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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.,

Wednesday, May 20, 1942.

GEO. L. HART
EDWIN DICE
LLOYD L. HARKINS,
OFFICE MANAGER

HART & DICE
SHORTHAND REPORTERS
416 FIFTH ST. N. W.
SUITE 301-307 COLUMBIAN BLDG.
WASHINGTON, D. C.

TELEPHONES
NATIONAL 0343
NATIONAL 0344

DARROW
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Wednesday, May 20, 1942.

The Advisory Committee met at 10:00 o'clock a.m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt, presiding, pursuant to adjournment from yesterday.

Present:

Arthur T. Vanderbilt, Chairman

James J. Robinson, Reporter

Alexander Holtzoff, Secretary

Leland Tolman, Assistant Secretary

George J. Burke

Gordon Dean

George L. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. C. Seth

John B. Waite

Hugh D. McLellan

C. Aaron Youngquist

George Longsdorf

Herbert Wechsler

John J. Burns

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P R O C E E D I N G S

The Chairman. All right, gentlemen, we will start will Rule 36. Any questions? Rule 36, paragraph (a).

Mr. Holtzoff. I move it be adopted, Mr. Chairman.

Mr. McLellan. May I just ask a single question? Does that mean the clerk's office is open Saturday afternoon?

The Chairman. Yes. During business hours. In many districts Saturdays are half holidays.

That is taken from the civil rules, I believe.

Mr. McLellan. I second the motion.

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

Opposed, "No."

Carried.

36 (b).

Mr. Youngquist. I move it be adopted.

Mr. Holtzoff. I second the motion.

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

Carried.

Rule 37 (a).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. Seconded.

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

Carried.

Mr. Youngquist. I move the adoption of (b).

Mr. McLellan. You don't want to put the word "lawful" before the word "manner"?

Mr. Youngquist. I wouldn't think so.

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Mr. McLellan. I don't think it is necessary. I second the motion.

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

Carried.

Rule 38.

Mr. Longsdorf. I suppose those files rules will be judicially noticed by the appellate courts all the way through, won't they?

The Chairman. They always have been.

Mr. McLellan. I move the adoption of 38.

Mr. Holtzoff. Seconded.

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

Carried.

Rule 39.

Mr. McLellan. With hesitation I move the adoption of 39.

Mr. Youngquist. I second the motion.

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

Carried.

Rule 40.

Mr. McLellan. Is that taken from the civil rule?

Mr. Holtzoff. Yes, sir.

Mr. McLellan. I move its adoption.

Mr. Seth. Seconded.

Mr. Seasongood. Well, just a matter of phraseology, "at the time the ruling * * * is made".

"before", isn't it?

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Mr. Youngquist. In line 4?

Mr. Seasongood. Yes; "at the time"--

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

Carried.

Rule 41.

Mr. Youngquist. I move its adoption.

Mr. Holtzoff. Seconded.

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

Carried.

Rule 42 (a).

Mr. Waite. I just have this question:

What is a holiday under the federal rules?

Mr. Youngquist. I have raised that question before.

Mr. Waite. Did you get an answer?

The Chairman. I have heard it said there are no federal holidays but we follow the rule of the state law.

Mr. Longsdorf. I think the holidays are defined by the state law and that has to be followed on the civil side, and I guess we might as well.

Mr. Holtzoff. This is the same rule as the civil rule.

Mr. McLellan. I move its adoption.

Mr. Youngquist. I second it.

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

Carried.

42 (b).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of adopting 42 (b) say "Aye." Opposed, "No."

Carried.

42 (c).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. Seconded.

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

Carried.

42 (d).

Mr. McLellan. I move its adoption, sir.

Mr. Holtzoff. I second it.

The Chairman. All those in favor say "Aye,"----

Mr. Medalie. There is only one trouble with that--no, there is not.

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

Carried.

42 (e).

Mr. Longsdorf. There is only one question in my mind about 42 (e) and that is whether the time is sufficient where the notice would be transmitted across the continent. If you do not have air mail, 3 days and 3 days is not enough.

Mr. Medalie. Why don't you leave that to the court, say "unless otherwise provided"?

The Chairman. We already have an enlargement of time provision.

Mr. Youngquist. I move its adoption.

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Mr. Holtzoff. Seconded.

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

Carried.

43.

Mr. Youngquist. I have a question about the phraseology of that. It may be more than phraseology. "The forms contained in the Appendix of Forms are intended to be illustrative and sufficient but not mandatory."

What is the meaning of "intended to be * * sufficient"?

Mr. Robinson. I would suggest we substitute for "intended to be", substitute "presented as".

The Chairman. Why not leave out all of it?

Mr. McLellan. Well, you want to leave the words in, "and sufficient".

Mr. Youngquist. Yes.

The Chairman. Why do you need to do that? You surely would not be accused of having no intention. Why not say, "The forms * * * are illustrative but not mandatory"?

Mr. Youngquist. All right. That is fine. I move its adoption.

Mr. Holtzoff. Seconded.

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

Carried.

Rule 44.

Mr. Medalie. That should be the last rule, whatever the last rule is.

I think the number of that would become 60, wouldn't it?

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Mr. Robinson. We have the same problem, Mr. Medalie, about the matter of keeping the appellate rules separate from the other rules.

Mr. McLellan. I move the adoption of 44.

Mr. Holtzoff. I second the motion.

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

Carried.

Mr. Youngquist. We have given up the idea of trying to find an abbreviation.

Mr. Waite. It is a good thing.

Mr. Wechsler. Mr. Chairman, is this a good time to refer to 37 (b) before getting to the appellate rules?

I understand 37 (b) was adopted as it stands, and yet it seems to me self-evident that 37 (b) cannot be adopted as it stands, because what it does is to supersede every statute of the United States in cases not covered by the rules.

Mr. Robinson. I think that should be taken care of by adding after "rule" "or by statute"; and at the end of line 8 insert the words "or statute".

Now that Mr. Dession is here I would like to refer that to him.

Mr. Dession. Yes. I am not sure we would want to perpetuate all of the statutes. That is the difficulty.

Mr. Medalie. Of course it is possible that this would be enacted, with procedure after the adoption of these rules.

Mr. Holtzoff. Judge McLellan had a suggestion, I believe, to insert the word "lawful" after the word "manner".

Mr. McLellan. Preceding the word "manner".

Mr. Holtzoff. Preceding the word "manner".

Mr. Wechsler. I wonder if that would not introduce a criterion as to what the manner of lawfulness was to be.

Mr. McLellan. I think very likely. I think that I said it just to say something, perhaps, but I think it would improve it.

The Chairman. I would rather doubt it.

Mr. McLellan. What?

The Chairman. I rather doubt that you said it just for that purpose.

Mr. Dession. Well, here are some of the statutes this might seem to repeal.

First, you have a conformity act according to the usual mode of process, and so on.

Then you have a similar condition dealing with the Philippines. I guess we don't have to worry about that for the moment.

Then you have a statute as to selection of jury lists.

Then we have a few rules of evidence.

Those are the main ones. Broadly, there are a good many things we have not touched within these rules, of a procedural nature.

So we preferred to leave existing law as it was in a good many instances.

This repeals that existing law, or could be so read, which leaves a vacuum, and the district court would seem to be invited to do as it chose.

You will get a great lack of uniformity on some of those things.

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Now, my feeling is that we might be better off without this section, because as it stands--I think all we are trying to do with it is to suggest to the court that it work out some practical method of handling any detail which these rules do not extend to.

In other words, to apply these rules in a practicable way.

I think that is all we meant, isn't it?

Now, I don't think we need a rule to tell them to do that. The court has to do that with any set of rules.

Mr. Holtzoff. I was going to suggest that we might add at the end of line 8, "not inconsistent with these rules or any applicable statute."

Mr. Dession. Well, that I think would be entirely safe but as a matter of draftsmanship it seems to be an unnecessary admonition, because all it boils down to is asking the court to use common sense and realize we have not spelled out every detail that could arise.

Mr. Wechsler. I wonder if it is as simple as that.

There are statutes in large matters which are not touched. Presumably we either want to change these rules, let the rules stand, or set the court free in individual cases to follow them or not follow them as the court chooses, and it is not clear to me what choice we want to make, at least without considering what the statutes are.

In other words, this rule really puts at issue the scope of the total set of rules and unless you think the total set is wrong, it seems to me you hesitate unnecessarily in making up your minds about this rule, but the safe thing to do is to perpetuate all the statutes which you do not know about.

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That seems to me preferable than repealing statutes which you don't know about.

Mr. Dession. I think that is right.

Mr. Wechsler. I don't think either course is right--

Mr. Holtzoff. May I make a motion?

I move that at the end of line 8 the following words be added, "or any applicable statute."

Mr. Waite. Supported.

The Chairman. Do you think that covers the point you had in mind, Mr. Dession?

Mr. Dession. That covers it provided that a complete check of all statutes is made.

Mr. Holtzoff. For this purpose we would not have to make a check of statutes. It would apply wherever there is a gap in these rules.

Mr. Dession. We want to make sure what we are perpetuating before we get through.

The Chairman. That is true.

Mr. Wechsler. Well, is it true that it is in rough conformity with state practices, incomplete, but in principle it guides the court? It does in rough principle conform.

Now, one thing that you want to decide is in the hiatus where there is no statute, whether you want to continue the principle of conformity or set the courts free to depart from conformity.

I am not clear but I think that is another angle.

Mr. Holtzoff. Wouldn't that be covered by inserting in the rule which advocates the statute, the conformity statute?

Mr. Wechsler. There is no conformity statute on the

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criminal side.

Mr. Holtzoff. There is--

Mr. Seth. Not on the criminal side.

Mr. Holtzoff. Oh, yes, there is.

Mr. Wechsler. What section number?

Mr. Holtzoff. I don't recall the section number.

It is worded in a very general way but it has been interpreted as a conformity statute. It is in Title 18.

In civil procedure the courts cut forth entirely from conformity and I venture to say it is better to do that on the criminal side.

Now, if the amendment I suggested is adopted it will accomplish your object, I think; it will unshackle the courts from any conformity.

Mr. Wechsler. Well, on the other side it will perpetuate.

Mr. Youngquist. If we advocate that statute, it will be out of the way.

Mr. Robinson. (a) and (b) as we have drawn them are substantially, if not exactly, the same in their results as Rule 83 of the district courts, that is, the civil rules, and they in turn, as Mr. Tolman informs me, are based on Rule 84 of the Admiralty Rules, which was originally formed just a hundred years ago, 1842.

It seems to me we can report on 37 (a) and (b) and it would not be any source of difficulty.

Mr. Dession. Well, if by "difficulty," Mr. Robinson, you mean litigated points on appeal, I think it is quite probable that we might not get a wealth of those, we might not find any evidence of difficulties, in that sense.

gll

But I think this does leave a district court without any particular policy guide.

Mr. Robinson. Don't you think, Mr. Dession, this is a situation where the rules from time to time come into play, that is,--

Mr. Dession. It can change the procedure to do so. But under the Admiralty Rules or Civil Rules--

Mr. Seth. It seems to me we are going to trust the district courts on a good many other things, and why not on this one?

Mr. Robinson. Right.

Mr. Longsdorf. Mr. Chairman, I think our policy should be to make our rules so that the courts and the lawyers will gravitate toward local rules wherever they are conformable to principle, but we ought not to put any of our federal criminal procedure under bondage to local laws.

That is what was the trouble with the conformity act of 1872.

Mr. Holtzoff. Question.

Mr. McLellan. May I ask one question, hold you up for a minute?

Suppose the district court under this rule has proceeded in a way not inconsistent with the rules, not inconsistent with any applicable statute, but a court of appeals thinks that their way of proceeding is inconsistent with established cases, would they have the power to reverse, or, are you leaving the whole thing to the district court?

Mr. Youngquist. I suppose they would have power to reverse if the departure resulted in depriving a defendant of due

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process of law.

Mr. McLellan. Well, suppose it does not, but it does just a foolish thing--the judge does--and they do some awfully foolish things--don't you want the word "lawful" before"manner"?

The Chairman. It would not do a bit of harm.

Mr. Holtzoff. I am in favor of it.

Mr. McLellan. It might be a substantial change.

Mr. Medalie. Being the motion as amended?

Mr. Holtzoff. Yes.

The Chairman. Now, the suggestions are, we insert in line 7, before the last word "manner", the word "lawful", and that we insert at the end of line 8, "or any appropriate statute."

Mr. Youngquist. "applicable statute."

The Chairman. "applicable statute."

Are there any further suggestions?

Mr. Seasongood. It is a little different than the civil rule, "district courts may regulate their practice in a manner not inconsistent with these rules."

Mr. Wechsler. Well, the civil rules were really intended to set the courts free.

Mr. Seasongood. The civil rule says the courts may regulate their practice.

Mr. Holtzoff. That is just a difference in phraseology.

The Chairman. I understand the committee had in mind to phrase those rules so there would not be an invitation to the district courts to make a multiplicity of rules.

The first set was an open bid to the district courts to make local rules, and some of them did, in a very extensive way.

You have heard the motion. Those in favor say "Aye."

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Opposed, "No."

Mr. Orfield. No.

Mr. Wechsler. No.

The Chairman. Well, now, for my own light, will you tell me what is the reason for the opposition?

Mr. Wechsler. Because it is an unanalyzed problem.

Mr. Orfield. I think we are covering the most important points of our rules, and, what we don't cover, I want to trust to them.

The Chairman. Now we pass to Rule--

Mr. McLellan. Was that passed?

The Chairman. Oh, beg pardon. Motion carried.

Rules 45 to 60 are all rules dealing with appellate proceedings.

I take it there had to be appellate rules.

Mr. Robinson. Yes.

The Chairman. And may we have some indicate as we go along as to where they depart substantially from the present appellate rules?

Mr. Holtzoff. 45 (a) is the same as the present appellate rule.

The Chairman. Well, do you move it?

Mr. Holtzoff. I move its adoption.

The Chairman. It is moved and seconded that we adopt 45 (a).

Mr. Youngquist. Do we have a second?

Mr. Holtzoff. That is the same as the criminal appellate rule. The new matter is in (b), (c), and (d).

Mr. McLellan. Second the motion.

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

Carried.

45 (b) is new matter?

Mr. Dession. I don't think those people are going to know what a "presentence"--I did not know what that was, but I see it is a presentence.

Mr. Burke. Isn't that the practice now in many jurisdictions?

The Chairman. I did not hear that.

Mr. Burke. Isn't that the practice now?

Mr. Holtzoff. It is.

The Chairman. It is the practice now in a good many districts, I am sure.

Mr. Holtzoff. And it is an increasing practice.

Mr. Robinson. I second the motion.

The Chairman. All those in favor of 45 (b) say "Aye." Opposed, "No."

Carried.

45 (c) is new.

Mr. Holtzoff. Mr. Chairman, I want to make a motion to strike out a sentence beginning on line 30, to 31, which reads, "The reports of presentence investigations shall be kept confidential."

I think each district court and district judge should handle that matter in his own discretion.

I personally am of the opinion, although I am told it is contrary to the sociological point of view, that defense counsel should have access to all information the judge has.

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Be that as it may, I think at any rate it ought to be left to the district courts, or the judges, and I move to strike out that sentence.

Mr. McLellan. One point is that you just don't want them to be locked up tight, at the same time you do not want it made a public record.

Mr. Holtzoff. That's right. I leave that to the district court.

Mr. Youngquist. Is that taken care of in the next following sentence?

Mr. Holtzoff. If it is taken care of, then this sentence is unnecessary.

Mr. McLellan. What he means is, it is taken care of with that sentence in there.

Mr. Youngquist. Yes. "Keep the report confidential"--after that.

Mr. Longsdorf. Just like an indictment is kept on secret file until the time comes.

Mr. Robinson. I would like to agree with his motion and suggest that the other sentence go out, or the remaining sentence, for the reason that this is a matter I think we can trust with the district courts themselves.

Mr. Holtzoff. I accept the amendment.

Mr. Medalie. If the district courts do nothing about it, then the reports are not confidential. They are simply made available to such persons afterward as the court cares to give them to, but in the meantime they are not confidential. The giving of them is a matter of discretion, but there is nothing confidential about it. That confidence ought to be preserved.

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Mr. Holtzoff. But the district court can determine that.

Mr. Medalie. The district court may never even think about it.

Mr. Youngquist. I am not willing to leave it to that uncertain end.

Mr. Medalie. Well, I think we have debated it. Let us vote them down.

Mr. Youngquist. There is a motion.

Mr. Holtzoff. That motion is to strike out the last two sentences.

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

The motion is lost.

Mr. Youngquist. I move the adoption of (c).

Mr. Robinson. Seconded.

The Chairman. You mean it is voted as is?

Mr. McLellan. May I go back to (b) for just one moment? The only discretion you leave with the judge as to presentence investigation is he may dispense with it or cut it down where it may interfere with the work of the probation office.

He ought to have discretion, I think, in a case which does not lend itself to investigation, to dispense with it.

Mr. Medalie. Why do you want a presentence investigation? You know all about it.

Mr. Seasongood. I was going to raise the same point. I don't think it is practical to have presentence investigation of every person who is sentenced.

Mr. Holtzoff. There are some districts where that is

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going to be done.

Mr. Seasongood. We ought to say you can do it. A man is found guilty and is sentenced, or he pleads guilty and is sentenced.

I think you place a terrible burden on the court.

The Chairman. You have got to exclude the well-known persons and the migratory birds.

Mr. Seth. And drinking two cups of coffee.

Mr. McLellan. Why not express the view that they should be conducted except in cases where it seems to the trial judge they are not advisable?

Mr. Burns. Why not say, "unless otherwise ordered"?

Mr. Holtzoff. Yes.

Mr. Youngquist. I think what was in mind in adopting these words was Professor Glick's idea.

Mr. McLellan. I was sitting in his chair.

Mr. Youngquist. To make sure that everything was being done that should be done and yet leave the judge some measure of discretion.

The Chairman. Couldn't we accomplish that in line 17 by saying, "the district court may direct"?

Make it permissive.

Mr. Holtzoff. Well, if you want to make it strong that the judge should do it, you can accomplish that by Mr. Burns' suggestion to put in there, after the word "court" on line 18--

Mr. Burns: I don't purport to know anything about this, myself, but I have heard Glick's talk about it to a considerable extent and I can guess what he would say if he were here, that he does not want to give that discretion to the judge, that

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that is one of the great troubles, that the judge is apt to think he knows, and therefore he ought to be required to find out, and, in a case that the probation department is capable of handling--

Mr. Medalie. Suppose you have a calendar of food and drug cases--and they are looked to with a lot of terror by the average district attorney, he does not know what the cases are, half the time. He has filed informations at the request of the Department, and the Department agent comes around and whispers to the assistant what he thinks ought to be done as to a sentence, it is usually done immediately.

Many of them are practically police ordinances where there is no intent to commit an offense--I don't think the judge certainly should even take the trouble to mumble, "I don't want to undertake this investigation."

Mr. Burns. Many times this would require a presentence investigation of the Pennsylvania Railroad.

Mr. Medalie. I know how those run, simply arrange with the Interstate Commerce Commission and the railroad company in advance what the fine shall be.

You sit down with the lawyer. You say $30,000. He says $20,000, and you agree on $25,000.

Mr. Burns. In the type of cases he has in mind, felony cases, and, problems of rehabilitating the individual, you either have to give the discretion to the judge or else you have to spell out in a very complicated formula those cases which are within the presentence and those cases which are not.

Mr. Robinson. These words which are here are the result

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of a very long study by Professor Glick, of the Probation Service of the United States Courts, and by this committee. Each word has been checked with extreme care over many months, and it seems to me, before stepping in here and changing words, which I think all lawyers and judges are very careful about doing, that we should make a longer study than we are making at this moment.

Mr. McLellan. But is there any doubt that the judge should have discretion as to whether a charge is of a type to warrant a presentence investigation?

The Chairman. A corporation; birds; we don't need to do it.

Mr. Robinson. Why did Mr. Chappell of the Probation Service pass on it?

The Chairman. That is the only justification for having a large committee.

Mr. Burns. Mr. Chairman, in addition to your list of railroads and birds, I think you would have to add all those commodities frozen as of March.

Mr. Youngquist. It seems to me to be the sense of the committee that the latter part be stricken entirely, that the court be given discretion, and the only question in my mind is whether the presentence investigation should be made unless the court directs that it be not made, or that he directs the cases in which it shall be made.

Mr. McLellan. May I make this suggestion--

Mr. Youngquist. I was going to say this: From my own viewpoint I would be inclined to encourage presentence investigation, and it seems to me that inserting in line 18 "unless the court otherwise directs" would serve the purpose, because

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6 otherwise the court could direct the classes of cases to be not investigated, such as the Migratory Bird Act, Food and Drug Act, and other offenses.

Mr. McLellan. May I make one suggestion, having in mind what Judge Burns suggested, and Mr. Holtzoff?

I think it will give rise to much difficulty in the future if you do it in this way, so I suggest that in line 22 you add, after the word "release","or is otherwise not feasible".

And if you add at the end of the paragraph the words "or is feasible."

Mr. Holtzoff. I was just wondering, Judge--"investigation might be feasible"--

Mr. McLellan. We differ upon the use of the word "feasible."

The Chairman. Doesn't Judge Burns' suggestion rather cover all of that by just inserting those words in line 18?

Mr. McLellan. I dare say, but that--has he got to make an order in each case?

The Chairman. Oh, no, no. It could be done in a few cases, it could be a standing order.

I take it what is desired is to put the burden on the court to do it where it should be done, and if those words were inserted in line 18 and if a district judge did none of them, the Administrative Office would soon make it known and it would come to the attention of the Circuit Court of Appeals, and he would soon begin to learn by the grape-vine that he was falling down.

Mr. Burns. I suggest it be by amendment to line 17, after the word "probation", "unless the district court otherwise

orders".

Strike out "district", leaving it, "the probation service of the court shall make a presentence investigation."

"unless the district court otherwise orders".

Mr. Holtzoff. Wouldn't you rather have "directs"? The word "orders" implies formality.

Mr. Burns. "the district court otherwise directs".

Mr. Youngquist. "shall make a presentence investigation and report." Stop there?

Mr. Holtzoff. Yes.

Mr. Seasongood. That would be satisfactory to me.

The Chairman. But I wonder if we could please Professor Glick.

Would it be fair to say the court should ask the probation department to investigate, and then leave the other sentences?

Mr. Medalie. You see you are not limited to the probation service making investigations. It is there to determine the sentence and where the man goes.

For example, there are some special penitentiaries for youthful offenders, aren't there?

Mr. Holtzoff. Yes.

Mr. Medalie. And then there are places where you can treat narcotic addicts.

Mr. Holtzoff. I can conceive of minor cases where it would not be necessary.

Mr. McLellan. Now, I would like to find fault with Judge Burns because I think he knows much more than I do, but the trouble is that those who want presentence investigation will say that that means that the court has the power to order that

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there by no presentence investigation in any case, and so I suggest, in place of the word "unless", "save in cases where the district court otherwise directs".

It is a little different than giving him the power to say that they shall not--he won't have that system in his court.

Mr. Burns. That is agreeable.

Mr. Holtzoff. "save in cases in which the district court"?

Mr. McLellan. "save in cases where".

Mr. Youngquist. Would that be inserted in line 17?

Mr. McLellan. Yes. It means more words but has a little different meaning.

The Chairman. Any further remarks.

Mr. Seasongood. Should you have a hyphen in "presentence"?

Mr. Holtzoff. I think you should.

I thought we were going to stop at the word "court".

Mr. Robinson. We made Professor Glick a special member of this committee and we can very well insert his words.

Judge, in migratory bird cases, don't lines 22, 23, and 24 take care of that?

Mr. McLellan. No. That relates back--

Mr. Robinson. This much does finally put it in the court's power.

Mr. Youngquist. But he may have to give a wrong reason.

Mr. Robinson. Let the clause stay in but put in a saving clause such as Judge McLellan has recommended.

Mr. McLellan. I don't think it is needed. I think it is clearly redundant.

Mr. Youngquist. First you give complete discretion and then you say you give discretion in a limited situation.

Mr. Burns. I would like to make a suggestion that the Chairman or the Reporter get in touch with Professor Glick and acquaint him with this change. Point out to him the other alternative of Judge McLellan, "or is otherwise not feasible", since that would enlarge the exception clause of Professor Glick and at the same time would meet substantially the problem of judicial discretion, and if it becomes important because of trial conferences with the experts on probation, that we keep lines 20 to 24--and I think we should consider taking the alternative of Judge McLellan, "or is otherwise feasible"--

Mr. Holtzoff. We ought to have some action now.

The Chairman. I think we are all of the opinion that some leeway should be given. Why can't we have a motion that either we take Judge Burns' suggestion on line 17 as modified by Judge McLellan's addition of introductory words, or Judge McLellan's original motion relating to the later lines involving the use of the word "feasible" or "not feasible", whichever in the opinion of Professor Glick will accomplish the job he has in mind?

Those men are experts; we want to take advantage of their experience.

Quite obviously, if we are right, they have gone a little too far.

Let us take the language which will accomplish the alternative.

Is that feasible?

Mr. McLellan. I think it is.

I might say I like Judge Burns' suggestion better than my own but I think perhaps mine more nearly meets what Professor Glick has in mind.

Mr. Burns. I think Professor Glick will like Judge McLellan's better than mine.

The Chairman. Do you make it a motion?

Mr. Burns. Yes.

The Chairman. You second it, Judge McLellan?

Mr. McLellan. Yes.

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

Carried.

Now, (c).

Mr. Holtzoff. I thought we adopted (c).

The Chairman. Yes. We will now go on to 45 (d).

Mr. Seasongood. Now, you give a general right to request, on determination of the guilt, presentence investigation, which apparently can be had any time before determination of guilt.

Might there not be a serious interference with the trial? Suppose while the trial is going on he says, "I would like you to determine this."

Mr. Holtzoff. No, I think the purpose of that is to aid the probation service.

Ordinarily, if the probation service may not start its investigation until after conviction it may be worse in some cases than it would to start its investigation immediately after the defendant is held by the magistrate, which would spread over the work of the probation service and it could handle more.

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Now, as a safeguard to the defendant it may not start until after conviction unless he consents.

Mr. McLellan. I move, in line 37, the word "requests" be changed to "consents".

Mr. Holtzoff. I second the motion. That was really the thought back of--

Mr. Orfield. This same thing has been done in England right along, hasn't it?

Mr. McLellan. I move the adoption of (d).

Mr. Holtzoff. I second it.

Mr. Seasongood. Well, you still have--well, that would probably take care of it. I mean, the way it is written, practically any time, but now it would be by consent, so it is all right.

The Chairman. Those in favor of the motion say "Aye." Opposed, "No."

Carried.

Rule 46 (a).

Mr. Holtzoff. That corresponds to the civil rule.

Mr. Youngquist. I thought we made a lot of changes in that.

Mr. Robinson. The Style Committee took the instructions of the Committee, and after a very careful study this is the result of their work.

Mr. McLellan. As it is written here in full?

Mr. Robinson. Yes.

The Chairman. This is not part of the appellate rules.

Mr. Holtzoff. In a sense it is.

The Chairman. I mean the start of it.

Mr. Holtzoff. No; it is the civil rule in substance.

Mr. McLellan. I move the adoption of 46 (a).

Mr. Holtzoff. I second it.

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

Carried.

Mr. McLellan. I move the adoption of 46 (b).

Mr. Holtzoff. I second the motion.

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

Carried.

Rule 47.

Mr. Holtzoff. I move the adoption of Rule 47.

Mr. Medalie. Did we check all the words?

Mr. Holtzoff. I checked that with the criminal section. I worked it out with them.

Mr. Wechsler. May I ask if Rule 47 is intended to apply to a case where sentence is excessive?

Mr. McLellan. What was that question, Professor?

Mr. Wechsler. I asked whether Rule 47 is intended to apply to a case where a sentence is illegally excessive as distinguished from too large.

Mr. Holtzoff. No; I think if it is illegally excessive it is always subject to correction.

Mr. Wechsler. Suppose there is no appeal.

Mr. Seth. Habeas corpus.

Mr. Holtzoff. Yes. It is void.

Mr. Wechsler. It isn't as simple as that.

Mr. Medalie. It is void only as to the excess or as to the whole sentence?

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Mr. Holtzoff. I think there would have to be a re-sentence.

Mr. Wechsler. That is required. It is void only as to the excess. There are Supreme Court decisions on that. And it raises a serious problem on habeas corpus.

Since the sentence is voided only as to excess, the man is lawfully in custody so long as the legal sentence has not run.

Accordingly, habeas corpus is not valid as a remedy.

Accordingly, the time in which he is eligible for parole will be estimated by the department in the light of the sentence that was imposed rather than in the light of the sentence that could lawfully have been imposed.

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Now, my understanding of the position taken by the Department is that in such a situation the prisoner must make a motion for correction of the sentence, that such a correction can be made by the court at any time, and, unless that motion has been made and the correction made, that prisoner is out of luck, and I don't think we ought to indicate a rule which in any way suggests he may not make that motion.

Mr. Medalie. You want us to make a rule where an illegal sentence has been imposed, the motion for its correction may be made at any time?

Mr. Burns. Suppose you make it read, "A motion for reduction of sentence addressed to the discretion of the court".

It would indicate that you were not dealing with where the motion for reduction was based on the illegality of the thing.

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Adv.Com.

Mr. Medalie. I thought we could leave it as it is, and then add the extra sentence dealing with the legal sentences, and then put no time limit on the other.

Mr. Wechsler. That would be one way. The other would be as Mr. Seth says--leave it out altogether.

Mr. Seth. You had better make it before the sentence expires.

Mr. Holtzoff. How would it do to insert in line 2, after the word "sentence,"the words, "except if the application is on the ground that the sentence was illegal."

Mr. Burns. I would like to object to that, Mr. Holtzoff, on the ground that it confuses a very important and a very well written rule.

I move now that there be a (b) along the line of suggestion of Mr. Medalie, which would take care of the point raised by Mr. Wechsler.

Mr. Youngquist. We could make it as a separate subdivision or merely as a separate sentence. I move that it read:

"A motion for a correction of a sentence imposing a penalty in excess of that permitted by law may be made at any time."

It should be a correction rather than a reduction.

Mr. Burns. I would like to raise a question on Rule 47. Suppose you have a situation where A and B are both indicted, both convicted, and both sentenced. A chooses to appeal; B does not. A's appeal is successful and a new trial is ordered. That is more than 60 days after B's sentence. Is there any way in which B may move? The time for a motion for a new trial

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has passed.

That occurred in your district, Mr. Medalie.

Mr. Holtzoff. I do not think that is taken care of.

Mr. Medalie. It is not. The judges would like to take care of that.

Mr. Burns. I think they would, too, because they have learned their lesson, so to speak, from theCourt of Appeals decision; but I understand that in one case at least they were powerless, despite their feeling that justice in a sense had been miscarried.

Is there a way we can provide for that?

Mr. Youngquist. I think that would be rather dangerous.

Mr. Medalie. It can be done by the President.

Mr. Holtzoff. Yes, and there have been cases where that was done, where the Department of Justice recommended pardon.

Mr. Burns. If that were a valid answer, we could save a lot of pages here.

Mr. Holtzoff. I do not say it is a complete answer. It is a partial answer.

Mr. Youngquist. The defendant always has remedy by appeal. We are not foreclosing his appeal.

Mr. Burns. I do not press it, and I do not think the cases are very numerous, and it would raise a very difficult question of draftsmanship. I just call it to the attention of the committee.

Mr. Medalie. I had a situation like that about twenty years ago in a state court, where two men were convicted and one appealed. The reversal followed, and on the retrial, which I had--I did not have the first trial--the man was acquitted.

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Thereupon the Governor pardoned the other man.

The Chairman. You have the amendment as made by Mr. Youngquist, to be added to line 7. What was that again?

Mr. Youngquist. "A motion for a correction of a sentence imposing a penalty in excess of that permitted by law may be made at any time."

Mr. Seasongood. There are some instances where the punishment is illegal, for instance, where they impose both fine and imprisonment. Would that be included in that?

Mr. Youngquist. One or the other would be the excess.

Mr. Medalie. Why don't you say"an illegal sentence"?

Mr. Holtzoff. You can say "in excess or other than permitted by law." For instance, only a fine is permitted by law, and the judge imposes a jail sentence.

Mr. Medalie. Wouldn't "illegal sentence" cover it?

Mr. Youngquist. I think it would. "A motion for a correction of an illegal sentence may be made at any time."

I so move, Mr. Chairman.

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

The heading should be corrected to read, "Motion for Reduction or Correction of Sentence."

Mr. Robinson. Youare speaking of cases which have accumulative counts, and the sentences should be concurrent sentences and not consecutive.

Mr. Holtzoff. That can be covered.

Mr. Robinson. Yes, but you had it for a while.

Mr. Seasongood. Line 1 should not be "A motion for reduction or correction of sentence"?

Mr. Youngquist. No.

The Chairman. 48 (a).

Mr. Medalie. I still have something here before we come to that. I am not so sure whether Chapter 10 is a good arrangement, "Judgment and Appeal." I think matters that are appellate should be entirely separate. Matters that relate to judgment should be separate.

Mr. Holtzoff. Our appellate rules take in--

Mr. Medalie. It is a historical reason. That is another reason.

The Chairman. No. It is more than that. We have another difficulty to meet there. The rules in Chapter 10 do not require the consent of Congress.

Mr. Medalie. Nevertheless, we can have two chapters. "Judgment and Appeal," for proper arrangement, would be better broken up into one chapter for judgment and its correction and another chapter for appeal.

Mr. Burns. I so move.

Mr. Holtzoff. I second the motion.

Mr. Youngquist. What you mean is that Rules 45 to 48 should be in one chapter?

Mr. Medalie. I think so.

Mr. Youngquist. And from 49 on should be in another?

Mr. Medalie. That is right.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No." The motion is carried.

Mr. Medalie. Then Chapter 11 starts with Rule 49.

Mr. Holtzoff. That is right.

The Chairman. Rule 48. Are there any questions on 48(a)?

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Mr. Holtzoff. I move its adoption.

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

48 (b).

Mr. McLellan. Under that how would a motion for a new trial now be? Is it sufficient that a defendant moves for a new trial because a new trial is desired?

Mr. Medalie. He would have to have an affidavit that sets forth facts.

Mr. Burns. Should we have a rule requiring him to do that?

Mr. Holtzoff. I suppose he would have to support his motion either by a memorandum--

Mr. McLellan. I know, but we have the old-fashioned way--against the evidence and against the weight of the evidence--and now are you going to change all that and give him the power to order a new trial whenever he thinks a new trial is in the interest of justice?

Mr. Holtzoff. Isn't that the existing law? I was of the impression that the district court did have authority today to grant a new trial if the judge thought there was a miscarriage of justice. Am I right in my conception?

Mr. McLellan. The truth is that I do not know. I thought there were well-defined grounds for a motion for a new trial.

Mr. Holtzoff. I was reading somepapers recently on motions for a new trial in another connection, and I noticed that in some cases a judge may grant a motion--

Mr. McLellan. I do not care for that. I will withdraw it.

Mr. Youngquist. Just as a matter of location, should the

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provision in (a) for a withdrawal of a plea of guilty and nolo contendere be in this set of rules? That really belongs in the earlier section, pleading in the trial court before conviction.

Mr. Holtzoff. It is in the civil appellate rule now.

Mr. McLellan. You already have the conviction.

Mr. Youngquist. I beg your pardon. This is after the plea is entered. That is probably all right.

Mr. McLellan. Is there any motion on (b)?

The Chairman. No motion yet.

Mr. Youngquist. I move it.

Mr. McLellan. I second it.

The Chairman. It has been moved and seconded that we adopt 48 (b). All those in favor say "Aye." Opposed, "No." The motion is carried.

We come now to 48 (c). Is there any motion on (c)?

Mr. Holtzoff. I move its adoption.

The Chairman. Does anybody second it?

Mr. McLellan. I second it.

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

We now come to 48 (d).

Mr. Robinson. I move its adoption.

Mr. Holtzoff. I second the motion.

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

We now come to 48 (e).

Mr. Waite. I want to ask a question about that. Is that purposely intended to make a motion for retrial on newly discovered evidence available any time?

Mr. Holtzoff. Yes. That was thrashed out at the last meeting, Mr. Waite. And it was voted unanimously, I believe on Judge McLellan's motion, that there should be no delay.

Mr. Seasongood. Just a minute. There is a difference in that (e) and the rule before the magistrates, on page 5, Rule 5. Did you mean that?

In this case you can only make it if you have a remand. If an appeal is pending, you can only make a motion to remand. In other cases you allow it before the justice.

Mr. Holtzoff. We struck out all the rules relating to trials of petty offenses, anyway.

Mr. McLellan. Would you not rather have "entertain" on line 21 rather than the word "allow"? That is giving the judge the right to hear the motion, but not to allow it until you get the case back.

Mr. Youngquist. We could go a step further and say, "but if an appeal is made, the motion shall be made only on remand of the case."

Mr. McLellan. As a practical matter, there is a case up in the Circuit Court of Appeals, a clear case of newly discovered evidence. Why not say the appellate court? In the necessity of deciding the case, let the motion be entertained, but not allowed until a remand of the case.

Of course, I am familiar with the rule that once a case is out of the court, ordinarily you cannot do anything with it; but, as a practical matter, I think it would be desirable to let that be heard.

Mr. Holtzoff. You mean, "shall be allowed"?

Mr. McLellan. No. "but if an appeal is pending, the

court may allow a motion only on remand of a case."

Mr. Holtzoff. He can hear it on remand and then ask it after remand.

Mr. McLellan. I think that is a desirable change.

Mr. Holtzoff. I am sure it is.

Mr. Seasongood. I am not sure that it is, with great deference. The appellate court has its calendar arranged, and the trial court starts to hear something and the appellate court says, "Well, we had better pass this until he decides the motion for a new trial."

Mr. Holtzoff. There is no harm in that.

Mr. Seasongood. But it is their calendar and they are supposed to expedite it.

Mr. McLellan. I do not care much, but if I saw a case for a new trial where there was really something to it, I would like to hear it.

Mr. Seasongood. All you would have to do is to make a showing to the appellate court that there is enough of a showing to send this back to the trial clerk and let them go ahead.

Mr. Holtzoff. No. Under Judge McLellan's amendment, before the motion is granted the case would have to be remanded, but the district court would be permitted to hear it in the meantime. Am I correct on that?

Mr. McLellan. Yes. I think that is a practical thing to do.

The Chairman. Can we use the words, "may grant the motion"?

Mr. McLellan. That is better.

Mr. Seasongood. That is a deviation from usual practice,

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is it not?

Mr. McLellan. Yes.

Mr. Seasongood. You take an appeal from a labor relations case. The court of appeals may order it, but I do not think the Board itself can go ahead while it is pending for enforcement in the court of appeals, can it?

Mr. Burns. It has been held that it can.

Mr. Holtzoff. The Supreme Court has held that the Board may reopen the case.

Mr. Burns. While the appeal is pending.

Mr. Holtzoff. I move the adoption of (e) as modified by Judge McLellan.

The Chairman. Change the word "entertain" to "grant"?

Mr. McLellan. Yes.

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

48 (f).

Mr. Holtzoff. I move its adoption.

Mr. McLellan. I second the motion.

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

Rule 49.

Mr. McLellan. I move the adoption of 49.

Mr. Holtzoff. I second the motion.

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

Rule 50 (a).

Mr. Orfield. It seems to me that lines 7 to 10 will invite too frequent appeals. I should imagine a good many

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defendants without counsel would want to take an appeal where it was not justified at all.

Mr. Holtzoff. Well, this relates only to appeals by the Government.

Mr. Youngquist. No.

Mr. Holtzoff. I thought you were talking about Rule 49. I beg your pardon.

The Chairman. Rule 50, lines 7 to 10.

This is off the record.

(There was a discussion off the record, after which the following occurred:)

Mr. Youngquist. I move that 50 (a) be adopted.

Mr. Holtzoff. I second the motion.

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

Rule 50 (b). This is taken verbatim from the present appeal rules.

Mr. McLellan. I move its adoption.

Mr. Longsdorf. Before we proceed to vote on that, Mr. Chairman, I want to make known some information I received which might bear on this. With respect to the printing of the testimony in the record or in the briefs, I was informed that some attempt would likely be made to amend civil procedure Rule 75 with respect to the reporter's transcript and with respect to the printing of it.

The Chairman. That would not come up under this section, would it?

Mr. Longsdorf. But a part of the proposal to amend was this: that with the notice of the appeal should be filed a

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specification of the points relied on for reversal--not these repetitious assignments of error, but a general specification--so that with the notice of appeal might be served a precipe for parts and not all of the record, to diminish the record. Then when the reporter's transcript is sent up in diminished form, with part of the testimony left out that the appellant does not deem necessary, the courts could pass upon the propriety of that designation, whether it would be sufficient or not.

The point is to keep them from overloading the record with excerpts of testimony or with the full record of the testimony where it is not needed.

Mr. Holtzoff. But the notice of appeal has to be filed within three days or five days, and it is impossible for the attorney to have his points.

Mr. Longsdorf. I realize that objection.

Mr. Holtzoff. That can all be done in the preparation of the record at a later stage.

Mr. Longsdorf. I know, but the proponents of this measure want to get it done sooner. I do not know that they want to limit the time for taking appeal quite so shortly as is provided.

Mr. Holtzoff. That was fixed by the Supreme Court back
4 in 1933, in order to shorten the time. To have the lawyers required to have a statement of points ready in five days is an injustice to defendants as well as a hardship to lawyers.

I think the rule in its present form is fair to everybody. After all, the appellant makes up the record. By that time he may know what to raise.

Mr. Longsdorf. I am neither pro nor con on the merits of this thing, but what I give you the information for is this:

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We do not want to proceed and get our rules here out of conformity with the civil methods of appeal any more than is necessary.

Mr. Holtzoff. This is in accordance with the civil rules.

Mr. Longsdorf. I know.

Mr. Holtzoff. If the civil rules should be changed three or four years from now, then these would be.

Mr. Longsdorf. Just so we do not get out of step with the civil side of the court.

The Chairman. You have heard the motion on (b). All those in favor say "Aye." Opposed, "No." The motion is carried.

All those in favor of 50 (c) say"Aye." Opposed, "No." The motion is carried.

I suppose the form on the following page is all right.

Mr. Seasongood. Why do you put it at this point rather than in the appendix?

Mr. Holtzoff. It will eventually be in the appendix. I think it was for the convenience of this committee.

The Chairman. It should go in the appendix.

Mr. Seasongood. It is out of place there.

The Chairman. Rule 51 (a).

Mr. Orfield. Isn't it necessary to add to Rule 50 the last sentence in Rule 49? Doesn't that cover simply prosecution appeals and not appeals by the defendant?

Mr. Medalie. I think that would be very desirable, would it not? One of the worst frauds that was ever invented was the assignments of error.

Mr. Orfield. I believe that the original criminal appeal rules contained this provision.

Mr. Holtzoff. Yes, but the civil appellate rules, which came five years later, eliminated the assignments of error, and this will put criminal appellate procedure in step with the civil appellate procedure.

Mr. Medalie. Mr. Warfield's point is that he wants the last sentence of Rule 49 to go into Rule 50, so it will apply to a case of the supreme court to the circuit court of appeals. There would be no question about that.

Mr. Holtzoff. There is no question about it, because there is no provision for it. It is necessary in Rule 49 because they are abolishing an existing practice.

Mr. Medalie. Why not put it in anyway?

The Chairman. Where would that go?

Mr. Orfield. At the end of 50 (b), I would think.

Mr. Holtzoff. You cannot transfer that into 50 (b), because the sentence reads, "Petitions for allowance of appeal, citations, and assignments of error in cases governed by this rule are abolished."

They have been abolished before in all cases except direct appeals, and that is why it is necessary in Rule 49 and would be out of place, I think, in Rule 50.

Mr. Longsdorf. We abolish it by saying it shall be taken by filing a notice. It is abolished by those words.

Mr. Holtzoff. I agree with you that it is surplusage. I would not object to striking it out entirely, but it should not be transferred to the other rule.

Mr. Orfield. I think the original appeal rules contain that provision.

Mr. Holtzoff. No. They contain a provision for a state-

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ment of grounds of appeal in a notice of appeal, but they did away with grounds of appeal and citations and assignments of error.

The Chairman. Would not the motion really be to eliminate the last three lines of Rule 49 as no longer needed?

Mr. Holtzoff. I think so.

Mr. Seth. Aren't they needed in appeals to the Supreme Court now? Is there anything abolishing them on direct appeals by the Government to theSupreme Court of the United States? You have got to have it in if you have it abolished there.

Mr. Holtzoff. The purpose of that is to abolish this requirement in those direct appeals by the Government.

Mr. Seth. It had better stay in.

The Chairman. If there is any doubt, you had better leave it in.

Mr. Medalie. You could take that sentence out of 49 and put it in somewhere else where it is applicable to both 49 and 50.

Mr. Holtzoff. I do not like to see it made applicable to 50, because the way it is worded it is only applicable to those cases where the requirement now exists, and you are abolishing it; but to abolish it in the other cases where the abolition took place in 1933 would seem to me to be somewhat incongruous.

Mr. Medalie. Well, you could have something that is very simple. Strike out, "cases governed by this rule." Wouldn't that do it?

Mr. Youngquist. I think that Rule 49 should be self-contained. It is a special proceeding--an appeal to a different court from that to which a defendant may appeal--

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and if we do anything, I think we ought to leave this one as it is and put in whatever language may be necessary in the rules that relate to appeals to the circuit court of appeals.

Mr. Orfield. This is the language of criminal appeal Rule No. 3:

"Petitions for allowance of appeal and citations in cases governed by these rules are abolished."

Mr. Holtzoff. Exactly, but that was in 1933. For us in 1942 to insert that sentence would seem to me to be somewhat incongruous.

Mr. Youngquist. If we are enacting them, would not the omission of that statement possibly be taken to be a reinstatement of the old practice?

Mr. Orfield. We have repealed all the old rules later on in these rules.

Mr. Longsdorf. I think we ought to read the rules of the Supreme Court which regulate the taking of direct appeals to the Supreme Court.

Mr. Holtzoff. We have read them in preparing and drafting this.

Mr. Longsdorf. Then you would see why this was put in here, and you would find out also that in the civil rules direct appeals to the Supreme Court are not regulated. Therefore, it had no place in the civil rules--there was no need for it--but there is a need for it here in Rule 49.

The Chairman. Let us get the question to a head. Is there a motion?

Mr. Orfield. I move that we take this last sentence of

Rule 49 and add it to 50 (b).

Mr. Seth. I second the motion.

Mr. Holtzoff. You mean to transfer it?

Mr. Orfield. To keep it in 49 and repeat it in Rule 50 (b).

Mr. Seasongood. Has Mr. Orfield read that? The rule there did not say "assignments of error," did it?

Mr. Orfield. No, it did not contain that language, that is true.

Mr. Seasongood. Where you have "assignments of error are abolished," that is not in the rule as it exists.

Mr. Orfield. Not in the criminal appeal rules.

Mr. Seasongood. It is not in the criminal appeal rule as it exists. Do you want it in?

Mr. Holtzoff. No.

Mr. Youngquist. We do want to abolish asignments of error.

Mr. Holtzoff. We abolished it in 1933.

Mr. Youngquist. As he read it they are not abolished.

Mr. Holtzoff. Rule 3 of the criminal appeal rules, which were promulgated in 1933, provides: "Petitions for allowance of appeal and citations in the cases governed by these rules are abolished."

Mr. Seasongood. We are talking about assignments of error.

Mr. Medalie. I began feeling silly, because I began thinking of a few cases in our office with those grotesque assignments of error.

Mr. Youngquist. I second the motion.

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

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Now we have Rule 51 (a).

Mr. Youngquist. You could now shorten the headings a good deal, now that you have a separate chapter.

The Chairman. Is there a motion on 51 (a)?

Mr. Holtzoff. I move that we adopt it.

Mr. Orfield. I would like to see added to Rule 51 a provision that the circuit court of appeals shall have the power to hear new evidence, in other words, review the facts. I donot believe that they have that power at the present time.

Mr.Youngquist. That is, to call witnesses and to hear them before the circuit court of appeals?

Mr. Orfield. Yes. I would leave it to the discretion of the circuit court.

Mr. Youngquist. Why?

Mr. Orfield. In order that the criminal defendant might have a hearing on the merits and that he might get a review on the facts as well as the law.

Mr. Seasongood. He would have to be tried by the jury, under the constitution, in certain cases, and he has to be there.

Mr. Orfield. It is the defendant who is taking the appeal, so he is not injured.

Mr. Longsdorf. That is under the jurisdiction of the circuit court of appeals, and we cannot do it.

Mr. McLellan. Wouldn't it be desirable to pass upon (a) first and take the matter of additions later?

The Chairman. All those in favor of 51 (a) say "Aye." Opposed,"No." The motion is carried.

Now, 51 (b).

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Mr. Seasongood. I would like to make the same point in behalf of the languishing prisoner--that he does not need five days before bail can be furnished. He does not have to do it under existing practice.

Mr. Holtzoff. I agree with Mr. Seasongood. I do not think the five days have to be made mandatory.

The Chairman. Your motion is to strike out "upon five days' notice"?

Mr. Seasongood. Yes.

Mr. Youngquist. That five days' notice requirement applies also to a motion to dismiss the appeal.

Mr. Seasongood. All courts of appeals have rules providing the time within which you have to serve motions.

Mr. Youngquist. I thought that your suggestion related only to an order on bail.

Mr. Seasongood. No. I would like to strike out the "five days' notice," because each court of appeals has rules as to the number of days' notice they require for filing the motion.

Mr. McLellan. Don't you want the Government to have some kind of a notice to dismiss an appeal?

6 Mr. Seasongood. They require that. All courts of appeals rules require you to give notice.

The Chairman. Isn't there an advantage in uniformity?

Mr. Holtzoff. I am wondering whether this is not the sort of detail which might be left to circuit rules, because the period of time might vary with local conditions. I can conceive of a longer time being required in the Ninth and Eighth Circuits than perhaps in the First and Second Circuits.

Mr. Youngquist. I second the motion.

The Chairman. The motion is to strike "upon five days' notice" in line 8. All those in favor say "Aye." Opposed, "No." The motion is carried.

The motion now is to adopt 51 (b) as modified. All those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 52 (a).

Mr. Waite. Are we going to discuss Mr. Orfield's suggestion?

The Chairman. I beg your pardon.

Mr. Orfield. I will put that in the form of a motion. I move that we add subsection (c) to Rule 51 (a), permitting the defendant to have an appeal on the facts, permitting the circuit court of appeals to hear new evidence, to call any witnesses, in the discretion of the circuit court.

I would not give the defendant that right--not an absolute right--but I would leave it simply in the discretion of the appellate court. That is the situation in England at the present time. The appellate court in its discretion may review the facts. The defendant has no absolute right to have the court review the facts.

Mr. Holtzoff. Do you mean to review the facts or to hear new evidence?

Mr. Orfield. That is somewhat broader--to hear new evidence--that is true.

Mr. Medalie. Do you want to carry out the idea of the English Criminal Appeals Act?

Mr. Orfield. Yes.

The Chairman. Will you separate your motions and make separate motions as to reviewing the facts and also as to

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hearing new evidence, because I think you have different problems?

Mr. Orfield. If they were permitted to hear new evidence, that would impliedly allow them to hear facts.

Mr. Holtzoff. I would favor giving that power to review facts. I should hesitate giving them any broader authority.

The Chairman. That is what is running in my mind.

Mr. Wechsler. Is there any question of jurisdiction?

Mr. Youngquist. That came up while you were out.

Mr. Wechsler. I am sorry.

Mr. Youngquist. I am commending you for remembering it.

Mr. Wechsler. Is it answered?

Mr. Youngquist. No.

Mr. Orfield. The appellate court is given a certain amount of power to review the facts, is it not?

Mr. Holtzoff. Yes, it may review facts, but not hear new evidence. I think there would be a great deal of justice perhaps in a similar rule in criminal cases.

Mr. Youngquist. I am rather puzzled by what "review of the facts" means. Does it mean that the court will determine whether there is substantial evidence to support the conviction, or does it mean that the court shall determine from the evidence whether it is satisfied--that is, whether the court is satisfied--beyond a reasonable doubt that the defendant is guilty? Those occur to me to be the only two.

Mr. Holtzoff. No. The equity rule is different.

Mr. Orfield. It would be a question, it seems to me, of weighing the evidence or balancing the evidence.

Mr. Youngquist. Doesn't that bring you right down to a

duty in a circuit court of appeals, then, to determine whether the defendant is guilty or not guilty?

Mr. Orfield. I would give them that power. I would not compel them to exercise it. I would leave it to their discretion.

The Chairman. Aren't you aiming at the power of the English Criminal Appeals Rules? They determine whether or not they, sitting as a jury, find that the evidence sustains or does not sustain a conviction. They put to themselves the same question as we put to a jury.

Mr. Wechsler. There is allowance for the jury having heard the witnesses.

The Chairman. They also revise sentences up and down.

Mr. Holtzoff. The equity rule does not go as far as you perceive this provision would go. My understanding of the equity rule is that the court of appeals may set aside the sentence as contrary to the weight of the evidence, but only if it deems that it is clearly and overwhelmingly so. It does not mean that the appellate court must be convinced beyond a reasonable doubt. The only question it will determine is, Is the weight of the evidence so overwhelmingly against the verdict of the jury that the verdict is erroneous?

There are many States where local procedure permits that. That is the New York procedure, I believe. The appellate court or the appellate division may review the weight of the evidence, and I can see a great deal of merit to it.

Mr. Seasongood. There is a great deal of merit to it, but isn't there some kind of statute that they cannot review evidence?

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Mr. Holtzoff. But, of course, these rules would have the effect of repealing the statutes.

Mr. McLellan. It is taking away from the Government its non-constitutional right to trial by jury.

Mr. Wechsler. Mr. Chairman, may I call attention to Section 2 of the Act which relates to appellate rules? It is as follows:

"The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules may, as herein authorized, prescribe the times for and manner of taking appeals and applying for writs of

7 certiorari and preparing records and bills of exception and the conditions on which supersedeas or bail may be allowed."

Mr. Seasongood. Is that as far as it goes?

Mr. Wechsler. Yes. It is the second section, and in a sense it is a limitation on the first and more general authorization.

It seems to me that there is some basis in this second section for feeling that the rules were not supposed to touch appeals except as to the matters therein specified, namely, the time for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exception.

Mr. Orfield. Might you not say that this goes to the manner of taking the appeal, the scope of appeal? It goes to the manner of taking it.

Mr. McLellan. I think, Mr. Chairman, that we would do well to leave to Congress any such change as this motion

contemplates.

Mr. Seasongood. I think you would have objection from the court of appeals. They feel that they are overworked as it is. I think it would be a fine thing if it could be done, but there seem to be limitations.

The Chairman. Can you have the motion separated?

Mr. Holtzoff. Mr. Chairman,may I offer a suggestion?

I do not read that as a limitation, Mr. Wechsler, because the first section of the Act gives authority to the Supreme Court to promulgate rules in respect to any and all proceedings after verdict, and so on; and the second section provides that the rule may prescribe those matters which you referred to. But do you construe that provision as a limitation on the first clause?

Mr. Wechsler. There would be no point to it otherwise, because, as you just said, the first section covers all proceedings after verdict, which I suppose includes appeal; and I think the point of the second section was to be sure that the rule did not in any way tamper with a man's right to appeal.

Mr. Holtzoff. This does not tamper with it.

Mr. Wechsler. It is perfectly true that Mr. Orfield's motion enlarges the fruits of an appeal, but I would want to see the legislative history of that rule in detail.

Mr. Seasongood. How about our own charter? Are we limited to anything that we are to do? Of course, we had rules in the district court. Later on they were enlarged. Does anybody have our scope?

The Chairman. It was enlarged rather informally by saying that we might submit any changes that we thought should be made

in the appeals rules to bring them in line with the developments of the last five or six years, brought about largely by the improvements in the civil rules.

Mr. Seasongood. There was an order of the Court, which I have seen.

Mr. Youngquist. On the appellate rules?

Mr. Seasongood. I think so.

Mr. Seth. Wasn't the order in criminal contempt cases?

Mr. Holtzoff. That was the statute.

Mr. Youngquist. Was there an order on the appellate rules?

Mr. Robinson. It was in the second motion.

Mr. McLellan. I would like to have the motion stated, so I can know what it is.

Mr. Orfield. The motion is that Rule 51 (c) shall read, "The appellate court in its discretion may review the facts."

Mr. Holtzoff. Wouldn't you add: "shall not pass judgment unless clearly erroneous," to embody the concept of the equity rule?

Mr. McLellan. Do you really mean that, Mr. Orfield? You want to adopt the equity rule rather than give the court of appeals the power to look the evidence over and to determine whether upon that evidence it would have come to a conclusion of guilt? I would like to know which you want in your motion.

Mr. Orfield. Maybe I do not have the equity rule clearly in my mind.

Mr. Seasongood. That is the ordinary equity rule. The court can always review the evidence in an equity case.

Mr. McLellan. "but reverse and come to a different

conclusion only when the court was clearly wrong."

Mr. Seasongood. Yes.

Mr. McLellan. As I understood Mr. Orfield, he wanted something more than that--power on the part of the court to look the thing over and decide whether upon the evidence they would have concluded that the defendant was guilty.

Mr. Holtzoff. I would like to go along with the equity rule, but I should hesitate to go further.

Mr. McLellan. Therefore, we ought to know what we are voting.

Mr. Seasongood. We ought to have the statute which we are repealing. I have in the back of my mind that you cannot review under an existing law.

Mr. Seth. The Constitution limits it.

Mr. Seasongood. But there is a statute that the appellate court shall not review questions of fact.

Mr. McLellan. It says the court of appeals has jurisdiction of certain things, which does not include deciding a case upon evidence heard below, except in equity cases.

Mr. Seasongood. Has only appellate jurisdiction.

Mr. McLellan. That is it.

Mr. Orfield. I move that this question be referred back for study.

Mr. Youngquist. I think we ought to decide it now.

Mr. Holtzoff. I think we ought to decide the policy and then study the phrasing.

Mr. Dession. There is more than phrasing involved. I am interested in two things. First I am interested in the merits of the proposal. I am troubled by, first, the question to

what extent would this involve changing the jurisdiction of any of the appellate courts?

Now, I am not sure that it would, but I think we would have to study that. We would have to study the statutes which define that jurisdiction now, and we would probably, after doing that, have to find out what content the word "appeal" can be given that is most broad.

We have the further point of the statutes conferring rule-making power.

As Mr. Wechsler said, the legislative history that he urged would be pertinent on that. I would hate to come to the conclusion that we cannot touch this at all, but I am not sure that we can.

Mr. Waite. I consider this as an extremely important problem, but one I have not thought about, even, and I would not feel qualified to give a sound judgment on it. I could not vote for or against it with any feeling of assurance on it. I would like to study it.

Mr. Holtzoff. I have the statute here, if you want to refer to it.

Title 28 of the Code, Section 225, relates to the appellate jurisdiction of circuit courts of appeals, and all it says that is germane to the question here is this:

"The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions -

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court."

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There is no jurisdictional question involved.

Mr. Seasongood. Isn't there another section that there shall not be a review of questions of fact?

Mr. Longsdorf. There is another jurisdictional question arising out of the Act which does not appear in Section 225 here. I think the section occurs around the 800-sections in Title 28. I remember that a very material part of that was omitted by paraphrasing when the U.S. Code was compiled.

Mr. Seasongood. Mr. Youngquist has the order of the Court there. He can comment on it.

Mr. Youngquist. The order of the Court authorizes the committee to make such recommendations as may be deemed advisable respecting amendments to the rules promulgated by this court--that is the appellate rule.

It occurs to me that the Court would be shocked if we should propose this as an amendment to the rules that had been made and also that it would be rather presumptuous on our part to propose so drastic a change. It is more than an amendment. It goes into a new field.

I would have no objection to the committee's studying the problem and perhaps making an informal recommendation to the Court later, but I should doubt very much the advisability of permitting that study to delay the action of the committee on the work that is clearly committed to it.

9 Mr. Wechsler. The essence of the problem really is, Mr. Chairman, I think, this, and it goes to some extent to the district court rule. Can we make any recommendations that go to matters which have heretofore been regarded as matters of

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power of the court as distinguished from the way in which the court shall exercise its power under the governing rules of procedure?

I do not mean that that formula makes that clear distinction, but, rather, is a way of stating the problem. I am very dubious on anything that touches power. I certainly think that we can propose no better reform than to bring sentences within the scope of appellate review in cases of abuse of discretion.

I rather believe that the court might hold that it has that power, if the appellate court permitted the issue to be argued, but even then I have doubt about moving beyond our mandate.

Mr. McLellan. Mr. Chairman, I think our rules ought not to be held up by this kind of investigation, however desirable the investigation may be.

I think I will call for the question.

The Chairman. May we have the motion repeated, because I am afraid I lost it?

Mr. Waite. The motion was to refer it for a further study to the Reporter and his staff.

The Chairman. The motion, then, is to refer the question raised by Mr. Orfield's motion to the Reporter's staff for further study. All those in favor say "Aye." Opposed, "No."

All those in favor show hands. Five. Opposed, six.

The motion is lost.

Mr. Seasongood. I would say that we should perhaps view this in some form as a matterfor consideration, but not in our assigned work.

Mr. Robinson. It has been under consideration, largely

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based on Mr. Orfield's book, in which the English practice has been observed. We have decided that some results obtained by that English practice cannot possibly be obtained in this country under constitutional restrictions.

The Chairman. That is why I asked Mr. Orfield to separate it. We know that in a court of criminal rules appeals in England the defendant is present. He is never present here. It seems to me that that fact alone would make a difference on the matter of taking testimony.

Might we have a motion that might bring these topics as topics to the attention of the Court, where we could say that we consider they are outside our province, but matters that we think require consideration? Is that presumptuous?

Mr. Seasongood. Why not wait until after the Chairman sees the Chief Justice and sees whether that is all right.

The Chairman. If it is, would it be the sense of the meeting that some memorandum be submitted to the Court broaching the topics but not attempting to pass upon them?

Mr. Seasongood. Including the ability to increase sentence.

Mr. Holtzoff. Not increase sentence. That would be unconstitutional.

Mr. Seasongood. That is the English practice.

Mr. Holtzoff. Yes. Ex parte Lang holds you cannot increase a sentence once it is passed.

Mr. Robinson. But the defendant could waive that as a condition of his appeal.

Mr. Seasongood. If that was a condition of his appeal, you could do it that way. There is a decision of the Supreme Court

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where in a state court they allowed an increase of sentence. They held that that was constitutional. I am quite sure there is a decision of that kind in the Supreme Court.

Mr. Youngquist. I second the motion.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No." It is unanimously carried.

Mr. Wechsler. If the line of approach is the power of approach, how do we get a thing like waiver of indictment? I simply want to get the sense of the definition with regard to jurisdiction clear. Perhaps my question was not clear.

Mr. Youngquist. Yes, it is clear.

Mr. Seasongood. Is it the same in a district court as it is in appellate jurisdiction?

Mr. Wechsler. I think the language of the statutes is about the same, except one says before verdict and the other says after verdict.

Mr. Holtzoff. Yes, but the words of limitation are not in the other statute.

Mr. Wechsler. What words of limitation?

Mr. Holtzoff. You construe section 2 of the appellate statute as words of limitation?

Mr. Wechsler. Well, I suggested that they might be, but I did not pass on the point.

The Chairman. Rule 52 (a).

Mr. Waite. Are we discussing 52 (a), Mr. Chairman?

The Chairman. Yes.

Mr. Waite. It seems to me that there is an alternative which has not been considered. It says, "A sentence of imprisonment shall be executed unless an appeal has been taken

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and the defendant has elected to remain in detention."

Suppose he does not elect to remain in detention, but has taken an appeal and has asked for bail?

Mr. Holtzoff. That is taken care of in another paragraph later on, in paragraph (c).

Mr. Waite. Well, even so, (a) as it stands simply says that unless he has elected to remain in detention, the sentence shall begin. It does not leave any alternative there for (c).

10 We ought to have something in there which will protect him after he has asked for bail under (c).

The Chairman. May we hold that until we get to (c), and we will take them together? Suppose we just pass (a) for a moment, then, and let us go on to (b).

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Mr. Holtzoff. That is the present rule.

Mr. Seasongood. It says, "A sentence of imprisonment". Do you not want "of imprisonment" out? Suppose it is a fine.

Mr. Holtzoff. Well, (b) takes care of a fine.

Mr. Seasongood. Stay of execution of sentence to pay a fine. Well, you do not say it is executed, the sentence; the fine is executed unless you stay it.

The Chairman. (a) is "Stay of Execution - Imprisonment." (b) is "Stay of Execution - Fine." Separate the two.

Mr. Seasongood. Oh, yes. "The trial court". It merely relates to stay of execution. Of course, I suppose it is obvious that sentence is immediate if it is a fine. You say if it is imprisonment it shall be executed, but you do not say that if it is a fine he has a right to execute it. (b) is just relating to the stay.

Mr. Holtzoff. Well, (b) is the present criminal rule the way it now reads.

Mr. Seasongood. That is all right, yes, but whether you should not leave out "of imprisonment": "A sentence shall be executed". You may have a sentence probably of fine, and that is not covered.

The Chairman. Your thought is to leave out in line 2 the words "of imprisonment"?

Mr. Seasongood. Yes.

Mr. Youngquist. Well, you would have to make other changes, though, in that.

Mr. Seasongood. Yes.

Mr. Burns. And in the case of a sentence of imprisonment.

Mr. Youngquist. Of course, you have a different situation.

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I suppose it would be taken care of if we should say in (b), "a sentence of a fine shall be executed unless the court stays it."

Mr. Seasongood. Yes. Well, refer it to the Committee on Style to fix it up if you want to.

The Chairman. I did not get that.

Mr. Seasongood. I say, let the committee fix it up or not, as they think right.

Mr. Holtzoff. Yes.

Mr. Seasongood. But it seems to me that you have enough to say that a sentence to pay a fine is executed immediately. It may be unless he stays it.

Mr. Holtzoff. That is in the present criminal code.

Mr. Medalie. Well, the heading of (a) is "Imprisonment," is it not?

The Chairman. That is right.

Mr. Youngquist. I beg your pardon?

Mr. Medalie. The heading of (a) is "Imprisonment."

Mr. Seasongood. "Stay."

Mr. Medalie. And that is all we deal with there. Then in (b) we are dealing with stay, and the heading is "Fine."

Mr. Holtzoff. I do not think you need any change.

Mr. Seasongood. Well, all right.

Mr. Medalie. I do not think so, in view of the content and heading.

Mr. Waite. Mr. Chairman, before we pass that I want to renew my suggestion that in line 5 there be added the phrase, "or has been admitted to bail".

Mr. Medalie. That would be complete.

Mr. Seasongood. I think so.

Mr. Burns. I move that.

Mr. Youngquist. Just a moment. I should like to think about that a little bit further.

Mr. Holtzoff. I think there is noobjection to that.

Mr. Seasongood. Surely; you execute the imprisonment.

Mr. Holtzoff. Unless he is admitted to bail.

Mr. Seasongood. Unless he is admitted to bail.

Mr. McLellan. I think there is not only no objection to it, but it is entirely desirable.

Mr. Youngquist. Yes, this expresses it.

Mr. Holtzoff. I think that is a desirable addition.

The Chairman. That is moved and seconded. Now, all in favor of the amendment in line 5 say "Aye." Opposed, "No." Carried.

All in favor of (a) as amended, say "Aye." Opposed, "No." Carried.

All those in favor of (b), say "Aye."

(There were a number of ayes.)

Mr. Youngquist. I should like to make the suggestion with respect to that that it be written to conform to (a) in its beginning.

Mr. Holtzoff. And leaving it to the Committee on Style?

Mr. Youngquist. Yes.

Mr. Holtzoff. All right.

Mr. Medalie. What is that? I missed that. What was that?

Mr. Youngquist. To conform the first part of (b) to the form of (a), leaving that to the Committee on Style.

Mr. Seasongood. Let us see. In (b) you recite

execution of a sentence to pay a fine, but you do not refer to it in (a).

Mr. Medalie. Can't. We do not do that now.

The Chairman. It would be best, perhaps, to proceed leaving it to the Committee on Style.

Mr. Medalie. Why have a meeting of the Committee on Style when it takes us two minutes to do it now?

The Chairman. Well, not at the moment, Mr. Chairman of the Committee on Style. We are plowing along while we still have a quorum, and shall come back in a few minutes.

All those in favor of the motion say "Aye." Opposed, "No." Carried.

Now, we go on to 52 (c).

Mr. Robinson. Perhaps you can explain all this.

Mr. Holtzoff. The rule is practically the same as the criminal appellate code except that it is in a little more detail. I do not think that the bracketed portion is necessary, and I am going to suggest that we omit so much of this as commences with the bracket in the middle of line 18 and goes down to line 26, because that matter can be taken--

The Chairman. (Interposing) Line 23.

Mr. Youngquist. It is line 23.

Mr. Holtzoff. Well, I think the next sentence does not go out, because it is rather a drastic--

Mr. Robinson. Well, it is all taken care of in Rule No. 55.

Mr. Holtzoff. It is taken care of in another rule, Rule 55.

Mr. Robinson. Based on the circuit rule.

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Mr. Wechsler. Have Justices of the Supreme Court now the power to admit to bail a defendant who is appealing to a circuit court of appeals?

Mr. Holtzoff. I think so, because the Justice of the Supreme Court is a circuit justice, and I think sitting as a circuit justice he has that authority, does he not, Judge?

Mr. McLellan. If I answered either way I would be lying, because I do not know.

Mr. Robinson. On the advice of counsel, do not answer.

Mr. Wechsler. Although I am not ordinarily timid in these matters, I think I would object to taking from a Justice of the Supreme Court any power that he now has.

Mr. Holtzoff. Well, I would too, sir. I understood that he would have that authority under this rule.

Mr. Youngquist. I should doubt it.

Mr. Holtzoff. It says, "if the appellate court * * * by any judge thereof". A circuit justice.

Mr. Youngquist. Yes.

Mr. Holtzoff. A Supreme Court Justice is competent to sit in the circuit court of appeals.

Mr. Youngquist. Yes, but he is still a circuit justice, circuit judge.

Mr. Dean. Why mention the Supreme Court Justices?

Mr. Holtzoff. Why not say "circuit justices"?

Mr. Dean. No.

Mr. McLellan. Well, do you mean a justice who has been assigned to a particular circuit?

Mr. Burns. Suppose he is ill.

Mr. Youngquist. Instead of "by any judge" do you want to

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say in line 18, "by any judge or justice thereof"?

Mr. Wechsler. I do not think it ought to be amended.

Mr. McLellan. Well, do you understand that a Supreme Court Justice, where he has not a given circuit in charge, is deemed a judge of the court of appeals?

Mr. Burns. Of course.

Mr. Seasongood. I think so. I think there have been cases. I know there is one case where Judge Anderson refused bail in an appeal, and Chief Justice Taft allowed it.

Mr. Burns. It was in the First Circuit, was it not?

Mr. Seasongood. Sir?

Mr. Burns. In the First Circuit?

Mr. Seasongood. No, not in the First; it was in the Seventh.

Mr. Seth. Is he not just as much a judge of the district court as he is of the circuit court of appeals?

Mr. Wechsler. No.

Mr. Holtzoff. The phrase "circuit justice" is used in the present criminal rules. You see, the subcommittee on style made this a little more definite, but the present rule merely says bail may be granted by the trial judge or by the appellate court or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Mr. Youngquist. That should be in. I did not know we had dropped that out.

Mr. Holtzoff. Apparently you did. I was not present when you were working on this.

The Chairman. You move to put it back in?

Mr. Youngquist. I move that it be restored, "or by the

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circuit justices".

Mr. Medalie. What line is that?

Mr. Youngquist. Line 18.

Mr. Longsdorf. And add the words "circuit justice" after the "or circuit judge".

Mr. Youngquist. "and by the circuit justice".

Mr. Holtzoff. "or by the circuit justice".

Mr. Longsdorf. "the circuit justice" or "a circuit justice"?

Mr. Holtzoff. Yes, that is the way the rule reads.

The Chairman. "the circuit justice".

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

Now, the motion is to delete the second half of line 18 through the first two words on line 26.

Mr. Youngquist. That was inserted, I think, at the suggestion of one or more district judges who complained of the fact that the defendant went over their heads and went to the circuit court of appeals for bail, where it was granted without their knowing anything about it.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. He shopped around among various justices.

Mr. Holtzoff. I do not think that that is any great deal of harm.

Mr. Robinson. But the point is that that is worded in Rule 55 as a separate rule. Rule 55 is a rule of the First Circuit, as you see.

The Chairman. If we adopt 55 we do not need those lines.

Mr. Holtzoff. You do not need those.

Mr. Robinson. They will go out.

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Mr. Youngquist. I second the motion.

The Chairman. All in favor of the motion to strike say "Aye." Opposed, "No." Carried.

Mr. Youngquist. That is the bracketed matter?

Mr. Holtzoff. Plus the sentence that follows,

The Chairman. Plus down to 26.

Mr. McLellan. Down through the first two words in line 26.

The Chairman. All those in favor of (c) as amended, say "Aye."

Mr. Youngquist. That ought to be, "The court or judge or justice," though.

The Chairman. Opposed, "No." Carried.

Mr. Youngquist. Do you not have to put that, "The court or judge or justice"?

Mr. Holtzoff. In the last line.

The Chairman. In line 26.

Mr. McLellan. You had better call him "circuit justice," because that cuts him down to one.

Mr. Holtzoff. What is that? "The court or judge or circuit justice"?

The Chairman. That is right.

52 (d).

Mr. Holtzoff. That is in the civil. That is taken from the civil rules.

Mr. Waite. I do not want to raise an argument, Mr. Chairman, but I again call attention to the fact that 52 (d) differs quite materially from Rule 6. That is more a matter of style than anything else, I think.

Mr. Holtzoff. Well, we voted last night, yesterday, if

you will recall, if I may refresh your recollection, on your motion--I thought it was your motion--to transfer Rule 52 (d) into Rule 6; and last night after this committee adjourned, the subcommittee did that very thing.

Mr. Waite. Oh, yes. All right.

Mr. Youngquist. And where is that form?

Mr. Robinson. We have it here. It has been typed. It was prepared for distribution later, and at that time I think it would be well to consider the comparable provisions.

Mr. Youngquist. All right.

The Chairman. All right. We pass 52 (d) for the moment.

Mr. Holtzoff. Well, no, Mr. Chairman; I think--

Mr. Medalie. (Interposing) Rule 52.

Mr. Holtzoff. I think we go from 6 to 52 (d). Rule 6 is a separate matter.

The Chairman. Well, your question?
Mr. Youngquist. Well, we have to change it.
Mr. Medalie. If you are through with Rule 52, I should like to say that the first sentence of (b) has been revised now, and I can read it.

The Chairman. 52 (b).

Mr. Medalie. (Reading:)

"A sentence to pay a fine or a fine and costs shall be executed, unless an appeal has been taken, upon such terms as the district court or the circuit court of appeals may deem proper."

I think that meets what was asked, does it not?

The Chairman. It does, I think.

Mr. Youngquist. Will you read that again?

Mr. Medalie. (Reading:)

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"A sentence to pay a fine or a fine and costs shall be executed, unless an appeal has been taken, upon such terms as the district court or the circuit court of appeals may deem proper."

Mr. Youngquist. No. Unless the court has stayed.

Mr. Holtzoff. Stayed.

Mr. Youngquist. The execution.

Mr. Medalie. All right. Then, after the words "an appeal has been taken"--

Mr. Youngquist. "unless stayed by the trial court or the circuit court of appeals". That is all you need.

4 Mr. Medalie. Well, you want the terms in there too.

Mr. Youngquist. That is in the second sentence.

Mr. Medalie. All right. "unless stayed". "stayed by the district court or the circuit court of appeals".

Mr. Youngquist. And the second sentence takes care of all the terms.

Mr. Medalie. That is right. I shall re-read it:

"A sentence to pay a fine or fine and costs shall be executed, unless an appeal has been taken and unless stayed by the district court or the circuit court of appeals."

The Chairman. Is the motion seconded?

Mr. Youngquist. I second the motion. I think perhaps we can improve the phraseology.

Mr. Seasongood. Yes, transpose some thoughts.

The Chairman. All those in favor of the motion as to 52 (b) say "Aye." Opposed, "No." Carried.

I am told that we may proceed to 52 (d) now because the change of rule has been made effectual under 6 rather than

52 (d). So may we direct our attention to it: 52 (d).

Mr. Holtzoff. That is taken from the civil rules.

The Chairman. That in turn is taken, I am told, from the civil rules.

Mr. Robinson. Civil rules?

Mr. Holtzoff. Yes, that is in the civil rules.

I move its adoption.

Mr. Youngquist. This does not take care of the cash bail, but we were told by Mr. Holtzoff last night that they are so few that they need not be considered.

Mr. Holtzoff. There are very few cases.

Mr. Youngquist. I am not entirely sure of it, but I am willing to go along.

Mr. Medalie. No; we ought to take care of cash bail.

Mr. Holtzoff. Beg pardon?

Mr. Medalie. You ought to take care of cash bail.

Mr. Youngquist. Cash bail.

Mr. holtzoff. Cash bail on appeal?

Mr. Medalie. Of course there are few, but it is there. It is a right.

Mr. Holtzoff. The only purpose of this paragraph is to make it possible to get a judgment against a surety without having to do so by an independent **suit.** So that cash bail is not a factor.

The Chairman. Yes, but why can we not have the same provision here as to cash bail that you have in the prime code?

Mr. Youngquist. That was my suggestion last evening.

Mr. Robinson. Last night, yes, that is right; you suggested too, Mr. Youngquist, something to the effect that the cash bail

shall be deemed to be the property of the defendant. Is that the same?

Mr. Youngquist. Yes. The purpose of that was to make it available for the execution of any sentence.

Mr. Robinson. Right.

Mr. Youngquist. By way of fine or costs.

Mr. Longsdorf. Cash bail will include government bonds put up as collateral in cash?

Mr. Robinson. We do not need to define that, do we?

The Chairman. Well, all those in favor of 52 (d) say "Aye." Opposed, "No." Carried.

Now may we have a motion that this section or a new section be provided to cover cash bail in the same way as we did in connection with bail in the trial court?

Mr. Holtzoff. I so move.

Mr. Burns. I second the motion.

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

Rule 53.

Mr. Holtzoff. Now, the bracketed portion beginning in line 11 is not necessary, because that will be covered if we adopt Rule 55. So I move to strike it out.

Mr. Youngquist. I second it.

Mr. Orfield. Second.

The Chairman. It is moved and seconded that line 11, the latter half, through line 15, be stricken. All those in favor say "Aye." Opposed, "No." Carried.

Mr. Orfield. I move to strike out all of the second paragraph, on the ground that it will promote delay: that the trial

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court or the appellate court should not have the discretion to extend the time in any unlimited way, on the ground that in the past, both in federal courts and in state courts, that has been one of the chief points in the criminal proceeding at which there has been delay.

Mr. Waite. To bring it up, I shall support the motion.

Mr. Holtzoff. Would you take away the entire power? Anybody's power to extend time?

Mr. Burns. I think that would be most unfortunate.

Mr. Holtzoff. Suppose you have a very long record.

Mr. Seth. You cannot get the transcript.

Mr. Burns. Or suppose there is disagreement as to the content of the record, and there is an attempt to establish it.

Mr. Orfield. I might compromise by giving the additional period of 40 days, but I would not permit the trial court to fix it for an unlimited time.

Mr. Holtzoff. But suppose you have a trial, as frequently is the case in federal courts, where the trial has lasted two or three months, and you certainly could not get the record ready in 80 days. I think you have to have a residue of power and trust the court.

Mr. Youngquist. The Doheny oil case took three months to try.

Mr. Burns. Suppose the trial judge is sick, which is common in the federal courts.

Mr. Holtzoff. Yes.

Mr. Burns. Suppose the trial judge is sick; suppose the counsel is sick.

Mr. Holtzoff. Well, you do not need the trial judge.

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Mr. Burns. Well, you may. You may very well need him in some dispute.

Mr. Holtzoff. No, because under this provision, under these appellate rules, each side puts in the record whatever it wants. We are trying to assimilate it in the civil rules.

Mr. Medalie. Yes, but that might not be approved; we may change our minds on that.

Mr. Holtzoff. Oh, yes.

Mr. Medalie. Circuit judges.

Mr. Holtzoff. I certainly think there ought to be residual power in the courts to extend time.

Mr. Burns. To what extent is delay in this field in the federal courts the subject of criticism?

Mr. Holtzoff. Well, delays were reduced to a very large extent by the rules of 1933. Prior to that there was a lot of criticism, and just criticism. But I think this, and I make this statement because a senior circuit judge called my attention to the fact that frequently delays occur because the United States attorney does not make a motion to dismiss. If he pressed the matter, the defense counsel, in cases where they were apt to be indolent or dilatory, would be more energetic. So I think that it is a matter of administration rather than a matter of court procedure, and certainly it would be most unfortunate if you put a distinct limitation of this kind.

Mr. Burns. Suppose you put in "any judge thereof, may for a good cause shown," to indicate that it is not to be uncontrolled and arbitrary.

Mr. Holtzoff. That is all right.

Mr. Youngquist. After the word "may" in line 9?

Mr. Burns. That is right.

The Chairman. Is the motion seconded?

Mr. Seasongood. I second it.

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

Professor Orfield, do you want a vote on your motion?

Mr. Orfield. I believe not. I do not believe it was seconded.

The Chairman. All those in favor of the adoption of this rule as amended, say "Aye." Opposed, "No." Carried.

Rule 54.

Mr. Youngquist. In Rule 53 why do you say the extension may be granted by the district court with respect to 42 (b)?

Mr. Longsdorf. Mr. Chairman, with respect to that matter which I referred to a while ago, there would be great dissatisfaction in the Ninth Circuit if the printing of records, the brief, was made a uniform rule. The Fourth Circuit looks at it from the other side.

The Chairman. The Fourth, the Third, the First, and the District of Columbia now all use it.

Mr. Longsdorf. I know, but we have been using it for 30 years and we are about to change it in the state courts quite radically. The experience in the state courts is against it. In fact, they did not do it in criminal trials at all in the state courts. They did it in the state courts in civil appeals, and the result of it is that we get the record presented by excerpts in the brief in a disjointed and discontinuous form. The appellant will pick out what he wants and stick it into his brief from various points in the record, and then the appellee

will put in other parts interposed between--if it was in order--and the judges do not like to read it.

Besides that, some attorneys are quite inexpert in choosing the parts that should be printed as excerpts. In criminal cases in the courts of California they have sent up the complete reporter's transcript if that was desired, or parts of it if that seemed sufficient, and it is now proposed out there in the state courts in criminal appeals to send up an original and two carbon copies.

Mr. Holtzoff. They send up the whole typewritten transcript?

Mr. Longsdorf. An original and two carbon copies of the reporter's typewritten transcript.

Mr. Holtzoff. The whole typewritten transcript?

Mr. Longsdorf. Well, now they propose to send up three, so each judge of the reviewing court will have one to read if he wants it. One is not enough for three men.

Mr. Holtzoff. Yes, but it costs an awful lot of money; it costs more to do that than it does to print an appendix to the brief.

The Chairman. Does not sending up three ignore the realities? because I do not believe that in any court of three appeal judges they all three read that record page by page.

Mr. Longsdorf. Perhaps not, but now the clerk of the Ninth Circuit tells me that by reducing the amount of the record that is printed, as they do under that section 865, his printing costs are less than they are in the Fourth Circuit. At any rate, I am telling you how they feel about it out there.

The Chairman. That is not involved in (a). Let us see if

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we can dispose of (a) first, if we may.

Mr. Wechsler. I move an amendment to (a) that after the last word there be inserted "or by the rules of the circuit courts of appeals."

Mr. Seth. Yes.

Mr. Longsdorf. I second that motion.

The Chairman. What would be the effect of that, Professor?

Mr. Wechsler. It would allow the circuit court of appeals to make rules with respect to preparation and form of record.

The Chairman. Well, that in effect would nullify (b), would it not?

Mr. Holtzoff. I think so.

Mr. Wechsler. Yes, but I intend to vote against (b), so that I am consistent in my purpose.

Mr. Robinson. Just slipped up on it.

6 Mr. Longsdorf. I must protest. It might make (b) a single purpose, but it would nullify --the Fourth would be at liberty to do it their way, and the Sixth would be at liberty to do it their way.

Mr. Wechsler. As a matter of fact, it would not nullify (b) because it says, "except as otherwise provided in these rules."

The Chairman. All those in favor of Professor Wechsler's amendment, say "Aye." Opposed, "No."

Mr. Medalie. Wait. Let me understand. What is the amendment.

Mr. Youngquist. No.

The Chairman. I am in doubt. All those in favor of the amendment say "Aye."

Mr. Medalie. Wait. What is the amendment?

The Chairman. The amendment is to insert at the end of line 5 "or rules of the circuit courts of appeals", having for its purpose leaving each circuit to adopt (b) or not adopt (b).

Mr. Burke. Does that not, Mr. Chairman, operate to prevent uniformity?

Mr. Holtzoff. Yes.

Mr. Youngquist. Yes.

The Chairman. It would.

Mr. Burke. I mean the adoption of this amendment.

Mr. Holtzoff. Yes.

Mr. Burke. Would that not have the effect of preventing the uniformity that you are seeking to accomplish?

The Chairman. Very obviously.

Mr. Wechsler. Well, it would not have that effect within the confines of any area of uniformity prescribed by these rules; and if (b) is retained, then no circuit could make a rule inconsistent with (b), since (a) reads "except as otherwise provided in these rules"; but within the area in which there is no provision in these rules I think the circuit court ought to have the power to make rules of their own.

Mr. Waite. Does not your amendment add "except as otherwise provided in these rules or by order of the circuit courts of appeals"?

Mr. Wechsler. "or by rules of the circuit courts of appeals".

Mr. Waite. So that the circuit court of appeals could depart from (b) if it wanted to?

Mr. Robinson. That is right.

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Mr. Wechsler. No, I do not think it could, because the circuit court cannot make rules inconsistent with these rules. There may be a drafting problem there, but that is not my purpose, really, to set aside (b), but to make clear that the circuit court can fill in the gaps.

Mr. Youngquist. But here in this case, while it may not make rules inconsistent with these rules, we would in (a) be giving them specific authority to make a rule different from that prescribed by (b).

The Chairman. That is right.

Mr. Youngquist. And the whole purpose of (a) that we arrived at after full discussions previously was to make the practice uniform throughout the country.

Mr. Wechsler. I see.

Mr. Longsdorf. We do not want to confuse the printing of the record with the preparation and form of it otherwise. Now, the preparation and form of it--when I seconded that motion, on further thought I can see that we might want to get uniformity in the preparation of the record and in the form of it, but not uniformity in the manner of printing it. Now, that is a matter that belongs to each circuit for itself, and I think we ought to let each circuit have it its own way, whichever way they think will facilitate work.

Mr. Wechsler. I think my motion is misconceived, Mr. Chairman. I withdraw it.

The Chairman. You withdraw the motion?

Mr. Wechsler. Yes.

The Chairman. All those in favor of 54 (a) as printed, say "Aye." Opposed, "No." Carried.

54 (b).

Mr. Holtzoff. I move its adoption.

Mr. Robinson. I second the motion.

Mr. Medalie. I should like to know about costs in criminal cases on appeal.

Mr. Longsdorf. I should like to propose an amendment now.

Mr. Youngquist. What is it.

Mr. Longsdorf. In line 7 it now reads, "it shall not be necessary to print the record on appeal except that". I should like to change that and say, in place of "except that", "but if not printed the appellant shall print, as an appendix to his brief". That would enable the court to have the record printed in its own way, but if it was not done that way it would be printed some way in the brief.

Mr. Holtzoff. Mr. Longsdorf, the reason we were heartily in favor of (b) is that it makes it possible for a litigant of modest circumstances to appeal, to get an appellate review. Today, without this rule, the cost of printing is sometimes so prohibitive that it becomes impossible for a defendant who is unable financially to bear the cost of printing the record to secure an adequate appellate review; and that is the reason, and the only reason, why we were heartily in favor of (b).

Mr. Wechsler. Is that not covered by the forma pauperis proceeding?

Mr. Holtzoff. Yes, it is, but the answer to that is this: There are lots of defendants who are not so poor that they can prosecute an appeal in forma pauperis but yet have not sufficient funds to print a big record, or they may have sufficient funds but they may become impoverished in doing it. The forma

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pauperis proceeding only takes care of the man way down at the bottom of the scale. I have in mind the persons in the middle bracket.

Mr. Longsdorf. All right.

Mr. Wechsler. Well, you speak as if it were a requirement in all cases to print the full record. It is not, is it? The defendant and the Government may agree on the deletion of parts of the record, and that of course is the result of the present bill-of-exceptions practice. I should like to retain that practice as it is.

So far as I can see, the only effects of this proposal are two:

First of all, it puts a little burden on the Government if it wants to be onery about the size of the record. Of course, that is not a substantial difficulty for a United States attorney, since he does not pay the costs of printing a record out of his own salary. Therefore, there is a distinction between the civil and criminal situation here so far as concerns the burden that is imposed upon the appellee.

The second consequence of this is that it divides up the parts of the record and achieves a dissipation of costs.

Now, I am very much impressed by the point that that division of the record is by and large a bad thing because I like criminal proceedings on appeal to present, insofar as possible, a full picture of the proceeding below. There are many cases in which the plain-error rule comes into operation where the court has the benefit of the record or a larger record--a continuous record--in finding reasons for reversal that not even the appellant's counsel assign. So it seems to me

it creates an abstract method of handling appeals, as distinguished from a concrete method.

The Chairman. But, Mr. Wechsler, you have always got that there in the typewritten record, and I assume that the judge who writes the opinion in the circuit court of appeals will refer to that typewritten record. I should be very much inclined to doubt, in the ordinary case, that the other two judges would. They are more likely to be content with the briefs and the excerpts. I cannot bring myself to believe that in the average case that is disposed of in circuit courts of appeals all three judges read all records. It just isn't so.

Mr. Wechsler. I am not suggesting that, but under the other practice there is an indication to do it, and that is effectively destroyed here.

Mr. Longsdorf. They may want to refer to parts of it without reading it. It is all in one paper. Somebody else is busy with it.

Mr. Wechsler. Do not forget, this is something that a circuit court of appeals is now free to do of its own rules, and I am not suggesting that the court forego doing it if its experience pointed that way; but this is taking a practice that is used in a few circuits and making it mandatory in the whole country, without, in my view, adequate reasons for doing it.

Mr. Holtzoff. Is not the reduction of the cost of appeal to the defendant a very important objective to be attained in appellate procedure, and does not this rule attain it?

Mr. Wechsler. I doubt that it would attain it appreciably, Mr. Holtzoff.

Mr. Longsdorf. There is one more advantage that our method has that I want to call attention to: When we print the record we print 60 copies of it. It costs but a trifle more to print 60 than it does to print 25; and then if the appellant fails in his appeal and wants to ask for certiorari he has the printed record already at hand to use.

Mr. Holtzoff. You are not thinking of the man who pays the bill.

Mr. Longsdorf. He may not get the certiorari, but he has got to send the record up.

Mr. Holtzoff. You are not thinking of the man that has to pay the printing bill, Mr. Longsdorf.

Mr. Longsdorf. I am thinking just exactly of him. If he comes to the point where he wants to petition for certiorari he is going to be up against a printing bill anyway.

Mr. Wechsler. How does the certiorari practice now work where this rule is enforced?

The Chairman. It may come up on the excerpts. I had a case that I argued in March where the record was one of about 8,000 pages, and I agreed with the Government on a record of about 1,100 pages, and we had time extended on both sides for the argument; and there was only one little question that the Court wanted light on, and they asked us to bring an additional single page of the record to give them two references. Now, it was the difference between having a book like that (indicating) and having seven books like that.

Mr. Longsdorf. Unless you can file the briefs above, the Supreme Court cannot tell always what the circuit court of appeals is deciding upon. The excerpts will be printed in the

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briefs, but if the briefs are not filable as part of the record upon a certiorari, then you do not know what moved the circuit court of appeals.

The Chairman. Well, those all go up on that.

Mr. Longsdorf. They do?

The Chairman. Surely.

Mr. Longsdorf. The rule covers that as now made for the Fourth Circuit, does it? The briefs go up as part of the record?

The Chairman. No; the excerpts go up.

Mr. Longsdorf. Do you take them out of the brief?

The Chairman. No, they are printed separately in the brief.

Mr. Holtzoff. The Fourth Circuit has that rule, the First Circuit, the District of Columbia, and the Third Circuit.

Mr. Longsdorf. Yes, I know.

Mr. Seasongood. This seems to me to be an admirable rule. It is a saving of expense, which is something you want to accomplish, and a saving of time. I have had instances where you fuss around about what should be printed, and the other person makes you print a lot of stuff that is purely vexatious. You do not want to ask in the circuit court of appeals to have the costs assessed against him for making you print it, but it has happened that way, and the circuit courts of appeals have been rather slow themselves in approving procedure. They were very insistent in our circuit, for instance, on retaining the old narrative form of bill of exceptions, which was, I thought, always absurd and involved an amount of work and cost entirely disproportionate with the idea of printing in question-and-

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answer form.

I think this is a good provision and that we ought to go ahead with it.

Mr. Longsdorf. Now, Mr. Chairman, I do not know whether we can evolve any method of dealing with this matter, in the light of what I am about to say, or not, but there is a very great deal in this rule that ought to be considered at the forthcoming conference of senior circuit judges. Can we devise any way of leaving this stand open until we know how they feel about it?

Mr. Youngquist. Would not the effective way be to suggest it to them and let them shoot at it?

Mr. Longsdorf. I know what the effect of waiting would be.

Mr. Holtzoff. I think the effective way would be to include this in the mimeograph of the rules that goes to the public--the legal public, judges--and see what kind of reaction it arouses.

Mr. Longsdorf. Your proposal, then, would be to pass this and of course see that it is brought before the conference of senior circuit judges, and if they object to it--

Mr. Holtzoff. Well, the senior circuit judges will all have copies of the preliminary draft. They will be asked to comment on that.

Mr. Longsdorf. That is what I am thinking of. And if they comment with sufficient adversity it goes out?

Mr. Youngquist. That depends upon what we did.

The Chairman. Surely. It depends upon what the Supreme Court does.

Mr. Longsdorf. I say, with sufficient adversity.

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Mr. Wechsler. In any case in which a defendant appeals from conviction and assigns as one of his points that the evidence was insufficient to sustain the conviction, he would have to print the whole record, would he not?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Since this is in the appellate rules and not in the district court rules and we are only proposing amendments within the terms of our authority, I think the senior circuit conference ought to have something to say about this as well as the Supreme Court.

The Chairman. This is one thing expressly that the Chief did mention should be agitated.

Mr. Longsdorf. We are agitating it.

The Chairman. Yes, sir.

Mr. Waite. Public agitation.

The Chairman. I mean, in my conference with him I mentioned this as one of the points on which there had been an advance in the practice since these appellate rules were promulgated about eight years ago. He did not commit himself one way or the other, but he did say that this was a point.

Mr. Wechsler. Do I understand this correctly in another respect, that the appellant may print the whole record if he wants to?

Mr. Holtzoff. Oh, yes.

Mr. Seth. Surely.

Mr. Wechsler. There is no penalty on him for printing an excessive record?

Mr. Holtzoff. No.

The Chairman. No; I mean, there is no saying to the

litigant, "You cannot print."

Mr. Longsdorf. No, I do not see anything to that effect; he can have it printed if he wants to.

Mr. Holtzoff. The advantage is that he can print as little as he wants to or as much as he wants to.

The Chairman. And the court may order it printed.

Mr. Longsdorf. Yes.

Mr. Youngquist. That is what I have been concerned about. We who are so valiantly battling for this new rule may be adopting a rule that can be nullified by any circuit court of appeals by reason of the first clause in (b).

Mr. Seasongood. Yes.

Mr. Youngquist. "Unless ordered by the appellate court, it shall not be necessary to print". There would be nothing to prevent any circuit court of appeals from making a general order that all records shall be printed in full.

I confess that I have heretofore overlooked the significance of that clause, and I shall now move that it be stricken.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. You may want to make it mandatory not to print.

Mr. Holtzoff. No.

Mr. Youngquist. "it shall not be necessary to print the record on appeal except that the appellant shall print, as an appendix", and so forth. That is what, as I understand it, we are trying to save.

Mr. Holtzoff. Yes.

Mr. Longsdorf. Well, really, if you are going to strait-jacket all of them in one rule that is the way it ought to be,

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but I do not think it ought to be done.

Mr. Youngquist. That is it.

The Chairman. I gathered--and I must confess I read this rule with particular care--I thought that meant specific cases, and if it does not I would much prefer, rather than striking it out, to say, "unless specifically ordered by the appellate court": to take out any general rule but to say that the court could in a specific case.

Mr. Burns. The advantage, however, Mr. Chairman, of starting out, "it shall not be necessary to print", ought not to be lost. Would it not be better to put at the end, "in specific cases, for good cause shown, the appellate court"?

The Chairman. That is right.

Mr. Burns. "may order printing of the entire record"?

The Chairman. I agree with that.

Mr. Seasongood. You can put that in in 15 and 16 there: "if the appellate court is of the opinion that the appellant has failed to print so much of the record".

Mr. Burns. Except that that would have to do with the imposition of costs.

Mr. Seasongood. Well, you can add here that it may itself order parts or the whole of the record to be printed or may impose costs against him.

9 Mr. Longsdorf. Judge Burns, you want to take away the power of the circuit courts of appeals to provide by standing rules that the record shall be printed in the manner provided by sections 864 and 865 of 28 U.S.C.; right?

Mr. Burns. That is right.

Mr. Holtzoff. That is right.

Mr. Seasongood. Let us move to strike out this first, "unless ordered by the appellate court," and you have got the idea, and insert it somewhere else, so it will be, "in a particular case the court may order".

Mr. Burns. I second it.

The Chairman. All right. You have heard the motion. All those in favor say "Aye." Opposed, "No." Carried.

Mr. Youngquist. I suppose this rule--I mean the addition to be made--will require the court to make an order in each individual case.

The Chairman. "unless specifically ordered," or something.

Mr. Wechsler. Mr. Chairman, I find myself slowly being persuaded on this point, but I should like to ask one question that occurs to me. When we get right down to it, I have only one reason for drawing back from it, and that is the discontinuate record. It seems to me, from the point of view of costs, that is bad and can be avoided. I wonder if exactly the same result as that here sought might be achieved without introducing a discontinuate record, this way:

The appellant would mark those parts of the record that he intends to print. He would then transmit the manuscript to the Government. The Government would mark those supplementary portions of the record that it desires to print. The record would be printed as requested by the appellant and by the Government combined. The costs would be distributed in accordance with the request of each side, subject to the judicial control that this rule allows: that is to say, costs for improvident omissions would be assessed against the appellant.

That, it seems to me, would get exactly the same result

and still get the book printed as a continuous book instead of disjointedly.

The Chairman. There is only one possible objection to that, and that is the objection of the delay in working out the brief. When a man has to print his excerpts and file them with his brief he goes about it in a businesslike way, and so does the respondent, but when there is this conferring process it always results in delay.

Mr. Wechsler. But there would not be any conferring process under the procedure as I have stated it. Each side would designate its part, and it would go to the printer.

The Chairman. Well, that clearly is an advantage.

Mr. Wechsler. There would be no subject for discussion at all.

The Chairman. And I may say, it is my understanding that it is a practice in the Fourth Circuit and these others, when matters come up to the Supreme Court, to consolidate your excerpts in just that fashion, so that you take the two and weave them together, just as you have suggested.

Mr. Wechsler. To bring the matter to a head, may I move as a substitute that the rule be redrafted in those terms.

Mr. Holtzoff. I do think that that would insure considerable delay in the process, as in this rule, and that is why I would hesitate.

Mr. Seasongood. Then it would introduce a different practice, as I understand it, in all these different circuits from a practice that is already fairly well crystallized.

Mr. Holtzoff. Yes, the Fourth Circuit--

Mr. Seasongood. And, also, you are not apt to print as

much if you do it in connection with your brief. You get sensible when you write your brief, whereas the other way the fellow says, "Well, I want this in, and this in, and this in," which he really does not need in.

Mr. Youngquist. I should very much prefer to see it submitted in the first instance in the form in which it now is. We shall get plenty of suggestions about it.

The Chairman. May I just observe this: Another indirect advantage in this plan is that when they read appellant's brief and they have a reasonably short excerpt from the testimony accompanying that brief there is a much greater chance that they will read the testimony than thatthat they will if they have a big, fat book. I mean I have always been impressed by that fact. I knew a man once who was a victim of that. He spent literally five months preparing a narrative for the Third Circuit Court of Appeals. Some months afterward, having lost his office copy, he went down to see if he could borrow one from the clerk, and they could not find it anywhere, but finally a bright young lady in the office said, "Oh, I know where they are," and they found all the extra copies of the narrative still in the original package. The case had been decided by the court without any member of the court having a copy of the record before him.

Mr. Wechsler. The narrative is out in this, is it not?

The Chairman. Yes, but I cite it from the fact that the very size of a volume of testimony precludes the court from even opening it.

Mr. Wechsler. I may have been corrupted, Mr. Chairman, by undue practice in the Supreme Court as distinguished from the

courts of appeals, but I have a sense that the record as a unit is important in getting the whole sense of the case.

The Chairman. There is another great advantage if the court, as in at least two of these circuits, reads the briefs in advance and becomes at all familiar with the excerpts of testimony on which you are relying.

Mr. Longsdorf. They all are.

The Chairman. And the argument becomes something rather live and vital, as distinct from the mumbo jumbo of talking to a court that is not aware of the issues until it is informed by counsel, and is then mentally struggling to relate it to its preexisting learning on the subject.

Mr. Holtzoff. In the Fourth Circuit every one of the three judges reads the brief and the appendix before argument; whereas it would not be so easy to do that if you have a good-sized record.

Mr. Medalie. May I ask a couple of questions?

The Chairman. Surely.

Mr. Medalie. First: Where the appellant in a criminal case sets forth an insufficient amount of the record, that puts on the Department of Justice the expense of doing a considerable amount of printing. It is prepared to do that, is it?

Mr. Holtzoff. It will have to be.

Mr. Medalie. I know it will have to be, but is it prepared to do it?

Mr. Holtzoff. Oh, yes, because it does it in civil cases now.

Mr. Medalie. Yes. All right.

Now, what is the idea of costs on appeal in criminal cases?

Mr. Holtzoff. Well, I guess that provision would be in effect if I would--

Mr. Medalie. Let us take it out.

Mr. Wechsler. Is there not a statutory provision on costs in criminal cases?

Mr. Holtzoff. Oh, yes, but I suppose what Mr. Medalie means is that you could very rarely collect the costs.

Mr. Medalie. I never saw a judgment for costs in a criminal case.

Mr. Holtzoff. Oh, yes.

Mr. Seth. Is there not a rule in all circuit courts of appeals that they shall assess costs neither for or against the United States?

Mr. Youngquist. I did not get Mr. Seth's question.

Mr. Seth. I say, is there not a rule of the Supreme Court and the circuit court of appeals that no costs are assessed where the United States is a party?

Mr. Seasongood. Yes.

Mr. Holtzoff. No, but you are speaking of costs against the defendant.

Mr. Seth. On appeal.

Mr. Medalie. Yes, and what good does it do to assess costs against the Government when you cannot collect them?

Mr. Longsdorf. Or against a defendant who hasn't anything?

Mr. Youngquist. Well, is there any provision for assessment of costs?

Mr. Burns. Yes.

Mr. Youngquist. Against the Government?

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Mr. Burns. No.

Mr. Youngquist. I mean in this rule.

Mr. Robinson. None.

Mr. Medalie. Only against the appellant.

The Chairman. That is right.

Mr. Medalie. And the Government may sin without penalty.

The Chairman. Well, it does have a very real penalty because if it annexes a lot of junk to its brief its chances of having it read by the court in advance of the argument are lessened to that extent.

Mr. Youngquist. And besides, there is this, Mr. Medalie:--

Mr. Burns. Well, is not the implication of dividing costs that you are not going to divide them against joint defendants alone, but you divide them against the parties? And that will run against the established rule that you cannot assess costs against the Government.

Mr. Holtzoff. I thought we could well afford to strike out the costs. That would begin on line 15 and end on line 20. Well, it would mean striking out everything after the word "appellee" in line 15.

The Chairman. To 19?

Mr. Holtzoff. Well, 22.

Mr. Youngquist. Yes, thatall relates to costs.

Mr. Holtzoff. All the rest of the rule, Mr. Chairman.

The Chairman. Oh, I think you need that. I think you have got to have something to hold counsel in line.

Mr. Holtzoff. Actually it is a fact that a judgment for costs against a defendant in a criminal case is very rarely collected.

The Chairman. Yes, but in the cases where they are most likely to sin it is collectible.

Mr. Holtzoff. Oh, yes, that is right.

Mr. Youngquist. This would permit a defendant to throw on the Government the burden of printing the appellant's record. I think it is all right.

The Chairman. The Government might outsmart them. If I represented a defendant I should not feel that I dared to do that. Suppose you had a smart district attorney who said, "All right. We will go up on your little point of the record."

Mr. Youngquist. I should assume that the appellant would print only that which is distinctly favorable to him.

Mr. Holtzoff. I do not think any terrible harm would be done under those circumstances. It would cost the Government a little bit more than it does today.

Mr. Medalie. Have you checked with the Department. Are they willing to do that?

Mr. Holtzoff. I have not checked it with the Department, but I think it is one of those things that they would not oppose, because they have never opposed the civil rule, and they have more civil appeals than they have criminal appeals.

Mr. Medalie. Yes, that is right.

Mr. Youngquist. Did we adopt (b), Mr. Chairman, as amended?

The Chairman. No.

Mr. Medalie. What is the amendment? What is going on? All on costs?

Mr. Youngquist. We struck out "unless ordered by the appellate court".

Mr. Burns. The question comes on the amendment, motion to strike out, then, does it not?

Mr. Youngquist. Oh, I thought the amendment to strike out those words had been adopted.

The Chairman. Yes, at the beginning of line 6.

Mr. Burns. Oh, yes, but we are talking about line 15.

The Chairman. Oh. Well, you press that, Mr. Holtzoff?

Mr. Holtzoff. No, I do not press it. I was just willing to concede that if it was necessary.

Mr. Youngquist. "in specific cases".

The Chairman. All right. Then the motion is to adopt (b) as amended.

Mr. Wechsler. Well, there is one other motion, Mr. Chairman. How about lines 19 to 21? What is the point of "that parts of the record have been printed unnecessarily"? Why should that be in? Why should not a fellow be able to print unnecessarily if he can pay for it?

Mr. Youngquist. That is for the protection of the court.

Mr. Wechsler. But then does that not make it mandatory to reduce the record?

The Chairman. That has been carried into all these different circuits from the Fourth Circuit. The purpose of that, as expressed in the address on the subject by the clerk, is to have a constant reminder to counsel that the court does not want them to print unnecessary stuff: as, for example, printing tremendous exhibits, where all you want to refer to is a line or two in the exhibit, and all that sort of thing.

Mr. Longsdorf. Send up the original.

The Chairman. What?

Mr. Longsdorf. Send up the original exhibit; you don't need to print anything.

Mr. Youngquist. That is what they should do, but they don't always.

Mr. Wechsler. I do not think there ought to be any suggestion that an appellant at his peril must decide precisely what is needed.

Mr. Holtzoff. I think that penalty would be invoked in very extreme cases anyway.

Mr. Youngquist. It is admonitory, I think, more than anything.

Mr. Holtzoff. Yes.

Mr. Youngquist. But I should like to see it in.

Mr. Medalie. Well, have costs been taken out now completely?

The Chairman. No.

Mr. Medalie. You want to leave them in?

The Chairman. I think they should be in.

Mr. Medalie. Leave it in?

Mr. Youngquist. Yes.

Mr. Medalie. What part have you taken out?

The Chairman. We have not taken anything out yet.

Mr. Medalie. Divide costs?

The Chairman. No, we have not touched that.

Mr. Medalie. Can you leave that?

The Chairman. Why not.

Mr. Holtzoff. You cannot divide costs.

Mr. Medalie. How can you divide costs with the Government?

Mr. Youngquist. Well, you can divide costs, but you cannot collect from the Government; that is all.

The Chairman. You divide them. That part is simply uncollectible. That is very often the case in business transactions.

Are there any further questions?

Mr. Wechsler. I move that that sentence beginning on line 19 go out.

The Chairman. The motion is that the sentence beginning "If" on line 19 and ending "require" on line 21 be deleted.

All those in favor say "Aye." Opposed?

Let us have a show of hands. All in favor of the motion raise hands. Five. Opposed? Five. The motion is carried.

Mr. Seasongood. What was the vote?

The Chairman. What was that?

Mr. Seasongood. I say, what was the vote?

The Chairman. Six to five.

Mr. Youngquist. You said five on a side.

Mr. Medalie. What about the special order in each case?

The Chairman. That has been carried already.

Mr. Medalie. Where does it appear?

The Chairman. We strike it out at the beginning of the first five words that come out, and it comes in there as part of the first sentence, "Unless the appellate court shall specifically order otherwise". I thought that was understood.

Mr. Youngquist. I thought we left that with the Reporter.

The Chairman. It was left with the Reporter, yes.

Mr. Holtzoff. The Committee on Style.

Mr. Medalie. No.

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The Chairman. Now, all those in favor of 54 (b) as thus amended, say "Aye." Opposed, "No." Unanimously carried.

Mr. Youngquist. May I merely make a suggestion on 53, Mr. Chairman?

Mr. Longsdorf. On the final report I want to vote no. I was not unanimous on proposing that. I am unanimous on having it considered by somebody.

The Chairman. All right. Then it is not unanimous. It is carried.

Mr. Youngquist. That we strike out the sentence in lines 10 and 11.

The Chairman. On 53?

Mr. Youngquist. 53. "The extension may be granted by the district court pursuant to Rule 42 (b)." That. I pointed that out to Mr. Holtzoff, and he says there is no need for it.

Mr. Holtzoff. Surplusage.

The Chairman. Surplusage. Is that it there?

Mr. Youngquist. Exactly, surplusage.

The Chairman. All those in favor of that motion say "Aye." Opposed, "No." Carried.

Rule 55.

Mr. Burns. I move its adoption.

Mr. Robinson. I second the motion.

Mr. Holtzoff. The words "circuit justice" should be inserted in line 2 after "circuit judge," in line with what we have done before.

Mr. Burns. "or a circuit justice".

Mr. Longsdorf. "the circuit justice" you used the other time.

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The Chairman. All those in favor of the motion as thus amended, say "Aye." Opposed, "No." Carried.

Rule 56.

Mr. Holtzoff. I move the adoption of the alternate rule, because the first rule is too detailed and is not suitable to every circuit.

Mr. Burns. I second the motion.

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

Rule 57.

Mr. Holtzoff. I move its adoption. That is the present rule.

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

Mr. Wechsler. Is that the present language?

The Chairman. Is it the present language, Mr. Holtzoff?

Mr. Holtzoff. I am not sure as to the present phraseology, but it is the present provision. That is what we adopted in New York, Mr. Youngquist. I think it is the present language, but I am not sure. But it is the present substance.

Mr. Wechsler. It is the present substance, yes. Here is the present language:

> "Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within 30 days after the entry of judgment in that court."

Mr. Holtzoff. This seems to be simpler.

Mr. Seasongood. According to this 56 preferably alternate rule, you can give these criminal cases priority over some civil cases. The enforcement of labor relations has special

priority.

Mr. Medalie. Yes.

Mr. Seasongood. And also I think appeals from some other things are to be heard immediately.

Mr. Youngquist. We added to the provision in the trial court. As far as practicable you would have to do that.

Mr. Seasongood. I think you would have to do that, yes, because they have priority too.

The Chairman. If there is no objection that will be ordered here.

Mr. Seasongood. Did you pass 57? because you have to have a provision for extending the time. A justice may extend the time under the law even after the time has expired.

The Chairman. Is there anything in the present rule about that?

Mr. Holtzoff. No, the present rule is silent on the subject.

Mr. Wechsler. It is the statutory time in criminal cases, the time of petition. I feel the justices themselves feel without power to grant under the statute.

Mr. Seasongood. In criminal cases?

Mr. Wechsler. In criminal cases. The criminal appeals rule in opposition is not textually decisive of the point, but I know that in at least two instances a justice felt he was without power.

Mr. Seasongood. I do not see why that should be, because the statute is general for allowance of writs of certiorari, and I think it is in the statute that a justice may extend the time, and he may extend it even after the 90 days has expired,

because one of them did it to me. Just recently he did.

Mr. Burns. Judge, does that mean that the justices conceive themselves without power even if the application is made before the 90 days expire? Well, I think we ought to do something about that if we have the power.

Mr. Youngquist. That was never the rule in my day.

Mr. Seasongood. I cannot see the difference. It is really one rule of certiorari, no matter what kind of a case.

Mr. Burns. I move, Mr. Chairman, that a (b) be put to 57: in substance, that on application to the Supreme Court for an extension of the time within which certiorari may be filed, a Justice of the Supreme Court may for just cause extend not more than 30 days additional.

Mr. Seasongood. Now, you had better look out for that, because there is some kind of statute on it.

Mr. Youngquist. Yes. Ought we not better first find out what the statute is?

Mr. Seasongood. Let us find out what the statute is.

Mr. Wechsler. Well, the criminal appeal rule is a limitation or the statute. The statutory time is 90 days, but the Court by rule cuts the 90 days to 30 in criminal cases. So that there is not any sense of lack of power individually to extend the time in criminal cases. It is on the ground that the power was recognized by the criminal appeal group. So that Judge Burns is right in making the motion, I think, and it is within the realm of the modification.

Mr. Burns. Modification, and I would think it ought to be to the balance of the period permitted by the statute, which is not more than 30 days. It seems to me 30 days is rather

court. I supplement that motion by saying it be referred to the Reporter to draft appropriate language to bring about that result.

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Mr. Youngquist. May I suggest, to dispose of it now, the addition to the same sentence of the words, "but the Court or a justice thereof may for good cause shown extend the time not more than 60 days", did you say? Thirty days, I think, would be better.

Mr. Burns. Not more than 90 days after the entry of judgment.

Mr. Youngquist. Would you want it that long?

Mr. Burns. Yes. That would be a total of 90 days, you see; not 90 days after the 30, but 90 days after the entry of judgment in the lower court.

Mr. Youngquist. Can we not do it by simply saying "not more than 60 days": that is, the extension is not more than 60 days?

Mr. Seasongood. Why do you want to place any limit there? They know the object is to expedite matters. Why not? They may extend the time. Let them fix the time.

Mr. Youngquist. I think that is all right.

Mr. Longsdorf. Mr. Chairman, I did not hear. Perhaps it was made specific, but in line 3 of Rule 57 we have the word "judgment." Of the circuit court of appeals, of course.

Mr. Holtzoff. I think that we do not need that.

Mr. Longsdorf. I think probably we do not need it.

Mr. Holtzoff. Yes.

Mr. Longsdorf. But--

Mr. Holtzoff. We purposely made it single.

Mr. Medalie. What judgment is it?

Mr. Seasongood. There would not be any other.

The Chairman. There couldn't be.

Mr. Longsdorf. There is only one that it could be.

Mr. Dean. Except the judgment which you seek to review.

Mr. Seasongood. You cannot have a petition for certiorari except from the judgment of the court of appeals.

The Chairman. Did we agree on the language? And if so may we have it restated?

Mr. Youngquist. Add in line 3, "but the Court or a justice thereof may for good cause shown extend the time."

Mr. Seasongood. Oh, excuse me.

Mr. Wechsler. I should like to know, Mr. Chairman, on the merits of it, whether there is in this group any experience that leads to the view that such an extension provision is desirable. If the lower court proceeded on the theory that in a criminal case an extension were permissible it would be taken advantage of, and it would be very difficult ever to deny applications for an extension where counsel said he could not get ready. I think the experience has been that counsel who could not get ready always did get ready, so long as the rule was in its present form.

In the absence of some experience indicating that the rule has worked hardship, I should be reluctant to recommend to the Court that it be changed.

I know in some cases at the last term, involving tremendous records, where there very able counsel, I felt it was a real hardship for them to have to come through, but they did, and in good shape.

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Mr. Medalie. It takes a long while to prepare some of those records.

Mr. Holtzoff. I agree with Mr. Wechsler on that.

The Chairman. I mean if the Court had felt that something like this was needed, they doubtless would have recommended it.

Mr. Wechsler. It is a thing within their most immediate experience, much more than it is within ours, and they seem to be satisfied with it. It is a thing that I think they would have changed on their own motion if they had felt there was any need for change.

Mr. Youngquist. I am afraid it might work a hardship in a case where it is physically impossible--

Mr. Holtzoff. (Interposing) But it doesn't work hardship.

Mr. Youngquist. --to do what is required in a period of 30 days. We have 90 days for a petition in civil cases. Here we have a third of the time.

Mr. Holtzoff. But, Mr. Youngquist, nobody has ever complained that the rule works hardship today, and they have had this since 1939.

Mr. Wechsler. Well, I always complain before the petition goes to the printer.

Mr. Holtzoff. Yes.

Mr. Youngquist. May I ask this: Has the Court not in any case granted an extension of time for the filing of a petition in a criminal proceeding?

Mr. Wechsler. I can only tell you this: that in the Shushin case at the last term--a large and complicated case--I think counsel had as just reason for asking an extension as counsel ever could have. An application was made to Mr.

Justice Black, who granted it. The Solicitor General's Office did not oppose the extension but felt that it was their duty to call to the attention of Justice Black that there had been a suggestion of lack of power, and upon that he revoked it.

Mr. Burns. Under those circumstances I think I shall press the motion. It seems to me that where the record indicates that counsel opposed and asked for an extension and did not secure it, but nevertheless under great stress was able to file the petition, you have a situation that puts in sharp relief the difference between a civil rule and a criminal rule. After all, this is usually the last step, and 60 days additional that is granted subject to the showing for good cause does not seem to me to be so important as to militate against the chance of one miscarriage of justice where the petition is not able to be procured in time. And then there is a question, that the very language and the attractiveness of a petition to the Court determines very frequently whether or not they are going to grant it, and if you prepare it under stress it is not likely to be so good a document as if you had some reasonable time.

Mr. Holtzoff. Yes, but it would be very difficult for the Court to refuse such an application in a criminal case where the defendant might be under a heavy sentence; whereas, if there was no opportunity to get an extension, lawyers would get together and have their record in.

Mr. Burns. Well, that is like saying, "I can't bear to see him drown; I think I will close my eyes."

Mr. Seasongood. You see, if you are adopting this new rule, the question was raised by Mr. Wechsler about printing:

the record for certiorari. Now, you may have complications in printing your record for certiorari which would make 30 days a frightfully difficult thing to do. You have to print your record with your petition, and I do not think you could do it in 30 days in some instances. Presumably the Court is only going to allow it on a showing and for a very short time. However, I will say in this labor relations case the showing was that one of the counsel was on maternity leave.

Mr. Burns. Of course, isn't that a well recognized exception, an act of God?

Mr. Seth. Public enemy.

Mr. Seasongood. I think you ought to give the Court the right to extend the time. You are not to presume that they are going to do anything improper.

Mr. Holtzoff. No.

Mr. Seasongood. They want speed in everything as much as everybody else does, but you do not want somebody hurt.

Mr. Holtzoff. Even if the defendant is on bail, he of course would be very anxious to postpone the evil day, and this would be one way of getting a postponement, and it may be, Mr. Wechsler, that that is one reason why the 90-day period was cut down, to do away with the scandal that existed prior to 1933 of convicted defendants walking the streets for years after sentence had been passed.

Mr. Seasongood. After all, whether you are applying 30 days or 60 days is not so terrific.

Mr. Wechsler. I would be in favor of giving the Court power, if the Court wanted the power, but the situation is a little different than that. I do not think they want it.

Mr. Burns. Should not we make our distinction as to whether it is desirable?

Mr. Wechsler. Yes, I think we should.

Mr. Youngquist. I call for the question.

Mr. Longsdorf. Mr. Chairman, the certiorari rules of the Supreme Court gave an enlarged time to cases coming from the far western states. Is this rule designed to call for that exceptional condition?

Mr. Holtzoff. They do not give that in criminal cases, though, Mr. Longsdorf.

Mr. Longsdorf. Well, they give it in civil cases.

Mr. Holtzoff. Yes.

Mr. Waite. No. Thirty days was just as long as we had to extend the time, if I recall the rule correctly. I am not sure that I do.

Mr. Youngquist. Well, is there any need for that any more, with the transportation that we have?

Mr. Seasongood. We haven't got any.

Mr. Burns. We do not have any. What we had.

Mr. Seasongood. It is wiped out.

The Chairman. Well, now you have the amendment. We had better have it re-read.

Mr. Youngquist. Add after the word "judgment" in line 3, "but the Court or a justice thereof may for good cause shown extend the time." Period.

The Chairman. Period. All those in favor of the amendment say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I have to raise another question in connection with this: The writ of certiorari need not be granted

after final order. I was wrong when I said that before. It can be taken in at any time before decision.

Mr. Longsdorf. Yes, that is correct.

Mr. Seasongood. So you do not want to change that.

Mr. Holtzoff. Well, this is the present rule. I think in criminal cases you only get it from final judgment.

Mr. Seasongood. They have decided that: the certiorari statute now says that the Court may take it at any time in advance of opinion of the court of appeals.

Mr. Holtzoff. That is right.

Mr. Wechsler. The criminal rule does not bar that, because the criminal rule says that it must be within 30 days after judgment. If there is no judgment--

Mr. Seasongood. Now, "within 30 days after judgment" means, to me, the beginning and the terminus are judgment and 30 days thereafter.

Mr. Wechsler. I think the criminal rule only prescribes the end rather than the beginning. At least I think that is true of the existing rule, is it not?

Mr. Longsdorf. "Within" means "not later than".

Mr. Burns. The time begins after the entry of judgment.

Mr. Seasongood. Yes, which is not the rule in certiorari. They may be made if it is certiorari after judgment.

Mr. Holtzoff. That is the rule now.

Mr. Burns. How about "not later than"?

Mr. Seasongood. Yes, that would be all right.

Mr. Holtzoff. "not later than"?

Mr. Burns. Yes.

Mr. Seasongood. Yes, that is better.

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The Chairman. If there is no objection that change will be made.

I believe lunch is awaiting us across the hall.

Mr. Burns. I think we probably could take Rule 58?

The Chairman. You know, it is these little rules that get us in trouble. Let us let it wait.

(Thereupon, at 1:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

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A F T E R N O O N S E S S I O N (2 p.m.)

(The Committee convened before the appointed time and in the absence of the shorthand reporter.)

The Chairman. Mr. Stenographer, will you note that we have adopted Rule 58, inserting after the word "appeals" in line 1, the words "relating to criminal appeals"; and that we have adopted Rule 59, striking the first word "These" and inserting after the word "Rules" "45 to 49 shall".

Mr. Longsdorf. Not 49.

The Chairman. "45 to 59 shall".

And at the end of line 4 add these words "trict courts of the United States and".

I don't think that we have had a vote on this particular rule yet.

All those in favor of Rule 59 as thus amended say "Aye." Opposed, "No."

Carried.

Rule 60.

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

Carried.

Mr. Wechsler. Mr. Chairman, again on Rule 49, "Appeal from a District Court to the Supreme Court."

This rule makes provision for appeals by the Government. I think there are some cases in which the defendant has direct appeal, and that has to be checked. We cannot find Title 18 to check it with. It ought not to be regarded as passed without checking that question.

Mr. Holtzoff. I do not recall a situation in which a

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defendant can appeal direct to the Supreme Court.

Mr. Wechsler. There was such an appeal in capital cases. I don't remember whether it was repealed or not.

Mr. Holtzoff. Oh, no, it does not exist any more.

The Chairman. Well, we should have that checked.

Now, we have had it distributed. Did we vote on 60--yes.

Now do you want to run over the forms, gentlemen, of which we have three here?

Any suggestion on Form 1?

Mr. Robinson. This is a form that was taken out by the Committee on Style.

We took a form and cut it down to what seemed to them to be comparable to the civil forms so far as reductions are possible in needless words, and Form 1 you see is the indictment form; 2 the information form; 3 the complaint.

Form 3 of course is subject to change in view of the discussion in the Committee, principally by Mr. Medalie, yesterday.

But Form 1 and Form 2 are offered as specimens of what the Committee on Style thinks would be useful as forms in the respective proceedings.

The Chairman. Any suggestion on Form 1?

Mr. Longsdorf. You say "in which it was charged". Is "charged" as good a word there as we could get?

Mr. Robinson. This is just the words of the actual indictment. We did not change the words.

Mr. Longsdorf. The law does recite it. I guess it is all right.

Mr. Dean. We did change this considerably, didn't we?

Mr. Robinson. Yes, this is the result of considerable

change. The way you can tell the change, you can look in Tentative Draft 2 and at the Appendix of Forms that was distributed with the previous draft, and you will see just what words have been stricken out.

Mr. Holtzoff. I don't suppose, Mr. Chairman, it is necessary for us to take a vote on forms, because they are supposed to be only illustrative anyway. We struck out the provision, "they shall be sufficient."

Mr. Youngquist. We ought to know what is in them.

Mr. Holtzoff. Yes.

Mr. Dean. Did you strike that out this meeting, "they shall be deemed sufficient"?

Mr. Holtzoff. They shall be illustrative.

Mr. Dean. I will not renew my previous arguments. I think it is useless.

The Chairman. It isn't as bad as it sounds with that naked explanation.

Now, we have certain revised rules here, gentlemen.

Suppose we take them up in numerical order.

The first is 5.

Mr. Robinson. There are two that have "5" on them.

The one which is the result of the work of this subcommittee last night and perhaps yesterday morning is the one which contains the three sections, (a), (b), and (c).

Another one marked "5" apparently was dictated by some member of the committee to show only what should be in (b), 5 (b).

You may compare the two (b)'s and see which one you prefer.

Mr. Holtzoff. Does that mean we can get only this half sheet?

Mr. Robinson. No; I am just saying you can compare them.

Mr. Holtzoff. I think this was a mistake.

Mr. Youngquist. No, it is not a mistake. You have in lead pencil 5 (a).

Mr. Robinson. 5 here as we have it is the lead pencil typed.

Mr. Youngquist. As we have it where?

Mr. Robinson. In this draft.

Mr. Holtzoff. This 5 is the one we agreed upon in the subcommittee last night.

Mr. Youngquist. Yes.

Mr. Holtzoff. I think this is a mistake. This should not have been distributed. This is a preliminary draft.

Mr. Robinson. I don't know where it came from.

Mr. Holtzoff. I think it should be collected up and not distributed.

Mr. Robinson. You mean this one with the blank at the top?

Mr. Holtzoff. Yes.

Mr. Longsdorf. The (b) which appears on the sheet with the other two is the one?

Mr. Holtzoff. That is right.

The Chairman. All right. Now may we proceed with 5 (a)?

Mr. Waite. I question in 5 (a) whether we should absolutely require the person making the arrest shall file the complaint.

It may be that the person making an arrest is acting in

an official capacity under a request from somebody else.

I wonder if it should not be "If the arrest is made without a warrant the person making the arrest, or some other person having knowledge of the facts, shall file a complaint"?

Mr. Robinson. That was discussed, Mr. Waite, in substance, and we decided to leave it pretty brief in this way.

Mr. Waite. The trouble now is it requires the person making the arrest to file it and it is possible he cannot make the complaint and somebody else could.

Mr. Robinson. That was stricken out by the Committee in 9, 10, and 11, "if it is impossible for the person making the arrest, he may delegate these duties to someone else".

Mr. Holtzoff. The person making the arrest would not have the right to make a complaint unless, of course, he could do it on information and belief.

Unless he is in position to make a complaint he has no legal right to make an arrest.

Mr. Waite. But it does not seem that he should have the right when the one instigating the arrest is present.

So I would like to have inserted, "or some other person having knowledge of the facts", to be inserted in line 7.

Mr. Robinson. That is all right.

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

Carried.

Mr. Holtzoff. I move the adoption of (a) as just amended.

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

Carried.

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Mr. Wechsler. Mr. Chairman, may I move an amendment to (a) which does not change its existing shape but adds a sentence to it?

It is the point of the motion of mine that was tabled earlier, that there be added to 5 (a), "No statement made by defendant in response to interrogation by an officer or agent of the Government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

Mr. Burns. I second the rule.

The Chairman. Where would that be inserted?

Mr. Wechsler. Right here (indicating).

The Chairman. At the end of (a)?

Mr. Wechsler. Yes.

Mr. Waite. Will you read that again, please?

Mr. Wechsler. It is the same language that was distributed. It is the first part of that proposal, the second part of which was accepted by the Committee and the first part tabled.

Mr. Youngquist. It was then designated "5 (c)."

Mr. Wechsler. That is right, but I think it ought to be a part of this rule rather than 5 (c) because it is a sanction to enforce this rule.

Do you want me to read it again, Mr. Waite?

Mr. Waite. No. I see I have it here.

The Chairman. Any discussion on the motion?

If not, all those in favor of it say "Aye." Opposed, "No."

I call for a show of hands. All in favor raise their

hands. One, two, three, four, five, six.

Opposed? One, two, three, four, five, six--

Mr. Youngquist. Did Mr. Robinson vote?

Mr. Holtzoff. Yes.

The Chairman. I was busy writing out another motion. I haven't the slightest idea what this was.

Mr. Robinson. I would like to ask Mr. Wechsler, how does that differ?

The Chairman. Would you read it again, Mr. Wechsler?

Mr. Wechsler. Yes. It is intended as a sanction to enforce the duty to bring an arrest person before a magistrate.

That duty has been considerably relaxed by the amended 5 (a).

The language of it is that "No statement made by defendant in response to interrogation by an officer or agent of the Government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

I would like to say, since the vote is so close in support of this, what its precise scope is.

It does not include voluntary statements made by the defendant at any time; that is to say, statements which are not made in response to interrogation by an officer or agent of the Government. It does not exclude statements of a defendant in response to interrogation by someone other than an agent of the Government, no matter when that interrogation occurs.

Third, it does not exclude statements made in response to interrogations by agents of the Government if there is no violation of the duty to bring him before a magistrate.

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he may be interrogated on the way to take him over to the magistrate; he may be interrogated while he is held overnight in cases where, under Rule 5 (a), it would be permissible to hold him overnight; but what it would exclude is extensive interrogation before a man is taken before a magistrate; and those are the cases, precisely, where the real abuses occur.

Mr. Dean. I don't see how you could sanction a statement made in response to questions by an agent when they are made in violation of this provision.

The Chairman. I vote in favor of the motion, to break the tie.

Now we go on to 5 (b).

Mr. Holtzoff. I move the adoption of 5 (b).

Mr. Burns. I second the motion.

The Chairman. Any remarks? If not, those in favor say "Aye." Opposed, "No."

Carried.

5 (c).

Mr. Medalie. There has been an omission here that I thought we approved yesterday morning, and that is admitting to bail pending examination.

Mr. Holtzoff. It is in here. It is line 19. We put that in.

Mr. Youngquist. Line 15.

Mr. Holtzoff. At line 15.

Mr. Youngquist. "may admit him to bail."

Mr. Medalie. Yes. All right.

The Chairman. 5 (c).

Mr. Holtzoff. I move the adoption of 5 (c).

Mr. Burns. Seconded.

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

Carried.

We now turn to the revision of Rule 6.

Mr. Medalie. I think we left something out of 5. Didn't we agree that we would provide for examination of witnesses by the Government even if the defendant waived?

Mr. Youngquist. Last evening while we were working over this rule--Mr. Holtzoff, Mr. Robinson, Mr. Dean, Mr. Dession, and I--we came to that provision.

The vote as I recall it was a fairly close one. Both Mr. Dession and I had voted for it.

We both came to the conclusion that we should have voted the other way and decided to recommend to the Advisory Committee that the provision be not included.

Mr. Medalie. I am satisfied.

Mr. Waite. What provision is that?

Mr. Youngquist. That is giving the Government a right to conduct their preliminary examination even though the defendant waives the preliminary examination.

Mr. Dean. The decision I think was based on the fact, largely, that we could not think of any illustrations where the Government would want to do it or where it presented any problems because they could not.

Mr. Waite. I think a better way, anyway, would be to give some official power to examine under oath witnesses.

Mr. Dean. Some provision for the preservation of testimony on a showing where it would be otherwise lost.

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The Chairman. Have you any other motion?

Mr. Modalie. 6c.

The Chairman. 6 (a).

Mr. Wechsler. Mr. Chairman, I would like to ask why--

Mr. Youngquist. Just a moment.

We passed on all of (6) except 6 (d).

Mr. Holtzoff. Oh, yes. I am sorry.

Mr. Youngquist. It was only 6 (d) that was to be revised.

Mr. Holtzoff. Yes.

The Chairman. (b) was to be revised, wasn't it? "Justification of Sureties"?

Mr. Youngquist. (c) as it originally appeared was stricken entirely, so that (d) becomes (c) and has been rewritten.

And I would like to call the Reporter's attention to the fact that in rewriting (a) some of the changes that were made yesterday were not shown.

(a), I think it is.

Mr. Holtzoff. Well, the way this is recopied is before our revision of yesterday's meeting.

Mr. Youngquist. We should strike out 6 (a) in the new draft because that is different from the one we adopted yesterday and we already have our notes of the change.

Mr. Holtzoff. We adopted it finally. We did not omit that.

The Chairman. The question is on 6 (b).

Mr. Youngquist. 6 (b). There was no revision to be made in that. That too can be stricken.

The Chairman. 6 (c).

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Mr. Wechsler. Mr. Chairman, under the rule there are two provisions in the Code that I know about, specifically dealing with appeal sections 596 and 597 of Title 18.

Section 596 is a general provision.

Section 597 is a special bail provision for capital cases. It allows bail in capital cases but provides that it may be taken only by the Supreme Court, district court, justice of the Supreme Court, and circuit judge or judge of the district court, who shall have discretion.

I am wondering whether 596 and 597 should not be made a part of this rule.

I am wondering further whether we have not modified 597 by our previous rule, inasmuch as we have authorized commissioners to take bail.

4 Mr. Holtzoff. Mr. Wechsler, you will recall that we referred in our provisions relating to admission to bail--we use the words "as modified by law," do we not?

Mr. Wechsler. No.

Mr. Youngquist. Not always.

Mr. Holtzoff. Well, I think we always should in order to incorporate existing law on the subject.

Mr. Wechsler. I don't think we should.

I think we should take existing law if we don't want to change it. It seems to me a foolish thing to leave on the books a couple of provisions as to when bail can be had, which is a really important thing, and putting in the rule only procedure relating to getting it.

The provisions are not complicated and I make those suggestions that the existing law be changed.

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My suggestion is that they be embodied in the rule.

The Chairman. Your motion is that we embody in appropriate sections the existing law now when bail may be had?

Mr. Wechsler. Yes.

Mr. Burns. Doesn't that involve the rule permitting magistrates to fix bail?

Mr. Dean. It does.

Mr. Burns. Well, I am in favor of having magistrates fix bail.

Mr. Wechsler. I had not thought about the substance.

Mr. Holtzoff. Under existing law the magistrates fix bail in the ordinary run of cases.

Mr. Wechsler. But not in capital cases.

Mr. Longsdorf. Those statutes referred to by Mr. Wechsler I think are substantive law, inasmuch as they give the right to be admitted to bail, and, of course, our rules would only take up the procedure on part of them.

Mr. Holtzoff. I don't think that is substantive law. I think that is part of the procedure in the case.

Whether an offense is bailable or not, I don't think is substantive law; do you?

Mr. Medalie. Yes.

Mr. Holtzoff. I should think that was procedural.

Mr. Waite. The Constitution makes certain offenses bailable.

Mr. Wechsler. Well, I do not call that substantive.

Mr. Waite. I call that substantive.

Mr. Holtzoff. Most of the provisions of the bail rights are procedural.

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Mr. Youngquist. I should think that bail was procedural.

The Chairman. Was Professor Wechsler's motion seconded?

Mr. Holtzoff. I second it.

Mr. Wechsler. It seems to me the title of Rule 6 has the essence of propriety.

It ought to be in Rule 6.

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

Carried.

The matter is to be referred to the Committee on Style.

Mr. Holtzoff. With power to act.

Mr. Youngquist. All you need to do is to say, "Defendant may be admitted to bail as provided by law."

Mr. Robinson. Let us do it now.

The Chairman. That is not what is wanted.

Mr. Wechsler. My motion is that the law be put in the rule. I made no motion that the law be changed.

The Chairman. The motion is to incorporate in appropriate sections the existing statute law.

Mr. Waite. Mr. Chairman, if you get back to 6 (b), I think you said what you did not mean, 6 (b) as it is stated in this new draft is the way it was adopted and approved before.

Mr. Seasongood. No, it is not.

The Chairman. I understand not. As adopted it is set forth in the original draft as modified, which struck out several lines.

Mr. Waite. All right.

Then we also add this provision. I had in my notes that we added a provision for no bond or undertaking unless the

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surety seems to be qualified.

The Chairman. It was as adopted in the old draft.

Mr. Waite. All right. I just wanted to make clear that point.

The Chairman. Now we come to (c) in the revised form.

Mr. Waite. That is just as we approved it, isn't it, in the other later rate?

Mr. Robinson. That is right.

Mr. Seth. I move its adoption.

Mr. Waite. Seconded.

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

Carried.

Now we proceed to the revision of Rule 19 (b).

Mr. Wechsler. Mr. Chairman, may I ask a question about 19 (b)?

The Chairman. Surely.

Mr. Wechsler. The question is, how is it envisaged that this rule would apply, if it would apply, to cases including charges of continuing offenses, such as conspiracy, scheme to defraud?

Mr. Holtzoff. I don't think it would apply to the type of offense.

Mr. Dean. It certainly should not apply to the type of offense.

If it is not made clear enough I think we should make it clear.

The Chairman. Well, isn't it clear that it relates solely to the type of evidence that is definitely located in time and

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place?

Mr. Waite. That is about all you have an alibi on.

Mr. Youngquist. Yes.

Mr. Medalie. This is a very ineffective provision.

What prosecutors are interested in is getting the names of the witnesses.

Mr. Robinson. There is very serious opposition to that requirement, of course, Mr. Medalie.

Your New York statute has that requirement, hasn't it?

Mr. Medalie. Yes.

Mr. Robinson. And that is the source of opposition to it.

It was the feeling of the committee--that was the work of the subcommittee last night, I believe--Mr. Dean, Mr. Youngquist, Mr. Holtzoff, and I, I believe, were appointed to consider it--to just leave it as we examined it yesterday and amended it, not requiring names.

Mr. Holtzoff. After all, the purpose of alibi is to give the Government an opportunity to investigate the fake alibi or to prepare to meet it.

It does seem to me that perhaps it might be asking too much of the defendant to give the names of his witnesses.

Mr. Medalie. They do in all of the alibi statutes I know of. Don't they?

Mr. Holtzoff. No.

Mr. Medalie. The New York one does.

Suppose you are charged with a particular time and place and the notice said you were on the Brooklyn Bridge--

Mr. Holtzoff. Another thing is this: It might be unwise for the Government to disclose its witnesses, because an

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unscrupulous defendant might obstruct the witness from being produced at the trial.

Mr. Dean. I think it is important also, Mr. Medalie, to know what witnesses you may call.

Mr. Medalie. It is. That is one of the objections to the whole procedure. And if it is to have any value, they want the names of the witnesses where there are witnesses.

Mr. Dean. Would you be precluded from using a witness if you did not specify in your notice?

Mr. Robinson. It was thought the parties might get together and exchange further information, but I will go along on this draft on the point--of course, Mr. Medalie, if you ask for witnesses you do have opposition from those who claim you thereby force the defendant to disclose his case.

Mr. Medalie. You say there are 13 alibi states?

Mr. Robinson. Fourteen.

Mr. Medalie. How many have the witness requirement?

Mr. Robinson. I think I can give the answer now if you want to wait.

Mr. Burns. If the defendant has sought to make the Government particularize as to the time and place of offense, he may invoke this rule, and then, when the Government has complied with it, he may then rest and refuse to tell the Government. And the only way he could be taken care of would be in the sentence.

Mr. Dean. I think that is a definite possibility that might happen.

Mr. Robinson. It was not possible under the one that this supersedes.

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Mr. Holtzoff. No, but there is another section.

If defendant does not serve notice, Mr. Burns, then he would not be allowed to introduce evidence unless he shows good cause.

Mr. Burns. Why not?

Mr. Dean. Mr. Holtzoff, he has already asked the court for the order. He has gotten the order. He has gotten the Government's information.

Judge Burns is talking about where, at that point, the defendant does not give the Government the information.

Mr. Holtzoff. If he files at the time--

Mr. Youngquist. He makes the motion but he does not carry through.

Mr. Dean. It is a loophole.

Mr. Youngquist. That should be closed.

Mr. Holtzoff. It should be closed.

Mr. White. Why isn't he entitled to know what time and place?

Mr. Burns. He is, but I am assuming he has been turned down on a bill of particulars, which is not uncommon.

I am not saying it is a loophole which is not desirable.

Mr. Dean. I think the defendant will pay quite a penalty if he should pull that stunt.

Mr. Burns. Oh, yes. He would have to be fairly desperate to make the representation that "I am going through with this alibi procedure."

Mr. Holtzoff. What penalty would he pay?

Mr. Dean. I think he would pay about a year more.

Mr. Holtzoff. I don't think the judge ought to penalize

him for the tactics of his counsel.

The Chairman. He is very likely to, however.

Mr. Wechsler. What is the consequence if the proof does not conform to the specification?

Mr. Dean. The Government's proof?

Mr. Wechsler. Each side.

Mr. Robinson. In an Ohio case where they did not conform to the proof he was sent to the penitentiary for several extra years.

He has perjured himself.

Mr. Burns. If you are going to look upon it as analogous to a bill of particulars--I don't think there is any sense in proceeding on any other basis--

Mr. Youngquist. I think it is binding on the Government as to the time and place.

Mr. Burns. I think it ought to be binding on the defendant too.

Mr. Holtzoff. I think we ought to amend line 35, and I so move, so as to insert, after the word "rule" in line 35, "or if he fails to give the notice"--or, "if he fails to give such notice"--or, "such indication", that should be.

Mr. Dean. That does not meet it.

Mr. Robinson. I made a draft this morning that I thought you could add.

Would you be willing to have your draft amended to provide that at the time the Government gives the defendant specification as to time and place, then the defendant in turn shall give the Government specific time and place?

Mr. Dean. If you feel that is necessary, I have no objec-

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tion to putting it in. I didn't think it was necessary.

Mr. Youngquist. It says "shall".

Mr. Robinson. "at the same time". I don't think the Government should give its information on day and the defendant never give his information.

Mr. Holtzoff.. I think the Government has to claim the particular time and place he was.

Mr. Youngquist. If you simply say, "he shall promptly specify as exactly as possible"--

Mr. Holtzoff. You couldn't have it simultaneously.

Mr. Robinson. It could be substantially at the same time.

Mr. Holtzoff. No. The Government says the crime was committed at such and such a time--

Mr. Robinson. But you are approving, I think, that it requires something in the nature of pre-trial conference.

6 Mr. Waite. The defendant has to have time to figure out where it would have been nice for him to be at that time.

Mr. Longsdorf. If one specifies where he was, he cannot specify anything else, or, is afraid to.

Mr. Wechsler. Then he cannot give evidence.

Mr. Burns. I suggest, following Mr. Holtzoff's indication, that you insert a clause somewhat like this after the word "rule" on line 25, "or if he fails without good cause to specify the place where he proposes to prove that he was at the time specified by the Government".

That takes care of the point I raised.

Now, on the point of being bound by the specification, the clause should be added: "At the trial neither the Government nor the defendant shall be permitted without a showing of good

cause to controvert the specifications which they have filed pursuant to this rule."

Mr. Dean. I second both of those motions.

The Chairman. You have heard the motion. Any discussion? If not, all those in favor say "Aye." Opposed, "No."

Carried.

Mr. Wechsler. Shouldn't there be a similar modification on line 4C, that if defendant fails to make the motion or fails to specify, he has not to show cause why?

It does not say that if he fails to show good cause the court may exclude the evidence.

Mr. Burns. I think that should follow.

Mr. Wechsler. So there should be something in there to say that unless good cause is shown, the evidence should be excluded.

The Chairman. What line do you suggest?

Mr. Seasongood. I am not sure it should be excluded, because you raise a constitutional question.

Mr. Wechsler. "may be excluded".

Mr. Seasongood. I mean, ought you go that far, or don't you raise, unnecessarily, constitutional questions?

Mr. Holtzoff. I don't think there is any constitutional prohibition against requiring a defendant to give notice of evidence that he is going to offer.

Mr. Dean. Well, it is partly cured by this draft because it starts out, 'If the defendant proposes to offer evidence". Then he makes the first move.

If we need a waiver, I think this draft contains it.

Mr. Burns. And it carries with it, I think, the implication

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that if he does not make a good case, then it shall not be admitted.

Mr. Dean. That is what was intended, that it should be excluded if he did not meet the condition without good cause.

The Chairman. Now, is there a motion on this last point?

Mr. Wechsler. Well, I think Mr. Dean is right, that the reference to a condition meets it substantially.

I would prefer, as a matter of drafting, to have it read, "The court may require him to show cause why he did not make the motion and, unless good cause is shown, may exclude the evidence."

Which would put it beyond peradventure of doubt that the court has the power of excluding. But I think it would mean the same thing, wouldn't it?

Mr. Burns. I think so. I have no objection.

Mr. Dean. I have no objection either but I think this contains it.

Mr. Youngquist. The second point, the last point you made, Mr. Burns, to make the condition rest not only upon the making of the motion but to give specification, should be taken care of by inserting in line 20 the words "or give the specification". That would meet the case where he does make the motion but fails to specify.

Mr. Burns. Yes. You might make that the first point.

Mr. Holtzoff. That should be in addition to the insertion on line 25?

Mr. Youngquist. Yes. You see, the first one, line 25, gives the case--is the preliminary statement. That is, if he does not make the motion or give the specification but then at

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the trial he offers the evidence, the court may require as a condition that he show cause why he did not make the motion.

And here we insert "or give the specification", to make the thing complete.

Mr. Burns. I think that is right.

The Chairman. Do you make the motion?

Mr. Youngquist. Yes.

Mr. Dean. It seems to me you have a pretty good statement of the matter as it appears here without the necessity of something which might possibly result in more confusion.

Mr. Burns. Well, the court right now, I would say, is not empowered to exclude alibi testimony which is offered by a defendant who has gone through the motions of saying he is going to offer an alibi and then stops in the middle.

So that rule should be fixed up on that point.

Now, there is nothing in the present law which permits a judge to exclude evidence offered by a defendant in contravention of the specification which you give pursuant to this rule, so, in order to make it certain "the specification" are words of limitation and in effect part of the pleadings of the service, we have to add that second provision.

Mr. Dean. As well as the provision limiting the Government.

Mr. Burns. That is right.

Mr. Cosgrove. Does the Committee have any time in mind when this should be done? Do they mean it can be done at any time?

Mr. Robinson. Mr. Dean?

Mr. Dean. I think it is very difficult to specify time in

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advance. You may not know. I was afraid of a 3, 4, 5, or 6-

day period before trial. You can be sure, if the defendant

proposes to take advantage of this, he makes it early, because

by it he gets the time and place from the Government.

Mr. Burke. What other advantages does he have in this

rule up to that point? Isn't he entitled to it anyhow?

Mr. Youngquist. I don't think there is any. But I think

a specification of time and place is very important in view of

the rulings permitting proof of a different time and place in

the allegation, and of a wide area as to place,--

Mr. Burns. It is a limitation of the government, a defi-

nite time and place, which is a great advantage, but I think

we should approach this from the viewpoint that this funda-

mentally was considered as a way of meeting a difficulty from

the prosecution's point of view.

Mr. Wechsler. What happens in a case like this:

A bank robbery is charged. There are multiple defendants.

The indictment is drafted in the usual form charging that

A and B at this time and place robbed a bank.

The actual purpose of the Government with respect to C

is not to prove that he was there at all.

They are going to prove that he was a party to a conspir-

acy to rob the bank, some time before the robbery, attempt to

hold him responsible as a conspirator. But under the existing

law the indictment may not indict him, and ordinarily does not

indict him.

Now, the basis of the conspiracy charge is that the three

men met at a certain place and planned the robbery.

The defendant, if he knew where it was that the Government

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claimed he met and joined with the co-defendants, might believe that he had evidence of an alibi.

He does not know that, and the only notice he has is that it is charged that the robbery occurred at a particular place.

Mr. Burns. Well, I would imagine the district attorneys in following this rule would be just as vague as the court would permit, so it is not likely that this will work very advantageously to the defendant.

Mr. Dean. On the other hand it is impractical to say that we shall specify exactly the time and place, because that won't work.

It is very hard to fix your standard of specification.

Mr. Wechsler. In the case I put would the defendant have to make any motion?

Mr. Dean. I would think not.

Mr. Wechsler. He does not know he is charged as a conspirator.

Mr. Dean. Let us assume he is an accessory before the fact.

The time and place is really the bank robbery, as alleged in the indictment.

Mr. Wechsler. That is right. And it is absolutely irrelevant so far as the defendant is concerned, but he would attempt to prove that he was not at that place. That would be his case.

He would make the motion and then he would get a specification from the Government. What kind of a specification would he get from the Government?

Mr. Burns. If he were indicted as an accessory?

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Mr. Wechsler. He is not, though.

Mr. Dean. If that is the Government's theory of the prosecution, it seems to me in the Government's specification they would be compelled to indicate that his participation was as an accessory and that therefore the time and place as to him was prior to the bank robbery.

Mr. Wechsler. So that he would gain something.

Mr. Dean. He may. Otherwise I don't think that would be a very practical disclosure.

Mr. Burns. You should not take away the power of the Government to keep him in the dark.

There are all kinds of strategy in the criminal game of getting behind the bars or staying out.

Mr. Wechsler. I am wondering--the important thing to the defendant there is to know the time when and the place where the Government charges he became an accomplice to the crime.

Mr. Dean. The Government will attempt to prove, rather than "charges".

Mr. Wechsler. Yes.

Mr. Youngquist. Well, Mr. Wechsler, you are speaking of a man who was not present at the place of the commission of the offense.

Mr. Wechsler. That is my case.

Mr. Youngquist. That would not have any application at all, would it?

Mr. Wechsler. We are debating that, and Judge Burns thinks it would, and I think he is right. He is going to prove that he was not present at the bank. He does not know whether he is charged as accessory or principal.

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He makes a motion. Then the point is, what would the Government do?

Should the Government specify only where the bank robbery occurred?

Mr. Burns. Wouldn't the Government do nothing and permit him to establish his alibi?

The Government will say, "We won't answer."

This is a condition for restricting the privilege of alibi defenses.

Now, if the Government determines not to go along, it merely means that the limitations of this rule do not apply and the defendant is exactly as he was if this rule were not in effect.

Mr. Wechsler. You say that, but the rule says, "the defendant shall apply for an order," and I assume an order is something for the Government.

Mr. Burns. That is right, but what are the sanctions if the Government does not comply with the order?

Mr. Wechsler. Well, there are none provided, unless it would be contempt.

Mr. Youngquist. I don't think you need to worry about that, because if the court requires the Government to do it, it will be done.

I call for the question, Mr. Chairman.

The Chairman. Question.

Mr. Youngquist. Question.

The Chairman. Call for the question on the motion as amended. All those in favor of the rule as amended say "Aye."

8 Opposed, "No." Carried.

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Mr. Longsdorf. May we have a complete redraft of it?

The Chairman. Surely.

Mr. Dean. If it is any help about the question of continuing conspiracy and situations of that type, it might conceivably be wise to make a reference in the footnote.

Mr. Youngquist. Yes.

The Chairman. We have a telegram from Judge Crane in which he regrets his inability to be here by reason of illness, but he makes a suggestion as to Rule 25 (b) that I would like to call to the attention of the Committee.

The question is whether in a capital case, even by stipulation, there should be a jury of less than twelve.

Mr. Holtzoff. I think Judge Crane must have in mind a very old New York case where it was held that in a capital case the defendant may not waive jury trial or consent to be tried by a jury of less than twelve.

In that case one of the jurors either died or became incapacitated in the course of the trial.

The defendant consented to go on with eleven jurors.

He was sentenced to death, and the conviction was reversed.

Now, that case has been disapproved, as I recall it, in many other states, and it was also, if I mistake not, disapproved by the Supreme Court of the United States.

Mr. Medalie. It is a different rule.

The federal courts consider that procedural.

Mr. Waite. It was disapproved.

The Chairman. Now may we turn to Rule 35?

Mr. Medalie. Will you please strike out subdivision (c)?

The Chairman. On the redraft?

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Mr. Medalie. Yes.

The Chairman. With pleasure. We will strike out all we can.

35 (a). Any questions there?

Mr. Medalie. That was approved yesterday.

The Chairman. That was approved yesterday. All right.

35 (b).

Mr. Medalie. That is the part that is done over and includes the original of (c).

Mr. Holtzoff. Mr. Medalie, is it necessary to limit it to an order to show cause? It is notice, you know--

Mr. Medalie. The notice must really come from the court. The individual cannot start this.

Mr. Holtzoff. All right.

Mr. Longsdorf. Mr. Chairman, I see what I deem to be a slight verbal error there in line 7: "in an action" I think should be "in any action".

Mr. Medalie. It doesn't make any difference, does it?

Mr. Longsdorf. It might not, but I think it is stronger.

Mr. Wechsler. Why shouldn't those words go out, "in an action or proceeding"?

Mr. Longsdorf. Yes, I agree to that.

Mr. Medalie. All right.

Mr. Burns. How about "an attorney especially assigned therefor" instead of "an attorney assigned thereto"?

Mr. Medalie. That is all right. I don't think it makes any difference. You want "especially", do you?

Mr. Burns. Yes. It emphasizes the fact that the private individual, an attorney on his own motion, cannot--

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Mr. Youngquist. He would not be assigned.

Mr. Medalie. He cannot do it unless he is assigned.

Mr. Youngquist. "assigned thereto" I think is the correct statement.

Mr. Holtzoff. I move the adoption of this.

Mr. Youngquist. Just a moment.

Mr. Holtzoff. All right.

Mr. Burns. You have the McGovern case in, Mr. Medalie?

Mr. Medalie. Yes.

Mr. Youngquist. "such" in line 8, and, paraphrasing, "such notice constituting the time and place of hearing shall be given by information filed by the United States attorney".

I think there should be a provision, Mr. Medalie, for the service of the notice.

Mr. Robinson. In all cases, other than the one where it was given by the court in open court.

Mr. Holtzoff. Well, you don't serve the information, do you?

Mr. Youngquist. No, no. That is the point. I say there should be service of the notice.

Mr. Wechsler. What happens now where an information is filed? Doesn't an order to show cause issue based on the information, and the defendant have a chance to answer?

Mr. Seasongood. Yes.

Mr. Youngquist. If you said in line 8, "prosecuted on notice served on the person charged", that would take care of all of those things.

In the next you specify what constitutes the notice, the order to show cause, the information.

Would that do it, Mr. Medalie?

The Chairman. There seems to be some gap here, doesn't there? "Notice * * * shall be given by order to show cause, information filed by the United States attorney or an attorney assigned thereto".

Mr. Burns. Should it read "by an order to show cause based upon an order of the court, information filed by the United States attorney"--

Mr. Holtzoff. The order to show cause is an order of court. It is the order of court which gives him the right--

Mr. Burns. Yes, but it is an order for notice.

Mr. Holtzoff. You don't give notice by information.

Mr. Medalie. No, there must be a document transmitting the information.

The Chairman. May I suggest it would be easier if you brought the last part of your sentence up toward the beginning?

Mr. Medalie. How would you do that?

The Chairman. "Such notice stating the time and place of hearing shall be given by the court in open court in the presence of the defendant or"--then bring in all the rest of this, "by order to show cause", and so forth.

Mr. Youngquist. The trouble is, you don't provide this service of any of these instruments embodying a notice on the person charged.

The Chairman. It says, "shall be given by order to show cause".

Mr. Youngquist. It is on the order to show cause, but it is not on the information.

The Chairman. Why do you have to have an information?

Why isn't the service of the order to show cause all you need?

Mr. Burns. It ought to be clear from the rule that this kind of information can be instituted by the United States attorney.

Mr. Medalie. You can take an information out and put it elsewhere.

The Chairman. Why isn't an order to show cause filed by a United States attorney, but in or an information? Doesn't that cure it all?

Mr. Holtzoff. In some cases you might not have an information. I think you will have to make the allowance for that.

Mr. Wechsler. The court should not issue an order to show cause unless an affidavit has been filed or unless the court has personal knowledge justifying the issuance of the order and not justifying summary punishment.

There are cases of that kind.

Mr. Holtzoff. I have in mind where the court has personal knowledge but it is necessary process to bring in the defendant.

The court can appoint an attorney to prepare an order to show cause.

Mr. Medalie. The court has personal knowledge to issue the order provided for in (a). It is the only kind of personal knowledge a judge can have.

Why do we really need an information?

Mr. Holtzoff. I didn't think we did.

Mr. Wechsler. There are places where cases are instituted by it.

Mr. Medalie. We have a substitute for it. The United States attorney can do it by an order to show cause.

Mr. Wechsler. Where does he get the order to show cause?

Mr. Medalie. By affidavit.

Mr. Wechsler. Why does he get it?

Mr. Medalie. Why should a private person proceed by information? Why shouldn't he proceed by an order to show cause?

I think we ought to exclude that, then, shouldn't we, "person assigned thereto", in connection with information, ought to go out?

Mr. Wechsler. The word "information" is misleading because sometimes it has to be sworn, in which case it is an affidavit.

The Chairman. The information should go out?

Mr. Medalie. The reason it is in there--

Mr. Holtzoff. Why not say "order to show cause issued on application by the United States attorney"?

Mr. Burns. How about this: "Such notice may be in open court or an order to show cause issued by the United States attorney"?

Mr. Holtzoff. I would suggest "on application made by the United States attorney".

Mr. Burns. And then have the separate one, "Criminal cases may be instituted on information filed by the United States attorney"?

Mr. Youngquist. Why not have a single procedure, the filing of affidavit, issuance of order to show cause?

The Chairman. You haven't brought in yet the order of arrest.

Mr. Holtzoff. It ought to be "order to show cause or

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bailable order of arrest filed by the United States attorney or by an attorney assigned thereto by the court".

Mr. Medalie. Let us start in all over again.

"by the court in open court".

Next, "by order to show cause".

Now, let us see what the order to show cause is based on.

Mr. Holtzoff. Issued on application by the United States attorney or an attorney assigned thereto by the court.

Mr. Medalie. An attorney ought to be able, on filing an affidavit, to get that order to show cause.

What does he need the assignment for?

Mr. Holtzoff. I think you don't want "an attorney of his own motion", do you?

Mr. Medalie. Why not? He cannot start it without the court signing an order to show cause,--

The Chairman. Wouldn't the proper sequence be--

Mr. Medalie. --then the court signs the order to show cause. Which means the court has permitted the institution of this proceeding by him.

Mr. Burns. If that is permitted, Mr. Medalie, won't it be almost permissive for any attorney to be the moving party?

Mr. Medalie. Yes.

Mr. Burns. If this rule reads the way you suggest, it would be almost automatic.

Mr. Medalie. It would be if the judge agrees.

Mr. Holtzoff. You know a lot of orders to show cause are signed with very little information.

Mr. Medalie. That is the proceeding in our state courts today.

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You fail to obey an order directing you to do something; you are in contempt. If you wish to say automatically that you disobeyed an order of the court and ask the court to issue an order to show cause--

Mr. Holtzoff. That is a coercive remedy, isn't it?

Mr. Medalie. Yes.

The Chairman. Mr. Medalie, after your "order to show cause" there, you ought to bring in there, or at some other point, "or by bailable order of arrest".

Mr. Medalie. All right. That is all right.

Mr. Holtzoff. Then comes "issued on application", and so forth.

Mr. Medalie. "Issued upon application of the United States attorney or"--

Mr. Holtzoff. --"an attorney assigned thereto by the court".

Mr. Medalie. Where are you going to get the assignment? You are complicating the proceedings.

The Chairman. It is not complicated. It is just two lines in the order to show cause, "Further ordered, John Jones is especially assigned to prosecute this matter."

Mr. Medalie. You say, "or an attorney assigned thereto" in such order?

Mr. Holtzoff. It does not have to be in such order.

The judge might sometime say to an attorney, "I want to appoint you a committee to institute a contempt proceeding against Mr. so and so."

The Chairman. I don't think there is any difficulty there.

Mr. Medalie. All right.

The Chairman. Are you ready for the question?

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

Carried.

Any other sections?

Mr. Seasongood. I suppose you mean 6 (c), and I just raise the question, if a contempt is also a crime it has to be tried as a crime.

Mr. Holtzoff. It does not have to be.

Mr. Seasongood. That is what it says.

Mr. Holtzoff. (c) was taken out.

Mr. Seasongood. Then I want to raise one more question, whether you want to put in anything about a judge should assign another judge to hear the contempt.

Mr. Medalie. That would depend.

If the contempt stated in writing something about the judge it may be that should be done; it may not.

Mr. Seasongood. Well, the Supreme Court said, where there is any personal element, and I think we should make that a rule.

Mr. Seth. Isn't that a provision in the Clayton Act?

Mr. Seasongood. In the Clayton Act there is, but that is of limited application.

Mr. Wechsler. Yes.

Mr. Seasongood. They have said in a number of cases that where there is anything in the nature of a personal affront to the judge it is better practice to have some other judge sit in the case.

They have just said it is better practice.

Mr. Longsdorf. The statutes providing for substitute judge are not sufficient to take care of that.

Mr. Seasongood. No. The bias statute does not apply to contempt.

Mr. Wechsler. Mr. Chairman, I move that this section go back to the Reporter for further work.

There are a lot of kinks that ought to be looked into.

Mr. Robinson. It is a very fine special committee that has been working on it.

Mr. Youngquist. I think there are some kinks but I don't think it should go back to the committee.

Mr. Seasongood. I think the courts have said they ought not to consider it.

Now do you want to say anything more?

Mr. Wechsler. I would second a motion that something be incorporated to give effect to that policy.

Mr. Seasongood. Well, I will make that motion.

Mr. Medalie. The only point, I understand, that is being raised now is whether the judge should disqualify himself.

It is almost impossible to define the conditions under which he ought to disqualify himself.

If you call the judge names I can understand why it would be in order, the filing of this affidavit of prejudice.

Mr. Seasongood. You cannot file an affidavit of prejudice.

Mr. Medalie. This is only for trial.

Mr. Seasongood. The district courts have so held.

Mr. Holtzoff. Do you think that is a correct statement of existing law, that an affidavit does not apply to contempt?

I doubt that, myself.

You say it is only a district court decision?

Mr. Seasongood. What they have said goes even further than an affidavit of prejudice.

In the Cook case and those others they said if it is an affront against the judge personally or in which he may think that his personal dignity is involved, he should assign it to another judge.

Mr. Medalie. It would be difficult to define this in a rule.

Mr. Seasongood. No. They have said that definitely.

In those cases they defined the circumstances under which it is preferable to assign it to another judge.

Mr. Medalie. But they did not make any rule.

Mr. Seasongood. Well, in the Schmidt case they reversed for the judge having heard it.

They said he should not have done it, should not have heard the case.

Mr. Holtzoff. Why should we have a rule on a judge disqualifying himself in a contempt proceeding unless we have a rule on judges disqualifying themselves generally?

Why should we have a special rule?

Mr. Dean. Well, we have done something like that in our venue proceeding.

Mr. Wechsler. But it is an acute problem in contempt.

Mr. Seasongood. Yes. They reversed in this Schmidt case on account of his having sat when he shouldn't have sat.

Mr. Medalie. If the Schmidt case is an authority on that we don't need to transmit that into any part of the rules.

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In other words, we cannot put in all the law of criminal contempt in one procedural subsection of the rule.

Mr. Seasongood. Well, I don't care whether you put it in or not.

Mr. Medalie. I think it would be better not to put it in, particularly since a judge would be disqualified by judicial decision which covers it.

Mr. Wechsler. There is a provision in the Norris-LaGuardia Act, I think it is sections 11 and 12, but I don't know whether it covers other than labor cases.

Mr. Seasongood. Probably not.

Mr. Dession. Probably not, no.

Mr. Medalie. If it is a case where the judge ought not sit, we have got to trust the appellate courts, and they can make up their own laws as they go along on that.

They have made it already, apparently satisfactorily.

The Chairman. Did you want to make a motion on it, Mr. Seasongood?

Mr. Seasongood. No, I do not care one way or the other. I think it would be appropriate.

Mr. Wechsler. It would be appropriate--

The Chairman. To have such a rule?

Mr. Wechsler. That was my understanding.

The Chairman. May I have the motion restated? I must confess I did not get it.

Mr. Medalie. A judge affronted may not sit.

That is the substance. Is that it?

The Chairman. No. I thought you were referring to a motion made by Mr. Seasongood.

Mr. Medalie. That is what I thought.

The judge who has been affronted will find words for it.

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

Show hands. One, two, three, four, five.

Opposed? One, two, three, four, five, six--

Give me the show of hands on the ayes again, will you?

One, two, three, four, five.

Opposed? One, two, three, four, five, six, seven.

Lost. Five to seven.

Mr. Orfield. I might raise very briefly a related question, trial by jury.

I think there ought to be trial by jury in all contempt cases if defendant desires it.

Historically there was trial by jury in criminal contempt cases.

Most cases of criminal contempt procedure are similar to our contempt procedure.

Mr. Burns. Would you go so far on that as where the judge may be hit by a brick?

Mr. Wechsler. I think so.

The Chairman. His motion is for contempt to be tried by jury.

Mr. Youngquist. May I ask a question?

The Chairman. Yes.

Mr. Youngquist. In what cases is contempt entitled to trial by jury?

Mr. Wechsler. The Norris-LaGuardia Act.

Mr. Youngquist. It is a statutory act.

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Mr. Longsdorf. Yes.

Mr. Medalie. The Norris-LaGuardia Act.

Mr. Dean. The Clayton Act.

Mr. Seasongood. Is there any reason why it should be in one case and not in another? As Mr. Orfield said, historically they were always tried by jury.

Mr. Orfield. It would not apply to (a).

The Chairman. It would not apply to (a)?

Mr. Orfield. No.

The Chairman. Then we will consider the motion limited to the contempts not heard or seen by the court.

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

I call for the showing of hands.

All those in favor raise their hands. One, two, three, four, five, six, seven.

Opposed? One, two, three, four, five, six.

Carried.

Mr. Medalie. Then this: "The person charged shall be entitled to a trial by jury unless waived."

"entitled to a jury trial unless waived."

Mr. Holtzoff. You don't need "unless waived".

Mr. Medalie. I would take no chance.

The Chairman. That applies to (b)?

Mr. Wechsler. One of the provisions covered by our said rule (b) and which is merely punishable under the statute, there now must be a jury trial?

Mr. Burns. Right.

The Chairman. Last night there was a call for the various evidence statutes. Those materials are being mimeographed and

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will be available in about half an hour.

I am wondering if we may now consider what the next step should be to be taken by the Committee with respect to our work.

Mr. Youngquist. I should like to hear the Chairman's suggestion.

The Chairman. Well, I should much prefer to have it discussed by the members of the Committee generally.

Mr. Seasongood. I move that on completion of the work by the subcommittee or perhaps on submission to the whole Committee, that it be then submitted to the Court.

Mr. Holtzoff. I wonder if we need another submission to the whole Committee?

Mr. Seasongood. I don't mean a meeting of the whole Committee, but there may be something to go back to the Committee on Style, some little verbal change.

Mr. Seth. Would it be well to submit it to the bar--

The Chairman. I talked to the Chief Justice perhaps five or six weeks ago and I told him at that time of the meeting of the Subcommittee on Style and of the prospect of a further meeting of the whole Committee during this month.

I also told him that there was a strong probability that there would be various matters that would have to be gone into further before the rules were finally submitted to the Court; I mean for ultimate approval.

And I showed him the form of letter of transmittal that was used in the case of the civil rules under which the Court merely authorized the circularization of the proposed draft to the bench and bar without the Court taking any responsibility for it.

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He indicated to me that if the Committee made that recommendation that he thought that would be the course that the Court would pursue with respect to our submission.

He did state, and I will try to state it as accurately as I can, that undoubtedly the Court would feel much more confident in acting upon the matter if the report of the committee were unanimous or substantially so.

And that is just about the substance of our conversation.

I may say that as the result of conversations had a couple of months ago, Professor Dession has agreed to obtain a release from the Department of Justice of his obligation to be there during the summer, and, now that his law school is closed, to be available during the entire summer with just a day or two off as occasion may require, to go into any matters in which he can be of help in collaboration with Professor Robinson and his staff.

That is about the way the matter stands so far as the Court is concerned.

Of course I have not discussed it with anybody in the Court except the Chief Justice.

Mr. Waite. What will Mr. Robinson and his staff be doing this summer?

The Chairman. One difficulty I think we have had is that by one accident after another, like an attack of appendicitis, and so forth, Mr. Robinson's staff has been rather less than he would have liked, and I have to ask Professor Dession's committee to augment them, and also with the hope that he may be able to get one or two or possibly three of his associates from the Department of Justice over here working during the

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summer.

Now, if these rules are circularized and if the same thing happens in this case that happened in the civil rules case, a very large number of communications will be coming in from bench and bar. Some of them will be very good ideas and will have to be considered. Others will be futile and will have to be considered before they are rejected.

But it is going to take a very considerable amount of work to see what merit there is to the various notions that are advanced.

Mr. Holtzoff. You will have a bar committee in most any district, and they will write in.

The Chairman. We have had various letters come in, many of which have been distributed in mimeographed form to our Committee.

Mr. Waite. Then you summarize what seems wise in the way of suggestions and then send it out to us?

The Chairman. I think we will want to do what was done in the civil rules.

Those communications were distributed to the Committee with a note from the Reporter and his staff.

Mr. Waite. All the communications?

The Chairman. I think that is correct.

Mr. Tolman. Yes.

Mr. Seasongood. Did they comment on every communication?

Mr. Tolman. No, not every one.

Mr. Longsdorf. May I ask in what form those communications were transmitted to the members of the committee? Did you condense them or did you arrange them according to

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substance and break them up?

Mr. Tolman. They were copied exactly as they came in.

Mr. Longsdorf. They were. And then were they arranged according to the rule affected by the comment?

Mr. Tolman. After they came in. When we were getting ready for a meeting we abstracted them for consideration at a meeting.

Mr. Youngquist. We have had that in these proceedings. We have been getting the copies and then, in Draft 2, I think it was, we had a summarization of the comments.

The Chairman. That is right.

Mr. Longsdorf. I think it is pertinent to inquire, but I don't know whether the Chairman or anybody else can give us a forecast of how long it will take to get these rules into print after it is decided to print.

The Chairman. I think Mr. Tolman can answer on that.

Mr. Tolman. It is pretty hard to say.

Mr. Holtzoff. A couple of weeks' time, would you say?

Mr. Tolman. I suppose that is feasible.

Mr. Longsdorf. Now I would like to add this:

I think the members of this Committee, all of us, probably have in mind persons to whom we are anxious that those copies would be sent.

I think all of us, if we have any particular persons in mind, ought to send in a list with addresses. That could go on the mailing list.

The Chairman. In addition to that we would want to call attention to its availability in the Federal Register.

Mr. Longsdorf. Yes.

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The Chairman. And the American Bar Association Journal and every state bar association journal, and all the law reviews.

Mr. Longsdorf. And all the daily court journals.

Mr. Holtzoff. And to every member of the Committee.

The Chairman. And to every federal judge.

Mr. Youngquist. What is necessary in order to get authorization before the summer recess?

The Chairman. The Chief Justice said he thought the Court would be sitting certainly until the first of June, probably until the 8th, and possibly until the 15th.

I understand in talking with the Marshal it now looks like June 1 would be the last day that the Court would sit.

He also said that if the report were coming along, even though it might not be complete, and the decision to submit were unanimous, or substantially so, that he would put the matter up to the Court in advance and undertake to obtain permission to circularize even if the Court had adjourned, but there was, I think, rather a preference on his part to see the document before.

Mr. Youngquist. Would it be possible then to get this in such form that it might be submitted to the Court by the first of June?

Mr. Holtzoff. I should think so, if the Subcommittee on Style would have a final meeting within the next day or two.

We could have mimeographed copies ready.

Mr. Youngquist. There wouldn't be any opportunity for resubmission to the members of the Advisory Committee?

I don't mean at a meeting.

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Mr. Holtzoff. I wonder why that would be necessary?

Mr. Vanquist. If the rules were to be presented to the Court before the annual adjournment, I don't think it would be necessary.

The Chairman. That is really not feasible.

Mr. Burns. Mr. Chairman, it seems to me what we ought to do is to get an expression of opinion here as to whether we think they ought to be circularized as finally polished or the way they are now, or, should we wait until the polishing on the work of Mr. Dession and Mr. Robinson during the summer.

And then I think Mr. Robinson should report on the suggestion of the Chief Justice.

Mr. Holtzoff. I think Mr. Robinson and Mr. Dession should collate and publish the suggestions.

Mr. Burns. I don't mean polishing, but it is going to be critical work.

Mr. Holtzoff. I suppose the rules will undergo changes anyway after they are circularized.

Certainly it was true under the civil rules.

The Chairman. Mr. Mitchell made it clear to me that as the result of the circularization of the rules they had many changes to make.

Mr. Vanquist. We have had what, four meetings?

The Chairman. We have had three, I would say, extensive meetings, and I suppose we could keep on meeting from now to doomsday, and keep improving the work all the time, or at least think we were improving the work.

We find ourselves, as I find myself, voting one way and then the other; to the possibilities of change are infinite

After all, we are undertaking to do what was done with respect to the civil rules, present something to the bar and to the people for suggestions.

I think, although there are differences of opinion as to whether this kind of provision--I mean, this principle--should be stated, or a different principle should be stated; we have threshed out all of these questions.

There is no likelihood of closer agreement in the future than there is now, perhaps.

We have all been apprised of the principles upon which each of these provisions rests and have given study to them.

I do not think it would be profitable for us, either for the purpose of further discussion or for the purpose of improving the form of submission or anything to make on further revisions--they are not so bad, when we read them now. It looks fairly respectable, and I think they look respectable enough, will look respectable enough to the bar, to justify the Committee and the Court in having them circularized in their present form with a little touching up that is to be done on the assignments given.

I would therefore second Mr. Seasongood's motion--I don't think I seconded it before--yes--but with the, well, suggested qualification, if I may, that there be no further circularization among the members of the Committee before the presentation to the Court.

The Chairman. Well, I would like to have a very frank discussion by the members of the Committee on the motion, because I think it is of very considerable importance to be sure that we are following the right course.

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Mr. Dean. Mr. Chairman, may I inquire about the notes that will go out with these rules, what form they will be in?

I think they are a very important part of the rules in explaining to the bar what the changes are that we have made, because they obviously cannot go through the extensive research that the Committee and the Reporter have gone through, as to why we made the change, and so forth.

Is it contemplated that the notes shall go out to the bar at that time?

Mr. Robinson. We have quite a lot of notes now that you are free to look at when you are free to do so.

We have been too busy to go into the matter of notes. Miss Peterson, Mr. Tolman, Mr. Dession, and I have been working on them, and I think you can see just what the style is.

You probably have seen a copy of a letter from Mr. William Stewart of Chicago?

Mr. Dean. Yes.

Mr. Robinson. It follows that style.

Therefore I believe that we will be able to meet your wishes in respect to the utility of the notes to the bench and bar.

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The Chairman. Well, if you have these here why not distribute them to everybody?

Mr. Robinson. Yes, I will.

Mr. Youngquist. Shall we just look at them and return them to you now?

The Chairman. Yes. I mean, just to get the style.

Mr. Longsdorf. I think we all remember that the Civil Rules Committee published more than one tentative draft.

The Chairman. As I recall it, they sent out two successive submissions, did they not, Mr. Tolman?

Mr. Tolman. There were two submissions, and then a final report, which was just circularized for the information of the bar.

Mr. Robinson. We have a good many more forms to be put in. Your Committee has kept us busy working on rules. Naturally, the notes come afterward.

Mr. Burns. May we keep these notes?

Mr. Robinson. Certainly. In one or two cases some of them are based on one or two earlier drafts, Mr. Tolman suggests to me, and it is based on experience.

It would be rather difficult on our committee, as it was on the Civil Rules Committee, to have all the notes of this type prepared the week after next, say, or something like that. It might take a good deal of time, but there will be an average coverage for the purposes at hand. In other words, the last word on rules and notes will not be spoken by this Committee for some months to come.

Mr. Holtzoff. You mean not until we get the reaction of the people who receive the drafts?

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Mr. Waite. Mr. Chairman, I am bothered by a problem that did not occur to me before at all. It did not occur to me and would not have occurred to me perhaps, except for a little incidental remark of yours a while ago. I would like to know what the Committee thinks about it.

There are several things that I think ought to have been included in the rules that are not included, and I venture to say that that is the case with other members of the Committee. I am not expressing my own desires at all, because I do not know. Would there be any desirability or impropriety in my attaching to what goes out, not exactly a dissenting opinion, but a suggestion that I think it would be desirable to have the bar's opinion with regard to this, that, or the other proposal?

The Chairman. I see no objection to that. On the contrary, I see a rather substantial possibility of gain.

Mr. Waite. I do not know that I want to do it or to work that hard.

Mr. Dean. I was going to say there is no reason why Professor Waite should necessarily make a list, but I think that in any list that went out representing various subjects, his suggestions could be included as things that came to our minds that might conceivably be in the second draft submitted to the bar, as things thought about but not referred to.

Mr. Burns. Refer to it in the notes and refer to it in the Appendix.

Mr. Dean. In that form it would not take the position of dissenting it to the rules, but it would indicate to the bar that these problems were there, that we were aware of them, that we chose in some cases to abandon them, but had not made

determination on all of them. In that way we might invite comments on some of these unexplored fields, like this pre-trial coverage, exchange of evidence on both sides before trial, and many other situations. We might invite comments that would be very helpful.

Mr. Waite. What would be the mechanics of that for me or you or the other fellow who has some such idea? To send it to the Reporter with a request that it be included?

Mr. Dean. I think the Reporter right now, with perhaps a few other suggestions, could make a list of such matters that we had suggested.

Mr. Holtzoff. I think it would be better for any individual member who wanted to have any particular suggestion included in the submission to the public to send it in, and that could be put in an appendix.

Mr. Robinson. It would be the best way to answer some of the problems that we have worked on at each session.

Mr. Seasongood. It would be impersonal. You could say, "The following question was presented but not deemed proper for inclusion."

Mr. Longsdorf. Mr. Chairman, I dare say that each and every one of us will be interrogated or invited to say something at some time about these rules. Is there any restraint that we should impose upon ourselves as to how much we shall say and what?

Mr. Youngquist. I would say no.

Mr. Robinson. I would like to say with regard to what Mr. Waite says that I have some proposals I would like to put on the list, because I have been turned down on some

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suggestions.

Mr. Youngquist. I think it might be well to withhold, however, how the vote stood on any particular proposition-- that is, that it was 7 to 6, or 12 to 3, or something like that.

Mr. Medalie. Do not say that. All you have to do is say, when you are brought into an argument and getting the worst of it, "That is what I thought, but the other fellows thought it should be this way."

Mr. Youngquist. That is the perfect answer, but I do not think we should divulge the details. We should be like the jury in that respect.

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Mr. Longsdorf. May I say that I have been overruled at the ration of 16 to 1 here, so I would be in favor of that.

Mr. Wechsler. Mr. Chairman, on the motion before the house, I shall have to vote in the negative, and I would like to state my reasons very briefly. I think it would be a great mistake to lose the benefit afforded to the bar of the work that they plan would have been done during the summer by Mr. Dession and others, working with Professor Robinson.

I do not have sufficient assurance in my own mind that these rules can possibly get in Congress before the opening of the session to let me feel justified in sending the rules out for comment without the benefit of all the work that can be done on them.

I think it must be kept in mind that the literature on this subject is very thin; that the Reporter had to start with substantially no literature to go on; whereas in the case of the civil rules there was complete literature to constitute the basis for the initial thought.

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Having to choose between sending out something that I think is less than our best, for the sake of speed, and, on the other hand, losing a year in submission to Congress at a time when the country is at war, I have no difficulty in making a choice against submission. I do not think this is a particularly propitious moment to gain the attention of the bar for these rules in the way that I would like to see their attention gained.

Secondly, I do not think that it is the best way to get consideration by the bar to send out simply a set of rules which represents our comments on the basis of what happened to be our particular experience, rather than to send out the finished job which from our viewpoint represents our own best view on the subject as represented by the criticism that comes in. I think the best job is to be given to the Committee on Style to do anything on the matters that have been referred between now and the date when they have to go to press for distribution--

Mr. Seasongood. Practically all that work has been done and submitted and passed on by the Committee.

Mr. Wechsler. I have no clear recollection of how many things there were referred that have not come back.

Mr. Holtzoff. Have you overlooked the fact that there are many bar associations meeting in the summertime and that there is an advantage in having their criticism at that time?

Mr. Wechsler. I would rather get it next summer, when I trust they will meet again.

Mr. Dession. I can see the advantage in point of time in getting it this summer, and I have been trying to persuade

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myself that it was ready for that, but I think you are optimistic. I think it needs testing for completeness and testing for coherence, and a general checking over before I would feel comfortable in submitting it to the Court for release.

The Chairman. I have the very unhappy feeling that if we work on it for another year and we then submit it to the bar you are going to find so many things suggested that you will have to change these other suggestions coming in, and you will be in exactly the same position that we would be in if it went out this summer. I cannot see why the work of checking and rechecking could not go on this summer simultaneously with the submission to the bar and the incoming suggestions from the lawyers of the country.

Mr. Dession. It could. The only difficulty is, if I am right in thinking that it is not tested to a point that would make me comfortable before we submit it, is that the bar won't have to react to what we want them reacting to, and to that extent we will get less help from their reactions, I think, than we would otherwise. I wish I felt it was ready, but I just do not.

Mr. Waite. I cannot think of anything in these rules that I would vote otherwise on, merely by knowing what the decisions are and what the law is. My distress about all of them has been that I know so little about the practical ends of the matters and the practice and what the bar thinks. So that my own impression is that if I had another year to work, I really would not have any better basis for determining than I have n but what I really want is what the bar thinks and what their experience has led them to believe is wise.

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Mr. Orfield. It seems to me that if we wait another year, the war will be taking more of our attention than it is taking now.

Mr. Seth. Mr. Chairman, I have to leave, but I would like to go on record as favoring their submission in their present form and authorizing you to submit them to the Court in such manner as seems necessary and appropriate.

The Chairman. Well, is there any other discussion? We might be able to take a vote before Mr. Seth leaves.

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

Let us have a show of hands, because it is a very important motion. All those in favor? Eleven in favor. Opposed? Three. Eleven to three.

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Judge McLellan, I know, is in favor of submitting them, and I have a telegram here from Judge Crane that says he is, but I doubt that it is proper to vote them in their absence.

That leaves me, gentlemen, very much in a quandary as to what we should do.

Mr. Dean. How was the letter to the bar worded, so far as explaining how tentative the civil rules were?

The Chairman. It was made very clear that they were submitted without approval of the Supreme Court and solely for the purpose of obtaining suggestions which would lead to changes in a future revision.

Mr. Waite. I am right, am I not, that they would be submitted by this Committee and not by the Court?

The Chairman. That is correct. The Court simply authorizes us to release them without even a blessing.

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Mr. Dean. I wonder if it is indicates that it is simply a tentative draft of this Committee?

The Chairman. That was done, I believe, by the Civil Rules Committee.

Mr. Dean. It is the first attempt on our part, on which we want the bar's view before further work is done on it.

The Chairman. Of course, it means if we do not do something like this we will not be able to submit the rules to Congress until January, 1944.

Mr. Dean. I notice in this submission it states that the draft has not been presented to the Court, but that permission to print and distribute has been given, and it incorporates a letter from the Chief Justice relating to that.

The Chairman. Yes. The Court is absolutely spared any responsibility for it.

Mr. Youngquist. And I think the Committee would be protected to the extent that it needs to be protected by the statement that it is a tentative draft distributed for examination and comment and suggestion.

Mr. Dean. I think that should be done with as strong words as possible, for the reason that what we have to submit is not a finished job, but because, I think, as we stand now, we are in a little bit of a rut. We have gone over it and over it and over it, and we have not got the fresh viewpoint that we may get after the treatment from the bar. What I look for is a revival of ideas.

Mr. Burke. That represents my views. It seems to me we have nothing to lose and possibly we may gain something in the way of suggestion or advice or criticism. Since it is submit

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in that fashion, it seems to me entirely appropriate in the line of work we have done, because if we meet here in three-month periods from now until next year, we will be precisely where we are now. I could not disclose how I voted on these from memory, when it comes to that.

Mr. Youngquist. If we were to continue the work, I would have a little difficulty in deciding where I could go from here on the rules, because, as Mr. Dean says, we have threshed out every problem that has been presented and we have reached a conclusion as to what should be in and what should be out.

Perhaps some of the provisions could be a little more adequate and polished up some, but that is not going to interest the bar. I would feel quite differently about it if this were to be the final draft.

Mr. Burns. Mr. Chairman, in the first submission of the civil rules did it contain notes?

The Chairman. Substantially in the form of these which have been distributed here.

Mr. Dean. Here is a copy of them, if you would like to see the form.

Mr. Burns. Yes, I would.

Mr. Robinson. Of course, the final notes accompanying the civil rules were made after their adoption. Mr. Tolman had quite a good deal to do with that, didn't you? You worked on the notes in the civil rules after they had been adopted and promulgated?

Mr. Tolman. Yes.

Mr. Youngquist. Weren't the notes that went out in the tentative draft to the public different from the notes that

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appear now?

The Chairman. Very different. This is a preliminary draft (indicating), with the rules in bold print. You will notice that these notes are rather brief.

Mr. Holtzoff. Both the rules and the notes were considerably changed between the preliminary draft and the final draft, as I understand it.

Mr. Robinson. I would like to raise this question. I happen to be on the firing line, so to speak, between the bench and bar. I receive many communications and recommendations from the bar associations wanting to know when the rules are going to be distributed. I got a letter from a prominent lawyer in Chicago wanting to know when he is going to receive a copy of them.

There might be a question that the bench and the bar are going to wonder if we are keeping good faith with them if we do not publish them.

Mr. Youngquist. All these bar committees have done quite a good bit of work in trying to help us, and if we let them run too long their organizations may not be functioning in as effective a way as they are now.

The Chairman. Maybe this will be helpful. The notes were not published until after the civil rules were adopted. General Mitchell wrote this foreword to the notes, which tells the story pretty much of their history. He says:

"Notes to the Federal Rules of Civil Procedure were prepared by the Reporter, Dean Clark, and his staff, in order to show the source of each rule, and to aid the Advisory Committee in framing their recommendations; to

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assist the members of the profession in their study of the Committee's preliminary drafts; and to aid the Supreme Court in its consideration of the Committee's report.

"Notes were first published with the Committee's Preliminary Draft of May 1936. They were revised and published with the Committee's Report of April 1937, and have been revised again to conform to the Committee's Final Report of November 1937, and to the rules as approved by the Court, December 20, 1937, both of which included some rearrangement and renumbering of rules.

"The notes in their revised form are now published by the Committee in order to preserve for the use of the profession material which the Reporter has so industriously gathered during the two and one-half years of the Committee's service. The notes show the background in Federal or State statutes and judicial decisions, in the Federal equity rules, or in the British system, of the procedure recommended by the Advisory Committee."

So you will see there that the notes as actually given out were three times revised.

I do not think we have anything to be ashamed of if as a result of this submission we find it necessary to revise our notes again next fall.

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(2) Mr. Longsdorf. I think Mr. Youngquist's suggestion that there is considerable eagerness on the part of these committe and these other people ought to be considered.

Mr. Robinson. I have 20 letters from bar committees ar from Mr. Margolius and Mr. McCarthy, local assistant United States attorneys, who told me a few days ago, "If you will

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please send us a copy of the draft, then we will know how to direct our comments. As it is now, we do not know what to aim at or what to say."

Mr. Holtzoff. Many of the members of the bar committees are going into the service, and you are going to have your bar committees as appointed a while ago gradually dissipated, which will be very unfortunate.

The Chairman. Is there anything else we can take up at this session, gentlemen?

I take it there is a motion--I think it was made some time ago--to leave the matters of detail to the Subcommittee on Style. That is the only thing that I can recall that needs further attention.

Mr. Burns. Just a question on this Rule 35. I have an impression, probably erroneous, that certain criminal contempts are not bailable; is that true?

Mr. Holtzoff. I think they are all bailable.

Mr. Burns. What is the issue on review where a judge certifies that he has been hit in the head with a brick, which is the usual ground?

Mr. Holtzoff. There are valid facts to constitute contempt. You can always review that. You can review the certification of the judge on the facts.

Mr. Burns. Can you review the sentence?

Mr. Holtzoff. I am not sure. I believe so. I believe a contempt case the circuit court of appeals may modify the sentence, but I am not absolutely certain of that.

Mr. Seasongood. Yes. There is a decision, Judge Bu where they did modify the sentence--in fact, they did it

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Gompers case, did they not?

Mr. Burns. Yes, but that was on a contempt not committed in the presence of a court, a violation of a court order.

Mr. Seasongood. Ordinarily you would think they cannot review the sentence. They can in a criminal case because it is excessive, but there is a case that says they can review the sentence.

Mr. Wechsler. Is the issue on whether the sentence is reviewable?

Mr. Seasongood. Yes.

Mr. Wechsler. In some of the cases the sentence was weak.

Mr. Seasongood. But there is a case where the appellate court reduced the sentence.

Mr. Wechsler. I do not remember it.

Mr. Seasongood. Well, it is cited.

The Chairman. Rule 13 as revised has just been distributed. May we have your examination of that, gentlemen, before we adjourn?

Mr. Youngquist. I move that it be approved.

Mr. Seasongood. I second it.

The Chairman. All those in favor say "Aye." Opposed "No." It is carried.

Is there anything else, gentlemen, before we adjourn

Mr. Longsdorf. Of course, it is not possible to fo in the slightest degree when we will have to come back again?

The Chairman. It won't be before fall.

Mr. Longsdorf. It won't be before fall?

The Chairman. No.

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Mr. Longsdorf. I feel sure of that.

The Chairman. The Subcommittee on Style may have a session or two before that.

Do I hear a motion to adjourn?

Mr. Youngquist. Mr. Chairman, do I understand that with the vote as it stands the draft will not be submitted to the Court for authorization for circulation?

The Chairman. I think I must take it up with the Chief Justice and consult with him as to what he would desire to be done in the situation.

Mr. Youngquist. And if the Chief Justice should want it circulated now, then it would be circulated, I suppose?

The Chairman. I think so. I think we will have to le it that way.

Mr. Medalie. What will we do about recording the r visions?

Mr. Holtzoff. I think the Subcommittee on Style meet in the next day or two. If you could stay over a day, perhaps we could meet tonight or tomorrow.

Mr. Youngquist. What has that committee to do?

The Chairman. Relatively small items. I do n would take more than a couple of hours of intensiv the committee to do it.

Mr. Youngquist. I could spend an hour and now at it. We ought to be able to finish it i I said a while ago, most of the work has been

Mr. Medalie. I do not think it can be way. A particular section to which there ha will have to be rewritten first before we t

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Then if we found it was all right--that is, that it meant what the full Committee decided--we would say, "All right. Mimeograph that."

Mr. Holtzoff. Could we have another meeting in a few days, then?

Mr. Medalie. If there is a considerable amount of typewriting to be done before we could meet--

Mr. Youngquist. But there is not. There is very little. I do not think there are more than three or four rules to be done over.

The Chairman. Gentlemen, we are getting into the work of the Subcommittee on Style. I think that in order to have the garden variety committee members adjourn, someone should move to adjourn.

Mr. Dession. I move that we adjourn.

Mr. Waite. I second it.

The Chairman. It is moved and seconded that we adjourn. All those in favor say "Aye." Opposed, "No." The motion is carried and the Committee stands adjourned.

(Thereupon, at 4:05 o'clock p.m., the Committee adjourned sine die.)

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