 7 opposed.)

THE CHAIRMAN: The motion is carried.

MR. CRANE: I want to ask this: I think that the substance of what is stated in that motion is correct, but I do not want to vote for it if it means that it is going to be put in the rule, because I think we ought to leave it alone so that they can work it out any way they see fit. I think there are a lot of things one cannot put in a rule; and one has more trouble trying to codify it, as

we had in the State here.

MR. McLELLAN: May we have another show of hands?

THE CHAIRMAN: Yes. All those in favor of the latest motion of Mr. Youngquist raise hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 10 opposed.)

THE CHAIRMAN: The motion is lost.

MR. HOLTZOFF: I suppose that that means that the rule be left as it is?

THE CHAIRMAN: That is exactly what it means.

MR. McLELLAN: Have we passed Rule 3?

THE CHAIRMAN: Rule 3 is passed until someone makes a motion.

MR. HOLTZOFF: Yes.

MR. McLELLAN: We have not voted on Rule 3?

THE CHAIRMAN: Yes, prior to Mr. Youngquist's motion. We are told that if we get up to lunch before 12:30 we will be much better off than if we delay.

MR. MEDALIE: May I make one motion before you leave this Rule 3. I think that all practice requires that the bench and bar have a notion of what we left out, and I think an approppiate notation ought to go in.

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

MR. CRANE: What will the notation be?

MR. MEDALIE: We will have to pass it around.

(Whereupon, at 12:30 o'clock p. m. a recess was taken to 1:15 o'clock p. m.)

AFTERNOON SESSION

THE CHAIRMAN: The meeting is called to order. Several of our members have raised the question as to our hours of servitude, and I would like to get the views of the membersof the Committee. One purpose in starting on Friday was that so we might have a recess on Sunday, except for the work that the Reporter and the Committee on Style may have to do, as a result of Friday's and Saturday's deliberations, so that when the rest of us come back on Monday we will be rather fresh, and I had hoped we might get along and finish in four days without evening sessions, but I have come to the conclusion, as a result of this morning's pace, in which we covered 5 per cent of our rules, three out of sixty, that I am a tremendous optimist.

MR. DEAN: Why don't you reserve judgment on that issue until we finish out this afternoon?

THE CHAIRMAN: I would like to know whether we will free tonight or not.

MR. CRANE: I think it had better wait. I suggest that we do not meet tonight. I see by the papers that the Mayor was not satisfied with the blackout last night and he proposes to have another tonightat half-past nine. That means you would all have to go in the hall and

spend an hour there, because all these lights are going to be out and the elevators stopped. Now, for the hour you might have before that, from eight to nine, or half-past nine, it would not pay to submit to all that inconvenience. So I do not think you ought to be here tonight. I saw that in this morning's press.

THE CHAIRMAN: Yes, you are correct. How would it be if we went on this afternoon, say, until five-thirty? Is that too late?

(A chorus of "Noes.")

THE CHAIRMAN: We will say five-thirty and reserve our decision as to what we will do tomorrow night.

MR. McLELLAN: May I ask, is it the plan to finish on Tuesday? I ask that question because reservations are not easy to get now.

MR. LONGSDORF: I think that is pretty important. I should like to know that, too.

THE CHAIRMAN: I had hoped we could. That depends upon you gentlemen and, as someone said before lunch, if we could change over from being senators and become congressmen, with some limitation on our debate, we might make better progress, but it ill becomes me to suggest it.

MR. WAITE: We might do what we do with our City Council. We are allowed to speak not more than twice on any one motion without consent of the Council, and there

are various other limitations.

MR. HOLTZOFF: I am afraid here the group will not withhold consent, will they?

THE CHAIRMAN: The only thing that the Chair can say is that the threat of evening sesssions and a Sunday session hangs over all of us.

Rule No. 4, paragraph (a). Any comment?

MR. HOLTZOFF: That first word should be "If," I think, rather than "When".

MR. ROBINSON: Some stylists on the Committee, Alex, think it would be better not to have the rules beginning with "If"; and the proposal came, I believe, as a matter of style from the members of the Committee, that "When" would be preferable to "If". That is just a matter of choice.

MR. HOLTZOFF: It depends on the context. Sometimes "When" is preferable to "If" but here I think the word should be "If".

MR. YOUNGQUIST: Why not leave that to the Committee on Style, Mr. Chairman?

MR. GLUECK: That is right.

THE CHAIRMAN: All right.

MR. SEASONGOOD: I move the adoption of Rule 4 (a).

MR. YOUNGQUIST: I want to ask one or two questions. I note in lines 4 and 6 the word "accused" is

used whereas ordinarily we use "defendant". I prefer "accused" but I think we ought to be consistent. And we also use in line 6 the words "United States attorney". I thought we had decided to drop that designation and say "attorney for the Government."

MR. ROBINSON: The point in the first case, if I may answer that question, is that he is not yet a defendant; he is just an accused. After there is a charge filed against him, and he becomes a defendant, then we say "defendant".

MR. YOUNGQUIST: How about "United States attorney"?

MR. ROBINSON: The wishes of the Committee were that that should be referred to the United States attorney. We have tried to follow that, I believe.

MR. YOUNGQUIST: I thought it was "attorney for the Government"?

MR. DEAN: It should be "attorney for the Government" because "United States attorney" is limited.

MR. ROBINSON: We followed what the decision of the Committee was. If it happens to be the other way around, we will make it "attorney for the Government."

MR. LONGSDORF: In line 15 the word "defendant" is used.

MR. ROBINSON: Mrs. Peterson reminds me it was to

"United States attorney" only where we meant United States attorney, and there are several situations where that is true, including this one. We did that with this idea: We did not want anybody,an attorney for the Government, a private prosecutor, perhaps hired to assist the Government, to have this power.

MR. HOLTZOFF: You do not have private prosecutors but sometimes you have special assistants to the Attorney General in charge of a case, and I thought in that case, in the case of a special assistant, it should be "attorney for the Government" rather than"United States attorney." The simpler way, to obviate all difficulty, would be to say "attorney for the Government." That is the reason for it in this place.

MR. YOUNGQUIST: I think it should be changed to "attorney for the Government."

MR. DEAN: Seconded.

MR. YOUNGQUIST: When you come to this matter of "accused" you will have to be consistent on this, when you come to the matter of issuing a subpoena, which has to be good throughout the country. You want any attorney for the Government to have that power also?

MR. HOLTZOFF: Let us take one rule at a time.

MR. ROBINSON: Let us take one question at a time, because we will have to be consistent about it. It

was felt that in this rule that the provision --

THE CHAIRMAN: That is Rule 4 (c) (2)?

MR. ROBINSON: It was felt there that rather than give a United States commissioner such extensive powers that he should be restricted to authorization or direction by the -- yes, that is at line 15 -- by the United States attorney himself.

MR. HOLTZOFF: I think that ought to be "attorney for the Government" also.

THE CHAIRMAN: Take one paragraph at a time.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: You make that motion, Mr. Youngquist, on the "attorney for the Government"?

MR. YOUNGQUIST: I do.

MR. WECHSLER: Seconded.

THE CHAIRMAN: All in favor say "Aye"; opposed "Nay".

Carried.

Anything else?

MR. YOUNGQUIST: In line 12 shouldn't the word "may" be "shall"?

MR. SEASONGOOD: I have the same inquiry. I felt it should.

MR. ROBINSON: I think we quote the Supreme Court Memorandum on that.

MR. HOLTZOFF: I would like to say a word about the Supreme Court Memorandum, because it was ~~purported to be~~ explained to me by the Chief Justice. The Chief Justice told me that that memorandum was prepared at his direction and it consisted of questions raised by any one of the justices, and he said those are matters that occurred only casually to the various justices as they went along and did not represent any definite views on the part of the members of the Court. I think in weighing the suggestion in that memorandum we ought to have the Chief Justice's observations as to ~~the~~ its purpose.

MR. ROBINSON: There is a further thing to be considered in connection with this rule. If a defendant fails to obey, as required by the summons - that would be the first summons, I take it - are you going to make it mandatory on the commissioner to issue a warrant? It is possible, I suppose, isn't it, another summons can be issued. Suppose they find some good reason why he has not appeared?

MR. HOLTZOFF: I think the issuance of the summons is a favor to the defendant anyway. If he has been granted one favor, I think that should end it.

MR. ROBINSON: The question is what the Commissioner should be compelled to do. You are changing a discretionary act to a mandatory one, and our general

policy has been not to put any binding directions on commissioners or district courts.

If you wish to make it mandatory, it is all right. It isn't merely a matter of style between "may" and "shall"; it is a matter of substance. The reason for the "may" is substantive. If it is inadequate, of course, change it to to "shall."

MR. HOLTZOFF: I think that should be done because the United States Attorney ought to be entitled to get his warrant.

THE CHAIRMAN: Is there a motion on it?

MR. SEASONGOOD: I move that it be changed to "shall".

THE CHAIRMAN: It is moved and seconded. All those in favor say "Aye"; opposed "No."

Carried.

MR. SEASONGOOD: As a matter of phraseology, I would suggest "shall be issued" rather than "shall issue".

THE CHAIRMAN: No. We always speak of an injunction "going" and a summons "issuing".

MR. SEASONGOOD: Isn't that a colloquialism?

THE CHAIRMAN: No, it is good law English.

MR. YOUNGQUIST: It is out in our jurisdiction.

THE CHAIRMAN: (b) --

MR. SEASONGOOD: Doesn't the commissioner have

contempt power? Has that been considered? Or do you simply say he issues a warrant instead of a summons?

MR. HOLTZOFF: I think we discussed that last time and we thought that there should not be any punishment of any kind for failure to answer a summons, as I recall the decision which we reached, because, if the defendant does not appear in response to a summons, he will issue a warrant to bring him in.

MR. SEASONGOOD: I had in mind the Chief Justice's comment.

MR. YOUNGQUIST: I think that was the conclusion.

MR. SEASONGOOD: After you had the Chief Justice's comment?

MR. DEAN: No; prior.

MR. HOLTZOFF: No, but I think the Chief Justice's comment was really in the nature of a query rather than in the nature of what he would like the rule to provide.

MR. WECHSLER: What is the answer to the query?

MR. HOLTZOFF: The answer would be no.

MR. WECHSLER: Then the comment should show it, shouldn't it?

MR. HOLTZOFF: Oh, yes.

MR. SEASONGOOD: I think at some stage we ought to take up all these suggestions, after we have gone through the rules, and see how far we have considered these

MR. SEASONGOOD: He could refer you to a district judge. All he can do, you say, for failure to obey a summons, is to issue a warrant. Does that mean he is through? Maybe it is enough.

MR. YOUNGQUIST: That is, I believe, what we concluded.

THE CHAIRMAN: We did.

Do I hear a motion on (b) (1)?

MR. HOLTZOFF: I move we strike out the words beginning on line 17 "and shall have attached to it a certified copy of the complaint."

MR. YOUNGQUIST: I second the motion.

MR. ROBINSON: You want to change the present law?

MR. HOLTZOFF: No, I do not. A warrant today does not have a certified copy of the complaint attached to it.

MR. WECHSLER: Doesn't the statute so require?

MR. ROBINSON: Yes, the statute expressly says so.

MR. HOLTZOFF: The statute says that in another connection.

MR. ROBINSON: It applies here. You would be changing the statute if you did that.

MR. YOUNGQUIST: May I ask a question?

MR. WECHSLER: The reason for that statute has just been suggested to me, because if the warrant goes to

another commissioner who has to have before me the charge so he can handle it.

MR. YOUNGQUIST: But you do not have to have that attached to the warrant when you are serving the warrant.

MR. ROBINSON: That is what the statute says.

MR. YOUNGQUIST: It does not.

MR. WECHSLER: This is Section 595: "It shall be the duty of the marshal, his deputy or other officer who may arrest a person" - this deals with the arrest on a warrant - "to take the defendant before the nearest United States commissioner," and so on, "of hearing, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached" --

MR. YOUNGQUIST: "Upon the arrest of the accused"?

MR. WECHSLER: Yes.

(Continuing) -- "the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him."

MR. YOUNGQUIST: If I understand --

MR. WECHSLER: You get it attached on the return.

MR. YOUNGQUIST: Your return, yes.

MR. HOLTZOFF: That is all right; there is no objection to it; but according to this rule you would have to attach it when you issued it.

THE CHAIRMAN: Read that first sentence again.

MR. WECHSLER: "It shall be the duty of the marshal, his deputy or other officer who may arrest a person charged with any crime or offense to take the defendant before the nearest United States commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him."

THE CHAIRMAN: So it would have to be in here unless we are changing the law.

MR. YOUNGQUIST: No.

MR. LONGSDORF: I would like to ask the Reporter what he understands this ambiguous statute to mean.

MR. WECHSLER: That is 595?

MR. LONGSDORF: Yes.

MR. WECHSLER: That is complimentary to 591. You have to read them together to know what they mean, if you

can know.

MR. HOLTZOFF: I have looked the point up, because I know it is not the practice, in serving a warrant, to have the complaint attached, and I find it has been held by the courts that the purpose of attaching a copy of the complaint to the warrant is to enable a commissioner, other than the one who issues the warrant, to hold a preliminary hearing. In other words, you do not attach the complaint to the warrant when you issue the warrant. The marshal does not have to have it when he makes service, but if, after arresting the defendant, the marshal is going to take the defendant to a commissioner other than the one who issued the warrant, he has to attach a certified copy of the complaint to the warrant in making his return, because otherwise the other commissioner cannot hold a hearing.

My objection to this provision is this: Not only does it make a change in the law, but it creates a practical difficulty, namely, that if perchance the marshal should fail to attach a certified copy of the complaint to the warrant, somebody might claim that the arrest was illegal. This might go to the legality of the arrest.

MR. LONGSODORF: Doesn't the statute say it has to be attached?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: Yes, I think it does.

MR. WECHSLER: 595 says what I read.

MR. HOLTZOFF: It has never been construed in accordance with the construction put on it by the Reporter.

MR. SEASONGOOD: That was my understanding, that the complaints were not ordinarily attached to the warrants. What about 591?

MR. WECHSLER: 591, as far as I can see, throws no light on the subject.

MR. SEASONGOOD: Would it be permissible to read that once more?

THE CHAIRMAN: Apparently it is one of those things the Government has waived for itself.

MR. HOLTZOFF: I think you have to read that whole section rather than this sentence taken out of its context.

MR. YOUNGQUIST: I do not suppose, Mr. Reporter, there is any requirement in the law that a copy of the indictment be attached to the warrant?

THE CHAIRMAN: No.

MR. SEASONGOOD: What does this mean, officer or magistrate --

MR. YOUNGQUIST: May I proceed? What is the difference?

MR. ROBINSON: I think there is a clear difference.

Our idea here is that the commissioner shall issue warrants which may be returned to other commissioners. In indictment cases, of course, the warrant and the indictment and all papers connected with the case come back to the court from which the indictment issued.

MR. YOUNGQUIST: In the case of removal proceedings?

MR. ROBINSON: On an indictment?

MR. DEAN: In that case it is sent separately along with the warrant to the marshal in the fugitive's jurisdiction.

MR. YOUNGQUIST: That is what I was trying to bring out.

MR. DEAN: Not required to be sent but it is sent, because they could not make probable cause in that jurisdiction without a certified copy of the indictment.

MR. ROBINSON: Our rule provides that, too.

THE CHAIRMAN: Do you find anything to shock your faith in necessity?

MR. SEASONGOOD: I do not know; it just says, "and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint."

MR. WECHSLER: That is what the rule has.

MR. HOLTZOFF: But the rest of the sentence throws light on the purpose of that.

THE CHAIRMAN: It does. It reinforces the question. Read it again, Alex.

MR. WAITE: I find I need some information on this. It is possible, is it not, under our rules, for a number of copies of a particular warrant to be issued and put in the hands of the various possible arresting officers. Would this mean that a certified copy of the complaint must be attached to each one of the 12 or 20 or 50 copies of the warrant that have been issued?

MR. ROBINSON: Why not, John?

MR. WAITE: I am asking for information. I am not ready to say why not.

MR. ROBINSON: It would mean that, wouldn't it?

THE CHAIRMAN: And the purpose, I take it, is to let the fellow know what it is all about.

MR. HOLTZOFF: We say the statute ought to be changed then, and we have authority to change it, because the statute is a dead letter if the statute means what the Reporter feels it means.

MR. YOUNGQUIST: I assume that the great majority of warrants are issued within the jurisdiction of the officer issuing them and the return is made to him.

MR. SETH: And they permit these warrants to go a hundred miles from the place they are issued now, into another district.

MR. YOUNGQUIST: Yes, but I say in the great majority of cases they are returned to the officer issuing them. In other cases there is no need at all for attaching a copy of the complaint. It is not customary in State practice to have anything more than a warrant for the arrest, simply advising the defendant of the offense with which he is charged.

THE CHAIRMAN: Why shouldn't the man who is being taken away from his work bench have some notion of what it is all about, so while he is on the way there he can collect his thoughts?

MR. YOUNGQUIST: The warrant gives a chance --

THE CHAIRMAN: But it does not tell you anything.

MR. DEAN: It does not tell you anything, and that is the trouble with it.

MR. ROBINSON: Section 192.

MR. YOUNGQUIST: You would find that it makes a lot of paper work.

THE CHAIRMAN: I know, but it is not for the man who is arrested many times, but for the fellow for whom it is a novel experience, to have something to guide him, something on which he may put his thoughts while he is on his way to the hoosegow.

MR. WAITE: I have to ask another question to make up my mind on this. Is it your understanding we have

no power whatsoever to alter any existing statute?

THE CHAIRMAN: Oh, yes, we have.

MR. WAITE: Must our rules conform absolutely to the existing statutes?

THE CHAIRMAN: No, we have full authority to recommend rules which change any statutes relating to procedure.

MR. WAITE: So the fact that the present statute requires determination does not bind us?

THE CHAIRMAN: No, doesn't bind us at all.

MR. ROBINSON: The only question is whether we see reason for repealing or superseding the present statute. If there is any reason, we should.

MR. WAITE: Is there any provision in any state now? It is not true in our State; you do not have to attach a copy of the complaint to the warrant.

MR. ROBINSON: I think your American Law Institute Code, of course, requires it.

MR. WAITE: That is not a State provision. I don't remember it.

MR. YOUNGQUIST: In (c) (3), relating to the service of the warrant, I notice that the officer making the arrest "shall upon request show the warrant to the defendant as sonn as possible." It begins, "The warrant shall be executed by the arrest of the defendant." That is

on page 2 of Rule 4. "The officer need not have the warrant in his possession at the time of the arrest, but he shall upon request show the warrant to the defendant as soon as possible."

Here a copy of the complaint is to be attached for the purpose of apprising the defendant of the cause of his arrest, and it would be necessary, to carry out that idea, to furnish a copy of the warrant and the complaint to the accused at the time of the arrest.

THE CHAIRMAN: Isn't that provision designed to meet the case where the arresting officer comes across a man unprepared to arrest him - meets him by accident, so to speak?

MR. YOUNGQUIST: The first sentence says simply this, "The warrant shall be executed by the arrest of the defendant." And the second clause of the next sentence applies both to that case and to the case where he does not have the warrant at the time, that is that "he shall upon request show the warrant to the defendant." That is the usual, customary practice in making arrests, and if we are to make effect the suggestion that the defendant should be apprised in detail of the cause of his arrest, it would have to be done either by the officer reading the whole thing to him or giving him a copy of it.

THE CHAIRMAN: Isn't this parallel to the situation

that existed so many years in civil actions, where, in many states your action was started merely by filing the summons, and the complaint came later? And then, when we got up to the point where stenographers were more common, that was changed in most jurisdictions and the summons and complaint were served at the same time.

MR. HOLTZOFF: I think there is a difference, Mr. Chairman, because the warrant in a criminal case specifies the charge. A summons in a civil case does not specify the nature of the cause of action.

MR. WAITE: Mr. Chairman, it might perhaps be illuminating if I were to read the American Law Institute provision. It says: "The warrant of arrest shall (a) be in writing and in the name of the state, commonwealth or people;

"(b) set forth substantially the nature of the offense;

"(b) demand that the person against whom the complaint was made be arrested and brought before the magistrate issuing the warrant or, if he is absent or unable to act, before the nearest or most accessible magistrate in the same county;

(d) specify the name of the person to be arrested or, if his name is not known to the magistrate, designate such person without any name from description

from which he can be identified with reasonable certainty;

"(e) state the date when issued and the municipality or county where issued; and

"(f) be signed by the magistrate, with the title of his judicial office.

"The warrant shall be executed only by a peace officer and may be executed in any county by any peace officer in the state."

It does not require any attachment of the complaint. It simply says the warrant shall state the nature of the complaint.

MR. SEASONGOOD: Mr. Chairman, if we are agreed that the present statute does require this attaching of a certified copy, unless there is some strong reason for changing it, we should not change the statute, because you just provoke a lot of controversy.

MR. HOLTZOFF: I do not think you would provoke controversy, because the present statute is never followed.

MR. SEASONGOOD: All right, then, but if you do put it in, you do change the existing practice, and the only reason adduced is that it is inconvenient. The other argument is, after all, it is not too much to say that you should give a man who is arrested some information about what it is all about.

I would say we should not change it and introduce

a controversial issue when there is no substantial point to changing it.

MR. HOLTZOFF: I think we would be changing the present practice if we adopted the rule in its present form, because, whatever the statute may be, it is a very old statute, I believe, it is certainly, I repeat, not a present practice.

THE CHAIRMAN: "It is old and, therefore, bad."

MR. HOLTZOFF: But as Mr. Youngquist said, this is not the present practice. It is not the practice to attach it.

MR. DEAN: I do not see how it would hurt to attach it.

MR. HOLTZOFF: It would not, but if you leave it as it is now, failure to attach it might affect the validity of the warrant.

MR. YOUNGQUIST: I think we have gone as far as we can toward convincing him. Let us have a vote on it.

MR. LONGSDORF: May I ask a question first? Is there a provision in any of the Federal rules prescribing the procedure to be followed when the warrant is issued by one commissioner, and the prisoner is taken before another one for hearing?

MR. ROBINSON: It is in this rule, in the next sentence. We thought of that, and that is the very problem

we tried to meet by his provision. Suppose you have a warrant issued by one commissioner, without attaching a copy of the complaint, and the man is arrested a hundred miles away, in another state, and brought in before a commissioner in that place? In that case the commissioner has nothing before him. However, where a copy of the complaint is attached to the warrant, the warrant plus the complaint will be right there before the commissioner.

MR. LONGSDORF: Have we covered the procedural jurisdiction on that Section 595? I don't know.

MR. ROBINSON: We have supplemented it and we have more or less built our rules around it, and we have got that. It seems to me you will have a very real problem if you do not require something of this kind. Then you are going to have this confusion, as I explained, where a defendant is arrested and brought before some commissioner other than the one who issued the warrant.

MR. LONGSDORF: You would not have the complaint and could not certify it.

MR. ROBINSON: He would not know anything about it. He would have to try and locate the first commissioner and get a copy of the complaint, and all your ideas of expedition and simplicity of procedure would be just thrown out of the window to that extent, I should think.

THE CHAIRMAN: The motion is to strike, beginning

on line 17, from the word "and" to the end of the sentence in line 18.

All those in favor of the motion say 'Aye."

(Chorus of "Ayes.")

Opposed, "No."

(Chorus of "Noes.")

The Chair is in doubt. We will have a show of hands.

(After a show of hands the Chairman announced the vote to be 7 in favor; 9 opposed.)

The motion is lost.

MR. DEAN: I should like to make another suggestion on this section, and that is that the warrant should contain the time of issuance, particularly in view of our requirement that he shall be brought before the nearest committing magistrate in a reasonable time. I think it should appear on the face of the document when it was issued, in case it might not be served for a month.

MR. LONGSDORF: Might not be; that is true.

MR. HOLTZOFF: The date on the warrant would not help the question of bringing the defendant within a reasonable time before the Commissioner, because you are interested in the time of service, not in the time of issuance.

MR. DEAN: That is true. It would not completely cover my situation. Is there any reason why the date should not appear thereon, or would it automatically appear?

MR. HOLTZOFF: It would automatically appear. Every paper is dated.

MR. DEAN: If that is so, then the point is academic.

MR. McLELLAN: Mr. Chairman, I move the adoption --

THE CHAIRMAN: That was covered by the Committee on Forms.

MR. McLELLAN: I move the adopt of Rule 4 (b) (1).

MR. WECHSLER: Seconded.

MR. DESSION: May I raise one question on that? This section does not say to whom it shall be directed. In the preceding section we talk about delivery to the marshal or other person authorized by law. Our form simply directs it to the marshal. Marshals sometimes have been confused, when they received a warrant directed to the marshal, as to whether it would be all right for an FBI man to serve it. Is it worth dignifying, that confusion, by specifying in here the warrant shall be directed to the marshal or other person authorized by law?

MR. HOLTZOFF: Don't you think that the preceding paragraph, the next to the last sentence, really covers it?

MR. DESSION: Well, I think it ought to, but I do

know of at least one instance where a marshal has been confused, and perhaps there have been others. It is directed to him and he does not know whether he can hand it over to somebody else.

Might I ask the Chairman of the Sub-Committee on Forms whether the warrant is directed generally? It is, is it not?

MR. DEAN: It is directed differently according to the forms that are in use, some to the marshal of the district, some to the United States marshal or any of his deputies. Those are two, I think, that are commonly used.

MR. SEASONGOOD: Doesn't (c) (1) take care of that? It shall be executed by the marshal or some other officer authorized by law?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Line 28 and following.

Are there any further questions on the motion to adopt Rule 4 (b) (1)?

If not, all those in favor of the motion say "Aye"; opposed "No."

Carried.

Paragraph(2), gentlemen. Any questions there?

MR. YOUNGQUIST: That we have in the rule of Draft 5, provision for an acknowledgment of service.

MR. ROBINSON: Yes, lines 20 to 22, "It shall be accompanied by a form of acknowledgment of service to be signed and returned as directed to the commissioner."

MR. YOUNGQUIST: What if he doesn't sign it?

MR. ROBINSON: What if he doesn't sign it?

MR. YOUNGQUIST: Where is the accused if he doesn't sign it?

MR. HOLTZOFF: We are dealing with "Summons" now?

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: In other words, you wish to leave out the words "to be signed"?

MR. YOUNGQUIST: I would certainly wish to leave out the entire sentence.

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: And simply provide instead, "The summons shall be returned to the commissioner"; and then you might add, if you want, "with acknowledgment or proof of service."

MR. MEDALIE: Well, you have another subdivision that deals with that.

MR. YOUNGQUIST: We have specified to make it with proof of service. I do not think it is practicable to use the acknowledgment method.

THE CHAIRMAN: Wouldn't that come in under

Rule (c) (4)?

MR. MEDALIE: Yes.

THE CHAIRMAN: Line 57.

MR. HOLTZOFF: I think you could afford to leave out the whole second sentence without substituting anything for it.

MR. YOUNGQUIST: Yes, you could; that is right.

THE CHAIRMAN: Is that the motion?

MR. YOUNGQUIST: Yes, that is the motion. Thank you.

THE CHAIRMAN: You move to strike out --

MR. ROBINSON: Of course - pardon me just a moment - you are assuming the summons is delivered to the person. Now, suppose he just has a copy left at the last usual place of residence and he comes in an hour or two later and finds it? Why shouldn't he be allowed to send in the signed acknowledgment to the commissioner without having to have another service of what was delivered to him? In other words, why do you think everything --

MR. YOUNGQUIST: The service --

MR. DEAN: Does not have to be personal.

MR. ROBINSON: Surely, it does not have to be at all personal. Say a summons is delivered to John Jones' home, he isn't in, it is left there, but attached to it is a form of acknowledgment of service, and when he does come

in, why wouldn't it be simpler to let him send it in?

I think the way we handled it in Draft 5 is all right. I do not understand the reason for the change.

MR. HOLTZOFF: What is the advantage of the requirement? You can have the acknowledgment tacked on or not, as you please, but why should it be in the rules?

MR. ROBINSON: There are a lot of things left out of the rules.

MR. HOLTZOFF: I call for the question on this motion.

MR. ROBINSON: What is the rule in civil cases for summonses?

MR. HOLTZOFF: There is no provision for formal acknowledgment; just a general requirement for proof of service, and proof can be in the form of an affidavit of service, or marshal's certificate, or anything.

THE CHAIRMAN: The motion is to adopt Rule 4 (b) (2) by striking the second sentence beginning on line 24.

All those in favor of the motion say "Aye"; opposed, "No."

Unanimously carried.

Rule 4 (c) (1).

MR. HOLTZOFF: I rule that that be adopted, Mr. Chairman?

THE CHAIRMAN: Any remarks?

MR. SEASONGOOD: Yes, I have some questions. "may be served by any person authorized to serve a summons in a civil action." Does that make it sufficiently clear that the only person who could serve a summons in a civil action is the marshal? I understand in New York you have other persons.

MR. HOLTZOFF: No; but this would be a Federal rule. Under the Federal rules the summons in a civil action may be served either by a marshal or by any person designated by the Court for that purpose and, of course, I do not think that this is intended or can be construed as intending to adopt the State rule. This is adopted as a Federal rule for actions --

MR. SEASONGOOD: You mean as prescribed in the civil rules of procedure?

MR. HOLTZOFF: Yes, I would say so. I see no objection to changing it.

THE CHAIRMAN: We have not followed a policy of incorporation by reference, have we? I mean, expressly.

MR. ROBINSON: No.

MR. DEAN: And it refers to rules. I do not think they ever refer to civil rules.

MR. ROBINSON: This is the only place we have done it.

MR. SEASONGOOD: If everybody thinks that is

sufficiently clear, all right. I thought it raised a question of whether a summons in a civil action was a somewhat indefinite and variable thing.

MR. HOLTZOFF: The Federal rules are quite clear on how a summons in a civil action must be served, and this obviously refers to a civil action in a United States court.

MR. SEASONGOOD: Why shouldn't the summons be served by the marshal or other person authorized to serve a warrant? Why should there be any difference?

MR. WECHSLER: Isn't that because a summons is much less important in a criminal proceeding than in a civil proceeding? There is always power to issue a warrant.

MR. SEASONGOOD: Did somebody move the adoption of that?

MR. HOLTZOFF: I did.

MR. McLELLAN: I second the motion.

MR. MEDALIE: But it is vague, as has just been pointed out; I don't know whether the State practice is followed or the Federal practice is followed.

THE CHAIRMAN: We will assume it meant Federal practice.

MR. YOUNGQUIST: I think we have references like that in a number of places in the rules.

MR. HOLTZOFF: Yes, and I assume it is the Federal practice every time we have such a reference.

MR. DESSION: Do we mean to preclude the mailing of summons?

MR. HOLTZOFF: We passed on that last time.

MR. ROBINSON: It is provided for in (3) for mailing it to the defendant. It is in here, mailing.

THE CHAIRMAN: What is your pleasure, gentlemen, with this question that has been raised as to the sentence beginning on line 29?

MR. DEAN: I suggest it be changed to read "to serve a summons in a civil action in a district court."

THE CHAIRMAN: Is that seconded?

MR. SEASONGOOD: Yes.

MR. HOLTZOFF: "in a district court of the United States", if you want to be exact.

MR. YOUNGQUIST: I wonder whether we are not going to find ourselves confronted by that same problem time and again?

MR. ROBINSON: The Committee, in adopting this language at the last meeting, based it on Civil Rule 4 (c) "By Whom Served." - in which fashion:

"Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose."

MR. YOUNGQUIST: To avoid repetition -- isn't it a matter of style -- wherever civil actions are used, I

suggest we add, "shall mean a civil action in a district court of the United States."

MR. ROBINSON: Take that up under Rule 52.

THE CHAIRMAN: Take that up afterwards.

Are there any further questions? If not, all those in favor of 4 (c) (1) say "Aye"; opposed, "No."

Carried.

4 (c) (2).

MR. LONGSDORF: I have a question I should like to ask about that and on which I should like to get the sense of the Committee.

The provision in line 34, "within the territorial limits of the state or within 100 miles of the place where the warrant or summons is issued." That might in some cases cause the warrant or summons to return outside of the district. Question might be raised whether that was an extension of the jurisdiction of the United States district court into a district in another state. Now, I know what the civil rules have provided, that is, that the summons runs throughout the state which contains the district. I would like to hear more about that.

MR. HOLTZOFF: We can change the practice by these rules.

MR. LONGSDORF: I know you can, but you cannot enlarge a federal district to run into another state.

MR. HOLTZOFF: This does not enlarge the jurisdiction of the court. This merely affects the place and manner of service of process, and if it could be done in connection with the civil rules, and it was done there --

MR. LONGSDORF: Not outside of the state. Within the state.

MR. HOLTZOFF: Well, but the state is not the unit in the Federal judicial system. It is the district.

THE CHAIRMAN: Can't you serve the summons outside the jurisdiction of the district, in New York or Pennsylvania?

MR. HOLTZOFF: Oh, no. You could subpoena.

THE CHAIRMAN: I know; you mean up to a hundred miles?

MR. HOLTZOFF: You can serve under the civil rules a summons, --

MR. LONGSDORF: Anywhere within the state, if it contains several districts.

MR. HOLTZOFF: But outside the district in which a case is pending.

MR. LONGSDORF: Yes, but so long as you stay in the state.

MR. YOUNGQUIST: But the district is the jurisdictional unit and not a state and, therefore, if you can go outside the district, why may you not go outside of

the state?

MR. LONGSDORF: I think there is a sound reason for it, for the restriction in civil cases. Since I am obliged to express my opinion before the other members of the Committee on it, I think there is a sound reason for that restriction in civil cases, because many of them depend upon diversity of citizenship, and you might hale a man into the state and destroy the diversity, if you let the summons run out in a civil case, but in a criminal case I do not think that applies.

MR. HOLTZOFF: No, I do not think service of the summons has anything to do with diversity.

THE CHAIRMAN: Doesn't that bring to mind Mr. Medalie's analogy of the crooks running back and forth across the Hudson River?

MR. WECHSLER: Yes.

THE CHAIRMAN: We do not want to go back on that, do we? Let us pass it.

MR. BURNS: What can the commissioner do about a corporation?

MR. HOLTZOFF: Summons them.

THE CHAIRMAN: Summons them.

MR. BURNS: When it is summoned, he cannot bind it over. A corporation has no place in the commissioner's jurisdiction, in my judgment. He cannot bind the corporation

over. He cannot bind it or do anything. Summons to a corporation ought to be in under itself.

MR. LONGSDORF: As a matter of fact, the summons to a corporation in another district or in another state has been used for years.

MR. BURNS: But not before a commissioner. That is a difference.

MR. LONGSDORF: Not before a commissioner?

MR. BURNS: The commissioner cannot do anything with the corporation when he summons it.

MR. YOUNGQUIST: I am asking --

MR. LONGSDORF: No, that is true.

MR. YOUNGQUIST: (Continuing) -- for information; I don't know. Is there no such thing as a preliminary hearing for a corporation?

MR. BURNS: No binding it over.

MR. MEDALIE: Why not?

MR. YOUNGQUIST: Why not?

MR. BURNS: I never heard of it. In the anti-trust cases, and we have had a lot of them out our way, they just sued them out in Denver, the indictment is simply returned.

MR. HOLTZOFF: How about your pure food law? You can have a preliminary hearing.

MR. YOUNGQUIST: I don't know. I never knew any

reason why a corporation is different from an individual defendant, so far as jurisdiction of and procedure before a commissioner is concerned. I may be wrong.

MR. LONGSDORF: You cannot bring the corporation before the commissioner like you can the body of the prisoner.

MR. DESSION: Why not? The same way you bring it before a court. It could appear by attorney or in some way like that.

MR. YOUNGQUIST: That is true, but isn't the corporation required to give bond to appear?

MR. LONGSDORF: Have to have a hearing before you can require bond, unless it is voluntary, and then somebody has to approve it.

MR. DESSION: Doesn't a subpoena to a corporation require an officer to appear? You could punish an officer for contempt.

MR. HOLTZOFF: You could not punish an officer for contempt for failure to respond to a subpoena directed to a corporation.

MR. DESSION: I think you can.

MR. HOLTZOFF: Only if it is directed to him also.

MR. DESSION: No, it does not have to be directed to him.

MR. WECHSLER: What is the point of a preliminary hearing where there is a corporation which is a potential defendant?

MR. LONGSDORF: As a practical matter, you do not bother about it, but I do not think you could have one.

MR. WECHSLER: What purpose could it possibly serve? There is nobody to be arrested, and therefore nobody to be bound.

MR. MEDALIE: It is a way of presenting a case to the grand jury.

MR. WECHSLER: But you can go directly to the grand jury.

MR. MEDALIE: But it is the commissioner's way of getting a case to the grand jury. The United States attorney could independently do it.

You know, some day all this procedure that we take for granted, which is not provided for by rules, will change. In our counties throughout the country a certain amount of business comes to the grand jury that the district attorney never heard about. We are proceeding on the assumption that the district attorney creates all the business which, for the moment, is correct. The time may come when it will come in by ordinary police processes.

MR. WECHSLER: Well, the rule could be changed.

MR. MEDALIE: Why should we wait that long?

MR. McLELLAN: When you summon a corporation and the corporation appears before the commissioner, what takes place then? What can he do?

MR. ROBINSON: The commissioner could throw it out, if it were a charge that the corporation should not be brought into district court on. In other words, just bailing a defendant or holding him over is not the only thing that a commissioner may do.

MR. HOLTZOFF: Suppose the commissioner throws the complaint out? The United States attorney can still proceed.

MR. MEDALIE: Of course he can, but he may not be interested, because there may be a complainant other than the United States, and that raises the question. Some day the people will take an interest in this Government and bring business to your commissioners.

MR. BURNS: What can the commissioner do to the corporation?

MR. MEDALIE: He cannot do anything. It is simply a matter of his passing the papers on to the grand jury or not passing them on to the g rand jury.

MR. YOUNGQUIST: Can he bind over?

MR. BURNS: No.

MR. ROBINSON: He can dismiss.

MR. McLELLAN: The dismissal does not amount to

MR. DEAN: Can he require the attendance of the

anything.

MR. DEAN: Can he require the attendance of the president of a corporation, for example, when it is directed to the corporation?

MR. DESSION: A commissioner has no contempt powers, so I do not see any use.

MR. MEDALIE: Isn't it simply a matter of procedure? The corporations themselves are not going to object. They get a summons to come down to see whether they have violated that statute, whatever it may be, and if they have not, it will be dismissed; if they have, it will be sent to the judge having jurisdiction to be tried.

MR. McLELLAN: I cannot see any good in it. I do not see that the commissioner can do anything against the corporation, and the fact of dismissing it is of no significance.

MR. YOUNGQUIST: May I ask this question;or two questions, really? Perhaps Alex can answer them. Was there ever a warrant issued by a commissioner against a corporation?

MR. HOLTZOFF: I donot know, but I never heard of any.

MR. YOUNGQUIST: Or a corporation ever bound over to a grand jury?

MR. HOLTZOFF: I never heard of any such case.

MR. DEAN: I never heard of such a thing.

MR. MEDALIE: There is another possibility. Suppose a corporation had individuals engaged in a violation of the law? Put them all in as defendants. Suppose there is search and seizure with a search warrant? It might be convenient to have search warrant proceedings before a commissioner. I mean, that would be incidental to the other matter.

1z MR. HOLTZOFF: Yes, but this would not be affected by the second sentence.

MR. ROBINSON: I think a part of the reason for that provision is that if we do not put it in criticism will come to us to the effect that we are overlooking what can be done by the commissioner, because in the codes and other rules of procedure you always have provisions for warrants for individual defendants and for corporations.

MR. McLELLAN: Warrant for a corporation?

MR. ROBINSON: Well, a summons, if you want to put it that way; or, dealing with them as defendants in criminal cases, what needs to be done about the corporation? Of course, if we left it out here it will just be assumed we overlooked it.

THE CHAIRMAN: According to this you can bring the corporation in from any distance within the United States.

MR. DEAN: That is right.

MR. ROBINSON: If the United States attorney orders it.

MR. WECHSLER: I move this sentence be eliminated, Mr. Chairman, if the motion is in order.

MR. YOUNGQUIST: What was the motion?

MR. WECHSLER: Strike out the sentence "A summons to a corporation."

MR. DEAN: Do you also wish to strike in lines 32 and 33 "other than a summons to a corporation"?

MR. WECHSLER: Yes, I do.

MR. YOUNGQUIST: Take it out?

MR. WECHSLER: Yes, take it out.

THE CHAIRMAN: The motion is to delete from lines 32 and 33 the words "other than a summons to a corporation". Also, the last sentence of this section beginning on line 35 and running through to line 38.

MR. YOUNGQUIST: The first two lines will then read: "A warrant or a summons may be executed or served anywhere within the territorial limits," and so forth.

THE CHAIRMAN: Yes.

All those in favor of the motion say "Aye"?

(Chorus of "Ayes.")

Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: Two votes in the negative.

Rule 4 (c) (3). Any suggestions or comments?

MR. SEASONGOOD: In lines 49 and 50 I have a comment: It states, "some person of suitable age and discretion." Shouldn't it be "an adult person" instead? What is the suitable age?

MR. YOUNGQUIST: May I make a comment?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: I have a note here in our Tentative Draft 5 which simply provides that the summons may be served in the same manner as in a civil action. And the civil rules take care of all that. So that will take care of your point.

MR. DESSION: The difficulty was that the civil rules provided various manners of service under circumstances that do not obtain in a criminal case; so we could not incorporate all of it.

MR. SEASONGOOD: Could we hear what they provided?

MR. HOLTZOFF: There is no provision for mailing a summons in the civil rules. If you incorporate the civil practice by reference you will eliminate the provision contained in this sentence about mailing a summons.

MR. YOUNGQUIST: Leave that last clause in. Simply substitute for the first clause for personal service

the civil action procedure.

MR. HOLTZOFF: I think that will be all right.

MR. SEASONGOOD: Before we do that, has anybody got the civil rules?

MR. ROBINSON: Mr. Dession, that was a point that you thought should be spelled out more explicitly than in Draft 5?

MR. DESSION: Yes; as I recall there were provisions in the civil rule which we clearly did not want to incorporate because it could not be applicable. My thought was that we had better spell out the portion we wanted.

MR. SEASONGOOD: I have the civil rules here. The point here is that service shall be made on a person other than an infant or incompetent person, or leaving copies at his dwelling house with some person of suitable age and discretion residing therein.

MR. ROBINSON: It would look like that is pretty poor draftsmanship, wouldn't you think, Aaron?

MR. YOUNGQUIST: Yes. I can see the point, because we may want to serve a summons on a minor.

MR. SEASONGOOD: It is in the civil rules, but it must be a terribly indefinite thing, "a person of suitable age and discretion." How are you goint to determine that?

MR. YOUNGQUIST: I think that that is a very common provision in the State statutes. I know it reads exactly that way in the Minnesota statutes. I am not familiar with the statutes of the other states, but perhaps some of you can recall.

MR. SETH: A summons is merely an invitation, anyhow. You do not have to obey it. It does not make much difference.

MR. ROBINSON: I suppose, to follow through, Mr. Seth, you want the last sentence stricken out here which applies to a corporation.

MR. LONGSDORF: The last sentence of (c) (3) ought to go out too?

MR. ROBINSON: Yes.

THE CHAIRMAN: By consent the last sentence commencing at line 51 will be stricken.

MR. YOUNGQUIST: Wait a minute. We still have in (2), Mr. Chairman, the provision for service of a warrant or a summons, and that is not limited to individuals.

MR. DEAN: That is correct.

THE CHAIRMAN: But this is served on a corporate defendant.

MR. YOUNGQUIST: Yes, I know. But we provide with respect to the summons - to go back to 4 (a) - that

provides for the issuance of a summons instead of a warrant, and that applies to corporations as well as to individuals. Likewise in (c) (2).

THE CHAIRMAN: I see the point. Well now, are there any further questions on 4 (c) (3) with respect to the manner of service?

MR. CRANE: Leaving the last sentence in?

THE CHAIRMAN: Leaving it in.

MR. WECHSLER: I have one, Mr. Chairman. Lines 44, 45 and 46 seem to me unnecessarily cumbersome. Starting with line 43 I would suggest that that sentence be reformulated as follows: "When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued." It seems to me unnecessary to deal with the case of flight, because if the information must be given at the time of the arrest, it may be given even when there is flight and after the fugitive has been found or the flight ended.

MR. WAITE: That raises a question of what you mean by the phrase "time of the arrest."

MR. WECHSLER: Yes.

MR. WAITE: Is it the time you started to seize him or the time you have effectively seized him?

MR. WECHSLER: I would say, John, that if it is

easy to seize him, tell him first; but if it is hard to seize him, tell him second.

MR. WAITE: There have been some unfortunate cases holding that the arrest occurred before he was seized.

MR. WECHSLER: I do not think I would be worried about that problem, though the main thing is that a fellow ought to be told, and usually is.

MR. WAITE: Well, why change this? It seems to me this is explicit and the other raises a possibility of doubt.

MR. WECHSLER: In the case of flight here, you see, there is no obligation ever to tell him what he is arrested for.

MR. WAITE: Oh, I did not read it that way. I agree with you that should not be.

MR. CRANE: I second Mr. Wechsler's motion.

THE CHAIRMAN: May we have it repeated, Mr. Wechsler?

MR. WECHSLER: "When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued."

MR. HOLTZOFF: I think the first word of the sentence ought to be "If"; not "When".

MR. WECHSLER: That raises an abiding stylistic issue. I would rather get the substance of my point across, Alex, and cover that later.

THE CHAIRMAN: Is there any comment on the motion to rephrase?

MR. McLELLAN: Will you read the complete sentence?

MR. WECHSLER: At line 44 insert after the word "defendant", "at the time" instead of "of the cause." It would read: "When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued."

MR. McLELLAN: Well, when you say --

MR. WECHSLER: Oh, I gave you an incorrect answer. You should really start striking out with the words "of the cause".

THE CHAIRMAN: All those in favor of Mr. Wechsler's motion say "Aye."

(Chorus of "Ayes.")

All those opposed say "No."

(No response.)

Are there any questions on this section as amended? All those in favor of adopting --

MR. SEASONGOOD: May I interrupt. At the end do

you think it is fair just to say it should be mailed to the corporation? Of course, it might be opened by some insignificant person who might not realize the importance of it. Wouldn't it be good to add to line 56 "for the attention of an officer or a managing agent"? If you just mail it to the corporation generally, it might go to some clerk or unimportant person who would not realize the importance of it.

MR. McLELLAN: I cannot see, Mr. Chairman, the necessity for that last sentence about service on a corporation. I do not see any sense in a commissioner summoning the corporation.

MR. DEAN: That is your difficulty. I wonder if we should leave (c) (2) the way it is, because as (c) (2) now reads, as I understand it, you can serve a corporation, a summons on a corporation, if you do it within the minutes set forth in that paragraph, namely, within the state or within 100 miles of the place where the warrant or summons is issued.

THE CHAIRMAN: That is right.

MR. DEAN: You do not want that, do you?

MR. McLELLAN: I do not think that a corporation has any business before a commissioner.

MR. SETH: I agree with that.

MR. DEAN: Then I think we should devote our

attention to (c) (2) then, because as it now reads you can serve the corporation within those limits.

MR. WECHSLER: Why do anything about (c) (2), because it never happened; and if you just keep quiet about it you are all right.

MR. DEAN: All right.

MR. SETH: I second the motion to close the motion.

THE CHAIRMAN: That is a motion to strike the sentence commencing on line 51 and ending on line 56?

MR. SETH: Yes.

MR. WAITE: If we strike that, how would a summons be served on a corporation?

MR. DEAN: It won't be.

MR. ROBINSON: It could not.

MR. SETH: When we get to indictments, it could be.

THE CHAIRMAN: You are not bringing corporations in before commissioners.

MR. CRANE: Do I understand then that the corporation can be dealt with by indictment but never in any other way?

MR. YOUNGQUIST: Or information.

MR. CRANE: What is the objection to it? If the Attorney General wants to, if they want to go before a

commissioner, is there any objection to that?

MR. HOLTZOFF: Ordinarily they do not do that, because commissioners' proceedings are only used for the purpose of binding over a defendant.

MR. CRANE: He can dismiss it.

MR. HOLTZOFF: Well, a dismissal in a binding over proceeding, of course, is of no importance to anyone. It does not bind the prosecution.

MR. MEDALIE: It is. It is not a matter of binding. The Government may want to thrash the thing out and find out the whys and wherefores.

MR. CRANE: That is just it. Give him an opportunity to thrash it out. I do not see any harm in it.

MR. YOUNQUIST: They can in any case. I mean, as it stands now, they could always use a warrant issued by a commissioner against a corporation.

MR. CRANE: I know, but here you say as to the individual defendant, you will have a summons just to have him come in and see what he has done. Why shouldn't you use the same process for a corporation? The same rules apply to it.

MR. HOLTZOFF: Isn't that a difference, though, Judge? The purpose of a summons procedure as to an individual is to make it possible to proceed against him without locking him up. It is a favor to him. But you do

not have that problem with a corporation, because you do not lock a corporation up anyway.

MR. CRANE: Aren't these proceedings ever dismissed as to the individual?

MR. HOLTZOFF: Yes.

MR. CRANE: Why couldn't a corporation have the same privilege?

MR. WECHSLER: There is no need to dismiss it as to the corporation because the corporation is not going to be locked up.

MR. CRANE: It is a criminal proceeding just the same.

MR. DEAN: But nothing can happen to a corporation before a commissioner. In other words, you can't take bail from it; you can't bind it over.

MR. ROBINSON: The Judge says you can dismiss.

MR. CRANE: I am simply saying that a criminal prosecution is a criminal prosecution. An individual may escape the stigma of being charged with a crime. It is not a matter of being locked up alone. Also, he may explain so that he would not be locked up and would not be charged with a crime.

MR. McLELLAN: But he cannot do anything else than dismiss.

MR. CRANE: And, I may say, that is a good deal.

MR. McLELLAN: No matter how guilty the corporation is, the effect of what the commissioner does is a dismissal.

MR. HOLTZOFF: He cannot bind the corporation over.

MR. McLELLAN: No.

MR. ROBINSON: Everybody seems to agree that the provisions are harmless. I have not heard anybody say that they are really harmful.

MR. YOUNGQUIST: That would be superfluous, certainly, if a corporation is never proceeded against before a commissioner.

MR. ROBINSON: I think I know of one instance which took place in Indiana with respect to the Automobile Stamp Tax Act. There were some corporations which had trucks or properties that did not have the $5 stamp on the windshield. The commissioner has been calling them in, and the question has been on the part of the United States attorney whether they should be proceeded against before the grand jury, and the commissioner has been turning them loose --

MR. CRANE: Would that be extra-judicial proceedings?

MR. HOLTZOFF: I think the whole proceeding is extra-judicial.

MR. ROBINSON: It is serving a very useful purpose.

MR. WECHSLER: You have got a time when the whole

commissioner system is under attack, and nobody takes it seriously, and the general feeling is that commissioners are not officers who perform really responsible functions; and at this particular moment, to expect them to perform a highly technical function in dealing with corporations seems to me unrealistic.

MR. YOUNGQUIST: What is the motion now, Mr. Chairman?

THE CHAIRMAN: The motion is to s trike the sentence beginning at line 51 through line 56.

MR. HOLTZOFF: I call for the question.

MR. CRANE: I do not see why you should not take the word "summons" out. If the summons does not mean anything to the corporation, let us go the whole hog and take it out.

MR. DEAN: It might be a summons to an individual.

THE CHAIRMAN: In line 32 we have already stricken the words "other than a summons to a corporation".

MR. CRANE: Yes, we have taken that out. But I have no objection to it if you get it so it is all right.

THE CHAIRMAN: I think Judge Crane has got a point there.

MR. YOUNGQUIST: What we should do, Mr. Chairman, is go back to 4 (a) in lines 6, 7 and 8, "U on the request of the United States attorney or of the complainant the

commissioner may issue a summons instead of a warrant" against an individual, and limit there, or, rather, exclude "corporations" there and then you have got that out.

MR. HOLTZOFF: I do not think you need that addition in 4 (a). I would leave 4 (a) as it stands and make a correction in 4 (c) (2).

MR. MEDALIE: I do not think you are right there, Aaron, because the choice of issuing a summons instead of a warrant can apply only to individuals, because you cannot issue a warrant against a corporation.

THE CHAIRMAN: All right. The motion now is to strike lines 51 through 56.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

Carried.

The motion now is to adopt 4 (c) (3) as amended.

MR. WECHSLER: There is one stylistic point, Mr. Chairman. At line 47 the word "defendant" is used, and I thought it was determined to call him the accused at this point.

MR. CRANE: Also line 40.

MR. ROBINSON: Well, the accusation has been

filed this time. Therefore he is a defendant. That is our distinction.

THE CHAIRMAN: Yes.

MR. MEDALIE: Then in line 47 you do not need "individual defendant"; "upon a defendant".

THE CHAIRMAN: Correct.

MR. MEDALIE: Change "an" to "a" and strike "individual".

THE CHAIRMAN: Done by consent.

MR. GLUECK: May I suggest the insertion of "or" in line 48 before the word "by"?

THE CHAIRMAN: Yes.

MR. DESSION: Have we stricken the word "individual"?

MR. MEDALIE: Yes.

THE CHAIRMAN: All those in favor of this section as amended say "Aye."

(Chorus of "Ayes.")

Opposed?

(No response.)

Carried.

MR. LONGSDORF: May I ask a question? Are we going to transfer into some other rule this language now stricken out, beginning with line 51 to line 56?

MR. DEAN: Yes.

THE CHAIRMAN: Any comments on Section (4)?

MR. HOLTZOFF: Yes, Mr. Chairman. I want to make a motion that goes to the substance of this rule. This rule would require every warrant to be returned within a reasonable time irrespective of whether it has been served or not. I think that the rule should be that a warrant should be returned promptly after service, but that it can remain outstanding until it is served. There are two very important practical reasons for it. In the first place, if the marshal returns the warrant and there is no other warrant outstanding, if the fugitive is afterwardspicked up, he is being arrested without a warrant, and it is like an arrest without a warrant, which changes the status of the officer making the arrest.

And, in the second place, - and that is a very important consideration - there is a harboring statute in the Federal code making it a crime to harbor a fugitive against ~~due~~ whom process~~s~~ is outstanding. If the warrant is returned and there is no process outstanding, a person can harbor that fugitive to his heart's content without violating any law, whereas if he harbors him while process~~es~~ is ~~are~~ outstanding, it is a crime.

Therefore I move to strike out paragraph (4) and to substitute the following therefor:

"Promptly after service an officer to whom a

warrant is delivered for execution, or any person to whom a summons is delivered for service, shall make a return to the commissioner by whom the process was issued."

MR. MEDALIE: Suppose the summons is returned on a particular day, which is the only way a summons can operate?

MR. DEAN: We so provided.

MR. MEDALIE: When is the return made?

MR. HOLTZOFF: Promptly after service.

MR. MEDALIE: Suppose it is not served. Suppose a summons is returned March 1st. He has not been served. What do you do with it?

MR. HOLTZOFF: I am perfectly willing to have a different requirement as to returns for a summons. I am not much interested in that. I am particularly concerned about the returns on a warrant. I know we have been confronted with that practically. From a practical standpoint many marshals for a long time have followed the direction of their own courts to return a warrant non est if it has not been executed. We issued instructions a number of years ago that under those circumstances immediately another warrant should be obtained in order that the warrant should be outstanding, so when the fugitive is apprehended there is a warrant out for his arrest. Now, it would be simpler just not to require a

return until the warrant is executed.

Now, George, I am perfectly willing to accept that amendment to cover the summons situation. I am really interested in not requiring the return of the warrant.

MR. ROBINSON: Alex, let me ask you this: As I understand it, we may know that a defendant is not present in a certain district; nevertheless, the formula has gone through of finding a complaint in that district, having a warrant issued, having the warrant returned non est, and then proceeding from there to removal proceedings. Now, the Department of Justice, as I understand it, the FBI particularly, have complained that that is a useless ritual that they would like to see our Committee correct.

MR. HOLTZOFF: That comes under a different rule.

MR. ROBINSON: This clause would correct it, probably.

MR. HOLTZOFF: No.

MR. ROBINSON: What rule do you think does correct that?

MR. HOLTZOFF: That relates to removal proceedings, and we take care of that under our removal rule.

MR. ROBINSON: I am not so sure about that.

MR. HOLTZOFF: The point I am trying to make is that a return of a warrant should not be compulsory if it is not executed. Of course, the United States Attorney can

state to the marshal, "I want you to return this warrant because I am going to nolle pross this case." But under this rule a return of the warrant would be compulsory, and that is what we have been trying to avoid for years.

MR. MEDALIE: What provision do you make for the cancellation of outstanding warrants?

MR. HOLTZOFF: In all fugitive cases we want warrants outstanding in order to be able to prosecute under the harboring statute; and also in order to protect the officer when he picks up the fugitive so that he can have the authority --

MR. MEDALIE: Wait. I want to know what you do about cancelling warrants. How do you cancel a warrant? Have you made any provision for it?

MR. HOLTZOFF: The answer would be this, that if a case is nolle prossed the marshal would return the warrant.

MR. MEDALIE: Let us see what happens in a commissioner's office. There are about 300 warrants outstanding; if you have been a commissioner about six years, what does he do with that accumulated stuff? Does he ever go over it to see if things have otherwise been disposed of, or if the United States attorney has --

MR. HOLTZOFF: I don't think the commissioner does a thing, actually.

MR. MEDALIE: Of course. Something ought to be done about going over these outstanding warrants. I will bet there are 25,000 outstanding warrants in the United States against persons whom no one is going to proceed against.

MR. HOLTZOFF: I am willing to leave that to the administrative office.

MR. MEDALIE: No; that is up to us.

MR. HOLTZOFF: Isn't that a different problem, George? After we take care of this we might add an additional sentence or an additional paragraph, as you may choose, to take care of that point. But that is a different point.

MR. MEDALIE: What would you do about it? I am willing to wait for its being drawn. But what would you do about it?

MR. DEAN: I might suggest, Mr. Chairman, that Alex make a draft of this and take into consideration George's suggestion about the summons and present it tomorrow morning.

THE CHAIRMAN: So moved. Unanimously carried.

MR. ROBINSON: About the harboring statute, Alex and I are debating that still. I do not think the statute amounts to what he says it does.

THE CHAIRMAN: All right; we will dispose of that

the first thing tomorrow morning.

Rule 5 (a). Any comment?

MR. HOLTZOFF: Mr. Chairman, I have some verbal suggestions that do not change the substance of it except in a slight manner. This provision requires an officer making an arrest to take the person arrested before the nearest available commissioner. Now, that might possibly be construed as abrogating or repealing the present authority to take the arrested person before a State magistrate. Now, that would be a very unfortunate result. So I want to suggest --

MR. ROBINSON: That is taken care of, Alex, under 52. It expressly says it does not apply.

MR. HOLTZOFF: I know, but each rule would have to be read together. Somebody reads 5 (a) and he might not know about 52.

MR. ROBINSON: You can't say it all at once.

THE CHAIRMAN: It comes in under the affirmation.

MR. HOLTZOFF: I would like to make a motion to take care of this point. I think most of you will agree that that would be a desirable way of handling it. In line 6, after the word "commissioner" insert "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. YOUNGQUIST: I would like to know just what

is in 52 to cover this.

MR. ROBINSON: Can we wait until we get there?

MR. HOLTZOFF: I think it is better not to leave things hanging like this.

MR. ROBINSON: Well, that is a long story. We have spent a lot of time in trying to harmonize 591, its provisions for justices of the peace, and all this long list of State magistrates and judges in such a way that we could work it in to our rules. We finally decided, I think, that the only clear thing to do would be to confine our work to United States commissioners as committing magistrates and leave 591 to take care of --

MR. HOLTZOFF: Then, if that is so, we had better leave out that sentence, because that sentence seems to change the law. There is a definite requirement that an arrested person must be brought before the nearest available commissioner. I know perfectly well that most people having to operate under this rule will assume that that destroys the present authority to take the arrested person before a justice of the peace or a State magistrate. Now, that may be of no importance in the big metropolitan centers; but it is of importance in the large, sparsely-settled districts like Montana, or the northern district of Texas, or California, or Nevada, or New Mexico.

MR. ROBINSON: Mr. Seth presented it quite

effectively at two or three of our previous meetings.

MR. HOLTZOFF: Here you say he shall be taken before the nearest available commissioner. That is what I think is --

MR. ROBINSON: So far as the Federal system is concerned.

MR. HOLTZOFF: No, no. Here is an FBI agent; he arrests somebody; he sees this rule. He says, "I have got to take my prisoner before the United States commissioner."

MR. WECHSLER: I do not think there is any answer to Alex's point.

MR. DEAN: What is the language you suggest?

MR. HOLTZOFF: I suggest insert "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. LONGSDORF: Mr. Chairman, may I be heard at this point?

THE CHAIRMAN: Yes.

MR. LONGSDORF: I am afraid we are assuming something to be true which may not be true. If I am wrong, I want to be set right. The Reporter says that we can't deal with the procedure before State officers acting as committing magistrates under a statute of the United States. I agree that we cannot take away the power they have to act as committing magistrates; but I feel, and

shall until my mind is changed, that we can regulate to some extent the procedure which they shall follow when they are acting under the authority of a statute of the United States; and when we come down to Rule 52 I would like to be heard on that, because I think there is a simpler way of handling this thing. I do not want to interject that discussion into the present one because it will get complex.

MR. WECHSLER: Mr. Chairman, isn't the solution to this that we will not be changing existing law in any respect; so it does not make any difference whether we have got power technically to recommend a rule relating to proceedings before State magistrates acting as Federal committing magistrates or not, if the rule that we recommend is what is now in Section 591, Title 18? So I am not worried about the jurisdictional point; but I am worried about Alex's point that this tells the officer to do something contrary to what present law tells him to do; and, therefore, it seems to me there is more question of the legality of this than there is of the --

MR. ROBINSON: May I interrupt? May I suggest, Mr. Wechsler, if you make this change that Alex suggests you are going to have to do the same thing to a half dozen other rules. We will have to go back to the work we have done and keep adding those words.

MR. HOLTZOFF: I do not think so.

MR. ROBINSON: Nothing has required more time and attention in the office of the Reporter than this very question. Nothing took more time at our meetings.

MR. HOLTZOFF: This sentence would deprive them of their power.

MR. ROBINSON: I do not think it does, Alex.

MR. WECHSLER: What do you think this sentence means?

MR. ROBINSON: Could he be taken before anybody else than a United States commissioner? Now, we are not talking about what can be done in a State court or what can be done by State magistrates. Of course, part of our trouble comes from the Supreme Court's memorandum of June 20, 1942. In that memorandum they object to the use or term "committing magistrate" in order to avoid this catalog of a United States commissioner or a justice of the peace or a district court judge or a Supreme Court judge, or all those that are listed in 591 - a list of 10 or 15 --

MR. HOLTZOFF: Well --

MR. ROBINSON: Just a minute, Alex. The Supreme Court's Memorandum suggested that the term "committing magistrate" which we used in our last draft is not a term of art, and does not have technical significance, or something to that effect. Now, that was our shorthand term

for all this catalog of 591. So we were prevented from using that term "committing magistrate" or, at least, we felt we were; and so everywhere you turn you have got that difficulty if you try to reach over in 591 under State procedure.

MR. WECHSLER: But why wouldn't it have been a simple response to the Court's question to define "committing magistrate" as meaning any officer authorized by Section 591 of Title 18 to bind over persons charged with crime against the United States?

MR. ROBINSON: That was inserted, and I think that was drafted that way at one time and rejected.

MR. WECHSLER: What was wrong with it?

MR. ROBINSON: I don't know. Two or three things.

MR. WECHSLER: What was one of them?

MR. ROBINSON: Well, am I under cross-examination here or something like that?

THE CHAIRMAN: Well, we are trying to find out what the objection is.

MR. ROBINSON: Well, they have been put in the notes.

MR. HOLTZOFF: The court did not raise any objection. The court propounded the ~~theory~~ question whether or not the term "committing magistrate" was or was not a word of art.

MR. McLELLAN: We haven't got it in here anyway.

MR. HOLTZOFF: I have got it in here without the use of those words.

MR. ROBINSON: Oh, here is Mr. Dession. George, you were out of the room when we discussed this point. Alex has proposed an amendment here to Rule 5 -- did you hear it before you left?

MR. HOLTZOFF: I will read it if you wish me to read it again. My motion is to insert in line 6 after the word "commissioner" the words "or other officer empowered to commit persons charged with offenses against the laws of the United States."

I do not know whether you heard that before you went out.

MR. DESSION: Yes, I heard it.

MR. ROBINSON: Now, the point I wanted to bring before Herb and Alex and Gordon particularly here was this: They asked about the difficulties we had in trying to find a shorthand term that would not be "committing magistrates" and yet would include everything in 591, would keep within our jurisdiction; and I have answered that to the effect that at our conference, you remember, specifically on this subject, we thought the simplest way and the clearest way to do would be simply to say that we are making rules for United States commissioners. We will not in any way

supersede 591, but we will, and we will make it understood, that 591 is still to apply as to officers other than United States commissioners.

Now, am I stating it accurately or not?

MR. DESSION: Yes. I am trying to recall now just what the series of difficulties were that led us to that conclusion. One point is that a similar change should be made in other sections dealing with the preliminary hearing to conform.

MR. HOLTZOFF: No; the point is that it is all right to limit our rules of procedure as to the conduct of preliminary hearings to commissioners only. But here we have a duty --

MR. DESSION: I do not see why, Alex. The magistrates have the power now to hold preliminary hearings.

MR. HOLTZOFF: But the point is this, George: This sentence if adopted in its present form would make it mandatory upon every arresting officer to bring his prisoner before a commissioner. Under existing law he may also bring him before a local magistrate. This would take away that option from him, and that is something that everybody agrees is undesirable.

MR. CRANE: Why couldn't you just add "other committing officer"?

MR. HOLTZOFF: That is what my motion amounts to.

MR. CRANE: State what you have got, will you, please?

MR. HOLTZOFF: "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. ROBINSON: Now, if we do that, Judge Crane, it will seem we are superseding 591 as to all the other powers there stated.

MR. LONGSDORF: I agree with that entirely, but I think we could do something with the State magistrates to produce uniformity.

MR. ROBINSON: We are trying to make these uniform Federal rules so far as committing magistrates' functions are concerned; we are trying to restrict these rules to United States commissioners, and so with warrants and summonses.

MR. CRANE: Yes, but you are dealing with a warrant here, aren't you?

MR. ROBINSON: Yes.

MR. CRANE: Not really the commissioner. What do you do with it?

MR. ROBINSON: Have it brought back to the commissioner. Now, I have gone into it quite extensively. I do not know how many weeks we spent on it; but I just want you to know we have given it due consideration, and I

tried to explain it in the notes at Rule 1, page 6, Reporter's Memorandum, Lines 2-3:

"'United States commissioners' is substituted for "committing magistrates' because of the comment on the latter express in the Court's Memorandum (page 1, paragraph (1), and page 16, first paragraph), and because the enabling act of June 29, 1940 authorizes rules to be made for 'proceedings before United States commissioners,' and omits reference to justices of the peace and the other types of 'magistrates' enumerated in U. S. C., Title 18, s 591. It will nevertheless be necessary to state in Rule 52 (Application and Exception), in the last chapter of this draft that the term 'commissioner' is not used to exclude state magistrates or judges from continuing to exercise similar powers under section 591. In other words, it is not intended that the rules shall attempt to take away from justices of the peace and the other state magistrates the powers now given them by section 591. In the application and exclusion rule it will probably be desirable to provide that the United States district judge is included in the term 'commissioner', when performing the duties mentioned in section 591, and that he, therefore, unlike the state magistrates, is to follow the procedure provided by these rules. There is no serious practical difficulty in confining the rules to commissioners. There

are about 1,080 United States commissioners, but there are only about 35 justices of the peace and other state magistrates who are performing to any considerable extent under section 591 the duties which are usually performed by the commissioner."

I got those figures from the Administrative Office. And those are the reasons that were stated for offering the draft in this shape. Now, I can suggest that Alex can accomplish all he wants to do here by saying that in Rule 52 we do make a suitable application and exception clause if it is not in there now.

MR. HOLTZOFF: No, that would not suit because this rule is a direction to officers, and it will go out in this form as a direction to all arresting officers, and they would not know anything about Rule 52.

MR. WECHSLER: That is the point, exactly. It is not a rule dealing with the powers of magistrates.

MR. ROBINSON: But if you examine the other rule, gentlemen, you will find if you write these words in here you will have to write them in in several other places.

MR. HOLTZOFF: I do not think so.

THE CHAIRMAN: You will have to write them in the heading in Rule 5.

MR. ROBINSON: Yes.

MR. HOLTZOFF: My objection rests on the fact that this is phrased as a direction to the arresting officer. Now, if it is phrased as a direction to the arresting officer, it has to be correctly drawn ~~in~~ as an accurate direction, and he is not going to look into Rule 52. He may not know anything about Rule 52.

MR. ROBINSON: If you apply the same tests you will find the same thing applies.

MR. CRANE: As long as we are all agreed that you are right, that it applies to the other officers as well as commissioners, is there any harm, except in style, to include it?

MR. ROBINSON: Yes.

MR. DESSION: There is another possible point. My objection to writing in the other magistrates goes a little beyond yours, Jim. Now, in the first place, if we make a procedure which is supposed to be applicable to these local magistrates, most of them are not going to hear about it; they are not going to know what it is; and I think more often they will follow their own. So to that extent I think it is futile to make a procedure for them unless we have to. Now, I would prefer not to make one for them and leave them dangling with whatever that statute gives them, and let us hope that they will rarely be used, if ever.

THE CHAIRMAN: Why couldn't you put an asterisk there, footnote the whole thing, and avoid all this cumbersome language?

MR. WECHSLER: You can't have a sentence which says, "Bring him before the nearest commissioner" if what you mean is bring him before the nearest commissioner or somebody else.

MR. HOLTZOFF: My objection is that this will go out to every arresting officer and he will think that the law has been changed. It is not in the form of a procedural rule. This is in the form of a direction to the arresting officers.

MR. GLUECK: He can get other instructions from the FBI, and so forth.

MR. HOLTZOFF: Yes; but why have a misleading rule?

MR. ROBINSON: Alex, if you put that in here you will be leaving them to infer that 591 is repealed or superseded except as to this point.

MR. HOLTZOFF: No, Jim, you see elsewhere you have tried very hard to cover everything that is included in 591. That is included in one of your notes. I believe you have everything in 591 and 595 except this.

MR. ROBINSON: We had this same problem and got into a jam on the Court's Memorandum on it. Mr. Dession --

MR. DEAN: As I recall, the Court's Memorandum you used the term "committing magistrate." You had not defined it.

MR. ROBINSON: My point is this: If you put the words in here, you have to write those same words in at other points, otherwise it will seem that you have accepted only part of 591 and abrogated or superseded the others.

MR. WAITE: Jim, isn't the fundamental trouble that under the heading "Proceedings Before the Commissioner" you have included directions to the arresting officer? That first section hasn't anything to do with the proceedings before the commissioner; under the ordinary statutes it is included under the duty of the arresting officer. As soon as he has made the arrest he must take the man before somebody. Then, proceedings before that person is something entirely different.

MR. ROBINSON: What about striking out the word "shall" and using the word "is", just as a description of what is done in the statute? What about that?

MR. WAITE: That will be all right.

MR. ROBINSON: How about that, Alex?

MR. HOLTZOFF: What is that?

MR. ROBINSON: Striking the word "shall" and using the word "is"? Substitute for "shall," a mandatory clause, by merely the descriptive thing.

MR. WAITE: I misunderstood you. That would not do the trick. As it now stands it says that the officer is limited. He must take the person before a commissioner and nobody else. That is the direction. Now, I question whether we want that to be a direction at all.

MR. ROBINSON: Alone we don't.

MR. WAITE: The only reason we are having trouble here is that you hooked it up with the proceedings before the commissioner. Why don't you make one section that the officer shall take the man wherever you wanted him to be taken, and then have another rule that the proceedings before the commissioner shall be thus-and-so?

MR. WECHSLER: Mr. Chairman, I think Mr. Seth has a proposal that solves it very easily and meets Alex's point. That is, let 5 (a) be as it is, but put it as a qualification - shall take the man before the nearest available commissioner unless one of the other officer specified in Section 591 is more accessible.

MR. HOLTZOFF: That would not do, for this reason: Let us take this particular instance. Suppose a man is arrested in the Bronx by an FBI agent; the City Magistrate's Court in the Bronx is more accessible than the United States commissioner in Manhattan, and in that case he will take him down to the United States commissioner.

MR. SETH: He violates the law.

MR. WECHSLER: I think Mr. Seth is right. He does violate the law.

MR. HOLTZOFF: We ordinarily use a state magistrate where the commissioner is too far away or is not available, or is home sick, for example. But you do not want to make it mandatory to take the prisoner to the nearest magnistrate. As a matter of fact, you may not know who is the nearest justice of the peace, and you would not care. Well, I think I would rather stick to my motion.

MR. WAITE: Mr. Chairman, unless that motion was seconded, I would like to limit the debate by suggesting that Rule 5 (a) be taken out of Rule 5 and made Rule 4 (a) under the title "Instructions to the Arresting Officer." I do not care how it is phrased.

MR. YOUNGQUIST: You would not make it 4 (a), would you?

MR. WAITE: I don't care.

MR. HOLTZOFF: But that would not completely cure the trouble because it is still worded as a mandatory direction. I agree with you that it might be better to --

MR. WAITE: Well, to add your suggestion in there. Include yours. Then you don't have to worry about proceedings before other people. This just tells him where he would take the fellow.

MR. HOLTZOFF: I would be glad to accept that as an amendment to my motion.

MR. WECHSLER: I still do not see the need for that when by and large that is going to apply to commissioners.

MR. CRANE: I do not either.

MR. HOLTZOFF: The question has been called for, Mr. Chairman.

THE CHAIRMAN: The motion has not been seconded.

MR. DEAN: I second it.

THE CHAIRMAN: This motion has been seconded.

MR. LONGSDORF: May I hear the motion again, please?

MR. HOLTZOFF: That we insert after the word "commissioner" in line 6 the following: "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. WAITE: And didn't you accept my amendment that it be taken out of this title "Proceedings Before the Commissioner"?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: And add it to the preceding rule?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Under the title of what?

MR. WAITE: "Duty of Arresting Officer."

MR. HOLTZOFF: That would be a good title.

MR. WECHSLER: Would you accept an alternative to yours, that instead of shifting it we keep it where it is and change the title of 5 to read "Proceedings Upon Arrest and Before the Commissioner"?

MR. LONGSDORF: That would answer it, I think.

MR. ROBINSON: We would be right where we were, before the commissioner.

MR. BURNS: Let us have two motions, first on the question of amending the language, and the second one on where you will put it.

MR. ROBINSON: We agree on the first. We are going to amend the language.

THE CHAIRMAN: That motion has not been put yet.

MR. LONGSDORF: Does the motion now invite a transfer to 4?

THE CHAIRMAN: No. The motion was to add these words in line 6.

All those in favor say "Aye."

(Chorus of "Ayes.")

Opposed?

MR. WAITE: I can't vote in favor of that if you are going to leave that in this place.

MR. YOUNGQUIST: I think the transfer was included in the motion.

MR. WAITE: That is what I thought.

THE CHAIRMAN: Well, if it would make you feel better, we can move it to the end of Rule 4 and give it a new caption as indicated, namely, "Instructions to the Arresting Officer" --

MR. WAITE: "Duty of Arresting Officer."

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: May I suggest, Mr. Chairman, that the language in line 8 - this is purely verbal - should read "shall make and file with the commissioner" rather than "file before the commissioner".

MR. DEAN: Seconded.

MR. HOLTZOFF: How are you changing it?

MR. YOUNGQUIST: "shall make and file with the commissioner".

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. GLUECK: May I inquire as to whether what we have done is affected at all by Rule 52, lines 19 and 20, which reads: "The rules do not apply to a criminal proceeding before any other officer acting as a committing magistrate"?

MR. HOLTZOFF: I think the two are not inconsistent.

MR. GLUECK: I don't know. But might they not be interpreted as --

MR. WECHSLER: Suppose we hold that until we get to it.

MR. GLUECK: All right, we will hold it.

MR. WECHSLER: I have got another point on 5 (a). The difficulty is this: The rule now states what I understand to be the judicial interpretation of 591 in providing that a person shall be taken without unnecessary delay before the committing magistrate. But we have another provision of law particularly applicable to the FBI in Title 5 of the Code. I think it is 300 (a), which uses the word "immediately" instead of the words "without unnecessary delay." And then in section 593 of Title 18 we have got a provision particularly applicable to liquor cases which uses the word "forthwith". In other words, you have three different statutory definitions.

MR. HOLTZOFF: Don't you think they all mean the same thing?

MR. WECHSLER: No.

MR. HOLTZOFF: I always construed them the same way.

MR. WECHSLER: I move that the word "immediately" be substituted for "without unnecessary delay."

THE CHAIRMAN: You heard the motion. If there is no further comment, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

MR. McLELLAN: I will take a count on that.

THE CHAIRMAN: All right. All those in favor of the motion show hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 6 opposed.)

THE CHAIRMAN: Tie vote. I call on the members of the Committee to vote.

All those in favor say "Aye."

mz MR. CRANE: Tell me what it is.

THE CHAIRMAN: That is where you have "without unnecessary delay" Mr. Wechsler calls attention to the fact that perhaps in one of the statutes somewhere else is the word "forthwith" and in a third statute is the word "immediately"; and he moves to substitute "immediately"

for the words "without unnecessary delay".

All those in favor of the word "immediately" say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

(After a show of hands the Chairman announced the vote to be 6 in favor and 8 opposed.)

The motion is lost.

MR. WECHSLER: I still have another problem, Mr. Chairman. In line 8 should there be any provision as to when the complaint shall be filed with the commissioner when the arrest is made without a warrant?

MR. YOUNGQUIST: You might say "forthwith" there.

MR. WECHSLER: I move that the word "forthwith" be inserted between "shall" and "file" in line 8.

MR. YOUNGQUIST: I second the motion.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: Then you have "forthwith" and

"with the commissioner".

MR. ROBINSON: That is right; two "withs".

MR. WECHSLER: There it should follow the word "shall".

THE CHAIRMAN: We are now at 5 (b) which later on will be called (a).

MR. HOLTZOFF: Mr. Chairman, a suggestion in lines 13 and 14: "He shall also inform the defendant that any statement made by him may be used in evidence at the trial." In Tentative Draft 5 we had the phraseology: "He shall also inform the defendant that any statement made by him may be used against him." I think that is preferable.

MR. MEDALIE: It is. I had that marked.

MR. YOUNGQUIST: I had the same note.

MR. HOLTZOFF: And there is a reason for it because they may use it in other ways than just in evidence.

MR. YOUNGQUIST: They might use it in a preliminary hearing.

MR. HOLTZOFF: Or use it as leads to get other evidence.

MR. ROBINSON: The only thing to consider is you are probably changing the common law on that. Mr. Pendleton Howard this summer worked with us and with me, and

on this particular point he told of being present in England when some counsel stated before the Lord Chief Justice or some functionary that the law is the defendant should not make a statement because he said it might be used against him, and the judge rebuked him and said that never was the common law and is not now; the law is that any statement may be used in evidence at the trial, and he went on and explained that it might be in favor of the defendant. He might make a statement that would show he was not guilty. Therefore when a trial came along whatever he said could have been stated for him.

MR. MEDALIE: Who was this learned judge, and does what he said appear in any book?

MR. ROBINSON: Well, he says it appears in all the books.

MR. MEDALIE: I think he is wrong about it. I think when a British judge pontificates to counsel, English counsel just sit up and do not talk back like American lawyers, so he got away there with it.

MR. DEAN: I think he should be informed that in all probability it would be used against him, or without doubt.

MR. WECHSLER: If he told the defendant it would be used in evidence, but the defendant thought it might be used in his own behalf, you will be misleading the

defendant.

MR. YOUNGQUIST: You are permitting him to make a statement in his favor at the trial.

MR. ROBINSON: You need not say that it shall be.

MR. YOUNGQUIST: It is permissive to both sides.

MR. HOLTZOFF: This would make hearsay out of it.

MR. DEAN: It seems to me when you say "in evidence at the trial" you are using the lawyer's language where this is to be used against the man that is punished, but if you say this other, he will understand it.

MR. ROBINSON: Do you assume that every man that is brought in is guilty?

MR. McLELLAN: You do not think that could be put in, that statement, in his defense? That is new law to me.

MR. ROBINSON: It is frequently used; a statement that he did not oppose a confession when some witness made a statement before him just after his arrest, Aaron, and you know it is a common situation too, where the defendant is arrested, have witnesses brought in and say, "That is the man that shot me," and he does not say anything, but the fact that he does not say anything may be used at the trial for him. Or if he said, "I did not do it." That too could be used at the trial.

MR. McLELLAN: We have been reading different

books.

THE CHAIRMAN: Is the motion to strike the words "in evidence at the trial" and substitute "against him"?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

We will proceed to 5 (c). Is there any comment on 5 (c)? If not all those in favor of 5 (c) --

MR. YOUNGQUIST: I have two or three comments. First in line 20 why do we have the words "without unnecessary delay"? I ask that of the Reporter.

MR. ROBINSON: On line 17 that blank should be Rule 45 and on line 32 it would be the same. That is the "Bail" rule.

THE CHAIRMAN: What was your question?

MR. YOUNGQUIST: In line 20 what is the purpose of the phrase "without unnecessary delay"? As I understand it, the commissioner simply binds the defendant over to the district court and he has to wait until the next term.

MR. ROBINSON: That too comes from the Supreme

Court's Memorandum.

MR. YOUNGQUIST: I must disagree with the Supreme Court, then, because all the commissioner does is to bind him over. He cannot say whether it shall be with or without unnecessary delay. That all depends upon the district court, when it acts and when its turn comes. I move that the words "without unnecessary delay" be stricken.

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: May I ask you to help us and consider what the court's objection is at page 16, paragraph 5 (c) of this memorandum. Obviously we need to meet it, I think. The rule should be explicit as respects of the term of the district court the person is held to answer. Under the rule as now framed the court could hold him for a term ten years distant.

MR. YOUNGQUIST: Well, if he binds him over to the district court, he is required to send the files to the district court forthwith, or without unnecessary delay, or immediately, although I do not remember which, and then immediately the district court has jurisdiction, and if we are going to give instructions to anybody it ought to be to the district court, because after the binding over process is done the commissioner is through.

MR. ROBINSON: It says that the commissioner

should hold him for appearance at the next term.

MR. YOUNGQUIST: No.

MR. McLELLAN: Is the Court doing this, or are we doing it?

THE CHAIRMAN: Gentlemen, isn't that covered fully by line 32; "After holding the defendant to answer or discharing him the commissioner shall transmit promptly to the clerk of the district court the complaint," and so forth. Isn't that covered by the word "promptly"?

MR. LONGSDORF: Wasn't that objection made to prevent the magistrate or commissioner holding that complaint on ice and binding over when he got ready to do it? Doesn't it mean that he shall, without unnecessary delay, hold him to answer to the district court? In which event all we have to do is transpose the words "without unnecessary delay" to follow immediately after "shall"; "shall without unnecessary delay".

MR. YOUNGQUIST: But this is on waiver of preliminary hearing.

MR. LONGSDORF: Yes, if he waives. "without unnecessary delay" qualifies the word "answer", as it is now. I think it should qualify what the commissioner shall do.

MR. HOLTZOFF: I don't think you need that, Mr. Longsdorf. It seems to me binding over all follows

automatically if the preliminary hearing is waived.

MR. ROBINSON: I think part of the trouble is with some state practice under the state statutes. Frequently a magistrate binds over the defendant for the next term of court; binds him over to the next term; and that is the way it used to be and was for 75 years or so in our state, with the result that a defendant would have to lie in jail frequently during the rest of the current term and into the next term before he could be tried; a very difficult provision, of course. So in many of these state codes they have gotten away from that by providing that a defendant may be bound over by the magistrate or justice of the peace for trial at the current term.

MR. CRANE: For the purpose of the preliminary examination, he cannot do anything else but hold him.

MR. ROBINSON: Certainly we do not want to have it understood he could bind him over for the next term.

MR. CRANE: You could transpose this and say "without unnecessary delay he is held," and so forth.

MR. HOLTZOFF: Under the Federal procedure the binding over is not to any particular term. He just binds him over.

MR. BURNS: He is held to answer, which is a technical term of art. What does he do? He says, "You go and appear before the district court."

MR. McLELLAN: Would it be a good sop to strike out "without unnecessary delay" and put in the words "in due course"?

MR. CRANE: I think he ought to do it right away.

MR. SEASONGOOD: It is not what he does that the Supreme Court meant. The Supreme Court says the rule should be explicit as to what term.

MR. HOLTZOFF: But under the Federal procedure the holding is not for any particular term of the district court. Am I right about that, Judge?

MR. GLUECK: I do not see why "forthwith" would not do it here.

MR. YOUNGQUIST: That is not what the court is driving at.

MR. HOLTZOFF: Of course these comments were not, as I explained earlier, made by the court as a group. The individual members of the court suggested these as queries.

MR. SEASONGOOD: Who made this one?

MR. ROBINSON: I do not know. We were not told.

MR. YOUNGQUIST: I understand that, but my view is that the comment of the court has no place in this particular provision and therefore the Committee should, with its knowledge of the practice and of the procedure, and with the provision that the Chairman pointed out in lines 32 and 33, proceed in an orderly fashion and strike

out the words "without unnecessary delay".

MR. WECHSLER: Mr. Chairman, there is one thing about the comment of the court that will be consoling to us. You remember we got two memoranda from the court, one purporting to contain an aggregate of comments and the second one was sent to us with the statement that those were comments that came in late, and they apparently were comments of only one justice therefore, and this particular one is raised only in that second memorandum.

MR. SEASONGOOD: He is going to have a vote as to whether the rules you submit will be approved.

MR. HOLTZOFF: I think it is understood that these were tentative comments.

MR. SEASONGOOD: Let me go back: This says that the rule should be explicit as to what term of the district court he is to be held to answer. Under the rule as now framed the commissioner could hold him for appearance at a term ten years distant. Jim says they do sometimes hold them to answer at the succeeding term.

MR. ROBINSON: That is state practice.

MR. SEASONGOOD: But that is not Federal practice?

MR. HOLTZOFF: It is not the Federal practice.

MR. ROBINSON: I suppose some state magistrates do it.

THE CHAIRMAN: Can we have a comment which makes

it very clear that the Federal practice is not to hold over to the next term of court and that the commissioners are expected to comply with that statute?

MR. BURNS: What is the procedure, say in the sparsely settled portions of this country, where there is an arrest about June when the district court is going on its vacation and may not convene again until September and the defendant is not able to raise bail?

MR. SETH: He goes to jail.

MR. BURNS: Is that different from the state practice? What would the footnote show? What is the difference between the state and Federal?

MR. HOLTZOFF: My understanding is that in some states the commitment is to answer at the next term, so even if there is a current term, the case cannot be taken up. Am I right in that? Of course, that is not the Federal practice.

MR. SETH: Why not put in here "without regard to the term of the district court"?

MR. ROBINSON: We have a statement somewhat to that effect.

MR. HOLTZOFF: The motion is strike out the words entirely.

MR. McLELLAN: I move as an amendment, without the slightest idea at all of getting more than one vote,

that those words go out and there be substituted for them the words "in due course".

MR. WAITE: I will second it.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

(After a showof hands the Chairman announced the vote to be 9 in favor; 4 opposed.)

MR. SETH: In line 27 the first words --

MR. YOUNGQUIST: Before we get to line 27, may I call attention to line 24. Isn't it customary to say "The defendant may cross-examine the witnesses against him," rather than "any witness"?

MR. HOLTZOFF: Yes.

MR. SEASONGOOD: And is it necessary to say "in person or by counsel"; because if the defendant can do it, he can do it by counsel.

MR. BURNS: Oh, yes, I think so. You have not said "by his counsel" in dealing with waivers and all these other matters.

MR. SETH: Line 27, the first word in the line, shouldn't that be "the offense charged"?

MR. YOUNGQUIST: Isn't it the practice that if it appears on the preliminary hearing that the defendant has committed an offense other than that charged, that the commissioner has authority to bind him over?

MR. SETH: You have to file a new complaint and start over again.

MR. YOUNGQUIST: I think not, but I may be wrong. That is my impression.

MR. HOLTZOFF: I think not. I think the complaint is used only to start the proceedings in motion.

MR. GLUECK: Suppose the complaint is for tax evasion and then it is found he murdered somebody. Can he bind him over?

MR. HOLTZOFF: Yes.

MR. WAITE: There are a good many decisions holding that he can be prosecuted against for any offense which the commissioner finds there is sufficient evidence to justify. Then there are cases to the contrary, too.

THE CHAIRMAN: Which way does the weight run?

MR. WAITE: That I do not know.

MR. HOLTZOFF: This is a practical situation: Suppose a person is arrested and charged with violating one section of the liquor laws and the evidence shows he violated some other section; for example, if he is charged with transportation but the evidence shows he is guilty of

possession; he can still be bound over even though the complaint charges a different offense than the one the evidence shows.

MR. MEDALIE: I have so understood it.

MR. SETH: Without an opportunity to know what he is charged with?

MR. MEDALIE: He finds out during the examination. The only trouble about that is that from the viewpoint of pleading he has not been protected. That is, you did not give him a paper telling him the precise thing that enters into the equivalent of a judgment, which is the magistrate's decision to hold him; but our attitude in matters of that kind is simply to permit, by the analogy of the rule in civil cases, an amendment.

MR. SETH: If it be for drinking too much coffee, they can get you on sugar?

MR. MEDALIE: Just about.

MR. CRANE: I see you have the words "without unnecessary delay" there.

MR. HOLTZOFF: We ought to correspond that with the other, Judge, and also to be done "in due course."

MR. CRANE: "in due course" sounds like a commercial paper. I should think "without unnecessary delay" is more appropriate for these court proceedings than "due course". I do not mean to criticize anyone,

but I mean it does not quite fit; "immediately" or "forthwith"; but not "due course". In using "due course" you think of these statutes on commercial paper "in due course" and "without recourse".

MR. McLELLAN: But you cannot say as a practical matter it must be "immediately" or "without unnecessary delay"; and the words "in due course", which I criticized myself, do prevent it seems to me any likelihood of any such 10-year delay as the court had in mind, or at least one of the justices in his memorandum.

MR. DEAN: Why should it not be "immediately"? That is one thing I did not understand about that motion that was adopted. That modifies the action of the commissioner and it should be "immediately". During that debate we were talking about two different things. Judge Crane pointed out the importance of acting immediately when there was a waiver, of some of us talked about the additional problem as to when he should be held to answer.

MR. McLELLAN: But it was the latter thing the court was talking about.

MR. CRANE: Don't you think "immediately" would be better there? Where a man waives, there is nothing the commissioner can do otherwise. He must hold him immediately. Why should he wait a month?

MR. DEAN: Despite the 9 to 4 vote, I do not

think we have answered the problem of the court. And I do not think we have answered Judge Crane's point that there is no reason why the commissioner should delay one second. "Due course" indicates considerable delay.

MR. McLELLAN: I would not put in "in due course" as applied to the duty of the commissioner to hold.

MR. DEAN: Doesn't it read that way, Judge, now?

MR. McLELLAN: No. "hold him to answer in due course".

MR. WAITE: "immediately hold him to answer"; as soon as he is proceeded against.

MR. SEASONGOOD: But that might not be until the next term.

MR. McLELLAN: That is right.

MR. BURNS: Why not "immediately to answer in due course"?

MR. WECHSLER: "the commissioner shall forthwith hold him to answer in due course."

MR. BURNS: I think that is better and quicker.

MR. WECHSLER: Then if we go back to line 20, the suggestion is to put in "forthwith" after "shall"?

MR. DEAN: I think that helps it a little.

THE CHAIRMAN: There is no motion, Just conversation.

MR. WECHSLER: I make the motion.

THE CHAIRMAN: Do the words 'without unnecessary delay" in line 20 come out?

MR. HOLTZOFF: Yes; "in due course" to be substituted, it seems to me, under Judge McLellan's motion, which was carried 9 to 4.

MR. DEAN: May I make a motion that line 20 read "the commissioner shall forthwith hold him to answer in due course to the district court"?

MR. SEASONGOOD: Can you say "as soon as possible"? "due course" does not mean a thing to me. It is just words. Excuse me for saying so.

MR. McLELLAN: It is words, but good words, I think. "Immediately" won't go.

MR. SEASONGOOD: I did not say "immediately". I would say "as soon as possible".

MR. DEAN: I do not think there ought to be a time indication when he is supposed to answer to the district court because the action of the commissioner does not indicate any time. That time is indicated by when the grand jury meets and returns an indictment. "in due course" is all right from that standpoint.

MR. MEDALIE: Holding a person for a term by a magistrate carries something else with it, because the code provisions that if at the next term of the court he has not been indicted he may make a motion to be discharged

from custody. That has been done. But there is not anything any fellow can do when he waives and he waits on the district court except being indicted or making a motion when he gets tired of waiting.

THE CHAIRMAN: Now we have Mr. Dean's motion on line 20. Will you give it?

MR. DEAN: "the commissioner shall forthwith hold him to answer".

MR. HOLTZWORTH: "in due course"?

MR. CRANE: While we are reconsidering, cannot we leave those words out and just say "hold him to answer to the district court"?

MR. DEAN: That is my preference.

THE CHAIRMAN: Will you restate your motion so we can all get it?

MR. DEAN: "the commissioner shall forthwith hold him to answer in the district court."

MR. CRANE: Seconded.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

Now we come to the question on line 28.

MR. HOLTZOFF: On line 28 "without unnecessary delay" is subject to the same objection as the same words were in line 20, so those words should be stricken out.

MR. CRANE: I so move.

MR. McLELLAN: Does the "forthwith" go in?

MR. MEDALIE: Yes. You want the same language, of course.

THE CHAIRMAN: The motion is to delete in lines 28 and 29 the words "without unnecessary delay" and insert "forthwith".

MR. BURNS: After "shall".

THE CHAIRMAN: After "shall". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed "No."

Carried.

MR. HOLTZOFF: Before you reach the line 30, the line "otherwise the commissioner", and so forth, ought to start a new sentence, as a matter of grammar. I think that is necessary.

MR. MEDALIE: No, I do not think so.

MR. ROBINSON: That was our language the last time. Why not keep it?

MR. YOUNGQUIST: That is good enough.

MR. HOLTZOFF: Is that a comma or a semicolon?

MR. YOUNGQUIST: A semicolon.

MR. MEDALIE: In line 30, if that discretion as to bail bond with or without surety means discretion as to bail, I think it is all wrong.

MR. YOUNGQUIST: I have a suggestion on that, George, that I have written out, which is in line with what you say. I would suggest that lines 30 and 31 read, "The Commissioner may admit a defendant to bail as provided by Rule 45."

MR. BURNS: Yes.

MR. MEDALIE: All right.

THE CHAIRMAN: Is that seconded?

MR. HOLTZOFF: I second it.

MR. MEDALIE: Why do we say "may", because I don't want any doubt?

MR. HOLTZOFF: Suppose it is a murder case?

MR. MEDALIE: Then there is no doubt about it.

MR. HOLTZOFF: But if you say "shall admit" that would make it mandatory for him to admit to bail in a murder case.

MR. MEDALIE: Then "except in capital cases".

MR. WECHSLER: If Rule 45 says no bail in capital cases, isn't that sufficient?

MR. SETH: Wouldn't it be better to say "The

defendant may be admitted to bail as provided in Rule 45"?

MR. YOUNGQUIST: If we substitute the "shall" for "may" that will take care of it as permitted in Rule 45, as Rule 45 does not admit to bail in a capital case.

MR. ROBINSON: You are kind of chasing yourself around a stump, aren't you? "shall admit except as provided in Rule 45"? Here is Rule 45: "A person arrested for an offense not punishable by death shall be admitted to bail."

MR. HOLTZOFF: Why not say, "The commissioner shall admit the defendant to bail in cases defined in Rule 45"?

MR. BURNS: "in accordance with Rule 45."

MR. HOLTZOFF: But if you say "shall admit him to bail" that seems to me to make it mandatory in all cases.

MR. YOUNGQUIST: It is substantive in Rule 45.

THE CHAIRMAN: Referring to Rule 45 (a) (1): "A person arrested for an offense not punishable by death shall be admitted to bail"?

MR. MEDALIE: Everything is in there except the alternative of bail with or without a surety. I do not think Rule 45 covers bail without a surety.

MR. ROBINSON: But elsewhere I think it is covered.

MR. WECHSLER: It should be in there, anyway.

MR. YOUNGQUIST: That is in Rule 45 (c), and that is a bond or cash or securities.

MR. MEDALIE: But that is not clear.

MR. YOUNGQUIST: "may require * * * one or more sureties". That covers everything.

MR. MEDALIE: That does not mean he can dispense with a surety. That simply indicates he can require one surety or two sureties. What we intended on page 2 of Rule 5, line 30, was that the commissioner could take bail without any surety, and it does not appear in Rule 45. If that were to appear in Rule 45, then you could strike that sentence in line 31.

MR. HOLTZOFF: Doesn't that belong in Rule 45 rather than here?

MR. MEDALIE: Yes. Put it in Rule 45 and we delete this other from Rule 5.

MR. ROBINSON: We talked about it and I will tell you why;we tried to get away from the term "his own recognizance."

MR. YOUNGQUIST: Line 31 it is?

MR. MEDALIE: Line 31 says one or more sureties, though it does not say "no surety".

MR. ROBINSON: Here is the idea, as you will see when we get to Rule 45, if you have not already read it

with that point in mind: The idea is to have a defendant always give a bail bond so he will be in black and white and there will be some record in the court's files showing that he has given a bond.

MR. McLELLAN: That won't work. Suppose he wants to put up cash?

MR. ROBINSON: That is provided, too.

MR. MEDALIE: It is in Rule 45.

MR. YOUNGQUIST: I think I can dispose of this matter of Rule 5 by amending my motion to strike out the sentence appearing in lines 30, 31 and 32 relating to bail. It is all covered by Rule 45.

MR. MEDALIE: But it is not all covered by Rule 45.

MR. YOUNGQUIST: But whatever changes should be made I think should be made in Rule 45.

MR. MEDALIE: Yes, but I did not want to get rid of this indulgence to the defendant in Rule 5 until we have provided for it in Rule 45.

MR. ROBINSON: I say then one sentence will finish that point. It is this, that every defendant who is released without cash or other type of security of that kind, if he is released that way, he shall give a bail bond. The question is whether or not on that bail bond he shall have surety.

MR. MEDALIE: That is right.

MR. ROBINSON: Now if he is released on a bail bond without surety, that means on his own recognizance.

MR. MEDALIE: Where does it say that?

MR. HOLTZOFF: Section 45 (c) I think supports the Reporter's point.

MR. MEDALIE: What is the objection to saying that he may dispense with sureties altogether if that is what we mean to say instead of having any doubt about it?

MR. HOLTZOFF: I would be in favor of it.

MR. ROBINSON: There is no doubt about it.

MR. MEDALIE: I have doubt.

MR. ROBINSON: When we get to Rule 45 let us see.

MR. MEDALIE: But I won't remember it.

MR. YOUNGQUIST: I will write it in now.

THE CHAIRMAN: The motion is to strike the sentence on lines 30 to 32.

MR. BURNS: I would like to be heard. Why not state what the commissioner's duty is about; admit to bail and refer to Rule 45? After all, you are trying to lay down the steps that are taken before the commissioner. Why not say he shall admit to bail as provided in Rule 45? The case where there is any problem is one out of a million because the normal procedure is to admit to bail if the defendant has the means.

MR. YOUNGQUIST: It seems to me we are repeating again what we have already said in Rule 45. That covers the entire situation and covers the case of every person arrested for an offense.

MR. BURNS: That is important as an instruction to the commissioner. We ought to leave it in here.

MR. YOUNGQUIST: Of course the commissioner will have to refer to the entire rules in order to know his duties and powers and authority under them. The rule is going to be long enough, anyway. I personally should very much prefer to avoid repetition, and it would be considered repetition.

MR. BURNS: There is a motion to strike out, I suppose. Did somebody second it?

THE CHAIRMAN: It was seconded.

MR. CRANE: I should make a motion to amend it. I don't see any harm in saying that bail may be furnished according to Rule 45. You refer back to the rule. You do not state anything more but just make a reference to it and it completes the situation.

THE CHAIRMAN: You mean so that the attorney who has only an occasional criminal case will get his instructions?

MR. CRANE: Yes. It cannot take more than a line.

THE CHAIRMAN: Do you move that change?

MR. BURNS: I move that, yes.

MR. McLELLAN: May I ask Mr. Robinson whether there is any provision anywhere in the rules, except this sentence you have been talking about, purporting to give authority to the commissioner, as such, to admit to bail?

THE CHAIRMAN: Oh, yes.

MR. McLELLAN: That is all right then.

MR. MEDALIE: Where is it?

MR. YOUNGQUIST: Rule 45.

THE CHAIRMAN: Rule 45 says the commissioner, the court or the judge may.

MR. McLELLAN: What part of 45?

THE CHAIRMAN: Line 31 of page 2.

MR. MEDALIE: No. It tells what he does when he takes bail, but it does not say he shall take bail. No where does that appear.

MR. YOUNGQUIST: Line 3 I think covers it. "A person arrested for an offense not punishable by death shall be admitted to bail." That begins from the moment of his arrest until the time of his conviction.

MR. CRANE: But this says the commissioner may do it. So this calls attention to it, and that is all, and I don't see why it did not make it clear in doing it.

THE CHAIRMAN: Your motion is to have the sentence read, "The commissioner shall admit a defendant

to bail as provided by Rule 45"?

MR. CRANE: I second it.

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

(Chorus of "Ayes.)

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

MR. WECHSLER: Mr. Chairman, the sentence in lines 21 and 22 it seems to me are a little cumbersome. Wouldn't it be saying thesame thing if that read "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time" instead of saying"either immediately or after postponement for a reasonable time"?

MR. ROBINSON: Those were the words of our fifth draft. You just want to change them, do you?

MR. WECHSLER: Exactly. It seems to me if he is told he has to do it within a reasonable time he knows he can do it immediately.

THE CHAIRMAN: I think this language hits at definitely certain evils which have existed in some districts in drifting along while they are waiting to get more evidence.

MR. HOLTZOFF: No. What they generally do is to have one continuance because the commissioner can take two

fees.

THE CHAIRMAN: Unless the FBI wants him to do it while they are gathering evidence.

MR. HOLTZOFF: No; because ordinarily by that time the case would be presented to the grand jury, if they wait long enough for a hearing.

MR. BURNS: Did you make that as a formal motion?

MR. WECHSLER: Yes.

MR. BURNS: I second it.

MR. WECHSLER: "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time" and take out "either immediately or after postponement for a reasonable time."

MR. ROBINSON: You leave the point behind, don't you, Herb, of the time in which the defendant could prepare his defense. That was argued so strongly at the last meeting. You ought to say that he shall be given adequate time to prepare his defense and see his lawyer.

MR. WECHSLER: This gives the commissioner that chance. He can do it immediately or after postponement. You have to leave some discretion. My modification says he is to act within a reasonable time.

MR. ROBINSON: You do not get the idea in there that this commissioner needs to give the defendant reasonable time. Let us put it in there.

MR. BURNS: Why not say this: Take Mr. Wechsler's motion and then add "after providing the defendant an adequate opportunity for preparing his defense."

MR. WECHSLER: Exactly. I accept that.

MR. HOLTZOFF: You do not need to put it that way because there is no defense, as such, in a preliminary hearing.

MR. BURNS: There is. He has been arrested.

MR. ROBINSON: That is the same question they were dealing with in this courthouse before Judge Hincks' Committee, dealing with the question of the commissioner, and it was pointed out there that a lot of our trouble with commissioner proceedings is we do not distinguish between the two functions of the commissioner, namely, while he is acting as a binding-over authority as distinguished from the one when he is trying a petty offense as a trial magistrate. When he is merely binding over you have something like the grand jury proceedings. It is merely a charge.

MR. BURNS: But time and again a defendant can be held for the grand jury and they turn in no bail. It is after all part of the judicial process and certainly he ought to be entitled to put on his witnesses.

MR. HOLTZOFF: We have all that there.

MR. CRANE: We are just talking here. Isn't that just what happens; if he does not waive the commissioner may hear it or the magistrate may hear it immediately, or you give him a reasonable time?

MR. HOLTZOFF: You do not call it a defense.

MR. CRANE: It is not a defense but he can hear the charge or the evidence as to the charge immediately or within a reasonable time.

MR. ROBINSON: Therefore you think it should be left out or put in?

MR. CRANE: I did not criticize any motion, but it strikes me that is what really happens. No matter what you say, he will hear it at once. He will say, "Go on and let us hear the case" or he will give a reasonable time.

MR. BURNS: What they are trying to aim at, it seems to me, is two things: First, the evil of unreasonable postponements; and, second, that he ought to be given an opportunity to present his side.

MR. HOLTZOFF: Mr. Wechsler's motion merely improves the English of the provision without changing its meaning.

MR. WECHSLER: I did not purport to change the meaning, but it just seemed cumbersome to me.

MR. SEASONGOOD: I think you had better leave out

there "immediately or after postponement", because you say in (b) that he has to allow the defendant a reasonable time to consult counsel, and if you say here "immediately" there is an inconsistency.

MR. WECHSLER: If you say "within a reasonable time", that is all right.

MR. HOLTZOFF: I call for the question on Mr. Wechsler's motion, Mr. Chairman.

THE CHAIRMAN: All right. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed "No."

(Chorus of "Noes.)

THE CHAIRMAN: There has to be a showing of hands.

(After a show of hands the Chairman announced the vote to be 8 in favor and 7 opposed.)

THE CHAIRMAN: The motion is carried.

dz MR. YOUNGQUIST: May I have the exact language?

MR. WECHSLER: "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time." That is the substitute for the sentence in lines 21 to 23.

THE CHAIRMAN: Anything further on this section?

MR. HOLTZOFF: Mr. Chairman, I move to strike out the last sentence of the section. I think it is unnecessary. It is one of those minor matters that can be handled by the Administrative Office.

THE CHAIRMAN: How could the Administrative Office handle that?

MR. HOLTZOFF: Oh, the Administrative Office issues instructions as to how papers shall be filed, how they shall be transmitted, and so on.

MR. ROBINSON: Isn't that a very good provision? Hear you have a commissioner where over in district A, we will say, issuing a warrant, and it is executed in district B, at a point a hundred miles away, and the return is had before a commissioner in that district. Now, what would be more natural than for the commissioner before whom the accused is brought to be required to notify the original commissioner, so he can find out what happened about this complaint that was filed before him and this warrant that was issued by him? Isn't that reasonable, that a process issued by a court should come back to that court?

MR. HOLTZOFF: It doesn't now. I do not think it is of any interest to the commissioner. He is through when he issues the warrant, unless the person is brought before him later on.

MR. ROBINSON: That is one of the troubles with

the commissioner practice too. There are lots of tag ends that are loose. There is no connected procedure.

MR. LONGSDORF: Isn't that because of some experiences had with commissioners who issued the complaint and had no record of what the document was and therefore they could not make up their accounts properly?

MR. HOLTZOFF: No, because the commissioner charges so much for issuing the warrant. Now, he has no other charge he can make in the same case unless later on the prisoner is brought before him, when he makes a charge for conducting the hearing.

Now, I think this requirement may satisfy the commissioner's curiosity ~~too.~~ It serves ~~an un~~ a useful purpose.

MR. GLUECK: It really might just as well say that the commissioner shall keep copies in triplicate. It is that sort of thing.

MR. HOLTZOFF: Exactly.

MR. ROBINSON: I discussed this sentencewith the members of the Administrative Office and they seemed to think it would help in keeping accounts and handling the administration of the commissioner's office.

MR. HOLTZOFF: If it does that, they can issue an instruction.

MR. ROBINSON: What is the objection to it, Alex?

MR. HOLTZOFF: My objection is this, because we ought not to bog down these rules with provisions as to petty administrative matters of this kind. If we can take out one here and another there, and so on, why, we can condense the rules considerably.

MR. GLUECK: I second the motion, Mr. Chairman.

THE CHAIRMAN: You have heard the motion, to strike out the last sentence, beginning on line 38. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is again in doubt. Show of hands. All those in favor?

(After a show of hands the Chairman announced the vote be 6 in favor; 8 opposed.)

The motion is lost.

A motion is now in order to adopt 5 (c) as amended.

MR. WAITE: Mr. Chairman, before you bring that up, I would like, pro forma, to propose an addition to this Rule 5. I say pro forma because I know perfectly well it will be lost, and I do not say thatas Judge McLellan did with the idea perhaps that then it will be carried, but I want it in the record, and if you will

permit me, I would like to explain why I make this proposal now and why I make several others that I am going to bring up later.

I have had Jim put around mimeograph copies of the proposal. You have one up there.

Proposal, Rule 5 (b). I say I would like to explain I want to bring it up even though I do not think it will carry, My idea of the purpose of these rules is three-fold.

In the first place, we want to codify certain practices; in the second place, we want to make clear those practices which are not now clear; and, in the third place, we want to add practices which might be desirable, and which haven't been followed.

It seems to me that when you put this out to the public we ought to put out things which seem reasonably wise in order to give the bar a chance to comment. If we put something in that the bar does not like, we will hear from it and we can take it out, but if we put in something which is only fairly wise, there will be a great many members of the bar who have never thought of it. There are lots of things in here that certainly I would probably accede to as wise, that I have never thought of. We ought to give them a chance to express themselves, and if we think of something they might like, that might be wise, it is

better to call their attention to it than to leave it out.

Now, one of the proposals that has been advocated time and time again, and advocated by men of very considerable prestige, is this proposal 5 (b). I do not care anything about the form of it. The gist of it is that at the preliminary hearing the commissioner may interrogate the accused, after giving him full warning that he is under no obligation whatsoever to answer. If that explanation is given, that he is under no obligation to answer and that what he says may be used against him, it cannot possibly be called compulsory self-incrimination. On the other hand, it is a procedure which will undoubtedly elicit a great deal of evidence that might not otherwise be developed. It is a procedure that is followed informally in my own district, and I must say it is perfectly astounding the number of trials that it has saved because of the confessions of guilt that are immediately elicited in that way.

I know that there is a strong desire on the part of a great deal of the bar for something of this sort and I therefore propose that we put it in, with the idea that if the bar does not like it, it will strike it, but at least we will give them a chance to say whether they like it or do not like it.

My motion is that we add to Rule 5 (b)

substantially as it is written in this mimeographed matter.

MR. LONGSDORF: Mr. Chairman, may I ask a question of Mr. Waite? There is nothing in here about whether that shall or shall not be reduced to writing.

MR. WAITE: No, that had not occurred to me. I do not know that I have any particular interest in that point.

MR. LONGSDORF: There are lots of state laws that require reduction to writing of the testimony taken, that is, translated into depositions.

MR. WAITE: I certainly would not object to that addition, if anybody thinks it is wise.

MR. LONGSDORF: I mentioned it because I thought somebody would ask about it.

MR. HOLTZOFF: The motion has not been seconded.

MR. DESSION: I second it.

MR. CRANE: I second it, for discussion, at least.

MR. SEASONGOOD: The point suggests itself to me, in opposition, is that the magistrate, if the person refused to answer questions, would draw an inference that he should bind him over.

MR. CRANE: The reason I seconded it was this: It came up in connection with this so-called investigation as to third degree, and some of us who have had something to do with it were troubled with it in our state. I made

two or three addresses before some bar associations and had suggested that I was not satisfied with the rule of leaving the question to juries. That is, you go further than anything you adopt here, and therefore they should never permit any testimony of a police officer as a confession made to him by a defendant when arrested at any time; and that the defendant may be questioned or his confession or statement taken before a committing magistrate for the first time.

That was going pretty far, and I do not advocate it, may I say, because it is a law, a rule that we have in our own state, but it certainly is the only way to cure the evil of leaving the question to so many people who never saw a criminal in their lives and never saw a criminal court, and the objection to it is that a question of fact should be left between the officer and the defendant. I advocated that there shall be no testimony from any officer, captain of police or anybody like that.

MR. HOLTZOFF: That is not included in this.

MR. CRANE: No, I know it is not. I mentioned that the way to meet that would be to have such a condition as this, which is that the committing magistrate, which is the continental way, should ask all these questions. That is the way in all hearings in civil law, because the one who does the questioning is the judge, not

the police officer. This is along that line. This is a live question and certainly if you are going to let the officer take his testimony too, that is volunteered, and let him testify in court, that is volunteered too.

MR. BURNS: Mr. Reporter, I think it is an excellent suggestion, but I wonder if we ought not to take into account what effect this would be likely to have on the rules in Congress. I think this is a rule which would never survive congressional attack.

MR. WAITE: I have an idea that if I were as persuasive as Mr. Medalie, for instance, knowing what I do about the actual processes, that I could go before a group in Congress and persuade them. I could not do it, but I think Mr. Medalie, if I could persuade him to go before Congress, could persuade them to adopt it.

MR. HOLTZOFF: I am afraid you do not know the Judiciary Committee. You would never get them to O.K. any set of rules that had a provision of this kind.

In so far as the continental system is concerned, my understanding is that these magistrates, or whatever they call them --

MR. WAITE: May I interrupt just long enough to say that I do not propose anything like the continental system?

MR. HOLTZOFF: I understand that.

MR. WAITE: And I hope nobody will suppose this is that kind of thing and get tough.

MR. HOLTZOFF: No, but I just wanted to make this comment, that they are professional men who devote their whole time to making investigations and questioning arrested persons. After all, many of the United States commissioners are insurance agents, real estate agents, postmasters, and many of them have only half a dozen cases a year in their capacity as commissioners, and I think they would do a lot of harm too, caused by asking questions in a bungling way.

MR. WAITE: My idea is simply this, that what we want to do by our criminal trials is to elicit the truth, and if we can elicit the truth without harm to the justice of the matter, we ought to do it, and I cannot see, if you say to the accused that, "You do not have to answer," and if you go further and say that his failure to answer, say, by implication, that his refusal to answer shall not be used against him - now, I bring that in because this matter was up once before in a committee, on which I was functioning, and the proposal was that we should go further and that he should be told that if he did answer, his answers might be used against him and, moreover, if he refused to answer, his failure to answer might be used against him, and the argument was that that really coerced

him into answering, and I am perfectly willing to agree to that. So I carefully left out of it any provision that his failure to answer might be used against him, but if he is told carefully that he need not answer, if he does not want to, and he is warned to keep his mouth shut, then he cannot possibly say he is being coerced within the meaning of the Constitution.

And it does seem to me that the examining magistrate's questions are a fair and legitimate, and certainly effective in many cases, way of eliciting the truth. The policeman can ask questions, the prosecuting attorney can ask questions, everybody can ask questions but the examining magistrate, and if he asks them under circumstances where there is no abuse, it seems to me that is the logical way to handle it.

MR. HOLTZOFF: I wonder if you are not overlooking the fact that the magistrate~~s~~ knows nothing about the case? He hasn't enough of the background of the case to enable him to conduct a really intelligent interrogation. I think that the average United States attorney would be afraid to have this kind of interrogation conducted, for fear that some bungling questions might spoil his case for him.

MR. WAITE: There I would say that there are two fallacies. In the first place, I agree that the magistrate might not be expert in doing it, but that is no reason why

he should not attempt. Now, your suggestion that he should bungle the case is a suggestion that the prosecuting attorney has a case where he does not want the truth to come out, and I flatly disagree with that. Whatever the magistrate asks, he will ask to elicit the truth, and if an answer comes out that is derogatory of the man's guilt, such as that he is innocent, so much the better, even if the prosecuting attorney cannot get a conviction in those cases.

I want to go further, if I may. You speak about Congress. I don't know whether it would go through or not, but I think if we feel it is a good rule, we ought to put it in. In fact, I would go so far as to say that even if we are doubtful about it being a good rule, if we think it might be a good rule, we ought to put it in in order to give the other people a chance to comment on it and throw it out, if they don't like it, rather than leave it out because we are afraid they are going to throw it out.

MR. HOLTZOFF: Congress is not going to strike out one rule or another. They might attack a rule like this and, as a result of this rule, they may chuck our whole set of rules into the wastebasket.

MR. WAITE: I cannot conceive that we have to get something that is so integrally perfect that Congress will take it all or nothing. If that is so, we might just

as well quit right now.

MR. CRANE: I do not want you to be misled about my seconding of the motion. I seconded it merely for the purpose of developing discussion. There is another thing to think about, and I used to think of it one way until I was familiar with criminal trials, and since then my thought has been changed, and that is this idea that a man need not testify against himself and that there should be no presumption against him in case he does, presumption of guilt; and, I repeat, I used to think that was a terrible thing, because the mind immediately reaches the conclusion that he is guilty if he won't testify. But my experience has changed my mind, and I think that is a salutory rule, although I think perhaps modified by public opinion somewhat, because I have known men who have been brave enough to take the rap, as it is called, to protect some members of their own family.

I know of a man who did it here in this city, to protect the reputation of many, many high officials, and he was a good man, he was not a gangster; and I have seen three instances of that, where it was a silly thing perhaps to do, but they did it, and it prevented more damage than anything that had happened - just the conviction of those men. And there are two sides to all those questions and it may be we have to go slow in saying that

a man can be questioned when the law gives him the privilege of keeping his mouth shut, even if he goes to jail for it, and that perhaps might be his privilege of having a magistrate questioning him or anybody else. Why, if he takes the stand, if he testifies, or makes a statement before the magistrate, the magistrate can question him now to his heart's content - he waives his privilege as soon as he testifies. If he appears before the commissioner and testifies, he can be questioned. It is only when he wants to keep quiet and say nothing that the problem arises, and I do not know as I would want to force him to do it.

I say those are things to which there are two sides. They are great human questions; not so much a matter of law. As happens so many times, you have theories which are perfect but human nature breaks under them, and you have to get on middle ground.

MR. WAITE: Your opposition is a little different from the opposition of Mr. William S. Forrest, when I brought it up once before. He said, "Why, Waite, that is a perfectly atrocious rule, because the amateur criminal will tell the truth and he will be caught thereby; the expert will know how to lie and you cannot get him, and it is not fair to get the amateur if you cannot get the expert."

MR. CRANE: That may be true, but I have seen very

few cases in this state where a man did not take the stand and the presumption was not against him in the minds of the jury, and they convicted him; but whether or not he should be questioned, if he wants to keep quiet, he can take the risk is another matter.

MR. WAITE: I did not propose he be put on the stand.

MR. CRANE: No.

MR. WAITE: I do not propose that he should be required to answer. This is nothing --

MR. CRANE: True.

MR. WAITE: (Continuing) -- perfect, but I am not going to direct he be questioned when he fails to take the stand in court.

MR. CRANE: That is all linked up together, and they are difficult questions. I am only stating from experience what my feeling is, because I started out with the idea, and I have seen these things happen.

And, of course, when they speak of Congress, I agree with what has been said here, you take the Congress, you take the Legislature, why, they are just men like ourselves, they are all citizens, they just reflect what we feel around here. They are no different because they are up in Albany or down in Washington; they are just fellow men. They speak what is in their hearts, they feel

what is in their hearts, and they respond to us, not the books they have read; they respond to what they have seen in human life round about them, in the cities, in the country, or anywhere else, and I find they come pretty near - unless it is simply a legal question - they come pretty near answering to what the people feel about it.

MR. HOLTZOFF: I call for the question, Mr. Chairman.

MR. CRANE: Now that we have had our say, I withdraw my second.

MR. HOLTZOFF: There were two seconds.

MR. CRANE: Oh, were there two?

MR. LONGSDORF: Can't we leave it up to the court? The court will pass on it before it goes to Congress.

MR. HOLTZOFF: Yes, but we are submitting a set of rules that are recommendations to the court.

MR. LONGSDORF: And the question is whether we want to recommend a rule such as this.

THE CHAIRMAN: I think it was definitely said at our last meeting in Washington that any member of the Committee or any group of members of the Committee would have the right to submit an addendum of rules that they would have liked to have submitted to the court, even though they do not meet with the acceptance of the majority of the Committee, and I think it is very much in order that

the right should be accorded. I think our primary obligation is to the court to submit to them our best judgment. They may conclude what one member or what a minority submits has more wisdom in it than the majority of the Committee. If they do, that is what they will submit in turn to Congress.

I do think there is something very real to what Mr. Holtzoff said about the attitude of Congress. I happened to be in attendance at some of the hearings on the civil rules - I had been asked to come down and make a very brief statement - and I know at one stage of the game how near the whole set of civil rules came to being wrecked. It was just a fortuitous circumstance that one man happened to be in the room who could talk the language of the Judiciary Committee, and I think at times he played them pretty hard, but he got them back and the rules went through. But that is an exceedingly difficult Committee to talk to, because it is made up of city lawyers and country lawyers, from the east, south, north and west, and you have really just got to know the combination.

(Discussion off the record.)

MR. WECHSLER: May I ask Mr. Waite one question before this come to a vote?

THE CHAIRMAN: Yes.

MR. WECHSLER: Why do you think this interrogation

by the magistrate under all these limitations is better than the ordinary kind of police interrogation that you get now, subject to the type of limitation that the Committee has already voted on, on police interrogation in one of our rules?

MR. WAITE: I will put it frankly, partly because I find so many defense attorneys are scared to death of it. Men like William S. Forrest -- perhaps you know who he was -- of Chicago --

MR. WECHSLER: Yes.

MR. WAITE: (Continuing) -- the ablest defense counsel I ever knew of, a man of absolutely unquestionable integrity, was opposed to it on just exactly that ground, that it would result in a great many convictions, not unfair convictions, except as he defined "unfair," which was that anything was unfair which was not precisely in accordance with the rules of law. The rules of law are now that you cannot interrogate and, therefore, to allow interrogation would be unfair, and inasmuch as it would result in convictions, it would be unfair. I have heard so much of that expressed fear.

MR. WECHSLER: That is not the point of my question. The point of it was that you now have a typical form of police interrogation of arrested defendants, and while that somehow is accompanied by abuse, I think we

could hit against that danger and do so in the rule that used to be an accompaniment to 5 and has been transposed. It seems to me that your theory must be that you want to shift the normal inquisitorial function that accompanies arrest from the police to the magistrate.

MR. WAITE: No, not at all. It is a matter of psychology. Apparently, I don't know why, I will have to admit that, but it does seem to be the fact that a man will often answer questions under those circumstances where he will not answer to the police. We can see how that psychology has grown up, though I do not purport to explain it, but it does seem to be the fact. Of course, if the police use a rubber hose on him, why, of course, he is going to answer, but if the police do not use it, he is much more likely to answer to the magistrate than he is to the police, and I have in mind of course not simply questions, "Are you guilty?" but here is a burglary charge:

"Q Where were you that night? A Well, I was in Jim Smith's blind pig.

"Q Who was with you? A Tom, Dick and Harry."

Now, those are fabrications on the spur of the moment. When it comes to the trial, he is appalled, and his attorney is appalled, to discover that Jim Smith's blind pig was raided the night before and it wasn't open

that night. Therefore he has to figure out some other place where he was at that time. And if Tom, Dick and Harry were in jail that night, he has got to figure up some other companions, and when he does figure them up, and what he says at the trial is contrasted with what he said at the time of the magistrate's interrogation, the jury is quite likely to get at the truth much more accurately than if he had not been asked in the magistrate's examination and had not answered, and it seems to be the fact that they do answer those questions.

MR. WECHSLER: I think the defendant is much more apt to answer the police, if he is questioned properly after he is arrested, than he is to answer the magistrate after he has seen his lawyer.

MR. McLELLAN: But he hasn't seen his lawyer. He is in what he thinks is a courtroom and he is scared to death and is afraid if he doesn't answer something that the magistrate will draw an inference against him. It isn't fair to him.

MR. SEASONGOOD: Which he will.

THE CHAIRMAN: You have heard the argument, which has been rather full. Are we ready for a vote?

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: All those in favor of Mr. Waite's motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be lost. The motion is lost.

MR. YOUNGQUIST: Before a vote is taken, Mr. Chairman, on Rule 5 (b) as it now is, Ijust want to call attention to the sentence beginning in line 32. In view of the fact that we have now provided that a copy of the complaint shall be attached to the warrant, we can omit a lot of that language, but perhaps that should go to the Committee on Style rather than take the time now. I merely call it to your attention.

THE CHAIRMAN: Will you keep it in mind, Mr. Youngquist?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of Rule 5 (c) as amended say "Aye." Opposed "No."

Carried.

We will proceed to Rule 6.

MR. WECHSLER: Mr. Chairman, there is a point in the commentary on Rule 5. Do you want to hear that?

THE CHAIRMAN: Yes, indeed.

MR. WECHSLER: I call attention to Subdivision (a) of the commentary, which is to be reworded. That

deals with the point about United States commissioners that we passed on. Down in the middle of the page, "Note to Subdivisions (b) and (c)," there is this statement: "It is the Federal practice to give a defendant a preliminary examination although no provision of the Constitution and no statute requires it."

I do not understand that to be true, that no statute requires it. It seems to me that 18, 591 (3) and (5), and quite specifically the provision in Title 5, dealing with the FBI, do require binding over for preliminary examination.

MR. ROBINSON: Yes, Herbert, we have studied that carefully and we will be glad to talk it over with you.

MR. WECHSLER: All I mean by preliminary hearing is the duty to bring the person arrested before a magistrate, who can discharge him if there isn't probable cause or, if there is probable cause, who can admit him to bail or hold him. This says that is not required by statute. It seems to me it is required by at least four statutes.

THE CHAIRMAN: Suppose Mr. Robinson, Mr. Dession, Mr. Holtzoff and yourself canvass that situation and bring it up later.

Rule 6. Any questions on (a)?

MR. HOLTZOFF: Mr. Chairman, I have a question as to the form of that rule. I think it is all right in substance. I rather like the form in which it appeared in Tentative Draft No. 5, and I think it is preferable, and I suggest that it be reworded to read as follows: "The court shall order a grand jury to be summoned at such times as the public interest may require. The grand jury shall consist of not less than 16 nor more than 23 persons."

MR. ROBINSON: Of course, you first sentence is not in Draft 5. You more or less intimated it was.

MR. HOLTZOFF: I meant the second sentence was, George, but the first, I think, was not. My suggestion relates to the phraseology of the first sentence. I think it ought to be in the singular rather than in the plural, and I think the second sentence ought to read in the same manner as it did in Draft 5.

MR. SETH: The first sentence was intended to provide that two or more grand juries might be going on at the same time, wasn't it?

MR. DEAN: The statute, as I recall, says that can be in some districts and not in others. How many are you allowed in this district?

MR. MEDALIE: All you want. This courthouse just crawls with grand juries.

MR. DEAN: I think in the Northern District of Illinois they can have only three, or something like that. There are statutory limitations or something.

MR. MEDALIE: There is one other thing that I think we leave out. This does not say what you do with a grand jury when you have it, how long you can keep it.

MR. ROBINSON: Yes, it does.

MR. HOLTZOFF: Yes, I think it does.

MR. ROBINSON: Very clearly and specifically.

MR. MEDALIE: Oh, I overlooked that. Where is that?

MR. HOLTZOFF: Line 59.

MR. MEDALIE: Wait a minute. Let me make sure.

MR. SETH: 59 and 60.

MR. HOLTZOFF: Lines 59 to 61.

MR. MEDALIE: Well, as the tenure of power is not affected by the beginning or the ending of the term, when does its term end?

MR. HOLTZOFF: It says, "A grand jury shall serve until dismissed by the court but no grand jury shall serve more than eighteen months."

MR. MEDALIE: That is very, very well covered.

THE CHAIRMAN: Any further comments on section (a)?

MR. YOUNGQUIST: Is that proposal that "The court

shall order a grand jury to be summoned" --

MR. HOLTZOFF: "at such times as the" --

MR. YOUNGQUIST: (Continuing) -- "at such times as the public interest may require"?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I second the motion.

MR. ROBINSON: I would like to speak against the motion. It is hard for me to see why we need so many particular or specific statutes on that subject for certain districts whereas the requirement is shown to be a generally needed requirement in other districts. We have run through the United States Code here, and we find for the Southern District of New York and for certain other districts which have a population of over 400,000 or something of that kind that they may have such-and-such grand juries and a very long and involved statute providing for more than one grand jury at various places.

MR. YOUNGQUIST: May I interrupt just to say that my interpretation of it is that under the provision "order a grand jury at such times" the court may order any number it chooses to.

MR. ROBINSON: I understood you to say "at such time."

MR. YOUNGQUIST: "such times".

MR. ROBINSON: What is the objection to leaving

it as "grand juries" then? Why couldn't the court order two grand juries at the same time?

MR. HOLTZOFF: They could. I then putting it in the singular would give the power to the court --

MR. ROBINSON: We considered that very carefully and we felt, Alex, unless we made it "grand juries" it would not be clear to the bench and bar that we do mean that there may be more than one grand jury sitting at the same time.

MR. HOLTZOFF: But "and in such number" is very ambiguous and may give rise to the thought that meant number of members of the grand jury.

MR. ROBINSON: I thought you had us add that, didn't you, George?

MR. DESSION: No, I don't recall.

THE CHAIRMAN: Doesn't the phrase "in such number" when taken with the second sentence make it perfectly clear that there may be more than one grand jury at a time?

MR. DEAN: I should think so.

MR. LONGSDORF: I had that idea.

MR. DEAN: I thought this authorized any number of grand juries you wanted in any district.

MR. HOLTZOFF: I thought "in such number" meant the number of grand jurors.

MR. LONGSDORF: No.

MR. DEAN: No, no.

MR. LONGSDORF: I didn't think so.

MR. ROBINSON: If it is perfectly clear, as Aaron suggests --

MR. HOLTZOFF: It is not clear to me.

MR. ROBINSON: (Continuing) -- and it is such a revolutionary idea in a good many places, we do have trouble because I do not think this statute provided for a grand jury summoned at one term to be held over by the court so as to take care of investigations begun at that term but not completed until a subsequent term.

Now, the Supreme Court has at least two cases on the docket now, the Evaporated Milk case, from George Longsdorf's district, and also the Johnson case from Chicago, in which those statutes have got the court into some bad snarls.

MR. HOLTZOFF: You take care of that in 6 (g).

MR. ROBINSON: Just hold that moment. You will find that is involved in this paragraph as well as later ones.

In other words, we want it to be clear that a district judge does not have to wait until a term of court has adjourned and another term has begun before he can call another grand jury.

MR. YOUNGQUIST: I was confused by that phrase "in such number". Let me suggest, in order that there may be no question about the meaning, that you say, "The court shall order one or more grand juries to be summoned at such times as the public interest may require."

MR. ROBINSON: Our question is one of style. You have one "grand juries", haven't you? Is that construction satisfactory to you?

MR. YOUNGQUIST: I would rather sacrificestyle to clarity.

THE CHAIRMAN: "in such number" is certainly ambiguous.

MR. DEAN: I think this would clear it up, "The court shall order one or more grand juries".

MR. YOUNGQUIST: Yes, I would be glad to accept that.

MR. ROBINSON: No one objects stylistically?

THE CHAIRMAN: The motion is to substitute, "order one or more grand juries to be summoned at such times as the public interest may require", and strike out "and in such number". Is that agreeable to you?

MR. ROBINSON: Is that part of the motion, to strike out, Aaron?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: What was the next sentence?

MR. HOLTZOFF: The next sentence, I suggest, should read as it does in Tentative Draft 5, "The grand jury shall consist of not less than 16 nor more than 23 persons."

My reason for objecting to the present wording is this, that the present wording provides how many shall be summoned but it does not say how many the grand jury shall consist of. Therefore I think we would do better to revert to Tentative Draft 5, which is clear rather than ambiguous.

MR. DEAN: Seconded.

THE CHAIRMAN: I don't quite follow that.

MR. MEDALIE: This is pretty well drawn. It provides that you call a certain number of persons but out of that number of persons you must produce not less than 16 nor more than 23. You might call 50.

MR. HOLTZOFF: Wait a minute. There is no direction here as to --

MR. MEDALIE: What constitutes the grand jury.

MR. YOUNGQUIST: That is right.

MR. HOLTZOFF: Whereas in Draft 5 we define it.

THE CHAIRMAN: The way I read it, it isn't more than 23 nor less than 16.

MR. YOUNGQUIST: Suppose he calls 23 and only 15 show up?

THE CHAIRMAN: He hasn't got a grand jury.

MR. ROBINSON: No; he has to have that many members.

MR. YOUNGQUIST: I know in our statutes and I think it is quite general, there is a very specific description of what a jury, a grand jury, consists of, just about as Alex says, that a grand jury shall consist of not more than 16 nor less than 23 members. That is all there is to it.

MR. HOLTZOFF: That is what we decided last time.

MR. YOUNGQUIST: You describe what a grand jury is, having previously given the court authority to order a grand jury summoned. One ties in with the other.

THE CHAIRMAN: Hasn't the point been made that it should provide that there shall be a sufficient number called as the experience in that district indicates is necessary to net not less than 16?

MR. MEDALIE: It is really important for this reason. I can show you that in New York State. I had one experience, impaneling a grand jury in Albany, way back in 1928. Under the statute applicable there, the commissioner of jurors picked 23 men, and whichever of those showed up constituted the grand jury.

In New York and Kings counties the commissioner of jurors under a court order brings in a panel and out

of that panel the court picks 23.

MR. HOLTZOFF: My point is we nowhere in this present form define what the grand jury shall consist of.

MR. ROBINSON: The word "members" takes care of that, with a little amount of common sense.

MR. DEAN: The statute, in substance, contains this provision about calling of grand jurors:

> "If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury."

MR. HOLTZOFF: I should like to preserve the definition in our fifth draft, namely, defining who shall constitute a grand jury, "The grand jury shall consist of not less than 16 nor more than 23 persons." If you want to add anything about directing the summoning, I do not object.

MR. ROBINSON: This says, "to provide not less than 16 members", and that will be the minimum, "nor more than 23", which will be the maximum.

MR. HOLTZOFF: But that is a lefthanded way of

get at it.

MR. SEASONGOOD: Strike out the words "to provide" and say "that there shall be"; would that do it?

MR. HOLTZOFF: The way it is phrased now, it is a sort of lefthanded way.

MR. DEAN: This provides that they shall be summoned so that there shall be not less than 16 nor more than 23 members for each grand jury.

MR. YOUNGQUIST: You still have no direct definition.

MR. ROBINSON: The statute defines it. We are not changing the statute.

MR. HOLTZOFF: This is supposed to supersede the statute.

MR. ROBINSON: Not at all.

MR. YOUNGQUIST: I would suggest the second sentence be stricken entirely. You don't need it. The statute says how many there shall be and how they shall be called, and we all know every judge in every district knows how many to call for in order to have the required number.

MR. CRANE: Why don't you say, "to provide for a grand jury of not less than 16 nor more than 23"? That is what you have said, but it just makes it a little clearer.

THE CHAIRMAN: "to provide a grand jury of not less than 16 nor more than 23 members"; is that all right?

MR. HOLTZOFF: I think you ought to have a definition of "grand jury."

THE CHAIRMAN: You have it.

MR. HOLTZOFF: No.

THE CHAIRMAN: Not less than 16 nor more than 23 qualified voters picked by the court.

MR. ROBINSON: Well, the Reporter must have had some purpose in changing the language of the preceding draft.

THE CHAIRMAN: He wanted to get more than 23 called because if 23 were called, they might be scaled down to less than 16.

MR. ROBINSON: That is right.

THE CHAIRMAN: Anyway, he thinks a full jury of 23 is better than a skinny jury of 16. That is what he is trying to say here, I think.

MR. ROBINSON: We did have some requests or recommendations coming in from district judges to the effect that the number of persons they felt they could call for grand jury duty was more restricted than they felt it should be. They wanted some express statute that they could summon -- if it was a situation where they thought they needed to call 50 people in in order to get 16

that they could summons 50.

MR. HOLTZOFF: There is no limitation of the number they can call.

MR. ROBINSON: More than that, if there are going to be more than one grand jury sitting at a time, they would have to call an additional number of prospective members.

MR. HOLTZOFF: They can call as many as they wish. The civil rules, for example, do not provide how many petit jurors shall be called. They call more than 23 and they select 23 of those called.

MR. CRANE: It is only a question of language.

MR. BURNS: Isn't it simpler to provide for not less than 16 nor more than 23 members as required to constitute a grand jury?

MR. HOLTZOFF: My motion, Judge, was to substitute a definition we had in a previous draft so we would have a substantive statement of what a grand jury is - the grand jury shall not consist of less than 16 nor more than 23 members.

MR. MEDALIE: The trouble is you have a statute and a rule, both of which deal with all the details. Once you adopt the rule, it supersedes the statute, because it cannot be, by this legislation which approves the rule, or where there is no legislation, which is the same thing,

that you have a rule and a statute in crime matters. You have two legal statements on it. That is not good legislation. That is not good rule making. You have to have one or the other. If you are going to fall back on this statute, you don't need a rule.

MR. ROBINSON: I don't think you need it.

MR. DEAN: You could eliminate the second sentence. The first sentence is necessary because you completely change a companion statute dealing with number of grand juries, but you could pretty well, it seems to me, omit the second sentence and just rely on your statute, which is clear.

MR. MEDALIE: The bar won't know about a fundamental thing like that. Really, they don't know.

MR. HOLTZOFF: I think it ought to be in, yes.

MR. DEAN: One thing the statute does, which every jury plan, both petit and grand, has tried to get away from for years, there is no excuse for the bystander types picked in the Middle West. I don't know whether it is different in the East.

MR. ROBINSON: Here, you see, this statute provides for bystander grand jurors too. It is right here in Section 419, Title 28.

MR. DEAN: To improve the situation for grand juries, just as you need to have it improved for petit

juries in many jurisdictions, we had better state that there shall be enough summoned so you will not have to call bystander grand jurors. I think that bystander business is a relic of the dark ages.

MR. HOLTZOFF: Put in the definition of grand jury as I think it should be and then add a sentence to take care of your point.

MR. ROBINSON: It isn't necessary. This takes care of both.

MR. DEAN: No.

MR. HOLTZOFF: You have no definition of a grand jury.

MR. DEAN: Why are you unwilling to say so as to provide that there shall be not less than 16 nor more than 23 members?

MR. ROBINSON: All right with me.

MR. HOLTZOFF: After this explanation, Mr. Seasongood, suppose we define grand jury and then add that "The court shall direct that a sufficient number of qualified persons be called for that purpose"?

MR. SETH: I move it be left as it is.

THE CHAIRMAN: I see what they are aiming at. I would like to suggest adding, "to provide not less than 16 nor more than 23 members for each grand jury without the use of talesmen" because I think it is terrible to use

bystanders on a grand jury, and if that is done anywhere we ought to definitely put in language that precludes it.

MR. HOLTZOFF: Is that ever done in the grand jury?

MR. ROBINSON: The statute permits it.

MR. MEDALIE: It has been done around here with petit jurors - very rarely, but it has been done.

MR. YOUNGQUIST: The grand jury?

MR. MEDALIE: No, it has never been done around here, to my knowledge, with the grand jury.

THE CHAIRMAN: The statute permits it?

MR. ROBINSON: The statute clearly permits it.

THE CHAIRMAN: If you put in "without the use of talesmen" that avoids it.

MR. ROBINSON: This permits a district judge to avoid it, without talking about talesmen, or whatever we call them.

Remember, we are working on the fundamental philosophy of calling in to the district judge an adequate number to make the machinery work right, so we are saying to him, "You can avoid bystander jurors by dismissing them until you make up a sufficient panel to make up as many grand juries as you need."

MR. HOLTZOFF: My understanding of the statute is that bystanders may not be used for grand juries.

MR. SETH: That is what I thought.

MR. HOLTZOFF: According to Section 419 of Title 28 you can use bystanders as talesmen for petit juries but not for grand juries.

MR. ROBINSON: I do not see why not, in the light of the last sentence.

MR. HOLTZOFF: That is an optional matter.

MR. ROBINSON: "And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

MR. HOLTZOFF: No.

MR. ROBINSON: "To summon a sufficient number of persons for that purpose."

MR. HOLTZOFF: Read the preceding sentence. It says "not from bystanders."

MR. McLELLAN: In practice I know what that means: If they get a lot of grand jurors in and enough of them have excuses so that you do not have 23, you summon more.

MR. HOLTZOFF: Yes, but not from bystanders.

MR. McLELLAN: But not from bystanders.

MR. CRANE: Why don't you say, "not less than 16 nor more than 23 members, who must constitute the grand jury"?

MR. HOLTZOFF: All right.

MR. CRANE: "who must constitute the grand jury."

MR. HOLTZOFF: I am sure you don't use talesmen for a grand jury.

MR. CRANE: Wouldn't it be all right to say, "not less than 16 nor more 23 members, who must constitute each grand jury"?

MR. MEDALIE: No, because if you do that, you have frozen your grand jury, and if one goes off you no longer have a grand jury, because you say "which must constitute the grand jury." Suppose there were 18 required and you had a grand jury of 18 --

MR. CRANE: You haven't summoned sufficient; you can summon more.

MR. MEDALIE: Let us say you have 18 now and that constitutes your grand jury. You say, "This must constitute the grand jury." That means 18 must constitute the grand jury and that means if one gets sick or dies or is excused or thrown off because he is corrupt, then you have no grand jury, in that language.

THE CHAIRMAN: Wasn't that the thought, that they are supposed to start with 23, and if seven may get bumped off, and you would still have a grand jury?

MR. MEDALIE: Yes, but Judge Crane's language

freezes the grand jury at that number, and there is no grand jury if the number goes down.

MR. CRANE: You can say "and which number must constitute".

MR. MEDALIE: That would be the same language.

MR. BURNS: Why do you have to say anything about constituting the grand juror? Why isn't this language adequate?

MR. MEDALIE: The language which Alex read makes it very clear, covers everything the statute covers, with these additions about ordering more than one grand jury, if you want to, in very simple language. It would cover everything that is in the statutes.

MR. ROBINSON: That is a large order.

MR. MEDALIE: I mean everything that has been read now, including this business about bystanders.

THE CHAIRMAN: We have our first sentence decided upon. Can we get to an agreement on the second?

MR. GLUECK: Why can't you split the second one into two sentences, saying, "Each grand jury shall consist of not less than 16 nor more than 23 persons. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement"?

MR. HOLTZOFF: Just for that purpose?

MR. GLUECK: Or something like it.

MR. HOLTZOFF: I am in favor of that.

THE CHAIRMAN: Do you second Mr. Glueck's motion?

MR. McLELLAN: I second it.

THE CHAIRMAN: Any remarks? All those in favor of that motion say "Aye"?

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. WAITE: I am curious about one thing, Mr. Chairman: Suppose they summon a sufficient number to constitute a grand jury of at least 16, but so many of them are released that there are not 16 left, then can they call in talesmen?

MR. HOLTZOFF: No. Under the present statute you can't use talesmen.

MR. ROBINSON: I would like to withhold the final word on that, Alex. There may be other statutes involved.

THE CHAIRMAN: Let us adopt it tentatively then.

MR. WECHSLER: How does it read?

MR. GLUECK: The second sentence is: "The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement"; the requirement having been previously that each grand

jury shall consist of not less than 16 nor more than 23 persons.

THE CHAIRMAN: All right. May we proceed --

MR. SEASONGOOD: I have something.

THE CHAIRMAN: Yes?

MR. SEASONGOOD: I notice in the Court's Memorandum on page 3 there are further questions as to whether the grand jury considered in its present form and in the present numberof grand jurymen is too cumbersome, as there has been inquiry into the qualifications of grand jurors, and whether the present statute which adopts the qualifications of the state in which the grand jury sits should be modified. Should Federal courts be bound by the poll tax qualifications existing in so many states; and there is a reference to the Conference of the Committee of Senior Circuit Judges on those questions. I do not think we should pass that without consideration. It should be considered.

MR. HOLTZOFF: I want to call attention to this fact, Mr. Seasongood: The Conference of Senior Circuit Judges appointed a committee some time ago headed by Judge Knox to study the question of jury selection. That committee has made a report recently in which it proposed uniform qualifications for Federal jurors throughout the United States, and a uniform system for summoning

veniremen. So it seems to me that perhaps the Supreme Court's question on that point might be answered by the suggestion that that is a matter that is being studied by Judge Knox's committee.

MR. WECHSLER: But the Court knew that. They referred to the committee.

MR. HOLTZOFF: Yes. Therefore there is nothing we can do about it.

MR. SEASONGOOD: They ask whether the jury in its present number is not too cumbersome.

MR. HOLTZOFF: As to the first question, there have been a number of suggestions. I know Judge Hincks' committee, which is studying the question of United States commissioners, among other things, has made a tenative suggestion that the number of the grand jury should be reduced; that the grand jury should be smaller.

MR. SEASONGOOD: I think it is something the Court has asked us to consider, and I do not think we ought to pass it without doing so.

MR. YOUNGQUIST: Mr. Chairman, didn't we decide this at the last meeting, that in view of the work of the Committee of the Judges, this Committee should await the conclusions and recommendations of that Committee before undertaking to specify qualifications and number of grand jurors?

MR. WECHSLER: That report is in.

MR. YOUNGQUIST: It is in now, yes.

THE CHAIRMAN: Did they recommend a change in the number of grand jurors?

MR. HOLTZOFF: No. The qualifications of grand jurors.

MR. SETH: We can't go into that.

MR. MEDALIE: Alex, did you mention the Hincks' conference?

MR. HOLTZOFF: Yes; but they have not submitted any report.

MR. MEDALIE: I gathered that Judge Hincks's associates, the other four district judges, were a little cold toward it; isn't that so?

MR. HOLTZOFF: They were. There is nothing in Judge Knox's committee report which would change the number of the grand jury.

MR. YOUNGQUIST: What about qualifications?

MR. HOLTZOFF: It deals with qualifications, but we do not deal with the subject of qualifications. Therefore there is no overlapping of our work with the work of Judge Knox's committee.

MR. YOUNGQUIST: That would be a matter of statute, then?

MR. HOLTZOFF: Yes.

MR. ROBINSON: Isn't it true that the qualifications of the grand jury are determined largely by the laws of the states, Illinois and elsewhere?

MR. HOLTZOFF: Qualifications to serve on a jury. The law provides that the qualifications of jurors shall be the same as those of the states. The bystander rule is a Federal rule of practice. Now, Judge Knox's committee reports a proposed bill to have uniform qualifications for Federal jurors. But that is a subject which we are not touching in these rules.

MR. ROBINSON: We spent a page on that in the notes, Rule 6, page 4.

MR. YOUNGQUIST: It seems to me, Mr. Chairman, that in view of the fact that we ought to have specific Federal statutes defining qualifications and the method of summoning jurors, that should apply alike in civil and criminal cases, as Alex suggested and as the Committee suggested, and the same qualifications should likewise apply to grand jurors as apply to petit jorors. Now it seems that we cannot deal with the subject in these rules, nor can the civil rules deal with it. It must be a matter of statute, and with that explanation I think the comment of the Court would be satisfied.

MR. HOLTZOFF: Yes.

MR. WECHSLER: But it need not be. Because while

our jurisdiction and the civil committees rules jurisdiction is separated by the distinction between civil and criminal cases, the Court's jurisdiction to formulate rules is not. In other words, the Court could put into effect the Knox plan by submission to the Congress as provided by the statute --

MR. HOLTZOFF: I am not so sure about that, because I am not so sure that qualifications of a person who serves on a jury is a matter of pleading, practice or procedure. And the field of rule making is only pleading, practice and procedure.

MR. GLUECK: If you are right that this is substantive, why did the Court ask us to consider the size of the jury?

MR. HOLTZOFF: I want to say this, as I said before, that these were tentative suggestions that occurred to the individual members of the Court, and I was warned and cautioned by the Chief Justice that these were not thought through and well considered suggestions, or representative views of the Court. They were just points that occurred to individual judges as they went along and as they jotted down tentatively.

MR. GLUECK: Mr. Chairman, I think this raises a very important policy question of this Committee. There must be quite a number of reforms that we may believe

in personally, such as reducing the size of the grand jury; and the question is, what shall we do with those?

THE CHAIRMAN: Those come in in the Addendum that we talked about before.

MR. GLUECK: As individuals?

THE CHAIRMAN: Or as collective groups. Mr. A likes rule so-and-so, Mr. B, C and D like the other.

MR. GLUECK: That takes care of rule, but it does not take care of recommendations as to substantive reforms.

THE CHAIRMAN: I do not think we have any right to propose anything beyond pleading, practice or procedure. I thought we had agreed that matters dealing with officers, creation of new officers, were outside of our scope.

MR. GLUECK: That is true; but take specifically the question under discussion: Suppose we conclude that it is our experience that a grand jury consisting of 12 does the job just as well and does it more cheaply. Now, what are we going to do with such a conclusion if we should agree to that?

MR. HOLTZOFF: I think that is a rule of practice, and we could act on it.

MR. WECHSLER: If the size of the grand jury were a matter of procedure rather than practice, then I

do not see why the qualifications of jurors is not a matter of procedure. I think they both are.

MR. DEAN: Are they proceedings before the district court or before the United States commissioners? That is our test, isn't it?

MR. HOLTZOFF: I think it is within the scope of our authority, but I think it would be a major mistake to go into that.

MR. GLUECK: That is another issue.

MR. SETH: Anything we put in there should be just an expression of our views.

THE CHAIRMAN: Aren't the grand jurors drawn specially? They do not come from the ordinary panel, do they?

MR. McLELLAN: The answer is "Yes" to both. Usually we draw a grand jury and then we draw petit jurors.

MR. YOUNGQUIST: From the same list.

MR. McLELLAN: But there are plenty of jurisdictions where they draw a lot of jurors and design some to petit jury work and others for grand jury work.

THE CHAIRMAN: To be a grand juror in my state you have to be either a Grand Mason or a High Knight of Columbus, the clerk being one and the jury commissioner another. That went on for a couple of years until the

judges discovered it and said, "You have got to sprinkle some ordinary citizens in the grand jury. It does not look right."

MR. WECHSLER: Mr. Chairman, I would like to make my view clear on the record as to this jury thing: I think there is a practical difficulty of proposing separate rules for criminal and civil cases. That is a difficulty for us, but it is not a difficulty for the Court, because they could propose the whole thing, having rule-making power in both civil and criminal cases. Now, it may be that the Court had in mind in putting this in that memorandum, getting a recommendation from both the standing Civil Committee and the Criminal Committee, and possibly putting the Knox plan into effect if it is sound by rule. It may be that it is just a casual thought that occurred to somebody noticing that we had not touched the subject. I think it would be sound on a matter of such importance to the Committee to take a position on the Knox Report, which is one of the best jobs I have ever seen emanate from a body of that kind. I personally would like to do it. But if the Committee thinks it should not be, I think the Court ought to be told what the reason is. I think the criminal-civil thing is an inadequate reason, since the two committees could jointly cover the field. Now, the proposition that it is

controversial, that we should not touch it, is quite another thing.

MR. HOLTZOFF: I suggest this, that perhaps we could pass this matter, and after the members of the Committee have had an opportunity to acquaint themselves with the contents of the Knox Report - some of them may not have had that opportunity - at the conclusion of our labors we will take a vote on whether we want to make any concurrence or dissent or recommendation.

MR. MEDALIE: I thought it was distributed.

MR. ROBINSON: It was.

MR. SETH: I read it on the train yesterday, and it is a good report.

MR. HOLTZOFF: It is an excellent report.

MR. WECHSLER: Mr. Chairman, to bring the thing to a head, I will make a motion:

The motion is that there be added to these rules the substance of the Knox recommendation; that it be submitted to the Court separately from the rest with the statement to the effect that there is no point in the Court's adopting it in the criminal rules unless they are also prepared to adopt it on the civil side in the exercise of their rule-making power under the Civil Act.

MR. SETH: That report does not deal with number

at all?

MR. WECHSLER: No, just qualifications.

MR. YOUNGQUIST: I am hardly in a position to vote on that, not having read the report.

THE CHAIRMAN: Will someone second it?

MR. GLUECK: I will second it.

THE CHAIRMAN: Then may we have a motion to lay on the table so as to give those members of the Committee who are not acquainted with the report an opportunity to study it; but let us not bring it up too late.

MR. HOLTZOFF: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

With Judge Knox right here in the building, if there is a shortage of these reports we may be able to get enough of them to accommodate everybody here.

MR. ROBINSON: I can telephone to Washington and bring a lot here by Sunday.

THE CHAIRMAN: We will ask Judge Knox's secretary.

Now may we proceed to 6 (b) (1).

MR. GLUECK: In line 1, Mr. Chairman, I suggest

the insertion of the word "for" before "a defendant" just for the sake of clarity.

THE CHAIRMAN: Why can't the defendant himself do it?

MR. GLUECK: Is that the intention?

THE CHAIRMAN: Yes. And everywhere we say "defendant" it is understood he may do these things through his attorney.

MR. GLUECK: I withdraw that.

MR. HOLTZOFF: I move the adoption of this rule, Mr. Chairman.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. WAITE: I would like to suggest to the Committee on Style that in line 13, the first word "is" should be changed to the past tense. The whole provision is that the defendant who has been held, already has been held to answer, may challenge an individual juror on the ground that the juror was not legally --

MR. HOLTZOFF: Pardon me. Held to answer by the commissioner, that means.

MR. WAITE: Then I question the whole thing. How in the world is a man who has been held by the commissioner, and who does not appear before the grand

jury, going to know whether a grand jury is or is not qualified?

MR. SETH: This is in case he does know.

MR. McLELLAN: It states "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court."

Now, may I ask this question" "and shall be tried by the court." What does that mean?

MR. MEDALIE: This is what actually happens. There is a courtroom, and you have got your 50 members of the panel, and then they pick 23; and before they are sworn a lawyer may get up and say, "Representing John Jones, who has been held to answer; I challenge Juror so-and-so on the ground that he is not a citizen of the United States, not a resident of the State of New York; he does not have the proper qualifications and is not a resident of the district." And there may be other grounds.

MR. McLELLAN: What is going to happen to the man who has a like right, theoretical right, but has not been held?

MR. MEDALIE: Then he has not the right if he has not been held.

MR. SETH: I think there is a provision later on.

MR. YOUNGQUIST: This rule is the counterpart of a common statutory provision --

MR. McLELLAN: I understand.

THE CHAIRMAN: Did you raise a question, Mr. Waite, on 6 (b) (1)?

MR. WAITE: I guess that is answered.

THE CHAIRMAN: Are there any further questions on (b) (1). If not, all those in favor of it say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Carried.

6 (b) (2). Any questions?

MR. SEASONGOOD: Yes. I am against that. I do not think that is a good provision that if there is a disqualified person and it appears that more than 12 joined in the indictment, that it is all right. Presumably that is not true with jurors; but if there is poison in the air, why, the virus is supposed to spread, and if the person who is disqualified participated in the deliberations, he may have induced many of the others to join in the indictment. I do not think that is a good provision at all.

MR. MEDALIE: He may, in fact, be the grand jury. The grand jury, we agreed a moment ago, is the district attorney and one or two grand jurors.

THE CHAIRMAN: Isn't this the law as is?

MR. HOLTZOFF: This is the law as is. It was passed, I think, at the request of Attorney General Mitchell.

MR. SEASONGOOD: Isn't that a different rule than we have in an ordinary jury case? One disqualified juror may have participated in the deliberations and very actively induced the indictment.

MR. BURNS: Suppose you had a case where a defendant was indicted and was able to show beyond all doubt that one of the grand jurors was a person who had a long-standing grudge against him, it seems to me they ought to vacate the indictment.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think this relates to a disqualified person sitting on a grand jury. That is just a person who does not have the statutory qualifications.

MR. MEDALIE: It does not affect a biased person.

MR. SEASONGOOD: One of your grounds of challenge in (b) (1) is if a state of mind exists that may prevent him from acting impartially.

MR. HOLTZOFF: That is bias.

MR. SEASONGOOD: Why, certainly.

MR. HOLTZOFF: But (b) (2) does not relate to a biased grand juror; just with respect to the statutory regulations.

MR. SEASONGOOD: He may be disqualified for bias.

MR. DEAN: He could have been challenged; yet he is in there.

MR. MEDALIE: If that is not clear, we ought to be clear as to what we mean to say in both cases. Do we mean only legal qualification or do we also mean --

MR. HOLTZOFF: Yes.

MR. MEDALIE: I know, but Mr. Seasongood does not agree with you. Do we mean only legal qualifications or do we also mean the state of mind itself? And if we say it in one place we ought to say it in both places; or if we are wrong in one place we are wrong as to both places.

MR. HOLTZOFF: Look back to line 13. It differentiates "legally qualified" and "state of mind".

MR. MEDALIE: Yes. If we want it, we want it in both places.

MR. BURNS: If 6 (b) (2) were applicable only to legal disqualifications, I would not object to it.

MR. WECHSLER: If 6 (b) (2) stands there is no provision for a motion to dismiss on the ground that there was a biased juror.

MR. HOLTZOFF: Is there today?

MR. WECHSLER: Yes.

MR. MEDALIE: I can see a flaw in what I said before. When you impanel a petit jury in a civil or criminal case, you may challenge for bias. After the verdict you may discover the bias, but it is no good to you. In other words, the way this is drawn, you challenge for bias before the man gets a chance to sit. Once he sits you may not challenge for bias. I think the analogy is probably what dictated the structure here.

THE CHAIRMAN: But that is not sound.

MR. McLELLAN: You mean you cannot base an application for a new trial in a civil action upon bias of a juror?

MR. MEDALIE: Can you?

MR. McLELLAN: Yes.

MR. MEDALIE: I doubt it very much.

THE CHAIRMAN: You cannot set the verdict aside automatically, but it is a matter of appeal to the trial judge.

MR. BURNS: It is a basis for a motion for a new trial in our state.

MR. DEAN: How about a plea in abatement?

MR. MEDALIE: The plea in abatement is covered by (b) (2), isn't it?

MR. DEAN: I would think so.

MR. WECHSLER: Is there a plea in abatement now

on the ground that a grand juror was biased?

MR. DEAN: I do not know of any cases, but you have one for prejudicial conduct on the part of the prosecutor. Now, if you had equally prejudicial remarks made by a hostile enemy of yours who sat as a grand juror, I do not know why it would not equally color that verdict of the grand jury. I do not know of any cases, but I do not see why there should not be any cases.

MR. WECHSLER: Whatever the present law may be, wouldn't we want the law to be that after indictment the defendant would have a remedy to attack the indictment on the ground of bias by a grand juror?

MR. SEASONGOOD: I think an indictment is a serious thing, and I do not see why you can't be indicted by a sufficient number of qualified persons.

THE CHAIRMAN: You mean that if there is one man in there who set out to get you, that that should not be a ground for your having a right to move to set aside that indictment?

MR. DEAN: The only penalty is that the Government has to get a new indictment.

THE CHAIRMAN: Do you believe that they should have a right to set aside the indictment?

MR. SEASONGOOD: Sure I do.

MR. MEDALIE: May I point this out: You know,

we must consider the theories of grand juries. We are not accustomed to the idea of the district attorney walking in with a bundle of cases and start presenting them to a lot of clean slates. As a matter of fact, the grand jury sometimes thinks up one or two of its own, decides, for example, that the city administration is crooked, and that is all there is to it, and they are going to find out, or that corruption exists in the Prohibition Unit or the Alcohol Tax Unit, or what have you, and go after it pretty vigorously and insist on investigation. As a result there is the indictment. I do not think indictments ought to be vitiated on that ground. There you have got very definite biases. I think those are biases you have to put up with, and some of them are mighty wholesome. I think you are striking at the foundation of the grand jury system. They are busybodies; they have a right to be. That is what we want them for.

MR. SETH: Isn't a grand juror supposed to bring before the grand jury facts within his knowledge, whether they are presented to him by the United States attorney or anyone? Isn't he supposed to be more or less biased?

MR. MEDALIE: I think so.

MR. GLUECK: That is what you mean by a presentment, don't you?

MR. MEDALIE: Yes. That is a wholesome bias.

MR. BURNS: How about the bias where a grand juror is deliberately out to get someone?

MR. MEDALIE: Well, let us say this fellow is a friend of, say, Sam Seabury, and he decides that the Commissioner of Licenses is a crook, and he is going to get after him; he is a Republican or a mugwump Democrat but not a regular Democrat; and he goes after him with a bias, and he can't get it over unless he gets evidence which is presented to the grand jury which convinces them that there is probable cause to believe that that man committed a crime. I do not think that is a very terrible thing. I think it is a thing we ought not to interfere with. In fact, it is something to encourage. Now, they make mistakes. These runaway grand juries make mistakes sometimes, but it seems to me they do good work too.

MR. BURNS: How would you allow a proceeding to raise the issue as to whether all the g rand jurors were citizens, and yet not allow the proceeding to test whether or not this grand jury made a fair presentment?

MR. HOLTZOFF: A trial juror has to be impartial. I do not understand that a grand juror has to be.

MR. MEDALIE: Another thing, you may file an affidavit of prejudice against a judge. All right, you have been indulged; he is out. Now, the next judge you get, you have got to take. Or, having filed no affidavit

of prejudice, you may find out, and often do, that the judge is very much prejudiced. What can you do about it? You have got to have a judicial system made up of human beings, and if you are going to attack it every time because a man happens to be human instead of an adding machine, you are going to hamper the administration of justice. I think we can take a few unfair indictments once in a while, and most of them are not so unfair when they are prejudiced, either.

MR. BURNS: But you permit challenge in advance --

MR. MEDALIE: Before the hearing. You have got that with your petit jury.

MR. BURNS: That is based on the efficiency consideration that you mentioned?

MR. MEDALIE: I think so. Once you get going, don't upset it. But before you get going, you have something to say about the organization of the judicial body. I think that comes near enough to meeting all needs; you will never get perfection on it.

MR. BURNS: Did you want to limit it to legal disqualification?

MR. ROBINSON: This is simply what the Committee adopted at the last meeting.

MR. HOLTZOFF: How about inserting the words "legally disqualified" in line 21? Wouldn't that do away

with any question?

MR. DEAN: That would, if we wanted it that way. That would do it.

MR. SEASONGOOD: In the statute it is "unqualified," which may mean something different. That means he does not possess the qualifications necessary to make him a juror.

MR. HOLTZOFF: That is what this really should be limited to. If the statute says "unqualified", maybe we ought to follow the language of the statute.

MR. MEDALIE: If we use the words "legally disqualified", don't we use clear language?

MR. YOUNGQUIST: I think so.

THE CHAIRMAN: What do you say to the case, George, where A's most violent political enemy - let us take it out of business quarrels or a little business skullduggery; let us put it right down into practical politics - A's violent political enemy gets himself acquainted with the foreman of the grand jury and spends six or eight weeks wining and dining him and his fellows on the executive committee and ultimately brings about an indictment. Shouldn't A have a chance to go to the court andshow up that particular situation?

MR. MEDALIE: No. All the trouble comes from taking extreme examples. Suppose he is his most violent

political enemy just because he thinks he is a crook and has gotten rich at public expense, robbed the treasury, extorted money from citizens having relations with the Government. It sounds bad if you put it one way; I think it sounds fine if you put it still the opposite way.

THE CHAIRMAN: Let me give you an actual case. Down in Ocean County, New Jersey, where we have as corrupt a political machine as Hague runs in Hudson County, the corrupt political boss indicted the editor of the only county newspaper with a real circulation just because he was trying to end the numbers racket and slot machine racket and all that sort of thing. Now, we have a proceeding in our state when that sort of situation arises to certiorari that indictment to trial in the Supreme Court. That has always been effective. If that fellow ever had to go to trial on that indictment of that grand jury, and before the petit jury and the judge in that county, he would have had ten years up his back; and I just do not like that thought.

MR. HOLTZOFF: What sort of charge was made against him?

THE CHAIRMAN: Criminal libel, and a few other things like that. I do not recall what they were. The charge is immaterial when you are on a grand jury. That is exactly what Mayor Hague is doing today to Mayor Donovan

of Bayonne. He has fixed up a fake vice scandal in Bayonne where none existed any more than in any city; the City of Bayonne is decently governed; but Mayor Donovan decided to back Governor Edison. That made a heretic out of him; and Hague went out to get Donovan and Donovan's family and all the other commissioners; and that is up on one of the certioraries which they are taking now, before a commissioner. It looks to me as if there should be some redress for that kind of a condition of anarchy.

MR. BURNS: That is true, but you never catch it with a false indictment. A man never gets his good name back.

MR. McLELLAN: What I wonder, Mr. Chairman, is if you would not cure the trouble if you changed the word "disqualified" in line 21 and the word "disqualified" in line 24 to read "unqualified".

MR. MEDALIE: It would if we knew what you meant by it. If you mean by that to include Mr. Seasongood's idea --

MR. SEASONGOOD: No, I think "unqualified" would mean something different. "Unqualified" would mean he would not have the qualifications for a juror, and "disqualified" for bias.

MR. MEDALIE: Instead of thinking of the words that we want to pick, let us stick to the idea first: Do

we wish (b) (2) to cover a case of bias and hostility? If we do, we will find the words. But let us make sure we agree on the idea.

MR. SEASONGOOD: I suppose there will be some difficulty changing a statute. The statute is there. It has been there since 1934.

MR. McLELLAN: I think we have changed it somewhat already.

MR. MEDALIE: I think we have the power to do this kind of thing if we think it is the right thing to do; but let us decide whether we want to deal with the situation of bias after an indictment has been found. If we agree, we will find the words.

MR. GLUECK: Why don't you make a motion one way or the other?

MR. MEDALIE: I am content now, after this discussion, to leave it as it is; that is, bias before the jury is impaneled but no bias after the jury votes. I may be wrong about it. This says that now.

MR. ROBINSON: I wish we knew what the evil was that the Attorney General was aiming at.

MR. HOLTZOFF: I will tell you what the Attorney General was aiming at. In two or three cases where we had a perfectly good indictment, somebody discovered that a grand juror was not qualified either by not being a

resident of the proper county or the district, or something of that sort, and pleas in abatement were sustained.

MR. YOUNGQUIST: Legal disqualification?

MR. HOLTZOFF: Yes, legal disqualification; and it seems like a miscarriage of justice to reverse a conviction or sustain a plea in abatement on the ground that it was found at a later date that one of the grand jurors was lacking in legal qualifications to serve on the grand jury where, actually, there was a sufficient number who voted for the indictment who were legally qualified. That was the evil aimed at.

MR. GLUECK: That merely means you have some delay in the prosecution. You can draw up a new indictment.

MR. HOLTZOFF: Well, you have got to get your witnesses back, which is a hardship on them; the statute of limitations may have run; any number of things.

MR. MEDALIE: Yes, and you may be dealing with a case that took two months to present to the grand jury.

MR. GLUECK: But all this refers to unqualified jurors.

MR. MEDALIE: Exactly. That is all the statute was intended to cover.

MR. GLUECK: But Arthur's question is, shouldn't it be broader? Shouldn't it include actual bias?

MR. BURNS: May I put an amendment. I think we

raised this question before. I move that line 18 be amended by inserting after the words "on the" the words "ground of legal disqualification"; and inserting in line 19 after the word "juror", "or where a state of mind exists on his part which may prevent him from acting impartially"; and then amend --

THE CHAIRMAN: It should be past tense.

MR. BURNS: (Continuing) -- then amend line 31 by inserting after the word "more", "legally qualified". So that the limitation on the power of the court to dismiss would be as to legal disqualification alone.

MR. SEASONGOOD: I do not see why you do not take the language of the statute and call him "unqualified." It seems to me better.

MR. BURNS: Are we certain that "unqualified" in the statute takes care of the situation of bias?

MR. HOLTZOFF: It was not intended to.

THE CHAIRMAN: But your language does.

MR. BURNS: Yes, I would accept that.

dz MR. SEASONGOOD: I would like to take the bias part and call the other fellow unqualified, which is the language of the statute and, really, to my mind, means a little something different than"disqualified".

MR. BURNS: I think that is right.

MR. SEASONGOOD: The Committee on Style, with the

idea, could lick that into shape.

THE CHAIRMAN: I think that raises the issue very clearly. You move that, Judge?

MR. BURNS: I move that, yes.

MR. DESSION: Seconded.

MR. MEDALIE: The real point is the state of mind existing that prevents him from acting impartially. That is the question before us.

MR. WAITE: I got a little lost on it.

MR. BURNS: As amended it would read, "A motion to dismiss the indictment may be based on objections to the array or on the ground of the legal disqualification of an individual juror or that a state of mind existed on his part which prevented him from acting impartially, if not previously determined upon challenge."

And then change in line 21 "disqualified" to read "unqualified".

MR. HOLTZOFF: I call for the question.

MR. YOUNGQUIST: Do I understand that means, with respect to the second change, that if there are 12 or more jurors, after deducting the number who are qualified, whether legally disqualified or biased --

MR. BURNS: Oh, no. That applies only to legal disqualification.

MR. McLELLAN: Would you help me out by reading

your language again of the first three lines?

MR. BURNS: "A motion to dismiss the indictment may be based on objections to the array or on the ground of legal disqualification of an individual juror or that a state of mind existed on his part which prevented him from acting impartially, if not previously determined upon challenge."

MR. McLELLAN: Would you listen to this, and I think it may be wrong, and it means a couple of more words, instead of "on the disqualification", "on the lack of qualification"?

MR. GLUECK: That is what I had in mind.

MR. BURNS: That is better.

MR. ROBINSON: That is supposed to be the same thing as "unqualified".

THE CHAIRMAN: It is an easier way of stating it.

Are you ready for the question, gentlemen?

MR. MEDALIE: I will be disappointed if you do not debate that very serious problem, because I may be all wrong in my last case on it.

MR. HOLTZOFF: It seems to me we understand the question thoroughly. We might as well vote on it.

MR. WECHSLER: Are we very sure that there is no remedy after indictment now under the present law on the ground of bias of a grand juror?

MR. DEAN: There is some question, I think. I know of a couple of cases.

MR. ORFIELD: Certainly under our new rules they have a right.

MR. WECHSLER: In a matter as doubtful as this, I would fight to keep the existing law, because I feel no conviction to change it.

MR. McLELLAN: We have it in this motion.

MR. WECHSLER: No, this motion would make a motion available after indictment for bias of the grand jurors, as was read by Judge Burns.

MR. McLELLAN: I think that is the law, but by virtue of no statute. I think that statute cut off the attack upon the --

MR. WECHSLER: That does not apply.

MR. McLELLAN: Does not apply.

MR. WECHSLER: I quite agree, but apart from that, I did not know what the law was.

MR. McLELLAN: By the use of the word "may" instead of "shall" we get back to what the law is, I think, that it is discretionary with the trial judge as to what he will rule.

MR. WECHSLER: I am not afraid of that part of it. I am afraid of the bias language.

MR. YOUNGQUIST: I am not quite sure, but I was

under the impression that after the grand jury returns an indictment, the only disqualification that was ground for a challenge or for a motion to dismiss on the ground of disqualification was legal disqualification in the sense that he was not a citizen or resident or something of the sort and did not include bias.

MR. McLELLAN: I dare say you are right in many jurisdictions, but all I know is what is around me, and we have a notion the other way in Massachusetts.

MR. MEDALIE: May I interrupt you for a moment? Arthur, isn't it a fact that indictments of the kind that were found in either Ocean County or in whatever county Bayonne happens to be are usually the products of the prosecutor? A political prosecutor, part of a political machine, can procure such an indictment from a perfectly impartial grand jury.

Now, I have in mind something that came up here --

THE CHAIRMAN: In neither case was there an impartial grand jury. In Ocean County the grand jury is Republican and in Hudson County it is Democratic; both strictly machine products.

MR. MEDALIE: Oh, but didn't you have a prosecutor who belonged to either of the two parties?

THE CHAIRMAN: Surely.

MR. MEDALIE: Let me give you an example -- I will

give you two examples. Recently, within the year - to say nothing about the correctness of the decision, and I do not claim that it was incorrect - the grand jury of one of the counties of this city refused to find an indictment against a prominent political person. You know the case to which I refer and I do not need to bandy the man's name around after this thing is over. Now, in the public mind the idea was two-fold, as indicated by editorials. One was that the district attorney was biased, and I do not say he was biased, and the other was that the grand jury came from a group that belonged to this political leader's following. Now, that is one kind of case.

Another case: About six or seven years ago or eight years ago, an aftermath of the Seabury Investigation, a person who had testified against a man by the name of Flynn, a public official of the Bronx, but not the political leader, was indicted in New York County for perjury. Now, there you had two things in the public mind, that the grand jury probably had a lot of politicians on it who normally would below to the prevailing political party, and the other was that the district attorney was a Tammany man.

Now, your feeling then seems to be in the public mind, and very often in fact when you get that kind of

indictment, it is more largely, though not exclusively, the product of the political attitude of the prosecutor.

Now, no matter what you do here, you will never meet that evil. That is one of the hazards of government.

Now, next, and again I say this without adopting anything that has been said on the subject, it is frequently said, naturally by Republicans, that the present National Administration gets even with people by having them indicted for income tax or what not. I think at least it is overstated but in the public mind the idea is that it is the Administration, the local or National Administration, that succeeds in doing these things. I do not think the evil is so much in the grand jury, if these things exist, as it is with the public officials, if in fact they do exist, as they do on occasions.

MR. GLUECK: But, George, wouldn't you say that nevertheless if we give them one more hurdle that they have to jump, we would reduce this evil?

MR. MEDALIE: You are taking a pebble off the road instead of all the tacks that have been strewn on it for the last three miles.

MR. HOLTZOFF: My objection to this proposal is this, that it will enable defendants to try the grand jury, and if the defendant is in a position to hire expensive counsel --

MR. MEDALIE: And good investigators.

MR. HOLTZOFF: Yes, he will just keep trying grand juries, and the chances are, in most cases it won't do him any good or get him anywhere.

THE CHAIRMAN: He tries it to the judge; he does not try it to a jury; and he is not going to bring that up unless he has a very good case.

MR. MEDALIE: So he takes it --

THE CHAIRMAN: That is the complete answer to it.

MR. MEDALIE: So he takes it to a judge who is, from his point of view, impartial; from the grand jury's point of view, biased.

MR. HOLTZOFF: Yes; but that will be also a ground for assigned error. On appeal you will have that whole thing reviewed again.

THE CHAIRMAN: Let us face facts very realistically, and I will give you one concrete example. Every meat packing concern in the United States was advised by its counsel that the AAA Act was unconstitutional. There wasn't a one of them that dared to desist from paying millions, and in some cases tens and perhaps hundreds of millions of dollars of taxes, although they were all told by counsel that that act was unconstitutional, because they were afraid that they would be picked up by one of the 15 or 16 or 18 other Federal agencies which were looking

them over, including Uncle Sam's Income Tax Division. And they had to wait until a couple of concerns went bankrupt, so that the receiver could test the constitutionality of the Agricultural Administration Act.

I cite that as illustrating the tremendous and growing force of the Federal departments collectively when they get after a man. If they get after anybody, he might just as well fold up and quit doing business.

MR. MEDALIE: And you have no redress.

MR. HOLTZOFF: This rule would not help him.

THE CHAIRMAN: This rule would help him all right because he would get a trial before a judge, and you have every belief that if you get before a judge with newspaper reporters present in the courtroom, that the man is going to get a square deal or come as near to it as we will ever get this side of Heaven.

MR. HOLTZOFF: And don't you think it would be used for dilatory purposes?

MR. DEAN: It isn't a charge that is lightly made. If you have to practice before that judge, you are not going to come in there --

THE CHAIRMAN: With a lot of flimflam stuff.

MR. McLELLAN: I think it might be well to consider whether this objection to the indictment can be taken after the verdict of conviction. I do not think they

should be permitted to attack an indictment for bias of a member of the grand jury after there has been a trial and the finding of guilt.

THE CHAIRMAN: I agree with you thoroughly.

MR. McLELLAN: Have you covered that?

MR. HOLTZOFF: But I am afraid --

THE CHAIRMAN: My thought was that this was a right that a man has to attack the indictment before he goes on to trial.

MR. McLELLAN: Yes, and that he ought not to be allowed to do it after conviction.

THE CHAIRMAN: I agree with you.

MR. McLELLAN: We have not covered that.

MR. BURNS: This is a motion to dismiss the indictment, so it must be before --

MR. MEDALIE: It is part of the judgment roll.

MR. BURNS: Failure to grant this motion might be ground for reversing a conviction.

MR. McLELLAN: I would provide that it should not be.

MR. MEDALIE: What is the good of it? Because, if a wrong judgment was made, why shouldn't it be reversed?

MR. McLELLAN: Because, as a practical matter, the man has had his chance and had a jury find beyond reasonable doubt he is guilty, and that is a different

thing from putting him to trial when he does not want to go to trial upon an indictment procured through the bias of somebody on the jury.

MR. HOLTZOFF: I would be willing to vote for Judge Burns' amendment, if the provision that you indicate was added to it.

MR. McLELLAN: I do not believe Judge Burns would be against that.

MR. BURNS: No, no; I would be in favor of it.

THE CHAIRMAN: If he had to raise this issue in advance of trial, and the judge decided against him, and the court of appeals thought there was merit to it, why shouldn't he have the benefit of that? I do not think he should be permitted to wait until after trial and the adverse verdict to raise the issue.

MR. HOLTZOFF: But in the meantime the petit jury finds him guilty beyond a reasonable doubt. Should he be allowed --

MR. McLELLAN: I can see two sides to it. I can see the Chairman's viewpoint.

THE CHAIRMAN: My only thought on that is that where an injustice has been done, in the opinion of the circuit court of appeals, and they cannot find a point to pin the necessary reversal on, on the evidence, this other ground would be there.

MR. McLELLAN: I don't know; if he has had a fair trial before a petit jury --

MR. SEASONGOOD: What is the scope of review on appeal from that? It is a question of fact before a jury.

MR. McLELLAN: That is conclusive, as a question of fact.

THE CHAIRMAN: It would depend on the individual judge. It would be a good bet with some judges to take that up.

MR. WECHSLER: Isn't it true that a plea in abatement is not a ground for reversal?

MR. HOLTZOFF: That is right.

MR. DEAN: There is a real distinction there, because one goes to thefairness of the original charge and the other goes to the fairness of the trial. Whether the charge is fair or unfair, you do not care about the circumstances of that by the time you get to trial, and if you have been convicted by an impartial petit jury, I think it is an entirely different situation, I agree with you.

MR. YOUNGQUIST: Doesn't that same principle apply to the proceeding before the trial judge? What is the difference?

MR. DEAN: I think a man ought to have an opportunity before he is put to the expense and trouble

and possible jeopardy of a trial to have brought before him a charge that was not born of malice.

MR. WECHSLER: Just carrying one step further George's point, that there is a difference between challenge and plea in abatement after the indictment is found, there is an even larger difference after trial. These are not isolated conditions for research, but there seem to be two cases in the annotations here that bear on this. One is a case in which the prosecutor was a member of the grand jury, but which, I take it, was meant the man who preferred the charge. That was in 1871. It was held no ground for plea in abatement.

There is another case in 1887, where one of the grand jurors had been a petit juror in a previous trial, in which there had been a verdict of conviction. That was held ground for plea in abatement.

MR. ROBINSON: The later one is the Egan case?

MR. DEAN: What is the 1887 case?

MR. ROBINSON: Egan, 30 Fed. 608.

MR. SEASONGOOD: Haven't we gone as far as we can in that tonight, Mr. Chairman?

MR. HOLTZOFF: So I suggest that we take a vote on the general idea and let the Drafting Committee draft something and that we look at it again, when it comes up.

MR. WECHSLER: Shouldn't we take a vote on the

principle of the thing?

MR. SEASONGOOD: Yes.

MR. WECHSLER: It seems to me we are pretty well agreed. There may be no drafting needed.

MR. SEASONGOOD: The motion of Judge Burns is before us, and it may be understood that when the rule is drafted it will have a provision in it to the effect that after verdict of conviction, it may not be done. I think we could vote on that.

THE CHAIRMAN: With that understanding, are you ready for the motion? If so, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed.

(Chorus of "Noes.")

THE CHAIRMAN: This Committee constantly fools me, so I have to call for a show of hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 7 opposed.)

THE CHAIRMAN: 8 to 7.

Gentlemen, it is getting very near to six o'clock. What time do you suggest we meet in the morning.

(Discussion re adjournment.)

(Whereupon, at 6:00 p. m. an adjournment was taken to February 20, 1943, at 10:00 o'clock a. m.)

MINUTES OF MEETINGS

OF

ADVISORY COMMITTEE ON RULES

ON CRIMINAL PROCEDURE

New York, New York,
February 20, 1943.

STENOGRAPHER'S MINUTES.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK CITY.

Met pursuant to adjournment at 10:00 a.m., February 20, 1943.

THE CHAIRMAN: I will declare a quorum and we will start with the next rule, which is 6 (c). Are there any questions or suggestions with reference to the Rule 6(c)? If not, a motion is in order.

MR.LONGSDORF: I find there is a question I might ask. I put a notation to ask Mr. Holtzoff and Mr. Dean, and I have not the answer yet. There is no prescription in these rules that I could find for the oath of the grand jury and witnesses before the grand jury, and if the court should choose, as it did in that Smith case to give an oath to the grand jury in the form used in the State courts, it might be too broad for the Federal rules, and might come into conflict with the provisions of this Rule 6(e). I have not any view to express.

THE CHAIRMAN: It is Rule 6(c).

MR. LONGSDORF: Nothing on (c).

THE CHAIRMAN: It is moved and seconded that Rule 6(c) be adopted as stated. All those in favor say "Aye."

(Chorus of "Ayes."

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Adopted. Rule 6(d).

MR. HOLTZOFF: I have a sort of verbal suggestion. Instead of "witnesses under examination" in lines 35 and 36, it ought to be "the witnesses", and instead of "interpreters" it ought to be "an interpreter."

MR. ROBINSON: That is your interpretation?

MR. HOLTZOFF: Yes. And in line 38 I suggest "except that" be changed to "but", and I move those changes be made.

MR. MEDALIE: There is one thing about the interpreter. You don't want him there except when actually working with a witness.

MR. HOLTZOFF: My objection was to the use of the plural. When ordered by the court.

MR. MEDALIE: Yes, but if he is ordered by the court he might hang around during the whole case.

MR. ROBINSON: The explanation, Mr. Chairman, is when you are ready for him.

THE CHAIRMAN: Yes. I am going to urge everybody today to state their propositions integrally and in as small sentences as possible because we just have to get through, gentlemen. The pace we made yesterday was not at all what we should have done.

MR. ROBINSON: The proposition is this as to

interpreters: I see no objection to having just one. The only point is under the present statute and under that rule as we had it in draft 5, we had "witness", singular and "interpreter", singular. The point has been suggested by members of the Committee that there might be times when it would be desirable to have more than one witness in the grand jury room in the presence of the grand jury, in the discretion of the court. Now if that is a possibility, this is the opportunity to put it in.

MR. HOLTZOFF: I never heard of such a thing.

MR. MEDALIE: It strikes me as a very unwieldy thing to have things depend on court direction while the grand jury is operating. It just does not work.

MR. HOLTZOFF: If you as district attorney have to have two witnesses in at the same time so that you could question them jointly you would not want the court to have the power to allow you to permit a second witness to be in the grand jury room.

MR. MEDALIE: Why should the court have the power about the operation of the grand jury. It is not a possible thing.

MR. HOLTZOFF: You could examine two witnesses jointly.

MR. MEDALIE: Confrontation, yes. But otherwise of course not.

MR. WAITE: Here it is "witnesses under examination" and it precludes the having of witnesses who are not under examination. I think we are quibbling over little things here that do not make any difference.

MR. HOLTZOFF: We adopted the other form in Tentative Draft 5, and I was wondering why the change. Draft 5 was acceptable to the majority.

MR. WAITE: Because members of the Committee recommended it be placed before the Committee for their consideration at this time. If they reject it, all right.

MR. HOLTZOFF: My motion really involves bringing it back to part of 5.

MR. SETH: How can two interpreters work at once? We do not need two at a time.

MR. GLUECK: Has there been a second to that motion?

MR. YOUNGQUIST: I move it be adopted.

MR. DESSION: Supported.

MR. SEASONGOOD: Just before I left home I noticed this Pelley case was affirmed in the Seventh Circuit, 132 Fed. (2d) 170, and apparently they have the special counsel present while the jury are deliberating. Of course I am opposed to that, but that was something new to me. The point was made that because the special counsel appointed by the Government had not been sworn,

that that invalidated the proceedings, and apparently the United States attorney is allowed to be present when the jury is sworn.

MR. HOLTZOFF: That is taken care of in the last clause.

MR. SEASONGOOD: I just call your attention to that. I do not think anybody in this room thinks that is good technique. I was amazed. I thought they always had to get out. That was one of the grounds of error assigned, and they said all right.

MR. McLELLAN: Mr. Chairman, I do not want to take your time or the time of the Committee, but I do not know what Mr. Seth just tried to say.

MR. SETH: I have presented cases with two interpreters; Navajo into Spanish and Spanish into English. I suppose that is a little unusual.

MR. MEDALIE: I move to amend the motion to adopt (d) by striking out the words "when ordered by the court" after "interpreters."

THE CHAIRMAN: You have heard the motion. All opposed say "No"; all in favor say Yes."

Carried. Are you ready for the question to adopt (d) as amended? All those in favor say "Aye"

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. SEASONGOOD: Mr. Chairman, may I penalize the Committee for my lateness on (c) just a minute. I wondered about it. How will you know how any jurors voted? That is, how will you know whether the disqualified juror made up the necessary number for an indictment?

MR. HOLTZOFF: You will know how many voted to indict and you will know how many are disqualified, and by subtracting you get --

MR. SEASONGOOD: How do you know whether the disqualified man voted to indict?

MR. HOLTZOFF: You do not know whether he voted to indict or not. Suppose, for example, there were fifteen grand jurors present. Suppose one was disqualified, that leaves fourteen, and suppose there were twelve votes in favorof indictment. You know then by that calculation there must have been twelve qualified jurors who voted to indict.

MR. SEASONGOOD: But suppose you have twelve vote for the indictment and you do not know who voted for the indictment. How do you know that the disqualified man was one of the twelve that voted for the indictment.

MR. HOLTZOFF: I think it must appear affirmatively from the computation that there were twelve quali-

fied votes.

MR. MEDALIE: Is not sixteen a quorum?

MR. HOLTZOFF: I should have said sixteen. We do not say anything about that.

MR. McLELLAN: Oh, yes.

MR. MEDALIE: But the quorum is sixteen, I think.

MR. SEASONGOOD: I do not see that merely by keeping a record of the number of jurors concurring in the votes on the indictment how you will know whether the disqualified person is of that number.

THE CHAIRMAN: You cannot know. But on the other hand it would be improper, would it not, to keep a record of the way each juror voted?

MR. SEASONGOOD: Unless that was just a record the court would see and nobody else. How are you going to make this effective unless you know a disqualified juror voted for the indictment?

MR. MEDALIE: The point is good. The difficulty is the mechanics of it. On its face the calling of the rolls and calling for votes is a pretty tough job if you are moving fast. After all the records of the grand jury are kept by a layman, called the secretary or the clerk of the grand jury. It would impose a tremendous amount of paper work. It is difficult enough to get somebody

to act as clerk of the grand jury.

MR. ROBINSON: You know that is the present law. You are proposing to amend the present statute?

MR. SEASONGOOD: I am just asking how it is effective. How can you find whether a disqualified or biased man voted?

MR. HOLTZOFF: The point is, you know how many voted for the indictment.

MR. SEASONGOOD: Let us say twelve voted for the indictment.

MR. HOLTZOFF: If one is disqualified then you are not sure whether there were twelve qualified votes, but suppose thirteen voted for the indictment, and suppose there was only one unqualified man on the grand jury, so irrespective of how the unqualified man voted there were twelve qualified votes for the indictment.

MR. SEASONGOOD: But take the twelve, as I suggested.

MR. HOLTZOFF: In that case you cannot tell and there I think the Government would not have the advantage of this rule. I think the burden would be on the Government to show the qualifications.

MR. McLELLAN: Doesn't it come to this: if there are only twelve for the indictment and there is one unqualified man in the jury room, the indictment is bad?

9mh

MR. HOLTZOFF: Yes, it does, but if there are sixteen for the indictment and but one unqualified man, then you know it is good.

MR. SEASONGOOD: How do you know whether he was one of the twelve?

MR. McLELLAN: As to that the burden is on the Government.

MR. SEASONGOOD: If that is so, it does not appear in this statement or anywheres, does it? I would think it would be the other way; that is to say, until you know the unqualified man was one of the necessary number to make up the indictment, you have not proved your case.

MR. McLELLAN: The practical difficulty there is you cannot show. They do not keep a record of, and ought not to keep a record of how each member of the jury voted, and the only practical rule is to say if they can only get twelve votes and there is somebody there in the room who is unqualified and may have voted for it, that the indictment is bad.

MR. HOLTZOFF: Yes. I think that is clear from the language; if it appears that twelve or more jurors, after deducting the number of unqualified ones, concur in the finding of the indictment. In other words, the Government must show there were twelve qualified

10mh

votes.

THE CHAIRMAN: Then we will go on to 6 (e). You had a question, Mr. Longsdorf?

MR. LONGSDORF: Only what I said before. Unless we have some form of oath, not necessarily in the rules, but it might be in the forms, indicating what the form should be, it is not clear.

THE CHAIRMAN: You move the oath to the grand jurors be included among the forms?

MR. LONGSDORF: I have nothing to say pro or con about that. That should be taken up later, I think, but if we have a judge who used the State statutory form of oath, as in the ~~Smith~~ Schmidt case in Ohio - Mr. Seasongood knows a good deal about that - why that imposes a degree of secrecy greater than is imposed by these rules.

MR. HOLTZOFF: But this paragraph defines the degree of secrecy. Therefore no judge could impose any greater degree of secrecy it seems to me.

MR. LONGSDORF: I think that is entirely correct. I just raised the question so we would be clear on it.

MR. MEDALIE: I move to strike out the first sentence of (e).

MR. WECHSLER: Seconded.

MR. MEDALIE: Because occasions do arise when

a judge is interested in finding out what happened before the grand jury. There are motions made to quash an indictment on the ground of improper proceedings and sometimes it becomes relevant how the juror voted.

MR. ROBINSON: As a matter of information you are also voting to repeal the statute on that subject, is that it?

MR. WECHSLER: No. I call your attention to this fact: it is true that Section 554(a) of Title 18 says that no juror may testify how he voted, but that provision adds the very significant words that are omitted from this, "for this purpose." That is to say, any challenge on the ground of an unqualified juror where the statute provides that if twelve or more qualified jurors voted, the indictment is good, the statute forbids any juror to testify how he voted. But that is not the general rule of evidence. It is limited to that particular case and as put here it is made a general rule of evidence.

MR. ROBINSON: I believe that was all discussed when the fifth draft was considered. So you are moving to change the fifth draft?

MR. MEDALIE: Jim, I cannot remember that, but I know it was not the statute.

MR. ROBINSON: I am asking for information.

MR. MEDALIE: I always opposed this provision.

MR. DEAN: What would you think of putting in the second sentence "No juror shall disclose the testimony of witnesses or anything said by a juror or how he voted except when required or permitted by the court"?

MR. MEDALIE: I was just looking at that and I would prefer it to read "said or anything done by a juror" and I include that in my motion, if I may.

THE CHAIRMAN: In line 44?

MR. MEDALIE: Yes, sir. "Anything said or done by a juror."

MR. HOLTZOFF: And omit the first sentence?

THE CHAIRMAN: The motion is to strike the first sentence of Section (e) and insert in line 44, after the word "said" the words "or done." All those in favor say "Aye."

(Chorus of "Ayes.")

Opposed "No".

(No response.)

THE CHAIRMAN: Carried. Are there any other suggestions with respect to Section (e)?

MR. YOUNGQUIST: I object to the second sentence. I move that the second sentence be stricken.

MR. HOLTZOFF: You mean the new second sentence?

MR. YOUNGQUIST: Yes, the new second sentence

beginning on line 46, and ending on line 49. That is the sentence prohibiting any witness from disclosing to anyone, his counsel or anyone else anything said or done during the proceedings.

MR. MEDALIE: You do not mean the second?

THE CHAIRMAN: It is now the second sentence, lines 46 to 49.

MR. YOUNGQUIST: That I know is the practice in some of the districts of the Federal courts, but I think it is much too restricted. It is all right to prohibit a grand juror from disclosing what went on in the jury room except as it may be required in judicial proceedings, and they do disclose it, but when you muzzle the witness so he cannot even tell his counsel what he testified before the grand jury, that is going much too far.

MR. WAITE: This only says "no witness * * * shall obstruct the grand jury * * * by disclosing."

MR. YOUNGQUIST: Shall obstruct by disclosing. Who is to measure what constitutes the obstruction? Suppose, for instance, it be said that his telling his counsel what he testified before the grand jury is obstructing justice? It is up to him to determine in his own mind, and he cannot ask his attorney about it because he would have to disclose what happened, whether

he is or is not obstructing justice by disclosing something that he said before the grand jury.

MR. WAITE: Would not you have to leave it to the court, just as you always leave the question about obstruction of justice to the court?

MR. YOUNGQUIST: That is the trouble, He would not know whether a particular fact that he wanted to disclose would be held to be obstructing justice or not, and he cannot even ask counsel for advice about it, because when he asks the question he has made the disclosure.

MR. WAITE: Would not you have by implication, if we strike this out, that he may obstruct justice by disclosing?

MR. YOUNGQUIST: If that be the consequence, yes. I think there should be freedom on the part of the witness to disclose; that there should not be a restriction on the witness before a grand jury so severe that he may not disclose.

MR. ROBINSON: What was said and done in the grand jury room?

MR. YOUNGQUIST: What was said and done in the grand jury room.

MR. MEDALIE: Mr. Chairman, we discussed that very fully before, and I will only say in a few words what

I said on other occasions. An employee has a right to come back and tell his boss; a fellow director has a right to come back and tell his fellow director what has happened. What has happened here is that people in close personal relations cannot tell each other what happened before the grand jury when it is to their interest and the interest of their business; everything they are doing; they should know and exchange that information.

Now we have developed a notion about grand jury secrecy that is really perfectly absurd. After all, it is only an inquiry made by a judicial body. The secrecies are really for the protection of grand jurors, explicitly for the protection ofpersons not indicted, and supposedly also to prevent the escape of persons who might know they are being investigated. Now in practice it is not so. In New York, for instance, there is no prohibition in the statute on a witness telling what his testimony was before the grand jury. Nothing bad has happened, and the pretense of this secrecy simply produces a falsehood. The fact is there is not that secrecy.

MR. HOLTZOFF: Question.

THE CHAIRMAN: You have heard the motion to strike the sentence beginning in line 46. All in favor say "Aye". (Chorus of "Ayes.")

THE CHAIRMAN: All those opposed, "No".

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 11 in favor; 3 opposed.)

THE CHAIRMAN: It is carried.

Section (f).

MR. YOUNGQUIST: I have not finished.

THE CHAIRMAN: I beg your pardon.

MR. YOUNGQUIST: I have a suggestion as to line 49. I suggest the substitution of "the attorney for the Government" for "the United States attorney."

MR. ROBINSON: That was made again a discrimination to show the fact that really it was a place you should not allow a special attorney or private counsel.

MR. YOUNGQUIST: A special assistant?

MR. HOLTZOFF: I think a special assistant ought to be qualified to give the direction.

MR. YOUNGQUIST: Anyone who acts as attorney for the Government ought to have authority to do that or to do with respect to the prosecution what the United States attorney should do.

MR. ROBINSON: You do not think the court should have to say anything on that?

MR. YOUNGQUIST: No. You should not need to bother the court. Another suggestion I have is merely one of language. In line 53 strike out "to the extent that disclosure may be" and substitute the word "when".

MR. ROBINSON: That is a good one.

THE CHAIRMAN: That, I take it, is accepted. What is your pleasure with respect to the motion directed to the words "the United States attorney"?

MR. ROBINSON: Apparently that was received too.

THE CHAIRMAN: Is there any objection? If not, that will stand changed by consent to "the attorney for the Government."

Are you ready for a motion on (e) as amended?

MR. SEASONGOOD: I just want to present the question which did come up in the Smith case: Suppose there is something wrong or trouble that say the juror can only give in a court proceeding. The trouble is that you cannot have a court proceeding unless you have some basis to go on. That is, if you would file a request with the court and not have any evidence to support it. In the Medical case they held that was insufficient. The only way you can get it - you cannot listen at the keyhole - is from a juror as a basis for getting your motion to set aside.

THE CHAIRMAN: There is no limitation in these rules against the clerk telling, is there, or the stenographer?

MR. MEDALIE: I know what Mr. Seasongood has in mind because there has been experience with that kind of thing and there are cases of motions made to quash on the ground that things happened before the grand jury.

MR. SEASONGOOD: That is right.

MR. MEDALIE: The motion is based on investigation made after the indictment has been found and the defendants have been apprehended. And the cases that deal with that hold that no harm is done by the juror telling because the indictment has been found and the defendant is apprehended and public interest is not involved. Therefore the attorney, or his investigators, may go around and interview the grand jurors and use their affidavits that set forth what they were told, and the grand juror himself may make an affidavit. Generally speaking that has been approved by the cases.

MR. HOLTZOFF: In the Sixth Circuit that was held to be contempt of court.

MR. SEASONGOOD: And in the Fourth it was not.

MR. DEAN: It depends somewhat on the particular oath the judge imposes, the oaths being different in different jurisdictions.

MR. WECHSLER: I assume this rule as drafted would adopt the decision that held it to be contempt and reject the decision that held it not to be contempt..

MR. SEASONGOOD: If there is anything wrong with the jury it is an idle thing to say you have a remedy in court, and the court can order it to be heard, because in the Kentucky case they held unless you have something to prove it, your motion is no good.

MR. LONGSDORF: How often would that case arise?

MR. GLUECK: May I ask whether the wording in line 43 is broad enough to permit counsel to interview the grand jurors, "except when required or permitted in the course of judicial proceedings"?

MR. HOLTZOFF: No, that would not include counsel.

MR. DEAN: How about 45?

MR. MEDALIE: If we strike this sentence then we do not have the law as it appears in various district decisions.

MR. HOLTZOFF: I think we ought to have a uniform rule instead of letting the confusion that now exists continue.

MR. MEDALIE: The only way we could carry out the idea Mr. Seasongood has talked for is a provision that a juror should make no disclosure as to anything said even before or after the indictment and the apprehension of the

defendant except by direction of the court.

MR. SEASONGOOD: All defendants?

MR. MEDALIE: Yes.

MR. SEASONGOOD: I do not have any positive opinion on it but I am presenting the question which is a question in my mind.

THE CHAIRMAN: Your idea then is the remedy is futile?

MR. SEASONGOOD: Yes, it seems to me so. That is what they said in the American Medical case. I believe that was the case they said "We won't entertain a motion to quash if you do not have any evidence to support it."

MR. DEAN: Isn't that arguing for putting in a provision where you can request the court, without any showing at all, to examine the transcript of the grand jury?

MR. MEDALIE: But the court won't do it. The transcript alone won't do because unscrupulous prosecutors do things, and we had an assistant prosecutor in the Eastern District here who used to, in intervals, walk up to a juror and tell him a lot of things that were not in the record. You know he was the subject of comment in another connection by the Supreme Court of the United States.

THE CHAIRMAN: Mr. Justice Stone.

MR. MEDALIE: We are entitled to protection against such people.

THE CHAIRMAN: Will somebody phrase this so we can get it in the form of a motion and get the vote of the Committee?

MR. MEDALIE: May I take a try at it?

THE CHAIRMAN: Will you, please.

MR. MEDALIE: "No juror shall disclose the testimony of witnesses or anything said or done by a juror during the proceedings before the filing of the indictment and the apprehension of the defendants except when required or permitted by the court."

THE CHAIRMAN: Is that motion seconded?

MR. WECHSLER: I second it.

MR. SETH: I second it.

THE CHAIRMAN: Is there any discussion?

MR. HOLTZOFF: Question.

MR. ROBINSON: Mrs. Peterson who has worked up on the figures on this oath of secrecy points out that in your comments on Rule 6, page 9, it is pointed out that no Act of Congress has required it, but in approximately 33 of the district courts such witnesses are required to take an oath of secrecy.

MR. HOLTZOFF: Question.

MR. McLELLAN: I am stupid, perhaps, but I am not

controversial about it. Do you mean to have it provided in substance, by implication, that jurors are entirely free to talk to their heart's content after the arrest of the defendant?

MR. HOLTZOFF: Apparently that would be the effect of this amendment.

MR. DEAN: That would be the effect.

MR. MEDALIE: I don't know what harm would come of it. In view of the advantages I think that the shock of tradition cannot be very serious.

MR. McLELLAN: That would be its effect, wouldn't it?

MR. MEDALIE: It would be its effect without question The jurors should no longer be told they should not talk about what they said and found and heard, but they may do it all they want to just as soon as the defendant is arrested.

MR. WECHSLER: Isn't this what we want. We do not want jurors to talk about what has happened before the grand jury except in the rare instance where they talk will reveal some improprieties. There we do want, or at least some members of the Committee want, the juror to be free to disclose improprieties. Could not we draft a rule in those terms so that the permissive disclosure is only for the disclosure of improprieties. I am not sure that that would be right.

MR. McLELLAN: That would be quite difficult.

THE CHAIRMAN: May we lay this on the table and ask the interested members to tackle it at lunch?

MR. MEDALIE: I am escaping at lunch for a little while to keep an engagement with which this session interfered.

MR. CRANE: So has the chairman and myself.

MR. MEDALIE: I tried to put it off but it was impossible. I was supposed to be engaged all day but I promised to be there for lunch.

MR. SEASONGOOD: Maybe Judge McLellan and Mr. Wechsler could draft something.

MR. WECHSLER: We could try it before lunch, Mr. Chairman, and if we get anything we will present it.

THE CHAIRMAN: We will pass 6(e) for the time being.

MR. SEASONGOOD: May I just ask, is there any reason why the United States attorney is allowed to tell what took place in the grand jury room, or the interpreter or stenographer?

MR. HOLTZOFF: He is not.

THE CHAIRMAN: The rules are silent.

MR. MEDALIE: They are silent, just like the New York practice.

MR. BURNS: Has there been any attempt to deal

with the problem of what the witnesses can disclose?

THE CHAIRMAN: That has been covered.

MR. SEASONGOOD: There was a case where the witnesses were sworn to secrecy and one told and I think he was held in contempt.

MR. BURNS: Then there is a practice in some districts to swear the witness to secrecy.

THE CHAIRMAN: Does anybody want to make a motion so that the Committee can start to work on it, dealing with the stenographer and the clerk and the interpreter and their secrecy?

MR. MEDALIE: I think you might look at the statute in that connection.

MR. SEASONGOOD: I mean if you have secrecy why not have complete secrecy. What is the point of having some people being able to blab and not anybody else?

MR. WECHSLER: The witness is a separate problem, isn't he?

MR. MEDALIE: As far as witnesses are concerned your main interest is there should not be wholesale publication and that it is not given to the press. You don't object to a witness coming and telling his wife what he has been up against, or telling his boss or his office associates about the investigation concerning the conduct of their office or telling the lawyer. In other words, what

we do not want is to have the thing get into the papers.

THE CHAIRMAN: All right. We will have all phases of this gone into.

Now let us go on, if we may, to 6(f).

MR. HOLTZOFF: I move that it be adopted.

MR. YOUNGQUIST: Seconded.

THE CHAIRMAN: All those in favor of the motion say Aye". (Chorus of "Ayes.")

Opposed "No. (No response.)

Carried.

Paragraph 6(g).

MR. HOLTZOFF: I have some verbal suggestions as to line 60. I move the word "dismissed" be changed to "discharged", because my understanding is that the word of art is "discharged" rather than "dismissed."

MR. YOUNGQUIST: That is all right.

MR. WECHSLER: Yes.

THE CHAIRMAN: That seems to be accepted. And the heading also?

MR. HOLTZOFF: Yes, the heading also. And the second sentence might have to read as follows: "the tenure or powers of a grand jury shall not be affected or limited by the expiration of a term of court." This does not change the substance. I think it just polishes up the phraseology.

MR. McLELLAN: Do we anywhere abolish terms of court so far as criminal proceedings are concerned?

MR. HOLTZOFF: We do not abolish terms but we have a rule to the effect that terms of court shall have no significance as limitations on ~~changes~~ of time.

MR. McLELLAN: Why doesn't that take care of this?

MR. HOLTZOFF: I think perhaps the general rule will take care of it but the reporter put this sentence in as a matter of precaution and I see no objection to it. I am only suggesting polishing up the phraseology.

THE CHAIRMAN: It has been the subject of quite a bit of litigation, hasn't it?

MR. HOLTZOFF: It has been.

MR. ROBINSON: That is right.

MR. LONGSDORF: I just want to call attention to the pending case of Evaporated Milk Association v. Roach - I forget the title of another case. They are now on certiorari and there was a grand jury continued by order of extension after the term to complete unfinished business. The objection was they took up new business that was not even begun. And in the Evaporated Milk case the program laid down by the grand jury was so vast I do not think it could have been accomplished within eighteen months by any grand jury. I just want the Committee to consider in connection with 6(g) that state of affairs. We are

going to have a decision on that one way or the other.

MR. HOLTZOFF: That is on a different point. 6(g) will abolish the difficulty that arises about a grand jury being allowed to continue old matters but not start new ones. We fix an eighteen months' limitation for all purposes.

MR. LONGSDORF: You put it in the power of the court to decide any time before eighteenmonths?

MR. HOLTZOFF: Yes, eighteen months is long enough for any grand jury.

MR. LONGSDORF: That is the point I want to make.

MR. MEDALIE: Even the Dies Committee requires renewal.

MR. WECHSLER: May I ask, Mr. Chairman, what the point of this question in the Court's Memorandum about United States vs. Johnson is?

MR. HOLTZOFF: I think that involved this question of a grand jury's term being extended for the purpose of continuing an investigation once begun, and the question in that case was whether the indictment resulted from a new investigation or continuation of the old investigation, and the first sentence of (g) will do away with that difficulty and controvery over that rather foolish point.

MR. WECHSLER: Thank you.

THE CHAIRMAN: You have heard the suggestions of Mr. Holtzoff which I take it are acquiesced in. Are you ready for the vote on 6(g) as amended?

MR. HOLTZOFF: Question.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried. We will now go on to Rule 7(a).

MR. HOLTZOFF: I note a verbal suggestion there. In the first sentence the rule speaks of prosecuting an offense and in the other sentence speaks of charging an offense. I think there ought to be uniformity and we want to use "charge" in each instance or "prosecute". I rather like the word "prosecute" better than "charge", so I suggest that the word "charge" be changed to "prosecute" in line 5, line 7 and line 9. I make that motion.

MR. ROBINSON: May I state the reason for the present form before you act. The court, as you will notice in its Memorandum, objected to the repetition there of "accusation" and said the term "accusation" might be open to objection, and apparently indicated that the repetition of the term "accusation" here would be objected to.

Therefore the effort was made in the drafting of this subdivision (a) to avoid any further criticism on the ground of repeating the same term, whether it is "accusation" or "charge" or "prosecution," and it was felt that it would be well not to use the same term all the way through.

Further, the term "prosecute" is used in line 3 because it is thought that it would be well to have a general sentence at the start. In other words it differs, you notice, from the second sentence, the third and the fourth, but particularly the second and third, where it is general, and the second and third are specific, and they deal with certain types of offenses. And the third point is that we not overuse the word "charge" because all through this draft we have had to watch the difficulty of the double use of the term "charge," as conflicting with the court's charge to the jury.

MR. HOLTZOFF: That is why I suggested the word "prosecute".

MR. YOUNGQUIST: I think there is a slight distinction between the use of the verb in the first instance and the verbs in the others. We are seeking in the first one of the entire course of the prosecution, a blanket term. Later although the form of the sentence is the same, you are talking only about the document by which

the offense, or the contents of the document, by which the offense is charged.

MR. WECHSLER: That is true. Aren't we later also speaking of whether you begin by indictment or information? In the second sentence of (a).

MR. YOUNGQUIST: As I say, the difference is very slight but I think there is a difference sufficient to justify the distinction.

MR. HOLTZOFF: Here they are the same and I do not understand that the court's comment objected to the uniformity but objected to the word "accuse."

THE CHAIRMAN: You have the question, gentlemen. It is a matter of your preference for "charged" or "prosecuted." All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

All those opposed say "No".

(Chorus of "Noes.")

The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 8 in favor and 7 opposed.)

The motion is carried, 8 to 7.

MR. WECHSLER: I would like to move a substitute for 7(a). It is set forth in the Memorandum and it is intended to do no more than to make it simpler reading.

MR. YOUNGQUIST: May I ask a question. You changed the word "charged" to "prosecuted" throughout, is that it?

MR. HOLTZOFF: Yes. Mr. Wechsler, before a vote is taken on your substitute, I wonder if you do not want to strike out the words "hard labor" because at present a person is not sentenced to imprisonment at hard labor.

MR. WECHSLER: Sure.

MR. HOLTZOFF: Before you do that I thought you might want to perfect your own substitute.

MR. WECHSLER: If that gets me in trouble on that issue I would rather have that a change later.

THE CHAIRMAN: Mr. Wechsler's draft is in the comment on Rule 7.

MR. WECHSLER: All I say is that it says entirely the same thing in less cumbersome language.

THE CHAIRMAN: This comment to Rule 7 is made a separate memorandum of comment of the members of the Committee.

MR. WECHSLER: I change that "charge" to "prosecute" in every instance.

THE CHAIRMAN: It reads "Offenses shall be prosecuted in the district court by indictment or by information as provided by these rules, Except as provided

in section (b) of this rule, an offense which may be punished by death or imprisonment for a term exceeding one year at hard labor shall be prosecuted by indictment or by information."

That is proposed as a substitute for the present 7(a). Are you ready for the question?

MR. MEDALIE: You want to take it all together, don't you?

MR. HOLTZOFF: Before we take a vote on it I think we ought to strike out "at hard labor."

MR. WECHSLER: That is all right with me.

THE CHAIRMAN: By consent "at hard labor" is stricken from the substitute rule proposed.

MR. YOUNGQUIST: May I ask the purpose of the motion? I rather like this form which sets out seriatim what may be done under certain circumstances and how it shall be done.

MR. WECHSLER: And in answer to your question, I felt that the form as it was was cumbersome and I tried to get brevity and if I have lost clarity my purpose failed, but I thought I could get equal clarity without having to repeat a couple of times the point of waiver.

MR. ROBINSON: Do you think it is specially good to start a sentence "Except as otherwise provided"? I have tried to avoid a statement in our rules by the "ex-

cept" clause.

MR. WECHSLER: I do not share the antipathy to that form but I would be willing to transpose that clause to the end.

MR. YOUNGQUIST: I note there is only one reference to waiver of indictment and that is in lines 7 and 8. I do not think it is important.

THE CHAIRMAN: You have the motion, gentlemen, which is to approve Mr. Wechsler's substitute 7(a). All those in favor of the motion say "Aye".

(Chorus of "Ayes.")

All those opposed say "No."

(Chorus of "Noes.")

The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 4 in favor and 11 opposed.)

THE CHAIRMAN: The motion is lost.

MR. MEDALIE: I understand then that on line 7 of Rule 7(a) "or at hard labor" goes out?

THE CHAIRMAN: By consent.

MR. HOLTZOFF: No. "or at hard labor" is all right.

MR. GLUECK: "at hard labor." Isn't that the same thing?

MR. MEDALIE: I thought that that was accepted.

MR. HOLTZOFF: But there are some statutes, very old, which prescribe a sentence of imprisonment at hard labor. In the Wilson case, the Supreme Court held --

MR. MEDALIE: I know that. But we do not have hard labor any more in any jail that I know of in all the United States.

MR. HOLTZOFF: I know, but the statutes provide for it in some cases.

MR. ROBINSON: And the Supreme Court decision in the Wilson and Moreland cases --

MR. DEAN: Did the statute provide for it in any cases where the sentence could have been less than a year?

MR. HOLTZOFF: I am not sure.

MR. MEDALIE: If the Supreme Court approves of this they will get rid of this fiction.

MR. GLUECK: I think that is a good argument; that it ought to be put into the commentary. We ought to refer to the Moreland case and the Wilson case and the actual practices in Federal prisons and indicate why that was taken out.

THE CHAIRMAN: Are you moving to strike out "or at hard labor"?

MR. MEDALIE: Yes.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All in favor of the motion to strike in line 7 the words "or at hard labor" say "Aye."

(Chorus of "Ayes.")

All those opposed sat "No."

(No response.)

THE CHAIRMAN: Carried. Are you ready for the motion on 7(a) as amended?

MR. ROBINSON: May I have it read?

THE CHAIRMAN: Just strike out the words "or at hard labor."

MR. BURNS: And every time "charge" appears change to "prosecute."

THE CHAIRMAN: That is right. All those in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I do hate to hold you up. I did not vote in favor but I want to ask one question: do we by this vote we have just passed impliedly change the law as to what is an infamous crime?

MR. SETH: We do.

MR. McLELLAN: We know we are doing that?

MR. GLUECK: Yes.

MR. MEDALIE: It is agreed we are changing it.

MR. DEAN: At the present time it would be infamous if you had a sentence over one year imprisonment at hard labor. As a practical matter you cannot sentence a man at hard labor because of the Federal penitentiary system which does not have hard labor, and in the absence of showing somewhere that makes it possible to confine a man for less than a year we would have no situation where a man was even punished at hard labor unless it was more than a year so we are saved by just saying imprisonment for more than a year.

MR. McLELLAN: It is still true, isn't it, that under some of the statutes there is a provision for imprisonment at hard labor?

MR. DEAN: That is true.

MR. HOLTZOFF: Yes, that is true.

MR. McLELLAN: And there are decisions to the effect that no matter whether a year punishment or not, if punishable at hard labor you have a crime that is infamous, and we have in connection with that the constitutional provision requiring an indictment.

MR. DEAN: Right.

MR. McLELLAN: In the case of a prosecution for an infamous crime. If we know what we are doing, I have

no objection.

MR. GLUECK: Of course, Judge, there may be other consequences of conviction for an infamous crime apart from the question of indictment. I do not know whether anybody has explored that.

MR. HOLTZOFF: I believe there is. The only distinction is as to prosecution by indictment or information.

MR. GLUECK: Such, for instance, time off for good behavior.

MR. HOLTZOFF: It is the same. That depends on the length of the sentence. I think it would be safer if we left those words in.

MR. LONGSDORF: Is it the understanding of the Committee that section 5041 would be superseded by this rule?

MR. DESSION: There is a possibility here: I think it is possible this is overruling the majority in the Moreland case.

MR. HOLTZOFF: Yes.

MR. DESSION: You remember that case where a six months' sentence to the workhouse was held by the majority to be hard labor. I do not think the case is much good today.

MR. WECHSLER: Suppose Congress passed a statute

tomorrow providing for punishment at hard labor.

MR. McLELLAN: That is my point. What harm can the words do in there and they might be of importance.

MR. HOLTZOFF: I move to reconsider the motion by which we struck it out.

MR. DESSION: Maybe we ought not to strike it out, but could we not put in a phrase something like that of "infamous punishment."

MR. HOLTZOFF: No, you leave it wide open then.

MR. MEDALIE: The Supreme Court made quite a mess of this as a matter of fact; that case from the district, selling the unused portion of a railroad ticket, 300 U. S.

MR. HOLTZOFF: The Clolands case?

MR. MEDALIE: That is right. It was three months or a fine, I think that was the penalty, and they went into a great discussion to the effect that you did not need a jury trial in many crimes even if the penalty was a public whipping, or standing in the stocks, and things of that sort. Well, frankly, those decisions are just a lot of nonsense if you deal with it in the terms of the particular kind of penalty, unless you decide once and for all you are dealing with that term.

MR. HOLTZOFF: But that related to a jury trial.

MR. MEDALIE: That is right, but they said it

is a petty offense and therefore it cannot be an infamous crime; you might stand in the stocks for being a common scold, yet you do not call that an infamous crime. Really I did not mean that personally.

THE CHAIRMAN: The motion to reconsider has been made and seconded. Are you ready for the question?

All in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I did not vote.

MR. YOUNGQUIST: I did not either because I did not know.

THE CHAIRMAN: The question is now before us again.

MR. CRANE: I think there is quite a little in what the Judge says. The statute prescribes what the crime is and we cannot say what it may be. We simply say what that statute says.

MR. ROBINSON: I am thinking about fifty rules still ahead and if we stop to consider present legislation very extensively we won't get along very fast.

THE CHAIRMAN: Is there a motion to reconsider?

MR. SETH: I move that the words be restored.

MR. CRANE: I second the motion.

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

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

All those in favor of adopting Rule 7(a) as presently amended say Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any suggestions on Rule 7(b)?

MR. HOLTZOFF: Mr. Chairman, I rather like the substitute suggested by Mr. Wechsler. The substitute reads:

"An offense not punishable by death may be charged by information if the defendant being represented by counsel waives indictment."

THE CHAIRMAN: Mr. Holtzoff moves and Mr. Wechsler seconds the substitute. Is there any discussion?

MR. SEASONGOOD: Are you going to use the same language, "prosecuted" instead of "charged"?

MR. HOLTZOFF: That ought to be "prosecuted."

MR. ROBINSON: The reason for changing "prosecu-

tion" is you may have to go before Congress, and with our using the same term throughout, the same word, prosecute, prosecute, prosecute, they will think that we are inaugurating a series of persecutions.

MR. YOUNGQUIST: I think there is a good deal in that. And yet, without further reconsideration of 7(a) the appropriate way to deal with it is, when you are speaking of the proceeding as a whole, to use the word "prosecute" as is done in line 3, and should also be done in line 9, but where you are talking about the form of the document by which you start it, you ought to have "charge."

MR. GLUECK: I move that it be left to the Committee on Style.

MR. MEDALIE: Don't leave too much to the Committee on Style.

MR. GLUECK: That is the sort of problem they should consider.

MR. WECHSLER: Why not use the word "initiate" instead of "prosecute"?

THE CHAIRMAN: We should use a word of art if one is available.

Gentlemen, the words "prosecute" or "prosecuted" are embodied in 7(a). Now once you take them out the Committee on Style would have no authority, after you take

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take them out, to put them in.

Now unless there is a motion to reconsider, and we are now on 7(b), the substitute motion of Mr. Wechsler. It has been amended and the amendment has been accepted by the maker of the motion and the seconder to use the word "prosecute" in the second line. Are you ready for the motion?

MR. HOLTZOFF: Question.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

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MR. YOUNGQUIST: Just a minute. Will you read it?

MR. WECHSLER: "An offense not punishable by death may be prosecuted by information if the defendant being represented by counsel waives indictment."

MR. CRANE: Is this a substitution?

THE CHAIRMAN: Substitution for 7(b). The motion is carried, I believe.

MR. HOLTZOFF: Yes.

MR. WECHSLER: Mr. Chairman, Mr. Seth raises a question of substance which I think warrants attention. Should not the waiver of indictment have to be in writing?

MR. HOLTZOFF: Isn't it better to leave that

open?

MR. WECHSLER: I do not know.

MR. HOLTZOFF: Ordinarily it would be in writing, of course.

MR. DEAN: I think in view of the split of the court itself on the whole subject of waiver a couple of months ago it behooves us to take every precaution. I am for putting it in writing.

THE CHAIRMAN: Is the motion made?

MR. WECHSLER: I move, Mr. Chairman, to change it to read:

"An offense not punishable by death may be prosecuted by information if the defendant being represented by counsel waives indictment in writing."

MR. DEAN: Seconded.

MR. HOLTZOFF: "in writing waives indictment"?

MR. WECHSLER: I would rather have it as read. I think my ear responds better to "waives indictment in writing," but I do not care what the order is.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. I take it that 7(b)

is then accepted as re-amended.

MR. WECHSLER: Mr. Chairman, I have a question on (a) and (b). We have in no way provided that an information may be filed only by the attorney for the Government. I ask the question whether it is necessary so to provide, assuming that that is what we mean.

MR. HOLTZOFF: I do not think it is, because there is no such thing as a prosecution in a district court except by the Government.

MR. WECHSLER: But that is what we do not want to change.

MR. HOLTZOFF: We do not want to change?

MR. WECHSLER: No. The reason why that is not true now is that the statute in its provision for information speaks of an information filed by the attorney for the Government; doesn't it?

MR. HOLTZOFF: I do not recall that.

MR. WECHSLER: Well, I am not sure either. And this difficulty that occurred to me could be easily met by inserting the words "filed by the attorney for the Government."

THE CHAIRMAN: We have no private informations in any State, have we?

MR. WECHSLER: I am not sure about that.

MR. ROBINSON: Filed just by an individual?

THE CHAIRMAN: Yes.

MR. ROBINSON: Oh, yes. Indiana has it.

MR. MEDALIE: What happens? Does the court have to approve it?

MR. ROBINSON: No.

MR. HOLTZOFF: Who tries the case for the prosecution?

MR. ROBINSON: The prosecutor.

MR. HOLTZOFF: Suppose he does not approve of the prosecution?

MR. ROBINSON: Well, it is approved by the prosecutor, of course. The information is signed by a private individual.

MR. HOLTZOFF: Yes, but the prosecutor has to approve it.

MR. WECHSLER: What do we want on that? May a private individual under our rule file the information with the United States attorney?

MR. McLELLAN: There is something there which seems to me of some consequence. We have had a practice right along that even the United States attorney could not file an information until the court approved it.

MR. DEAN: That is true; in several districts they won't let you file it.

MR. McLELLAN: I am not sure that that would not

be a good thing.

MR. HOLTZOFF: May I ask a question, Judge: granting leave to file an information - is that a pro forma matter with the court, or does the court go into the matter?

MR. McCLELLAN: Some courts take the information when presented and read it and see what it is about, and then write on it "This may be filed."

MR. ROBINSON: We have tried to make a survey of the various districts on that, Judge, and our belief is that the majority would be the other way. In many districts the approval of the court is very much a formality.

MR. DESSION: But not everywhere, Jim. In some districts it is pro forma; in others there is a real showing.

MR. MEDALIE: I do not think judges have anything to do with the initiation of any cases.

MR. YOUNGQUIST: In our State an information may be filed only by leave of the court. I suppose the purpose of it is to protect a defendant from prosecution by one individual and prosecuting attorney in a case the court thinks ought to be submitted to the grand jury. I am assuming that is the reason for it.

THE CHAIRMAN: Well, we have two specific questions here: it is Mr. Wechsler's motion that private informa-

tion be tabooed. Can we have a vote on that idea, getting the language later?

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried. That will go to the reporter for drafting.

Now may we have a vote on Judge McLellan's suggestion that information should not be filed without the consent of the court, getting language appropriate to that later. All those in favor of that motion say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor raise hands.

(After a show of hands the Chairman announced the vote to be 9 in favor; 6 opposed.)

THE CHAIRMAN: The motion is carried.

That would be part, I take it, gentlemen, of this 7(b).

MR. MEDALIE: You can put the language in now. You do not need to leave it.

THE CHAIRMAN: I think we can let it go.

Are there any suggestions on Rule 7(c)?

MR. HOLTZOFF: On line 23 the word "and" I suggest should be "or", and I so move.

MR. WECHSLER: What is it?

MR. HOLTZOFF: On line 23 the word "and" I suggest should be "or".

MR. YOUNGQUIST: I have the same comment.

MR. ROBINSON: I wonder why we left it that way the other time.

THE CHAIRMAN: If there is no objection, that will be the order. Any other suggestions?

MR. YOUNGQUIST: Yes. I think in lines 18 and 19, at the end of line 18, there should be substituted the word "matter" for "allegation". Those are not allegations at all.

THE CHAIRMAN: Any objection? (No response.) That will stand.

MR. YOUNGQUIST: And in line 19, referring back to 16, we have "and definite statement of the essential facts constituting the offense charged." I would suggest that line 19 read "not necessary to such statement."

MR. HOLTZOFF: That is a good idea.

THE CHAIRMAN: Any objection to that?

(No response.)

THE CHAIRMAN: Is there anything else, gentlemen?

MR. SEASONGOOD: Did we decide at line 27, the way it is written there, that you could omit the citation if it did not prejudice the defendant? It seems kind of futile to me to say that you should have the customary citation.

MR. ROBINSON: Those are the words of Draft 5 as we decided before.

MR. HOLTZOFF: That matter was debated at length, Mr. Seasongood, if you recall, in connection with Draft 5, and that is the way it was agreed upon. The objection was made at that time --

MR. SEASONGOOD: Was there a division of opinion at any time?

MR. DEAN: Pretty sharp. We thought we might help the thing along a little in the form here indicating the citation of the statute as the better practice.

MR. HOLTZOFF: Under existing law we do not have to cite statutes in the indictment.

MR. SEASONGOOD: I thought, with all these regulations and rules and everything that makes one a criminal, why don't they tell him why he is a criminal? What is the difficulty?

MR. MEDALIE: The Government does not know.

MR. SEASONGOOD: I do not want to protract the thing, but I just move to strike the words "or its omission"

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in line 27.

THE CHAIRMAN: The motion is to strike the words in line 27, "or its omission".

MR. BURNS: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands is called for. All those in favor of the motion say "Aye."

(After a show of hands the Chairman announced the vote to be 7 in favor, 8 opposed.)

THE CHAIRMAN: Lost.

MR. LONGSDORF: Mr. Chairman, isn't our difficulty very largely in the use of the word "shall" in line 24, and then the negation of it in line 27? Suppose we change the word "shall" to "should". The civil rules have the same language.

MR. HOLTZOFF: I move we adopt --

MR. YOUNGQUIST: Alex, wait a minute. I have another suggestion: in lines 29 and 30 I move the striking of the words "if the proceeding was in fact supported by a statute, rule, regulation, or other legal provision."

MR. MEDALIE: I second the motion.

MR. YOUNGQUIST: It seems rather absurd to

state it must be supported by such a thing.

MR. MEDALIE: And strike out the word "and" on line 31.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed,"no."

(No response.)

THE CHAIRMAN: Are there any other suggestions?

MR. ORFIELD: In line 16, I move that the word "written" be incorporated before "statement". I think it ought to be clear that the indictment or information be in writing. Even though it has always been the rule, I think it ought to be stated expressly.

THE CHAIRMAN: What line is that?

MR. ORFIELD: That is line 16, - "and definite written statement".

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. HOLTZOFF: Mr. Chairman, I move to adopt Rule 7(c) as amended.

MR. WECHSLER: I have still got a problem, Mr. Chairman. We do not say anything about what the form of an information is. I mean, is it to be supported by the official oath of the United States attorney or by the attorney for the Government?

MR. HOLTZOFF: Of course, the present rule is that you do not have to have an oath to your information unless you are going to ask for a warrant. If you are going to ask for a warrant on it, why then you have to show probable cause by affidavit.

MR. WECHSLER: But this involves an extension of the use of informations.

MR. YOUNGQUIST: We provide that a warrant may be issued upon the filing of an information, do we not? We give an information the same dignity as an indictment. Why call for an oath on the information? I never heard of an oath on the information. That simply is an information signed and filed by the prosecuting officer.

MR. WECHSLER: I will withdraw it.

THE CHAIRMAN: All those in favor of Rule 7(c) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

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Any suggestions on 7(d)? If not, all those in favor of 7(d) say"Aye."

(Chorus of "Ayes.")

MR. LONGSDORF: Wait a minute, there is something there. Suppose it is moved to strike a surplusage, and the court grants the motion and there is a mistake, isn't the indictment amended thereby?

MR. DEAN: You mean strike something other than surplusage?

MR. LONGSDORF: Yes.

MR. HOLTZOFF: I think this was discussed at great length in every draft we had, and we all felt there ought to be provision for striking surplusage.

MR. DEAN: It would be error for the court to so amend the indictment if it struck anything other than surplusage.

MR. YOUNGQUIST: He would be exceeding his power under the rule.

MR. DEAN: The Judge is going to have to use his pencil on the indictment very carefully.

THE CHAIRMAN: All those in favor of 7(d) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

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THE CHAIRMAN: Unanimously carried.

Any suggestions on 7(e)?

MR. SEASONGOOD: The word "thereby" in line 39 should be stricken because it has no antecedents.

THE CHAIRMAN: Any objection? If not, "thereby" is stricken in line 39.

Any other suggestion? (No response.)

All those in favor of 7(e) as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Rule 8(a).

MR. HOLTZOFF: Mr. Chairman, as to Rule 8(a), I move that we strike from lines 3 and 4 the words --

MR. MEDALIE: Excuse me. Something just occurred to me. I was just telling Mr. Wechsler something that I remember twenty-five years ago. A man has a right not to be prosecuted by a false alias.

MR. YOUNGQUIST: By a what?

MR. MEDALIE: By a false alias, calling a man "John Jones, also known as'Mike the Slugger'". He is not known as "Mike the Slugger." He is entitled to protection against that. I think we ought to make provision for such correction.

MR. DEAN: Isn't that surplusage?

THE CHAIRMAN: Is it common?

MR. MEDALIE: It is not uncommon.

THE CHAIRMAN: Isn't that surplusage?

MR. MEDALIE: It is not surplusage because you are supposed to describe a person by his name. The word "alias" simply means otherwise. He could have either of those names. A man might be known as John Smith or as Joe Brown.

MR. YOUNGQUIST: George, why wouldn't it be surplusage if one name sufficiently identifies him?

THE CHAIRMAN: Wouldn't any judge strike that out as surplusage?

MR. MEDALIE: I do not know whether he would call it a surplusage. He would say that is descriptive. He can't interfere with the description.

THE CHAIRMAN: We might just as well say "John Jones, the dirty dog."

MR. MEDALIE: That is exactly what the indictment states, and that is what it is intended to state. In setting forth aliases that is all they intend to imply.

MR. DEAN: The only other remedy would be to have it not read to the jury.

THE CHAIRMAN: Well, it gets in the paper anyhow.

MR. MEDALIE: Well, most indictments do not get

into the newspapers. Most indictments are never heard of except around the court house, but it is very important to the defendant that twelve people should not hear this kind of thing. He would like a trial on what he did and not on what the district attorney says is his name.

MR. DEAN: I think that would be surplusage.

MR. YOUNGQUIST: I doubt, Mr. Chairman, that that is a sufficiently widespread evil to justify saying anything about it in the rule.

THE CHAIRMAN: Couldn't that be covered by a note?

MR. MEDALIE: All right, a note could do it.

MR. HOLTZOFF: I think that evil is limited to the Southern District of New York.

MR. MEDALIE: Is it?

MR. HOLTZOFF: Yes.

MR. MEDALIE: It is most widespread. A young district attorney who does not get a chance to throw in an alias here and there is a bitterly disappointed person.

THE CHAIRMAN: All right. Someone had a suggestion on 8(a).

MR. HOLTZOFF: I move that we strike out from lines 3 and 4 the words "in a separate count for each offense." Now this really is a substantive change.

My point in making this motion is this, that if we leave out those words we would abolish all the abstruse learning that has accumulated through the years on the question of duplicity. Whether you can set forth two offenses in the same count, or whether you must have them in separate counts, - it is really needless so far as the protection of the defendant is concerned; but in years past the books have been full of it on the question of ~~deficiency~~ duplicity. It is immaterial, I think, whether you join offenses in the same count or whether you set them forth in separate counts.

MR. WAITE: If we merely strike out the words "in a separate count," that does not mean that they may be put in a single count. I would just leave the matter open.

MR. HOLTZOFF: I would be willing to go still further and provide that they may be put in a single count.

MR. WAITE: I do not know a blessed thing about this. I haven't any choice, but I do not think that would solve it.

MR. HOLTZOFF: I think it would. It would then read: "Two or more offenses may be charged in the same indictment or information if the offenses charged," etc.

MR. WAITE: Then the court would have to fight it

out as to whether it would be in separate counts or not. I think we ought to say it one way or the other.

MR. HOLTZOFF: But my point is this: suppose they are not in separate counts; suppose there is a question as to whether they are separate offenses; then if you have this requirement, you have got an old-time controversy as to whether your indictment is duplicitous somehow - something that does not concern the defendant's real legitimate interest, but may be getting him involved in a technicality. What difference does it make whether they are in a separate count or not?

MR. ROBINSON: I might say that Mr. Holtzoff raised this point with me several months ago when I sent him the rule. As you know, our method of working in Washington is to send copies of the rules to all who are actively interested in them; and copies were sent to Mr. Dession and Mr. Holtzoff; and Mr. Holtzoff immediately raised that point. This was, I suppose, about two or three months ago.

Now I have made a very careful examination of all the cases that I think are the leading cases on the subject - that is a rather broad statement but I really made it with the assistance of a research assistant - and it seems to me that the words are not necessary. I would be glad to give you a brief on that, and I would

like to refer you to the notes which are quite extensive and cite the authorities. Mr. Holtzoff was under the impression, he told me, at our previous meeting - you correct me, Alex, if I am wrong --

MR. HOLTZOFF: I just want to say before you proceed that Tentative Draft No. 5 did not have these words in.

MR. ROBINSON: That is right.

MR. HOLTZOFF: These words were put in --

MR. MEDALIE: Which words?

MR. HOLTZOFF: "in a separate count for each offense."

MR. ROBINSON: That is what I was leading to, Alex. You called attention to it and said that by leaving them out you thought the Committee abolished the defense of duplicity. I did not think it did anything of the kind. I thought it would be very poor to throw into the same count rape, migratory birds, arson, and things like that.

MR. McLELLAN: Didn't you find that there was responsible authority to the effect that if two single offenses were charged in the same indictment, that the indictment was bad?

MR. ROBINSON: Yes. In the notes you will find an abundance of authority.

MR. HOLTZOFF: That is what I want to do away with. I want to do away with the rule.

MR. McLELLAN: Well, I do not want a man to be put on trial on one count of an indictment that contains numerous offenses. When the jury finds him guilty, what do they find him guilty of?

MR. WAITE: We have got to say one thing or the other, Mr. Chairman. Either we have got to say that they may both be in one count or they must be in separate counts. It seems to me the only way we can say it is that they be in separate counts.

MR. McLELLAN: Of course, Mr. Waite, I agree with you that if you take out the words "in a separate count for each offense," the law still is that you cannot put two offenses in the same count.

MR. WAITE: But we are drawing pretty liberal rules, Judge, so no United States attorney can throw three or four offenses into one count.

THE CHAIRMAN: We have the question.

MR. WAITE: I move that (a) be adopted as is.

MR. DESSION: Before we vote, let me point out one practical difficulty about Alex's suggestion. If you adopt that you might not be able to avoid charging more offenses, if you wanted to. You might need to mention overt acts to define your conspiracy.

MR. HOLTZOFF: You could say, in the process of carrying out the conspiracy the following overt acts were committed. That would be clearly one offense.

MR. DESSION: I am not so sure.

THE CHAIRMAN: I understand the motion is made and seconded to adopt Rule 8(a) as set forth. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, No."

(No response.)

MR. YOUNGQUIST: Mr. Chairman, I call attention to the fact that Alex overlooked the word "charged" in line 2, which I think is a perfect example of the propriety of its use.

MR. ROBINSON: That is right.

THE CHAIRMAN: All right. Are there any suggestions on Rule 8(b)?

MR. WECHSLER: Mr. Chairman, I have a question I would like to put. Is there any provision that authorizes the court to provide for separate trial?

MR. HOLTZOFF: Yes.

MR. WECHSLER: I know there is where there are several defendants, but where there is one defendant, to split an indictment into many counts?

MR. HOLTZOFF: Yes.

MR. WECHSLER: Where is that?

MR. ROBINSON: 13 and 14. I suppose 14 is what you are referring to.

THE CHAIRMAN: Are there any suggestions on 8(b)?

MR. HOLTZOFF: One verbal suggestion. In line 13, strike out the last word on that line, the word "a" and substitute the words "one or more."

MR. ROBINSON: I think that is right. That is in line with our action yesterday.

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

MR. SETH: What was that?

THE CHAIRMAN: "one or more" at the end of line 13 in place of "a".

If there are no further suggestions, all in favor of 8(b) as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. SEASONGOOD: In the Court's Memorandum they refer to Rule 8. Has there been any study of the abuse of indictments drawn with an excessive number of counts? Have we sufficiently considered their complaint or sugges-

tion?

MR. ROBINSON: We made a careful study of that. I think that is mentioned in the notes, Mr. Seasongood, the reporter's memorandum.

MR. SEASONGOOD: Well, if you are satisfied that we have given it sufficient attention, that is all I am asking.

MR. WECHSLER: Well, my question was motivated by the same thing, but I think Rule 13 meets it.

MR. SEASONGOOD: All right.

MR. WECHSLER: I have a suggestion on (b), to strike out "in any manner" and everything thereafter on lines 14 and 15.

MR. YOUNGQUIST: Which rule?

THE CHAIRMAN: In Rule 8(b).

MR. CRANE: What are you striking out?

MR. WECHSLER: "in any manner indicating their respective participation in the offense or offenses."

MR. ROBINSON: I would like to oppose that suggestion very strongly. It will take quite a bit of time to go through the matter stated in the notes. All the reasons I would state are set forth in the note in the reporter's memorandum; and I would like to ask Mr. Wechsler to look into that and then speak to me about it. I would like to save the Committee the time, and it will take

at least a half hour to go into that; and if the matter can be taken up this afternoon I would be glad to go into it. We have already passed this, haven't we?

MR. HOLTZOFF: Yes. Mr. Chairman, before you go into 9(a) I want to make a comment on the note in Rule 8. Page 10 of Rule 8, summarizes the present state of Federal authority. I think it is unwise for us to have that because then someone is likely to cite our Committee as an authority for what the present law is. The Civil Rules Committee has never done it, and we have avoided this sort of thing in other notes.

MR. MEDALIE: I think this is one subject on which you had better inform the bar.

MR. CRANE: What?

MR. MEDALIE: This is one subject on which the bar had better be informed. They are starting off, most of them, cold, on a subject they do not understand; and we are going to have a lot of trouble explaining this unless we tell them what the cases have held. It is a very troublesome subject and most prosecutors and defense counsel do not know the law.

MR. HOLTZOFF: I know the Civil Rules Committee was very careful in its note not to put in authority as to what the law is.

MR. MEDALIE: Well, that is another point. I

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won't press it.

THE CHAIRMAN: 9(a), gentlemen. Are there any suggestions?

MR. HOLTZOFF: In line 7, the sentence commencing on that line, I have a suggestion: ~~couldn't~~ undir that sentence ~~be~~ "It is discretionary with the clerk to issue more than one warrant or summons." I feel it should be made mandatory on the clerk to do so if the United States attorney wants more than one. Therefore I move to strike out the words "He may" and to substitute therefor the following: "Upon like request or direction he shall". In other words, if the United States attorney --

MR. ROBINSON: Excuse me. What line is that?

MR. HOLTZOFF: Line 7. Strike out the words "He may" and insert in lieu thereof the following: "Upon like request or direction he shall".

MR. ROBINSON: I think that is satisfactory.

MR. McLELLAN: Do you want to change "United States attorney" to "attorney for the Government"?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I wonder whether in the same sentence it was intended to say merely that he shall issue more than one warrant or summons for the same defendant. I thought we had discussed the matter of issuing multiple warrants when there was more than one defendant.

MR. HOLTZOFF: I think both situations apply.

MR. YOUNGQUIST: Wasn't it intended to cover both cases?

MR. ROBINSON: I thought so.

MR. YOUNGQUIST: Then why hadn't we better say "issue more than one warrant or summons upon the same indictment or information"?

MR. ROBINSON: Would that be understood by clerks and United States attorneys? It is a change in the practice, I think, for a good many of them.

MR. YOUNGQUIST: But here we have it only for the same defendant. Suppose we have two different defendants and want two separate warrants? This does not cover it.

MR. ROBINSON: Well, there are other provisions that do, aren't there?

MR. BURNS: You have got it in the third line, "a warrant for the arrest of each defendant charged."

MR. YOUNGQUIST: Yes, that is right. I overlooked that.

MR. LONGSDORF: Line 3, Mr. Chairman, the last word "shall". If that is mandatory he shall issue a bench warrant although the defendant is already in custody.

MR. ROBINSON: We thought we had that expressed as carefully as it could be done.

MR. YOUNGQUIST: I think that is a good sugges-

tion. I move that the word "charged" be stricken and the words "not in custody" substituted.

MR. ROBINSON: I am afraid we are leaving out something, Aaron. There is an awful lot of background on this section.

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: What could you leave out? You are simply adding something.

MR. ROBINSON: That question is raised, too, in the memorandum. We spent a good many hours trying to check on that point.

MR. CRANE: Who is going to ask for a warrant when the man is in jail?

MR. YOUNGQUIST: It is made mandatory.

MR. CRANE: I know, but he is in jail.

MR. ROBINSON: We can go into the Court's Memorandum on it, if you wish.

MR. CRANE: Of course, if the man is not in jail you get a warrant; if he is in jail you do not need it. He is there.

MR. ROBINSON: We spent so many hours on that one sentence, I sort of hate to start all over again.

MR. MEDALIE: I hate to raise any point, but the fact is that when all but professional criminals are indicted, the district attorney calls someone and says:

"Come in a week from Wednesday," or something to that effect. You would not like to see those people arrested; the district attorney does not want to see them arrested; the F.B.I. does not want them arrested. Nobody seems interested in arresting them. They come in and they are told "Your bail is going to be $2500," or "$12,500" or whatever it may be.

MR. YOUNGQUIST: Isn't that taken care of by the first sentence, Judge, that he issues a warrant unless directed otherwise by the court?

MR. MEDALIE: Yes. All right. I am satisfied. As a matter of fact, we can put through all the rules we want to, but the district attorney will always do what he always did.

MR. CRANE: We have got to allow a little leeway for ordinary judgment.

MR. YOUNGQUIST: In the last sentence, last line, I think we should substitute "shall" for "may" to conform with what we did in the corresponding section.

MR. SEASONGOOD: The same with section 4(a), line 12.

THE CHAIRMAN: Have you all the amendments before you? Are you ready for the motion? All those in favor of 9(a) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. 9(b) (1).

MR. HOLTZOFF: I move its adoption, Mr.Chairman.

MR. CRANE: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. 9(b) (2).

MR. YOUNGQUIST: We have the same question in the form of acknowledgment of service that we struck out in connection with commissioner's proceedings.

THE CHAIRMAN: You move to strike it here?

MR. YOUNGQUIST: Yes, the word "and", on line 20, to the end of the sentence.

MR. ROBINSON: Seconded.

THE CHAIRMAN: That is seconded by the reporter. All those in favor of 9(b) (2) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. ROBINSON: There we need to correct the striking out of the corporation provision, as done before, or,

rather, we will need to insert it here. We cannot incorporate by reference as to getting the corporation into the district court by a summons; so it will have to be written in here rather than --

MR. McLELLAN: Pardon me. Mr. Chairman, have we just passed (2)?

THE CHAIRMAN: Yes. Any question?

MR. McLELLAN: Well, I suppose it is foolish - "except that it shall summon the defendant." I think this is probably silly. Are you going to summon him and arrest him, too?

MR. CRANE: This relates only to the summons.

MR. McLELLAN: I know. "The summons shall be in the same form as the warrant." The warrant provides for an arrest.

MR. ROBINSON: We did make a comparison with the form of a summons and the form of a warrant to check each word on that, and I believe this does not provide for the arrest of a corporation.

MR. WECHSLER: I see the Judge's point. Suppose it were changed to read: "The summons shall summon the defendant to appear before the court at a stated time and place, otherwise it shall be in the same form as the warrant."

MR. McLELLAN: Yes, I think that is what it ought to be.

THE CHAIRMAN: That would then read: "The summons shall summon the defendant to appear before the court at a stated time and place" --

MR. HOLTZOFF: "otherwise it shall be in the same form as the warrant."

MR. CRANE: Why do you need to put that in?

MR. ROBINSON: Because you are leaving out everything; you do not have anything left for your summons. You have stripped it down to your chassis and thrown your chassis in the river.

MR. MEDALIE: Well, the only other thing you want it to say is that it shall describe the offense.

MR. CRANE: Isn't this all right as it is? Except the summons shall summon the defendant to appear. It would be the same form as a warrant, except instead of an arrest it shall summon him to appear.

MR. BURNS: I think the contrast between a summons and a warrant is so clear that we do not have to go into it.

MR. ROBINSON: Yes.

THE CHAIRMAN: Have we covered (c) (1)? I think we have, have we not?

MR. YOUNGQUIST: That is to be revised.

MR. HOLTZOFF: I think it requires a provision.

MR. ROBINSON: Yes, because the provision for

summoning the corporation was stricken out in Rule 2 when we referred to it.

THE CHAIRMAN: Let us let it go and come back to it. 9(c) (2).

MR. HOLTZOFF: Mr. Chairman, we adopted the motion yesterday to change the --

MR. MEDALIE: Excuse me a moment before you get to that. Once a person is indicted, do you want to summon him by leaving a copy with a person of suitable age or discretion?

MR. ROBINSON: The Committee has voted on that before.

MR. MEDALIE: That is all right in proceedings before a commissioner. Now you are dealing with something else.

MR. ROBINSON: Couldn't that be left in the discretion of the court, the United States attorney?

MR. SEASONGOOD: I think so.

MR. MEDALIE: I won't press it. All right.

THE CHAIRMAN: Any question on 9(c) (2)?

MR. HOLTZOFF: On 9(c)(2), Mr. Chairman, we adopted a motion yesterday to change the provision as to returns of a warrant issued by the commissioner, and the same point is applicable to returns of warrants issued on indictment or information, namely, that there should not

be a requirement that warrants must be returned within a reasonable time if the defendant is not --

THE CHAIRMAN: Well, all right, make your motion addressed to the rule.

MR. HOLTZOFF: Well, I move that Rule 9(c) (2) be revised in the same manner as the corresponding rule relating to warrants before commissioners. I was directed to redraft the rule in accordance with the motion, and I have a draft ready whenever the Committee is ready to take it up.

THE CHAIRMAN: Shall we take it up now so we can pass this at the same time?

MR. ROBINSON: Take it up now.

MR. HOLTZOFF: What I have here would be a substitute for Rule 4(c) (4), the last paragraph of Rule 4. This would be a substitute for that whole paragraph:

"The officer executing a warrant shall make a return thereof to the commissioner or other officer before whom the prisoner is brought pursuant to Rule 5(a). At the direction of the United States attorney any unexecuted warrant shall be returned to the commissioner by whom it is issued or cancelled by the commissioner. The officer to whom a summons is delivered for service shall make a return thereof prior to the return day to the commissioner before

whom the summons is returnable."

That takes care of Mr. Medalie's point that there should be a return of the summons so that the commissioner would know whether or not the defendant may be expected to appear. But it takes care also of the other point, namely, that it is not mandatory to return unexecuted warrants unless the United States attorney wants them returned.

MR. DEAN: I second the motion.

MR. SETH: Shouldn't you retain the last sentence of the original form?

MR. HOLTZOFF: If we do not require a return of the warrant it remains outstanding and we do not need that last sentence it seems to me.

MR. ROBINSON: I do not see why we don't. I am inclined to agree with Mr. Seth.

MR. SETH: I think so. That is a very important provision.

MR. HOLTZOFF: I have no objection to the last sentence being in. The one thing I did consider important is not to require the return of an unexecuted warrant.

MR. ROBINSON: What are you doing in connection with the F.B.I. request that was directed to you by a representative of that bureau in regard to taking care of the non est warrant?

MR. HOLTZOFF: That refers to removal proceedings, and I think we could take that up in connection with the removal rule.

MR. ROBINSON: No, I do not think we can. I think that will have to be worked in here, and that is the importance of this provision as it is; it takes care of removal proceedings.

MR. SETH: I move that Mr. Holtzoff's motion be amended by including that last sentence.

MR. HOLTZOFF: I accept the amendment.

MR. ROBINSON: I would like to see a draft of that. Would you mind having it written out so we can see it before us?

MR. SEASONGOOD: I would like to see it. For instance, you said "to be delivered to the officer," didn't you?

MR. HOLTZOFF: Commissioner or officer.

MR. SEASONGOOD: Well, you have a provision for summonses - shall deliver to the marshal or other person authorized by law to execute it or serve it. Now that is not sufficiently --

THE CHAIRMAN: Well, shall we have it written out? That will save time. Now that brings us to Rule 10, which is the other volume. Suppose we take a five-minute recess. (Short recess.)

12n. THE CHAIRMAN: All right, gentlemen. Rule 10. All those in favor of it say "Aye"; opposed, "No." Carried.

Is there anybody who has any suggestion on --

MR. DEAN: Shouldn't "shall be" be used instead of "is" on line 4?

MR. HOLTZOFF: I think "is" is better because this is a descriptive rule.

MR. DEAN: I do not much care. I do not make must of a point. I just raise the question.

MR. LONGSDORF: I had a note here. "At any time." Does that mean "forthwith"? Line 5 "at any time," the last words.

THE CHAIRMAN: The first sentence seems to me like "is" but the second one, I have a feeling, calls for "shall be".

MR. ROBINSON: We carried "shall" through for two or three reasons.

MR. HOLTZOFF: Leave "is" in the first sentence and change the second to "shall be".

MR. McLELLAN: What is that "the arraignment shall be conducted"?

MR. HOLTZOFF: Yes.

MR. McLELLAN: Is that "open court" when the judge gets up and goes into another room and says "Open

court"?

MR. HOLTZOFF: I do not think "open court" means courtroom necessarily.

MR. MEDALIE: I move to strike out the words in line 5, "at any time."

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: Those are in there for this reason, George: we have had letters from Judge Schwellenbach of Washington, and other judges and district attorneys, raising the question, and I think the Court's Memorandum too indicates a question with regard to getting a copy of the indictment or information to a defendant before he is brought into court on arraignment date, and the Committee, not acting wisely, I think, has rejected a great deal of the extensive provisions for that. These three words are about all that is left of some three or four pages that accompanied former drafts, but I wonder whether you do not need something to indicate to a defendant that he can have a copy of the indictment or informatinn at the time when he is arrested or at some time other than just when he is brought into court? That is about the way it works out in a great many of the district courts now, and he does not feel like asking for it.

MR. GLUECK: Wouldn't he have it then?

MR. ROBINSON: No; where could he get it?

MR. GLUECK: No, I meant with the words you have left in, "upon request made to the court." Doesn't that cover that contingency?

MR. ROBINSON: Theoretically so, but does it actually? Shouldn't a defendant be exactly informed by these three brief words?

I would like to know George's reason for striking them out. I do not think the burden of proof is on me to keep them in so much as on the person moving to strike them out.

MR. MEDALIE: Supposing he is negotiating for his return from another district?

MR. ROBINSON: Why shouldn't he be told to ask for it at any time before arraignment or immediately after he learns of the indictment?

MR. GLUECK: He should.

MR. HOLTZOFF: Does that mean at any time of the day or night? I think that is an awfully broad statement.

MR. GLUECK: At any stage of the proceedings.

MR. LONGSDORF: Why not transpose those words "at any time" to follow the word "request"? It is the time of the request, not the time of the delivery.

MR. ROBINSON: All right. Still that does not get it to him.

MR. SEASONGOOD: I want to raise the question whether he should not receive a copy of the indictment in all cases, and if you should not say who reads the indictment to him. If you say "arraigned by the clerk reading the indictment," all right. But if the defendant requests that the substance be stated to him, who is going to sstate the substance, and how do you know he states the substance correctly? What is the harm in giving him, the defendant, a copy of his indictment and letting him see what it is?

MR. HOLTZOFF: May I call your attention to this. You take an ordinary plea day where there might be forty or fifty defendants brought up to plead. Now, if you had to read the indictment in each case, in the first place it would take several days to complete one day's work; in the second place, it would not help a defendant, because the average defendant would not grasp the verbose language of an indictment. In some courts the clerk states the charge; in others, the United States attorney. I think you ought to leave that to the local practices. I think sometimes United States attorneys do better than the clerks. But anyway, I think that ought not to be covered. That is a matter of local variations.

MR. SEASONGOOD: Well, wouldn't it be at least fair to say that it should be read to him unless he con-

sents that the substance be stated?

MR. ROBINSON: Murray, you remember when we were discussing that before, somebody brought up a case of a defendant who wished to be obstreperous, and there was an indictment many pages long, and he insisted on it being read, so that the courtroom had to mark time for an hour or two, merely because of a defendant's obstreperousness.

MR. SEASONGOOD: They are not so busy. They have time. That is, I understand, the practice that Judge McLellan follows.

MR. McLELLAN: Yes, "Do you waive the reading of the indictment?" he says "No," you read it to him. With us, he always waives.

MR. YOUNGQUIST: Mr. Chairman, I suggested at a previous meeting, and I renew the suggestion, that the objections be met by merely providing that the defendant be given a copy of the indictment at the time of arraignment.

MR. SEASONGOOD: That is right.

MR. YOUNGQUIST: That was the practice in our State, and he ought to have a copy of the indictment. He is going to have it before he is through. If there should be cases where there is a large group of defendants, officers of corporations, where they do not need all to have

copies, then provision can be made for waiving a right to a copy.

MR. HOLTZOFF: When you have a lot of run-of-the-mine cases - you might have thirty, forty or fifty defendants on one pleading - there it is not the custom to hand each a copy of the indictment, and I do not think they would want copies of the indictment.

MR. YOUNGQUIST: They can waive it. Provide for a waiver. "Shall be furnished a copy of the indictment unless he waives it."

MR. ROBINSON: But you said at the time of the arraignment.

MR. YOUNGQUIST: Yes.

MR. ROBINSON: And you state that with full recognition of what is said at page 5 of the reporter's memorandum; and we have the Supreme Court Memorandum in which the court says, "Should there be a lapse of time between the reading of the indictment and the plea, unless the defendant announce he is ready to proceed" - there he has received a copy of the indictment in advance of trial.

MR. YOUNGQUIST: And in advance of arraignment.

MR. ROBINSON: Apparently so, and that is the way we took it.

MR. YOUNGQUIST: Of course, the court will give time to plead upon request. I do not think that we

should direct the court.

MR. ROBINSON: There seems to be some impression that some defendants would not know about requesting it.

MR. YOUNGQUIST: That is my suggestion. I haven't anything more to say about it.

MR. SEASONGOOD: The American Law Institute code requires the defendant should have the benefit of counsel before being required to plead to a charge of felony.

MR. ROBINSON: Yes.

MR. DEAN: Don't we provide for that?

MR. ROBINSON: That is our counsel rule, in the presence of counsel or something of the kind.

MR. DEAN: Plea to a felony.

MR. HOLTZOFF: How do you propose to change this, Aaron?

THE CHAIRMAN: Yes, may we get a specific motion?

MR. SEASONGOOD: I was thinking about inserting in line 1 after "by", "is arraigned by the clerk reading to him the indictment or information," and then, line 2, after the word "or", "if the defendant waives," so it would read, "A defendant is arraigned by the clerk reading to him the indictment or information or, if the defendant waives, stating to him the substance thereof, and by calling on him to plead thereto."

MR. HOLTZOFF: Do you want to prohibit having the United States attorney read the indictment, as they do in some districts, or make a charge?

MR. ROBINSON: You make it reversible error not to.

MR. HOLTZOFF: I think I would not change it, because, as a matter of fact, the average United States attorney knows more about the charge and he can explain it better than the clerk can.

MR. SEASONGOOD: Does he explain it all right?

MR. HOLTZOFF: Yes, I have seen it done very well.

MR. SEASONGOOD: Have you seen it done badly?

MR. HOLTZOFF: No, I have seen it done badly by the clerk, but the clerk is more apt to do it badly.

MR. SEASONGOOD: I defer to your knowledge on the subject.

THE CHAIRMAN: You have heard the motion by Mr. Seasongood.

MR. SEASONGOOD: Leave out "by the clerk" then. Strike that out.

THE CHAIRMAN: Mr. Seasongood withdraws the amendment on line 1, the words "by the clerk" and his motion now relates to line 2. All those in favor of the amendment --

MR. WAITE: Just a moment, Mr. Chairman. Would

that mean that if we adopt Mr. Seasongood's motion that there would be no provision for his having a copy before he is called upon to plead?

MR. SEASONGOOD: I would like that in, too.

MR. DEAN: Except as provided in the third sentence of the rule.

THE CHAIRMAN: We are merely dealing with that one sentence.

MR. YOUNGQUIST: That would require a reading in every case unless the defendant waives the reading in full.

THE CHAIRMAN: No; that was your practice, wasn't it?

MR. McLELLAN: Yes, the clerk gets up, and when the man gets up to be arraigned, and the clerk says "So-and-so, do you waive the reading of the indictment?" invariably he does. Then the clerk says to him, "This charges you with a violation of a certain statute which makes it an offense to unlawfully transport a motor car that has been stolen," giving him a fairly good idea of what it is, and then he pleads.

MR. WAITE: Mr. Chairman, my question, I am afraid, is not answered. I strongly think that every man ought to have a copy of the indictment before he is called upon to plead to the charge, and I cannot vote for the motion if it does not include that; but if it does

include that, then I am for the motion.

MR. McLELLAN: I was not speaking against that. I was simply stating what the practice was.

MR. WAITE: I am not sure what the motion is.

THE CHAIRMAN: Doesn t the last sentence give him his indictment?

MR. WAITE: No, it says he shall get it upon request made to the clerk. A good many of those birds do not know how to request.

MR. SEASONGOOD: They do not know they can request.

MR. McLELLAN: I don't want to go overboard on this but I think it is of some importance. What I have in mind probably violates all your notions of what should be done, but why shouldn't a copy of the indictment be handed to the defendant at the time that either a warrant or a summons is served upon him? Then you know he gets it right at the very beginning.

MR. ROBINSON: The objection made when that point came up before was that some of these indictments are very long, and the anti-trust cases were mentioned.

MR. McLELLAN: All the more reason he should have a chance to know what is in it.

MR. DESSION: In that case you always give them to them anyway. That would not be any controversy.

MR. ROBINSON: The further suggestion was made that the defendant might not want it; you would be pushing it at him when he really did not want to have it.

MR. YOUNGQUIST: There might be this difficulty with that, certain defendants may be fugitives from justice and the warrant does not name the fugitive. To furnish a copy of the indictment or the information would disclose the fact that they have been indicted and make it more difficult or impossible to apprehend them. It seems, wouldn't it, to be enough if a copy of the indictment is supplied to the defendant at the time of arraignment? He always asks time to plead, if he is going to do anything about it.

MR. BURNS: Does anybody know of any abuses?

THE CHAIRMAN: No.

MR. BURNS: Complaints that the present system does not work well?

MR. HOLTZOFF: No.

MR. ROBINSON: There are these requests that come to the Committee from some very high sources and, in addition, I have seen the sytem work in the Federal court myself and I would not consider it a proceeding conducive to a defendant getting his defense in order. I have seen some forty or fifty defendants come into a Federal courtroom and all of them called on for pleas --

MR. CRANE: If you will pardon me, I think all we need to do is state the element of right because the practice takes care of itself.

MR. ROBINSON: Well, the rule has it.

MR. CRANE: No man is going to plead to any charge he doesn't understand, and I cannot imagine anybody stating it to him in a wrong way, and I think if we had it here that when he is arraigned he should be told he has a right to have a copy of the indictment, if he wants it, and he gets it, he will plead not guilty, if he doesn't understand it; and, if so, and it is only when he thinks if over himself or talks to somebody, that he comes in and pleads guilty, he certainly should have a copy of the indictment when he wants it. I cannot imagine anybody being refused that.

MR. ROBINSON: Do you want the rule as it is?

MR. CRANE: I would support it as it is.

MR. WAITE: Is there a motion before us? If not, I would like to make one.

THE CHAIRMAN: I think there is no motion seconded.

MR. WAITE: I should like to move that Rule 10 be amended to read "A copy of the indictment or information shall be delivered to the defendant before he is called upon to plead." Then "a defendant is arraigned by reading

to him the indictment or information," etc.

MR. LONGSDORF: Mr. Chairman, I would like to call attention in that connection, bearing on that motion, to the Committee's annotations on Rule 10, at page 3, wherein it is stated that this rule will supersede Title 18, section 562, and supersede completely Title 18, section 562a, which contains the provision for so many days after delivery of the copy before trial.

Now if we are going to entirely supersede those statutes, I think we ought to consider that part of them.

What do we do with the two or three days provided in the statutes? What becomes of them?

MR. ROBINSON: The rule, as you know now, Mr. Longsdorf, is Title 18, section 562, and Title 18, section 562a.

MR. LONGSDORF: That relates to time of trial, not to time of arraignment.

MR. ROBINSON: Yes, and the idea that was sought to be brought about here was, as we usually try to do, to bring about uniformity in statutes --

MR. LONGSDORF: Yes.

MR. ROBINSON: -- that are needlessly diffuse or self-contradictory, and this is a summary of them, as they are laid down there, (1), (2), and (3).

MR. LONGSDORF: I don't mean superseding the statutes, but I want to know if we supersede that part of them.

MR. ROBINSON: It would seem the last sentence already takes care of that.

THE CHAIRMAN: You have Mr. Waite's motion. Is there any further discussion? If not, all those in favor of the motion, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. We will have a show of hands. All those in favor, raise hands.

MR. YOUNGQUIST: There are two or three out.

THE CHAIRMAN: Seven. Opposed, 5. The motion is carried.

MR. McLELLAN: Then what we have done is, Mr. Chairman, to vote that on arraignment day every indictment has to be read in full.

THE CHAIRMAN: No, no, that he gets a copy of the indictment.

MR. McLELLAN: Oh, I beg your pardon.

MR. HOLTZOFF: How about these Mexicans down on the border?

MR. McLELLAN: I am going to rely on my own memory

in this instance as to what Mr. Waite said. Didn't you say they should be read to them?

MR. WAITE: My first revision was that a copy of the indictment should be furnished him before he was called upon to plead.

MR. McLELLAN: Yes, and then?

MR. WAITE: And then the rest as it stands here.

MR. McLELLAN: Didn't you say it should be read to him, when you stated the motion?

MR. WAITE: Yes, because I put in as my second sentence the first sentence.

MR. BURNS: Mr. Waite, have we really considered the possible practical difficulties, just from the viewpoint of typing and clerical work for a United States attorney to have to give to every defendant, whether he wants it or not, a copy of the indictment? After all, what we should do is provide clearly what his rights are, and I think we have done that by the last sentence. He can get it any time he asks for it.

MR. HOLTZOFF: In New Mexico and Texas we have a lot of cases under the immigration laws, unlawful entry into the United States, and the defendants are all Mexicans. They cannot read and write any language, certainly not English. There will be fifty or a hundred of those cases in one day. Now they are informed by the clerk or the

United States attorney, as the case may be, what this charge is. To make it mandatory that a copy of the indictment be handed to each of them is futile. It just wastes time.

THE CHAIRMAN: Why, with a mimeographed paper with the only difference being the defendant's name on it? That is the simplicity of it, Alex.

MR. WAITE: Surely you are not suggesting that any question arises?

MR. McLELLAN: I would like to have that motion read, so I understand it.

THE CHAIRMAN: Will you read Mr. Waite's motion?

MR. YOUNGQUIST: I have it here. I took it down in shorthand. It was to insert at the beginning of rule 10 this language, "A copy of the indictment or information shall be delivered to the defendant before he is called upon to plead," and the rest of the rule stands as it is.

MR. BURNS: Except the last sentence.

MR. YOUNGQUIST: Yes, that is right.

MR. LONGSDORF: "Before he is called upon to plead." A considerable time before? How long before?

MR. YOUNGQUIST: This says "before".

MR. LONGSDORF: Well, "before" can be a long time.

MR. BURNS: Say he wanted it two weeks before he is going to be arraigned and the rule can be complied with

by giving it to him ten minutes before he is arraigned.

THE CHAIRMAN: All that will accomplish will be that the man will have two weeks when he comes into court. The delivery of the copy then will only delay the proceedings two weeks.

MR. BURNS: Then the defendant is between Mr. Waite's amendment and this present rule, that there is an obligation on the district attorney to furnish it.

THE CHAIRMAN: In every instance.

MR. HOLTZOFF: Without request.

MR. BURNS: Can that be waived?

MR. HOLTZOFF: Yes, that can be waived, I suppose.

MR. GLUECK: And there is another difference.

MR. BURNS: Shouldn't we say so?

MR. HOLTZOFF: I think so.

MR. GLUECK: There is another difference in connection with this present rule. It says "At any time." That is the real difference.

THE CHAIRMAN: As I recall it, we voted on that, didn't we?

MR. McLELLAN: We did.

MR. SEASONGOOD: I move a reconsideration of it along the lines --

MR. DEAN: Seconded.

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MR. SEASONGOOD: Along the lines Mr. Burns suggested, if he asks for it, give it to him.

MR. McLELLAN: I was sidetracked on the suggestion that it should be read to him unless he waived it.

MR. WAITE: I would not object to the insertion of the provision that "a copy of the indictment or information shall be delivered to the defendant before he is called upon to plead, unless he waives such delivery." I see no objection to that.

MR. McLELLAN: Delivered to him and read to him.

MR. WAITE: Then the next sentence has to do with reading it to him unless he waives it.

THE CHAIRMAN: First you give him the document, unless he waives it.

MR. WAITE: Yes.

THE CHAIRMAN: Secondly, you read it to him unless he waives it. What more can you do for the man?

MR. SEASONGOOD: Nothing.

MR. McLELLAN: If you do that, nothing.

THE CHAIRMAN: Isn't that what we have agreed to?

MR. SEASONGOOD: No.

MR. McLELLAN: We haven't in this rule given him the right to have it read to him.

MR. ROBINSON: Or stated to him.

MR. McLELLAN: Yes; we ought to give him a right to have it read to him after he waives it.

MR. SEASONGOOD: That was my motion, to insert at line 2 --

THE CHAIRMAN: Maybe we had better go back and make haste a little more slowly.

MR. SEASONGOOD: I do not know if it had a second, but my motion was to insert in line 2 "or if the defendant consents, by stating to him," that is, have it read to him, or if he consents, that the substance of it be stated.

THE CHAIRMAN: Maybe we should go back and consider this matter over again. We first voted on Mr. Waite's motion, which is, in effect, to give him a copy of the indictment before he is arraigned, unless he waives it.

MR. YOUNGQUIST: Before he is called upon to plead.

THE CHAIRMAN: Before he is called upon to plead, unless he waives it.

MR. SETH: Will you accept a substitute, "to be read, if he requests it".

MR. WAITE: No.

MR. SETH: I am afraid you are raising a jurisdictional question.

MR. YOUNGQUIST: The waiver will take care of

jurisdiction.

MR. HOLTZOFF: Yes, but how do you prove the waiver? We get so many habeas corpus proceedings, trying to review what happened at a trial five years ago, for example. How would you prove the waiver?

Now I am still thinking about the case of those hordes of Mexicans that are arrayed in the Federal court along the Texas border and New Mexico border.

MR. WAITE: They do not even know enough to ask for an indictment, and it is particularly important they should be given it without having to ask for it.

MR. HOLTZOFF: No; they want to be sent to jail. They come over in order to be sent to the prison farm.

MR. WAITE: That is silly, to say in one breath that a man ought to ask for it and in the next breath to say because he is too dumb to read it, if he gets it, he is too dumb to ask for it.

MR. ROBINSON: Mr. Chairman, may I say this: I seem to have some faith in what this committee did at the last meeting. This rule in Tentative Draft 6 says just what they say in Tentative Draft 5, after the same points were considered that are being taken up today, and it seems to me you did a fine job in the former draft, and the only thing that has been changed has been because of the Court's Memorandum. Those words were added "at any time" just

to make it clearer that he could get the indictment, or a copy of it, whenever he wanted it.

MR. HOLTZOFF: Suppose he requested it at night - at any time?

MR. ROBINSON: Isn't that silly? Isn't that absurd?

MR. YOUNGQUIST: I call for the question, Mr. Chairman.

MR. DEAN: What is the question?

THE CHAIRMAN: The question is on Mr. Waite's motion which is that the man may have a copy of the indictment before arraignment unless he waives it - in writing?

MR. WAITE: No, we haven't required that, I think.

MR. WECHSLER: I would like to state that, having voted for Mr. Waite's motion, I am going to vote against it now.

MR. DEAN: So do I.

MR. WECHSLER: Because I do not see, when you introduce the waiver point, I do not see that it accomplishes anything.

THE CHAIRMAN: All those in favor of the motion as made by Mr. Waite, say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: All those in favor, raise hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 7 opposed.)

MR. WAITE: In view of what Mr. Wechsler just said, I would like to move that substantial requirement and see this rule provide that he shall be given a copy of the indictment or information before he is called upon to plead.

THE CHAIRMAN: Your motion is carried.

MR. WAITE: With the waiver point?

MR. SEASONGOOD: That, I thought, was lost.

THE CHAIRMAN: No, it is carried.

MR. YOUNGQUIST: I thought it was lost.

MR. SEASONGOOD: I think it was lost.

THE CHAIRMAN: Let us call again. Please vote the same as you did before. All those in favor of the motion --

MR. WAITE: This is the one with the waiver in it?

THE CHAIRMAN: Yes. 7. Opposed? 8. Lost.

MR. DEAN: I would suggest one that might satisfy everybody as a new rule.

MR. WAITE: I make my other motion, Mr.Chairman, which I did make before, in view of what Mr. Wechsler said.

He voted against it because of the waiver - that this Rule 10 provide in substance, I am now not putting out the form of the words - that every defendant be given a copy of the information or indictment before he is called upon to plead.

MR. BURNS: Whether he wants it or not?

MR. WECHSLER: May I ask Mr. Waite if he would accept a substitute for that? I go back to the Court's Memorandum and things that have been said here. I would like to see a system under which, when the defendant appeared in court, the judge either read the indictment to him or, if he consented, stated the substance of the charge, told him that he was entitled to have a copy of the indictment, and then the rule provided that he could get it upon request at any time.

My difficulty, in other words, is that unless somebody tells him that he can have it, I do not see that you have really given him anything because, as you put it so well,in the case where it is important, he doesn't know.

I would like to see the judge tell him that he can have it.

MR. WAITE: My rule is that he should be given it without being told that he can have it.

MR. WECHSLER: I know, but my suggested substitute is, perhaps, as a method of reaching the same result, I think, better, because if it is just handed to him, as a

formal matter, if he hasn't a lawyer, it is not going to mean anything to him in a large number of cases.

I would like to see all that responsibility on the judge, to tell him what the charge is, see that he gets the papers that he is entitled to have, and, of course, if he wants time to examine the documents, any civilized judge would give it to him. That, it seems to me, would achieve the result you are after.

THE CHAIRMAN: Doesn't that impose an intolerable burden on the judge? I mean, just as a matter of physical energy.

MR. WECHSLER: What burden does it impose on him, when the defendant stands up?

MR. McLELLAN: Why not make the clerk do it?

MR. SEASONGOOD: Let the clerk read it and the judge tell him, if you want, that he is entitled to it.

MR. WECHSLER: Yes, if course, I accept that.

MR. HOLTZOFF: Does that suggestion mean must be read unless the reading is waived?

MR. WECHSLER: I follow Judge McLellan's suggestion on that.

MR. McLELLAN: And, without knowing it, this comment is suggesting the other thought with reference to the waiver, only require that he know what he is waiving.

MR. WECHSLER: That is right.

MR. MEDALIE: I assume that he knows what he is waiving. The waiving is the giving up of a known right.

MR. McLELLAN: But we have had trouble with that, and the question is, how you can be sure he knew it, and our whole trouble is that there hasn't been any formal way of being sure about that.

MR. MEDALIE: I agree.

MR. McLELLAN: Now, if the responsibility is focused, you get that.

MR. MEDALIE: I agree with all you say.

THE CHAIRMAN: Mr. Wechsler, will you put that in tentative language, so that we can have something to vote on?

MR. WECHSLER: Let us see, if we go to Rule 10, as it is, a defendant is arraigned by reading to him the indictment or information, or, if he consents, by stating to him the substance thereof, by advising him of his right to a copy of the indictment or information, and by calling on him to plead thereto.

MR. GLUECK: Except that the advice is not, technically, a part of the arraignment, is it?

MR. WECHSLER: I would like to make it part of the arraignment.

MR. GLUECK: You want to make it that?

MR. WECHSLER: Yes.

MR. WAITE: As it stands, he is called upon to plead before he had had a copy, even under that. He is told he can have a copy, but then he is immediately called upon to plead.

MR. WECHSLER: Not necessarily.

MR. WAITE: I do not think I would accept that.

MR. WECHSLER: I guess that is a weakness. Suppose we put it this way: let the first sentence stand as it is and change the second sentence to "The defendant shall be advised before he is called upon to plead that he may have a copy of the indictment or information."

MR. WAITE: Why isn't it easier to give him a copy than advise him?

MR. WECHSLER: I want to make the point that there are some fellows who don't want it.

MR. WAITE: It is rather appalling to me that we should suggest that when a man's life or liberty is in danger, the Government should be niggardly about the stenographic costs of getting up a copy of the indictment to give to him. I think that is penny wisdom that is perfectly astonishing in view of the amount of money that the Government is spending to have us here.

MR. HOLTZOFF: Mr. Waite, I think ninety per cent of the defendants today do not get copies of the indict-

ments; they don't ask for them, they don't want them.

MR. WAITE: If ninety per cent of them do not get copies of the indictment, they are pleading to something they have never seen? I think that is an absurdity.

MR. HOLTZOFF: No, because they are more anxious to know what the indictment contains in substance, and most of them can learn much better from an oral summary than they could by reading the indictment.

MR. WAITE: You are not telling me that a man can listen to an indictment read and plead --

MR. HOLTZOFF: Oh, no.

MR. WAITE: -- more accurately than he can after sitting down and reading it or having his lawyer read it?

MR. HOLTZOFF: In most cases the indictment is not read. What is done, the man is told "you are charged with transporting liquor from such and such a place, on such and such a date, involving such and such a statute."

MR. WAITE: That would be done, too, but I cannot see the possible objection, except your objection to cost, to giving the paper beforehand.

THE CHAIRMAN: There is no question of the cost. All it means is putting a sheet of carbon in and another piece of paper under it.

MR. YOUNGQUIST: Do I understand the motion to be this, that the first sentence remain as it is; the second

will be changed to read in substance "The defendant shall be advised before he is called upon to plead that he may have a copy of the indictment or information."

MR. WAITE: No, that was not my motion.

MR. YOUNGQUIST: I am speaking of Mr. Wechsler's.

MR. WECHSLER: As a substitute for John's motion, on which he turned me down.

MR. BURKE: Mr. Chairman, I dislike injecting another thought in the matter. I am not concerned with the expense of mimeographed copies, but I am just wondering if a group of forty or fifty people have pleaded, where they are given the option of waiving the right to receive the indictment or demanding it, just what proof you are going to make in later proceedings to indicate the return to those who actually received an indictment. Maybe one of them would come in and file a motion a few months later, saying he had not received it.

MR. BURNS: Then you would have a question of fact.

MR. YOUNGQUIST: Won't the clerk's minutes take care of that?

MR. WAITE: It would show waiver but it would not show delivery, unless it is consummated by a return, unless he actually made the delivery.

MR. YOUNGQUIST: That is what I mean.

MR. WAITE: It is easier to show it has been delivered than waived.

MR. LONGSDORF: Maybe if you filed a precipe for a copy, the clerk would make an entry of it; otherwise it is not likely.

THE CHAIRMAN: Gentlemen, we have had various suggestions but we haven't anything to vote on. If someone will make a motion, we will vote on it.

MR. ROBINSON: I would like to suggest this, Mr. Chairman. A minute ago we had a very close vote on Mr. Waite's motion, but I am not sure all of us understood what he was including in his first sentence, and then the second sentence, and the rest of the rule. I would like to ask Mr. Waite to prepare his motion in full and submit it to us for final action.

MR. WAITE: Yes, I will be glad to do that.

MR. SEASONGOOD: What is the objection, unless Mr. Wechsler wants to withdraw his motion? It seems to me perfectly plain that Mr. Wechsler meant that you read the indictment to the defendant, unless he waives, and give him a copy of the indictment, unless he waives.

MR. WECHSLER: And you tell him he has a right to have it.

MR. SEASONGOOD: And you tell him he has a right to have it.

MR. WECHSLER: That is would I would like, in substance, if we could vote on the substance of that.

MR. SEASONGOOD: I move that.

MR. WECHSLER: We might agree and get a draft on it. I make that as a motion.

THE CHAIRMAN: Will you state your motion.

MR. McLELLAN: You would not contemplate in the case of the feared failure to be able to prove that the indictment, copy of it, was given to him, that that would be a ground for a new trial?

MR. WECHSLER: No.

MR. HOLTZOFF: In the last couple of years we have had a lot of habeas corpuses which have been predicated on the proposition that the defendant was deprived of a certain right at the trial and we have had to take depositions of the trial judge, and of the United States attorney, and the clerk of the court, to determine whether or not the defendant was deprived of his rights. Now if you establish more rights, you give an opportunity for more habeas corpus proceedings.

MR. WECHSLER: If I was the trial judge in this district, when the defendant was standing there, and I got done reading the indictment and telling him about it, I would say "Did you get a copy of the indictment?" And if he said no, I would say "Well, you waived it?" and if

he said "Yes," there would be a record showing it.

MR. BURNS: That is not shown in the record.

MR.CRANE: Mr. Chairman, are we going to get lunch or are we going to wait for lunch until you settle this point?

THE CHAIRMAN: If that threat would settle it, I would say yes. Do you want to make a motion, to see if we can get it disposed of before we go to lunch?

MR. WECHSLER: All right. I move that the rule be redrafted so as to accomplish three things: first, to provide that a defendant is arraigned by reading the indictment or, if he consents, by stating the substance of the charge to him - given the right to read it; second, to provide that he be advised of his right to a copy; and, third, to give him that right to a copy before he is called upon to plead.

MR. GLUECK: And what about the recording of these facts? Is that included in your motion?

MR. WECHSLER: No, I am a little bit troubled about that in view of what has been said about making a record somehow, but maybe if we can get agreement on what we wanted to have happen, we could work out the next part.

MR. BURNS: If the clerk had the duty of delivering it, he would have a duty of making a record.

MR. WECHSLER: Just as when we ask a man if he

wants counsel?

MR. DEAN: That is right.

THE CHAIRMAN: You have heard the motion, as given in substance. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be 10 in favor; 5 opposed.)

THE CHAIRMAN: Carried.

I suggest we adjourn for lunch.

(Recess from 12:35 p.m. until 1:15 p.m.)

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AFTERNOON SESSION

THE CHAIRMAN: Rule 11, gentlemen.

MR. DESSION: Before we get into that, there is an alternate proposal, which is in the nature of an addition to the present Rule 10.

THE CHAIRMAN: Where is that alternate rule, in the book?

MR. DESSION: Yes, it is in the Memorandum, on page 6, Rule 10. You will notice the only difference between that and the Rule 10 which we have worked through is that this would add an additional provision. The addition is to furnish the defendant at arraignment with a list of the witnesses on whose evidence the indictment or information was based.

I am thinking of this as one of a group of proposed rules, all of which are designed to give the defendant a little more notice in advance of trial of what the case against him is and, likewise, to give the Government more notice in advance of trial of what the defendant's evidence is.

I realize this is something of a departure, but I think if any further disclosure before trial is desirable, then it would be very important for us to consider that and see how far we might want to go. If it is neither feasible nor desirable, why, then,

we have gone as far as we want.

As it stands now, we are giving the defendant a copy of the indictment or information, and beyond that, I guess, we have not changed the law very much as to what he is entitled to receive beforehand. We have made provision for a pre-trial conference, which is pretty much permissive in terms. There is that. We have not dealt with one problem, I think, and that is the list of the witnesses to be called to trial.

The statute mentioned in the note to Rule 10 points out that in capital cases, by statute, the defendant gets a list of the jurors and witnesses; in non-capital cases, he does not. I wonder whether there is any justification for such distinction?

MR. HOLTZOFF: List of witnesses not to be called at the trial.

MR. DESSION: No; that would be the witnesses on whose evidence the charge was pressed.

MR. HOLTZOFF: Yes.

MR. DESSION: I suppose in capital cases, if there is any advantage in letting the defendant know who the witnesses are, the advantage would be at a maximum then, he has more to lose than in a non-capital case, so that is where we give it to him.

We get that, I think, from English practice,

but we do not give it to him in non-capital cases. It seems to me he ought to get that in both cases or in neither case because, I just do not see what basis there can be for such distinction.

Beyond that, in order to bring this whole question of policy to a head, I am proposing several rules. There is this one. There is a rule designed to afford inspection before trial, in the court's discretion, of documents, objects and so on, where a showing can be made that there is some good reason to have those in preparing a defense. I am also providing for an exchange of lists of trial witnesses before trial.

The purpose of all these rules is merely to try to get a little further away from surprise and to get a little more of the atmosphere that has become more customary in civil cases. You are all familiar, of course, with the extensive development along this line on the civil side. We have had no such development on the criminal side.

I want to raise that question of whether we ought to consider it.

MR. HOLTZOFF: Of course, on the civil side you do not furnish lists of witnesses, even in the pre-trial and discovery proceedings.

MR. DESSION: No, I know that. I was speaking generally of the whole problem rather than of that specific proposal.

So, in order to bring that up, I move that we add to Rule 10 the new matter which is contained in alternate Rule 10.

THE CHAIRMAN: On page 6?

MR. DESSION: On page 6.

THE CHAIRMAN: Is the motion seconded?

MR. BURKE: Seconded.

MR. WECHSLER: This is in substance rather than in form, George?

MR. DESSION: Yes, I think there would have to be slight corrections in form.

MR. WAITE: Would you require, in every case, furnishing of all the names and addresses?

MR. DESSION: That is right.

MR. LONGSDORF: I think, Mr. Chairman, from some inquiries which I have made that you will get very vigorous objection to this rule from district attorneys. I have even gone to the extent of inquiring of a leading defense attorney and I got the same comments. I am expressing no opinion of my own.

MR. HOLTZOFF: I think it is a highly undesirable rule. I cannot see why the defendant should be entitled

2 to a list of witnesses who testified against him before the grand jury. I can see a lot of danger in it.

THE CHAIRMAN: What dangers?

MR. HOLTZOFF: Well, there are two dangers. In the first place, there is always the possibility --

THE CHAIRMAN: Of shooting them, you mean?

MR. HOLTZOFF: Yes, of doing away with the witnesses, or will facilitate the concocting of perjured testimony; and, second, a witness, if he so desires, is entitled to maintain secrecy as to the fact that he testified before the grand jury.

MR. WECHSLER: What is the present law on this?

MR. HOLTZOFF: In capital cases you get it.

MR. DESSION: In capital cases you get it, but you are not entitled to it in any others.

MR. HOLTZOFF: I agree; I do not see any reason for the distinction. I would like to see it abolished in all cases.

MR. LONGSDORF: This extends to information cases, including misdemeanors?

MR. HOLTZOFF: It could not be an information because there may not be any witnesses.

MR. DESSION: Well, the prosecutor would be supposed, under this rule, to give you a list of the witnesses on whose evidence it was based. To some

extent, of course, the court would have to take his word for that, but at least he would be getting something.

MR. WECHSLER: George, speaking of the present law, you said it referred to witnesses before the grand jury, but that is not true, as I read the statute.

MR. DESSION: Was I mistaken about that?

MR. WECHSLER: In treason and capital cases, it says the witnesses to be produced on the trial for proving the indictment.

MR. DESSION: I was in error then. That is trial witnesses. I am sorry. I have not seen that in some weeks. I was confused on that.

MR. WECHSLER: If it relates to witnesses at the trial rather than to witnesses before the grand jury, wouldn't it be well not to raise a question here in connection with arraignment but to raise it rather in connection with the other pre-trial rules that you have in mind?

MR. DESSION: We could do that, yes. I do not particularly care at which point it is raised.

MR. WECHSLER: I suggest that your motion be laid on the table until we get there, because it does not seem to me the important language is "witnesses before the grand jury," but rather the witnesses at the trial. I may be wrong.

MR. DESSION: I would rather leave it separate because in some cases those witnesses would overlap considerably; in others they might not. My thought is the need of maximum opportunity to test evidence before trial.

MR. WECHSLER: Maybe you want the witnesses before the grand jury. I do not propose to alter your suggestion.

MR. DESSION: I think, however, that we could defer consideration of that until later, so we could have the whole thing together. They are related.

THE CHAIRMAN: If there is no objection we will lay this over for consideration at a later point.

MR. DESSION: May I just make one more proposal, which involves harking back to the note to Rule 7 (c)? The proposal is before you in mimeographed form. It was distributed just this morning. Here, what this amounts to is inserting in the note a paragraph which indicates that we are not changing the present law with respect to bills of particulars. As I understand it, we have no desire to change that law. At least, that is my impression.

We have no rule which anywhere refers to a bill of particulars, and I think there might be some virtue, and I do not think we need a rule on it, but I think

there might be some virtue in indicating in a note that we conceive that practice is continuing, and I think the one appropriate place for that note would be the note to 7 (c), the section which deals with the sort of description of the offense that the indictment or information shall contain.

THE CHAIRMAN: If there is no objection, that will be inserted in the notes to Rule 7.

MR. WECHSLER: Why should there be no rule on bills of particulars? I am lost on that.

MR. DESSION: Well, I haven't a very strong view on that. We have, of course, a general provision for motions, and it is drawn in such form that a defendant, on motion, may ask for anything he wants to ask for on the kind of relief he is entitled to. I suppose that ought to be enough to enable him to move for further particulars when he thinks he needs them.

MR. WECHSLER: Why shouldn't this note be moved from here to the rule on motions?

MR. DEAN: That would be my suggestion.

MR. DESSION: It could go there.

MR. WECHSLER: Well, I propose that.

MR. DEAN: I second that proposal.

THE CHAIRMAN: Is that acceptable?

MR. DESSION: That is entirely acceptable.

THE CHAIRMAN: All right.

Then we move on, if we may, to Rule 11.

MR. DEAN: Mr. Chairman, are we passing the question of whether we should require the names of the witnesses before the grand jury?

MR. DESSION: Yes, that is being deferred.

THE CHAIRMAN: That is passed for the time being.

MR. DEAN: Along with witnesses for the trial?

THE CHAIRMAN: Is there any comment on Rule 11, which I think we have pretty well rehearsed?

MR. WECHSLER: I move its adoption.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor --

MR. SEASONGOOD: Wait a minute. What about the point I had on Rule 11? Why does the corporation get this special treatment? Why should they enter a plea of not guilty for a corporation? Why shouldn't they just go ahead and take judgment against it?

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MR. HOLTZOFF: You cannot take judgment by default in a criminal case. In case a natural person fails to appear, you cannot do anything about it but try to locate him, but in the case of a corporation, being an artificial entity, you cannot apprehend the

corporation and so enter a plea of not guilty.

MR. ROBINSON: Rule 11, page 3, there is a note that this follows Federal practice, see United States v. Beadon; that it is a common provision of state statutes; that the same provision is in the Criminal Justice Act.

It is a very common provision and I do not know of any reason for dropping it.

MR. YOUNGQUIST: You can proceed against them for contempt, can't you, if they disobey any lawful order or process?

MR. ROBINSON: We are talking about dropping this last sentence of Rule 11. That is the suggestion that something be done differently about a corporation.

MR. YOUNGQUIST: Yes, all you can do against a corporation is just enter a plea of not guilty for it.

Would that not inferentially exclude the possibility of proceeding against them for contempt for disobeying lawful process? I do not know about that, but I was wondering what suggestion you are making textually in Rule 11.

MR. DEAN: I do not think it would exclude anything in the way of contempt. I should not think so.

MR. BURNS: Is it important enough to dignify it by rule?

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MR. DEAN: Would you say, "If a defendant refuses to plead, the Court shall enter a plea of not guilty"?

MR. HOLTZOFF: Yes.

MR. McLELLAN: I would be agreeable but --

MR. HOLTZOFF: It seems to lay an emphasis on "corporation" that is unnecessary.

MR. ROBINSON: I am afraid, if we do not mention it, it is not so awfully clear now, of course, because --

MR. BURNS: It would be clear by note.

MR. YOUNGQUIST: What good does it do to enter a plea of not guilty?

MR. ROBINSON: It just says what to do to the district judge. All of our rules are simply statements of what the Federal law is, designed to fill gaps and make the procedure complete, instead of leaving lawyers and others wondering what to do if you have a corporate defendant.

MR. YOUNGQUIST: Do nothing, if it fails to appear, the same as you would do with an individual defendant.

MR. HOLTZOFF: There is a difference. With an individual defendant you can send a marshal out and bring him to court, but you cannot do that with a corporation.

THE CHAIRMAN: The difference between answering a summons and being hailed into court on a warrant. I think that is a sound distinction, isn't it?

MR. HOLTZOFF: Yes.

MR. SEASONGOOD: Of course, if it makes it so they do not have to appear at all, the court can enter a plea of not guilty.

MR. HOLTZOFF: I think there is this to it, if a natural person does not appear, unless you can find him and bring him to court, you cannot impose a penalty, but the idea of this rule is to make it possible to impose a penalty on a corporation that does not appear.

MR. YOUNGQUIST: Enter a plea of not guilty and then what?

MR. HOLTZOFF: Set the case for trial.

MR. ROBINSON: Merely complete your issue and prepare for trial.

MR. YOUNGQUIST: Yes, that may be.

THE CHAIRMAN: Don't you actually have to get the defendant into court physically, or have him there by any contemplation of the law, in a criminal case?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I think the reason it has been followed is that every time the corporation is indicted, the president or some official of the corporation

is also indicted, so he is always in there and he is appearing for the corporation as well as for himself.

MR. HOLTZOFF: Oh no, I have known a lot of cases where the corporation has been indicted without an individual defendant.

MR. McLELLAN: In pure food cases that is often so.

MR. HOLTZOFF: I remember some pure food cases like that.

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MR. McLELLAN: I want to make trouble, Mr. Chairman. I hope I won't be sorry as I was this morning, because I felt a little bit strongly about it for reasons I will state briefly after I have made the motion.

I move that Rule 11 be amended to read:

"Rule 11. Pleas. A defendant may plead not guilty, guilty, or with the consent of the court nolo contendere," and strike out the second sentence.

Nolo contendere has become pretty unfashionable in this country I think, and has been abolished in New York because it was thought useless. I think it is a useful thing to have but I think the burden should not be put upon the judge when a man gets up to plead nolo contendere/of telling him he cannot do it. I think the plea of nolo contendere should be something that a man may enter only with the consent of the court, and the court ought not to have to say to him when he starts to plead it, "You cannot plead that." We allow it in Massachusetts when, in the exceptional case, it is to prevent a man getting a record that could be used in court against him afterward.

MR. SEASONGOOD: You would have to say the court may refuse to accept the plea of guilty --

MR. McLELLAN: No. I would not have to say that. Yes, the court may refuse to accept the plea of guilty.

MR. CRANE: You know in one of our sessions I took a little time to plead the abolition of this nolo contendere plea and I was excited because I thought that there was a feeling against it, although everybody expressed themselves. I recognized the inconsistency of a man saying he is not guilty but he may go to jail. I do not know how you feel about it now. I am glad to know that Massachusetts recognizes the fact that it is an absurdity in some cases. I noticed in the press the other day, I think in some Federal court, it had some plea such as this because they said they were not guilty, and the judge did not feel he ought to try it out. But it is inconsistent. I think it is abolished in England, and why we keep it here I, for the life of me, do not know, except as it has been stated, a chance to get rid of a plea of this kind and then it cannot be used as having decided a fact in some other case, or as res adjudicata on some other case. But that seems to me absurd too. Anyhow I have a horror as we start out here with our fine preface and wonderful language, how we are going to simplify this, and then carry this in our courts where England has abolished it and it is not used anyway. It is so inconsistent for a man to say that he will go to jail because he is not guilty.

MR. McLELLAN: Just one moment more. I am not

finding fault with retaining the plea of nolo contendere, but what I do say is a defendant ought not to have a right to come in and on being asked what he says to the indictment say "nolo contendere" and then the court has to say "Well, I do not believe this is that exceptional case where you can plead nolo contendere." I would rather have the consent to enter that plea obtained first, from a practical standpoint.

MR. ROBINSON: Would the procedure then be changed? The defendant would move the court for leave to file a plea of nolo contendere?

MR. McLELLAN: The court is asked, under our practice, whether a plea of nolo contendere will be accepted, and the court frequently says, "No; this is not the kind of case." And then comes along a young fellow, 17 or 18 years old, who has gotten into trouble, and you intend to put him on probation anyway and you don't want to hamper him with a record that can be used against him, and you say in that case, "This is a proper case for the plea of nolo contendere ." It comes to the same thing, but to put it upon the court every time a man comes in and says "nolo contendere", you cannot do that.

THE CHAIRMAN: I thought I heard in a conference in Boston between two judges, one or both of them said

they never would accept the plea. If we put it in the form you recommend we make it very difficult for a judge with that slant to ever accept the plea.

MR. McLELLAN: I do not know who told you that.

THE CHAIRMAN: I heard him say it at the Judicial Conference. I cannot recall his name; one of the more recently appointed.

MR. BURNS: Sweeney?

THE CHAIRMAN: Sweeney.

MR. McLELLAN: If Ihad been there I would have dared, because I know him very well, to say "You have done it."

THE CHAIRMAN: Nobody took it up.

MR. McLELLAN: There are cases that lend themselves to it, but it ought to be a matter of special consideration, and not give the right generally to plead

2 nolo contendere and then have to take it back because the court says he refuses to accept it.

MR. CRANE: May I ask, hasn't this matter been in any way questioned outside of what we are doing here? As to whether this plea should stand or not? It has been advocated in the magazines and law articles. Does the United States Supreme Court feel we ought to keep this plea?

MR. SEASONGOOD: They did not say one way

or the other in the Memorandum.

THE CHAIRMAN: It seems to be desired by the district attorneys, but no objection raised in the Supreme Court Memorandum, as I recall.

MR. McLELLAN: I do not mean to get into a discussion whereby it might follow that you would do away with the plea because I think it is useful in exceptional cases.

MR. BURNS: Judge, what are you going to do about that part of the second sentence which you have stricken out?

MR. McLELLAN: I did not mean that. That was a mistake. I should have said part of the second sentence be stricken out; the part remaining being "The court may refuse to accept a plea of guilty."

THE CHAIRMAN: You have heard Judge McLellan's motion. Is there any further discussion?

(No response.)

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.)

THE CHAIRMAN: The motion is carried.

MR. CRANE: I am glad we have gotten something in the right direction.

THE CHAIRMAN: Are you ready for the motion on the rule as modified?

All those in favor of Rule 11 as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried unanimously.

12 now. 12 (a).

MR. ROBINSON: In that first line I suppose better construction would be to leave out "a" and make "proceeding" plural, and beginning with line 3 there is "The pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere." Would that be acceptable to the Committee?

THE CHAIRMAN: If there is no objection that is so amended.

MR. YOUNGQUIST: Is it intended by this to say that the pleas are pleadings? That is the way it reads.

MR. ROBINSON: That is right; just as it says. You remember we have had quite a bit of discussion in former meetings as to what is a pleading and what is not a pleading, and as in the case of the Civil Rules it seems it might be advisable specifically to say that the

pleadings shall be this type of information; pleas of not guilty, guilty, and nolo contendere. The reasons for that I believe are supported in the notes of Mr. Justice Gray in 151 U. S., Tucker v. United States, who seems to have indicated that.

MR. YOUNGQUIST: Yes, I read that comment.

MR. ROBINSON: And Mr. Longsdorf and other authorities.

MR. DEAN: The only problem is whether we later use the word "pleading" in the narrow, orthodox sense.

MR. ROBINSON: No, we do not, because I have checked it carefully.

MR. LONGSDORF: Before we proceed to vote on the motion I would like to suggest we take out the word "abolished" at the beginning of line 6 and instead use "shall not be used", which is the language of the Federal Civil Rules which dispense with those formal motions of pleading.

MR. ROBINSON: They abolish, do they not, too.

MR. LONGSDORF: Maybe they do, but they do not abolish all functions of them. They abolish just the names of them.

MR. ROBINSON: Yes, Civil Rule 7 (c) says that "Demurrers," and so forth, "are abolished." That is a

heading. And then the text says, "Demurrers, pleas, and exceptions for insufficiency of pleading shall not be used", so you have both there, do you see?

MR. LONGSDORF: Yes. Well, suppose somebody comes along and makes his motion in the form of a motion to dismiss or a plea in abatement and it is substantially good if he would only change the name of it to a motion. What are you going to do with it; throw it out because it is out of form?

MR. ROBINSON: I am afraid what you are suggesting, George, would take the niceties out of this rule if you are going to preserve the significance of the rule and merely change the name.

MR. LONGSDORF: In the beginning of line 8 you have riveted it down by the use of the word "only."

MR. ROBINSON: That is what the Committee has voted for.

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THE CHAIRMAN: Hasn't that been the process by which both at common law and under the civil rule we have gotten rid of demurrers and all the other antiquated pleadings?

MR. BURNS: Suppose you just said the term shall be abolished, because in 5 you say the statute shall continue in effect but this "shall be interpreted to mean 'motion raising a defense or objection' as

provide i in this rule."

MR. HOLTZOFF: How about Mr. Longsdorf's suggestion "shall not be used"?

MR. ROBINSON: That is the trouble. You have your rule speaking of demurrer and all these other motions and there is no need to abolish the term and still leave the body continuing.

MR. HOLTZOFF: I don't think it makes any difference whether you say "abolished" or "shall not be used". I think they are the same, but if you want to use the words of the Civil Rules it would be "shall not be used".

MR. LONGSDORF: But, Mr. Chairman, there is another thing. The Congress of the United States since we voted on this rule at the last session has passed the Act of May 9, 1942, and continues to use the words. What are you going to do about it?

MR. ROBINSON: We are talking about two different things, when you talk about using them or not. Of course, for one thing, in May, 1942, these rules were not in effect, and I think our subdivision (b) (5), which is our paragraph (5) under subdivision (b) to which attention has been called, simply calls attention to the fact that you can interpret legislation by using in place of those terms the motion raising a

defense or objection.

MR. LONGSDORF: Although I don't want to be obdurate --

MR. ROBINSON: I don't think you are obdurate, but I do not believe we are getting anywhere if we change the phraseology and still say everything else continues.

MR. McLELLAN: I move, Mr. Chairman, the adoption of Rule 12 (a).

MR. BURNS: I second the motion.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

We will take up 12 (b) now, section (1).

MR. LONGSDORF: Mr. Chairman, there is a question in there in line 13: "The motion shall present together all defenses and objections then available to the defendant." Now the question arises in that Evaporated Milk case which leads me to call attention of the Committee to those words. If you are going to make an objection which goes to the jurisdiction of the court you can raise it at any time. But if you are going to make an objection that goes to the jurisdiction of the person you can waive it if you do not make it at

the right time. What happens if you make them all together? Then you combine them.

MR. HOLTZOFF: Isn't that taken care of in paragraph (3)?

MR. LONGSDORF: Well, maybe it does take care of it.

MR. HOLTZOFF: I think it does.

MR. LONGSDORF: I want to know.

MR. ROBINSON: I think so.

THE CHAIRMAN: It seems to be the consensus that paragraph (3) takes care of it. Any further questions on 12 (b) (1)?

MR. SEASONGOOD: As a matter of style could not you leave out "together" in line 13?

MR. ROBINSON: Murray, that is awfully important. We did have a word in there. We did have "shall present at the same time". That is just the nub of this whole rule. Just as Alex was telling me the other day about an assistant United States attorney in Chicago who was fuming about a famous case there, and he only got to the 21st plea in abatement in the case. In other words, what we are trying to do is to require, as the Civil Rules do, that all defenses and objections be presented at the same time and the court can consider them at the same time, and you do not have the sequence, month after

month, of one objection or defense being overruled and then another being filed.

MR. SEASONGOOD: You would not, would you?

MR. DEAN: Aren't you trying to say that the same motion shall present. In other words, try to present them all in a single motion?

MR. YOUNGQUIST: The motion shall present all the defenses. Otherwise it is redundant.

MR. ROBINSON: I hope we are not leaving out something there.

MR. SETH: I think we ought to emphasize it.

MR. ROBINSON: I think with Mr. Seth, we should emphasize it.

MR. SETH: I would not say in one document.

MR. ROBINSON: We do not mean necessarily one. It does not make it a condition whether it is one piece of paper or half a dozen.

MR. SETH: No. It does not make any difference, but I do not like the word "together".

MR. DEAN: I do not either.

MR. YOUNGQUIST: Would it help if you say "The motion shall include all defenses"?

THE CHAIRMAN: Yes, "shall include all defenses and objections then available to the defendant."

MR. ROBINSON: I cannot imagine that the court

would refuse to accept a supplement or addition to the motion. We want to watch that to be sure if the defendant made a motion one day he might overlook objections.

MR. SETH: What does the civil rule say on that? Don't they have a rule on that?

MR. DEAN: If "together" means all at one time, whether in one document or many documents, then your rule has an objection.

MR. ROBINSON: Why?

MR. DEAN: For the reason that it just governs time and precludes the defendant from filing another motion. "Together" means something different than "the same time".

MR. ROBINSON: I had "at the same time" in the draft and I wish I could remember the gentleman who insisted that it be stricken out and we use instead the word "together".

MR. DEAN: What would you lose, as far as your objection goes, if you said "The motion shall include all the defenses"?

THE CHAIRMAN: Or if you want to make it doubly certain "all defenses and objections then available shall be presented in the motion"?

MR. LONGSDORF: Mr. Chairman, do you want to

add "known or available"?

MR. WECHSLER: Is it the purpose of this to put a penalty on a fellow who does not see he has a point until he gets a different lawyer?

MR. ROBINSON: I think not, Herbert. Do you?

MR. YOUNGQUIST: Isn't that protected in (3)?

MR. ROBINSON: There is your "together" again you see.

MR. YOUNGQUIST: No, it is not protected in (3), but it is protected by the note I had to (3) by which I added after the word "present" in line 29, "unless the court for good cause shown relieves him of it".

MR. ROBINSON: That is a good addition, isn't it?

THE CHAIRMAN: What line?

MR. ROBINSON: Line 29.

MR. WECHSLER: That is what we want is, he has to do it unless he has some good reason for not doing it?

MR. YOUNGQUIST: That is right.

THE CHAIRMAN: If you have that, then do you still need the word "together" in line 13? Or wouldn't it be the word "include"?

MR. ROBINSON: I am suspicious about it.

MR. GLUECK: Unless you use the word "embrace".

MR. HOLTZOFF: I think "include" is all right.

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MR. ROBINSON: We are not thinking just alone about the demurrers but we are thinking of the hearing on the motion.

THE CHAIRMAN: You are thinking of the motion itself which is a hearing and that seems to me, with that, plus (3) that you just agreed to amend, gives you all you need possibly hope for.

MR. ROBINSON: The objection to the two together is then tautology.

MR. BURNS: It may mean time, the bundle of papers, or it may mean one paper.

MR. ROBINSON: And if your word before that was "at the same time" that would be difficult because of the point just mentioned.

THE CHAIRMAN: It is moved that 12 (b) (1) be amended in line 13 to strike "present together" and substitute the word "include".

MR. WECHSLER: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any more changes in (1)? If not, the motion is to adopt 12 (b) (1) as amended.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now 12 (b) (2).

MR. HOLTZOFF: Mr. Chairman, in lines 17 and 18

5 I think we can leave out a few words of surplusage; the words "upon request of the defendant, of the government or upon its own initiative". They do not add anything. If you strike out all those words you still have the same meaning without them.

MR. GLUECK: That is it must still be in the opinion of the court anyhow?

MR. LONGSDORF: Seconded.

MR. HOLTZOFF: I move to strike out the words in lines 17 and 18, "upon request of the defendant, of the government or upon its own initiative".

MR. ROBINSON: I would like to ask Judge McLellan's view.

MR. McLELLAN: I do not think they add anything to it because the court can do it of his own initiative or on anybody's request.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All those in favor of the motion

say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: Do we need the word "immediate" in there?

MR. ROBINSON: I think so.

MR. YOUNGQUIST: He is given authority only to order an immediate hearing.

MR. BURNS: How about "forthwith"?

MR. ROBINSON: That is "whenever in the opinion of the court".

MR. HOLTZOFF: I second Mr.Youngquist's motion to strike out the word "immediate" and change the word "and" to "a".

THE CHAIRMAN: I wonder if that does not do violence to the thought, and you would not cure it all by starting with that subordinate clause, "whenever in the opinion of the court" and so forth "the court may order an immediate hearing of the motion"?

MR. HOLTZOFF: That is better.

MR. ROBINSON: That is acceptable.

THE CHAIRMAN: If there is no objection we can do that.

MR. WECHSLER: But why should it be "immediate"? There may be a hearing in a week. What we really mean is a hearing of the motion before trial.

MR. ROBINSON: Well, is that all?

MR. WECHSLER: Sure.

MR. ROBINSON: Don't we have in mind to mean here what we say?

MR. DEAN: Suppose it is the opinion of the court that it would help dispose of the trial by having a hearing a week before then?

MR. ROBINSON: The word "immediate" itself calls attention to the fact that these rules are framed or designed to secure some expedition, if possible.

MR. HOLTZOFF: The court may order an immediate hearing or may order a hearing a week from now.

MR. WECHSLER: The court may order a hearing immediately or within a reasonable time.

MR. McLELLAN: Why don't you do what the Chairman says: "Whenever in the opinion of the court", and so forth,"the court may order an immediate hearing of the motion"?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think the word "immediate" is out.

MR. ROBINSON: I would like to have the record

show a protest on that. I think our whole object here is to end unjustifiable delays that have occurred in criminal proceedings, and I think for the sake of style of saving a word here or there or a comma there, we better not get ourselves into a position where we are losing the real point we have in mind just in the interest of a little stylisticism.

MR. DEAN: What I object to is it does not require an immediate hearing. If you want to require an immediate hearing then require it, but if not then don't.

MR. ROBINSON: Where we use the word "may" we are putting discretion in the court to do what he thinks best, and I can hear you, Gordon, in court now before the district court under these rules - it is rather optimistic I suppose - say to the judge "I don't want a hearing on this motion for some time. We want to have quite a bit of time to deliberate." And the judge could say "The rule expressly directs me to order an immediate hearing. It means, the word 'immediate', what it says and it shows that it is designed to expedite this matter. Therefore I feel that I had better do so." Now if you don't want a rule having the court supported by that word, to that extent, all right. But let us be sure we know what we are doing before we strike it out.

MR. WAITE: It seems to me a word that cannot do any harm and, therefore, some good. Therefore it is advisable to leave it in.

MR. YOUNGQUIST: I have a more fundamental question in my mind, Mr. Chairman: If we do not have the sentence at all what would the court do? Having the sentence as it is the court may in its discretion hear the motion or refuse to hear the motion.

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THE CHAIRMAN: You think the word should be "shall" instead of "may"?

MR. YOUNGQUIST: If we are to have anything at all. I think as a matter of fact we do not need the sentence, because when a motion is made the necessary sequence is that it is heard.

MR. WECHSLER: It is not as simple as that, Aaron, I do not think, because if you go back to 12 (b) (1) you will notice that it says that the motion shall include all defenses. There was a time in the previous life of this rule when it said "all defenses that heretofore could be raised before trial." It does not say that any longer, and as a lawyer it would leave me a little uncertain as to what defenses had to be raised by motion of that group that stated affirmative defenses heretofore raised at the trial.

Now I understand the purpose to be that whenever

a defendant has, what heretofore has been called an affirmative defense, he has to put it in the motion. Some of those may be defenses that can properly be disposed of before trial and some the judge may have to hold for the trial.

MR. ROBINSON: That is right.

MR. LONGSDORF: I see another difficulty here I would like to mention. In the last three lines at the bottom of Rule 12 (b) (2) authority is given to order the defenses or objections raised by the motion to be submitted for determination at the trial of the general issue. You go to the trial of the general issue of "not guilty" and therewith you dispose of special motions in bar, on the ground of former acquittal, conviction, former jeopardy or limitations. If you allow that to be made that way, and especially the first three, are you going to give them to the same jury that disposes of the general issue?

MR. ROBINSON: Surely.

MR. HOLTZOFF: You do do it today.

MR. LONGSDORF: All the authorities I have been able to find said it was wrong, but it did not hurt in that particular case to have done it.

MR. HOLTZOFF: I think the Supreme Court allows it to be done.

MR. ROBINSON: I think that is right, George.

MR. WECHSLER: I wonder, going back to (b) whether we should not qualify the word "defenses" somehow in a way that we previously had it. The stuff that used to be a plea in abatement or plea in bar is the stuff that we mean to have raised by motion.

MR. LONGSDORF: The object of the former practice was to cut off the trial on as short and brief a provable issue of fact before you went into the general issue. If you are going to abandon that let us know it, and you go to the trial on the general issue and have the whole works in there.

MR. ROBINSON: The sentence you talk about goes with the sentence that precedes it. "The right to trial by jury shall be preserved to each party." We are getting into difficulty if we thereby multiply jury trials, so the object here is to put it in the hands of the district judge to say that an issue which has been raised, that is a defense or objection which has been raised, shall not be tried on this preliminary hearing by jury as he has requested, but will simply be tried by the same jury that tries the general issue.

MR. LONGSDORF: How will the judge instruct the jury the kind of verdict to bring in?

MR. ROBINSON: That will be easy if there is a right to jury trial now.

THE CHAIRMAN: Would not the jury dispose of this preliminary issue first and then go on to the main trial?

MR. HOLTZOFF: Oh no.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: Not if you raise the issue of former jeopardy, for example, at the trial of the general issue. The jury brings in a verdict of not guilty --

THE CHAIRMAN: You mean you go on and try the whole case and these others all in one ball of wax?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Horrible.

MR. DEAN: As I read this in the last three lines you could try on order of the court everything that could be raised on some kind of motion to the same jury on any issue as well as that of not guilty.

THE CHAIRMAN: I thought the practice was to let the jury hear the first issue first and render its verdict and then go on to the trial of the general issue if the first verdict does not dispose of the matter.

MR. YOUNGQUIST: I do not think it is right.

MR. ROBINSON: I have cases in which Federal judges have done exactly that and it seems to me it would be

desirable, if you had some issue there which makes the rest of the issue, the general issue of not guilty,

7 usually relatively immaterial.

MR. YOUNGQUIST: I am not questioning that, but I am only saying that the general practice, as I have known it, is to try them all at the same time.

MR. BURNS: It seems to me if you adopt the Chairman's transposition and strike out the word "immediate" you get what you want to get. The district judge having control of the issue, whether or not he should expedite secondary issues which might be determinable of the whole controversy should decide, and if he decides "no" he proceeds to have them all tried by the same jury that tried the general issue. I move that those limitations be adopted.

MR. ROBINSON: May I ask a question about that, Judge Burns: I understood the Chairman's suggestion about transposing the relief clause was mixed up with "immediately". If you strike out "immediately" we better keep the same order because we will have an awfully long tail on an awfully short horse.

THE CHAIRMAN: All right.

MR. YOUNGQUIST: Strike out "immediate" and what else?

MR. BURNS: And after the word "motion" strike out - but that has been voted upon.

THE CHAIRMAN: All right. You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. CRANE: Doesn't that adopt (2) as it is?

THE CHAIRMAN: This is a motion to strike the word "immediately".

MR. CRANE: And adopt the rest of it?

MR. YOUNGQUIST: The whole of (2).

THE CHAIRMAN: Are we covering too much?

MR. WECHSLER: Mr. Chairman, I am really troubled about this whole thing and I have before me the Rule 15 as it was drafted by this Committee and it has got a lot of things in it that I do not see here now that were very carefully hammered out.

MR.ROBINSON: I shall be glad to explain all of them because they are all written out in the notes or in our supplementary papers.

MR. WECHSLER: I think if you will give me a minute you will see what I have in mind. Now that

90 rule reads as follows, and I will start with what was

15 (b) which is the substance of 12 (a):

"All demurrers, pleas in abatement, and pleas in bar are abolished and motions shall be used in their place."

And the second thought: "Any matter capable of determination before the trial of the general issue may be raised in advance of trial by motion."

So that told you definitely what the motion was for.

Then the next thought was: "Defects in the institution of the prosecution and objections to the form of the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion before trial."

The result was that all the freedom that a defendant heretofore had to deal with the matter at the trial as a defensive proposition was preserved, except defects in the institution of the prosecution and objections to the form of the indictment, other than failure to charge an offense, or jurisdiction. There was, in short, a device for requiring it to be raised before trial; any objection to the indictment or information, and it was permissive beyond that in allowing a defendant to raise before trial any other matter that was in its nature capable of determination

before trial of the general issue. Now I think that is sound and I think what we have now is unsound and I move the substitution.

MR. LONGSDORF: And I second the motion.

MR. YOUNGQUIST: May I call attention to the fact that immediately after page 10, from which you read, appears another draft of the rule on page 11.

MR. ROBINSON: Yes. I need to call attention to the fact that this Rule 15 which Mr. Wechsler has read was not really approved by this Committee. In fact this Committee had so much difficulty with it that a sub-committee was called of which Mr. Youngquist, I believe, was chairman and there were two or three drafts prepared and we tried to prepare an alternative rule. Mr. Holtzoff and I talked it over quite carefully and Mr. Holtzoff thought in view of the status of the whole matter that the Rule 15 Mr. Wechsler just read really does not represent the conclusions of the Committee at its last meeting and he felt we should favor that rule you have before you.

MR. HOLTZOFF: That is quite correct.

MR. WECHSLER: I am not making any point about it, having been foreclosed, but I think this is better than what we have got.

MR. YOUNGQUIST: I had not seen the (b) and (c)

until this draft came. I do not think I was Chairman of the sub-committee. We were just working together. Rule 15, as it appears on page 11 to the end of 12 is the rule as I last saw it. I worked a good deal on it at the time and we reported what I thought was an appropriate rule that would cover all situations and would provide for an orderly procedure for the disposition of motions by character, as to whether the objection was one that might be raised under the general issue or must be made as a step preliminary to trial. I am very much in doubt about 12 (b) (2). I confess that I do not know what it means. I have a number of questions in the margin about it.

MR. ROBINSON: Let us hear them as soon as you are ready.

MR. DEAN: I will give you one, and that is that a demurrer could be determined by the petit jury.

MR. McLELLAN: That is just what I was wondering.

MR. DEAN: Oh yes. The question whether it constituted a cause of action would go to the jury.

MR. ROBINSON: That is if there was a right to trial by jury or the court submitted it.

MR. McLELLAN: No. It says "may determine the motion or it may order that the defenses or objections raised by the motion may be submitted for determination at

the trial of the general issue."

MR. ROBINSON: And isn't that purely optional?

MR. HOLTZOFF: No, but it would be determined by the judge as a question of law, wouldn't it?

MR. McLELLAN: Of course it would, Mr. Holtzoff, but I am talking about what this says.

MR. LONGSDORF: If it means that why not change "submitted" in line 25 to "reserved"?

MR. WECHSLER: No. I want to know what the theory of the objection was. You see, as I understood it, we had this very technical problem: There are some things you can raise before trial under the present practice that you can also raise after trial, and there are some things you have to raise before trial that you cannot raise after trial. Then the whole right to trial by jury thing is inextricably bound up with these procedural details. You have a right to trial by jury on a plea in bar if you raise it before trial, and you also have a right to trial by jury if you raise it at the trial, but if you raise it on motion under the present practice you have not a right to trial by jury. So I thought we were trying to work it out so we would, to some extent, take account of all those points.

95 MR. ROBINSON: We have done it. What you are

saying is this: What is absolute right? We have a 75-page memorandum on this subject. We have examined, we think, all the Federal cases that are in point on it and we have found that the present situation is extremely complicated and that the Johnson case and the Evaporated Milk case are now before the Supreme Court of the United States because there is such a confusion and split of authority in the Ninth Circuit and Seventh Circuit. We have gone into that very carefully, and this represents a safe presentation of the rule that will take care of the difficulties now existing, until the court speaks, of course. As Mr. Longsdorf has suggested, just as soon as the Supreme Court decides the Johnson case in the Seventh Circuit and the Evaporated Milk case in the Ninth Circuit all you or I may say does not make much difference, because the Court in that Evaporated Milk case I think will have to decide the question pretty squarely that we are dealing with.

MR. DEAN: What is the question the Court is going to determine?

MR. LONGSDORF: Whether you must determine a plea in abatement on Wednesday when the defendant claims it goes to the jurisdiction of the Court. The question thus called for is whetherthat plea must be determined as an issue of fact before you go to the trial of the

general issue. Now that is squarely up on the Evaporated Milk case.

MR. HOLTZOFF: Yes, I know, but if our rule says otherwise our rule would supersede that decision.

MR. LONGSDORF: Not necessarily, but the decision may contain matter which will make us very loathe to supersede it.

MR. ROBINSON: It doesn't, it seems to me. If we keep on suggesting how difficult the present problem is and how some things can be raised by plea in abatement, some by motion to quash, and others by demurrer, and some things can be tried by the jury and some cannot, then we get ourselves just hopelessly confused, because it is possible to cut a channel through all difficulties and resolve them by a rule, and I believe that this rule does do that thing.

MR. HOLTZOFF: I would like to say a word in support of what Mr. Robinson says. That last sentence beginning on line 23, I do not construe the way Mr. Dean suggested. I don't think this means that a demurrer may be submitted to the jury. I think it means that this refers to the time of the disposition of the motion and not the manner of it.

MR. McLELLAN: It says "at the trial of the

general issue".

MR. HOLTZOFF: At the trial. It does not mean necessarily by the jury. It means the judge may reserve decision on the motion to dismiss until the trial on the merits. I do not think that would mean he has to submit it to the jury, would it?

MR. McLELLAN: Oh no. I daresay the construction you put upon it would be the one at which the court would arrive.

MR. DEAN: I do not have any doubt about that. I don't think the court will ever submit a demurrer to the jury.

MR. HOLTZOFF: Maybe it is not the most felicitous phraseology.

MR. McLELLAN: So what would you say about that? The court may determine the motion or it may order that the defenses, and so on? Suppose the motion raises an issue of fact? Are you going to let the court determine the issue of fact; the judge?

MR. ROBINSON: Or a fundamental proposition, but I think Mr. Youngquist will bear me out on this, or if not, correct me, our fundamental proposition before us was with the word "heretofore" indicating to the judge what the practice had been as to whether an issue was to be tried by a jury or by the court and that the judge

now would have to determine that, so we have made it in line 24 that the court may determine the motion. That would be the end of it if it is a demurrer raising simply a question of law; the judge would determine it.

MR. WECHSLER: May I interpose this: Let me show you how nicely the previous rule, the one we had before --

MR. ROBINSON: If the Committee wants the previous rule that is all right with me.

MR. WECHSLER: But they did not adopt it. On page 11 look at 15 (3).

MR. CRANE: We have all read it and I move that we adopt it.

MR. BURNS: As a substitute?

MR. CRANE: Yes. It embodied the same thing but it is a little clearer.

MR. WECHSLER: I think, Mr. Chairman, it would be worth talking it out. I think that that 15 (c) (3) answers this question of form precisely.

MR. YOUNGQUIST: That was the idea in drafting what appears now on page 11; to classify motions with respect to their subject matter and with respect to the method of trial of the issue raised by the motion.

MR. BURNS: Is it the motion that 15 (c) (3) be substituted for 12 (b) (2)?

MR. WECHSLER: I do not think you can quite handle it that way, Judge. All I can say on the comparisons thus far made I would like to see the substance and the language of 15 (c) (2) and (3), which seems to me the crucial matter, brought back.

MR. BURNS: Cannot we vote on that on the assumption that the Committee on Style would work it in?

THE CHAIRMAN: That is in place of 12 (b) (2) - that would include it all; (1) and (2) - we substitute what appears on page 11 of Rule 12 under the heading (c) (1), (2), (3) and (4). Is that correct?

MR. WECHSLER: Under the headings (c), isn't it?

THE CHAIRMAN: Under the headings (c) (1), (2), (3) and (4).

MR. WECHSLER: Would be substituted for --

MR. WAITE: That takes the place of (b) (1), (2), (3) and (4) assuming the Committee on Style will work into the new arrangement the provision that all motions shall be presented at the same time.

MR. HOLTZOFF: It seems to me you have taken out too much. I think paragraph 3 on the top of page 2 out to stand, relating to waiver. Rule 12 (b) (3) ought to stand.

THE CHAIRMAN: All right. Then in place of (b) (1), (2) and (4).

MR. ROBINSON: Another point needs to be raised --

MR. WECHSLER: Even that is not as simple as that, Mr. Chairman, because 12 (b) (3) speaks of defenses and objections then available to him, and the very essence of 15 (2) was to preserve in the defendant the option to raise before trial or at the trial, as he chose, matters as to which that option has heretofore existed.

MR. ROBINSON: I don't think that is true, Mr. Wechsler. That certainly was not my idea.

MR. WECHSLER: Let me read you the language which, in my opinion, makes that clear.

MR. HOLTZOFF: That is the air raid signal.

THE CHAIRMAN: We have received permission not to be interrupted, - from the District Attorney.

MR. YOUNGQUIST: I was going to say with respect to that, the old 15 as we have it provides that all defects in the institution of the prosecution or in the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion before trial. So that clause is made limited.

MR. WECHSLER: And it also says "shall be made and heard together unless, for good cause shown, the court shall otherwise permit". So it is all there.

MR. ROBINSON: What about the word "together"?

We have to get rid of "together".

MR. YOUNGQUIST: "Shall be heard together." Isn't this what it amounts to, Mr. Chairman: I think we all understand the substance of the motion which will require the Committee on Style, or someone, to dovetail the provisions into what we now have by incorporating the content of the old Rule 15.

MR. ROBINSON: I think that will be fine. I think the result will be surprisingly like the present Rule 12.

MR. WAITE: I cannot vote on that.

THE CHAIRMAN: The Chair would like to make a motion that Mr. Wechsler, Mr. Youngquist and Mr. Waite be a committee of three and spend tomorrow getting the rule in shape.

MR. WAITE: I have the time tomorrow but I have not much knowledge on this subject matter. Hadn't you better put somebody else on it?

MR. YOUNGQUIST: I would suggest Mr. Robinson who is an ex officio member, I suppose, of the Committee.

THE CHAIRMAN: Of course.

MR. ROBINSON: I will be willing to be relieved of further labors on this rule. It has taken more time than all the other rules put together.

THE CHAIRMAN: It might as well go to the

Committee on Style then.

MR. ROBINSON: Right at this point is where the Civil Rules Committee had their big trouble. It is right in about this point where there are more decisions piling up in the Federal courts under the Civil Rules than on any other subject, according to the statement of Judge Clarke on the subject.

THE CHAIRMAN: I was suggesting referring it to the Committee on Style.

MR. YOUNGQUIST: I so move.

MR. ROBINSON: I second the motion.

THE CHAIRMAN: All those in favor of the motion referring it to the Committee on Style say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: With instructions to report on Monday.

All those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. SEASONGOOD: I do not understand this. The court has a note on Rule 12 which does not seem to me to be at all related to Rule 12. It says "Should the rules require the presence on resentence" etc. "under an old and erroneous sentence?"

MR. ROBINSON: You have your numbers twisted

there, haven't you, Murray?

THE CHAIRMAN: What page is that on?

MR. SEASONGOOD: Page 4.

MR. ROBINSON: Yes, you see you have the wrong number. It is No. 15 in the old rule, Murray, the top of page 5 of the court's notes.

THE CHAIRMAN: Rule 13, please; back in the other

11 book.

MR. HOLTZOFF: Mr. Chairman, I have some matters of phraseology to suggest. In lines 4 and 5 I think there is surplusage there and I move to strike out the words "whether by a multiplicity of counts or of defendants or otherwise".

And I also move to strike out from lines 5 and 6 the words "upon motion of the defendant, of the government, or of its own motion".

MR. ROBINSON: On the latter point if the Committee feels the question is the same as it was when last voted on I see no objection to that, but on the former point I feel the words would be very unfortunate, to have the "order" clause stricken out.

MR. HOLTZOFF: That is a dragnet clause and covers everything. I do not see that it adds anything to it.

MR. ROBINSON: You want to give the defendant

plenty of room here for making his motion and for securing his relief.

THE CHAIRMAN: I am inclined to agree with your second point, Alex, but not with the first.

MR. HOLTZOFF: I will modify my motion accordingly.

MR. LONGSDORF: I would like to make a suggestion about the headline. I think the headline would better read "Prejudicial Joinder of Offenses or of Defendants; Election or Severance."

MR. ROBINSON: The note to the rule covers "other relief" in the last line.

MR. LONGSDORF: Put that in, but if you want to make the headline descriptive of the content of the rule --

MR. HOLTZOFF: If you make that heading too long you put the rule in the heading.

MR. LONGSDORF: Somebody is going to read this rule with an impression fixed in his mind as to what he gets out of the italicized lines and he has his eyes shut before he gets to the end of the rule.

THE CHAIRMAN: Just put in the words "Effect Of" at the end.

MR. BURNS: Why not say "Effect of Prejudicial Joinder" and so forth?

MR. YOUNGQUIST: "Relief From Prejudicial Joinder"?

MR. LONGSDORF: That is better.

MR. HOLTZOFF: That is better yet.

MR. McLELLAN: What is it? Going out by consent?

THE CHAIRMAN: By consent in line 5, running into line 6 "upon motion of the defendant, of the government, or of its own motion". Just as we struck the same words out in the previous rule.

MR. McLELLAN: Yes, but you have a different question there. They ought to have been stricken out, but because that rule had to do with the setting of the time of the hearing upon a motion. But there are some things which courts cannot do of their own motion and I am not sure that this is not one of them.

MR. DEAN: You raised that point before.

MR. McLELLAN: I do not remember it.

MR. DEAN: That the court would have been reluctant to do it without some kind of indication he could do it on his own motion.

MR. McLELLAN: Yes, and I really doubt the power of the court to do that kind of thing on its own motion.

MR. ROBINSON: In other words, the considerations

are not the same as the last time. I think we better leave it in.

THE CHAIRMAN: Then why not say "upon motion of the party"?

MR. ROBINSON: I would expressly give the power to the court to do it.

THE CHAIRMAN: You want to save that?

MR. ROBINSON: Yes, but if you strike out the words you have not saved it.

THE CHAIRMAN: Then shall we leave the words in?

MR. ROBINSON: Yes.

MR. BURNS: Yes.

MR. HOLTZOFF: Mr. Chairman, on line 8 there ought to be an insert. It is now provided that the court may, as a relief, order an election of counts or grant a severance of defendants. Should it not only be permitted to grant a severance of counts, and insert "or counts"?

MR. WECHSLER: Yes.

THE CHAIRMAN: "Election or severance of counts"?

MR. ROBINSON: The term "severance" is not used correctly in that sense. You speak of severance of defendants but you do not speak of severance of counts according to the best cases I read on it.

MR. HOLTZOFF: What word do you use?

MR. ROBINSON: Election.

MR. HOLTZOFF: With election you compel the Government to elect one or the other, but I want to provide for the contingency where counts are separated and both are saved and a separate trial granted as to each.

MR. ROBINSON: Perhaps we then have to say "a separation of counts"?

MR. WECHSLER: That is all right. It is really

12 a separate trial.

MR. YOUNGQUIST: I do not think "separation" is a word of art.

MR. HOLTZOFF: I do not either.

MR. ROBINSON: "Severance of counts" is not a word of art.

THE CHAIRMAN: What you mean is really an election of counts or separate trial of counts?

MR. HOLTZOFF: Why not say so?

MR. YOUNGQUIST: "Election or separate trial"?

THE CHAIRMAN: That, I think then, is the only correction that we have?

MR. HOLTZOFF: That is right.

MR. McLELLAN: Are you going to give the judge the right to dismiss an indictment for that reason - kick the whole indictment out?

MR. ROBINSON: Why not?

MR. McLELLAN: I do not know. I am just asking.

MR. ROBINSON: Where else could you put the discretion? You have an indictment which is prejudicial and the defenses joined are in both. Why should not the judge have power to dismiss?

MR. WECHSLER: We meet all that by the remedies of separate trial or dismissal of counts, and I don't see any reason for the additional waiver.

MR. ROBINSON: There are lots of Federal cases where they do dismiss.

MR. HOLTZOFF: Because they cannot separate the counts.

MR. McLELLAN: Did you ever know of a case where a judge was permitted to dismiss the whole indictment because it had too many counts in it?

MR. HOLTZOFF: That is not the point here.

MR. McLELLAN: No, but I am asking that question.

MR. ROBINSON: I expect that would be too narrow if you put it that way.

MR. WECHSLER: I move that the words "dismiss an indictment or information" go out and that it read instead "may dismiss one or more counts of an indictment or information".

MR. HOLTZOFF: I second that.

MR. GLUECK: If the indictment consists of only one count then it, in effect, means dismissal of the indictment.

MR. McLELLAN: It ought to if it is as bad as that, by getting too much in one count.

MR. YOUNGQUIST: "Or more" includes all, doesn't it?

THE CHAIRMAN: Would it then read "or of its own motion may dismiss one or more counts of an indictment or information"?

MR. WECHSLER: Why don't we say "may dismiss these offensive counts" or "may dismiss unnecessary counts"?

MR. HOLTZOFF: "objectionable counts"?

MR. WECHSLER: Or may be "objectionable counts". This rule deals with a situation where a defendantmay be prejudiced by one of three things; by a joinder of offenses, by a multiplicity of counts or joinder of defendants. That is all the rule deals with.

MR. HOLTZOFF: Why should we ever allow a dismissal of an indictment for violating this rule because the defendant gets all the relief he needs by severance or separate trials?

MR. WECHSLER: I agree with that and I therefore move that "dismiss an indictment or information or one or

more counts thereof" go out and it read "of its own motion order an election of separate trial".

MR. HOLTZOFF: I second the motion.

MR. McLELLAN: I think that is better.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

If there are no further questions we are ready to vote on the rule.

MR. SEASONGOOD: Mine is just passing. I do not like the heading you have, "Prejudicial Joinder of Offenses".

THE CHAIRMAN: That is changed to "Relief".

MR. YOUNGQUIST: One thought I had, Mr. Chairman, is that in line 9 you strike out "is required" and substitute "as justice may require".

MR. ROBINSON: "provide whatever other relief as justice may require"?

MR. YOUNGQUIST: No, "provide whatever other relief justice may require".

MR. ROBINSON: That sounds nicer.

MR. YOUNGQUIST: I think it means more.

MR. SETH: What could require anything but justice?

MR. YOUNGQUIST: It might mean dismissal of the whole indictment too, but I think that is all right.

MR. WECHSLER: That reserves it for the most exceptional case though. I still think, Mr. Chairman, we can do better than "whether by a multiplicity of

13 counts". Suppose we revise that to read "If it appears that a defendant or the government may be prejudiced by a joinder of offenses, a multiplicity of counts, or a joinder of defendants in an indictment or information"? Won't that give what we want?

MR. ROBINSON: No, it will not. We would have to check through these notes and cases and see what we would get.

MR. WECHSLER: All this says is "multiplicity of counts or of defendants".

THE CHAIRMAN: "or otherwise" intended as a dragnet.

MR. YOUNGQUIST: It is much broader than that. You have joinder of offenses and defendants, and joinder of --

MR. WECHSLER: I do not press it.

MR. HOLTZOFF: "or otherwise" does not mean anything additional under the rules of statutory

construction.

MR. WECHSLER: I did not think it dealt with anything but those three pleas. If it does I will withdraw it.

THE CHAIRMAN: Are we ready on the rule with the two amendments? All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

We now come to Rule 14.

MR. HOLTZOFF: I move to modify the last sentence, beginning line 5, and this is by way of phraseology. It speaks now of an indictment being on trial. Of course that is inadvertence.

MR. YOUNGQUIST: I have suggested simply substituting "being tried".

MR. HOLTZOFF: You do not try the indictment. You try the defendant.

MR. YOUNGQUIST: No. You try the defendant.

MR. HOLTZOFF: You try him on an indictment. Here is the suggestion I have: "In such event the procedure shall be the same as if the offenses or the defendants were joined in a single indictment or information."

MR. ROBINSON: Let me try it this time and see what you think of this. I agree with you and Mr. Youngquist it should be changed. "The procedure shall be the same as if", and then substitute for the rest of the sentence this, "the proceeding were under such single indictment or information."

MR. HOLTZOFF: I think that would do it.

MR. WAITE: That seems to fix it up.

MR. HOLTZOFF: Would you mind reading that?

MR. ROBINSON: "The procedure shall be the same as if" and strike out the rest and substitute "the proceeding were under such single indictment or information."

MR. YOUNGQUIST: Wouldn't it be better to say "prosecution"?

MR. HOLTZOFF: I rather object to the use of the word "such" in that way.

MR. ROBINSON: It is right here. We are not using it in the sense of the "same" or "aforesaid". We are using it as referring to the particular type of indictment or information, namely, this type that would seem to combine, and that which could be consolidated.

MR. HOLTZOFF: All right.

THE CHAIRMAN: What about "such prosecution" instead of "proceeding"?

MR. ROBINSON: Is there anything we might leave out if we say "prosecution" instead of "procee ing"?

MR. YOUNGQUIST: This is a trial and certainly part of the prosecution. Will you read that again, please, Jim?

MR. ROBINSON: "The procedure shall be the same as if the prosecution were under such single indictment or information."

MR. GLUECK: Does that affect the number of challenges allowed, for instance?

MR. ROBINSON: No. I cannot see how it would.

MR. GLUECK: Why not say "The procedure thereafter, as well as the rights of the parties, shall be the same" and so forth and so forth?

MR. ROBINSON: The matter of challenges is involved, but I believe this takes care of it clearly.

MR. GLUECK: Does it, without some such inclusion, because you say only the procedure or the prosecution. Why not say "The procedure thereafter, as well as the rights of the parties, shall be the same as if" and so forth?

MR. ROBINSON: Our first trouble is more words unless we gain something by adding them.

MR. GLUECK: Don't we lose something by leaving them out?

MR. McLELLAN: In that connection may I ask something, because I was thinking about the same thing.

14 Suppose A is the defendant in one indictment, and B is the defendant in another indictment, and the circumstances were such that they could have been indicted together in one indictment. Then the case comes on for trial and A demands all the challenges that the statute gives him. B demands all the challenges that the statute gives him. How many challenges is he going to have? Must they divide the challenges between them?

MR. ROBINSON: We have been expecting that question from you, Judge McLellan, because Massachusetts has, of course, some of such Federal cases going way back to Colonial times on this question of how many challenges. We have a collection of the statutes here, and we also refer to it in the note.

MR. McLELLAN: But what is the answer to that question?

MR. ROBINSON: I think the answer ought to be what it is now in the Federal cases; that they must join in their challenges.

MR. McLELLAN: When they are separately indicted?

MR. ROBINSON: That is all right, but they were mixed up in the same transaction.

MR. HOLTZOFF: You separately indict, but

consolidate for trial.

MR. ROBINSON: The Federal law is clear on that point; that they have to join where they are joint defendants.

MR. McLELLAN: Yes, where the statute says they are joint defendants but they are not separate defendants here; one against A and one against B. Are you going to change that when you say the procedure shall be the same?

MR. ROBINSON: The point is, Judge, as I understand the case, the best case from your Circuit, and other cases referred to here in the notes, as I understand a consolidation is permitted where the transaction is really the same transaction. There would be a waste of the court's time and officials' time to have to conduct two separate trials on a state of facts which are substantially the same. Now then you have got defendant A in indictment No. 1 and you have defendant B in indictment No. 2.

MR. McLELLAN: But you are not providing for the consolidation in this rule at all.

MR. ROBINSON: Oh, pardon me a second. The fact is this: The facts are so united that it means as though it were just one transaction and therefore it should have been possible to join the two indictments in

one indictment. Now you have one indictment, count 1 against defendant A, and count 2 against defendant B.

MR. McLELLAN: An indictment against A and an indictment against B.

MR. ROBINSON: The cases say it amounts to their being the same thing. I can give quotations on that.

MR. YOUNGQUIST: While you are looking that up doesn't it amount to this: The defendants could have been included in one indictment in the first place?

MR. ROBINSON: Yes, exactly.

MR. YOUNGQUIST: The court makes an order, the effect of which is to make a single indictment of what previously was two.

MR. HOLTZOFF: Suppose the court does not do that. Suppose the court consolidates two indictments for trial?

MR. McLELLAN: Leave out the word "consolidate" as that is not a word of art. But the defendants are tried together.

MR. HOLTZOFF: But each of the defendants.

MR. YOUNGQUIST: I am speaking of the rule. The rule says the court may order the indictments to be tried together. Now does that mean they are tried as one indictment?

MR. ROBINSON: That is right.

MR. YOUNGQUIST: Or as if there had been one indictment?

MR. ROBINSON: It is meant to say what it says.

MR. McLELLAN: May I interrupt and ask a question: Do you conceive there is any difference between the consolidation of cases and an order that they be tried together?

MR. ROBINSON: I am not sure I understand your question, Judge. I think I understand both "consolidation" and --

MR. McLELLAN: This does not consolidate the cases but it simply provides they may be tried together.

MR. ROBINSON: Yes, I am getting a bit refreshed on all this. You remember that term "consolidation" was one the Committee decided it would not allow to be stated in those words for the reason that "consolidation" has become an extremely artificial and confusing subject, largely because the Massachusetts case, which I am sorry to say was decided in the Second Circuit when Mr. Justice Oliver Wendell Holmes was a Circuit Judge, Putnam was another Circuit Judge, on the case --

MR. McLELLAN: When he went from the Supreme Court?

MR. ROBINSON: Yes, and a third judge whom I don't remember. It was a divided court; in the Betts case

which is cited here under Rule 14, page 7, and previously - you can get the citation from the notes - the Massachusetts judges there began raising the question of this very matter of the joinder in challenges to jurors. There were two defendants, I believe, in the case, and the judges were inclined to think that following the Massachusetts law there should have been in the trial below a separation in challenges, and so the reversed on that ground, overlooking the fact that the statute on which they were acting largely had been repealed so far as this point of challenges was concerned, and confusing too, it seems to me with due respect, on noticing the case and opinion, and other cases since under it, that they were getting consolidation in civil cases mixed up with consolidation in criminal cases. In civil cases consolidation has at least three different meanings. It does not have those in criminal cases. And the result has been that the Betts case, raising this same point of whether or not defendants joined together, or being tried together in consolidated cases, are entitled each to have his separate challenges, or all to have their challenges together,-- that case has been followed down through a lot of other decisions in other districts, always adding more confusion to the doctrine of consolidation, which is largely the reason

why this Committee voted the term "consolidation" as such an abused term and confusing term that we did not want to use it in these rules, and that was a vote of the Committee, so this rule is drawn with the term "consolidation" left out largely because of that confusion arising there in Massachusetts in the Betts case and coming down in the other cases.

MR. McLELLAN: My suggestion is that you pass the rule, perhaps, without putting in that last sentence.

MR. BURNS: What is the advantage of the last sentence?

MR. ROBINSON: The last sentence is essential. If you don't have that you don't have anything.

MR. HOLTZOFF: Don't you want to make certain that the defendants are indicted separately and the court just orders the indictments tried together and each shall have his own challenges?

MR. McLELLAN: You certainly do.

MR. ROBINSON: In the dissenting opinion in the Betts case the judge called attention to the fact, I think at that time, he had 20 challenges for the offense on which the defendants were charged. He says, in other words, if there are just enough defendants you can prevent justice being done because there would not be enough jurors.

THE CHAIRMAN: That is all changed now with the limitation of the number of jurors.

MR. HOLTZOFF: I do not think it is fair to deprive a man of challenges by joining him with somebody else.

MR. ROBINSON: You cannot join him unless it is the same offense.

MR. HOLTZOFF: So it was up to the United States Attorney to join him?

MR. GLUECK: My objection to this last sentence is that it is not clear on these various issues. We do not know whether the wording, even as amended, means that each defendant shall have the same number of challenges as before.

MR. ROBINSON: Pardon me. I will answer that. He does not have the same.

MR. GLUECK: What does it mean? We do not know whether he should or should not have.

MR. HOLTZOFF: My understanding of this last sentence is, in its present form, if you join different defendants, separately indicted, or, not join but order them tried together, you deprive them of their separate challenges and I don't think you should do that.

MR. GLUECK: I do not think that is our intention.

MR. HOLTZOFF: I don't think it ought to be.

MR. DEAN: I think we should vote on the principle whether we want to do it or not.

THE CHAIRMAN: Mr. Dean moves that in the event of this joinder for trial the individual defendants be allowed their separate challenges?

MR. DEAN: Yes, joinder under this rule.

THE CHAIRMAN: That is for the purpose of getting a principle stated.

MR. HOLTZOFF: I second it.

MR. WAITE: I am seconding it only for discussion as I have a question: As I understand the proposition about this rule it is that if they could have been joined in the same indictment to begin with, and the two indictments are then put together in a single trial, they shall be dealt with as far as challenges are concerned and that sort of thing exactly as though they had been joined in the same indictment to begin with?

MR. ROBINSON: That is right.

MR. WAITE: So they are not deprived of a blessed thing by this procedure. I second the motion in order to vote against it.

MR. ROBINSON: May I read Section 424 of the present Code, Title 26; Section 424:

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to six peremptory

16 challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants or several plaintiffs the parties on each side shall be deemed a single party for the purposes of all challenges under this section.

"All challenges, whether to the array or panel or to individual jurors for cause or favor" --

MR. HOLTZOFF: That still does not cover this point.

MR. ROBINSON: That shows that in criminal trials as well as in civil all the parties on one side, that is the defendants on the one side and the United States on the other shall be deemed a single party.

MR. HOLTZOFF: That is only when you have a single case.

MR. McLELLAN: But not in a separate indictment.

MR. ROBINSON: But when you bring them together --

MR. McLELLAN: No you don't. You just try the cases together.

THE CHAIRMAN: Judge McLellan makes the distinction between an actual consolidation, which is a civil matter to make two cases one, and the common instance where there is a suit by a plaintiff against eight or ten insurance companies and the trial of those causes are ordered together because they involve a common fire.

MR. McLELLAN: And in that case the defendant is entitled to his challenges.

MR. DEAN: I vote for this principle because of our rule of joinder. You mean joint defendants, although there has been no joint participation?

MR. HOLTZOFF: The United States Attorney has the privilege of joining them in one indictment if he wants to. If he did not make that choice I do not think the court ought to deprive the defendants of the challenges.

THE CHAIRMAN: You have the question very clearly put. Those in favor of the motion made by Mr. Dean say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: I will call for a show of

hands.

(After a show of hands the Chairman announced the vote to be nine in favor and six opposed.)

THE CHAIRMAN: The motion is carried nine to six.

MR. DEAN: That only covers one of many points of procedure. The challenges happens to be one.

MR. GLUECK: Before you go ahead may I suggest again the following language to cover not only this point but any others that may be involved merely to protect the rights of individual defendants once a case against several is ordered to be tried as one case. In the last sentence "The procedure thereafter, as well as the rights of the parties, shall be the same as if such single indictment or information were on trial." That provision including all rights of the parties is broad enough to cover any other rights.

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MR. HOLTZOFF: No, but you are defeating by that language the motion which has just been carried.

MR. ROBINSON: Let me give you a citation that helps us, I think, Judge McLellan --

MR. HOLTZOFF: We voted on this motion.

MR. ROBINSON: I do not care. We have still got the problem about what we are going to do about challenges. In Kettenbach v. United States, the opinion says this: the effect of consolidation of indictments upon the number of peremptory challenges allowed is determined in these words: "The consolidated indictments having become in legal effect separate counts of the same indictment" -- that is, in one indictment --

THE CHAIRMAN: Jim, you do not need to go any further. If they are consolidated indictments, that follows. But if they are merely indictments joined for trial, that is something entirely different.

MR. ROBINSON: That brings me to this question: Do we have to use the term "consolidation" which this Committee has eliminated in order to get that same effect?

MR. McLELLAN: Why do you want the effect for?

MR. ROBINSON: For the same purposes.

MR. YOUNGQUIST: That is the whole question.

MR. CRANE: May I ask this: If you make a motion to be tried together, is there any objection to the judge consolidating them?

MR. ROBINSON: If you want to go back and use the term "consolidation" --

MR. CRANE: No, I am taking your view of it. But you say "tried together." Now, suppose they are tried together and they are all there in the courtroom and the evidence goes in. Now, what happens? Is it just the formal words we are using? What is consolidation? Is it just a word? Do you say they are going to be tried together, and the next thing, they are going to be consolidated? Now, what is the difference between the two? What is the difference between the two?

THE CHAIRMAN: There is this difference, as I see it, Judge. In a consolidation you get one verdict at the end. If it is several indictments being tried together you will get a series of verdicts.

MR. ROBINSON: I beg your pardon, Arthur, that is not it.

MR. CRANE: You are coming back to what this really means, and it says that the man can join them together or separate them. Why should he separate them or why should he join them? You are back to that. What rule governs consolidation? What rule governs separation?

MR. McLELLAN: The reason I have talked so much about this is because I had this situation once, and you will be ashamed of me when I tell you this: Some people down in Fall River held up a mail man and took away his money, and they were clearly guilty; and there were several indictments, and there were a lot of defendants, and it was perfectly patent to me, because I knew counsel for the defendants, that they were going to try to exhaust our panel by the use of challenges; and the Government made a motion to try the cases together. And I said, "Clearly the cases ought to be tried together. Why shouldn't they be consolidated, gentlemen?" And they finally said they should be. And I said, "All right, then, these cases are consolidated for trial, and together you will have the same challenges as if you were single defendants."

Now, that was a wicked thing to do, but the circumstances warranted it, and that is how I knew the distinction between a consolidation and trying together.

MR. CRANE: Judge, we haven't a thing in here in our rules about the distinction between consolidation and separation; and before you go to work and make changes dependent upon whether it is consolidation or whether it is separation, you, at least, ought to describe those terms. I do not care what you do. I am in

favor of giving challenges to defendants. But I do not think it should depend upon such an airy thing which we haven't attempted to describe. What is a consolidation and separation? Which is which, and which is it?

MR. BURNS: Could you strike out the last sentence and have this apply only to trial together, which has to do with the convenience of the court, etc., and then possibly have another rule which will define consolidation as resulting in the same situation as though they had been indicted jointly, and then let your challenges depend upon whether it was a trial together - there will be no substantive rights affected - or a consolidation, which would be the same as though they had been indicted jointly.

MR. McLELLAN: Why isn't that pretty good?

MR. YOUNGQUIST: I was wondering, Judge, in view of the illustration you gave us, whether the rules should make provision for the accomplishment of the

2 sinister purposes you mentioned?

MR. McLELLAN: It was a wicked thing to do, but if you had been there you would have done the same thing. That is the question I am asking, whether these rules should be so framed as to permit that practice.

MR. ROBINSON: That is just what we are trying to do in this rule.

MR. McLELLAN: No, the rule does not say so.

MR. YOUNGQUIST: When it says, Judge, that it shall be the same as if the prosecution were under a single indictment, that does throw the defendants into one group for challenge purposes.

MR. ROBINSON: Exactly.

MR. YOUNGQUIST: That, as I understood it, is the whole purpose of the rule.

MR. ROBINSON: That is right.

MR. YOUNGQUIST: We say they shall be tried together, and then we say what the effect of the trial together is, - that is, that it shall be as though they had all been indicted together.

MR. CRANE: May I ask a question? I am learning something this afternoon about the intricacies of Federal procedure. We do not have anything like this in the State. If these indictments were separate, and an order could be made to try the indictments together, could an order also be made legally to consolidate them? Or, take it this way, dealing with your indictments which you are speaking of as separate indictments, could they, in the first instance, all have been included in one indictment?

THE CHAIRMAN: Surely.

MR. CRANE: Then there is no distinction that

I can see between a consolidation and a separation.

MR. ROBINSON: There is this distinction in the cases that we have to follow. The Federal courts are much more liberal in the rules as to consolidation than they are in the rules as to joinder in one indictment. In other words, they will allow, especially in the Fifth Circuit - it is a minority opinion, really - that is, they will allow different defendants to be indicted on different counts; and count 1 in the indictment may be against A; count 2 in the indictment may be against B, and count 3 may be an indictment against A, B and C. That is, you allow consolidation in cases of that kind in most of the Circuits. But in most of the Circuits they do not allow that kind of a joinder of counts.

MR. CRANE: Shouldn't we cover it by a rule so as to have some uniformity?

MR. ROBINSON: I think we should.

MR. CRANE: I think it is ridiculous for us to sit here and speculate upon what separation is which one court follows and what consolidation is and others do not follow; and we are making rules and saying nothing about it. We are trying to get uniformity. If we are at that impasse let us deal with it. It simply flows from your premise. We should deal with it.

MR. HOLTZOFF: We decided a few moments ago as

to which policy we wanted to follow, and it seems to me, in order to effectuate that policy, we have to drop the second sentence from this rule.

MR. CRANE: When we were talking about it before I had no idea there was such separation.

THE CHAIRMAN: I think what went before is this: Where the district attorney does not know his job and it has to be left to the court to do the consolidating, then the defendant shall have the advantage of multiplicity of challenges. But where the district attorney does know his job and is on the job and indicts them together, the defendants just have one batch of challenges. That is what underlay our decisions.

MR. CRANE: What are we making rules for, deficient district attorneys or efficient ones?

THE CHAIRMAN: Well, maybe we had better reconsider.

MR. DEAN: I think Judge Crane's question is very much in point. Is there any legal distinction between trying the two together and consolidating?

MR. McLELLAN: What is that, Mr. Dean? I could not hear you.

MR. DEAN: As I understood Judge Crane's question, is there any legal difference, in the actual mechanics of the trial, between consolidation and trying together?

If there is I would like to know what it is.

MR. McLELLAN: You are trying one case when you have consolidation, and you are trying two when you have two cases together.

MR. BURNS: That talks about the results of it. But those flow from a concept of consolidation which strikes me as being artificial and synthetic; and I am asking the question, is there anything about the administration of justice that calls for that kind of a concept? I cannot see it. It seems to me that convenience of the trial is the thing you are aiming at, and the judge has that when you can try the people together, as limited by this rule with the last sentence taken out.

MR. McLELLAN: Can't you conceive of a situation where counsel on one side asked you to order cases tried together, that you might do it in order to save time; but if he asked you to make the two cases one, that you might not do it?

MR. BURNS: I would like to take away the power to make the two cases one. I would like to eliminate that because of its synthetic quality.

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MR. WAITE: Mr. Chairman, I have written a suggestion here which perhaps will bring us together. I have tried to listen to the various ideas to see if I could pick up the threads of it. How would this

be:

"If the court finds that the charges in two or more indictments or informations could have been joined in a single indictment or information, and that the interests of justice will be served by trying the defendants therein named as though they had been joined in a single indictment or information, he may order that they be so tried."

MR. ROBINSON: That is satisfactory.

MR. McLELLAN: It is satisfactory to Mr. Robinson, but the truth is that the grand jury has not seen fit to unite the defendants in a single indictment.

MR. ROBINSON: Maybe the question has not been before them.

MR. McLELLAN: I do not care whether it has been before them or not. They have not done it. Now, I have a little feeling about it. I do not know whether I can express it; but where a grand jury has said "Here are two cases," I do not think there is anything we can do about it. If the grand jury makes one case of them and indicts them together, that is one thing. But to say that you will treat the case just as if the grand jury had done something it did not do is a little bit against my sense of what is right. I feel that A

indicted alone, being entitled on that indictment, which is the only one he is concerned with, to a certain number of challenges, ought not to be deprived of his right to challenges because somebody else happens to be indicted and there be an order consolidating the cases. If they are ordered to be tried together I haven't the slightest doubt that each retains his right to challenges.

MR. CRANE: May I ask a question, Mr. Chairman?

THE CHAIRMAN: Yes.

MR. CRANE: Assume, Judge, as an illustration, that two grand juries indicted men separately. Could you or would the court have power to consolidate as distinguished from separate trials? Stop and think.

MR. McLELLAN: I can answer that by saying that I don't know.

MR. CRANE: That is just it.

MR. ROBINSON: The statute squarely says so, doesn't it? 18557.

MR. SEASONGOOD: What is wrong with Judge Crane's suggestion? Do you want consolidation or don't you? If you want consolidation, why don't you say they may be joined together in the trial, but the right to challenges should be preserved.

MR. ROBINSON: Here is 18557. It reads:

"Joinder of Charges: 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. DEAN: That is a case of a single defendant. That is only one defendant.

MR. CRANE: If it should happen, as a district attorney has a right to do, and he is an efficient district attorney, such as the Chairman has selected as an example, and you have got three or four or ten defendants all in one indictment, and it is legal, does our rule provide that they have to divide the challenges?

MR. HOLTZOFF: No.

MR. McLELLAN: They must exercise them jointly. If they cannot agree on them they do not get them.

MR. CRANE: Then what is all the fuss about it when you try them together? Let us get to the realities of it. I will do whatever anybody wants, but, I will say this, let us clear about it. If in one indictment there are ten men charged with the same offense, and by our rule those ten men have to join in a challenge,

it is just as unjust as it is when you consolidate indictments. Let us change that rule then. If men are tried together by a joinder or having indictments tried as one indictment, and then they are entitled to several challenges, the rule applies, in all equity and justice and fairness just the same as if they are all embodied in one indictment.

MR. ROBINSON: That statute I read needs to be supplemented --

MR. CRANE: Just a minute. Isn't it fair, if you have got separate indictments, you have got a right to consolidate them, and you have got a right to try them; and you are saying here in all fairness and justice they should have separate challenges, - isn't it just as fair and isn't it just as right that they should have those separate challenges when they are all put in one indictment?

MR. McLELLAN: Yes; but when that first indictment against A came out of the grand jury he had a right to his 10 challenges if he were put to trial.

MR. CRANE: They ought to change the fundamental rule. It is unjust and unfair.

MR. McLELLAN: It seems to me by consolidating by an order to try the cases together you are taking away from A, who is a single defendant in an indictment, the

right to those challenges. If you want to do it and risk it, it is all right. I have talked too much about it already.

THE CHAIRMAN: If the Chairman may speak again, we have a different situation that prevails when an individual plaintiff brings a suit on the civil side. But the right of the state to go ahead and try this man goes back to the grand jury action, which is against this one man individually. Then you go to the next term of court and another grand jury brings in an indictment against another fellow, and it may even bring a third grand jury into the thing. Now, those successive grand juries might have been unwilling, for one reason or another, to have indicted A, B and C together; and I do not think it should be in the power of the district attorney at a later date to do it, or to empower the court to do it, except for convenience of trial because of the common witnesses that may be involved, and whatever rights they had at the time of their indictment ought to be preserved to them.

MR. CRANE: I will take everything you say, and I will agree with it, but doesn't the same thing apply if it were all put in one indictment by one grand jury? What is the reason back of it?

THE CHAIRMAN: There is a sound reason back of

that. Take the oil indictments out in Wisconsin where there were 300-odd attorneys and I don't know how many individual defendants. If they had all had their challenges you could not have had a jury.

MR. CRANE: That is just exactly why the rule is adopted now when they join them. Suppose every one of those defendants had a separate indictment against him, as he could have from the law, and then they said for convenience we will join them, what comes to your mind?

THE CHAIRMAN: If they indicted those men out there separately and then wanted to join 60 or 70 or 80, or how many there were, for trial, I think counsel could have made a very sound case against a joinder because --

MR. CRANE: Now you are coming back to what the judge should do.

THE CHAIRMAN: -- because of the fact that the district attorney got separate indictments, and perhaps he could not get a joint indictment.

MR. CRANE: You are coming back to what the judge should do. If the judge is in error, of course, that is not our fault. But the reason applies just as much in one case as in the other. I do not see how you can answer it.

THE CHAIRMAN: Is there any law for consolidating

indictments against different defendants?

MR. ROBINSON: Oh, yes, by the case law. Plenty of law.

MR. McLELLAN: But it is subject to limitations that can't be stated in words. There are many cases where a judge would be warranted, in the exercise of his discretion, in ordering cases to be tried together which he would not be warranted in consolidating. But whichever view is right there is something ailing with the rule.

MR. CRANE: I have no objection. I do not want you to think I am opposing. I want to make our rule sensible. If you want to say that if there had been separate indictments and if they are tried together each is to preserve his challenges, I have no objection to it. I think that is all right. But I am only saying this. Do not take the absurd position - excuse my language - the absurd position by saying that if they are consolidated, however, that does not apply. When you do that, then it is ridiculous, because we have then got to explain what consolidation is as distinguished from trying them together.

MR. YOUNGQUIST: In order to bring this to a head, Mr. Chairman, and in line with the vote that was taken, I would suggest in behalf of the opposition, or,

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rather, I would make this motion on behalf of the opposition, that there be substituted for the last sentence the following:

"The procedure and the rights of the defendants shall in all other respects be the same as if the indictments or informations were tried separately."

I think that would cover it.

THE CHAIRMAN: That covers the prevailing philosophy.

MR. HOLTZOFF: May we have it again?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: "The procedure and the rights of the defendants shall in all other respects be the same as if the indictments or informations were tried separately."

5 MR. BURNS: This is in addition?

MR. YOUNGQUIST: No, a substitution for the last sentence.

MR. BURNS: What is the antecedent to the word "other"?

MR. YOUNGQUIST: Tried together.

MR. DEAN: May I speak in behalf of that motion? It seems to me you could get this sort of a situation once in a while. Now, our joinder rule as to defendants is very broad. You can join men

who are not jointly participating if they are in the same series of transactions. Now, take the illustration of this Murder, Inc. in Brooklyn where you had a whole series of murders. In one sense it was probably a series of transactions. They were all separate murders performed by certain cliques out of the big group. Now, in his discretion and out of a sense of fairness I can see a prosecutor saying, "It would be unfair - although by the joinder rule I could do it - it would be unfair to join these men in the same indictment, because everything that goes against one goes against both." So he separates them for trial. Then he comes up before the judge, and the judge really takes your position. He consolidates them. And that is a situation where the judge should not consolidate them, for reasons of fairness. Now, if the judge does do it, I do not know what action you can take.

MR. CRANE: I agree with you on that. I am saying this. What is consolidation? It is just a word.

MR. DEAN: I am assuming that "consolidation" as used means the same as joinder.

MR. CRANE: I do not see anything but a myth and a ghost. What is consolidation? It is the scratch of a pen. The actual reality is nothing different from

trying together. But I am saying, let us be fair, or, at least, have it in the notes, if it applies to the same as consolidation, that there is no distinction under our rules between consolidation and trying people together, then we are not dealing with realities; we are dealing with shams.

MR. DEAN: I agree. I do not see any difference between consolidation and joint trial, or consolidation and trial together.

MR. BURNS: Before the question, will it be understood that there will be in the notes a statement to the effect that consolidation, as a technical concept, having significance quite apart from the reality of trial together, is not looked upon as having any vital force in these rules?

MR. DEAN: I think it should be.

MR. McLELLAN: Look at your rules, Judge. It says that the judge may order the cases tried together and that the procedure shall be the same as if they had been consolidated.

MR. HOLTZOFF: No, the other way.

MR. McLELLAN: You are talking about Mr. Youngquist's motion?

MR. HOLTZOFF: Yes.

MR. ROBINSON: Now, Mr. Youngquist's motion

included your point about multiplicity.

MR. McLELLAN: I know that it did.

MR. ROBINSON: Well, I beg your pardon. I wanted to say, it goes far beyond your point of multiplicity of challenges, multiplying the number of challenges by the number of defendants. He is saying after you have consolidated them you just unconsolidate them, and you do not get anywhere by what you have done.

MR. YOUNGQUIST: I undertook to incorporate in the amendment the philosophy of the vote that we recently took that the joint trial shall be only for the convenience of presenting the evidence in one case.

MR. ROBINSON: It is no convenience --

MR. YOUNGQUIST: You will have one trial. I am not arguing for it, you understand, Jim. But for all other purposes, for purposes of challenges and motions, and appeals, and everything else, each defendant goes his own way. I disagree with it completely; but that is what you have got to do in order to carry out the idea behind that vote.

MR. ROBINSON: You would not call it reductio ad absurdum?

MR. YOUNGQUIST: No.

THE CHAIRMAN: You all have the motion, I think, clearly before you.

MR. GLUECK: I would like to ask, Mr. Chairman, why not make that read "the rights of the parties", because the prosecutor has some rights here too.

MR. YOUNGQUIST: All right.

THE CHAIRMAN: You accept that, Mr. Youngquist?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands is indicated.

(After a show of hands the Chairman announced the vote to be five in favor; six opposed.)

THE CHAIRMAN: The motion is lost.

MR. CRANE: Mr. Chairman, tell me, if you had carried that motion, and you had had these men all having these challenges and tried them all at once - now you have got 30 or 40 or 50 challenges, but if they had been written on one paper instead of on five they would not have had them - doesn't that seem silly?

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THE CHAIRMAN: Not to me when I bear in mind that these indictments have to originate through a grand jury.

MR. CRANE: Well, what is a grand jury?

You know if you go to bring the vote in, they vote. There is no other person there except the district attorney, and they come in and he talks and they listen.

THE CHAIRMAN: Suppose, as a practical matter, the district attorney did not dare to ask that grand jury for a joint indictment, but he preferred to get them seriatim, and then, having them put through that way he then wanted them all brought together: Now, it seems to me he ought not to have that right to do that. True, there is no objection to consolidating them for purposes of trial, but they should remain on the docket as individual cases, and verdicts should be entered in those cases, and appeals separately conducted. Now, it would be a very unfortunate thing for, say, a pretty decent citizen, who is brought in, say, on the fifth indictment, to be joined with four scoundrels; whereas if the district attorney had tried to get an indictment against the fifth man with the other four he probably never could have got it. Now, those situations arise.

MR. ROBINSON: Many of the cases, though, Mr. Chairman, show that the only reason why the second and third and fourth defendants were not indicted with the first is because they got away faster, before the grand jury could get them. They got away.

THE CHAIRMAN: There is no problem there. You can have a superseding indictment and bring them all in, if the district attorney dared to do that.

MR. ROBINSON: Well, the statute of limitations may run on part of them. It makes quite a mess.

MR. CRANE: Well, as long as you have heard me, and as long as I have made it plain to you, showing you what you are doing, I will go along with it.

MR. BURNS: Jim, is it your theory, where in any case by the terms of your rules they can be tried together, they must be considered to be consolidated in the sense that there is just one trial?

MR. ROBINSON: That is not the Federal Criminal Law in the Federal decisions. You are talking Civil Law.

THE CHAIRMAN: You mean when you consolidate them, they are still separate cases?

MR. ROBINSON: They are not one case.

MR. McLELLAN: That is just what consolidation is. It makes them as if they were one case.

MR. ROBINSON: It is a kind of a merger. It is a ghostly sort of thing.

MR. YOUNGQUIST: I want to make another motion, having lost my last one, in order that we may dispose of this and proceed.

I move that the following be substituted for the last sentence:

"The procedure shall be the same as if the prosecution were under such single indictment or information." That is the language used by the Reporter a while ago.

MR. WAITE: I support it.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be eight in favor; seven opposed.)

THE CHAIRMAN: Carried. Eight to seven.

Are you ready for the question on the entire --

MR. McLELLAN: Do I understand we have passed this rule?

THE CHAIRMAN: Yes.

MR. SETH: In line 3 the word "or" I think should be "and". Rule 14.

MR. HOLTZOFF: I think this ought to be "or". This is two kinds of cases, one where you have multiple offenses against the same defendant, and one where you

have multiple defendants.

MR. SETH: It may be both then.

MR. ROBINSON: Then you have to use "and/or". That reminds of a rule in 52 which is good for a half day's argument when we get to it. We are trying to avoid this "and/or" controversy. There are many places where we need "and/or", but I think this is a point where we better use the "or".

MR. SETH: I do not think so.

MR. DEAN: Perhaps it would be better to have two sentences.

MR. ROBINSON: I do not think so. That is the way it is, and it has been passed by the Committee. I would like to have it stay that way for at least a little while.

MR. DEAN: I do not think that issue that Mr. Seth raised has been raised before.

MR. HOLTZOFF: I think you lose the contingency if you change it.

MR. ROBINSON: Look it over and read the notes and the cases cited before you decide.

MR. SETH: I have read them, and I think it should be "and".

MR. YOUNGQUIST: I think you had better add the words "or both" at the end of that line.

MR. ROBINSON: That is better.

MR. HOLTZOFF: That is better. Keep the word "or" and then add "both".

MR. YOUNGQUIST: That is what you must do.

MR. SEASONGOOD: What is going on?

THE CHAIRMAN: Mr. Seth moves in line 3 of Rule 14, at the end of the line, to add the words "or both".

Is that seconded?

MR. HOLTZOFF: I second it.

THE CHAIRMAN: It is accepted by consent and made part of the preceding motion.

Rule 15(a).

MR. SEASONGOOD: I do not want to fuss about it, but it would not be correct, would it, to say "two or more indictments or both"? "Both" would mean two or more indictments and two or more informations.

MR. ROBINSON: You are in the wrong line, aren't you?

MR. SEASONGOOD: No, coming back to lines 2 and 3. "And it may order two or more indictments or two or more informations, or both."

MR. ROBINSON: "Tried together." You are on the wrong line.

MR. SEASONGOOD: I am bringing something else

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up. "Both" can only refer to what has preceded, and what has preceded is two or more indictments and two or more informations.

MR. HOLTZOFF: I think the "or both" there is used to indicate that you can join an information or an indictment.

MR. SEASONGOOD: Surely.

MR. HOLTZOFF: How can we change that?

MR. SEASONGOOD: I do not know. Let the Committee on Style do it. It is not a correct statement.

MR. ROBINSON: That is the closest you can get to it, Murray.

THE CHAIRMAN: Will you have that in mind, Mr. Youngquist, for the Committee on Style?

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: I move its adoption, Mr. Chairman.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Carried.

Rule 15 (a).

MR. WECHSLER: I would like to stick to that, Mr. Chairman. I would like to move that Rule 15 (a) be eliminated entirely. I think that is in accord with the Reporter's conclusion that there is no basis

for it, no need for it; and what troubles me even more is that in having a single rule on pleading special matters which exists only because it is in the Civil Rules, there may be adverse implications with respect to other pleas about special matters that we have not touched. Therefore I think the sound solution is to eliminate the whole thing.

MR. BURNS: I second the motion.

MR. ROBINSON: I say it is open to question, though I would rather not take the position that it should be thrown out here --

MR. HOLTZOFF: I raise the question.

THE CHAIRMAN: It is moved and seconded that Rule 15 (a) be stricken out.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 15 (b).

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MR. WECHSLER: Same motion.

MR. BURNS: Seconded.

THE CHAIRMAN: Those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 16 apparently is --

MR. WECHSLER: I move its adoption.

MR. ROBINSON: It is the same one we had before.

MR. HOLTZOFF: Yes, we had that before. That has not been changed. That is 16, the pre-trial rule.

MR. SEASONGOOD: You say the defendant "may be present" in line 4. Oughtn't he have to be present, on the theory, that he might say he was not present at the trial? This is part of the trial.

MR. HOLTZOFF: I don't think that is part of the trial.

MR. SEASONGOOD: Why, surely, it is.

MR. HOLTZOFF: Pre-trial.

MR. BURNS: It may have some of the most important incidents, which may eliminate a whole defense.

MR. HOLTZOFF: That is like a conference at which a stipulation is agreed on. The defendant does not have to be present on an occasion of that kind, unless

he wants to.

MR. BURNS: If this were not dignified by rule, you could say it could be done but it wasn't part of the trial, but where you make it a part of the pre-trial procedure, query, if he should not be present?

MR. YOUNGQUIST: I hadn't thought it was so, but I am wondering whether it is not, because it is provided that the order to be entered - the order should be a certificate or something other than order - at the pre-trial conference shall control the subsequent course of the proceedings.

MR. HOLTZOFF: Isn't that the same thing as a motion, or the disposition of a motion. At the disposition of a motion the defendant does not have to be present, although a motion is part of the trial proceedings.

MR. YOUNGQUIST: No, I shouldn't think so. Suppose there is a stipulation as to what the evidence will be on some certain point at issue? When the defendant comes to trial, no evidence need be introduced except the court's order or certificate. That is part of the trial and it becomes part of the trial only by reason of the pre-trial conference.

MR. WECHSLER: Aaron, suppose it said, "at which the defendant shall have the right to be present"?

Would that meet your point? He would not have to be there.

MR. BURNS: Yes.

MR. SEASONGOOD: "May" is the same.

MR. YOUNGQUIST: "May" is the same thing.

MR. HOLTZOFF: Suppose there are a number of defendants scattered all over the country and you want to have a pre-trial conference? Shall you require all defendants to appear and say that unless they do appear, you cannot have a pre-trial conference?

THE CHAIRMAN: They can certainly waive.

MR. YOUNGQUIST: I suppose they could waive it.

MR. HOLTZOFF: Well, if they could waive it, then "shall have the right to be present" is all you need and not "shall be present".

MR. BURNS: Make that in the form of a motion, "shall have the right".

MR. WECHSLER: I move the substitution of the words "shall have the right to" for the word "may" on line 4.

MR. HOLTZOFF: I second the motion.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: May the invitation extended to the defendant be declined?

MR. WECHSLER: Yes.

MR. SEASONGOOD: That is why we said "invite".

MR. DEAN: I would like to raise a question, Mr. Chairman, as to what we mean by this "action taken at the conference". By whom is that action taken? Does that contemplate joint action by counsel for both sides and the judge?

MR. HOLTZOFF: Yes.

MR. DEAN: Or does that include orders of the judge alone without consent of counsel?

MR. HOLTZOFF: On consent of counsel. Everything done at the pre-trial conference is done by the consent of all the parties.

MR. DEAN: Let me read that. "The court shall make an order, which recites the action taken at the conference and the agreements made by the parties". Do we mean something different by "the agreement of the parties" and the action taken by counsel?

MR. HOLTZOFF: No, we don't.

MR. WECHSLER: Wouldn't that be met by striking "the action taken at the conference"?

MR. DEAN: I think it would.

MR. WECHSLER: Might not the judge rule that you should not have more than three character witnesses, or something, without agreement of the parties?

MR. DEAN: I think he might.

MR. WECHSLER: At the pre-trial conference.

MR. DEAN: I think that disposes of the difficulty, under this rule, of making orders without the consent of counsel which go beyond his present power to make.

MR. BURNS: Suppose he made an order that "we won't permit the Government to have more than five victims in a mail fraud case; we won't permit the defendant to have more than five character witnesses"? Now, that would be taken down and there would be a certificate to that, and if the defendant tried to put in a sixth character witness, there would be a ruling in connection with that character witness that would be reviewable.

MR. DEAN: Except I imagine the other side, the Government, would come back and say "But in your pre-trial procedure you have waived the right to take such an exception at the trial, because you have given to the court here the right to make any order relating to the four above-named subjects".

MR. BURNS: Have you?

MR. DEAN: Yes.

MR. BURNS: Is there anything in our rules that says you have to waive your right to any action taken at the pre-trial conference?

MR. HOLTZOFF: It is subject to review, of course, if there is a discretion.

MR. BURNS: Is it subject to review if you have empowered him to take the action in the four above-named --

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MR. HOLTZOFF: Yes, certainly, because every order of court is subject to review in case of discretion.

MR. YOUNGQUIST: But he cannot make the order unless you accept the invitation.

MR. HOLTZOFF: By accepting the invitation you do not waive your right to object to the order.

MR. YOUNGQUIST: That is the question Mr. Dean raises, whether you don't.

THE CHAIRMAN: Aren't you on safe ground, as in a civil case, if you confine this order to reciting the agreement itself?

MR. DEAN: That is my suggestion.

MR. YOUNGQUIST: Isn't that enough?

MR. DEAN: I think it is plenty.

MR. BURNS: Then you would strike out "the action taken"?

MR. DEAN: "The court shall make an order, which

recites the agreement".

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: Should we use the word "order" there? Well, I do not suppose it makes any difference.

MR. DEAN: That is what they get used to doing.

THE CHAIRMAN: Is there a question?

MR. YOUNGQUIST: No; I merely asked whether we should use the word "order" or "certificate".

MR. HOLTZOFF: It is an order in the civil rules.

THE CHAIRMAN: The motion is to strike out, lines 13 and 14, the words "the action taken at the conference and". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

The motion is to adopt Rule 16 as amended.

MR. McLELLAN: May I ask one question without taking too much time? Suppose the judge determines, in the light of (3) above, that there shall be not more than 20 character witnesses? That would not go into this order, because that would not be an agreement of the parties, would it?

MR. DEAN: It would, if they agree.

MR. McLELLAN: Yes, if they agreed, but if he wanted to say "Well now, I think 30 character witnesses are all that either side should call," that the defendant, in the first instance, would call, or the other side, why, that would not get in unless they agreed to it.

MR. DEAN: I think that is the way it should read. Of course, discretion is the better part of valor and you probably would not call over 30, if the judge suggested it.

MR. McLELLAN: I had 50 in Philadelphia last summer.

THE CHAIRMAN: There are very few cases in which they produce the whole Sunday School class.

MR. HOLTZOFF: They apparently helped out a little.

MR. McLELLAN: Yes, they got some of them.

MR. GLUECK: Mr. Chairman, is it clear what you mean by (4) in lines 11 and 12? Isn't that rather broad?

THE CHAIRMAN: That is a catch-all, dragnet, whatever you want to call it. There are a thousand things that may come up; you might want to agree on a surveyor or appraiser, or a thousand other things.

All those in favor of the motion on the rule as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. WECHSLER: Was (4) changed?

THE CHAIRMAN: No.

(Short recess.)

THE CHAIRMAN: All right, gentlemen, the motion is made and seconded to pass Rule 17, is that right?

MR. ROBINSON: I believe that is right.

MR. GLUECK: I think there is something there I would like to call to the attention of the Committee. In line 3, "a continuing offense". Perhaps that should be changed so that the rule could apply to offenses which were not continuing but were ubiquitous, if I may use that word, being carried on in more than one place at the same time. Wouldn't you, in that situation, want to specify the place as well as the time? Isn't the rule incomplete unless you do that?

MR. MEDALIE: Instead of saying, "other than a continuing offense", I would suggest you say "an offense which it is charged to have been committed at one time and place".

MR. YOUNGQUIST: What about a conspiracy?

MR. MEDALIE: Of course, you could not give an

alibi on a conspiracy; you are all over the lot then, you are conspiring everywhere, from the cellar to the roof, indoors and out, and in every State of the Union.

MR. GLUECK: You can have an alibi as to an overt act.

MR. MEDALIE: Isn't that pressing it a little too far? Isn't it enough to limit this to a post office robbery and the like?

I move that the language be changed to read, on line 3, "an offense alleged to have been committed at a single time and place".

MR. WECHSLER: Seconded.

THE CHAIRMAN: Any discussion? All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Are there any further suggestions with respect to Rule 17?

MR. YOUNGQUIST: I have one question, Mr. Chairman. In line 12 - 11 and 12 - "The court shall grant the motion except for cause shown." Does this rule contemplate that the defendant must, as a part of his motion, disclose his alibi?

MR. ROBINSON: No. Doesn't say so, does it?

MR. YOUNGQUIST: Well, I haven't seen it, so I don't know. What I was trying to guard against was the possibility that after he has disclosed his alibi, the court exercised discretion and refused to require the Government to show its hand.

MR. ROBINSON: This is put in, you know, Aaron, on your suggestion that it ought to go through the court.

MR. YOUNGQUIST: Oh, yes, that is all right.

MR. ROBINSON: I do not believe there would be any need to require the defendant to disclose his alibi --

MR. YOUNGQUIST: Oh, no. It's all right, the Government specifies first. It is all taken care of.

MR. ROBINSON: Yes.

MR. WECHSLER: I have this question, Mr. Chairman. The words "place and time the Government may propose to establish". Shouldn't that be "place and time alleged"?

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MR. ROBINSON: No, that is not what the defendant wants to know.

MR. YOUNGQUIST: He has that.

MR. ROBINSON: No, but it is put in this way that

if he plans to offer evidence that he was not present at whatever time and place the Government may propose to establish, now, shouldn't he be permitted to assume at the start that the time and place are those alleged by the indictment?

MR. SETH: That may be in one district which may cover several thousand acres.

MR. ROBINSON: But he does not know whether to plan to prove that he wasn't where the Government proposes to prove he was unless he has some initial information as to what the Government's proposal is.

MR. SEASONGOOD: We assume he is an innocent man. He knows he wasn't there at the commission of the crime.

MR. HOLTZOFF: Let me put it this way, the Government alleges that in the Southern District of New York on January 1, 1943 the defendant did so and so. Now, he wants to ask where in the Southern District of New York and at what hour and, if possible, what minute you claim this to have happened.

MR. ROBINSON: That is right, he has to ask for those details, and that is what the Government proposes to establish, isn't it, as its venue and date? Isn't that right, Herbert?

MR. WECHSLER: I must be missing a trick.

I thought there ought to be something in here that permits him at the start to find out what the Government intends to prove. Can he get that by a bill of particulars?

MR. MEDALIE: This comes to a bill of particulars. This is a kind of bill of particulars. Let me put it this way, Herbert: The defendant knows that he committed the crime at the corner of Pearl and Lafayette Streets on January 1 at 4 o'clock, and he wants to pin the Government down to that because he has his alibi ready for January 1 at 4 o'clock, as to Pearl and Lafayette Streets. So the Government says, "All right, if you want to do that, tell us where you were."

MR. WECHSLER: Suppose he has not committed the crime and doesn't remember where he was?

MR. HOLTZOFF: Oh, he will remember.

THE CHAIRMAN: All those in favor of Rule 17 as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. SEASONGOOD: I just wanted to raise a question, which I did not get to.

THE CHAIRMAN: Pardon me.

MR. SEASONGOOD: It does not amount to anything. Lines 9 and 11, you say the motion has to be made at the time of the arraignment unless the court order gives you more time. Isn't that too summary? Can you make that motion right when you are arraigned?

MR. ROBINSON: You will assume the court is fair and reasonable and will suggest that more time may be taken.

THE CHAIRMAN: Isn't that a bit early?

MR. SEASONGOOD: It seems to me, you get called up there and they tell you the substance of the indictment; you don't even know what is in the indictment, and you have to make the motion.

THE CHAIRMAN: Why fix that as the normal time?

MR. SEASONGOOD: That is what I have in mind.

MR. ROBINSON: Do you want to fix it ten days after arraignment?

MR. SEASONGOOD: No.

MR. HOLTZOFF: May I suggest this, why not use the same phrase as in Rule 12?

MR. MEDALIE: That is the normal time for all motions.

MR. BURNS: "Within a reasonable time after arraignment"?

MR. MEDALIE: Why do we need make any provision?

I move to strike out that sentence.

MR. DEAN: The defendant is going to make it whenever he wants to get the information. He is the first mover.

MR. YOUNGQUIST: We have to guard against this: He may make the motion a few hours before the trial.

MR. ROBINSON: That is it.

MR. YOUNGQUIST: Wouldn't it do to simply say, "motion shall be made at such time as the court may permit"? Would that meet your point?

MR. SEASONGOOD: Yes, or "at the court's direction".

MR. DEAN: You say, "may be made at such time as the court will permit". It might foreclose him from making it.

MR. HOLTZOFF: Why not use the same phrase as in Rule 12 for all the other motions as to the time when the motion shall be made? We say there, "motion shall be made at arraignment or at such other time as the court or these rules provided". Rule 17 is, in its present form, practically the same.

MR. ROBINSON: In order to have a uniform time. That is the idea.

4 THE CHAIRMAN: Then why do we say it? Because this sort of carries with it to my mind the feeling that

the court should say, "You should have made it at arraignment," and put the burden on him for not making it.

MR. HOLTZOFF: Defense counsel will ask at the arraignment for permission to make any motions that he sees fit and the court will grant him a certain time.

MR. ROBINSON: Yes.

THE CHAIRMAN: That is so in an anti-trust case, where you have counsel around, but I am thinking of many cases where they do not know of their rights yet.

MR. YOUNGQUIST: The alibi would be pertinent to those cases rather than to the others.

MR. SEASONGOOD: Couldn't you say, "The motion shall be made in such time as the court directs"?

MR. YOUNGQUIST: That might be more unreasonable, that is, if you are relying on the reasonableness and fairness of the judge. You would not improve this sentence by that, would you?

THE CHAIRMAN: Why not rely on Rule 12 and strike it, so this is not singled out?

MR. YOUNGQUIST: I so move.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Any remarks? If not, all those in favor of the motion say "Aye" - Mr. McLellan?

MR. McLELLAN: Mr. Chairman, I do not suppose

I am entitled to, but I had trouble just as Mr. Wechsler did with that. I do not know how the defendant knows what time and place the Government proposes to show. That first sentence there is just meaningless to us.

MR. MEDALIE: I have been laughing at it ever since. It is funny. The defendant makes a motion in which he offers to show that, if you will tell him at whatever time and place you are going to establish the offense was committed, he wasn't there.

MR. McLELLAN: In my opinion it is perfectly absurd.

MR. ROBINSON: Oh, no.

MR. HOLTZOFF: All he wants to do is take a position.

MR. WECHSLER: I feel vindicated. Thank you, Judge.

MR. SEASONGOOD: If he is not guilty --

MR. McLELLAN: Why not say, if the defendant is not going to confess guilt, he must do so and so?

MR. DEAN: He wants to stand trial.

MR. McLELLAN: But how does he know what the Government proposes to fix as the time and place?

MR. DEAN: He just knows he wasn't there, whatever time and place they fix.

MR. ROBINSON: That is all. That is fair enough.

MR. MEDALIE: I think we can meet what the Judge is asking about in very simple language. Where the indictment or information alleges the offense to have been committed at a single time and place, the defendant may move the court to order the Government, etc. That takes care of all that.

MR. ROBINSON: We had that in a former draft, George. I don't know how many drafts back.

MR. MEDALIE: What, the language?

MR. ROBINSON: That you are using.

MR. MEDALIE: The language that later caused the derision?

MR. ROBINSON: The language causes derision just as it aroused derision when it was first suggested, if you will think it through.

MR. SETH: May I call your attention to this, and this may throw some light on it: The defendant makes his motion. Thereupon the Government is required to specify the time and place that it intends to prove. Thereafter the defendant may do one of two things: He may submit a statement of the time and place he was, in which event he may admit evidence; he may do nothing and, in that event, he may proffer evidence of alibi only if the court lets him, because - doesn't that really answer it? - he is asking the court upon his motion to specify the

time and place, and after he has that information, he makes his choice as to whether he does anything or not.

MR. BURNS: Wasn't that Mr. Medalie's suggestion, that you take out all this matter which has to do with his offering evidence that he was not present at whatever time and place?

MR. MEDALIE: Yes.

MR. HOLTZOFF: Leave out lines 4, 5 and 6 and the first three words on line 7.

MR. WECHSLER: I agree; strike out from "plans" to "time" on 7.

MR. HOLTZOFF: Yes.

MR. MEDALIE: Start at the beginning.

MR. HOLTZOFF: Then it would read, "If a defendant is charged in an indictment or information with an offense alleged to have been committed at a single time and place, he may move the court to order the Government to specify" --

MR. MEDALIE: That is what I suggested.

MR. DEAN: That seems useless language because every indictment will charge a time and place. We so prescribe.

MR. MEDALIE: "A single time and place".

MR. DEAN: Oh, I see.

MR. ROBINSON: That will be just the way it was back in our May 1942 draft, which we rejected.

MR. HOLTZOFF: Maybe it is not a good idea to go back to that.

MR. ROBINSON: Maybe it is not.

MR. DEAN: Suppose the indictment does not state a single time?

MR. McLELLAN: It is rare, the kind of offense you are referring to, the one that has double time. In the case of a single time and place, such as in the case of murder, the defendant does not know the time and place alleged by the Government --

MR. HOLTZOFF: He does not know unless he is told.

MR. ROBINSON: Of course he does. You are charged with murder, don't you know whether you killed the fellow or not?

MR. HOLTZOFF: Yes, but I don't know whether I was at the scene of the murder or not.

MR. ROBINSON: A murder couldn't take place under your nose without knowing about it.

MR. MEDALIE: Mr. Chairman, May I point out that one may have been present at the time and place where a crime was committed and be innocent for a number

of reasons. One, he may not have participated; secondly, he may have acted in self-defense, like justifiable homicide.

MR. DEAN: This really does not apply to him, if he plans to prove he wasn't there.

MR. HOLTZOFF: That is it.

MR. MEDALIE: The rule would apply. In that case he would say, "Sure, I was there, and I saw John Smith killed." So your illustration does not hold.

MR. HOLTZOFF: But I did not, because he was shooting at me.

MR. YOUNGQUIST: Was Alex's motion to strike out all of line 3 except the first two words, with the substitution we have, and all of lines 4, 5, and 6 and four words on line 7?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I second it.

THE CHAIRMAN: Any discussion?

MR. HOLTZOFF: Then we could also omit the words in the second line, "in an indictment or information", which are surplusage.

MR. YOUNGQUIST: In the second line?

MR. HOLTZOFF: Yes, "in an indictment or information", and just say "If a defendant is charged" --

MR. DEAN: Could you state the whole change again?

MR. HOLTZOFF: "If a defendant is charged with an offense alleged to have been committed at a single time and place, he may move the court to order the Government to specify in writing as exactly as possible the place and time which it proposes to establish".

MR. DEAN: My trouble is with that "single time and place". You are moving a motor vehicle in interstate commerce, is that single time and place?

MR. HOLTZOFF: No, but I do not think the alibi defense would be applicable.

MR. DEAN: Oh, yes. He picks up the car at one point and takes it to another.

I have a suggestion, if you want to get rid of the objectionable language in the beginning. Why don't you start down on line 7 and simply start out, "A defendant charged with a continuing offense may move the court to order the Government to specify in writing as exactly as possible the time and place where it is proposed to establish that the crime was committed", and then go on, "The court shall grant the motion except for cause shown." Leave out all the first six lines.

MR. ROBINSON: Because you will have all the United States attorneys in the country opposing this

rule.

MR. DEAN: Why?

MR. ROBINSON: It would just be requiring a bill of particulars.

MR. BURNS: No; if he made that move, he has to go on, and he has to specify. That is the thing that will limit it.

MR. ROBINSON: But you start off in a kind of bob-tail way. You don't say this is going to be an alibi defense.

MR. YOUNGQUIST: This is all descriptive. What he plans to do is a matter in his own mind.

MR. DEAN: That is right.

6 MR. YOUNGQUIST: I would suggest leaving out "charged in an indictment or information" is too much, because, after all, he may be charged in loose bar-room talk as having done this. You have to nail it down to "information or indictment", "If a defendant charged in an indictment or information".

MR. DEAN: That is easy. Just say this, "A defendant charged in an indictment or information with an offense other than a continuing offense" --

MR. YOUNGQUIST: That has been amended.

MR. DEAN: -- "may move the court", dropping down to line 7, "to order the government to specify in

writing", and so forth, and leaving out lines 3, 4, 5 and 6.

MR. BURNS: That is all right.

MR. GLUECK: And part of 7.

THE CHAIRMAN: Was Mr. Dean's motion seconded?

MR. GLUECK: I second the motion.

THE CHAIRMAN: Any discussion on the motion?

MR. ROBINSON: I would like to have it read now, so we know just what it is.

THE CHAIRMAN: Read it again, Gordon.

MR. DEAN: Beginning on line 2, scratch "If" and start "A defendant charged in an indictment or information with an offense other than a continuing offense" --

MR. YOUNGQUIST: Wait a minute, right at that point. That has been amended. You want to leave it that way?

MR. DEAN: I do not see any objection.

MR. BURNS: That was voted through.

MR. YOUNGQUIST: That was changed "single time and place", and I think "single time and place" is very difficult in view of your illustration of the stolen car and so forth.

MR. DEAN: All right; line 2 is as is; then starting "A defendant charged in an indictment or

information with an offense other than a continuing offense", and scratch "plans to offer" and all of line 4, and all of line 5, and all of line 6.

MR. MEDALIE: Excuse me for interrupting you. You are transporting a motor vehicle. That is a continuing offense. It runs over considerable territory. You transport it from the Southern District of New York to the District of Columbia.

MR. DEAN: Suppose you are operating three stills?

MR. HOLTZOFF: That is a continuing offense.

MR. DEAN: Is that a single time and place?

MR. HOLTZOFF: Operating a still is.

MR. MEDALIE: But it is a continuing offense to run it. You start in, in New York, and you run your stolen motor car up to Vermont. That is a long, long pull.

MR. BURNS: Why shouldn't that fellow be entitled to establish his alibi because he was in Florida?

MR. MEDALIE: He should be, but I am kicking about the language "continuing offense". I am not objecting to giving it to him, but the language "other than a continuing offense" would bar him.

MR. DEAN: It is a question of finding language to cover what we mean by "continuing offense".

MR. SETH: Why not come out and say "charged with an offense where alibi would be a defense"?

MR. ROBINSON: We try to keep away from the term "alibi" as much as possible, for the reasons stated in the note.

MR. SETH: I know, but you cannot get away from it.

MR. ROBINSON: "Alibi" is ambiguous, and certainly, the courts would say, an inartistic term.

MR. DEAN: I think that is good English. I would have no objection to it.

MR. CRANE: Wait a moment. Why not say, "state to the defendant when the district attorney claims it happened"?

7 MR. DEAN: We are thinking about the conspiracy cases.

MR. CRANE: If it is impossible for him to state, he can state why he cannot give it; or he can state what it was. If the charge is transporting a car, and he were traveling around, if that was the case, he could state that it would take a month to get it all together.

This just calls upon the district attorney to state what he claims as the time and place.

MR. DEAN: That is agreeable to me. I think that is all right. If it was a continuing offense,

he would say, "Well, I frankly covered 28 States."

MR. ROBINSON: Judge Morris of the District of Columbia suggested the word "continuing". He thought that would include only offenses --

MR. DEAN: Continuing in time?

MR. ROBINSON: Yes, like a nuisance, and just simple things.

MR. DEAN: Leave out the reference to "continuing offense" and make it to read "A defendant charged in an indictment or information with an offense", scratch "other than a continuing offense" --

MR. WECHSLER: You don't need "with an offense".

MR. DEAN: Just need "A defendant", as a matter of fact.

MR. SETH: Now, I think you ought to keep this procedure away from the commissioners. Better limit it to the indictment and information.

MR. DEAN: "A defendant charged in an indictment or information", scratch "with an offense" and drop down to line 7, "may move the court to order the Government to specify in writing as exactly as possible the place and time".

MR. HOLTZOFF: "at which it claims the offense was committed".

MR. YOUNGQUIST: No; "which it proposes to

establish" is the way it ought to be.

MR. HOLTZOFF: Establish what? You see, the sentence --

MR. YOUNGQUIST: Oh, I see. Did that go out?

MR. WECHSLER: "The place where and the time when it proposes to prove that the offense was committed".

MR. HOLTZOFF: Yes.

MR. ROBINSON: "The place where and the time when it proposes to prove that the offense was committed"? That is certainly ambiguous. "The time when" it is intended to prove it doesn't mean trial, grand jury or when they will offer proof. That was in the former draft too.

MR. CRANE: "Time and place it proposes to establish of the commission of the offense".

MR. MEDALIE: I would like to make the further point that a man charged with mail fraud does not get any right to make this motion, because he has been operating a fraudulent scheme for a year, or two, or three or four or five years.

MR. YOUNGQUIST: Wouldn't that be taken care of by the provision that the court shall grant the motion except for cause shown?

MR. CRANE: The district attorney will say it covered a year.

MR. GLUECK: Why not say, "the place and time of the offense it proposes to prove"?

MR. DEAN: That is good.

MR. SETH: What does it mean by "place", a town or a county or a state?

MR. ROBINSON: Says "as exactly as possible".

MR. MEDALIE: "80 Foley Square."

MR. GLUECK: It means for the purpose of alibi, which means something specific.

MR. SETH: I think you ought to get in the word "exactly".

MR. WECHSLER: It says, "as exactly as possible".

MR. ROBINSON: Lines 4, 5 and 6, that was only used on those lines to help show it was the time and place the Government is proposing to establish.

MR. HOLTZOFF: I would suggest changing line 9 to "place where and the time when it is claimed the offense was committed".

MR. YOUNGQUIST: "it is claimed"?

MR. HOLTZOFF: No, you don't want that.

MR. YOUNGQUIST: You want what the Government is going to prove.

MR. DEAN: What is the matter with this language, "place and time"?

MR. McLELLAN: What is the matter with saying, "if

the defendant relies upon an alibi"?

MR. DEAN: Why isn't Mr. Glueck's suggestion a good one? Read that.

MR. GLUECK: "the time and place of the offense it proposes to prove".

MR. HOLTZOFF: I think that is a little ambiguous, isn't it?

*8 MR. DEAN: "time and place of the offense".

THE CHAIRMAN: May I suggest we ask Mr. Dean to try to state it from the beginning? Let us see if we cannot all agree, we have such a multitude of suggestions.

MR. DEAN: All right, line 2, "A defendant charged in an indictment or information", dropping to line 7, "may move the court to order the Government to specify in writing as exactly as possible the place and time of the offense it proposes to prove."

MR. ROBINSON: You want a "which" there, "offense which it proposes to prove". No?

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: Is that acceptable?

MR. MEDALIE: You know, maybe we should have the procedure there. The just thing would be for the defendant, not through someone else, but on his own affidavit - he can support it, if he wants to - to swear he was at a certain place, where he was conducting himself

quite innocently. Therefore he would like the district attorney to specify precisely the time and place where the district attorney claims the crime was committed, and you have started with something, and you are entitled to get something, and he is already committed. All you ask him afterwards is the names of the witnesses.

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MR. ROBINSON: You can ask that.

MR. YOUNGQUIST: I should think you could from choice; that there are 14 different States that have this provision and you could always copy --

MR. ROBINSON: We are a lot better than they are.

MR. YOUNGQUIST: Doesn't that become a matter for the Committee on Style then? We are agreed, I think, what it ought to be.

THE CHAIRMAN: Will someone make a motion that we accept the suggestion last made by Mr. Dean, in principle?

MR. ROBINSON: I will make the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

MR. MEDALIE: No. May I state my objection. The discussion has been stimulating. I believe the defendant ought to have the specification as a matter of right when he makes an affidavit and has committed himself to time and place. If he wants something he ought to give something.

MR. DEAN: Why should not he get it anyway and couldn't he get it by a bill of particulars possibly?

MR. MEDALIE: Why, of course that is the fair thing, but we abandoned that undertaking to draw an alibi statute.

MR. YOUNGQUIST: I think you are laboring under a misapprehension. He does not in his motion specify anything. He asks that the Government specify.

MR. MEDALIE: But he ought to specify when he asks for something.

MR. BURNS: Oh, if he asks he has to specify.

MR. MEDALIE: No, not quite. He wants it in taking his evidence anyhow.

MR. WECHSLER: Why put that burden on him?

MR. MEDALIE: He is asking for something and if he is asking let him come in after all his ablutions.

THE CHAIRMAN: Let the Committee on Style struggle with this an hour earlier than they expected.

MR. MEDALIE: I do not think it is a matter for the Committee on Style. I think that is a matter of principle.

THE CHAIRMAN: I think you are a majority of one on this.

MR. MEDALIE: All right.

MR. SEASONGOOD: Page 7, Rule 17, and page 2, I call the attention of the Reporter to the fact that you refer to Throckmorton's Ohio Code Annotated. In one

place you have Throckmorton and one place Paige. Actually what you now refer to is the Ohio General Code which is the official volume and this is only the unofficial annotation, and my objection to representing Paige's Code with that of Throckmorton's was that Throckmorton's was a copyright infringement or steal. Why put in something like that?

MR. ROBINSON: I would like to state that Mr. Seasongood's suggestion already has been put into effect. The reason it is this way is because the Civil Rules' note used both Throckmorton and Paige.

MR. SEASONGOOD: I was not on that.

May I just mention one more thing on page 3, just so you would note it: You say the statute has been held constitutional and quote the case of State v. Thayer, 124 Ohio State. We have a peculiarity in the Ohio law that only the syllabus is the law of the case and actually in the syllabus of that case there is not a word on this subject.

MR. ROBINSON: But in the case of course there is.

MR. SEASONGOOD: Well, the opinion is only the opinion of the judge writing the opinion.

MR. McLELLAN: It is no part of the decision in Ohio?

MR. SEASONGOOD: No. What is official is the syllabus, which is the law of the case, and the opinion is the opinion of the judge writing the opinion.

THE CHAIRMAN: Is that constitutional?

MR. SEASONGOOD: No, but it is a rule of court which has been in effect for over 80 years.

MR. BURNS: Who writes the syllabus? The judge who writes the opinion?

MR. SEASONGOOD: I do not know.

MR. MEDALIE: Cannot he write an opinion and say "As I well said in such an opinion"?

MR. SEASONGOOD: If you want to leave it in it is all right.

THE CHAIRMAN: I think the Reporter would want to correct that.

MR. ROBINSON: We will just put a "See Syllabus."

THE CHAIRMAN: Rule 18 (a). Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. SEASONGOOD: I want to call attention to line 12, "the court on the application of the witness shall direct that his testimony be taken by deposition." I think sometimes personal appearance is much better than a deposition and I wonder whether the court ought --

MR. HOLTZOFF: Isn't that taken care of in the next sentence, "After the deposition has been taken and

subscribed, the court may discharge the witness from

2 custody"? It is mandatory.

MR. LONGSDORF: Why is it mandatory to direct that his deposition be taken?

MR. HOLTZOFF: I think Judge McLellan made the motion on which this language was adopted, and my understanding of the theory of the motion was that the defendant has a right to have his deposition taken and then after his deposition is taken the court, in its discretion, after seeing the deposition can determine whether he should be discharged or whether he should be used by personal appearance at the trial. I wonder if I am correct?

MR. McLELLAN: I am not sure.

MR. LONGSDORF: Why cannot the defendant move that his deposition be taken?

MR. McLELLAN: This is to protect the witness who has been committed.

MR. YOUNGQUIST: It is a personal privilege.

MR. LONGSDORF: To have his deposition taken?

MR. YOUNGQUIST: No. To be discharged.

MR. SEASONGOOD: And you let him out and never get his personal testimony.

MR. HOLTZOFF: That is in the discretion of the court whether or not he might. Well, I have presented it,

and if everybody thinks it is all right it is all right with me.

MR. HOLTZOFF: There is no change in this paragraph from the former draft?

MR. DEAN: If there is any danger of his getting away --

MR. HOLTZOFF: I think you make that representation at the time and the court, in its discretion, probably would not turn him loose.

MR. SEASONGOOD: He was talking of the deposition.

MR. McLELLAN: To find out what he can really say so the court may have that.

MR. SEASONGOOD: If he is committed for failure to give bail he can ask the court to take his deposition and maybe he can get out.

MR. HOLTZOFF: It is not mandatory to release him though.

MR. SEASONGOOD: No. I know it is not.

THE CHAIRMAN: Are there any further questions on 18 (a)?

MR. WAITE: Yes, Mr. Chairman. For the sake of the record I want again to make the motion that Section 18 (a) be so amended as to provide that a witness whose deposition has been taken must be released from custody after a reasonable time, either on bail or

otherwise. I think this business of holding a witness for eight or ten months while they are hunting for the alleged defendant is travesty on justice. I have had that up before so I won't push it, but I want to bring it into the record.

MR. HOLTZOFF: It does not happen often.

MR. WAITE: It can happen, and Mr. Medalie very effectively pointed out the evils of it in an article in the Panel a year ago.

MR. MEDALIE: I cannot live this down because my children look it up in the card index to find out if I wrote anything and then they find out.

MR. HOLTZOFF: Question, Mr. Chairman.

MR. CHAIRMAN: Is Mr. Waite's motion seconded?

MR. WECHSLER: I second it.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. YOUNGQUIST: What is the motion?

THE CHAIRMAN: Mr. Waite's motion is, in substance, to provide after the deposition is taken that the witness may be released within a reasonable time.

MR. WAITE: Either on bail or otherwise.

MR. HOLTZOFF: He has always the right to be released on bail. The question is whether he should be released without bail.

MR. WAITE: No. This does not provide they may be released on bail.

MR. HOLTZOFF: Under the statute you cannot commit a witness except subject to bail.

MR. WAITE: But you have many cases where the witness cannot get bail. That is why I put in "otherwise". He must be released on bail or otherwise.

MR. MEDALIE: Let me point this out: The scandal is more an administrative scandal than anything else.

MR. WAITE: Yes. This does not provide for it. It says he may be released. I want to make it mandatory.

MR. HOLTZOFF: What you want is to change the word "shall"?

THE CHAIRMAN: Shall be released within a reasonable time.

MR. YOUNGQUIST: This applies only to a witness who is committed for failure to give bail?

MR. WAITE: That is right.

THE CHAIRMAN: And after he has given his

deposition. Are you ready for the motion?

MR. SEASONGOOD: Is that what you want to do? Of course you have that in the comment on page 5. That is the existing law "may be taken after which the witness must be discharged from custody".

MR. ROBINSON: That is a mistake. That was a mistake made in the office and it ought to be corrected. That word "must" should be stricken and the word "may" put in there. That was called to my attention afterwards; Rule 18, page 5.

MR. SEASONGOOD: Then you are changing the existing law?

MR. HOLTZOFF: No. Under existing law if the witness is committed he has no right to have his deposition taken. Now where we are changing the existing law here is to give him the opportunity to have his deposition taken; make it mandatory upon his request to take his deposition. Then after the deposition is taken it is discretionary whether or not to release him.

THE CHAIRMAN: Mr. Waite moves that it not be discretionary, but after the deposition has been taken that the witness must be released within a reasonable time by the court on bail or otherwise.

MR. HOLTZOFF: Not on bail or otherwise.

MR. WAITE: This says he may be discharged.

My provision is that he must be released on bail or otherwise. I dictated "discharged". That "discharged" means he is not held on bail. I think he should be held on bail.

THE CHAIRMAN: We have the motion. Let us have it put.

MR. HOLTZOFF: Let me explain: I think under the existing law he has the right to be released on bail. What we are trying to give is an additional right to be released without bail.

MR. WAITE: But you disregard my statement "or otherwise". There are many who have a right to be released on bail who cannot get bail and therefore are held. A poor devil who has not money to pay a bondsman I want released.

MR. HOLTZOFF: But he is already committed for want of bail and therefore you are not giving him anything when you say he may be released on bail. To accomplish your object all you need is change the word "may" to "shall".

MR. WAITE: No, because that word following "may" is "be discharged" and I am not suggesting that he be completely discharged.

MR. McLELLAN: Question.

THE CHAIRMAN: You have heard the motion.

All those in favor say "Aye."

MR. WAITE: Aye.

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be lost. The motion is lost.

MR. CRANE: Are we opposed to the substance of what Mr. Waite said, or just that word "bail"? Is there any objection to saying a man must be discharged?

THE CHAIRMAN: Will you put it in that form?

MR. WAITE: I move that Rule 18 (a) contain a provision, in substance, that after a witness has had his deposition taken he must be released from imprisonment either on bail or otherwise.

MR. SETH: That is the same motion.

MR. WAITE: Except I said "in substance", and the Judge just suggested he was perturbed about the phraseology.

MR. CRANE: Yes. He is there because he does not give bail. But I think after the man has had his deposition taken he should be discharged within a reasonable time.

THE CHAIRMAN: You make a motion, do you, Judge, that after he has given his deposition the witness

must be discharged within a reasonable time?

MR. CRANE: Yes.

MR. DEAN: I second the motion.

MR. MEDALIE: May I ask why so long if the only purpose is to get him out after he has given him his deposition? Why hold him any longer?

MR. CRANE: That may be just five minutes.

MR. MEDALIE: That is not what you mean by "reasonable time".

THE CHAIRMAN: Question. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to me to be carried but we better have a show of hands.

(After a show of hands the Chairman announced the vote to be nine in favor; six opposed.)

THE CHAIRMAN: The motion is carried.

MR. DEAN: I move to strike out the words "within a reasonable time."

MR. HOLTZOFF: I second the motion.

MR. WECHSLER: What line?

MR. DEAN: "the court shall release the witness

from custody".

MR. HOLTZOFF: "shall discharge the witness from custody".

MR. SETH: Why not change the word "may" to "shall"?

MR. HOLTZOFF: I want to say that originally in this draft it was "shall" and at the last meeting the Committee voted to change the "shall" to "may". I originally favored "shall" and I am glad to see it go back to "shall".

MR. MEDALIE: There is no law that compels a judge to commit a person who is a witness. The court has always the power to release a person who is a witness without any statute or rule giving him that power.

MR. GLUECK: But this provides after a deposition has been taken he shall definitely discharge the witness from custody.

MR. ROBINSON: It was pointed out at the last meeting the reason for changing from "shall" to "may" was that this put the power in the defendant to give a deposition which merely amounts to nothing. Having gone through the form of giving a deposition it was felt by the Committee it should not be made mandatory.

MR. HOLTZOFF: This is not a defendant but only

a material witness.

MR. ROBINSON: That is what I mean; a witness.

MR. McLELLAN: When you get all through with it and you have a judge who knows how important it is to have a witness in the case before the jury he is going to avail himself of the permissive part of the rule and not order the deposition to be taken, if he is going to be permitted to take the deposition.

MR. SEASONGOOD: That is why I wanted it made direct that he give his testimony, but you voted that down.

MR. McLELLAN: I did not.

MR. SEASONGOOD: It was voted down. I do not want to protract the discussion but if you get some scalawag witness he says "I did not give bail, but the court, you see, must take my deposition" and then let him go.

MR. McLELLAN: No. You say the court may take his deposition and must let him go.

MR. SEASONGOOD: But you say the court must take his deposition and then let him out. That is a very serious thing for a proposal.

MR. HOLTZOFF: I move to reconsider the vote just taken. I voted with the majority so I suppose I am qualified to move to reconsider the vote by which the

word "may" was changed to "shall" in line 14.

MR. GLUECK: It seems to me you are putting an awful burden on the many decent witnesses when you emphasize the occasional scalawag.

MR. HOLTZOFF: Very few witnesses are committed in the Federal courts, and most of those committed are not decent.

MR. MEDALIE: May I make a comment on this, and it is based on what actually goes on: In this rule you are providing that when the witness wants to get out the court must take his deposition. Let us look at it practically. Those who have prosecuted or who have had connection with it know perfectly well that many a witness who is held, a material witness, does not want to testify and does not want to tell the truth, and furthermore many a witness held as a material witness is really suspected of being in cahoots with the defendant. You are, in effect, telling some earnest prosecutors who are not trying to embarrass people, that the man who is being held, and who might finally be induced to tell the truth, shall get out of the clutches of the law and get away from the district attorney as fast as he can without any trouble whatever. He is in a week or ten days. He has not gotten tired of jail yet, and now he comes in and testifies "I was

not there. I do not know nothing. I didn't see nothing" and so forth and so forth, and he must be discharged. Now I think there will be a roar from the vigilant prosecutors on this. They will say you are selling them out.

MR. McLELLAN: And it is not abused very much.

MR. MEDALIE: That is right. It is not abused very much, but it is abused. Some of the youngsters never let go.

MR. McLELLAN: It is pretty serious to have a man come in, or let him come in, and say he does not know nothing and then the judge lets him go.

MR. CRANE: I see much force in that argument and I would like to ask something I had in mind reference to some other matters. They have different terms of court. Is it possible a witness is kept in six or eight months before they have a trial?

MR. SETH: It frequently happens.

MR. CRANE: I do not mind keeping him in, but I hate to think we have to feed him.

MR. McLELLAN: One thing, Mr. Chairman, the only particular experience we had, so far as I remember, with reference to holding a witness in Massachusetts was where he was brought in on habeas corpus, and I said "You cannot hold him any longer," whereupon they indicted him for

murder and within three months he was convicted of murder and was later electrocuted. Those are the kind of things you have to think of in connection with that kind of person. But the thing is not abused very much I do not think.

MR. HOLTZOFF: Mr. Chairman, I move to reconsider then this last vote so as to restore the word "may" in line 14 instead of "shall".

MR. CRANE: I second it.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: It is moved and seconded that the motion be reconsidered. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: I move we adopt Rule 18 (a).

THE CHAIRMAN: You have to have a vote on that motion first.

MR. HOLTZOFF: I move we adopt 18 (a) as written.

THE CHAIRMAN: We have to cover a lot of ground now. Let us keep the motion now to the first one. The motion is to rescind the motion previously adopted; to restore "may" for "shall". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now we are free to move on.

MR. MEDALIE: Having raised the question I will move that "may" be substituted for "shall" in line 12.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor of the motion to substitute "may" for "shall" in line 12 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further amendments to Rule 18 (a)?

MR. LONGSDORF: I would like to ask whether the Reporter wishes to put a paragraph mark on line 15 after the period. It seems to me there is a paragraphic change of sense there.

MR. ROBINSON: You will notice our system is not to separate into paragraphs unless we have a separate subdivision with headings.

MR. LONGSDORF: I notice that.

MR. ROBINSON: Does it take up a separate matter, George?

MR. LONGSDORF: The sentence beginning on line 15 obviously speaks of the process of giving notice between the parties at whose instance the deposition is to be taken.

MR. GLUECK: I think your heading under (a) is incomplete.

MR. ROBINSON: So you think line 15 as George suggests should be "How Depositions Are To Be Taken"?

THE CHAIRMAN: If that suggestion is taken.

5 MR. LONGSDORF: One other provision I want to inquire about and know whether this provision for counsel for taking depositions is clear and understood by the Committee? I do not know. I am just asking. Suppose he has counsel at the place where he is detained, and the deposition is to be taken elsewhere and his counsel does not want to go?

MR. HOLTZOFF: But it says in line 24 that the court must assign counsel. Naturally the court must assign counsel who will be present at the hearing.

MR. LONGSDORF: Can the court assign counsel in another State where the deposition is to be taken?

MR. HOLTZOFF: That is clear; otherwise there is no counsel.

MR. LONGSDORF: Or can he ask for counsel resident where the prisoner is?

MR. HOLTZOFF: That is in the discretion of the court. He must arrange for counsel who can be present.

THE CHAIRMAN: All those in favor of Rule 18 (a) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: May I ask a question about (b)? I have not been able to find here any provision for taking depositions other than that of the material witness committed for failure to give bail.

MR. HOLTZOFF: Oh no. This applies to anyone, any witness. I think the first sentence of (a) indicates that any witness's deposition may be taken.

MR. WECHSLER: Mr. Chairman, may I make a motion based on the previous discussion?

THE CHAIRMAN: Yes.

MR. WECHSLER: The previous discussion brought out that we have no rule dealing with the material witness problem. Is that right, Mr. Chairman?

MR. ROBINSON: That is right.

MR. WECHSLER: The provisions of the Code that deal with this matter are apparently Sections 657, 658 and

659 of Title 28. It seems to me it is an important matter and there ought to be a rule on the subject. Moreover, Mr. Medalie and I are just examining Section 659 and note that it provides that any judge of the United States on the application of a district attorney and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial may compel such person to give recognizance with or without sureties at his discretion to appear and testify therein. In other words, there is no condition at all on when a judge may require a prospective witness to give bond to appear. It is at least questionable, I think, whether that provision is not too broad as it stands.

MR. ROBINSON: Of course are you bearing in mind our Rule 24 on evidence there; lines 4 and 5 "Competency and Privileges of Witnesses"?

MR. HOLTZOFF: I don't think this applies.

MR. WECHSLER: This is a rule on arrest and bail. That is what this is.

MR. MEDALIE: In other words, the point Mr. Wechsler makes is that a man ought not to be committed or required to give bail as a material witness unless there is a showing that there is danger that he will not appear; either that he is a vagabond or derelict and runs

around different places, or is about to depart the jurisdiction or has indicated some hostility indicating intent to get out of the jurisdiction.

MR. HOLTZOFF: As a matter of fact isn't this what happens: They do not commit reputable persons who are not going to run away?

MR. MEDALIE: I think since most codes make the provision; that a comprehensive set of rules might do the same.

MR. ROBINSON: Well, it is true we have no rule on this subject but Mrs. Peterson calls my attention to Rule 52 (3) which says expressly we do not disturb Section 659.

MR. MEDALIE: But it is not a good statute for the reasons pointed out.

MR. ROBINSON: That is our only provision.

MR. WECHSLER: I stand by the motion that there be a rule drafted on it.

THE CHAIRMAN: May we have that motion again. I did not get it.

MR. WECHSLER: The motion is that there be a rule drafted to cover the subject dealt with by Sections 657 to 659 of Title 28, namely, when a witness may be required to give bond to appear at the trial or be committed for failure to give bond.

MR. SEASONGOOD: How can you do that? Isn't it discretionary with the court?

MR. MEDALIE: There should be a showing. The court should require an affirmative showing that there is danger the witness would not appear.

MR. YOUNGQUIST: Does not the court do that? I cannot imagine the court committing a witness without a showing that there is good reason for committing him or requiring him to give bail. I think the courts would resent a rule which would require them to exercise their discretion, and that is what it amounts to, on an application of that sort.

MR. WECHSLER: Well, without considering whether the present law should be changed, which had not been so much in mind, ought not the thing be in for the sake of completeness?

MR. YOUNGQUIST: I am wondering whetner it is within our jurisdiction.

MR. HOLTZOFF: Yes, that is procedural.

MR. WECHSLER: If the arrest of a defendant and provisions on bail for the defendant are within our jurisdiction this should be.

MR. MEDALIE: I think this is a procedural as a provision in the Civil Practice Rule for arrest and attachment.

MR. ROBINSON: We do provide this in our Rule 52, at page 2, that the procedure shall be made to conform to these rules so far as applicable, although we do not alter the power of the judges to require bail for the appearance of witnesses under 679 and 657 and 660.

MR. WECHSLER: I would be happier to see a rule because it would mean we would look at it and the proposal might change the law.

MR. ROBINSON: Would you mind drafting such a rule and submit it to us for adoption?

MR. YOUNGQUIST: The question is whether we want one.

THE CHAIRMAN: The motion is to have a rule prepared on the subject of bail for witnesses.

MR. ROBINSON: I would not know how to vote on that motion.

THE CHAIRMAN: Just the matter of principle; whether there should be a rule of this kind. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried. I suppose that carries with it the suggestion that we require the

Committee on Style to prepare a rule tomorrow.

MR. WECHSLER: Without any special notion what should be in the rule we decided there should be a rule.

THE CHAIRMAN: On that particular subject matter. That is correct.

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MR. WAITE: Mr. Chairman, before we adopt 18 (b), I have a suggestion.

THE CHAIRMAN: I do not think we have adopted it yet, have we?

MR. WAITE: No. I say, before we adopt it.

"The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination."

That, I concede, is fully necessary; but I wonder if that needs to be done if the witness is willing to waive that privilege.

MR. HOLTZOFF: You mean the defendant.

MR. WAITE: Yes, if the defendant is willing to waive that privilege. It seems to be an unnecessary thing. This, as it stands, is mandatory. It says that the officer shall produce him. Therefore I suggest that we add to that sentence the words "unless the

defendant waives in writing the right to be present."

MR. McLELLAN: Suppose he waives in writing the right to be present at the trial, you are getting a substitute here for trial, aren't you?

MR. MEDALIE: That is right.

MR. HOLTZOFF: You can waive a constitutional privilege of confrontation. If you can waive a trial by a jury, you can waive confrontation, can you not?

MR. McLELLAN: Not at all. The only kind of a case where they can go on without the defendant is where he absconds.

THE CHAIRMAN: That is the law, unquestionably.

MR. McLELLAN: Aren't we getting a deposition here that is going to be used at the trial?

THE CHAIRMAN: That is right.

MR. McLELLAN: Then isn't it a part of the trial?

MR. WAITE: Is there any constitutional provision waiving the right of confrontation? I never heard of it.

MR. MEDALIE: What you are dealing with is the practice of the courts. Let a defendant fail to come back after a recess, and the district court will wait and wait and wait and won't allow a witness to be asked a question. Now, that is the attitude of every district judge, practically.

MR. WAITE: That may be the practice, but there is no reason why we should not change it by rule if we think a change is desirable. It seems to me if the accused is willing to waive in writing the privilege of being present when the deposition is taken, and have it done by his counsel --

MR. McLELLAN: Pardon me. Let me ask you this question: Suppose he does waive it, and is not there, and then at the trial the deposition is offered in evidence, and he objects to it. If you were the judge would you let the deposition in?

MR. WAITE: Yes.

THE CHAIRMAN: It is hard to see why a man can waive a jury at a trial and not be able to waive being present at the taking of a deposition.

MR. McLELLAN: Could he waive being present at the trial?

THE CHAIRMAN: I do not see why not if he can waive these other things.

MR. WECHSLER: Could he be tried in absentia?

THE CHAIRMAN: Yes, with his consent. I cannot see why, if he can waive indictments and waive trials by jury, which are constitutional privileges, he cannot say, "I am willing to let my attorney try the case because he is a better looking and better talking

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man than I am."

MR. McLELLAN: You are perfectly right as a matter of logic. But they are all afraid of it.

THE CHAIRMAN: Well, if we put it in the rules --

MR. McLELLAN: To cover it they have got an express statute, as I remember it, to the effect that if he skips out during the trial that you can go on without him, which is an intimation that you could not otherwise.

MR. MEDALIE: Let me put it this way, Judge McLellan. I would like to get an answer on it. The defendant is on bail, and the Government is taking a deposition under the conditions stated here. Now, what he does is just not show up, and just sends his lawyer. The deposition cannot be taken because the defendant chooses not to be present. That would be a bad situation, would it not?

MR. WAITE: Let me call your attention to what is in the next sentence, because the next sentence says that if he is not in custody he simply has the right to be present at the examination, and if he does not choose to come to the examination, I suppose, the statute is

2 perfectly good. Now, it seems to me if a defendant who is not in custody can properly waive the right to be present, a defendant who is in custody might properly

be permitted to waive the right.

MR. WECHSLER: The real question is what kind of waivers you get from defendants in custody.

MR. WAITE: I think if it is in writing I would not have any doubt about it.

MR. HOLTZOFF: I think there is always an implication that any right can be waived. I do not think you need an express provision for waiving this kind of right, do you?

MR. ROBINSON: I second it.

MR. WAITE: Well, if there is no harm in putting it in, I think it is good.

MR. SEASONGOOD: I think there is harm in putting it in. You are introducing a new procedure here. Ordinarily the evidence has to be adduced in open court; he is entitled in a criminal case to have it adduced in open court. That is one hurdle you are jumping over, and here you are putting another one, introducing another constitutional question as to whether he can waive it. The more of these you pile on there the less chance there is of anything being adopted.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: All those in favor of the motion permitting a waiver of the defendant's presence, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be five in favor; eight opposed.)

THE CHAIRMAN: The motion is lost.

MR. WAITE: Now I am going to ask if you are going to allow a waiver in the case of a defendant who is not in custody, which is the next sentence.

MR. WECHSLER: I am satisfied with the sentence as it stands.

MR. WAITE: You are allowing one to waive but you are not allowing another to waive.

MR. WECHSLER: I am not sure that the effect of the rule as it is is to preclude a waiver even of a defendant in custody.

MR. WAITE: Then it seems to me absurd. If we think it does not preclude it, it seems to me we are sticking our heads in the sand if we are not willing to express ourselves clearly about it. That, to my notion, is pretty faulty draftsmanship.

MR. WECHSLER: Mr. Chairman, I move we adopt 18 (b) in its present form.

THE CHAIRMAN: Mr. Waite raises a question. I do not know whether he wants to press it.

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MR. WAITE: Well, I just seem to think it is very poor draftsmanship to leave it that way.

THE CHAIRMAN: All those in favor of the motion to adopt 18 (b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

18 (c).

MR. HOLTZOFF: Mr. Chairman, I move to strike out the clause commencing after the semicolon on line 53 --

MR. MEDALIE: Before you get to line 53, may I touch upon an earlier line?

MR. HOLTZOFF: Surely.

MR. MEDALIE: In lines 50 and 51 it states, "or that the witness is unable to attend or testify because of age, sickness, or infirmity". I never thought that age was an excuse for not testifying, or that it rendered a person unable to testify. We agree that infirmity might, whether the person is 21 years of age or 92. But age does not determine that.

MR. HOLTZOFF: Unless it is accompanied by infirmity.

MR. MEDALIE: Then it is the infirmity that counts, not the age. I move to strike "age".

THE CHAIRMAN: By consent, gentlemen?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All right, now line 53.

MR. HOLTZOFF: I move to strike out the clause beginning with the word "but" after the semicolon, down to the end of the sentence at line 55.

MR. YOUNGQUIST: I second the motion.

MR. HOLTZOFF: I want to call attention to the fact that this is a new clause that was not in the former draft. Just very briefly, this clause would permit the judge in his uncontrolled discretion to prevent a party from using a deposition even though the deposition has been taken and all the conditions for its use have been complied with. For that reason I think it ought to be stricken.

MR. YOUNGQUIST: I have the same notion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further questions or suggestions? If not, the motion is to adopt 18 (c) as amended. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

18 (d): Any questions?

MR. HOLTZOFF: I move its adoption.

MR. DEAN: I have one little question. If we have (b) sub-headed "How Depositions May Be Taken," I wonder if (d) should be "Manner of Taking Depositions."

MR. HOLTZOFF: Suppose the headings be left to the Committee on Style, if that is satisfactory?

THE CHAIRMAN: Yes. Make a special note of that.

All those in favor of 18 (d), say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

18 (e).

MR. HOLTZOFF: I move its adoption.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

18 (f): All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

19. This is a new rule suggested by Mr. Dession, and I think it comes under the general scope of those you outlined earlier this afternoon.

Any suggestion?

MR. HOLTZOFF: I move that this rule be not adopted, Mr. Chairman.

MR. MEDALIE: Why put a motion on a rule in the negative? That has not been done previously.

MR. HOLTZOFF: I see.

THE CHAIRMAN: I would like to hear a motion that it be adopted.

MR. DESSION: I so move.

MR. WECHSLER: I would like to hear cases.

MR. DESSION: I think there are frequently occasions in criminal courts when some inspection should be allowed, and at the present day I think that is recognized in case law. Now, it is true that in the Federal court an inspection of objects is not granted very freely, but from time to time it is, and should be, I think.

MR. WECHSLER: Mr. Chairman, as I read the

learned memorandum circulated this morning, this seemed to be the law of the United States since the trial of Aaron Burr; and if that is so I do not see what the objection to it is.

MR. HOLTZOFF: I do not understand that the United States attorney may be directed to produce for inspection prior to the trial --

MR. DESSION: He certainly may. He has been.

MR. CRANE: It is done right along.

MR. HOLTZOFF: I move we strike out the words "grand jury minutes" from this rule.

MR. MEDALIE: I second it.

MR. DESSION: You mean there should never be a time when grand jury minutes should be shown?

MR. HOLTZOFF: No, but I do not want to invite motions to inspect the grand jury minutes by putting it in at this point.

MR. DESSION: Yes, but if you exclude it now there might be an inference that you are changing the existing law.

MR. CRANE: I move we take out the words "and exhibits" as well.

THE CHAIRMAN: Do you accept that suggestion, Mr. Dession?

MR. MEDALIE: I think that is a good idea.

THE CHAIRMAN: The motion then is to adopt Rule 19 as amended by deleting the first five words in line 8.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. WECHSLER: Do "exhibits" go out too?

THE CHAIRMAN: Yes. The motion seems to be carried.

MR. SEASONGOOD: I had some questions. In line 5 - "government to produce and permit the inspection". I think the word "produce" then is unnecessary and probably should not be in there. In other words, you are going to order him to bring or take things out; and when you come to line 12 and following, it states "The order shall specify the time, place, and manner of making the inspection".

THE CHAIRMAN: Do you agree to that, Mr. Dession?

MR. DESSION: Yes.

THE CHAIRMAN: The motion will be so amended.

MR. SEASONGOOD: Now, another thing. While it may seem very trivial, it states here "tangible objects". We have "things" in the Civil Rules, if

you are going to follow the Civil Rules. Is there any reason for not using the same word? It is "things" in the Civil Rules.

MR. DESSION: I think "things" would do just as well.

MR. SEASONGOOD: I would rather have it made conform to the Civil Rules.

4 THE CHAIRMAN: That is agreeable.

MR. SEASONGOOD: Then in line 9 - "showing in good faith". Well, upon a showing is enough, isn't it?

THE CHAIRMAN: What line?

MR. SEASONGOOD: 9. I would like to strike out "in good faith".

MR. DESSION: I would agree to that too.

THE CHAIRMAN: Accepted.

MR. SEASONGOOD: In line 11, I think it should be "that the request is reasonable". I would leave out "otherwise".

MR. DESSION: I am thinking of some instances where the stuff you wanted might be highly material, that there might be other reasons why it would be a considerable burden and difficulty to produce either in the way of expense, or something else. Now, in a case like that I think some adjustments sometimes have

to be worked out.

MR. WAITE: If I remember correctly, a gentleman here in New York named Snitkin used to have a habit of making such motions as this, which were not in good faith, and were definitely not reasonable. It seems to me we ought to inquire into that very definitely.

MR. HOLTZOFF: I would like to remind the Committee of that. My recollection distinctly is that we voted down a rule on discovery.

MR. YOUNGQUIST: I thought we did.

MR. HOLTZOFF: Yes.

MR. MEDALIE: The Government permits a discovery in two ways. One by unlawful search and seizure, and the other by running a grand jury which has not anything pending before it except the defendant's witnesses. And, Mr. Chairman, I want to point out another thing which has been pointed out again and again. What the Government does in many important cases is to seize the books, papers and records of the defendant company and then hold them on the theory that they are grand jury minutes, exhibits. Now, practically, what this gets at is that the defendant is given an opportunity to look at his own papers.

MR. HOLTZOFF: I vote for this rule if it is limited to the defendant's own papers.

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THE CHAIRMAN: Mr. Dession, do you accept the deletion of the word "otherwise" in line 11?

MR. DESSION: Yes.

THE CHAIRMAN: I think we have covered that rule except with respect to the grand jury minutes and exhibits.

MR. HOLTZOFF: It was agreed to take that out.

THE CHAIRMAN: Was there a suggestion that that be covered otherwise?

MR. DEAN: That was adopted.

MR. HOLTZOFF: The opposition calls for a show of hands, I think. I am not sure.

THE CHAIRMAN: All those in favor of the rule, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: Any motion, Mr. Dession, on grand jury minutes and exhibits?

MR. DESSION: I now move that a rule be prepared to provide for a limited privilege of inspection in the discretion of the court.

MR. HOLTZOFF: My understanding is, so far as today's practice is concerned in the Federal courts, unlike in the New York courts, such a motion is hardly

ever granted, if at all. Am I not correct on that?

MR. DESSION: Very rarely. But there are cases where it should be. They are rare but important.

THE CHAIRMAN: We all know the issues. All those in favor of Mr. Dession's motion, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. CRANE: May I say this. I understand that motion to be similar to what we have here, that a motion to inspect the grand jury minutes may be made. Now, it is seldom granted, but there are cases - it was done in Buffalo by a Supreme Court judge in a very important case - a motion was made to dismiss the indictment because there wasn't any crime at all.

MR. HOLTZOFF: I do not think it is ever granted.

MR. MEDALIE: I think I can summarize what happens to show you how we have covered all you are asking for. In New York State there was a prevailing practice at one time of having motions made on a showing - that is, oral statements of witnesses - that they had testified to certain things; then you moved on the basis of that for an inspection of the grand jury minutes for the purpose of making a motion to dismiss the indictment

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on the ground that the grand jury had no right to indict, because it is provided in the New York Code of Criminal Procedure that the grand jury must not indict unless as petit jurors they would have voted for a conviction even though they had not heard the defendant. All that comes in. Now, the only advantage the prosecution has is, the defendant did not have to be called. Now, at that time there used to be endorsed by statutory requirement the names of the witnesses on the back of the indictment. That has been abolished. They do not get that, and therefore it is almost impossible to make the motion, and it is made very, very rarely.

5 Now, in the Federal courts those motions are not made. In other words, when made - that is, a motion for the purpose of inspecting minutes on the ground that you are going to prove that the grand jury should not have indicted, that is, that there was not evidence - it is practically ignored. Courts pay no attention to it. But grand jury testimony or the proceedings before grand juries are obtainable when you move to quash an indictment because the wrong thing happened in the grand jury. Now, in those cases we have provision here - and we passed on it yesterday - that is, in the proper case testimony can be given, the court can permit the giving of testimony by grand jurors as to what occurred

before the grand jury. For example, the improper presence of an unauthorized person. That is covered, isn't it?

MR. HOLTZOFF: Yes.

MR. MEDALIE: And that is the only thing that we would want to cover. Those things came up on motions to quash or on these various pleas.

MR. GLUECK: What about exhibits?

MR. HOLTZOFF: In most districts they do not take grand jury minutes. In the Federal courts in most districts there are no grand jury minutes because there is no stenographer.

MR. MEDALIE: Obviously it could apply only if there were such minutes.

MR. GLUECK: How about the exhibits mentioned here?

MR. DESSION: Suppose a witness is giving very different testimony on the trial from what he gave in the grand jury. Suppose the defendant suspects this. He moves to inspect for that purpose. Under the practice in some states the court takes a look. If there really is a serious discrepancy, then you get that portion of the minutes for purposes of impeachment. Now, do you want to do that?

MR. MEDALIE: It would be a good thing. We have

never done that. The only time you get a look at grand jury minutes under those circumstances is when the district attorney gets a witness who is not helping him, and then he pretends to refresh his recollection by asking him to read a paper which is a transcript of his grand jury testimony, and says, "Doesn't that refresh your recollection? In fact, he frequently has the unprofessional temerity to read it and ask, "Didn't you testify so and so before the grand jury?" Then the court is required to permit counsel for the defendant to look at that testimony to see whether he can't rehabilitate him. That was the rule in the Socony Vacuum case and has been the rule in this Circuit for some time.

MR. HOLTZOFF: We do not want a rule that could be applicable in very few districts because the vast majority do not have minutes.

MR. DESSION: Might we not adopt this motion, because we don't know what it is going to contain, and if George will produce something then we will have something to argue about.

THE CHAIRMAN: Well, the motion is that Mr. Dession be directed to draft a rule on this. All those in favor say "aye."

(Chorus of "Ayes.")

MR. WECHSLER: What is the motion?

To have Mr. Dession consider it, or --

THE CHAIRMAN: The motion is that there be a rule ordered, and he be requested to draft it.

MR. WECHSLER: The rule to authorize inspection?

THE CHAIRMAN: Yes.

MR. WECHSLER: If you are against inspection you vote against it?

THE CHAIRMAN: Yes. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be five in favor; nine opposed.)

THE CHAIRMAN: Lost, five to nine.

We come now to Rule 19.1.

MR. LONGSDORF: May I ask a question. I have no objection to make, nor have I anything to say in favor of it either, but wouldn't it be feasible to combine this with alternative Rule 10? They embrace different subjects; but would it be possible to put them in one rule?

MR. DESSION: I think it probably would.

MR. HOLTZOFF: I would like to ask a question about this Rule 19.1. Of course, I am opposed to it.

I will say very frankly, I do not believe parties ought to be required to exchange lists of witnesses in advance. Even the broad discovery civil rules do not provide for exchange of lists of witnesses. They do not go that far; and I see no reason why you should have a broader discovery in criminal cases than you do in civil cases. But I also want to call attention to the fact that it cannot operate in actual practice. Every trial lawyer knows that he frequently is not sure of what witnesses he is going to call until the trial develops. And it certainly is not fair to ask him to furnish a list of witnesses in advance. That is one type of impracticability. The other type of impracticability is this: We know that in lots of criminal cases defense counsel does not get ready until the last minute, especially assigned counsel; and you are going to put an awful burden on him.

MR. MEDALIE: Even if he does he is surprised by some of the testimony, and he is going to do a lot of scurrying around to see if he can find a witness.

MR. HOLTZOFF: And it certainly does not go in country districts where you indict a group of persons today and try them all tomorrow.

MR. WAITE: I can imagine one rather interesting development. If the Government attorney omits a witness

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or two, it is ground for continuance. If the defense counsel omits a half dozen witnesses the Government attorney does not even dare ask for a continuance because that is exactly what the defendant wants in the way of delay.

MR. HOLTZOFF: That is right.

THE CHAIRMAN: Are there any suggestions on 19.1?

MR. LONGSDORF: I said I had no objections, but I want to repeat what I said a while ago, that I am sure you will get earnest objections from the United States attorneys and some defense attorneys.

MR. HOLTZOFF: I am not afraid of objections from United States attorneys but I am afraid of objections from Congress.

MR. WAITE: Mr. Chairman, I move that 19.1 be stricken.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: It is not adopted yet. Let us follow the usual practice and first have a motion to adopt it.

MR. DESSION: I so move.

THE CHAIRMAN: Mr. Dession moves and it is seconded that 19.1 be adopted.

MR. DEAN: Might we not divide the list of the

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jurors and the list of witnesses? I think they present two different problems. I am against 19.1 because, as a practical matter, you do not know your witnesses in advance. But I think there is a lot to be said for getting a list of the jurors.

MR. HOLTZOFF: You can get them from the court clerk. That is a public document.

MR. WECHSLER: How about the existing law on treason in capital cases which requires a list of jurors and witnesses three days before trial? Is it intended to repeal that? I would be very reluctant to repeal that.

MR. MEDALIE: Let me point out something about this district. The rule as to jurors' lists would not work in this district because we have a jury pool for all civil and criminal cases, and you can get the telephone directory every month, you ask for it, and you go up and look at it. It would not do you any good.

MR. DEAN: I agree. It would not.

MR. HOLTZOFF: I move the question.

THE CHAIRMAN: All those in favor of the motion say "Aye." The motion is to adopt 19.1.

(No response.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: It seems to me to be unanimously lost.

Rule 20 (a).

MR. WECHSLER: Mr. Chairman, I would like to make a motion. I would like to move that at the very least we retain the existing law on treason and in capital offenses which deals with the Government providing a list of witnesses, and in that connection we might consider broadening that provision which, I think, is not subject to some of the objections that led to the defeat of 19.1.

THE CHAIRMAN: May I ask, if that motion prevails, that the Style Committee bring in something on that.

MR. MEDALIE: I think we will have to find out something. In this district there have recently been treason trials. I do not know what practice was followed. I think we ought to find out. Mr. Correa is not here. His chief assistant, Mr. Corcoran, can give us the information as to what occurred. We ought to get the benefit of some experience on that.

MR. YOUNGQUIST: It occurs to me, on Mr. Wechsler's motion, that the statute now provides for furnishing a list of witnesses in those cases, and that might be enough. Of course, the rules won't affect that

statute.

MR. HOLTZOFF: The rules do not affect any statute except those that are inconsistent.

MR. YOUNGQUIST: That is right.

THE CHAIRMAN: Well, we have the motion befor us. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The response is very faint on both sides.

MR. DEAN: I think there is some question of what you want to do. Do you want to put in a footnote saying we do not want to repeal that present statute,

7 or do you want to go further than that?

MR. WECHSLER: What I really had in mind is, we ought to consider whether we want to continue that statute. I think it is clear it should be continued, and from that premise I think it might be thought about, as to whether the statute should be broadened at all, and then get the benefit of Mr. Dession's thinking on this witness list problem.

MR. HOLTZOFF: Haven't we defeated the witness list problem?

MR. WECHSLER: I don't know. If the

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Committee by voting against 19.1 meant to eliminate any disclosure of witnesses, then there is no use talking about it. But I voted against 19.1 because I thought that mutual disclosure was no good; but I am uncertain as to what disclosure ought to be required of the Government.

MR. SETH: Couldn't we follow the suggestion made a while ago to get somebody here who has had some recent practice and experience and talk to him about it?

THE CHAIRMAN: Would it be agreeable to let that motion lay over? I am in doubt as to whether it is carried or lost. I think you voted for it and I think Mr. Holtzoff voted against it, and it is a tie, and I would prefer not to break that particular tie. So let us leave it that it might be brought up on Monday or Tuesday.

MR. LONGSDORF: Mr. Chairman, isn't it now in order to consider Mr. Dession's alternative Rule 10? I understand that was reserved to be considered with 19.1.

MR. HOLTZOFF: Let us pass that for the time being.

MR. WECHSLER: That is a related problem, the problem of witnesses before the grand jury. That is

what you mean Mr. Longsdorf?

MR. LONGSDORF: Yes.

THE CHAIRMAN: Rule 10, on page 6 of Rule 10, alternative Rule 10?

MR. LONGSDORF: Yes, that is the one.

MR. HOLTZOFF: All of it is covered in the rule we adopted, except the requirement of furnishing names of witnesses who appear before the grand jury.

MR. DESSION: That is right.

MR. MEDALIE: I take it there is a motion that alternative Rule 10 be substituted for the approved Rule 10.

MR. DESSION: I also move conformity to what was done with Rule 10 in the course of these meetings.

MR. WECHSLER: Couldn't we have it as a motion to adopt the provision dealing with the names of witnesses before the grand jury, and thus get away from other complications in Rule 10?

MR. DESSION: I think that is the best way to do it.

MR. LONGSDORF: Would the motion then be to add that 10 as already adopted?

THE CHAIRMAN: Yes.

MR. MEDALIE: May I state that that practice has existed in New York, and it has been trying. In

other words, the tendency is against it.

THE CHAIRMAN: Are you ready for the motion?

MR. MEDALIE: Yes.

THE CHAIRMAN: All those in favor of alternative Rule 10, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

MR. CRANE: Mr. Chairman, may I ask a question? I do not want to interrupt your going ahead; I just want to ask you to think of something, if you will, and not answer it. In connection with Rule 6 I have a query, (b) (1). I spoke to Mr. Holtzoff about it and he thought there was something in it. You see, you do not say the challenges shall be made. A challenge may be made on the ground that a state of mind exists on his part which may prevent him from acting impartially. Now, who makes the challenge, and when, and how, and how do you discover the state of mind unless you can question him? In the Federal courts there is a system that permits lawyers to question the grand jury. We do not in the State.

MR. MEDALIE: May I answer that, Mr. Chairman?

THE CHAIRMAN: Surely.

MR. MEDALIE: We do not in New York interrogate grand jurors in advance for the purpose of determining prejudice or bias. The fact is, however, that the district attorney after 23 names have been pulled out of the box from the panel that has come there asks them "Do you all live in -" and then he names the eleven counties. Then he asks if each of them possesses at least $250, that is, in property, and so forth, and then he stops. That is all he needs to ask about their qualifications. Also he asks them if they are citizens of the United States. And when he is through with that he has done all the interrogating necessary. Now, no one else does any interrogating.

Now, in our State practice, which is not sanctioned by law, by the way, there is the habit when 12 men get into a box, of asking each man a lot of fool

8 questions.

MR. CRANE: That is a petit jury.

MR. MEDALIE: Yes, petit jury.

Now, the Code of Criminal Procedure has a provision for challenging jurors on the ground of bias and other disqualifications. It also provides that that challenge shall be filed - you have to write a challenge under the law - and then you try the challenge if it is traversed. That is all in the Code of Criminal

Procedure, and I will bet you now that outside of yourself, whom I have just told it to, and me, there are no other two lawyers who know about it. Now, because that practice was provided for by statute they got the habit of interrogating jurors to find out if there was a ground for challenge. It was an illegal procedure.

MR. CRANE: Well, you are not speaking about what I am speaking about.

MR. MEDALIE: If it is illegal in the case of petit jurors it is illegal in the case of grand jurors.

Now, if you know that a grand juror has a bias you can go ahead and challenge him, and then you can try that challenge, and go prove it yourself.

MR. CRANE: But how? You never heard of a grand juror being questioned by the lawyers in a case. Now, here you have provided everything with respect to challenges of a petit juror in these rules, and that the questions may be asked by counsel with the permission of the court, and so on. We have passed all that. But now you come to the grand jury which you say shall consist of 16 to 23 men, and then you go on and say that the juror may be challenged by the attorney for the Government or the defendant. You are providing for a challenge by the defendant, and I agree with you it should not be. The attorney for the defendant

who has been held to answer in the district court may challenge the array, or he may challenge a grand juror or an individual juror on the ground that the juror is not qualified. When does he do it and before whom? And the defendant may do it when a state of mind exists on his part which may prevent him from acting impartially. How does he find that out? Except we impliedly say there that when the grand jury is called the defendant's counsel, who knows he is going to be taken up by that grand jury, may appear and question it to find out its state of mind, and challenge a juror because he is not qualified. We ought not to have any such implication at all if he does not have any such right.

MR. MEDALIE: Don't we have that in New York?

MR. CRANE: I never knew a grand jury to be questioned by any lawyer in the court, and I have had plenty of them.

MR. MEDALIE: Isn't that in the Code of Criminal Procedure in New York?

MR. CRANE: I am just stating what happened. I never knew a lawyer to come and question a grand juror. In the first place, he does not know his client is going to be indicted.

MR. ORFIELD: I believe it can be done in some States.

MR. CRANE: That is the trouble. Some States have that, and that will leave an implication here that they can appear when the grand jury is called. They may think they have the right.

MR. MEDALIE: We intended that. It is a universal practice to challenge to the array.

MR. CRANE: Yes, but you are going to question as to his state of mind.

MR. MEDALIE: You can't question him. You must first challenge him.

MR. CRANE: How are you going to challenge him as to his state of mind unless you question him?

MR. MEDALIE: If you do not know about it you can't challenge him.

MR. CRANE: How can you know about it without asking him?

MR. SEASONGOOD: If he has gone around and said "So and so is a such and such" --

MR. MEDALIE: That is exactly it. For the same reason you cannot file an affidavit of prejudice against a judge unless you specify something and know what you are talking about.

THE CHAIRMAN: Well, we have voted on that. Unless there is a motion to reconsider may we go on to Rule 20 and finish that perhaps tonight, and the one additional rule

that Mr. Wechsler suggests.

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fols.

THE CHAIRMAN: Rule 20 (a), are there any suggestions?

MR. HOLTZOFF: I don't think there are any changes in that from the previous drafts. These are just routine provisions, Mr. Chairman.

THE CHAIRMAN: Rule 20 (a). All those in favor, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 20 (b).

MR. SEASONGOOD: As a matter of style, on lines 13, 16 and 20, "objects" should be "things".

THE CHAIRMAN: Is that accepted, change "objects" to "things" in lines 13, 16 and 20?

MR. ROBINSON: That is in harmony with the civil rules.

THE CHAIRMAN: And also in the title.

Are there any further suggestions? If not, all those in favor of Rule 20 (b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 20 (c).

MR. SEASONGOOD: I do not want to open the discussion again, but I do not favor serving subpoenas by persons other than officers. The return of an officer is prima facie evidence of correctness. Here you get some other fellow to serve a subpoena and the question is whether he did or whether he did not.

MR. MEDALIE: It has been followed successfully in New York and for years there has never been any trouble over it.

MR. SEASONGOOD: It isn't in our jurisdiction. Nobody serves a subpoena but an official.

MR. MEDALIE: You remember we discussed that last time?

MR. SEASONGOOD: If it has been finally settled, I do not want to open it again, but I want to register my views.

MR. MEDALIE: And I won't say anything this time, because I defended it at the session three drafts ago and I don't want to do it again.

THE CHAIRMAN: All those in favor of Rule 20 (c) say "Aye."

MR. WAITE: I want to ask a question about the last sentence, "When the subpoena is issued on behalf of

the United States fees and mileage need not be tendered." Does that mean a man in Michigan can be subpoenaed to come down here to New York and not have his mileage tendered to him in advance?

MR. ROBINSON: He knows he will get his money, of course, doesn't he?

MR. WAITE: He may not have the money.

MR. MEDALIE: The New York practice is, when he cannot do anything about it and tells the marshal he cannot come, the local marshal who served him makes some arrangement with the marshal in the district in which he is to appear to advance the money.

MR. HOLTZOFF: We thrashed this out at the last meeting, Mr. Waite.

MR. WAITE: Did we? I didn't know. This is just formal, I move that the last sentence be stricken, and I will accept defeat.

THE CHAIRMAN: All those in favor of Mr. Waite's motion say "Aye."

(Single "Aye.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

MR. CRANE: May I ask, what do they do, don't they get anything at all?

MR. HOLTZOFF: Yes, but they get paid afterwards. The marshal pays them after they testify.

MR. CRANE: As a matter of grace?

MR. HOLTZOFF: No, it is required, but the only thing is that they do not have it tendered in advance.

MR. SEASONGOOD: Mr. Chairman, I should like to ask whether in line 28, "or by leaving copy at his usual place of residence" provides for the service of subpoena only by serving it on him?

THE CHAIRMAN: Isn't that the general rule in most States? Service of the subpoena must be personally made as distinguished from a summons, which may be served by leaving it with a member of the family.

MR. YOUNGQUIST: That is my understanding.

MR. HOLTZOFF: That is the civil rule, and we certainly do not want to have a different rule on the serving of subpoena.

MR. MEDALIE: We don't want a man committed for contempt.

MR. YOUNGQUIST: Disobedience is contempt, isn't it?

MR. MEDALIE: Yes.

THE CHAIRMAN: Rule 20 (d0 (1), any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. WECHSLER: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

20 (d) (2).

MR. YOUNGQUIST: I move its adoption.

MR. McLELLAN: I second the motion.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 20 (e) (1).

MR. HOLTZOFF: I move its adoption.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

2 THE CHAIRMAN: Carried.

20 (e) (2). Are there any suggestions?

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

20 (f).

MR. LONGSDORF: Mr. Chairman, I have an objection to that. Failure to obey a subpoena served upon him may be deemed a contempt. We are not providing what constitutes contempt. We are telling how to proceed when the witness so behaves. I suggest that "deemed" be changed to "may be prosecuted as".

MR. YOUNGQUIST: Wouldn't it be better, Mr. Longsdorf, to say, "shall be deemed"?

MR. McLELLAN: No.

MR. LONGSDORF: That is just what I do not want to do.

MR. McLELLAN: That raises a question of whether the witness knew anything.

THE CHAIRMAN: Mr. Longsdorf, it is in the civil rules.

MR. HOLTZOFF: This is the language of the civil rules.

MR. LONGSDORF: I am sorry, but I remain unmoved, Mr. Chairman.

MR. YOUNGQUIST: So do I.

MR. McLELLAN: I think the question might arise

as to whether the evidence he has to give is material or immaterial.

THE CHAIRMAN: The motion is to adopt the section, following the civil rules.

MR. HOLTZOFF: There is an amendment. Mr. Longsdorf wants to change "deemed" to "prosecuted".

MR. LONGSDORF: I put it in the form of a motion.

THE CHAIRMAN: State the motion.

MR. LONGSDORF: I move that the word "deemed" be stricken out and the words "prosecuted as" be substituted.

MR. YOUNGQUIST: I did not hear that.

THE CHAIRMAN: The motion is to strike out the word "deemed" in line 55 and substitute the words "prosecuted as".

MR. GLUECK: I second the motion.

THE CHAIRMAN: We are changing the civil rule, and I think they may deem it --

MR. HOLTZOFF: In contempt of court.

THE CHAIRMAN: -- supercilious on our part to pass on a similar provision that the court has already approved. That is the only thing which is troubling me.

MR. YOUNGQUIST: I wouldn't want to do that either.

THE CHAIRMAN: I would not say Mr. Longsdorf is not right, but this is not only the work of the Civil Rules Committee but it has been approved by the court.

MR. YOUNGQUIST: There should not be any difference between contempt in one case and the other.

MR. SEASONGOOD: That is true, except you have a set criminal statute on contempt, and disobedience of any lawful order of court is a contempt under - what is it? - 325. So here you say it may be a contempt, whereas the other says it is a contempt.

MR. McLELLAN: Does it say it is a contempt not to answer a subpoena?

MR. SEASONGOOD: This says it is a contempt to disobey any lawful order.

THE CHAIRMAN: This follows the exact language of the civil rule.

We have the motion of Mr. Longsdorf to amend. All those in favor say "aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed,"No" --

MR. McLELLAN: What is that?

THE CHAIRMAN: Mr. Longsdorf moves to amend by striking out the word "deemed" on line 55 and substituting in place of it "prosecuted as a contempt". The section

as is follows a corresponding section of the civil rules.

Now may we have the vote again? All those in favor of the motion will say "Aye."

(Chorus of "Ayes.")

THECHAIRMAN: Opposed,"No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote was five in favor and opposed nine.)

THE CHAIRMAN: The motion is lost.

All those in favor of 20 (f) in its present form say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Mr. Wechsler has an additional Rule 11 (b) that he desires to propose. Mr. Wechsler, would you read it?

MR. WECHSLER: Yes. Rule 11, you will recall, is the rule on Pleas, and I propose that what is now Rule 11 be called Rule (a) and that we add Rule 11 (b) to read as follows: "The court shall not accept a plea of guilty without previously determining that the indictment or information charges an offense and that the

plea is entered voluntarily, with understanding of the nature of the charge."

I understand this to be the law as it is in any well-administered court, but I think it well to articulate it in a draft that deals as fully as ours

4 with matters of procedure.

Secondly, I have a deeper purpose. The Supreme Court in its concern with matters of this sort has taken the tack of what seems to be an almost unreasonable extension of the right to counsel as a remedy. I think a better remedy is the traditional one of vesting in the sitting judge the responsibility that any judge feels for protecting against oppression and assuring that the defendant knows what he is doing. We cannot change what the Supreme Court has done in the matter of counsel, but we can, I think, articulate this responsibility that I feel any judge would appreciate now that he has.

MR. McLELLAN: I second the motion.

THE CHAIRMAN: You have heard the motion.

MR. YOUNGQUIST: May I make a suggestion? We have already in Rule 11 that "The courtmay refuse to accept a plea of guilty." How does that tie in with your suggestion?

MR. WECHSLER: This is really a setting out of what is involved in the statement that the court need

not accept a plea of guilty.

MR. YOUNGQUIST: Why don't we strike out the language in the present rule?

MR. WAITE: Couldn't we leave that to the Committee on Style, as to how they shall be related to each other?

MR. YOUNGQUIST: All right.

MR. HOLTZOFF: It seems to me what is in this rule is so understood you do not have to spell that out. Obviously every judge wants to know whether the defendant knows what he is doing when he is pleading guilty. I do not think you have to direct the judge to be sure that he does.

MR. WECHSLER: I do not think the courts of the United States will take offense at it, Alex.

MR. HOLTZOFF: I am not suggesting that anybody will take offense. I am suggesting that it is surplusage.

MR. WECHSLER: It is a fundamental thing but it relates to the procedure of the courts on plea of guilty, and that procedure varies.

MR. CRANE: Can we have this put over until tomorrow morning?

THE CHAIRMAN: Not tomorrow morning.

MR. YOUNGQUIST: I have another question there. Why impose on the court the duty of determining whether the

indictment or information charges an offense?

MR. WECHSLER: That is part of my substantive proposal, I mean to impose that obligation.

MR. CRANE: A judge is not going to make a ruling on that and say that he finds it defective as a matter of fact. And if the man has pleaded guilty to a bad indictment, he can always get out on habeas corpus.

MR. HOLTZOFF: No.

MR. MEDALIE: You cannot test an indictment with a habeas corpus, even in the State courts, Judge.

MR. CRANE: I don't know; are you sure about that?

MR. MEDALIE: Yes.

MR. CRANE: A verdict of guilty would not cure the defect.

MR. HOLTZOFF: You can go up with a defect but you could not go up on habeas corpus.

MR. CRANE: You can raise it at some point, can't you?

MR. MEDALIE: No, the only thing you can raise with a habeas corpus in connection with an indictment is jurisdiction of the court.

MR. CRANE: If it doesn't say, it doesn't state any crime at all, the court hasn't jurisdiction.

MR. HOLTZOFF: Yes, it has jurisdiction.

Under the recent decision, the Supreme Court says you can raise other questions, like fairness of the trial.

MR. MEDALIE: That is something else.

MR. HOLTZOFF: But you cannot raise the sufficiency of the indictment, as I understand it.

MR. McLELLAN: I do not want to interrupt anybody, but may we have the question?

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Contrary, "No."

(Chorus of "Noes.")

MR. WAITE: That is Mr. Wechsler's motion?

THE CHAIRMAN: Mr. Wechsler's motion.

I will call for a show of hands on that.

(After a show of hands the Chairman announced the vote was nine in favor and opposed five.)

THE CHAIRMAN: The motion is carried.

Gentlemen, we have concluded the chapter on trial. We have done a little better today than we did yesterday, but may I suggest that we ought to plan a long session Monday, to last day and evening, and may we start at nine o'clock sharp?

(Discussion off the record.)

MR. MEDALIE: I move 9.30.

MR. WECHSLER: Seconded.

THE CHAIRMAN: I won't even put the motion. I see I am overruled.

(Adjourned to February 22, 1943, 9.30 a. m.)

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