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CRIMINAL RULES COMMITTEE
207 United States Supreme Court

Copy for Mr. Alexander Holtzoff, Secretary.

Monday, September 8, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S.

Monday, September 8, 1941.

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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Monday, September 8, 1941.

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

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

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

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

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

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

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

Mr. Holtzoff (reading):

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

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

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

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

(All the committee members rose.)

The Chairman. The motion is carried.

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

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

Mr. Seth. I so move.

Mr. Longsdorf. I second it.

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

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

The question as to how we may best proceed with our work has been given some attention by the Reporter and the Secretary, and the suggestion is made that we proceed through and discuss rule by rule, not reading the rule but calling on the Reporter in the first instance to bring to our attention any points that he thinks deserve special consideration, and then afford an opportunity to each member of the committee who desires to

2 comment on the rule. After we have gone through all the rules in that fashion we might then give each member of the committee an opportunity to suggest further rules or any changes in the present rules that have occurred to each of us as a result of going over the entire body of the rules. If that meets with approval I suggest that Mr. Robinson start with Rule 1.

RULE 1

Mr. Robinson. Chairman Vanderbilt and members of the

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

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

Carrying out that idea in a purely mechanical respect, the

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

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

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

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

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

Mr. Longsdorf. Thank you.

Mr. Robinson (reading):

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

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

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

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

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

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

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

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

Now, Rule 2.

Mr. Glueck. May I inquire?

Mr. Robinson. Yes.

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

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

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

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

Mr. Robinson. Is there further comment?

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

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

Mr. Longsdorf. Yes. And in Puerto Rico.

Mr. Holtzoff. Well, not in Puerto Rico.

Mr. Longsdorf. Doesn't it?

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

Mr. Longsdorf. Yes.

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

Mr. Longsdorf. Yes.

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

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is used in both cases.

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

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

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

Mr. Holtzoff. Yes, I understand.

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

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

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

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

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

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

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

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I am sure.

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

Mr. Holtzoff. That cures it.

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

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

The Chairman. That is right.

Mr. Youngquist. I do not have the phraseology.

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

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

Mr. Seasongood. What is going in now?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Holtzoff. Yes.

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

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

Mr. Holtzoff. No.

Mr. Seasongood. They are in this bound volume.

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

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

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

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

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

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

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

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

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

Mr. Youngquist. Yes.

Mr. Holtzoff. Or did I misunderstand it?

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

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

Mr. Youngquist. Of petit court proceedings.

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

Mr. Seth. Bail.

Mr. Robinson. Bail.

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

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

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

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

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

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

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

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

Mr. Seth. We cannot change the statute.

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

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

Mr. Holtzoff. What is it?

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

Mr. Holtzoff. Yes.

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

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

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Mr. Robinson. It seems to me you may.

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

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

Mr. Holtzoff. No.

Mr. Glueck. There are none?

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

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

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

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

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

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

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

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

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

Mr. Holtzoff. Yes.

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

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

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

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

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

Mr. Seasongood. Yes?

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

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

Mr. Holtzoff. Yes.

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

(There was no response.)

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

RULE 2

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

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

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

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

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

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

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

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

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

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

The Chairman. Yes.

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

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

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

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

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

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

Mr. Longsdorf. That is the trouble.

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

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

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

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

Mr. Glueck. You mean in the constitutional sense?

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

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

Mr. Holtzoff. I do not know.

Mr. Glueck. Do you not agree with that?

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

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

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

Mr. Holtzoff, is that not so?

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

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

Mr. Holtzoff. Oh, I agree with that.

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

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

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

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

Mr. Holtzoff. No.

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

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

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

Mr. Longsdorf. Yes.

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

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

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

Mr. Longsdorf. No.

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

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

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

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

Mr. Longsdorf. Yes.

Mr. Holtzoff. It is so.

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

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

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

Mr. Holtzoff. They do.

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

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

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

Mr. Seth. I second the motion.

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

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Rule 3.

RULE 3

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

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

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

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

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

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

025

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

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

Mr. Medalie. That is right.

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

11 Mr. Holtzoff(reading):

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

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

Mr. Medalie. Purposes of the statute of limitations?

Mr. Robinson. Yes.

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

Mr. Robinson. And the statute begins to run.

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

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

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

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

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

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

Mr. Robinson. Yes?

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

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

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

Mr. Seasongood. Yes.

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

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

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

Mr. Medalie. Yes.

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

Mr. Glueck. That is not at all?

Mr. Holtzoff. No.

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

Mr. Glueck. Yes.

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

Mr. Longsdorf. Yes.

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

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

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

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

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

Mr. Holtzoff. Oh.

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

Mr. Holtzoff. You mean as it now stands?

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

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

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

Mr. Holtzoff. Well, that is all right.

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

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

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

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

Mr. Robinson. I think that is the answer.

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

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

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

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

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

Mr. Glueck. Yes.

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

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

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

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

Mr. Medalie. I cannot state that.

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

not to be adopted by the federal courts.

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

Mr. Holtzoff. Yes.

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

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

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

Mr. Medalie. Yes, sir.

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

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

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

Mr. Holtzoff. Yes.

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

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

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

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

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

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

Mr. Crane. Well, perhaps it would be.

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

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

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

Mr. Longsdorf. Ought to.

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

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

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

Mr. Youngquist. I think so too.

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

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

Mr. Crane. I second the motion.

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

The Chairman. Oh, no.

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

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

(There was a chorus of ayes.)

The Chairman. All those opposed will say no.

(There was no response.)

The Chairman. Carried.

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11:30am

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

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

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

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

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

Mr. Clark. Would it be a case like the situation where the grand jury investigates a major or public calamity and makes a presentment?

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

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

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

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

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

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

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

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

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

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

Mr. Glueck. May I ask a question?

The Chairman. Yes.

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

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

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

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presentment; not that I ever heard of.

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

Mr. Crane. They are kind of separate.

Mr. Holtzoff. Yes.

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

Mr. Holtzoff. I move to strike it out.

Mr. Dean. I second the motion.

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

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

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

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

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

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

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

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

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

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

Mr. Medalie. Yes.

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

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

Mr. Crane. It is not the presentment that counts; it is the indictment that counts. We are dealing with prosecutions today, not a hundred years ago. Everybody understands that the indictment is the thing. Why should we confuse the bar and the courts by the use of that word instead of clarifying it. It is

3 our duty to clarify it and to present it in clear light and not to put in notes that we do not need.

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

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

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

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

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

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

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

Mr. Medalie. Yes.

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

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

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

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

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

Mr. Holtzoff. Let me cite an example.

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

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

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

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

(There was a chorus of ayes.)

The Chairman. All those opposed.

(There was a chorus of noes.)

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

(There was a show of hands.)

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Mr. Holtzoff. Eight.

The Chairman. And those opposed?

(There was a show of hands.)

Mr. Holtzoff. Eight to six.

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

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

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

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

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

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

4 information on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Crane. Under Rule 3?

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

Mr. Crane. That may be a separate matter.

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

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

b12

RULE 4

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

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

(There was no response.)

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

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

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

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

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

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

Mr. Seth. The clerk could issue them.

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

b13

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

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

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

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

Mr. Medalie. That is in here.

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

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

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

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like traffic violations.

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

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

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

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

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

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

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

(There was no response.)

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

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

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

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

Mr. Seasongood. I second it.

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

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

Mr. Glueck. How about the civil rules?

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

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

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

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

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

(There was a chorus of ayes.)

The Chairman. All those opposed.

(There was no response.)

The Chairman. It is carried.

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

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

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

Mr. Seasongood. This is the warrant.

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

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

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

7 substitute.

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

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

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

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

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

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

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

Mr. Crane. Yes.

Mr. Robinson. There is a reason for that.

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

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

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

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

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put in the words "committing magistrate."

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

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

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

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

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

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

Mr. Holtzoff. Sometimes it is carried too far.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Medalie. Yes, sir.

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

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

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

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

Mr. Seth. Yes, it does.

Mr. Holtzoff. There is no difficulty about that.

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

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

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

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

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

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

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

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

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

(There was a chorus of ayes.)

The Chairman. All those opposed. (Silence.)

It is carried.

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

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

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

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

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

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

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

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

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

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

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

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

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

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States Attorney.

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

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

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

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

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

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

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

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

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

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

Mr. Seth. Not those who try petty offenses?

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

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

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

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

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

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

Mr. Holtzoff. It may happen in big cases, it is [illegible]

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[illegible] in run-of-the-mine cases.

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

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

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

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

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

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

Mr. Holtzoff. Yes.

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

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

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

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

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

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

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

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

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

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

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

Mr. Youngquist. Application by whom?

Mr. Wechsler. The United States Attorney.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Holtzoff. Suppose I withdraw my motion.

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

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

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

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

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

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

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

Mr. Crane. Yes.

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

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

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

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

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

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

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

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

Mr. Holtzoff. I think it should be.

Mr. Medalie. It does not belong here.

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

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

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

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

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

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AFTERNOON SESSION

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

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

RULE 4(b) (2)

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

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

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

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

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

Mr. Holtzoff. I suggest that it read:

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

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

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

Mr. Holtzoff. You could issue a warrant.

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

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

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

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

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

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

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

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

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

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

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

that it is in the same substance also.

Those are questions I have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Glueck. There is a warrant on file.

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

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

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

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

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

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

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

change. It does not hurt the defendant at all.

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

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

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

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

I am in favor of the proposed change.

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

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

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

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

Mr. Holtzoff. It is also the Federal rule.

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

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

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

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

Mr. Youngquist. Almost necessary.

Mr. Holtzoff. Yes.

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

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

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Mr. Holtzoff. I am.

Mr. Dean. My objection is not well founded.

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

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

What office does the word "served" have?

Mr. Holtzoff. "Served or executed."

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

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

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

Mr. Youngquist. You execute a warrant.

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

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

Mr. Youngquist. It is not important, though.

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

The Chairman. Which one is going out.

Mr. Robinson. "Served" would go out.

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

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

Mr. Holtzoff. Are you changing the heading?

Mr. Robinson. Yes.

Mr. Holtzoff. How?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Crane. Yes.

The Chairman. Is there any debate on that motion?

Mr. Holtzoff. I second the motion.

Mr. Youngquist. They are very lengthy.

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

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

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

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

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

The Chairman. Let us dispose of this motion.

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

(There was a chorus of ayes.)

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

Very well, the motion is passed.

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

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

Mr. Robinson. "Served" covers both.

Mr. Holtzoff. I think it does, too.

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

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

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

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

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

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

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

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

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

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

(There was a chorus of ayes.)

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

The motion is carried.

Let us take up (f).

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

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

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

Mr. Crane. Is that so?

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

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

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

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

Mr. Glueck. Why should that be?

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

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

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

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

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

part of the country to another.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Holtzoff. Yes.

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

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

Mr. Youngquist. That is right.

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

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

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

Mr. Holtzoff. There are not any such districts.

Mr. Seth. How does the preceding sentence read?

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

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

and so forth.

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

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

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

"All process other than a subpoena may be served

anywhere within the territorial limits of the state."

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

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

Are there such statutes?

Mr. Holtzoff. No.

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

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

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

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

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

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

Let us consider (h).

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

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

Mr. Longsdorf. All right.

The Chairman. Let us consider (h).

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

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

Mr. Holtzoff. How does that deprive him of civil rights? I do not think any arrested person has any civil right to be liberated because someone made a mistake.

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

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

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

Mr. Wechsler. Yes.

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

The Chairman. Does not the last clause safeguard that?

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

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

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

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

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

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

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

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

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

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

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

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

limited to warrants. It affects all process.

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

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

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

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

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

Mr. Holtzoff. What purpose does that serve?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The courts overlook the defective warrants for arrest,

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Medalie. That is the theory of it.

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

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

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

(There was a chorus of ayes.)

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

Carried.

RULE 5

The Chairman. We shall now consider Rule 5.

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

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

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

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

defendant should be in writing?

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

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

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

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

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

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

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

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

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

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

The Chairman. What would the other defenses be?

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

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

Mr. Robinson. What was your question?

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

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

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

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

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

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

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

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

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

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

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

Mr. Robinson. You might make the plea oral.

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

have --

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

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

Mr. Holtzoff. Yes.

The Chairman. Is there any further discussion of that?

Those in favor say "aye."

(There was a chorus of"ayes.")

Opposed, "No." (Silence.)

It is carried tentatively.

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

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

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

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

Mr. Medalie. That is the point involved.

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

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

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

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

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

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

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

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

favorable judicial decision.

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

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

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

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

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

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

In districts where the court meets only occasionally and

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

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

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

Mr. Holtzoff. We do.

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

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

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

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

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

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

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

have a conspiracy conviction in a Federal case.

Mr. Holtzoff. You have got to have two.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Youngquist. I think that would cover it.

Mr. Medalie. That would cover it.

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

Is that motion seconded?

(The motion was seconded.)

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

(There was a chorus of ayes.)

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

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

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

Mr. Youngquist. May I ask a question concerning the

language appearing in lines 4 and 5, "unless the court otherwise
11 orders because of numerous defendants."

Just what is that intended to cover?

Mr. Holtzoff. That would be out now.

The Chairman. In view of the changes in lines 8 and 9?

Mr. Holtzoff. Yes.

The Chairman. Is that so?

Mr. Robinson. Of course, that was a saving clause in connection with our discussion before. The court could say Defendant A, B, and C should be served, instead of sixty defendants.

The Chairman. Does not that trouble relate to instances where you have short terms with many judges?

Mr. Robinson. When a man's life or liberty is at stake, I do not think we ought to take that into consideration.

Mr. Holtzoff. These terms are fixed by statute. We have to take the courts as we find them.

Mr. Robinson. We have to take the rights of defendants as we find them. Judges shift around in district courts.

Mr. Holtzoff. They cannot do it without the defendant's consent.

Mr. Robinson. They usually consent to it. There are a lot of shiftings.

Mr. Holtzoff. In the Federal courts?

Mr. Robinson. Yes.

Mr. Holtzoff. It is not done very often.

The Chairman. But if the changeis made in lines 8 and 9, does not the change as now suggested in lines 4 and 5 necessarily follow?

Mr. Holtzoff. It does.

Mr. Robinson. I think it is rather unfortunate if it does.

Mr. Seth. Does not the earlier language make the language in lines 8 and 9 unnecessary?

Mr. Robinson. I was not noticing that, because it was so definitely stated. I had not read my text here carefully enough.

Mr. Holtzoff. I certainly think that lines 4 and 5 have got to go out. Otherwise it would not serve any purpose here.

Mr. Dean. Mr. Chairman, is it not the consensus that, on Rule 5 (a), which was to be redrafted in order to make provision for pleas, they need not be in writing; that all we need is that in the event of a written motion it should be served on the adverse parties? Haven't we said everything?

Mr. Crane. That is going to be rewritten. We can take it up then.

The Chairman. With that understanding, we will pass on to (b).

Mr. Medalie. Will you have the words "offer of plea or consent arrangement"?

Mr. Holtzoff. That is going out.

Mr. Seasongood. What about designation of record on appeal? Isn't that beyond our jurisdiction?

Mr. Robinson. It is not a question of policy that the committee has to find. We find, on drafting these rules, that we keep running into matters of appeal. In other words, you cannot assume that there is a sharp distinction between matters of plea of guilty and matters following. Therefore, you have

to consider appeals in many places, regardless of whether we had any drafting in regard to appeal rules or not.

The Chairman. May I suggest that wherever a question comes up as a question of appeal, as this one, we will indicate that by brackets, so that we will have it called particularly to our attention, so we won't skip it?

I think it is quite likely that our references may be extended to include a revision of the appeals rules. Tentatively we can leave these things in.

Mr. Holtzoff. May I suggest this, though, Mr. Chairman, that even though the words "designation of record on appeal" do not belong in this one, because that should be in one of the subsequent rules which relates to appeals, under any circumstances I think perhaps these words or this phrase should go out of this particular one.

The Chairman. All right. Do you agree to that?

Mr. Robinson. Yes, with this question. You notice that that, too, is a civil rule provision. As I have said, I want all of your criticisms on the matters that really cannot be carried over on civil rule analogy. At the same time I do not want us to change too much the order as established in the civil rules.

If we begin to leave a thing out as dealt with in the civil rules at one point and proceed to make our own rearrangement, we are going to get pretty far away from our plan of holding the two systems of rules pretty closely together. That is my only question.

Mr. Glueck. Besides, this deals only with one of a series of documents with reference to service.

The Chairman. All right. Let us consider (b).

Mr. Medalie. Is this under civil rule?

Mr. Holtzoff. There is a typographical error on line 13. It says "services." It should be "service."

Mr. Medalie. I do not want to raise any question about the civil rules, but isn't it the practice in New York that when the other fellow's office is closed, you throw the pleading or notice of motion through the slot in his door and make affidavit to that effect? That is good service. You do not have to go looking for him at his house.

Mr. Holtzoff. Yes. Well, line 21 takes care of that, Mr. Medalie.

Mr. Medalie. If the office is closed or the person to be served has no office.

Now, if his office is closed, why, our practice is to throw it in somehow, either over the transom or through the slot.

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Mr. Holtzoff. Lines 19 and 20 take care of that, on page 2,--

"or, if there is no one in charge, leaving it in a conspicuous place therein;"

Mr. Medalie. There might be an office boy in there, but not in charge. The office is open.

Mr. Youngquist. Dropping it through the transom in a conspicuous place is the point Mr. Holtzoff I think has in mind.

Mr. Medalie. This is not serious, but it incidentally raises questions that run away from the normal practices today in cities. I do not know how they do it in small towns. I suppose with the lawyer out and the office closed you slip it under the door.

Mr. Holtzoff. But it works all right in the Civil Rules.

Mr. Medalie. Yes. I hate to raise the question. There is no use of our trying to amend the Civil Rules, and I think there ought to be uniformity, I suppose.

The Chairman. I think we had better let it stand.

Mr. Medalie. I was simply noting my disapproval.

Mr. Robinson. The record will so show.

The Chairman. Proceed.

Mr. Glueck. That is"whenever under these rules service is required." Surely the warrant we propose to serve personally?

The Chairman. This is under a caption of "Service of Pleadings" as distinguished from the service of either summons or warrants.

Mr. Glueck. Quite true, but I was wondering whether the expression "whenever under these rules" is too broad, nevertheless.

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The Chairman. Oh, I get your point.

Mr. Holtzoff. I say it is taken from the Civil Rules and it works out all right in the Civil Rules, because there is a separate rule for service of summons, which is the initial process for subsequent papers.

Mr. Glueck. The pleadings?

Mr. Holtzoff. Yes; and this phraseology is sanctioned by the precedent of the Civil Rules.

Mr. Glueck. I am a little afraid, where criminal cases are involved or personal liberty is involved, to have it this loose.

Mr. Longsdorf. Mr. Chairman, may I make a suggestion that I think may help to clear this up? You will find in numerous statutes the language speaking of service, when they mean service of papers in the case, and yet the statutes are worded as if it might seem to mean service of summons or something of that order.

Now, it is not the same kind of service, and it is not intended to do the same sort of thing, and maybe if we bear that in mind we will keep straight on this.

The Chairman. In the earlier rule you have dealt with original process.

Mr. Longsdorf. Yes, exactly.

The Chairman. This deals with service of pleadings and documents in the nature of pleadings. Then, Mr. Glueck, we are driven either to following the language and conforming or taking it out. Which is the safer?

Mr. Glueck. I think the Reporter ought to note it and see what he can do with it. The question is whether the caption here takes care of this difficulty, or whether some change

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should be made in this expression, "whenever under these rules."

Mr. Holtzoff. Do not overlook this limitation, Mr. Glueck. This refers to a party represented by attorney.

Mr. Glueck. I notice that.

Mr. Holtzoff. A person before he is arrested is not represented by attorney.

Mr. Glueck. Occasionally he might be.

Mr. Holtzoff. Well, there would be no representation required because there is no action.

Mr. Youngquist. I do not think there is any danger, because of rule 4, where we have in great detail provided for the service of process, both warrant and summons.

The Chairman. I agree with you.

Mr. Longsdorf. I had that in mind. I think that will cover it.

Mr. Holtzoff. I think (c) should go out because it is not at all applicable to criminal cases. That of course is a civil rule, and I do not think it has any application to a criminal case.

Mr. Robinson. Hold that for 8 again, will you? I think that is tied up with our whole problem that we will get into in Rule 8. If it is not, I will let you strike it out or do anything you want to with it; but I suggest you defer it, there.

The Chairman. Fine. "(d)".

(d) Filing.

Mr. Robinson. I suppose there is no problem there of filing with the United States Commissioner, or anything of that kind.

Mr. Dean. Do we hereafter require that certain of these

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pleadings and documents must be in writing and must be served?

Mr. Robinson. Yes.

Mr. Holtzoff. We have a written motion to take the place of a demurrer.

Mr. Dean. But do we require that they be served?

The Chairman. Rule 8, we are talking about.

Mr. Robinson. It is in there.

The Chairman. Let us wait until we get to it. Then, I do not know what will happen to it.

Subdivision (e).

Mr. Crane. Pass that.

Mr. Medalie. That means you can file an indictment by giving it to the judge if the clerk is not around, if the other pleadings are oral?

The Chairman. If you require a written alibi pleading or a written insanity pleading, it shall be filed.

Mr. Robinson. What about an information?

Mr. Medalie. Yes, the pleading or the information could be filed with the judge.

Mr. Robinson. Yes, or the information could be filed with the clerk, although the indictment I suppose would have to be returnable to the judge, would it not, to be operative in his court?

Mr. Dession. You have to get leave of court to file it. It is pro forma in some districts, but the Supreme Court has held that the court is entitled to require some showing. Sometimes it is not required, sometimes it is.

Mr. Holtzoff. I think that is one of the things we should change in these rules.

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Mr. Dession. The judge could be satisfied with anything he likes. In some districts it has become pro forma. The informer still has leave to file in the record.

The Chairman. If there is nothing further on Rule 5, we will proceed to Rule 6.

Rule 6. Time.

Mr. Robinson. That happens to be a rule which is just the civil rule carried over with practically no change, so far.

Mr. Youngquist. Speaking of a legal holiday, I question whether that is a federal legal holiday or state. The Civil Rules use the same language as here, but as I recall it the Appeals Rule says "federal or state holiday." Let us see where I got that--on page 2, preceding page 2:

> "Sundays or legal holidays, whether under federal law or under the law of the state where the case is brought."

I do not know whether the Civil Rules have been construed judicially in that regard or not.

Mr. Holtzoff. They have not.

Mr. Medalie. How many federal holidays are there?

Mr. Holtzoff. There aren't any.

The Chairman. Thanksgiving?

Mr. Youngquist. Wait a minute. Yes, that is a state holiday.

Mr. Holtzoff. The presidential proclamation has no legal effect except in the District of Columbia and on federal reservations.

Mr. Youngquist. I thought the Fourth of July was a federal holiday.

Mr. Holtzoff. No.

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Mr. Dean. It does not even have persuasive effect in some jurisdictions.

Mr. Holtzoff. In fact it would be unconstitutional as a federal holiday, except in the District of Columbia and on federal reservations.

Mr. Youngquist. What about the operation of the federal courts?

Mr. Medalie. I have worked on legal holidays in federal courts.

Mr. Holtzoff. Lots of federal courts are open.

Mr. Medalie. Especially if a Vermont judge came in and did not recognize New York holidays.

Mr. Youngquist. The point I was making is, I do not see why Congress could not declare certain holidays shall be effective with respect to all federal business.

Mr. Holtzoff. Oh, it has done that, but what I meant was, there are no federal holidays that are effective anywhere except in federal buildings and in the District of Columbia.

Mr. Youngquist. Well, that is true.

Mr. Medalie. Tell me what happens with banks? I do not know much about it, but the bank has to stay closed on election day, Thanksgiving, and I think Christmas Day and New Years day.

Mr. Holtzoff. That is because of state law.

Mr. Medalie. No, it applies to federal banks and the national banks.

Mr. Holtzoff. I know. The rule as to banks is this--a bank can close on any day on which you cannot present negotiable paper under the laws of the state; that is, where you cannot present negotiable paper on a state holiday; and that is why

even federal banks close on state holidays.

Mr. Medalie. We have solved the mystery.

Mr. Youngquist. I am interested. You say there are certain days upon which Congress says that federal business shall be suspended. What are those?

Mr. Holtzoff. I haven't got them.

Mr. Youngquist. Would not that be a federal legal holiday?

Mr. Holtzoff. In that sense, yes. I thought you meant a federal holiday within the state.

Mr. Youngquist. Oh, no; they couldn't do that, of course. But these are ~~legal~~ federal courts we are dealing with, and they are subject to a rule of Congress. I think in order to avoid question we ought to follow the Criminal Appeals Rules so as to make it both federal and state holidays; and we certainly have good precedent for it. The Supreme Court has already adopted it.

Mr. Holtzoff. The Civil Rules are more recent than the Criminal Appeals Rules, and they do not use the words "federal or state."

Mr. Robinson. I am told that one reason they did not put the federal holidays in the Civil Rules is because there are no federal holidays. That point was being discussed.

Mr. Seasongood. Election day with us is a half holiday, and Saturday or Saturday afternoon is a half holiday.

Mr. Holtzoff. Lines 10 and 11 say--

"A half holiday shall be considered as other days and not as a holiday."

Mr. Seasongood. Oh, yes; that is right.

The Chairman. Is there any objection to 6 (a) standing

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"as is"?

Mr. Dean. Might it not be well in the 9th line, where you say

"When a period of time prescribed or allowed is less than 7 days,"

and so and so, to make it read this way:

"When a period of time prescribed or allowed is expressed in a number of days as distinguished from weeks or months, then intermediate Sundays or holidays shall be excluded in the computation?"

Why do we limit it to 7 days?

The Chairman. I do not know what was controlling with the draftsman of the civil rule, which uses exactly the same language.

Mr. Youngquist. That is common state practice, too.

Mr. Medalie. If you had a 60-day period, just think of all the Sundays and holidays you would take out; for instance, a 60-day period from Labor Day in New York--Columbus Day--election day.

The Chairman. Armistice day?

Mr. Medalie. Armistice and election day, and Thanksgiving day, and your Sundays.

Mr. Youngquist. Iknow the practice in our state is that whenever the period is not more than a week they exclude intervening Sundays and holidays.

The Chairman. Is there anything on "(c)"? "(d)"?

Mr. Holtzoff. I want to make a suggestion as to (d). This provides for 5 days.

The Chairman. Just a minute. I asked if there were any

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questions on "(d)". Did you have any, Judge Crane?

Mr. Crane. No, not at all.

The Chairman. (b), (c), and (d). That will be on page 2, of Rule 6.

Mr. Holtzoff. This provision 6 (d) would provide for a 5-days' notice of motion. Now, there we must bear in mind that later on we provide for a motion instead of a demurrer, or a motion to quash. Well, that might operate perfectly all right in the large metropolitan centers, but it is impossible of operation in the average federal court where the term might last a week and where the trials commence on the second or third day of the term.

The defendant might be given a couple of hours to make his motion, or a half a day, if he is going to make one; he cannot take 5 days, because by taking 5 days he gets a 3 months' continuance.

Mr. Youngquist. But you have there-

"unless a different period is fixed by these rules or by order of the court."

Mr. Holtzoff. It ought to be "by local rules."

Mr. Youngquist. "By order of the court."

Mr. Holtzoff. "By order of the court" I think applies to a specific case.

Mr. Youngquist. Yes.

Mr. Holtzoff. If you change the word "these" to "local" that would meet the thing I have in mind. By local rules, in other words, in some districts they might provide for 2 days' notice, and in another, for 24 hours.

As a matter of fact it was found by experience that the 5-

day notice under the Civil Rules is not operative in Chicago, because they never had a 5-day notice, and they ignored that provision of the rule in our Civil Rules.

Mr. Glueck. In practice do they use up the full 5 days?

Mr. Holtzoff. Most of them do. Well, it is not only that, but the average. The average person that serves a notice knows that he has to give notice returnable at least 5 days later.

Mr. Seth. I think we should not pay too much attention to the short terms in these districts. Five days' notice is pretty short notice in lots of instances. I think the defendant has some rights, and it should not be merely a question of convenience to the government all the time. Now, that is my frank opinion.

Mr. Holtzoff. Now, you take it in this form, the defendant files a demurrer, and that demurrer may be argued the very following morning. They would not postpone a trial because the defendant filed a demurrer; whereas this rule in its present form might mean that the case would go over for the term.

Mr. Robinson. If he doesn't have a lawyer, what does he do in that sort of case?

Mr. Holtzoff. He does not demur if he doesn't have a lawyer.

Mr. Seth. Why should a man be indicted on Monday and tried on Tuesday?

Mr. Holtzoff. Well, he would either be put on trial Tuesday or he might have to languish in jail for two or three months until the next term of court.

Mr. Seth. He probably would not be demurring; but there

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is too much of a tendency it seems to me to do away with the rights of the defendants to meet the convenience of the government. If the court cannot reasonably handle it at the time, why it should be put over until a later day.

The Chairman. Mr. Seth, these cases, as I got the picture--and I must confess, coming from a district with fixed judges, I was shocked by it--some of these district judges will move about to five or six different places, and some of them are places that are not very conspicuous on the map.

Mr. Seth. That is right.

The Chairman. --except, I suppose, through some great victory, some statute was amended to include the sitting of the court in his home town; and I suppose that is going to be one of the things that we won't dare touch, if we hope to get our rules accepted by Congress. I think we have got to bend to it a bit.

Mr. Seth. I think we have got to bend the other way if we want to get them accepted by Congress, Mr. Vanderbilt.

Mr. Holtzoff. But that is the common practice.

Mr. Seth. I think that is the most serious difficulty we confront. We have got to put up reasonable rules or Congress will reject them.

Mr. Holtzoff. No, but Congress is perfectly satisfied with the present practice. The only time we run any risk of rejection is when we change the practice.

Now, the only suggestion that I make as to this paragraph is--and I so move--that in line 35 we change the phrase "these rules" to "local rules".

Mr. Wechsler. Would it meet your point, Mr. Holtzoff, if

the shortening of the time could be by the consent of the defendant? If he is going to languish in jail throughout a summer probably he would be glad to avoid it.

Mr. Medalie. What is the "confidence," Alex?

The Chairman. I remarked I thought Mr. Seth had a point, there.

Mr. Holtzoff. And my answer was that you cannot meet that point without changing the federal court system, and 75 percent of the places where federal court is held are of this type, where court is held every six months, and then the judge moves on.

Now, you talk about Congress changing those statutory terms. Well, I would like to answer Mr. Wechsler's point. You take your defendant who is out on bail, he could use this rule for dilatory purposes. He would move to dismiss on an indictment for insufficiency or some very minor ground and be given his 5 days' motion. He could have the case thrown over for the term.

Now, I think this is a matter that should be taken care of by local rules. As I see it, in the big centers of population there might not be any harm with this rule, but we have got to look at the majority of the federal courts. The only modification of this paragraph that I suggest is to insert the word "local" in place of "these".

Mr. Medalie. You mean by rules of the district court?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Then you destroy uniformity.

Mr. Holtzoff. But under the Civil Rules there are lots of points that are handled by local rules, and I venture to

say there will be lots of things under these rules that will have to be handled by a local rule.

Mr. Seth. But not a matter of time. That is not handled by a local rule. This is a civil rule.

Mr. Holtzoff. Yes, 6 (c); but I do not think it is applicable to the criminal rule.

Mr. Seth. Well, these short terms you speak of operate just as disastrously on civil cases as they do the criminal cases.

Mr. Holtzoff. Yes, the defendants in civil cases get civil cases thrown over for the term by filing a motion.

Mr. Seth. Sure.

Mr. Medalie. Not necessarily; cases on the calendar for trial on a certain day, motions made returnable several days later, the judge trying the case is not to be halted by that motion if he doesn't want to be.

Mr. Holtzoff. But there is another point, there. Your civil cases might be brought in vacation and just pending and brought to issue before the term of court, but your criminal case starts when the indictment is found, on the first day of the term, and the defendant pleads the next day, and he pleads "not guilty", and he is tried the day after.

Mr. Seth. Well, that is not right. It should not be permitted.

Mr. Holtzoff. Well, it is done in 90 percent of the cases.

Mr. Seth. I know it is done in lots of cases, but it works injustices.

Mr. Holtzoff. I do not think it does in actual practice.

Mr. Medalie. That depends of course on what crime is

charged. There are petty offences for which indiscriminately acts of Congress prescribe ridiculous penalties, but they are really petty cases.

Mr. Holtzoff. Of course 90 percent of the cases in the average country federal court are liquor cases or national-law motor vehicle theft cases or Canadian and Mexican border immigration cases, or the sale of liquor to Indians out in the Indian country, and that accounts for about 90 percent of those cases.

Mr. Seth. To get back to the automobile theft case, some young fellow is arrested going through the country with a car, indicted one day and put on trial the next, away from his people, and it is not fair, whatever the necessity may be. I have prosecuted them. I have done it over and over again.

Mr. Holtzoff. In some ~~places~~ instances he would not even ~~have~~ ask for a trial, but plead guilty.

Mr. Glueck. That is not the test. It seems to me, Mr. Chairman, that the phraseology you have here covers the point made by Mr. Holtzoff adequately. I interpret that, "or by order of the court," to permit sufficient flexibility.

The Chairman. Yes, but should we not leave out the word, by "these" rules?

Mr. Holtzoff. I would like to substitute the word "local" for the word "these"--

"by local rules or by order of court."

Mr. Medalie. If you say "local" you create an ambiguity.

Mr. Glueck. Yes, you create confusion.

The Chairman. If you leave in "by these rules" those words are meaningless, because we are putting in "5 days". Why

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not leave it up to the court each time?

Mr. Glueck. That is right.

Mr. Youngquist. I assume "a different period is fixed by these rules" somewhere in the rules. I have not seen it yet, but I assume there is some different period fixed.

Mr. Holtzoff. That is under the Civil Rules. I do not think you need it here.

Mr. Medalie. This language would permit reference to any amendatory rules later. I think it ought to stay in these rules.

Mr. Robinson. Just the same as the Civil Rules?

Mr. Medalie. You might have different provisions in the other rules, even if you haven't got them in mind. Also, the district court has its own experience, the judge also responds reasonably to bar pressure. When the bar is annoyed and feels that the practice is unfair he would provide appropriate rules. I do not think there is a district in the country where the bar is not hurt occasionally about things not working well and calls it to the attention of the judges.

Through bar associations or otherwise rules are prepared to meet those situations. The district court ought to be trusted to have that power.

Mr. Holtzoff. But I would like to have a saving clause which would permit the district court to change this.

Mr. Medalie. I agree with you about that, and if you said, "a different period as fixed by these rules or by rule of the district court"--

Mr. Holtzoff. "or by rule of the district court."

Mr. Medalie. All three things in there, then that will

amply safeguard.

Mr. Holtzoff. Yes. I did not catch your amendment. I would be in favor of that.

Mr. Medalie. I move--

The Chairman (interposing). Before you put that, may I ask this? I do not see why, if "as provided by these rules" means rules of the Supreme Court, there is any sense in copying them, because we might put in such saving clauses in each one of these rules, looking to unimportant changes, and it seems to me to be meaningless phraseology, if it means as I think it means, the federal court rules. Is that sound, or isn't it?

Mr. Holtzoff. I think it is sound.

Mr. Medalie. You mean that if subsequently there is a change of the time limitation in some other rules, you do not need the words "fixed by these rules"--that would take care of that?

The Chairman. That is right. The court would take care of it.

Mr. Medalie. So the amendment we would make here would be limited to district court rules?

Mr. Robinson. Are we justified in changing from the district civil rules?

Mr. Medalie. I was thinking what you said this morning about that. I do not care how you simplify the rules of criminal procedure, the fact is, to a lawyer, however capable, who has had no experience in criminal cases, a terror arises and mystery pervades the court in which the criminal case is to be tried, and if he can afford to have his client out of it, he will, invariably. I recall seeing good counsel--they will

always be afraid of criminal cases if they are not experienced.

Mr. Robinson. They certainly will, for there is a great difference in the two procedures, even as to notice. We cannot do anything about that, but we can, about this.

Mr. Medalie. But there is only one thing that will bring about what you had in mind, and that is, if a larger number of respectable lawyers will take criminal cases. For instance, ~~Mark Conroy~~ Martin Conboy will not be accused of having refused to take a certain appeal. If he were a K. C. over in London he would have taken it, even if he were abused for taking it.

Mr. Robinson. That is an ultimate thing, and these rules cannot contribute to that ultimate end.

The Chairman. Coming back to this for a moment, whether we ought to use "these rules", which I take it we all agree are meaningless, here, just because they are in the other rules, I think we ought not to be bound by that.

Mr. Burke. Mr. Chairman, I move we omit the three words "by these rules", and approve the form.

The Chairman. The motion is to omit the word "by these rules or"?

Mr. Medalie. I should like to amend that motion to add the words "or by the rule of the district court".

Mr. Crane. What does it means, "by order of the court"?

Mr. Medalie. That means in a specified proceeding.

Mr. Crane. You are going to make it read, "unless a different period is fixed by local rules of the district court or by order of the court"?

The Chairman. The motion as made by Mr. Burke would leave the subordinate clause, "unless a different period is fixed by order of the court."

Mr. Crane. That would be very clumsy, would it not?

The Chairman. That is Mr. Burke's motion. Mr. Medalie moves an amendment to that,

"unless a different period is fixed by local rules or by"

Mr. Medalie. "Or by rule of the district court, or by".

Mr. Crane. Now, just a minute, before voting on that. Isn't that a little clumsy? We now have to explain it to ourselves, what it means. "Unless a different period is fixed by the district court." It would be an order of the court. If it is a local rule, it would be an order of court. If it is made in special instances it means the same thing.

Mr. Wechsler. Suppose we said, "by order or rule of the district court"?

Mr. Crane. Yes--"order or rule of the district court."

Mr. Medalie. I would agree to that.

Mr. Holtzoff. I agree to that. I think that is better.

The Chairman. Now we have before us Mr. Burke's motion, and an amendment by Mr. Medalie.

Mr. Burke. I will accept the amendment by Mr. Medalie, "order or rule".

Mr. Crane. "Order or rule of the court."

Mr. Medalie. "Of the district court."

Mr. Crane. "Of the district court."

The Chairman. The vote then will be on the motion as amended.

Mr. Seth. That will permit the district courts to adopt local rules each time, is that the understanding?

The Chairman. That is what it would come to.

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Mr. Seth. I am against it.

Mr. Burke. I would be, if I thought it had that meaning, but my impression was the order of court would be a sufficient limitation in itself, but I see no objection to the rule,

Mr. Chairman, because the order of the court would have to be a deciding factor in it anyway.

The Chairman. Perhaps we had better take a vote on it separately. We will first vote on the amendment, which would have the clause reading,

"unless a different time is fixed by rule or order of the court."

After that, if it is carried, we will vote on the motion as amended.

Mr. Glueck. "Order of the district court."

The Chairman. "Order of the district court."

Mr. Crane. "Unless a different period is fixed by the order or rule of the district court"--is that it?

The Chairman. Yes. Are you ready for the vote on the amendment?

Mr. Youngquist. That includes the original amendment, plus the amendment to the amendment?

The Chairman. That is right.

Mr. Crane. That is the way that reads, now?

The Chairman. Yes.

(The motion to amend was agreed to, with one dissenting vote.)

Mr. Medalie. I would like not to take advantage of an overwhelming majority vote on this, because there must be something definitely in mind in opposing the district court's

power to have the rule, that I would like to know about.

Mr. Seth. I am opposed to doing anything that upsets the uniformity of this practice, Mr. Medalie. The district courts will have rules. They can make orders applicable to particular cases, but standing rules--you do not know whether you are afoot or on horseback in different divisions of the same district.

Mr. Glueck. I would like to raise the question apropos of that, Mr. Chairman, if somewhere at the beginning or in the commentaries it is proposed to mention the fact that in addition to these general rules we reserve the right of local district courts to make special rules as to certain topics?

Mr. Holtzoff. That would be Rule 83.

Mr. Glueck. It is in there?

The Chairman. I had supposed everybody had been through the same sad troubles I was. I happened to be chairman of our local district rules committee. and have had to read the district rules from about twenty different districts. They vary from a small sized book, in the Southern District of New York, to something about 10 or 12 rules in other districts, and I certainly think that the less district rules we get the better.

I agree thoroughly with you. Mr. Seth, on that, and yet you do have to give to the district court some small degree of power in that direction.

Mr. Seth. I was a member of our district court rules and had the same experience, Mr. Vanderbilt, and I want to avoid it. I want them limited to the smallest scope possible.

Mr. Crane. I have had that. I was not sensible enough to read all the local rules. I read all the general rules and

supposed of course they applied. I woke up later when I was sitting as special master to find out there were also some local rules which I did not discover.

The Chairman. In your district, Judge, they are more extensive in words than the general rules.

Mr. Crane. And sometimes a little hard to understand, and I think it is a very confusing thing to have. They are maybe an exception, here, but I suppose when they write the rules for the district court--I am speaking of the civil rules--they are applicable to all the courts, and when you come back to these exceptions, why, what is the good of any local rules? You might as well have local rules, to be done with it.

Mr. Medalie. I am beginning to weaken. I move to reconsider my motion.

Mr. Youngquist. Second.

The question being put, the motion to reconsider was carried, with one dissenting vote.

Mr. Crane. When in doubt, we will leave these to the Reporter.

Mr. Seth. That is right.

Mr. Glueck. That still leaves the question, Mr. Chairman, I take it, that you raised, whether the words of these rules are superfluous, providing "by order of the court".

The Chairman. The matter is open for consideration.

Mr. Glueck. I would like to say a word to an amendment which Mr. Medalie is trying to abandon--his own amendment. I would like to say a word in support of it.

Mr. Medalie. As the minutes go by, I know the abandonment is complete, now.

Mr. Holtzoff. I think so. The thing that bothers me is a practical situation.

Mr. Seth. I think the matter should be referred to the Reporter.

Mr. Holtzoff. It is the situation of courts where it is impossible without changing the statutory terms of having the cases go over the term ~~to give~~ by giving 5 days' notice. I would just like to leave this rule out entirely, but you have got to give flexibility to those courts, which form about 75 percent probably of federal courts in the United States.

Now, that is the reason why I feel that we would be making a grave mistake if we fixed 5-day notice. Now, it is true we will provide for an exception by order of the court, but I take it "order of the court" means an order in the case and not a general order.

Mr. Crane. Now, that is what you think, and that is perhaps so, but it certainly could make an order of court applying to that term.

Mr. Seth. Yes.

Mr. Robinson. Or the next term.

Mr. Crane. Well, make it apply to that term; only going to sit three days; and make it an order of court that motions shall be returnable within a day or so.

The Chairman. What Mr. Seth wants to do is put the burden of deviation on the court.

Mr. Crane. I would just leave it as it is here, "unless a different period is fixed by these rules or by order of the court." Now, you say it is applicable in the particular case, and if the court is only going to sit five days, it could say

so, and therefore the rule would be that the motion shall be returnable in one day.

Mr. Holtzoff. I think that is all right. I would suggest then that there might be comment made by the Reporter that by the word "order" is intended either an order in the case or a general order.

Mr. Crane. An order in the case, or for the term.

Mr. Seth. I would suggest the matter be left to the Reporter for further consideration.

Mr. Crane. Isn't that so? There is no limitation to the court.

Mr. Holtzoff. The matter I have in mind is fully met by the word "order", if it should be construed as meaning a general order and is not to be limited to an order in a particular case.

Mr. Crane. But they do have general orders for the term.

Mr. Holtzoff. I suppose that is so.

Mr. Seasongood. Why can we not just make it--

"unless less time is fixed by order of the court for the defendant or accused"

or--

"unless accused is ordered to plead in a less time"?

Mr. Holtzoff. I do not think it should be only in favor of the accused.

Mr. Crane. No.

Mr. Holtzoff. It should also work in favor of the Government because otherwise a defendant could get the case continued over the term by filing a motion to dismiss.

Mr. Seasongood. "Unless the defendant is ordered to plead in a less time."

Mr. Holtzoff. Oh.

Mr. Seasongood. I know in Kentucky for instance it would be perfectly impossible. Your rules would never be adopted if you were going to say that you had to wait five days, because they go to these small places and are there a day or two at most, and it is better to dispose of most of those cases, most of which are small offences, expeditiously than to have the thing go over six months. That is not a rule for accomplishing speedy justice.

Mr. Crane. I think the court could make an order covering that term, or case, or a year.

Mr. Seasongood. Well, "unless the accused is ordered to plead in a less time by the court."

Mr. Holtzoff. I think the word "order" in connection with the Reporter will take care of that.

Mr. Crane. I think so.

The Chairman. Will somebody make the motion now, so our record will show it.

Mr. Crane. I make the motion that the rule stand as it is, (d), with perhaps a possible explanation, that "the order of the court" be explained so as to apply to the term--such time as the court desires to fix.

Mr. Seth. I second that.

The Chairman. We are leaving out the words "by these rules"? Those are out?

Mr. Seth. Yes.

Mr. Youngquist. "By these rules or".

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The Chairman. Yes, "by these rules or", and the rest stands. All right.

Anything else on section (3)?

Mr. Robinson. No. I have no comments.

The Chairman. If there is nothing further we will go on to Rule 7.

Rule 7. Pleadings allowed; Form of Motions.

Mr. Robinson. In that rule 7 (a) the title should have the words "and Motions" added, I believe--"Pleadings and Motions"--and then follow Mr. Holtzoff's suggestion early this afternoon, if we are going to provide for "an oral plea or by other."

In line 3 I suppose we could say "there shall be a written accusation and an answer either by oral or written plea or motion; there may then be a reply by motion."

Mr. Seth. Shouldn't it be "either answer by plea or by written motion," just the word "written" before "motion"?

Mr. Youngquist. Just a little further down in (b) (1) of the same section, that application shall be by motion, and shall be made in writing, unless made during the hearing and trial.

That might have connection with your suggestion.

Mr. Robinson. There again we may wish to consider putting in "oral or in writing".

Mr. Medalie. I do not understand the last clause of the first sentence. That is where there is a plead or a motion. Why need there be a reply by motion? Of course I can understand answering affidavits and things of that sort.

Mr. Robinson. This is the difficulty, there, Mr. Medalie, and I am glad to put it before you because we want the answer to it. Whatever you put into the rules, it adds to this

proposition of the requirement of notice--the desire that as to certain affirmative pleas, advance notice be given that such pleas are to be made. Now, I have received from some bar associations some rather extensive drafts of how you should draw a requirement for a notice of alibi--it covers half a page or three quarters, on just that one affirmative defense, alibi; and we have received other recommendations from other sources likewise.

The chief requirement of space in cases of that kind has been due to uncertainty in regard to what the Government is going to allege. As we all know, the indictment may recite the defendant committed the offence on July 1, 1940, and then on the trial, as we know, the Government may prove that the offence was committed on any day within the period of the statute of limitations prior to the filing of the indictment or the information.

Now the defendant notices that that indictment or information alleges that the offence was committed on July 1, 1940. He wishes to plead and prove that he was in some place other than the place where the offence was alleged to have been committed on July 1, 1940, so he files his notice to that effect. Now, the Government in fairness to the defendant should be required to tell him, if it is not expecting to offer proof limited to July 1, 1940, the Government should be required to allege the date for which it is going to offer proof, so the defendant will get information from the Government and the Government will get information from the defendant, in order to get together on that.

I think the Advisory Committee would not be willing to

have those details written into the rules at the cost of a page or two of space, and then maybe limited to only one or two of the affirmative defences; therefore the objective of most of rule 7 and a good deal of Rule 8 has been to provide for rather flexible measures not specified in detailed rules, by which such exchanges of information may be made as to permit a fair application of the requirements of the principle that notice should be given in regard to affirmative defences.

Mr. Medalie. Do you not deal with this elsewhere?

Mr. Robinson. Yes, in Rule 8; but you are asking about this matter of reply. Now, the Reporter's difficulty there I think is due to meeting some term which will indicate the successive pleadings or motions by the prosecution and by the defense, some term other than "answer" or "reply".

The terms have not been used with strict legal accuracy in line 3, as is clear, there. Some substitute term probably is needed, and yet what we want is some term which will first represent the Government's plea, the written accusation, then in turn the response by the defendant, either by way of plea or motion, and then in turn what the Government files or presents by way of the next step in the proceeding.

Mr. Dean. What could the Government's response be in a case of that kind, where the defendant was required under the rules to give an advance specification of its defense of alibi? What would the Government reply be? That is what I cannot visualize.

Mr. Robinson. I believe it would work out this way: Here the defendant under the rule would come in and plead or give notice that he plans to introduce on the trial of the

case evidence to show that he was in a certain place other than the place of the alleged offence on July 1, 1940, but if the Government--this is his plea, motion, whatever you wish to call it--but if the Government plans to offer evidence of some date other than July 1, 1940, then he, the defendant, requests that the Government be required to state the specific date on which it is going to offer proof of his alleged offence; that is, the date of the alleged offence which it expects to prove.

Now then, it would be up to the Government you see to give notice of that, I will grant you, but you could talk about bills of particulars as that, to take that place, but I do not believe it should be quite that extensive. I know that bills of particulars in some districts have come to be very seriously abused. I do not think there ought to be, in this situation, with the pleading of affirmative defenses, with the mutual exchanges of information by the Government and defendant, I do not believe that it ought to be possible merely to use the situation as a means of delay and obstruction; and therefore if we could have something a little shorter, a little simpler than bills of particulars, or what is commonly attached to that term in the practice, the methods now used, I think we ought to try the shorter method; and this is here to do that.

Mr. Dean. This is a bill of particulars in reverse?

Mr. Robinson. Well, in brief.

Mr. Crane. Let me ask you this question: How far can you constitutionally go? because a defendant has never got to prove his defense. A defendant has never got to prove his defense. He may offer evidence, but the people have always got to prove everything against him. All he has got to do is create a

reasonable doubt. Now, how far can you go in requiring the defendant constitutionally to set forth his defense? Has that been passed upon by the court?

Mr. Robinson. Yes, sir; it has, in Ohio, in State versus Thayer. That is one decision. Of course, alibi notice is a law in Michigan, Mr. Waite.

Mr. Dean. About eight states now provide for notice of alibi, several on insanity.

Mr. Robinson. I have the states.

Mr. Dean. In California the constitutional question came up on conveying a specification of the insanity defense, and they held it constitutional. You really require him to break down his not guilty plea.

Mr. Crane. It is a statement of fact.

Mr. Holtzoff. There is nothing in the Constitution which would preclude the legislature from saying to the defendant "You shall not be allowed to produce evidence along a certain line unless prior to the trial you will apprise the prosecuting attorney of your intention to do so." That is all this amounts to.

Mr. Medalie. I think we are bringing in this alibi question here unnecessarily. Your subdivision deals with pleadings. I do not think anything that has to do with notice ought to be the subject of a section or subsection dealing with pleadings. I think we ought to deal with it separately.

Mr. Robinson. Let us get back to where out question came up. The question was asked, why should there be any occasion for the Government to file something in the nature of

a reply? And my explanation is what I have given.

Mr. Medalie. The reply then would have to do with bills of particulars, notices of intention to prove a certain thing; therefore would that logically belong in this subsection?

Mr. Robinson. We could of course enlarge the heading of the subsection so far as that is concerned.

Mr. Medalie. Well, would it not be better to keep the subsection purely on pleadings and not create any questions in the minds of practitioners as to what statutes to plead?

Mr. Robinson. All you would have would be simply--

"There shall be a written accusation and an answer either by plea or by motion"?

Mr. Medalie. Then you have got the plea of guilty or not guilty.

Mr. Robinson. Oh, that comes in 8.

Mr. Medalie. You also have a provision that you must get ~~ready~~ aid of your demurrer.

Mr. Youngquist. Before we get through considering rules 7 and 8, we are going to encounter the distinct classes of things we are dealing with. First you have three pleas, of nolo contendere, guilty, and not guilty. Secondly, we have those that we lump pretty much under the particular head of "demurrer". That is another class.

Third, we have substantive defenses offences, such as insanity at the time of the commission of the offence, or justification, which is mentioned here--various things of that class--and, fourthly, we have those matters such as former jeopardy which do not come under the head of demurrer nor under the head of substantive defense, but must be and usually is imposed before

trial; and fifth, what is proposed here, we have notice of proposed defenses such as alibi and insanity, and I think before we are through we must deal with those five classes separately, because they are so wholly different in their natures.

I am just giving you notice of the fact that as we go through these I am going to express views in that direction.

Mr. Robinson. May I ask this--would you say we would have to provide separate procedure for those five classes--what might be called "affirmative defenses"? You say we deal with them separately.

Mr. Youngquist. I think there must be a separate procedure. For instance, plea of former jeopardy on one hand and the notice of intention to claim an alibi on the other. They are so unlike in their nature that you cannot consolidate them under a single provision.

Mr. Holtzoff. One is not a defense. One is an affirmative defense, the other is a notice that you intend to offer certain evidence at the trial.

Mr. Robinson. But that, too, then is an affirmative defense.

Mr. Holtzoff. No, no; alibi is not an affirmative defense.

Mr. Robinson. In a sense it is.

Mr. Youngquist. The first is not an affirmative defense. The first is in the nature of a plea in bar, such as former jeopardy. It does not matter whether he has committed this offence or not, he has been tried and convicted or pardoned. That is one. The other, alibi or insanity, is merely a notice that you intend to set up a substantive defense on the trial.

Mr. Robinson. You see what we are trying to do here is to simplify the procedure and unify it. This is based on a pretty careful analysis of the defenses. I do not have the outline of it here, in which I think you will see that there is a sufficient relationship, in the way of criminal pleading, that would justify our considering them as a unit.

Mr. Youngquist. I am in full sympathy with your form here, and I hope we can work it out, but I just wanted to call your attention to the difference in characteristics of the five different groups we are talking about.

The Chairman. Let us see if we can get somewhere on 7-(a).

Mr. Holtzoff. On 7 (a) I suggest we omit reference to reply.

Mr. Crane. I should think so, yes. I do not want to talk all the time but I was thinking, I do not see how you can take up something you can call a "pleading", if it involves this thing of separate offences and comes in in 8; I think you have to eliminate it.

Mr. Robinson. Couldn't we use some term other than "reply", Judge?

Mr. Crane. I do not see any necessity for it.

Mr. Seth. Couldn't it just be a reply to the motion?

Mr. Crane. That is not a pleading.

Mr. Dean. With the language as broad as it is now it indicates we are creating some such thing as a reply to a reply.

Mr. Holtzoff. Yes.

The Chairman. What is your motion, then, Judge Crane?

Mr. Crane. Just take out for the present, then, that there may be a reply by motion. I do not think you need that.

Mr. Medalie. Second that.

Mr. Robinson. Consent, so far as I am concerned.

Mr. Crane. You are going to have "oral" in there. There should be a written accusation and an answer.

Mr. Holtzoff. (reading)

"There shall be a written accusation and a written or oral plea or motion."

Mr. Crane. Yes.

Mr. Youngquist. No, wait a minute. The motion must always be written.

The Chairman. "Oral plea or written motion."

Mr. Seth. That is right, "oral plea or written motion."

Mr. Holtzoff. I think there ~~would~~ could be an oral motion.

Mr. Youngquist. You require later that the motion shall be in writing, in Rule 8.

Mr. Holtzoff. I can conceive that an oral motion might be made in open court.

Mr. Crane. So can I.

Mr. Dean. Not a pleading.

Mr. Crane. I think you should keep these things separate.

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

Mr. Crane. If you do not, you get them ambiguous.

Mr. Holtzoff. Rule 8 takes care of your motion.

Mr. Robinson. It is line 6. This takes care of the rest. Then--

"No other pleadings shall be allowed* *"

Mr. Crane. Yes.

Mr. Robinson. (reading)

"and further action in the case shall be upon

motions* *"

Mr. Crane. Yes.

Mr. Robinson. All right. Where would you stop the first sentence?

Mr. Medalie. I would say "other" instead of "further".

Mr. Robinson. You mean on line 7?

Mr. Medalie. On line 7, you mean "other" instead of "further."

Mr. Robinson. Yes.

The Chairman. Let us see if we can get this. Will you read that one as you have it now, Mr. Robinson.

Mr. Robinson: (a) as I have it marked:

"Pleadings and Motions"--

changing the title, here.

"(a) Pleadings and Motions. There shall be a written accusation and an oral or written plea or motion"

Is that right?

The Chairman. I thought your motion cut out--

Mr. Crane. The motion was to make it--

Mr. Robinson. --to leave nothing but "plea", is that right, Judge Crane?

Mr. Crane. Yes.

Mr. Robinson. All right.

"answer and oral or written plea"?

Mr. Crane. Yes.

Mr. Robinson. The written accusation may be an indictment, a presentment.

The Chairman. We abandoned that.

Mr. Robinson. We abolished it this morning--in spite of

you?

Mr. Crane. We left that to you, Mr. Reporter. Why don't you put a parenthesis about that, because while the motion was carried we think there may be something of a question presented, that we had not thought of. We refer it to you. Put a parenthesis around that.

Mr. Robinson. I will bring the authorities to you at the next meeting.

"The written accusation may be an indictment, an information, or a complaint. The plea shall be not guilty, nolo contendere, or guilty."

With nolo contendere we have an issue, probably.

Mr. Crane. It is not an issue. I wrote you about it. I just wanted to state what I said about it. I suppose all of your practice is contrary to mine, but I never thought that was a plea of any consequence. It is absolutely illogical and in my state in a case I had to "write" in we had to determine whether it was a confession or was not, whether he was guilty or not, under the third and fourth offences, which sent a man to jail for life.

Now a nolo contendere of course puts in a plea in which he virtually says "I am not guilty," but he goes to jail. Now, is he guilty or isn't he guilty? It is such a ridiculous thing to my mind that I do not see why it is perpetuated, unless there be, as I think, as I understand there is, a use made of it which I am not accustomed to; but we have guilty or not guilty. A man is either guilty or he is not guilty, and you cannot get away from that.

He says "I am not guilty, but I enter the plea of nolo

contendere," and he goes to jail. The question came up where that happened in our state under our statute, where a man goes to jail for a fourth offence, and he entered that kind of plea in another state. Now was he guilty of the fourth offence, or wasn't he? He said he was not guilty, but I admitted it in the opinion of the court that I wrote, and the court admitted it, that it was a plea of ~~not~~ guilty in the meaning of our statute, so he was a fourth offender. He went to jail for life.

But it seems so inconsistent, so absurd to say that a man can go to jail for 10 or 20 years on a plea of nolo contendere, yet he says he is not guilty.

Mr. Holtzoff. I do not think nolo contendere means that he says that he is not guilty. I think nolo contendere, as you ~~can~~ translate the Latin, means that he is not going to contest your case.

Mr. Crane. Of course.

Mr. Holtzoff. It is not equivalent to an assertion of innocense, quite the contrary. He doesn't want to formally plead guilty but he says "I am not going to contest the case."

Mr. Crane. That is pretty thin. A man says 'I don't want to contest this, but I am perfectly willing to go to jail for 10 years or for 5 years. I am not guilty"--if that is what it means. Now I understand, and that is the reason I put the caveat to what I am saying, that in the federal practice, in civil suits, especially in these on the question of prosecutions, some of the federal statutes, that plea of guilty can be taken as prima facie evidence against other defendants in the same litigation who were not in the criminal case when it was brought

up, in the civil suits, where some of the defendants who pleaded guilty, that it would be prima facie evidence against some of the defendants in the civil case.

Now that kind of evidence I do not understand, and yet if you put in the plea of nolo contendere then the Government would have to prove the case as against the other defendants in the civil suit. That has been explained to me by federal judges in my State.

Mr. Youngquist. The plea of guilty constitutes prima facie evidence in the subsequent civil suit. The plea of nolo contendere does not.

Mr. Holtzoff. But against the same person?

Mr. Youngquist. Against the same person, in each instance.

Mr. Holtzoff. Not the others.

Mr. Crane. Why should you have such inconsistencies in the law? Isn't it a fiction simply of the spawning thing that we are trying to get rid of, which is legal nomenclature that is so contrary to fact? Why don't we confess the facts as they are and state them?

Mr. Holtzoff. I agree this plea of nolo contendere has no basis in logic, but sometimes it is useful to have illogical things.

Mr. Crane. I agree to that.

Mr. Holtzoff. In the federal courts the plea of nolo contendere is a very helpful plea.

The Chairman. For whom?

Mr. Holtzoff. For defendants as well as for the Government. Now, I think in the Southern District of New York it is very rarely used if at all, because they are accustomed to

the State practice, where the plea does not exist.

The Chairman. Is it not a bargaining plea?

Mr. Dean. Surely.

Mr. Holtzoff. Yes. It is very often a bargaining plea, but at the same time it helps. I think it helps many of the defendants.

Mr. Medalie. I think there is a practical reason that does not arise in a state criminal prosecution, generally speaking. People who are prosecuted in the state courts have committed what people regard as crimes. Now, in the federal courts many people are prosecuted for the commission of acts which are made crimes by Congress. Many respectable people are included in the accusations and are undoubtedly guilty, and the real purpose of the prosecution is to accomplish something else, perhaps to get a consent decree, antitrust cases, cases affecting business, where Congress is putting penalties really that are very very serious, and one of the outcomes of those cases is that people are sued, made bankrupt. The common law rule that a plea of nolo contendere does not carry an admission with it enables these people to get rid of these accusations, to pay the penalty, which is more often a fine than anything else, and then take care of the civil litigation that arises out of it without all of the consequences.

Now, there is another thing to consider there, too. The contesting of some of these accusations is a very costly business. These trials take a long time. The cost to the Government and the accused, think of it. Now, it is illogical, and the Judge is quite right about it, but it is exceedingly practical in getting rid of something which does not ordinarily

involve moral turpitude.

I have seen examples, which I think are rare, of persons being allowed to plead nolo contendere in a mail fraud, that is pretty bad, but in the antitrust litigation or where business agreements are involved it does not outrage the moral sense even though it is not very logical.

Mr. Holtzoff. Then, there is no stigma attached to the plea of nolo contendere that would attach ~~as against the same person~~ to a plea of guilty.

Mr. Crane. Is it a fact that they do not go to jail on such a plea?

Mr. Holtzoff. No, they can go to jail.

Mr. Crane. What kind of stigma is that?

Mr. Holtzoff. Prison sentences are not often imposed on plea of nolo contendere. They are sometimes, but that is an exception.

The Chairman. As part of the federal and local law I do not think we can touch it.

Mr. Wechsler. I wanted to ask only if it is the intention to permit the plea of nolo contendere to be filed without leave of court.

Mr. Holtzoff. That should not be, and I do not suppose that was the intention. The intention is to continue it in its present form, where the court has to exclude or accept the plea.

The Chairman. You mean the court has to be a party to this bargaining business?

Mr. Holtzoff. Oh, yes. The court may refuse to accept the plea of nolo contendere.

Mr. Medalie. Either the prosecution or the court can

refuse it.

Mr. Holtzoff. Yes.

Mr. Medalie. That is common law.

Mr. Youngquist. I think the common law rule is that the plea of nolo contendere may never be interposed except with the consent of the court.

Mr. Holtzoff. And with the consent of the prosecuting attorney.

Mr. Youngquist. I am not so sure of that, but we might write that in. I do not know why perhaps we shouldn't.

Mr. Glueck. Do you want to limit the discretion of the prosecutor as to this and not his discretion as to other features, such as accepting the plea of guilty to a lesser offence than that actually committed, technically? It seems to me if you write this in you open the whole vast field of the extent to which you are going to discipline the discretion of the prosecutor.

Mr. Holtzoff. Of course you do not have the problem in the federal system that you have in the states, because in the states the prosecutor is an independent officer responsible to nobody, elected to office, whereas the United States Attorney is under the supervision of the Department of Justice, and in all districts except one, the Southern District of New York, ~~you~~ he cannot even nolle pros. a case without the consent of the prosecutor.

Mr. Medalie. You saw my correspondence with the Attorney General when one of his deputies undertook to tell me I couldn't?

Mr. Holtzoff. There is a special rule in the Department

as to the Southern District of New York, because of the great volume of business.

Mr. Medalie. I helped make that rule.

Mr. Holtzoff. This case you spoke of does not arise so much because of the fact that the prosecuting attorney is not an independent officer, he is responsible to nobody, as he is in the states.

Mr. Wechsler. There is still a problem there, I should hope we would consider, namely, the problem whether the internal organization of the Department of Justice is sufficient reason for paying no attention to the general issue with respect to the acceptance of pleas. I do not mean to prejudge the question but I think it is now to be discussed fully.

May I suggest, Mr. Chairman, that if the plea of nolo contendere is to be retained that there ought to be in the rules a section defining the circumstances under which it may be used. It occurs to me further that it might be possible at this stage to improve the situation somewhat by articulating the considerations that ought to guide its use.

I think a similar section in connection with pleas of guilty may point the answer to the problem of affirmative defenses that we will come to, a section that will indicate what the plea of not guilty puts in issue and what it does not put in issue; but as a matter of draft technique I suggest to the Reporter that a separation be made, and that a separate provision of each one of these pleas dealing with the consider ations specially applicable to each of them may help to define some of these issues more clearly.

Mr. Crane. Then as I understand, if a man got to plead

not guilty or guilty, it is going to hamper getting rid of him some way easily without trial. Well, it is illogical, and I see the difficulty of course when you have something that is well written perhaps in the practice of states and also in the Federal Government. It might be a very difficult thing to become logical at the expense of overturning a long-established usage, but personally I do not like fiction.

Mr. Youngquist. I think, with respect to Mr. Wechsler's suggestion, if I understand it, this, so far as pleas of guilty and pleas of not guilty are concerned, we need go no farther. That is simply permitting the making of them.

So far as the pleas of nolo contendere are concerned we should at least provide that they may not be made except by consent of the court, but if we try to write into the rules the circumstances under which the court should permit the making of the plea we would get into a job that we could never finish. So if it is to be in, it ought to be in with the simple provision that it shall be made only with the consent of the court, and possibly as some one suggested, with the consent of the United States Attorney; but I am not so sure of that.

Mr. Wechsler. I am not clear that it would not be possible to have a rule which said that the plea of nolo contendere may be filed with the consent of the court when reasonably necessary to safeguard the rights in civil actions.

Mr. Holtzoff. I would not want to limit it to that. I would not want to limit it to that.

Mr. Seasongood. Isn't there a provision--I thought Mr. Seth was going to mention it before--that you have to assess triple damages under the Antitrust Law if you find them guilty, and

and that this is a way of doing it?

Mr. Holtzoff. Yes.

Mr. Dean. That is the particular reason for it--the triple damages under the Antitrust Law.

Mr. Crane. I knew there was some reason for it.

Mr. Seasongood. That is one of the reasons, isn't it?

Mr. Medalie. If we did not have so many of the federal criminal statutes this would not raise the problem.

Mr. Crane. I did not know it was the province of the court to undermine the will of Congress.

Mr. Medalie. You are illogical again. We still have our difficulties.

Mr. Youngquist. I was noticing in one of the books that Thurman Arnold wrote, he said that no business man should feel that an indictment for violation of the antitrust laws was any reflection upon him.

The Chairman. Mr. Strawn has prepared a memorandum on this plea, and I am arranging to have that mimeographed so we may have it tonight, and I think perhaps it would be well to withhold a vote on what seems to be a very useful matter--

Mr. Crane (interposing). Do not misunderstand me, Mr. Chairman. I did not want to put it in the form of any proposal to strike it out. I did want to have us pass upon it, at least, after having us know what it was and what it was doing, and that we were doing it for some useful purpose, if we are going to continue it, because it did seem so illogical.

The Chairman. Now, if I could, I would like to have Mr. Robinson read the 7 (a) as it is, passing for a minute, over this plea of nolo contendere, because I do not think we have

it in form yet. It would be helpful to have it. Will you just read it.

Mr. Robinson. (reading)

"Pleadings and Motions. There shall be a written accusation and an oral or written plea. The written accusation may be an indictment, an information, or a complaint. The plea shall be not guilty, nolo contendere, or guilty. No other pleading shall be allowed, and other action--"

changing "further" to "other"-

--"in the case shall be upon motions presented by the defendant and by the Government."

Mr. Holtzoff. I am wondering--this is a minor matter, but--whether there is a possibility of misunderstanding. "The written accusation may be an indictment, an information, or a complaint. No other pleading shall be allowed." You might have a complaint in a case first and an indictment afterwards, or a complaint first, and an information afterwards.

Mr. Medalie. It would require no pleading. I do not think you would need write anything about it.

Mr. Youngquist. No.

Mr. Medalie. Just the same as you might have an indictment to supersede an indictment and have to have a new pleading.

Mr. Holtzoff. That is right.

Mr. Youngquist. May I raise another question in line 6, "no other pleading shall be allowed." Should that be "no other pleading shall be allowed?" because later we do I think in section 8 refer to pleadings or those motions only.

Mr. Robinson. We have used "pleadings" four times there

from the top of the page on down to the place you mention. Do you wish to have it changed in each place?

Mr. Youngquist. If I am correct in my thought it should be. Wait a minute. You would not want "motions" up there in the heading, would you?

Mr. Robinson. We have "pleadings and motions."

Mr. Youngquist. Oh, yes, that is right.

Mr. Holtzoff. I think "motions" ought to be left out.

Mr. Youngquist. No.

Mr. Holtzoff. The heading, in view of the change of the context.

Mr. Youngquist. No. The last sentence still shows "motions".

Mr. Holtzoff. Oh, yes, that is right. I will withdraw my suggestion.

Mr. Youngquist. That is a matter of detail. I am just calling attention to it.

Mr. Robinson. I think that is a real improvement. After this joint work here it has cut down the paragraph considerably and simplified it.

The Chairman. Let us see if we have disposed of Mr. Youngquist's suggestion. I do not believe we have.

Mr. Youngquist. As this (a) now reads, the only things that are spoken of are the three pleas and motion, outside of the accusation. The first heading is "Pleadings and Motions."

The Chairman. In other words, your thought is that "pleadings" would be a better heading?

Mr. Youngquist. No. I am not quite sure, but I was thinking more particularly of subsection (a), which does not now

deal with pleadings but deals with pleas and motions--the three traditional pleas, and, in addition to that, motions.

Mr. Glueck. But also "accusation"--an accusation plus a plea is a pleading or pleadings.

Mr. Dean. "Pleading."

Mr. Youngquist. It is an accusation.

Mr. Holtzoff. Isn't an indictment a pleading?

Mr. Dean. Oh, just as much as a complaint in a civil suit.

Mr. Holtzoff. I think an indictment is a pleading. You speak of a "criminal pleading".

Mr. Youngquist. I am getting overtechnical I guess.

The Chairman. This then leaves open two questions, one, as to whether the word "presentment" stays in or not, and second, whether the phrase "nolo contendere" stays in or not. Those will come up later for discussion.

Now, we will go on with subsection 1.

(1) Indictment; Waiver.

Mr. Robinson. Subsection (1),"Indictment; Waiver." You notice you do not permit waiver where the indictment alleges a capital offence, but if it is a noncapital but infamous offence there may be a waiver by the person if he

> "informs the court either orally in open court or by a written communication that he waives accusation by indictment and consents to the filing of an information or a complaint against him. In case of such waiver the attorney for the government may by leave of court proceed against the accused by information or complaint."

Mr. Holtzoff. Now right there.

Mr. Robinson. Yes, Iwas just going to stop there. May I explain it, and then you may have an opportunity. Would you mind? Pardon me.

Mr. Holtzoff. It was just on this next sentence, I was going to make a motion. Go ahead.

Mr. Robinson. Are you going to discuss the complaint?

Mr. Holtzoff. No, I wanted to move to strike out "by leave of court".

Mr. Robinson. All right, we will go back to it. Why don't you go ahead and state?

The Chairman. Line 17?

Mr. Holtzoff. Yes. Strike out the requirement that you need leave of court to file an information. That is an anachronism. I do not see why you should have to have leave of court to file an information any more than you have to have a leave of court to file an indictment.

Mr. Dean. But there is a lot more reason I think in that situation, because you have some check by a grand jury sitting there listening to the evidence, and you have had to go by certain rules, but the information is a very broad power given to the prosecutor. He simply takes it, writes it up in his own way, and he signs his name, and he can use it in some rather serious offences.

Mr. Holtzoff. At least in some of the States all prosecutions are by informations nowadays and the prosecuting attorney does not have to secure leave of court to file the information.

Mr. Dean. In many of those States. California happens to be one--my State.

Mr. Glueck. In Minnesota they do.

Mr. Dean. You have to have a preliminary examination before you can get your indictment, you are bound over to the grand jury following a hearing before a magistrate, so even then you have a chance to make a record.

Mr. Seth. Does not that rule come up under subdivision 2? Those special classes of informations I think ought to have leave of court, where it is an infamous offence, and there ought to be a record of some kind, referring to some of the recent decisions on habeas corpus.

The rule ought to carry a provision for a definite record of the waiver, to be made in court in some way, but when we come on to (2) there is no requirement, the ordinary require ment of any leave of court, as I see it here, but this is just a special type of information.

Mr. Holtzoff. I think it is an anomaly to require leave of court to file any information, because the information takes the place of your indictment, and it is like asking permission of the court to prosecute somebody.

Mr. Medalie. The fact is that informations are filed today in non-infamous crimes by the United States attorney without leave of court, isn't that so?

Mr. Holtzoff. That is right.

Mr. Medalie. Now, nobody has made any objection to that practice?

Mr. Holtzoff. No.

Mr. Medalie. And there seems to have been no injustice that has come to our attention in connection with it.

On the other hand there are situations where analogously to the state practice in certain crimes, though they can be

prosecuted by information, they are in specific cases to be prosecuted by indictment. To give you an example of it, in New York misdemeanors may be prosecuted by information or by indictment, and when the information is filed a defendant sometimes moves that the case be prosecuted by indictment; in some instances the court in the interests of justice makes an order requiring that the district attorney proceed by indictment if he can get one.

What you want to deal with here is that the court shall still have the right to protect the defendant against having to meet an accusation where the district attorney has simply filed an information, and ought to have a safeguard of grand jury supervision. Now probably it would be fair to say to them that the defendant when proceeded against by information ought to have the right to move the court that the district attorney be directed to proceed by indictment if he procures one.

Mr. Holtzoff. That is peculiar to New York State practice I think.

Mr. Medalie. But it is a very just rule, and that is just so it ought to be included in our final form.

Now, as far as the United States attorney filing information against a person for a non-infamous offence, to meet it, you would have to go through a month or two months' trial and go to tremendous expense. Now, under certain conditions they could present facts to the court showing that that was unjust and thereby require an order of the court that an indictment be procured before he is required to meet that sort of thing.

Mr. Glueck. George, in such cases as you have mentioned,

is there a preliminary hearing before a commissioner?

Mr. Medalie. No.

Mr. Glueck. In other words, is there not one sifting already?

Mr. Medalie. No.

Mr. Glueck. There is not?

Mr. Medalie. Today the United States attorney files information in these minor offences without a preliminary proceeding of any kind.

Mr. Holtzoff. Take the Pure Food Law, for example, that is the type of case, or the Migratory Bird Act, where they file informations. Now, it seems to me--and I may be wrong on it--it is a survival of an anachronism to require a leave of court. In some jurisdictions they still adhere to the rule that the United States attorney has to get a leave of court. Now he gets it pro forma.

Mr. Medalie. I do not think he ought to be required to get a leave of court, but where it appears it would be unjust to proceed against the defendant, simply because the United States Attorney chooses to, and where it is in the discretion of the court, in the opinion of the court, in a proper case, to have a grand jury pass upon it, he ought to get that protection.

Mr. Holtzoff. Well, you suggest we leave the phrase "by leave of court" in this particular case, is that what you mean? Is that what your suggestion is?

Mr. Medalie. "In case of such waiver the attorney for the government may by leave of court proceed against the accused." I don't think you need it. I think "by leave of court" is unnecessary.

Mr. Holtzoff. Well, that is what I say.

Mr. Medalie. And should be used only when there is a particular motion made by the defendant.

Mr. Holtzoff. That is my point. I think "by leave of court" ought to be omitted at this particular point.

Mr. Dean. I should like to ask this question: What kind of showing could you make to a court, why you should be proceeded against by way of indictment rather than by information?

Mr. Medalie. In these cases in New York these two things are pointed out. Of course the court wants to have a notion that you have a genuine defense to the accusation, otherwise his discretion would not be moved, notwithstanding the minor character of the offence; that it seriously affects a man's property rights and business; the fact that he will be subjected to a long and expensive trial.

Now without our saying so that will develop under the common law of this provision as we make it. The courts will begin to find their own good reasons and have a fair unanimity of opinion as to what is fair and when they ought to act.

Mr. Holtzoff. Anyway, you agree to this particular phrase being omitted?

Mr. Medalie. Yes. I do not think it is needed there.

Mr. Holtzoff. I move--

Mr. Seth (interposing) Don't you think it is needed in this class of cases, this class of cases we are considering now that have to be proceeded on by indictment, except where the defendant waives indictment? I think the "leave of court" should remain in that type of case.

Mr. Robinson. I think the Advisory Committee before over-

ruled it. As the law now is, Mr. Medalie, I do not follow your statement. You have in mind the Albrecht case, decided in 1926, in which the Supreme Court held that before a United States attorney can file the information he must first obtain leave of court, and before granting such leave the court must in some way satisfy himself there is probable cause. (273 U.S.)

Mr. Holtzoff. I should like to see that law changed.

Mr. Medalie. Where the leave of court was specifically needed for the filing of the information, is that the rule of the Albrecht case?

Mr. Dession. Yes.

Mr. Crane. It said these cases have to be prosecuted--

Mr. Holtzoff. In some districts they do not seek ~~a rule~~ leave of court, but I think your information always starts out, "The United States Attorney for such and such district, by leave of court," and then he just goes ahead and files the information.

Mr. Dession. That is it.

Mr. Holtzoff. It is a legal fiction.

Mr. Dession. Yes.

Mr. Holtzoff. I think now it is a legal fiction. That is why I want to abolish it, because it is a legal fiction.

Mr. Dession. The judge sometimes examines it. It is up to the court, and in some districts it simply so reads but it has never been submitted to the court at all, because the prosecutor knows in general that that is acceptable. However, there is nothing to stop the court in a particular case from asking for a showing. That is the Albrecht case.

Mr. Holtzoff. That is correct, and I just raised the question whether we shouldn't change the law on that point, but I see the force of your remarks, George.

Mr. Youngquist. Of course what we are talking about here relates to infamous crimes.

Mr. Medalie. Yes.

Mr. Crane. These are cases that you have to prosecute by indictment unless the defendant waives, and I suppose it is only a question of a court checking up on his waiver, that is all.

Mr. Holtzoff. That is all.

The Chairman. Did we have a motion on this point?

Mr. Holtzoff. I move that we strike out the phrase "by leave of court" in line 17 of the first page of rule 7.

The Chairman. Is that seconded?

Mr. Crane. Well, you want to make sure that the waiver is put in proper shape--"unless the person against whom the accusation is to be filed informs the court." There is no question about it then, is there? The court would know it then. "Either orally in open court or by a written communication." Now, a communication to whom? "that he waives accusation by indictment." I think the court should check up on the waiver. That is the only thing I see about it.

I think the court should check up on the waiver. If he files it orally in open court of course there is the check-up, and these pleas of guilty sometimes are forced--there is nothing in that--and the communication, does that mean to the court? If that is so, why that is checking up on it. The written communication, to whom? The prosecuting attorney, I do not

think that would be sufficient.

Mr. Youngquist. No, he "informs the court, either orally in open court."

Mr. Medalie. Orally or in writing.

Mr. Crane. I think the communication should go to the court. The court should check up on the waiver.

The Chairman. It says that, Judge.

Mr. Crane. Yes, that is right.

Mr. Youngquist. I would like it better if it read, "either orally in open court or in writing waives accusation."

Mr. Wechsler. At the appropriate stage, Mr. Chairman, I would like to move that that be confined to waiver in open court. I cannot conceive of any procedure short of that that will provide the protection that Judge Crane pointed out to be necessary.

Mr. Holtzoff. You mean that the letter to the judge from the defendant should not be sufficient?

Mr. Wechsler. Right.

Mr. Holtzoff. I am inclined to agree with Mr. Wechsler on that.

Mr. Medalie. That would be "informs the court"?

Mr. Crane. "Orally."

Mr. Holtzoff. "Orally."

Mr. Medalie. "Orally or in writing."

Mr. Holtzoff. But it ought to be in open court.

Mr. Crane. I think so.

The Chairman. May we have a vote on the motion? The first made is to delete the words in line 17 "by leave of court".

Mr. Wechsler. My vote on that, Mr. Chairman, would be

determined by the action taken on the preceding point. I would favor that if it were "in open court".

Mr. Crane. Yes, so would I.

The Chairman. You want to joint with that a motion to delete the words in lines 13 and 14, "or by a written communication"?

Mr. Wechsler. Yes.

Mr. Crane. Yes.

Mr. Holtzoff. Yes, I will join with him. I will make that a part of my motion, Mr. Chairman.

Mr. Seth. That raises the question, in some of the districts, of bringing the prisoner from a long distant division where he is in jail before a court that is sitting, at a large amount of expense. I do not think it makes any difference whether it is in open court or in writing so long as the judge determines the fact. The marshal might transport a prisoner 200 or 300 miles in my district to bring him before the court and he not do anything when he got him there. He would have to take him back.

Mr. Holtzoff. Ordinarily this will happen when the defendant wants to plead guilty.

Mr. Seth. And he has been held over for the grand jury by the United States commissioner.

Mr. Holtzoff. Yes. Now then, he wants to plead guilty and have the thing over with instead of languishing in jail three months or six months. He writes a letter to the clerk of the court or the United States attorney, "I want to waive indictment."

Mr. Seth. That is right.

Mr. Holtzoff. Now, he ought to be brought into open court so that the judge can be sure that he understands what he is doing, but that would not be a useless trip, because probably at the very same time he will probably also plead guilty and his case be disposed of.

Mr. Seth. Yes, but he ought to communicate in some way that he intends to waive before they bring him in.

Mr. Holtzoff. Of course, he would not be brought in unless he indicates a desire to be brought in for that purpose. Isn't that the way it would practically operate?

Mr. Wechsler. In any event, Mr. Chairman, you face the difficulty the other way that seems to me more serious, because otherwise you face the possibility that if there is the trial the defendant at the trial will claim that he signed the waiver without knowing what he was doing, or that he was coerced, or if he pleads guilty, what is even worse, you will face habeas corpus proceedings in which the basis of the complaint will be that the waiver was either made ignorantly or involuntarily.

Mr. Robinson. That is the reason the requirement for writing is written here.

Mr. Holtzoff. I agree with Mr. Wechsler, the waiver ought to be repeated even if it is made in writing, ~~before~~ in open court.

Mr. Seth. If the marshal transported a prisoner 200 miles without something, he would be disallowed his expenses.

Mr. Holtzoff. That has occurred, but that's the way this would operate. He would not transport a prisoner 200 miles without there being some reason for transporting him.

Mr. Seth. There should be an order of court in advance. I think the determination on final waiver should be in open court. There should be a written request for the prisoner before the marshal goes for him.

Mr. Holtzoff. That is an administrative matter that could be handled between the department and the marshal, but the jurisdictional waiver so far as rules are concerned ought to be in open court.

Mr. Seth. Unquestionably--and it ought to be made of record.

Mr. Holtzoff. It ought to be made of record, of course.

Mr. Waite. Mr. Chairman, could I suggest this? As I understand the purpose of this waiver it is one of expedition. If we require the man to be brought into open court first, somehow or other I do not know how, to signify his desire to waive, and then go through the process of having him brought into open court to declare his waiver, and then wait until we can get an information written up, and then bring him into court again to plead not guilty to that information, you might just as well go through the regulary grand jury process in most districts.

On the other hand I cannot see any serious danger if we do not require his waiver in open court, if we have it in writing. After all, the only difference is that the accusation is over the signature of the district attorney rather than coming from the grand jury, and I cannot see any sound basis for his moving to quash on the ground that he did not know what he was doing when he filed that waiver, because after all it is essentially the same thing, the form and content of the

accusation.

Mr. Youngquist. I think the practical working of that would probably remove those objections. I used informations in circumstances like this under the state law. What happens is this: When the defendant indicates that he wants to plead guilty and not wait for the grand jury, the prosecuting attorney then prepares an information so that he may know what is in it.

The prisoner--with us it was by petition; here it would be simply by waiver in open court--appears then with the United States attorney and with his own counsel, if he has one, in court, knowing at the time what the information contains, because he does not want to waive indictment unless he knows what he is going to be charged with in the information.

He enters his plea of guilty forthwith and is sentenced. That is the way that always worked with us.

Mr. Waite. You mean that the information is drafted before he is brought into court to waive?

Mr. Youngquist. Yes.

Mr. Holtzoff. I think it would generally operate that way.

Mr. Youngquist. And certainly if I were counsel for the defendant I would never let him waive the indictment without his knowing what was in the information.

Mr. Waite. I am not familiar with very many district attorneys. The prosecuting attorneys that I have known I think would be very hesitant about drawing up the information before they were asked to do so, on the strength the man might waive.

Mr. Youngquist. No, no, he asks.

Mr. Waite. Oh, I see.

Mr. Youngquist. He asks for that in advance.

Mr. Waite. Oh. Then he waits until it is drawn up before he asks again in open court?

Mr. Youngquist. Then he waives in open court.

Mr. Holtzoff. He indicates the intention of waiving. The United States attorney draws the information, arranges for the marshal to bring the prisoner into open court, and he then waives in open court. Right then and there the information is filed.

The defendant generally pleads guilty and sentence would be imposed. As to practical operation, it would all be done simultaneously.

Mr. Medalie. The chances are the warden's commitment would be ready for the man who asked for it.

The Chairman. Now, gentlemen, shall we vote? The motion is to strike, in lines 13 and 14, the words "or by a written communication", and in line 17, "by leave of court."

(The question being put, the Chair is in doubt.)

Mr. Youngquist. May I ask a question before we take the other vote? Does this question of waiver arise anywhere else under the rules, Mr. Reporter?

Mr. Holtzoff. No.

Mr. Robinson. No,sir.

Mr. Youngquist. Only here?

Mr. Robinson. I think that is right. I do not believe there is any in 8.

Mr. Wechsler. It arises in connection with counsel. Is there not a provision for counsel?

Mr. Holtzoff. No, waiver of petitioners.

Mr. Robinson. This is the place where it is supposed to

be provided for, waiver of indictment.

The Chairman. Let me get the vote.

Mr. Medalie. I have something troubling me here. I do not like to dispense with the words "by written communication," at least not with the idea there. I think practically you do want to save time, and you would, and the way that is done is to have the defendant sign a waiver which can be filed in court. I do not think we ought to cut this out of the draft.

The Chairman. You are voting No?

Mr. Medalie. Well, I wanted to explain it. I think it is very important. Most of the work that will be done there in the jails will be to have the defendants sign waivers, and they will be asking for them so they can get their cases disposed of speedily.

Mr. Holtzoff. But I think it is important to have the waiver repeated in open court for the record.

Mr. Glueck. Why not say, "unless he indicates in open court," which might mean either orally or written?

The Chairman. May I get the vote on this motion, first?

Mr. Medalie. I do not get the motion.

The Chairman. The motion is the original motion as to which I was in doubt, which was, to delete the words in lines 13 and 14, "or by a written communication," and the words in line 17, "by leave of court".

Mr. Medalie. I think they should be voted on separately.

The Chairman. We can, later.

(The motion is lost.)

Mr. Holtzoff. Then I would like to renew my motion to strike out the words "by leave of court" in line 17.

The Chairman. Is that motion seconded?

Mr. Medalie. Seconded.

The Chairman. Is there any discussion?

(The question being put, the motion is LOST.)

Mr. Glueck. As to the first item, I would move that we substitute for the words there, "or by a written communication," --in fact, substitute for lines 13 or 14, the statement, "indicates in open court that he waives accusation." That would make an indication either oral or written as necessary in individual cases. It would read:

"unless the person against whom the accusation is to be filed indicates in open court that he waives accusation."

Mr. Crane. Wouldn't that be covered by the consent of the court?

Mr. Glueck. Well, that is the issue, whether we should cut out the "written".

Mr. Youngquist. Well, not make them alternative but conjunctive--"inform the court in writing in open court."

Mr. Holtzoff. Suppose the defendant is illiterate? That is not a far-fetched idea, because we get a good many liquor-law defendants up in the hills who may be illiterate.

Mr. Glueck. This is done before they get counsel.

Mr. Youngquist. He may sign with a cross.

Mr. Holtzoff. What is the object of requiring written waiver?

The Chairman. Is there a second to Mr. Glueck's motion?

Mr. Youngquist. I second the motion.

Mr. Wechsler. What is the motion?

Mr. Glueck. The motion is that for lines 13 and 14 the

language be substituted, "be filed, indicates in open court that he waives," leaving out the alternative "orally or by written communication"--"indicates in open court."

Mr. Medalie. Why do you use the word "indicate"? You are going to get deep on that.

Mr. Youngquist. May I offer an amendment--"that he informs the court in writing in open court".

Mr. Glueck. Well, I wanted to avoid that "court" and "open court" construction.

Mr. Holtzoff. Why not say, "waives in open court"? And it could be either oral or written--"waives in open court."

Mr. Seth. Could we not follow the language of the old statute waiving jury trials? First they required a writing, then they amended, "to be entered of record"--"which waiver is to be entered of record."

Mr. Glueck. That is all right. I think that would be all right.

Mr. Holtzoff. I move then we substitute for the phraseology, "unless the person against whom the information is to be filed waives accusation by indictment in open court, which waiver shall be of record, and consents to the filing," and so on.

Mr. Waite. That, Mr. Holtzoff, is again the motion to preclude waiver in writing, is it not?

Mr. Holtzoff. It does not preclude it.

Mr. Waite. I am just trying to find out. Is that the same motion in a different dress?

Mr. Seth. Yes.

The Chairman. Yes, it definitely precludes a waiver in

advance, not in court.

Mr. Holtzoff. In advance, yes.

Mr. Crane. The only thing I had in mind, I do not care how you get it, whether it is oral or in writing, but it is that the court, the judge, should check up on the waiver.

The Chairman. You have that, Judge, in this last clause.

Mr. Crane. Now, the Constitution says "indictment". We are going a little far to get rid of it. My court very early said he could not be tried by 12 jurors. The United States Supreme Court did not follow that, did not approve it, and I think the Supreme Court was right about it.

I do not think we ought to make these things to set forth entirely. It does not work out right, because the principal thing is that the defendant knows what he is charged with, he pleads guilty to it, but I think there should be some check-up by the court on any written communication rather than as to whether or not a man is able to make his mark. They may get a printed form and mark it, it comes in and is filed. The judge may never see it. The information is filed, he pleads guilty to an infamous crime. I think they should be checked up.

Mr. Holtzoff. That would be saved by a provision "in open court".

Mr. Crane. Oh, yes.

Mr. Wechsler. Why not do that? Why not have it read, "unless the person against whom the accusation is to be filed waives accusation by indictment"--period. Then the second sentence, which reads that before accepting a plea on information the court shall satisfy itself that the waiver was knowingly and voluntarily made--which will indicate that at some stage before actual action is to be taken there has been a

determination.that the man knew what he was doing.

Mr. Holtzoff. I venture to suggest that we leave this to the Reporter to redraft, rather than trying to redraft it in committee.

Mr. Wechsler. I think so, too.

Mr. Holtzoff. I think the concensus is known, by this time.

The Chairman. We only have four motions to entertain now, gentlemen, so I think I will entertain one to adjourn until 8 o'clock.

Mr. Holtzoff. I so move.

The Chairman. Hearing no objection, it is carried.

(Whereupon, at 4:45 p.m., the Committee adjourned until this evening at 8 p.m.)

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NIGHT SESSION

The proceedings were resumed at 8 o'clock p. m., at the expiration of the recess.

The Chairman. Gentlemen, I think we came down on Rule 7 to page 2, and then there seemed to be some question raised as to the fourth and fifth words on the top of the page, 18, "or complaint."

Mr. Robinson. Yes, sir.

Mr. Crane. What is that rule?

The Chairman. On page 2 of Rule 7, some question raised as to the phrase on line 18 at the top of the page, "or complaint." What is it, Mr. Reporter?

Mr. Robinson. That word "complaint" represents a possible additional form of written accusation on which I should like to have the views of the committee.

I happen to be familiar with the procedure in one state where a complaint may be filed, sworn to by a private individual, and signed by the private individual, then approved by the prosecuting attorney and filed in a court having either misdemeanor or felony jurisdiction, and carried right on through to a conviction or acquittal. In fact, sometimes a complaint is filed in a committing magistrate's court, and that same complaint signed by the private individual, approved by the prosecuting attorney, serves as the basis for the binding over of the defendant, and then after he is bound over that same complaint is used in the trial court for his trial on the felony charge. The procedure happens to be quite successful in that state. It has been on the statute books there for, I believe,

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thirty-six years, and it has some advantages that I want to mention to you.

I think perhaps I have mentioned one: that is the fact that you may start out in the lowest court with the document, the written accusation, and on that same accusation, without any additional drafting or filing, carry the case on through to completion.

Perhaps that is not as great an advantage as some that we found in using it. If you have the affidavit--that is, the complaint--sworn to by an individual who is the injured party, it has been found that that person is bound to stick to his story and, further, that the jury is likely to give more consideration to the state's case because here it is, filed not by some official prosecutor, but it is filed by a private citizen like themselves, and therefore they are likely to give it a more sympathetic hearing.

Now that is all I have to say about it. I just mention it here as a possible additional form of accusation. It has its objections, but from almost forty years of experience with it in the state of Indiana it has been considered by lawyers, officials there, as being more advantageous than the ordinary information and certainly much more advantageous than the indictment.

Mr. Dean. If you used it, though, would it supplant the indictment when you got up to the court of general jurisdiction?

Mr. Robinson. Oh, yes. Wait a minute. "Supplant"? Now, by "supplant" you mean if you have a grand jury indictment. No, no. If you have an indictment--

Mr. Dean. You would not have any necessity for an indict-

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ment or an information, as I understand, if you started in the committing magistrate's court with the complaint.

Mr. Robinson. That is right.

Mr. Dean. But would you not run right in the teeth of your constitutional provision with reference to indictment?

Mr. Robinson. That is in a federal court. In our state court we did not have it, because by our Constitution there the grand jury system is modified by permitting the filing of such a complaint in a felony court as a basis for a charge there.

Mr. Dean. How could we do it in view of the constitutional provision?

Mr. Robinson. Well, it would have to be used here as a substitute for information.

Mr. Dean. Only for an information?

Mr. Robinson. That is right.

Mr. Crane. The only thing I am thinking about is, Would that not add to confusion? Only one state, I believe, uses the word "complaint": would that not add to the confusion as to what was meant by it, when "information," which simply means something different from "indictment," really covers it?

Mr. Robinson. That is a possible objection, yes.

Mr. Holtzoff. It seems to me there is also another objection going to the principle of the thing. The federal system today envisages a prosecution on the responsibility of the official prosecutor only, whereas if you permit a private

2 individual to file a sworn complaint, even though it has to be approved by the United States attorney, and have that take the place of an information, you are putting the United States attorney in a place where he can sort of shift half the

responsibility at least for the prosecution, and you are much more likely to have prosecutions based on animosity and for personal reasons than you are when the United States attorney subject to the control of the Department of Justice has to take full responsibility for instituting the prosecution.

Now, I do not see that you gain anything by using such a complaint in lieu of an information. The suggestion that that puts the complaining witness in a position where he cannot back away from his story seems to me can be met by the thought that every United States attorney anyway gets a written statement from the complaining witness if there is one, and it is just as hard to get away from that kind of statement as it is from one that is used in lieu of an information.

Mr. Robinson. Pardon me just a second. On that point I do not quite agree that that is accurately stated in that way, because where it is filed in the court as a document of the court it becomes a much more effective document than a mere paper in the files of the United States attorney, which he cannot introduce directly anyway.

Mr. Holtzoff. Well, an affidavit that the United States attorney obtains from the complaining witness may be used to confront the complaining witness if he reneges on the witness stand; but I think the type of prosecutions we have in the federal courts is entirely different from those in state courts: you do not have so many cases arising out of personal grievances. Most of them are violations of statutes affecting the Government. I do not see that you derive any advantage from this type of prosecution, and you do have the disadvantage of relieving the United States attorney of the moral responsibility for

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instituting a prosecution. I think that is a very important one.

Mr. Youngquist. If I might make this suggestion.

Mr. Robinson. Yes, sir.

Mr. Youngquist. Of course, the United States attorney would have to approve the complaint, as provided by the next subdivision, but in line with what Judge Crane said this occurs to me: In this particular paragraph that we are dealing with we are dealing with infamous crimes only. Those cases that must be tried by the district court ought, I think, be initiated by indictment or by information. Before the committing magistrate we have a complaint as the initial pleading.

Mr. Robinson. Yes, sir.

Mr. Youngquist. And we have also, as I recall it, in the rules as well as in the statutes provision for trial of petit offenses by the United States commissioners, who are the committing magistrates also, of course. Those may be tried on complaint, if I recall it right, approved by the United States attorney.

Why, then, should we not limit to indictments and informations the proceedings in the district courts, which are the ones of the higher grade ordinarily, and also limit complaints to the committing magistrates whether for the initiation of a charge of an infamous or capital crime and also the initiation of the petit offenses that he may try? Would that not be a more appropriate classification and a more appropriate restriction of the use of the complaint?

The Chairman. I am impressed by that argument, Mr. Youngquist. Judge Crane, to attempt to introduce a new classification instead of simplifying this really complicates

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without any definite advantage that I can see to offset the trouble we might get into by it.

Mr. Holtzoff. I move, then,--

Mr. Robinson (interposing). Pardon me. I will withdraw the amendment to the motion. But we do not have the technicality, do we, now, with the information that they used to have at common law where an information had to be based on the affidavit of some individual?

Mr. Holtzoff. Oh, no.

Mr. Robinson. And the prosecuting attorney had to state, you know, that he is basing this information on affidavit.

3 Mr. Holtzoff. Oh, no. No.

Mr. Robinson. That has been one reason, one advantage of the direct affidavit statement I was carrying on.

Mr. Holtzoff. The federal rule does not require it.

Mr. Robinson. Well, I just put that out for your consideration. I shall be glad to knock that word out.

Mr. Longsdorf. You will find the words "information or complaint" in the last line of section 541.

Mr. Robinson. Yes. Section 541 U. S. C. A. Misdemeanors, petty offenses. All such petty offenses may be prosecuted on information or complaint.

Mr. Holtzoff. Well, that refers to--

Mr. Youngquist. Petty offenses.

Mr. Longsdorf. Yes, only.

Mr. Holtzoff. There are three places where the word "complaint" occurs.

Mr. Robinson. In other words, Mr. Longsdorf, your point is that the term "complaint" already is used?

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Mr. Longsdorf. Yes, it is used, whatever it may mean.

Mr. Robinson. I think the point was worth bringing to your attention. I should like, then, just to withdraw it, but with the idea that is in our minds, and in case we do see some use for the idea later, we can.

The Chairman. Now, that goes out in lines 18, 19, and 22.

Mr. Longsdorf. "Complaint"?

The Chairman. Yes.

Mr. Glueck. Lines 18, 19, and 22.

Mr. Robinson. And 23, it is.

The Chairman. Well, I am just sticking to the one section.

Mr. Robinson. Yes, sir.

The Chairman. Then, is there any need at all for that last sentence of this subsection, beginning on line 21?

Mr. Youngquist. Yes.

Mr. Longsdorf. Yes.

Mr. Youngquist. One relates only to capital offenses.

The Chairman. That is the first sentence on lines 9 and 10.

Mr. Youngquist. Infamous offenses.

The Chairman. Which may be by indictment or information, and then that is exactly the situation which is applicable to non-infamous offenses.

Mr. Youngquist. But you might want to deal with a non-infamous offense in the district court, and there you do it either by indictment or by information.

Mr. Holtzoff. Yes. I think that is surplusage because you have three classes: You have the capital offense,--

The Chairman. Which must be by indictment.

Mr. Holtzoff. --the infamous offense, and noncapital, which

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must be by indictment unless there is a waiver, and noninfamous, which may be either by indictment or information.

The Chairman. Without waiver.

Mr. Waite. Mr. Chairman, may I interject at this point a question of definition on which I confess I am frightfully confused: the matter of infamous crime. I have spent a great many years trying to find out what it means, and I have not a definition yet, or rather I have too many definitions, and it is used here apparently in a significance with which I am not familiar. From the fact that lines 21 and 22 provide that where it is not an infamous crime an indictment is not necessary, it apparently is meant to indicate by "infamous crime" the kind of crime which is not covered by the jury trial provisions of the Constitution. Well, that is the most important or one of the most important provisions of the Constitution. Well now, it seems that is a most unusual definition of "infamous crime," and I think we should have it defined one way or the other.

Mr. Holtzoff. The term "infamous crime" as used in the constitutional provision has been defined by the Supreme Court for the purposes of the constitutional provision as meaning any crime which may be punished by imprisonment in the penitentiary or at hard labor, and that has really become a word of art so far as federal criminal law is concerned, I believe.

Mr. Glueck. It has been more than that.

Mr. Dession. One no longer knows what hard labor is.

Mr. Holtzoff. There is no more hard labor, but the line is drawn as between a crime that may be punished by imprisonment in the penitentiary and a crime that may not be punished by imprisonment in the penitentiary.

Mr. Crane. For a year. A year in the penitentiary or not more than a year in the penitentiary.

Mr. Seth. Over a year.

Mr. Holtzoff. Not more than a year.

Mr. Crane. A year or less. If it is more than a year--

Mr. Holtzoff. It is a penitentiary offense.

Mr. Robinson. A felony.

Mr. Crane. It is a felony, then, so far as this goes, the indictment. We adopted it in the state of New York.

Mr. Holtzoff. Yes. Now, the Constitution uses the words "infamous crime" in connection with the grand jury provision, and the Supreme Court has defined "infamous" as meaning a crime punishable by imprisonment in the penitentiary.

Mr. Waite. Now you are not suggesting that under the Constitution a crime which is not punishable by imprisonment in the penitentiary does not need indictment?

Mr. Longsdorf. That is right.

Mr. Holtzoff. That is right, because it is not an infamous crime.

Mr. Seth. That is the federal rule.

Mr. Glueck. I thought the test was whether or not hard labor was attached, in the Moreland case.

Mr. Holtzoff. No. They dropped the phrase "hard labor" in a recent statute, and the Supreme Court has held that any imprisonment in the penitentiary is included.

Mr. Crane. Just as a matter of interest, we had a difficult problem because we adopted the same rule--it has always been such--that any crime laid by the legislature punishable by imprisonment in the penitentiary limited to a year be tried at

a special session; that is, without indictment, and that was the rule. Then came along these welfare statutes, the reform statutes, which tried to discipline by control, and they said that they could send these special sessions prisoners to the penitentiary for an indeterminate sentence, which might last three years; and the question then happened: What about this? If they went to the penitentiary for more than a year they could go for three years under this reform. That is, they have tried to be reformed, not imprisoned. Another one of those things that kind of stick in your crop: you hate to do it. But we did it. We said that it was perfectly legal to prosecute by information ~~or~~ at special session because like nolo contendere they were reform measures. So he was just tried, not imprisoned: he was not in jail; he was being schooled. So this question is coming up all the time in some form or other, but we have to take them as we get them.

Mr. Youngquist. Well, we have now a definite definition of "infamous crime."

The Chairman. I should like to explain, Mr. Waite, that this morning we tentatively agreed, following the wise formulators of the civil rules, that we would not define any.

Mr. Waite. I am afraid I do not quite understand that.

The Chairman. We tentatively agreed on it, I said.

Mr. Waite. We surely are not going to use words of uncertain definition. Now, I ask for my own information: Is it agreed that the federal courts have defined "infamous crime" in such a way that under the provision requiring indictment for capital offenses and infamous crimes an indictment is not required if the offense is not punishable by at least a year in

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the penitentiary?

Mr. Holtzoff. An indictment is not required if the offense is not punishable by a penitentiary sentence at all. Now, under the statutes, however, only sentences for over a year may be served in a penitentiary. The statute does not permit a person to be sentenced to a penitentiary unless the term of imprisonment is at least a year.

Mr. Dession. There have been some statutes since, though, that authorize the Attorney General to put any federal prisoner in any institution he chooses and put him at road work and levee work. I do not believe that makes any difference.

Mr. Holtzoff. None whatever under that statute.

Mr. Dession. I know you do not, but the court has not construed it yet. I do not think there is any doubt about it, but I think you have the choice between using the term "infamous crime," leaving it to construction as time goes on, or using the word "felony," which is probably synonymous so far as one can make out.

Mr. Wechsler. There is still another drafting possibility that seems to be before you, and that is to refer to this one

5 case in which the Constitution does not require an indictment, and let the actual content of that formula be determined from case to case as the problem arises. I take it that is our purpose in using the phrase "infamous crimes," and we are not wedded to any particular definition of that phrase. If the court is to change that definition at this next term, we would want to get the benefit of that change.

Mr. Holtzoff. Is not that the purpose in using the word "infamous," because the word "infamous" is the term used in the

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Constitution? And if the Supreme Court should change the definition of the term "infamous," the rule is adjusted following that.

Mr. Seth. We cannot define it in any binding way, in any event. That is a subject of law.

The Chairman. Now are there any further questions on this section?

(There was no response.)

The Chairman. If not, we shall go on to subsection 2.

Mr. Robinson. "and Complaint" comes out of line 23, so we would have:

"(2) Information; Signature and Approval. When the written accusation is an information it shall be signed by the United States Attorney."

Strike out the next sentence. That is subject to what we may do in our special section on the provisional or supplementary proceedings; when we come to what may be done before the United States commissioner we may want to extend complaints there.

Mr. Glueck. Strike out the next two sentences.

Mr. Seth. Save all the rest.

Mr. Longsdorf. Before we pass that may I put in a suggestion: Your method of procedure on private complaint, it seems to me, although it begins at a little earlier stage, is very much like the present English one.

Mr. Robinson. The present what?

Mr. Longsdorf. Very much like the present English method by which private complaint is lodged, and a court officer examines to see if it is conformable to law. If he so finds he

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signs it, and then it is an indictment in the terms of the English statute. That is the statute of England of 1933, which abolished the grand jury entirely, but they still have indictments.

Mr. Holtzoff. I think we ought to bear in mind the way the prosecuting machinery of the federal courts operates; it is somewhat different from the states'. Suppose a private person comes in to a United States attorney and makes a complaint of a mail fraud. No United States attorney would be allowed under the practice to base a prosecution on that. He would be required, or he would turn that over to the federal investigating agency to make an independent investigation. In the case of a mail fraud violation it would be the post office inspector; in another case it would be the F. B. I. And after he gets a report of the investigation, then on the basis of that report he starts his prosecution. So that the complainant plays a very small part in the prosecution in the federal courts.

Mr. Crane. I doubt if there are very many private complainants in federal court matters.

Mr. Holtzoff. I think that is one reason, of several, why we get such a large percentage of convictions in federal courts.

The Chairman. All right. Are there any questions on (b)(1)?

Mr. Robinson. In line 33, in view of our previous section, there should be added "shall be made orally or in writing."

"An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made"--well, I suppose the "unless" clause should be left out.

Mr. Seth. Did we agree to have motions orally and during

the trial? I thought it was only pleas we agreed to have oral.

Mr. Robinson. Prior to trial?

Mr. Seth. Yes.

Mr. Longsdorf. We have another rule over here which provides that notice of the motion shall serve as a written motion as well as the notice thereof, have we not?

Mr. Youngquist. 7 (1), I think.

The Chairman. Going back to your question, Mr. Robinson, that "oral," that should not need to be there in view of the proviso in line 32, should it?

Mr. Robinson. "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made"--perhaps not. I suppose that is not required by the previous section.

Mr. Medalie. Well, I have in mind that many--not many but occasional motions are made orally.

The Chairman. At the trial?

Mr. Medalie. No. Even on a calendar call, without provision for pretrial practice or anything else, the district attorney rises on calendar call and says, "I move to sever this case as to Jones and Brown."

"Motion granted."

Mr. Robinson. Would there be any advantage in having that motion in writing?

Mr. Medalie. None.

Mr. Holtzoff. No. That would be extra work for the United States attorney.

Mr. Medalie. On the other hand, when that is done another defendant gets up and says, "I move that be severed as to me."

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The court says, "Denied."

But the motion is made, and on occasion the district attorney may consent. It has occurred. The district attorney says to counsel, "All right. Now, your client is a nice fellow; he has given us lots of valuable information; and when the case is called tomorrow you move to sever and I won't oppose or I will consent."

No reason; why should they not?

Mr. Youngquist. Could that be taken care of, Mr. Medalie, by making it "unless made in open court"?

Mr. Medalie. Yes, certainly.

Mr. Youngquist. That includes your open court.

Mr. Medalie. Well, of course ex parte will not do. I think we are getting too rigid when we are trying to say a motion may be made only in writing.

Mr. Robinson. Here again, Mr. Medalie, are we not getting ready and have we not been proposing to take care of affirmative defenses later?

Mr. Seth. We have to take care of those.

Mr. Medalie. That is something else. But take severances, consolidations. Motions for consolidations are frequently made very informally, certainly by the district attorney. I cannot recall a single consolidation motion that I made that was granted that was ever done in writing, and on the calendar call--isn't that how it is done all over the country?

Mr. Holtzoff. Yes. Oh, yes. I think that criminal practice is much more informal than civil procedure, and I do not think we want to make it any more formal or any more difficult. I think our aim should be to simplify it rather than to compli-

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cate it.

Mr. Medalie. What is the harm in granting motions without papers?

Mr. Holtzoff. None at all.

Mr. Medalie. I mean, let us take something else. The defendant gets up and says through his counsel, "We need some particulars."

Some judge who likes to cut corners says, "What particulars do you want? Do not waste time making your motion. Tell me what it is, and I will tell the district attorney to give it to you if you are entitled to it." Occasionally that happens.

Why papers? We want to encourage judges and counsel to do things speedily and informally, and that too fits in with your civil practice, with the vogue that is beginning to develop to do many things quite informally and without papers.

Mr. Youngquist. Would it be enough if we said "unless made in open court"? That includes a hearing or a trial, and it would also include the opening of the term that you speak of.

7 Mr. Seth. Why not limit it, "Except those specified in section 8 may be made orally"?

Mr. Holtzoff. I think even those motions could be made orally occasionally.

Mr. Medalie. Yes.

Mr. Holtzoff. A motion to dismiss an indictment for insufficiency might well be made orally.

Mr. Medalie. Yes. A judge can pick up an indictment and say, "That does not look good to me."

Mr. Robinson. In a great many states your motion to quash, of course, has to be in writing, has to follow the language of

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the statute: that is, state some statutory ground. I cannot quite imagine a motion of that sort being made merely orally.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. In a great many states under the statutes, Mr. Holtzoff?

Mr. Holtzoff. That is why the federal criminal procedure is so much more effective, because it has gotten away from the state technicalities.

Mr. Medalie. I do not think we ought to inject into the new procedure we are trying to establish any additional formality.

Mr. Robinson. I do not either.

The Chairman. May I suggest that we leave this proviso in 32 with a note to the Reporter to keep it in mind and give us the appropriate language after we have disposed of Rule 8. It seems to be tied up with that.

Are there any other questions on (b) (1)?

(There was no response.)

The Chairman. If not, we shall go on to (b) (2).

Mr. Robinson. That is self-explanatory, I believe: (reading)

> "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

Mr. Holtzoff. I wonder if we need in these rules any provision as to the captions of documents, and so forth. You do not need all that formality with papers in a criminal case. You do not have it now.

The Chairman. Taken from the civil rules.

Mr. Holtzoff. Oh, it is taken from the civil rules, but I feel as Mr. Medalie does, that we do not want to inject technicalities and formalities that do not now exist.

Mr. Robinson. Do not let us use epithets like "technicalities and formalities."

Mr. Holtzoff. Well, I think we should try to simplify it rather than to complicate it.

Mr. Robinson. It is a question whether they are or not.

Mr. Holtzoff. I think we should try to simplify rather than to complicate it.

Mr. Medalie. You know, today federal criminal practice, except perhaps in a few districts, is virtually no practice. In other words, all that people believe about criminal law is just a lot of nonsense; it just is not so. The practice of criminal law, so far as practice and procedure go, is virtually nonexistent except that here and there someone looks up some ancient procedure.

I remember a dozen years ago I raised a question of double jeopardy of a defendant. I formally filed a plea. My very competent predecessor in office did not know what to do next, and I advised him that the old common law procedure required the filing of a replication or a demurrer. Well, if I had not injected that unnecessary learning--which, by the way, was not my own, but one of my young men happened to have looked it up--we would have brought that on just on the paper that I filed, and the judge would have said, "Well, let us have a hearing," and nobody would have minded, and everything would have run very smoothly, and the decision would have been rendered on that.

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Now, we can get more formality into these things than we need. If the established practice is to be exceedingly informal and simply to have things before judges as nearly as possible, I think in our procedure we ought to have it, so long as the judge is there to pass on it.

Mr. Robinson. May I ask this question on that: In the civil rules and I take it in these rules also we are trying to avoid as much as possible unnecessary hearings and trials and trying to keep dockets as clear as possible. Is it not reasonable to think that we might accomplish that by pleadings, by written papers? For instance, you speak of filing a motion or a defense of double jeopardy. Why would a hearing be necessary if you would file a paper setting out the judgment and giving citation to the docket where it is entered; I suppose that you were defending, of course, on that, and then the state would come along; and, since your pleading or your motion would adequately show that you did have a good defense on that score, why could not the state concede your position and avoid the necessity of a hearing?

8 Mr. Medalie. They disagreed with my conclusion. They admitted that that was the proceeding but said that it did not constitute double jeopardy, and that was something for the court to pass on.

Mr. Robinson. Well, a hearing would be necessary, but now in another case it might be possible that the matter could go off on the pleadings, could it not, or on the papers?

Mr. Medalie. Yes, but in view of the fact that the Government had indicted in that second case, it is pretty clear that they thought that the prior proceedings did not constitute

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jeopardy, so all the court required was that it be told what the proceeding was and have the papers before it in the prior proceeding and read the indictment in the instant case.

Mr. Youngquist. I was going to say, I note that this particular provision merely says "rules applicable to captions, signing, and other matters of form," and rules shall apply to all motions and other papers. It cannot well apply to oral motions of the kind we are talking about. If we insert the word "written" before "motions," I cannot see any objection to having provisions relating to captions, signatures, and other forms applicable to motions.

Mr. Holtzoff. I should like to see all provisions as to captions and so forth stricken out. I think they are unnecessary, and if they are stricken out this likewise would fall.

Mr. Medalie. What of the prior--

Mr. Youngquist. They are uniform, are they not?

Mr. Medalie. What are the prior provisions on this about captions, signatures , and so forth? There aren't any, and they do not cover the whole thing.

The Chairman. Is there any objection to entitling the case and the name of the paper and the name of the court and the name of the moving party and the name of the defendant? I mean we do not want to get like the lawyer from Texas, a lawyer who said, "Don't call me Mister. Just call me Jones." That was written at the top above his letterhead. We do have to have a little form, such as the name of the court and the names of the parties.

Mr. Medalie. Well, where is your prior proceeding as to caption, your prior provision as to caption?

Mr. Robinson. Of course there isn't any specification in

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the federal law now.

Mr. Holtzoff. We have not come to that yet.

Mr. Robinson. Some of the rules.

Mr. Holtzoff. We have not come to the rule relating to captions.

The Chairman. Is not this subsection (2) quite harmless?

Mr. Holtzoff. Oh, yes, it is harmless.

Mr. Youngquist. I think so.

The Chairman. I do not think this is going to interfere with the old tradition of oral pleading.

Mr. Youngquist. Certainly not, if you put "written" before "motion."

Mr. Robinson. I think that is a good suggestion.

The Chairman. Are there any further suggestions with respect to this section: subsection (2)?

Mr. Longsdorf. With respect to (c) I have a suggestion that the word "formal" be inserted before "demurrers" and following the catch line, because I think we do not mean to imply that the substance of demurrers, pleas in abatement, to the jurisdiction, and so on, is abolished, but only the formal.

Mr. Holtzoff. Well, that relates to the civil rules, and the motion to dismiss is used under the civil rules in lieu of a demurrer.

Mr. Longsdorf. And it is a demurrer under another name.

Mr. Holtzoff. Yes, but this rule is used in the civil rule, and it is understood that only the form is abolished.

Mr. Youngquist. After all, your demurrer is based upon defect. In one instance you set out a defect in your demurrer, and in the instance of an indictment you set it out by motion.

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Mr. Longsdorf. Well, which are we abolishing, the form or substance?

9 Mr. Robinson. The form.

Mr. Youngquist. The name, after all, is only the form, and if we would say "motion" in place of "demurrer," we would accomplish the same purpose.

Mr. Medalie. Well, what is really back of the whole business is that we want the public to think that there is nothing in the way of mystery about the practice of criminal law.

Mr. Youngquist. Yes, that may be an advantage.

Mr. Robinson. It may be part of it, but in addition to that Strine and Peterson have been doing quite a bit of research work on this, and they have found a certain amount of diversity in the federal courts of the country in the way of bringing up defects that the defendant wishes to allege. In one district you may have a demurrer used, in another a plea in abatement, and a great deal of time may be consumed in the court in deciding whether or not it should have been the other thing when it is really filed as that one.

Mr. Holtzoff. Is not a great deal of time taken up learning to know when you should use a motion to quash and when you should demur and when you should use a plea in abatement? Now, if you abolish all three and substitute a motion to dismiss, I think you simplify matters.

Mr. Dean. Should you not in the same way delay matters earlier?

Mr. Medalie. Fancy words. I think the public does not like something mysterious.

Mr. Robinson. I do too.

023

Mr. Holtzoff. I think you ought to insert "motions to quash."

Mr. Robinson. Yes. In line 41 after "pleas to jurisdiction" insert "motions to quash"?

Mr. Holtzoff. "Motions to quash." I do think you ought to leave out--

Mr. Robinson. "Motions"?

Mr. Holtzoff. You ought to leave out in line 42 "exceptions for insufficiency of a pleading." That is a term taken from old-time equity pleading; it does not exist in criminal law.

Mr. Robinson. Yes, but it is designed to take care of something that may be taken care of later on, namely, abolition of exceptions to rulings holding that a--

Mr. Holtzoff (interposing). That is covered by another rule.

Mr. Robinson. I think it is. I have no objection to that going out: "exceptions for insufficiency of a pleading." Every word you can save us safely, of course, ought to be saved.

Mr. Crane. Well, you see, motions to quash are still in order, are they not?

Mr. Robinson. Yes, sir.

Mr. Crane. Do you not think you are going to include them here?

Mr. Holtzoff. Well, you include them here and substitute a blanket omnibus motion to dismiss. Later on you will find that in the draft.

Mr. Robinson. By "still in order" I thought you meant there present practice.

Mr. Dean. They could still be used under this paragraph.

The Chairman. What is that?

Mr. Dean. Motions to strike as well as other motions to quash, I mean.

Mr. Medalie. There are no motions to strike in criminal cases.

Mr. Dean. Oh, yes.

Mr. Medalie. Are there?

Mr. Dean. Surely.

Mr. Medalie. What, for instance?

Mr. Dean. You may move to strike testimony; you may move to strike an allegation from the information.

Mr. Medalie. I was talking about the indictment.

Mr. Dean. I am thinking of the information.

Mr. Medalie. I am talking about the indictment.

Mr. Dean. I am thinking of the information. There is no reason why you may not move to strike an allegation of an information or a part thereof, but that would be to the indictment, of course, because you would be amending the grand jury's work as to that.

Mr. Youngquist. But you can when you move to strike, I mean.

Mr. Dean. Prejudicial language: for example, where someone has set forth facts obviously not germane to anything in the case, and you know the document is going to be read to the jury, and you want it out.

Mr. Youngquist. That would not be included in this exception for insufficiency of pleading?

Mr. Holtzoff. No.

025

Mr. Youngquist. That comes under a different category?

Mr. Holtzoff. That would come under a different category.

Mr. Dean. Well, it is a defect in the pleading.

Mr. Waite. There is something here I do not see at all. (b) (1) says an application to the court for an order shall be by motion. Would that not automatically exclude demurrers and pleas in abatement?

Mr. Robinson. Not for some lawyers. It would not be interpreted that way, would it, to rely on that?

10 Mr. Waite. I should suppose it would be mandatory, exclusive.

The Chairman. I think logically you are sound, but I wonder whether by reason of the existence of the similar provision in the civil rules under 7 (c) we would not be met by some people coming along and making the argument that all trials on the subject must be--

Mr. Longsdorf. Lost.

Mr. Waite. What worries me is that if we lose (c) and leave out some particular motion, I had not thought of a motion to strike until Mr. Dean referred to it; by expressing some in (c) will we not be strengthening the idea that those which are not expressed in (c) may be used despite the first part of (b) (1)?

Mr. Robinson. I think Mr. Dean's suggestion, that is, the motion to strike, is the only one which is not included.

Mr. Seth. (a) (2) covers it pretty thoroughly.

Mr. Medalie. I wonder whether this would cover: "Proceedings directed to the sufficiency or validity of an indictment or information shall be only by motion."

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Mr. Longsdorf. Where is that?

Mr. Medalie. In "Proposed."

Mr. Dean. New proposed.

Mr. Medalie. In lieu of (c).

Mr. Seth. What is the matter with just what is here as to motions that are made and you wipe them out?

Mr. Holtzoff. I think you ought to make it clear that you are abolishing demurrers and pleas in abatement and motions to quash.

Mr. Crane. Those are words of art that have been used right up to the present time, and you just simply say you are not going to use them any more; we are going to take "motion to dismiss." You have done that in New York. I was a member of the Judicial Council of New York for a great many years, and we did away with that practice, and the state writ, we just abolished the name, but you make a motion now as to all these different state writs, and it is a good thing, too.

Mr. Orfield. Would a motion in arrest of judgment do it?

Mr. Holtzoff. No; I think you should keep a motion in arrest of judgment because that goes to the defendant's substantial rights. It might be undesirable to abolish that.

Mr. Seth. It does not come under our jurisdiction anyhow.

Mr. Youngquist. We are not abolishing motions by this anyway.

Mr. Holtzoff. No.

Mr. Youngquist. We are abolishing demurrers and pleas and exceptions.

The Chairman. Now will you read the (c) as it presently stands?

027

Mr. Robinson (reading). Line 40.

"(c) Demurrers and Certain Pleas Abolished. Demurrers, pleas in abatement, pleas to the jurisdiction, motions to quash, and special pleas in bar shall not be used."

The Chairman. What about this motion to strike that Mr. Dean referred to?

Mr. Robinson. Well, we certainly would not want to supplant that by motion to dismiss.

Mr. Longsdorf. I do not think so.

Mr. Holtzoff. I do not think you ought to include that.

Mr. Medalie. I do not think you need to abolish motions to quash because every motion directed to an indictment for the purpose of getting rid of it is a motion to quash.

Mr. Crane. Use the term--

Mr. Youngquist. "Motion to dismiss."

Mr. Holtzoff. "Motion to dismiss," in order to abolish a technical motion to quash as distinguished from demurrers and pleas in abatement.

Mr. Crane. The same motion with a different name; that is all.

Mr. Medalie. No.

Mr. Holtzoff. Of course, "motion to quash" today is a word of art that can be used only for certain purposes; it has a lot of barnacles attached to it.

Mr. Youngquist. All we are doing is repeating names.

Mr. Holtzoff. That is right.

Mr. Youngquist. In (c).

The Chairman. All right. If there is nothing further

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suppose we pass on to Rule 8.

Mr. Waite. Mr. Chairman, before we do that may I ask the Reporter if there is anywhere else a provision that the court may decline to accept a plea of guilty, as there is in most states now?

Mr. Robinson. No, there is none.

Mr. Waite. If not, I should like to suggest that we consider that matter in bringing in the new draft. I think myself we ought to give the court power to refuse a plea of guilty if he thinks wise.

Mr. Robinson. I did not get that last sentence.

Mr. Waite. To give the court power to refuse to accept a plea of guilty if he thinks proper.

Mr. Robinson. You say he should have the power?

Mr. Waite. It is a conventional practice.

Mr. Robinson. What did you say, Judge?

Mr. Crane. I should think the court had the inherent power, Mr. Waite.

Mr. Waite. I assume it does.

Mr. Crane. I do not think you ought to put that in. That really has been done right along.

Mr. Waite. But after all, we are putting in here a great many things which the court has inherent power concerning.

Mr. Crane. Certainly.

Mr. Waite. And it is a common practice, and we find it in a great many codes.

Mr. Crane. I think you will find that the court will do a lot of things that are not in this rule. There are certain inherent powers of a judge that he has to exercise anyway.

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Mr. Robinson. You remember the Capone case in Chicago, Mr. Waite, where I think it was Judge Wilkerson, was it not, who refused to allow Capone's plea of guilty to stand?

Mr. Waite. Oh, it is a very common practice. I am just suggesting that because it is a common practice we ought to express it here.

Mr. Youngquist. I had a lot to do with that. It was entered, and then he was permitted to withdraw his plea.

Mr. Robinson. Yes, but that amounted to the same thing, did it not?

Mr. Youngquist. Would not accept it.

Mr. Robinson. The Judge told him,"We refuse to permit your plea of guilty to stand"; was that not the substance of it?

Mr. Youngquist. Oh, no; it was quite different. He entered a plea of guilty and thereafter changed his mind--with just cause, I thought; and he moved for permission to withdraw his plea, and the United States Attorney agreed that he should be permitted to withdraw his plea, and Judge Wilkerson allowed it. That is what happened there. I have good reason to remember that.

Mr. Holtzoff. Of course the court has inherent power to refuse to accept a plea of guilty.

Mr. Crane. Surely.

Mr. Holtzoff. If the court feels that the defendant is, say, a moron or mentally deranged, and that is not infrequently done. I do not think you have to cover it by rule. That is inherent.

Mr. Crane. Certainly.

Mr. Wechsler. But the point is that there are definite duties that fall upon the court at the time when a plea of guilty

is offered. They are defined by the Supreme Court in the Kercheval case in 274 U. S., and I think that they ought to be protected. They ought to be articulated here, because there are some courts, as I know from sad experience, that have failed to abide by that duty, with serious consequences thereafter. I do not see what the criterion for inclusion and exclusion is if things that are so important that they are inherent are to be omitted. By the same token you might say that there is no need to state that prosecutions shall be taken by indictment because the Constitution says so.

Mr. Crane. A great deal that a judge does at a trial may never be put in any rule. I know that a plea of guilty was put in for a man once, and they came to find out upon questioning him that he could not understand even the interpreter who attempted to interpret for him,from which he entered a plea of guilty. Of course the plea was withdrawn. That is, the court struck it out and entered a plea of not guilty. Those things arise from incidents that you cannot cover by any rule. And even some of these rules here may not work in a certain given case, but a judge must have some discretion to do the sensible thing, and I should not think any judge would feel that he is bound hand and foot, because these rules are for the general application, not for circumstances which we cannot foresee; and if you are going to try to make a judge move every step by a written letter or by letter, of course you lose all initiative: he is not a judge.

Mr. Robinson. Of course, but as to the plea of nolo contendere, Judge, I believe we at least tentatively have decided that if it is to be permitted to live it shall be filed

only by permission of the court. Now here, too, maybe Mr. Waite's suggestion could be carried along with it, that a plea of nolo contendere or of guilty may be filed only by permission or by leave of the court.

Mr. Crane. These are general rules anyway, general rules of practice.

The Chairman. Why do we not leave that point that Mr. Waite raises open and see if it fits in with some other proposition?

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Mr. Youngquist. May I ask one question with respect to this (c) that we are on? We speak of pleas in abatement. They are abolished. I do not know whether there is a difference between a plea in abatement and a plea in bar.

Mr. Holtzoff. There is.

Mr. Youngquist. I suppose that a plea of double jeopardy or of former jeopardy would be a plea in bar rather than a plea in abatement.

Mr. Holtzoff. Yes.

The Chairman. Yes.

Mr. Youngquist. So might we not here say, "pleas in abatement and in bar," or "pleas in bar"? What I am afraid of is that, since we specify these particularly, we might overlook, we might still leave alive, a plea of former jeopardy rather than a motion to dismiss.

Mr. Holtzoff. Well, we have to enumerate pleas in bar.

Mr. Youngquist. Where? Oh, I see. "Special pleas in bar."

The Chairman. Yes, sir.

Mr. Robinson. But you have double jeopardy, you see.

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Mr. Holtzoff. The word "special" perhaps is not necessary.

Mr. Youngquist. I overlooked that. Then there is a question, as Mr. Holtzoff says: Why "special"? Is not "pleas in bar" a wider term? Is not that what we want?

Mr. Robinson. You would rather strike off "special"?

Mr. Holtzoff. I think that is right. There would be confusion, because it seems to me indicated there that there are some pleas in bar that are not abolished.

Mr. Robinson. What about a plea of not guilty?

Mr. Holtzoff. That is not a plea in bar.

Mr. Robinson. No?

Mr. Longsdorf. I think you will find that the books generally--and I suppose the lawyers have read them at times--have pretty studiously classified as special pleas in bar the plea of former acquittal or conviction or former jeopardy because they do not touch or raise the general issue.

Mr. Robinson. Pardons.

Mr. Longsdorf. That is a plea in bar. A plea of pardon is a special plea in bar. Now, do we want to keep that term because it is understood, or dispense with it because it is not understood?

Mr. Holtzoff. Such a matter as a pardon would be raised by motion, according to one of the later rules that we come to.

Mr. Longsdorf. If you did not have record evidence you would have to try it as an issue of fact, and even if you did have evidence the issue of fact would be decided by the production of a document.

Mr. Youngquist. A plea of former jeopardy would have to be tried, too; that would fall in the same class as a plea of pardon.

Mr. Crane. They are all coming up as motions.

Mr. Longsdorf. Yes. You have some motions that go off on issues of fact and some on issues of law.

Mr. Youngquist. They are all included in the motions that are provided for in Rule 8.

Mr. Longsdorf. Only, one kind of motion shoots one way and the other shoots another.

The Chairman. Now, I am not certain as to what is the wish of the committee. Does the word "special" stay in line 49 of Rule 7 or does it go out?

Mr. Robinson. I should like to leave it in until we are a little more certain about it. I think it does have definite meaning, as Mr. Longsdorf says, and as set forth in Blackstone.

Mr. Glueck. Should you mention general pleas in bar? Is it not better to leave out any qualification?

Mr. Robinson. I am not sure what would be included in "general pleas in bar".

Mr. Holtzoff. Anything but a plea of not guilty, I suppose.

Mr. Seth. I think the reporter had better look it up and report later.

Mr. Longsdorf. I agree.

Mr. Robinson. Further.

Mr. Crane. You ought to have a wastebasket.

Mr. Robinson. All right.

The Chairman. Rule 8.

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RULE 8

Mr. Robinson. You will notice in passing to Rule 8 that the pages indicating the recommendations from the bar are quite heavy under 8, just as they have been under 7. We have taken care of them under 7 where they dealt especially with the matter of waiver of indictment. Now, under 8, we have lots of recommendations of the short form of indictment. I think

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those are the three principal topics, numerically at least, that we have had recommendations on: that there be a short form of indictment adopted and that the defendant be permitted to waive indictment in specified cases, and another point we shall come to later. So the effort has been made to decide what the answer is to "short." Just what is your short form of indictment?

Mr. Crane. The specifications. There are ten specifications; if any one of them is not in the indictment it is fatal. What is the matter with just stating, just a statement of facts constituting the crime?

Mr. Robinson. Yes. Well, then the question would be, What are the facts constituting the crime?

Mr. Crane. I know. This is no criticism.

Mr. Robinson. I understand.

Mr. Crane. Of course not, because it may be all right. I am only speaking of possible objections. You get so much written law, you arealways giving an opportunity for a come-back. You have, of course, ten things. The ten things have got to be there, any one of which being out is fatal. You can say "a brief statement of facts constituting the crime"; it covers all these and yet leaves some liberality. But this is stiff. I think

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this is a little bit too stiff.

Mr. Robinson. Oh, I think what you say ought to be followed now, and if there is any one of these ten that can be spared it ought to be done.

Mr. Holtzoff. I thinkyou ought to strike No. 7.

Mr. Robinson. Well, now, just a minute, Mr. Holtzoff.

Mr. Crane. You could specify the crime and the facts constituting it, and what is the matter with that statement itself? Specify the crime and the facts constituting it.

Mr. Medalie. Judge Crane, you have in mind, and I do not remember the language, the latest provision of the New York Code of Criminal Procedure with respect to the simplified indictment.

Mr. Crane. A simplified indictment I think says you should simply specify the crime: you need not state the facts, because there they say you can get the facts by a bill of particulars. Now, this is what New York has done, and I do not like it, but we had it before that specifying the crime. Of course, the trouble is that that does deal with a specified crime against individuals. Now, so much of the federal practice has to do with conspiracy and things of that kind, but we do have it specifying the crime: arson, murder, assault, whatever it is, and the facts constituting the crime: that in the night so-and-so John Jones entered the house so-and-so, such a place, with an intent to steal, committed burglary or larceny or both, whichever it was.

Now, that specifies the crime and specifies the facts constituting the crime, and you cannot imagine anything that is specified in the congressional act or the legislative act that

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constitutes a crime as to which you could not specify the facts bringing it within it without putting it in a mold that you cannot always fill, perhaps. And that leaves the attorney general or the district attorney to state the thing that really occurred, and you have got it. It is simple and yet it has got the whole thing.

Mr. Glueck. Judge, does your suggestion cover the problem of the court's jurisdiction?

Mr. Crane. Oh, yes. Of course you have to have that. That would be the place where it occurred and the time and within the court's jurisdiction.

Mr. Robinson. I have set out the American Institute proposal for forms of indictments under Rule 8, page 14, the left. You notice there that they do not state the time or the place.

Mr. Crane. No, but you have to have your statement of facts constituting the crime to get that.

Mr. Robinson. That is an alternative.

Mr. Crane. I cannot imagine stating the fact. You would not state it. I should think, as requiring things, it is in the very nature of things to be stated, and they have gone so far in adopting the New York rule somewhere else--it did not originate in New York; it is an idea I think from Pennsylvania--that they just state the crime, that so-and-so committed murder in the first degree, and then require a bill of particulars. And that is not right; I do not like that at all.

14 Mr. Holtzoff. Judge, my recollection is that many years ago the district attorney in Kings County on his own motion started to use a short form of indictment.

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Mr. Crane. Yes.

Mr. Medalie. The simplified form of indictment.

Mr. Holtzoff. Yes, where he would allege that the defendant murdered John Smith by a fatal gunshot wound.

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Mr. Crane. Yes, sir, it was a man named Cropsey.

Mr. Holtzoff. Yes, Judge Cropsey when he was district attorney, and it worked very well indeed. That is the same idea.

Mr. Crane. I myself think that we should have a statement of the facts, but I do not like to say how the facts should be stated. There are so many different facts, but when you state these facts you know that when they are true that a crime has been committed.

Mr. Holtzoff. You mean you would admit item 6, 7, 8, 9, and 10 and substitute the facts constituting the crime?

Mr. Crane. Yes.

Mr. Robinson. May that form that is at the indictment on page 23 to the left compare with that specimen from Massachusetts on page 25? You have set out in this indictment United States against Ball, and we have also some photostatic copies of the present-day indictment. This happened to be for murder. That is rather unfortunate because murder is not a very good offense on which to compare an indictment. It is very unusual in federal jurisdictions.

Mr. Holtzoff. There still you would have the old form of "did languish, and languishing did die."

Mr. Medalie. They do not need that.

Mr. Robinson. Well, some are afraid not to put it in.

Mr. Medalie. Some are and some are not. Cropsey did but Charles Perkins in New York County still used the very ancient form, the common-law form. You may permit a simple indictment under your rules, and there will still be people in the Department of Justice who will want to mystify the defendant attorneys.

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I would let the scared-to-death practitioner draw up his elaborate indictment, but I would give the good progressive practitioner who wanted to draw a simple one some simple rules.

Mr. Holtzoff. The civil rules have forms which operated very well, and I think that when the time comes we could have an appendix to compare some specimen forms with. If you do that that will encourage these United States Attorneys who may have a little hesitancy.

Mr. Medalie. You can get some simple forms of indictment for the Department of Justice to exercise its persuasion in convincing some United States Attorneys, especially district attorneys where they do not do that kind of thing.

The Chairman. In my district there is one man who is making long indictments, but he has convinced other lawyers that he is the only man who can do it. If you put simple forms in, it would just about wreck that man's life work.

Mr. Medalie. He draws a ten-page indictment which might take one sentence?

The Chairman. Judge Crane, would you look at this indictment on page 25 to the left. Doesn't that practically have just what you want? It states specifically the facts with perhaps just a little nonsense under point 4, which could be omitted.

Mr. Crane. I suppose it does. Aren't they all included? Could you think of any one of them being left out when you say "State the facts constituting the crime"? Can you think of any of them being left out? You can't imagine a district attorney drawing an indictment that would not show that the court

b3

had jurisdiction, or that the occurrence showed that it did give the court jurisdiction, or if it did not totally occur there that at least part of it took place so as to give the court jursidiction? I suppose that even in mail fraud cases you have to draw them showing where the mail was posted and so stating the facts as to what the mail was, stating that it was fraudulent and why it was fraudulent and giving the facts.

It says here, "State the name of the defendant." You would not leave that out, would you?

"State where this occurred." Of course, why would you leave that out? Then it states that you name the territory and the state and the venue. Why leave them out? It seems as though it must be an indictment which might just as well state that you must use the English language and use the following letters of the alphabet, A, B, and C. You do not have to state that. You might just as well state that they should be drawn in the English language and in letters that everybody can read. There are some things, however, that you just take

2 for granted. I am not arguing that point; I am just stating my thought.

The Chairman. I think we could have one or two specimen forms, Mr. Robinson.

Mr. Crane. The venue; then the name; then the territory; then the term. Then the name of the defendants. You can't imagine leaving them out. Then the time and the place. Of course you would. Then the act.

As far as criminal intent is concerned, as for example with intent to murder, you have to have intent to get your degree, I

b4

suppose. You have to state that.

Then the act, by shooting him in the bodywith a loaded pistol. Well, youcould not shoot him in the body without a loaded pistol. That is obvious.

Then the name of the person injured, and "against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

These are all essentials, but you can state the facts constituting the crime and you have the same thing.

Mr. Robinson. How would the indictment be changed when the stated facts are different?

Mr. Crane. Why give the form of the indictment?

Mr. Robinson. You say "State the facts." You agree that these are essentials?

Mr. Crane. Well, take for instance: it happened in New York County on the night of July 12. John Jones, the defendant, shot and killed James Smith with intent to kill him, showing first-degree murder, and that constitutes the crime of murder in the first degree.

Mr. Robinson. That is what is in this.

Mr. Crane. You do not have to say that he shot with a gun.

Mr. Medalie. Let me say this: You can talk about murder. That is a simple form, but I would like to draw your attention to mail fraud, to antitrust prosecutions, and to conspiracy. If you want to draw a simple form of indictment, if you could get some forms on that it would be very nice.

Mr. Crane. Leave the forms out; just state the facts constituting the crime. If you cannot state them, you cannot

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prove them.

Mr. Robinson. But some of these people address the question, "How can you provide a short form of indictment for mail fraud or for antitrust prosecution?"

Mr. Crane. A short form does not mean that you have to make it short. I mean a short form of rule. You can have that. You need not have a short form of indictment. If you have 50 defendants on a charge of conspiracy you have to state the facts, and it may take a lengthy indictment, but your rule can be short.

Mr. Medalie. You have the same situation as in modern equity pleading. In our code states it is provided for the complaint giving a simple and concise statement of the facts constituting the right to release. That is all that is necessary. Some lawyers do it, but they are scared to death when they do it.

To this day, notwithstanding the simple code of pleading, the average complaint calling for equitable release in any pleaded state of facts is a virtual pamphlet. Even the leader of the New Jersey Bar will tell you that.

Mr. Crane. Why limit it to the New Jersey Bar?

The Chairman. Because we have the shortest bill of ~~pleading~~ in the world.

Mr. Medalie. I think that if you just have a rule such as you have in the civil practice acts and codes of criminal procedure where simple, nontechnical forms of pleading are provided for by saying, "a concise statement of facts constituting the offense," that is sufficient. That gives ample power to the court. That is the simple indictment showing the elements of the alleged act. That is the simple form of indictment

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instead of the short form which names only the offense. I understand that the sentiment is against simply naming the offense and later giving the particulars.

I think that a short, concise statement of facts constituting the offense would get rid of all the complexities and technicalities of common-law pleading in criminal cases, assuming that there is today any judicial requirement to that effect, and I know there is not.

Mr. Holtzoff. Right there, Mr. Medalie, let me say that the civil rules, under Rule 8-A, requires a short and plain statement of the claim showing that the pleader is entitled to relief . We could adopt that language and require a short and plain statement of facts constituting the offense with which the defendant is charged.

Mr. Crane. Say "a concise statement of facts."

Mr. Youngquist. I like the word "plain" because it eliminates these technical forms.

Mr. Crane. You want to state that he is charged with the crime first, and then you state the facts.

3 Mr. Holtzoff. Yes.

The Chairman. May this be a fair solution of the problem, to adopt the language of the corresponding section of the civil rules for this purpose and then in a note indicate what would be some of the different elements that would be specified.

Mr. Crane. I was thinking, Mr. Chairman, that so far as we are concerned--and I mean here and now--that as far as the rule goes, if we say that he is charged with a crime, you state the crime, giving a concise statement of the facts; then you have written a complete rule. Then there cannot be any fault

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found with the rule. If the indictment does not measure up to that, then it is not the fault of the rule. The rule is perfect. You cannot find any fault with the rule because the defendant is first charged with a crime or a violation of some statute, and then you have a plain and concise statement of facts constituting the crime. If anything is left out of the indictment, it is not the fault of the rule.

The Chairman. I agree with you, but I have in mind other things that we should keep in mind. First of all, this will go to the bench and bar generally. After that it will go to the Congress and they will want to know what you meant by it. They will say, "Give us a sample." If we have some notes down somewhere it will save us a lot of explaining all through the country. A little explanation will help a great deal.

Mr. Crane. They have law schools to teach them law. You are not going to teach Congress law, are you?

Mr. Holtzoff. I think if you have the benefit of some sample forms, it may be very useful.

Mr. Medalie. Are you going to have some on counterfeiting, some on mail fraud, and some on conspiracy?

Mr. Robinson. Let me observe the way this Rule 8-A is drawn. You see it is based on page 25 to the left, which Judge Crane read a minute ago. That is the constitutional form. That is the form that was used in the Sacco-Vanzetti case.

Mr. Medalie. I still do not know why it would be necessary to give that "It was against the peace of said Commonwealth."

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Mr. Robinson. That is the constitutional form.

Mr. Youngquist. It is a constitutional question.

Mr. Holtzoff. I think our simple form of indictment should omit that.

Mr. Robinson. On page 25 lines 20 and 21 knock out "willfully, feloniously, and maliciously."

Mr. Crane. You do not want to use those things. You are going forward, not backward.

Mr. Youngquist. I think that in Massachusetts the constitution requires that it shall be against the peace of the commonwealth.

Mr. Crane. Is that in the constitution?

Mr. Youngquist. Yes. It was adopted around 1858.

Mr. Holtzoff. There was a case ~~cited~~ decided in Missouri some years ago where there was a similar constitutional provision where a murder case was reversed because the typist made a mistake in omitting the word "the" in "contrary to the peace and integrity of the state."

Mr. Medalie. And Governor Hadley wrote an article about it and made it the subject of a speech before bar associations for about 60 years.

Mr. Youngquist. Well, that takes us down to the end of the first sentence, Mr. Chairman?

The Chairman. Yes.

Are we generally agreed that it is sufficient on this first page of Rule 8 to provide a paraphrase corresponding to the civil rules?

Mr. Seth. I would like to see what is in there.

b9

The Chairman. What is that?

Mr. Seth. I would like to see most of the points in here left in. I see no harm in leaving them in. There is enough in there about what is required, but I do not see why they should not be in the rule. A great many district attorneys might be helped so they would not leave out something.

Mr. Youngquist. You mean put in a few forms?

Mr. Seth. I do not think you could get enough forms to do any material good.

Mr. Youngquist. All they need is a sample, I suppose.

Mr. Dean. I wonder if this is a complete enumeration. If you cannot have a complete one, what is the advantage of enumerating them?

Mr. Robinson. You will find you have to have the complete allegation. You have to have the act; you have to have the intent; you have to have the jurisdiction.

Mr. Dession. Sometimes you need some other things which would not be enumerated.

Mr. Robinson. Yes, along the lines of what Judge Crane said.

Mr. Medalie. Let me say here that there is some trouble with federal indictments. You can look up the law books and you can find the statutes and still wonder why they indict. There is often a very good reason and that is that there is a departmental rule which nobody knows about and which was legally promulgated. If they do not tell you what that rule is in the indictment you would never find it out. That is quite a problem in federal indictments.

b10

The Chairman. That is administrative process.

Mr. Robinson. You are speaking for point 10 when you would supplement it by showing the statute or the administrative rule.

The Chairman. Or the regulation adopted.

Mr. Holtzoff. I am opposed to point 10. Many United States Attorneys cite the statute in their indictment and many do not. I do not think you should be required to cite the statute.

Mr. Medalie. I can practice law without your citing the statute, but I cannot practice it unless you cite me the departmental rule, because I do not know how to find one unless they tell me what the rule is that we are violating.

Mr. Robinson. I see objection to citing the statute or regulation. If the indictment states any public offense or under one statute or another, that should be sufficient.

Mr. Medalie. It should be sufficient except for the fact that for all practical purposes a man wants to know what he is indicted for. It is not enough for a lawyer to find out whether he is indicted but what he is indicted for and under what rule. He would like to know that.

Mr. Holtzoff. Suppose a man is indicted for sending threatening communications. You would want to state the nature of the physical facts. That is all the defendant needsto know.

Mr. Medalie. But suppose you come to some agricultural provision. In New York in the Eastern District or thelower end of the Southern District, they would not know much about agriculture. When the product reaches New York we may be violating

some statute, some rule which was promulgated far in advance, and I am asking this in behalf of the modern lawyers who would like to be advised.

I know practically what usually happens. You say to the district attorney, "What is the rule? What is the departmental rule that you are relying on?" And, being a good fellow, he tells you. He gives you a copy, and a printed one at that. However, that does not always happen.

Mr. Robinson. We are talking about the fundamentals. As it is, our indictment would cover that.

As you know, the reason for the prolixity of the common-law indictment was that all indictments had to state all of the legal elements of the offense. It had to have all those felonious and unlawful things because the common law was so indefinite that it was necessary to state all those elements. Thus, in every indictment you had to write each common-law requirement for the offense plus the alleged facts.

Now, Holzworth, Kenney, and Stevens have pointed out that we have our offense defined by statute and it is not necessary to have a long recital of detailed legal elements of the offense. Why should we carry all those words in our indictment? They can be very easily omitted as long as we cite the section or the departmental rule, and when we do that we fulfill the requirements without any unnecessary wording.

Mr. Crane. Coming back to your short form I have no objection to citing the statute, but I see that the American Law Institute adopts the short form.

Mr. Robinson. A very short form. Mr. Waite is here and can tell us about that.

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Mr. Crane. This says, "The grand jurors accuse A. B. of poisoning an animal contrary to Section 31 of the Penal Code and charge that (here the particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars.)"

Mr. Youngquist. Do they contemplate a bill of particulars?

Mr. Crane. You get them anyway.

Mr. Robinson. I don't know.

Mr. Youngquist. Isn't that to avoid the necessity for a bill of particulars?

Mr. Crane. No. It says, "Here the particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars." You can get them.

Mr. Robinson. The English Indictment Act of 1915 was very successful. They had to set out in the English indictment all the facts and the elements of the offense and cite the statute. Then they set up a permanent rules committee that keeps on providing new rules as they are necessary.

Mr. Crane. Well, you state the facts. We are not speaking of rules as though they were drawn up for school boys. Indictments are drawn up by people who are lawyers just like prescriptions are drawn up by doctors. You do not draw up prescriptions so that the man on the corner can read them.

5 When you have an indictment it is supposed to be drawn by people familiar with the rules of procedure. They are not drawn by laymen. They are drawn by skilled men in our profession.

Mr. Robinson. Then a lot of time is lost because of the dispute in court about the sufficiency of the indictment.

Mr. Crane. If you have a statement of facts you cannot have any dispute about it. You simply charge what the crime is; then state the facts. You cannot have any dispute about that.

The Chairman. There seem to be two schools of thought as to this first page of Rule 8. I suppose we had better have a decision on it. One seems to be content with a mere statement of facts, and the other wants something longer.

Mr. Medalie. I suggest that you do not decide this now. You are dealing with one of the most fundamental questions that you are going to decide here. I think it is good to discuss it today and then discuss it on some other occasion before we come to a final decision. I think we should do a lot of thinking about it.

Mr. Youngquist. Ask the reporter to submit the other form which was discussed here.

Mr. Robinson. No. The suggestion is that you keep one.

Mr. Dean. Has any attempt been made to draft other forms of typical federal indictment?

The Chairman. I will put that question to Mr. Holtzoff.

Mr. Holtzoff. I think it could be done.

Mr. Dean. I think if we try a hand at doing that either tomorrow or the next day we might have a better basis for determining what we want in this rule.

Mr. Crane. As it is here, this is all leading up to this short form. Yet it is hard to move others who have a different idea. You cannot find fault with that, but I think you will find that the process has been toward the short form. It is

the same story and less difficult. Certainly you can get the thing stated, and the substance of the indictment is all you have to have. You charge the defendant with the crime; assault; guilty or not guilty. If you do not have all the facts you get a bill of particulars, but all this paper work in the courts is something that is tremendous. Either this paper work in the courts has got to be less or the courts will be swamped. We thought we had done a great deal with the short form and the pretrial, and I notice that you have some pretrials also. Up in Buffalo they are looking for work. They have a constitutional provision for increasing the number, but they are looking for a constitutional provision so that they can decrease them.

Mr. Medalie. I think that with respect to congestion that in many districts it is due not to the amount of work on criminal cases, to the number of them, but due entirely to the fact that a handful of them take a long time to try. Isn't that a fact?

Mr. Holtzoff. Yes.

Mr. Medalie. I have sat through a number of these trials, eight-week trials, and during that time hundreds of short cases could have been disposed of. They could be disposed of if the court was not tied up with one long case. They are not the cases in which any ordinary criminal is concerned, but some important person is involved in them.

Mr. Holtzoff. Mr. Chairman, Mr. Dean asked whether an indictment has been drawn up under a typical federal criminal statute. Suppose you take the Stolen Property Act. The offense there consists of transporting stolen property in interstate

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commerce of the value of over $5,000, knowing it to be stolen. It seems this would be a sufficient indictment if it stated that the defendant transported certain property, to-wit, certain bonds to the value of $6,000 from New York City, State of New York, to the City of Washington, District of Columbia, and said property had been stolen, and the defendant knew the same to be stolen.

Wouldn't that be a sufficient indictment under the statute? Of course, you would have the fact that the grand jury makes the accusation.

Mr. Youngquist. You would have to tell when, because there may be the statute of limitations.

Mr. Holtzoff. Yes. On a specific date.

Mr. Dean. I think that is sufficient but I was wondering about the bill of particulars on the bonds.

Mr. Holtzoff. The court will take care of that.

Mr. Robinson. It probably would?

Mr. Medalie. No, it never would.

Mr. Holtzoff. Specifying what issue of bonds?

Mr. Medalie. You would not get the specification of place other than, say, the Eastern District of New York, but you would get the particulars on the bonds.

Mr. Glueck. It seems that not too great harm would be done in leaving the statement of this in there and merely adding a few sentences. If these items exhaust the specifications necessary in the simpler indictments, then I would prefer some such statement as this because, as was suggested, it would be a guide to Assistant United States Attorneys at least. That would still result in short, simple, and nontechnical indictments,

but it would afford an opportunity to check up item by item with whether or not the relevant data was contained in the indictment.

Mr. Holtzoff. I am inclined to agree that the items which should be omitted from this are item 7 and item 10. Item 7 raises the presumption that you have got to allege the intent and all that verbosity about intent.

Mr. Glueck. You just mentioned that in your sample indictment,"knowing them to be stolen."

Mr. Holtzoff. That is not intent.

Mr. Glueck. That is the element.

Mr. Holtzoff. That is not intent.

Mr. Crane. What I had in mind was this, and the same thing is in the indictment. That is one way to express it. Why should there be any objection to this if this is perfect and accurate? Yet when you have a page of detail you are liable to have so many things in there that you may be in doubt about the interpretation of words. You have the criminal intent with which the defendant is alleged to have committed the offense.

So someone says the intent must be stated and has not been stated when there is no question of intent necessary?

As it says here:

> "Any other fact or allegation which may be necessary because of special requirements, statutory or otherwise, for notice to the defendant and to the court of the act and offense of which the defendant is accused."

That is all right, but what are the circumstances? What does it mean? You have so many words. There may be something you cannot foresee. I do not see the necessity for that. Just

make a statement of facts constituting the crime. Then you have got everything that there is.

Mr. Glueck. You could take the form and the commentary would give the additional information.

Mr. Crane. My suggestion is not to take the words that I am using. I am not suggesting that.

The Chairman. Well, take some special form.

Mr. Glueck. Yes, an illustrative form.

Mr. Crane. Yes, you save yourselves from putting something in there that is not necessary.

Mr. Holtzoff. You have civil rules which have been in effect for three years, and they have worked out very well.

Mr. Robinson. Here is one place where the civil rules and the criminal rules are different. You are stating the grounds for putting a man in the penitentiary. There is nothing comparable to that in the civil rules.

Mr. Holtzoff. I think that if you have a statement of the facts that is all that any defendant is entitled to.

Mr. Robinson. I think that what Judge Crane is doing is saying that we simply take No. 9 and make it the rule.

Mr. Glueck. You mean that No. 9 is a sort of extra catch-all?

Mr. Robinson. Yes. That is just generally what Judge Crane is doing, suggesting we make that the rule. That is why I object to it.

Let me say this: There is one other thing, and that is the fact that these rules are just not simply for federal courts alone. We know that about 15 or 20 states have rule-making powers. Many of these states are watching this committee to see

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whether the rules as proposed by this committee will serve as models for them. Judges of the Supreme Court have told me that. While that is not argument, it is a fact. To a certain extent we can be general and state the points briefly and concisely because you cannot state all the details. I think, however, that to the extent that we can be specific rather than general we are serving not only the federal rules and the federal courts but the state courts also.

The Chairman. Haven't we pressed this issue about as much as we can? The issue is pretty clear: either to have the rule stated in substantially the same form as it is now or alternatively to have it made in paraphrase with the civil rules corresponding to it with an accompanying annotation by the reporter giving it substance plus some specimen forms in an appendix?

Mr. Medalie suggests that we do not have a vote on it, but should not we think about this issue and perhaps see a revised form of the rule in a form suggested by Judge Crane, and then tomorrow proceed to come to a tentative decision on it?

Mr. Wechsler. Before we leave this topic I would like to ask one question on this issue. Is there any intention by this rule to affect such rules of pleading as the following: the rule that you can charge a substantive offense as in the case of robbery and charge the robbery as if the defendant had actually stolen the money with a gun in his hand and sustain that charge by proving that he was an accessory before the fact and the robbery committed by somebody else? I merely wanted to know whether it is the purpose to affect such rules as that or

whether it is the purpose to leave such rules unaffected and perpetuate them.

Mr. Holtzoff. I think either version of this rule would change that because you would have to state the alleged acts constituting the offense.

Mr. Medalie. It is the intention to eliminate all short cuts which practice has developed and require a specific statement of what Judge Crane calls the essential facts of the crime.

Mr. Holtzoff. It is intended to omit all this verbosity such as we have.

Mr. Medalie. I understand that.

Mr. Waite. I rather disagree with Mr. Holtzoff thatthis would change that. The Constitution provides that the defendant shall be informed precisely of the nature of the accusation against him. That has been interpreted as being specified by allegation that he committed robbery and proving that he was an accessory.

Mr. Holtzoff. If you take the civil rules, you can say "a plain and specific statement of the facts constituting the offense with which the defendant is charged", then paraphrase the civil rule.

Mr. Waite. The Constitutional provision is that he shall be informed of the accusation against him. That is not as specific as this.

Mr. Holtzoff. I do not think it is.

Mr. Waite. Well, I cannot see the difference.

Mr. Holtzoff. If you take the present rule, Rule 8, in item 6 it requires:

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"The act or acts or the omission of legalduty by which the defendant is alleged to have committed the offense."

We want to do away with that fictitious form of pleading.

Mr. Robinson. I would like to answer Mr. Wechsler's question that there is no intent, so far as I know, to change the rule as far as accessories before the fact are concerned.

Mr. Holtzoff. Under this you allege the person is a principal.

Mr. Robinson. Well, we are not going to change criminal law.

Mr. Holtzoff. This is a rule of procedure, and this rule would change the present law.

Mr. Waite. I disagree with you on that.

Mr. Dean. I think it is a serious question whether it would change the law.

The Chairman. Why shouldn't it be changed?

Mr. Holtzoff. Yes, it should be, because there you can charge a principal by indictment and then prove him to be an accessory, which is not fair to the defendant.

Under item 6 you have to allege the act or acts or the omission of legal duty by which the defendant is alleged to have committed the offense.

Mr. Crane. The same question arises under the rule as written here.

Mr. Holtzoff. No, I do not see how, because you have to allege it.

Mr. Crane. The same question Mr. Wechsler has raised now would be raised under this present one.

Mr. Holtzoff. No, I do not believe so, because under this you have to allege the acts to be proved.

Mr. Crane. No. I think you misunderstand me. Under the short form or the long form here the same question would arise.

Mr. Wechsler. There may be a lot of rules about an indictment of that sort which a study of the decisions would reveal. It is hard to measure the text as to the merits of it as to what the indictment should contain unless you are put on notice as to some of the issues of that sort. That may be affected by formulation one way or the other. I raised the question because I was thinking of the difficulty of facing the point without further information.

Mr. Crane. That is covered in our practice, but whether you have the long form or whether you have the short form, it is a question in the defendant's mind whether he is charged as a principal or an accessory, but he can get it by a bill of particulars. The bill of particulars is given in every criminal case. He can go to the court for it and ask for it. He can go to the court and ask for the bill of particulars as to what the facts are.

Mr. Robinson. If you have A, the defendant, and B, another defendant, charged with killing C, when you charge in the indictment that A and B killed C, you allege the facts and you show them if they can be proved as substantially true. Why should you begin alleging that A was the accessory before B or B before A?

Mr. Holtzoff. Suppose the other fellow died.

Mr. Robinson. Then go ahead and allege the same thing.

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Mr. Holtzoff. You would have to allege what the accessory did, wouldn't you?

Mr. Wechsler. Suppose he became an accessory by words of encouragement. Would you have to allege what the words of encouragement were?

Mr. Crane. The same question arises every day. The same question arises in any state. I think it is covered in those states where they have bills of particulars. I never heard of a defendant going to trial where his lawyer did not know or could not obtain the charge against him with a specified showing of exactly what the facts were. I never heard of any court which prevented a defendant from knowing what he was charged with. I cannot imagine a casebeing tried where that is not done, and I do not know of any instance where that has not occurred, because I cannot imagine that a defendant could not find out in some way with what he is charged, whether he is charged as an accessory or as a principal or an aider and abettor or whatever else it may be, it is always possible to get a statement of the facts. Then these forms should be sufficient.

Mr. Wechsler. The moral I am disposed to draw from this is rather like the one suggested, because I think when you try to be more specific in a situation as complex as this you are very likely to overlook one thing or another and settle it by inadvertence.

Mr. Crane. I do not want you to think that I had thought of it. I had not thought of it.

Mr. Seth. The civil rules on that as drafted in some particular provisionsset out alternative sections, do they not?

Isn't that a fact?

The Chairman. Yes.

Mr. Seth. We should bear that possibility in mind on some of these rather important provisions in these rules.

The Chairman. Now, may we go on to page 2 of Rule 8?

Mr. Longsdorf. Do you want to break a paragraph in line 26 of Rule 8, page 2, before the words "bill of particulars"?

The Chairman. I think so. I was going to suggest one in line 36.

Mr. Robinson. Correct that typographical error in line 31. "Offense" should be "defense".

Mr. Medalie. Should we have a provision here concerning defenses? At any rate I do not think it should be under Rule 8, subsection (a), "The written accusation." I do not think that anything relating to defenses should bein there at all.

Mr. Robinson. That is more related to bills of particulars. You know what happens in some jurisdictions. I am not sure about the federal rules, but many districts follow many different rules, but it is quite common when the government gives a bill of particulars its proof is restricted to that bill of particulars rather than to the indictment. That should be controlling. Here we are talking about bills of particulars in line 29. I think my suggestion would be that since you bring in bills of particulars here you have to say as much as is stated here.

Mr. Dean. The question is, Should it be in there at all?

The Chairman. From line 26 to 36 it deals with bills of particulars and it clarifies it to some extent.

Mr. Robinson. But there is no other civil rule which deals with bills of particulars. That civil rule was not drafted

yet.

I want to get your views on that first. Do you want to segregate them?

The Chairman. Do you want to note that?

Mr. Robinson. I will note that as a possibility.

The Chairman. Are there any other suggestions on this page?

Mr. Youngquist. May I ask about the preceding page?

The Chairman. Yes.

Mr. Youngquist. Is the complaint included in the written accusation?

Mr. Robinson. Yes.

Mr. Youngquist. Then should not we say that instead of saying "namely, the grand jury or the United States Attorney" on the first page and say a person may do it, because a complaint may be made by an individual?

Mr. Robinson. That can be taken care of by saying "unknown to the grand jury or the United States Attorney or to the complainant." That could be worked in there. I hesitate to drop the words "unknown to the grand jury." They are quite common.

Mr. Dean. May I ask a question?

The Chairman. Yes.

Mr. Dean. I gather that in lines 34 and 35 that your intent is that the bill of particulars, when furnished, should not restrict the proof. I would like to know what the policy is on that.

The Chairman. Well, what does the reporter say about that?

Mr. Robinson. I would like to hear what Mr. Dean has to

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say.

Mr. Dean. I think it certainly should restrict the proof. It is a specific limitation on the indictment in order to know what the real issues are.

Mr. Holtzoff. I think the proof should be restricted to it; otherwise what is the bill of particulars for?

Mr. Robinson. If it is restricted, then the bill of particulars takes the place of the indictment.

Mr. Burke. It is supplemental to it.

Mr. Dean. The only function of the bill of particulars is to make the indictment clear and specify the acts with which the defendant is charged, giving the man notice of the particular issues involved.

Mr. Holtzoff. It is certainly not fair when you have a bill of particulars calling for certain details and then be allowed to prove other details than those alleged in the bill of particulars.

Mr. Robinson. This is based on a certain complaint which has been made stating that a very unfair use of it was made by defense counsel asking for bills of particulars and then insisting on the bill of particulars and then restricting the government to it in cases, to the allegations of the bill of particulars where there is no prejudice.

Mr. Medalie. It is due to the sloppy way in which the bill of particulars is gotten up without any true sense of responsibility, and then they blame the defendant for holding them up.

The Chairman. Do you want to make that motion?

9 Mr. Holtzoff. Yes. I move we leave out the sentence

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which comes at the bottom of page 2, beginning with line 32 and ending with line 36.

The Chairman. Do you want to state the contrary rule?

Mr. Holtzoff. No. I do not thinkyou need it. That is what a bill of particulars is for.

Mr. Wechsler. There is another proposition. Where you cannot amend the indictment, you can permit the bill of particulars to be amended. There may be occasion to do so, and there is opportunity to grant just such an amendment.

Mr. Robinson. Would you permit the amending of the bill of particulars and approve of it during the trial?

Mr. Holtzoff. If you gave notice.

Mr. Crane. You do not have to amend the bill of particulars after the trial. Do it before the trial or at the trial. What is the object of amending the bill of particulars after you have the evidence in?

Mr. Wechsler. Not after the evidence is in.

Mr. Robinson. Would that be during the trial? You would permit the amendment of the bill of particulars?

Mr. Holtzoff. I think so.

The Chairman. Isn't that in the discretion of the trial court?

Mr. Crane. May I ask a question about something that I do not know? You assume that you can require a bill of particulars from a defendant. Can you?

It says here:

"A bill of particulars likewise may be supplied by the defendant voluntarily or by order of the court if additional details are necessary to give notice to the government of

the defense which the defendant is asserting."

Can the court require the defendant to disclose his evidence? Would the court ever require him to disclose his evidence?

Mr. Robinson. That is a different thing.

Mr. Crane. Can you require him to give his evidence?

Mr. Robinson. Well, there are certain things he can be required to doin advance of trial.

Mr. Crane. Are you sure? I think you should look at that carefully, because you cannot require him to testify against himself, can you?

Mr. Robinson. No. That is right, but he would not be testifying against himself. He pleads not guilty.

Mr. Crane. But you have to prove him guilty, and if he does not take the stand you have to prove his guilt just the same. He may refuse to take the stand. That is his privilege.

Now, can you make him disclose by a bill of particulars what he refuses to disclose if he does not testify? I am asking you now what you think about it.

Mr. Robinson. What I think about it is this, to take a specific example. You have to get away from logic once in a while, as was stated before.

Mr. Crane. But we do not want to get away from the Constitution.

Mr. Robinson. Here is the situation. I have this case in which Douglas MacGregor, district attorney of Houston, Texas, had the experience with a defendant on trial recently bringing in alibi evidence, and the only person by whom the evidence really could be met was somewhere in the Platte River Valley

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section, and what MacGregor had to do was to use about $1,400 of government money in long-distance telephone calls over the highway garages and filling stations and finally using airplanes to get this testimony to trial in time in order to combat this defense evidence.

That is the kind of experience you also have sometimes at trials by the defendant in insanity cases in places where it is not required that the defendant make an advanced defense of insanity.

That type of procedure is very unfair to the government and so unfair that it has tobe met in some way. Therefore, in these alibi and insanity cases, if the defendant is going to put on that kind of defanse, certainly the government should know in advance of the trial what that type of defense will be, so that the government may have a fair chance and not be taken by surprise.

Mr. Crane. I can see that, but here you have something else. Now you are asking for a bill of particulars.

Mr. Holtzoff. May I add this? Under the Constitution you cannot ask a defendant to testify or give any information against himself, but there is nothing in the privilege against self incrimination which prevents the government from saying that you are going to notify them in advance as to what evidence you are going to give.

Mr. Crane. But when you get to a bill of particulars you are requiring him to give his evidence so that you know in advance what he is going to produce. Can you require him to name the persons and places and other evidence that he is going to produce?

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Mr. Holtzoff. I don't think that goes to the constitutional provision. That applies to the application of the rules.

Mr. Crane. It says here:

"A bill of particulars likewise may be supplied by the defendant voluntarily, or by order of the court if additional details are necessary to give notice to the government of the defense which the defendant is asserting."

c10 I think we get into rather dangerous ground. I am just a little hesitant about it.

Mr. Longsdorf. Is alibi an affirmative defense or a negative defense?

Mr. Robinson. It is generally chosen as an affirmative defense. It is equivalent to denying it. You are really saying that it is impossible that he could have done it because he was insane or because he was somewhere else.

Mr. Crane. We are suggesting rules which the Supreme Court says should be adopted. Everything we settle here precludes them from holding it not to be all right.

Mr. Robinson. Oh, no.

The Chairman. They did not do that in the civil rules in the case of a physical examination.

Mr. Crane. It would be very hard not to take the rules we adopt and then call them unconstitutional.

Mr. Robinson. They did not do that with the civil rules.

The Chairman. That did not bother them.

Mr. Seasongood. That was the provision in the rules that you could compel an examination by the plaintiff in a damage suit. Four of those judges said it was an interference, and those four will be in the majority now and they may rule

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differently than when they were in the minority.

Mr. Dean. Isn't this language too broad to provide for insanity and alibi defenses?

The Chairman. That is not the only purpose. It is not limited to that.

Mr. Dean. That is the way I read it, that the court may order it in any case of any kind where the court sees fit. That is what I am afraid of.

Mr. Seasongood. Let the reporter make some more study on that.

The Chairman. What sound reason can be urged against it?

Mr. Dean. You are interfering with his constitutional privileges.

The Chairman. He is not being called upon to testify. He is being called upon to plead.

Mr. Holtzoff. The constitutional privilege is only against self incrimination. There is no constitutional privilege which entitles the defendant not to disclose his defense in advance of trial. There is nothing in the Constitution which guarantees him the right to throw in evidence at the trial without giving notice in advance.

Mr. Dean. I am not arguing the constitutional question. I think it may or may not violate the privilege against self incrimination.

The Chairman. The motion is limited to the bill of particulars sentence beginning with line 29 and ending with line 32. All those in favor of that motion say aye.

(There was a chorus of ayes.)

The Chairman. No?

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(There was no response.)

The Chairman. The motion is made to strike out the sentence, lines 32 to 36. Any further discussion of that motion?

(There was no response.)

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Noes?

(There was no response.)

The Chairman. It is carried.

Mr. Seasongood. I notice that you allow an amendment to that.

The Chairman. What is that?

Mr. Seasongood. You allow an amendment to the written accusation or bill of particulars? That is page 2. That encouraged me to hope that you would reconsider what you struck out of Rule 4, page 4, in allowing amendment of process. I will hope that you will consider whether you want that in. I was thinking of the amendment of the written accusation or bill of particulars in your amending of process.

The Chairman. Will you hold that and bring it up at the end?

Mr. Robinson. Let us hold that.

The Chairman. Let everyone please make a list of these items so that we can dispose of them later.

That brings us to the last sentence on page 2 and the beginning of page 3.

Mr. Dean. The court may cause the written accusation to be amended.

Mr. Holtzoff. I think we should make it clear that you are not trying to permit the indictment to be amended.

Mr. Crane. Yes.

Mr. Seasongood. Add the words "except the indictment".

Mr. Medalie. All you need to do is take out "written accusation" in line 37.

Mr. Holtzoff. You should be allowed to amend the information.

Mr. Glueck. Why not say "information"?

Mr. Robinson. Leave it as wide as you can.

Mr. Medalie. Why conform to the evidence?

Mr. Seasongood. That is usual, isn't it?

Mr. Medalie. He has the bill of particulars.

Mr. Holtzoff. I do not think that in criminal cases it is customary to conform to the proof or to amend to conform to the proof.

Mr. Seasongood. When the evidence has gone in and it is not pleaded you should surely be allowed to amend to conform to the evidence that has gone in without objection.

The Chairman. I think so.

Mr. Robinson. That protects the defendant on the plea of double jeopardy.

Mr. Seasongood. How does it protect the defendant where he had secured a bill of particulars and the facts are set forth?

Mr. Robinson. We are talking about amending the information.

11 Mr. Dean. I am thinking about amending the pleading. I think it is highly dangerous to a defendant.

Mr. Seasongood. Suppose that the evidence has gone in. Would you let him make the point of surprise that it was not pleaded? Suppose the evidence has gone in without objection against him.

Mr. Medalie. You do not need that.

The Chairman. When the evidence is there? Is it all right?

Mr. Robinson. He has a chance to object on the ground that it is not relevant.

The Chairman. Is it right to let him stand by and let the case be proved, a different case than the one pleaded in the bill of particulars and then at the end of the case let him have his objection?

Mr. Robinson. Then at the end of the case the government moves to make the bill of particulars conform to the evidence that is in.

Mr. Medalie. You never need those things. For instance, take the case of a man killed upon a certain date. The crime is dated July 1. You prove the crime was the date of July 3. The defendant raises a howl about it and the court ignores it. There is no point to anything about that. It was substantially proved. You need no amendment.

Mr. Robinson. That gives the defendant protection against a later prosecution of the same charge when you make the date July 3.

Mr. Medalie. I don't think that you need any amendment to protect him.

Mr. Robinson. There are two objects in doing that: One is to give notice to the defendant, and secondly to protect him

against double jeopardy.

Mr. Medalie. Well, you charge that a man stole $60 and you prove that he stole $6. You do not need any amendment.

Mr. Glueck. Suppose you charge larceny and you prove merely joy-riding, where they have a joy-riding statute.

Mr. Medalie. That is a substantial variance, because you have not established your case.

Mr. Waite. Take a stolen bond case. The government proves that the bonds were stolen, but the government falls down on the number. There you have to amend.

Mr. Robinson. Yes.

The Chairman. That is a good example.

Is there anything further on this sentence?

Mr. Wechsler. Is there a rule on variance?

Mr. Holtzoff. I do not believe so.

Mr. Wechsler. In that connection I would like to suggest that the reporter consider Section 184 of the Institute Code, which provides for amendment of the indictment where immaterial errors are found.

Mr. Robinson. The Institute Code was dealing with an ideal situation. Here you have something different.

Mr. Waite. The Institute Code says specifically that the indictment may be amended as far as immaterial errors are concerned.

Mr. Holtzoff. The Institute Code was not confronted by the constitutional objection.

Mr. Waite. Yes. It says "indictment."

The Chairman. It was intended to be a state code, not a federal code.

Mr. Waite. But you have the same problem of amendment in the state courts as you have in the federal courts. It does not grant that you may amend the substance of the indictment, but to take care of immaterial variations which some courts have held some doubts on.

Mr. Holtzoff. I doubt the constitutionality of that because the indictment is something found by a grand jury, and I do not see how the prosecutor can amend the indictment of the grand jury.

Mr. Waite. Perhaps if you read that section you can get my point. I am only suggesting that the reporter consider it in the future.

Mr. Robinson. Please consider ex parte Bain, in which the federal courts have held that you cannot amend the indictment.

Mr. Waite. Read 184 and see my point.

Mr. Robinson. Yes.

The Chairman. We have covered this sufficiently for this evening and we will adjourn. The suggestion was made by one or two of the members that tomorrow morning they would prefer to start at 10 o'clock and then work up to 9:30 by Monday morning.

Mr. Crane. That is standard time?

The Chairman. Yes.

Mr. Longsdorf. How long will this take?

The Chairman. I should think that we would take about four days, unless our speed increases.

Mr. Medalie. What are the prospects with respect to the rules upon the subjects which do not appear to be covered? Do we have another draft?

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The Chairman. At the conclusion of the discussion of these rules we go over them and then pick out additional suggestions with respect to these rules and then take them up by paragraph and list up then the new matter that the members have thought of which should be included in the rules and get the benefit of the counsel and advice of each as we can and then leave it to the reporter to finally prepare these rules.

Then the chairman of the committee and the reporter will be confronted with two tasks: No. 1, to revise the rules with respect to the subjects we have covered; No. 2, to prepare a new set of rules with respect to those subjects which we have not covered.

That would probably necessitate a second meeting of the committee, which I would anticipate would be held around a month or a month and a half or two months from now. We hope that we may be able to get a complete set of rules in the hands of the court for the purpose of authorizing distribution sometime early in the year. Then we can have a general discussion when we meet here again in the latter part of June with the idea of incorporating such of these rules in final form.

It was the experience with respect to the civil rules that those rules needed some sort of revision after this criticism period was gone through. Then what will happen will be that the rules will be turned over to the courts, federal and state, during the summer so that when the court reconvenes in the fall next year they may pass our rules, if they approve them with the suggested changes, so that we would have time to get them in shape so that they may be submitted to the Congress at the opening of the session of 1943.

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Mr. Longsdorf. I would like to say something about that. I gave Mr. Holtzoff a suggestion to get this draft when it finally comes out not only into the hands of a lot of lawyers but to direct it to the attention of a great many of them who would not ordinarily receive copies of the draft. I do not know just how we can do it. I do not suppose that the Supreme Court wants to circulate 125,000 pamphlets, but I do not think that is necessary. If you can arouse some curiosity, that may help a lot of them. Perhaps the bar associations can do a great deal.

Mr. Medalie. They can help, yes.

The Chairman. W e have committees appointed for that.

Mr. Longsdorf. I know, but in our district there was no local committee appointed when I left except the one appointed by the bar association. They encouraged the state bar, and our senior district judge talked to me about the possibility of having a local committee appointed.

The Chairman. We had two letters from Chief Justice Hughes and followed by letters from others. I do not know what more we can do with the district judges.

Mr. Longsdorf. I believe it should be done.

The Chairman. Mr. Tolman said the committee has been appointed. He received the letter today.

Mr. Longsdorf. As far as the committees are concerned, they really get going when they have something to shoot at, and the best thing for them is a draft.

(Thereupon, at 10:20 o'clock p. m., the committee adjourned until 10 o'clock a. m. Tuesday, September 9, 1941.)

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