Washington, D. C.

Wednesday, January 14, 1942.

ADVISTORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT.

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

Present: Same as previously noted.

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The Chairman. Gentlemen, we will come to order.

Rule 52 (e).

Mr. Robinson. This is where Mr. Medalie said he wished to be present, and he is not here.

Mr. Glueck. He advised us to go ahead with something else and come back.

The Chairman. Suppose we pass it and go on to Rule 52.

Is there anything special on that?

Mr. Holtzoff. I move we adopt it.

Mr. Youngquist. I had, on the second line of (b), just a suggestion for clarity. We say "judicial or quasi-judicial tribunal, or of a board or officer."

I wonder if it would not be better to say, instead of "or," "decision or order of an administrative agency."

Would that be clearer?

Mr. Holtzoff. I do not think it makes any difference.

The Chairman. What difference is there between a judicial tribunal and a court?

Mr. Holtzoff. They are the same thing.

Mr. Robinson. I am trying to find whether this is just the way we adopted it at the other meeting or not. What was the number of this rule in the former draft? I have a chart here, but that does not seem to cover that.

Mr. Youngquist. It comes from 9 (c) of the Civil Rules, if that helps any.

Mr. Holtzoff. I hope Mr. Youngquist will not withdraw his suggestion, because I think it will clarify it.

Mr. Robinson. In the first draft there must have been a request to prepare 9 (d) and 9 (e). Mr. Seasongood made the suggestion, and he is not here this morning yet.

The Chairman. Can anybody think of a judicial tribunal that is not a court?

Mr. McLellan. I can't.

Mr. Holtzoff. I think the two are synonymous.

The Chairman. The term "administrative agency" has come to include boards, officers, commissions, and so on.

Mr. Youngquist. I notice that (b) is identical with 9 (e) of the Civil Rules.

Mr. Robinson. 9 (d) and (e) were requested to be drafted for this draft -- that is, a rule for criminal procedure which would compare to Civil Rule 9 (d) and (e), and so we have taken those words exactly here.

Mr. Holtzoff. I think we can improve on the civil rule in this case.

The Chairman. It seems so to me.

Mr. Glueck. I wonder if they had in mind including both the court and the judicial tribunal?

Mr. Holtzoff. I think they are synonymous.

Mr. Glueck. Do you think they are?

Mr. Longsdorf. Perhaps because we had "foreign court" in there it was deemed by the Civil Rules Committee better to put in the additional words to indicate the scope.

The Chairman. The motion by Mr. Youngquist is to delete the words "judicial or quasi-judicial tribunal, or of a board or officer," and substitute the words "or administrative agency."

Mr. Crane. Isn't the Interstate Commerce Commission a quasi-judicial body?

The Chairman. But there are many more than that. You need to include the Secretary of State, the Secretary of Agriculture, the Secretary of the Treasury, the Tariff Commission, and a great many more, and the words "administrative agency" have been accepted to cover commissions, committees, individual officers, or special appointees.

Mr. Youngquist. The language I had was this: "In pleading a judgment" -- omit the words "or decision" -- "a domestic or foreign court, or decision or order of an administrative agency."

2 That is sufficient. I do not know whether that is inclusive or not.

Mr. Holtzoff. I second the motion. I think it is inclusive. The words "administrative agency" cover every one of those bodies, as well as individual officers.

The Chairman. Are there any remarks on the motion?

Mr. Glueck. There may be -- I can't think of any changes -- an agency which is designated a quasi-judicial tribunal --

Mr. Holtzoff. Quasi-judicial tribunals are included under the term "administrative agency."

The Chairman. All those in favor of the motion say "aye." Opposed, "no." The motion is carried.

Then we have a motion covering the entire rule as amended.

All those in favor of Rule 52 as amended say "aye." Opposed, "no." The motion is carried.

Rule 53.

Mr. Robinson. I do not believe any comment is required there except to say that on 53 (a) it is apparent that there already has been part at least of this same ground covered. At the same time it is desirable to have the views of the committee on the language of 53 (a) in order that we may use your views in whatever consolidated rule finally is drafted on this point.

Mr. Holtzoff. I think Rule 30 (c), paragraph 3, which we adopted yesterday, and the language to which we agreed, covers the entire subject matter and the entire substance of the rule.

If I am right on that, then I think that 53 (a) might well be deleted. I can understand why, of course, it is here -- because you presented it in alternative form. I think we might--

Mr. Robinson. With due respect, I do not think your statement is quite accurate. They are equally extensible. There is a clearer statement of it here, on which I should like to have the views of the committee.

There was discussion yesterday, for example, about amending an indictment. We did have a statement with reference to correcting clerical errors, but the Bain case, which Mr. Medalie has mentioned, has made some courts very nervous about correcting even clerical errors, apparently.

Here is our surplusage point again.

It seems to me there is ground for thinking that the express

statement that the Court may correct clerical errors ought to be considered.

Mr. Holtzoff. We did adopt a rule on surplusage. That was 30 (c) (1), so the new matter is the correction of clerical errors in an indictment. I am not sure that perhaps the Bain case goes so far as to correct clerical errors in the indictment. I am not certain whether it does or not.

Mr. Youngquist. Could we, Mr. Reporter, incorporate the contents of 53 (a) in 30 (c) (1)?

Mr. Robinson. Yes. That was my original suggestion, Mr. Youngquist -- that you give us your ideas on the way 53 (a) runs, so that I may incorporate or consolidate a rule in 30 (c) which would include our recommendations here.

The Chairman. Is there any doubt as to the soundness of the rule on the merits?

Mr. McLellan. Do you want to let theCourt amend either an indictment or an information on its own motion?

Mr. Seasongood. I thought you might strike out the words in lines 4 and 5: "Upon motion of the Government, of the defendant, or upon its own motion."

Mr. McLellan. I rather like it, "upon motion of the Government or the defendant." I do not like the idea of the Court itself doing it on its own motion.

Mr. Crane. Didn't we thrash this out pretty well yesterday?

Mr. Holtzoff. We did.

Mr. Crane. On clerical errors?

Mr. Holtzoff. Not on clerical errors.

I am afraid of the constitutional question. I am wondering whether the constitutional bar goes as far as correction of

clerical errors, on the theory that, after all, the indictment
3 is the action of the grand jury and even a clerical error should not be corrected except by the grand jury.

Mr. Robinson. Even the error of the clerk in writing up what the grand jury did?

Mr. Holtzoff. The clerk does not write it up after the grand jury acts. The grand jury approves the text of the indictment and the foreman endorses it, and if he endorses it with the errors in it, that is the action of the grand jury. I hope the constitutional rule is the other way, but I am afraid of it.

Mr. Dean. Are not most such errors covered by the harmless error statute? Misspelling would not be regarded as an error harming the rights of the defendant. Rather than risk the possibility of tampering with the indictment, which is rather a constitutional question, if clerical errors are going to be corrected, aren't they going to be corrected in that way?

Mr. Robinson. I do not believe so. I do not think that is specific enough to meet this, and I am basing my statement partly on state statutes which have this provision.

I know several States that have statutes to the effect that the court may correct clerical errors, and I have felt that the courts on state benches have dealt with that effectively.

Mr. Holtzoff. It says, "No indictment or information shall be deemed insufficient by reason of any defect or imperfection in form only and which shall not tend to prejudice the defendant."

Mr. Robinson. It does not authorize correction.

Mr. Holtzoff. No, but it means that you can ignore the error.

The Chairman. I think it is more effective.

Mr. Robinson. I disagree, with respect to all this weight of authority here, but I do not think it is more effective in view of the attitude just as Mr. Holtzoff suggested here. For example -- I am sorry to have to take this time, but I guess we will have to go into detail about it -- I can give you citations to a case in which there was an error in the date. It was a printed form, used at Evansville, Indiana. The form started out with "Nineteen Hundred" spelled out, and then there was a blank which the assistant prosecuting attorney was to fill in with just "29"; but instead of just filling it in with "29," he filled in "1929." So the date left was "Nineteen Hundred 1929," and the Supreme Court of Indiana reversed. They said that was an impossible date; therefore the indictment was bad.

The Chairman. In face of the harmless error statute?

Mr. Holtzoff. I do not think the Appellate Court of --

Mr. Robinson. Wait. Let me finish the story and give you the happy ending.

The Legislature of Indiana passed a statute which provided that the court could, upon its own motion, strike out clerical errors of that sort, and since that time courts have exercised that authority. I have heard lawyers cite that statute as authority to do it.

The Chairman. Wouldn't that be covered in a harmless error statute?

Mr. Robinson. It would not, because there is nothing in the harmless error statute that says a correctinn may be made.

Mr. McLellan. You just disregard the error in the trial.

Mr. Glueck. What do you need the correction for?

Mr. Robinson. The harmless error statute is used with regard to errors committed in the court below. It gets up to the higher tribunal, where the courts, in the Federal appellate divisions, say, "This error perhaps was an error, but it was a harmless, and therefore will not be considered."

Mr. Youngquist. I think I see the point in the matter of the date given. The vice was that there was no date at all, an impossible date; and therefore no date at all.

Mr. Robinson. Yes, I think so.

Mr. Holtzoff. Our harmless error rule covers more than the ordinary harmless error statute. It contains the additional sentence that any imperfection of the indictment in form only shall be disregarded, and the last sentence of the harmless error rule says that that may be done at any stage of the proceeding.

Mr. Robinson. That what may be done?

Mr. Holtzoff. Disregard the error or defect.

The Chairman. "The Court shall at any stage of the proceeding disregard any error or defect * * *."

Mr. Robinson. The argument of defense counsel is that it would affect the substantial rights of the defendant to have a date corrected which is bad.

Mr. McLellan. Then it is not a mere detail that can be corrected?

Mr. Robinson. No. It is a fatal defect, and for you to make an indictment good which was bad is affecting the substantial rights of the defendant.

Mr. Dean. If it does affect the substantial rights of the defendant and the defendant can so contend with some persuasion, then you cannot change it by this rule which would correct the

error in the indictment.

Mr. Robinson. The point is that it takes up the time of the court by saying it affects the substantial rights. That is taken care of if it is expressly stated that the court may make that change.

Mr. McLellan. I would rather take my chances, if I were for the defendant, of arguing that the court did not have any right to change the indictment than hoping to get away in the face of the harmless error statute.

Mr. Robinson. In the higher court, you mean?

Mr. McLellan. Any court.

Mr. Moltzoff. I move that we strike out 53 (a), Mr.Chairman.

Mr. Crane. I thought that rule 30 covers most of this. We have the surplusage amendment to written accusations.

Mr. Dean. It covers everything except the harmless error provision.

Mr. Crane. Why don't we complete it under Rule 30 --

The Chairman. That is a thought, Judge. 53 (a) is covered by 30 (c) (1), except this provision about clerical errors, which some of us seem to think is covered by the harmless error provision, Rule 5.

Mr. Crane. If it is covered by one of the others, I think it ought to go out here.

Mr. Glueck. I was going to suggest that perhaps we could add "including clerical errors" at the end of line 10, but I notice that line 11 refers to proceeding.

At line 10, Rule 5, if we would add "including clerical errors" to that, would that be one way of handling it?

Mr. Holtzoff. I think perhaps that would be undesirable, because you take away from the general character of Rule 5, which is one of its principal merits.

The Chairman. And it would certainly include clerical errors, if it includes anything.

Mr. Longsdorf. I think we ought to read Rule 91 of Title 28, I think it is. When that was amended not so many years ago, as I understand it, precisely to take care of this kind of a situation, it read this way. I will read the second sentence, which embodies it. That was added either in 1919 or 1926. I am not sure which of those it was.

> "On the hearing of any appeal, certiorari, or motion for a new trial in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Now, the effect of that was to reverse the old presumption that an error was harmful and established one that was harmless, and you cannot reverse on an error unless the harmfulness of it appears.

Mr. Youngquist. Isn't that applicable only to appellate proceedings?

Mr. Longsdorf. No, because it mentions new trials. New trials are also specified.

The other statute, 377, takes care of that, and they have been combined in our harmless error rule.

Mr. Holtzoff. Those statutes, of course, will be super-

seded by our rule. Our Rule 5 takes care of it entirely.

Mr. Longsdorf. I said 377. It was not 377. I can find it, I think.

Mr. Robinson. I think the will of the committee is indicated to the effect that this may well be taken care of with the caveat, perhaps, in making the new draft, that we be sure that what we did in Rule 31 does cover everything that the committee desires to remain from 53 (a).

Just for the sake of the record -- and that is about all that losing counsel here is ableto do -- I think I ought to put this in, too: that many States have both a harmless error statute and a clerical error correction statute. Now, the fact that States have both should not have a lot of weight with us, I suppose, but it is something that we may consider.

Mr. Longsdorf. And also some of them have relaxed constitutions which permit an indictment to be changed in that way.

The Chairman. Unless there is objection to the suggestion of the Reporter, we will go to Rule 53 (b).

Mr. McLellan. Are you leaving anything out with reference to information?

The Chairman. That is all taken care of in Rule 30 (c)(1).

Mr. Holtzoff. Mr. Chairman, with regard to Rule 53 (b), I cannot visualize any use for supplemental pleadings in a criminal prosecution. I do not think that, once a prosecution has been commenced, it would be appropriate to permit the prosecuting attorney to bring in additional charges or offenses committed subsequently to the start of the prosecution.

Mr. Robinson. Before you spoke I said to the Chairman that I felt that 53 (b) should be passed over or stricken, because of

the fact that what is urged in there is covered in other rules, and I asked that we come to the real rule covering that.

The Chairman. 53 (b) is stricken.

Rule 54.

Mr. Robinson. Mr. Holtzoff is our service man on Rule 54, so we will now let him take the plaintiff's side instead of the defendant's.

Mr. Holtzoff. I do not think this needs much of an explanation. It just relates to the technical methods of service and filing of papers after the prosecution has started, and is based very largely on the corresponding civil rules. In fact --

Mr. Robinson. It was Rule 5 in the first draft, and I think what Mr. Holtzoff's work has been is to take Rule 5 and supplement it by your instructions at the September meeting, and that leaves it in this form, Rule 54 now.

Mr. Holtzoff. I move that we adopt Rule 54.

Mr. Glueck. I second the motion.

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

Mr. McLellan. May I ask a question about (b)? "Service by mail is complete upon mailing."

Do you have a provision somewhere about allowing the time for the mails to operate?

Mr. Holtzoff. Yes. There is a provision in an earlier rule -- perhaps you may recall it -- adding three days to the time for anything that needs to be done, on the strength of a paper served by mail.

Mr. McLellan. That stayed in, did it?

Mr. Holtzoff. That stayed in.

Mr. Youngquist. I had a question as to whether mailing it

and, more particularly, whether leaving notice with a clerk is sufficient service, not from the legal viewpoint but with regard to doing justice to the party.

Mr. Holtzoff. You have the same rule in your civil rules. Take a lawyer who is practicing both civil and criminal cases. I think it would be very confusing to have different rules as to the mode of serving papers in the two types of cases.

Mr. Youngquist. That is entirely true. I am in agreement on that.

Is leaving notice with the clerk service at all upon a party? There is no duty imposed on the clerk of advising him that the notice has been left with the clerk. How shall the adverse party get knowledge of that?

Mr. Holtzoff. That seems to be in the civil rules.

Mr. Youngquist. I am conceding that.

Mr. Crane. In the big offices you never find him there.

Mr. Youngquist. What is that?

Mr. Crane. I say, in the big offices --

Mr. Youngquist. But this means leaving it with the clerk if the address is not known.

The Chairman. He refers to line 13, and I think it is salutary. If the party does not leave an address andyou cannot find him, service is not prevented, any more than the failure of the defendant to sign a deed would prevent specific performance.

It is in the civil rules. It is just designed to cover those cases where a party leaves no address. If he does not leave his address on the paper, he does not deserve much notice, does he?

Mr. Holtzoff. I do not know what else you can do.

The Chairman. All those in favor of Rule 54 say "aye." Opposed, "no." The motion is carried.

Mr. Dean. With regard to 54 (a), I notice you have "written pleas." Didn't we abolish those?

Mr. Holtzoff. No.

Mr. Dean. Didn't we?

Mr. Holtzoff. That is right. Anything that would be in a written plea would hereafter be raised by motion. I think you are right about that.

The Chairman. By consent, in line 3, the words "written please" are stricken.

Rule 55.

Mr. Robinson. Mr. Holtzoff will present that.

Mr. Holtzoff. That is, with one or two changes, the pretrial rule that is in the civil rules and as we agreed upon it at our September meeting.

I left out, in revising this rule, the provision which is contained in the civil rule in reference to amendments, because amendments do not play an important part in criminal procedure.

Now, the only other important change is the addition of the last sentence, namely, that the rule shall not be invoked in case of any defendant who is not represented by counsel.

It seemed to me that that might meet the sort of objection that Mr. Burke suggested at the September meeting, namely, that the pretrial might be used to bring pressure upon a defendant, and it also might meet any outside criticism.

The Chairman. It is purely an invitation matter, and there is no compulsion on either the Government or the defendant

to attend and accept the invitation.

Mr. Holtzoff. That has been successfully used in some long criminal cases, and therefore it is a very desirable provision, I think.

The Chairman. Is there any discussion of the rule?

If not, all those in favor say "aye." Opposed, "no." The motion is carried.

Rule 56.

Mr. Crane. May I ask a question? "This rule shall not be invoked in case of any defendant who is not represented by counsel."

What about assigning counsel?

The Chairman. He has counsel.

Mr. Crane. That does not prevent assigning counsel?

The Chairman. The purpose is to prevent unrepresented defendants from the fear of being coerced.

Rule 56.

Mr. Holtzoff. I am responsible for this, but I move to strike out Rule 56. I drafted it because the committee directed at the September meeting that there be such a rule. I do not think there is any reason for a rule on discovery in a criminal proceeding. Certainly there cannot be any discovery on the part of the prosecution against the defendant, because the Constitution precludes that, and I do not see why there should not be a compulsory discovery in favor of defendants against the Government.

Therefore, I move to strike this rule out.

Mr. McLellan. I second the motion.

Mr. Dean. I think we ought to reconsider that without

going over it too quickly. I wonder if we should not have a rule with regard to pretrial wherein the prosecutor should be required to allow the defendant to examine certain exhibits such as a revolver, a broken safe, something like that?

Mr. McLellan. Wouldn't he get that without a rule?

Mr. Dean. He gets it depending largely on how he gets along with the prosecution, and then it is done very informally.

Mr. Crane. Hasn't the defendant a right to apply to the Court for permission to see papers and books before the case goes to trial. Suppose the district attorney won't show them?

Mr. Holtzoff. I do not know of any cases arising where the district attorney refused to show documents in his possession where those documents are needed by the defendant.

The Chairman. Should it be a matter of grace to get the consent of the district attorney for something the defendant should have as a matter of right?

Mr. McLellan. It is not a matter of grace. The Court has the right to do that. The question is whether you want the discovery rule in a criminal proceeding.

Mr. Crane. I think the defendant should have that right. We treat a judge as though the judge had to be checked up on everything. We are fighting in these rules for the mediocre man, and I do not see why we should consider the Attorney General or the District Attorney as a super-man, and I think we should make rules that give the defendant that right.

Mr. Youngquist. I think we should have a rule -- not in the discovery rule -- which gives the defendant a right to inspect any books or documents in the possession of the Government when it is necessary for the preparation of his defense.

Mr. McLellan. By motion to the Court, for that reason.

The Chairman. I thought Mr. Dean made the suggestion that this might require a rule in pretrial practice and work it in there. That seems to me to be a good idea.

Mr. Seth. This ought to be a matter of right, not an invitation matter like pretrial.

Mr. Seasongood. The other merely invites the party.

The Chairman. Shouldn't this rule be referred back to the reporter to be restated?

Mr. Dean. There are two or three cases that raise confusing questions, and I think we ought to have that before us before we attempt to redraft it. There is one written by Judge Cardozo. I think it is People against Lemon.

The Chairman. The motion is to refer the rule back to the reporter for redrafting, in light of the discussion.

All those in favor say "aye." Opposed, "No." The motion is carried.

Rule 57.

Mr. Holtzoff. Rule 57 is the rule on depositions. In its structure it follows the Civil Rules, but it is much more circumscribed. It does not permit any depositions on notice; it only permits depositions by order of the court, because depositions play much less part in criminal cases than they do in civil cases and are the exception rather than the rule.

(a) is the general provision as to/when depositions may be taken in criminal cases, and the second sentence relates specifically to a witness who has been committed for inability to give recognizance.

Cases of that type are not very frequent in the Federal

courts, but when they do occur they cause hardship to the witness, and that provision would give the witness the right to have his deposition taken so that he could be discharged from custody.

Some States have similar statutes.

Mr. Youngquist. That is why you use the word "shall" in line 8?

Mr. Holtzoff. Yes.

The second part of 57 (a) is just as to the contents of the notice, which is issued on the basis of a court order, and the civil rule is followed as to that.

Mr. Glueck. May I inquire as to what the expression "particular class or group" in line 16 refers to, usually?

Mr. Holtzoff. Suppose you want to examine a member of a group that you can identify but you do not happen to know the man's name.

The Chairman. Members of Union No. 670, for instance.

Mr. Seth. That is the civil rule.

Mr. Holtzoff. That is the language of the civil rule.

Mr. Longsdorf. May I suggest for Mr. Holtzoff's consideration, in line 11, "the party at whose instance a deposition is allowed and directed to be taken," so as to keep someone from thinking that this is to be taken on notice like a deposition de bene esse?

Mr. Holtzoff. I think it is a good suggestion: "the party at whose instance the deposition is ordered to be taken."

The Chairman. That correction will be made, if there is no objection.

All right, will you go on, Mr. Holtzoff?

Mr. McLellan. May I ask one question, because we want to finish what we can? Do all of you think that it should be provided that a witness must be released when he is held as a material witness if his deposition is taken? May there not be circumstances in which the presence of the witness might well be required and a deposition not be substituted?

Mr. Holtzoff. You would change "shall" to "may"?

Mr. McLellan. I am only wondering about that.

7 Mr. Seasongood. The same question occurred to me. It might be very important to have the witness personally present. A deposition loses a great deal of force as compared with the personal attendance of the witness.

Mr. Youngquist. That was in my mind, too.

Mr. Seth. Leave out "forthwith" also.

Mr. Holtzoff. Personally, I think it is always a grave injustice to a witness who is at no fault at all to be kept in prison for a number of months just because he happened to see a particular crime.

Mr. McLellan. They do not exercise it except when they need to, and there may be circumstances where his personal presence is necessary for trial purposes.

Mr. Youngquist. I suggest that we change "shall" to "may."

The Chairman. And strike out "forthwith."

Mr. Waite. That matter was very definitely considered by the American Law Institute. There have been a number of cases in which witnesses have been held longer, as a matter of fact, waiting to give their testimony, than the defendant was held after he was convicted and sentenced, and there was a thorough-

going agreement that that was a danger, a menace, which ought to be changed.

The Institute Code reads that a witness may be held for two days and then released if he gives security for his appearance, and then there is the provision:

> "When, however, it satisfactorily appears by examination on oath of the witness or any other person that the witness is unable to give further security as provided in Section 57, the magistrate may make an order finding such fact, and the witness shall be detained, pending examination, for his conditional examination. Within three days from the entry of the order last mentioned the witness so detained may be conditionally examined on behalf of the State," and so on. "At the completion of the examination the witness shall be discharged, and his deposition may be admitted in evidence."

I should myself be very loath to perpetuate the present system of making it possible to keep a witness indefinitely awaiting trial.

Mr. Holtzoff. Of course, in the Federal courts witnesses are not committed anywhere near as frequently as the case in state courts, because of the difference in nature of the Federal prosecutions.

Mr. Waite. That may be. It is quite possible that they do not happen, but we should recognize that they might happen and make a rule taking care of that.

Mr. McLellan. I move that in the tenth line of Rule 57(a) the word "shall" be deleted and the word "may" inserted.

Mr. Youngquist. Isn't it the eighth line?

Mr. McLellan. I thought it was the tenth line, sir.

Mr. Seasongood. No; it is the eighth.

The Chairman. No; it is the tenth line.

Mr. Youngquist. My proposal was directed to the eighth line. That is the heart of your statement.

Mr. Glueck. But that refers to taking of the deposition, which is always allowed, and the other refers to the discharge.

Mr. Youngquist. Do you mean you could take his deposition and still keep him in jail?

Mr. Glueck. You might. You could change your mind. He might get killed.

The Chairman. Shouldn't the Court have the right to protect the man, Mr. Waite?

Mr. Waite. If we give the Court the discretion as to whether he should release the man or not, that leaves the rule exactly as it is today, and today it has been demonstrated to have been abused time and time again. You might just as well have no rule in there if we are making it just what the present rule is.

Mr. Crane. It would cover cases like we used to have that involved the Black Hand. One witness got on his knees before me when I was on the bench and begged me not to discharge him, and I had no power to keep him, and he was killed the next day.

Mr. Holtzoff. It seems to me that this does not perpetuate the present practice, because by providing for the taking of the witness' deposition you are more apt to get the discretion of the Court in favor of the witness.

Mr. Waite. I had not thought of it as an absolute obligation to discharge a man who did not want to be discharged.

Mr. Dean. It must be done on his application, in the first place.

Mr. Waite. That is my understanding -- that he shall be discharged only if he wants to be discharged; but that if he wants to be discharged, then he must be discharged.

Mr. McLellan. That does not cover the case where it is important to have the person's testimony. It might be a rare case.

Do you think you would want to have the rule so that the Court could in a proper case discharge a man?

Mr. Waite. That is precisely where the abuse has occurred, where the Court thinks that it is important tohave the witness and has held him despite his protest. It makes it a criminal offense ever to have seen an occurrence that might itself be criminal.

Mr. Holtzoff. Do you know of any such abuses in Federal cases? I do not know of any myself. I was wondering if any had come to your notice arising in Federal courts.

Mr. Waite. No, not in Federal courts.

Mr. Holtzoff. If you say there is no abuse in the Federal courts, why should we legislate here for that?

Mr. Waite. I do not say that there is no abuse in Federal courts. I say I do not know of any. I happen to know of a great many cases where it has occurred in the state courts.

Mr. McLellan. I do not know of any, but I do know of cases where we discharged from custody witnesses who were held by state courts because they were holding really a party

under the guise of his being a material witness for an unreasonable length of time.

Mr. Seasongood. Those are all instances of where you would either hold him or his testimony is lost, but if you have a provision that you may take depositions, then the reason for it would not be so great.

Mr. Waite. Exactly.

Mr. Seasongood. Therefore, it should be discretionary with the Court.

Mr. Waite. No. If the Court can preserve his testimony by taking deposition, then the reason for holding a man indefinitely ceases to exist.

Mr. Seasongood. Not always. I think Judge McLellan would say that sometimes the personal attendance of the witness at the trial is very important.

Mr. McLellan. I can add nothing to what you have already said. I agree entirely with you.

The Chairman. We have a very definite conflict of opinion here.

Judge, should not your motion with respect to "may" and with respect to "shall" also take with it the word "forthwith"?

Mr. McLellan. I think so.

Mr. Seasongood. Is the amendment to change "shall" in line eight?

Mr. McLellan. Line ten.

The Chairman. The motion is to strike in line ten the word "shall" and "forthwith" and substitute the word "may" for the word "shall."

Is that correct, Judge?

Mr. McLellan. That is right, sir.

Mr. Seasongood. I would like to amend it by saying that "may" shall be substituted for "shall" in line eight.

The Chairman. May we take one motion at a time? I think we perhaps can clarify it.

Mr. Seasongood. Very well.

The Chairman. All those in favor say "aye." Opposed, "no." It seems to be carried. The motion is carried.

Now, Mr. Seasongood moves to amend the word "shall" in line eight to "may." Is that seconded?

Mr. Youngquist. Seconded.

The Chairman. It has been moved and seconded. Is there any discussion?

Mr. McLellan. I have a feeling, Mr. Chairman, that there is not quite as much reason for making that change as the other, because I think it rather probable that the witness should have the right to have his deposition taken, so that, the deposition being in existence, that can operate upon the exercise of the Court's discretion, given in line ten, to discharge the witness or not discharge him; but if others see it the other way, I shall vote with them.

Mr. Seasongood. One thing that occurs to me is that it may tend to delay the trial.

Mr. Robinson. You might save a life.

Mr. Seasongood. It might be a long distance away and it might be a means of delaying the trial. I think the Court should be allowed to do it in proper cases. You can trust the Court, if nothing is lost by it, but he should not be allowed to do it in all instances.

Mr. McLellan. I feel that the witness should have the right to have his deposition taken so as to make out, in the ordinary case, a case for discharge, leaving to the court the power, however, after the deposition is taken, of discharging or not discharging the witness; but I am not strong on it.

Mr. Robinson. I am wondering about the case you mentioned, Judge Crane, and the reason for that Black Hand party not wishing to be discharged. Was he a witness?

Mr. Crane. He had confessed against his confederate and was to be used and detained by the district attorney.

Mr. Robinson. In other words, a provision like this would probably have saved his life.

Mr. Crane. It was after the trial, of course, when I had no power to hold the man, but he was shot and killed the next day.

Mr. Robinson. In the Capone cases in Chicago I know that there were times there where I think witnesses' lives would have been saved. I think there were fourteen or fifteen killed--at least that many; it may have run past twenty -- and I think that even the gangsters, in a good many of those cases, would realize that the witness' deposition is on record and, in case of his death,it could be used against him anyway. I think that that is just one factor to be considered in deciding that a witness' deposition shall be taken.

Mr. Burke. Mr. Chairman, I am wondering if by any possible interpretation of this provision as it stands at the present time it could be construed as placing a premium upon a certain type of testimony to be given, with possible discretion that if the testimony given was what the authorities considered

satisfactory he would be released, otherwise not? It might happen to a witness that --

9 Mr. Robinson. This provision might help to secure the release of some witnesses who are being held, too, because the deposition showed that the witness would not testify to what the prosecutor's office felt he was going to testify.

The Chairman. Mr. Burke's point is to the contrary -- that the witness might be released if he gave testimony desired by the district attorney. Otherwise he might not be. But that, of course, presupposes a weak judgment in the hands of the district attorney.

Mr. Burke. I am not indicating that it would ever happen, but the possibility of the rights of the witnesses, as we all well know, could be made the subject of a fishing expedition to determine what he might or should testify.

Mr. Robinson. I know of a case like that, Mr. Burke, but I think that perhaps that would be rather rare, because, after all, there is a law against perjury. Here is a witness putting himself down in black and white.

The Chairman. Subject to checking up between that date and the date of the trial.

Mr. Waite. It would certainly occur to the witness to forget a great deal when he was giving the deposition in order that his testimony would seem so valuless that he would be released.

Mr. Robinson. That would not necessarily follow.

Mr. Waite. That would not necessarily follow, but it might encourage the witness to do it.

Mr. Crane. A man can be sent to jail for perjury for

forgetting. A man was sent to jail for ten years in New York because in the third trial he had forgotten all he said in the first.

Mr. Waite. That is all right, but if I had to stay in jail for eight weeks, as one chap had to do in New York, waiting for my testimony in a minor case, I would risk perjury rather than remember what happened in that particular case.

Mr. Holtzoff. I call for the question on the motion.

The Chairman. The question on the motion with respect to the word "shall" in line 8 as made by Mr. Seasongood. All those in favor say "aye." Opposed, "no." The motion seems to be lost.

If there is nothing further on (a), will you tell us what differences there are in (b)?

Mr. Holtzoff. (b) relates to depositions taken at the instance of the Government. Of course, at the present time there is no such provision, but many States have provisions for depositions at the instance of the prosecution, and there are many situations in which such a provision is necessary.

The rule as it is now drafted contains a safeguard guaranteeing the confrontation privilege.

I would like to say that in the light of the discussion at the last meeting, the confrontation rule has been construed by the Supreme Court as not meaning that the witness has to be confronted by the defendant at the trial, but merely that he has to have an opportunity at some stage of the proceeding, or other, to see and cross-examine the witnesses. This rule is drafted on that theory.

The Chairman. And the matter of expense is taken care of

in the last part.

Mr. McLellan. Yes, but is that sufficiently done, Mr. Chairman? Should there not be some provision that they should be advanced prior to their being incurred? When you are dealing with this delicate subject of using a deposition against the defendant, should not the means of getting to the place be supplied to the defendant and his counsel in advance?

Mr. Holtzoff. Shall we change the word "paid" to "advanced" in line 30? "shall be paid in advance." That is in line 30. I second the motion.

The Chairman. Is there any objection to that? It is adopted by consent.

Mr. Seth. Does this rule sufficiently protect the defendant? I mean, is it definite that before a deposition of this kind is taken he has had the opportunity to employ counsel and has been advised by the court that he can have counsel of his own selection or that one will be appointed by the court?

The Chairman. I think that is covered by a rule on counsel.

Mr. Seth. I know, but may a deposition be taken before that is done?

Mr. Holtzoff. You do not take depositions before a plea is made.

Mr. Dean. At any event, I was going to suggest the insertion "and the attorney for the defendant" in line 23, so that it reads:

"The officer having custody of such defendant and the attorney for the defendant shall be notified."

The Chairman. Will you read that again? In what line is that?

Mr. Dean. Line 23, after the fourth word.

Mr. Holtzoff. I think grammatically that cannot be worked in at that place. I think that ought to be in a separate sentence, Mr. Dean.

Mr. Youngquist. Wouldn't that better come in the preceding section, with reference to the time and place, in lines 11, 12, and 13?

Mr. Holtzoff. I think that the first sentence covers that point.

Mr. Youngquist. No, it does not.

Mr. Holtzoff. Perhaps it does not.

The Chairman. Rule 40 provided that this matter of counsel is taken up at the arraignment. What we are now dealing with could not happen before the arraignment, could it?

Mr. Dean. That is true, but it is just a question in my mind if this is one of the proceedings of the trial to which we referred. I do not think there should be doubt that it is the taking of the deposition.

The Chairman. Your motion is that provision be made that the defendant's counsel be notified?

Mr. Dean. I do not care about the style.

The Chairman. All those in favor say "aye." Opposed, "no." The motion is carried.

The proper wording will be produced.

Mr. Crane. You say it is compelled that the defendant is not necessarily confronted with the witnesses at the trial. Can that be carried further to say that the testimony taken at

the preliminary hearing will be admissible if the witness dies?

Mr. Holtzoff. It has been applied to two types of cases: One, testimony given in a preliminary hearing, and the other at the trial, and the witness died in the meantime.

The reason for the court's permitting such testimony to be introduced was that, as against the confrontation rule before, the confrontation rule does not mean that the witness must be produced at the trial, but merely means that at some stage in the proceeding -- and it is not limited to any specific stage --

Mr. Crane. It seems to me that it might be made to look very ridiculous if you say that a defendant locked up in Washington should be taken to Hawaii or Alaska or San Francisco, with expenses paid.

I do not want it to seem that I am opposed to it. I want to go along with any advance. But we do not want to look absurd. It seems to me that that constitutional provision means that he shall be confronted by the witness at some part
11 of the judicial proceeding of the trial. There may be a hearing before a magistrate or a judicial office. It is "quasi," as we call it. I have never known the authorities to go further in the decisions than to day that when a witness has appeared there -- where he testified at the preliminary hearing-- cross-examination was permitted. I do not think any authorities have gone further than that.

Mr Holtzoff. Many States have the confrontation requirement, and yet they have provisions for taking depositions by the Government, and the two have not been held inconsistent.

Mr. Crane. It has never been tried out.

Mr. Holtzoff. I do think that the Supreme Court interpre-

tation of the confrontation rule goes perhaps a little further than the rule that you expressed.

Mr. Robinson. I do not know about that. In view of Judge Crane's request at a previous meeting, Mr. Strine, of the research staff, did prepare a study of that. It is in the back of the book. You might look at that.

Mr. Crane. What was the result of it?

Mr. Robinson. Just about what you say as to how far the Supreme Court has gone.

Isn't that right, Mr. Strine?

Mr. Strine. Yes, my views are just about what Mr. Holtzoff has expressed.

Mr. Crane. As to how far the Supreme Court has gone, what does it show?

Mr. Strine. The Supreme Court has not gone beyond depositions taken at a preliminary hearing, but I think the reason might well apply to other depositions.

Mr. Crane. I think we ought to be a little slow to go beyond what has been held.

The Chairman. Doesn't it often result in a gross miscarriage of justice if you cannot examine the witness outside the jurisdiction?

Mr. Crane. There might be some process by which you can get to the court.

Mr. Dean. You can now.

Mr. Holtzoff. You can't from Europe or South America.

Mr. Dean. You can from anywhere in the United States.

Mr. Crane. Are you going to put in a rule here where there are some things impossible? Sometimes you cannot unearth

a crime, but are you going to take a deposition down in South America or Europe to discover that?

Mr. Holtzoff. Suppose the witness is in the hospital. The subpoena does run throughout the United States. The witness may be in the hospital. He may be bedridden at home.

I would like to add this observation. Several years ago a bill was introduced in Congress embodying the substance of this provision, and it passed one House. It was not acted on. It was not defeated in the other House; it just was not acted on. But it passed one House.

Mr. Crane. I think if they got that far and they would not adopt it you ought to go slow about getting in the back door.

Mr. Dean. One question I have about this whole section, Mr. Chairman, is that the only test by which a deposition may be taken, unlike most depositions, is in order to prevent delay and injustice.

Mr. Holtzoff. That phrase is borrowed from the existing statute.

Mr. Dean. You mean the Civil Rules?

Mr. Holtzoff. No; the deposition statute in the Judicial Code.

Mr. Crane. If you will excuse the expression -- I do not mean to be critical at all -- we are going to be laughed at. I have spoken to two or three judges with regard to where the defendant is given the right, at the expense of the Government, to travel in some foreign country to take a deposition.

Is there any harm in speaking to Judge Reed or Judge Frankfurter and asking them what they think about it?

Mr. Holtzoff. Perhaps Judge McLellan, a former Federal Judge, could tell us his experiences about that.

The Chairman. How about the oil cases, where some of the people fled to Paris?

Mr. Crane. One of them had a house not so far from me, in GardenCity. He died of a broken heart. He tried to get back, and he could not get back. That poor fellow died in misery. There is justice.

There are some things we can do, but let us not do ridiculous things.

The Chairman. It does not set well with the common people to think that just because a man has millions on which to live in Paris in the old days he can get away with it.

Mr. Crane. There are some things we have to leave to the vengeance of the gods.

Mr. Youngquist. This provision for the payment of expense applies only when it is at the instance of the Government.

Mr. Crane. Yes.

Mr. Holtzoff. You are going to leave it to the Department of Justice and the United States Government.

Mr. Crane. I am speaking only of this. There may be nothing in it. Maybe I am wrong. But whenever you have this sort of thing going forth, they will pick out the absurd thing and the ridiculous thing, and it harms everything else.

If this is going further than the Supreme Court of the United States has gone -- but you say you think it was not even the intent of their language -- I say you ought to consult them. They will talk to you about it. Go up and ask them.

Mr. Holtzoff. The Supreme Court has never had occasion to

pass on the validity of the present situation, because there has never been a provision for it.

Mr. Crane. It is not the validity of it; it is the ridiculousness of it. You are going to pay the expenses of a lawyer for traveling three or four thousand miles.

Mr. McLellan. It is permissive only.

Mr. Crane. But what is the good of it if you are going to limit it by saying, "Well, of course, the judge won't allow one to be taken at Boston or San Francisco or Mexico"?

We have got just those things to face.

12 The Chairman. For instance, let us take a scene in the Hall-Mills case in New Jersey, where they took this Pig Woman from the courthouse in a stretcher. They had a perfect vaudeville show.

Mr. Crane. Even the taxicab driver talked about that from the station Sunday afternoon. He wanted to know when they were going to have another trial like that -- it was a good show.

I am not criticizing New Jersey. We have had them in New York. The Dawes case and the Patrick case were a disgrace.

Mr. Holtzoff. Wouldn't this rule avoid that type of situation? You can take depositions in the hospital.

Mr. Crane. How can you prevent a judge from getting in the newspapers in a case that is spectacular? You cannot change that.

I will go along with it. I am simply telling you what I think about it. I have spoken to two or three people about it, and they laughed about it. It seems absurd on its face.

Mr. Robinson. I wonder if you could put a clause in there calling attention to the fact that it would be purely optional

on the part of the Government?

Mr. Crane. This is a case where concededly we are going beyond anything that has been done and that has been justified by the courts, and we are agents of the court.

You know some of the judges, and so do I. Why not go in and talk to them about it? Mr. Vanderbilt could do it, with extreme good taste. He is born with that.

Mr. McLellan. Would you let me ask one question, in order that I may know how to vote? I would like to ask the question of Mr. Holtzoff.

Have you adequately and specifically enough provided for the right of the defendant himself to cross-examine or have his counsel cross-examine him?

The Chairman. That is in (c).

Mr. Holtzoff. I thought it was, but I would be glad to have it strengthened or emphasized in any way.

Mr. McLellan. It says, "examination and cross-examination of deponents may proceed as permitted at the trial."

The Chairman. I think it should be "in accordance with the practice at the trial."

Mr. Holtzoff. I used the phraseology of the Civil Rules, but I do not know why we should be wedded to it.

The Chairman. May we, with regard to Section (b), consider whether or not you want to take it in its present form or whether you want to limit it to the use of witnesses who cannot be brought to court by reason of illness, or something like that? I think to that extent nobody could question the use of it, could they?

Mr. Holtzoff. Paragraph (d) limits it.

Mr. Wechsler. It limits the admissibility of the deposition, but it does not limit the taking of the deposition. I think it is a sound idea to limit the taking of the deposition where it would not be pertinent to the case. I think that would meet Judge Crane's point.

Mr. Holtzoff. I have no objection to that.

Mr. Seasongood. I suppose it is temerity on my part, after what Judge Crane said, but I call attention to the fact that there is no similar privilege given to the defendant.

Mr. Holtzoff. Rule 57 (a) gives that privilege to the defendant.

Mr. Wechsler. Before putting the question, I would like to say a word about Mr. Seth's point of some time ago, which seems to me a valid point. Under 57 (a), the general provision, the court may order a deposition to be taken at any time after the filing of an accusation. Under the previous rules that have been considered, the counsel provision does not become operative until the time of arraignment.

Mr. Seth. We amended it by putting "counsel" in there.

Mr. Wechsler. I would like to know what the sense of that amendment is. I missed it.

Mr. Dean. Simply that counsel shall be notified.

The Chairman. Notice shall be given not only to the

2-1 defendant but to defendant's counsel

Mr. Wechsler. That does not meet the point, it seems to me. Suppose he has not got counsel?

The Chairman. Then you cannot operate, because the notice must be given to counsel.

I think the point is well taken. Why not, in lines 3 and

4, make the provision that it shall be after arraignment?

Mr. Holtzoff. I was just wondering. Suppose a witness is infirm or sick and dangerously ill and about to die. You might want to take his deposition at an earlier stage.

Mr. Wechsler. I think that is true. I think the way to meet it is that, if that situation arises and if the defendant is not a fugitive, he be given the benefit of counsel at that time.

Mr. Holtzoff. I agree with that, and if it is the sense of the committee, I will be very glad to recast the rule so as to include a provision to that effect.

Mr. McLellan. I am enough afraid of this rule so that I would like to have it apply only to a situation where the defendant has already pleaded, instead of having anything in advance of the parties' being at issue because of the notice. That would cut out that time situation that you had in mind.

Mr Holtzoff. Yes.

Mr. Wechsler. May I ask on that point, Judge McLellan, whether there might not be situations where the defendant is a fugitive and where it is desirable to permit the Government to take a deposition? In that case you could not do it.

Mr. Seth. You could not do it anyhow, unless you had the defendant present.

Mr. Wechsler. Well, it occurred to me, in my statement before, that perhaps it ought to be permissible, where the defendant is a fugitive and where his game may be to stay away until a sick witness dies --

Mr. McLellan. Then he does not have a chance to confront the witness.

Mr.Wechsler. It is arguable, I think, that if he were a fugitive he would forfeit his right and forfeit it fairly.

Mr. Robinson. In this connection, this point should be brought up, I think: that in the Southern District of New York Mr. John T. Cahill and also his successor, Mr. Correa, have told us that they have difficulties there with depositions being used by defense counsel for obstructing cases. They mentioned one case where a defendant --

Mr. Medalie. They took him to South America and to France and did not use the deposition.

Mr. Robinson. To Timbuktu, also.

Mr. Medalie. Counsel retained to try the case would have nothing to do with it when he learned about it and declined to use the deposition.

Mr. Robinson. Maybe this is still another one.

Mr. Medalie. That is just one case.

The Chairman. May we go back to the question raised by Mr. McLellan and Mr. Wechsler? As it stands now, it is any time after the filing of an accusation. You think that is unsafe, Judge?

Mr. McLellan. I could not give a very good reason for it, but when we are doing something as new as this and as valuable, I think, in view of all that has been said here, it might be well to confine the taking of depositions to cases where the parties are at issue.

The Chairman. Particularly as up to that time you would not have the defendant in court and he could not be given notice so he could confront the witness.

If you proceed on the fugitive theory, Mr. Wechsler, don't

you think we are getting out on new territory, where the court might not be willing to go along with us?

Mr. Wechsler. I see the point. You have got to face the question, I think, to what extent you are prepared to have witnesses locked up, if the arraignment is a long distance off, when a procedure of this kind might operate to get them released. I myself do not feel I have the practical knowledge to make the choice, and I certainly would not oppose limiting it to the arraignment.

Mr. Holtzoff. Maybe we would be more cautious if we adopted Mr. McLellan's judgment, because this is a step forward and this is an advance, and maybe it is better to make a little advance at a time.

Mr. Waite. I wonder if a good deal of the trouble is that in this section we have an unhappy confusion of two things. We have the problem of taking the deposition of a witness who is somewhere else;and also the problem of taking a deposition of a witness who is incarcerated, with the idea of releasing him.

So far as taking the deposition of a witness who is somewhere else, I fully agree that that should not be done until after arraignment and appointment of counsel.

So far as taking the deposition of a witness who is incarcerated and ought to be released, I think it would be absurd to keep him there until after arraignment, because arraignment, if you cannot find the defendant, may not take place for six months.

I suggest that the whole matter be referred back to the reporter, with the suggestion that he divide those two

objectives so that we can discuss them more readily.

Mr. Dean. I second the motion.

The Chairman. All those in favor of the motion say "aye." Oppose, "no." The motion is carried.

I think that is a very happy suggestion.

Mr. Crane. I vote for that.

The Chairman. (c) was to be strengthened. "shall proceed in accordance with the usual practice of trial," or some such language.

Mr. Medalie. Did you approve of (a)?

Of course, I must apologize for my lateness.

Mr. Holtzoff. We made a change in line 10.

The Chairman. Changing "shall" to "may."

Mr. Medalie. What did you do to prevent a failure or delay of justice?

Mr. Holtzoff. That is taken from an existing statute that has been in force many years.

Mr. Medalie. In criminal cases?

Mr. Holtzoff. It is a general statute, and that is the statute under which the defendants take depositions in criminal cases.

Mr. Wechsler. You will recall, Mr. Chairman, that I suggested that instead of that language, the reasons which would justify the admissibility of a deposition be incorporated in 57 (a), or whatever is the equivalent general provision. I think that would meet Mr. Medalie's point.

Mr. Dean. I second that motion, so that we have that clear.

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

Opposed, "no." The motion is carried.

Mr. Seth. But that restriction ought not to apply to the case of a witness in custody.

Mr. Holtzoff. No.

Mr. Seth. That ought to apply only to those at large.

Mr. Holtzoff. We would differentiate it.

Paragraph (d) is just the usual provision --

Mr. McLellan. Have you got through (c)?

The Chairman. (b) has gone back to the reporter; and, with regard to (c), we were considering using such language as "shall proceed in accordance with usual practice of trial."

Mr. McLellan. "and the right to cross-examine shall be preserved," or something like that.

The Chairman. All those in favor of such amendment to (c) say "aye." Opposed, "no." The motion is carried.

Now, (d).

Mr. Holtzoff. (d) is with respect to contingencies in which depositions may be used -- namely, that the witness is deceased or is unable to attend trial.

Mr. Seasongood. Couldn't you strike out "because of age, sickness, infirmity," and so forth? Suppose he is testifying in another court?

Mr. Holtzoff. Then the trial can be continued.

Mr. Medalie. Suppose he is on the stand indefinitely. That has happened.

Mr. Seasongood. He may be kept in another court for days or weeks. Doesn't that limit it?

Mr. Glueck. He may be in the military service.

Mr. Holtzoff. I did not have military service in mind.

Suppose we strike out "because of age, sickness, infirmity, or imprisonment."

Mr. Glueck. That would then affect the point that Mr. Wechsler made.

The Chairman. No. The impression I got of the point that Mr. Wechsler made was that we should have a recitation of the circumstances under which the deposition shall be available for use at the trial. If it is to be incorporated in (a), I have no objection to its going out here, but we want it in somewhere.

Mr. Holtzoff. We want it in, but my understanding is that Mr. Seasongood's suggestion is that it should not be limited.

Mr. Seasongood. That is, to strike out "because of age, sickness, infirmity, or imprisonment," because that is an illustration of the limitation, and the word "unable" is sufficient.Suppose he is in the military service. That would not be covered by those enumerations. There might be other causes of inability which the court would determine.

Mr. Youngquist. We have two situations. (a) relates to a situation which permits the taking of the deposition. (d) permits the use of the deposition.

The Chairman. Your motion, Mr. Seasongood, is to strike out from the beginning of line 39 through the word "trial" in line 41?

Mr. Seasongood. No; "because of age, sickness, infirmity, or imprisonment."

The Chairman. "or by procurement of any defendant has avoided the service of process or has otherwise been prevented from attending the trial."

Mr. Holtzoff. I think that should stay.

The Chairman. That should stay?

Mr. Holtzoff. Yes.

Mr. Medalie. Why shouldn't the word "disability" be used in some way? "Disability" is generally recognized by law.

Mr. Holtzoff. "is unable to attend the trial" is broad enough to cover that.

The Chairman. And more.

Mr. Medalie. Do you think so?

The Chairman. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. What I have in mind there is that a deposition in a criminal case should not be used unless you just cannot get the witness

Mr. Holtzoff. "is unable to attend the trial" covers that.

Mr. Youngquist. Why couldn't you do this: "unless his attendance at the trial cannot be procured," or something like that?

Mr. Seth. That is in somewhere.

The Chairman. Mr. Seasongood's motion is to strike out line 39 through the word "imprisonment."

All those in favor of that motion say "aye." Opposed,"no." It is carried.

Is there any further motion addressed to this section?

Mr. Holtzoff. There is a misprint in my copy.

Mr. Medalie. In line 41 it says "or has otherwise been prevented."

Mr. Holtzoff. That is limited by "procurement of any defendant."

Mr. Medalie. No. "has avoided the service of process."

Mr. Holtzoff. It was certainly not intended by the draftsman --

Mr. Medalie. If he has been prevented -- in line 41 -- by the defendant or his procurement, we ought to say so. Otherwise it means otherwise prevented. Perhaps his mother-in-law got married again and he had to attend the wedding.

Mr. Holtzoff. I must confess that apparently it has not been made clear. The phrase "is unable to attend the trial" is applicable to both --

Mr. Medalie. I think the repetition is permissible there, for clarity.

The Chairman. That will be recast for clarity.

Mr. Youngquist. Wouldn't it be better to say "party" rather than"defendant" there?

Mr. Seth. I think the Government might hold him out.

Mr. Medalie. It might. It has been done.

Mr. Seth. Absolutely.

The Chairman. The word "party" in place of "defendant" in line 40 is accepted.

Lines 39 to 41 are to be recast to meet the objection raised by Mr. Medalie.

Is there anything else?

Mr. Holtzoff. Line 47 contains a misprint. The word "changes" goes out.

Mr. Medalie. I move that everything in line 43 after the period and the balance of the subsection be stricken as unnecessary, "Any deposition may also be used," and so forth.

A deposition or any part of it can be used in accordance with rules of evidence. You need nothing else.

Mr. Holtzoff. The only reason I put that in is that it is in the Civil Rules, and I was afraid that somebody might say that because it is in the Civil Rules --

Mr. Crane. I do not think it is fully understood by the judges to mean that.

The Chairman. I think there is enough dispute to leave it in.

Mr. Holtzoff. It may be that in the Southern District it is clear.

Mr. Medalie. We do not know any more law in the Southern District than the other districts know.

Mr. Holtzoff. I did not mean that in any sarcastic sense, but it may be that they use it more.

The Chairman. Do you press the motion?

Mr. Medalie. I do. I do not propose to be hypnotized by errors in the Civil Rules.

Mr. Dean. I second it.

The Chairman. All those in favor of Mr. Medalie's motion to strike out lines 43 to 48 say "aye." Opposed, "no." The motion appears to be lost. The motion is lost.

All those in favor of section (d) as previously amended say "aye." Opposed, "no." The motion is carried.

4 Mr. Holtzoff. Mr. Chairman, (e), (f), (g), (h), (i), and (j) are purely formal and technical provisions as to the manner of taking and recording depositions, and they are largely --

Mr. McLellan. You mean objections, don't you?

The Chairman. Objections.

Mr. Holtzoff. Yes, beginning with that. That paragraph and the paragraphs following, to and including (j), all relate

to the matter of taking and recording (c) depositions, and these provisions are taken entirely from the Civil Rules, somewhat condensed.

Mr. Crane. You have not anything there about the defendant crossing the ocean on a steamer?

Mr. Holtzoff. No.

Mr. Seth. I would like to refer to page 4, lines 78 and 79. Isn't that language, "or is financially interested in the action", out of place in a criminal proceeding?

Mr. Holtzoff. Yes, you are right.

Mr. Seth. It is in the Civil Rules.

Mr. Holtzoff. You are quite right.

Mr. Robinson. Strike out the word "financially," you mean?

Mr. Holtzoff. "financially interested in the action."

Mr. Robinson. Strike out the word "financially" and leave in the rest of it.

Mr. Seth. Just leave out "financially." I guess that is sufficient.

Mr. Holtzoff. I see.

The Chairman. If there is no objection, "financially" will be stricken.

Are there any further suggestions as to these provisions which have just been referred to?

(Does (k) come within that same category, or is that new matter?

Mr. Holtzoff. (k) is new matter. (k) relates to depositions and written interrogatories to be taken at the instance of the defendant.

The Chairman. May we pass on the other?

If there is no objection, may we have a vote on (g), (h), (i), and (j)?

Attig
fls
11:30 am

hs

atbig
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cincy
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1/14
Advis.
Com.

Mr. Medalie. First, I would like to be informed, How do you compel testimony? By the same process as you have in civil cases?

Mr. Holtzoff. Yes.

Mr. Medalie. What happens when the officer taking the deposition excludes testimony that is offered, say, by the defendant? Where is that? He excludes testimony. The defendant wants to get something in.

Mr. Youngquist. That is in lines 90 and 91. I think the second sentence should read:

"Evidence objected to shall be taken subject to objection being renewed at the trial."

Mr. Holtzoff. This is from the civil rules.

Mr. Medalie. Yes, that is the usual practice.

Mr. Youngquist. Doesn't that take care of what you have in mind?

Mr. Medalie. Yes, of course, that is the way these things usually run. Very often immaterial things are asked, and it usually becomes a fishing expedition, and it is only when someone advises the witness, "It is immaterial; don't answer the question," that the question comes up.

Mr. Youngquist. That is something you can't avoid.

Mr. Medalie. Even the rules can't handle that.

The Chairman. All those in favor of the motion say aye; those opposed, no.

Now (k).

Mr. Holtzoff. (k) relates to written interrogatories, but only at the instance of the defendant. It is taken very largely from the civil rules.

Mr. Medalie. Does this mean that if the defendant wants them taken on written interrogatories, the Court may so order? But if the defendant wants to take oral depositions, has the Court the discretion to direct that they be taken by oral interrogatories?

Mr. Holtzoff. No.

Mr. Medalie. It reads that way now.

Mr. Holtzoff. I think you are right as to your interpretation.

Mr. Medalie. We don't want it that way, do we?

Mr. Holtzoff. No.

The Chairman. I thought the question really was covered by the first section, (a). This is only an alternative.

Mr. Holtzoff. Yes, but the alternative should be only at the defendant's election.

The Chairman. If the defendant requests the taking of depositions by way of written interrogatories. In other words, that change, I take it, is by common consent?

Mr. Holtzoff. I suggest that we change the word "any" to "every." That was poor draftsmanship in my part.

I move we adopt it.

The Chairman. In line 31 "any" is changed to "every."

Mr. Medalie. Suppose you have 126 defendants and they have managed to assort themselves among a handful of counsel--say 26 counsel. That is an awful lot of serving to have to do.

The Chairman. If he does that by serving counsel, and he serves one copy on the counsel to cover all of his defendants?

Mr. Medalie. Yes, but I point out to you that even in the case I have, of 126 defendants and only 26 counsel, you have an

awful lot of serving to do on 26 people.

The Chairman. I do not see how you can avoid it.

Mr. Holtzoff. I think it should be done, because every counsel is entitled to cross-examine the witnesses.

Mr. Medalie. That is true.

The Chairman. Where there are 126 defendants, there probably are some good fees.

Mr. Medalie. This is only because they are written interrogatories. On the other hand, isn't it a fact that it is provided for here -- and I assume it is -- that interrogatories are returned by the officer taking the deposition and filed with the clerk of the court and are available to anybody who wants to read them?

Mr. Seth. Yes.

Mr. Medalie. Why should it be necessary to go to that expense?

Mr. Holtzoff. You have to give the people an opportunity of defraying the cost of the interrogatories.

Mr. Medalie. You are talking about proposed interrogatories?

Mr. Holtzoff. Yes.

Mr. Medalie. All right; withdrawn. Practically there will be no hardship, because rarely does anyone undertake a process like that, only a capable official.

The Chairman. All those in favor of Section (k) say Aye; opposed, No.

Mr. Seasongood. Before you leave this, this idea of taking depositions is not a novel thing, as has been intimated. On the contrary, it is provided for in the constitution of the State

of Ohio, in Article 1, Section 10, which says:

" * * * but provision may be made by law for the taking of the deposition by the accused or by the State, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and jury and made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

That amendment was adopted in 1912. The privilege is provided in Sections 13444-11 and following for the defendant to be paid his compensation and that of his counsel when he takes the deposition.

Mr. Youngquist. If he is financially able.

Mr. Seasongood. It does not make that provision. It says that when either party wants to take a deposition, the defendant and his counsel have a little junket and can take it at the expense of the State.

I don't suppose you want to go that far, but I am just calling your attention to the fact that that is the Ohio law. I suppose the idea is that both the State and the defendant shall be treated equally.

Of course, if the defendant is impecunious, or counsel has been appointed by the court --

Mr. Crane. We might add to our rule that it is for the

duration of the war. He can't take a trip to Europe.

Mr. Dean. I might just state that you have given the Government the privilege and the defendant not the same privilege. If the defendant takes the testimony, he waives the right to that extent to be confronted in court by the witnesses he calls. But in the Ohio statute or constitution they treat the defendant exactly the same as the Government and give him the privilege of taking these depositions, if the Court so orders, at the expense of the State.

Mr. Youngquist. But, Mr.Seasongood, should we not provide in (b), where the deposition is taken at the instance of the Government and requires, of course, the attendance of the defendant and his counsel, that the defendant's expense should then be paid by the Government, whether the defendant is financially able or not?

Mr. Crane. I think that is there. All I am saying -- and what my contention is -- is this: that it has never been done. I have stated my reasons before; I shall not do it again.

Mr. Wechsler. I should like to have a chance to second Mr. Seasongood's motion, if it was a motion.

Mr. Seasongood. You mean that the defendant should have the same privilege as the Government?

The Chairman. Did you make a motion?

Mr. Seasongood. I am not sure that I did. I just mentioned the Ohio law. The defendant is entitled to there; but if he calls witnesses himself, doesn't he waive the privilege of having them brought into court, if he calls them by way of deposition?

Mr. Wechsler. Suppose the defendant is indigent, as most

defendants are, and there is a witness who will testify in his behalf who is inaccessible, who is likely to be unavailable at the trial. It seems to me that the procedure -- the principle of the procedure, if valid -- ought to carry to making some provision for helping a defendant in that situation. I understood that to be Mr. Seasongood's suggestion, and I would like to support it if he thinks it should be in.

Mr. Holtzoff. The rule permits a defendant in those circumstances to take a deposition.

Mr. Seasongood. But he does not get the expenses of his counsel.

Mr. Wechsler. He has the privilege of sleeping on the park benches, which is open to the poor and the rich alike.

Mr. Crane. I am sorry that I have caused so much trouble.

The Chairman. I have no motion. I don't want to shut off any discussion.

Mr. Holtzoff. I think a provision should be made along this line, safeguarded by the discretion of the Court.

Mr. Seasongood. I think so, because you have a better chance. Otherwise you are going to have the argument made, "You give the Government the right, but you don't give the impecunious defendant the right."

The Chairman. Do you make the motion?

Mr. Seasongood. I move that in the case of an impecunious defendant, he be allowed to take depositions subject to the approval of the court, whenever the court orders, and that on the taking of such depositions the reasonable expenses of himself and his counsel in attendance at the place be defrayed by the Government.

7 Mr. Crane. Before we adopt that, how many lawyers in New York do you think would immediately find witnesses in the winter time out in California or down in Florida?

Mr. Seasongood. I agree with you. It is subject to great abuse. But if you say that the court has the say as to whether this is really just a means of getting out to Sunny Palm or is in the interest of justice, then you are protected.

Mr. Crane. Seriously, you must remember this: We can never get a thing perfect. We can never cover every instance in the law. We don't in many of our decisions. Both in college, teaching it, and in our decisions we are always taking the lesser of two evils. It is never a question of right or wrong, good or bad, perfect or imperfect; it is the lesser of two evils.

I say it is b etter, perhaps, that a prosecution fail in some very rare instances than it is to have a general provision that the Government or the defendant can take depositions in far off climes, with expenses to be paid to carry the defendant and his counsel there.

On the face of it it seems absurd, and it is only necessary because of our constitutional provision. It is better in one or two instances that the prosecution fail than to have such a provision which is absurd.

Mr. Seasongood. How can we say it is absurd when the great State of Ohio has had it embodied in its constitution for thirty years?

Mr. Crane. No, that is not so. It would not apply to New York or to Texas, because there are reasonable limitations to traveling; but it is not so when you take a steamer and go to Honolulu, China, or the Philippines.

The Chairman. We trust the judges.

Mr. Crane. That is the trouble: you have all distrusted the judges.

The Chairman. Now we are trusting them. Despite what Judge Crane says about human nature, I have a bookkeeper who gave me a chart showing that my associates always have to go south on important business matters in the winter and north and west in the summer time.

I do think there is something to Mr. Seasongood's suggestion to get this in before Congress, or else we will be accused of putting through a lopsided rule. If we trust the judge, what is the harm?

Mr. Crane. Ask your associates.

Mr. Youngquist. We might suggest, Mr. Seasongood, a change to eliminate the payment of the expenses of the defendant, who need not be there.

Mr. Seasongood. I am agreeable, but I am referring to the Ohio provision.

Mr. Holtzoff. Is not that Ohio provision limited to the confines of the state? I don't think you should allow the defendant to go outside the jurisdiction and then come back.

Mr. Seasongood. Will the Reporter examine the Ohio provision and see how far it is applicable? Of course, there is more reason for such a provision in the state than in the United States, because the United States Government can subpoena witnesses anywhere within the United States. The state does not run outside the state. There is more reason and more sense in the state than in the Federal.

The Chairman. You have heard the motion. Allthose in

9 favor say Aye; all those opposed, No. The motion is carried.

Mr. Crane. If you are going to adopt the other one, I am for it. But I am against the whole thing in principle.

The Chairman. Rule 58.

Mr. Robinson. On Rule 58, the Committee will recall that your instructions to Mr. Tolman were that he call upon the Administrative Office for its assistance on matters having to do with calendars, dockets, and other details connected with the administration of the District Courts. So, Mr. Tolman has worked out these rules with the assistance of the Administrative Office, for your consideration.

Mr. Tolman.

The Chairman. There is an alternative rule?

Mr. Robinson. Yes.

Mr. Tolman. Rule 58 is here in two forms. The rule is supposed to deal with the problem of arrangement of calendars and with the action that judges may take to advance cases or to arrange them so that they may be promptly disposed of.

The first rule you have is drafted in the form which the Committee instructed should be followed. The second alternative rule, which appears three or four pages later, is the form in which the Administrative Office would like to have the rule appear.

The difference between the two is that the first one contains a provision -- subdivision (b) -- for the listing of all pending cases, and the alternative contains no such provision. That is really the only difference between them.

The Chairman. The alternative is preferred by Mr. Chandler's office?

Mr. Tolman. Mr. Chandler prefers the alternative.

Mr. Glueck. May I ask why that is preferred?

Mr. Tolman. Well, a statement has been prepared on the subject, but I can tell you briefly what it amounts to. He thinks it is going to be a great big practical job to list cases quarterly for the District Courts, and the amount of labor involved will not be worth what could be accomplished, and he feels particularly so because he thinks that the Administrative Office already has the power and is set up to bring cases that are long overdue to the attention of the judges.

Mr. Waite. Does the District office have its fingers on that sort of thing? Does it know the status of all the cases?

Mr. Tolman. I think most District judges do not know the status of the criminal calendar -- do not know what the pending cases are.

The Chairman. You said "District office." Did you mean that?

Mr. Waite. Your office.

Mr. Tolman. At the present time I do not think we could fairly say we do know the status of the calendar, but I think there is a good possibility that we will. We require reports from the judges now on civil cases pending before them. We have not yet gone into the field of criminal cases, but Mr. Shafroth, I know, intends to do it, and we are now starting, this year, a system of statistical reports on criminal cases filed and terminated in the District Courts, which ought to be a source from which we can get the statistics at any time.

Mr. Waite. My opinion is that somebody ought to know what is being done -- whether certain cases are grossly delayed or

not. If your office knows, that would be enough for me.

Mr. Tolman. I do not want to say that we do know now, because I do not think I could fairly say that. But I think we hope we will know.

The Chairman. Don't you know what districts are most in arrears?

Mr. Tolman. Oh, we know what districts are most in arrears. We can tell you that.

The Chairman. Don't you know, in the districts that are most in arrears, just what the extent of the trouble is?

Mr. Tolman. Generally we do. If we cannot tell from the statistics, we send someone out to find out what the trouble is.

Mr. McLellan. I can answer your question. Every year, as I am informed, a detailed statement is by statute required and made to the senior circuit judge, in duplicate, and he forwards a copy of that report to the Administrative Office. So, once a year it is known just about how many cases -- criminal cases -- there are pending and why they have not been disposed of.

Mr. Tolman. And how long they have been pending.

Mr. McLellan. And how long they have been pending. There will be a great many pending by reason of the defendants being fugitive.

Mr. Yoltzoff. The Department of Justice has a double check on that, because we have a requirement that every United States attorney must semi-annually submit a list of every one of the cases in his office which have been pending more than a certain length of time, and he must state the reason why it has been pending that long. Those lists are checked very carefully.

Mr. Tolman. As I recall it, the Committee wanted this particularly because it had some word about the length of time people were being detained before trial. Mr. Wechsler, I think, was particularly interested in that.

In order to supply you with information on that subject, I asked the Bureau of Prisons to give us information for the fiscal year ending June 30, 1941, as to the length of time defendants were held before trial, and I have here statistics on the subject, by judicial districts, and if you are interested, I can give them to you.

The Chairman. I think they have been distributed.

Mr. Tolman. I gave them to those who asked for them, but I did not distribute them generally, because I did not know whether they would be wanted. But I would be glad to let you look at them.

As Mr. Holtzoff says, I think it is the policy of the Bureau of Prisons to call the attention of the Attorney General to any case which seems long overdue, and they do keep current check on all jail populations.

Mr. Medalie. Most good district attorneys do that.

Mr. Tolman. I think they do.

Mr. Medalie. I know that in my district I used to get a report from the head of the criminal division once a week as to how many people were in jail, breaking it up into those under indictment and those awaiting indictment, and how long they had been there. In other words, we were operating under the permission of oyer and terminer and general jail delivery. That was the first order of business -- to clear the detention house of people who were there. I think that practice

13 is generally followed.

Mr. Tolman. I think it is the duty of every district attorney to keep track of his district.

The Chairman. In view of the fact that the Administrative Office has the jurisdiction to handle these matters, and in view of Mr. Chandler's expressed preference for the alternative rule, I am wondering if that is not the one we should adopt.

Mr. Seth. I move that we adopt it.

Mr. Holtzoff. I second the motion.

Mr. Seasongood. Of course, I am afraid to suggest anything that disagrees with Mr. Chandler and his office, but I don't believe that this 58(b) would be workable in our district, because senior judge would mean senior in point of time.

Mr. Tolman. Yes.

Mr. Seasongood. The Southern District of Ohio has a judge in Columbus -- that is, the Eastern Division of the Southern District -- and it has a court in Dayton, which is the Dayton Division; and it has a Cincinnati court.

I am quite sure that no single judge would undertake to interfere with the calendar of the judges in those other cities. I think that that would be completely unworkable. He would not do it, and they would object very much to his doing it.

Mr. Tolman. There is a question about that.

Mr. Seasongood. How could he inform himself of the situation in Dayton and Columbus and say that his colleagues were not attending to business?

Mr. Tolman. There is a questionabout it, and undoubtedly this giving of authority to the senior district judge is rather a new idea. We have found that there are districts in the

14 United States where there is no judge who has any control over the general run of business in the district, and it does cause a great deal of difficulty.

A number of senior district judges and other judges have suggested that it would be desirable to obtain legislation giving the administrative responsibility for each district to the senior judge of that district.

I believe Judge Knox, of New York, although he has had great success in the arrangement of the business of the Southern District of New York, feels that quite often he is limited in what he can do to improve the efficiency of the court, by reason of the fact that he has no authority, no real power, to tell judges what they shall do, and to keep track of the administrative problems.

Mr. Medalie. He is admittedly a very good judge and is highly respected by his colleagues. His influence is tremendous.

Mr. Tolman. That is very true. But there are other districts where it is not successful. Chicago, notably, is a place where it is not successful. Chicago has practically six separate district courts.

The Chairman. Is your problem involved in the alternative rule?

Mr. Seasongood. Yes, it requires the senior circuit judge to find out what is the state of the calendar and to make rules for expediting it. They will not do it.

I know in the matter of the appointment of a referee, it is supposed to be left to one judge. Both are supposed to do it, but he defers to the one, whether it is in Cincinnati or

15 Dayton.

The Chairman. Must there not be a voice in every court that has more than one judge?

Mr. Seasongood. In our case the judge in Dayton is the senior judge. He would say, "Well, I am busy with my own calendar. How can I say what the judge in Cincinnati ought to do and what the judge in Columbus ought to do? They are as able to determine that as I am, and I just won't do it."

I am quite sure they would not.

Mr. Medalie. It may be that in some districts that situation arises. It may be, also, that in many districts either that situation will not arise, or else the senior district judge, under the authority given here in subdivision (b), will be strong enough to exercise that authority.

Even though we fail in some districts, I think we ought to make it possible for this to work in whatever districts it is workable.

The Chairman. He has certain rights now. For instance, he picks the clerk of the court in the event of a vacancy.

Mr. Tolman. And disagreement, too.

Mr. Glueck. This imposes an additional burden of work.

The Chairman. But they are getting used to that by reason of the fact that they have to attend the judicial conference in their circuit once a year, and they see that the senior circuit judge presides twice a year over the conference. The idea that a judge, if he is a single judge, is responsible to nobody in the world but God and his conscience is obsolete. There has got to be a voice. There may be districts where there will be a revolution, but still I do not think that that militates

against the desirability of the rule.

Mr. Medalie. This is permissive. He gets power but is not required to exercise it.

Mr. Tolman. It is an empowering section, not a mandatory section.

Mr. Dean. What is the definition of "senior judge"?

Mr. Tolman. The oldest.

If you are willing to leave the senior judge this way, there will have to be a provision made for the District of Columbia, where there is authority in the chief justice. I thought that might be taken care of in the rule on definitions. For the District of Columbia we could say "The chief justice of the District Court of the United States for the District of Columbia."

It is so hard to see what individual personalities are involved or what particular problems arise in each district. What we wanted to do was let the judges know, some how or other, that they have this power.

The Chairman. Do they have the power unless you say "shall"? In other words, here is a judge who has two or three cantankerous colleagues. They think he is trying to set himself up.

He calls for information, and they say, "You don't have to do this. This just says that you can. If you want to be disagreeable, go ahead and do it."

If it said "shall," he would say, "Boys, I have no choice; I have to go to work on this problem."

Mr. Youngquist. You would have to change that around entirely, because he may require this information with respect

17 to any criminal case. Or do you have in mind a wholesale report to him on all cases?

Mr. Tolman. I am afraid that would be impractical. I am afraid the United States attorneys might resent being asked the procedural status of every criminal case.

Mr. Youngquist. It occurs to me that since we are again moving on somewhat fresh soil, trying to expand the powers of senior district judges, it would be wiser to leave it as it is and probably obviate an attack, covertly or otherwise, by the district judges.

Mr. Glueck. What would move the senior district judge to request such information in any single case? For instance, if some well known defendant were being prosecuted, and three or six months have passed since the point of arrest, and the papers are after him, writing editorials? Is that the thing you have in mind?

Mr. Tolman. That might be the sort of thing, or we might call attention to a long delayed case and say to the district attorney, "Would you find out the reason for the long delay?" He would find out better if he had a rule.

Mr. Seasongood. At the present time does not the administrative officer look into these other things?

Mr. Tolman. He looks into them, yes, but he cannot tell the judges what to do in individual cases. The responsibility is theirs, and they resent it very much if we should tell them what to do. We are in no position to tell them what to do. We are in Washington and have no knowledge of what the background is. All we can do is call it to their attention.

Mr. Wechsler. These statistics seem to me to show, unless

my practical judgment is wrong -- that the trouble spot probably arises after two months of detention. Here you have a total of 33,000 defendants, roughly. As you would expect, almost half are disposed of in under ten days. But you have well over 4,000 of that total detained for two months or more.

Now, I wonder if that may not suggest some clew to a solution. I am not sure just what the rule should be, but if there were machinery whereby the senior district judges were informed of cases after a certain minimum period of detention, that, it seems to me, would place the responsibility on the senior judges. It would also give them some clew as to how to exercise responsibility.

I hate to suggest any departure from the proposal of the administrative office, but I wonder if the administrative office might not view some such more modest proposal with greater approval.

Mr. Glueck. Would not that involve a great deal more work, because statistically it would involve a great many cases?

Mr. Wechsler. It seems to me that the United States attorney would have to do what many now do -- keeptrack of his jail cases. It would mean, judging from the statistical table, that the number of cases with which he would be confronted would be relatively small, because he would only be concerned with the cases in two months. Then he would be under the duty, if not the requirement, to report that to the judge, and the spotlight would be focused on those cases. It seems to me that that would be a desirable result, unless he misses something in the picture.

Mr. Glueck. I have not seen the table, but did you say

that over half the cases were in two months or longer?

Mr. Wechsler. No, half of them are disposed of in under ten days. There are only between 4,000 and 5,000 out of 33,000 where the period of detention is longer than two months, which seems to me to indicate a natural reduction in the number that would involve attention. I simply accept the statistical norm indicated by these figures, taking into account all variations. Most cases seem to be handled in under two months.

The Chairman. Do you make any motions, or do you prefer to refer it back to the administrative office and request that they attempt to formulate some rule that will cover that situation?

Mr. Wechsler. I would rather put it that way -- not with the direction to the administrative office but with the request for their consideration of that proposal and their recommendation.

The Chairman. All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Then, I think we will withhold the completion of discussion on Rule 58, but are there any further suggestions as to change, we will say, in the alternate Rule 58?

Mr. Seth. Is not the last sentence covered by a previous rule?

Mr. Tolman. That last sentence? I am not sure about that. I don't know whether or not it ought to be there.

Mr. Seth. See if it is not already covered.

Mr. Robinson. Yes, that is covered.

Mr. Tolman. Then, we will take it out of here.

Mr. Waite. Will you eliminate my ignorance, Mr. Tolman,

concerning one matter? This provides that

"The district courts shall by rule provide for the placing of criminal proceedings upon appropriate calendars."

When does a matter become a criminal proceeding?

Mr. Tolman. I assume it becomes a criminal proceeding at the time when it is commenced, whenever that may be. The Committee has not decided that.

Mr. Waite. One thing that has worried me about this whole matter is the interval between arrest and indictment -- formal accusation.

Mr. Tolman. Yes.

Mr. Waite. If it does not become a criminal proceeding until the accusation has been filed, then this rule would not cover that particular problem. But if it becomes a criminal proceeding as soon as an arrest is made, then it covers it.

Mr. Tolman. I drafted that rule with the original rule on the commencement of a criminal proceeding in mind, and my thought was that it would include cases that had been referred to the court and where no indictment had been returned.

Mr. Waite. I suggest that you and the Reporter look into that and make it explicit in the next draft.

Mr. Glueck. May I advert to the point Mr. Wechsler and I were discussing before? On this table, you take, for instance, Ohio, Northern District, and Ohio, Southern District. I add up that in the Northern District about ninety-six cases were pending two or more months, and that in the Southern District there were 163.

Now, it seems to me that if all those cases have to be analyzed with reference to what is wrong with them or why the

delay, it might cause complications, although I admit that that is highly desirable. I don't know what the machinery would be. But I am just wondering whether judges, who have other work to do --

Mr. Wechsler. I do not imply that this period of detention is wrong; I am willing to assume that it is justifiable under the circumstances. That was only to focus attention on the problem.

Mr. Tolman. You really think it is the sort of thing that could be taken care of by rule of court?

Mr. Wechsler. It occurs to me that a rule might strengthen the administrative office and strengthen the senior district judge. I have no fear that when you get into it, you will handle it, but I would be quite content to see no rule if on further consideration that is still the judgment of your office.

Mr. Tolman. Well, I would be glad to ask that it be reconsidered.

The Chairman, I think we have voted on that motion. That brings us now to Rule 59.

Mr. Holtzoff, will you report on that please?

Mr. Holtzoff. That is a rather long rule, but it does not contain startling provisions. It has the usual provisions regulating the issuance of subpoenas, subpoenas duces tecum, and the service of subpoenas. It is taken almost verbatim from the civil rules, only somewhat condensed.

Mr. Seth. Why in lines 3 and 4 do you authorize the attorney for one of the parties to issue a subpoena? That is not in the civil rules.

Mr. Holtzoff. That is not in the civil rules, but that is

something that we adopted at the last meeting on motion of Mr. Medalie, because in the State of New York -- and I daresay perhaps in other states -- attorneys issue their own subpoenas. They are issued in the same form as the court subpoenas. They are signed or attested in the name of the court, but the attorney as an officer of the court issues them instead of having the clerk or other officers of the court issue them.

Mr. Medalie. As a matter of fact, when the clerk issues a subpoena, he issues anything the attorney asks for.

Mr. Seth. He issues them in blank.

Mr. Medalie. Yes.

Mr. Seth. I think they ought to be in a form --

Mr. Dean. He does not send a piece of paper that looks like a promissory note and call it a subpoena.

Mr. Medalie. Let us take it as it actually works. I think the administration of justice works very well and very practically in New York.

Mr. Dean. But this will be new to people in many sections of the West.

Mr. Medalie. Yes, but it was new in New York when it was first adopted.

Mr. Dean. In New York you know that you can go down to the clerk's office and get a stack of subpoena forms. You go back to your own office, and you --

Mr. Holtzoff. In New York you go to a stationer and you buy a pad of blanks.

Mr. Dean. Anyway, you use a regular form.

Mr. Medalie. Except that when you serve a subpoena duces tecum with a large number of items, you actually typewrite it,

although it looks like a bill in equity. It looks very formidable.

The Chairman. I do not think there is any real danger there, because you just give them a little slip of paper in the form of a promissory note, and the witness comes in for contempt proceedings and says, "I didn't think this was a subpoena; it didn't look like one." No judge is going to hold him.

Mr. Dean. I was going to suggest saying "on a form provided by the clerk."

Mr. Robinson. Don't you think that is a good suggestion by Mr. Dean?

Mr. Holtzoff. No, because it might give rise to the condition that attorneys deviate from the form prescribed by the clerk.

The Chairman. You get into trouble when you have one of those long subpoenas to produce documents, where you have to have just page after page.

Mr. Holtzoff. New York experience shows that there is no difficulty arising.

Mr. Dean. I know. We do the same thing in the Southern District of California. But there are many places where it is not done.

Mr. Holtzoff. This will be a new form in places where it is not now done.

Mr. Dean. I think you miss my point. I think it ought to look like a subpoena.

Mr. Medalie. Practically, you can count on it that lawyers will have subpoenas on printed forms. It works that way. In other words, the point you are raising is one that is not likely to come up. It conceivably can come up, but it just does not

24 come up. It is not the convenient way of doing those things.

Mr. Holtzoff. Of course, we could have a subpoena form in the appendix. That might help.

Mr. Medalie. All right.

Mr. Holtzoff. I move that we adopt 59(a).

Mr. Seasongood. I move that we strike out "attorney for one of the parties."

The Chairman. We have adopted it once.

All those in favor of the motion to strike out the words "or by the attorney for one of the parties," say Aye; those opposed, No.

Mr. Seasongood. You had better have a division.

The Chairman. Yes, I am in doubt. All those in favor of the motion, raise their right hands.

Seven.

Those opposed please raise their right hands.

Nine.

The motion is lost.

We go now to 59(c).

Mr. Holtzoff. That relates to subpoena duces tecum.

Mr. Medalie. I would like to ask Mr. Dean something about that. You were at the tobacco trial in Lexington?

Mr. Dean. Yes.

Mr. Medalie. Did not the Government get hold of all the company records prior to trial and have them brought down to the court house at Lexington?

Mr. Dean. Yes.

Mr. Medalie. Wasn't there abuse there?

Mr. Dean. We are assigning it as one of the errors in the

Appellate Court.

Mr. Medalie. You are dealing with it practically.

Mr. Dean. I think there could easily be an abuse.

Mr. Medalie. Do you think in view of your experience that we ought to reconsider this provision at the end of (b)?

Mr. Dean. Yes, possibly.

Mr. Medalie. Let us get his view on this, Mr. Chairman. He has had an experience, and perhaps a horrible one.

Mr. Holtzoff. But I thought you were against him.

Mr. Medalie. I am showing you I am a broadminded fellow.

Mr. Dean. To get the facts on that thing, first they ordered the documents in on subpoena duces tecum, and then they moved the trial date three or four months over. Then we resisted inspection of all those documents -- about 250 boxes -- really on the theory that we were discommoded and could not prepare our case. The court overruled us, writing a short opinion saying that they had the right.

I think there might be real abuse.

Mr. Medalie. There is another form of that abuse under legal pretense, and that is when the Grand Jury is in session, prior to trial but after indictment and plea. The United States Attorney or the Attorney General will subpoena things like that on some theory or other, and the same thing happens.

Mr. Dean. They get things like that in the office, and is very difficult to get them back.

Mr. Youngquist. Before you came this morning, Mr. Medalie, we amended Rule 56 to provide that the defendant shall have the right by order of the court to inspect documents in the possession of the Government that are necessary for the preparation of

the defense. That answers it in part.

Mr. Medalie. Both get it?

The Chairman. No.

Mr. Youngquist. Practically, under the provisions of the last sentence of subdivision (b) of 59, the Government gets that discretion.

Mr. Holtzoff. So does the defendant.

Mr. Medalie. Yes. Now the defendant gets the additional right. That has been put into 56.

Mr. Holtzoff. Yes. This is for the benefit of the defendant who subpoenas a third party, as well as for the benefit of the Government.

Mr. Medalie. But you know what the Government subpoenas in anti-trust cases. It subpoenas the corporate defendant's records.

Mr. Dean. It means the defendant, for all practical purposes.

Mr. Medalie. It is not a very terrible thing. You just don't like them to have it when you are on the other side.

Mr. Dean. That is right. In this case they have all been seen before anyway. The only point was to avoid having a trial that would last a year and a half.

The Chairman. The motion is to adopt Rule 59(b). All those in favor will say Aye; those opposed, No. The motion is carried.

Mr. Holtzoff. 59(c) provides that

"A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party."

That is the same provision as the provision in the civil

27 rules.

Mr. Youngquist. Does the civil rule contain "eighteen years of age"?

Mr. Holtzoff. I believe so.

Mr. Seth. Should that one day's fee be in there where the Government supboneas, unless demanded? You require the payment of one day's fee whether he is in attendance or not. Where the Government subpoenas, that ought not be.

Mr. Holtzoff. In the first draft a provision was made that the Government need not tender the money to the witness in advance. The civil rules provide that the Government need not tender money in advance.

The Committee in its last session struck out the provision, with a view to putting the Government on a par with other parties. In drafting this, I drafted it in accordance with the directions of the Committee, but I want to suggest reconsideration of the action taken.

I therefore move that 59(c) be amended so as to include the provision contained in the civil rules, exempting the Government from the necessity of tendering witness fees and expenses in advance.

Mr. Seth. Unless demanded.

Mr. Holtzoff. There is really a reason for that. The reason why a private party is required to pay a witness in advance is that nobody knows whether the private party is financially responsible. But there is no question of the Government making payment at the proper time. What happens is that after the witness arrives and after he has testified, the marshal pays him his fees and his mileage.

Mr. Medalie. Under a certificate of the district attorney, who makes an endorsement on the subpoena, and sometimes holds it up if he was not satisfied with the testimony.

Mr. Holtzoff. There are instances where you have an impecunious defendant or defendants who have no money to pay their carfare. What happens then is that the marshal informally advances the money and credits the defendant when he later pays him. Otherwise you would have a considerable waste of Government funds in the light of the large volume of Government criminal cases, because sometimes a case may be continued, and the witness is notified not to come. In the meantime he has had his mileage, and when he is resubpoened, he has got to be paid again.

I don't know whether or not it is of interest to this Committee, but I know that it will create a great deal of burdensome, additional, and difficult work in the marshal's office. They have to make those payments.

Mr. Medalie. The long and the short of it is that the system that now exists, by which the Government gives you a subpoena and you collect later, works very well.

Mr. Seth. Very well.

Mr. Youngquist. I think we ought to restore it.

Mr. Medalie. I think so.

The Chairman. You have heard the motion. Is there any comment?

Mr. Holtzoff. To add a provision to the last sentence, that in case of Government subpoenas --

Mr. Youngquist. When a subpoena is issued on behalf of the United States or an officer or agency, the fees and mileage

need not be tendered.

Mr. Dean. I ran into one embarrassing case. I was trying a case down in Arkansas, where I had sixteen Negroes, and I had to go out and rake them up by myself, because the marshal never would get them. I had to pay out of my own pocket for a truck to go down into Southern Arkansas and get them.

Mr. Holtzoff. You were not getting proper cooperation from the United States marshal.

Mr. Dean. I didn't want to fuss with it. I paid for their expenses for the first night, which looked like barratry or maintenance, or something.

Mr. Holtzoff. On the whole, I know the defendant would hate to have a change made in this present practice, because it would create a lot of difficulty and more expense in allowing each deputy a considerable amount of currency to hand the witness.

Mr. Seasongood. Are you making the defendant pay this and not the Government?

Mr. Holtzoff. The Government pays after the event.

Mr. Seasongood. I think if you make the defendant pay them --

Mr. Holtzoff. This would continue the existing practice.

Mr. Youngquist. I think that is common practice in the states.

The Chairman. All those in favor will say Aye; those opposed, No. The motion is carried.

Mr. Seasongood. I just want to go on record as objecting to the service of subpoena by anybody other than a marshal or his deputy. As it is now, the return is prima facie. If you

get some other person, and there is a question whether the subpoena was served or was not, there is trouble. That probably will not have weight with the brethren, but I object to it.

Mr. Holtzoff. We have no trouble in New York. This is similar to the New York provision and is also similar to a provision in the civil rules. There has never been any trouble about it.

The Chairman. Mr. Seasongood's objection will be noted.

We now go on to (d).

Mr. Glueck. May I ask one question, so that I may understand this? Do you have in the rules anywhere anything as to the requirements -- something in lieu of the marshal's return, by way of a certificate or service of process upon a witness, such as they have in New York?

Mr. Holtzoff. There is a provision in one of the earlier rules with reference to the proof of service.

Mr. Youngquist. Is that by others than the marshal?

Mr. Holtzoff. Yes.

Mr. Dean. Should there not be a provision for a form for proof of service on the back of the subpoena. That is usually done in the case of service of a civil complaint, where you want to prove that it was served, so that you can take judgment by default. In California we always make a return on every paper, including subpoenas.

Mr. Medalie. Do you think that is necessary?

Mr. Holtzoff. Think of the additional burden it involves. If the witness shows up, why bother showing the service on the subpoena? The only time that case comes up is when you want to punish him for not showing up.

Mr. Dean. Then you make an affidavit saying he did not show up.

Mr. Holtzoff. (d) relates to the service of subpoenas to be used in connection with the taking of depositions, and it follows the practice used in the civil rules, namely, that the clerk of the district court for the district where the deposition is to be taken issues a subpoena.

In this case the subpoena that is provided shall be issued by the clerk, because we want to hedge the taking of depositions with considerable limitation. We also provide that a subpoena duces tecum shall not be issued without a court order.

Paragraph 2 incorporates the provision of the civil rules as to how far a witness may be subpoened for the purpose of having his deposition taken. It provides, as you know, that he may be subpoened only in the county in which he resides or in which he transacts business.

The second sentence also provides that a non-resident may be required to attend in the county wherein he is served or within forty miles from the place of service.

Mr. Glueck. Why do you use "county" as the geographical unit here?

The Chairman. That is what is used in the civil rules.

Mr. Holtzoff. It is arbitrary, and we could use some other unit; but the county is the most convenient.

The Chairman. It is customary even in state practice.

If there are no questions, all in favor of Rule 30(d) will say Aye; those opposed, No. The motion is carried.

Mr. Holtzoff. Section E-1 continues the existing practice in the Federal courts.

32 Mr. Glueck. Will a subpoena issued on behalf of a defendant run anywhere in the United States?

Mr. Holtzoff. Oh, yes, anywhere in criminal cases.

Mr. Glueck. Then, these lawyers in New Mexico can issue a subpoena on somebody in New York; is that the rule?

Mr. Youngquist. If they pay the fee.

Mr. Holtzoff. They have to pay the fee and actually do. There is no control over the matter, because the clerk issues the subpoenas in blank.

Mr. Seth. I did not think the defendant could ever get anybody outside the district under the present law. The Government can't, I know.

Mr. Holtzoff. My understanding is that any subpoena to a criminal case runs all over the United States. It certainly should. I think the defendant should be on a par with the prosecution.

Mr. Seth. I do, too.

Mr. Wechsler. So far as service goes, if I get a subpoena to appear in California, I would certainly feel a lot better if it were served by somebody from the court than by somebody over the age of eighteen years.

Mr. Seasongood. That is why I was objecting.

Mr. Wechsler. I supported you before. I wondered if we might not prevail if we distinguished between service in the district and service outside the district.

The Chairman. I do not see how you get into trouble, because if there is going to be service at a long distance, you are presented with a subpoena fee. No man is going to pay mileage just for the fun of it. No boy of eighteen is going

33 to serve that just as a trick.

Mr. Waite. Is there a provision in here that subpoenas served on behalf of a defendant must be accompanied with an offer or a tender of mileage?

Mr. Holtzoff. Yes, we just passed that. That is paragraph (c), Mr. Waite.

The Chairman. Line 24.

Mr. Waite. I misunderstood that. I thought that had to do only with subpoenas coming from the state.

Mr. Dean. Didn't we strike out the last --

The Chairman. That was about Government witnesses -- merely the tender there.

The next section, Mr. Holtzoff.

Mr. Holtzoff. Section (f) is merely the customary provision that failure to comply with the subpoena is in contempt of court.

Mr. Longsdorf. Do we really need (f)?

Mr. Holtzoff. We do not. It is in the civil rules.

Mr. Longsdorf. But isn't it the process of the court?

Mr. Holtzoff. I was afraid that in view of the fact that it is in the civil rules, somebody might point to the distinction.

Mr. Medalie. Yes, there is that danger.

The Chairman. May we now go back to rule 51(e), Motions? Mr. Medalie desires to be heard on that.

Then we will go back to Rule 20(e), on which Mr. Waite desires to be heard. Then, I think, we shall have mopped up our rules.

Mr. Medalie. I assume that we have disposed of everything

else in Rule 51 except (e)?

The Chairman. Did you have any particular point?

Mr. Medalie. I had something in mind. I will look at it again.

The Chairman. Do you want us to go on to something else?

Mr. Medalie. Yes.

The Chairman. Let us go on to Rule 20(e), which is the one Mr. Waite was going to bring up. I think it came up at the end of the evening session on Monday, and he was going to renew his motion on that.

Mr. Waite. Yes.

The Chairman. It was a new section, to be called (e).

Mr. Waite. The suggestion was that as at present conducted the preliminary examination is simply and solely an examination of the evidence of the prosecution; it has no bearing whatsoever in getting at the sum total of the trouble. The proposal is that the magistrate be allowed to ask the same kind of questions as the police officers ask. My idea is that eventually we may be able to get to a point where we can eliminate the third-degree sort of proceeding.

I think that we have got to get at it gradually, step by step, and if we begin by allowing the magistrate to interrogate the defendant, with a clear explanation to the defendant that he need not answer, we have made a beginning along those lines. Many a defendant is willing to spill the beans if he is only asked about it, and there should not be a preclusion of the magistrate asking him, when the police and everybody else are permitted to ask him.

Mr. Holtzoff. Don't you have an additional provision that

his refusal to answer may be used against him?

Mr. Waite. That is part of the fact picture and therefore ought to come into the picture, so far as use is concerned.

Mr. Youngquist. I object to his declination to answer being used against him.

The Chairman. Do you want to read that provisi on?

Mr. Waite. I should be pleased if half a loaf goes through, although I should prefer to see the whole thing adopted. The provision as suggested is this. I have in mind only the substance, of course, and not the form.

> "Whenever any person has been brought before a committing magistrate, as provided in Rule 20, and has been advised of his rights to advice of counsel and to a preliminary hearing as provided in Rule blank, the magistrate may interrogate him concerning his participation in the alleged offense and concerning his whereabouts and activities at the time of the alleged offense. Before the magistrate does so interrogate the defendant, he shall inform the defendant that he is under no obligation whatsoever to answer the magistrate's questions, but that if he does answer, his answers may be used in evidence in subsequent proceedings, and that if he declines to answer, the fact of his refusal may be used in so far as the rules of evidence permit."

The Chairman. Have you any objection if we separate it and withdraw this last clause? I think we could probably have unanimous agreement here on the last clause.

Mr. Seth. I don't think so.

Mr. Waite. Let me make my motion that it be adopted without that last clause. I will offer the first clause and then

will bring the last clause up later.

Mr. Glueck. May I inquire, Mr. Chairman, how that would differ from what we already have in Rule 20(c), except that this is more specific. I like Mr. Waite's greater explicitness, that the magistrate shall proceed promptly to hear the case.

The Chairman. There is nothing there about examining the witnesses.

Mr. Waite. Convention has limited him to examining the state's evidence.

Mr. Seth. And it should remain so, in my judgment.

Mr. Holtzoff. I think so. I do not think the committing magistrate should be authorized to interrogate the defendant, even if the defendant has a right to refuse to answer.

Mr. Waite. Why not? The police do.

Mr. Holtzoff. I do not believe there is anything inherently unfair in allowing this, but I think we must be, in certain matters, bound by tradition, and certainly we would be departing from our traditions as old as this republic if we permitted committing magistrates to interrogate defendants.

The Chairman. Isn't it a matter of fact that the English magistrates do it?

Mr. Waite. I have heard so.

Mr. Dean. The French do.

The Chairman. Then, it does not help much if the French do. That sets my argument back.

Mr. Glueck. I wonder, Mr. Waite, if the very real evil is not the abuse of power of interrogation by the police and whether you do not have in mind, in the remedy that you suggest,

37 the idea that interrogation by the police should be in the presence of a magistrate.

Mr. Waite. I have that in mind ultimately, but we are not yet prepared to do that. We could not make it practical. I think this might be an approach to it.

One of the most cogent arguments I have heard against this proposal was put up by the late Mr. William S. Forrest. His argument was that it is unfair to a certain type of defendant; that the expert criminal knows enough to keep his mouth shut or to lie cleverly. An inexpert criminal does not know how to tell lies. You get the inexpert criminal, but you do not get the expert criminal, and that is not fair to criminals.

Mr. Seasongood. There seems to be a further objection to it. If the magistrate interrogates the defendant, and the defendant refuses to answer, the magistrate will say that there is probable cause. He will draw an inference against the defendant for refusing to answer.

Mr. Waite. That is just a matter of not trusting the magistrate.

Mr. Seasongood. Well, I don't.

Mr. Waite. Why not let him have an opportunity to get at the truth if he can.

Mr. Holtzoff. It seems to me that a magistrate's function is merely to determine whether or not a defendant shall be held to answer.

Mr. Seth. Or whether the Government has made a case.

Mr. Holtzoff. Or whether the Government has made a case. If the Government has made a case, he commits the defendant. If the Government has not made a case, that ends the matter, and

the magistrate should release the defendant.

Mr. Waite. You are quite right; that is the function. But my idea here is that this Committee ought to make the best rules that it can -- the best rules from the point of view of public policy, the effectuation of a fair trial, and discovery of the truth. We ought not to base rejection on the ground that it has never been done, but on the question of whether it would be wise.

Mr. Holtzoff. I agree, but I do not think it would be wise -- that is, it would not be wise as measured by our traditional point of view toward the rights of the defendant. I think it certainly would deprive the defendant or embarrass the defendant in the exercise of his right against self-incrimination. It does not deprive him of it, of course, but it embarrasses him.

Mr. Dean. If the purpose of the principal proposal is to dispense with the interrogation of the defendants before they have an opportunity to get counsel, why didn't we provide a rule for all such interrogations to be before a committing magistrate, which seems to me to be different from this one here but going to the same objective?

Mr. Waite. I would like to see such a rule formulated. I am not ready to formulate it and put it through, but in the absence of that I can't see any reason why the committing magistrate should not ask the man, "Did you commit this crime?" "Where were you?"

Mr. Youngquist. Don't you convert him from a judicial officer to an investigating officer?

Mr. Waite. Well, he is an investigating officer in that

39 he is investigating to find out what the fact situation is. Conventionally he has been confined to finding out what the state already knows, but his purpose is to determine whether there is enough evidence to justify holding the man; and if it is possible to have a fair method to find out from the defendant himself whether there is evidence to justify holding him, I see no earthly reason why that should not be done.

Mr. Holtzoff. The holes in the prosecution's case, if any, may be filled in by the interrogation of the defendant.

Mr. Waite. Quite so.

Mr. Holtzoff. Instead of the defendant being released.

Mr. Waite. Quite so.

Mr. Holtzoff. According to your plan, after the Government rests the defendant is to be interrogated by the magistrate before the magistrate decides the case.

Mr. Waite. Yes. After all, this is no game. We are trying to find out at that hearing whether or not it is justifiable to put the accused on trial, and it seems to me that any fair method of finding that out is something we should use.

Mr. Holtzoff. But the privilege against self-incrimination is worth something. I think you will whittle it away.

Mr. Waite. No, I maintain that, at least with that last clause stricken out, we are not abusing the privilege against self-incrimination.

Mr. Holtzoff. You are not infringing on it as a matter of law, but you are making it more difficult for him to assert it.

Mr. Wechsler. I see no point whatsoever to the insistence on the privilege against self-incrimination at the preliminary hearing in the terms in which Mr. Holtzoff now insists on it.

So far as the situation exists, and as we know it to be, the police do the job rather than the committing magistrate. That is the evil against which any proposal of this sort is directed, and it seems to me it is a sufficient problem to warrant the attention of this Committee.

You will remember that yesterday Judge Crane proposed one method that has been thought of to meet the situation, namely, to render confessions inadmissible in evidence unless taken before a magistrate. Now, I do not think we are in a position to pass on Mr. Waite's proposal without relation to Judge Crane's, nor indeed to pass on Mr. Waite's proposal separately. But it does seem to me that that problem is a problem that ought to command our attention. Therefore, the way to act at this stage is to refer that problem, together with Judge Crane's proposal, Mr. Waite's proposal, and anything else that may be thought about it, to the Reporter for consideration as to whether or not action with respect to that problem is feasible.

I may say that I do not think there is anything in these rules thus far adopted that really amounts to very much in the way of criminal procedure. But any genuine attack on that problem would constitute real accomplishment. It seems to me that we ought to concern ourselves, at least in part, with the real problems in criminal procedure.

The Chairman. Mr. Dean made some suggestion in that same sphere.

Mr. Dean. I think we view it in the same light. I agree with everything Mr. Wechsler has said.

The Chairman. Do you agree to Mr. Wechsler's motion, Mr. Waite?

Mr. Waite. That is a motion I am happy to accept.

Mr. Medalie. What is that motion?

The Chairman. The motion is to refer this present motion of Mr. Waite's and the suggestion of Judge Crane, that no confession shall be permitted in evidence unless taken before a magistrate, and Mr. Dean's suggestion --

Mr. Dean. That they may not be divorced.

The Chairman (continuing). -- to the Reporter for preparation of a rule.

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Mr. Waite. Before we drop that matter, there is one thing in addition I should like to bring up for possible reference to the Reporter in that connection.

Under our rules as they now stand, if the defendant chooses to waive preliminary examination, nothing more is done. In the Code there is a provision. I do not myself pretend to be a proponent of it, and I frankly do not know much about the merits of it, but I think it is something that might be considered. It would be Section 40 of the Code, Subsection 2, and it reads as follows:

"Notwithstanding a waiver of examination by the defendant, the magistrate on his own motion may, or on the demand of the prosecuting attorney shall, examine the witnesses for the state and have their testimony reduced to writing or taken in shorthand by a stenographer and transcribed. After hearing the testimony, if it appears that there is not probable cause to believe the defendant guilty of any offense, the magistrate shall order that the defendant be dis-

42 charged."

In other words, it really permits the magistrate to go ahead with a preliminary examination, even though the defendant chooses to waive. That is Section 40, Subsection 2.

The Chairman. May we now proceed to Rule 51(e)?

Mr. Dean. I think that is a pretty important rule, and it would be helpful to have it read.

Mr. Wechsler. Before proceeding to this different matter, there is one problem, it seems to me, that is very closely related to the one we just discussed and which is not now covered by rule. It is the question of the duty to bring an arrested person before a magistrate. There is no rule on that subject now.

You recall that we gave some attention to the question whether we had jurisdiction to formulate a rule on that matter, the issue being whether there is yet a proceeding within the meaning of the enabling act and rule. After some consideration of that, I think it is sufficiently arguable that it is within our jurisdiction, and this court might so hold, to propose that in the consideration of this other phase of the subject, a rule on that subject be formulated as well.

Mr. Holtzoff. I think that arrest is part of the substantive law.

The Chairman. I think it might well be covered.

Mr. Youngquist. Yes, I think it should.

Mr. Dean. I think that if the court is willing to view it in that light, that is the answer to it. If we would defend the court by doing it, we should not do it; but when it is arguable, I think there is something to it.

43 The Chairman. The motion is to refer this subject to the Reporter for the preparation of a tentative rule?

Mr. Wechsler. Yes.

The Chairman. All those who are in favor of the motion will say Aye; those opposed, No. The motion is carried.

We will now go to Rule 51(e).

Mr. Robinson. Rule 51(e) follows 51(d), which is "Demurrer and certain pleas abolished; motions substituted."

I read beginning at line 44:

"(1) Form and Content. The motion"

Strike out "of defense" because we struck it out in the preceding paragraph --

"-- shall be in writing signed by the defendant or by his attorney. It shall be verified if it alleges matters as being in the personal knowledge of the defendant or of his attorney. It shall specify distinctly the ground of defense or of objection relied on and the court shall hear no objection other than that stated in the motion. It shall specify also the order or relief which the court is requested to provide, but the court shall make such order as it considers to be just."

Mr. Holtzoff. I think the clause beginning in line 49

"-- and the court shall hear no objection other than that stated in the motion"

is too rigid. In the first place, it is not necessary.

Mr. Medalie. It departs from the normal practice, especially where you want to have a full hearing of everything the parties want to say.

Mr. Robinson. That comes from a proposal that has been

44 made or recommended to the advisory committee by one of the Federal court committees, as I recall. That is one source of it and was placed in here for that reason.

Mr. Holtzoff. I would rather see it stricken out in fairness.

Mr. Medalie. I think what you have there is this: You bring the district attorney and the defendant in. The court hears them. Something calls the court's attention to the situation, and the court decides that it will hear anything that affects the substantial rights of the parties. I think we ought to strike it.

Mr. Robinson. By consent, does everybody feel that that may go out?

The Chairman. All right. That will go out by common consent, unless there is specific objection.

We will proceed now to (2).

Mr. Dean. I have one other question on this general subject. We have specified in 51(d) that certain pleas are abolished. We said that those particular pleas shall be substituted by motion. Are there other motions, or are we restricted to these motions listed above?

Mr. Robinson. No.

Mr. Dean. Does (e) refer only to the motions in (d)?

The Chairman. Oh, no; motions in general, including the motions which arise from the abolition of pleas. Isn't that the general intent?

Mr. Medalie. Yes.

Mr. Dean. I hope that is clear.

The Chairman. Now, (2).

45 Mr. Robinson. "(2) Grounds. The motion --"

Strike out "of defense" --

" -- may specify one or more of the following grounds of defense, but no other legal ground of defense is barred because it is not enumerated herein: that the written accusation was not prepared, filed, or prosecuted according to law; that it does not charge the defendant with the commission of an offense" --

The Chairman. And the rest of it.

Mr. Youngquist. What does the word "prosecuted" there mean?

Mr. Robinson. Followed through after it had been filed in court. I know that it refers to some distinct possibility there.

Mr. Dean. It might be that it was not prosecuted speedily under the constitution.

Mr. Robinson. What would be a better word than "prepared"?

Mr. Youngquist. Preparation of the docket.

Mr. Medalie. You mean presented to the Grand Jury.

Bx.2 cyl.1 Mr. Youngquist. The presence in the Grand Jury room of any unauthorized persons.

Mr. Medalie. "Obtained."

Mr. Robinson. I do not like that. We want a better word.

Mr. Medalie. "Presented."

Mr. Robinson. No. The Grand Jury is present. Persons who should not have been there.

Mr. Moltzoff. I think "Obtained" is all right. The word "presented" is a little ambiguous.

Mr. Medalie. All right.

46 Mr. Dean. Why don't you say, "evidence before the Grand Jury was not presented"?

Mr. Youngquist. Leave it to the Style Committee.

The Chairman. All right.

Mr. Robinson. We say:

"Does not charge the defendant with the commission of an offense; that it misnames the defendant; that it misjoins defendants or offenses; that it contains allegations which are surplusage or duplicitous or repugnant" --

Mr. Holtzoff. I think that "surplusage" is not a ground of defense.

Mr. Medalie. We do not call it a motion of defense any more.

Mr. Seth. We leave out "of defense."

Mr. McLellan. We again strike out the words "of defense," in the second line.

Mr. Robinson. We are getting everything clear off the ground if we strike out everything having to do with grounds of defense.

Mr. Dean. A moment ago I asked whether (e) applied to all motions that might be filed during the course of a criminal proceeding. If it does, (2) should not apply to motions for criminal defense but should apply to all motions.

Mr. Holtzoff. Surplusage is not a defense.

Mr. Wechsler. May I ask what the purpose of this enumeration is anyhow? As I understand the object of the proposal, it is simply to abolish pleas and substitute motions as a form. There is no purpose to alter the preexisting law as to what is available under plea of not guilty as distinguished from special

47 plea. Under those circumstances, it can all go out. If there were some purpose to alter the preexisting definitions, then it would be some point to retain.

Mr. Robinson. This suggestion I was going to make as soon as I could complete the enumeration. It is up here for your consideration whether or not the bench and bar -- particularly the bar -- will understand just by a motion that each of these things can be raised. If they do, all right; it saves us that much work.

The Chairman. I think it would be better to put it in a note.

Mr. Wechsler. May I ask, referring to the same line, if it is the Reporter's judgment that no attention should be devoted to the preexisting law, except what is available under the plea of not guilty, and what requires a formal special plea or motion? Is it your judgment that the existing law is sound? That whatever was available under the plea of not guilty should be taken to be available under that plea? Whatever heretofore required the motion or special plea should now require motion?

Mr. Robinson. That is right; everything comes under "Motion."

Mr. Dean. We had no ground of motions, and we add no ground of motions?

The Chairman. Yes. The question of surplusage was never a matter of defense, was it?

Mr. Holtzoff. Adopting Mr. Wechsler's suggestion, which I think is sound, they go back to (d), which refers to anything that could be raised by a plea in abatement.

The Chairman. Then, you put a note there that it goes be-

yond those things.

Mr. Youngquist. There is a difference here, in that (d) refers to a form of plea, whereas (e)2 refers to the objection raised by that means, so I don't think (1) is a substitute.

Mr. Holtzoff. If we strike out (2) we just leave the existing law with the change that we raise the point by motion, which we now raise in one of those other points.

Mr. Youngquist. I think it is all right. I was just pointing out the distinction between the two sections.

Mr. Robinson. How should that read?

Mr. Dean. If we are going to leave the existing law as it is now and not change it in any respect, adding or subtracting, I move that (2) go out completely and that the items in there be listed, since they are in a footnote.

The Chairman. In a footnote only?

Mr. Dean. Yes.

The Chairman. It has been moved and seconded that 51(e)2 be deleted and the observations made in our discussion be included in the footnote to 51(e)1.

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Mr. Robinson. (3) becomes (2).

Mr. Holtzoff. What is a counter motion?

Mr. McLellan. I know one fellow who files them all the time. I don't see any sense in a counter motion.

The Chairman. Before we go on with that, I have been advised that our lunch is ready and that we will be served in the next room.

(At 1:05 o'clock p. m. a recess was taken until 1:30 o'clock p. m. of the same day.)

Pendell
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1-14-42

A F T E R R E C E S S

The recess having expired, the Committee reconvened at 1:35 p.m., and proceeded further as follows:

The Chairman (Arthur T. Vanderbilt). Gentlemen, we will please come to order.

Mr. Youngquist. Mr. Chairman, may I return to (e) (2)?

The Chairman. Yes, indeed.

Mr. Youngquist. I supported the elimination entirely of (e) (2), but it occurs to me that we should perhaps somewhere define the ground that the motion which we now create is to cover, and I suggest that the Reporter consider the inclusion in (d) of rule 51, whereby we abolish the demurrer and all pleas other than guilty, not guilty, and so forth, and substitute for the motion, and to incorporate in that section in some form of statement the particular kind of defenses that the motions will cover, so that he who reads the rules may know what we are trying to accomplish.

The Chairman. Wasn't that about the sense of what we did, which was to provide in a note for (e) (1), stating what these various ones were, with the thought that if we have perhaps missed one, the fact that it was in the note would not weigh against us?

Mr. Youngquist. We have a general statement of (d), now, in the abolishing of pleas--any plea other than a plea of not guilty, and so forth.

Mr. Holtzoff. Well, don't we in effect provide that any point that was previously raised by a demurrer, plea in abatement, and so forth, shall now be raised by motion? Isn't that a specific indication, so far as the rules are concerned? and

then the notes will make the explanation.

Mr. Youngquist. All we say now is that demurrers and all pleas, except the three that are permitted, are abolished.

Mr. Holtzoff. No, but look at line 37 on page 2 of this rule.

Mr. Youngquist. Line 37? Yes, that is the one I am reading. I am reading line 36.

Mr. Holtzoff. Doesn't that cover your point?

"All matters heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by a motion* * *"

Mr. Youngquist. Wait a minute.

Mr. Holtzoff. You haven't got the same page, have you?

Mr. Youngquist. Page 2.

Mr. Holtzoff. Oh, yes.

Mr. Youngquist. I hadn't quite come to 37.

Mr. Holtzoff. Well, that sentence beginning on line 37, I think covers your point.

Mr. Youngquist. Yes, but how does that read, now? I have that stricken out.

Mr. Holtzoff. No, that reads, now-

"All matters heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by motion."

The Chairman. And striking the rest?

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Mr. Holtzoff. No, we struck out only lines 41 and 42.

Mr. Youngquist. I think we revised that, at Mr. Dean's suggestion.

Mr. Dean. All I was anxious was to make it clear that all other motions were abolished.

Mr. Holtzoff. We didn't make any further changes on that.

Mr. Robinson. Let me state what one part of the point I think is, that Mr. Youngquist is getting at. It is this: We are providing that the defendant shall do one of two things, as I see it. He may either plead one of these three pleas that we have now made possible, guilty, not guilty, or nolo contendre, or he may file a motion, otherwise nameless--just a motion--which would set up any other defense which he has.

Now, in order to show what that motion would include, I have tried to enumerate in 51 (d) and 51 (e) (2) what would be involved or what might be raised by the motion.

Now, as we went out of the room for lunch, Mr. Dean and Mr. Wechsler said to me, "What do you propose to leave under the plea of not guilty?" Well now of course that is a subject I have tried not to get into, because it is terrifically indefinite and rather antiquated. I have before me Blackstone, here, IV Blackstone 332, in which he goes into what a defendant may do, and under the general issue on plea of not guilty he may do just about everything, really. There may be a plea to the jurisdiction, there may be a demurrer to the indictment, there may be a plea in abatement, special pleas in bar--all of them are of very limited application--and then under the plea of not guilty, as Blackstone lays it down, a defendant can raise just about anything, including a good many of the points that we

wanted to raise under our motion.

Mr. Glueck. For instance?

Mr. Robinson. Pardon me just a second. Therefore, it seems to me it would be impossible to enumerate what can be pleaded under not guilty, under this revised rule we are trying to set up, and also to fail to enumerate what defenses may be raised under a motion and yet be specific in drawing a line between what a defendant may raise by a plea of not guilty or by this general motion.

Now if you are going to strike out enumerations under the general motion, you have got to enumerate under not guilty what is going to be included under it. That is part of the difficulty.

Mr. Wechsler. Jim, let me ask you this: There are some things which are defenses which under present federal practice you can raise by special plea if you want to.

Mr. Robinson. Certainly--demurrer.

Mr. Wechsler. You can raise them by motion if you want to.

Mr. Robinson. Right.

Mr. Wechsler. Or on the other hand you can wait until the trial and raise them there. Now, is that option preserved to counsel for the defense under this rule?

Mr. Robinson. As I understand your question, you are just asking virtually what I was trying to explain. I do not believe that your question could be answered Yes or No, because to begin with your question is rested on a very indefinite line.

Mr. Wechsler. Jim, I can make it just as precise as a razor blade.

Mr. Robinson. You can't do it, because under the present

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practice it is absolutely undetermined what can be raised, in certain districts at any rate, on, say, demurrer.

Mr. Wechsler. Yes.

Mr. Robinson. Or certain pleas in abatement or pleas to the jurisdiction, or whatever pleas may be drawn. In some places, in order to make an answer to an indictment, to raise a defense against an indictment, the defense counsel will file both a demurrer--

Mr. Wechsler. --and a motion to quash.

Mr. Robinson. --and a motion to quash. Those two, in several districts, are filed because they cannot be sure which is needed.

Mr. Wechsler. I understand that. I will put my question again, and I think it is precise. Do you mean to alter the existing law as to what must be raised in advance of trial by some form of special pleading or motion as distinguished from what the defendant at his option can raise at the trial after a plea of not guilty? Now, if you do not mean to alter the law on that point--if you mean to let it stand so that where under the authorities a defendant could in advance of trial raise double jeopardy by plea--didn't have to, but could--then under this procedure he can make a motion in advance of trial--doesn't have to but may--if that is what you want to do, then I am not certain that your language on line 40 accomplishes that purpose.

Mr. Robinson. You can stop there. Yes, you can stop there, because I think that what we want to do is just what the majority of the committee wants to do--is to compel the defendant to raise it by this motion.

Mr. Holtzoff. That is not the way I construe the rules.

Mr. Wechsler. That is just what I want to get at, Jim. Now, if that is so, you have got a very real problem.

Mr. Robinson. This is good.

Mr. Holtzoff. I construe the rule as we have adopted it as merely substituting a motion for pleas in abatement, demurrers, and so forth, but not making any other change.

Mr. Wechsler. That is not the Reporter's interpretation as just given.

Mr. Robinson. You do not have to take my interpretation.

Mr. Wechsler. I say, that is not the Reporter's interpretation as just given.

Mr. Holtzoff. No, that doesn't seem to be his interpretation.

Mr. Robinson. It is our task here to see what interpretation we should take, and whatever one we wish to take is the one that will be the simplest way around.

Mr. Wechsler. Right. Now, in order to bring the matter to a head, I move the language be in such form that the option of defense to raise the matter in advance of trial or to wait for the trial, the option that exists under present law, be retained.

Mr. Holtzoff. I second the motion.

Mr. Robinson. Now, do you think you can deal with that before you get to these matters of notice, insanity, and alibi--those matters we are going to require?

Mr. Wechsler. Except any specific modifications later made.

Mr. Robinson. Don't you think it would be well just to complete this consideration of rule 51?

Mr. Wechsler. I do not press for the order.

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Mr. Robinson. And then consider the whole thing as the problem that I have tried to put before you?

The Chairman. We will hold it in abeyance, then.

Mr. Wechsler. Certainly.

The Chairman. All right. Will you remind me of it, if I overlook it?

Mr. Robinson. Line 68. Mr. Medalie was objecting to the word "counter", which therefore may go out, and maybe the rest of it is unnecessary, "motions by Government".

Mr. Holtzoff. I move to strike it.

Mr. Robinson. Just a minute, let's see what Mr. Medalie wishes.

Mr. Medalie. I do not think we need it. I was going to ask you what you thought ought to come in under "Counter motions by Government".

Mr. Robinson. Well, since we are setting up what, to many at least, will be a very novel method of handling a criminal defense, the idea was we might say, or expressly state what I suppose would be obvious, at least, to us, in this consideration now, that the Government in turn may, instead of, say, demurring, to a motion, may itself then file a motion.

Mr. Medalie. You mean if I file a motion--

The Chairman. Or counter affidavits?

Mr. Robinson. Or a counter affidavit.

Mr. Medalie. Well, that isn't a motion.

Mr. Dean. That is not a motion.

Mr. Robinson. Well, all right, add it.

Mr. Medalie. Because under established practice, as required by the rules, whenever one party files an affidavit, the

other may answer by affidavit or any other form to which it is susceptible.

Mr. Holtzoff. Or if you are just raising a question of law, you go up and argue, and maybe you do not file anything.

The Chairman. Should not the right to file counter affidavits be included as part of it?

Mr. Holtzoff. I think it is so obvious.

Mr. Robinson. That is just a question, whether it is obvious to others.

Mr. Holtzoff. Well, in my opinion it is, and I move--did you move to strike this out?

Mr. Medalie. No, I would not.

Mr. Robinson. Oh, you do not need a motion. We won't argue about it. If you do not want it, it will go out.

Mr. Medalie. If you think there is any doubt on this subject as to whether the Government has the power or has the right to file affidavits or submit other proof, put it in.

Mr. McLellan. Where is the provision for affidavits in support of the motion?

Mr. Dean. There isn't any so far, unless it comes later.

Mr. Robinson. Oh, yes--the verification.

Mr. Medalie. That again depends upon the form in which you move. Now we are accustomed in our district, and also in the New York practice, when drawing up a paper, a notice of motion, to have it signed by the attorney, stating he will move for certain relief at a certain time and place, and he signs his name, and it is addressed to his opponent. Then that notice of motion also makes specific reference to what it is based on, informing you that he has, we will say, objection to the indictment

proceedings heretofore had, and the affidavit of John Smith, verified May 1, and so on and so forth.

Mr. McLellan. I haven't got an answer to the question as to where there is a provision for affidavits in support of motions.

Mr. Seasongood. Line 46, "shall be verified".

Mr. McLellan. That is only where the matters of fact are within the knowledge of the defendant.

Mr. Seasongood. That is true.

Mr. Holtzoff. I think today they do not use that on motions quite to the same extent as they use it in New York. In New York, nobody makes a motion without attaching an affidavit to it, except in exceptional circumstances, but the opposite is the practice in many districts.

Mr. Wechsler. May I ask a related question?

Mr. Robinson. Certainly, certainly. I don't guarantee I can answer it.

Mr. Wechsler. Suppose under the practice a defendant makes a motion for acquittal, on the ground of immunity, and in support of the motion sets forth the facts which defendant believes establish immunity. Now, that raises an issue of fact of the sort previously raised by special plea--that previously could be raised by special plea.

Now, the Government denies those facts, and thus an issue of fact is created. Must the Government file a counter motion, now, which consists of denials? Is that what is substituted for the replication?

Mr. Robinson. To begin with, Herbert, I don't understand that your motion would be a motion for acquittal.

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Mr. Wechsler. What would it be?

Mr. Robinson. I was just starting to say, it would seem to me that we want that taken care of; whether that is something we can attain or not is another question, by dismissing the indictment, dropping it, letting the matter be brought in before trial by motion to acquit. I assume you mean at trial?

Mr. Wechsler. Oh, no, no; in advance of trial.

Mr. Robinson. Motion to acquit, in advance of trial? How can you have a motion to acquit in advance of trial?

Mr. Medalie. To dismiss.

Mr. Dession. To dismiss the indictment or quash it.

Mr. Wechsler. Motion to dismiss, or to quash.

Mr. Robinson. Yes.

Mr. Wechsler. I am simply seeking the equivalent of the old verbiage, that is all, under this procedure. Under the practice, you could raise the question of immunity in advance. You get a trial on an issue of fact. If you prevail, whatever you called the defendant's status, he is acquitted of the charge. Now, I want to know what happens if an affirmative defense of that sort is raised. Is there a counter plea, or an answering plea, or a motion by the Government, creating an issue? Are we going to call that a "counter motion"?

Mr. Holtzoff. Well, paragraph 4 answers that.

Mr. Robinson. I was just trying to say that, Alex. My answer would be, paragraph (4), Herbert, but have you read that, to consider whether that meets your question, or how it can be made to answer your question?

Mr. Wechsler. Certainly, but the error of paragraph (4), if I may say so, is that it presupposes the creation of an

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issue of fact by an affirmative defense, by two moves, alone--by the indictment, and by the motion. If that is what is intended--that is to say, if there is to be no answering plea by the Government when an affirmative defense is raised--then I simply want to know it. If on the other hand it is contemplated that the Government will now make some other move to make an issue, or that the plea or that the motion will stand granted on confession if the Government does nothing else, then again it seems to me we ought to make it clear.

Mr. Robinson. Oh, I can see, now. The Government has filed an indictment, now, or its information?

Mr. Wechsler. Right.

Mr. Robinson. That is, a charge against the defendant?

Mr. Wechsler. Right.

Mr. Robinson. Here comes a defendant and files a motion in which he sets up immunity, as you suggest?

Mr. Wechsler. Right.

Mr. Robinson. Isn't that an issue?

Mr. Wechsler. It is an issue, if the Government denies the facts constituting the basis for the claim.

Mr. Youngquist. I would like to say that I think, on the motion presented and on the facts presented in support of it, that it must determine whether immunity exists.

Mr. Dean. Isn't it conceivable though on a collateral question of that kind, that the Government will wish to file a response to it?

Mr. Youngquist. Oh, yes; yes, indeed. I had assumed that that would relate only to facts, however, and that it would be in the form of a responsive affidavit, the filing of which I had

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assumed would be permitted as a matter of course, without a rule.

Mr. Holtzoff. It has been abolished.

Mr. McLellan. Well, you have a rule on it; as Mr. Tolman has already pointed out, (8) (d) covers that.

Mr. Youngquist. (8) (d)?

Mr. McLellan. It provides for the service of opposing affidavits not later than one day before the hearing.

Mr. Youngquist. Then we have taken care of that?

Mr. McLellan. I should not have known it if Mr. Tolman had not told me.

The Chairman. Now, what have we done with 51 (c) and 51 (e) and 51 (e) (3)?

Mr. Robinson. If I may make a suggestion on this, Mr. Chairman, I think our problem here is a unit problem to the extent that we try to take it up as such rather than piecemeal.

The Chairman. All right. Suppose you run over all of them. Suppose you outline the whole thing from here on.

Mr. Robinson. At least, until you see some reason for changing that procedure.

The Chairman. We will follow through. That is correct.

Mr. Robinson. Now, as I take it, lines 68-71 are designed to meet the point at least in part that Mr. Wechsler mentioned. If the Government did wish to file some additional motion or supplementary memorandum or something of that kind, this would expressly provide for that. Now, if we strike that out, our problem still is to provide for the point Mr. Wechsler raises, I think, on that particular point.

Mr. McLellan. Why not by affidavit?

Mr. Robinson. By affidavit?

Mr. Youngquist. Isn't that taken care of by (8) (d)?

Mr. Dean. (8) (d).

Mr. Robinson. All right. You think the filing of an affidavit under (8) (d) is sufficient?

Mr. Youngquist. Yes.

Mr. Wechsler. Suppose the motion is insufficient in law, which sets forth the claim of immunity, and is insufficient on its face; would that be handled by affidavit?

Mr. Holtzoff. I think you can argue that as a question of law, just as, under the civil rules, you no longer are required to reply to an affirmative defense, but you can raise all these questions on the argument.

Mr. Medalie. You know it is not all quite so simple as this. As Mr. Youngquist pointed out, defendant moves to dismiss the indictment on the ground of immunity, and he sets forth that he appeared before the grand jury and was questioned and thereby obtained immunity, in that class of cases where, when they are questioned, unless they waive that right, they obtain immunity. Now, he said something about a grand jury proceeding.

The case cannot be determined simply on his representation, version, or belief as to the meaning of what happened before the grand jury or the questions that were asked him. He may have omitted some. Well, the district attorney then would have one of two remedies. The court certainly is not bound to accept what the defendant says. Even if the District Attorney said nothing, the court ought to make an inquiry, in any event.

The district attorney's opposition may be nothing more than a request that if there is a stenographer in the grand jury he

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be heard, or the transcript be taken, or that the grand jurors be heard. Now, he may ask the court to have a jury trial. In other words, he may put in nothing but a denial, without having much formality to it, and without giving all of the details.

There are cases which a court cannot decide on affidavits. It is sufficient toindicate generally that the court cannot decide that on affidavit, and for that reason I assume that you have preserved the right of trial by jury in matters which formerly could be raised by plea in bar or by plea in abatement, where the jury trial was appropriate.

Mr. Robinson. That is provided.

Mr. Medalie. Now, in other words, you do not need a counter motion.

Mr. Robinson. No.

Mr. Medalie. Any piece of paper that shows what you want, with that affidavit verified or not depending on the local practice. In other words, the motion is answered in whatever way the opposition to the motion cares to answer it, in accordance with the existing local practice, which we do not and should not regulate.

Mr. Robinsnn. And which in turn tends to show that the Committee was clearly right in striking out (3), lines 68-72--the effect of what you said.

Mr. Youngquist. Mr. Chairman, I was recalling the practice in our State, and Mr. Tolman calls attention to rule 43 (e) of the civil rules with respect to motions, which reads thus:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court maydirect

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that the matter be heard wholly or partly on oral testimony or on depositions."

I wonder if it might not be advisable in this rule relating to motions to insert a provision of that sort. That would clear up some of the questions that have been raised by the members of the Committee. That would not, however, preclude the trial by jury of issues of the kind that Mr. Medalie suggests.

Mr. Longsdorf. Mr. Chairman, might I suggest a re-wording of that rule 51 (e) (3)?

The Chairman. All right.

Mr. Longsdorf. To read like this. Instead of "counter motions by Government, "opposition by Government". Then continue:

"Counsel for the Government may file or make opposition to the motion of defense; if the opposition contains allegations of fact, it shall be verified."

Mr. Holtzoff. I do not think that the United States Attorney ought to be required to verify by oath a pleading of that kind.

Mr. Longsdorf. That should stay out, too.

Mr. Medalie. He should not verify what by oath?

Mr. Youngquist. Verify what?

Mr. Medalie. What should he be excused from verifying?

Mr. Holtzoff. Mr. Longsdorf suggests a pleading verified by the Government, setting forth matters that should be verified by oath.

Mr. Youngquist. Why not?

Mr. Medalie. He was not referring to pleadings.

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Mr. Youngquist. Any facts presented to the court in a situation of that kind should be verified.

Mr. Medalie. Surely, they should be verified.

Mr. Holtzoff. No, because if there is a hearing on the issue, you present the evidence at the hearing. Why should the United States attorney have to swear to his reply?

Mr. Medalie. Well, if he files a reply that contains a statement of fact, he ought to swear to it the same as the rest of us do.

Mr. Robinson. That was the idea, Mr. Holtzoff, because you see we require the defendant to verify in a similar situation, so why not require the United States attorney to verify?

Mr. Holtzoff. Well, we don't.

The Chairman. Gentlemen, I am wondering if we won't get through faster if we go through this whole batch of "motions". We are taking it up piecemeal again and we are not getting along very fast. Suppose the Committee hear the Reporter on the whole of the "motions", and make note of your comments, but reserve them to the end.

He reminds me that the rule as prepared was prepared as the result of our discussions in September, and apparently we are back-tracking on it.

All right, go ahead, Mr. Reporter.

Mr. Robinson. (reading)

"(4) Hearing or trial. The court shall hear a motion".

strike out "of defense", because we have decided to get along without that, and without your right.

"--in which the issue is an issue of law immediately upon its being made, unless, upon request of counsel for

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the government or for good cause shown, the court postpones the hearing. If the motion"--

strike out 'of defense".

--"raises an issue of fact, a jury may be had upon request of the defendant or of the government or upon the court's own motion.

"(5) --"

Mr. Medalie. You did not want us to stop you there?

Mr. Robinson. No, just make a check, draw a little "tombstone", and mark it.

The Chairman. Go ahead.

Mr. Robinson. (reading)

"(5) The order or other action on a motion by the court. If a motion"--

strike out "of defense".

"--is based on an alleged defect in the written accusation which can be cured by amendment which it is within the power of the court to make, the court shall order the amendment to be made and shall overrule the motion."

By way of explanation, that is misjoinder and other similar matters, John, which you have listed in the American Law Institute Code.

Mr. Wechsler. Yes.

Mr. Robinson. 84:

"If the hearing is by the court and the motion is sustained the court shall make such orders as it considers to be just."

Now, these last four lines or last five lines are sketchy, because I am wanting you to help fill in the procedure, what

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should follow if the court does sustain the motion, or if it does not.

86:

"If the motion is tried before a jury, the court likewise shall make such order as it considers to be just either disposing of the accusation or bringing the case to trial."

Then that brings us to the matter of matters which may be pleaded in advance, and then we close this rule, because as you will recall your outline required getting our chapter heading here-

"Arraignment and other proceedings preparatory to trial, pleas, motions, and notices."

The effort now has been to take up each one of those things in order, the pleas, the motions, and now the notices.

"Insanity."

This is section 235 of the American Law Institute Code.

Mr. Medalie. May I suggest--

Mr. Robinson. Yes, sir.

Mr. Medalie. --that in dealing with insanity, alibi, and so forth, we can leave that as a separate subject, and even two, and consider the rest of our section without having to go over that.

Mr. Robinson. I think you are right on that, George.

The Chairman. All right, let us go back.

Mr. Robinson. But just remember we do have these provisions for defenses which we wish to have raised by notice in advance of trial.

Mr. Medalie. A "notice" is one thing, a "motion" is another

Mr. Robinson. Exactly.

The Chairman. Now, we are talking about motions, sections (3), (4), and (5).

Mr. Medalie. Now, I understood that section (4), without writing language in there, -- it would take too much time for us to write what we want to say--that provisions shall be made by subdivision (3) for the filing of proof or the setting forth of the claim by the Government in answer to those motions.

Mr. Robinson. Yes, sir.

Mr. Holtzoff. I would like to ask you this: In the civil rules, if the defendant pleads an affirmative defense, no reply is required, as it is under the New York civil code. Do we want--

Mr. Medalie. (interposing) None is required under the New York civil code.

Mr. Robinson. Thatis right.

Mr. Medalie. You file a reply only to a counter-claim and to other matters that are affirmative--affirmative defenses. Only on motions for special hearings.

Mr. Holtzoff. I stand corrected. Now, I wonder whether we ought to make the criminal procedure on this point more and more complicated than the civil procedure. Should we require the United States attorney to file any document in response to a motion for example raising the former jeopardy or immunity?

Mr. Medalie. It is not suggested that he is to be required to. He is given the right to do it.

Mr. Holtzoff. Oh, well, that is all right.

Mr. Medalie. He is not required to do anything.

Mr. Youngquist. I think all we need is a provision giving

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the right to file counter affidavits.

Mr. Medalie. I once made a motion to dismiss an indictment, in the County Court of Richmond, which was at Staten Island, on the ground that the term of the court had expired, where the grand jury was still sitting, before whom the alleged perjury was committed, and I made the motion. The Attorney General came in and said, "That's right." Out it went. There was nothing for him to submit. We don't require anybody to submit anything, but if he has anything to submit, then he submits it.

Mr. Holtzoff. No, but I am trying to say this--that if he is going to deny the allegations in the motion, he should not be required as the basis for his denial to file a pleading.

Mr. Medalie. If he doesn't file a pleading, how in the world is he going to know whether the attorney and his witnesses and the affidavits and so forth have correctly informed the court or have correctly conceived the facts?

Mr. Holtzoff. Well, how do you know in the civil case whether the plaintiff admits the averment of affirmative facts?

Mr. Medalie. Those are pleadings. That is another thing. That is what you were telling me.

Mr. Waite. I think the matter is 43 (e) of the civil rules, isn't it?

Mr. Holtzoff. Isn't it when any matter comes up on motion, permitting supporting affidavits, there may be counter affidavits?

Mr. Medalie. Yes.

Mr. Youngquist. And the court could take oral testimony if he liked. It seems to me that is all we need, for the purpose of what is now (3) here, don't you think so, George?

Mr. Medalie. These are not pleadings, that is.

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Mr. Holtzoff. I agree with that.

The Chairman. Is it your motion, then, that we substitute for this rule (e) (3) something comparable to the language of civil rule 43 (e)?

Mr. Youngquist. I so move.

Mr. Wechsler. I support it.

The Chairman. All those in favor say aye--

Mr. Longsdorf (interposing). There is a question about that, Mr. Chairman. Are we going to abolish the right of jury trial on special pleas in bar?

Mr. Medalie. No, that is the next section.

Mr. Longsdorf. I just wanted to know if we were.

Mr. Dean. I would like to suggest that in framing that provision, whether by using the exact language of civil rule 43 or not, that we might consider the use of the phrase "response to the motion".

Mr. Medalie. Yes.

Mr. Dean. I think it would cover any motion that you wanted to accompany with affidavits.

The Chairman. I did not call for the No's on that motion, yet. Those opposed, No. The motion is carried.

(The motion was duly AGREED TO.)

Mr. Medalie. I would like to make another suggestion. (3) doesn't belong here, does it? Doesn't it belong in the same place as (1)?

Mr. Robinson. The effort was, you see, to follow along with the following procedure as far as possible.

Mr. Medalie. That is not very important.

Mr. Holtzoff. Leave that to the committee on style.

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Mr. Medalie. Is it new, there?

Mr. Dean. I would like to make a suggestion that (8) (d) is certainly not satisfactory to cover it.

Mr. Youngquist. No.

Mr. Dean. Because it comes under an early rule dealing with time computations alone.

Mr. Youngquist. That is right.

Mr. Glueck. And it is only incidental.

The Chairman. That is another question for the committee on style.

Now we go on to (4).

Mr. Medalie. Aren't you necessarily saying that the court shall pass on the questions of law raised by the motion, immediately, or later? That is exactly what the court always does.

Mr. Dean. I do not think you need it.

Mr. Robinson. Yes, the issue is "immediately".

Mr. Medalie. I think we are doing a lot of pious things here that are meaningless. Either the court will hear it immediately, if he is an expeditious judge, or put it off, if he feels it is too much for him, and send it to another judge.

Mr. Robinson. After all, George, piety has its place, sometimes.

Mr. Medalie. Well, we are accomplishing nothing. Every judge knows he ought to hear a motion immediately. If he doesn't, he has either got a good reason for it or he is not attending to business. Are we going to put in here that every judge shall attend to his business? That is what in effect we are saying.

Mr. Dean. I think we should strike the first sentence.

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Mr. Holtzoff. I think we should strike the first sentence.

Mr. Robinson. Do you think this would be understood that this does not change the present procedure by which, when a demurrer is filed, the court says, "Well, we will hear your argument next week--or 10 days--or on a certain day"?

Mr. Medalie. That depends on local practice.

Mr. Robinson. This, again, is brought in from the recommendation of a district court committee.

Mr. Medalie. What district is that?

Mr. Robinson. That does not make it sacrosanct or anything like that.

Mr. Medalie. No.

Mr. Robinson. But I just wanted you to know it has been thought out by lawyers out in the districts, and they felt there is too much delay now--contrary to your "pious" assumption, perhaps, or optimistic assumption,--and for that reason they wanted the word put in here requiring that "immediately" something be done.

Mr. Medalie. You mean my assumption with respect to piety.

Mr. Robinson. All right.

Mr. Waite. It is another illustration of the thing called "propaganda" that they are using, isn't it? Again, I think it is good propaganda.

Mr. Robinson. "Emphasis", I believe the chairman said.

Mr. Medalie. I do not think we ought to have anything in here that is really futile and is not a rule.

Mr. Holtzoff. I move we strike out the first sentence.

Mr. McLellan. Second the motion.

The Chairman. Any remarks? -- It is passed, with two

votes in the negative.

(The motion was duly AGREED TO.)

Mr. Medalie. The second sentence, Mr. Chairman, was designed to meet a situation to which Mr. Robinson referred and to which Mr. Wechsler referred. That is, that there exists today a right of trial by jury of an issue raised for example by pleas in bar, and it is not our intention, and we would not succeed if we attempted, to take away the right of trial by jury, and the purpose of this provision is to see to it that if either the judge or the district attorney or the defendant wants a trial by jury he shall have it.

Mr. Youngquist. George, should however that not be limited to the cases where the defendant is now entitled to a trial by jury? Under the language of this sentence it applies to every motion.

Mr. Dean. And should we not specify?

Mr. Medalie. I think that is in any motion, civil or criminal, where there is no constitutional right to trial by jury, the judge can if he chooses to, try an issue of fact by a jury to advise him, so that he can get the angle of the common man on the state of facts as represented by the evidence.

Mr. Youngquist. Surely.

Mr. Medalie. Now, you do not need to make provision for that, at all. Judges have that power. Now, the one thing we want to make sure of is that we have not attempted by these rules to abrogate the existing right, and that is all we need to put into the rules.

Now, what we are putting in, if this has the broad meaning, as it undoubtedly has, is the provision that on all motions the

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court has the power if it chooses to try all or any issues of fact, all or any part of the issues of fact on the motion, by trial to a jury, and using, of course, necessarily, accepting or rejecting the jury's verdict. I think it is unnecessary.

Mr. Waite. I would like to ask a question apropos of that statement. Suppose the defendant moves to dismiss on the ground that there was no evidence whatsoever before the grand jury on which to support the indictment? That is a question of fact, obviously, but it is not a question of fact on which he has an existing right to jury trial, whether there was or was not evidence before the grand jury.

Mr. Medalie. Or any right.

Mr. Waite. If I understand this last sentence correctly it gives him a right to a jury trial on such an issue of fact as that, and I think that would be a great mistake.

Mr. Medalie. I am sorry, Mr. Waite, that you chose that example, because I do not believe that a defendant has any right to make a motion on the basis of the grand jury evidence.

Mr. Waite. Well, he has made it, in New York, and got away with it.

Mr. Medalie. Oh, well, in New York they are made because of a very peculiar situation. Our Code of Criminal Procedure expressly forbids the inspection of grand jury minutes, so the courts worked out this doctrine--no man may be indicted except on evidence--this is his constitutional right--except on evidence which the grand jury actually received.

If he can circumstantially show that the grand jury did not have such evidence, as for example the affidavits of the witnesses who appeared before the grand jury, then the court

may order an inspection of the grand jury minutes to determine whether he was indicted on insufficient evidence, and though prohibited by the Code of Criminal Procedure, they claim that to that extent the provision of the code is void, because it takes away from him a remedy for enforcing a constitutional right to be indicted by a grand jury.

Mr. Waite. That really does not answer my question.

Mr. Medalie. But that is a peculiar situation in New York. Does it exist anywhere else?

Mr. Waite. Yes, in various States it has been set up.

Mr. Medalie. Now, come to your point.

Mr. Waite. And the point I want to raise is this--That would be a question of fact that he has raised by his motion to dismiss. I think it would be a great mistake, I think we all agree on that, to give him a right to jury trial on that point.

Mr. Youngquist. Yes.

Mr. Medalie. Yes.

Mr. Waite. If I understand this sentence correctly it does give him a right to trial by jury.

Mr. Holtzoff. I do not think that ground arises in the federal practice.

Mr. Youngquist. Take any other ground.

Mr. Medalie. Let us assume it is a ground in connection with a motion as Mr. Waite indicates, where the right to trial by jury is not now guaranteed. Mr. Waite says that he does not want the defendant to have a jury as of right to pass on that issue of fact, and I agree with him completely.

Mr. Holtzoff. This is not a trial as of right.

Mr. Dean. This gives it to him if he asks for it.

Mr. Medalie. It does?

Mr. Youngquist. If he asks for it, he gets it as a right.

Mr. Glueck. It may be had upon his motion.

Mr. Holtzoff. It ought to be modified.

Mr. Medalie. Well, to bring this to a head, Mr. Chairman, I move that the only provision with respect to juries, in subdivision (4), be one that applies only to those cases where a defendant is now entitled by plea in bar or in abatement to a trial by jury.

Mr. Youngquist. Second the motion.

Mr. Medalie. And that he may have it, on his request, on the request of the district attorney, or by order of the judge.

Mr. Youngquist. Second the motion.

The Chairman. Is there any discussion?

Mr. Dean. I wish we could formulate the instances. This is not going to be of much help to the practitioner. When he gets through, he has got to go back all through it.

Mr. Medalie. The practitioner has got to know a little law.

Mr. Dean. I know, but the very question we have been talking about is not so well settled as you suggest, if I may suggest it. In some jurisdictions in the federal courts you can go in and make a plea in abatement based on the fact that there was no competent evidence before the grand jury, and if you know that one witness went in there and only one, and that he could not have given competent evidence, you can have a trial on that issue of fact. I had one last summer out in St. Louis and it lasted a week.

Mr. Youngquist. As a right?

Mr. Medalie. He is not guaranteed that, either. The

Constitution guarantees no such trial as that.

Mr. Youngquist. No.

Mr. Dean. Granted; but can we specify the ones where he does and where he does not have the right?

Mr. Medalie. No. I think it is enough if we wish to let the court decide on the question of what the constitutional guarantee is, by saying-

> "in those cases where by a plea other than a plea of guilty he is entitled to a trial by jury on the issues so raised he shall have that right"

Then what you have left is a question of constitutional law, and we ought not to write constitutional law into rules of practice.

Mr. Dean. The difficulty in specifying those cases is that we might go over the line into something where there is a guarantee.

Mr. Youngquist. Yes.

Mr. Dean. And we are not sure of the guarantee.

Mr. Medalie. Or give it where there isn't one?

Mr. Dean. Or give it where there isn't one.

Mr. Medalie. Yes. I think we are safer to let it stay just where it is guaranteed by the Constitution.

Mr. Dean. All right.

Mr. Holtzoff. The same way, under the civil rule.

Mr. Medalie. I think my motinn is understood.

The Chairman. The motion is pending.

(The motion was duly AGREED TO.)

Mr. Medalie. And that is to be redrafted?

The Chairman. Yes, to be redrafted.

That brings us to section (5).

Mr. Wechsler. May I ask a question on the last motion, Mr. Chairman?

The Chairman. Surely.

Mr. Wechsler. Does that mean that the court is without power to try the issue before a jury in cases where there is no constitutional right to jury trial?

Mr. Medalie. My answer is that that is still a matter for the court itself to decide for its own convenience as it may.

Mr. Wechsler. Yes. I just wanted to be sure that was the view.

Mr. Dean. It may.

Mr. Wechsler. It may?

Mr. Medalie. You do not need to say anything about it. It has that power at any time.

Mr. Glueck. The verdict, however, would be merely advisory.

Mr. Medalie. May I give an instance like this. A man has been served with a subpoena, or it is claimed he has been. A motion to punish for contempt is filed, and he claims he was not served with the subpoena. The court could if he wanted to have a jury trial on it, but neither party is entitled to such a jury trial.

Mr. Wechsler. May I say one further thing on this resolution, Mr. Chairman? I am not sure this is a real difficulty, but it may be worth looking into. There may be some instances under the existing practice where precisely the same point can be raised in the defendant's discretion on motion or by plea--by special plea in bar. If raised on motion, under the existing practice, there would be no right to a jury trial.

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Mr. Medalie. That is right.

Mr. Wechsler. If raised by plea, under the existing practice, there would be a right to jury trial.

Mr. Medalie. That is correct, I think.

Mr. Wechsler. Now, if that is a correct statement of the law, think of the dilemma the court and counsel are in in deciding whether or not when raised by motion under this procedure there is a constitutional right to jury trial.

Mr. Medalie. I do not think that that can arise, because we have taken away from the defendant the right by plea to get a jury trial, so we preserve to him the right to get that same jury trial where he asks for the same relief by motion.

Now, he can decide for himself, as he does now. If he does not want a jury trial, he makes a motion; if he does want a jury trial, he files a plea. We we have it now, he makes a motion and then requests a trial by jury, if he wants one, so we have fully preserved all the rights and the choices.

Mr. Wechsler. It might be that the drafting problem could be met by speaking of where he had a constitutional right to trial by jury, if the issue were raised by plea. I am not sure that is necessary.

Mr. Medalie. I think it is.

Mr. Wechsler. You think it is?

Mr. Medalie. Yes.

Mr. Wechsler. At any rate, that would meet the difficulty.

Mr. Glueck. You mean whether the issue was formerly raised by plea?

Mr. Wechsler. Yes.

Mr. Glueck. Before these rules?

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Mr. Wechsler. Yes.

The Chairman. Do you offer that as a motion, Mr. Wechsler?

Mr. Wechsler. I think so.

Mr. Medalie. I think you and I are in agreement on this.

Mr. Wechsler. We are. It is just to get the thing clear for the drafting job that I raised the point.

Mr. Longsdorf. Do I understand this correctly? Does he have to ask for the jury trial when he makes a motion which functions as a plea in abatement, and that he does not have it unless he asks for it? Or does he get it whether he asks for it or not on such a motion?

Mr. Medalie. As I have stated it here, he is to get it only if he asks for it.

Mr. Longsdorf. All right.

Mr. Medalie. I do not think he has lost anything, because the construction would be that he had waived it.

Mr. Robinson. Do you think we had better state it, Charlie, that he may waive the jury trial?

Mr. Longsdorf. As long as we have got a waiver of jury trial in here, why not make that waiver apply to a motion?

Mr. Medalie. It would dispose of any doubt on the subject if we follow what Mr. Longsdorf suggests. I will move to have that adopted.

The Chairman. Will you hold that a minute? We have Mr. Wechsler's motion, which I would like to have him read again, if he will.

Mr. Wechsler. My motion is that the rule when finally drafted make it clear that the defendant on these affirmative motions is to have a right of jury trial in cases where formerly

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he would have had a constitutional right had the issue been raised by special plea.

Mr. Medalie. I thought that was covered in what I suggested should be in the rule, but I am willing it be again put in.

The Chairman. It is merely adopted for clarification.

Mr. Wechsler. Yes.

(The motion was duly AGREED TO.)

The Chairman. Now, Mr. Longsdorf's motion.

Mr. Longsdorf. My motion is that the rule be so worded that he gets a jury trial without request, but may waive it, in the same manner as in a former rule provided.

Mr. Medalie. Do we need to go as far as that? He can waive it at any time, can't he?

The Chairman. He may waive it in the same manner.

Mr. Medalie. But why have that "manner"?

The Chairman. What is that?

Mr. Medalie. He can waive it in his motion, or when the court comes to set it down he may say, "We don't need a jury trial."

The Chairman. He may waive it?

Mr. Longsdorf. He may waive it in his motion.

Mr. Medalie. Or any other time.

Mr. Longsdorf. Yes.

Mr. Medalie. He can change his mind.

Mr. Longsdorf. My point is, he should be made to waive it, instead of being made to request it.

Mr. Robinson. That has been our general policy.

Mr. Longsdorf. All right.

The Chairman. You have heard the motion.

(The motion was duly AGREED TO.)

The Chairman. Now we come to (5).

Mr. Medalie. That has been read, hasn't it?

The Chairman. That has been read.

Mr. Medalie. Now, I made some notes here. You have two situations with respect to the indictment, where there are defects in the indictment, and one, where the court has the power to order an amendment. There are other defects in the indictment not curable by amendment.

I think it would be a serious loss if an indictment having curable defects, but not curable by amendment, resulted in complete dismissal or discharge of the defendant and the discharge of his bail. Now, I think what ought to be done under the second possibility is for the court to dismiss the indictment, because it must, provide for the continuance of bail, and fix a time for the district attorney's resubmission of the case to the grand jury to cure that defect by a new indictment.

Suppose he left out the word "wilfully" and could show that he could supply the word "wilfully" by proof, he would have to dismiss the indictment. That is a defect. Suppose there were the omission of a jurisdictional allegation, he forgot to say "in the Southern District of New York."

Mr. Glueck. That is a good idea, I think, Mr. Chairman.

Mr. Robinson. Of course, that would not be a written accusation that could be cured by amendment as stated by rule 81.

Mr. Holtzoff. No, you would have to call them over and represent it to the grand jury.

Mr. Youngquist. We have a statute to that effect in

Minnesota.

Mr. Medalie. And we have, in New York.

Mr. Robinson. What is your proposal, George?

Mr. Medalie. That in cases where there is a defect which in the opinion of the court can be supplied by proof so that the indictment, a correct indictment, can be obtained, either by merely rewriting it and getting the grand jury to vote it again, or by resubmission, to supply the proof to the grand jury so they can vote it; that though the indictment is dismissed the bail shall not be discharged, and the time set by the court for the resubmission of the case to the grand jury and the filing of a new indictment.

Mr. Holtzoff. I second that motion.

The Chairman. Is there any discussion?

(The motion was duly AGREED TO.)

The Chairman. Are there any other suggestions with respect to paragraph 5?

Mr. Holtzoff. Mr. Chairman, I think that the last two sentences beginning with line 84 are unnecessary. They practically say that if the court hears a motion, he shall make such orders as are just. I think that is implied, of course.

Mr. Medalie. That is right.

Mr. Holtzoff. I move the last two sentences be stricken out.

Mr. Medalie. I second the motion.

The Chairman. Is there any discussion?

(The motion was duly AGREED TO.)

The Chairman. Now we come to the three special defenses.

Mr. Robinson. May I ask Mr. Medalie or any other member

of the committee whether you feel now that this is a complete treatment of this matter of the motions which we propose to establish, plus the hearing?

Mr. Medalie. I think it is, and the small amount of home work I shall do and that I have noted I must do is a careful reconsideration of this, and if anything occurs to me, of course, I will communicate with you.

Mr. Dean. Mr. Reporter, have we taken care of the problem that was raised a little earlier about those matters which may be raised by motion, and those matters which are available under the general issue?

Mr. Robinson. I do not think so, have we, George?

The Chairman. That was something Mr. Wechsler was to make a motion on when we came to the end, but I thought we were going to hold that until we came to the end of this whole section.

Mr. Dean. All right.

The Chairman. We still have "insanity" and "alibi", and so forth.

Mr. Dean. I thought we were at the end of this part of it, but I will be very glad to wait until we are through with the "insanity" and "alibi".

The Chairman. Let us go on with this.

Mr. Seth. May I make a suggestion that this last section (5) will necessitate an amendment of 26, on that continuing bail. The bail terminated on judgment in the earlier one. It ought to be corrected.

Mr. Medalie. That was "except as provided in 51," and so forth.

Mr. Seth. That is right.

Mr. Robinson. Now, (f), beginning at line 89 on "Notices", the draft on "insanity" is just the same as in the American Law Institute Code. The two big questions on these notices that we have been trying to work out together have been, how much the notices should contain--for instance, that is particularly true in the alibi notice, whether or not there should be a certain place named, and whether or not there should be certain witnesses named. That does not apply to insanity particularly, but you do have this question of giving both insanity and alibi notices in advance.

That is, what shall be the effect if the defendant fails to give the notice in advance of trial? Shall the court then be given the power to exclude the evidence if offered without previous notice having been given--that is, with proper protection, such as in lines 98-99, for good cause, for failure to file a notice, if the defendant has made an offer, then the evidence may be admitted; or should some other method of dealing with the situation be proposed? Should another method be devised?

The members of this Committee have of course split at least two ways on that. Some feel that it would be violating a constitutional privilege of a defendant to exclude evidence which he offers in his defense on the trial merely on the ground that he had failed to give advance notice in regard to that evidence, say on "insanity" or on "alibi". Others of the Committee feel that it would not be a breach of the constitutional provision against self-incrimination; that is where it is usually based.

In order to get that question squarely before us, we have prepared alternate drafts on the subject of alibi. The plan followed here has been this. On "insanity," that is taken from the American Law Institute Code, we have copied the American Law Institute Code exactly. Then on the alibi, we have prepared the first alternate draft; that is, beginning at line 101; squarely on the basis of the Institute Code provision on insanity, substituting matters relative to alibi in this draft at the place where matters relative to insanity were placed in the American Law Institute draft.

Then as a second alternative, or the alternative draft on alibi, beginning at line 112, we have prepared a draft which is based on the present statute in Oklahoma, the only State that has such a provision. In brief the Oklahoma provision is that if the defendant fails to give the notice of alibi in advance of trial the court during the trial when the defendant offers evidence of alibi may provide a continuance or recess, during which, then, the Government may have a chance to check up on the alibi.

The advantage of that Oklahoma draft, for your consideration, is that it avoids the constitutional difficulty that some feel, and at the same time, it takes away from the false defense of alibi the element of surprise, because it permits the trial to be recessed on a motion of the United States attorney during the time necessary for him to investigate the basis for the defense.

That statute was enacted in Oklahoma in 1935, and this report from a district court committee for the Eastern District of Oklahoma incorporates that part of their State statute, with

Mr. Holtzoff. I might add this, that in federal cases the defense of insanity does not arise nearly so frequently as it does in state cases, because of the different nature of the average federal offence, and I do not think that any particular object would be served by making the requirement of a notice in advance, of insanity, and therefore I move to strike out the requirement.

Mr. Glueck. There are many mentally ill people in St. Elizabeth's, and many of them plead irresponsibility by reason of insanity, which, by the way, is the technical--

Mr. Holtzoff. I do not see why they should be required to give notice in advance.

Mr. Glueck. I would like to hear Mr. Medalie on that. Now, frankly, we were at a disadvantage, as to this. That is, where you do not have notice. Did you have cases where they sprang it on you at the last minute?

Mr. Medalie. No.

Mr. Glueck. With some fake experts, or something of that sort?

Mr. Medalie. No, and the fact is that in no criminal case that I know of, in and around New York, in the state courts, where this is more likely, was a district attorney to my knowledge ever taken by surprise.

Mr. Youngquist. I have had two experiences with the insanity defense in murder cases in our state court. In one, the defense of insanity, or evidence in support of the defense of insanity, was introduced at the trial. We did not know of it in advance, but it happened that the evidence adduced in support of the defense was such that we did not find it necessary to

introduce evidence against it. In the other, we expected that the defense of insanity would be introduced and had two experts of our own present during the two weeks' trial, and the trial ended without the defense being asserted at all, although I learned later that defense counsel had intended to assert that defense, but the development of the case was such that they found it inadvisable. I am merely citing those experiences without making a suggestion one way or the other, for the information of the Committee.

Mr. Medalie. You know, there is one thing to be said about insanity in all criminal cases. There has been a lot of newspaper hullabaloo based on a paucity of incidents, to the effect that all you have to do is commit a crime and then spring a defense of insanity, and out you go! That myth is utterly false, and there is practically no record to sustain it.

Now, there are persons who have put in the defense of insanity in crimes commonly called "crimes of passion." You know it in advance, everybody knows it. The defense is a fake and has nothing to do with insanity. It is usually a way of telling a story otherwise irrelevant but nevertheless known.

There is another aspect of insanity, and that is, we have a legal definition--perfectly absurd--recognized by the medical profession as absurd, and largely ignored by juries, notwithstanding the court's instructions.

There is another phase of this. That is, what happens to insane persons who are acquitted on the ground of insanity, or found "guilty but insane", where it is so provided by special statute? That is another question altogether, but so far as the element of surprise is concerned, I think experience indicates

there is virtually no surprise. Where it is possible that the defendant is insane; that is, where it might be plausible to assert that he is, the prosecutor and the law enforcing officers know enough about the defendant to be able to anticipate that that might be the defense, or that it might be the fact.

Mr. Youngquist. I think that it would be convenient to the Government to have notice of the defense of insanity, but I do not think it is essential.

Mr. Medalie. No.

Mr. Holtzoff. The Department of Justice--

Mr. Medalie (interposing). Alex, if you don't mind. The great trouble here is that there seems to be doubt as to the federal government having the right to make preliminary inquiries, which are provided for in all state procedures, where a defendant is insane. Then, after it finds he is insane, there is another doubt as to whether the federal government has any power to do anything with a man simply because he happens to have been a defendant in a criminal case.

Mr. Dean. There is no place to send him afterward?

Mr. Medalie. No power to send him.

Mr. Seasongood. You move to strike this out?

Mr. Holtzoff. Yes.

("Question.")

The Chairman. The question is called for on the motion to strike out (f) (1).

(The motion was duly AGREED TO.)

The Chairman. That leads us to the two alternative statements of the alibi rule. What is your pleasure with respect to that.

Mr. Dean. In the interests of playing safe, I suggest we take the Oklahoma draft, which simply calls for the postponement.

Mr. Seth. Mr. Reporter, don't these alibi provisions generally contain some provision whereby the government shifts the date, does not undertake to prove the date alleged in the indictment?

Mr. Robinson. You will recall in our former rule we tried to take care of that by a bill of exceptions. You will notice in this draft we have not mentioned bills of exceptions. It is a matter for this committee to consider, and there is no specific provision for that. Our assumption has been--perhaps we anticipated a motion to strike out, by Mr. Seth--the power exists in the court, and that the court, by pre-trial procedure or otherwise, may be expected to restrict the State or the Government to the date it alleges in the indictment. If it alleges some other date, of course, the statute surely should be applied--or the rule.

Mr. Seth. I think we have got to put something in there, if this goes out to the public.

Mr. Robinson. Maybe so.

Mr. Seth. If we are to have this notice of alibi, we have got to protect the defendant against that 3-year provision, "any time within 3 years."

Mr. Youngquist. Pardon me, what was the number of that rule in the first draft?

Mr. Robinson. There were two or three provisions with regard to bills of particulars. There was nothing specifying the trials, of course.

Mr. Holtzoff. It seems to me we should have a provision in whichever one of these alternatives we select, that if after the notice of alibi is given the Government offers proof that the crime was committed on some other date, that the defendant then would not be bound by his notice of alibi and could offer a defense of alibi if he wished, without a notice.

Mr. Seth. And be given time to get his witnesses, and to show a different place. The Government is not hurt.

Mr. Holtzoff. Yes, he needs that, of course.

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

Mr. Seth. Yes, I think so.

Mr. Robinson. Do you consent to that?

Mr. Holtzoff. I think so.

I want to make a suggestion that in either of the alternative drafts we should not state a definite period of time. Now, "10 days before the trial" or "4 days before the trial" may be all right in some districts, but may be entirely too long in other districts where a trial may take place very shortly after the indictment.

I think we ought to make it a reasonable time, and let the local rules or local practice fix the exact number of days.

Mr. Glueck. I second that.

The Chairman. You have heard that motion with respect to the number of days' notice. All those in favor--

Mr. Youngquist. May I ask a question?

The Chairman. Yes.

Mr. Youngquist. Is that liable to give us trouble before Congress? I am just raising the question.

Mr. Holtzoff. Well, certainly not the second alternative.

Mr. Youngquist. You mean the Oklahoma rule?

Mr. Holtzoff. I don't think the Oklahoma rule would ever cause trouble before Congress.

Mr. Youngquist. No.

Mr. Holtzoff. I am not so certain as to the first. Although in principle I approve the first rule, I am going to vote for the Oklahoma rule, for that reason.

The Chairman. I would like to ask the men who try cases for the Government whether the second rule would not be very awkward in practice?

Mr. Medalie. Any rule is awkward in practice.

The Chairman. Leaving a jury suspended or hanging for a half a day, a day, or a week? What are they going to do--lock up the jury?

Mr. Medalie. Well, the juries are not ordinarily locked up. Sometimes counsel gets sick.

The Chairman. What's that?

Mr. Medalie. Sometimes counsel gets sick. I walked out of a criminal trial, with the permission of the court in New York, to come down to this building to argue an appeal, and I stayed away three days. Nothing happened to the jury. Nobody was worried about the jury in my absence.

The Chairman. That trusting disposition is commendable.

Mr. Holtzoff. I think juries are locked up very rarely in criminal cases.

Mr. Medalie. Very.

Mr. Dean. Very.

Mr. Medalie. The jury is not likely to be locked up in a burglary or robbery case.

Mr. Seasongood. Well, the jury has not been empaneled if the court continues the case.

The Chairman. That would be right.

Mr. Robinson. May I add one word of explanation or addition rather to what I said a moment ago. I said that there was no compulsion under the Oklahoma statute. Mr. Longsdorf shows me the two lines, 123-124, which show that the court may in its discretion--

Mr. Seasongood. Refuse to permit an alibi?

Mr. Robinson. --put the defendant on trial and refuse to admit the introduction of evidence tending to establish such alibi. I do not think that is the Oklahoma rule, though. That was a decision of this district court committee.

Mr. Longsdorf. Yes.

Mr. Robinson. So the question becomes a little more complicated, than as I stated a moment ago. Shall the discretion be left to the trial judge to say whether the trial of the case shall go on, in case he has a jury there--that he thinks should not safely be separated or dismissed, or not dismissed, but the case adjourned temporarily? Should the court have a discretion there to compel the trial to go ahead?

Mr. Holtzoff. In the light of that last law, there isn't any substantial difference between the two drafts.

Mr. Robinson. Well, we can straighten that out. That is all I am saying now.

Mr. Holtzoff. Yes.

Mr. Robinson. If that former action was taken on a basis that there should not be even a discretionary alternative of compulsion by the court, I would move that line 122 go out.

Mr. McLellan. Then if you take it out, will you have anything left except that the court may in its discretion, in the absence of the defendant's having done something, grant the United States attorney time within which to meet the situation?

Mr. Robinson. That is about all that is left, Judge.

Mr. Dean. Nothing else.

Mr. McLellan. Would he do it?

Mr. Robinson. I never heard of a court granting a continuance merely because an alibi defense was raised, and if this rule expressly recognizes that such a continuance would be proper, wouldn't that add a little bit to the protection of the public generally against alibis--defenses that have become so notorious that 14 States now have provided specifically for the defense of alibi, and most of the States put the compulsory clause in it?

The Chairman. Why are we afraid of the first part of the rule? Why do we shy away from that?

Mr. Robinson. Personally, I am not afraid of that.

Mr. Medalie. There are two ways in which this job is done. That is apart from the fact that I do not believe in this alibi provision or any kind of alibi provision, and I know it is not applicable to most of the important cases tried in the federal court, where the indictment alleges that "beginning with January 1 1923 and continuously down to the date of the filing of this indictment, the defendant contrived devices," and so forth, and so forth, all over the lot, and all over the Southern District of New York.

Mr. Robinson. It is not applicable in that kind of case, of course.

Mr. Medalie. Not applicable?

Mr. Holtzoff. No, but when the increase of federal reservations there are more common-law-crime cases in the federal courts, occurring on a federal reservation, such as robbery.

Mr. Medalie. You say there are many?

Mr. Holtzoff. Yes.

Mr. Medalie. Ever since Theodore Roosevelt tried to indict Pulitzer for libel?

Mr. Holtzoff. No, no, you don't get many of those cases in the Southern District of New York, but in a district like Virginia, rape on the Mt. Vernon boulevard. We had a case like that recently. Or a robbery on Quantico reservation.

Mr. Medalie. I know one of those cases was defeated because the surveyor had incorrectly stated the federal bounds.

Mr. Holtzoff. No, but I mean we have an increase in the type of cases such as were formerly tried in the state courts.

Mr. Medalie. All right. Let us assume there are such cases. All right.

Mr. Dean. Alex, you have just convinced me, though, on the insanity cases, that we do not have those cases, just a moment ago, that the federal cases are of such nature that you do not get that kind of defense. Now, if we are getting rapes on Mt. Vernon Boulevard and homicides on federal reservations, I think we ought to reconsider the insanity.

Mr. Holtzoff. No, because we have got the burglary and robbery cases on federal reservations.

The Chairman. May we get a tentative vote on each of these alternative forms, as to which one we want?

Mr. Medalie. Before you do that, the one provides for

compulsion of the defendant. That is the Oklahoma draft.

Mr. Youngquist. It provides what?

Mr. Medalie. The defendant must give notice that he is going to prove an alibi.

Mr. Youngquist. Yes.

Mr. Robinson. Yes, in the alternative, discretionary with the court.

Mr. Medalie. In other words, these two subdivisions (2) and (3) are alibi alternatives, providing for the defendant's giving notice. He is the person who does it.

The Chairman. That is right.

Mr. Medalie. Now, you will have a different New York statute, which Mr. Longsdorf said he couldn't find, because it undertakes to get a bill of particulars. That provision was conceived and drawn by my associate George Sylvester as a member of a special committee of the New York County Lawyers Association, and the committee reported it to the American Bar Association, and it was adopted by the New York legislature in 1935.

That provides that the district attorney may make a motion in an appropriate case for a bill of particulars from the defendant on that subject, with the consequence that if he does not comply with the order for the bill of particulars he is precluded from giving proof on that subject. That was not considered, was it?

Mr. Robinson. That was at our previous meeting I believe, George. I am just trying to find what rule that was under. I will get it in just a minute. Do not wait for me, though, go right ahead.

Mr. Medalie. I think we ought to consider, if you are going

to have an alibi provision--which I shall vote against, anyhow--but then after you have it, I will decide. I know you are all eaten up by this clamor on alibi changes.

Mr. Robinson. Oh, not a bit, George.

Mr. Medalie. No?

Mr. Robinson. Not "eaten up."

The Chairman. Let us have this. All those in favor of an alibi rule--not specifying what rule it is--will say aye, so we can see where we are at.

Mr. Youngquist. To what?

The Chairman. In favor of a rule providing for alibi notice, will say aye. The chair is in doubt.

(There was a show of hands, 8 ayes, 8 noes.)

Mr. Wechsler. Perhaps we could discuss that question, Mr. Chairman. It would seem to me more important than the form of a rule. I am opposed to it. I would like to state my reasons at the appropriate time.

The Chairman. All right, now is the time.

Mr. Seasongood. Well, it has failed, hasn't it--there is to be no alibi notice?

Mr. Wechsler. Oh, I am sorry.

Mr. Seasongood. If it is equally divided, the motion fails.

Mr. Seth. I think the question ought to be discussed where we have an equal division like that.

Mr. Seasongood. All right.

Mr. Seth. I would like to hear the reasons against it, myself.

Mr. Seasongood. All right.

Mr. Wechsler. I have no passion to state my views.

Mr. Waite. Go ahead.

The Chairman. Well, if it has failed, that is all there is to it.

Mr. Robinson. I suppose the Reporter ought not to fail to put before you the fact that the alibi notice rule is the one that has received the greatest support from all over the country.

Mr. Seth. Absolutely.

Mr. Robinson. It is almost unanimously recommended by the United States attorneys, and almost unanimously recommended by the bar committees, who have sent a request to us. Whether that amounts to anything, to us, of course, we ought to do it with our eyes open.

Mr. Seasongood. That ought to be reframed all through and fixed up, Mr. Wechsler.

Mr. Robinson. The only proposal they recommended this Committee adopt, with any greater uniformity, was the waiver of indictment. The next was the alibi notice. They have sent us in a long list of cases in which the Government has lost a good many thousands of dollars because of fake alibi notices throughout the country. I just want that in the record.

Mr. Orfield. Mr. Chairman, I am going to change my vote, and vote in favor of alibi.

Mr. Robinson. If that is close, we do not need much debate about it.

The Chairman. That is nine. The motion for an alibi rule has prevailed.

Mr. McLellan. I want to say that in nine years, trying criminal cases for some time, I have never seen an alibi defense

succeed.

Mr. Glueck. How many, roughly speaking, Judge, have you had?

Mr. McLellan. I could not answer that; but "some."

Mr. Glueck. "Some"?

The Chairman. Somebody mentioned at the last meeting--I think it was Mr. Seth--about an alibi being pleaded and having to send away down to Texas at an expense of $900 or $1,000 to the Government to pull up some witnesses--how many thousand miles? Maybe it was Mr. Dean. Somebody brought it up.

Mr. Medalie. "Not guilty." That was because it came so suddenly. They can spend money so lavishly. Or weren't they able to get the witnesses?

Mr. Robinson. No, George, the facts were, the defendant waited until the last day of the trial, about a 2-weeks' trial, to bring up the alibi defense. Dustin McGregor, of Houston, Texas--that is one of the letters I referred to.

The Chairman. They had to get them by airplane, and all that sort of thing?

Mr. Robinson. Other district attorneys say that is a common experience and that it happens frequently now.

Mr. Holtzoff. Mr. Alexander has had a similar experience.

The Chairman. Just state it, Mr. Alexander.

Mr. Alexander. We brought three witnesses by airplane from California to Illinois just two years ago in that mine bombing suit where one defendant tried to prove an alibi. I have had cases in the last four years where we were surprised by the defense of alibi in the evidence, and we did not lose any of the cases, but they were pretty close. We brought witnesses from

St. Louis overnight in one of the cases.

Mr. Medalie. You won them all?

Mr. Alexander. Yes, we did not lose them.

Mr. Medalie. Yes, that has been my experience.

Mr. Alexander. But we did have more larceny cases and bank robbery cases and stolen property cases than ever before, within the last eight or ten years.

Mr. Medalie. I want to ask Mr. Alexander a question. The New York provision--did you follow it?--provides that the District Attorney may make a motion directing the defendant in an appropriate case to file a bill of particulars with respect to alibi, if he has such a defense. Of course, he does not know that he has, but in the case of bank robbery, burglary, and so on, cases where you suspect that there might be an alibi defense, you then make your motion.

Now, the reason it is put this way in the New York statute I would guess is that the average defendant in a criminal case, even if he has an alibi defense, doesn't have his case properly prepared, until the last minute. He hasn't much money with which to get competent counsel, and he doesn't always get competent counsel. The day before the trial, he has a talk with his lawyer, who just hears the case is going on, or meets him in the court room on the day of the trial; the district attorney starts proving his case, and by night-fall the attorney is informed as to who the witnesses are to be.

I think that is the normal procedure in most ordinary criminal cases. Therefore, the defendant is not required--and you must be fair to the defendant--not required to think of doing these things which are provided for either by code or by

statute or rule, and in those cases where the district attorney thinks it is appropriate, there is no difficulty in his sharply bringing it to the attention of the defendant, as provided in the New York statute, and requiring of him a bill of particulars.

Mr. Alexander. I think that would be satisfactory.

Mr. Medalie. And it would be fair, wouldn't it?

Mr. Alexander. And it would take care of that matter of the date in the indictment, because you could provide that the United States attorney should specify the time that the offence was committed.

Mr. Medalie. This is the language of the New York provision with respect to the contents of the bill of particulars:

> "* * file a bill of particulars, which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and the places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time and place of commission."

Mr. Holtzoff. I do not think the defendant should in his notice be required to disclose names.

Mr. Medalie. Well, leave that out.

Mr. Seasongood. I would like to hear Mr. Wechsler's argument on the general proposition.

Mr. Medalie. I did want to get Mr. Alexander's view.

Mr. Seasongood. I can see an objection to that. It delays the trial, and if you file a bill of particulars, then the court has to hear it, grant it, and give them time in which to comply with it.

Mr. Robinson. I am afraid if we leave the record in this shape now we do not have the whole story from Mr. Alexander. As I recall the way he told me the account of bringing those witnesses from California, it was only by the grace of God and good luck and speedy work and the expenditure of government money they were able to meet that alibi. Is that true?

Mr. Alexander. Oh, that is true. We had to use the long distance. We had a night and a day in which to do it, and we managed to bring three boys who were at the scene of a certain affair.

Mr. Robinson. How late in the trial was it before you knew the defense was to be alibi?

Mr. Alexander. We didn't know it until the trial was about over. The defense concluded the next day, and the court gave us a recess beginning about 3 o'clock, until the next morning, in which to produce our witnesses.

Mr. Holtzoff. George, in mail robbery cases and bank robbery cases, the defense of alibi arises. You had your mind directed to thetype of offence that involves a mail fraud or a bank--

Mr. Medalie (interposing). No, that's out. By agreement, that's out. We are talking now of the kind of cases that are susceptible of alibi notices and alibi particulars. I am talking of robberies, burglaries, assaults, and murders.

The Chairman. Why shouldn't a defendant be willing to tell where he was?

Mr. Seasongood. Mr. Wechsler has some views on it that I would like to hear.

Mr. Robinson. I would like to hear them, too.

The Chairman. All right.

Mr. Wechsler. The argument doesn't merit all this build-up. It has been made in large part by Mr. Medalie, in what he says. I emphasize primarily the fact that in criminal prosecutions most defendants are not now well represented, or will not be well represented, or represented by counsel, at all. It seems to me that is unavoidable, and that no matter how much the Supreme Court, or we following in their trail, attempt to build up the assignment of counsel, that situation will in practice continue for the most part.

Now, to put any burden on a defendant who may be in that situation seems to me to be a priori unwise, particularly when on the other side--I do not know--I may be wrong on this--but I do not know of any serious number of miscarriages of justice by reason of surprise proof of alibi. There may be some expense in consequence of it, but the Federal Government has the assistance of a national investigative agency in the Federal Bureau of Investigation. It is able instantly to be in touch with law enforcement officers anywhere in the country and almost anywhere in the world.

It seems to me this is a terribly important fact which distinguishes the federal situation from the state situation, and I am not terribly concerned that in particular cases it may have been necessary to fly witnesses from California or Texas. The important point is that that can be done, and the cost of it in financial terms is a very small item in the total budget for the administration of federal criminal justice.

Those are my reasons in substance. I add the fact that the whole alibi defense and notice seem to me inapplicable to the

great bulk of federal criminal prosecutions--a point which was made--and finally I hold the view that reforms like alibi notice derive their strength as much from simple contagion as from anything else. I had occasion once to make a study of the proposals in the field of reform of criminal procedure, and these few ideas which are in the standard arsenal of reform are copied to a very considerable extent.

You get a committee together and you ask, "What shall we propose?" And you go to the bar association recommendations and the other standard sources, and it is perfectly clear what to propose--"alibi notice," "comment on failure to testify," and so on down the line--things which in my view really do not matter in the administration of criminal justice, but they are very significant in appraising the weight of popular recommendations such as the recommendations that have come to us from the various local committees.

I can't believe that this alibi situation represents a real abuse and that there is a real problem there that needs to be met. It seems to me it is liable to work a hardship in the very cases that I confess are my special concern. Federal criminal law is not administered, with the Solicitor General of the United States representing the prosecution and John W. Davis representing the defense. That is an unusual situation to get that kind of litigation.

For the most part, the men are poor, they are dragged in, they appear without counsel or with incompetent connsel, their address is the local jail and their destination is the penitentiary. I think we ought to recognize then that that is so.

Mr. Waite. I would like to make an answer if I may to one

point of Mr. Wechsler's argument. I think you overlook one provision in the statute. You suggest that a defendant may not be properly represented by counsel. It has been our insistence that he shall be, and therefore you want him to file the notice, but the provision itself specifically provides that for good reason shown the court may permit the defense to be entered even though there was no notice, and I cannot imagine a judge so unreasonable as not to allow evidence to be given despite lack of notice, but it turned out a man didn't have counsel, or was not properly represented by counsel; and on that matter, the suggestion that surprise was not successful in the case where the Government spends several hundred dollars in getting its witnesses up here--that is not the point.

The great matter was the opportunity to investigate. The man sets up an alibi at the last moment, it may be sound, and it may not. If you know it is not sound you can get some witnesses up there, but if you do not have time to investigate, you may not be able to find who the witnesses are and to get them; and then my final reaction.I must say I started listening to this discussion without any predilection at all one way or the other, but I feel very definitely this way. I do not know a blessed thing about this situation, and when the attorneys throughout the country say that it is important to have that provision put in there, I do not like myself, out of the depth of my ignorance, to sit up here and reject it.

Mr. Seasongood. Is nobody disturbed by the constitutional argument that you cannot make a fellow put on his case in advance or give notice of what his defense is?

Mr. Holtzoff. The constitutionality of the state statutes

has been sustained.

Mr. Seasongood. It has been sustained?

Mr. Holtzoff. In the various States. I do not think it has ever come before the Supreme Court of the United States.

Mr. Robinson. We had a full brief on that in the appendix to the book.

Mr. Seasongood. The way the Court is going in reference to other constitutional principles it is very doubtful whether they would sustain that.

Mr. Holtzoff. But I do not think the constitutional provisinn is invaded by this.

Mr. Youngquist. The provision against self-incrimination?

Mr. Holtzoff. No, this is not self-incrimination.

Mr. Youngquist. That is the only one I can think of.

Mr. Holtzoff. This is a question of what evidence you are going to offer in support of your denial.

Mr. Longsdorf. Mr. Chairman, I do not wish to take up time or prolong this, but I have a suggestion to make that I think is not at all irrelevant. These rules, when we get them into condition, are going to go out before the bar of the United States. We have many proponents of improvements in matters now. The opposition won't develop until they see what we have done. Maybe the demand for alibi notices will be far outweighed by the storm of protest that will arise when we send this out over the country; and that applies to other innovations as well. I do not think we ought to forget that.

Mr. Youngquist. Don't you think we ought to invite those "storms"?

Mr. Seth. Yes.

Mr. Youngquist. Let's get the views. That is the only way in fact that we can I think get the views and the general sentiment, whether for or against proposals of this sort.

Mr. Longsdorf. Then I think our draft when it goes out ought to intimate in some way that we were not in complete agreement on this thing.

Mr. Youngquist. Oh, that would be all right.

Mr. Robinson. All right.

The Chairman. That would be understood. Any group of lawyers in the United States who get a draft submitted by 17 or 18 lawyers will know without being told that it is not a unanimous product.

Mr. Medalie. Mr. Chairman, I move the Reporter be instructed to prepare a subsection on alibi substantially in conformity with the New York provision, section 295 (L) of the New York Code of Criminal Procedure.

Mr. Seth. I second the motion.

The Chairman. And may I add--

Mr. Medalie. That is notwithstanding my opposition to the whole alibi.

The Chairman. Do I understand that he is to draft these pther two in such forms as he wants to submit them for circularizing among the members and for a vote taken by mail, so we can use one in our next draft?

Mr. Medalie. I do not think much of votes by mail. I think we had better meet again.

The Chairman. We are going to meet again and have another vote on it, but I think we ought to know substantially where we are headed on as many of these things as we can; but I won't

urge it if you do not wish it.

Mr. Medalie. If you think it ought to be done.

The Chairman. I think it might help.

(The motion was duly AGREED TO.)

Mr. Holtzoff. I understand that motion does not exclude these others.

The Chairman. It includes them.

Mr. Holtzoff. It includes them?

The Chairman. It includes them, in such revised form as the Reporter may desire to submit them.

Rule 60. Mr. Wechsler had a general observation on the whole matter of motions. We go back to that.

Mr. Wechsler. I can bring my difficulty to a head I think by a very simple amendment. In rule 51 on line 40, the troublesome word is the word "shall".

> "All defenses heretofore raised by demurrer, by motion to quash or to dismiss the indictment or information, by plea in abatement, by special plea in bar or by any plea other than the plea of not guilty, shall hereafter be asserted by a motion* * *"

I think that word introduces an ambiguity, though I confess it is only an ambiguity, as to whether in the case of matters which heretofore could have been raised either by such pleas or the plea of not guilty, the defendant is required to raise them by motion. I simply suggest that that language be reconsidered by the Reporter. I think that is the simplest way to bring it about, to avoid that difficulty.

Mr. Robinson. Mr. Wechsler, that has been a troublesome point for us. I agree with you, and I think that that is well

taken--that is, that clause-

"or by any plea other than the plea of not guilty" especially, and then the word "shall", following it--I will be glad to take that up with the committee on style, certainly.

Mr. Holtzoff. Wouldn't your point be met, Mr. Wechsler, if the word "shall" is changed to "may"?

Mr. Wechsler. Well, I thought it would, at first, but on second thought I am not so sure that that would not involve other difficulties. It might be construed to mean that there is permission to use a motion. I suppose that might do it.

Mr. Youngquist. That probably would do it.

Mr. Dean. At least you abolish the other pleas.

Mr. Youngquist. You abolish the other pleas.

Mr. Wechsler. Yes, the first sentence I suppose makes the peaceful solution.

The Chairman. The motion is, in line 40--

Mr. Dean. 40.

The Chairman. --to change "shall" to "may". Are there any remarks on the motion?

(The motion was duly AGREED TO.)

The Chairman. We will now move on to rule 60.

Mr. Orfield. With respect to line 4--

The Chairman. Of rule 60?

Mr. Orfield. Yes. I would omit the words "of the government", there.

Mr. Youngquist. So would I.

Mr. Orfield. It seems to me there is no real right to waiver if the government has to consent to the waiver. It seems to me it ought to be a right of the defendant alone.

Mr. Holtzoff. No, I think the Government ought to have the right to insist on a jury trial, and it ought not to be sufficient for a defendant to waive it, if the United States attorney prefers a trial by jury. I know that jury trials are occasionally waived now in criminal cases, but only when the United States attorney joins, because trial by jury is the normal method of trying criminal cases; unless both parties are willing to waive it, I think the case should be tried by the jury.

Mr. McLellan. That is established practice, now, isn't it?

Mr. Holtzoff. Yes. Wasn't it, in your court, Judge?

Mr. McLellan. Yes. It took three to waive a jury trial--both parties, and the court.

Mr. Holtzoff. Yes.

Mr. Burke. It is not the practice in all the state courts.

Mr. Waite. That was the decision in People versus Scornavache, in Illinois. You remember the point was raised with great vigor that the defendant had a right to be tried without a jury if he wanted to, and the court said emphatically that that was not true; he had a privilege of being tried by a jury, which he could waive, but no constitution or statute in Illinois gave him a right to be tried the way he wanted to be tried, that that was a matter for legislation, of course. I think he ought to have the power to insist on being tried without a jury, if he wants to.

Mr. McLellan. I move rule 60 be adopted.

Mr. Wechsler. I support it.

Mr. Seasongood. I wonder whether we ought not to have in there how it is waived, whether in writing, or on the record, or waived in open court, or how? It used to be you had to waive

in writing.

Mr. Robinson. What do you think about it, Judge?

Mr. McLellan. Well, I think it well, lest there be any question about it, that in practice, no matter what your rule says, the waiver should be in writing and signed by the government, by the defendant, and the approval of such waiver endorsed thereon and signed by the judge.

The Chairman. Shall we say, "with the approval of the court in writing" the waiver may be made?

Mr. Holtzoff. I do not think it has to be in writing, if made in open court and recorded in the minutes.

Mr. McLellan. I had always felt it was a pretty good thing before we start a trial where the jury is waived--and we have a good many of them--to get the papers all signed, so that there won't be any misunderstanding about it, and all three of the persons concerned sign it.

Mr. Medalie. You have practiced it that way?

Mr. McLellan. Oh, yes; and I won't start a jury-waived trial until they get the papers signed.

Mr. Seasongood. It is a solemn matter and there ought to be some real evidence that it is waived. Well, that is the motion.

Mr. McLellan. I may be too fair about it.

Mr. Dean. I second it, if it has not been seconded.

The Chairman. What is the general practice? Is that the general practice?

Mr. Medalie. I have seen cases triable by jury tried without a jury, where counsel gets up and says, "I am willing to waive a trial to the jury," and the district attorney nods

and says "Yes," and the court says, "Well, go ahead with the evidence."

Mr. McLellan. Without even asking the defendant, first?

Mr. Medalie. Just asking the counsel. Counsel makes the statement.

Mr. Seasongood. What's the trouble with getting a little writing?

Mr. Medalie. They might forget to do it.

Mr. Seasongood. Oh, no; they won't.

Mr. Medalie. Now, just a minute. Don't be impatient. You might forget to do it. And everybody is satisfied. It is recorded, and the trial starts. The reporter is present. Counsel gets up and makes a statement that gets right on the minutes. The district attorney says "Yes," and the court says "All right." Now, suppose that happened, and you had this provision, what would be the net result? The trial is had, the defendant is convicted. Two, three, four, five, or six weeks may be spent on it. New counsel comes in and says "This is all void." I don't think it should be. They just forgot, because they were treating each other like gentlemen, to write a piece of paper.

Mr. McLellan. But you see we do not have stenographers. Maybe you are going to have hereafter, but we do not have stenographers in most criminal cases, and that is one reason that heretofore I have always wanted the thing signed and approved by the judge in writing.

Mr. Robinson. Would you have that done in connection with the next sentence of 60, Judge? Could there be a combination of that provision--that is, requiring that that writing be filed

before the date set for trial?

Mr. McLellan. I should think so. All that I was doing was to state what the practice was, in the limited time--

Mr. Robinson. What was your practice in regard to the amount of notice before the date set for trial, of the jury waiver? Was there any?

Mr. McLellan. No. The thing has always transpired in my experience that we would be sitting with the jury, and the lawyers would come up and say "We think this type of case can be better tried without a jury, will you hear it?" And I usually say "Yes." I tell them, "But we won't start until you get the papers signed." And they go and get the papers signed.

Mr. Youngquist. I think a notice might well be required in advance, though.

Mr. McLellan. An advisory notice?

Mr. Youngquist. Yes.

Mr. McLellan. But it should not cut off that kind of thing, which saves a lot of time.

Mr. Medalie. Suppose the suggestion just comes to you at the last minute. It can happen, and that is how things run in trials, most of your stipulations. I am talking now of the busy man, the trial lawyer. He makes most of his stipulations and agreements the very minute that the court starts trying the case, and I think that in most instances if you are going to get waivers you will get them just about the time the trial starts.

Now, very often those things are discussed the night before. In one case I tried a year and a half ago, it was a long case, counsel for other defendants suggested he would like to dispose of the jury. He made the wrong guess, because we tried that

case and there was an acquittal. I am glad we did not take his advice--we had a convicting judge. But that thing would not have been decided, if I had agreed with him, until the last minute--the very morning of the trial, and I think that is when most of the decisions are made. I do not think there ought to be a provision for notice.

Now, the last sentence, here, is another futile sentence. It does not compel anything to be done or require anything to be done. This is a piece of advice:

"A defendant who plans to waive jury trial shall notify the court* * *"

Well, suppose he doesn't?

"* *at his earliest opportunity preceding the date set for trial."

Suppose he doesn't?

Mr. Robinson. You see what it is, of course, Judge, as a practical matter; that is an effort to hit a happy medium between your position and Mr. Youngquist's--not very happy, perhaps, but--

Mr. Medalie. Well, if we are agreed that a man has a right to waive a jury trial, if the Government agrees, the very minute that they start trying the case--

The Chairman. And the judge.

Mr. Medalie. --and the judge--then what do you need this for?

Mr. Holtzoff. As a matter of fact there is no penalty for not giving this advance notice. It is purely hortatory.

Mr. McLellan. No--and he won't give it until he knows who the judge is.

67 .

Mr. Holtzoff. That is right.

The Chairman. And maybe not until he has had a chance to look at the jury.

Mr. Medalie. What jury?

Pendell
ends
Darrow
3:25p
1-14-42

Jarrow
Allo-1
Wed.
1/14/42
3:15 p.m.
fols.
Pendell

MR. YOUNGQUIST: Take for instance in country districts you have a jury there and only one judge there. He sits perhaps for a week or two weeks with that jury. The Government is ready to try this case as the first case on the calendar. Well, the judge is not going to let that jury loaf around and try this one case. The Government has its witnesses there, the judge is going to put that case to the foot of the calendar, and, for the purpose of avoiding the inconvenience and expense to which the Government is put in that situation, I think it is a very reasonable thing, at least, to advise the defendant by rule that he ought to give advisory notice.

MR. MEDALIE: I want to be agreeable, but I have to say to you that that is not the way we have done it. If the witnesses are there, and they waive a jury trial, they turn to the jury and say, "You may be excused until tomorrow."

You save expense to the jurors by letting them stay at their homes while you are trying that case.

MR. YOUNGQUIST: Don't you pay the jury just the same?

MR. MEDALIE: We do not pay the jury when they do not come.

MR. YOUNGQUIST: In Fergus Falls, Minnesota, for instance, the jurors are called for considerable distances. They cannot go home.

MR. MEDALIE: We send them home. Just as soon as we know we do not need a jury, or the supernumeraries, we send them home.

MR. YOUNGQUIST: Well, sometimes they may come from a distance of a hundred miles.

MR. MEDALIE: Well, most of them go home anyway at the end of their day's work.

I said only advisory. I meant that is as far as I would go.

Darrow
Allo-2

MR. YOUNGQUIST: That is what I would suggest.

MR.MEDALIE: I do not like a provision in the rules that does not have any effect.

MR. HOLTZOFF: There is no sanction back of it.

MR. MEDALIE: That is just it. And also neither the defendant nor his counsel have violated any duty.

THE CHAIRMAN: May we have a motion?

MR. MEDALIE: I move that the last sentence be stricken.

MR. YOUNGQUIST: Seconded.

MR. HOLTZOFF: Seconded.

THE CHAIRMAN: Those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

It seems to be carried. It is carried.

There was another suggestion of requiring that waiver to be in writing.

MR. SETH: Mr. Chairman, in Civil cases, as you may remember, the statute used to require that a waiver of jury be in writing. The books were full of cases where counsel neglected to file a written waiver and the courts would refuse to review. The statute was amended in the last seven or eight years to be either in writing or by record entered by the court. By providing writing, you just lay a trap, I think. They had to amend the Civil rule to do away with the stipulation waiving jury.

MR. MC LELLAN: There is a little difference, it seems to me in a criminal trial. It would not do any harm to have it in writing, but, I do not feel strongly about it.

MR. SEASONGOOD: The reason for it under the Zerbst case, they said, "I didn't know we were waiving a right to trial by

jury."

MR. MC LELLAN: The agreement is not signed by counsel, it is signed by the defendant himself, that he is giving up a constitutional right.

THE CHAIRMAN: There is no motion on it.

MR. SEASONGOOD: We might have it voted on so as to be a matter of record.

THE CHAIRMAN: Then it is moved and seconded that there be a provision inserted requiring that the waiver be in writing. All those in favor of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(There was a chorus of "Nays.")

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

(Hands were raised.)

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

Opposed?

(Hands were raised.)

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

Carried. Eight to six.

All those in favor of Rule 60 with these two amendments say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 61.

MR. ROBINSON: 61-A is a blank spot because of the fact that

D.a.4

there is a great deal of activity now with regard to the proper selection of panels on juries. Under this rule you have extended comment on the situation beginning at Rule 61, Page 3.

MR. DEAN: Would this A cover the legal disqualification of jurors or would the present statute which is now on the books leave it to State law? What is the proposal in that respect?

MR. ROBINSON: Under A? There is no proposal.

MR. HOLTZOFF: That is just a reference.

MR. ROBINSON: Nothing to be done with it.

MR. DEAN: On legal disqualification of jury?

2 MR. ROBINSON: Yes. 61-B, examination of jurors, the court may permit the defendant or his attorney, or the attorney for the Government to conduct the examination.

I presume it is not necessary to read it.

MR. HOLTZOFF: That is the same as the Civil rule, is it not?

MR. ROBINSON: Yes.

MR. SEASONGOOD: I made the same objection to it the last time. You mean "and", "defendant and his attorney or attorney for the Government"?

MR. ROBINSON: I think that should be "and".

MR. SEASONGOOD: And that line then puts some value to being able to interrogate the jury.

MR. HOLTZOFF: The sentence beginning Line 12?

MR. SEASONGOOD: Yes.

MR. DEAN: I do not think that covers it. In the provision in that second sentence the judge who will not let you ask questions anyway, will probably deem the questions you do submit to him, improper questions.

MR. HOLTZOFF: Is there the possibility of our bringing in

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the evils in State courts of interminable examination of juries?

MR. SEASONGOOD: I do not think it happens very often.

MR. DEAN: What B does is take away the right to examine jurors.

MR. MC LELLAN: It does give him the right to indicate the questions that he wants to have put.

MR. DEAN: Yes.

MR. HOLTZOFF: This is not the same as a Civil rule.

MR. DEAN: That is not the question. The people are going to decide some day that the criminal rules do something.

MR. SEASONGOOD: It is only the questions the judge thinks are proper that are put.

MR. MC LELLAN: In my district, you hand up to the judge a handful of questions. He puts them to the jury. If he is nice about it, he lets you ask one or two supplemental questions. What usually happens is, after he gets through, they say, "Will your Honor ask him so and so?" He lets you ask him one or two questions.

Of course, those examinations are unsatisfactory in the minds of counsel but not unsatisfactory in fact.

MR. DEAN: This is one place where there is a terrific variety of practice. Some judges will let you ask any number of questions and in other places they won't let you ask any.

MR. MEDALIE: In my court they just keep counsel as quiet as possible. You cannot ask a juror a question that will warm him up to your side. That is really the objection to the practice.

MR. MC LELLAN: I move the adoption of 61-B.

MR. HOLTZOFF: I second the motion.

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(There was a chorus of "Nays.")

THE CHAIRMAN: Three voting in the negative.

MR. MEDALIE: I know it is not parliamentary when I vote "No" to ask for reconsideration, but may I make a remark or two about the second sentence?

This practically compels the court to permit counsel to do some more questioning, does it not?

MR. MC LELLAN: No. That says "shall itself submit to the respective jurors."

MR. MEDALIE: The court may permit the defendant's attorney -- in the latter event -- the attorney for the Government conducts the examination or may, itself, conduct the examination.

Now, if the court conducts the examination the court shall permit the defendant, and so forth, to examine.

MR. YOUNGQUIST: No. The last four words.

MR. MC LELLAN: It leaves it all up to the judge.

MR. MEDALIE: All right. My motion to reconsider is withdrawn.

THE CHAIRMAN: C.

MR. ROBINSON: C has to do with the number of alternates.

THE CHAIRMAN: This we passed on the last time.

MR. ROBINSON: The only difference, the change in present law thus provided for -- beginning Line 21 -- the defendant has six peremptory challenges instead of under the present law it would be ten. If there is more than one defendant, and so forth.

I think that represents the vote of the committee at the last

meeting.

THE CHAIRMAN: We spent a lot of time on this before.

All in favor of C say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ROBINSON: D provides for the alternate jurors.

MR. MEDALIE: That is practically the statute, isn't it?

MR. DEAN: The parenthetical material is unnecessary, isn't it?

MR. ROBINSON: That is my question. I put parentheses around it to see whether or not you thought it should be retained.

MR. DEAN: It seems to me it is fully covered in Lines 42 to 50.

THE CHAIRMAN: Do you move to strike?

MR. DEAN: I do.

MR. MEDALIE: Is that in that statute?

MR. HOLTZOFF: This changes the statute in that it requires the alternate juror to remain until the verdict comes in instead of discharging the alternate juror at the time the jury retires.

MR. DEAN: I do not so read it.

MR. MC LELLAN: That is no good, is it? He cannot go in and consider with the twelve. He has been excused from consideration.

THE CHAIRMAN: We had a case involving the city commissioners of Newark and after seven weeks' trial, one of the jurors after deliberating a few hours developed an acute appendix and there wasn't anything to do because our statute discharged the alternate juror at the time it went to the jury.

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MR. MC LELLAN: But if you change it this way, can you properly change it so that you can add a juror who was not present at the trial?

MR. ROBINSON: That is the holding in the California cases.

MR. MC LELLAN: You can do that?

MR. ROBINSON: Yes. You will find it in your notes there.

THE CHAIRMAN: Take that case in Connecticut that involved the Lieutenant Governor and the Mayor of Waterbury. One of the jurors had an appendix case. It would be a pretty serious thing for both the state and the honest defendants if they could not find some way of ending the case.

MR. HOLTZOFF: What bothers me is the alternate juror has not had the benefit of the first part of the case.

MR. MC LELLAN: He has not participated.

MR. MEDALIE: I move to strike the sentence on Lines 39 to 42.

THE CHAIRMAN: We have another motion first, if I may -- on the matter on 32 to 35 in parentheses.

All those in favor of striking that say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

What was the second motion?

MR. MEDALIE: That the lines 39 to 42 be stricken.

MR. LONGSDORF: I would like to be heard on that.

THE CHAIRMAN: You may.

MR. LONGSDORF: That precise question arose in California, or the California law was considered in that precise statute, and the statute was sustained.

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The conclusion of the court was that when the alternate juror was substituted after deliberations had begun but before they were concluded, that the verdict represented a verdict of twelve jurors and there was no constitutional denial of the jury of twelve.

THE CHAIRMAN: Just like a man going in a foot-ball scrimmage.

MR. LONGSDORF: Exactly.

MR. MEDALIE: May I ask, Mr. Longsdorf, whether that was a case that arose on that precise situation?

MR. LONGSDORF: Yes.

MR. HOLTZOFF: I am going to vote for Mr. Medalie's motion. I think, as a matter of record, I ought to state that we have had correspondence with Judge Ben Harrison of the Southern District of California who strongly urges the proposal that is now in the rules.

MR. DEAN: Judge Hart in New Jersey had a case that lasted four months in which he used up his alternate jurors and they returned a verdict but had to re-try it.

THE CHAIRMAN: That is the case I am speaking of.

MR. SEASONGOOD: I thought the objection was to the words "shall remain in the custody of the Marshal." Why should you do that? Why should he not be discharged?

MR. ROBINSON: The California case that you have, Rule 61, Page 4, in your comment, that the alternates may not retire with the principal jury and sit passively in the case. They must be then in the custody of the marshal rather than with the jury because the view of the Supreme Court of California was that if you have twelve men serving as a jury at each moment of the trial, you have the constitutional twelve man jury.

MR. YOUNGQUIST: That motion also goes to the next following sentence which provides that the alternate juror may take the place of a juror discharged for illness at any time.

MR. ROBINSON: The argument that you men, several of you, made in the committee when we adopted this proposal at the September meeting, was to the effect that the present rule, both the present Federal statute and the present Civil rule 47-B, by providing for the discharge and dismissal of the alternate jurors just at the time the case is submitted to the jury and before they begin their deliberations really throws awaythe advantage of the alternate juror at the most critical time of all.

That was the argument before.

MR. HOLTZOFF: I am in hearty sympathy with thds proposal as it now stands but I cannot get away from the fact that the alternate juror under those circumstances would not hear all of the deliberations in the jury room.

THE CHAIRMAN: What of it?

MR. MC LELLAN: That he has not participated in it.

THE CHAIRMAN: In many trials one figure of the twelve is to be added up and then divided by twelve. I do not know just how they carry on in criminal trials. Well, you have the motion to strike sentence 39 to 42.

All in favor of the motion say "Aye."

Opposed, "No."

(There was a chorus of "Nays.")

MR. MEDALIE: We lost.

THE CHAIRMAN: Did we? The motion is lost.

Are there any other suggestions?

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MR. SEASONGOOD: I think it is for the committee on style to consider whether it would not be better to say, "Shall remain subject to call" rather than putting in in the custody of the marshal.

THE CHAIRMAN: That will go to the committee.

Are you ready for the motion on Section D? All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 70.

6 MR. ROBINSON: I would like to suggest, Mr. Chairman, that this Chapter VII on Trial is concerned mainly with evidence, and in the interest of time, I would suggest that we not spend any time in discussing it at this time.

In other words, I am suggesting that the whole problem of evidence and the extent to which we, in these criminal rules, should provide for evidence is in a state of great uncertainty, due partly tothe fact that the American Law Institute is now engaged in drafting what could be called a "Model Code of Evidence I talked to Mr. Morgan, the draftsman, in Chicago two weeks ago. He told me then that he expects to submit his final draft of that code to the American Law Institute at its meeting this spring, and I assume that we all feel it would be rather wise for us to defer, so far as possible, consideration of the subject of evidence until that time. It is merely my suggestion. If you wish to go into each of these rules that have been proposed, just sketching in certain portions of the chapter, of course, we would be pleased to have your views, because it has been a

very difficult question.

THE CHAIRMAN: So that we skip through to 70?

MR. ROBINSON: Well, 72 -- I wonder if Mr. Tolman agrees with me on that? That was assigned to him.

THE CHAIRMAN: If there is no objection we will skip 70 and 71 tentatively. All right, Mr. Tolman. 72.

MR. TOLMAN: I have no feeling of any difference in Civil and Criminal cases.

THE CHAIRMAN: This follows the Civil rule?

MR. TOLMAN: This follows the Civil rule.

THE CHAIRMAN: Any suggestions?

MR. LONGSDORF: In Line 12, I think it should be specified that the officer making the certificate should be the custodian of the record certified.

MR. MEDALIE: Did you skip 71?

THE CHAIRMAN: We skipped it temporarily.

MR. HOLTZOFF: I think this rule should be exactly the same as the Civil rule so there should not be two different rules as to authenticating the documents.

MR. LONGSDORF: You may be right about that.

MR. HOLTZOFF: I move we adopt 72.

MR. YOUNGQUIST: Seconded.

MR. MEDALIE: May I make a remark about these rules on evidence?

THE CHAIRMAN: Certainly.

MR. MEDALIE: The New York ruleprovides the rule in criminal cases shall be the same as the Civil rule unless where specially modified. I think that is a pretty good rule and I think we ought to do it.

MR. HOLTZOFF: We cannot say that because the rule in Civil cases is that such evidence shall be admissible as is admissible either under the State or under the Federal rule, whichever is more liberal. Now, if we adopt that rule for criminal cases, we get in great difficulty because of the rule excluding illegally obtained evidence in the Federal courts.

THE CHAIRMAN: Rule 73.

MR. MC LELLAN: Have we adopted 72?

THE CHAIRMAN: All those in favor of Rule 72, say "Aye."

(There was a chorus of"Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. MEDALIE: No. Because I am opposed to the rules of evidence --

THE CHAIRMAN: This is a rule for authenticating documents.

MR. MEDALIE: I do not know why we should have a separate rule in criminal cases.

THE CHAIRMAN: Rule 73.

MR. ROBINSON: Mr. Holtzoff has that rule.

MR. HOLTZOFF: I drafted this rule pursuant to the directions of the committee at its September meeting. I think the recent Supreme Court cases that passed on the validity of the Civil rule by vote of 5 to 4 upheld the validity.

I must confess that I drafted this rule because the committee so directed. I have a great deal of misgiving about it, and for that reason, I amended the second paragraph.

"No such order shall be made if the defendant interposes an objection on the ground that the proposed examination may tend to incriminate him. No such order shall be made in respect to any defendant who is not represented by counsel."

Personally, I think there ought not to be any rule on this subject.

MR. ROBINSON: I would rather not have any rule than have those lines 6, 7, and 8.

MR. MC LELLAN: I move Rule 73 be omitted.

MR. HOLTZOFF: I second the motion.

MR. WECHSLER: May I ask what the present law is?

MR. HOLTZOFF: There is no rule.

MR. WECHSLER: Does that mean that there cannot be any examination?

MR. HOLTZOFF: I do not think there can be.

MR. ROBINSON: Oh, yes. There can be physical examinations.

MR. MEDALIE: The FBI can examine him before he is arraigned before a Magistrate. The FBI can examine him physically before he gets into court.

MR. MC LELLAN: You are talking about Civil rules of criminal procedure. I move that be omitted.

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Rule 74.

MR. HOLTZOFF: Well, now, this is "Motion for Directed Verdict." A is the same as the Civil rule. It expressly provides that by moving for directed verdict at the close of the prosecution's case the defendant does not move or waive the right to offer evidence if the motion is denied as he does today in certain states.

And I also changed the phraseology of the last sentence so

as to make it clear that although a motion for a directed verdict must state specific grounds, failure to make such motion and state the grounds therein does not deprive the court of the right to direct a verdict of acquittal if the evidence plainly fails to sustain the charge set forth in the accusation.

MR. MC LELLAN: Why not strike out the word "plainly"?

MR. HOLTZOFF: I think it should be stricken out.

THE CHAIRMAN: By consent that will be done.

MR. HOLTZOFF: I move we adopt 74-A.

MR. SEASONGOOD: The rule now is, as I understand it, that if you make a motion at the close of the plaintiff's evidence and offer evidence, you waive your motion. You can renew the motion at the end of all the evidence; that is, you can make another motion at the end of all the evidence, but you waive the motion if you offer evidence.

MR. SETH: That is right.

MR. SEASONGOOD: Now, do you mean that we are continuing this way? I mean you waive your motion for directed verdict after the Government's evidence is closed, by offering evidence?

MR. HOLTZOFF: So far, it seems to me that if later on in the case additional evidence is adduced which makes out a prima facie case for the Government, certainly defendants ought not to be allowed to insist that the court should have directed verdict at an earlier stage of the case merely because the evidence is developed later. That is the present law.

MR. SEASONGOOD: I am just raising the point if you want to continue the existing law, have you waived that motion?

MR. HOLTZOFF: You do not waive the motion except so far as the evidence of the defendant may be --

MR. DEAN: I think you will find the cases are the other way. That you waive that motion.

MR. HOLTZOFF: Oh, yes, you waive that motion.

MR. DEAN: You renew at the close of the case.

MR. HOLTZOFF: Yes.

MR. MC LELLAN: But the matter is raised after the evidence is produced on both sides.

THE CHAIRMAN: All those in favor of 74-A say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

B.

MR. HOLTZOFF: Now, B, in substance, although not in phraseology, is the same as the corresponding Civil rule. It preserves the form of a verdict non obstante veredicto, but it does it in a different form.

That was done as a result of the September meeting, a point that was then raised by Judge Crane, I believe. It provides that the judge may submit the case to the jury subject to a motion to direct a verdict, and may direct a verdict for the defendant even after the jury comes in, or after it agrees, if it does agree. Then it provides that if a motion is denied and thecase is submitted to the jury, the motion for directed verdict may be renewed afterwards and considered as though made and determined prior to the time of the jury's retiring. That is in effect a motion for judgment non obstante veredicto.

MR. MC LELLAN: Do you think it is desirable to give the judge, under those circumstances, the right to order a new trial, or direct the judgment?

MR. HOLTZOFF: Well, I can see new sides to that. That particular point is contained in the Civil rules. You know under the Civil rules, under those circumstances, the judge can do either one or the other. He is not obliged to direct a verdict.

MR. ROBINSON: Isn't this a scheme to let a weak judge let the case go to the jury, and, if the jury does not do what he thinks they should have done, at a belated hour, do what he should have done all the time?

MR. MEDALIE: It can work that way and sometimes it does.

MR. ROBINSON: What is the opposite of that?

...

MR. MEDALIE: This is what happens. If a judge is in doubt as to what are the facts that constitute a crime or make out a case for damages, as the case may be, and he grants a motion for a directed verdict, -- well, in a Civil case, you get this situation: if he is wrong, then if it goes up and the jury has not given a verdict, you must have another trial. If there has been a verdict and it goes up and he is wrong, why, then, of course, it can be set aside.

In other words, there is a saving of time in Civil cases.

In criminal cases, that reason does not apply.

MR. HOLTZOFF: There is another reason in addition to the one mentioned, Mr. Chairman. Under the existing practice, if the judge, after further consideration, reaches the conclusion today that he should not have let the case go to the jury, the only thing he can do today is to grant a new trial, because it is too late to direct a verdict; whereas, under this plan, the judge can reopen the judgment and without having to direct a new trial, he can direct the verdict that he feels he should have directed before the jury retired.

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It seems to me, too, that that is nothing but the judgment non obstante veredicto of the common law and I think it is a desirable implement.

MR. LONGSDORF: Mr. Chairman, there is a reason that has not been mentioned. Congress, some years ago, enacted a law giving the Government the right to appeal on criminal cases where constitutional cases were involved. Congress was a bit stingy about that. That law was designed to provide a method of review which would be advisory in future cases, so at least I understand. That law also contains a provision that such an appeal cannot be taken if the accused has been put in jeopardy.

Now, when you let him go on trial, the trial begins, he is in jeopardy. If you make a motion for directed verdict and reserve decision on it, it also goes to verdict and you completely frustrate the Government's right of appeal. And that is precisely what happened, as I understand it, in those Wisconsin Oil cases; and I also understand there was a good deal of protest in high places about the predicament the Government was put into.

I do not think we ought to render that law giving the Government the right of appeal abortive.

MR. DEAN: How could they appeal at that point?

MR. LONGSDORF: They did appeal on the ground they had no right to enter a verdict after the jury returned a verdict of acquittal, and the jury verdict stood.

MR. HOLTZOFF: It seems to me this procedure gives the trial judge an opportunity if he wants to first deliberate, which he does not always have time for if the question is at all complicate where there is a jury sitting and he has to decide with considerable promptness whether the case should go to the jury; and it

also gives him an opportunity to correct an error if he feels he made one in denying the directed verdict in the first instance.

Now, it does not put the Government in any worse position than it is today on acquittal. The Government can appeal, and from that standpoint, it is immaterial whether it was directed before or after verdict.

MR. LONGSDORF: But if the trial court rules the other way, the right of appeal is left to the defendant but it is not left to the Government.

MR. HOLTZOFF: That is not changed by this rule.

MR. MC LELLAN: And it helps the judge, weak though yu may call him, in a case where he ought to have directed the verdict and did not; the jury acquits; and nobody ever knows anything about his mistake.

THE CHAIRMAN: Suppose the jury acquits, and he says, "I made a mistake and I have not been fair to this defendant," and he reverses himself?

MR. MC LELLAN: He orders a verdict of acquittal?

THE CHAIRMAN: Yes. Does that improve the administration of justice?

MR. DEAN: If he had the power to do it before, and if he made a mistake, he should correct it.

MR. HOLTZOFF: I think it would provide an opportunity for correction of errors.

MR. ROBINSON: In the Thurman Arnold report, what is it he protested so bitterly against?

MR. HOLTZOFF: Well, of course, he is a party litigant who exercises --

MR. MEDALIE: Go on.

MR. SEASONGOOD: Mr. Chairman, I think with the Supreme Court having divided so sharply on this issue, -- I do not know whether it is decorous for us to undertake to do this thing. The judge reserved decision, refused to direct an acquittal, the jury convicted, and then he entered a verdict of acquittal, and the Government took exceptions and claimed he had no right to do that, and the court divided four to four, I think, an even number.

MR. YOUNGQUIST: The question was whether it could be done under the law as it then stood.

MR. DEAN: That is the question.

MR. YOUNGQUIST: We now have the question whether that should be the law, and I think it should.

MR. HOLTZOFF: We can draw the conclusion from that, that the Supreme Court believes in this type of practice.

THE CHAIRMAN: Are you ready for the vote on 74-B? All those in favor of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried - B.

MR. WECHSLER: Mr. Chairman, before you go to 75, may I ask one question that relates to 74, generally?

THE CHAIRMAN: Certainly.

MR. WECHSLER: It always seems to me that these requirements which relate to motions that mean nothing where the defendant is well represented, mean something occasionally in the case where the defendant is not well represented. Every year the Department of Justice in opposing petitions for certiorari makes the point that motions were not renewed at the appropriate time.

This rule in 74-A seeks to meet that situation to some extent by reiterating the rule that the trial court has the right to direct if the evidence plainly fails to support the charge.

MR. HOLTZOFF: The word "plainly" is out now.

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MR. WECHSLER: That was stricken?

MR. HOLTZOFF: Yes.

MR. WECHSLER: I was just wondering whether it might be helped if we put it in these terms, that at the end of the prosecution's case, the trial court shall consider whether a case has been made, whether there is a case for the jury, stated in terms of the time when those questions shall be determined, whether or not the motion is made, if that is what this means. I am not sure that the rule in 74-A means the court is under the duty. It is likely to be argued that it is a power of court rather than an obligation. Therefore, I suggest for a consideration of the Reporter, consideration here, a redraft in terms of automatic consideration of the questions at the appropriate time.

THE CHAIRMAN: Any comments, Mr. Holtzoff?

MR. HOLTZOFF: This is just a suggestion for consideration by the Reporter.

MR. WECHSLER: I shall put it in the form of a motion at the next meeting.

THE CHAIRMAN: What is that?

MR. WECHSLER: I suppose I should, and I might put it as a motion now.

THE CHAIRMAN: Will you make the motion?

MR. WECHSLER: I do so move.

MR. SEASONGOOD: Seconded.

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

(There was a chorus of "Ayes.")

MR. SEASONGOOD: That is, that the Reporter shall consider it.

THE CHAIRMAN: Yes. Opposed, "No."

Carried.

Rule 75.

MR. HOLTZOFF: Rule 75 is practically the same as the corresponding Civil rule with exception of a change that was made on Mr. Medalie's motion at the last meeting of the committee. "At the close of the evidence or as soon thereafter as the court may direct."

The Civil rule was a little tighter as to the time when instructions should be submitted, or requested, rather. It required at the close of the evidence, or such previous time as the court may direct.

MR. YOUNGQUIST: Such earlier time.

MR. HOLTZOFF: Such earlier time.

MR. MC LELLAN: Before you pass on the whole thing -- "such time as the court reasonably directs." I would not give the court the power to order or direct the filing of requests or presentation of requests before the evidence is completed.

MR. DEAN: I move it be stricken.

MR. MEDALIE: Seconded.

MR. HOLTZOFF: Now it reads " at the close of the evidence or as soon thereafter."

MR. MC LELLAN: Or at such earlier time as the court directs. Those are the words.

MR. HOLTZOFF: That is in the Civil rules.

MR. YOUNGQUIST: He is referring to the original 75. You are referring to the Alternate 75, are you not?

MR. HOLTZOFF: I see.

MR. YOUNGQUIST: You will find the Alternate Rule, Judge McLellan, omits that language.

MR. MC LELLAN: Oh, good.

MR. STRINE: There is a difference also in the third sentence.

MR. ROBINSON: You might explain that, Mr. Strine.

MR. STRINE: The first rule is exactly the same as the Civil rule except for the words Mr. Holtzoff just referred to, "or as soon thereafter as the court may direct."

This Alternate Rule is about the same except for the sentence starting at Line 6. The phraseology of that sentence is a little less peremptory than the Civil rule, and our first rule, in order to make it clear that the Appellate Court can consider a plain error even though it was not excepted to --

MR. WECHSLER: Are you referring to the sentence at Lines 8 to 11, Mr. Strine?

MR. HOLTZOFF: Are you speaking of the Alternate Rule, Mr. Strine?

MR. STRINE: Yes.

THE CHAIRMAN: Why shouldn't we adopt the first rule -- striking out in Lines 2 and 3, "or at such earlier time during the trial as the court reasonably directs"?

MR. MC LELLAN: May I say just one word? I would like the rule better if it were that "at the close of the evidence unless further time is granted by the court."

I think that is better.

MR. MEDALIE: Much better. Much better. "Unless further time is granted."

THE CHAIRMAN: By the court.

9 MR. MEDALIE: Who else can grant it?

THE CHAIRMAN: I take it, it is accepted.

MR. WECHSLER: There is another issue, Mr. Chairman. There is an issue on the sentence upon which the Alternate Rule differs that I would like to have considered.

MR. HOLTZOFF: It omits the sentence about assignment of error, but I will say this, the first sentence provides, "No party shall assign as error the failure to give instructions unless exception is taken."

That will not conflict with the rules of the Circuit Court of Appeals. This is merely tothe effect that a party has no legal right to assign error. It does not conflict with the discretionary power of the Circuit Court of Appeals.

MR. WECHSLER: I think it ought to go out, anyhow. It seems to me, as I recollect, that there is a general duty defined in an earlier rule, the number of which I do not remember, to object. That general duty applies with respect to the charge as well as to other matters.

MR. HOLTZOFF: No, there is no rule setting forth the duty to object. I am wondering if you are not thinking about the rule which abolishes exceptions.

THE CHAIRMAN: Just abolishes the taking of exceptions.

MR. WECHSLER: Well, by implication the objection is required. And since the objection is generally required, I do not see any reason for legislating specially on this point. As a matter of fact, it does not seem to me to be right that if there is a plain

error in the charge, the plaintiff should not be permitted to assign the error. It does not make for sound practice, in my mind. The proper rule is the rule of plain error; that is, that the judge ought not reasonably to make, even if it is not called to his attention.

MR. YOUNGQUIST: Does not the Alternate Rule take care of those things?

MR. WECHSLER: Yes.

MR. HOLTZOFF: I am wondering if the conclusion that you are arguing might not give opportunity to astute counsel to gamble with the verdict?

MR. MEDALIE: Astute counsel never did that. These things only arise when counsel is not astute. Astute counsel takes no chances there, and if he overlooks anything he knows it is not worth wasting time on and he wants the court's attention concentrated on things he wants attention on.

MR. SEASONGOOD: There has been language in Appellate opinions in which they say give reasons why, because they say if you do object, the courts might make the corrections. They do make that point because they say the court might have corrected the mistake if you had called it to its attention.

MR. MEDALIE: In that connection, giving the ground of the objection is introducing a very new practice. I would like the Chairman to follow this, because he has had plenty of experience.

Now, we have put in here -- take the second Alternate -- the Alternate that I am looking at now. We did not use the word "exception," we used the word "objection."

The practice today in order to raise a point with respect to instructions, either an additional request to charge or a

specific instruction made by the court, is to say, "I except to your Honor's failure to charge as requested in No. 23," or, "I except to that portion of the charge in which your Honor tells the jury so and so." That is the exception and that calls the error to the Court's attention.

The present practice does not permit you to stop and argue the point and give your grounds.

MR. YOUNGQUIST: On the exception?

MR. MEDALIE: Yes. Or on the objection.

Now, here you provide that first, the time shall be taken up in expounding what you now call an objection and which heretofore has been called an exception.

Now, without making much point about the words, the courts do not want you to argue those points in connection with exceptions.

THE CHAIRMAN: We have in New Jersey just the opposite rule. If we take an exception to the court's refusal to charge as requested by counsel and do not state briefly the grounds for the objection, the objection is worthless. The point is not to argue but to give the court a distinct notice of what you are trying to do and unless you do that, our courts say it is of no value.

MR. MEDALIE: They do not let us do that in our district.

MR. HOLTZOFF: Your court is an exception.

THE CHAIRMAN: What is your rule?

MR. SEASONGOOD: That is the Federal rule, generally. They won't pay any attentionto an exception.

MR. YOUNGQUIST: May Iask, Mr. Chairman, if the Civil rule departs from the criminal rule in that respect?

THE CHAIRMAN: Yes. Mr. Tolman just tells me that that rule, 8 to 11, was put in there at the request of Judge Chestnutt,

admittedly one of our best district judges.

MR. YOUNGQUIST: What is the rule in Massachusetts?

MR. MC LELLAN: The grounds must be stated unless the grounds are perfectly obvious.

THE CHAIRMAN: That is different from arguing it, you just state it, one, two, three, four.

MR. MC LELLAN: We do not let them argue it.

MR. WECHSLER: Under Rule 6 that would be the requirement, because an exception was heretofore necessary on these matters. The exception is abolished provided that the objection is made and the grounds stated, so that there seems to be no need to repeat it in Rule 75.

The rule on instructions ought to be the same as on other matters, and therefore I press my motion to strike the sentence.

THE CHAIRMAN: May I make this suggestion, that there is such a diversity in state practice that it may be misleading if that statement does not stay in there. Logically, I think you are correct in your suggestion. I am suggesting a practical argument.

MR. LONGSDORF: The words "no party may assign as error" -- other words may be substituted, and I suggest that it be referred to the style committee. I note the alternate leaves it out.

MR. DEAN: What don't we start with alternates?

THE CHAIRMAN: Well, now, we have Mr. Wechsler's motion on sentence beginning on Line 8 and running through to Line 11.

MR. MC LELLAN: Will you state what that motion is?

THE CHAIRMAN: His motion was to strike it on the ground that it is already covered by Rule 6, abolishing exceptions. I did urge a contrary argument that there is so much diversity of

state practice that we really ought to put them on guard here.

MR. MEDALIE: Well, do we not really need all this if we adopt the alternate in the first statement of the rule?

THE CHAIRMAN: Then we run into the trouble on the alternate.

MR. YOUNGQUIST: I withdraw the suggestion on the alternate.

THE CHAIRMAN: All those in favor of the motion to strike say "Aye." Opposed "No."

(There was a chorus of "Nays.")

THE CHAIRMAN: The motion is lost.

MR. MEDALIE: I move as an alternate that the corresponding sentence in that alternate rule be adopted.

MR. WECHSLER: Seconded.

THE CHAIRMAN: The sentence on Line 6.

MR. MEDALIE: That is Line 6, "objection to the giving," and so forth.

MR. YOUNGQUIST: That is a departure from the civil rule.

THE CHAIRMAN: Any discussion?

MR. MC LELLAN: You would not want, would you, gentlemen, "stating distinctly the matter to which the objection is directed and the grounds of the objection"?

Now, perhaps it is because I have sat there so many times and heard exceptions taken to charges I think of that, but suppose the judge has stated a proposition of law, and you say you object to that, must you add "because it is not a correct statement of the law"?

MR. MEDALIE: What other ground could you give?

MR. MC LELLAN: I do not know of any, but should your objection be invalid because you do not do that?

MR. MEDALIE: I am used to practicing the way you state and

when I think it is an obvious proposition, I simply except.

MR. MC LELLAN: Why couldn't you add there the obvious grounds of the exception in the ninth line?

MR. YOUNGQUIST: That is nothing that is not in the Civil rule. Do you think it is necessary?

MR. MC LELLAN: I do not press it.

MR. MEDALIE: I would like to press it for you. When the judge states a bald proposition of law, if you wish to contest if the verdict goes against you, how do you state your exception and the ground?

MR. YOUNGQUIST: You mean in his instruction to the jury?

MR. MEDALIE: Yes. The court has made a statement in a single sentence which you believe to be incorrect.

MR. YOUNGQUIST: Your exception in such a situation would be simply be on the ground that that is not the law. What other way would you do it?

MR. MEDALIE: Well, of course, I have a way of doing it in another way, "I ask your Honor to charge another way," and I state what I believe to be the law.

MR. YOUNGQUIST: I believe what Judge McLellan has in mind is -- what shall I say -- no, that does not relate to instructions to the jury. You said sometimes an exception is made without stating the ground which is soobviously valid that you would sustain it without the stating of the ground?

MR. MC LELLAN: Yes. And if it is not sustained and it ought to have been, the objection is goodtho no ground be stated if the ground is obvious.

MR. YOUNGQUIST: Exactly. But does not that apply in case of instructions to the jury?

MR. MC LELLAN: You are up there with a long charge, you do not want to have to say over and over again "I object to that proposition of law and my reason for the objection is that you stated it wrong, that is not the law."

I would not want to have to state that over and over again. Because it is perfectly obvious that it is the ground of the objection.

MR. YOUNGQUIST: I think a mere statement that that is not the law is stating the ground. I have in mind, Judge, conformity with the Civil rules as far as practicable.

MR. GLUECK: I would like to know, Mr. Chairman, what would be the effect if you do not state the grounds, of this Rule 75. Would that mean that you could not use it as a basis of error,
11 or what does it mean? What is the purpose of it?

MR. MEDALIE: There is a reason. It has been stated on cases that the court is not bound to consider anything not very specifically raised and called to the attention of the court below, either in the admission or exclusion of evidence, or instructions to the jury, or refusal to charge the jury as requested.

THE CHAIRMAN: The court is entitled to the help of counsel.

MR. MEDALIE: Yes. And if the court does not get that and the matter was not raised in this way, then the C. C. A. may refuse to consider it. And there have been occasions when they have considered matters not raised below or raised below where the assignment did not cover it.

THE CHAIRMAN: The Chairman suggests that perhaps we can do better work if we take a ten minute recess. Is that accepted or is it not?

MR. MC LELLAN: Of course it is.

(There followed a short recess.)

THE CHAIRMAN: All right, gentlemen.

MR. MEDALIE: I want to raise another point, if I may. I wish you would tear up those civil rules.

MR. YOUNGQUIST: What rule is that?

MR. MEDALIE: All of them.

THE CHAIRMAN: May I quote a rule Mr. Tolman has just shown me, Supreme Court Rule No. 8:

"The judges of the District Courts in allowing bills of exceptions shall give effect to the following rules:

No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions."

MR. GLUECK: Suppose he states one ground and after thinking it over, in his brief, states another ground? Does that mean they won't consider the other ground?

THE CHAIRMAN: You state you are excepting as a provision of law. Then you argue the point of law.

MR. GLUECK: You have jumped the hurdle to get to the Appellate Court.

THE CHAIRMAN: As I understand, you are not submitted to that rule.

MR. MEDALIE: The Supreme Court uses the word "exceptions," but I won't press that.

I come to another point that I wanted to raise. Before you started your summation you have submitted to the court a set of

written requests, it might be a dozen or it might be two dozens. The court has had a chance to look them over. He does not charge any of those requests.

Do you follow me?

Now, do you need to do more than to say, "I except to your Honor's refusal to charge as requested in Request No. 3"?

Why should you need to do more than that?

MR. YOUNGQUIST: I do not think you do. You state distinctly the matter to which you object and under the language here, the matter to which you object is the failure to give an instruction.

MR. MC LELLAN: How about the grounds of the exception?

MR. MEDALIE: You must give grounds.

MR. MC LELLAN: You must put in the words "unless obvious."

MR. YOUNGQUIST: It seems to me that can apply only to the giving of instructions to which you object.

MR. MC LELLAN: No, it includes failure to give instructions.

MR. YOUNGQUIST: That is the language, but I do not see how that can apply to failure to give.

MR. MEDALIE: It says so. And if there is a doubt about it, if you fail to except to any specific number of requests before the charge, or at the summation, that is, at the close of the evidence, if it requires a statement of the grounds, why shouldn't we make that clear? And that is the accepted grounds today. I never heard of anybody giving a reason for failure to except to a particular charge. Let us protect that.

MR. HOLTZOFF: New Jersey requires it.

MR. MEDALIE: Is that the general practice? I know it is not our practice. Mr. Youngquist states it is not his practice.

THE CHAIRMAN: Well, what do you do? Do you just state you

object?

MR. MEDALIE: I do not know.

MR. YOUNGQUIST: You have the exception. You merely except to the failure of the court to give instruction No. 3.

MR. MEDALIE: That is all you have to do.

MR. YOUNGQUIST: Do you in New Jersey say why the court was in error in failing to give a requested instruction?

THE CHAIRMAN: Yes. The court in failure to charge that rule has committed error.

MR. MC LELLAN: I move that there be inserted in the ninth line after the word "objection," the words "unless obvious."

THE CHAIRMAN: That is in the alternate?

MR. MC LELLAN: This is in the alternate rule.

MR. SEASONGOOD: That injects an element of uncertainty, doesn't it, what is obvious and what is not? I have thought lots of positions were obvious which the court felt were obvious the other way.

MR. HOLTZOFF: I second the motion.

MR. GLUECK: Now, you say --

MR. YOUNGQUIST: There is a motion up.

MR. GLUECK: Aren't we allowed to discuss a motion?

THE CHAIRMAN: Up until six o'clock.

MR. GLUECK: I think that is a different situation from objecting to an erroneous instruction.

MR. MC LELLAN: This refers not only to the objection to the giving, but also the failure to give?

MR. MEDALIE: Yes, and that is the point we are all concerned with, and you feel the same way, I gather.

MR. GLUECK: Yes.

MR. YOUNGQUIST: What I would like to say is this, regardless of the rule or practice in one district or another, to get a rule that will help properly to inform the court as to counsel's position, it does two things. It makes it possible for the court to correct an error either in instructing the jury or in refusing to instruct the jury as requested. And also to
12 adequately protect the defendant after the trial in getting him to change the instruction, or on appeal to protect the defendant's right.

Now, I think you can do it in two ways. One is that where requests have been submitted in writing and separately numbered it is sufficient to except to the failure to give that instruction, without saying more. The court is not misled and it requires neither debate nor argument.

Next, where the court gives an instruction of his own, I think it is sufficient to point out specifically what it is in his instructions to which you except, stating the substance of it; and, offering what you believe to be the correct instructions.

Now, that is the New York practice and it flows into the practice of lawyers in the Second Circuit.

THE CHAIRMAN: You do not object to that. I am trying to make it clear that it differs from both the alternate rule and the first rule which used the words "ground of objection."

Now that is what you want to get rid of.

MR. MEDALIE: Yes.

THE CHAIRMAN: Now, this rule is drafted very obviously having in mind states where the judge does not give the charge but the charge, if you will look at this, is the result solely of instructions handed up by counsel. There should be mthing in

there covering the judge's own handiwork that is lacking now.

MR. MEDALIE: I think both should be covered.

THE CHAIRMAN: Well, they are not covered there.

MR. MEDALIE: In those jurisdictions, I do not know the practice, you hand up written requests and the judge picks out what he thinks is all right and throws away what he thinks is not all right, my first suggestion, that failure to charge, the number is sufficient.

THE CHAIRMAN: You accomplish that by striking out the words "the ground of the objection."

MR. MEDALIE: No.

MR. YOUNGQUIST: I think what you want to do is to strike out the words "and the failure to give." This is merely a limitation on the right to assign. If this were not here, you would have the right to make all assignments and to assign all errors to which you made objections.

MR. MEDALIE: Providing you do it in a certain way. Notwithstanding what I said about our Circuit, the fact is, -- and our own Court of Appeals -- it is not enough that you take exception to the judge's actual instruction, you must present what you think is a correct alternate. You must point out to him what you think is the correct thing to charge.

When you hand that out in writing you have done that.

I would like to get away from this language. Because when you start re-writing language that does not meet what you are thinking about, you do not get by revision what you really wanted to say, and I think we ought to rewrite that.

MR. HOLTZOFF: It is wise to have two sets of rules, Civil and Criminal?

A lawyer might be trying a civil case today and a criminal case tomorrow. Would it not be confusing to have two sets of regulations?

MR. MEDALIE: I agree with you. Does not the civil rule, if there is one covering it, does it cover the two things that I would like to have covered, and is it limited to those two things?

MR. HOLTZOFF: Well, the civil rule is substantially the first alternative of 75. This is copied substantially from the civil rule and the only thing that is bothering me is whether or not it is desirable, on a matter such as this, to have one rule for civil cases and another rule for criminal cases.

MR. MEDALIE: All right. I will tell you what the answer to that is, if the civil rule does not adequately and realistically and practically meet the situation, then it calls for a better rule, and then attacking that question with those responsible for the civil rule. Let them, if they can, make the change conformable to our judgment, if we are right.

MR. HOLTZOFF: Well, the civil rules have been in effect all of three years now, and I do not think any trouble has been found with that rule.

MR. YOUNGQUIST: Mr. Chairman, I think we have agreed upon what we want. Can't we dispense --

THE CHAIRMAN: May I have a motion to refer back to the Reporter?

MR. MEDALIE: Well, may I ask that my views be adopted in principle? I can restate them. Shall I restate them?

THE CHAIRMAN: No.

MR. MEDALIE: All right.

MR. HOLTZOFF: Suppose we refer to the reporter without taking a vote?

MR. MEDALIE: No, we want to do the thinking for the reporter around this table. I think that is what our business is. We are called upon to do that. We must think of our lines.

MR. HOLTZOFF: Won't you state your motion?

MR. MC LELLAN: I would like to withdraw my motion, if I may have unanimous consent to do it.

THE CHAIRMAN: Judge McLellan's motion is withdrawn.

MR. MEDALIE: I would like to state my views that the ground of the objection need not be stated. Secondly, that where there is a written numbered request previously handed to the judge, failure to charge as requested may be excepted to without further statement.

Let me finish. I want you to listen to it.

Next, that where the court has given its own instruction to the jury, exception to that portion of the charge which is deemed erroneous is sufficient if counsel then states what he believes should be the correct instruction.

MR. WECHSLER: Seconded.

THE CHAIRMAN: Gives his reasons, in other words.

MR. MEDALIE: That does not give reason. That simply states what the correct instruction is without argument or reason.

MR. SETH: He may refer to what the correct exceptions are.

MR. MEDALIE: "I except to what your Honor said on fraud and I ask your Honor to charge as in Instruction No. 3."

MR. DEAN: It will only really apply to requested instructions as distinguished from a charge.

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THE CHAIRMAN: It does not cover his own handiwork at all.

MR. MEDALIE: I do not quite get that. The Judge's own handiwork is covered, as I have submitted.

THE CHAIRMAN: But not by the rule as written.

MR. MEDALIE: I think we would have a better rule than as written.

MR. HOLTZOFF: It leaves the present rule on this to the giving of an instruction.

MR. DEAN: The giving or failure to give an instruction, to my mind, means the failing or the giving of the one you ask for or the giving of the one that your opponent asks for.

MR. YOUNGQUIST: You do not say requested instruction, you say the court's instruction.

MR. DEAN: I would like to have Mr. Medalie's distinction.

THE CHAIRMAN: The motion is to have it committed to the Reporter. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

We will now move on to Rule 76.

MR. MC LELLAN: Well, I do not understand that by voting that it goes to the Reporter, we vote in favor of a rule such as has been stated. Or, do we?

THE CHAIRMAN: All of these votes, Judge, are tentative. We disagree with many things we argued violently for in September. I suppose that will have to continue until the last day. So it is open, and we will go to work again.

Mr. Strine will take Rule 76.

MR. STRINE: The right to have the jury polled is recognized in the Federal courts and we found that exactly half of the

forty-eight states have statutes on the subject. Most of the statutes are substantially similar and this one is based on the New York statute. It is submitted for your opinion as to whether you want the rule.

MR. MEDALIE: Does the judge take the poll, or does he ask the clerk to take the poll? I do not like to have a judge keep on repeating the same formula to twelve men and women. The clerk ought to do that.

MR. SEASONGOOD: The clerk does it with us.

MR. SETH: "The judge shall order the clerk to poll the jury."

THE CHAIRMAN: Yes, I think that is the practice, that the clerk polls the jury under the direction of the court.

MR. MC LELLAN: Yes. In some jurisdictions it is discretionary.

THE CHAIRMAN: With that modification, is there any objection to the rule?

MR. HOLTZOFF: I was wondering if there was any necessity for having a rule on that subject. What is the change?

THE CHAIRMAN: "The judge shall direct the clerk."

MR. MEDALIE: Why don't we use the New York language, "The jury may be polled on the requirement of either party"? Or we can say, "of any party." And "if any one answers in the negative, the jury must be sent out for further deliberation."

Now, that takes it away from the judge. He does not have to do it. Whatever is the accepted practice can be left to the district.

MR. SEASONGOOD: That can be referred to the committee on style.

MR. MC LELLAN: It does not send them back.

MR. MEDALIE: If the jury disagrees they can be sent back. They must announce they are unable to agree.

MR. GLUECK: It does not state who shall send the jury back.

MR. MEDALIE: There is only one person who has power to send the jury back.

I move Rule 76 be rewritten in accordance with the language of the New York Criminal Code procedure, Section 450.

THE CHAIRMAN: Well, I do not fancy that language. Let it be taken under consideration but let us not follow it exactly.

MR. MC LELLAN: Is the word "clerk" substituted for "judge" in the third line?

THE CHAIRMAN: Yes.

MR. MC LELLAN: I move the adoption of that.

MR. MEDALIE: I withdraw my motion and favor yours.

THE CHAIRMAN: All those in favor of the motion to adopt that change in Line 3 say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Carried.

Rule 80. Mr. Holtzoff.

MR. HOLTZOFF: This rule relating to new trials is substantially in accordance with the direction of the committee at its last meeting. It has also been combined with Rule 2 of the Criminal Appeals rule because that rule covers part of the ground of this motion. The two have been combined into one.

Now A is taken from the criminal appeals rule verbatim and comes within the language of the Supreme Court. I presume the court would want to have that continued, namely, it is indicated as the desire of the Supreme Court that the motion shall be

returned promptly.

B is the same as the Criminal Court Appellate rule; and so is C.

Now D, however, it relates to motions for a new trial, has been changed in accordance with the direction of the committee at its last meeting. At the present time a motion for a new trial on newly discovered evidence has to be made within sixty days except in capital cases. This time was changed on the direction of the committee to one year, and, because the committee so voted the last time, I inserted that one year as the time. I must say, however, -- I want to recall the fact that we had a discussion as to whether or not there should be any limit whatsoever. That question was voted on and the right to bring it up again was reserved, and so I want to amend -- I want to move to amend D so as to abolish any time limit on the motion for a new trial on newly discovered evidence.

MR. MEDALIE: You are making a motion on D before we have
14 had a chance to do anything on the other subdivisions.

MR. HOLTZOFF: Oh. Yes.

MR. MEDALIE: If there is no motion to be made on B, I would like to say something about C.

MR. SEASONGOOD: I would like to move to strike out A. It seems to me superfluous.

MR. HOLTZOFF: I would like to myself, but it is in the Supreme Court rules so I hesitated.

THE CHAIRMAN: It was prepared by the justices, themselves, and I do not think we should tinker with them any more than we need to, to bring them up to the same degree of efficiency as the Civil rules.

MR. LONGSDORF: Mr. Chairman, there is one improvement I think we could make. The title of the section in Line 1 is simply the words "New Trials." I think we ought to add "Arrest of Judgment and Withdrawal of Plea" so that the searcher would catch that in looking through the rules.

MR. SETH: That would be motions after verdict.

THE CHAIRMAN: Is that a better term, "motions after verdict"?

MR. LONGSDORF: "New Trials, Motions After Verdict." That would be all right.

MR. SEASONGOOD: Let the Reporter get a suitable caption.

THE CHAIRMAN: The Reporter will tackle the matter of captions.

MR. LONGSDORF: I do not want to press the argument.

THE CHAIRMAN: Someone had a motion going to C.

MR. MC LELLAN: What have we done about A and B?

THE CHAIRMAN: Tentatively. I was going down and adopt the whole rule if we could.

MR. SETH: B is not in the present rule.

MR. HOLTZOFF: It is in the present Appellate rule.

MR. SETH: The grounds are not stated.

MR. HOLTZOFF: I think it --

MR. MC LELLAN: Is it an Appellate matter only?

MR. ORFIELD: B was a matter of the committee at the last meeting. It was not passed on the old rules.

MR. MC LELLAN: Is it a motion for a new trial in the trial court?

MR. SETH: Yes.

MR. MC LELLAN: It would not be in the Appellate rules.

MR. SETH: They are called Appellate Rules but they are rules

covering everything after verdict.

MR. YOUNGQUIST: B is not in the present rule.

MR. HOLTZOFF: It was in the rule that we adopted at the last meeting. That is right. I was mistaken. Now C is in the present rule.

MR. MEDALIE: Well, I think there is an addition that needs to be made. Of course a motion for arrest of judgment. Lawyers know how to state the formula so that it covers everything once, both on arrest of judgment and for new trial; but sometimes those motions -- the court may require them to be made more elaborately, at least, the motion for a new trial; and if the court wants to give an opportunity to hear one of those motions and instead of taking down by the stenographer, he is given power to do so -- I would like to suggest here in the interest of efficiency to give the defendant a hearing if he wants one "unless the time is extended."

MR. HOLTZOFF: I did not understand it was on the hearing.

MR. MEDALIE: I addressed myself to the making of the motion where the court indicates he wants the motion made with more elaboration. The court may say, "I am troubled about this. Will you prepare a set of papers or be prepared for a more elaborate discussion of the motion, and I will set it down for some day next week, or within the next two weeks."

We ought now to make that possible so that it may be three days after verdict or finding of guilt,"unless the time is extended."

MR. MC LELLAN: Do you want to have the time extended within the three days? Do you want the rule made so that the motion may be made after the three days or within the three days?

MR. MEDALIE: The extension of time would be granted within the three days or unless within that time further time has been granted; something of that sort.

MR. LONGSDORF: I thought we had a rule that provided for that.

MR. MEDALIE: Of course, if we are sure about it, I won't press it.

THE CHAIRMAN: It must be extended within three days. Unless within that time further time is granted.

Fix that language up.

MR. ROBINSON: All right.

THE CHAIRMAN: Anything else on C?

Anything on D?

MR. HOLTZOFF: I move that D be changed, or modified, rather, so that a motion for a new trial solely on the ground of newly discovered evidence may be made at any time.

I want to say that the Department of Justice Committee is recommending such a provision.

It has also been recommended by the Pardon Department attorney.

We have had an occasional case now and then where there has been newly discovered evidence. One of them, by the way, have involved an alibi in which it appeared that the wrong person had been convicted of the offense charged.

And those things are likely to turn up not shortly after the trial. They develop sometimes considerably later. Today the only way they are taken care of is by the pardoning power.

Well, there are two objections to that. In the first place, the pardoning power is not a matter of right. The pardon does not wipe out the judgment or conviction even if the defendant

is innocent.

And there is a practical objection. There have been instances where we would much rather have taken the verdict of another jury with the new evidence before the jury instead of having to recommend a pardon. But in view of the circumstances we had no alternative but to recommend a pardon.

Now, the only objection that has been urged against such a change is that it would burden the court with numerous motions for a new trial.

Personally, -- well, none of us in the Department is afraid of that contingency because the ordinary motion for a new trial on newly discovered evidence does not receive much consideration.

Mr. Medalie: The language is worthy of scant consideration and is treated accordingly.

MR. HOLTZOFF: Yes. So there are very few of those motions that are worthy of serious consideration, and when they are worthy of serious consideration, you can be sure the cases are rare, but when those rare cases arise, there should be a remedy.

MR. MEDALIE: You wrote that out, didn't you?

MR. HOLTZOFF: Yes, I did.

MR. MEDALIE: Propaganda.

THE CHAIRMAN: Judge, would that be a burden on the trial judge?

MR. MC LELLAN: I don't think so.

MR. MEDALIE: I would like to say very few motions are made even in the very busy place of the Southern District of New York on the ground of newly discovered evidence. I should be surprised if more than three such motions are made in two years.

MR. YOUNGQUIST: Isn't there a danger, though, if the time is left open indefinitely, that some newly discovered evidence will be cooked up and presented?

MR. MEDALIE: I think Mr. Waite suggested at the last meeting that if you waited long enough you could move on grounds of retraction.

MR. YOUNGQUIST: Thinking of the Mooney case, for instance,

MR. HOLTZOFF: After all, newly discovered evidence involves more than a retraction. Every case we have had was more than a retraction of testimony.

MR. MC LELLAN: I move the adoption of 80-D after there has been substituted for the words "within one year," the words "at any time."

MR. ROBINSON: Well, Mr. Holtzoff, is it true that you always want a new trial or an expungement of the whole record? These cases you give of erroneous convictions indicate the defendant needs not a new trial but what he needs is expungement of the whole record.

MR. HOLTZOFF: No. The court grants a new trial and the United States attorney nol-proses the case if he is convinced.

MR. LONGSDORF: That is right.

MR. GLUECK: I move to amend the Judge's motion and substitute the words "within a reasonable time."

MR. HOLTZOFF: Well, suppose the evidence is not discovered within a reasonable time?

MR. MC LELLAN: Then he would accept it and say that is a reasonable time.

MR. GLUECK: Sure. I think it is half way between the specified one year and leaving it absolutely open.

MR. YOUNGQUIST: That rule was adopted at the last meeting and contained the one year's limitation but provided also that there should be no limitation in capital cases until the judgment was executed.

I also call attention to the fact that the criminal appeal rules put a sixty day limitation on all motions for new trials for newly discovered evidence.

16 MR. HOLTZOFF: Here you have the prosecuting committee recommending that there be no time limit. It seems to me that is pretty strong evidence of the desirability.

MR. GLUECK: That is why you left out capital cases.

MR. LONGSDORF: Mr. Chairman, are not these rules going to go before the Supreme Court merely as recommendations and not of anything else? In any matter that was in the criminal appeals rules, are we going to submit anything other than recommendations?

THE CHAIRMAN: That is all we do in any case.

MR. LONGSDORF: This is a recommendation for them to change this rule.

THE CHAIRMAN: Well, but we have here the backing of the Department of Justice, which certainly has never shown any disposition to let offenders go loose.

MR. LONGSDORF: No.

MR. ORFIELD: I might say, in England you can take an appeal at any time.

THE CHAIRMAN: Without limitation?

MR. ORFIELD: Yes, sir.

MR. ROBINSON: Of course, there is this matter, the Court of Appeals may increase the sentence as well as reduce it.

MR. MEDALIE: Also you do not get a new trial. It is final

disposition one way or the other and then you are out.

MR. ROBINSON: One opinion shows there are so many factors of a negative nature that they do not have too many petitions for new trial. Another is, defendant does not have to stay in prison while the appeal is being considered.

MR. ORFIELD: They do not have a new trial. They have a criminal appeal.

MR. MEDALIE: All thathappens if you win is that you get a new trial.

MR. ROBINSON: I think I get a good part of that from your book.

MR. MEDALIE: I want you to understand I own that book, too.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: The question is called for on Judge McLellan's motion. Was that seconded? The motion made by Judge McLellan was to change in Line 15 "within one year" to "at any time." And Mr. Glueck made a motion to change that to "within a reasonable time," but I did not hear a second.

MR. ORFIELD: I second Judge McLellan's motion.

THE CHAIRMAN: The vote then is on Judge McLellan's motion to adopt section D--

MR. MEDALIE: I would like to bring up first a question about a case that is in the Appellate Court. Shall I wait until you have voted on Judge McLellan's motion?

MR. HOLTZOFF: That should come later, I would say.

MR. MEDALIE: That is what I suggested because the motion, as put, was that we adopt this section with an amendment.

THE CHAIRMAN: D is the one.

MR. MEDALIE: I am talking about D.

THE CHAIRMAN: I will put it solely on the amendment. The motion is to strike "within one year" and substitute "at any time."

All those in favor of the amendment say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Now, anything further?

MR. MEDALIE: I would like to have it explained again, without regard to the time when judgment was entered, unless appeal was taken --

MR. HOLTZOFF: I think that language has to be modified and I suggest in Line 17, the words "has been taken" may be stricken and that there be substituted therefor the words "is pending."

MR. MEDALIE: Well, how would that read?

MR. HOLTZOFF: That would read "unless an appeal is pending and in that event the trial court may entertain the motion only on remand of the case by the Appellate Court for that purpose."

MR. MEDALIE: Why do you say "for that purpose"?

MR. HOLTZOFF: Because you make a motion in the Circuit Court of Appeals asking the court to remand the case to the District Court for new trial, and you do not wait until the appeal is disposed of. That is the present practice, that you do not make a motion for a new trial until after the appeal is taken.

MR. MEDALIE: Suppose the court does not remand?

MR. HOLTZOFF: There would be no practical difficulty. It is only to meet the administrational difficulty in a case which is pending in the higher court.

MR. MEDALIE: "Unless an appeal is pending." Is that your language?

MR. HOLTZOFF: Yes.

MR. MEDALIE: "The trial court may entertain the motion" -- the event is that the appeal is pending. When the appeal is out of the way, then you may make your motion.

MR. MC LELLAN: I move the adoption of D as amended.

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

Any suggestions on E?

MR. MC LELLAN: I move its adoption.

MR. MEDALIE: There is no time limit.

THE CHAIRMAN: No. All those in favor say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. ORFIELD: B sets out the grounds for a new trial but there is no ground for arrest.

MR. HOLTZOFF: I think that is covered by present criminal appeals rule.

MR. MEDALIE: Motions and arrest.

MR. ORFIELD: The criminal appeals rules do not state the grounds.

THE CHAIRMAN: Will the Reporter make a note of that point?

MR. ROBINSON: Will you give me the statute?

THE CHAIRMAN: In the meantime, may we go on to F?

MR. ORFIELD: Doesn't F set out to brief period? Isn't

ten days too short a time?

17 MR. MEDALIE: It is.

MR. HOLTZOFF: That is in the cdminal appeals rule now.

MR. ORFIELD: But shouldn't it be modified?

MR. SEASONGOOD: There is a case in our district where a man had been convicted and withdrew his plea.

MR. ORFIELD: I think ten days is pretty short.

MR. MC LELLAN: Why not let him do it at any time before sentence is imposed?

MR. HOLTZOFF: I do not see why not. I hesitated to suggest it.

MR. MEDALIE: It probably arose out of one scandalous claim maybe which was widely flung around in the newspapers, that the defendant made false claims as to what he understood and some Grand Jury got all excited; and the chances are it happened in New York.

MR. YOUNGQUIST: There is no exception to the ten days.

MR. HOLTZOFF: Before sentence.

MR. ROBINSON: Of course, this may operate in favor of the defendant. I do not know of any other time after plea of guilty in which sentence may be imposed and sometimes it might be desirable.

MR. MC LELLAN: In the interest of progress, I move that the words "within ten days" be stricken out.

THE CHAIRMAN: The motion is "a motion to withdraw a plea of guilty may be made at any time before sentence is imposed."

MR. MC LELLAN: After entry of such plea and before sentence is imposed.

MR. HOLTZOFF: I second the motion.

MR. MEDALIE: Assume it is an ignorant defendant who did not understand what he was leading to, willing enough to go to thirty days for speeding, and finds he is convicted of manslaughter; he won't realize it until he got six years.

MR. ORFIELD: This is the provision of the American Law Institute:

"The court may, in its discretion, at any time before stenence permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside such judgment, and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty."

That is Section 230.

MR. ROBINSON: Don't you think that is too long?

MR. SEASONGOOD: We had anactual case not far back where a fellow pleaded guilty and was sentenced, and the judge refused to let him withdraw his plea of guilty, and he took it to the Court of Appeals and they allowed him to plead not guilty, directed him to plead not guilty, and then the case was nol prosed.

THE CHAIRMAN: All those in favor of the motion as amended say "Aye." Opposed, "No."

MR. MEDALIE: No. The ground for my opposing is that you don't give a man a chance to make that motion after he has been sentenced.

THE CHAIRMAN: Well, do you want to suggest the language that the Reporter might consider on that?

MR. MEDALIE: "At any time that may be deemed just."

MR. ROBINSON: You say that may be deemed just.

MR. MEDALIE: You do not even need that. At any time a man is entitled to withdraw his plea, when it is evident to the court --

MR. MC LELLAN: You mean after he has spent ten years of his sentence?

THE CHAIRMAN: Remember these are rules already adopted.

MR. MEDALIE: Well, I think that ten day provision was a little severe.

THE CHAIRMAN: Well, we have modified that.

MR. MEDALIE: Well, really, I do not think these questions come up until after the sentence has been pronounced.

MR. ORFIELD: Ten states provide this way:

"The court may at any time before judgment permit a plea of guilty to be withdrawn and plea of not guilty to be substituted."

MR. MC LELLAN: You let him gamble with his sentence. He pleads guilty and knows he is and then he does not like the sentence and you let him withdraw it.

THE CHAIRMAN: Rule 81. Suppose we have a motion on the entire rule 80. All those in favor of the entire Rule 80, as amended, say "Aye."

Opposed "No."

Carried.

Rule 81.

MR. HOLTZOFF: On the criminal appeals rule, as it now stands, we sort of brought it up to date by provision for nolo contendere and for judgment for acquittal. But Mr. Glueck has a very elaborate and I think a very able, very well written rule, on the question of sentence. I want to make one or two comments

about it.

I notice Prof. Glueck is out of the room.

THE CHAIRMAN: Shall we pass that until he comes back?

MR. MEDALIE: I think so.

THE CHAIRMAN: We will pass that then until he comes back. May we go on to 82?

MR. HOLTZOFF: 82 is pretty much the same as the Civil rule on the subject, permitting the court to correct clerical mistakes in its judgment, and so forth, to relieve -- to permit the court to relieve a party of any judgment taken against him by mistake, and so forth.

Now, I think Paragraph D would be applicable, for example, where a judgment is taken against a surety on bail bond. It is very largely the same as the Civil rule on the subject.

MR. MEDALIE: Which are you talking of?

MR. HOLTZOFF: Both.

MR. MEDALIE: Well, just take one at a time.

MR. HOLTZOFF: Well, A would have you empower the court to correct a clerical error.

MR. MEDALIE: That is a different kind of error. I will agree that there are errors that ought to be corrected.

Now, let us take up the errors that are made in the court room by the court staff, and then the errors that are made by the parties.

I do not think anybody disagrees that errors ought to be
18 corrected. I want to bring up something else.

MR. MC LELLAN: Is it B or A?

MR. MEDALIE: You have got the language "arising from oversight or omission." Why do you need to qualify those errors?

MR. HOLTZOFF: Well, you don't. Strike that out.

MR. MEDALIE: I so move.

MR. HOLTZOFF: I copied that from the Civil rules.

MR.MEDALIE: I am glad to find that the Civil rules have excess language, "arising from oversight or omission."

MR.HOLTZOFF: I move we adopt A with the amendment suggested by Mr. Medalie.

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

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No." Carried.

B.

MR. MEDALIE: That is all right. Now, if you strike out that withdrawal of plea and let it work under B, I think you would have a just rule.

MR. HOLTZOFF: I do not get your point.

MR. MEDALIE: B covers a mistake, surprise, excusable neglect made under misconception of some kind or other. Is a mistake made by a party?

MR. HOLTZOFF: I do not think so. I think B would be more applicable to judgment taken by default on a surety.

MR.MEDALIE: It is applicable to that, but under this language it is applicable to everything.

MR. HOLTZOFF: I do not think it would be applicable to a plea of guilty under misapprehension.

MR. SEASONGOOD: Is surety the legal representative of the party? You say you want to cover the surety.

MR. HOLTZOFF: Well, suppose the surety is dead.

MR. SEASONGOOD: How do you get the surety?

MR. HOLTZOFF: He is a party.

MR. SETH: I would leave out "party or his legal representative." "May relieve from a judgment."

THE CHAIRMAN: Strike out the words " a party or his legal representatives"?

MR. HOLTZOFF: I think we ought to strike out the words "against him" in Line 10.

And the words "his" following that.

MR. ORFIELD: Would you say that Section B of Rule 82 is intended to be a substitute for the writ of error?

THE CHAIRMAN: I am not sure that the writ might be broader.

Same Line, "taken against him."

MR. MEDALIE: "Taken against him" goes out and the word "his" before "mistake."

MR. LONGSDORF: So it reads "from a judgment, order or proceeding through mistake, inadvertent, surprise, or excusable neglect."

MR. MEDALIE: Now, just to explain the applicability of this, the court may relieve from a judgment; that is within six years and twenty-nine days, through mistake.

That covers exactly your case of a person who has erroneously entered a plea and been sentenced.

Now, as you have it with sub-division B here, and the change of plea -- of course, the change of plea is an exception to this -- if that were not there that would be as it is in sub-division B of 82.

MR. HOLTZOFF: We have there to show that the plea was entered by mistake.

MR. MEDALIE: The defendant is entitled to that if it is only ten days. I don't think they let him change his mind even when

the ten days -- even with the ten day limit, now existing, unless it is shown he was imposed upon. And I do not think he should be relieved --

MR. MC LELLAN: Is there any danger that that kind of case will be brought in under B?

MR. MEDALIE: No, there is not. That is the reason I would like to bring this up, that we get rid of the provision for time limitation other than this, the withdrawal of the plea. This sub-division B of 82 gives the only ground on which a plea can be withdrawn, if this is the only rule.

MR. MC LELLAN: Then solely to raise the question, I move the adoption of 82-B as modified.

MR. SETH: Seconded as amended.

THE CHAIRMAN: Have we passed on 82-A?

MR. SETH: We have.

THE CHAIRMAN: The vote on 82-B as amended. Those in favor say "Aye."

(There was a chorus of"Ayes.")

THE CHAIRMAN: Opposed, "No."

Carried.

MR. MEDALIE: This is very unparliamentary, but in view of what I have said about 82-B, I move that we reconsider and delete the provisions of --

THE CHAIRMAN: 80-F?

MR. MEDALIE: What was that?

THE CHAIRMAN: 80 -F.

MR. MEDALIE: -- motion to withdraw a plea of guilty, 80, sub-division F.

THE CHAIRMAN: "A motion to withdraw a plea of guilty shall

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EVENING SESSION

(The Advisory Committee reconvened at 7:30 o'clock p.m., at the expiration of the recess.)

The Chairman. The committee will be in order.

Mr. Wechsler suggested that he had some thoughts on the subject of appeal, Rules 90 to 95, so for the moment we will pass this, until he returns, and go on to Rule --

Mr. Seasongood. Mr. Chairman, may I go back a minute to Rule 83?

The Chairman. Yes, indeed.

Mr. Seasongood. "A motion for reduction of sentence may be filed within 60 days from the date on which the sentence was imposed, * * *. A motion filed pursuant to this rule shall be acted upon by the court within thirty days from the date on which it was filed."

That seems to be the only instance where we have tried to make the court do something within a limit of time.

In our State we have a statute requiring motions for new trial must be passed on in a certain time, and the courts habitually disregard the statute. They say that the statute cannot tell them in what time judicial action should be taken, and I do not see why we should single this particular thing out for a time limitation.

The Chairman. Here it would be the upper court telling the trial court what to do, a somewhat different situation, would it not?

Mr. Seasongood. No, I do not understand it that way. It says, "A motion for reduction of sentence may be filed."

be made within ten days after entry of such plea and before sentence is imposed."

MR. MEDALIE: This states not the grounds on which it can be made but only that it can be made. Now 80-B, if 80-F does not exist, makes it possible for the motion to be stated only on the ground stated by 82-B and only for six months.

MR. HOLTZOFF: They do not over-lap.

MR. MEDALIE: That is not the reason. I am simply proposing a juster rule, and the juster rule is 82-B; and my reason is that the real ground for withdrawing a plea will not be
19 evident until sentence is pronounced.

I do not believe in letting the defendant withdraw a plea when he understood what he was pleading guilty to.

THE CHAIRMAN: Well, he is sentenced and then it appears he made his plea by mistake.

MR. MEDALIE: No. You place a limitation under 80-F. One minute after he is sentenced, he has no right to withdraw his plea, and the court has no right to entertain the motion.

THE CHAIRMAN: I concede according to the facts of your case 80-F is out. Sentence has been imposed. Then I am his counsel and I turn to 82-B and I say, "Well, was there any surprise or neglect?"

MR. MEDALIE: 80-F covers it. I do not think any man should make a motion to withdraw his plea unless it is for such grounds as appear in 82-B.

MR. HOLTZOFF: But I think such motions are granted for other than these narrow reasons.

MR. MEDALIE: I do not think they should be.

MR. MC LELLAN: If he changes his mind before he is sentenced--

MR.MEDALIE: I would like to give him time if he has been mistreated.

THE CHAIRMAN: Do you make amotion on it?

MR. MEDALIE: I move that 80-F be stricken.

THE CHAIRMAN: Is it seconded?

(No response.)

MR. MEDALIE: What a futile effort.

THE CHAIRMAN: 83.

MR. STRINE: This rule is also recommended by the Department of Justice Committee. They had a case where sentence was entered for ten years. At the end of the year, the term was extended again, at the end of that time it was extended again. At the end of three years, the court had changed the motion and produced it to the time served.

That is the purpose of this, to obviate such situations.

MR. HOLTZOFF: Well, Mr. Strine, we do not want to take away from the district the right to reduce a sentence, do we, after the Appellate Court has affirmed his conviction? I would hate to see the district courts acquire thatpower -- I am for the rule as it stands now, but I think there should be this qualification added,"within sixty days after sentence was imposed or affirmed."

MR. MEDALIE: Be careful of the use of the word "affirmed." What do you mean by that?

MR. HOLTZOFF: Affirmed by the court.

MR. MEDALIE: When was it affirmed? You are either in the C. C. A. or the court. When is it affirmed? What date is it? Is it the date of the order of affirmance?

MR. HOLTZOFF: I would say it is the date of the order of

affirmance.

MR. MEDALIE: If you are clear about that, it is all right. It may not be affirmed until it does down to the district court again.

MR. HOLTZOFF: I think an affirmance is when the Appellate Court hands down its judgment.

MR. MEDALIE: It does not hand down its judgment. It makes an order.

MR. HOLTZOFF: Well, hands down its order.

MR. MEDALIE: Then something has to happen to an order. It has to reach the District Court. Suppose, for some reason, it does not reach the District Court for sixty days? What has happened to it? All your kindness has then evaporated.

MR. HOLTZOFF: Well, is the date the mandate is received by the District Court the governing date?

MR. MEDALIE: Yes.

MR.HOLTZOFF: I won't object to that.

THE CHAIRMAN: Let us get that.

MR.HOLTZOFF: In Line 3, after the word "imposed" insert the following: "or on which the judgment was affirmed or on which the mandate was received by the District Court" -- no, that is not good language.

MR. MEDALIE: The language you want to get it in is"sixty days after the District Court is empowered to deal with the case again."

MR.HOLTZOFF: Is that right?

THE CHAIRMAN: How about leaving it to the Reporter?

MR. HOLTZOFF: I move Rule 83 be amended so as to contain a provision, the substance of which would be to empower the

District Court to entertain such a motion for sixty days after a mandate is received from an Appellate Court affirming the judgment of conviction.

Is it seconded?

MR. MEDALIE: Sixty days from the filing of the mandate from the Appellate Court in the District Court.

MR. ORFIELD: Seconded.

THE CHAIRMAN: All those in favor of the purpose of the motion say "Aye."

(There was a chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

Carried.

All those in favor of the Section as amended --

MR. SETH: In view of the broad language of 8 (C), have you safeguarded the language?

THE CHAIRMAN: 80 (C)?

MR. SETH: 8 (C). It gives general power to extend the time, with certain exceptions, of which this is not one, -- 8 B, I should have said.

THE CHAIRMAN: 8 B, yes.

MR. HOLTZOFF: You can add a Line 22 clause covering motions to extend sentence.

MR. SETH: Yes, Rule 83.

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

MR. MEDALIE: Let me understand that.

MR. SETH: You cannot extend time.

MR. MEDALIE: 8 (B) provides that when these rules are in order requires an act to be done -- allows it to be done at or within a specified time -- now, you do not want it extended

beyond the time fixed.

MR. SETH: That is right.

MR. MEDALIE: Then you would have to add a provision that the provisions of 8 (B) are not applicable.

MR. HOLTZOFF: No, you add those at the end of 8 (B) because there is a clause at the end of 8 (B) that the court may not enlarge the period for taking certain actions.

MR.MEDALIE: That would make it correct enough but Rule 8 is a general rule with respect to time and I think it is bad arrangement to put in a specific provision where you have only general provisions.

MR. SETH: But you have 80 in here already, -- no, 8 (B) -- "not enlarge the period for taking any action on the rule 80." You might as well put 83 with it.

MR. MEDALIE: I see. All right.

MR. SETH: How long is the Chairman going to keep us here? Shall we adjourn, or must we just walk out?

THE CHAIRMAN: The Chairman thinks this is a very good time.

MR. MEDALIE: We have the man up to conviction, and now we leave him.

MR. MC LELLAN: What time will we adjourn to?

THE CHAIRMAN: 7:30.

(Whereupon, at 5:50 p. m., the meeting recessed until 7:30 p. m., of the same day.)

end
Darrow.

The Chairman. You said that in your State the Legislature told the court what to do.

Mr. Seasongood. That is true.

The Chairman. Here it is the Supreme Court telling the District Court what to do.

Mr. Medalie. It does not make any difference, I do not think.

Mr. Seasongood. There is a difference, to the extent that one is by state statute and one is the Supreme Court telling the lower court what to do.

Mr. Medalie. You have the rules, and they are simply equivalent to the act of the legislature. It does not matter who makes the rule.

Mr. Seasongood. Well, I move to strike it, and take the opinion which has been expressed.

Mr. Medalie. I second the motion. The motion is to strike the last sentence.

The Chairman. Are there any remarks?

Mr. Seasongood. The chairman has some doubt, I judge.

The Chairman. No. I am trying to figure out whether this is one of our own creation or one of the Supreme Court rules.

Mr. Holtzoff. That is one of our own.

The Chairman. Are there any remarks on the motion?

If not, all those in favor say "aye." Opposed, "no." The motion is carried.

Now, may we go on to Rule 100? I do not seem to have any.

Mr. Holtzoff. We do not have any.

The Chairman. Rule 101. We are making progress.

Mr. Holtzoff. This relates to removal, and I would like to discuss first alternate rule 101, the adoption of which I would suggest.

The Chairman. We will turn to alternate rule 101.

Mr. Holtzoff. The first part, down to line 10, is practically the same except for purely stylistic changes.

The existing statute provides a hearing before a commissioner or the district court, and upon the finding that there is reasonable cause, an issuance of a warrant for his removal.

The last two sentences, beginning on line 10, are not now contained in any statute or rule. They deal with the question as to how much must be established in order to justify a removal.

There is a lot of divergence, both in practice and reported cases -- in fact, considerable confusion -- as to the extent to which the Government must make out a prima facie case and the extent to which the defendant may go into the merits of the case. In fact, there are some districts where the defendant is allowed to offer evidence in proof of innocence, which enables the judge of another district practically to review the action of the grand jury in finding an indictment, although the judge of the district in which the grand jury sat could not do that.

So in those two sentences we propose this rule, that if the removal is based on an indictment, a certified copy of the indictment should be conclusive proof of reasonable cause.

Of course, proof of identity would also have to be added.

In the second of the two sentences I suggest that if the removal is based on a complaint or information -- in other

words, no quasi judicial agency has intervened before the prosecution was instituted -- that the Government should adduce proof of reasonable cause, and the defendant may controvert such proof.

The Chairman. Are there any remarks on the rule?

Mr. Longsdorf. Did we keep the provision requiring leave to file an information? I was wondering whether an information filed with leave might take on a little higher character of probative value than one filed withoutleave.

Mr. Holtzoff. I feel this way: Leave ordinarily is granted perfunctorily.

Mr. Longsdorf. I do not think it makes any difference.

Mr. Holtzoff. I do not think it makes any difference.

The Chairman. Are there any further remarks?

Mr. Holtzoff. I move the adoption of Rule 101.

Mr. Medalie. I second it.

The Chairman. All those in favor say "aye." Opposed, "no." The motion is carried.

Rule 102.

Mr. Holtzoff. Rule 102. We also have an alternate draft on that rule, and I suggest the alternate.

This rule relates to the procedure that should govern removed cases. You will recall, of course, that certain government offices, when they have prosecuted cases in state courts, may remove to a Federal court.

Alternate Rule 102 provides that in such instances the procedure after removal should be the procedure prescribed by those rules in the Federal Court. Of course, the state substantive law would govern as to the substantive part of the

prosecution.

Mr. Medalie. Why don't we say that?

Mr. Holtzoff. The alternate rule.

Mr. Medalie. I am looking at the alternate rule.

Mr. Holtzoff. "These rules apply to criminal proceedings removed" --

Mr. Medalie. We say that. We do not say anything about the state government. We do not have any business to.

It is all right. My suggestion was wrong.

Mr. Longsdorf. What is the need of the last sentence: "Repleading is not necessary"? What occasion is there for repleading?

Mr. Holtzoff. Suppose the indictment was drawn in accordance with the provisions of the state law. We say that the federal procedure shall apply after removal, in order to prevent some judge or lawyer from thinking that you have to find a new indictment in accordance with the federal court. This provision was put in for that reason. There is a similar provision in the civil rules.

Mr. Longsdorf. There is a place for it in the civil rules. Why don't you say, "Reindictment is not necessary"?

Mr. Holtzoff. It may be"reinformation."

Mr. Longsdorf. And "reaccusation."

Mr. Medalie. It is not necessary.

Mr. Longsdorf. I wonder if that has any utility?

Mr. Medalie. If there has been an indictment, there would not be a new indictment in the federal court.

Mr. Longsdorf. We would not remove --

The Chairman. Could you cover it by saying, "after

removal, but no new accusation is necessary"?

Mr. Holtzoff. I think perhaps that would be an improvement: "but no new accusation is necessary."

Well, suppose the defendant had pleaded. Would he have to replead?

The Chairman. Would he plead before removal?

Mr. Holtzoff. He would not ordinarily.

Mr. Medalie. Why do you need that?/

Mr. Longsdorf. Just a minute, until I look at that statute. I think that will answer the question.

Mr. Holtzoff. The statute does not cover this particular thought.

Mr. Longsdorf. What is the time for removal in these criminal cases?

Mr. Tolman. Any time before trial.

Mr. Longsdorf. Any time before trial? Can the defendant be removed before he leaves?

Mr. Holtzoff. Ordinarily they are removed right away, but they would have the right to remove after a plea.

Mr. Longsdorf. If he is removed after a plea the issues are all made up and there is no occasion for repleading.

The Chairman. "Repleading" leads one to think that you are addressing it to the plea.

Mr. Holtzoff. Yes, you are right.

The Chairman. "No new accusation is necessary." I think that is better.

Mr. Holtzoff. I think that is better.

I move the adoption of alternate rule 102 as amended in accordance with the Chairman's suggestion.

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

Rule 103.

Mr. Holtzoff. That rule relates to what is technically known as rendition or interstate extradition and would be applicable in the District of Columbia and the territories, because those jurisdictions are called upon to surrender fugitives to the states.

Mr. Medalie. Here is what I do not understand. I think the principle is all right, but why do you limit the activity to the chief justice of the district court? Suppose he is sick. Why does he have to be there?

Mr. Holtzoff. There is a provision in the last sentence that an associate justice may have authority.

Mr. Medalie. Why can't any judge have that?

Mr. Holtzoff. This is the existing provision of the District of Columbia Code. It has been in existence for years, and the chief justice, in interstate extradition cases, acts as the governor of the state.

3 Mr. Longsdorf. Do we want this in the criminal rules? Isn't this a political procedure?

Mr. Holtzoff. No. That is quite a judicial procedure.

Mr. Longsdorf. If the governor of the state had to do with it, it would not be.

Mr. Holtzoff. He issues a warrant and he conducts a hearing --

Mr. Glueck. I think it is part of the criminal procedure.

Mr. Holtzoff. I think it is, and it is in the judicial sections of the District of Columbia Criminal Code.

Now, (b) embodies the existing statutory provisions in reference to the surrender of fugitives by territories to the states and to other territories.

Mr. Glueck. You say that is just the way the existing statute is, Mr. Holtzoff?

Mr. Holtzoff. Yes. I made some stylistic changes and have gotten away from some obsolescent language, but substantively the provision is the same.

I move the adoption of rule 103.

The Chairman. Are there any remarks?

All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I will vote for it, if you think it is necessary to have something. If it is in the statute, as you say, you do not need to say anything.

Mr. Holtzoff. These rules will supersede the statutes.

The Chairman. The statutes will probably be repealed. The idea is to get the whole body of procedural law in one spot.

Mr. Longsdorf. Is this going to take out of federal statutes only those interstate rendition rules which apply to these particular courts?

Mr. Holtzoff. Yes.

Mr. Longsdorf. You are not going to venture into interstate rendition at all?

Mr. Holtzoff. Absolutely not, because that is not a matter that is part of the federal judiciary.

Mr. Longsdorf. I may say that that was in our book, but I never understood why Mr. Nichols put it in.

The Chairman. Rule 104.

Mr. Holtzoff. Rule 104 is the third and last phase of extradition, namely, extradition from the United States to foreign countries.

Now, certain phases of extradition are Executive and are carried on by the State Department. No attempt is made to embody that in this draft.

Mr. Medalie. You perpetuate the horror, as appears on lines 19 to 20: "Commit the person so charged to the custody of the United States Marshal, pending the final disposition of the matter by the Secretary of State."

He cannot get bail. It is a very bad business.

Mr. Holtzoff. Read on, beginning on line 21: "If the person so committed is not delivered and conveyed" --

Mr. Medalis. After staying in the jug for two months? Oh, no. If a person happens to have a fight with the political authority of a foreign country and they want to make it disagreeable for him and charge him with something -- it may be a political offense; it may not -- the fact remains that the person stays in jail under the existing extradition rules, without bail --

Mr. Holtzoff. Until the State Department --

Mr. Medalie. Yes. That is a long, long time. I think people ought to get bail, and that has been one of the outrages of our extradition laws.

Mr. Holtzoff. My understanding is that it is international practice in all countries not to grant bail in extradition cases, because of the duty that one government owes to another.

Mr. Medalie. That is right. Hitler doesn't like you, or Mussolini doesn't like you, and that settles it -- or, if you wish, Stalin doesn't like you. I don't care who you put in.

Mr. Holtzoff. These are used for the extradition of criminals, such as bank robbers --

Mr. Medalie. There is no reason why there should be a distinction between a bank robber, or someone charged with that offense, and the president of a bank who was wanted for something. Is there any difference because he is French or Russian or Turkish than because he remains an Englishman?

Mr. Holtzoff. If he becomes a fugitive we answer to the other government, whereas if he is indicted in this country, it is under our laws --

Mr. Medalie. If a man is here --

Mr. Holtzoff. I should hate to act on this certainly without the acquiesence of the State Department, because we would be treading on international relations.

Mr. Medalie. You embarrass the State Department by asking the State Department if it would agree to bail.

Mr. Holtzoff. I would have no hesitancy about asking the State Department.

Mr. Medalie. I move that there be added at line 20: "except that he may be admitted to bail in accordance with the usual practice in other motions."

Mr. Holtzoff. Because this involves foreign relations, I do not think we ought to adopt this motion -- certainly not without consulting the State Department.

4 Mr. Medalie. I would not consult the State Department, because you cannot get any action out of the State Department

here.

Mr. Holtzoff. I will get a response --

Mr. Medalie. You will get a response, but not the kind of response we want.

The Chairman. Off the record, Mr. Reporter.

(There was a discussion off the record, after which the following occurred:)

Mr. Medalie. This is an act of the legislature. If this is an act of the legislature, you know perfectly well that the Congress can override the State Department, and I do not think that the amenities between the State Department and the other departments have any application to this work.

Mr. Holtzoff. Congress would not override the State Department in a matter of this kind if the State Department made representations on a point just as this.

Mr. Medalie. You mean, generally speaking, about Chinese, Japanese, Englishmen, Malayans, and Turks?

Mr. Holtzoff. I am talking about matters not involving great public interest.

Mr. Dean. It is time they did.

Mr. Holtzoff. If there is any question about the desirability of the provision as it now exists, I would like an opportunity, if it is agreeable to the committee, to consult with the State Department and get their reaction, because I do not think we ought to insert a provision for bail which would change a practice that has existed in foreign extradition cases since our government was established and it affects foreign relations. I would not want to see --

Mr. Medalie. You mean they started it in 1789? This Code

makes 1789 look silly.

Mr. Holtzoff. We ought to consult the State Department as a matter of courtesy. They do not have to follow it. They may say, "We do not care one way or the other."

Mr. Medalie. Let them tell us after we pass the rule.

The Chairman. I do not think it is wise to ask them.

Mr. Glueck. I think we ought to hear the argument.

Mr. Dean. You won't hear the argument. You will hear "Yes" or "No."

Mr. Glueck. We will know where we stand then.

Mr. Holtzoff. I would like to ask the State Department.

I would rather see the provision stand in its present form, but if there is any thought about inserting a provision as to bail, I do think we should consult the State Department.

Mr. Medalie. Let us take a simple example. An American swindler gets bail pending his extradition, but if he is a Frenchman --

Mr. Holtzoff. An American swindler in England does not get bail while we are asking for extradition. An American swindler in Canada does not get bail.

Mr. Medalie. It is about time we did start a new pattern.

Mr. Seasongood. We are only talking about 60 days.

Mr. Medalie. It is a long, long time, if you are doing 60 days.

The Chairman. Especially in Washington in the summertime.

Mr. Glueck. We have plenty of Americans now in jail for 60 days.

Mr. Medalie. I press my motion, Mr. Chairman.

Mr. Longsdorf. Mr. Chairman, I simply want to say that I

think that this is so entangled with political questions that we ought to leave it out entirely. I think Congress has to do with the job, not we.

Mr. Holtzoff. We are the agents of Congress.

Mr. Longsdorf. We are, for limited purposes.

The Chairman. The motion is made and seconded.

If there are no further remarks, all in favor of the motion say "Aye." Opposed, "No."

The Chair is in doubt.

All in favor make a show of hands. All those opposed. It is seven to four.

Mr. Glueck. I want to record, however, that I am wholly in sympathy with the comment of Mr. Medalie. What I object to is passing it without exploring it with the State Department.

Mr. Medalie. I move that the State Department be asked for its opinion and that further action on this particular provision be held in abeyance.

Mr. Glueck. I second the motion.

The Chairman. All in favor say "Aye." Opposed, "No." The motion is carried.

That brings us to rule 105.

Mr. Holtzoff. Rule 105 has to do with search warrants. This, with some stylistic changes of language, embodies the present statutory provisions on search warrants.

There is some slight change, and that is (b), in line 19. The present law requires the search warrant particularly to describe the property and place to be searched. I am changing that to "identifying the property and the place to be searched."

Mr. Medalie. What line?

Mr. Holtzoff. Line 19.

The reason for the change is this. The reporter called attention to a case in which the District Court vacated a search warrant that suppressed evidence obtained by its means because the search warrant described the house by an old number, which had been changed, and although everybody knew what premises were intended, the Court held that that was not a sufficient description, because it did not particularly describe it.

Mr. Medalie. That was during prohibition days.

Mr. Holtzoff. No; recently.

Mr. Medalie. Recently?

Mr. Holtzoff. Yes.

Mr. Medalie. What a hangover!

Mr. Holtzoff. Exactly. That is why I suggested changing the language to "identify."

Mr. Medalie. Fine.

Mr. Holtzoff. Aside from that, the rest of this is all in the present statutes.

Mr. Medalie. I want to ask one question there with reference to lines 27 to 31, regarding daytime and nighttime.

Mr. Holtzoff. This is the substance of the present statute -- that a search warrant may be served only in the daytime unless the issuing officer endorses that it may be served at any time of the day or night, and he may put such an endorsement on only if it positively appears that the property to be searched for is on the person or in the place to be searched.

If the affidavits are made on information and belief, then

the search warrant may be executed only for the daytime.

Mr. Medalie. This means, then, if it is itinerary property, not on a person?

Mr. Holtzoff. Suppose a premise is to be searched, and they are not positive that the property is there. The premise is to be searched only in the daytime.

Mr. Medalie. You mean that this property shows up only at certain hours and in a particular place?

Mr. Holtzoff. No. Under existing law, which this rule continues, if you have a search warrant to search certain premises for certain property listed in the search warrant, you may execute that search warrant only in the daytime, unless there is an affirmative direction on the warrant made by the commissioner or judge issuing the warrant that the warrant may be executed at any time of the day or night.

Mr. Medalie. I am talking about what the affidavit states.

Mr. Holtzoff. Such a direction may be made, however, only if the affidavits positively show that the property to be searched is to be located in the premises that are to be searched. If the proof is not positive, but still sufficient to justify the issuance of a search warrant, the search warrant may not be executed in the nighttime.

Mr. Medalie. I wish you would tell me the difference between one that positively states that the article to be searched for is on the property and one that sufficiently establishes that it is.

Mr. Holtzoff. If your affidavit establishes a probable cause to believe that the contraband to be searched for is on the premises, that is sufficient for the search warrant to be

issued for the daytime. That is not established positively, and therefore it is not to be issued for the nighttime.

Mr. Medalie. What is the difference? Is that a genuine difference?

Mr. Holtzoff. Yes, and it is the existing law, and it always has been the existing law.

Mr. Medalie. But is it a genuine difference?

Mr. Holtzoff. Yes.

The Chairman. The difference between "may be" and "is."

Mr. Medalie. If it is "may be," it should not have a search warrant.

Mr. Holtzoff. Oh, yes. You can have a warrant for arrest on a reasonable ground to believe, and you can have a search warrant on a reasonable ground to believe.

Mr. Medalie. If you can have a warrant that deprives a person of his liberty on that ground, then you ought to have a search warrant on that ground.

Mr. Holtzoff. Yes.

Mr. Medalie. You can execute a warrant at any time of the day or night that will deprive a person of his liberty, but you are more solicitous about property.

Mr. Holtzoff. I think that there is a good deal in what you say, that a search warrant should be permitted to be executed at any time of day or night. It is the sort of change which would cause an antagonism on the part of those --

Mr. Medalie. I think it would create more of an antagonism by not explaining what you mean by "unless the affidavits are positive. A daytime search if not positive; a nighttime search if positive."

Mr. Holtzoff. If you can convince them that you are continuing a rule of law that has been in existence for a century --

Mr. Glueck. Is there any reason for having this beyond that distinction?

Mr. Holtzoff. Yes.

Mr. Glueck. Is it because when you are positive you go directly to the place without causing disturbance and trouble?

Mr. Holtzoff. No.

Mr. Glueck. What is it?

Mr. Holtzoff. Of course, a search in the nighttime is naturally much more distressing than a search in the daytime, and you ought not to be permitted to cause that additional disturbance unless you are absolutely certain that the property is to be found on the premises.

Mr. Glueck. That is what I said.

Mr. Dession. Isn't it because of the urgency of making the search?

The Chairman. That is undoubtedly the rationale of the thing.

Mr. Dession. It seems to me that you should not make a search at night unless there is a reason to be in a hurry. If there is a reason to be in a hurry, it might be all right. I do not see that being positive about the place has anything to do with whether you are in a hurry or not.

Mr. Holtzoff. I think this is one of those things where it pays to adhere to the law that has been in existence --

Mr. Dession. Our function is not to continue existing law. That is not our function?

Mr. Holtzoff. It is not our function, but I say this is one of those things where that should be taken into consideration.

Mr. Medalie. Who gets excited about the service of search warrants at night?

Mr. Holtzoff. The Civil Liberties Union.

The Chairman. I think Mr. Holtzoff will back me up on this. The majority of the Judiciary Committee of the house will get wildly excited over a thing like this.

Mr. Medalie. Well, if you put it on the ground that that does not make a distinction without a difference, I am willing to go along, but you are making a distinction without a difference, the difference being between probable cause and positive cause.

The Chairman. For a very obvious purpose. That language, when you rationalize it, is to discourage searches at night. They apparently could not think of any language which would say, "Don't search at night unless it is terribly important."

Mr. Medalie. I can think of language.

The Chairman. So this is apparently the accepted formula.

Mr. Medalie. We can get a better formula that will satisfy our consciences and our minds by saying that "no search warrant shall be executed in the nighttime unless a special direction therefor is made upon special circumstances shown."

Mr. Holtzoff. That would give the issuing officer broader authority than he has under existing law to permit searches at

night.

Mr. Medalie. No. The difference between "probable cause" and "positive" means nothing.

Mr. Holtzoff. That language would convey such an impression.

The Chairman. I have not been in favor of considerable delay and argument on a number of changes that we have made. I think I more or less move faster than most of you on some of these things, but this is one thing with regard to which I can see wisdom in getting legislative consent.

Mr. Medalie. Let me put it in the form of a motion.

I move that the sentence running from line 27 to 31 be deleted and that in place thereof there be inserted a provision that the warrant shall be served in the daytime urless it contain a direction for service in the nighttime, which shall not be made unless the affidavits or depositions establish some special circumstance requiring that provision.

Mr. Holtzoff. I hope the motion will not prevail.

Mr. Medalie. I know that.

The Chairman. Is the motion seconded?

Mr. Dession. I will second that.

Mr. Longsdorf. Before we go to the motion, I would like to make this as a suggestion. This statute on search warrants is comparatively recent, 1917, and, by its own terms, applies only to search warrants authorized by this chapter. It is section 611 of Title 18, and in the concluding section it says:

> "Nothing contained in these sections of this title shall be held to repeal or impair any existing provisions of law relating to search and the issue of search warrants."

Now, what are those other provisions of law? I think we should reserve consideration of this until we have time to look into them and find out what they are. I do not know what is lurking around in those. I hunted for them. I know there are a whole lot of searches under the provisions of the statute, but I have not had time to look into all of them. There is a multitude of them.

I would be a little afraid of venturing into that subject on the basis of this comparatively recent statute. There must have been a lot of search warrants before this statute was passed in 1917.

Mr. Holtzoff. But this language was not new in the 1917 statute.

Mr. Longsdorf. Oh, no. There are plenty of cases which hold that this is an attempt to codify the common law of search warrants. I will concede that.

Mr. Holtzoff. Do you want to put the question, Mr. Chairman?

The Chairman. All those in favor of Mr. Medalie's motion say "Aye." Opposed, "No."

The Chair is in doubt. All in favor make a show of hands. Five. Opposed, six. The motion is lost.

Mr. Holtzoff. Now, I move we adopt rule 105 as it now stands.

Mr. McClellan. Seconded.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

Mr. Dession. May I ask one question before we leave, Mr. Reporter? Why is the issuance of search warrants limited to articles used in committing felonies, in section (a)? I

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realize that most of your federal crimes are felonies, but is there any reason for that limitation?

Mr. Holtzoff. There is this reason and only this reason: The existing search warrant contains that. It contains no provision for searching for property used in the commission of a misdemeanor.

Mr. Dession. I know that.

Mr. Holtzoff. And in drafting that --

Mr. Dession. I know that that was the old statute, but the fact remains that in all state practice that I know of you have no such limitation, and I see no reason to write it in unless there is a reason for it other than historical.

Mr. Holtzoff. The reason is one of sentiment. People are very touchy on the subject of search warrants. I thought that it would be very unwise policy to extend the scope of search warrants, especially in the light of certain sentiments in certain quarters.

Mr. Dession. You have no limitation on searches without a warrant. They are apt to be more abusive than searches with a warrant.

Mr. Holtzoff. The law does not permit searches without a warrant except as an incident of arrest and in the presence of the arrested person.

Mr. Dession. Are you sure of that?

Mr. Holtzoff. Oh, yes. I have lectured on the subject of search and seizure in the Department.

Mr. Dean. You know how broad that "search incident to arrest" is.

Mr. Holtzoff. I know.

Mr. Dean. You walk in the door. You want the man. You go through every room in the house and upstairs, too. It is the sort of thing that calls for a search warrant, if anything ever did.

Mr. Holtzoff. The point is that the traditional rule of law permits that search without a search warrant, but I do not believe it is good policy for us to carry it further and extend the scope of the law of search and seizure.

Mr. Dean. If you have ground to arrest the man without a warrant, you could do everything at the time of the arrest that you could do with a search warrant.

Mr. Holtzoff. In his presence and at the time of the arrest.

Mr. Dean. You can haul him upstairs and you can go through the house and take out every dresser drawer.

Mr. Holtzoff. I can see a very good, logical argument in favor of Mr. Dession's suggestion to extending it to all searches and seizures. As a matter of policy, I am opposed to doing it.

Mr. Dession. What is the policy? We are not opposed to obtaining evidence of crime in a proper fashion?

Mr. Holtzoff. By "policy" I mean so far as getting these rules adopted. I think if we make the law of search and seizure any more stringent and any more extensive than it now is, we will create objection to these rules.

Mr. Dession. I am very sensitive to that problem, and wherever I felt that we were writing in something that I felt would hamper the objectives of the rules, I would not go along with that, but I still have the feeling that some of these

historical accidents are not as popular as we may think.

The Chairman. What would the misdemeanors cover? They would be the other class. Would they cover migratory birds and things like that?

Mr. Dession. I am not prepared to submit a list.

The Chairman. Isn't the difficulty with the classification of crimes?

Mr. Dean. Yes, it is.

The Chairman. Some things are called misdemeanors that should be classed as felonies.

Mr. Holtzoff. Any crime punishable by less than a year and a day in prison is a misdemeanor. In addition to that, certain very severe offenses, though punishable by longer terms, are denominated misdemeanors by statute.

Mr. Medalie. What are we on now?

8 Mr. Dession. To save time on this, I do not have before me a list of all federal misdemeanors.

I will merely move that the question of whether those crimes which are classed as misdemeanors are sufficiently different or unimportant for our purposes to warrant leaving

? this in the form as it is. It may be covered by later discussion, if it be advisable.

The Chairman. We will consider the motion passed.

May I ask a question? I think it is connected with that point.

I would like to ask Mr. Holtzoff, speaking about section 612 of Title 18 of the statute, What would be the effect of our passing a rule like 105 (a), which just takes what might be called the headlines from a statute? Will the rule then be

considered as supplementing the statute or would there be any possibility of its being subject later to repealing it?

For instance, on the point that Mr. Dession is making, you have the top line, "When the property was used as the means of committing a felony."

The statute goes on to clarify that: "In which case it may be taken on the warrant from any house or any other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

Mr. Holtzoff. I studied that language. A lot of it is repetitious. So far as the substance of the meaning is concerned, everything that is in the statute is carried into rule 105, but the language is condensed and made more succinct.

Mr. Robinson. I hope you are right.

Mr. Holtzoff. I will be very glad to have you check it.

Mr. Robinson. Those words I have just read I think go a little further than what you go in this section.

Mr. Holtzoff. I do not think they do.

Mr. Robinson. As a general proposition, what is the relationship between our rule and a statute where the rule covers what might be considered some of the essential portions of the statute? Are the remaining essential portions of the statute still in effect?

Mr. Holtzoff. I think not. I think that if we cover a topic by rule, that rule would supersede the statute on the same subject, even though the statute is more complete and more detailed.

Mr. Robinson. I rather think that that is true.

The Chairman. Do you move for a repealer of these various statutes?

Mr. Holtzoff. They never did that in the civil rules.

Mr. Dean. I think the Reporter has raised a pretty fundamental question, particularly when we repeal in part and it is not clear as to whether we have repealed the whole of the statute. Wouldn't it be wise to corsider whether we should have a special section specifically repealing or whether we should cover it in footnotes, saying that it is regarded by the committee that such and such a section is considered repealed?

Mr. Holtzoff. I would rather see it down in the footnotes

Mr. Dean. If we do not do it rather specifically, I think there will be some question as to whether the statute has been repealed.

Mr. Holtzoff. There has been no trouble of that sort with respect to the civil rules, although the same situation exists there.

The Chairman. Rule 106.

Mr. Holtzoff. Rule 106 covers motions to quash search warrants and suppress evidence.

The first part is substantially, with some condensation and stylistic changes, the existing statute on the subject.

The latter part codifies and, I hope, clarifies the existing practice on the question of motions to suppress evidence. I think that there is no change in the law or the existing practice in any part of this rule.

Mr. Medalie. You have one difficulty in language.

Mr. Holtzoff. I beg pardon?

Mr. Medalie. You have a difficulty of language.

Mr. Holtzoff. That is always open to improvement.

Mr. Medalie. Talking about persons making motions where the property was seized pursuant to warrant, in line 11: "Such person" -- that is, a person whose property was seized pursuant to a warrant -- "may also move to suppress evidence and for return of the property seized, on the ground that such warrant was served illegally or that the property was illegally seized without any search warrant issued therefor."

Now, that has two implications. One is that under a warrant -- acting under a warrant -- the officer seized more property than was authorized to be seized by the warrant. The other is that without any warrant at all the officer seized property.

Mr. Longsdorf. And the third is that a third person's property was seized and he is not the defendant and cannot suppress the evidence.

Mr. Holtzoff. The only person who can move for return of property illegally seized is the person who is entitled to the possession of the property.

Mr. Medalie. Suppose there was no warrant. Let us put the three together that Mr. Longsdorf and I are talking about. One: a warrant; excess seizure. Two: a warrant; person not named. Three: no warrant.

Mr. Holtzoff. Well, I think perhaps your criticism of that sentence is well taken, Mr. Medalie. If we change the language from "such person" so as to read that any person from whom any property has been seized --

Mr. Medalie. With or without a warrant.

Mr. Holtzoff. With or without a warrant, may also move.

Mr. Medalie. I think those are rights that are to be protected against unlawful search and seizure.

Mr. Holtzoff. That language would meet your thought?

Mr. Medalie. Yes.

Mr. Holtzoff. "Any person whose property has been seized, with or without a warrant."

Mr. Longsdorf. May move to suppress evidence? Suppose he is not a defendant?

Mr. Medalie. He might be a defendant.

Mr. Longsdorf. He might not be.

Mr. Medalie. A warrant may issue against you, as a result of which I get indicted, and it might be my property and not yours, or I am indicted because I am seized at a railroad station where a post office inspector, without a warrant, either searched or seized off my person.

Mr. Youngquist. I want to ask a question. The rule reads, "a person against whom a search warrant has been issued." Is a search warrant necessarily issued against a person?

Mr. Medalie. It is not. Concerning whose property?

Mr. Youngquist. Suppose you know there is contraband property in a place. Do you not issue a warrant for the search of that place and the seizure of the property without regard to whose it is?

Mr. Holtzoff. Yes, I think you are right about that.

Mr. Medalie. "A person whose property has been seized under color of a search warrant."

"A person whose property has been seized under color of a search warrant"

would cover the first two of the situations that I mentioned.

Mr. Youngquist. I was directing myself more particularly to the propriety of the phraseology that we have in the section.

Mr. Holtzoff. In the light of the remarks that have been made, I am of the opinion that this phraseology should be modified, and I will be very glad to have an opportunity to rephrase this, and perhaps we could adopt it now, subject to being rephrased in matters of style.

Mr. Longsdorf. Mr. Chairman, may I make a suggestion to Mr. Holtzoff that might simplify it?

The Chairman. Certainly.

Mr. Longsdorf. Why not transpose this second half, which I find no fault with outside of that "such person," over into a rule designed to cover all phases of motions to suppress evidence? They may reach into other things than search warrants.

Mr. Glueck. I have that in mind, too, Mr. Chairman. What about wire tapping, for instance?

Mr. Holtzoff. I do not think we had better deal with wire tapping.

Mr. Longsdorf. That is another thing, but there are other ways of obtaining property than by illegal search warrants. Why not put them all together.

Mr. Robinson. Perhaps in our chapter on proceedings preparatory to trial, such as motions, pleas, and so forth.

Mr. Longsdorf. Yes.

Mr. Medalie. May I suggest that we ought not to consider that now until we get the principles settled, and then ask for the transposition?

Mr. Longsdorf. That is agreeable.

Mr. Medalie. May I then make a motion?

The Chairman. Yes.

Mr. Medalie. I move that the language in lines 11 to 14 in rule 106 be substituted by the following:

"A person whose property has been seized under color of a search warrant, or a person whose property has been seized without authority of a search warrant, may move for the suppression of the evidence and move for the return of the property seized."

Mr. Robinson. Such as returning property obtained incident to arrest?

Mr. Medalie. Yes. You make the motio on the basis of your simple constitutional principles, which we are not attempting to define here; but a person from whom property has been seized, either on his person or in his home, has certain rights. That involves a lot of complications, which we do not decide.

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Mr. Holtzoff. I think that is all right.

Mr. McLellan. Suppose A is indicted and B's property is seized under a searchwarrant. Has A any right to have that evidence suppressed?

Mr. Youngquist. No.

Mr. Medalie. Suppose he is a defendant.

Mr. McLellan. Suppose he is not a defendant. Read your language.

Mr. Medalie. We can add something there to make sure it applies only to persons who are the subject of criminal prosecution.

Mr. Holtzoff. No; whoever has the right to the possession of the property.

Mr. Youngquist. You have got to divide them into two classes. The man who has the right to the return of the property on the one hand may or may not be the same as the person in the other class, the man who has the right to suppress the evidence. Isn't that your idea?

Mr. McLellan. Yes, but that didnot make that distinction.

Mr. Dession. Under the existing practice only a person with interest in the property has a standing to make such a motion; isn't that true?

Mr. Holtzoff. Yes.

Mr. Medalie. Mr. Longsdorf has made a good suggestion. The language would read:

"A person whose property has been seized under color of a searchwarrant, or a person whose property has been seized without authority of a search warrant, may move for the return of the property, and, if he be a defendant, for

the suppression of the evidence."

Mr. Youngquist. What about a defendant to whom the property does not belong? Can he move to suppress?

Mr. Holtzoff. No, because his rights have not been invaded.

Mr. Medalie. This says "a person whose property has been seized," and the only one who can move for the suppression of evidence is a defendant if it is his property.

Mr. Holtzoff. I think I would like an opportunity to recast this rule, in the light of the observations that have been made in the last few minutes.

Mr. Longsdorf. I move that the consideration of this section be reserved for redrafting by the reporter, with the assistance of Mr. Holtzoff.

The Chairman. You have heard the motion --

Mr. Medalie. And that I be consulted.

Mr. Holtzoff. We will be glad to have you.

Mr. Longsdorf. Yes; add that to the motion.

The Chairman. All those in favor of that motion say "aye." Opposed, "no." It seems to be unanimously carried.

Mr. Dean. I would like to make one suggestion in connection with that recasting. Whereas one of the grounds you specify is that the warrant is insufficient on its face, does that cover the situation where the officer who makes the seizure is exceeding the authority granted by the search warrant? I do not think it covers that situation.

Mr. Holtzoff. Well, line 12 covers the contingency that you have in mind: "on the ground that such warrant was served illegally."

Wouldn't that language cover that contingency?

Mr. Medalie. Let us stop debating this one. We are going to do it over.

The Chairman. Rule 107.

Mr. Holtzoff. That relates to criminal contempts and it codifies, in a condensed form, what I understand to be the present practice as embodied in the existing statute.

Mr. Medalie. I think you make one error.

Mr. Holtzoff. What is the error?

Mr. Medalie. There are two kinds of contempt: One that can be purged and one that cannot be purged. In other words, if you call the court a name, you are guilty of contempt that cannot be purged. In the other case the court issues an order requiring the person charged to show cause why he should not be punished for contempt, and you either conform to the original order of the court, which purges you of the contempt, or you are punished for contempt for not doing so.

Mr. Holtzoff. I used the language of the existing statute on the subject.

Mr. Medalie. If the existing statute has lame language, we are supposed to fix it up.

11 Mr. Holtzoff. I agree with that. I am always open to improvement.

Mr. Medalie. When it gets down to lines 18 and 19, "The alleged contempt is not sufficiently purged."

Mr. Holtzoff. I must say that there I copied exactly the language of the existing statute. I agree with you that the language might be clarified a little bit. I will be glad to do it.

Mr. Medalie. If you clarify that, I can go to sleep.

Mr. Holtzoff. Then, I move, subject to that clarification, that Rule 107 be adopted.

Mr. Youngquist. Just a moment. Can a corporation be guilty of contempt?

Mr. Holtzoff. I believe so.

Mr. Longsdorf. It can be guilty of disobedient contempt.

Mr. McLellan. The corporation itself may be guilty.

The Chairman. A corporation may be guilty and punished by fine.

Mr. Holtzoff. That is the present statute.

Mr. Longsdorf. May I ask a question for information? I do not know. Is it possible, in the case of disobedient contempts, for a court in any way to combine a civil enforcing contempt proceeding with a criminal punitive contempt proceeding?

The Chairman. It cannot be done at common law.

Mr. Longsdorf. I know it cannot be done at common law.

Mr. Holtzoff. Ordinarily coercive measures are used for civil contempts.

Mr. Medalie. Also in criminal contempts. If you will allow me, I will give you an example of it. At the end of 1932 I was attempting to prosecute for violation of our Federal laws with respect to elections. I attempted to get the basic information. That is, I subpoenaed the chairman of the New York City Board of Elections to produce certain election books.

I happened, incidentally, to be a very good friend of that person, but he was advised by the powers that be that we had no authority to do so. He was brought before the grand jury

and declined to produce the books.

Thereupon I moved, before Judge Cox, to punish him for contempt. Judge Cox was satisfied that there was a contempt -- that is, disobedience -- and he sentenced him to sixty days in jail, as he put it, correctly, coercive but not punitive.

Mr. Justice Stone refused to give a stay.

One night after that I met him and he said to me, "I thought you were a friend of mine, but JudgeCox told me this about you. I asked him why did he give me sixty days. He said, 'I don't know. George Medalie told me that that was the thing to do.'"

Mr. Wechsler. Mr. Chairman, on this issue, I think that before voting on this section we ought to consider the rule of the McCann case in the Second Circuit. I do not remember the citation of that case, but it is an attempt by the Second Circuit to address itself to one of the realities of criminal contempt proceedings: Namely, the difficulty that often arises in determining whether a contempt proceeding is criminal or civil; and, secondly, the question as to the degree of supervision that should be exercised by the court over the institution of criminal contempt proceedings.

The substance of the second circuit ruling is that where the proceeding is intended to be criminal in purpose the proceeding shall be instituted not by the filing of an affidavit of some credible person, as is here provided, but by information filed by the United States Attorney or by some person specially designated by the court to prosecute.

I think there is a great deal to be said for that procedure.

Mr. Holtzoff.. But the statute is otherwise. The statute

is the same as this rule.

Mr. Wechsler. The statute,as I recollect it -- and I speak with diffidence -- does not distinguish at this phase between civil and criminal contempt.

Mr. Holtzoff. No, but this particular statute relates only to criminal contempt -- that is, the criminal contempt statute which permits proceedings to be instituted by a private party as well as by the United States Attorney.

Mr. Wechsler. Well, I am not impressed by the fact that the statute may so provide, even if it does, because I still think we have the power to change it and might well consider changing it.

Mr. Holtzoff. Oh, no doubt.

Mr. Wechsler. At any rate, I should not want to vote to approve this without considering that.

Mr. Medalie. By the way, there is another thing that I think we ought to consider. One of the most important cases on criminal contempt is the case of a person who gave evasive answers before a grand jury and was punished for contempt.

Mr. Robinson. The Finkle case.

Mr. Medalie. No; another one that happened in my time. I cannot think of the name.

There the court proceeded on an informal oral presentment in open court before the grand jury. Afterwards, of course, the defendant had an opportunity to be heard and present witnesses; but here, instead of being able to proceed and dispose of it summarily, it would have been necessary for me, under this rule, to have filed an information.

Mr. Holtzoff. I think so.

Mr. Medalie. Of course, that would have taken another day and the preparation of a great amount of material. What we did was that the grand jury came to the courtroom, with the United States and the witness, and then a statement was made by the United States Attorney in behalf of the grand jury: "The grand jury wishes to present Mr. So-and-So for contempt for giving evasive answers as follows," and then I called the stenographer of the grand jury to read the testimony.

If I had to draw it according to this, I would have lost a day or two or three.

Mr. Holtzoff. That is covered by paragraph (a) of this rule.

Mr. Medalie. It would not appear clearly that that was a contempt commited in the presence of the court, although I believe it was.

Mr. Holtzoff. The grand jury is part of the court.

Mr. Longsdorf. The judge does not know it of his own knowledge.

Mr. Wechsler. Section 387 of Title 28, to which Mr. Holtzoff referred, applies only in a single type of contempt. It is one of the sections of the Clayton Act, and it applies only in the case referred to in section 386:

> "Namely, the case where there is willful disobedience of an order or process where the thing so done is of such a character as to constitute also criminal offense."

So that it does not apply throughout the whole scope of criminal contempt under present law and, as a matter of fact, applies to a relatively rare case in the field of criminal

contempt.

I appreciate the force of the position that the same procedure may properly apply in other cases as well, but that involves, it seems to me, weighing of the position taken by Judge Hand in the case in the Second Circuit to which I referred.

I myself see great merit in the position taken by the Second Circuit. I do not think we ought to reject it without considering it.

Mr. Waite. What is your proposed change?

Mr. Wechsler. The substance of the Second Circuit is that when you are dealing with true contempt the procedure is either by information filed by the United States Attorney or by affidavit filed by some person specially designated by the court for the purpose.

Mr. Waite. It would change this phrase: "by the filing of an affidavit of some credible person."

Mr. Wechsler. Precisely.

Mr. Dean. What is the case?

Mr. Wechsler. I know it is the McCann case. I do not know whether it is United States or some other party, but I can easily give you the citation.

Mr. Holtzoff. I can say this: that in the Department for years we have been declining applications on the part of personsinjured by criminal contempts to institute prosecutions on the ground that they can go ahead and institute their own prosecutions under this statute.

Mr. Longsdorf. Mr. Chairman, there is another question I would like to ask, of which I am also ignorant. When a

general contempt proceeding is instituted upon information for a contempt which was done in the presence of the judge and of which he knows, but which he was disinclined to pursue in a summary way, what can he do then? Can he proceed on that information to try the question summarily on his own knowledge or must he call in witnesses to tell him what he already knows?

Mr. Holtzoff. If he proceeds by information, he has got to give a regular trial.

Mr. Longsdorf. I think so, and I was reminded of that question by reading the Toledo newspaper case, where he seems to have done just exactly the other thing. It would have been sufficient ground for reversal, but it was not the one.

The Chairman. Where do we stand on this rule?

Mr. Wechsler. My motion was that it be held for further consideration, rather than adopted.

Mr. Longsdorf. I second the motion.

The Chairman. It has been moved and seconded.

All those in favor say "aye." Opposed, "no." The motion passes.

Now, what does that mean? That somebody is going to submit ideas? Are the reporters to do something with it?

Mr. Dean. I would like to make two suggestions: One, that the McCann case be looked at; and the other, that Mr. Seasongood be consulted, because he is particularly interested in that subject, and he had to run out before we reached it.

The Chairman. Very good.

Mr. Medalie. Considering subdivision (a), may I make a suggestion, as a tentative thing, that we amend that to read: "In the presence of the court or the grand jury"?

The Chairman. Yes.

Mr. Medalie. I move that after the words "the court" in line 5 there be inserted " or of the grand jury."

The Chairman. It has been moved and seconded.

All those in favor say"Aye." Opposed, "no." The motion is carried.

Mr. Youngquist. It says "while the court is in session."

Mr. Holtzoff. Yes. You ought to say, "while the court or the grand jury are in session."

Mr. Youngquist. "while in session."

20 Mr. Holtzoff. Sometimes the grand jury is in session and the courtis not.

The Chairman. Rule 108.

Mr. Holtzoff. This rule relates to habeas corpus.

Although I drafted it, I have this misgiving about it. The subject of habeas corpus, although it hinges on criminal proceeding from a practical standpoint, is really within the jurisdiction of the Civil Rules Committee, because a habeas corpus proceeding is a civil proceeding and the Civil Rules do refer to habeas corpus. All of them say that, except for purposes of appeal, the old procedure shall continue, while appeals shall be governed by the rules governing appeals in civil cases.

So in the comment that I attach to this draft of the rule, I suggest that if we want to deal with the subject at all, we ought to make our recommendation to the Civil Rules Committee.

Mr. McLellan. I do not think it is our job.

Mr. Holtzoff. I do not think it is our job, either. I drafted it because this was one of the topics that was to be covered.

Mr. Longsdorf. May I correct you, or try to do so?

"In the following proceedings appeals are governed by these rules but are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States."

Perhaps not all of the procedure in habeas corpus is set forth in the statutes of the United States -- in fact, it is not all set forth there.

Mr. Holtzoff. Then, the Civil Rules simply, in effect, merely continue the preexisting procedure, whatever that procedure was.

Mr. Longsdorf. I think the habeas corpus rules at the present time consist of the habeas corpus statutes and the civil appeal rules and any part of the civil procedure rules which apply and are not contained in the habeas corpus statute, the way I read it.

Mr. Holtzoff. And also such rules of the common law relating to habeas corpus on points which cover the statutes.

Mr. Longsdorf. For that reason I think we can adopt habeas corpus rules without undertaking to amend the rules of civil procedure. I do not think we ought to try to do it.

Mr. Holtzoff. I agree with that.

I move that we dispense with Rule 108 or any other rule on the subject of habeas corpus.

Mr. Longsdorf. I second the motion.

Mr. Dession. I would like to suggest this. It may well be that we need no change in the existing civil rule, but I think we should consider whether the present procedure on habeas corpus is satisfactory in all the respects in which that

procedure is used in connection with criminal proceedings. If we conclude that it is, no change is needed. If we conclude that it is not, then I think we should consider what, if anything, we should do on that.

My suggestion is to take care of criminal procedure. Habeas corpus is used mostly -- not entirely, but mostly -- in connection with criminal procedure, and the fact that it is not a criminal proceeding in theory is historically and theoretically true, but it is not functionally true.

Mr. Holtzoff. It is also used to a very large extent in deportation proceedings.

Mr. Dession. Nevertheless, it is used more in connection with criminal cases.

The Chairman. In view of the fact that the Supreme Court has, just in the last week or two, referred the Civil Rules to the Civil Rules Committee, why wouldn't it be a proper thing to refer this matter to them?

Mr. Dession. We can, except that we cannot expect them to worry about criminal procedure.

The Chairman. They said the problem arose, and we felt it was on their side of the house.

Mr. Wechsler. May it not be relevant to know why the Civil Rules Committee did nothing about the habeas corpus rule? I asked one of the members about it. They felt that the whole habeas corpus procedure was a pretty sanctum sanctorum affair and that it would be needless to touch it without a need for it which did not exist.

So I do not think we would be referring to them a subject which they overlooked, but, rather, a subject on which they had

a firm view. Therefore, I do not think we ought to refer it to them unless we had a concrete suggestion to make, and I know of no concrete suggestion,at least that is embodied here.

Mr. Glueck. Mr. Chairman, I think Mr. Dession's point is well taken, and I was wondering whether it would be proper to have a little survey made as to the actual operation of habeas corpus so far as impinges on criminal proceedings in the Federal courts. Is that feasible?

Mr. Dean. Couldn't Mr. Gottschall get you up that material in the Department of Justice?

The Chairman. Could we not get a memorandum fromsomebody?

Mr. Holtzoff. Oh, yes. I can have somebody in the Criminal Division get it.

Mr. Dean. There are people who work on it every single day, like Mr. Gottschall.

Mr. Glueck. I think we ought to have a memorandum on these headaches that you talk about.

The Chairman. The motion is that we request aid through Mr. Holtzoff and the Department of Justice on that.

All those in favor of themotion say "aye." Opposed, "no." The motion is carried.

Now, may we go back to Rule 81, which we held until Mr. Glueck arrived.

Mr. Glueck. This rule is drafted at the suggestion of the chairman as the result of some correspondence --

2-2 The Chairman. May I ask which is your rule? The one on page 2 or the one on page 3?

Mr. Glueck. Page 3, and also a little farther down, on page 8.

The Chairman. It commences on page 3.

Mr. Glueck. Yes. It deals with presentence investigation to be made by probation officers.

The Chairman. This is Rule 84, page 3.

Mr. Glueck. There is the question of the scope of this investigation and whether it should be applied to all offenders or only certain classes. There is the problem of the procedural stage at which it should be made. There is the question of whether it should be confidential or not, and several related problems.

We are dealing here essentially with the manner in which, to my mind, theory and policy point on the whole in one direction, but certain practical considerations may point in another.

As you will observe on page 3, the way it is drafted is, first of all, that the investigation should be made after a period of continuance and after conviction. Now, it has been recommended by Mr. Chappell, who was in charge of probation in the Office of Administrative Reports, that that investigation should be made at an earlier stage, because of the fact that several agencies had large territories, and probation officers cannot get this investigating done in time.

My objection to that is, of course, that the accused is presumed to be innocent until proven guilty, and I do not think it is proper for probation officers to investigate his home and his employment, and so on, because he may ultimately be acquitted. I understand that many defendants do not seem to object to that.

Then there is the question of the scope of this investigation. Theoretically, of course, the investigation should cover everything that may perform a twofold purpose: First of

all, aid the judge in imposing sentence; and, secondly, serve as a sort of plan of supervision and correction in the case of those men who are put on probation.

You will observe that I have expanded its possible use also to the case of men who are sentenced as a result of the court's considering his investigation reports. I do not think there ought to be a duplication of these investigations, once by the probation officer and the court and then again by the investigators attached to the various penal institutions.

Now, one of the practical difficulties involved is that a thoroughgoing investigation takes time, and certainly in some regions if the convict cannot be released on bail pending the completion of this investigation, he has to languish in very bad jails that we all know. That is one of the difficulties we must face if we accept this provision for a continuance for a reasonable period in order to make this investigation.

You will observe also that I provide for the investigation of the prior criminal record in all cases and in such cases as the court or judge shall designate. I provide for a thoroughgoing social case history going into the make-up and background of the offender.

That is done because at present, as you all know, there are not enough probation officers, but it is hoped that ultimately there will be enough so that at least the first time a man is up for sentence in any court a thoroughgoing investigation into the kind of man he is and what makes him tick and why he committed the offense and the possibilities of his reformation and the like may be obtained.

In order to compensate a person for the time it will take

to make this investigation, I provide that the time shall be deducted from the ultimate sentence, that a week or two weeks or even three weeks cannot make much difference in the long run so far as the correctional and penal treatment is concerned, and is a sort of reward that I believe the accused is entitled to.

Mr. McLellan. Is that whether he is under bail or subject to confinement?

Mr. Glueck. No; only where he is detained.

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Mr. Glueck (continuing). Now, there was another problem which was raised in this exchange of correspondence in reference to the confidential nature or otherwise of the investigation report. There are many reasons why it ought to be confidential. I think if you read this correspondence you will see some outstanding abuses, as where one judge is accustomed to read this confidential report to the court room before imposing sentence.

On the other hand, I think it ought to be permitted to make this report available to the defendant, certainly where his counsel asks for it. That does not occur very frequently in real life, but it seems to me to be a right that we ought to provide for. So that, roughly, is the rule as drafted.

Now it seems to me that our job is to determine on these matters of policy in the light of the practical limitations set forth in this exchange of correspondence.

Mr. Holtzoff. I would like to suggest, about line 5, in the light of your remarks and in the light of what I believe to be the situation in many courts, where it is wise to have the mandatory "shall" instead of "may". I am visualizing the court in a small rural district where court sits for a week or two. Now, if he is required to continue the case for an investigation, the case goes over the term, and the judge may not be back there for three or six months.

Now, suppose the defendant is in custody all this time, he has not given bail, he has to be continued in custody. Suppose eventually he is placed on probation. In the meantime he will have served an additional three or six months' time in jail. Now, I think all that matter ought to be left to the good sense and the discretion of the judge; and I therefore suggest--or,

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I want to ask you how you would feel about changing the word "shall" to "may"?

Mr. Glueck. Well, if the practical difficulty is as you say, I suppose we should do that.

Mr. Holtzoff. I feel sure it is. I think the difficulty might be helped if, in the discretion of the judge, we permitted investigations to commence immediately after the prosecution has started, but I think the whole thing can be cured by using the word "may", and you will leave the whole subject in the discretion of the judge. I am in complete sympathy with presentence investigations, but I do not want them to become a hardship for the defendant.

The Chairman. Isn't that open to this objection? You might have probation facilities that are fairly adequate in the district, and one judge may avail himself of them and another judge may totally neglect them.

Mr. Holtzoff. That is exactly what has happened.

The Chairman. And shouldn't it be provided that wherever the facilities of the probation officer will permit, the judge "shall"? Then you avoid getting Judge A, relying on the probation reports, and Judge B, absolutely ignoring them.

Mr. Holtzoff. Yes, but the change covers more ground than that. This is a provision that the judge shall order the continuance of the case for a reasonable period for the purpose of an investigation.

Mr. Glueck. But that also says that the investigation in some cases need consist of only the check-up on the prior criminal record.

Mr. Holtzoff. Yes.

Mr. Glueck. Wouldn't that be covered in those regions where this time element would come in?

Mr. Holtzoff. Well but the point is, suppose there is a 1-week session; this particular case is tried on the last day of the week. You wouldn't want to have the case passed for three or six months until the court sits again in that division?

Mr. Dession. I am not sure that would be necessary. We have provided in cases like this, here, that either you have got a conviction or plea of guilty or nolo, but that the sentencing may be done anywhere in the district. In another connection we provided that, in order to cut down this delay. Now, wouldn't that mean, then, that as soon as your probation investigation was over your man could be taken to whatever court was in session in that district at the time, whatever division it might be, for sentence, there?

Mr. Holtzoff. That can only be done with his consent. Of course in some districts there are no statutory divisions. There may be a half a dozen places of holding court, without separate divisions. I think that is true of the district of Massachusetts.

Mr. Dession. That is right.

Mr. Holtzoff. So that any action of the court can be performed in any place in which court is held; but in a great many districts there are statutory divisions.

Mr. Dession. That is true.

Mr. Holtzoff. And without the defendant's consent everything in that proceeding has to be done in the division in which it was done.

Mr. Dession. Well, that is true, but if he doesn't consent,

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then I would not worry about him too much in this connection. I think he will, most of the time.

Mr. Holtzoff. I do not like to put it up to the defendant, who is not represented by counsel, to do any consenting.

Mr. Dession. If it is explained to him that the difference between consenting and not consenting is spending the next four months in the county jail, I think he will usually consent, unless he thinks he has some reason not to, and if he would rather play it that way, why worry?

Mr. Holtzoff. But another thing is this. Do we want to carry prisoners, say, 250 miles, from one division or point to another, as you would have it, in the Northern District of Texas to the Western District?

Mr. Dession. Yes, I want to, if it is his alternative of waiting for the court to come to town, for four months.

Mr. Holtzoff. Well, it is these problems that led me to the thought that there ought to be a lot of discretion left in the district court on this whole question.

Mr. Glueck. Well, that puzzled me, frankly, because in this kind of section you really come up against a basic difficulty in the federal system, where you have on the one hand crowded regions and cities, and on the other hand you have these vast territories and infrequent sessions.

Mr. Holtzoff. This is an ideal rule for a big metropolitan center.

Mr. Dession. Well, there is this difficulty, though, and that is, if you do not do it in this way, I rhink the probation investigation, which I am very much interested in, will be a dead letter on paper to the majority of courts--not all, but in

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a majority. Now, I am not interested in dead letters. If we want this kind of investigation I think we ought to try to work it out so that it can be done. That is the only way I can see.

Mr. Holtzoff. I think it can be done perhaps if you authorize such investigations to be commenced at any stage of the proceeding. You see, the way the rule is now framed, the investigation cannot be commenced until the conviction. Now, I see no harm in having the probation officer conducting the investigation even before that time.

Now, I think the difficulty that I suggested--and I think it is a very serious one--could be very largely obviated if we omitted the prohibition against commencing an investigation prior to conviction.

Mr. Glueck. Well, I see lots of harm in that. I do not think it is a fair proeedure, and besides, it is wasteful, because it entails the investigation of numerous cases that will later be acquitted.

Mr. Holtzoff. Well, there are only five percent acquittals or something like that--six or seven percent acquittals in the federal courts. I wouldn't worry about that in the least.

The Chairman. Isn't there a great deal that it would be harmful for the district attorney to know?

Mr. Holtzoff. Well, the attorney wouldn't know. That is for the probation officer,and the district attorney wouldn't have access to the probation officer's report.

The Chairman. He would not?

Mr. Holtzoff. No, not until conviction. He shouldn't.

Mr. Wechsler. The harm that I see in it is to the trying to build up confidence that should exist between the probation

investigator and the defendant before the defendant has been convicted. It seems to me it is destructive to sound probation work, because the defendant speaks, or thinks he speaks, at his peril; and more than that it is a procedure that is clearly susceptible of abuse.

Mr. Holtzoff. I am not convinced we should permit such investigation before conviction, but if we do not, we cannot make it mandatory to have such an investigation in every case, because the only sufferers from such a mandate would be the poor defendants who might be kept in jail for three or six months. I do not think it would always be practical to cart defendants from one division to another.

The Chairman. You could certainly make it mandatory in those divisions and districts where the judges do not move about, at that one place.

Mr. Holtzoff. Oh, there--yes, yes.

The Chairman. And if necessary you could have a rule that said that, couldn't you?

Mr. Holtzoff. Yes. That is why I said this is an ideal rule for a big metropolis.

Mr. Glueck. Is that the rule in different courts?

The Chairman. Yes. I do not see how you can escape it. I mean, the problems are so directly different.

Mr. Seth. In New Mexico, Mr. Chairman, we have lots of illegal entries--coming across the line from old Mexico. They are held in the jails in the southern part of the State, down close to the border, and about once a month the judge goes down there and they round them up, sometimes 20, sometimes 50. They all plead guilty. They go to Latuna, there, close to El Paso,

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and the immigration officers put them across the line after they have served the sentence; and the next day they are probably back; but there is no use having this kind of investigation in that class of cases.

Mr. Holtzoff. No, there is not.

Mr. Seth. There must be a wide discretion given to the district judge.

Mr. Holtzoff. As a matter of fact, most of those Mexicans apply for sentence to that Latuna farm, because Latuna Farm affords them a type of life that is much better than that they have been used to.

Mr. Seth. They used to call it the "Bootlegger's Country Club" at Latuna.

Mr. Holtzoff. I was told that a consul at El Paso visited Latuna and said to the immigration authorities, "Well, how do you ever hope to suppress illegal entries so long as you are running such a fine jail?"

Mr. Seth. They have a radio in every cell.

The Chairman. A radio in every cell?

Mr. Seth. A radio in every cell. Quite a place!

Mr. Wechsler. How much would it help if this were limited to felony cases?

Mr. Glueck. I thought of that and decided that is the way to word it, as I did in lines 9-10--

"in such cases as the court or judge shall designate" meaning by that, either as a matter of general policy or certain individual cases.

The Chairman. Might it not be the misdemeanor cases where most good could be done by probation?

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Mr. Seth. Yes.

Mr. Glueck. That is what I had in mind, as against that simple division. Of course, that might be a beginning; you might arbitrarily draw the line between a felony and a misdemeanor.

Mr. Wechsler. I can't think it would be much good in misdemeanor cases, Mr. Chairman, because the punishment alternatives are not large enough to permit of much more than a rough judgment.

The Chairman. Up to a year in the Hudson county jail,--That is in Jersey City, just to identify it,--would be worse for a man than some long terms in federal prisons. I am concerned about that, because they learn more bad things over there than they probably would in a federal prison.

Mr. Waite. You are right about a great many local prisons being worse than federal jails.

Mr. Wechsler. I am not against probation in misdemeanor cases. I just wonder about the necessity for an extensive investigation, because it seems to me it is used to so great an extent in such cases simply on the ground of the triviality of the offence--and rightly so, I think.

Mr. Glueck. I think Mr. Means had a record of felonies behind him, too.

Mr. Holtzoff. I would like to ask you a question as to why you include an investigation of the prior criminal record by the probation officer? What actually happens is that the district attorney has the F.B.I. record of prior convictions. That is a simple matter. You do not have to refer that subject to the probation officer.

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Mr. Glueck. But in practice it is put into the probation report.

Mr. Holtzoff. Well, the probation officer gets it from the F.B.I. You do not have to have an investigation.

Mr. Glueck. It is much harder in states. I did not realize that.

Mr. Holtzoff. The United States attorney always has the F.B.I. record in a case in which he is going to trial.

Mr. Medalie. Does the F.B.I. have the state records?

Mr. Holtzoff. Oh, yes; the F.B.I. has everything.

Mr. Medalie. I know our probation officer himself makes an investigation as to state offences.

Mr. Holtzoff. The F.B.I. record covers all arrests where fingerprints are taken, irrespective of whether they are federal or state.

Mr. Dession. The F.B.I. record does not always include juvenile institutions. Sometimes when they hear about it, it is there, and sometimes when they don't, it is not.

Mr. Holtzoff. It doesn't include any institution that does not take fingerprints. It is a fingerprinting institution.

Mr. Dession. That is right. So the probation officer sometimes gets these from the defendant himself.

Mr. Waite. I wonder, Mr. Holtzoff, if you can get this--that is, if the officer, even in districts where the court is sitting more or less continuously, where the court can take care of it--do they have a probation service sufficient to make an investigation in every case?

Mr. Holtzoff. They haven't. I do not know of any district where they have enough probation officers to make it possible to

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investigate them in every case.

Mr. Waite. That is a matter that should be of importance to the district judge.

Mr. Holtzoff. Now, of course, that is their difficulty. They are trying to get more money every year to add to their staff, and I hope that before long they will reach that point, but my understanding is today that they have not got a force with which to carry on the pre-sentence investigation in every case, especially since the probation officer performs two other functions as well. He supervises defendants who have been placed on probation by the court, and he also supervises the prisoners released from federal institutions on parole.

Mr. Glueck. Yes, but their aim is to get more, and I think if we had this kind of rule they would be aided in getting more probation officers.

Mr. Holtzoff. I think it would, but yet you can't make it mandatory unless you are sure the facilities will be present.

Mr. Glueck. It is mandatory only in the cases that the court or judge designates as requiring this more intensive investigation.

The Chairman. Mr. Tolman says there are ten or twelve districts in which pre-sentence investigations are now made in every case.

Mr. Holtzoff. Are there that many?

Mr. Tolman. Yes.

The Chairman. I know in my district the probation officer says he is doing that, but it keeps his men working practically five or six nights a week, and they work all day and work all evening to get it done, but he has got to [illegible] that state of

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enthusiasm about it, and it seems to me our rule ought to be predicated on the fact that such is going to be forthcoming. I do not think it ought to be built on the theory that the probation department is going to be undermanned.

Mr. Wechsler. Moreover, if Congress should approve the rule, they would probably provide the funds.

The Chairman. It certainly would lead to it.

Mr. Wechsler. It certainly is not an objection to the rule that the funds may not exist.

Mr. McLellan. In the districts where the judge does not sit in one place only, why shouldn't he go to the place when he is needed and where he is needed, after a probation report has been furnished, for the purpose of sentencing the defendant?

Mr. Holtzoff. I suppose he could, Judge, though taking a district like the Eastern and Western Districts of Kentucky, in each of those districts there are six or seven places of holding court, and by the time the Judge makes the rounds, the time has come for him to start making another round. In other words, it is pretty difficult for him. He does so much traveling, any way, to keep his statutory terms, that he might find it difficult to make additional trips in between times.

The Chairman. Or the single judge of the Eastern and Western District of South Carolina.

Mr. Holtzoff. Yes, that is another one.

Mr. McLellan. I am just asking. I do not know.

Mr. Holtzoff. In some districts he can do that.

Mr. Youngquist. There are consecutive terms in various divisions that keep the judges going from one to another, up in our State.

The Chairman. Of course, the cure for that, in the days of automobiles, will be when Congress gets around to the point of abolishing some of these terms and places where court is merely held because of some statesman's birthplace.

Mr. Holtzoff. The Judicial Conference has advocated the abolition of the statutory divisions.

Mr. Seth. That is what ought to be done. They ought to abolish divisions.

Mr. Holtzoff. Yes, then the judge would be free to go around his district without being required to hold statutory terms in specific divisions; but I am not particularly sanguine about that statute passing, because there is a jealousy on the part of local chambers of commerce, local bar associations, if you please, and so forth.

Mr. McLellan. Then under those circumstances you have got to distinguish between judges that sit in one place, and those that travel about, unless you are willing to say "may" instead of "shall".

The Chairman. I hate to see us go to the "may". I think where it is possible it should be the "shall".

Mr. Glueck. Do you think it is feasible to draft it according to that suggestion--that is, having two different procedures set out in the rule?

Mr. Holtzoff. I imagine it is.

Mr. Glueck. Is it?

The Chairman. Might it be possible to predicate it on some principle that in such districts in a circuit, "as the judicial council of the circuit shall designate"? so that you will have it left to the Council of Circuit Judges to decide

that there is enough manpower in the probation office in a certain district to do it, and in others, that it must be progressive.

Mr. Waite. That ought to be good.

Mr. Youngquist. Wouldn't you run into the danger of finding a Council that would not require it in any case?

The Chairman. I do not think so. I think the Senior Circuit Judges who preside at these conferences are in the main men who are intensely interested in this sort of thing.

Mr. McLellan. Well, why not leave that to the Reporter and Professor Glueck to work out something on that?

The Chairman. May we do that? I really think we cannot decide it tonight.

Mr. Medalie. Before you do that, I want to make a suggestion of law on 81. It is really not of very much importance.

The Chairman. Yes.

Mr. Medalie. Rule 81, line 5, "sentence shall be imposed without delay." That doesn't mean anything. That might mean he should impose it the same day.

The Chairman. You are reading where?

Mr. Glueck. What line are you talking about?

Mr. Medalie. Rule 81.

The Chairman. Now, turn to page 3. We are dealing with the alternative rule.

Mr. Medalie. Have you disposed of that?

The Chairman. No.

Mr. Holtzoff. Right there I might say the present 81 is the Criminal Appeals Rule, but if the alternative rule is adopted, that would supersede 81, I think.

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Mr. Medalie. Would it? Only in part.

The Chairman. We will hold it in abeyance.

Mr. Medalie. Hold the old 81 in abeyance, and the alternate rule?

The Chairman. Now, are there other parts of your alternate rule which you want to comment on, Mr. Glueck, or have you covered it?

Mr. Glueck. I was wondering about this matter, from line 22 down. Some people have objected, beginning with line 26, on the ground, as some probation officers claim, it would create a lot of difficulty for them. Once it got around that the defendant could see this report, it might get them into all sorts of trouble, because they might have recommended certain things to the judge or made certain statements about the prisoner's wife, and all that sort of thing.

Mr. Youngquist. What is the purpose of permitting the accused to see the report?

Mr. Glueck. I thought it was part of fair play.

Mr. McLellan. I do, too.

Mr. Holtzoff. I think it is fundamental in due process that a person should not be sentenced on information that he does not know exists.

Mr. Medalie. "Due process" does not apply here.

Mr. Glueck. Not due process, but it is fair play.

Mr. McLellan. I do not think it is fair that one side should know something that the other side does not know.

Mr. Glueck. Do you think, Judge, in practice, it would get around to the point where every lawyer and every defendant would say, "Let me see that report"?

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Mr. McLellan. No; and in practice, Professor Glueck, so far as my own personal observation goes, if in our district counsel for the defendant wants to look at the probation report, he does that, and he will talk on matters, in sentence, about the contents of the probation report, and the judge has it right there, and so far as one of them is concerned he reads it before he sentences, and he also listens to what both sides have to say about it; but there are places where the probation report is not seen by counsel for the defendant, and he should have the privilege of seeing it, I think.

Mr. Glueck. Now, let me ask you this--would it be just as well, in order to meet the objection of these probation officers, to limit this to counsel? That is, the defendant would be protected through his counsel, and it might avoid individual defendants insisting on seeing these reports.

Mr. McLellan. I think that might be all right. I think that might be all right.

Mr. Longsdorf. Doctor Glueck, is there any possibility of withholding the names of informants and giving out only the information?

Mr. Holtzoff. That can be done in the framing of the report. The probation officer can withhold the names of informers from it.

Mr. Glueck. That would cause a complication. The way the case histories are written up, they are supposed to give the names of the informants.

Mr. Longsdorf. I know there are other statements.

Mr. Glueck. And to make statements as to their reliability, too.

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Mr. Longsdorf. Yes.

Mr. Glueck. And your suggestion would make neeessary a digest of that--one more step, if that is to be done.

Mr. McLellan. There is not much trouble over the lawyers seeing it.

Mr. Dession. I am afraid if you did allow the defendants to see it in all cases, it is somewhat like the problem you have in trying to serve papers on some persons. It includes part of the document. He reads, here, he is "crazy", or something.

Mr. Medalie. May I make a practical suggestion? In rule 81, page 8, you refer to the defendant as a "convict".

Mr. Glueck. That is the other 81.

Mr. Medalie. That is your 81, page 8, rule (3).

Mr. Glueck. Page 8. What was your comment, there?

Mr. Medalie. (reading)

"It shall not be lawful to sentence a convict."

The Chairman. "A defendant."

Mr. Medalie. It should be "a defendant".

Mr. Glueck. It is all right with me, but by that time, he is convicted.

Mr. Medalie. We never call him a "convict". We are all agreed to let it go?

Mr. Holtzoff. We don't even call him a "convict", though he is in prison.

Mr. McLellan. There is something the matter with rule (3) in my judgment. I think it is controversial, but I do not know how you can pass it up and leave it just to the Reporter. I have had cases--maybe it is by reason of my misconduct that this

rule exists--where I thought it was not right to let a man go entirely free from a jail sentence, that the interests of justice would be served if he got just a taste of imprisonment, and that would not be enough for him, because he ought to be watched for a considerable period of time; so I have sentenced him to say three months on the first count, and on the second count, provided for a year's probation, or two years' probation, and I think there are certain kinds of cases, cases where the men are young, that that is a very desirable power; and when you are considering such a rule as that you have to bear in mind, don't you, that where there are two counts on which the defendant is convicted, you can sentence him on each count and make the sentences consecutive?

There is something about that. There must be some abuse that you had in mind, Doctor.

Mr. Glueck. Well, you see the letter right above that, Judge? Mr. Tolman brings out the evil. He says that transforms probation into a sort of policing rather than a rehabilitative measure. What you have in mind, in other words, while desirable, ought to be done as part of parole rather than probation.

Mr. Holtzoff. But the parole law only comes into operation if the sentence is for longer than a year.

Mr. Glueck. That may well be, but I am merely saying it ought to be done.

Mr. Medalie. You have any number of sentences on that theory. There are many cases where a man gets two years or even five years on the first count, or a number of counts, that run concurrently, and then the judge reserves another count and gives him five years more, suspended after the service of the sentence

on the first count.

Mr. McLellan. Well, I think it is desirable; he ought to have that power. It does not need to be exercised always.

Mr. Medalie. There is a tendency for the cases to be uniform in my district, and I suspect, in most other districts.

The Chairman. Mr. Tolman suggests to me that Mr. Chandler, when he read this rule, doubted whether rule 3, paragraph (4), was within the rule-making power.

Mr. Medalie. You mean it fixes sentences?

The Chairman. Yes.

Mr. Glueck. I think that, too. It was merely one of the topics referred.

The Chairman. Well, will the Reporter consider the whole rule, and keep what Mr. McLellan and Mr. Chandler have said in mind?

Mr. McLellan. I did not want to delay you by it.

The Chairman. I think that is important.

Mr. Glueck. What about rule 2 on page 7?

Mr. Holtzoff. I want to say a word about rule 2. It provides that it shall be the duty of the court to give careful consideration to the probation officer's report. I do not think we ought to make such a statement. You might as well provide or have a rule that it shall be the duty of the court to give his careful consideration to the evidence in the case.

Mr. McLellan. And yet there is need for that.

Mr. Holtzoff. You think it is?

Mr. Glueck. Why, certainly it is needed, yes.

Mr. McLellan. I do not want to be preaching about judges, but I am afraid some of them don't pay much attention to it.

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Mr. Glueck. I think there is a difference. They are accustomed to giving careful consideration to evidence that is offered, but they are not accustomed to giving careful consideration to matters of this kind. That is about all you can say.

Mr. Holtzoff. I know they need something of the sort. I am wondering whether it would be wise to put it into the rules. I am through with my judging.

The Chairman. But you can't forget that you were on the bench?

Mr. Wechsler. Mr. Chairman, do I understand that the action was, to refer this whole matter back?

The Chairman. To the Reporter and Mr. Glueck.

We have left, the six rules dealing with appellate matters. That commences with rule 90. I wonder if we may take just a few minutes to glance through them and get some word as to wherein they differ from the previous rules.

Mr. McLellan. May I raise a question of personal privilege? I should like to have it understood that I was speaking in a very general way only when I referred to judges sometimes not paying very much attention to probation reports.

Mr. Glueck. I'll say they don't--and you can leave that in the record.

Mr. Holtzoff. Rule 90 is the same as the corresponding civil rule on this subject. It relates to direct appeals from the district courts to the Supreme Court. The only direct appeal that I know of under existing law in criminal cases is the appeal by the Government from a decision on a demurrer or similar ruling on a question of law, where there is a constitutional question involved or a statutory-construction question

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involved.

Mr. Wechsler. How about where there is a judgment sustaining a special plea in bar, does that language apply?

Mr. Holtzoff. Well, it is the same.

Mr. Wechsler. We have abolished special pleas in bar.

Mr. Holtzoff. There is a direct appeal in those cases also if there is a constitutional question involved.

Mr. Medalie. We can't provide as to when a person has a right of appeal.

Mr. Holtzoff. No, but I am just explaining in answer to Mr. Wechsler's question.

Mr. Medalie. Well, I move it be approved.

Mr. Longsdorf. Second the motion.

(The motion was duly AGREED TO.)

Mr. Holtzoff. Now, rule 91--

Mr. Robinson (interposing). I have a question, there, Alex. Pardon me. I am seeking to go back. But this assignment of errors, in the Southern District of New York, the judges there and others have protested vigorously against continuing the assignment of errors.

Mr. Holtzoff. That is for the Supreme Court.

Mr. Medalie. The Counsel have. I think you were present when they protested at the Circuit Session with the bar.

Mr. Holtzoff. This relates only to appeals to the Supreme Court, and the Supreme Court still requires it.

Mr. Robinson. The question was whether there would be the same point applicable here.

Mr. Holtzoff. I don't think so.

Mr. Medalie. It might be a good idea if we were in some

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way to memorialize the Supreme Court, if it is responsible for the continuance of the requirement of filing assignments of errors in criminal cases, to have it do something to abolish it, because it is a fraud and a nuisance.

Mr. Holtzoff. We do not provide for assignment of errors in any other instance, except on direct appeals to the Supreme Court.

Mr. Medalie. You guarantee you are abolishing assignments, now?

Mr. Holtzoff. I beg pardon?

Mr. Medalie. You guarantee you are abolishing assignments of error in the appeals to the C.C.A.?

Mr. Holtzoff. Well, if these rules are adopted.

Mr. Medalie. Where do you abolish that?

The Chairman. Later on.

Mr. Medalie. You do?

The Chairman. Yes.

Mr. Medalie. Good! Good!

The Chairman. Why not here? Let us press Mr. Robinson's question a minute.

Mr. Holtzoff. The only thing is this. My understanding is, and Mr. Tolman will correct me if I am wrong, that the civil rules Committee hesitated to abolish assignments of errors, in respect to direct appeals to the Supreme Court, because they felt that touched the internal administration of the Supreme Court, and the rules of the Supreme Court provide for assignments of errors, and so they made no suggestion on that.

The Chairman. We suggested to the Court that there were certain anachronisms in the appellate procedure, and the Chief

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Justice said, "Well, point them out to us. We don't see how they could exist." And I related three or four of them to him, and he said, "Why, they manifestly should be changed." So I take it that we are permitted to make suggestions.

Mr. Holtzoff. Well, if that is so, I would like opportunity then of revising rule 90 so as to abolish petitions for appeals as well as the assignment of errors, and permit such appeals to be taken by mere notice, as appeals are taken to the Circuit Courts of Appeals.

The Chairman. Why not?

Mr. Dession. I second that motion. I think it is a very good one.

(The motion was duly AGREED TO.)

Mr. Holtzoff. I am glad you raised the point.

Now, rule 91 relates to making up the record on appeal to the Circuit Court of Appeals, and it represents one of the two or three changes in the present Criminal Appeals Rules. The present Criminal Appeals Rules perpetuate the old-time bill of exceptions. The Civil Appeals Rules, which came about four years later, abolished bills of exceptions. Rule 91 abolishes bills of exceptions, and makes the procedure for that purpose the same in criminal appeals as it is in civil appeals.

Mr. Seth. Mr. Holtzoff, is this intended to be complete, or merely to change the Criminal Appeals Rules in some particulars The reason I am asking that is, you do not specify in this any time for taking the appeal, do you?

Mr. Holtzoff. Oh, well, the time for taking the appeal is not a procedural matter.

Mr. Seth. It is specified in the Civil Appeals Rules.

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Mr. Holtzoff. Oh, yes, your appeals--civil appeals, and all those questions.

Mr. Seth. You take rule 3 of the appeals rules.

Mr. Holtzoff. I am not suggesting any change on that score.

The Chairman. Then ought it not to be all incorporated here as one complete set?

Mr. Holtzoff. Perhaps so.

Mr. Youngquist. Mr. Chairman, I have been wondering for some time whether the Court wants incorporated into these rules of criminal procedure that we are preparing the suggestions for changes in the Criminal Appeals Rules, or whether they want that in a separate communication?

The Chairman. Well, I am not altogether clear on that, but I gathered from my talk with the Chief Justice that they wanted one complete report with a definite indication from us on where we were recommending changes in the appeals rules.

Mr. Holtzoff. Well, I am bothered by the fact that under the Criminal Appeals Act, the Supreme Court may make rules without referring them to Congress, whereas under the 1940 act, rules have to be referred to Congress.

The Chairman. I do not see anything to worry about in that. They are not going to lose their control over appeals rules by submitting the whole block to Congress; and, after all, they are not dealing at arm's length.

Mr. Holtzoff. I had the thought that maybe the two groups of rules should be in two separate documents and all that part of it which is covered by the 1940 act submitted to the Congress.

Mr. Wechsler. Why don't we wait until we get congressional sustaining?

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The Chairman. Yes. The Court should inquire at least whether or not they are sensitive on that point; but I am afraid, practically speaking, that if the appellate rules were submitted, and these were held away from Congress, why, those Congressmen would go up in the air. They would say, "Well, we will pick these to pieces, boys, just to show you what we can do!" you know; but that is up to the Court.

Mr. Longsdorf. Mr. Chairman, that prompts a question that has been in my mind for some time. Should we--are we authorized to--submit these appeals rules as a part of the criminal procedure rules, or have they been referred to us merely for suggestions of changes or amendments to be made in the Criminal Appeals Rules, with the expectation that the Criminal Appeals Rules will stand as a separate code of rules? I do not know.

Mr. Robinson. It seems to me, Mr. Chairman, that our task simply is in the drafting of the rules to see to it that there is as distinct a line as possible, on the one side of which would be rules which we draft clearly under the power of our statute, and on the other side of that line, as clearly as possible, rules which are beyond the particular scope of our statute; and if we will do our drafting with that in mind, then I think we will have to let those other problems take care of themselves as we come to them.

Isn't that about as well as we can do?

The Chairman. In other words, do you want to make it so they can besubmitted or be used as a complete system?

Mr. Longsdorf. Of course I understand these numbers are merely working numbers for our present consideration and working out, and are not at all indicative of what the final numbers

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will be.

Mr. Glueck. But if they are not meant to be a part of an entire system of criminal procedure, does your Chapter IX cover all the problems in the field?

Mr. Robinson. No, it does not. In other words, Chapter IX is obviously incomplete, and I agree with the recommendations that have been made here, and, Alex, I think no doubt agrees with the recommendations made here, that the appeals chapter should be drafted now in the light of whatever recommendations the Committee makes, and combined with the Criminal Appeals Rules, so that they will be harmonious.

Mr. Holtzoff. Yes, I agree to that.

Mr. Glueck. To be presented as a separate document entirely?

Mr. Robinson. When the time comes.

The Chairman. Suppose we leave that open to further instructions.

Mr. Holtzoff. In answer to Mr. Seth's question as to the time for appeals, that is taken care of by Criminal Appeals Rules, by one of the rules as to which I am not suggesting any change.

Mr. Seth. But you said this was intended to be complete, this is a set. That is what I was worried about.

Mr. Holtzoff. Perhaps I spoke too rapidly. This, plus the Criminal Appeals Rules.

Mr. Robinson. Adapting the two to each other.

Mr. Holtzoff. And they are to be dovetailed one with the other.

Now, rule 91 is the rule which does away with the bills of

exceptions and provides for a simple record in its place.

Mr. Dean. I do not think you allow enough time in rule 91. 40 days is the maximum that you can get.

Mr. Holtzoff. That is the time fixed in the civil rules, and there is no reason why in a big civil case--

Mr. Dean. It is not the time in criminal appeals as it stands now, though you can get any amount of time in some cases. If you have got a complicated record, you are going to need more than 40 days in order to take it to the Court of Appeals.

Mr. Medalie. It says:

"but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal."

Mr. Holtzoff. The Circuit Court of Appeals can grant him another extension.

Mr. Medalie. We had better preserve that specifically, because there is much confusion if you do not say it specifically.

Mr. Dean. There is much confusion now because there are certain of the Circuit Court of Appeals rules which specify the time, and whereas the criminal rules now give the judge the privilege of setting the time, within the first 30 days, in which to file a bill of exceptions, he would be inclined to set say 150 days, whereas the Criminal Court of Appeals has already fixed the time in its rules. We should take care of that.

Mr. Medalie. What would happen to your tobacco case?

Mr. Dean. Very much!

Mr. Medalie. I have seen the record, and it could not be

printed within that time. It would be physically impossible.

Mr. Dean. You could not do it.

Mr. Holtzoff. Is this problem different from the problem in civil cases?

Mr. Medalie. Where is the discretion vested in the court by this rule to give a time that is reasonable?

Mr. Seth. The present rule gives a discretion.

Mr. Medalie. I thought we were going to exclude that.

Mr. Seth. It ought to be.

Mr. Holtzoff. The district court may grant a 90-day extension, or an extension up to 90 days from the date of the notice of appeal, and I think there is another provision that the Circuit Court of Appeals can grant another one.

Mr. Medalie. Where is that?

Mr. Youngquist. The last line.

Mr. Medalie. The district court gives 90 days, and I am wondering what would happen in the tobacco case we were talking about, where it is physically impossible for them to print that record in that time. What is it--30 volumes, now, without exhibits?

Mr. Dean. More than that.

Mr. Holtzoff. The printing comes later. This is only the time for settling and filing.

Mr. Medalie. But they cannot do that.

Mr. Dession. It could not be done in that time, though.

Mr. Glueck. What do you propose, George? How would you allow that to be more elastic?

Mr. Seth. The present rules allow the district court to extend it indefinitely, within the first 30 days.

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Mr. Dean. I think that is where it ought to be, because the district court, as no other court, knows what the case is about, and the size of the record.

Mr. Medalie. That is why it is a distinction without a difference. Mr. Longsdorf points out to me that the record shall be filed. That means you can file the transcript. That is right. So it also is a distinction without a difference, if you have only one copy of the record.

If you have only one copy of the record to file with the clerk of the appellate court, how are you going to get that stuff to the printer? Obviously you must have two records, so unless there are two copies of the minutes made through the trial, you would have to sit down and copy it again.

The Chairman. You take the court's record and send it to the printer, and keep your own record.

Mr. Medalie. The court has no record necessarily. Usually they do not.

Mr. Dean. Not unless it is given as a gift by the people who pay for it.

The Chairman. I thought that was something every district court had.

Mr. Medalie. No, that is not.

Mr. Youngquist. Wouldn't the Circuit Court of Appeals allow you to withdraw the record for that purpose?

Mr. Medalie. It might or might not. Why shouldn't he be required--

Mr. Dean. Some of the rules provide now that you can only withdraw a copy, and one must be left there.

Mr. Medalie. You see, if you have only one stenographic

record, and you file that in the appellate court, your job then in order to get this to the printer is first to copy the record that you are going to file in the appellate court. Well, the copying of that record is almost as big a job as having it printed.

Mr. Seth. Just about.

Mr. Dean. Yes.

The Chairman. Of course, the easiest thing to do, obviously, I would say, would be to get two copies.

Mr. Medalie. Yes, but suppose you didn't?

The Chairman. That would indicate that someone in the defendant's counsel's office ought to learn how the mechanics of the case should be run.

Mr. Medalie. I know, but suppose he didn't? Suppose he is limited in his disbursements, or he could only get disbursements for appeal after conviction, which is a normal situation any way?

The Chairman. I should think he could appeal and then get the record back from the C.C.A.

Mr. Medalie. I do not think that would be so easy.

Mr. Dean. I think there is one basic question underlying all these appellate sections, and that is whether we are purporting to adopt a procedure that is followed in the Fourth Circuit and the Court of Appeals of the District, and, I think, in the Third Circuit.

The Chairman. And the First.

Mr. Holtzoff. That is provided in the older rule. I have that here.

Mr. Dean. If it is, have we provided for review by the

Supreme Court in that set-up? because I think they have run into real difficulties where you only have one copy of your original transcript filed in the Circuit Court of Appeals. The Supreme Court has nothing to review, unless it takes the digest of the transcript which accompanies the brief.

The Chairman. Well, that is no problem. I have a case that is coming up next month, in which the record is 7,000 pages.

Mr. Dean. That is, if counsel on the other side stipulate that that shall be the record.

The Chairman. The original record has been filed with the Court, and there are being printed as appendices to the two briefs about 600 pages of testimony. Now, if the Court handles that 600 pages, it has got all that is pertinent. If they conceivably want to find anything in the 7,000 pages, it is there, but the issues which are being raised in the Supreme Court do not involve the other 6,500 pages approximately, and it is perfectly foolish to let the court be burdened with the physical weight of carrying that about.

Mr. Dean. I agree with you, and I think it is a very expeditious way of bringing a case up to an appellate court; but will the Supreme Court, as it is now constituted, or under its present rules, look at the transcript of testimony, or will it only look at such parts of the transcript as are set forth in the appendix to your brief?

The Chairman. We would stipulate that the entire original record filed with the clerk is the record in the case and may be referred to by the counsel in the argument if desired, and by the Court. Now, whether the Court will do it or not, I do not know.

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This is a form of stipulation suggested to me by counsel for the T.V.A., and he says that is the way they have regularly done it in appeals coming up from the Fourth Circuit.

Mr. Dean. Now, you have a problem, don't you, assuming that the court will look at that as your record? Suppose counsel on the other side will not stipulate that that is the record? And I understand that that has arisen in several cases. What do you do then?

The Chairman. I was interested in another case that involved about 5,000 pages, where counsel would not do that, and they printed the whole record on an application for certiorari--and it was denied. I don't know anything about it, but it struck me as the most foolish thing a man could ever do.

Mr. Dean. It was foolish, and that was probably one of the reasons it was denied!

Mr. Longsdorf. Mr. Vanderbilt, have you had experience with the opposing counsel making additional excerpts in the brief, on the contention that yours were not enough?

The Chairman. That is done now in the C.C.A.

Mr. Dean. That is done in the Fourth.

The Chairman. I mean, each side presents his own appendix to his brief.

Mr. Longsdorf. All he wants?

The Chairman. Yes. And in this case, we have also stipulated that if either of us has left out of our printed excerpts of the record in the appendix, we can add it in our briefs.

Mr. Longsdorf. We do that in California, and we do not use those stipulations.

The Chairman. We are stipulating out of an excess of

caution.

Mr. Longsdorf. Well, that is all right.

Mr. Youngquist. That is provided for by these rules.

The Chairman. Yes; and really, from the standpoint of the judges of the Circuit Courts of Appeals, they just "eat it up", because it strips the record of a lot of stuff which from their standpoint is just surplusage.

Mr. Longsdorf. For a long time in the Ninth Circuit we have been doing the same thing in a different way. The record is printed under the supervision of the clerk of the Circuit Court of Appeals, but only so much is printed as is designated by the parties tobe printed. It is selected in about the same way, and a short record goes up, and it is all in one book, and there are ample printed copies left over to be sent up to the Supreme Court in case there is a petition for certiorari.

The Chairman. I did not know the Ninth did it. If they do, then you have practically half the Circuits doing it.

Mr. Longsdorf. Well, they don't--I say, we print the record there in a separate book, and that is filed as the printed record. The transcript is there, too, but not all of the transcript is printed, and the record is printed under the supervision of the clerk of the Circuit Court of Appeals and not under the supervision of the judge of the district court--the transcript.

Mr. Holtzoff. Mr. Chairman, may I revert to a question Mr. Medalie raised a few minutes ago, namely, an extension of time within which to file the record. True, the district court is given only up to 90 days, but the corresponding civil rule from which this is taken has been construed as not depriving

the Circuit Court of Appeals of the inherent power to grant a greater extension, only you have to apply for another extension to the Circuit Court of Appeals instead of to the district court.

Mr. Medalie. It does not appear in the rules, does it?

Mr. Holtzoff. No, but the Circuit Courts of Appeals have so construed the corresponding civil rules.

The Chairman. Is there any reason why it should not do so?

Mr. Holtzoff. I see no reason why it should.

Mr. Medalie. I think that should say so.

The Chairman. Do you so move?

Mr. Medalie. I so move.

(The motion was duly AGREED TO.)

Mr. Holtzoff. With that amendment, I move the adoption of rule 91.

Mr. Dean. I would like to amend it again, and that is to place no limitation on the district court. It seems to me the Circuit Court of Appeals has no basis for determining whether the extension should be granted. The district court is the court that knows how long a record is and the difficulties of getting it up for appeal purposes, and if you go into the Circuit Court of Appeals and make your representation, you can only at the most make certain superficial arguments about the length, and so forth.

Mr. Medalie. That is all they need to know, isn't it--that, plus the exhibits, and the character? That is not difficult to establish.

Mr. Dean. How are you going to get relief from the C.C.A. though if the district judge, who knows all about it, turns you

down?

Mr. Medalie. You have limited his power. It isn't that he is turning you down.

Mr. Dean. That's what I mean.

Mr. Medalie. This rule gives him a limited power.

Mr. Dean. That's what I mean.

Mr. Medalie. In view of his limitation, it would be a question of getting relief only from the Circuit Court of Appeals, which is the only court now, sometimes.

Mr. Dean. If I were sitting on the Circuit Court of Appeals and they came up to me, and the district judge had turned them down, or at least had said, "Gentlemen, I can only give you so many days," I would have no way of knowing whether it should have been more, because I would not have as much knowledge as the man who had tried the case.

Mr. Medalie. Right you are--if the district court turns you down--but under rule 91, the district court can't give you more than 90 days even if he thinks you are entitled to nine months.

Mr. Dean. We make him turn them down, is what you are saying to me.

Mr. Medalie. That's right.

Mr. Wechsler. I second Mr. Dean's motion, anyhow, to give the district court power to grant the extension.

Mr. Dean. That's it.

Mr. Holtzoff. I don't like the idea of having a different practice in civil cases from that prevailing in criminal cases, on the same point.

The Chairman. Is the problem here any different from what

it is on the civil side?

Mr. Dession. Yes.

Mr. Wechsler. One thing, Mr. Chairman--appeals in criminal cases come very frequently in cases of a different sort than you get on the civil side. It may be a matter of simple convenience and necessity not to go further than the district judge in making the application in civil litigation where you have got to appeal; you have got a solid issue, and it is a lot easier to regularize the practice in terms of knowing the Circuit Court.

It seems to me it may still be burdensome in criminal cases to have to do that, the argument of symmetry making it prevail, because of the real issues that may be involved.

Mr. Dean. I would really like to see the present rule for criminal appeals retained; that is, which gives to the district court the opportunity to fix the time at which your bills of exceptions should be filed, and I think the same thing should apply here with reference to your notice of appeal and the filing of your appellate record.

Mr. Holtzoff. I would like to call attention to 8 (b), which gives general plenary power to extend the time, and it is under this provision that Circuit Courts of Appeals have been extending the time in civil cases for the filing of the record. The corresponding civil rule is 6 (b), I think.

The Chairman. Now, you have the motion by Mr. Dean, seconded by Mr. Wechsler.

(The motion was duly AGREED TO.)

Mr. Dean. Don't limit the district judge.

Mr. Holtzoff. I move we adopt rule 91, with the amendments

that have been approved.

Mr. Youngquist. What was the first amendment, now?

The Chairman. The first amendment was to give the C.C.A. power to extend, and the second one is an amendment to give the district court power to extend. The only man who doesn't have the right to grant the extensions is the defendant!

Mr. Medalie. If the district court turns you down, you ought to have a right to go to the Circuit Court of Appeals.

The Chairman. You have got it, under our motion.

Mr. Youngquist. They both apply.

The Chairman. All those in favor, say age.

(The motion was duly AGREED TO.)

Mr. Medalie. Mr. Chairman, isn't it a fact that the balance of these rules with respect to an appeal, except the rule with respect to liability on a bond, deal with this Fourth Circuit practice?

Mr. Holtzoff. No. All of rule 92, to and including paragraph (k) is the same as the civil rule. Paragraph (L) is the Fourth Circuit practice on printing the record.

Mr. Seth. Well, you do away with the bills of exceptions in these rules?

Mr. Holtzoff. Yes, we did that in rule 91.

Mr. Youngquist. I was looking for it. I do not see it. I do not see the elimination of the bills of exceptions in 91, except and unless it may be inferred from the mere fact that you file the record.

Mr. Wechsler. It is in rule 90, isn't it?

Mr. Holtzoff. Rule 92.

Mr. Seth. That is the Supreme Court.

Mr. Wechsler. Oh, you are right.

Mr. Seth. I don't see where it is done away with.

Mr. Youngquist. Unless it is by implication.

Mr. Holtzoff. By implication, and also is included in our rule 92, which describes how the transcript shall be made up, and there is no rule or provision for bills of exceptions, but the new provision is paragraph (L), which is in substance the Fourth Circuit Court.

The Chairman. (L), 92.

Mr. Longsdorf. Now, with respect to (L), I am obliged, on behalf of the Ninth Circuit, to protest against passing that in this way. They would not like it out there, and it is not their way. The clerk of the Circuit Court of Appeals has the record printed there, and I know I am speaking correctly when I say that that is satisfactory. We do it differently in the state courts of California, and just as Mr. Vanderbilt said, the difficulty is in getting transcripts enough to handle your appeal.

Mr. Vanderbilt has said "Two." My own experience is that three are hardly enough, because each party to the case wants one of the transcripts on which to make his discussions, and one has got to be filed, and even then, the printer is left out in the cold. Now, the way it is done in the Ninth Circuit is, when that transcript is filed, the parties then designate what parts of the typewritten transcript filed as the record on appeal are to be printed, and when they have made those designations, the appellant designates his, then the appellee designates what additional he wants if any, or they may stipulate, and then the clerk in the Circuit Court of Appeals takes that

down to the printer and supervises the printing.

Then the C.C.A. judges have all the record that they need to read contained in one book, and there are ample copies to go around. Sixty of them are printed, and there are enough left over to file in the Supreme Court if you apply for certiorari. The thing works, and they do not want it changed.

Mr. Dession. Well, it works very well if your parties can print a record, but when you have to publish books at the rate of anywhere up to a hundred thousand on some appeals in order to have an appeal, it becomes a little bit silly, I think.

Mr. Longsdorf. You don't print the entire transcript. You reduce it, just as you do by excerpting it in the briefs, but you get enough copies.

Mr. Glueck. Suppose you can't get the parties to agree as to how much they put in?

Mr. Longsdorf. They say how much they want printed, and if they want too much, they have to pay for it.

The Chairman. The Circuit Court rule is, the moving party prints what he wants; hence, if he prints too much, he has either to pay the cost of it or get called down by the court, or both. Now, if he doesn't print all that the respondent needs, the respondent prints what he wants.

Mr. Longsdorf. We have been doing that thing in California for years.

The Chairman. And it saves all that interminable business of counsel getting together and figuring out what shall be printed.

Mr. Longsdorf. I know.

The Chairman. Or having to go in to the judge and having

the judge necessarily decide.

Mr. Longsdorf. I know that.

The Chairman. And getting the judge so sore at you on account of the nuisance of making him do it that when your case comes up you have already got two strikes against you before you go to bat. It is just nonsensical from that standpoint. That is relieved by this.

Mr. Youngquist. Do we not have a duplication between (a) and (L)? (a) provides for designation of the parts of the record to be printed, and (L) provides that either party may print the record.

Mr. Holtzoff. No. (a) is a designation of what is to be included in the record to be filed.

Mr. Youngquist. To be filed--I see.

Mr. Holtzoff. So you don't reach any of that part of it there, Mr. Youngquist.

Mr. Dean. Why shouldn't the entire record be filed?

The Chairman. It is.

Mr. Dean. Then why do you have to have a designation as to what portions of it shall be filed?

Mr. Longsdorf. No, we don't file the entire transcript, unless it is necessary.

Mr. Holtzoff. Suppose you go up on a question of law?

Mr. Dean. Don't they, in the Fourth Circuit, file an entire copy of the transcript?

Mr. Seth. Yes.

Mr. Dean. Beginning with the selection of the jury, right on through to the last?

The Chairman. The whole thing.

Mr. Longsdorf. There are plenty of appeals that go up in California without a word of transcript, where it is only on the law and the pleadings.

Mr. Dean. Should not (a) therefore be re-worded?

Mr. Holtzoff. The civil rules do not require the entire transcript to be filed. They provide that only those portions shall be filed which counsel designate. Then under the Fourth Circuit rule, when it comes to printing, as I understand it, each counsel prints in the appendix to his brief so much of what has been filed as he wants to.

The Chairman. I have struggled through the old method that we have had in the Third Circuit, the traditional method of printing everything, and I have also struggled through the days when you reduced everything to narrative form.

Mr. Longsdorf. That was worse.

The Chairman. And when this Fourth Circuit thing was devised, the judges in the Third Circuit couldn't see it at all. They only adopted it after the Court of Appeals in the district had; and within the last year it has been adopted in the First Circuit, and the judges in every circuit that has it prefer it because it reduces the amount of their paper work.

Mr. Longsdorf. We prefer it to the old system, but I think the way they print the record in the United States Circuit Court of Appeals in the Ninth Circuit accomplishes the same result, and is still more convenient.

The Chairman. That is all right if you are both in San Francisco, but suppose one is up in Portland, Ore., and the other is down in Los Angeles, it isn't so easy, is it?

Mr. Longsdorf. Well, you have got to exchange praecipes

designating the parts you want included.

The Chairman. I have gotten into more bull-fights over what records shall be printed than I have in the course of all the trials I have ever been in.

Mr. Seth. Mr. Holtzoff, aren't 92 (L) and 93 a duplication?

Mr. Longsdorf. Yes, more or less.

Mr. Seth. 93 seems to be much more complete than 92 (L). They look like the same thing.

Mr. Holtzoff. 93 is a little more detailed. I think (L) of 92 covers everything.

The Chairman. On 92 (L), Mr. Dean, the clerk of the Fourth Circuit, has published an address that he gave at some one of their judicial conferences.

Mr. Dean. I read that.

The Chairman. And they are really grateful, and from the standpoint of the litigants it cuts down their printing bills to about one fifth or one sixth of what they normally would be. It is certainly worth saving.

Mr. Dean. Oh, I agree with you absolutely. I read that, and the only question I had was when you got to the Supreme Court, whether you ran into any difficulties.

The Chairman. Well, I asked Judge Parker about it, and he said they never had had any complaint from the Court, and these two cases that I have had from the Fourth Circuit seem to have worked out all right.

Mr. Longsdorf. I might add that the whole process of appellate procedure in California is under revision by court rules at the present time, and I do not know what they are going to do about it. I tried to find out, but I couldn't get any

inkling.

The Chairman. Is that in the Ninth Circuit?

Mr. Longsdorf. No, no, in the state courts.

The Chairman. Oh, in the state courts.

Mr. McLellan. There is one thing in these rules taken from the civil rules that I think is perhaps of some consequence, but it may be merely personal to me. The rule gives the district judge among others the right to call the attention of the Court of Appeals to misstatements in the record, either early, or after the case has been entered in the Circuit Court of Appeals. There is no provision however for the judge seeing the record.

About three or four weeks ago I had the experience of a lawyer who was filing his brief thinking that he would send a copy of it to me, and he sent a letter saying that he enclosed it, but unfortunately for me, he sent the record instead of his brief, and it was just as full of errors and misstatements as it could possibly be. Both sides had agreed to it. The punctuation in the judge's charge was such that it was utterly senseless, and under that rule, because I happened to see it, I called the attention of the court to it, and counsel, who made all the changes that I suggested.

Now, I do not believe that a judge should have any power--the trial judge--with reference to the record, as he did in the case of a bill of exceptions, but I think you serve the interests of everybody if the rule provided that he shall have a chance to see the record before it goes up, and the stipulation as to what should be a part of the record, to the end that he may suggest to counsel that the errors therein be corrected in the early stages, instead of having to do it through printing the changes later in

case the judge happens by chance through somebody's mistake to see it, and to see some misstatements in the record.

I think that is one of the defects in that rule, but it may be just because I am always anxious to see what somebody says that I have said.

Mr. Dean. I think that is rather important, since we are abolishing bills of exceptions.

Mr. Robinson. Certainly.

Mr. Dean. That is, the procedure under which they were filed with the district judge.

Mr. Robinson. Yes, and signed by him.

Mr. Dean. And since the errors are often errors of law made largely by the trial judge, it seems to me he should have some opportunity to glance at it.

Mr. McLellan. Yes, not to say what should go up, but to see it, to the end that he may act under the rule, if the lawyers won't correct the misstatement, and of telling the Circuit Court of Appeals what the errors are.

The Chairman. You make that as a motion, Judge--some such provision?

Mr. McLellan. Yes, I do, the language to be left to the Reporter.

Mr. Dean. I second it.

Mr. Longsdorf. May I interrupt for a question? You are leaving the provision of paragraph (g) in this rule (92), the record to be prepared by the clerk and certified?

Mr. McLellan. Yes, but I refer especially I think to (h), which provides that the parties or the district judge, either before or after the record is transmitted to the appellate

court--

Mr. Longsdorf. Yes.

Mr. McLellan. That the appellate court, on proper suggestion, or of its own initiative, may direct that an omission or misstatement in the record be corrected.

Mr. Longsdorf. Under this similar practice that we have in California, the judge certifies the reporter's transcript, just as he did a bill of exceptions.

Mr. McLellan. Well, he doesn't do that here.

Mr. Holtzoff. The civil rule to which you refer, Judge, is it not the provision in (h)? Isn't that the same as the civil rule?

Mr. Youngquist. Yes, that is what he said.

Mr. McLellan. Yes, but how is he going to know about the misstatements, unless he sees the record?

Mr. Longsdorf. The clerk certifies it and sends it up, and that is the end of it. He doesn't see it at all.

Mr. McLellan. No, he doesn't see it at all; and he ought to have the opportunity, because he sometimes can help counsel and be perfectly willing to correct his misstatements.

Mr. Youngquist. By the way, the clerk prepares the record, under (g), and I suppose the judge coulr arrange with the clerk to see the record before it goes up. Would that be sufficient protection for the judge?

Mr. McLellan. No, I do not think the judge wants to go around asking for the privilege of looking at a record.

Mr. Youngquist. No.

Mr. McLellan. I think it should be made a part of the rule that it should be submitted to him, though not passed upon by him

Mr. Youngquist. I did not mean that, but simply to give the clerk instructions to submit all records to him, in view of the contents of (h), which gives him the right to suggest the record.

Mr. Longsdorf. The practice under (g) corresponds to the California practice. The clerk simply certifies the record, not the reporter's notes. The clerk certifies that, then the reporter's notes are certified by the reporter, and the clerk sends the whole thing to the judge.

Mr. McLellan. We don't know anything about it.

Mr. Holtzoff. To bring it to a head, may I move that rule 92 be approved as it is in the draft, with the addition of an amendment to cover the point suggested by Judge McLellan.

Mr. Robinson. Second.

Mr. Longsdorf. Now, just wait a minute. I want to add something else. I think there is an error in (g) here that I should have called to your attention sooner. Rule 92, page 2, paragraph (g)-

"but shall always include, whether or not designated, copies of the following: the material pleadings* *"

That is a little bit uncertain, or ambiguous.

"--without unnecessary duplication"

Then -

"--the judgment;"

Nothing about the defendant's plea, or the verdict, and that ought to go in. You can't have a complete record without that.

Mr. Holtzoff. Well, the judgment shows what the verdict was, of course.

Mr. Longsdorf. How's that?

Mr. Holtzoff. The judgment shows what the verdict was, of course.

Mr. Longsdorf. Well, how about the plea?

The Chairman. It is part of the pleadings.

Mr. Holtzoff. It is part of the pleadings.

Mr. Longsdorf. Well, is it a pleading?

The Chairman. Yes.

Mr. Medalie. No, no, that ordinarily goes in. The clerk sends in the minutes. That shows everything that happens in the case.

Mr. Holtzoff. They do not do that in all districts.

Mr. Medalie. They do not?

Mr. Holtzoff. They do in some.

Mr. Dean. After all, this is only a matter--

Mr. Medalie. You see, you are going up on the judgment roll, and you want to have everything that happened. These appeals are appeals on the judgment roll, because it includes every intermediate step, and there is no appeal on any of the intermediate steps, until you have the judgment roll.

Mr. Longsdorf. How have we got a record of what the verdict was?

Mr. Medalie. I move the minutes, certified by the clerk, be included.

Mr. Holtzoff. They are not included in the civil rule.

Mr. Medalie. Well, of course, I know they are not, but it has been the custom in many many jurisdictions to include them, because your appeal is on the judgment roll.

Mr. Holtzoff. I have no objection.

Mr. Medalie. I move they be included.

Mr. Holtzoff. I will make that as part of my blanket motion.

Mr. Medalie. All right.

Mr. Holtzoff. That we include the minutes.

The Chairman. All right, Mr. Holtzoff accepts that, and we have Judge McLellan's motion. All those in favor of the motion to amend 92, say aye.

(The motion was duly AGREED TO.)

The Chairman. 93 has been covered by 92 (L).

That brings us to 94.

Mr. Holtzoff. That is similar to the corresponding civil rule, and just makes it easier to enforce a simple procedure.

Mr. Medalie. All right, where is your procedure for the supersedeas bond?

Mr. Holtzoff. That is contained in the Criminal Appeals Rules. I am only including those appeals rules which I am suggesting be changed, rather than carrying them all.

Mr. Longsdorf. May I call attention to a difference here between 92 (L) and 93? 93 reads:

"Unless ordered by the circuit court of appeals it shall not be necessary to print the record on appeal in any criminal proceeding."

92 (L) reads:

"Unless ordered by the court it shall not be necessary to print the record on appeal."

Which court are you talking about in 92?

Mr. Holtzoff. You want to change that? That ought to be "circuit court". Of course, it was intended to be "circuit court".

Mr. Longsdorf. Well, I thought so.

Mr. Holtzoff. Shall we change it by consent?

Now, we are ul to rule 94, Mr. Chairman, which relates to the simple enforcement of supersedeas bonds.

Mr. Longsdorf. What became of 93, may I ask?

The Chairman. It is out. It is a duplication of (L).

Mr. Holtzoff. That is out.

Mr. Longsdorf. Out?

Mr. Youngquist. And in 94, line 3, "the court", by notation. Is that the Circuit Court of Appeals or the district court, or is that dealt with in a preceding rule that does not appear in this volume?

Mr. Dean. I assume it is the district court.

Mr. Holtzoff. I think it would be whichever court takes the supersedeas. That is my opinion.

Mr. Longsdorf. Which court clerk is the agent?

Mr. Holtzoff. Whichever court takes the supersedeas, I will say.

Mr. Medalie. Why don't we say it, and make it clear?

Mr. Dean. Doesn't the judge of the district court ordinarily take it?

Mr. Holtzoff. Ordinarily, the district court takes the supersedeas, but sometimes the Circuit Court of Appeals will.

Mr. Medalie. Why don't you say the clerk of whichever court takes the supersedeas bond?

The Chairman. The jurisdictional court accepting the supersedeas.

Mr. Longsdorf. The judgment ought to be entered by the clerk where the case started, and that would be the district

court. When it goes back the minute can be entered, "Judgment on the motion by summary judgment."

Mr. Seth. 94 would not have to cover both bail and supersedeas bonds. The Circuit Court of Appeals rules limit the supersedeas bonds to fines. They designate the appearance bail in separate rules pending appeal. Ought not this to cover both?

Mr. Longsdorf. You mean bail on appeal?

Mr. Seth. Bail on appeal, yes.

Mr. Holtzoff. Well, the supersedeas bond is equivalent to bail pending appeal, isn't it?

Mr. Seth. Well, look at rule 6. It is distinguished. The trial court may stay the execution of any sentence of fine or costs, and it may require the defendant pending appeal to pay the fine, submit to an examination of his assets, or give the supersedeas bond.

Mr. Holtzoff. Well, if he does not give a supersedeas bond, the defendant stays in jail.

Mr. Seth. This relates only to the fine.

Mr. Longsdorf. The appeal stays the execution of the sentence. There is nothing to supersede there.

Mr. Holtzoff. No, butthe supersedeas bond is so, as I understand it, if the defendant is to be released from custody pending appeal.

Mr. Dean. That is a bail bond.

Mr. Seth. The trouble here is, the supersedeas is used to stay the execution of the fine.

Mr. McLellan. Why don't you cover both?

Mr. Seth. That is what I say--"supersedeas or bail bond."

Mr. Holtzoff. Yes, sir, I think we should.

The Chairman. All right, a motion is made to include bail bonds as well as supersedéas bonds on appeal, in rule 94.

Mr. Dean. I second it.

(The motion was duly AGREED TO.)

MR. HOLTZOFF: I move, with that amendment, the rule be adopted.

Mr. Medalie. At whichever court he happens to file the bond in. I think that the provision, however, ought to be for his filing the bonds only in the district court. The circuit court isn't going to.

The Chairman. Well, we define "court" to mean the district court, so that is all right.

Mr. Medalie. Well, is it clear that the supersedeas and the bail bond are both filed in the district court? If it isn't, it ought to be so, because the clerk of the circuit court can't go around to the various districts enforcing bail bonds or supersedeas bonds and collecting fines.

The Chairman. Subject to a check-up on that, may we have a tentative acceptance?

Mr. Medalie. Yes, sir.

The Chairman. All those in favor of the motion say aye.

(The motion was duly agreed to.)

Mr. Holtzoff. Now, rule 95, "Definitions," really duplicates in a sense the general definition section of these rules, in part, not in whole, of these rules, and I think if we are going to have just one set of rules, you do not need rule 95.

The Chairman. It can be combined with rule 1.

Mr. Holtzoff. Yes, I think so.

Mr. Robinson. I think so.

Mr. Medalie. Computation of time, lines 11-13. If you give somebody 40 days or 90 days, and the time is extended, and you give them nine months, or let us say 180 days, why should you exclude Sundays and legal holidays? That is no place for excluding them.

Mr. Holtzoff. Well, that is the President's rule.

Mr. Medalie. It is a poor rule.

The Chairman. If the last day on which you happen to act happens to be Sunday or a holiday--isn't that right?

Mr. McLellan. Yes, or when the time is less than seven days.

The Chairman. Yes.

Mr. Medalie. Well, you have no such time here. The time is specified in the foregoing rules.

The Chairman. We have got an earlier rule on that.

Mr. Holtzoff. Rule 8 (a) covers that, and I think this second paragraph becomes unnecessary.

Mr. Medalie. All right, I move to strike it out.

Mr. Seth. It is taken from the present appeals rules, this part.

Mr. Robinson. That is right.

Mr. Longsdorf. If this is all part of one whole system of rules and one complete whole, then the foregoing rules, occurring on page 95, overlap the rule we have got away up in front of this.

The Chairman. That's right.

Mr. Longsdorf. If these rules apply only to the chapter on Appeals, then they should be so worded, so as only to apply.

The Chairman. We can't do that yet, until we know what

the court wants us to do with the situation. It is our problem, so we will have to get a very tentative approval of this, knowing that it may or may not be combined with rule 1, with rule 8, or possibly may be made separately.

Now, as I understand it, the last paragraph is the only new part.

Mr. Holtzoff. That is right.

The Chairman. So far as the criminal appeals rules are concerned?

Mr. Holtzoff. Well, no, only the last clause of the last paragraph is new, including proceedings to punish for criminal contempt of court. That is to cure the defect pointed out in the Nye case.

The Chairman. I see.

Are there any other questions on this rule?

Mr. Holtzoff. I move it be adopted, Mr. Chairman, with the omission of paragraph 2, and subject to consideration of its being combined with rule 1.

Mr. Youngquist. Yes.

Mr. Longsdorf. And the correction of the rule, and permitting in this other unforeseen rules that might be misleading.

Mr. Holtzoff. That is a matter for the committee on style.

Mr. Longsdorf. Yes, I think so.

The Chairman. All in favor of the motion, with this amendment and modification, say aye.

(The motion was duly AGREED TO.)

The Chairman. I cannot think of any rule we have not covered.

Mr. Medalie. There may be a few odds and ends we will

want to put in--for example, stating what is to be done on a motion in arrest of judgment.

Mr. Holtzoff. We have no rule on arrest of judgment, and no rule on grand jury, as yet.

Mr. Medalie. Also such things as viewing the premises, as to which there ought to be specific authority.

Mr. Longsdorf. Indeed there ought.

The Chairman. I would like to suggest this--that the Secretary write a letter to each member, which would reach him probably as soon as he gets home or be there waiting, asking him to suggest any topics that he thinks of that should be included that we have not touched so far.

Mr. Longsdorf. If that is a motion, I second it, and I hope it will be worded broadly enough.

The Chairman. Let us proceed to the restcof the program. I think any of the matters that we have covered today that seem to be controversial so far as the members of the Committee are conecrned, as soon as they are redrafted, should be sent out to all the members of the Committee, so that we can see whether the third redrafting embodies a meeting of the minds. I do not mean by that, if you are on the losing side of a motion, that you should argue it over again, but to see whether or not the rule expresses the sense of the meeting.

Mr. Longsdorf. The same questions will be open as on a motion for rehearing on appeal?

The Chairman. No. 3: That as soon as we get a return or an expression of opinion on those things, that the Committee on Style start to operate, and as fast as they can get the matter in shape, that another tentative draft be sent out to all the

members of the Committee, and we will arrange for a final meeting before the report is submitted to the Court. I take it, after that it will be for the Court to determine whether or not it is to be printed and circularized to the bench and bar, and then, from then on.

Mr. McLellan. Are you deciding whether to hold the meeting in Washington or some place else where the hotal accomodations are more suitable?

Mr. Medalie. Thank you for that. I was about to put it.

The Chairman. Chief Justice Hughes expressed the desire that our meetings be held here. I do not know whether that commandment continues or not under the present conditions. Perhaps I may talk to Chief Justice Stone about it. I take it your favorite meeting place is Atlantic City?

Mr. McLellan. That is it.

Mr. Seth. Hoboken, we figured on!

The Chairman. Well. Why dissent from anything in Hudson county?

Mr. Holtzoff. How about Essex county?

The Chairman. Oh, that is all right. We will see you are well treated in the hotels and clubs.

Does that general program meet with the approval of the committee? If it does, we will consider it accepted tentatively.

Mr. Longsdorf. Can we have any forecast about when the next gathering will be?

The Chairman. That, I should think, would probably depend on the reporter.

Mr. Robinson. And Mr. Holtzoff, and all of our staff, and how fast we can work.

Mr. Waite. I understand the Reporter is to sail for Singapore on a battleship. I do not know whether the war will be over by then, or not.

The Chairman. I think the Chief Justice ironed that out with the Secretary of the Navy.

If there is nothing more, gentlemen, I think we can adjourn and notify everybody of course at the earliest possible moment when it is likely that we will have another committee meeting.

That is all. I think a motion to adjourn is in order.

(The motion was duly AGREED TO.)

(Whereupon, at 10:30 p.m., the Committee adjourned.)
