Mr. Tolman's
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Washington, D. C.

Tuesday, January 13, 1942.

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

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The Advisory Committee met at 10 o'clock, pursuant to adjournment, in Room 147-B, Supreme Court Building, Washington, D. C., Frederick E. Crane, presiding.

PRESENT:

Same as previously noted; Arthur T. Vanderbilt absent at the morning session.

P R O C E E D I N G S

The Chairman (Frederick E. Crane). Gentlemen, shall we get to work?

We had this proposition of Mr. Waite's, but I think we had better wait until he comes.

I think we are down to rule 30, and Mr. Robinson has something to explain regarding it.

Mr. Robinson. The first rule 30, with the index tab on it in your books, is based on the work of the Committee at its September meeting. It is rewritten with words deleted and other changes made in accordance with the votes of the Committee.

However, a substitute rule 30 has been prepared also, for your consideration, and you will find it just following this old rule 30. You will find it, the third page after the chapter headed Chapter 3, "Indictment, information, and Complaint, Rule 30.

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My suggestion, Judge Crane, would be that we start with the new rule, using the old one for whatever reference purposes the members of the Committee may wish to use it for.

Mr. Holtzoff. I would like to ask a question, Mr. Robinson. Subsection (c) of paragraph 1 of the old rule, which abolishes demurrers--has that been carried into the new rule? I do not find it there.

Mr. Robinson. Yes. As I just stated to you, Mr. Holtzoff, that is in a later chapter.

Mr. Holtzoff. It is a later rule?

Mr. Robinson. Just a minute, please. You will observe that chapter V deals with arraignment, pleas, motions, and notices, and therefore, under chapter V, subsequently, we will come to that matter of abolishing demurrers, and all that.

Mr. Holtzoff. I see.

The Chairman. Is the first one the new one?

Mr. Holtzoff. The second one.

Mr. Robinson. The second one is the new one.

The Chairman. The second one?

Mr. Robinson. Yes, sir.

The Chairman. You want us to take that up?

Mr. Robinson. Shall I take up rule 30 (a)?

The Chairman. Yes, you may.

Mr. Robinson. The heading, "Written Accusation of a Criminal Offense."

"The written accusation of a criminal offence may be indictment, information, or complaint. Information of a capital offense is by indictment. Accusation of infamous offence which is not capital is by indictment, unless the

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person accused waives indictment, as provided in rule 30 (e), and consents to the accusation by information. Accusation of an offence which is not infamous and which is not a petty offence is by indictment or by information. Accusation of petty offence is by information or by complaint."

As you know, the Federal law has those classifications of offences, and while it seems somewhat repetitious perhaps, it is necessary I think for us to consider the form of written accusation which is to be used for each classification of federal offence.

Mr. Medalie. Why do you limit petty offences to the information or complaint, in view of the fact that you may have indictments of many counts, which may include a petty offence with more serious offences?

Mr. Robinson. I was basing that largely on the fact that the Supreme Court has provided rules governing petty offences, and in those rules it is stated only that petty offences may be charged by information.

Mr. Holtzoff. Oh, no; those rules--

Mr. Medalie (interposing). If you provide that petty offences are to be charged by information or complaint and exclude their being charged by indictment, you create procedural difficulties.

Mr. Robinson. Now, just a moment. Those are petty offences committed within jurisdictions that have exclusive or concurrent, within the federal jurisdiction.

Mr. Holtzoff. Yes.

Mr. Robinson. But I wanted to explain this, just as soon

as I can get to it, that we need to consider, too, the possibilities of dealing with petty offences in places other than those under exclusive federal jurisdiction, before a United States Commissioner. That is just a consideration that the research staff has been giving a good deal of time to, and while it is true that we do not want to have any part in setting up new sorts of federal courts, namely, under United States Commissioners, still the possibility of dealing with Alex's "migratory bird" cases and others, other than by the district court, itself, is one that we have got to consider, you know, so that is still involved, Alex, and that is a point--if you do not mind I would like to pass it, because it is not involved here.

Mr. Holtzoff. No, but I would like to say this. At the present time commissioners have jurisdiction of petty offences only on federal reservations. What may happen as the result of future legislation, we do not know, and we could not legislate and should not legislate for that.

Mr. Robinson. Certainly.

Mr. Holtzoff. Now, it seems to me that to cure Mr. Medalie's objection, to which I agree, all we need is to insert a word in the last sentence:

"Accusation of a petty offence is by indictment, information, or complaint."

Mr. Medalie. Yes.

Mr. Dean. "May."

Mr. Robinson. Yes, that is all right.

Mr. Dean. There is at the present time as I recall a federal statute which says that "petty offences"--and it

defines them--"may be prosecuted by information." This, again, says "may be".

Mr. Robinson. Yes.

Mr. Holtzoff. They do not have to be.

Mr. Dean. Those are petty offences, not necessarily on federal reservations or territories, and not necessarily within the jurisdiction of United States Commissioners.

Mr. Robinson. Right.

Mr. Longsdorf. This section 541 is the one you refer to, is it not, Mr. Dean?

Mr. Dean. I have forgotten the section number, but it defines them, and says they may be prosecuted by information.

Mr. Glueck. As a matter of comment, merely, the "by" ought to come out, now, in line 10, before "complaint".

The Chairman. Yes, that is right.

Mr. Robinson. That is right.

The Chairman. "By information, indictment, or complaint."

Well, is this satisfactory to you all, this section (a) of rule 30?

Mr. Dean. I still have one question about it, and that is whether or not it contemplates that a complaint should ever be filed before anyone other than a United States Commissioner.

Mr. Holtzoff. No, it does not.

Mr. Dean. Well, shouldn't we then indicate some how or other what a complaint is? A complaint is not an accusatory document in the same sense that an information or an indictment is, because it is one that is only used before a United States Commissioner, whereas the other two are filed with the federal district court. In other words, we have nowhere here defined

"complaint".

Mr. Holtzoff. I wonder if that could not be cured by changing this last sentence to read as follows:

"Accusation of a petty offence is by indictment or information, if prosecuted in the district court, or by complaint, if prosecuted before a United States Commissioner."

Mr. Dean. Some such language as that.

Mr. Longsdorf. Mr. Chairman, if I may address Mr. Holtzoff, I think that that section 541 of Title 18 contains no such limiting means. It says:

"Petty offences may be prosecuted by information or complaint."

But it does not enlighten us very much about what the complaint is, of course, because it uses only the word. I think the complaint referred to in section 541 is probably an accusative complaint and not a preliminary one.

Mr. Holtzoff. Yes. Well, the difference as I understand it between a complaint and information is that an information is filed by a public prosecutor, and a complaint may be filed by anyone--the arresting officer, or anyone else.

Mr. Longsdorf. I do not know whether that would be true if it is the basis of a trial for an offence.

Mr. Holtzoff. It is. That is the practice, and that is being followed for the trial of petty offences committed on reservations.

Mr. Longsdorf. Yes.

Mr. Holtzoff. Trial before commissioners is upon complaint made by the arresting officer.

Mr. Longsdorf. Usually made by the warden or somebody else.

Mr. Robinson. Of course, this needs to be considered, Mr. Holtzoff, that we do take the petty offence rules promulgated January 6 last year, which do provide for the trial of petty offences on informations.

Mr. Longsdorf. And they do not mention complaints.

Mr. Robinson. They do not mention complaints.

Mr. Holtzoff. But we have secured a formal construction administratively from the Supreme Court that that term, "information," in that rule is to be construed as including either information by the public prosecutor or a complaint by any other--by an arresting officer.

Mr. Robinson. In other words, there can be accusation then by complaint or by information, used in the sense of complaint, as well as a committing magistrate proceeding based on a complaint?

Mr. Holtzoff. Yes.

Mr. Crane. Wouldn't Mr. Dean's suggestion cure it?

Mr. Robinson. What is that, Judge?

The Chairman. Would you state it again?

Mr. Dean. Well, I think we are under some compulsion to define this word "complaint", and I think it is obvious that there is some disagreement here as to what it means. Secondly, I think there is some misunderstanding as to whether it might be used in the federal district court.

I have never heard of a complaint being used in a federal district court. Now, if we do not intend to use it there, I think we should state so, and define a complaint as an accusatory

document before a United States Commissioner.

Mr. Holtzoff. I wonder if my amendment would not cure that point, Mr. Dean?

Mr. Dean. I am not sure that it would not. I am not sure that it would not.

The Chairman. What was your amendment?

Mr. Holtzoff. My amendment was to modify the last sentence of 30 (a) so as to make it read as follows:

"An accusation of a petty offence in the district court is made by indictment or information, and before a United States Commissioner, is by complaint."

I think it should be-

"is by information or complaint."

Mr. Robinson. Yes, you would have to change that.

Mr. Youngquist. You do not discriminate though between your different proceedings. I think that the distinctions ought to come at the beginning of the paragraph where you describe the written accusations.

What we want to do, I take it, is to say that indictments or informations may be used in the district court; informations may be used also before a magistrate in the prosecution of petty offences; complaints may be used before the magistrate, either for the prosecution of petty offences or as a basis for a preliminary examination. I think that is what we are trying to say, isn't it?

Mr. Holtzoff. I think that is right.

The Chairman. Trying not to say that.

Mr. Youngquist. Would it be simpler for the Reporter to say that?

Mr. Robinson. I think so. You would have it right after the heading?

Mr. Youngquist. Well, in some appropriate place.

Mr. Robinson. As you have been speaking I have been wanting to ask you about the possibility of using your definition section for something of this kind.

Mr. Glueck. I was going to suggest, Mr. Chairman, the possibility of putting that into rule 1.

Mr. Robinson. Whenever we begin to degenerate into too many small details, I begin to think about your definition section.

The Chairman. Would that be a rule 1 definition?

Mr. Glueck. Yes, "and application".

The Chairman. And application.

Mr. Holtzoff. I think we could well afford to define "information or complaint," because there is confusion in the cases as to the meaning of the term "information". There is one line of authorities which limits it to a document signed by the public prosecutor, and there is another line of authorities which construes the term "information" as broad enough to include a complaint by an arresting officer, so that I think it would be useful for the purposes of these rules, clearly to define those terms in the definition section.

Mr. Robinson. It is rather a tough order on definitions, though, isn't it, Alex?

Mr. Holtzoff. I think that is exactly the type of thing that ought to be defined.

Mr. Robinson. Yes.

Mr. Holtzoff. The term is susceptible of two meanings.

Mr. Robinson. I would appreciate a memorandum from you on that, if you will help in that definition.

Mr. Holtzoff. I will be glad to.

The Chairman. Is that agreeable to you, Mr. Dean?

Mr. Dean. Yes.

Mr. Seth. The statute says "petty offences in the district courts may be prosecuted by complaint." Now, ought we to ignore that?

Mr. Holtzoff. Not in the district court, I do not think.

Mr. Seth. Yes, it does--the general statute covering anything punishable by not more than six months and not more than $500 fine may be prosecuted by complaint in the district court.

Mr. Holtzoff. By information, or complaint?

Mr. Seth. Or complaint.

Mr. Medalie. Now, "complaint" as I understand it is nothing more or less than an affidavit setting forth the facts which constitute the crime. In stating the nature and contents of the written accusation you deal with complaint just as though you were dealing with a mere technical document which is called an indictment or an information.

Now as a matter of fact, in order to charge a person with a crime by affidavit, you cannot set forth facts in the summary way that you can in an information or in an indictment. The complaint must go into the facts. You are creating limitations on a complaint, which practically assassinates every characteristic of an affidavit.

Mr. Robinson. I do not think that is true throughout the districts of the country, George, because I know that some

complaints--and I have some specimens here--the body or charging part of the complaint could be substituted for the body or charging part of an indictment or information without any illegality one way or another.

Mr. Holtzoff. I have seen some very general complaints.

Mr. Medalie. I know, but those are not proper complaints.

Mr. Robinson. Oh, I don't know.

Mr. Medalie. A person should not be deprived of his liberty by an arrest on an affidavit, unless the affiavit sets forth the facts.

Mr. Robinson. Well, if it sets forth the facts which will be sufficient for an indictment or information, he surely cannot object to it.

Mr. Medalie. I think he can.

Mr. Robinson. Why?

Mr. Medalie. Because an affidavit must contain facts upon the knowledge of the affiant. You cannot draw conclusions.

Mr. Robinson. Well, there is some dispute about that. Some affidavits are based on information and belief.

Mr. Medalie. Then you have to set forth the sources of your information and the grounds for your belief.

Mr. Robinson. Not always. Not always, under the cases. That is, you do not always have to disclose your informant--do you, in all districts? I know there is some variety of opinion on that.

The Chairman. Do you have to define in detail the nature of the complaint? Do we not just say, "complaint" as used in these rules cares for these petty offences? Wouldn't that be sufficient, leaving the complaint to be used as it has been

heretofore--that is, the nature of it?

Mr. Medalie. Well, because, here we admit a complaint to be as general and as summary as an information or an indictment. In other words, we are saying that an affidavit does not have to contain the facts that an affidavit ought to contain, when you define it, just as we do an indictment or an information.

Mr. Holtzoff. Well, I do not think an officer who swears to a complaint is required to disclose confidential sources.

Mr. Robinson. I don't, either.

Mr. Medalie. Well, assuming he doesn't, he must state his facts.

Mr. Youngquist. Mr. Chairman, is it proposed we define "complaint"?

The Chairman. Yes.

Mr. Youngquist. I see no need for it.

The Chairman. Neither do I.

Mr. Youngquist. Do you think there is real need, George?

Mr. Medalie. I do not think you really need to. It is a term that has a definite meaning in criminal law, but a complaint nevertheless is essentially an affidavit.

Mr. Holtzoff. I think we could well afford to define the word "information", because the cases view the term "information" in two different senses.

Mr. Robinson. That is right.

Mr. Holtzoff. One line of authorities limiting the term "information" strictly to an accusation by a public officer, and the other line of authorities defining it broadly enough to include what we generally call a "complaint." That being so, I think we might define the term, so that we know in what sense

we are using them in these rules.

Mr. Medalie. Well, regardless of whether you define it, the fact remains that a complaint is an affidavit.

Mr. Crane. You haven't got to state that in the rule, have you?

Mr. Medalie. No, I don't think you have to state it, but if you admit a complaint--that is, an affidavit--to charge a person with a crime, so that he may be arrested or held, and by implication provide that it doesn't contain any more than a short form indictment or information, you do not set up a standard of having a person who sets forth facts on oath set forth facts.

Mr. Robinson. But who said the short form indictment or information was going to be adopted or recognized? We haven't adopted that, have we?

Mr. Medalie. I am not saying the short form is adopted.

The Chairman. Before coming to the definitions, and what form they should take, Mr. Holtzoff has made a motion that we deal with this matter in rule(1)by defining particularly "indictment", but particularly "information" and "complaint", and what courts they are used in, and where; and I am ready for a vote on that.

Those in favor of this motion, for defining these words and putting them into definitions of rule 1, say aye. Opposed, no.

(The motion was duly AGREED TO.)

The Chairman. Now we come to the nature of the definition, as to what the definition shall be. Suppose we leave that. Professor Robinson's suggestion was that Mr. Holtzoff get up some definitions for him, he to report later on them, rewriting this subdivision (a). Is that your suggestion?

Mr. Robinson. Well, the way you put it, Judge, it sounds as if I am trying to pass the buck to Alex. I do not mean to do that, of course.

Mr. Holtzoff. I think nobody would so construe it.

Mr. Robinson. I would be willing to work with him on that, surely.

The Chairman. All right, then (a) is to be rewritten.

Mr. Robinson. Are there any other suggestions or corrections on rule (a), Judge?

The Chairman. Is that satisfactory, Mr. Dean, and does it meet your objections?

Mr. Dean. Oh, yes.

The Chairman. Are there any other objections, now? If not, we will pass to (b).

Mr. Robinson. Do you wish, Mr. Chairman, that I read that, as I did the first section?

The Chairman. I think so, yes. That will give us a chance to read it again while you are reading it.

Mr. Robinson. (reading)

"(b) Nature and contents of a written accusation. The written accusation shall be a plain, concise, and definite statement of the essential facts which constitute the offence charged against the accused."

Mr. Holtzoff. Suggested by Judge Crane?

Mr. Robinson. Yes, Judge, you will recognize that as your idea, from our September meeting, to try to state in a few words what was contained in the former rule, which sought to catalog or list the essential elements of the offence.

The Chairman. I recognize it.

Mr. Robinson: Continuing at line 14:

"It is sufficient without a formal commencement or a conclusion or other allegation which is not necessary in order to state the essential elements of the offence or to give notice to the accused or his assistants in making his defense or to protect him against a second prosecution for the same offence."

The Chairman. "It is sufficient without a formal commencement or a conclusion or other allegation which is not necessary in order to state the essential elements of the offence or to give notice to the accused or his assistants or to protect him against* * *."

I do not quite get that.

Mr. Glueck. That is a very clumsy sentence.

Mr. Robinson. Yes. Well, I would like to explain it. It perhaps has a touch of propaganda in it, that is the reason it gets clumsy. The object is to head off any possible criticism that by shortening our requirement for an indictment or information we tend to overlook the essential requirements of an indictment or information, namely, that it fails to give the accused adequate notice, or fails to protect him against second jeopardy.

The Chairman. I should think you would very much confuse by so many negatives.

Mr. Holtzoff. I suggest that could be left to the committee on style, because that is really a question of phraseology rather than of substance.

Mr. Glueck. May I suggest some such language as this to the committee on style:

"It shall be adequate even though not containing a formal commencement."

You see, when you say "it is sufficient" you sort of throw us off.

Mr. Robinson. When you say "shall be" you get into mandatory matters generally, not in this particular case perhaps.

Mr. Glueck. Not here.

Mr. Robinson. I think "it is sufficient" is preferable here, to "shall be".

Mr. Glueck. Some general language of that kind, because I think the present tense is the thing that throws us off.

The Chairman. Yes.

Mr. Holtzoff. The civil rules use the present tense, almost throughout.

Mr. Glueck. They do?

Mr. Holtzoff. Yes; and itwas done intentionally.

Mr. Robinson. Yes.

Mr. Dean. I wonder if we need it, if we are going to have forms in the back, from which there will be omitted any formal commencement or conclusion?

Mr. Robinson. I think we do, Gordon.

Mr. Dean. Why?

Mr. Robinson. Because we are going to say expressly that those forms are merely illusbrative, and I think that a good many district attorneys might hesitate to leave out "contrary to the form of the statute, and against the peace and dignity of the United States," and similar expressions, unless the rule expressly says they do not need to be in there.

The Chairman. You do not mind my exposing my ignorance, do

you?

Mr. Robinson. Well, you probably have none to expose.

The Chairman. Tell me what you mean by "formal commencement and formal conclusion and other allegations not necessary."

Mr. Robinson. Well, the formal commencement would include, "The grand jurors, being duly empaneled and sworn, upon their oaths say," or some other form of that sort. The formal conclusion is what, you know, was called "contra formam statuti," I think--against the form of the staute in such cases made and provided, and against the peace and dignity of the state" or "of the United States."

You will find those in these forms at the back of the book.

The Chairman. I think Mr. Dean's suggestion is probably a good one, because unless you have some such statements and it is a clear case as to what you mean--frankly, I did not know what you mean; I might have guessed at it, but I did not know definitely what you meant by "the formal commencement and the formal conclusion."

Mr. Waite. Jim, you asked to be reminded at this point of what I had mentioned in connection with section 14, that there was no statement that these forms were permissible and might be followed. If you put that in here, these forms may be followed, that would coincide with what Mr. Dean has just suggested, that you don't need to say anything about "formal conclusions," and so forth, if your forms do not have them; but you say that the forms may be used.

Mr. Robinson. I believe this language, too, is in your American Law Institute Code, isn't it, John?

Mr. Waite. Yes.

Mr. Robinson. And it is understood, isn't it, by the members of the American Law Institute, that that refers to commencements and to what others speak of as "formal conclusions"?

Mr. Waite. Oh, yes. With all due respect to Judge Crane, I think the lawyers dealing with that would know precisely what we mean.

The Chairman. That is all I want to know, if you think so.

Mr. Glueck. I move that the terminology be left to the committee on style.

The Chairman. As to this sentence?

Mr. Glueck. As to both the first and second sentences. For instance, it may be advisable to leave off in line 14, "charged against the accused." That may be surplusage.

The Chairman. Well.

Mr. Glueck. Go up to line 14. I think, up to line 19, it is desirable to have this in, but to make it clearer.

The Chairman. Yes. Are you all in favor of that?

Mr. Robinson. I consent.

(The motion was duly AGREED TO.)

The Chairman. All right.

Mr. Robinson. Line 19:

"It is not necessary to state that the accused acted unlawfully, feloniously, wilfully, maliciously, negligently, or recklessly, or to characterize his offence * * *unless such words are used in the statute, in the rule or other law as part of the legal definition of the offence charged."

Mr. Holtzoff. I would like to ask a question about that last clause, beginning with the word "unless." I am heartily in favor of the first part of this sentence, but "unless"--that

clause would mean to imply or would probably give rise to an inference that an omission of the word "malicious" or "malice aforethought" in a first-degree murder indictment would invalidate the indictment.

Mr. Robinson. That is exactly what it is intended to do.

Mr. Youngquist. I think it should.

Mr. Holtzoff. Well, I do not think it should, because while we want to inform the defendant what he is charged with, I would like to go back to the type of indictment that they have been using in King's County, Mr. Chairman, which I believe was designed by Judge Cropsey. Now, they had a murder indictment there which alleged"that the defendant murdered John Smith in the following manner and on the following date."

The word "murdered" covered "with malice aforethought" and all the other, and "intent" and so on. Now, it seems to me that we ought to, in the reformed procedure, get to a point where the omission of an adjective or an adverb even though it is part of the offence should not invalidate the indictment.

The Chairman. If you will pardon me the interruption, I think you have gotten that a little bit too narrow. Now, we did take out all this "malice aforethought," and that, but you had to state the nature of the crime, the act, and for murder in the first degree, the use of the word "murder" was not sufficient.

Mr. Holtzoff. Wasn't it?

The Chairman. No. You charged a murder in the first degree, "in that with premeditation and deliberation," and so forth. That constitutes malice. "That with premeditation and deliberation," those are the words of the statute, "he did kill

John Jones on the night of so and so." Now, "premeditation and deliberation," those are facts. "Premeditated and intended to kill him and did kill him"--those are facts, and those facts have to be stated. That was the short form; but the word "murder" did not cover it, because there is murder in the first degree, murder in the second degree; and murder in the first degree was "with premeditation." Murder in the second degree was without premeditation but with intent; and those are the statutes.

We had to use the words. We had to state the facts. But the other adjectives were all left out, and that was covered by the first sentence, which is-

> "plain and concise and definite statement of the essential facts."

F-a-c-t-s! Facts are so important to all of us. We think we always get to the law before we get to the facts, but the facts must be stated which constitute an offence charged against the accused.

I do not see how you can narrow that, and I do not see how you can enlarge upon it. And, as you know, we have found it worked pretty well.

Mr. Holtzoff. Well, I just had in mind the thought, it is not necessary to require an allegation of intent in the technical terminology of the old common law and to invalidate an indictment if such intent is not properly alleged.

What we want is to preserve the right of the defendant to be sufficiently apprized of the crime with which he is charged, so that he may make his defense. Now, suppose the United States attorney makes a mistake in the manner in which he alleges the

intent. No defendant is ever really and honestly prejudiced by such a failure or such an omission.

Mr. Youngquist. Well, Alex, isn't this true--that the mere fact that he makes a mistake in the manner of alleging the intent would not invalidate the indictment, in either event, but since intent, premeditation, and other states of mind are essential elements of certain offences, how can you state an offence without including those allegations?

Mr. Holtzoff. Well, suppose, for example, by mistake, the United States attorney in charging a fraud against the Government sets forth the facts of the fraud, and he fails to say, "with intent to defraud the United States." Now, wouldn't it make a laughing-stock of the law to let a defendant go free because the United States attorney, very reprehensibly perhaps, or perhaps his stenographer, forgot to copy in the words "with intent to defraud the United States"?

Mr. Seth. That is an essential element of the crime.

Mr. Glueck. There is no jeopardy there.

Mr. Holtzoff. He may go free on the statute of limitations.

Mr. Glueck. Yes.

Mr. Crane. If you started to allege fraud, now, any law student starting to allege fraud, how could you possibly allege fraud without intent to deceive and intent to cheat?

Mr. Holtzoff. If you are a good pleader, you would say that.

The Chairman. I know, but we will agree we cannot make rules for people who do not know the law.

Mr. Holtzoff. Well.

Mr. Glueck. No, I like this the way it stands. Where a term used, of this kind, is put into the statute, particularly,

not such things as "feloniously", because they usually are surplusage, or "unlawfully," but when it comes to "wilfully, maliciously, negligently, recklessly, fraudulently," it seems to me those are the substances of certain offences. We just can't get around it.

Mr. Holtzoff. Just to bring the matter to a head, to get an expression of opinion, I move to strike out the second clause of the sentence beginning on line 19. That is the clause beginning with the word "unless" and ending with the end of the sentence.

The Chairman. Is that motion seconded?

(Not seconded.)

The Chairman. The motion is this--to strike out "unless such words are used in the statute or rule or other law as part of the legal definition of the offence charged."

Now, the motion is to strike those words out. Is that seconded?

(Not seconded.)

Mr. McClellan. If I may vote against it after seconding it--(laughter)

The Chairman. Whether it is seconded or not, let us get an expression of opinion.

Mr. Holtzoff. I would just as leave withdraw the motion, because I hear no expression of opinion.

The Chairman. No, this discussion is not too formal. Are you in favor of striking it out? If anybody is, say so; if not, we will consider it lost.

Mr. Dession. I would favor it, except I am not sure it goes quite as far as I would like to go. I am for it that far.

Isn't the problem this: I suppose we would all agree that before the pleading is finished facts should be set out which clearly cover every substantive detail of an offence. Now, the question in my mind is how much of that has got to be in the indictment or information, as against a demurrer, and how much of it are we left to have either there or in a bill of particulars, just so, when you put your initial pleading and your bill, which fits (if there is one) together, you have got it all there.

The Chairman. All you have got to do is state those facts which make an offence at law.

Mr. Dession. Well, normally I should say one would put all that in the initial pleading, because you do not always leave everything for a bill of particulars, I assume, but if we want to guard against pleadings being dismissed through an inadvertent error, then I think the extremely short form of pleading might be worth considering here; and so I would like to raise that question by asking those who have had experience with the New York short-form pleading. And as I understand it, that means that all you need in your indictment is a correct characterization of the offence, not setting out its elements, but if you said "first-degree murder," that is enough.

The Chairman. Just to answer your question--Mr. Medalie will correct me if I am not correct, because sometimes there is a big difference, sitting in a court where cases come up finally and only a few out of a great majority, and he is perhaps more familiar with it--but I haven't known of any short indictment that did not state all the elements of an offence.

Now, if they wanted to get the particulars, they would get

a bill of particulars, specifying certain details of the facts that the court may think they are entitled to have, but I do not know that any indictment has been dismissed because it did not state facts sufficient under the short form. Of course, that does not apply to certain matters where perhaps it is a testing out as to whether or not there has been a crime committed, on those facts, at all. That is a different matter.

Mr. Dession. No. I understand that. We have in Connecticut a statute modeled on your New York statute, and it is perfectly true that the State's attorneys do not ordinarily rely on that statute to the extreme. In other words, they will not simply give the name of the offence and leave everything else to the bill; but the point is, under the statute as we understand it there, one could do that.

Now, the effect at first is to avoid,to practically make the demurrer meaningless, except in cases where one could not in a bill of particulars allege facts that would round it out.

Mr. Glueck. But where you have a provision for the amendment of an indictment right then and there as you have, I think--don't you?--I do not see such a problem here. If anything is wrong, you just move to amend, right then and there.

Mr. Holtzoff. Oh, I don't think you can amend the indictment by adding an important allegation.

Mr. Dession. That is a little variance, is it not?

Mr. Medalie. Yes. I just want to make this thing clear. The short-form indictment, which is called a "simplified indictment," under the New York Code of Criminal Procedure, with the 1929 amendment, provides that you simply state the name of the crime, if it had one, such as treason, arson, murder, manslaughter,

or the like, or if it be a misdemeanor having no general name, such as an assault, and the like, a brief description of it, and if it is given by statute, a statement of the crime may also contain a reference to the statute defining the crime.

In other words, no element of the offence is stated, under the simplified indictment. The word is "simplified" indictment, rather than "short form". Now, the form given was-

"The grand jury of such and such a county by this indictment accuses A B of the following crime:

(SIGNED) District Attorney."

That is your simplified indictment, and that of course is not covered by our discussion at all.

Short forms such as Cropsey followed in King's County, simply say that "on such and such a date, A, with premeditation and intent to kill, killed or murdered B with a pistol," or "with a knife." That is the short form.

Mr. Glueck. Yes, but that includes the elements of the allegation of first degree murder.

Mr. Medalie. Every element is there, in a simple statement of fact.

Mr. Glueck. Premeditation and deliberation are both necessary in New York.

Mr. Medalie. Yes, I meant to bring that out. Just as Judge Crane said, you cannot say"murdered," because there are two kinds of murder.

Mr. Dession. You would have to say "first degree murder," as I understand, and that would be good against a demurrer, and one would be entitled to a bill of particulars.

Mr. Medalie. Yes.

The Chairman. Of course, in practice, I do not know of any judge--I do not know how it is possible for any of us not to give a man a fair show.

Mr. Dession. Well, he will get it under a bill of particulars, under this statute.

The Chairman. Surely.

Mr. Holtzoff. Of course, we want to avoid a bill of particulars as much as possible by having the indictments set forth sufficient so that bills of particulars would not be necessary.

Mr. Dession. But isn't this clear, under a statute of that kind--and that simplified indictment is what I had in mind--ordinarily the district attorney will, when he draws this indictment, put his allegations of fact in, because he wants to avoid a bill of particulars, too.

Mr. Holtzoff. Yes.

Mr. Robinson. That is true.

Mr. Dession. The point is that if through inadvertence he has left out some word which it later develops should be there, that statute will protect him against demurrer and enable him to protect it by having a bill of particulars. Now, isn't that the result we want to get?

Mr. Holtzoff. Yes, but this provision of this rule will not protect the United States attorney in such contingency.

Mr. Dession. I agree, and that is why I am not sure this rule simplifies it as much as we want to.

Mr. Holtzoff. Why didn't you second my motion?

Mr. Seasongood. The motion is seconded.

Mr. Dession. I do go that far with you.

The Chairman. Do you want to strike out the words, -

"unless such words are in the statute or in the rule or other law as part of the legal definition of the offence charged"?

Mr. Seasongood. I understand that you always put in the statute under which the crime is committed.

The Chairman. Yes.

Mr. Seasongood. Well, then, if you have the statute, of course it is there in the statute, so what is the use repeating it in the indictment? And why isn't it all right to say he "committed first-degree murder, within statute such and such," and then as counsel looks at the statute he sees what is charged.

The Chairman. These words have reference, as I understand it--

"Unless such words are used in the statute or rule or other law as part of the legal definition of the offence charged"--

Suppose the word "reckless"is used, as in the case of reckless automobile driving resulting in manslaughter; most of the States now have a rule that it is manslaughter if a person drives--what are the words?--"recklessly," or "with gross negligence," I think.

Mr. Dession. Yes.

The Chairman. "Gross negligence."

Mr. Robinson. Sometimes it is "negligently."

The Chairman. Yes--"negligently." I think you would have to use those words, and that is what this prescribes.

Mr. Robinson. In a case of that kind.

Mr. Seasongood. If you said "manslaughter" wouldn't it be there in the statute?

"Whoever unlawfully kills a person is guilty of manslaughter."

It might state "negligently."

The Chairman. It might be good as against demurrer.

Mr. Longsdorf. You have many varieties of manslaughter. That is why I do not think that is a good example.

Mr. Glueck. Then under the federal system you have a code, and you could merely refer to the section of the code.

Mr. Holtzoff. Suppose you just allege that the defendant defrauded the United States by doing so and so?

The Chairman. I would get a new assistant!

Mr. Seasongood. Isn't that a violation of section so and so of the United States Code?

Mr. Dession. Under your simplified statute, here is what would happen: That is all right, provided you are able to follow it up immediately with a bill of particulars setting forth whatever words anyone could want to use, but if for any reason that bill of particulars is not provided or cannot be provided, then I take it you go right back and sustain a demurrer.

The point is it can be done by a bill of particulars. Now, the only question is in which paper these words must all appear.

The Chairman. Well, we had discussion on that, I guess, and according to the consensus it stays in.

Now, do you want to read the rest?

Mr. Youngquist. I should like to ask a question or two about the words,-

"unless such words are used in the statute or rule"

Mr. Robinson. That is right.

Mr. Youngquist. (reading)

"or other law, as part of the"

What does "rule" and what does "other law" as there used mean?

Mr. Robinson. "Rule" means a rule which has been passed or promulgated under the authority of a statute.

Mr. Youngquist. You mean "regulation"?

Mr. Dean. "Administrative regulation."

Mr. Holtzoff. That ought to be "regulation."

Mr. Youngquist. "Regulation" would express to me at least the thought.

The Chairman. Let us make that "regulation," if there is no objection.

Mr. Youngquist. Then what does "law" mean?

Mr. Robinson. I think we need both, because we do have some provisions of administrative bodies that are called "rules". That is what the indictment division of the Department of Justice tells me.

Mr. Youngquist. All right, let's make it "rule or regulation".

Mr. Robinson. Right.

Mr. Youngquist. Now, what does "or other law" mean, there, Mr. Reporter?

Mr. Glueck. Sometimes an expression is used which merely states a well known common law name of a crime.

Mr. Robinson. That is about it.

Mr. Glueck. In which event you have to go to the common law for a judicial interpretation.

Mr. Medalie. Like "murder on the high seas"?

Mr. Youngquist. All right, that explains it.

Mr. Seasongood. There aren't any common law federal offences, are there?

Mr. Robinson. No.

Mr. Glueck. No, there are no offences, but where the statute uses a common law term anddoesn't define it, then you have got to go to the cases for a definition.

Mr. Seasongood. That is in the statute.

Mr. Medalie. I think you have another situation, in defining federal territory, a place in a state, like the post-office building, like the customs house. The laws of the State of New York, for example, up till a certain date--they change it as they go along; every once in a while they catch up and bring it up to date--those laws are applicable. Those laws may be either statute or common law, as the case may be in the particular State, and I think you are safe in using the language "or other law".

Mr. Glueck. Or an Indian reservation--something within a State? How about that?

Mr. Holtzoff. No, Indian reservations, those crimes are provided by federal statute, but others, the federal reservations generally--

Mr. Glueck. But suppose they commit a crime which the federal statute does not account for?

Mr. Holtzoff. Then the crime is not triable in the courts.

Mr. Glueck. How about West Point?

Mr. Holtzoff. Well, I say, on all federal reservations, other than Indian reservations, the state law governs, except

as to those crimes that are defined in the federal statutes.

Mr. Medalie. That is the same as a crime committed in a post-office building.

Mr. Holtzoff. Yes.

Mr. Medalie. Customs house, national park, and so on.

Mr. Holtzoff. The only difference is that on Indian reservations the crimes are not punishable unless defined.

Mr. Dession. Doesn't that become clear, that "other law," if it means anything, means--

The Chairman. I do not think it is pertinent, here, but I wish that some time they could make it a little clearer as to when federal law applies to reservations like West Point, because I had a very sad experience regarding it, which depends more on the law governing the giving of copies, and when it came to a dock down in the Brooklyn Navy Yard where a man was killed, tried before me for murder in the first degree, my grief! we couldn't get the attorney general down here--long before your day--and neither of the title companies could ever find out how the United States got the property.

Mr. Robinson. A good place to pick for a murder!

The Chairman. A man was convicted of less than murder in the first degree. He was convicted. I gave him a long-term sentence. Then I got panicky and wrote the Governor, Governor Whitman, and he wrote back and said that I had not given him enough! and so I always was quite anxious about the man, until he came out. When he came out, I had him pardoned by Smith, so he could go back to his employment in Burlington, Vt.

He went back up there in the employment of the post office, and he got a big document like that, with a big seal on it,

which restored his citizenship, so he got in the post office. He hadn't been there very long before I got a letter saying he got married and was in difficulty--borrowed $500 from the mail by taking it out of the bag--in a little difficulty, and would I kindly send him down another certificate of character. He is down here now in some jail in the South. I get a letter from him once in a while.

Mr. Dession. Well, it seems to me this"or other laws", if it means anything, must mean that we incorporate all of the substantive case law. Now, if that is true, this is not making any change whatever in existing practice. Any artificial flourish which may now be necessary is still going to be necessary. That is, it doesn't change anything.

Mr. Medalie. We make only substantive law the subject matter of this. We don't make the procedural requirements that go with crimes in particular States. In a particular State that has common law crimes--I don't know if there are any. Are there?

Mr. Burke. Oh, yes.

Mr. Dession. In Pennsylvania.

Mr. Medalie. They may have procedure or pleading that requires great elaboration, with much technicality. That doesn't go with the common law definition of the crime, does it?

Mr. Robinson. No.

Mr. Dession. Well, I see that it would accomplish that.

The Chairman. Shall we go on now again, with (f), line 25? Will you read that, Mr. Robinson.

Mr. Robinson.(reading)

"If such terms or characterizations are necessary, they may be used without repetition in the same count or

accusation."

The Chairman. Go on.

Mr. Robinson. (reading)

"If there is more than a single count, allegations may be incorporated in one count by reference to allegations contained in another count, and the repetition of such allegations is thereby made unnecessary."

Mr. Youngquist. Why not strike out that last clause on the repetition?

Mr. Robinson. Well, somebody might need it for explanation, I think.

Mr. Holtzoff. No, because you have it in the first part of the sentence.

Mr. Youngquist. Incorporated by reference.

Mr. Robinson. I am willing to leave that to the committee on style, if you desire. I am not just ready to strike it out without examining it a little bit further.

The Chairman. All right.

Mr. Robinson. (reading)

"The indictment, information, or complaint should state in each count the official or customary citation of the statute, rule, or regulation which the accused is alleged therein to have violated, but the omission of such citation or an erroneous citation shall not invalidate the indictment, information, or complaint, or any proceedings thereunder."

Mr. Youngquist. I suggest, in place of "indictment, information, or complaint" we insert "written accusation".

Mr. Robinson. You prefer that?

The Chairman. Where is that?

Mr. Youngquist. My suggestion is that we substitute for the words "indictment, information, or complaint" where they appear in the last sentence the words "written accusation".

Mr. Robinson. Would we have to do that in line 30 and in other parts of the same paragraph, if we did that there?

Mr. Youngquist. Yes--30 and 35.

Mr. Robinson. Would you tell us why you think that ought to be done?

Mr. Youngquist. Well, we start with a reference to written accusations, and elsewhere as I recall it we define the written accusation as being "by indictment, information, or complaint". I think it would be simpler to use throughout, the words "written accusation" where we include all three of those forms.

Mr. Robinson. These words were used intentionally rather than "written accusation" because it was felt that it would make more explicit and more forceful to the minds of lawyers and United States attorneys and others that those are the terms we are talking about. Now, I can refer that to the committee on style, too, Mr. Youngquist, if you don't mind that, without taking action.

Mr. Youngquist. All right.

Mr. Dean. You use the term "written accusation" in other places though, Jim, instead of "information, indictment, or complaint," such as in line 34.

Mr. Robinson. Certainly, in lines 12 and 32, you are starting out.

Mr. Dean. 44 is about procedure.

Mr. Robinson. We haven't got to that yet.

Mr. Dean. Line 34, you use it.

Mr. Robinson. Well, I think maybe there is a reason for using it there.

Mr. Dean. Why define it anywhere--define "written accusation" as including indictment, information, and complaint--if every time thereafter that you want to use the words "written accusation" you refer to all three? That is I think the point that Mr. Youngquist makes. He means it saves space.

It is also in accordance with the principle we have just announced in this rule that you can incorporate by reference.

Mr. Robinson. I didn't hear you.

Mr. Dean. I say, it is also in line with the principle in this very rule, that you do not have to repeat.

Mr. Youngquist. In line 28.

Mr. Robinson. Line 28? Well, of course, that is applying to written accusations.

The Chairman. You make that as a motion, that we define it?

Mr. Dean. I think it is a good suggestion, which would simplify the rules throughout, particularly since we have defined it.

Mr. Glueck. I second the motion.

The Chairman. It is moved, in rule (1) where we have the definition, we include a definition of "written accusation."

Mr. Youngquist. No.

Mr. Glueck. No, I beg your pardon, Mr. Chairman. I think the motion was that inasmuch as we have the definition of "written accusation" to include these three possibilities, that hereafter we merely refer to the written accusation only, instead of "indictment, information, or complaint."

The Chairman. Those in favor of that, say aye. Are you

sure you understand that?

Well, we have here, you see, the words "indictment, information, and complaint," and they run through this chapter very frequently, and it is suggested that instead of the three words, the words "written accusation" be used, and that somewhere--is it in this chapter?--that "written accusation" be defined as including "complaint, indictment, and information."

Mr. Robinson. Yes.

Mr. Holtzoff. It is already defined in rule 38, Mr. Chairman.

The Chairman. It is defined? Then if it be defined, the motion is that the words "written accusation" be used instead of the words "indictment, information, and complaint," where those words are necessary.

Mr. Youngquist. Is that right?

The Chairman. Is that understood by everybody?

(The motion was duly AGREED TO.)

Mr. Holtzoff. Mr. Chairman, I would like to raise a question as to the desirability of that whole last sentence. This last sentence provides that the indictment should cite the statute, but a failure to cite it carries no penalty, just as hortatory or precatory words. It seems to me that in those circumstances it is surplusage.

Mr. Dean. You can cite it by the figure, though, can't you? I think that is the answer, isn't it?

Mr. Holtzoff. I think that is, and a good pleader will always cite statutes, but some do not, and I do not think there ought to be a requirement. Certainly there is no requirement today.

The Chairman. But it says-

"The omission of such citation or an erroneous citation shall not invalidate the written accusation."

Mr. Holtzoff. Well, that being so, then it does not seem to me that this sentence serves any purpose.

Mr. Dean. It does.

Mr. Seasongood. I think it serves an educational purpose.

Mr. Dean. It does serve a purpose.

The Chairman. It points to the better practice, that is all.

Mr. Youngquist. The word "shall" is used, instead of in line 32, which indicates that it is an indication rather than a requirement.

Mr. Holtzoff. Couldn't we cover that by our sample forms?

The Chairman. Is there any objection to leaving it? I think that is pretty good.

Mr. Robinson. It is based on the recommendation of the Department of Justice, the section having to do with informations. Before I forget it, I want to express my appreciation for the assistance of the Department of Justice, and particularly its indictment section. Mr. W. W. Barron and Mr. George Kneipp have been really very generous with their time, and during the past two or three months we have had numerous conferences, and I am indebted to them for some of these forms that have been placed in the book.

This language as well as other language has been checked by them, at least by Mr. Kneipp, and their attitude has been this, that they have bean willing to offer us any possible assistance but at no time have they made any request or in any way exerted

any pressure to get us to adopt their views; and because of their helpfulness, including these matters that Mr. Holtzoff is just referring to, namely, lines 30 to 35, I wanted us all to recognize our indebtedness to them.

That is all I have to say, there.

Mr. Dean. Mr. Chairman, I would like to argue for the retention of this, because it makes clear that you can get it by a bill of particulars.

The Chairman. I think the concensus is for its retention.

Mr. Holtzoff. I am not addressing my remarks to that.

Mr. Wechsler. I have this question about it, Mr. Chairman. It seems it sometimes happens that an indictment which the trial court sustains under statute A was erroneously sustained, under that statute, but can be sustained on appeal under statute B, which was not in the mind of the draftsman or brought to the attention of the trial court.

Under the present rule of the Supreme Court that is permissible so long as the allegations are the same, of course. I wonder if there is anything in this language that would alter that rule? If so, I think it is a question that ought to be considered deliberately.

Mr. Robinson. Doesn't line 34 take care of that?

Mr. Wechsler. How about line (c) 2, however, which rather suggests that an amendment is necessary?

It may not be possible to get an amendment after judgment.

Mr. Robinson. I agree with your position, and I will say our effort has been to incorporate that view in our provisions.

Mr. Dession. It seems this might very well result in the conclusion that you had a material variance, and I think your

point is important.

Mr. Wechsler. Yes. That is my difficulty. Therefore, I am wondering whether it might not be well to strike (c) (2).

Mr. Youngquist. Yes.

Mr. Wechsler. And let the language of lines 30-35 stand. The result then would be that it is regarded as good practice, but not essential to the validity of the document.

Mr. Youngquist. I second that motion.

The Chairman. Do you want to take a vote on that motion in regard to (2), Mr. Wechsler? We haven't had that read, yet.

Mr. Wechsler. As you choose, Mr. Chairman. I will withhold it.

The Chairman. We are dealing with that?

Will you read that amendment as to the written accusation. Read the subdivision (2) so we will all know what it is.

Mr. Robinson. Beginning with line 42?

The Chairman. Yes, line 42.

Mr. Robinson. (reading)

"Erroneous citation. The court is authorized to amend an erroneous citation, rule, or other law, which is cited as the basis of the written accusation. The court may grant additional time or whatever other relief may be proper on account of the erroneous citation or on account of the amendment."

The Chairman. Would you want that stricken out, Mr. Wechsler?

Mr. Wechsler. I move it be stricken, Mr. Chairman, for the reasons stated.

Mr. Youngquist. I second the motion.

Mr. Holtzoff. I second the motion.

The Chairman. You have all heard the motion. Are there any questions about it?

Mr. Medalie. Yes. I have myself had difficulty finding out what the statute, rule, or regulation was, under which the Government was proceeding.

Now, there is a tremendous body of criminal law embraced within "rules and regulations." What the Supreme Court had to say about it in the early days of the new dispensation is still partly true. It is difficult for even experts to know, and those in the very departments that framed the regulations, just what the regulations are; and a lawyer who has recourse only to an ordinary over-sized library and various services finds it extremely difficult to find out all of these regulations.

It is very important for the proper preparation and defense of a case that a defendant and his counsel should get that information. Sometimes the importance of it is not evident even until a trial. Lawyers frequently call up the prosecutor and say, "Well, now, Joe, for goodness sake, will you tell me what this rule is, where I can find it? Have you a copy?" And not infrequently the young assistant district attorney says, "I will try to get one," his knowledge being based on a memorandum that comes from some department official, other than the Department of Justice.

I think it is very important, and we ought not to delete these things. I will agree that the right to amend ought to exist down to and including the time of trial, but the defendant and his counsel ought to get that information.

Mr. Holtzoff. Well, I have in mind the identical situation that Mr. Wechsler referred to. I do not think we ought to make

the criminal procedure more complicated than it is. Today, suppose you indict a person for harboring, admitting that the allegations are not sufficient to make out the crime of harboring, but they are sufficient to make the defendant out as an accessory after the fact. That is a typical situation that occasionally arises.

Mr. Medalie. This does not prevent that. It is the power of the court.

Mr. Holtzoff. No, but if I may finish, I understand of course that under this there could be an amendment prior to the trial, but suppose there is a conviction and you go up on appeal, I think that the appellate court should have the right to affirm the conviction, if the conviction may be sustained under the one statute or the other statute, rather than the one stated in the indictment.

Mr. Medalie. Now, there really are different elements in these offences, and I think a defendant ought to have an opportunity to raise the question. If he raises the point during the trial, or at a proper place, before the trial, he ought to be set right, and all that is in this, here, is giving him an opportunity to say that he does not know, and ask to be set right.

Now, if during the trial--now take your case--if during the trial of a person charged with harboring, on facts that do not make out harboring, but which make out this "accessory after the fact" situation that you mention, he should know that, even during the trial. I do not say that he should raise the question after a conviction, for the first time.

Mr. Holtzoff. No, but suppose he raises it by the motion in arrest of judgment?

Mr. Medalie. I will agree it is too late. He should raise it during the trial. If at any time when he could meet the situation, he raises it, he ought to be set right.

Mr. Wechsler. Suppose he raises it during the trial, and the trial judge improperly rules that the indictment is sufficient and that the evidence makes a case. The trial judge has improperly interpreted the statute under which the indictment is based. There is a conviction and judgment. On appeal the defendant renews his contention; the attorney representing the Government on appeal finds himself unable to sustain the trial judge on the statute which he interpreted, but there is another statute under which the allegations of the indictment and the propositions proved constitute an offence against the United States. Why should not the judgment be affirmed? It is now, and I do not know of any abuse incident to procedure.

Mr. Medalie. I do not think there is likely to be abuse in matters of that kind. I think that gives an example of how it is we are led off the track of our discussion of regulations.

Mr. Wechsler. Well, the regulation case may be a special case, but this covers statutes as well as regulations.

Mr. Medalie. Yes, but primarily I would like the regulation thing attended to.

Mr. Wechsler. Then I think we might draft a rule specifically directed to the regulation, where the violation charged is a violation of the regulation.

Mr. Medalie. I agree with Professor Wechsler that in the case of well known crimes or statutory crimes the situation is not serious and we need not trouble about it, but I do think that when it comes to rules and regulations which would warrant

indictment, the person ought to know what the rule or regulation is.

Mr. Youngquist. George, subdivision(2) would not take care of what you have in mind, it seems to me. Really what you are suggesting is that at the request of the defendant the Government be required to elect before the case is submitted to the jury, what statute or rule or regulation they choose to prosecute, is that it?

Mr. Medalie. Yes, you are right, and I am willing to limit it to "regulation" because a lawyer ought to be able to find his way around statutes. Even if it is difficult, he can with effort do so.

Mr. Youngquist. But then if you do require the government to elect in that situation, the appellate court may not sustain a conviction on some rule or regulation other than the elected one, may it?

Mr. Medalie. You are quite right, yet we can provide for that. The test is whether the defendant has been misled honestly in his defense, or is uninformed.

Mr. Wechsler. That is right.

Mr. Medalie. And we should make provision for that. I do not believe that the demand for the rule or regulation should be a technical trick, and we must safeguard against that.

The Chairman. Is there anything else on subdivision (2)? The motion is to strike it out because it is covered, as it is claimed, by the lines 30-35, in the other provision at the top of the page. Did you wish to speak, Mr. Waite?

Mr. Waite. I will wait until after this motion is put.

The Chairman. No, no.

Mr. Waite. No, I am perfectly willing to wait.

The Chairman. Does it pertain to this motion?

Mr. Waite. No. I can vote in favor of this motion and then raise what I wanted to afterwards.

The Chairman. Oh, all right.

Mr. Medalie. There is something else, Judge, that is involved here, and that is the whole subdivision (c). As I remember it, and I haven't used that one for a good many years, it is Ex Parte Bain, I think it is 121 U. S., or something like that.

Mr. Wechsler. That is right.

Mr. Medalie. The last time I had it was in Westchester county over 20 years ago, and I may be wrong in the citation, but you know what I mean. The court may not amend--so the Supreme Court said, and the reason for that rule is that the indictment guaranteed by the Constitution is the act of the grand jury, and you cannot amend what the grand jury did, or the grand jury may indict, and amend an indictment, that is not the indictment of the grand jury. Now, that is not bad reasoning.

There is another way of dealing with it. For example, certain defects, errors, or omissions may be supplied without amendment. In other words, however we do this, we should do it in such a way that it does not offend that judicial constitutional rule.

Mr. Robinson. That is right. That case has been considered, and we think has not been in any way infringed on.

Mr. Medalie. But if you may amend the indictment, you do infringe on Ex Parte Bain, I think.

Mr. Robinson. Where do you find a provision that the indictment may be amended? I do not know of anything in it about amending the indictment.

Mr. Dean. (c) (1), isn't it?

Mr. Holtzoff. (c) (2) is the one we have been talking about.

The Chairman. If we come down to (c) we will have open discussion on that, if we dispose of (b). The only reason we took up (c) (2) was because it would be unnecessary if we adopt (b).

Mr. Holtzoff. There is a motion pending to strike out (c) (2), Mr. Chairman.

The Chairman. Yes, I know.

Mr. Holtzoff. Do you want to take a vote on that?

The Chairman. I thought perhaps that before going down to (c) we had better dispose of (b) first.

Mr. Medalie. I thought we had disposed of (b).

The Chairman. We have not disposed of (b), because I take it up in connection with the last sentence of (b), "The indictment, information, or complaint should state".

Mr. Medalie. May we vote on the question as to whether (c) (2) should be omitted?

The Chairman. Well, all right, we will put that first, if that is your desire. There is a motion made to strike out (c) (2).

Mr. Robinson. May I just say another matter that is to be considered--I am not taking sides either for or against this clause at all--

The Chairman. Do not be too modest.

Mr. Robinson. --but I do want to say this: It may not be in the minds of all of you, but the attitude of the United States attorneys properly ought to be considered. This proposal

has been considered at various judicial conferences, and we have had the advantage of United States attorneys in the office and otherwise, and we have their views, and there is a feeling that the Government would be--that is, on the part of some of them, and on the part of some judges--that the Government would be weakening its position by being required to cite the section of a statute or rule or regulation on which the indictment or information is based.

Now, (c) (2) tends to allay the apprehension that will be met by these rules when they are promulgated along about two or three months from now if present plans mature along with it, and I suggest it would not be wise for us needlessly to raise any apprehensions in the minds of a large portion of those concerned and charged with the duties of law enforcement of the Government, and I do not think personally that (c) (2) is applicable elsewhere.

That is merely my opinion, however, and I will be governed by what the majority opinion of the Committee is as to what you want.

Mr. Holtzoff. I would like to make a comment on that. I think that (c) (2) makes the work of the United States Attorney more difficult, because I construe (c) (2) as it is, Mr. Wechsler, as sort of a limitation on the last clause of (b), which provides that the omission of such citation or an erroneous citation shall not invalidate the indictment or accusation.

Then if you add (c) (2), which requires the amendment of an erroneous citation, and that gives rise to the question, what happens if you forgot to ask for an amendment, and that is the reason why I am in favor of striking out (c) (2).

The Chairman. The only reason Mr. Wechsler made that motion is that with the clause here, the sentence between 30-35, (c) (2) was unnecessary.

Mr. Holtzoff. Yes.

Mr. Robinson. I understand that. I think it is necessary. That is my point.

Mr. Waite. Mr. Chairman, in view of what the Reporter has said, perhaps I ought to go ahead with what I was planning to say before we vote on this motion.

I am in thorough agreement with you, Mr. Holtzoff, that no conviction ought to be reversed because of some omission in the indictment such as referred to here. On the other hand, I quite agree with Mr. Medalie that the defense connsel is entitled to know with some degree of accuracy what rule or statute is charged to have been violated; so if subsection (2) is stricken out, I had in mind to suggest that we add to the end of (b) this provision--(b) winds up this way:

> "but the omission of such citation or an erroneous citation shall not invalidate the indictment, information or complaint or any proceedings thereunder."

I think that is very wise.

Now, I suggest that we add:

> "If, however, the omission or error is called to the court's attention before the trial or during the trial, the court may direct correction of the accusation and may grant additional time or whatever other relief may be proper on account of the erroneous citation."

Mr. Robinson. May I say, Mr. Waite, that we did have that originally in (b), just as you say, but it seems we get extensivel

into an amendment by doing that, and (b) is on the nature and contents of a written accusation, and therefore it was felt that to be accurate in placing the matter under a proper heading, it should be put down under (c) (2). That was the reason; and you add what I think probably should be added, and I think Mr. Medalie would approve.

Mr. Medalie. Yes.

Mr. Robinson. --that (c) (2) be amended, if we retain that provision, that amendment must be made before trial, if you want a fixed time, that it should be made.

Mr. Waite. That is the thing I am interested in--before or during the trial.

Mr. Robinson. I think that would be a good suggestion.

The Chairman. Let me make this suggestion before putting the motion, to see if it meets with your approval. Everybody seems to be in favor of section (b). It is subdivision or section (c) that is causing the trouble.

We can amend that, on subdivision (2), when we come to it, just as you suggest, but if (b) is satisfactory to everybody, let us get rid of it, then take up (c) as a whole.

Mr. Waite. (b) would not be satisfactory if we struck out (c). That is what I am driving at.

The Chairman. Yes. Then we can go back and amend it, if we strike out (c). Is that satisfactory to you, Mr. Wechsler, if we do that?

Mr. Wechsler. Yes.

The Chairman. Just hold your motion in suspense until we get through with that.

Those in favor of (b) as amended, or suggested, say aye.

Mr. Dession. No.

The Chairman. You are not in favor of it?

Mr. Dession. On the grounds I stated before. I think it to some extent contemplates the pleading in the case of an information, and I do not want to see that done.

The Chairman. Well, it seems to be carried, and that probably will straighten itself out as we go along with some of these others.

Mr. Dession. I simply want to register my dissent on that at this point.

(The motion was duly AGREED TO.)

The Chairman. Now, we have disposed of (b) and gotten it out of the way. Now we will take up (c), and this section or subdivision (2), first, upon the motion of Mr. Wechsler to strike that out.

Mr. Medalie. Don't you want to take (1) first?

The Chairman. We will take (1) first if you prefer to do that.

Mr. Medalie. I would like to address myself to that.

The Chairman. Mr. Wechsler has a motion. Is that with your consent, Mr. Wechsler?

Mr. Wechsler. Oh, yes; indeed.

Mr. Medalie. The heading of (1) is "Surplusage." I think it should be "Surplusage and Variance," and my suggestion was made because I still respect Ex Parte Bain--or I "fear" it--put it any way you wish. With due regard for my fear of Ex Parte Bain, I would suggest that there be no provision for the amendment of an indictment, and I propose in substance the following language:

"The court may direct that a word or words which constitute surplusage may be disregarded where prejudicial to the defendant or confusing to the jury, and that any variance between the indictment and the proof that has not been prejudicial to the defendant shall be disregarded."

Mr. Holtzoff. I would like to say a word about your suggestion. Judge Lindley, of the Seventh Circuit, in the Seventh Circuit Conference, made a strong point of the desirability of the court having power to strike surplusage from an indictment, because he calls attention to the fact that the jury may take the indictment into the jury room and may read the indictment, and he called attention to an indictment that he had in which there were numerous very prejudicial allegations--allegations very prejudicial to the defendant, which were not relevant to the charge set forth, and he felt that as a matter of justice to the defendant there ought to be some way of striking out such surplusage from that so that the indictment could not be read to the jury with the surplusage in it.

Mr. Medalie. He could have done another thing much more simply--he could have accomplished the same result much more simply. It isn't necessary that the jury have the indictment, but the court can give the jury a schedule of counts, and similar things.

When an indictment contains surplusage, it ought not to go to the jury, and that's all there is to it. Now, a lot of dirty remarks in an indictment about the defendant just means that the Government cannot send that indictment in to the grand jury, and shouldn't, and just because they have gone and filed a scurrilous, unwise and unwarranted indictment is no reason why fundamental

laws should be changed or tampered with. And I think generally speaking, prosecutors do not file scurrilous indictments. In the one instance that the Judge mentions, this thing may have happened, but it happens so rarely that we are not depriving the Government of any substantial right or the jury of any substantial aid by ignoring that case.

Mr. Robinson. It seems to me that the point just now being discussed indicates that the difficulty both with (c) (2) and the recommendations in regard to it in this matter, I do not think that we need to look ahead to see whether or not a conviction is to be held invalid or upheld. That more or less partakes of surgery.

But I do think that we had better consider keeping the trial running along in a fair way, and if that requires that an indictment with scurrilous surplusage be amended by having the scurrilous part stricken out, or if it requires that a citation be corrected so that the arguments of counsel and the general conduct of the trial may be corrected, before the time comes to consider reversing a conviction, if any, it seems to me that we had better use preventive methods rather than surgical methods. That is a rough analogy, but that is the reasoning that I think ought to be considered basic in what we are doing here.

Mr. Medalie. Let us take the trial of a case in which the indictment contains certain erroneous allegations; that is, the proof does not conform to certain allegations in the indictment. All we need then is--

Mr. Robinson (interposing). Pardon me, now, George, just right there. I think we take that "detour" you were speaking about awhile ago with Mr. Wechsler. It is not just a matter of

having a variance, but it is a matter, as I understand Alex's comment, when he came back from speaking at the Seventh Judicial Conference and told me what Judge Lindley had said, it was a matter of protecting the defendant's rights.

Mr. Holtzoff. Yes.

Mr. Robinson. Before you get to a jury.

Mr. Holtzoff. That's right. The particular indictment he had before him was an indictment under the Sherman Act, I think, or under the anti-procurement act, where there were a lot of factual allegations creating atmosphere, which did not relate to the specific charge against the defendant, evidence of which obviously was inadmissible; but if that indictment were read to the jury--and I suppose counsel has a right to read the indictment to the jury in his summing up--

Mr. Robinson. Certainly.

Mr. Holtzoff. --and you can't stop him from doing it--it would have prejudiced the jury against the defendant improperly, so the suggestion was made by Judge Lindley that in order to protect a defendant against prejudicial, irrelevant allegations in an indictment, there ought to be some way by which it could be stricken; and I am suggesting that, for the defendant's protection, rather than for any interest that the Government might have.

Mr. Robinson. So the point isn't the matter of variance, but it is a matter of whether we are going to privilege libel. That is what it amounts to.

Mr. Holtzoff. Yes, sir.

Mr. Glueck. Let me ask, is this to be done, in practice, on the initiative of the judge, or only on motion of the accused?

Mr. Holtzoff. Well, ordinarily it would be done on the motion of the defense counsel, of course, although the judge could do it on his own initiative, but like most actions of a judge, the action would be taken on motion of the defense counsel.

Mr. Medalie. I notice this in your subdivision (1), and it may be in favor of what you say. You deal only with surplusage.

Mr. Robinson. That is right.

Mr. Medalie. Where the crime is alleged to have been committed on May 1, but is proved to have been committed on June 1, you do not provide for amendment. That, I suppose, is in deference to the rule in Ex Parte Bain.

Mr. Robinson. I think that is right.

Mr. Medalie. In other words, striking from an indictment is different from rewriting statements in it.

Mr. Holtzoff. That is right.

Mr. Medalie. Now, perhaps we are safe on that.

Mr. Holtzoff. All right.

Mr. Robinson. I think so, George. It ties in with our definition, too, in 30 (b).

Mr. Medalie. Do you think that is a sound distinction, Judge?

The Chairman. I should think so. I think so.

Mr. Medalie. Wait, now--I just want to think down the list of justices!

The Chairman. I suppose in that case and in others you cannot amend the indictment if it changes any substantive part of the indictment, but Mr. Medalie, in the change of something

that does not touch the substance of the offence, I should think it would be all right.

Mr. Medalie. No, that isn't it. You can't tinker with an indictment by rewriting any part of it. That I think is a fair statement of Ex Parte Bain, without over extending its holding.

Mr. Robinson. Well, George, there is a later case than that, and they cite it.

The Chairman. How old is the Bain case?

Mr. Medalie. It is 121 U.S. That is awfully old. Nobody reads that far back.

Mr. Robinson. 1887.

Mr. Holtzoff. There is a difference between striking something out of an indictment and changing something that is in it.

Mr. Medalie. Yes, that is what I have been pointing out. You didn't listen to my statement of my own reformation on the subject.

Mr. Robinson. Ex Parte Bain was decided in 1887, 121 U.S. 1.

Mr. Medalie. That was in my life-time.

Mr. Robinson. There was also a 1940 case that was in your life-time.

Mr. Medalie. I haven't caught up. What does that say?

Mr. Robinson. It is United States versus Reisley, 32 Federal Supplement 432, in which a word had been erased from an indictment and another had been substituted in place of it.

Mr. Medalie. Who decided that?

Mr. Robinson. 32 Supplement. I think there was certiorari refused on that. I am not sure.

Mr. Holtzoff. That must have been the district court.

Mr. Dean. That is the district court. What judge wrote that opinion? Judge Supp?

Mr. Robinson. We could send and get that 32 Supplement.

Mr. Glueck. What district?

Mr. Robinson. I do not know.

The Chairman. We move on. I doubt whether the courts today have any such rigid attitudes toward either evidence or pleading as they may have had in an earlier day. We know they had cases where they dismissed complaints and indictments because they left out a word, "dual". We have passed away from all those rigid attitudes, and we approach it with the idea that if a man has had a fair opportunity to know what he is charged with, he has got to stand the defense, and I do not think we are anywhere near so rigid, the courts today, either as to rules of evidence or as to the pleadings. We have gotten away beyond that. We are thinking of other things today, of course, than the rigidity by which everything is supposed to fit into a certain pigeon hole; and I should hate to see anything frozen so that we could not put life into our criminal procedure to meet the situations that have developed today.

Mr. McClellan. I still have difficulty with the right of the court to make any fundamental amendment or change in an indictment. I do not think we want to place this upon that ground. In order that I may understand what you are doing, I would like to know whether (c) (1) really contemplates anything more than such a change as the defendant (the accused) may ask for? And if it doesn't, why not say that the court upon motion of the defendant may do so and so, and not extend to the Government the right of even changing the indictment by taking something out of

it, because when you take it out, you do not know what the effect may be on the meaning of what you have left.

Mr. Seasongood. Suppose the court wants to do it of its own motion?

Mr. McClellan. I would not let the court meddle with a thing of that kind on his own motion. If the defendant does not move for it, I would not let him do it.

Mr. Holtzoff. I second the motion that we insert those words in (c) (1).

The Chairman. What is that?

Mr. Robinson. "The court, on motion of the defendant."

Mr. Holtzoff. "On motion of the defendant."

The Chairman. "The court, on motion of the defendant"?

Mr. Holtzoff. Yes.

The Chairman. That is (c) (1) I was talking about, Judge, and you were talking about (c) (2).

Mr. McClellan. No, I am talking about (c) (1).

The Chairman. Is that satisfactory to you, to put "on motion of the defendant" in?

Mr. McClellan. Yes, sir.

Mr. Seasongood. I do not see why you should limit it in that way. Suppose the defendant is not properly represented, and the court thinks it is injurious to the defendant. I do not see why he should not have the power to strike it out.

Mr. Holtzoff. The court could suggest to counsel that he make the motion.

Mr. McClellan. Oh, yes; that is so.

Mr. Wechsler. I wonder, Mr. Chairman, if it would be equally acceptable to use the words, "for the protection of the

defendant," instead of "on motion of the defendant," which would interpose the limitation that is desired and still eliminate the necessity for a motion.

The Chairman. Judge McClellan?

Mr. Youngquist. The danger on that would be that the defendant may disagree with the court as to what is or is not for his protection. I think it might better be left.

Mr. Seasongood. That will infuriate the prosecutor. With the explanation that Mr. Holtzoff makes, which had not occurred to me, that the judge can say, "Well, you move to strike that out," I would withdraw what I said.

The Chairman. Is there anything else now about subdivision (1)?

Mr. Medalie. Yes. It should not be limited only to surplusage, because any other change made on motion of the defendant ought to be validated. I think consent of defendant would cure a violation or any infringement of the Ex Parte Bain rule by the court.

Mr. Youngquist. I wonder if you are right about that, Judge? Suppose it is an indictment for an infamous crime, or a capital offense. It does not call in the class of informations, at all.

Mr. Medalie. Well, we have no trouble with informations.

Mr. Youngquist. No.

Mr. Medalie. Because they are not upon an act of the grand jury.

Mr. Youngquist. No.

Mr. Medalie. And therefore do not come within that condemnation.

Mr. Dession. We are allowing a defendant to waive indictment.

Mr. Youngquist. I am thinking of a class that may be prosecuted by information. There you might have the right to provide for amendment and all that, but where you have a crime that must be prosecuted by indictment, I doubt the advisability of going beyond what is here proposed.

Mr. Medalie. You can waive indictment, why can't you do anything else with the indictment?

The Chairman. I will tell you why, along the line you speak of. If a judge dismisses an indictment, the Government has an appeal, doesn't it?

Mr. Holtzoff. No, not under the federal statute.

The Chairman. Don't they, under federal statute?

Mr. Holtzoff. Only if a constitutional question is involved or a question of statutory construction. We have been trying to pass an act to enlarge our authority to appeal, so as to cover such cases as that.

The Chairman. Of course, the reason he dismisses an indictment is because it doesn't state facts sufficient to constitute the crime.

Mr. Holtzoff. The Government has no appeal, unfortunately.

The Chairman. Then my objection would not apply.

Mr. Wechsler. Ordinarily it involves the construction of a statute, if it is on the ground that the indictment does not constitute a crime. It is only when there is poor pleading that there is no appeal.

Mr. Holtzoff. I know, but the Supreme Court has held, hasn't it, that whether the facts constitute a crime is not a

statutory question, unless the meaning of the statute is involved? They have declined to entertain a good many of our appeals where we have pressed that question.

The Chairman. Well, gentlemen, what shall we do, now, with subdivision (1)? We have got "Surplusage and Variance."

"The court, on motion of the defendant, is authorized to strike from the indictment"

and the rest remains as it is.

Mr. Holtzoff. I move we adopt (c) (1) with this change.

The Chairman. "On motion of the defendant?"

Mr. Holtzoff. Yes.

Mr. Wechsler. Mr. Chairman, if there is to be a motion of the defendant, may we not eliminate the words beginning with the word "especially" in line 39?

Mr. Holtzoff. Yes.

The Chairman. Take "specially" out?

Mr. Wechsler. Take out everything--"especially" and everything after that in the paragraph.

Mr. Glueck. Everything after that.

Mr. Wechsler. Since it is to be on motion of the defendant, I should think that the requirement that it be prejudicial to the defendant is unnecessary.

The Chairman. Yes. Do you want to take out "variance"?

Mr. Robinson. George says "variance" may go out of the title.

The Chairman. Well, you read it as it is now, Mr. Robinson. Will you read it as it is now.

Mr. Robinson. (reading)

"Surplusage. The court on motion of the defendant is

authorized to strike from an indictment, an information, or a complaint a word or words which constitute surplusage."

The Chairman. Those in favor of this--

Mr. Medalie (interposing). Excuse me. May I make another suggestion? Why "is authorized"? Why not "may"?

Mr. Youngquist. "May."

Mr. Robinson. All right.

Mr. Youngquist. Leave that to the style committee.

Mr. Seasongood. I still think you ought to give the Government a locus penitentiae and let it strike out anything as surplusage? I do not see any use of limiting that power in the court.

The Chairman. Does anybody else wish to say anything? If not, I will put the motion as to whether we shall adopt subdivision (1) as just read.

(The motion was duly AGREED TO.)

The Chairman. Now we come to Mr. Wechsler's motion to strike out subdivision 2. That is open to further discussion, if any.

Mr. Youngquist. Should we consider in connection with that Mr. Waite's proposed addition to (b)?

Mr. Holtzoff. Why not consider Mr. Wechsler's?

Mr. Youngquist. They involve exactly the same subject matter.

Mr. Wechsler. Mr. Chairman, might it help in the consideration of this if instead of moving to strike (c) (2) I move that the question be referred back to the Reporter for further consideration? my purpose being to achieve a result under which a judgment will be affirmed if the only vice is that the statute

was wrongly cited, my further purpose being to adopt any proper regulation for the trial, for notice to the defendant, especially in the case of regulations.

That further study may be deemed to be wise, it seems to me, rather than to simply to operate on the text. We have got a problem here that requires attention.

Mr. Dean. Second the motion.

Mr. Medalie. I go along with it, provided that when we do take care of this business about informing counsel--

Mr. Robinson. You want those words in about the time limit, that the court is only authorized before trial?

Mr. Seth. At or before trial.

Mr. Medalie. I do not think you need that here, but the first thing is to get this out. The next thing to do is, either now or later, to make provision for supplying the defendant with information as to regulations and rules.

Mr. Holtzoff. Isn't that all taken care of by Mr. Wechsler's suggestion?

Mr. Youngquist. Yes.

Mr. Holtzoff. I think it is.

Mr. Medalie. I did not understand it that way.

Mr. Youngquist. Yes.

The Chairman. Mr. Waite?

Mr. Wechsler. I think Mr. Waite's point would be covered by my suggestion, Judge Crane.

The Chairman. I wonder if he would be willing to write out what he has, here.

Mr. Wechsler. He has written it here, and I will read it to the Committee if I can make out his handwriting.

The Chairman. Have him write it out and submit it to the Reporter, if he can do that. He is absent, but if he will, we will have him write out what he has suggested and submit that to the Reporter and see whether it has suggestions to be adopted.

Mr. Wechsler. Yes.

(Mr. Waite later wrote out a memorandum cnntaining his suggestions and submitted them to the Reporter, Mr. Robinson.)

Mr. Seth. It is understood, I take it, that the last three lines, 45, 46, and 47, are to be retained in principle?

Mr. Wechsler. Yes.

The Chairman. Now we come to (3). Will you read that.

Mr. Robinson. (reading)

"Amendment of Information by Adding a Defendant. The court is authorized to amend the information at any time before trial, upon cause shown by the United States attorney, by adding a defendant or defendants."

I take it that as a matter of style you would wish to make the same suggestion Mr. Youngquist made a minute ago, and say, "The court may amend"?

Mr. Holtzoff. No, I think it ought to be, "The court may permit the information to be amended." It would be counsel that does the amending, I think.

Mr. Medalie. That is right. Why limit it, in the case of informations, or to adding a defendant or defendants, in view of the fact that an information is exactly of the same nature as a complaint in a civil action?

Mr. Robinson. Would you wish to add "complaint" there?

Mr. Medalie. No, I don't mean that. I mean, why not permit any legitimate amendment of an information which you would admit

of a pleading in a civil case? because your information is practically of that character. It is not the act of a grand jury which gives it sanctity.

Mr. Robinson. I would be willing, but I thought you or the other members of the Committee would not be willing to go that far.

Mr. Youngquist. I think we should also include the complaint with the information.

Mr. Robinson. Yes.

Mr. Medalie. My point is that we deal with this the same as if it were a pleading in a civil case.

Mr. Glueck. There being no obstacle, let them add anything.

Mr. Medalie. Anything that is just.

Mr. Dean. Strike out everything after the comma in 50.

Mr. Holtzoff. No, I think we should strike out the words of line 50, as well, because the occasions might arise making amendment desirable during a trial.

Mr. Youngquist. Yes.

Mr. Robinson. I think the Committee turned that down at the September meeting.

Mr. Dean. That is pretty late notice to a man that he is going to be--

Mr. Robinson. I think the record shows that you turned that down, but if you are going to change your mind on it now it is all right with me.

Mr. Holtzoff. I think we might reconsider it. Hope so, anyway.

Mr. McClellan. You could not amend the information by adding a party defendant at the trial.

Mr. Burke. That is pretty late notice, I think.

Mr. Holtzoff. No, but if you are going to have general permission to amend, it seems to me you ought not to limit it to before the trial.

Mr. Glueck. Why not say, "by adding a defendant or defendants, before or during trial"?

Mr. Holtzoff. Why not just run 49, standing alone, and strike out lines 50 and 51? Why would that not be sufficient?

Mr. Glueck. I suppose so.

Mr. Holtzoff. The court could permit the information or complaint to be amended at any time.

Mr. Dean. But the word just before, I think, has to do with parties, that you can amend by adding a party. Do you want to amend it at any time?

Mr. Holtzoff. You can leave that to the discretion of the court.

Mr. Seasongood. The court would not amend after the trial has begun, by adding a party.

Mr. Holtzoff. No, I couldn't conceive of any court doing that.

Mr. Robinson. Might try it!

Mr. Longsdorf. Mr. Chairman, if there are going to be new defendants, they might claim the right to be indicted. They have not waived anything. I do not know that we ought to take care of that in this rule, but I would like to call it to the attention of the Committee.

Mr. Holtzoff. No, I do not think this would permit the addition of a person to an information where the information charges an infamous crime.

Mr. Longsdorf. I do not, either.

Mr. Robinson. This rule is based largely on a New York case. Mr. Wechsler has a book with the citation in it. It is a Strewl case, you will recall, in which there was a conspiracy charge against two defendants named, and the statement made that there were three unknown conspirators. The statute of limitations was about to run, and the other conspirators were discovered, and so the United States attorney was faced with the difficulty of getting all of them joined in the same indictment or for the same trial, and the opinion was by Judge Hand, in which he pointed out that the United States attorney had made a mistake in dismissing, or trying to dismiss, the first indictment against the original two named conspirators, in order that he might join them with the three, later discovered.

I am stating the facts just to show what confusion can result in cases of that kind where you cannot join defendants. The conviction was sustained, but it caused a good deal of difficulty in court, clear on up to the Circuit Court of Appeals. I just refer you to the opinion, as the courts say, rather than try to state it more exactly, but I would like to call attention to the fact that this possible joining of defendants is a provision that ought to be in our rules.

The Chairman. We agree that it is going to be restricted to just joining defendants?

Mr. Medalie. No.

The Chairman. That is the point?

Mr. Holtzoff. No.

Mr. Medalie. My proposal is that the power to amend shall be as broad as it is in civil cases.

The Chairman. That is another matter, isn't it?

Mr. Robinson. Yes.

The Chairman. Yes.

Mr. Robinson. Either another clause or a second sentence.

Mr. Holtzoff. I would like to move that we amend (c) (3) so as to read as follows:

"The court may permit the information or complaint to be amended at any time except that an amendment adding a defendant or defendants may be made only before the trial."

I think that would meet Judge McClellan's point.

Mr. Medalie. How do you amend a complaint, which is an affidavit? Somebody swears that certain facts are true.

Mr. Holtzoff. The information is sworn to, too.

Mr. Youngquist. He would make a supplemental complaint, wouldn't he?

Mr. Holtzoff. Yes.

Mr. Youngquist. Wouldn't that serve the purpose?

Mr. Medalie. I guess that would be the answer.

Mr. Holtzoff. Yes.

The Chairman. You have heard the motion. Is there any other discussion as to this subdivision (3)? Those in favor of the amendment as proposed by Mr. Holtzoff please say aye.

(The motion was duly AGREED TO.)

The Chairman. Now, (d), we come to, "Dismissal."

Mr. Seasongood. Excuse me, did you insert something, now, about variance in here?

Mr. Holtzoff. I think the rule on "harmless error" takes care of that, does it not?

Mr. Medalie. I think it does.

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Mr. Medalie. I think it does.

Mr. Robinson. Well, I might say to that, Alex, it is taken care of in chapter V, on Pleas, Motions, and so forth, or perhaps on trial. At any rate, I think that can come up later, Mr. Seasongood.

Mr. Seasongood. All right.

The Chairman. Now we come to the Dismissal, subdivision (d). Would you mind reading it?

Mr. Robinson. (reading)

"Dismissal. The court may dismiss the written accusation upon the motion of the United States attorney, or after hearing evidence in support of the motion to dismiss or of the written accusation."

That is of course one of these subdivisions that are set up for the committee's discussion; that is, to start on. I realize that the time for dismissal or nol-pros needs to be worked out more fully than that. I simply want your views on it. I take it that first clause is clear. That amounts to nol-pros.

"The court may dismiss the written accusation upon the motion of the United States attorney* * *"

Mr. McClellan. That's it.

Mr. Medalie. No. I would like to say something on that. The United States attorney files a nolle, and it is no longer any of the court's business. I know that here and there, there are some district judges who tell the clerk, "Now, don't you file this, until I pass on it," but the conduct is absolutely illegal. Today, the Government may dismiss any indictment by the filing of a nolle, and the judge has nothing to do with it.

This rule abolishes that right of the Government.

Mr. Robinson. The question is whether we abolish it. The State practice in many of the States is to require that a nolle pros cannot be granted except by consent and approval of the court.

Mr. Medalie. That is true, and that is certainly the law in New York.

The Chairman. May I interrupt you?

Mr. Waite, we strike out subdivision (2) on which you made suggestions to amend subdivisinn (b), by adding what you read, and we have dealt with it in this way. Subdivision (2) is to be rewritten, taking into consideration everything that has been said, and I would like to have you, if you will, submit to the Reporter for his consideration what you read to us.

Mr. Waite. I will read it, and the stenographer will take it, is that it?

Mr. Robinson. To save time, just write it out and hand it to us.

Mr. Waite. All right, I will do it that way.

The Chairman. Is that satisfactory to you?

Mr. Waite. Yes.

Mr. Robinson. Now, what is your suggestion?

Mr. Medalie. The nol-pros situation is this. The United States attorneys, with the possible exception of one district, today, do not file nolles without the approval, theoretically, of the Attorney General. Actually, whoever happens to be in charge of the particular bureau that has charge of that particular class of indictments. That is correct, isn't it?

Mr. Holtzoff. That is correct.

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Mr. Medalie. My time, and that of my predecessors, is filed with nolles, regardless of Washington, and it was so understood. The reason of course is that it is a large, responsible office, and you can't stop and have other people, who do not know anything about it, go and veto the details--the conduct of a going business that is operating on a large scale.

Furthermore, the kind of people who deign to be United States attorneys in the southern district would not let anybody veto it if they wanted to do it! Is that still the rule?

Mr. Holtzoff. The rule is that, in the Southern District of New York, and in the District of Columbia. The United States attorney is not required to get authority of the Department to nol-pros.

Mr. Medalie. All right.

Mr. Holtzoff. And that is due in part at least to the large volume of business in the two districts.

Mr. Medalie. Yes. The reason in the Southern District was something else, and make no mistake about that. Well, we go on from that point.

Mr. Youngquist. Shall we leave?

The Chairman. Yes.

Mr. Medalie. As a general proposition, there is no problem, no abuse.

Mr. Holtzoff. No.

Mr. Medalie. --no lack of control; and I have never heard a scandal in connection with nolles anywhere in this country, in any administration.

(Whereupon, at 11:55 a.m., the Committee recessed until

Pendell ends

1:30 p.m. of the same day.)

AFTER RECESS

(The Committee was called to order at 2:45 o'clock p. m., Mr. Crane acting as Chairman.)

THE CHAIRMAN: Gentlemen, shall we continue. I think we were dealing with Section D.

MR. HOLTZOFF: I move that we strike out the rule.

MR. MEDALIE: This says "After hearing evidence in support of the motion to dismiss."

THE CHAIRMAN: What do we need this section for?

MR. MEDALIE: The court may dismiss it because of motion which appears, that the indictment does not cause a crime. There are still other situations. The court may say there is no use wasting three weeks trying this case, you haven't got a case, we will just dismiss it, on motion made by the defendant. Then you have another case where an indictment has not been tried for about four years.

MR. HOLTZOFF: There is a rule, for example, about dismissing an indictment if the evidence is insufficient.

MR. MEDALIE: So there are situations covered.

THE CHAIRMAN: Any objection to striking it out?

MR. SEASONGOOD: Mr. Chairman, this raises an important question of policy; that is, whether it shall be necessary to get the approval of the judge before the indictment may be nolled. I understand in many States it is necessary to get the consent of the judge. I have seen cases nolled which in my opinion should not have been nolled. I have seen some cases nolled after intercession from Washington; also some gross income tax fraud cases.

Now, what is wrong with having the prosecutor get up and

say in open court why he wants the case nolled and letting the judge decide whether it should be nolled?

There is no doubt in my mind that your existing law is that the prosecutor may just nolle the case and the judge has nothing to say.

THE CHAIRMAN: State law?

MR. HOLTZOFF: It is just common law.

MR. SEASONGOOD: So it would be within the scope of the rules to change that if we had a mind to.

MR. HOLTZOFF: I believe that the present system has worked on the whole very well without any particular abuses because, as Mr. Medalie has pointed out, the federal prosecutor is not an independent officer, he is under the supervision of the Department of Justice, and the practice of the Department is that its consent must be obtained by the United States Attorney before any nol-pros is entered, with exception of two districts, but the Department would have the right to change the practice in those two districts if desirable; so you don't have the system of independent prosecutors who have no one to control them.

THE CHAIRMAN: I think the practice almost uniformly throughout the State courts is the indictment cannot be dismissed without the approval of the court.

MR. HOLTZOFF: Well, the federal system has worked well enough. There is no particular reason for changing it if the situation has not been abused.

MR. MEDALIE: In New York it may be dismissed only on motion made and on order of the court. You have as many independent district attorneys as there are counties. In other words, you

haven't got a Government. Over and above Government you have a lot of these officials aided and abetted by our Constitution that gives you a government without a head. You have to do it. Because some little fellow with about 3,000 votes in his county has all the power of the United States. There is no government.

MR. YOUNGQUIST: You would have those cases inthe federal courts.

MR. MEDALIE: They are rare. You see, this is the part of responsible government. The district attorney is supervised, not theoretically but actually, and very generally, and is responsible to the Department of Justice. If that Department goes wrong the President has to deal with it, and if it is serious enough he gets the blame from the press and the people. You have responsible government even though it seems to be removed from the people; whereas, in the counties, for instance, in New York, you have the burdens without having a particular government. You have to have a rule like that in New York because you don't have the responsible government you have in the federal courts. It will be corrupt at times; it has been; and the people knew it.

MR. YOUNGQUIST: I had 3½ years' experience, and in thousands of cases it is open to abuse, but I think the dangers of abuse are not sufficiently great to require taking away from the Department of Justice--that is the way it really works out --the right to file a nol-pros without the consent of the court.

THE CHAIRMAN: Those in favor of striking this provision out say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary, "no."

(There was a chorus of "nays.")

THE CHAIRMAN: To make sure, suppose those in favor hold up their hands.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven. Those opposed?

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven.

MR. WAITE: Mr. Chairman, I missed a part of the discussion this morning. What would be the substitute if D is stricken out?

THE CHAIRMAN: The point is this, that the Attorney General has the right to discontinue any prosecution without the consent of the court. That is what they have been talking about. That has been the practice, the custom. They say it is the law. And the court does not now have to approve. They can dismiss it or not prosecute it without the judge's consent. Now, they say this changes the whole system, that they cannot dismiss without the court's consent.

This does not apply to motions made at the end of the case on the evidence. That will be taken care of.

MR. WAITE: I notice a great majority of the State statutes require the consent of the court.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think Mr. Medalie explained very clearly the difference between the State and the federal rule. In the federal system you have your prosecutor supervised actively, not only theoretically.

MR. GLUECK: To what extent is that so? To what extent do you review the equities? Mr. Youngquist speaks of thousands of cases. He could not possibly review thousands of cases.

MR. YOUNGQUIST: This is 3½ years. First, it was reviewed by my staff, and then it came to me.

MR. MEDALIE: How do they do it in England? The Crown prosecutes, or it discontinues the prosecution. The judges have nothing to do with it.

THE CHAIRMAN: But now things are turned about. Instead of us going back 250 years to find what they did, they are coming over here now to find out how we do.

MR. GLUECK: Mr. Chairman, one of the ways of controlling the abuse in State practice has been--and I don't think it has worked very well in our State--to require the district attorney to note on the back of the indictment the reasons for the nol-pros.

As you might expect, those reasons quickly fall into rather mechanical routine statements such as "insufficient evidence." There is nobody there to check up on whether there is sufficient evidence.

Now, one of the reforms suggested for that was to assign, say, one of the judges to the job, say, of checking up on the abuse of discretion in this matter of accepting a nol-pros, etcetera.

Now, when we turn to the federal situation here again, the question arises whether this new office of the Administrator of the Courts, which is a sort of superintendent of justice, is not in a position, together with the assistants of the Attorney General's office, to guard against abuse of this thing on

anywhere near the scale that has occurred in certain counties.

Now, we have run into that problem in several of these rules. We must not forget that we now have a federal agency whose job is to look after the processes of judgment and see whether or not certain abuses cannot be avoided. So I would like to know practically whether that new office has done anything, or would contemplate doing anything, with reference to keeping sort of a check-up on the exercise of discretion.

MR. HOLTZOFF: The jurisdiction of that office is confined solely to what might be called the business side of the courts, not to the exercise of discretion either by counsel or judges, because that would be an infringement into the judicial field.

MR. GLUECK: Well, what about the Attorney General's office in actual practice?

MR. HOLTZOFF: Well, in actual practice before the United States Attorney nol-proses a case he submits the matter to the Attorney General's office and requests permission.

Now, that is not perfunctory. He submits a memorandum summarizing the case giving his reasons, and if the reasons are not sufficient there is a check-up, so, after all, isn't this a fact, we want to change existing practice in those matters in which existing practice has developed evils or abuses or defects? There is no system of abuses or evil that has developed on any important scale so far as nol-pros in the federal court is concerned. After all, the people are afraid of giving that authority to the prosecutor in the State court because the prosecutor might be subject to improper influence. That is the only reason. And that is due to the fact that the average county prosecutor is steeped in politics in the first

place, and, in the second place, no one has any control over him. You don't have that same situation here.

MR. YOUNGQUIST: You don't have it to the same degree, perhaps.

MR. HOLTZOFF: Justice Holmes said difference of degree is sometimes equivalent to difference in principle.

THE CHAIRMAN: May I suggest that the practice of resting the power with the Attorney General has existed for a long time, and still exists, that if we are going to do it we ought to do so with the pretty firm conviction that it needs changes; and the vote here is about equally divided. Would you advocate a change under those circumstances? I suppose if you felt there was any real reason for changing it and requiring the consent of the court, that we might put this in dual form, one, the present practice, and suggest the other requiring the consent of the court, so they will open it for discussion either by the judges of the court, when we submit this to him, or by those of the bar associations who may have had experience such as stated here; or by members of Congress when submitted to them. If you were going to change the practice which has existed for so long a time, and which may meet with the opposition of the Attorney General in Congress, is there any harm in submitting both ways?

MR. ROBINSON: Well, I wonder whether we are distinguishing the difference between supervision of United States Attorneys by the Attorney General. I think we are all agreed that that has been a wise provision. Therefore, we are not considering the abolition of that plan. The only question is whether after the Attorney General has approved the nol-pros whether or

not the judge then shall have the power to pass on or dis-
4 approve the recommendation which the United States Attorney then makes in his court. I am not sure yet what the federal judges' attitude will be. I would like to hear from Judge McLellan on that. I want to say that the Committee has not received recommendations that the present rule should be changed in not requiring the approval of a judge for dismissal or nol-pros.

As I stated to you in September, and as I stated to you in this letter, one of the governing principles we have adopted is to place full confidence in the trial judge as well as full responsibility. Now, if the matter of dismissal of prosecution is not to be left in the hands of the trial judge we are departing from that policy. If there is good reason for that departure, I think that is all right, but if we are departing from that rule we need to do so on full consideration.

THE CHAIRMAN: Mr. McLellan, why don't you tell us what you think about it?

MR. McLELLAN: I think what Mr. Robinson has so carefully stated is not to be applied to a situation where we are dealing with something started by the Government, and the question is whether the Government should be permitted to drop it. We have had this federal practice for all time. So far as I know, it has not been subjected to extended abuse, and if it were to be abused, the power to nol-pros, I don't know of any more effective way of bringing about such abuse than to require that the judge shall lend his support to a nolle prosequi. We know perfectly well in dealing with the United States Attorney

you become acquainted with him, you don't know the evidence on which the indictment is founded. He comes in to see you, if we have such a rule as this, he says "I would like to nol-pros this case, but the rule is that I must get your consent." Wouldn't you say to him, "What is the reason for it?" Yes, I think we would all say that. Well, he says, "Well, the evidence is insufficient. When the indictment was returned we had some evidence, but we found out that that evidence is really not to be trusted." Or if some other reason. The ordinary judge--and, we have to deal with the ordinary judge--would say, "Well, you are in a better position to deal with that than I am. I think I will give my consent to it." And so he gets it.

Then he nol-proses a case that perhaps he would not have had the courage to nol-pros exceptfor the fact he could share the responsibility with the judge.

I think we ought to be very, very careful of changing this long-established practice. Because I think the province of the court would in many instances become perfunctory.

THE CHAIRMAN: Now that we have heard more discussion on this, more reasons, shall we vote again on it?

MR. ROBINSON: May I ask one other question.

As Mr. Medalie has said, this matter of dismissal runs all through the proceeding. If we have a general rule about it--if we strike it out here we don't have a provision on it that is as general as this provision, and my question is if we strike it out what are we going to do for a substitute? Mr. Holtzoff said there is another rule or two where nol-pros is permitted. I wish you would cite those rules.

MR. HOLTZOFF: I didn't say that. There are rules as to

different types of dismissals. I think the first question is, shall we strike this out, and then we can take up what shall we substitute for it.

THE CHAIRMAN: Mr. Dean.

MR. DEAN: Mr. Chairman, on the question of substitute, in view of the very realistic remarks made by Mr. Justice McLellan, I would like to suggest this as a substitute:

A written accusation may be dismissed upon motion of the United States Attorney providing the reasons are made known at the time of dismissal. A dismissal may be made by the court at any stage of the proceeding upon good cause shown.

MR. WAITE: Would you state the reasons therefor should be entered in the record?

MR. DEAN: Well, they would be.

MR. WAITE: If "made known" means "entered on the record," I would be glad to second your motion.

MR. DEAN: That is what I mean.

MR. HOLTZOFF: I don't like the idea of the reasons being stated because that seems to insert into the rules an expression of suspicion that there might be wrongdoing, and I don't think we ought to have a statement of that kind in the rules.

MR. GLUECK: I don't agree with that. We have shown that abuses have existed.

MR. HOLTZOFF: I don't know that they have.

MR. YOUNGQUIST: I don't know of any.

MR. GLUECK: But you have not investigated all prosecutions from time immemorial.

THE CHAIRMAN: When they come in and recommend that indictments be dismissed, I require a written statement from the

district attorney of the reason so it would appear there, and it was written on the indictment and filed. Now, when anybody else came around to find out why an indictment was dismissed it saved a great deslof trouble for the district attorney or the judge. All they had to do was to send and look at the record. It was all public. It was filed right on there. And I did that.

MR. DEAN: It was protection to the prosecutor.

THE CHAIRMAN: It was protection to the prosecutor. Because as time goes on you have that statement right there.

MR. WAITE: In addition to that it is very desirable, as a matter of statistics. I don't think it is casting any aspersions in inquiring of the district attorney the number of prosecutions that have been dismissed, and the reasons why they are dismissed.

MR. ROBINSON: I think it is protection for the Attorney General. We have just had this situation about the W.P.A. out in Indiana. Mr. Dean knows about it. So does Mr. Holtzoff. My only suggestion would be I think the United States Attorney General has had his position strengthened greatly by the fact that the reasons were stated for the dismissal. So apparently he does it anyway.

MR. HOLTZOFF: I believe the reasons should be stated in those cases, but I don't know why we should make them required rules. I don't object to having the reasons stated, but to make that a requirement is another thing.

MR. MEDALIE: I nolled many cases, most of them inherited cases, because my predecessors nolled only current cases, so I had a tremendous accumulation. There wasn't one of them in

which my own nolle was not attached to a paper called a recommendation, signed by one of my assistants, setting forth the facts or the law, or whatever the reason was, with fair details.

The federal nolle runs a page and a half, including, for example, the nolle of the case of the United States against Fritz von Papen, and things of that sort, giving the reason, stating where we had looked for evidence, even attaching letters showing whether the State Department had anything, the Justice Department had anything, the F.B.I. had anything. Consistently we did that.

Now, it is done anyhow.

MR. YOUNGQUIST: May I ask, was that statement filed with the court?

MR. MEDALIE: Oh, yes. Always filed with the court. And with my assistant's signature, on whom I relied. Obviously, I could not know everything. Because I had 65 assistants.

MR. HOLTZOFF: Would you make the situation compulsory?

MR. MEDALIE: Let me give the New York statute. The court may either of its own motion or on motion of a district attorney order an indictment to be dismissed. In such a case a written statement of the reasons therefor shall be made by the court and filed as a public record.

MR. YOUNGQUIST: By the court?

MR. MEDALIE: Yes. All the court need do is say, "On the district attorney's recommendation," which states all the reasons.

THE CHAIRMAN: The court states it for the record.

MR. WAITE: I have here the statute of 14 different States,

which reads this way:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order any action after indictment found or information filed to be dismissed; but in such cases the reasons of the dismissal shall be set forth in the order, which must be entered on the minutes."

THE CHAIRMAN: If the reason is given anywhere, it may be connected with the indictment.

Now, that motion by Mr. Dean--would you read it again?

MR. DEAN: The only difference between mine and the one Mr. Medalie read for New York, and Mr. Waite read for 14 States, is that under this one the district attorney, if he entered a nol-pros, would not have to get the approval of the judge. And it reads, "The written accusation may be dismissed by the court at any stage of the proceeding upongood cause shown."

MR. HOLTZOFF: Should it not say, "The United States Attorney may dismiss"?

MR. DEAN: That would be better.

MR. LONGSDORF: I don't want to prolong this and propose a rule for the exceptional case, but I have a case in mind. There was a case in the Southern District of California where several men were indicted, I think for some espionage or violation of that kind, and one of them apparently was a diplomatic agent, or semi-diplomatic agent, for a foreign government, and the district attorney nolled the prosecution against that one and continued it against the other one, and he did not want to give any reasons why he did it, but the intimation was very, very strong that it was because of some information that came through the Department

of State. And there was a prolonged discussion at the conference over that very thing, and I thinkthe predominant sentiment of the conference was that reasons of that kind ought not to be disclosed.

THE CHAIRMAN: I happen to know the situation in this case. The United States Attorney was directed by the Department of Justice to nol-pros an indictment against the foreign agent. This in turn was done at the request of the State Department, and the reason the State Department was anxious not to prosecute was that the defendant had pleaded not guilty, and in order to prove the case against the defendant it would be necessary to reveal certain secrets to the defense, which would have gone to the foreign government whom the defendant represented, and the State Department felt that if the foreign government did not know these secrets they would rather forego punishing this particular defendant rather than have the information transmitted to the foreign government.

Now, all these reasons could not be stated in the nol-pros. The United States Attorney just entered the nol-pros at the direction of the Attorney General. He was confidentially informed, of course.

So there are exceptional cases where it would not be practical to enter the reasons on the record.

Now, I don't know whether you want to legislate for an exceptional case. I don't see why in a case of that kind they could not simply state the fact, for reasons of state.

MR. DEAN: The question is how fully you are going to state the reasons.

THE CHAIRMAN: Yes. It could almost appear on the face

of the indictment as to that.

MR. SEASONGOOD: May we have the advantage of hearing from the American Law Institute on it? Mr. Waite?

MR. WAITE: The rule provides both for consent of the court and the reasons of the court; either on application of the prosecuting attorney or upon its own motion it may, in its discretion, for good cause, order that a prosecution by indictment or information be dismissed. The order for dismissal shall be entered of record with the reasons therefor. No prosecution by indictment or information shall be dismissed, discontinued, or abandoned, except as provided in this chapter.

THE CHAIRMAN: Power given to the court instead of the Attorney General.

MR. WAITE: Either on application of the prosecuting attorney, or upon its own motion.

THE CHAIRMAN: Here the reasons shall be given by the Attorney General.

MR. WAITE: Mr. Dean, I understand, contemplates that the reasons shall be entered of record.

MR. HOLTZOFF: May we have a motion?

MR. MEDALIE: May I make a comment on this dismissal by the district attorney without the consent of the judge?

I do want to point out that if a judge is corrupt or politically influenced he can do all the things the district attorney is doing, or is suspected of doing.

THE CHAIRMAN: Will you read it again?

MR. DEAN: The written accusation must be dismissed--here is the way it should read, I guess: "The written accusation may be dismissed by the United States Attorney provided the

reasons for such action are made known at the time of dismissal. The written accusation may be dismissed by the court at any stage of the proceedings upon good ground shown, good cause shown."

MR. SEASONGOOD: Is that accurate? The court enters an order, doesn't he, on the nol-pros?

MR. HOLTZOFF: No. No. The United States Attorney just files a nol-pros.

MR. YOUNGQUIST: Strictly speaking, that is the way we ought to describe it.

MR. HOLTZOFF: I wonder if you wouldn't word it, "The United States Attorney may file a nolle prosequi"?

MR. YOUNGQUIST: A statement of the reasons for such action shall be filed. Is that it?

MR. GLUECK: I think so.

THE CHAIRMAN: You could vote on it.

MR. MEDALIE: I want to see what we are going to vote on.

THE CHAIRMAN: Yes. Well, now, if we get the substance on that--

MR. HOLTZOFF: It seems to me the wording can be left to the Committee on Style.

MR. DEAN: The United States Attorney may at any time enter a nolle prosequi providing a statement of the reasons for such action are filed with the court. The written accusation may be dismissed by the court at any stage of the proceeding upon good cause shown.

MR. HOLTZOFF: It seems to me that second sentence is very ambiguous. Does that statement mean the judge may dismiss an indictment because he thinks there should be no prosecution?

MR. YOUNGQUIST: For good cause shown.

MR. HOLTZOFF: I think the second sentence ought to be out.

MR. DEAN: Suppose we just leave the first one there and I won't submit the second one for the moment.

THE CHAIRMAN: And do you understand it now?

MR. MEDALIE: I do now. My difficulty was the second one.

MR. GLUECK: May I ask the first sentence?

MR. DEAN: The United States Attorney may enter a nolle prosequi providing a statement of the reasons for same are filed with the court.

MR. McLELLAN: Would it be permissible to have added to that something to the effect that that statement shall be a part of the permanent records of the court?

MR. WAITE: That was the condition on which I seconded the motion, that it would be.

MR. MEDALIE: Haven't you language in there that makes it of record by saying "filed"?

MR. GLUECK: And made a part of the record.

MR. MEDALIE: Well, if it is filed, it is part of the record.

MR. GLUECK: Do you think it is implied in the language?

MR. MEDALIE: Oh, yes.

MR. McLELLAN: I dare say it was all right as it was.

THE CHAIRMAN: All in favor say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary minded?

(No response.)

THE CHAIRMAN: Carried.

Now, when we come to the power of the court, there, of course, as far as I am concerned, I am up against the federal practice, of which you all know so much more about it than I do, and you will have to make suggestions on what you want to do.

MR. McLELLAN: There is a situation that Mr. Medalie called to my attention where the United States Attorney left a case stand along for years and the defendant, seeking a trial, cannot get it. I think that probably under those circumstances the court should be given the power to dismiss for want of prosecution, but that he should not have the general power to say, "I don't like this case, and it may be dismissed." I don't like the judges to have that power.

MR. GLUECK: Well, now, in the case you put, Judge, wouldn't that occur under the first part of this that we have already passed?

For instance, the United States Attorney would make out a list, say, of 200 old cases and after each one he would put, say, "Prosecution begun 8 years ago. Witnesses died or disappeared."

MR. MEDALIE: Suppose he doesn't? Suppose he just doesn't want to dismiss, he just doesn't like the defendant. That is the case the judge refers to.

MR. DEAN: It is getting more frequent, too. He makes a motion to dismiss the case. He makes a motion to set it or dismiss it. And then he can go to the C.C.A. and get a mandamus if it is not submitted. And it is frequently done now. My motion was where circumstances might arise that overlooked some

situation such as that. And it argues, possibly, for a general statement--

MR. HOLTZOFF: Well, I move at the proper place there be inserted a rule to be drafted by the Reporter to dismiss for want of prosecution if the defendant is pressing for trial and trial has been denied him.

MR. WAITE: I might say I have a specific proposal on that when we get around to it.

THE CHAIRMAN: Why don't you do it now?

MR. WAITE: I remember that the Code Committee was working on that and found a good deal of difficulty with precisely that matter. A man would be put in jail and an indefinitely long time would pass before any information was filed against him, and there was no specific provision to protect him. And in other cases he would have been indicted, and he could not bring the matter to trial. He might be out on bail, or he might be in jail, or there was no procedure, and, after a good deal of discussion, this provision was formulated:

"When a person has been committed to answer for an offense if an indictment is not found or an information filed against him for the defense within blank period after his commitment, or, when a person has been indicted or informed against for an offense, if he is not brought to trial for that offense within bla nk period after the indictment has been found, or information filed, the prosecution shall be dismissed upon the application of such person or the prosecuting attorney or on the motion of the court itself unless good cause to the contrary is shown, or unless the case has not proceeded to trial by defendant's consent."

MR. HOLTZOFF: I think it is a dangerous thing to set a definite time.

For instance, we have one district where you get grand jury sessions only every six months, in other districts you have it continuously. I think the defendant's rights should be safeguarded by a provision that if he is pressing for trial and a trial is denied him for a reasonable length of time, the case may dismiss the indictment.

THE CHAIRMAN: Maybe you want to have just the general statement.

MR. WAITE: This goes further. This says if an unreasonable length of time has passed, or a fixed time has passed, it must be dismissed on motion of the accused.

THE CHAIRMAN: Sometimes you cannot get a witness, sometimes you are holding off for a decision of the United States Supreme Court.

MR. WAITE: Well, if the time is made along enough--

THE CHAIRMAN: I think it should be left to the judges on that. I suggest the court have power to dismiss an indictment for failure to prosecute within a reasonable time.

MR. HOLTZOFF: I move we adopt the judge's statement as a rule to be inserted at the proper place.

THE CHAIRMAN: Not exactly in that language.

MR. HOLTZOFF: No, in a general way.

THE CHAIRMAN: With all of the criticism of the judges all of the time, really the judges in America--leave me and my court out now--I have known them all, and it is my belief they have done remarkable work. They can be trusted. Some are slow. Some are not. Some may not know much law. Some may be

irrational. But I don't know a judge that has not tried to do the right thing according to his own lights. Now, there are exceptions. Once in a great while there are exceptions, but I think the judiciary of this nation measures up to any other profession or to any other nation. Why don't we trust our judges?

MR. WAITE: I don't trust some of them, but I am perfectly willing to go along with you as far as the federal judges are concerned.

MR. McLELLAN: Would you be willing to cut the right of the judge to dismiss for want of prosecution down to cases where the defendant moves for dismissal upon that ground?

THE CHAIRMAN: Oh, yes.

MR. McLELLAN: I don't like throwing this thing around in a way that a judge can walk into a criminal case and do what he wants.

THE CHAIRMAN: Oh, yes. The defendant must move for it.

MR. NEDALIE: In connection with the dismissal of prosecutions, where no accusation is filed, there are many defendants who, as Mr. Waite has pointed out, would languish in jail and not even know what their rights are, not even have any counsel interested in them. I think there ought to be a way of safeguarding that sort of thing, and protecting those people, and the only way you will get it if the district attorney does not act is if the judge has the power to assume that responsibility, and, it ought not to be taken from him.

Now, there is another thing to be considered. In a particular district an enormous list or calendar of criminal cases may accumulate, and the district attorney do nothing about it,

and the defendants have been forgotten, some of them, but they have been under indictment. And that has happened.

Now, I think the judge should have the right and the duty to make sure that his calendar be cleaned up. If defendants' attorneys make motions, you are going to have a scandalous condition because of the failure of the judge to act because of lack of power.

MR. HOLTZOFF: But you do not have scandalous conditions today. We didn't have any scandals when you were United States Attorney.

MR. MEDALIE: There was a reason.

MR. HOLTZOFF: As a practical matter, if a criminal languishes in jail we get a memorandum from the director of the Bureau of Prisons calling attention to the fact that here is John Smith, a prisoner, in such and such a prison; he is not under indictment. He has been there so and so long, and the criminal division immediately gets on the job, and we have had two or three situations of that kind in one or two districts.

THE CHAIRMAN: They have these statistics from the Bureau of Prisons. They will follow that up, I take it.

MR. MEDALIE: But why should we write all of these rules on the basis of the presence excellence of the Department of Justice?

THE CHAIRMAN: We don't have to. We have just said there the court has power to dismiss indictments which have not been prosecuted within a reasonable time.

MR. MEDALIE: And also where there has been no indictment filed.

THE CHAIRMAN: That should be included. That will be a

separate section right in here (indicating).

MR. ROBINSON: Do you think this is the right place for it?

THE CHAIRMAN: I think this is the right place.

MR. WAITE: At the last meeting I made a motion that there be periodical reports of the prosecuting attorneys as to the status of every case. I understand there has been opposition to that from the office, the business office, the administrator of the courts.

I want to ask the Reporter, was that proposal for reports by the district attorney omitted from this draft because of the opposition? I don't find it anywhere in this draft.

MR. ROBINSON: No. There was no opposition whatever. I am trying to remember where to locate it.

MR. TOLMAN: It is in Rule 56. The provisions are drafted there. There is an alternate draft there which represents the views of the administrative office.

THE CHAIRMAN: We will come to that a little later on, Mr. Waite.

MR. WAITE: Yes. That has a direct bearing, it seems to me, on this whole matter of dismissals, because of delay. If we have such a provision the judge is in a position to know.

THE CHAIRMAN: All in favor of drafting a rule in some such form as I have stated, by the Reporter, giving the power to the court to dismiss an indictment or information that has been delayed, or any accusation that may be not prosecuted beyond a reasonable time, if you are in favor of that, say "aye."

Any objection?

MR. SETH: The objection I have is, is that the only

ground you are going to give the court? I think the broadest power should be given to the court. I have seen all kinds of judges, and I have confidence in the judges, and the judge should have control of the administration of justice in his court. I don't believe we should limit him to dismissal for want of prosecution.

THE CHAIRMAN: We have gone that far. We have to go piecemeal on it. Otherwise, we just get in general conversation. We have one rule on delay.

MR. SETH: I think the latter part of Mr. Dean's motion, I would make that as a motion.

THE CHAIRMAN: Read that again. You have read the first part of it there, Mr. Dean.

MR. DEAN: The written accusation may be dismissed by the court at any stage of the proceedings upon good cause shown.

MR. HOLTZOFF: Well, that language is so broad that it would seem as though the judge could dismiss a case merely because he thinks the case should not be tried.

MR. DEAN: Shouldn't he?

MR. HOLTZOFF: No.

MR. DEAN: If there is good cause why a case should not be tried, why shouldn't he dismiss it?

MR. HOLTZOFF: He hasn't got that power today. He has to try every case that is brought before him.

MR. DEAN: He can dismiss it two minutes after it is started.

MR. HOLTZOFF: Under that, he might dismiss because he doesn't believe in the statute.

MR. DEAN: It is broad.

MR. HOLTZOFF: It is much too broad.

MR. DEAN: Don't you have two alternates, to list the various instances in which you are going to give the judge the power to dismiss, and, on the other hand, is the other alternative making a broad conference of power upon the court to dismiss.

MR. HOLTZOFF: Today the judges have no such power.

MR. DEAN: How is that?

MR. HOLTZOFF: Today the judges have no plenary power to dismiss a case.

MR. DEAN: No, but the judge has power to dismiss it in many stages.

Don't you have two alternatives, with such limiting language--I am just thinking outloud.

MR. HOLTZOFF: If you give him plenary power, you are changing the existing law. Before changing the existing law we have got to see that there is some particular evil that we want to cure, but it seems to me that it would be a terrible thing to confer plenary power on a court to dismiss any prosecution at any time for anything that the court deems to be good cause.

MR. MEDALIE: Mr. Crane, in that connection, do you doubt that the judge has the power to effectively dismiss any prosecution without any rules? All you can say about his order dismissing the case is that he should not have made it, he had no legal authority to make it, but the order is effective, that indictment is out.

MR. McLELLAN: Is it?

MR. MEDALIE: I am sure it is.

MR. McLELLAN: Do you mean a single judge of a court by saying "This indictment is dismissed," do you say that does dismiss?

MR. MEDALIE: Oh, yes. That order is effective. That order is not a nullity.

MR. YOUNGQUIST: I don't think it ought to be.

MR. MEDALIE: I agree with you. We are not conferring plenary power with this.

MR. CRANE: A judge should be honest. No judge is going to do a thing of that kind.

MR. DEAN: A judge sometimes dismisses a case at the end of the opening statement, he sometimes dismisses a case at the opening of the government's case, he sometimes dismisses a case at the conclusion of the entire case; he sometimes reserves a ruling on a motion, then turns around and dismisses the indictment. Sometimes he will dismiss for the reason assigned by Mr. Medalie, and the thing your proposal covers, namely, that the prosecution has been delayed and the person is entitled to a speedy trial--I am anxious that we not overlook any of those good reasons.

We have an alternative, of listing them.

MR. HOLTZOFF: Well, to take care of these various contingencies, which you have eliminated, I think it is an undesirable thing to add plenary power in addition to those various contingencies. Because, after all, the experience of several hundred years of criminal cases has evolved various contingencies under which a judge can dismiss an indictment. All of those contingencies I think are now in the rules.

THE CHAIRMAN: The principal one is delay. The other one

is the fact that a case has not been made out by the prosecutor. Now, there are a lot of incidental matters, I suppose--you wouldn't call it dismissal, but a motion can be made, for instance--I don't know about the federal practice, but it would be the State--if the Attorney General should happen to be in the grand jury room while they are voting. That is a matter that can be brought beforethe court to set aside that indictment.

Now, if all those things are taken care of, I guess we can hold up on that general power.

Now, we come back to that Rule D. That is taken care of and Rule D is out.

MR. HOLTZOFF: Yes. And a substitute in its place.

THE CHAIRMAN: That will be the substitute. D goes out. Is that right, gentlemen? And a substitute adopted?

MR. SETH: I would like to have a vote on that general power of dismissal, Mr. Crane.

THE CHAIRMAN: Justread it again, Mr. Dean, please.

MR. DEAN: The written accusation may be dismissed by the court at any stage of the proceeding upon good cause shown.

THE CHAIRMAN: I want a vote on that.

Those in favor of that general power being given to the court, say "aye."

(There was a chorus of "ayes."

THE CHAIRMAN: Contrary minded, "no."

(There was a chorus of "nays.")

THE CHAIRMAN: Well, we have to show our hands again. Those in favor of that power being given to the court please hold up your right hand.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven. Now, those opposed.

(Hands were raised.)

THE CHAIRMAN: One, two, three, four, five, six, seven--where are you on this?

MR. ROBINSON: I voted the other time.

THE CHAIRMAN: It is not adopted. Seven to seven.

MR. YOUNGQUIST: Mr. Chairman, may I suggest in lieu of that, that the power be requested to see that the rules take care of all possible causes of dismissal of written accusation, in the proper place. We are discussing here merely the written accusation itself. When we get down to the point of trial then we have other causes for dismissal suggested by Mr. Dean, on the opening statement, at the conclusion of the Government's case, at the conclusion of the entire case.

THE CHAIRMAN: We are simply submitting this for the approval of three bodies, first, the bar, then the Supreme Court judges, and then the Congress, and we are divided here seven to seven. What do you think of the idea of having it put in some dual form to submit for discussion by the bar? The Reporter thinks perhaps it would be a good idea.

MR. SETH: I so move.

(The motion was seconded.)

THE CHAIRMAN: Those in favor, say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Contrary, "no."

(There was a chorus of "nays.")

MR. MEDALIE: May I say a word on that, Judge?

THE CHAIRMAN: Wait.

Those in favor of having this put in dual form, hold up the right hand.

(Hands were raised.)

THE CHAIRMAN: One, two,three, four, five, six, seven, eight nine.

Well, we don't have to count the others. We will do that. And then that is perhaps a little fairer to those who feel that way about it.

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Mr. Glueck. You mean, Judge, that in the final draft that we issue certain of these sections are to be drafted in the alternative?

Mr. Crane. Yes.

Mr. McClellan. My understanding is that we are doing that simply for the purpose of further discussion, and that is why I voted for it.

Mr. Medalie. If that is in, you may record me as voting "Yes." I voted "No."

Mr. Crane. You cannot put that in the final draft. I take it that we put it in for final discussion. I do not know whether it would be possible to put it in for discussion or just send it down to the bar.

Mr. McClellan. Let us see how we get along with it, first.

Mr. Seasongood. In the American Law Institute they put in "we raised this question," which they send to the bar, and I rather think that is a frank way to do it. This has been discussed, and this is the thought of the committee.

Mr. Youngquist. We have this difference: This is approved tentatively by the Supreme Court before it goesout at all.

Mr. Seasongood. As I understand it, we are going to submit it to the bar, first.

Mr. Youngquist. Only after the Supreme Court has reviewed it, not finally.

Mr. Holtzoff. The Supreme Court, my understanding is, will give permission to circulate the preliminary draft. That does not mean it approves the text of the rules, but it has to be good enough to give tentative approval or permission for

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its circulation.

Mr. Crane. However it is, it will be brought up again.

Mr. Robinson. I do not think there is any doubt that we will have another meeting before even the permission of the Supreme Court is asked to circulate this.

Mr. Holtzoff. I know that in this preliminary draft the civil rules committee framed several rules in alternative form. Of course, in the final draft they had to have just one rule, but when the preliminary draft was circulated several rules were framed in alternative form. I remember a number of them specifically; for instance, the one about the service of the summons.

Mr. Crane. May I call attention to the fact that rule 48, dismissal without prejudice, of the rules of civil procedure was submitted to the bar in dual form, first as rule 48 and then as alternative rule 48, just about as long. I suppose it was because of the discussion.

Mr. Seth. They also submitted in alternative form, Judge, whether we would adopt in the federal courts your New York hip-pocket practice of not starting a suit by filing a complaint with the court. That was submitted in alternative form in the civil rules.

Mr. Crane. Let us go to (e) Waiver of indictment. Would you like to read that?

Mr. Robinson. Line 56 of rule 30, (e), Waiver of indictment:

> "The accused may waive accusation by indictment in the case of a non-capital but infamous offense and may consent to have the proceeding conducted by an information.

The accused shall inform the court both in writing and in person that he is making a waiver upon the advice of named counsel, and the court shall accept the waiver only after the court is convinced that the accused is fully aware of his constitutional right and of the meaning and consequences of the waiver. The waiver may be made by the accused, and it may be accepted by the court, either in term time or in vacation. The attorney for the government may thereupon file an information against the accused and the court may arraign and accept the plea and proceed to dispose of the case, either in term time or in vacation, with jurisdiction as complete as if the proceeding had been by indictment."

2 Mr. McClellan. I have to ask a question, because I hardly know what is meant by "either in term time or in vacation" in a federal court.

Mr. Robinson. Some federal courts have terms, as I understand it, Judge.

Mr. McClellan. Well, we have terms in New York, but they go throughout the year.

Mr. Holtzoff. A term in a federal court continues until the date when the next term starts. There are no vacations.

Mr. Robinson. I suppose that the meaning there would be at times when the court is not sitting. Perhaps this approaches the discussion we had yesterday on open court, whether or not the court is conducting court only when in the court room.

Mr. Youngquist. Take, for instance, a state like Minnesota. We have six different divisions. The court is permanently located in two. Does the term in each of those

divisions continue until the beginning of the next term of that division?

Mr. Holtzoff. Yes, it does. Of course, the actual session of the court may last a week or two or three days or two weeks, but the court is open until the beginning of the next term.

Mr. McClellan. We have a provision to the effect that court is always open. I think we ought to avoid "term time"or "vacation."

Mr. Robinson. Our purpose is to say just what we want to say. At the present time, Judge, as I understand the procedure, it is that you cannot have a criminal case disposed of while the court is not in session at a particular place and time, but this rule would permit the defendant to come in and waive indictment and be charged.

This is based in part on the address of Mr. C. C. Baron made in Chicago two weeks ago, a member of the Attorney General's Committee assisting us, and he pointed out at that time how frequently a defendant will be left in jail at some place where the court is not sitting and is not available to hear his plea.

I think there is no way by which a man can be allowed to plead guilty and begin serving his term under the present procedure. So our question here is simply one of terminology.

Mr. Medalie. It means either during a stated term or at any other time.

Mr. Robinson. Yes.

Mr. Seasongood. Why can't you just say "at any time"?

Mr. Medalie. That won't have reference to term, and someone will raise a question that it means at any time during a term.

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Mr. Dean. Why not say "while court is in session"?

Mr. Seth. Or "at any place in the district."

Mr. Dession. That is your real problem -- finding a place where they actually are.

Mr. Robinson. As I understand, the recommendation is that this rule be modified to permit waiver and disposition by the court at any place in the district and at any time, whether or not the court is in session at that time.

Mr. McClellan. I do not see any necessity for that. If you say he may do it, he has to appear personally before the judge, anyway, under the terms of the rules.

Why not strike out line 65 where the words "term time or in vacation" appear?

Mr. Robinson. Would that satisfy the minds of counsel and the court that the court would be proceeding with jurisdiction?

Mr. Holtzoff. I would like to have the words "at any time," in order to emphasize that thought.

Mr. Robinson. At what point? At what line?

Mr. Crane. "By the court at any time."

Mr. Holtzoff. I suggest striking out "either in term time or in vacation" and substituting the phrase "at any time or at any place within the district."

Mr. Robinson. Line 65, then, following the word "court":

"The waiver may be made by the accused and it may accepted by the court at any time and at any place within the district."

Mr. Holtzoff. Yes.

Mr. Seth. I think that is largely covered, Mr. Reporter, by rule 11 (b), as we agreed on it yesterday -- what the court

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can do.

Mr. Robinson. Rule 8 (c) I think is probably a bit closer, is it not, Mr. Seth?

Mr. Seth. 8 (c) and then 11 (b). "Terms" does not amount to anything.

Mr. Holtzoff. I think 11 (b) and 8 (c) probably cover this, but I thought, for the purpose of emphasis, it might be well to have it in.

Mr. McClellan. Then, is it desirable to strike out "either in term time or vacation" in lines 68 and 69?

Mr. Holtzoff. Yes.

Mr. Seth. Yes.

Mr. Medalie. You do not think we ought to put anything else in?

Mr. Crane. Is it our intention always to have the advice of a lawyer? It says that the accused shall inform the court, both in writing and in person, that he is making waiver on the advice of named counsel. Suppose he has no counsel?

Mr. Medalie. Then the court appoints one.

Mr. McClellan. He cannot give up this right without counsel.

Mr. Medalie. It is pretty much like the arrangement in the arraignment part in the Kings County Court. Persons are brought up for pleas after indictment. Many of these defendants want to plead guilty. They know they are guilty. Nevertheless, the judge in charge of these arraignments will not take a plea unless some lawyer has talked this over with him, even for five

3 minutes, to see whether or not he ought to take a plea, and the judge picks one out of a multitude of lawyers that are around,

and he says, "Mr. So-and-So, talk to this defendant. See if he will plead guilty. He wants to. I won't take a plea until he does talk with you."

Mr. Holtzoff. I wonder if that should be applicable to a plea of guilty, whether that should be required for a waiver of an indictment by a grand jury and consenting to prosecution by information?

In the rural districts they get a raft of liquor cases. Many of the defendants are repeaters and many of them are anxious to waive indictment and get sentenced so as to start serving their sentence. Under those circumstances should there be an affirmative requirement that counsel be assigned before there is a waiver of grand jury indictment?

Mr. Medalie. Yes.

Mr. Robinson. I think a short answer to that is that I do not believe you can get the rule through without it.

Mr. Holtzoff. I do not agree with that, because we have various circuit conferences, bar committees, all recommending a rule on waiver of indictment, and the majority of them do not suggest that there should be a requirement of advice of counsel before indictment is waived.

Mr. Medalie. Many of them do.

Mr. Robinson. Many of them do.

Mr. Holtzoff. What?

Mr. Medalie. Many do.

Mr. Holtzoff. Some do, undoubtedly.

Mr. Medalie. That is the sentiment in New York.

Mr. Holtzoff. I know that is the sentiment in New York, but New York is not a typical district.

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Mr. Medalie. No, but I just give you a very large membership, that is all.

Mr. Robinson. You may notice that in the appendix of the book that you have there is a special study on waiver of indictment, showing the legal basis of this rule.

Mr. Holtzoff. With regard to the practice that you speak of in Kings County, you know that in most federal courts -- certainly that is true throughout the West and the South, or was true until the Supreme Court case of Johnson v. Zerbst -- there was not even an assignment of counsel until after the defendant pleaded.

Mr. Glueck. Is that desirable?

Mr. Holtzoff. I think that is very undesirable, and of course it is no longer permissible.

Mr. Medalie. Encourage people to think in terms of lawyers.

Mr. Glueck. I think it is desirable on its own bottom. The more we provide for the provision of counsel as far back as possible in the process, the better the rules will be, particularly in view of the temper of the times. I think these rules ought to take those protections of individuals very much into account wherever we get a chance.

Mr. Holtzoff. But this rule is in favor of the defendant and it is for the purpose of helping the defendant, rather than for the purpose of helping the court.

Mr. Crane. Is there any further discussion on (e)?

Mr. Dean. I have one suggestion, Mr. Chairman, at line 57, where it refers to "non-capital but infamous" crimes. As I read the whole section, you could not waive indictment in a

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non-capital, non-infamous case.

Mr. Holtzoff. You can be prosecuted by information.

Mr. Dean. That is not the question. You provide here for information, don't you?

Mr. McClellan. What line is that, sir?

Mr. Dean. This is on line 57. Why shouldn't it be made to apply to all cases, in other words?

Mr. Holtzoff. Because this rule provides a method of waiving a constitutional right. A constitutional right to a grand jury indictment exists only in the case of infamous crime.

Mr. McClellan. I want to find out what "infamous" crime, as used here, means. Do you mean where the imprisonment is more than a year?

Mr. Holtzoff. I think the Supreme Court has described an infamous crime as a crime punishable by imprisonment in a penitentiary.

Mr. McClellan. I did not know they had defined "infamous crime." They had defined a felony.

Mr. Crane. I wanted to know about that earlier in the hearing yesterday, but I hated to expose my ignorance, so I kept quiet.

Of course, in the states we have felony and misdemeanor. A felony, which I suppose corresponds to infamy, is understood by us to be a crime for which the defendant is sent to a state prison. In a penitentiary you go for a year or longer. We made that distinction quite clear.

Mr. Glueck. I think that in the Moreland case the United States Supreme Court defined "infamous crime" as one punishable

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by hard labor.

Mr. Holtzoff. That has been superseded, because the words "hard labor" are no longer used in modern statutes, and the more recent definition is "any crime punishable by sentence in a penitentiary."

Mr. McClellan. I have been all through it and had all
4 kinds of trouble with it -- the question as to whether a witness to a will was disqualified because he had been committed and had been convicted of a certain crime. I think it would be much safer, not knowing much more about it, if you would make it "felony" and not "infamous crime."

Mr. Holtzoff. I wonder if you will consider the fact that the Constitution uses the phrase "infamous crime" relating to grand jury indictment?

Mr. McClellan. What else?

Mr. Holtzoff. It does not use the word "felony."

Mr. McClellan. Felony or other infamous crime.

Mr. Dession. It is the grand jury section, "infamous crime" is the only expression.

Mr. Medalie. Mr. Longsdorf found the section, 541, old Criminal Code Section 335:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies" --

exactly what you say.

Mr. McClellan. And the Constitutional provision refers not to infamous crimes primarily but to felonies.

Mr. Robinson. We have made a careful study of this, if I might get a word in here. We tried to go clear to the roots

of this, and the Constitution says "infamous crime." In every prosecution for infamous crime the defendant is entitled to indictment by grand jury.

Further, in the Moreland case and other cases it has been definitely decided that any crime punishable by hard labor is an infamous crime. Therefore, as Mr. Alexander says here, even 30 days at hard labor is an infamous crime.

Mr. Holtzoff. There is one crime which is punishable by imprisonment in a penitentiary and which is designated a misdemeanor -- embezzlement, misappropriation of funds in a bank. That is punishable by five years in the penitentiary. The statute calls it a misdemeanor.

Mr. Medalie. Isn't this what we are trying to get at? Wherever a case now can be prosecuted only by the filing of an indictment, if it is not punishable by death, we would like to arrange for this waiver.

Those are the terms in which we seek, and we can avoid getting mixed up with "felony" and "infamy."

If we speak in terms of offenses which at this time, the time of the adoption of these rules, would be punishable only if prosecuted by indictment, then the indictment may be waived, unless it is a capital offense. Then we will have no trouble about words.

Mr. Glueck. I was going to suggest that the familiar way to do these things is to refer to them as indictable offenses.

Mr. McClellan. The trouble with that is that the smaller crimes are not indictable. There are many crimes for which you can return an indictment and in which an information is all right.

12m

Mr. Crane. You can say "prosecuted by indictment."

Mr. Medalie. "All crimes except for the waiver herein provided for must be prosecuted by indictment, may be waived."

The judge is right.

Mr. Crane. Offenses which must be prosecuted by indictment. The defenses may be waived. But we have got other provisions here. Yesterday, when we used that word "infamous," if I did not know what it meant, why, possibly somebody else in the United States might not know, and it would not be a bad idea to have a definition.

Mr. Glueck. The Supreme Court has defined it authoritatively.

Mr. Dession. No, because there have been statutes since which complicate that. It will be ironed out.

Mr. Holtzoff. There is a fairly recent case which defines it as punishable by imprisonment in a penitentiary.

Mr. Youngquist. I am a little troubled, if I may ask a question. The Constitution, as I understandit, requires that all capital offenses and infamous crimes be prosecuted by indictment.

Do we propose to provide for waiver of indictment in infamous crimes?

Mr. Seth. Yes.

Mr. Medalie. With the consent of the defendant.

Mr. Youngquist. Oh, yes. I forgot that. I am sorry.

Mr. Dean. Why don't we say "in non-capital offenses," and leave out "infamous"?

Mr. Holtzoff. I do not like "non-capital."

Mr. Robinson. We have looked that up in the latest

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Webster's unabridged. "Noncapital"is a well recognized, established term, without the hyphen. If you wish to use a term that is strictly correct, it is all right.

Mr. Holtzoff. Why don't we say "in non-capital cases"? Then it includes infamous crimes for which you have to prosecute by indictment and crimes which you do not have to prosecute by indictment.

Mr. McClellan. There is no use providing for waiver in there.

Mr. Holtzoff. No, but there is no use of putting the word "infamous" in there.

Mr. Robinson. We cannot change the Constitution.

Mr. Holtzoff. We do not use it. I do not see how we can get in trouble by leaving it out -- just in non-capital cases.

Mr. Robinson. I have a case, United States v. Moreland, which holds that a crime is infamous if punishable by imprisonment for more than one year, either with or without hard labor, or by imprisonment with hard labor. That is United States v. Moreland, 258 United States 433, in 1922. That is the latest statement of the Supreme Court on the subject.

Mr. McClellan. It seems to me that Mr. Medalie has put his finger on what we want.

Mr. Crane. Shall we leave the word "infamous" in or take it out?

Mr. Medalie. I would like to move that the provision for waiver in this subsection be in terms of crimes which are required to be prosecuted by indictment, except, of course, capital cases, and leave the language to the Committee on Style.

Mr. Holtzoff. I second the motion.

14m

Mr. Crane. Those in favor say "Aye." The motion is carried.

Mr. Holtzoff. Mr. Chairman, I want to raise a question about the second sentence. Apparently that second sentence, the sentence beginning on line 59, contemplates that the waiver must be both in writing and oral, in person. It seems to me it would be hardly necessary to require both.

Mr. Seth. It means, I take it, that when he is brought into court he has to be questioned about the written request that he has already sent in.

Mr. Crane. I think that was discussed by us last time, and we took that view of it.

Mr. Holtzoff. If he waives in open court, why should he also waive in writing?

Mr. Youngquist. What happens -- at least up in our state -- when an information is used is that the prisoner files with the court a petition that the court direct or authorize the prosecuting attorney to file an information, and ordinarily the prosecuting attorney already has his information present, so he appears before the judge with the accused, the accused presents his petition, and the court may then inquire of him concerning it. The court then takes his order for the filing of an information, and the information is filed.

Mr. Crane. I take it it is something like an acknowledgment to a deed. You sign it and also appear in person and acknowledge it before a notary.

Mr. Robinson. That is right.

Mr. Crane. So here he signs the waiver and appears in person and acknowledges that to be his signature.

Mr. Medalie. I think it works this way, Judge. First, the judge is satisfied that the man knows what he is doing and knows what he is talking about. Then, because he has signed, he has a record.

Mr. Robinson. It takes care of Johnson v. Zerbst.

Mr. Holtzoff. I was wondering why an appearance in open court would be necessary if you had it in writing.

Mr. Medalie. It is safer. Then the man can't run out on you and deny it.

Mr. Crane. Is there any further comment on section (e)?

If not, we will vote on it.

Mr. Seasongood. There is, but it is purely mechanical. You have again in line 58 "either in term time or vacation."

Mr. Crane. That has been taken out.

Mr. Seasongood. I beg your pardon.

Mr. Crane. Those in favor of section (e) as it now stands say "Aye." It is carried.

Mr. Waite. Before we pass on, there is another matter which I think ought to be added to rule 30.

Mr. Crane. I beg your pardon?

Mr. Waite. I think another matter ought to be added to rule 30, before we move on to the next rule. It is what I think is the conventional practice on thepart of the courts, and it certainly ought to be the practice if it is not, and it ought to be embodied in a section of this rule.

So I propose that we add to rule 30 a provision substantially as follows:

"No judgment of conviction shall be set aside, nor shall a new trial be granted, because of any defect or

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insufficiency in the written accusation or because of any variance between the written accusation and the evidence adduced, unless the court is satisfied that the judgment of conviction was not justified upon the merits of the case."

This does not have to do with appeals. I believe there might be something in appeals later. This has to do with the trial court setting aside the judgment or ordering a new trial.

Mr. Holtzoff. Rule 5, I think, covers the first part of your rule. It does not cover variance, which you also cover, but it covers the first part. That is rule 5, which we adopted yesterday.

Mr. McClellan. Isn't it broad enough to cover variance?

Mr. Waite. That is more to cover appellant procedure.

Mr. Holtzoff. No. It covers the entire field. We could perhaps insert a rule on variance in rule 5. That would be the logical place for it.

Mr. Waite. I must say that I do not think that rule 5 is expressed as emphatically as I should like to see it expressed. Rule 30 is a sort of catch-all section. It is covering all sorts of phases and aspects of the accusation. We have something about the contents, something about the form, something about dismissal, something about waiver.

That is the logical place to put in a proposition that these various possible defects shall not be ground for setting aside the judgment unless they affect the merits. I think it might very appropriately go in there specifically.

Mr. Crane. Would the last sentence of rule 5, be sufficient, do you think, Mr. Waite?

17m

"The court shall at every stage of the proceeding disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Mr. Waite. Well, I can see that it might do so. I still think, however, that as long as we have so much in rule 30 -- all these different aspects -- it would do no harm to have that specific proposition, and have it in rule 5 in more general language.

Mr. McClellan. If you start specifying in rule 5, you have to be careful that the specifications are complete.

Mr. Holtzoff. It seems to me that rule 5 is so broad that it does not need any amplification.

Mr. Crane. Have you all looked at rule 5?

Suppose you read that again, and we will vote on it.

Mr. Waite. This would be subsection (f) under rule 30:

"No judgment of conviction shall be set aside, nor shall a new trial be granted, because of any defect or insufficiency in the written accusation or because of any variance between the written accusation and the evidence adduced, unless the court is satisfied that the judgment of conviction was not justified upon the merits of the case."

That is limited, you see, to the trial judge's activities and limited to the matters contained in rule 30, which has specifically to do with written accusation.

Mr. McClellan. Professor Waite, rule 5 is not limited to the appellate court, is it?

Mr. Waite. Rule 5 is very general and covers the whole thing, but it seems to me that as long as we are talking about

these particular matters here, it would be desirable to have a particular specification in respect to the trial judges' activities.

Mr. Holtzoff. Don't you weaken the general statement if you begin to specify following the general statement?

Mr. Waite. I would say no, when it is expressed in that form.

Mr. Holtzoff. My observation is to the contrary.

Mr. Crane. Those in favor of Mr. Waite's proposal say "aye."

Mr. Burke. I would like to ask a question. Just what phase of Rule 5 do you feel is insufficient to cover what you seek to cover by this?

Mr. Waite. I do not suggest that Rule 5 as interpreted might be insufficient, but I am afraid it might be considered as a direction to the appellate court; and here I have in mind particularly the action of the trial judge in setting aside the judgment or granting a new trial. But Rule 5 will be considered as applying after the trial judge has got through with his activities.

Mr. Crane. Have you anything else to say, Mr. Burke?

Mr. Burke. No, that is all.

Mr. Crane. All those in favor of Mr. Waite's motion say "aye."

I am getting deaf, Mr. Waite.

Mr. Waite. I said "aye," at any rate.

Mr. Crane. Well, I guess it is lost.

Mr. Waite, before we go to 32, would you want us to take up what you proposed yesterday?

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Mr. Burke. That was on 20.

Mr. Waite. That is away back.

Mr. Crane. Or shall we go ahead and wait until Mr. Vanderbilt comes?

Mr. Waite. Go ahead.

Mr. Crane. We will go ahead to Rule 31. Do you want to read the first part?

Mr. Robinson. This is based on Rule 20 of the first tentative draft. According to your instructions at the September meeting, you wanted to combine joinder of defendants, joint or separate trials of defendants, joinder of offenses, and joint or separate trial of offenses.

Beginning at line 1, Rule 31:

"Permissive Joinder of Defendants and of Offenses.

"(a) Permissive Joinder of Defendants. Two or more defendants may be accused jointly in one count of an indictment or other written accusation if they are alleged to have participated jointly in the same offense, whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together or from two or more acts or transactions involving the same class of crimes or offenses. If such defendants are accused in separate written accusations, instead of being accused in separate counts of the same accusation, the court may order the written accusations to be consolidated for trial."

Mr. Holtzoff. I would like to ask a question of information. What is intended to be conveyed by the phrase "same

20bb

class of crimes or offenses?" I am not clear as to that.

Mr. Robinson. That is Section 557 of Title 18 of the United States Code. This rule is based on the old 1853 Act of the United States Code, 18 U.S.C. 557.

Mr. Holtzoff. But these rules are intended to stand on their own feet, and I am just wondering what is meant by "the same class of crimes."

Mr. Robinson. I think the way of getting these rules to stand on their own feet is to incorporate at this point this Federal statute, which has worked so successfully and which has been interpreted by the courts through allthese years, and that expression "the same class of crimes or offenses" is borrowed from the language of the statute.

I asked the same question of United States Attorney McGregor of Houston, Texas, and he told me of a situation in Texas which he felt represented that classification in 557.

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He said there were three defendants who, at three different places in the State of Texas, engaged in fraudulent transactions with regard to taking or getting from farmers their cotton gin receipts, and McGregor joined in one indictment all three of those transactions, on the ground that they were of the same class of crimes or offenses.

In other words, "the same class of crimes or offenses" does not necessarily mean that they all have to be felonies or that they all have to be misdemeanors and some infamous and some not infamous; but the interpretation of 557, as I understand it, by the courts would support the instances given by Mr. McGregor.

Mr. McClellan. Suppose A files a false income tax return

21bb

and B, living within the district but in a different town, files a false income tax return. Could you join those two under the language here?

Mr. Robinson. No, sir.

Mr. McClellan. What does the language say?

Mr. Robinson. Not under this language as interpreted in 557. That is one advantage of staying within that language interpreted by the courts.

Mr. McClellan. There you have two or more transactions involving the same class of crimes or offenses.

Mr. Robinson. Yes, but isn't it true that every provision and every statute is subject to certain general qualifications and exceptions, and here I think it must be fundamental that you can't join different defendants in the same indictment. You can't have count one against A and count two against B? That is fundamental.

Mr. McClellan. But this would put into one count those two.

Mr. Dean. It is fundamental, but this language would permit it.

Mr. Seasongood. I do not think so, because this says if they are alleged to participate jointly in the same offense.

Mr. Dean. That modifies it.

Mr. Robinson. Yes.

Mr. Medalie. Answering Judge McClellan, this is conceivable: Two bootleggers who are in partnership in the bootlegging business separately make an income tax return, but each helped the other fix up the books and fake the written evidence. Both could be indicted together in one indictment: First count, A

22bb

and B filed a false return as to A; second count, A and B filed a false report as to B.

Mr. McClellan. I concede the error of my ways, because I did not carry the last part of that language to the words "participating jointly."

Mr. Holtzoff. I think we ought to have an explanation as to what we mean by the rather ambiguous statement, "same class of crimes." What is meant by "same class of crimes"?

Mr. Medalie. A and B had committed joint burglary 1, burglary 2, and burglary 3. Those can be put together. But if A and B commit a burglary, a robbery, an arson, a murder, those may not be put together.

Mr. Holtzoff. I am not questioning that. I am questioning the language of this rule. I think we ought not to use the phrase "the same class of crimes," because that requires an explanation.

Mr. Medalie. I think the examples I give you cover that.

Mr. Holtzoff. What is meant by "the same class of crimes"?

Mr. Medalie. I will tell you what I mean. You can indict acts: False return, 1936; false return, 1937; false return, 1938; false return, 1939; plus perjury for each of those returns.

Mr. Holtzoff. What is"the same class of crimes"?

Mr. Medalie. You mean it means more than the same offense?

Mr. Holtzoff. To what does that extend? What is the meaning of the term "class" as used in this connection?

Mr. Robinson. Mr. Chairman, may I ask permission at this time to introduce to you an assistant United States Attorney who has drawn a good many indictments under this

23bb

Section 557?

Mr. Alexander is the Assistant United States Attorney in the Southern District of Illinois, assistant to Mr. Howard Doyle, who is president of the National Association of United States Attorneys. At my request Mr. Doyle had Mr. Alexander come with us for some two or three weeks.

He has had many years of experience as Assistant United States Attorney, and some of his indictments have been before the Supreme Court on various occasions.

The Department of Justice told me, when I had Mr.Alexander with me, that we could not have a better man from the field, and I am introducing him because I know that you may have questions from time to time that you would like us to refer to him.

At my request he has been here in the room, and I would like for him to take Mr. Holtzoff's question, for example, and tell us what has been his practice with regard to this clause-- what he considers to be offenses belonging to the same class of crimes.

Mr. Holtzoff. I should like very much to have that statement, but I would like to add this for Mr. Alexander's guidance,

8 perhaps. I think we ought to work out some language for the rules explaining what we mean by the term.

Mr. Medalie. When he tells us what he means by the term, then if the language is inappropriate, we will change it.

Mr. Alexander. The meaning is indefinite, but the thing about it is that the Federal Courts have interpreted that so often that the law is well and definitely settled. Now, I could not tell you what the term means, but I can pretty nearly

24bb

tell you if two offenses ought to be joined.

Mr. Crane. Give us an example.

Mr. Alexander. Take all the Internal Revenue offenses that have reference to liquor. They can all be joined in one indictment. Wherever you can show joint action, you can join a number of defendants -- anyone who has jointly participated.

Take counterfeiting. That is the same class of crime. There are probably twenty different crimes of counterfeiting. They are of the same class.

Mr. Medalie. For example, you have one crime that is called counterfeiting. That is making the bad money.

Mr. Alexander. That is what counterfeiting is.

Mr. Medalie. Then you have another crime that is passing the bad money.

Mr. Alexander. Then you have counterfeiting paper currency and counterfeiting coins. There is no reason why you should not join the two, if a defendant is committing both offenses at approximately the same time.

That statute is rather old, so that wherever a word is used that has a different legal meaning, that, it seems to me, is the word that should be used.

Mr. Medalie. Can you give us some examples in connection with the liquor traffic, such as forged stamps?

Mr. Alexander. You have a bootlegger here. He is making liquor. You can charge him with operating a distillery without a bond. You can charge him with operating a distillery without filing a notice with the Collector of Internal Revenue. You can charge him with operating a distillery without having a notice posted. You can charge him with keeping liquor in a

container that does not have the proper stamp on it.

I venture to say that there are fifty of them that you can join.

Mr. Holtzoff. Mr. Alexander's statement clarifies my difficulty entirely.

Mr. Youngquist. Form No. 6 is such an indictment.

Mr. Holtzoff. Instead of "the same class of crimes or offenses," I suggest that the rule ought to read, "involving crimes or offenses of the same class."

Mr. Medalie. Let us keep the hallowed words.

Mr. Holtzoff. That is for the Committee on Style.

Mr. Medalie. I move that it be excluded from the Committee on Style and that we accept the language as set forth.

Mr. McLellan. Suppose you have an indictment like that and it is alleged in the indictment that they did this jointly, and you prove that they both did it but that they did not do it jointly, and there is no evidence that they did it jointly. Does the judge have to order a verdict for the defendants?

Mr. Robinson. May I answer that in this way, Judge? At our meeting in September that question was considered and, in the light of that meeting and our discussion, I should like to suggest that at line 4 the word "jointly" be stricken out, and in line 5, after "offense," I would insert "whether they were acting jointly or independently."

The reason I would do that is this. I think that represents what the Committee wanted me to do at the September meeting, and I think the stenographic record bears me out. You remember that your instructions were based on the Washington case of State v. Blackley, in which the facts were that

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the defendant A had illegally parked a bus so that it partly covered the highway. Defendant B came along, intoxicated, and driving in such a way that he struck the bus and killed the deceased who was coming from the other direction.

In the Blackley case the indictment joined the defendants A and B, charging them with manslaughter of the deceased. In that case the Court, by a majority in which there was a strong dissent, held that the joinder was proper.

I presented that case to this Committee, and the Committee felt that that decision was right, and instructed me to draft the rule in a way that action by the defendants, whether they were acting jointly or independently, would be sufficient basis to join them as defendants in the same indictment.

Mr. McLellan. But you are citing a case where you can fight as to whether it is joint or not, but you have got to show that the two wrongs are concurrent.

Suppose you have a case where they are neither joint nor concurrent. You allege that they are joint, and that is not proved, though the two distinct crimes are clearly shown. Haven't you got the Government into a pretty fix? Aren't you in a situation where the verdict should be ordered for the defendants?

Mr. Robinson. How about the expression "in the same offense"? They are alleged to have participated in the same offense.

Mr. Seasongood. It spoils it if you take it out.

Mr. McLellan. If you do that, you face a trial difficulty.

Mr. Dean. Isn't it "alleged to have," so if it is alleged, whether the truth later supports joint action or not, it has

been sufficient for the purpose of joinder?

Mr. McLellan. It is rather tough to try two separate offenses together that have no connection with each other, just because they deal with the same type of crime.

Mr. Dean. I think it might be tough.

Mr. McLellan. I do not feel at all sure of it.

Mr. Robinson. That is just the difficulty. Just how would you state the Blackley case?

Mr. McLellan. You are stating the case of a concurrent action.

Mr. Crane. Shall we try to state a case to meet every particular fact and circumstance? How do we know what that will be?

Mr. Robinson. This Committee wanted me to do that, as I understood it.

Mr. Crane. I do not think so.

Mr. Robinson. That is not a fair statement. With due deference to you, that is not quite a fair statement of what the Committee was trying to get me to do in the last meeting. It was not to meet a rare case, but it was to meet a situation which the Committee felt was typical; namely, they did not want to require that the defendants must have acted -- I think they used the word "mutually" -- jointly -- but they did say that they would like to have the rule provide in cases of that sort-- not in just that particular case, but in cases of that general type -- that there be joinder permitted, on the ground that the evidence would be substantially the same; that there could not be prejudice, or, at least, if there was prejudice against either A or B, the Court could order that the joinder be changed

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and that separate indictments be brought.

I am simply trying to do what I understood to be the wish of the Committee.

Mr. McLellan. Even if they agreed with it, you are putting a case where the acts of the two defendants concurred in bringing about the result, but you have a rule that covers all kinds of separate cases if you take out the word "jointly," and if you leave it in --

Mr. Crane. Do you think it is a good thing to take out the word "jointly"?

Mr. Robinson. I am offering that for your consideration.

Mr. Crane. If you take out "jointly," it reads, "if they are alleged to have participated in the same offense."

Mr. Robinson. And then insert "whether" --

Mr. Crane. Why do you want to insert it?

"Two or more defendants may be accused jointly in one count of an indictmentor other written accusation if they are alleged to have participated in the same offense."

Now, if they participated in the same offense, they certainly can be joined.

Mr. Medalie. You have two situations. One is acting in concert, which is covered by "jointly." The other is not acting in concert and perhaps acting jointly.

Let me give you an extreme example, which you can visualize. A and B set out to kill X, each separately, not knowing of the other, and each with a different grievance. One does not know the other. Each gets himself an ax and waits in a place where X will show up, and simultaneously and in the dark, each at the same instance chops at him, and he dies.

There has been joint but not concerted action. I think you would make a case that could go to the jury where both could be convicted.

Let us say that there were pistols instead of axes and they were a distance of a hundred yards apart, A and B never having met. I think they could be convicted on a charge of killing with a joint action.

Mr. Crane. That is not excluded.

Mr. Medalie. No. "Joint" covers all that.

Mr. Crane. "Two or more defendants may be accused jointly in one count * * * if they are alleged to have participated."

Do you leave that "jointly" in there?

Mr. Medalie. Yes. "Joint" is more inclusive than "acting in concert."

Mr. Crane. "Participated jointly in the same offense."

Mr. Holtzoff. In your case they were not joint; they did not participate jointly.

Mr. Robinson. That would not cover your case.

Mr. Crane. What harm does it do? If they participated, they did act to a certain extent jointly. Whether they intended to act jointly or not, they did. I think it is refining it a little too much to take it out.

"Participated jointly in the same offense, whether the offense arose from the same act or transaction, or from two or more acts or transactions * * * involving the same class of crimes or offenses."

What is the matter with all that?

Mr. Medalie. You want to know whether "participated in the same offense" covers it. Suppose you leave out the word

"jointly."

Say, two of us, each not knowing what the other is doing, pours arsenic into a man's coffee or beer. We will make it beer, because that is a Court of Appeals case. The man died because of the poison given by each. He did not die twice; he died once. One grain of arsenic from me is as good as a grain of arsenic from Mr. Holtzoff. We both participated in the act or transaction. The act or transaction is the act or transaction by which the man died. His dying is the important thing.

Mr. Holtzoff. The word "jointly" should go out.

Mr. Medalie. I do not think the word "jointly" is necessary, but they participated in the same act or transaction. Would that cover your Washington case?

Mr. McLellan. When you get "jointly" out, then read your last three lines.

Mr. Crane. "whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together or from two or more acts or transactions involving the same class of crimes or offenses."

Mr. Holtzoff. Under that last contingency you could join two defendants, each committing, say, a separate forgery, a separate act of counterfeiting, with no connection between the two.

Mr. Crane. "Two or more defendants may be accused jointly in one count of an indictment * * * if they are alleged to have participated in the same offense."

What is the object of all the rest of that, whether the offense arose out of the same act or transaction or two or more acts or transactions? If they participated, it does not

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make any difference.

Mr. McLellan. But when you qualify the same offense by the last clause in the sentence, I am afraid you are getting into trouble.

Mr. Holtzoff. Why not stop after the word "offense" at line 5, and strike out the rest of the sentence?

Mr.McLellan. Will you say that again?

Mr. Holtzoff. Strike out everything after the word "offense" in line 5, and put a period after the word "offense."

Mr. Medalie. Can we check that with 557?

Mr.Robinson. I have been wanting to get a word in about 557, because I think it is quite material. 557 really applies to the joinder of an offense in (c), but the same language has been applied in 31(a), with the idea that the application on joinder of offenses would be equally applicable. If it is not necessary, I think we should leave it out.

Mr. Medalie. Somebody else is looking at the book now, but let me ask a question with reference to the words after "offense." Are they in 557 in any form?

Mr. Robinson. Yes. In other words, the language of 557 begins, as you see it down in (c) --

Mr. Medalie. I am talking about (a).

Mr. Robinson. Let me refer to (c), because that is the answer to your question. (c) is 557 exactly:

"When there are several charges against any person for the same act or transaction," et cetera.

557 also includes (d), beginning at line 21.

All that is changed from 557 in 31 (c) is the addition of

32bb

the words "or information" in line 19 and in line 20, because the old section 557 applied only to indictments and, in view of our extension of the use of informations, we should, of course, add "informations."

Mr. Holtzoff. Is 557 limited to joinder of offenses and not to joinder of defendants?

Mr. Robinson. We just got through saying that.

Mr. Medalie. Where do you have joinder of defendants in the existing statute?

Mr. Robinson. 557.

Mr. Medalie. Both for (a) and (c)?

Mr. Robinson. There is no statute on joinder of defendants. I misunderstood you.

Mr. Medalie. There is no statute that provides for joinder of defendants?

Mr. Robinson. There is no statute; it is common law.

Mr. Crane. Why can't we stop with "offense" and take out the rest of that sentence?

Mr. McLellan. May I ask one thing, and then I promise to keep still?

I do not see any harm, instead of putting the period after "offense," in making the rule a little more far-reaching by putting the period two lines farther down, after the word "together," and leaving out everything afterward.

Mr. Crane. I do not see that it adds anything to it. "whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together."

If they are connected together, it must be the same

33bb

offense.

Mr. Robinson. I favor the Judge's suggestion, because I do not think most lawyers or judges would take Mr. Medalie's case, the two-ax case, for example, and say that such a case would be included up there in lines 4 and 5.

Mr. Holtzoff. I think that perhaps would be an improvement.

Mr. McLellan. I think that makes it a little better.

Mr. Crane. "whether the offense arose from the same act or transaction, or from two or more acts or transactions connected together."

Mr. Holtzoff. Shouldn't that be "out of" instead of "from"?

Mr. Robinson. There again we are using the language of 557.

11 Mr. Holtzoff. The civil rules use the language "out of."

Mr. Crane. Is that satisfactory? To keep the words down to "together"?

If we get rid of this section, we will then adjourn.

Mr. Holtzoff. I suggest that we just say "a written accusation" in line 3.

Mr. Crane. Why not leave it "indictment or other written accusation"?

Mr. Youngquist. The Committee on Style can take care of that.

Mr. Crane. Those in favor of the phraseology of subsection (a) as it reads down to the end of the sixth line, ending with the word "together," and the word "jointly" being taken out on line 4, and striking out the rest of the sentence, say "aye."

34bb

It is carried.

Can we get rid of the rest of the section? All in favor of that, say "aye."

Mr. McLellan. There is one trouble with that. In the last sentence you have "in separate counts," and up above we have been talking about joining in one count of an indictment.

Mr. Seth. Why not strike out all of line 9 except the last word?

Mr. Crane. "If such defendants are accused in separate written accusations, the court may order the written accusations to be consolidated for trial."

I think that is all right.

Mr. Youngquist. The same language in line 19.

Mr. Crane. Well, we will take that up later.

All right, gentlemen. That disposes of subsection (a) of Rule 31. We will stop there.

Does anybody want to continue?

Mr. Holtzoff. I move we adjourn until 8 o'clock.

Mr. Crane. I will come at 8 o'clock if you all promise to be here.

(Thereupon, at 5 o'clock p.m., a recess was taken until 8 o'clock p.m.)

EVENING SESSION

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(The Committee reconvened at 8 o'clock p. m., upon the expiration of the recess.)

The Chairman. Shall we start, gentlemen, or wait just a minute or two more?

Mr. Glueck. It was 8 o'clock that we were scheduled to resume.

Mr. Robinson. Mr. Wechsler was very much interested in this Rule 31, that we were on.

Mr. Seasongood. We can go ahead now and come back to that later.

The Chairman. What is our next item?

Mr. Robinson. We can leave that. We can pass 31 until Mr. Wechsler comes, and in the meantime start with 32.

The Chairman. Did we approve all of 31?

Mr. Robinson. No.

Mr. McLellan. Just 31-A.

Mr. Burke. I move that Rule 32 be adopted.

The Chairman. It is suggested that we pass Rule 31 until Mr. Wechsler gets here and that we move on to Rule 32. Is there any comment on Rule 32?

Mr. Robinson. My question about that is whether the Committee feels that since this deals with dismissal, it should be placed with Dismissals, or should we leave it because it deals, too, with misjoinders. Perhaps it should be a subsection under 31.

The Chairman. Suppose we concern ourselves, Mr. Robinson, in the first instance, with the contents of it. Is there any criticism of the content?

Mr. Longsdorf. I should like to make an observation corresponding to one I made a while ago or this afternoon. This reads:

"Defendants may be dropped, or in proceedings by information defendants may be added, by order of the court."

Again, if the information was the result of a waiver, the additional defendants might not be willing to join in the waiver. I don't know whether or not that needs a saving clause. I am just suggesting it for consideration.

Mr. Robinson. Mr. Longsdorf and I have discussed that point, but so far neither of us has been able to convince the other on it.

Mr. Longsdorf. That is why I am asking for consideration.

Mr. Robinson. At present I feel that we have the question taken care of. The point goes back to what has been said about the Bayne case and other cases with regard to the changing of indictments or amending of indictments. An information, on the other hand, being the act of the United States Attorney, can be amended, as we agreed on previous rules this afternoon.

That amendment may take the form, in the case of informations, of adding or joining defendants. The first line reads:

"Misjoinder of defendants is not ground for dismissal of a criminal proceeding."

I think that is generally acceptable. It incorporates what is in the American Law Institute Code to the same effect.

In the next line -- "Defendants may be dropped" -- I take it that that is clearly within the power of the judge at any time. He may dismiss the proceeding as to one or more defen-

dants. Or if he proceeds by information, defendants may be added. Of course, you can't add defendants to an indictment.

Mr. Burke. Hasn't that been covered by Rule 30, at the bottom of the page? We redrafted that rule today which provides for the addition of defendants. It seems to me that it is repetitious to that extent.

Mr. Robinson. Perhaps you are right. What would go out?

Mr. Burke. The second sentence.

Mr. Robinson. Did we?

Mr. Burke. Yes. If the amendment is the way I recall it, it would provide for any amendment.

Mr. Longsdorf. I do not think the saving clause would save the right to indictment. The constitution would do that. It might save our faces.

Mr. Burke. As I recall the amendment down here -- I don't have it here -- the substance of it was that you could amend the information or complaint at any time as to any matter except as to adding or subtracting defendants.

Mr. McLellan. Except as to adding.

Mr. Burke. Was it only adding?

Mr. McLellan. That is all.

Mr. Burke. Then, it must be done prior to the trial.

Mr. Holtzoff. The text said that the court may permit the information or complaint to be amended at any time, except that an amendment adding a defendant or defendants may be made only before the trial. That is the one that we adopted earlier today.

Mr. Dean. If we are going to have anything about adding, should it not be in one place instead of in two rules?

Mr. Holtzoff. In view of that other rule, this seems to be repetitious. The second part of that second sentence is repetitious.

Mr. McLellan. Now the United States Attorney has the power to nolle pros. Do you want to put in that defendants may be dropped? He can nolle pros as to certain defendants, can't he, under the other rule?

Mr. Robinson. Yes. I suppose the reason for our placing it here would be that we are trying to consider the correction of misjoinder, which follows in the first sentence, suggesting expressly to the Court that if there has been misjoinder, while he may not dismiss, still he may drop a defendant or defendants who have been improperly joined.

Mr. McLellan. Then, why not put a period there and drop the rest of the sentence?

Mr. Robinson. In other words, put a period after "dropped"--

Mr. Holtzoff. I don't think you need that there, because it is covered by the prior rule.

Mr. Robinson. I was just about to read what goes out.

Mr. Glueck. What goes out?

Mr. Robinson. May we take care of Mr. Youngquist's suggestion?

The heading of Rule 32 is:

"Misjoinder and Non-Joinder of Defendants."

In that case you can't say you will drop the defendants.

Mr. Youngquist. Is there such a thing as non-joinder of defendants in criminal proceedings?

Mr. Holtzoff. There is not.

Mr. Youngquist. It seems to me that that could apply only

to failure to include necessary parties in a civil suit. I think that that "non" should come out.

Mr. Robinson. What else? We would still have the problem of what to do about dropping a defendant.

Mr. Holtzoff. I don't think you need that, because the dropping is a part of other rules. I think you can dispense with that whole second sentence.

The Chairman. What other rule covers it?

Mr. Holtzoff. The rule as to nolle pros. We adopted a rule on nolle pros this afternoon.

Mr. McLellan. In this repetition it calls attention to what you can do about misjoinder. It has that advantage.

The Chairman. Might we not in the interest of brevity, if it has that purpose, cover it in a note and refer to the other rules?

Mr. Robinson. I suggest you put a period after "added" and say:

"Any proceeding against a defendant may be severed."

Mr. McLellan. I don't know what that means. What do you mean by "severed"?

Mr. Medalie. To be tried separately on the same indictment.

Mr. McLellan. If that is what it means, that is all right. I guessed that was what it meant, but I don't know whether you could do something by way of severance.

Mr. Medalie. Except give them separate trials.

Mr. Holtzoff. Haven't you another rule on separate trials?

Mr. Robinson. Yes. I think when we come to that, we can see. At the present time, I don't think we should say we should

drop this.

Mr. Youngquist. I would suggest that the title read:

"Misjoinder and Severance."

I would strike out "of defendants."

Mr. Medalie. There isn't any such thing that anybody can be agreed about in connection with non-joinder.

The Chairman. Well, this reads:

"Misjoinder and Non-Joinder of Defendants. Misjoinder of defendants is not ground for dismissal of a criminal proceeding."

Is there any objection to it thus far?

(There was no response.)

The Chairman. Going on:

"Defendants may be dropped * * * "

Whether that is necessary will depend on another rule.

Mr. Robinson. Perhaps so.

Mr. Medalie. That is something else. A may object to being tried with B. B may object to being tried with A. Nevertheless, if they have not been properly joined, each may be tried separately. Therefore, with the exclusion of the second sentence you have a particular situation -- and very particularly where you safeguard the defendant's right in another section -- to require a severance in the interest of justice.

Mr. Holtzoff. You mean you cannot drop a defendant in a criminal case.

Mr. Youngquist. Dismiss as to him. That is what you really do.

Mr. McLellan. You just nolle pros, if you want to, or

you can hold him and try him later.

The Chairman. Is there a motion to strike the second sentence?

Mr. Holtzoff. I so move.

The Chairman. It has been seconded. All those in favor say Aye; those opposed, No. It is unanimously carried.

What about the last sentence? The question is whether that does not come in some subsequent rule.

Mr. Robinson. Mr. Medalie suggested that it was not covered by a later rule because it is covered here.

Mr. Medalie. In other words, where there has been misjoinder, the Court can cure the error by giving the man a separate trial rather than by taking action against the accusation.

The Chairman. May I suggest, for the Committee on Style, that as to the last sentence it be recast in the active voice?

Mr. Dean. And that it refer to the subject of misjoinder. As it is now stated, it is pretty broad.

Mr. Robinson. And to say, "may be granted a separate trial by the Court."

Mr. Medalie. The word "severed" covers it.

Mr. Robinson. I know it covers it, but it is technical.

Mr. Medalie. But everybody who practices Federal criminal law knows the meaning of the word "sever." That is, he is not tried with other defendants and expects on the basis of statistics that he will never be tried, but he may be.

The Chairman. On the rule as amended, are there any further remarks? If not, all those in favor of the rule as amended will say Aye; those opposed, No. It is carried unan-

8 imously.

We will now go back to Rule 31. I understand that Mr. Wechsler had some question about Rule 31(a).

Mr. Wechsler. My question, Mr. Chairman, related to the words in line 3, "in one count." It seemed to me that there was no reason why the accusation of more than one defendant in the same written accusation should have to be put in one count, and I don't know whether it was the Reporter's intention to limit this permissive joinder to the case where you were dealing with one count, or whether it was his intention to permit it for one count and a fortiori for several counts, but I think it should be made clear.

Mr. Glueck. In a single count.

Mr. Wechsler. There are really two separate problems: joinder in one accusation, and secondly, joinder in one count. I am not sure we need even address ourselves to joinder in one count.

Mr. McLellan. Why not call it "in a single count"?

The Chairman. Does that meet what you have in mind, Mr. Robinson?

Mr. Robinson. Not quite. The difficulty there was, you will see, in trying to use very few words in expressing this idea that you might have an indictment in which there is only one count. That is, it is not called one count; nevertheless it would be just one indictment. Certainly in that case you would wish the defendants to be accused jointly.

Then, if you have an indictment which has two or more counts, you likewise would wish to provide that in either of those counts or in both of them you could join two or more

defendants.

After talking to Mr. Wechsler about this two hours ago, I thought that possibly this would take care of it.

Mr. Wechsler. Two or more defendants may be accused jointly in -- You can't say "a single indictment" or "an indictment having only one count," because that is difficult; that is not quite what you mean.

Mr. McLellan. "In a single count of an indictment."

Mr. Wechsler. Would that cover, Judge, an indictment that had only one count?

Mr. McLellan. Yes.

Mr. Seth. Why not leave it out altogether or else say "alleged jointly to have participated"?

Mr. Robinson. Would the reader understand that we meant that they could be joined either in one count of the indictment or in a single count?

Mr. Waite. "Two or more defendants may be accused jointly in an indictment or in any other written accusation, or in any count thereof."

Mr. Robinson. If you make it that long, I might join with someone to use "written accusation" at this point.

Mr. McLellan. That would not cover putting two defendants in a single count.

Mr. Robinson. I believe it does, as I understand Mr. Waite.

"Two or more defendants may be accused in a written accusation or in any count thereof."

Does that help, Mr. Wechsler?

Mr. Wechsler. Yes, that meets my point.

Mr. Robinson. Your second point had to do with the use of the term "jointly."

That raises the question, Mr. Chairman, in this type of case where you have parties acting in such a way that their joint action constitutes a single offense, but they do not intend to cooperate in bringing about that offense. There are numerous instances of that.

You will remember the case that I spoke of at our September meeting, the Pacific Highway case, reported in 70 Pacific Second, 799, a case in the State of Washington in 1937, where one of the defendants was driving along the Pacific Highway, stopped, failed to get his bus off the highway, and illegally left it so that it projected out or covered a large part of the traveled portion of the pavement.

Then the second defendant, whom I shall call B -- the first one I will call A -- drove up from the rear -- he was driving while intoxicated -- and recklessly struck the bus.

Through the illegal act of A and the illegal act of B, C, who was driving from the opposite direction on the highway, was struck and killed.

In that case -- the Blakeley case -- the Supreme Court permitted a joinder of A and B.

I tried to use a term mutually expressive, because in its opinion the Supreme Court used the language that "They acted mutually or participated mutually in the offense."

That went out, and I think properly so, after discussion by the Committee, so in this draft, in line 4 the term "jointly" is used.

Just before t he evening recess the question was raised

11 whether we could not get along without "jointly." Judge McLellan suggested that if they participated in the same offense, they would have to be participating jointly.

Am I putting it correctly, Judge McLellan?

Mr. McLellan. Not exactly, but I will not take the time to go over that discussion again.

Mr. Youngquist. But not in concert.

Mr. Waite. Has anybody objected to striking out "jointly"?

Mr. McLellan. We struck out "jointly" in the third line. Now you are talking about it in the second line?

Mr. Robinson. No, it was in the fourth line.

Mr. Crane. It is not necessary where you had to participate in the act.

Mr. Holtzoff. In that Washington case they did not participate jointly.

Mr. Youngquist. As I understand it, the reason why we struck out "jointly" was to preclude the possibility of it being thought necessary that they be acting in concert.

Mr. Crane. Yes. I thought we struck that out pretty well.

Mr. Youngquist. I think it is all right.

The Chairman. Is there any motion addressed to Rule 31(a)?

Mr. Crane. We carried it.

The Chairman. All right. 31(b).

Mr. Robinson. That reads:

"The Court may order such separation of joint defendants or such groupings of joint defendants in separate trials as shall be conducive to a fair trial for each defendant and for the Government."

Mr. Holtzoff. I move that we strike out the last seven

words as being surplusage:

"For each defendant and for the Government."

Put a period after the words "fair trial."

Mr. Robinson. I put them in -- of course, they may go out, if you wish -- but I put them in with due deliberation. I felt that all too often it might be that in the argument on the point, the whole thing would be argued as though it were only the defendant who was concerned, whereas my own experience has been that in matters of that sort the Government interest is involved as much as the defendant's.

Mr. Holtzoff. I agree with you, but I thought the words "fair trial" meant fair to everybody.

Mr. Robinson. They do, but in the actual combat in the court room I am not sure that the defendant would realize that the Government is entitled to as much consideration in this matter of joint trials as the Government really is.

Mr. Waite. I think the Reporter is right. I think it is a very wise bit of propaganda.

Mr. Medalie. We do not want propaganda in the rules.

Mr. Waite. Of course we do. That is what nine-tenths of the rules are.

The Chairman. Are there any further motions addressed to Rule 31(b)?

Mr. Medalie. I move that "for each defendant and for the Government" be stricken.

Mr. Holtzoff. That was my motion.

The Chairman. Is there any further comment on that motion? If not, all those in favor of the motion say Aye; those opposed, No.

The Chair is in doubt, having voted loudly himself. All those in favor will please raise their hands.

The Chair is no longer in doubt. The motion is carried.

Mr. McLellan. I now move that as thus deleted, (b) be approved.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of the motion say Aye; those opposed, no. The motion is carried.

Rule 31(c).

Mr. Robinson. That is: "Permissive Joinder of Offenses."

This is the exact wording of the Act of 1853, which is now in the United States Code, Title 18, Section 557:

> "When there are several charges against any person for the same act or transaction, or for two or more" --

Now, the word "acts" here has been left out in the Mimeographed sheets and should be added --

> "-- acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments" --

The only change from the old Section 557 is to add: "or informations" at that point, because the old statute refers only to indictments --

> "-- the whole may be joined in one indictment or information in separate counts."

The Chairman. Are there any suggestions?

Mr. Youngquist. I suggest the excision in line 19 of the phrase "instead of having several indictments or informations," in order to conform to the action we took in line 9 of Rule

14 31(a).

Mr. Robinson. I do not see any connection there.

Mr. Dean. It is the same language as is used in line 9.

Mr. Holtzoff. It is surplusage.

Mr. Robinson. Here is what I really should say: I should say that I think the reason for retaining it here is just the same as it was in line 9: namely, that you do have the words of a statute there which have received almost eighty years of adjudication in Federal courts, and I do not see just why we should change that language without having some reason other than a change of style.

Mr. Holtzoff. I think that that is a very poorly worded statute.

Mr. Robinson. It has worked awfully well.

Mr. Holtzoff. I know, but there are two or three other things in the statute that I think require clarification.

In line 18 I want to address myself to the clause "which may be properly joined."

Mr. Robinson. That is right.

Mr. Holtzoff. I think that is sort of begging the question. There is no statement of what may be properly joined. That assumes something back of this rule. After all, I do not think we should perpetuate an old statute in these rules. These rules are supposed to be a statement of the entire procedure as it is going to be, and I think we ought to clarify or explain what may be properly joined.

Mr. Robinson. I should like to have the permission of the Committee again to call upon Mr. Alexander, because I know that Mr. Alexander has given very careful thought to the inclusion

of that clause "which may b e properly joined."

Mr. McLellan. Of course, we want to hear from Mr. Alexander, but when you leave this in here, all you say, in substance, is that they may be joined if they may be properly joined.

Mr. Robinson. That is right. That is the argument that has been made about that statute for eighty years.

Mr. Holtzoff. I think we ought to state what the rule is-- what may be properly joined.

Mr. Glueck. Hasn't that now been adjudicated?

Mr.Robinson. The result of it is to say -- I think Mr. Alexander will bear me out -- that these words are not harmful; they are recognized and accepted.

Mr. Holtzoff. I don't think they are harmful. I claim that they should be explained. The mere fact that the words have been construed by a long series of decisions is no reason for not stating what the words mean, because the function of the rules is to contain within one set of covers, in so far as it is possible, a code of Federal criminal procedure.

Mr. Youngquist. It occurs to me that the preceding language, in 31(c), sets out the rule which may properly b e used. We do not need any further explanation, because the preceding language itself defines that which may be joined. 31(c) is on Offenses, Mr. Chairman.

Mr. Glueck. My question was whether lines 15 to 18 really exhaust the possibilities. I agree with Mr. Holtzoff that, if possible, the rule should exhaust all the possibilities. I am just wondering whether others have arisen and been adjudicated.

Mr. Holtzoff. I think this probably exhausts it.

Mr. Youngquist. We might ask Mr. Alexander about that.

Mr. Alexander. I think it covers everything. It has been very workable. We faced an argument on that language, the words "which may be properly joined."

That is simply a statement that you can join such offenses as would be joined at common law and has given the words no meaning in the interpretation of the statute. They said there was language in the statute and that Congress must have had something in mind, so they paid no attention to that.

Mr. Holtzoff. I move that it be stricken out.

Mr. Medalie. I second the motion.

Mr. Alexander. Although it has been interpreted as Mr. Robinson s tated.

Mr. Wechsler. Has there been an interpretation of the phrase "which may be properly joined" as distinguished from an interpretation of the statute as a whole? If there has, it seems to me we ought to know what we are throwing out before we throw it out.

If there has not been -- if the words are mere surplusage or simply tautology -- then I think they can properly go. It occurs to me that the language might mean, in the absence of some reason why the joinder would work injustice in the particular case, a kind of general qualification. If that is so, it might be well to put such qualification in, although I would rather see one that said that in so many words.

Mr. McLellan. It looks to me -- I don't think I understood it; it was clear before -- that you are leaving in there language which says, "They may be joined if they may be joined," which, no matter what Congress has done, looks foolish for us.

Mr. Glueck. It might mean "which for other reasons may be properly joined."

Mr. Medalie. It means that in the category recited up to that language you may have a joinder, provided over and above that mere statement of category there is some reason why they can be properly joined.

If those categories are correct, then you need nothing more. You do not need "which may be properly joined," because you provide for joinder under those conditions.

"The same act or transaction"; "two or more transactions connected together"; "two or more acts or transactions of the same class of crimes or offenses"; three cases where there may be joinders.

The Chairman. May we request the Reporter and his staff to look that up and see whether there are any other cases than those covered in lines 15 to 17, and then, subject to the report, may we proceed to vote on this motion tentatively to strike out "which may be properly joined"?

Mr. Robinson. We have already looked it up, and I might just refresh your minds on it now. There really has not been much adjudication of it, though there is a Missouri case, Dolan vs. United States, 137 Federal, and Kidwell vs. United States, 38 Appeals District of Columbia 12.

In this section, which authorizes that paragraph "When there are several charges against any person for the same act or transaction, or for two or more transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined," it is not intended by the whole phrase to limit the joinder or

18 the consolidation to charges which might have been joined at common law, but merely to vest the trial court with discretion to refuse to permit a joinder or a consolidation where it would prevent a fair trial or be an injustice to the defendant.

Mr. Wechsler. That is precisely my point. The phrase can be given the meaning of a discretion on the part of the trial court to forbid the joinder where, in the circumstances of a particular case, it may work injustice.

It is easy to think of an example of that sort. Suppose you have a series of forty or fifty charges against a particular defendant. They are all of the same class of crimes or offenses, but the thought of getting a fair trial on all of them, in view of the number, is simply fantastic under those circumstances.

Mr. Holtzoff. Does not the severance provision take care of that -- the provision as to severance or trial?

Mr. Wechsler. What do you sever?

Mr. Medalie. Mr. Wechsler has made a good point.

Mr. Holtzoff. I think it is a good point, too, but I think it is taken care of by the rule on severance.

Mr. Medalie. It depends on how sensible and capable the trial judge is. You have got to allow him to show some ability and some practical judgment.

In 1936 the State of New York adopted a statute more or less like the thing we are now discussing. The ablest criminal judge around New York, who retired a year ago, was Judge Knott, a very practical, sensible judge, who had had long experience. He would get an indictment with about forty, sixty, or ninety counts in it.

19 Then, Judge Knott would say, "You have enough; you don't need to prove the other counts; in fact, I won't let you."

Knott was what was generally considered a convicting judge, nevertheless a fair one. You may still be a fair judge although a convicting judge -- a convicting judge of guilty persons.

Or if evidence was given as to many of the counts, he would say, "Now, in going to the jury, I am going to submit your six counts out of ninety-three."

In other words, what is provided here -- "which may be properly joined" -- in so far as it applies to the cases is that the discretion as to what is fair to a defendant, so as not needlessly to overwhelm, so as to be convicted of everything, is left entirely to the trial judge, even though that is not included.

As I remarked this afternoon, I do not care what we put into these rules; I know what the judge's part is in the case.

Mr. Holtzoff. If we want to convey that thought --

Mr. Medalie. Why convey it? Why don't you allow some exercise of good sense on the part of capable judges of experience, who want to be fair?

Mr. Holtzoff. "Which may be properly joined" does not convey the thought you have in mind, Mr. Wechsler?

Mr. Wechsler. You have a clerical problem in the matter of drafting here. I agree with Mr. Medalie. This is an important problem in the way of criminal procedure. It is going to work all right. What we have to do is take the existing job and either retain it or change it. If we drop out that phrase, "which may be properly joined," if the phrase has had the meaning of vesting discretion in the trial court, then, in strictly

20 legal terms, if our action means anything, it may be taken to evince an intention to destroy discretion, which, it seems to me, is productive of litigation which won't amount to anything in the end, or it is not the right way to proceed.

Mr. Holtzoff. If we want to continue discretion -- and I do not object to that -- I think we ought to change the phraseology, so as to cure an ambiguity in that clause. I certainly think it should not stand as it now is. It should either go out or else be amended.

Mr. Wechsler. I agree with you.

Mr. Holtzoff. We are turning over a new leaf; we do not want to perpetuate poor phraseology and poor draftsmanship in these rules.

The Chairman. We are conversing around it, but we are not progressing.

Mr. McLellan. There is a motion to strike out the words "which may be properly joined."

Mr. Dean. I have one suggestion which will take care of Mr. Wechsler's problem; that is, to have Section (a); then to have Section (c) labeled (b); then take (b), which deals with "Joint or Separate Trials of Defendants," and so reword it that it covers also separate trials of the same defendant where that defendant is charged with more than one offense, which, as we have the language now, "shall be conducive to a fair trial."

Mr. Wechsler. I agree with you. That will meet the problem entirely.

The Chairman. Now, will you state that in the form of a motion?

Mr. Dean. I should like to make that in two motions:

21 First of all, that (c) be labeled (b) and that it be amended to read, in line 18, after the word "Offenses,"

"Such charges may be" --

striking out the rest of line 19 --

"--joined in one indictment or information in a separate count."

The Chairman. All right. Now let us have your other motion.

Mr. Dean. Second, that the present (b) be labeled (c) and be amended to read, after the words "separate trials" in line 19:

"Separate trials of the same defendant, where the defendant is charged with more than one offense."

Mr. Medalie. I think what you really want to get is this--

The Chairman. Are we addressing ourselves to Mr. Dean's substitute motion?

Mr. Medalie. Yes. That, of course, deals with the original and any other alteration that may be made there?

The Chairman. That is right.

Mr. Medalie. If a man is charged in ninety counts, properly joined, according to the three categories set forth in (c), before you get to the words "which may be properly joined," and it is not fair to try him on ninety counts and he ought to be tried on only twenty-seven counts, give the Court the power in his discretion to take such action as he thinks fair in the way of cutting down the number of counts.

Now, actually the judge does not know, and he won't know until there is a trial, and only at the trial can he make that reduction. Now, if you wish expressly to give him the power

that you know he has anyhow to cut them down, then give him the power, at the trial or otherwise, to cut down the number of counts on which a defendant has to go to trial. If we mean that, we ought to say that.

Mr. McLellan. When you cut down the number of counts, what becomes of the other counts? Are they retriable or tried later?

Mr. Medalie. That all depends.

Mr. McLellan. No defendant would stand for that. He would rather go on his whole ninety counts.

Mr. Medalie. No. I will answer that as to the legal proposition and then as to the practical one.

As to the legal proposition, if he severs all counts before testimony is taken, then there is no jeopardy. Those counts stand, and he is to be tried, if they ever try them on another occasion.

Practically, we know, as I said before, on the basis of statistics, that if there is a severance, he has one chance in a hundred of ever being tried on what remains. He will not be tried unless there is great public necessity for trying him, at least in the opinion of the prosecutor.

Mr. Dean. Isn't that one of those instances where we want to give the trial judge power to dismiss?

Mr. Medalie. The thing I can't understand is how the trial judge, even if you gave him power, could soberly exercise it with competentness and the correctness of his judgment without knowing all about that case.

Mr. Dean. He could not; but if you gave him power to dismiss it at any time in the proceedings for good cause shown--

23 Mr. Medalie (interposing). In the trial. The trial started, jury empaneled, witnesses sworn; and if either before the case goes to the jury or when it goes to the jury the judge withdraws certain counts from the consideration of the jury, there is a dismissal.

Mr. Dean. That is right.

Mr. Medalie. Whether he acted rightly or wrongly, fairly or unfairly, that is an end of those counts for all time. He has that power, even if you do not put it in here.

Mr. Holtzoff. If there is an acquittal, can't the defendant be tried on the other counts?

Mr. McLellan. No, because the trial started.

Mr. Medalie. If you want to make it specific and clear, so that there will be no question about it, though I think there is no necessity for it, you may make a provision here, by a single sentence, that, in the interest of justice or of fairness, the judge may withdraw certain of those counts, even if proved. That is what you can do. But good judges will do that anyhow, whether you put it in or not.

One of the reasons for doing it is that a judge who has tried many cases will say, "How on earth is that poor jury going to pass on ninety counts? I will make it easy for them, or I will be fair to the defendant, and submit only eight counts."

Mr. Glueck. Why can't this rather depend on "separate" in line 8? Or, "which may in fairness to the defendant be properly joined"? Or, as Mr. Youngquist has it, "which may in the judgment of the Court be properly joined"?

The Chairman. I think we should take some action on this now.

24 Mr. Medalie. I think this is an important question, Mr. Chairman. I really think it is an important question, andI would like to answer the point raised by Mr. Glueck.

The Chairman. All right.

Mr. Medalie. When you ask the court to pass on what is fair in the joinder of counts in a single indictment, the court does not have the information on which to pass on it. He cannot do it unless he is at the actual trial.

As Mr. Wechsler pointed out, we are dealing with a question of what is good pleading. In dealing with good pleading, you can't decide this question of fairness in advance of the trial. Therefore, you should make no provision for it.

Mr. Youngquist. But aren't you always deciding the question of severance before trial, and doesn't that have the same character as what we are talking about?

Mr. Medalie. Yes, but when you decide the question of severance, you are not deciding the question of pleading.

Mr. Youngquist. Such pleading is all right in either case. The only question is whether it is proper under these particular circumstances to have the two counts tried together or whether they should be tried separately.

Mr. Glueck. That is right.

Mr. Holtzoff. That practice of Judge Knott's is never followed in the Federal court. Take an indictment of fifty counts. I don't understand that any Federal judge would withhold any counts from the jury, no matter how confusing it may be to leave fifty counts to the jury.

Mr. Medalie. I think Harry Anderson used to do practical things like that.

Mr. McLellan. I don't think any judge has the right or has the power to do it. He can in a single case, when the evidence is overwhelmingly in favor of the Government, order a verdict for the defendant, and nobody can do anything about it. But he has no right to do it, even though he has power; and he has no right to say to the Government, "You have fifty counts here, but the jury, though there is evidence on all of them, will be permitted to return a verdict on one or two or three."

He is exercising a power, but he is not exercising that power rightfully, any more than he is when he orders a verdict for the defendant when he knows that there is abundant and substantial evidence for the Government against the defendant.

Our conceptions are entirely different. I have to proceed on that notion.

Mr. Robinson. As a matter of practice, Mr. Medalie has mentioned ninety counts. In People vs. Luciano, in an opinion affirmed by Judge Crane, there were ninety counts, and there was conviction on sixty counts. The sentence was from thirty to fifty years, which nobody thought was too much.

Mr. Glueck. I move to amend Mr. Dean's motion, if it is possible to so move, by inserting in line 18, after the word "may," the words "in fairness to the defendant."

Mr. Holtzoff. There is still my motion ahead of that to strike out "which may be properly joined."

The Chairman. We will record each of these as substitutes, if the Committee is willing.

I will call for a vote, first, on Mr. Glueck's motion, which is to amend the latter half of line 18 to read:

"Which may in fairness to the defendant be properly

joined."

Are you ready for the vote on that motion?

Mr. Medalie. How do you decide that?

Mr. Glueck. In the judgment of the trial court.

Mr. McLellan. We are talking about a series of indictments. Now, if they put in too much, and the judge says, "I don't think that is fair to the defendant to have so many counts," what does he do?

Mr. Glueck. It is for the purpose of avoiding a clumsy trial, as I understand it.

Mr. Holtzoff. But what is the penalty for joining too many counts under this provision?

Mr. Crane. May I say something, Mr. Chairman?

The Chairman. Yes.

Mr. Crane. I think I understand all that is being talked about: that this provision contains exactly the words of the statute. There is a question as to whether or not it is wise to continue with the words as they are. After this discussion, from which it is apparent that nobody knows what it does mean or what they want, I think it would be wise for us to continue it just as it is.

Mr. McLellan. Because we don't know what it means?

Mr. Crane. Because we can't agree.

The Chairman. Eventually you will want to vote on Mr. Holtzoff's motion.

Mr. Crane. Eventually I should like to see it just as the Reporter has it. I think after all this discussion, when no one seems to agree with anyone else as to what should go in and what should go out, and we have heard as an example what

some judge did with ninety counts, and we don't know who he is or why he did it, I think it is wise to let the thing stand as it has been in the law for a long time, because there must have been wiser men before we came here. It has stood for a long time, and the courts have worked under it, and worked well. Now we are talking about changing it, and we can't agree as to how we should change it.

The Chairman. There are two other possible motions that might be made. One is to refer it back to the Reporter to prepare a memorandum to be circulated to the Committee. The other is to leave it to the Committee on Style. Nevertheless, we have Mr. Glueck's motion.

Mr. Medalie. Mr. Chairman, will you indulge me for a moment? Perhaps my statement will affect one of the motions or the gentleman who made the motion.

We may accomplish what we want if after striking out the words following "which may be properly joined," say, "The court may in the interest of fairness to the defendant," to which you can add the words, "for the simplification of trial, before trial sever the counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would be satisfied with the first part, but I would not want to confer on the court the power to withdraw counts.

The Chairman. The question, as I understand it, is on Mr. Glueck's motion, which is to amend line 18 to read:

"Which may in fairness to the defendant be properly joined."

All those in favor of the motion say Aye; those opposed,

28 No. The motion seems to be lost.

The next vote will be on Mr. Dean's motion, which the Chair would like to have Mr. Dean restate.

Mr. Dean. I am afraid I have made it a little clumsy.

The suggestion is that in (c), in line 18, we make it read as follows:

"Of the same class of crimes or offenses, such charges may be" --

to

then skipping/line 20 --

"-- joined in one indictment or information in separate counts."

Then, providing in (b) a provision for the severance, where you do have joint counts against one defendant, by adding in line 13:

"Or separate trials of the same defendant where he is charged with more than one offense."

The Chairman. All those in favor of that motion say Aye; those opposed, No. The motion seems to be lost.

We are now ready for a vote on Mr. Holtzoff's motion, which is to strike from line 18 the words "which may be properly joined."

All those in favor of that motion say Aye; those opposed, No. The motion is lost.

Mr. Medalie. May I now make my motion?

The Chairman. Yes.

Mr. Medalie. I move that there be stricken from Section (c) the words "which may be properly joined" and at the end of that subdivision the following be added:

"The court may in the interest of fairness to the

29 defendant before trial sever counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would vote for that motion.

Mr. Youngquist. Will you read that again?

9 Mr. Medalie. "The court may in the interest of fairness to the defendant before trial sever counts or at the trial withdraw counts from the consideration of the jury."

Mr. Holtzoff. I would vote for that motion if you left out the authority to withdraw counts at the trial.

Mr. Medalie. The reason I put that in was that it was pointed out to me, when I thought it could not be done, that just as you could get a severance of persons on evidence submitted to the court before the trial, so in the same way conceivably you might get a severance of counts. That is why I included that.

Mr. McLellan. That is the equivalent of ordering a verdict on certain counts.

Mr. Medalie. At the trial.

Mr. Crane. I will substitute an amendment that we leave the section prepared as it is by Professor Robinson.

The Chairman. Will you hold that a while, Judge?

Mr. Holtzoff. I move to amend Mr. Medalie's motion by striking out the authority to withdraw counts.

Mr. Medalie. At the trial.

Mr. Holtzoff. For this reason: that as Judge McLellan has so pointedly remarked, for a judge to withdraw counts is equivalent to his directing a verdict or an acquittal.

I do not believe that that should be done, because suppose the jury finds the defendant not guilty on the counts that are

30 left with the jury. Yet it might have convicted the defendant on the counts the judge chose to withdraw. I think it would be arbitrary to have a judge withdraw counts from the jury when the prosecuting attorney --

Mr. Medalie. Very unrealistic.

Mr. Glueck. Do you think that the proper remedy for that-- and I take it Judge McLellan thinks so, too -- is a motion for a directed verdict?

Mr. McLellan. No, you could not have a directed verdict because there is evidence on those counts, but if you let him, in a circuitous way, direct a verdict for the defendant --

Mr. Medalie. How can you take from the jury a count on which there is evidence?

The Chairman. Do you accept Mr. Holtzoff's amendment?

Mr. Medalie. No, I don't. Nevertheless, as a practical matter, you are dealing with trials, and when there are so many counts as to be overwhelming, the judges do not take things away from the jury unless it is practical, where there is evidence enough on plenty of counts, to take away the counts that are more troublesome.

Mr. Holtzoff. The United States Attorney will consent if that is the reasonable thing to do.

Mr. Robinson. There is another point of information on Mr. Medalie's motion. He is apparently repudiating the New York statute 229-A, and I think our discussion has been unrealistic to the extent that we have not talked about an election.

24 on cyl.

Mr. McLellan. An election has nothing to do with it where there are separate offenses.

Mr. Medalie. The Court says to the District Attorney,"You

have forty counts, so let us make it ten. Which ten would you like me to submit to the jury?"

Mr. Holtzoff. Under your rule, the judge could do the selecting.

Mr. Medalie. Practically the judge asks the district attorney, but why don't we put it in? Don't you trust the judge any more?

Mr. Robinson. Your point would not be possible in New York under 229-A. You think the restriction on the Court, which forbids the Court to require an election on more than one count, is a bad provision?

Mr. Medalie. Not bad; unnecessary. It can be done anyhow by the judge saying to the district attorney --

The Chairman (interposing). The question is called for on Mr. Holtzoff's amendment to Mr. Medalie's motion to strike from Mr. Medalie's motion that part which would give the judge power to withdraw counts.

All those in favor of the amendment to the amendment will say aye; those opposed, no. The amendment is lost.

The question is now on Mr. Medalie's motion. All those in favor of the motion, say aye; those opposed, no. The motion is lost.

Mr. Crane. I now move that we adopt (c) as it is written, because it is the only thing, apparently, that we can all read and understand.

Mr. Glueck. I do not think this states an amendment, but I would like to suggest that in the commentary of the cases Mr. Robinson report any such other cases as may be relevant to that clause "which may be properly joined."

Mr. Robinson. It will be done.

The Chairman. Are you ready for Judge Crane's motion? All those in favor will say aye; those opposed, no.

The Chair is in doubt. All those in favor of the motion will raise their hands.

Nine.

Now those opposed.

Six.

Nine to six; the motion is carried.

Mr. Waite. I wonder if much of the trouble has not been due to the fact that there has been no provision for compulsory election between counts or severance of trials on different counts. If we do that thing, then I venture to say that this thing would be clarified.

Mr. Robinson. That is the next thing, Mr. Chairman. Provision is being made for election and has the effect of acquittal on single count.

The Chairman. We will go on to 31 (d).

Mr. Holtzoff. I suggest that at the end of line 24, in section (d), we add the words "for trial."

"the Court may order them to be consolidated for trial."

Mr. Robinson. That again is the wording of this statute of 1853.

Mr. Holtzoff. I think the statute is so old it should be changed.

Mr. Seth. Should not the letter in line 23 be "c" instead of "a"?

Mr. Robinson. Yes, that is true. That correction should be made.

Mr. Holtzoff. I move that we add the words "for trial" at the end of (d).

The Chairman. All those in favor of the motion will say aye; those opposed, no. The motion seems to be lost.

All those in favor will show their hands. All those opposed will now show their hands.

The motion is lost by a vote of four to seven.

We will now proceed to Rule 40, gentlemen.

Mr. Robinson. The point about that rule that needs to be settled or taken under consideration, first, by this committee is whether or not the provision for counsel should be emphasized by placing it in a separate chapter.

In a letter that was sent to you under date of January 8, 1942, attention was called to the point in these words:

"In regard to the proposed chapters, one question which requires the attention of the committee at the forthcoming meeting is the advisability of having a full chapter assigned to the subject of Counsel for the Defendant (Chapter IV), and another chapter assigned to the Trial Jury (Chapter VI). These two subjects are generally regarded as so essential to the preservation of individual liberties, especially in these days, that they are entitled at least to consideration for such emphasis in a Code of Federal Criminal Rules."

I am not taking sides either way, but I do wish that the committee would express itself as to the feasibility and desirability of making separate chapters for those two subjects.

Mr. Holtzoff. Don't you think that that is a matter for the Committee on Style -- the arrangement of chapters?

Mr. Robinson. The Committee on Style may well be advised

by the full committee.

The Chairman. Do you make a motion that there be such a chapter?

Mr. Robinson. There might be more than one rule on each subject. I ought to explain this further or again.

Counsel for the defendant comes into the case, as you know, or may come at various different stages, and sometimes different counsel come in at different stages. Therefore, it is difficult to follow the chronological order, the procedural order, which you specified for this draft, and place counsel in a proper consecutive or procedural point.

Therefore, it would seem that a general chapter containing as many rules as you care to provide on Counsel for the Defendant and, likewise, on Trial Jury, which does have more of a procedural point, should be separated into separate chapters, so that they would apply to the whole proceeding, and not have in it some rather arbitrary points.

That argument is not as strong for Trial by Jury, but I think the point of emphasis is just as strong for that.

In other words, it will give Congress the feeling that we can streamline these rules considerably if we will protect defendant's rights by seeing that he does have representation by counsel and, further, that trial by jury in full vigor is made available to him.

Darrow
fls
9:15

THE CHAIRMAN: Mr. Robinson's motion is that the matter be set apart in separate chapters of the rules. All those in favor of the motion say "aye."

(There was a chorus of "ayes.")

THE CHAIRMAN: Opposed, "no."

Carried.

Now, on Rule 40 we have alternative rules. Do you want to outline them, Mr. Robinson, before we proceed with the consideration of either of them?

MR. ROBINSON: Rule 40, the first rule, that is an effort to qualify--you may call it that--Johnson v. Zerbst, and also Walker v. Johnston.

You will recognize the fact that as an alternate we also provide for Johnson v. Zerbst in Rule 30(E) so far as waiver of indictment is concerned. This goes a little bit further, though, than 30(E), as you will see.

It seeks to provide for counsel earlier in the proceeding than 30(E) does.

Now, alternate Rule 40 goes still further with regard to providing counsel for the defendant. In fact, you will notice it provides an alternate Rule 40(A), that it shall be the duty of the United States Commissioner acting as a committing magistrate to furnish to every person imprisoned or bailed by him for trial, copies of appended forms A and B. Failure to do so, however, shall not invalidate subsequent proceedings against the accused in the district court of the United States.

The idea that originated that recommendation came to the Committee including an article by Justice Miller, who was our host at noon, and also following those recommendations on

drafting, that was done by Mr. Alexander while here, further working with the committee, and also by further work by Mrs. Peterson of our research staff.

Now, I don't know how this plan strikes you or whether you wish to have it or not, but, briefly, the present law is, as we have experienced it in most of our average courts, that the first time counsel is mentioned is when he stands there on arraignment. The judge asks him whether he has any lawyer. The judge very effectively tells him, "If you wish to have counsel the court will provide counsel for you if you are unable to provide it for yourself," or words to that effect, or, sometimes the judge will say to some member of the bar, "You will just step outside with the defendant so you can confer with him as to what his plea should be"; followed very often by the prompt return of counsel and defendant.

Now, the view that Justice Miller and the others advanced was that that is a little bit too late in the game for defendant to be getting the assistance of counsel, and that problem is placed in your hands with the suggested alternate Rule 40 with the effect that as soon as defendant has been arraigned before the United States Commissioner, if the Commissioner, acting as committing magistrate, bind him over, the Commissioner shall give him forms, which are appended here, Form A and Form B, by which the defendant may proceed at that time to inform the court of his need for counsel, or take whatever action seems proper.

The whole thing is explained in the comment on the alternate Rule 40, page 4 also.

Mr. Waite: Will you explain one thing further that I didn't get. I don't see how Alternate Rule 40 eccelerates the time at

which he gets counsel appointed. That provides that counsel shall be appointed after the arraignment.

MR. ROBINSON: Yes, his arraignment before the Commissioner.

MR. GLUECK: Strictly speaking, arraingment is not before the Commissioner.

MR. ROBINSON: That is right.

MR. DEAN: How would you suggest that he be informed -- as I get it now, he would be informed after the Commissioner has bound him over.

MR. ROBINSON: In Rule 40, we do use arraignment. In Alternate Rule 40, we do not use the term "arraignment." I probably misused the word "arraignment."

MR. WAITE: Paragraph D says before the court.

MR. ROBINSON: Well, that is before the court.

MR. WAITE: That is when the court has to appoint counsel. D also says the court will assign him counsel.

MR. ROBINSON: That is on Line 21.

MR. WAITE: Yes.

MR. YOUNGQUIST: The way the Alternate works is that before the Commissioner he is merely advised of his right to have counsel. When he is arraigned before the court, he is not only thus advised but also offered counsel by assignment by the court if he is unable to engage one himself.

MR. DEAN: I don't read A that he will be advised prior to appearing before the Commissioner.

MR. SETH: Rule 20 takes care of that.

THE CHAIRMAN: Does it?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I do not see anything more in Rule 20 than

that he will be advised of his right to counsel and I should like to see Rule 40 as originally drawn with some changes that are not important that I have noted here, adopted, because you can get too much machinery.

THE CHAIRMAN: Your motion then would be to favor the principle of Rule 40 as distinguished from the Alternate Rule 40?

MR. YOUNGQUIST: That is right.

MR. HOLTZOFF: I second it.

THE CHAIRMAN: Is there any discussion on the general principle involved without getting to the exact language of Rule 40? Do you have anything further, Mr. Robinson?

MR. ROBINSON: I am not sure I understand Mr. Youngquist's reasons.

MR. YOUNGQUIST: My reason is only this, that for practical purposes it is sufficient that the committee magistrate advise the accused at the outset that he has a right to counsel. For instance, there is no obligation under the statute or otherwise for the Government to furnish counsel at that stage. That arises only at the time of the arraignment and that, too, is a really important time for him to have counsel.

MR. CRANE: It is a very salutary rule, especially if there is a law providing for compensation, but it also has abuses.

There were four men charged with murder in the first degree. Counsel had an allowance of a thousand dollars for the defendant, paid by the State of New York, whereupon the judge assigned three counsel to each of the four defendants, twelve counsel in the case, all of whom tried to examine the jury, which took about two or three weeks.

MR. HOLTZOFF: There is a bill pending now for a public

defender.

THE CHAIRMAN: You have a motion favoring the principle of Rule 40 as contrasted to Alternate Rule 40.

Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. MEDALIE: Mr. Chairman, I have some suggestions as to Rule 40.

MR. YOUNGQUIST: May I make mine first?

MR. MEDALIE: Certainly.

MR. YOUNGQUIST: I mentioned it a moment ago, that is why I would like to be first.

In Line 5, after the word "counsel" insert a comma, strike out the words "and of the advisability of having counsel, and the court shall" so it will read, "his right to counsel, give him the opportunity to obtain counsel of his own choice," strike out the word "court," and say "and inform him also that the court will assign counsel" and to the end of the paragraph.

MR. WECHSLER: Should it not carry through to the actual assignment?

MR. MEDALIE: And afterward appoint.

MR. HOLTZOFF: That is what I was going to suggest.

MR. MEDALIE: Three of us thought of it all at once.

MR. HOLTZOFF: I have some language here.

MR. MEDALIE: Let us get the point and deal with the language later.

MR. YOUNGQUIST: Before we come to that, that I think should follow after the next paragraph.

I would suggest that the next paragraph read -- and I will not ask you to take it all down -- "a defendant shall not be deemed to have waived counsel unless it shall be shown that the foregoing requirements have been fulfilled."

After that we can put in the provision for counsel.

THE CHAIRMAN: So that we do not get too much before us, is there any comment on Mr. Youngquist's suggestions?

MR. WAITE: There are several combinations I don't get.

THE CHAIRMAN: The motion is to strike from Lines 5 and 6 the words "and of the advisability of having counsel."

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: The motion is carried.

That was the first substantial change, I think, was it not?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: The rest are matters of style. The second paragraph seems to stand.

MR. WAITE: Mr. Chairman, before we get to the second paragraph, I should like to see stricken out the words "is not financially able to engage counsel." That, it seems to me, ought to come out for two reasons; in the first place, I think the counsel should be assigned if a man wants counsel, regardless of his financial responsibility, but more particularly, I do not see how the judge is ever going to determine a man's financial responsibility.

MR. HOLTZOFF: They do now.

MR. SETH: He takes his word for it.

MR. WAITE: Here is one man that has a hundred dollars a week and no family. Here is another man with a hundred dollars a week and five children. The judge would have to hold a trial to determine whether they can have counsel or not.

MR. CRANE: We have always had that. We have always asked him if he was able to pay counsel and then take his word for it.

MR. WAITE: That seems to me a rather silly proposition. If he is an honest man he may say, "Yes," although he cannot do it. Otherwise he may say "No," when he can. If you are simply taking his word for it you might as well strike the matter out. So it seems to me this ought to read something like this:

Line 9 would read: "assign counsel to represent him without expense to him if he does not desire to engage counsel for himself."

It is one step toward the public defender who does defend a man free of charge regardless of finance.

MR. HOLTZOFF: Oh, no. He only defends a man who is not able to hire counsel.

MR. WAITE: That is not what has been behind the advocacy of the public defender.

MR. HOLTZOFF: Certainly he would not assign free counsel any more than free hospitalization.

MR. GLUECK: You are wrong. Justice for the poor. That is the idea. And besides the public defender's ofice makes an examination of the person's financial status.

MR. WAITE: That is true but it has never been demonstrated that a man is unable to pay before he can have counsel.

THE CHAIRMAN: Is Mr. Waite's motion seconded?

MR. WAITE: It is a good motion.

MR. ROBINSON: He seconds it.

MR. DEAN: It is still a good motion.

MR. WAITE: I might say that now that that motion is over, as a matter of fact that provision was approved in principle by the American Law Institute last May.

MR. YOUNGQUIST: Well, I would not be willing as a member of this committee to approve it.

MR. WAITE: The matter was brought up and approved on that basis.

THE CHAIRMAN: Is there any discussion on the first paragraph? Any on the second?

MR. YOUNGQUIST: I have a change in the second.

THE CHAIRMAN: Yes, the change was that no defendant shall be deemed --

MR. YOUNGQUIST: "The defendant shall not be deemed to have waived counsel unless the record shows that the foregoing requirements have been fulfilled."

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: May I ask one question of Mr. Youngquist. Have you studied the language of Johnson versus Zerbst as to what the Supreme Court said should be done with regard to counsel?

MR. YOUNGQUIST: Not specifically. What I have done is take the last paragraph of Alternate Rule 40 except the statement that it must appear that the defendant voluntarily and with full knowledge of his rights waived the assistance of counsel. I do not see how the record can show that.

MR. ROBINSON: Well, don't you think it should follow pretty well the words of the court? That record has come to us.

MR. YOUNGQUIST: But here we have set out in the first para-

graph what the requirements are; the court has informed him that he has the right to counsel, has given him an opportunity to obtain counsel of his own choice; or he shall assign counsel for him.

My suggestion two says that he shall not be deemed to have waived counsel unless these prerequisites appear in the record.

Now, so far as the last word is concerned, "and further that the defendant voluntarily and with full knowledge of his rights waived the assistance of counsel," I think it is wholly impractical because you can never show that by the record. That leaves open the entire question and defeats the purpose of the record that you previously provided for.

THE CHAIRMAN: On Mr. Youngquist's motion to amend the second paragraph --

MR. LONGSDORF: Mr. Chairman, before that motion is put, may I invite Mr. Youngquist's attention and the attention of all of the committee to Rule 12, which specifies what entries must be made in the record, and perhaps Mr. Youngquist's sentence may prove to be unnecessary. Rule 12-A.

MR. YOUNGQUIST: That rule went out.

MR. LONGSDORF: It did?

MR. HOLTZOFF: Rule 12 refers only to the docket. This entry is not a docket. This is a minute.

MR. LONGSDORF: Was it intended that the docket be also a record?

THE CHAIRMAN: You will get no help from that, Mr. Longsdorf, because that wasdeleted.

The question on Mr. Youngquist's paragraph --

MR. WECHSLER: What is the motion?

THE CHAIRMAN: Read it again, Mr. Youngquist.

MR. YOUNGQUIST: That the second paragraph, Rule 40, shall read:

"A defendant shall not be deemed to have waived counsel unless the record shows that the foregoing requirements have been fulfilled."

THE CHAIRMAN: All those in favor of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now, there is a third paragraph suggested by Mr. Medalie.

MR. MEDALIE: Well, it was suggested by several people.

MR. HOLTZOFF: Mr. Youngquist and I have some matters here.

MR. MEDALIE: Very good. Then I will have another one.

MR. HOLTZOFF: To add the following paragraph:

"If the defendant requests the court to assign counsel to represent him or if he fails to waive the right of counsel, if it appears to the court that the defendant is unable to retain counsel, the court shall designate one or more members of the bar to act as counsel for defendant."

MR. MEDALIE: Designate counsel?

MR. HOLTZOFF: Shall designate counsel for the defendant.

MR. MEDALIE: Counsel, that says.

MR. ROBINSON: Why have"the defendant"?

THE CHAIRMAN: Read that in its amended form.

MR. HOLTZOFF: "If the defendant requests the court to assign counsel to represent him or if he fails to waive his right of counsel, and if it appears to the court that the defendant is unable to retain counsel, the court shall designate counsel."

MR. SEASONGOOD: Is unable financially.

THE CHAIRMAN: That business about being able financially is a third proviso tied up with the first section of the rule.

MR. HOLTZOFF: I thought, too, this ought to tie up ahead of the last paragraph.

MR. CRANE: What do you mean by "waive the right"?

MR. HOLTZOFF: The Supreme Court thought unless a defendant affirmatively waives the right of counsel, if he stands mute, counsel must be assigned for him.

MR. WAITE: Regardless of his financial ability to pay?

MR. HOLTZOFF: Well, if he is unable.

MR. WAITE: Well, if he stands mute --

MR. CRANE: Must he waive the right to counsel before he can have one assigned?

MR. HOLTZOFF: No, no. Unless he waives the right of counsel the court cannot go on without counsel.

MR. CRANE: But if he waives the right of counsel.

MR. WECHSLER: Mr. Dean, do you think there is anything in Johnson versus Zerbst about ability to pay?

MR. HOLTZOFF: No.

MR. WAITE: Then how can he be said to waive if he stands mute? He has only got the right to counsel if he asks for it on the ground of financial inability to pay.

MR. CRANE: All you have to do is ask him "Are you able to get counsel?" And he says, "No."

MR. HOLTZOFF: This may not be conclusive, but after the decision in Johnson against Zerbst, the department issued instructions to every United States attorney and every defendant is asked in open court whether or not he wants counsel, and unless

he affirmatively waives, they are to see that counsel is appointed for him.

MR. CRANE: What does he waive?

MR. HOLTZOFF: Waives the right of counsel.

MR. CRANE: He does not waive the right of counsel. He wants counsel. He does not waive the right to counsel. He wants counsel. He waives the right to get his own counsel, if that is what you mean, but certainly he does not waive the right to counsel when you try to get one for him.

MR. WECHSLER: Mr. Chairman, may I make a suggestion?

THE CHAIRMAN: Certainly.

MR. WECHSLER: It seems to me this rule suffers to some extent with an undue preoccupation with waiver of counsel rather than obtaining counsel.

MR. CRANE: That is the point.

MR. WECHSLER: The initial problem for us ought to be to devise a procedure calculated to provide counsel for defendant if he has not got counsel of his own choice.

Now, the waiver problem is a problem which is lumped much in departmental procedure because of the habeas corpus procedure in the past years, and I do not think the rules ought to conform to that situation. The only point certainly with respect to waiver that is involved here is that the Department has suggested the desirability of the record noting that the defendant was apprised of his rights, and the record should note that the defendant was apprised of his rights, and the rules, I suppose, should provide that the record should note that. But I do not see any necessity other than that for defining what is a waiver of counsel, or for determining when the constitutional right to counsel has or has

not been infringed. There is a terribly complex constitutional issue.

MR. CRANE: The only thing he waives is his right to hire his own counsel.

MR. HOLTZOFF: Mr. Waite, don't you agree that under Johnson against Zerbst that the court must appoint counsel unless there is a waiver?

MR. WAITE: I think it is the duty of the court to advise defendant of his right to have counsel and to provide him with counsel. The defendant may say, "I choose to appear here alone." Having been told of his rights, that procedure is valid. The record should show the judge advised the defendant of his rights.

THE CHAIRMAN: Could we secure the situation by inserting at the end of paragaph 1 the words: "and in that event the court shall assign counsel unless the defendant shall waive counsel," and then go on with our final language that he shall not be deemed to waive it unless the record shows?

MR. CRANE: Mr. Chairman, I cannot see -- maybe I am stupid about it -- the defendant waives the right to get his own counsel but if he does want counsel or does not want counsel, he does not waive counsel.

Why do we use such language as that? I do not care what the Supreme Court says. What does it mean? What do you mean by such language?

MR. HOLTZOFF: He waives his constitutional right to be represented by counsel.

MR. CRANE: Which means he cannot get his own counsel.

THE CHAIRMAN: It goes beyond that. He says, "I haven't got counsel, I haven't got the money to get one." And the judge

says, "All right, I am going to appoint one." He says, "I don't want him."

Isn't that the issue? It happened one day when I was in court in the early days. The judge said, "I will appoint Senator So and So to represent you." He said, "I would rather have a lawyer."

MR. CRANE: It happened in court once that the defendant looked at the lawyer and said, "Is he going to defend me?" They said "Yes." He said, "All right, I plead guilty."

I never heard a man say he did not want counsel, unless he was crazy, and we had to put him in the Lunatic Asylum.

MR. WAITE: If Johnson versus Zerbst said what counsel said it said, if he does not choose to engage counsel himself, I think I ought to remove my motion because with these words in, it is not in accordance with Johnson against Zerbst.

MR. CRANE: I think we ought to look at that case. So many things are included in an opinion -- you do not write an opinion with the idea ofwriting rules for everything. Lawyers so often think that the judge, in an opinion, means more than he really says.

MR. YOUNGQUIST: Mr. Chairman, is there a motion pending?

THE CHAIRMAN: Yes, there are two. There is the Youngquist-Holtzoff motion and the Chairman's alleged improvement of it.

MR. MEDALIE: Why don't you accept the Chairman's amendment?

MR. HOLTZOFF: Mr. Youngquist and I will accept that.

MR. YOUNGQUIST: I will accept that, yes.

THE CHAIRMAN: All right, the suggestion is, at the end of Line 10, it shall say: "In that event shall appoint counsel unless the defendant shall waive."

MR. SETH: Would not the wording "refuse" be better?

THE CHAIRMAN: Would refuse?

MR. YOUNGQUIST: I think we ought to leave it to the committee on style.

THE CHAIRMAN: Yes. Unanimously to the committee on style. We all know what the problem is there. It is a matter of language now.

MR. CRANE: This means he waives the right to get his own counsel, that is all that means. It could not mean anything else. He waives his right to have counsel of his own.

THE CHAIRMAN: What else, Mr. Medalie?

MR. MEDALIE: This not infrequently happens that the counsel who originally was retained, or supposedly retained for the defendant, at the time of the arraignment has not been paid or has been dropped, or the counsel assigned for him, if he should be an irresponsible person does not show up at the trial. It is important that the trial go on if possible with counsel. I think the court ought to have the power -- I think it has anyhow, but it should be stated in the interest of completeness, --
6 to designate counsel for the trial. It is done anyhow.

The case comes up, the defendant says he hasn't got a lawyer, he dropped him. Well, you have to go on. There shouldn't be any adjournment. There should not be any doubt he has the right to do it. The case should not be delayed unnecessarily for lack of counsel.

THE CHAIRMAN: Should that be in the rules?

MR. MEDALIE: I am not sure, because I think the court has the power, anyhow. The court has assigned counsel, counsel does not show up. The defendant is entitled to a trial with

counsel where he has been victimized by the negligence of counsel, he did not show up or was unable to, or the assigned counsel has forgotten about the case.

MR. CRANE: I think the rule we now have would answer.

MR. MEDALIE: No, it is only on arraignment.

MR. CRANE: If the assigned counsel did not appear, would not the power be in the court to assign other counsel?

MR. MEDALIE: Yes.

MR. CRANE: In the Federal court does defendant have a right, not being a lawyer, to defend himself?

THE CHAIRMAN: Yes.

MR. CRANE: What are you going to do about this, he says, "I don't want a lawyer." How can you make him take one if he wants to defend himself?

MR. HOLTZOFF: There is a provision there if he waives counsel.

MR. CRANE: Counsel has to be admitted to the bar. He waives counsel.

THE CHAIRMAN: We provided for waiver in our rule.

MR. SETH: There is one thing I want to ask, Mr. Chairman. I have not heard, but that bill that is pending for official reporter, that contemplates that all these matters will be taken down and made part of the record in all proceedings of this kind, does it not?

MR. HOLTZOFF: I did not hear it.

THE CHAIRMAN: The question of stenographer.

MR. SETH: That will become part of the record?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Are you sure about that?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Do you mean a stenographic reporter will take down all that? It might not pass that way.

MR. YOUNGQUIST: We have taken care of it anyway.

MR. ROBINSON: I think we have to carry our rules along through the year and watch Congress, and if the rule is completed, coordinated.

MR. CRANE: It should not be merely taken down by a stenographer but the clerk ought to make an entry in the case.

THE CHAIRMAN: I think that is contemplated.

All right. Rule 50, gentlemen.

MR. ROBINSON: We have changed Chapters here, moving into Chapter V, which has to do with arraignment, pleas, motions, and notices, and other proceedings preparatory to trial.

I believe we should take up 51. Rule 51-A.

THE CHAIRMAN: Rule 51-A, all right.

MR. SETH: That applies only to the District Court.

MR. ROBINSON: That is right.

MR. SETH: Should it not specify we abolish pleas to the United States Commissioner?

MR. ROBINSON: Did we not say District Courts?

MR. WECHSLER: Why do we say "stated" or "read."

MR. ROBINSON: That was to take into account the discussion at a former meeting. This instance has occurred, Mr. Wechsler, where a defendant in a case in which the indictment is some fifty pages long in an obstructive mood has demanded that the whole thing be read to him in toto in open court, and I suppose if he insist on that he can get it, but the rule has been provided for some recommendations that have been made on the subject to

provide that it shall be read to him, so the stated "or" is put in there to expressly provide that the court or the United States attorney can simply state to him the contents.

I think that is commonly done now, is it not?

MR. CRANE: The way we do it, we say, "Do you waive the reading of the indictment?" And counsel will say "Yes."

THE CHAIRMAN: It has been suggested though that there may be some reading.

MR. YOUNGQUIST: I think this rule should require that he be given a copy of the indictment or information.

MR. HOLTZOFF: I have never heard an indictment read, the charge is stated to the defendant and he is called upon to plead.

MR. CRANE: Is he not asked whether he waives the reading of the indictment?

MR. HOLTZOFF: Well, in may cases they don't even do that. I suppose they should. Would you insert, then, Judge McLellan, in Line 3, "and should be read"?

MR. MC LELLAN: No, because I think your rule is better than the practice.

MR. MEDALIE: Say he is charged with passing counterfeit of $3. He is charged with 13 counts.

Try to describe a particular mail fraud in a statement, if you can.

MR. WECHSLER: Mr. Chairman, may I move an amendment?

THE CHAIRMAN: Yes.

MR. WECHSLER: I move that instead of "stated or read," the word "read" be used.

MR. YOUNGQUIST: That would be worse.

MR. DEAN: I would like to put in an amendment, to have a

copy of the indictment given to defendant. It seems to me he is entitled to that.

MR. HOLTZOFF: Well, I do not think in all these cases. Where the defendant pleads guilty, you do not want to go to the extra trouble of handing him an indictment. He does not want it.

MR. DEAN: He can give it back.

MR. HOLTZOFF: But why make it required?

7 MR. WECHSLER: I do not think a man should plead until he understands what the charge is.

THE CHAIRMAN: Isn't it fairly comprehended in the word "stated"?

MR. CRANE: Can't you trust the judge?

MR. MEDALIE: We are really fencing about words when we have in mind the reality. The reality is that any man going into court pretty well knows what he is brought there for. Now, if he does not know, of course he ought to have an opportunity tobe told. We are measuring off abstractions against what we know to be the reality.

MR. YOUNGQUIST: But I think he should have a copy of the accusation.

MR. MEDALIE: It is simple enough. If I happen to be retained in a criminal case, I telephone up to the District Attorney and say, "Have you a copy of the indictment for me?" And the answer is "Yes, I am having it copied. I will see that you get one."

MR. HOLTZOFF: You take some of the courts where theremight be thirty or forty liquor cases, the defendants probably all but one or two will plead guilty, and they do not want copies of the

indictment.

THE CHAIRMAN: We have two motions but neither one has a second.

MR. MEDALIE: Is there a motion to pass the rule?

MR. WECHSLER: I substitute Mr. Dean's motion as a substitute for mine, and second it.

THE CHAIRMAN: Mr. Dean's motion is that defendant be given a copy.

MR. DEAN: I think there ought to be some provision in these rules saying a man is entitled to a copy of the accusation against him.

MR. MEDALIE: Why not say "the defendant shall upon demand made to the District Attorney be furnished with a copy of the indictment." It is the District Attorney who furnishes it, not the clerk.

THE CHAIRMAN: I do not think that he ought to have to demand it.

MR. MEDALIE: He must ask for it.

MR. HOLTZOFF: Do you want that in the rules?

THE CHAIRMAN: The maker and seconder of the motion seemed to think so.

MR.MEDALIE: I accept your language.

MR. ORFIELD: The Federal statutes make provisions in certain cases.

MR. YOUNGQUIST: They ought to have that in all cases.

THE CHAIRMAN: Well, you have heard Mr. Dean's motion seconded, which is a substitute for Mr. Wechsler's motion. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No." Carried.

Is there a motion on the Section A as amended? -- It is moved and seconded that 51-A be adopted as amended. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Section B.

MR. SEASONGOOD: Do you want to cover an arraignment of a corporation? You have done it in 50. Is there any need to have it in 51?

THE CHAIRMAN: I thought we were going to go through with 51, first. Is that right?

MR. ROBINSON: Yes.

THE CHAIRMAN: May we go on to B, then?

MR. ROBINSON: B is on counsel, as you see, and is alternative to a separate chapter on counsel, and indicates we may have to have a clause of this kind.

THE CHAIRMAN: We have covered that.

MR. HOLTZOFF: This goes out, then.

THE CHAIRMAN: It is moved and seconded that this be deleted. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ROBINSON: Next, Line 14, the defendant may be arraigned, he may enter his plea, not guilty, guilty, or nolo contendere.

MR. MC LELLAN: Are you going to give him the right to plead nolo contendere?

MR. ROBINSON: That is the next clause. The court may refuse to accept a plea of nolo contendere.

MR. MEDALIE: If the defendant stands mute, a plea of not guilty shall be entered of record.

MR. SETH: He may ask for more time, but, does he get it?

MR. DEAN: That is my question. Either we should authorize the court to grant it -- in which case I do not think it belongs here --

MR. ROBINSON: It is only stated as a matter of emphasis. I will be very glad to strike it out, may enter his plea not guilty, guilty, nolo contendere -- very well. Strike it then.

MR. CRANE: Strike out what?

MR. ROBINSON: Beginning Line 14 after "arraign" strike out from there down to "may enter as his plea" in Line 16.

MR. HOLTZOFF: I like "plead" instead of "entering a plea," because it saves two words. "May plead not guilty, guilty, or nolo contendere."

MR. ROBINSON: I could say "may enter a plea of not guilty, guilty, or nolo contendere."

MR. HOLTZOFF: I like "plead."

MR. MEDALIE: The defendant does not enter that plea.

THE CHAIRMAN: No. He pleads.

MR. ROBINSON: All right. Do you wish to change that to "plead"?

THE CHAIRMAN: I think so.

MR. ROBINSON: "The defendant may plead not guilty, guilty, or nolo contendere." That is enough, is it not?

MR. HOLTZOFF: I want to ask a question, Mr. Chairman. This provides that the court may accept a plea of nolo contendere.

Now, shouldn't the plea of nolo contendere be accepted only with the consent of the United States attorney? I believe that is the usual practice,that both the court and the United States attorney must consent.

MR. MC LELLAN: In Massachusetts the practice is as you have stated but I have always supposed that the court could, whether the District Attorney was willing that that be done or not, permit the defendant to plead nolo contendere, but the general practice is not to do it unless the United States attorney consents. Sometimes he asks for it and the court won't do it.

MR. HOLTZOFF: That is what I understood to be the practice. It seems to me it might be well to have that practice embodied in these rules.

MR. ROBINSON: Mr. Alexander might tell us about it.

MR. ALEXANDER: It has always been my understanding that it has to be acceptable to the prosecutor. That is the practice in our courts. And it is rarely accepted.

MR. DEAN: It is usually the result of a bargain between the District Attorney and defendant's counsel.

MR. HOLTZOFF: Well, I move that Paragraph 2 be amended requiring the consent of the United States attorney to the acceptance of a plea of nolo contendere.

MR. YOUNGQUIST: I accept it with the purpose of arguing against it. I do not see why that should lie in the power of the United States attorney. There may be reasons for it, but I think there are better reasons against it. So long as the statutes permit a plea of nolo contendere, I see no valid reason why the making of that plea should not lie with the court rather than with the United States attorney. Of course, as I understand

the history of that plea, it was only made after conference with the court and an understanding of what the penalty, usually applied, should be. It may be true that a United States attorney, or the prosecuting attorney, cooperated and participated in the negotiations, but after all, if the court sees fit under the circumstances to accept the plea of nolo contendere, I do not think it should be placed in the power of the United States attorney to prohibit the court accepting the plea which the defendant is willing to make.

MR. CRANE: I suggested here the last time we were together, that it be put for further consideration that the plea be wiped out altogether as being inconsistent and inadequate, that the man is either guilty or not guilty, and to plead that he won't make any defense, don't want to plead guilty, but he does not want to make any defense, and the court can sentence him as though he had pleaded guilty, and then it imposes sentence, and the only reason I ever found for preserving it is this question of res adjudicata in some states; whereas, if he put in the plea, they could not receive it, as res adjudicata, in some civil proceedings.

Now, that seems to me to be pressing res adjudicata beyond anything I ever heard. Something must be wrong with the law when a man refuses to plead guilty and yet you use a word, just a sign, to get away from it, and treat him as though he were guilty, just one of those fictions that we have preserved because we are afraid to come out and state the facts as they are.

MR. YOUNGQUIST: That may be so, but the difficulty is that that is the law and we cannot change it.

MR. CRANE: Why can't we change it? We have been changing

it here right along.

MR. YOUNGQUIST: We cannot change the question in a civil action of whether a plea under our rules may be res adjudicata.

MR. SEASONGOOD: In anti-trust cases if he is guilty you treble the damages, and this is one way of not tripling the damages.

MR. MC LELLAN: There is one way -- a young man comes in who has committed an offense and the judge feels that he is not too bad after all, and the judge feels it would be too bad if in the next five years he were called as a witness in a civil proceeding and has faced that conviction as affecting his credibility; and in Massachusetts the law is that a nolo contendere plea does not result in the kind of a conviction that can be used against the defendant in any other proceeding of any kind, and there are quite frequently cases of the type where it is fair to the defendant not to encumber him with a record that can be used against him elsewhere.

In other states, there are decisions that it is a conviction, not only for the particular case.

MR. CRANE: In a case in our courts, on a man's third offense they took the man's plea in Pennsylvania and that meant the fourth, and he went to jail for life.

You can ask him if he is a witness, call him as a witness in court, you can ask him if he hasn't been sentenced, can't you?

MR. MC LELLAN: You can't in Massachusetts.

MR. CRANE: Can he defeat the plea?

THE CHAIRMAN: I think there are matters beyond our control in this.

MR. CRANE: I think there are. But I do not want to ac-

quiesce in it, I just want to get it cited here because it is all I can do. I think it is time we cleaned out on a lot of these fictions.

MR. MC LELLAN: May I ask one question. You say that he may plead not guilty, guilty, or nolo contendere. Why isn't the place to put that, not guilty "or with the court's consent, nolo contendere"?

MR. ROBINSON: It was put there first, Judge, and then we dropped it to 2, because 2 deals with the court's consent with regard to accepting a plea of guilty.

THE CHAIRMAN: I was going to suggest if you follow "nolo contendere" with the word "or" indicating it is tied with the next paragraph, and then go on, "the court may refuse to accept a plea of nolo contendere."

MR. MC LELLAN: That's it.

THE CHAIRMAN: What about this question of the District Attorney in the plea of nolo contendere? I suppose the Department of Justice thinks it is necessary and that defendant's counsel thinks it is, too.

MR. MC LELLAN: I think the court should have the power in a propose case to accept a plea of nolo contendere. I do not think that he should have to get the consent of the United States attorney.

MR. SEASONGOOD: The plea is to the court and it seems to me the court ought to have the say.

THE CHAIRMAN: It seems so to me.

MR. MEDALIE: I am not a District Attorney and have not been for eight years, so I have no prejudice. Suppose we take it up from the technical viewpoint of pleading. When you plead nolo contendere, or offer to, you are offering the Government less

than it asks for, namely, a plea of guilty, and you are ofering less than the Government asks for because the Government has the right to ask for certain consequences of that plea. The consequences unfavorable to the defendant on a plea of nolo contendere are less than the consequences unfavorable to the defendant on a plea of guilty. In other words, if the court may accept the plea of nolo contendere without the approval of the counsel for the Government, that is, without the approval of the Government, then you are in the equivalent position of the court being able in a civil case to compel the plaintiff to take less than he asks for.

Now that, obviously, is bad in principle.

Now, I need not labor the point by pointing out that the consequences of a plea of nolo contendere are less harmful to a defendant than the consequences of a plea of guilty.

THE CHAIRMAN: I cannot accept your premise that the Government is a plaintiff and entitled to what it asks for. It seems to me that that analogy falls.

MR. MEDALIE: Oh, there are other consequences. The consequences with respect to the plea of guilty, let us say, in an anti-trust case, are entirely different from the consequences in an anti-trust suit of a plea of nolo contendere.

MR. YOUNGQUIST: The Government has no interest in that, has it?

MR. MEDALIE: It has when it is the plaintiff in an equity case, for an injunction, for other things in connection with anti-trusts.

MR. YOUNGQUIST: Why should it not be required to prove its case, then?

MR. MEDALIE: Well, one of the advantages it has under the present law is that if it has a plea of guilty, it does not have to prove its case under certain circumstances.

MR. YOUNGQUIST: But why should there be a civil remedy as a result of criminal prosecution?

MR. MEDALIE: Well, there have always been civil consequences as the result of conviction; for example, loss of the right to vote.

MR. YOUNGQUIST: Yes, but the Government asserts something which normally it is required to prove. Why should it have the benefit?

MR. MEDALIE: Well, it is required to prove less if the defendant has pleaded guilty. It is getting less than it seeks when it seeks a plea of guilty or a conviction.

MR. YOUNGQUIST: I think the answer to your argument is that we should eliminate the plea of nolo contendere.

MR. MEDALIE: If the Government sues.

MR. HOLTZOFF: I ask a thousand dollars. A defendant says "I offer $750." The court cannot say, "You take the $750." I say I will take my chance of getting the thousand.

THE CHAIRMAN: I cannot follow your analogy.

MR. MEDALIE: There must be some flaw in it, if you will point it out.

THE CHAIRMAN: Well, I do not think the Government is in the same position in a criminal case as in asserting a claim in a Civil action, any more than a decree of divorce for adultery should be used against the defendant and made the basis of proof of adultery on an indictment. One does not follow any more than the other.

MR. MEDALIE: It does follow because the Government has an interest in the consequences usually which affect the defendant. For example, he may not be able to hold office.

MR. MC LELLAN: Well, I am against criminal prosecution or a civil remedy anyway.

MR. MEDALIE: Well, the people said that is all right.

THE CHAIRMAN: When did they say that?

MR. MEDALIE: In '36 and '40 when they ratified the things that had been done in the preceding four years. I am afraid we will have to accept it even if we do not like it.

MR. DEAN: Why don't we find, Mr. Chairman, that the conviction in a criminal case is not a prima facie case when a third party brings the suit?

MR. MC LELLAN: But the plea of guilty can be used as an admission, can't it? That has been held quite a number of times, I think, that a plea of guilty can be used as an admission, just as a man's statement outside of court.

THE CHAIRMAN: Well, we have the issues pretty clearly before us. All those in favor of the motion to amend Paragraph 2 to provide that the District Attorney must confer in the plea of nolo contendere, say "Aye." Opposed "No."

(There was a chorus of "Nayes."

THE CHAIRMAN: The "No's" seem to have it.

MR. MEDALIE: They have.

MR. MC LELLAN: Well, we did something to it anyway.

THE CHAIRMAN: Are there any suggestions on sub-paragraph 3?

MR. MEDALIE: Wait a minute -- all right.

MR. MC LELLAN: Have you voted on 2? We voted on one aspect of it.

THE CHAIRMAN: Well, I think we have not. All those in favor of 2 as amended say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No." Carried.

All those in favor of 3 --

MR. YOUNGQUIST: It was not amended.

THE CHAIRMAN: As not amended. Pardon me. Not amended.

All those in favor of 3 --

MR. MEDALIE: Did you pass two?

THE CHAIRMAN: Yes.

MR. MEDALIE: I favor an amendment. The court shall hear the grounds therefor. We do that anyway.

MR. CRANE: We do that anyway. It is just a rule. It will be no trouble in practice at all. It will never be done if the attorney-general objects to it.

THE CHAIRMAN: You had a word on 3, Mr. Glueck.

MR. GLUECK: No, I was merely referring to your use of "but" in Line 18. Do you remember that?

THE CHAIRMAN: It was at the end of Line 17.

All those in favor of 3 say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried. Any suggestions on 4?

MR. MEDALIE: Yes, sir.

MR. DEAN: Yes, sir, plenty.

MR. MEDALIE: I want a chance to read the indictment and confer with my associates and get some facts and not get caught right in the court room. That is no reflection on anybody, but I think it is pretty raw.

MR. ROBINSON: The reason for that is this: it has been represented to our committee that that is the practice in some courts, that the judge will simply say when the defendant files his plea count,"Well at this time you may file any motions which you have with regard to any further proceedings in the case, and of course you may withdraw, it is understood that the plea may be withdrawn at any time."

Now, the object is to avoid a practice of a defendant coming in and filing a request for a bill of particulars and having that heard and then filing a demurrer to the indictment perhaps, and having that heard, and so on, a succession, series of motions which when properly nurtured by a defense counsel, so the objection has come to us, can succeed in delaying the proceedings indefinitely. This probably should be fixed in such a way that no right of a defendant shall be invaded, at the same time that no premium shall be allowed to the procedure to indefinitely delay the trial of the case or the disposition of it, by a succession of motions.

MR. HOLTZOFF: Well, as a matter of fact, you make your motions before you plead.

MR. ROBINSON: This rule will change that. This rule can take care of that. It can say that you can plead and file your motion. We are abolishing the demurrer, are we not?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Let us see what the fair thing is.

MR. ROBINSON: Yes. That is what you must do.

MR. MEDALIE: You get an indictment, let us assume it is only forty pages long, I think the defendant is entitled to have a person allegedly learned in the law read it, and also have a person whom he retains make an inquiry into the fact of a number of things.

Now, certain motions can be made within a reasonable time thereafter. One is a motion to dismiss the indictment for reasons of insufficiency; other motions can be made and those things can be done, say, within ten days, a motion for a bill of particulars. Those things may be extremely important or they may not, but they are matters which ought to be determined and counsel ought to have a fairopportunity to prepare. I do not like to suggest that a particular time be fixed for all cases or all decisions. You must trust the judge to be fair. So the judge will determine whether he is treated unfairly, but the court ought not to be precluded by the word "shall" from giving the defendant time in which to do these things.

Now, there are other motions which ought to be made with respect to the trial. I am not sure whether that is applicable here, but frequently after extended preparation and after a considerable lapse of time, defendant might want to have depositions taken, and, very properly.

Now, time must be given for all of that.

Now I think we can cover that the defendant pleads not guilty, he shall file any motions "within such reasonable time under all the circumstances as the court shall fix."

MR. ROBINSON: You see, part of the trouble is by striking out part of Lines 5 and so on, you strike out part of 4, "shall have the advice of counsel," the theory being he had counsel before this time came.

MR. MEDALIE: Practically, you know too, you were told to come to court. Suppose the defendant is not arrested. Let us say, respectable defendants, bank presidents, important merchants and so on. Counsel is told "Your client has been indicted.

He will be arraigned on Monday,"and on Monday or Tuesday you probably will get a copy of the indictment. There is no time to do these things.

MR. GLUECK: I second Mr. Medalie's motion if he puts it in the form of a motion.

THE CHAIRMAN: Before you do it, I would like to get the reaction on that.

MR. SETH: My idea is that it is a place where we should encourage a local rule.

MR. MEDALIE: But the provision should be made that the time is reasonable.

MR. SETH: Unfortunately --

THE CHAIRMAN: In framing your motion, if you could keep in mind that there are places where the judge only sits for a week and then won't be there for half a year.

MR. MEDALIE: Let me suggest this situation, a defendant is arraigned and is called on to plead on a particular day, that being the last day the judge will be at that particular place for holding court and he won't get back for two months. Well, it stands to reason that the judge will arrange for a time and place that those motions can be heard, or you can wait until the judge gets back if he won't arrange it. Let us say the judge sits in three different places within his district, a large territorial district. He can state to counsel, "Now, I will be in Spokane," or wherever the place is, "ten days from today, or two weeks from today. You can make your motions returnable before me there and I will hear you there."

MR. HOLTZOFF: They do not do it that way, though, in many rural districts.

MR. MEDALIE: What do they do?

MR. HOLTZOFF: You take the northern district of Texas which covers from Dallas to the Texas Panhandle. There may be a term at Wichita Falls or Lubbock once or twice a year. If a case is pending in one of those two districts, the motions will be heard there, because it is 250 miles.

MR. MEDALIE: Well, the judge sits some place.

MR. HOLTZOFF: He sits in Dallas, 250 miles away.

MR. MEDALIE: It is certainly of great inconvenience to counsel to come down to Dallas and talk to him there.

MR. MC LELLAN: I thought you were talking about the time of filing the motion. The judge does not have to be there for that, does he?

MR. MEDALIE: He has to dispose of them.

MR. HOLTZOFF: On the first day of the term all indictments are found and the second day the trial begins.

MR. SETH: That is too fast.

MR. MEDALIE: Let me put this to you, if I may: the Government in certain so-called crimes, that is, business practices on a large scale, usually in the anti-trust division of the Department of Justice, can pick any place in the United States for the filing of the indictment, and it picks from the viewpoint of the defendants some very strange places. Now, there is no reason in the world why a defendant's rights should be abrogated or diminished to any extent by reason of that practice, of the court's judge sitting in a particular place for a day or two, with the case requiring a considerable initial debate on the defendant's rights under the indictment, particulars, or anything else -- we just ought not to have that kind of thing. It is wrong.

THE CHAIRMAN: Could we get before us what Mr. Seth's motion would be on this?

MR. SETH: I am merely wanting to amend your motion to such reasonable time as is fixed by the court and by local rule.

MR. MEDALIE: If the local rule is fair, but if the local rule says the motion should be made in two days --

MR. SETH: It would not be reasonable.

MR. MEDALIE: It might be reasonable in an income tax case but not in a mail fraud case.

MR. YOUNGQUIST: Shouldn't we say "or within such reasonable time as the court may allow"?

MR. SETH: That may be true but I think we should encourage local rules on a thing like this.

MR. MC LELLAN: May I say, in order that there may be no difficulty in those large territorial districts, it might be well to put in something like"tendays and such further time as the court may allow."

MR. HOLTZOFF: It would not work in some of those districts, Judge.

MR. MEDALIE: It would not work because on certain cases you can do it the next day.

MR. MC LELLAN: You ought not to have to do it the next day.

MR. GLUECK: I think if you designate a reasonable time then the local rules will designate more aptly.

MR. YOUNGQUIST: Conditions vary so much in the different districts.

THE CHAIRMAN: Will you state your motion, Mr. Medalie.

MR. MEDALIE: Strike out the words "at the same time," and say "file any motions within a reasonable time fixed by the court

under the circumstances of the case."

MR. SEASONGOOD: Fixed by the court, isn't it, if it is a reasonable time?

MR. MEDALIE: The defendant cannot fix his own time.

MR. YOUNGQUIST: The word is "reasonable."

MR. MEDALIE: Strike out "at the same time file any motions with the reasonable time fixed by the court --"

MR. SETH: "Shall within a reasonable time."

MR. MEDALIE: "Shall within a reasonable time fixed by the court."

MR. SETH: Was that put in there with any idea that all motions shall be filed simultaneously? Was that the intention of the word "same"?

MR. ROBINSON: Really this rule was sketched in here for the consideration it is receiving right now, and at the same time had this in mind, Mr. Seth, that a plea of not guilty and a demurrer to the indictment might be filed at the same time.

MR. SETH: Well, ought not all motions, ought not they be required to file all motions in one document or at the same time?

MR. MEDALIE: Can I finish what I wanted to put in there?

THE CHAIRMAN: Yes.

MR. MEDALIE: "asking the court"is not necessary, because motions all ask the court.

MR. ROBINSON: But in your meeting last September you decided every motion should simply be expressed in that way, you would not allow us to call it a motion to dismiss, or anything else, but just put "motions which shall ask the court for whatever relief."

MR. HOLTZOFF: You mean, strike out those words?

MR. ROBINSON: Just a second. "Whatever relief or order would be proper under the circumstances."

MR. MEDALIE: You do not need the words "ask the court."

MR. HOLTZOFF: Why not just say "orders with respect to the written accusation"?

MR. MEDALIE: Yes, I agree.

MR. ROBINSON: Would everybody understand this?

MR. HOLTZOFF: It is broad enough to cover.

MR. DEAN: Will all of the motions at that time be with respect to the written accusation? I was thinking of a motion to suppress the evidence, search warrant.

MR. ROBINSON: Yes.

MR. MEDALIE: I do not think there is any necessity for fixing the time as to that any more than the taking of depositions. It is tinkering with the indictment that you want to get out of the way. Now you know what you are going to try, you ought not to delay that determination. Bringing the case on for trial, you do not need it.

MR. ROBINSON: I disagree with that.

MR. MEDALIE: You do. I am probably wrong and you are probably right.

THE CHAIRMAN: It can be made a year later. Why fix the time?

MR. ROBINSON: There you get an order or orders that do one of two things, throw the case out of court by dismissing the indictment, or there would be orders which would be designed to bring the case on to trial. Those are the alternatives. You cannot name the order in which it is to be, like a demurrer, or bringing it on for trial. It seems to me it should go in.

MR. MEDALIE: A motion to bring the case on for trial can be

made at any time. It can be made six years after the indictment was filed. Why should the person have to make a motion of that kind at that time?

MR. ROBINSON: I do not agree with your interpretation of bringing the case on to trial. I would include in that any motion or any order requesting the court which would do something with the case other than throwing it out, disposing of the indictment.

MR. DEAN: I can think of only one, in the interests of a speedy trial, the thing has been delayed so long, but you would not be making that so soon after the arraignment.

MR. MEDALIE: You would be restricted only to the time when you would be likely to be getting a speedy trial.

THE CHAIRMAN: I think Mr. Robinson means in matters which have to do with preparing for trial. I think it is a question of language.

MR. HOLTZOFF: Like a motion to take depositions.

MR. MEDALIE: You can make that any time. You ought not to be restricted because you won't know until your case is very thoroughly prepared. You ought not to have to make your motions like that immediately.

MR. ROBINSON: It is within reasonable time.

MR. MEDALIE: You do not know if you require depositions until you have worked on it half a year.

MR. ROBINSON: I still think your reasonable time would govern.

MR. MEDALIE: The court fixes that time.

MR. ROBINSON: For each motion.

MR. MEDALIE: If you make a motion with respect to the

to the indictment, that is a motion the court ought to get out of the way early so you know your issues; to dismiss indictments, to dismiss counts, to sever, and so on, those motions ought to be gotten out of the way. That includes the bill of particulars, of course. But the other things, you won't know until there is a long investigation. There ought to be no restrictions on it.

The court can determine then whether there has been undue delay. It is decided on a different theory all together.

MR. MC LELLAN: I would like to know -- that is 5 -- what the defendant must do with respect to applying to the judge. May he sit still, or must he immediately ask the judge to fix the time?

MR. HOLTZOFF: Unless a local rule fixes the time.

13 MR. MC LELLAN: But the application to have the time set?

MR. SETH: The court can do it on its own motion.

MR. ROBINSON: I wish Mr. Medalie now would take the constructive side. I have tried to do what I understood your wishes were, so how should it be worded to move the matter along without a successful series --

MR. MEDALIE: Everything is out of the way except the language that I think ought to remain in there because the only things that remain have to do with the facts, deposition, or suppression of evidence, matters which you find only after considerable work on the case. You may not know that any necessity exists.

MR. HOLTZOFF: Are you moving to strike out the words "or bring the case on for trial"?

MR. MEDALIE: Yes.

MR. ROBINSON: Yes. Mr. Medalie says the only thing you can do at this time is something with respect to the written accusation, which I suppose would amount to a demurrer.

Proceeding from that point then, when will you move the next thing? Where are you going to write that in?

MR. MEDALIE: Do you mean by that motions to take depositions or suppress evidence?

MR. ROBINSON: I include everything.

MR. MEDALIE: You include that in your language which is not clear. I think there ought not to be any time limit except that which goes with the ordinary rule that you shall do those things with due diligence.

MR. YOUNGQUIST: Won't that all take care of itself, whenever the motions are required to be made, will not the court then set the case down for trial and will that not necessitate the defendant's taking all his preliminary actions before that date?

MR. ROBINSON: Well, that is the point. The language we want there in Lines 26 and 27 in place of that which is about to be stricken out, I would think it takes care of the motions, beginning at Line 43-D with counter motions, hearing or trial on these counter motions, notices, if there be any, of insanity or alibi, all of those are here included with the idea of bringing the case on to trial.

MR. GLUECK: You are after abolishing undue delay, I understand. Now the chief reason for undue delay seems to be all sorts of motions for continuance, further continuance, and so on.

MR. ROBINSON: No. There would be the matters I mentioned a minute ago of asking for bill of particulars, and motion for examination of the Grand Jury minutes which comes up in some

districts.

MR. GLUECK: I mean, what is the real force of the abuse we are trying to remedy here.

MR. ROBINSON: Well, so many of them. Take the one of the attacks on the indictment iself. In a good many districts, I do not know how general it is, but in a good many districts it is true you have a demurrer filed to the indictment, or you have a plea in abatement filed, or you have some special plea in bar filed, not concurrently, but strung along. As United States attorneys explained it to me, there will be a date set for a hearing, then a motion, then another hearing, then another motion filed, and another hearing.

MR. GLUECK: Is not that all covered by what has already been written in here, within a reasonable time fixed by the court?

MR. ROBINSON: No. You see, that only applies to a request to the court.

MR. GLUECK: All that remains is the delay of the court in acting on the motion. Is not that right?

MR. ROBINSON: I do not believe so.

MR. YOUNGQUIST: Isn't this what happens under the language proposed by Mr. Medalie, that this covers all of the motions which may be made relating to the accusation itself?

MR. ROBINSON: Mr. Alexander is familiar with this. I would like to call on him, if I may.

MR. ALEXANDER: Under the common law, when a man came in and pleaded not guilty, he waived all those motions. Now the practice has grown up in our court where everybody could come along and plead not guilty. Then we go along and set the case for trial. The morning of trial the attorney will come in and

he says, "I ask leave to withdraw the plea of not guilty and file a demurrer."

Well, you have a jury there and the lawyer may raise a good point and you have to go out and spend a couple of hours.

MR. MEDALIE: Doesn't this take care of it? It has to be done within a reasonable time.

MR. ALEXANDER: Do you mean those motions which cite thecase ready for trial?

MR. GLUECK: Which are those?

MR. MEDALIE: The demurrer, plea in abatement, double jeopardy, and that about covers it. Bill of particulars should be in there by all means.

MR. SETH: What was your language, Mr. Medalie?

MR. MEDALIE: Well, as it reads now, according to my motion --

THE CHAIRMAN: Read 4 as you have revised it.

MR. MEDALIE: "If the defendant pleads not guilty he shall, within a reasonable time fixed by the court, file any motion for orders with respect to the written accusation."

THE CHAIRMAN: Are you ready for the motion? All those in favor of the motion as amended, say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried.

Section 5.

MR. ROBINSON: Section 5, "The Arraignment and Plea shall be entered of record."

Now, the arraignment and plea arraigned in sequence beginning at Line 13 brings the matter to a conclusion and states what probably would be understood anyway but other provisions have

provided that the arraignment and plea shall be entered of record, therefore we copied it, and having done that it seems necessary to state the rule to the effect that even if you fail to enter on the record the arraignment and plea, that is not reversible error.

MR. WECHSLER: Well, I do not think we have to state the rule in that case so long as the rule is that way. If it were the other way, I think you might have to change it.

MR. ROBINSON: You move to strike after record?

MR. DEAN: Seconded.

MR. HOLTZOFF: I move to strike out after Paragraph 5. I do not see the need of the whole paragraph.

THE CHAIRMAN: We have the motion to strike Paragraph 5. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. SETH: We have another rule requiring all this talk about counsel to appear of record.

THE CHAIRMAN: Well, now, that is an exceptional situation, is it not?

MR. SETH: No. In every case where he hasn't counsel of his own, he will be there. It will have to be.

MR. WECHSLER: I have my doubts as to whether that should be in the rule, too.

THE CHAIRMAN: Section 3 --

MR. WECHSLER: Or have I abolished -- now, what to call that motion is something for us to decide. Apparently, we have to go a little further -- requesting the court to make an order

MR. HOLTZOFF: Is a demurrer a defense? I did not understand that it was.

MR. ROBINSON: It raises defenses. By demurrer, you can raise defenses if the indictment on its face shows it is repugnant or there is lack of jurisdiction.

MR. DEAN: Why don't you simply say, "All matters heretofore raised by demurrers"?

MR. ROBINSON: All right. Then what are you going to put under defenses?

MR. MEDALIE: There is a little amendment I have there.

MR. ROBINSON: We can close this. All matters heretofore raised.

MR. SETH: The civil rules say "All claims for relief." They include demurrers.

MR. ROBINSON: Maybe we should copy the civil rules on that. Although I believe they were stricken out.

MR. LONGSDORF: Yes. It was inapplicable.

MR. SETH: Somebody said a demurrer was not a defense. The civil rule says it is.

MR. MEDALIE: I think the main thing is to get rid of the demurrers.

THE CHAIRMAN: Any questions on the first sentence?

MR. MEDALIE: I want to move as to that so it will read "demurrers and all other pleas than the plea of not guilty."

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: Demurrers?

MR. ROBINSON: And all pleas.

MR. GLUECK: That is superfluous.

THE CHAIRMAN: The first sentence as amended seems to

accepted by consent.

Now, Line 37 starts off: "All matters heretofore raised by demurrer," and so forth. Are there any other changes in that sentence?

MR. ROBINSON: Would you leave out the words "of defendants"?

THE CHAIRMAN: Yes.

MR. ROBINSON: Very well.

MR.HOLTZOFF: I suggest we strike out the rest -- heretofore asserted by motion. And, strike out the rest.

THE CHAIRMAN: Any objection to that? If not, that stan I think it would be shortened by saying, "demurrers and a other pleas other than," cutting out all this reference to p in bar.

Let us have a motion to adopt Paragraph D as thus amer

Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. MEDALIE: I have another motion. I move w until ten o'clock.

THE CHAIRMAN: May I make a suggestion, then. you members been slipping up to me and telling me various appointments at divers places?

MR. ROBINSON: Will 9:30 be all right?

MR. MEDALIE: I will be late, but I am p if the others come at 9:30.

THE CHAIRMAN: Quite a few have said th

MR. MC LELLAN: I am staying over.

THE CHAIRMAN: Oh, you are staying ov

MR. MEDALIE: The matters we take up tomorrow are matters I would like not to miss. Now, if you want to start earlier and go over to something else, I will appreciate it as a personal indulgence.

THE CHAIRMAN: Shall we start at ten?

MR. MEDALIE: When shall we finish?

MR. GLUECK: Tomorrow night.

THE CHAIRMAN: The Chair will have to be a lot tougher than he has been.

They have wanted to take eight and one half million dollars of property away with just one of those little orders.

Well, it looks as if we are inevitably set for ten o'clock. But we may consider decreasing our recesses and sandwiching or something like that in an effort to make some progress tomorrow.

(At 11:00 o'clock p. m., the meeting recessed until 10:00 o'clock, a. m., of the following day.)

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