Minutes of Meetings

Of

Advisory Committee On Rules

On Criminal Procedure

New York, New York,
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Met pursuant to adjournment on Monday, February 22, 1943, at 9:30 a.m.

THE CHAIRMAN: All right, gentlemen. Rule 21. Are there any suggestions on Rule 21(a)?

MR. GLUECK: I just wonder, Mr. Chairman, whether it would be wise to require the qualification as to counsel there?

THE CHAIRMAN: At 21(a)?

MR. GLUECK: Yes, "unless the defendant in writing with the approval of the court." There you have two things, in writing and the court's approval. What about being sure that he has counsel?

MR. HOLTZOFF: In the McCann case, the Supreme Court held that a defendant who wants to try his own case without counsel may waive a jury trial. Now we do not want to overrule the Supreme Court.

THE CHAIRMAN: We have given him the right to counsel.

MR. SEASONGOOD: Mr. Chairman, I think that should probably be amended in line 2, by saying "trial of cases required to be tried by jury shall be so tried."
You have stated all cases are to be tried by jury and, of course, there are a lot of cases that do not have to be tried by jury.

MR. HOLTZOFF: I concur in that suggestion.

THE CHAIRMAN: What language would you suggest?

MR. SEASONGOOD: It should read, "trial of cases required to be tried by jury shall be so tried," in line 2, instead of "trial shall be by jury." Lots of cases do not have to be tried by jury.

MR. HOLTZOFF: Such as petty offenses - no, the district court tries many petty cases in which there is no constitutional right to trial by jury. That was held in the case you mentioned the other day, the Funk case.

MR. ROBINSON: I think the Committee has to be careful, or we may cause some trouble.

MR. SEASONGOOD: It seems to me so, but I am just putting it forward. We do not want to say that all cases have to be tried by jury when they do not.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

Carried.

MR. MEDALIE: Just so that I know something, I never had a case that was not triable by jury, and I was district attorney for almost three years.

MR. HOLTZOFF: George, in this district you probably don't have very many cases where the maximum penalty

is six months, do you?

MR. MEDALIE: No, ours are ten years for walking against a red light.

MR. HOLTZOFF: In those cases where the maximum penalty is six months, according to the Funk case, the Supreme Court held there is no right to trial by jury.

MR. MEDALIE: I guess we just scorn prosecuting those little things. I don't remember any of them.

THE CHAIRMAN: Are you ready for the motion? All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No".)

(No response.)

THE CHAIRMAN: Carried. Any further suggestions in 21(a)? If not, the motion is to adopt 21(a) as amended. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Any suggestions on 21(b)?

MR. McLELLAN: Mr. Chairman, should there not be the same provision for a smaller jury, as to the court's approval, as is required for the waiver of a jury?

MR. ROBINSON: It seems so, Judge.

THE CHAIRMAN: Do you make that as an amendment, Judge?

MR. McLELLAN: Yes.

THE CHAIRMAN: It is moved and seconded. All those in favor say "Aye."

MR. YOUNGQUIST: Should not that also be in writing?

MR. McLELLAN: Just as it is above.

THE CHAIRMAN: Yes, repeat the same thought as above.

MR. HOLTZOFF: How shall we put it?

THE CHAIRMAN: Let us work out the language later. All those in favor of 21(b) as amended, say "Aye."

MR. LONGSDORF: I have a question as to the meaning of the "stipulate" there.

THE CHAIRMAN: We will use the same language as in 21(a), "in writing with the approval of the court" in other words.

MR. LONGSDORF: I am not sure as to the time of the stipulation there. May a stipulation be made during the trial or before the trial or both?

MR. HOLTZOFF: Both times.

MR. ROBINSON: It leaves it open as in the Patton case.

MR. HOLTZOFF: Suppose one juror dies during the

trial? You could stipulate to have the trial go on with eleven jurors, as was done in the Patton case, or you could stipulate before trial.

MR. WAITE: Why not say "may stipulate at any time before verdict"? Then we won't leave the court guessing.

MR. YOUNGQUIST: In the light of the Patton case, do you need that?

MR. WAITE: I don't think you need it, but you might just as well set it out, so nobody will question it.

MR. HOLTZOFF: I don't think you need that.

THE CHAIRMAN: Let us have a motion.

MR. HOLTZOFF: I move we adopt this.

THE CHAIRMAN: I mean, do you want to put that in?

MR. WAITE: I move that, in one form or another, it be made clear that they may stipulate at any time before verdict.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

All those in favor of 21(b) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Any suggestions on 21(c)?

MR. SEASONGOOD: I do not see why the judge should not be required, if the defendants wants him, to file special findings. I would move to amend line 9 by striking out "may" and inserting "shall on request" so it will read "if the judge finds the defendant guilty he shall on request in addition find the facts specially or file an opinion instead of" - and take out "such" - "instead of special findings."

Suppose the man wants to take an appeal, isn't he entitled to findings of fact, if he wants them?

MR. HOLTZOFF: But the judge's general finding is what you have and that is the fact of a jury's verdict.

MR. SEASONGOOD: I know, but it used to be the law that if you had special findings tried to a judge you could do more than if you just had a general finding.

MR. MEDALIE: May I ask what the practice is in Maryland and Connecticut, where there are so many cases tried without a jury?

MR. HOLTZOFF: They do not have findings in Maryland. In Baltimore they waive, the defendant generally

waives a jury trial and they do not have special findings.

MR. McLELLAN: And they waive them frequently in Connecticut.

MR. HOLTZOFF: I am not familiar with the Connecticut practice. Of course I suppose the average judge would not accept a waiver if accompanied by a requirement that he has to make special findings.

MR. BURNS: They waive quite frequently in Massachusetts, and it is only when the judge determines the case is of sufficient importance that the matter requires an opinion that you have the elements of findings.

MR. McLELLAN: That is right. Not to waste your time by trying to be jestful, what would happen or might happen would be that the lawyers would get up and say "Well, now, we would like to try this without a jury, both of us, if you will permit us," and then I would say, "Would you waive any findings of fact and let me go ahead and decide this case?" "No, we want findings of fact." I say "Impanel your jury."

MR. SEASONGOOD: Why would you do that?

MR. McLELLAN: Because cases come along frequently which do not require findings of fact. A judge's finding of guilt is just like a jury verdict, and all the questions are open to the defendant that would be open in the case of a jury verdict.

MR. SEASONGOOD: In the ordinary civil case you have findings of fact, as they are requested. Why should it be more onerous on the defendant in a criminal case?

MR. McLELLAN: They are different things, and we never used to have them in law cases until we got the Federal rules. The issue is usually a simple one, and it seems to me that a criminal case that ordinarily is tried without a jury does not lend itself to findings of fact, and you do not get the advantage that otherwise you would get of letting the judge attend to other matter s instead of having to sit down and write a complete set of findings of fact.

MR. SEASONGOOD: He doesn't have to do it. He can get the United States attorney to do it and submit them to him.

MR. McLELLAN: That is something some of us never do; never let anybody get up findings of fact for us.

MR. YOUNGQUIST: The defendant always has his right to trial by jury. If he chooses to waive, I do not see any particular reason why he should have anything more than there should be a finding of guilt, or, at the option of the judge, findings.

THE CHAIRMAN: Did you make a suggestion in the form of a motion, Mr. Seasongood?

MR. SEASONGOOD: Yes, I made it that way.

THE CHAIRMAN: All right; is it seconded?

MR. LONGSDORF: I second the motion.

THE CHAIRMAN: All in favor of the motion which is, as I understand it, to the effect that the rule be amended to say that the judge shall, on request, prepare findings of fact - all those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The "Noes" seem to be vociferous. The motion appears to be lost. The motion is lost.

Are there any further suggestions on (c)? If not, all those in favor of 21(c) as is, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Rule 22. 22(a), any suggestions?

MR. HOLTZOFF: I do not think there has been any change from Draft 5, Mr. Chairman.

THE CHAIRMAN: All those in favor --

MR. YOUNGQUIST: Just a moment. In line 10, shouldn't the first word "of" be "by"?

MR. ROBINSON: The fifth word also, would you say?

THE CHAIRMAN: No, the first word in line 10.

MR. ROBINSON: That is what I say, and the fifth word also, would be the same thing.

MR. YOUNGQUIST: Yes, strike out the fifth word.

MR. LONGSDORF: Why don't you change the verb "is" in line 16 and in line 20 to "are".

THE CHAIRMAN: In line what?

MR. LONGSDORF: 16 and 20.

THE CHAIRMAN: We are not yet there. We are on (a).

MR. LONGSDORF: I know.

THE CHAIRMAN: All those in favor of 22(a), that is, the amendment to change "of" to "by" first word in line 10, and to strike out the word "of", the fifth word, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Now 22(b), please. What was your suggestion, Mr. Longsdorf?

MR. LONGSDORF: Lines 16 and 20, there is a single verb there that I think should be plural: "is" should be changed to "are."

MR. YOUNGQUIST: "If there are more than one defendant"?

MR. HOLTZOFF: No, I think singular is correct.

MR. LONGSDORF: All right, then.

MR. YOUNGQUIST: I have a suggestion in lines 14 and 15. In order to make it conform to the similar statements that precede and follow it, 14 should read "imprisonment for more than one year"; strike out "government" and insert "each side," and in line 15, strike out "and the defendant who asks". Then we have that conforming with the others.

MR. ROBINSON: All right.

THE CHAIRMAN: If there is no objection, that will stand. Any further suggestions on (b)?

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor of 22(b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. 22(c).

MR. SEASONGOOD: Lines 29, 30 and 32, I should think "regular jurors" would be a better word than "principal jurors".

MR. YOUNGQUIST: What would you think of striking out the "principal"? The juror becomes a juror when he is made a part of the jury.

MR. SEASONGOOD: Nobody is a principal juror. They are all of equal dignity.

MR. HOLTZOFF: I think you should have the word "regular". You have to say something there because you speak of alternate jurors. You have to have a contrast between an alternate and some other kind of juror.

MR. SEASONGOOD: Why don't you say "and other" - "other" instead of "principal".

MR. McLELLAN: I would rather have "regular" rather than "other" because "other" is too inclusive.

MR. SEASONGOOD: That is the same language as is in the American Law Institute Code.

MR. ROBINSON: What about the civil rule and the Federal statute? Is the same thing there?

MR. SEASONGOOD: I don't know.

MR. ROBINSON: Let us check again. I think this follows that language, but I would not be sure.

"Principal juror" is used in the civil rule, so maybe we ought to follow the same language, though I realize it is not a very felicitous choice of words.

MR. GLUECK: Why are we bound by the language of the civil rules on a thing of this character? It seems to me to be perfectly ridiculous that we cannot change it.

MR. HOLTZOFF: We are not bound, except the alternate juror procedure is the same.

MR. MEDALIE: The judge does not like to use one kind of language one time and another kind of language another time. It places him in the position where he must remember to use one kind of language under the civil rules and another kind of language under the criminal rules, and it may cause him to make derisive comments in relation to one set of rules or the other.

MR. GLUECK: Let us make it conform to their set of rules in order to be uniform.

THE CHAIRMAN: That argument was done away with the other day when we decided the word "deem" was not a good one.

MR. DEAN: It has been put back by someone then.

THE CHAIRMAN: Then it was put back in the dark.

MR. SEASONGOOD: If you see an inaccuracy of expression I do not think you have to follow it. To say that they are all principal jurors is not correct.

MR. SETH: When you get down in line 34, they call them just plain jurors.

MR. DEAN: The reporter just points out that the statute uses the term already selected.

MR. ROBINSON: And in another place it uses the term "regular jurors,"-"but if the regular jurors are ordered to be kept in custody during the trial, the court and such alternate jurors," etc.

MR. HOLTZOFF: The statute is older than the civil rule. The civil rule uses the term "principal juror."

THE CHAIRMAN: The question is on Mr. Seasongood's motion to substitute the word "regular" for "principal" in three places in this rule. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of Noes.")

THE CHAIRMAN: The "Ayes" have it. The motion is carried. Are there any further suggestions? If not, all those in favor of --

MR. YOUNGQUIST: By the way, on lines 32 and 33 I suggest striking out the words "principal jurors are" and inserting the words "jury is."

MR. WECHSLER: Seconded.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: And in line 37 could we not make that read "to take his place" and stop there. That is not important, but what is more important I think is to substi-

tute the word "side" for "party" in line 38.

MR. ROBINSON: I believe this is clear.

MR. HOLTZOFF: No, I think there is a mistake in the language as it now stands. I think it refers to a situation where there are two alternate jurors, or more, and the question is, which of the alternate jurors should be impaneled and the direction is to take the first alternate juror and have him take the place of the absent juror.

MR. YOUNGQUIST: No, I think you misunderstand the motion, Alex. In line 38.

THE CHAIRMAN: Read the clause at line 36 as you would have it. That would make it clear "and may order" --

MR. YOUNGQUIST: "and may order an alternate juror in the precedence in which he was impaneled to take his place." That refers back to the juror discharged.

MR. HOLTZOFF: Oh, I see.

THE CHAIRMAN: The difficulty is stylistic.

MR. ROBINSON: That is right.

THE CHAIRMAN: You have "his" referring to two different people.

MR. YOUNGQUIST: The other suggestion was that in line 38 we substitute "side" for "party." Here, unless you want to give additional challenges for alternate jurors, where you have a conspiracy case, for example --

MR. MEDALIE: It works; it works this way.

MR. YOUNGQUIST: Does it work this way?

MR. MEDALIE: Yes, no trouble.

THE CHAIRMAN: "each party" or "each side"?

MR. MEDALIE: "each side." You see, by the time --

MR. WAITE: You may have three parties. You cannot have three sides.

MR. MEDALIE: -- by the time you get two alternate jurors, the large number of ounsel have become sufficiently disciplined in the selection of the regular jurors to come to a concurrence of opinion. The smart young men who have had no experience, the civil lawyers who want to fight every point, they have all been flattened out and work under a unified command.

MR. DEAN: The point is, I think you miss my suggestion as to alternate jurors. Might you not have, if you have three defendants, where they were jointly indicted, each exercising peremptory challenges, instead of as a group?

MR. MEDALIE: But you do not have that when you are impaneling the regular jury.

MR. WAITE: You don't use the word "party" there.

MR. HOLTZOFF: Shouldn't we substitute the word "side" for "party"?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: We are all arguing on the same side. The motion is to substitute the word "side" for "party".

MR. WAITE: Does that presuppose that there aren't three parties? Might there not be the Government and two defendants, each defendant being entitled to a certain number of challenges? I do not get that very clearly.

MR. HOLTZOFF: In the Federal court all defendants are entitled to --

MR. MEDALIE: If you will allow me, the New York Code --

MR. WAITE: Suppose we are trying two cases simultaneously? You will remember we had a discussion.

MR. McLELLAN: We made our mistake on that yesterday.

MR. WAITE: What do we find it was? Isn't it possible that both defendants may have the same number of challenges under our rules?

MR. MEDALIE: Wasn't it that the challenges should be joint and not several?

MR. HOLTZOFF: That is right.

THE CHAIRMAN: Are you ready for the motion? This motion is to substitute the word "side" for "party"

in line 38. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. You are ready for the motion, I take it, on Rule 22(c). All those in favor of the rule as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Any suggestions on Rule 23?

MR. SEASONGOOD: I should think that in line 3, "cause" would be better than "disability," that is, "absence from the district, death, sickness or other disability".

MR. ROBINSON: That is from the civil rule.

MR. HOLTZOFF: "or other cause"?

MR. SEASONGOOD: Yes.

MR. MEDALIE: All you are dealing with, really, is his absence, because he may just decide he is taking a day off.

MR. ROBINSON: The language is from the civil rule.

MR. SEASONGOOD: Maybe it is, but why do you want to limit it to disability?

MR. HOLTZOFF: Suppose the judge takes a day off? I do not think some other judge should be compelled to perform these duties. This relates to a situation where the judge that sat in the case is unable to perform his duties.

MR. SEASONGOOD: That is what it says.

MR. MEDALIE: Take this situation: suppose a judge isn't sick but his wife or child is pretty sick and he won't leave his wife's or his child's bedside. That can and does arise. You just cannot do anything, since there is no disability.

MR. HOLTZOFF: No, but if you say"other cause" - suppose he has gone on a vacation over the weekend?

MR. MEDALIE: I will give you another example. Under the New Dispensation it happens that some very brilliant men are on the bench whom the Government likes to consult, and on some other matters that are very important. That courthouse right next to this is sometimes disabled by the absence of its most brilliant members.

MR. BURNS: Judge Boylan went to South America for the Government. How would you describe that, as disability?

MR. HOLTZOFF: No.

MR. BURNS: It is absence from the district.

MR. SEASONGOOD: Why should you use a word of

limited meaning, if there are possible occasions where you would want the same thing to happen?

MR. HOLTZOFF: Well, I think this is taken care of, as it stands, because this is disjunctive, if he is absent for any reason from the district or absent because of death, sickness or other disability,- "death, sickness or other disability" is an alternative to absence from the district. In other words, the alternative is absence from the district or presence in the district but, in addition, that has "disability."

MR. MEDALIE: No. Suppose a judge in the District of Columbia got himself all tied up at the White House on something important enough for the President to have to consult him in a crisis like this, what would you do?

MR. HOLTZOFF: Well, I do not believe under those circumstances some other judge, for example, should pass sentence. I think you ought to continue the case.

MR. BURNS: George, I think, strictly speaking, the judge is disabled by reason of participation in a Government proceeding. It may be heresy but I feel very strongly that way.

MR. MEDALIE: These things have arisen under the present crises, and I am certainly not criticizing them either, because I think attending to our national affairs

is a lot more important than passing on routine judicial matters.

MR. SEASONGOOD: Look, you are just giving a right to perform certain duties in certain instances, and if the other judge is satisfied that he cannot perform these duties, he may grant a new trial.

MR. HOLTZOFF: No, but the parties may not wish to have the duty performed by some other judge. It seems to me this is broad enough as it stands, it covers absence from the district for any cause whatsoever, and it also covers disability even though there is no absence from the district. Now is there any other contingency that should be covered?

MR. SEASONGOOD: Well, there might be. What is the objection if there is any cause why he cannot perform his duties? And there has to be a cause.

MR. BURNS: I second Mr. Seasongood's motion.

MR. HOLTZOFF: Here is what I am afraid of. This might permit a judge other than the one who heard the case to pass sentence. Now that should be something that should not be resorted to except in cases of utmost necessity.

MR. YOUNGQUIST: I had supposed that the use of the word "disability" was intended to restrict rather severely the cases in which another judge might take the

place of the one who tried the case.

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: And, for instance, his voluntary absence from the courthouse, or anything short of absence from the district or death or sickness or disability, would not be a reason for calling in another judge.

MR. HOLTZOFF: That is right.

MR. YOUNGQUIST: I think it ought to remain as it is.

MR. MEDALIE: May I ask who calls in the other judge? Who determines that, leaving out the case of death?

MR. HOLTZOFF: I presume it would be the senior district judge, wouldn't it?

MR. MEDALIE: Well, you have no provision for that, and suppose the senior district judge is the only judge in the district?

MR. HOLTZOFF: Under the statute creating the Administrative Office, the Judicial Council and the senior district judge probably would have authority to issue that call.

MR. MEDALIE: We are not sure about that. The very fact that you are able to use the word "probably" it seems to me would show there is a doubt.

MR. HOLTZOFF: There is a general direction in that statute that the judicial council may issue directions concerning the transaction of judicial business in the circuit.

MR. MEDALIE: Well then you mean that the judicial council does that?

MR. HOLTZOFF: I would say so. I think the senior district judge could but you take the situation where you supposed there was only one judge in the district --

MR. YOUNGQUIST: Do we need concern ourselves about that now?

MR. HOLTZOFF: No, I do not think so.

THE CHAIRMAN: That is directed to Mr. Seasongood's motion.

MR. SEASONGOOD: I just want to call attention to the fact that if you leave it "disability", it will be disability in the nature of death or sickness. In other words, under the ordinary rules of construction, "death, sickness or other disability" would have the limited meaning in the nature of death or sickness.

MR. MEDALIE: Suppose the judge is in jail? That can happen.

MR. YOUNGQUIST: That would disable him from attending, certainly.

MR. SEASONGOOD: It would disable him, but it would not be a disability under the meaning of the Connecticut rules because it would have to be a disability in the nature of death or sickness under the Connecticut rules.

THE CHAIRMAN: All those in favor of the motion to amend say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. A show of hands. (Hands raised.) Six for and six against. We need more voters, gentlemen. All those in favor --

MR. WAITE: I did not get the motion, so I did not vote.

THE CHAIRMAN: The motion is to substitute the word "cause" as the first word on line 3 for the word "disability." "Disability" is the language of the civil rules. Mr. Seasongood objects that it is not broad enough. That is the general basis of his motion.

All those in favor of the motion show hands?

(Hands raised.)

THE CHAIRMAN: 8 opposed and 7 for; the motion is lost. Any further suggestions.

MR. GLUECK: Mr. Chairman, in lines 4 and 7 I suggest that the words 'carry out" be substituted for

"perform," because we have so many "performs" in this rule that we ought to avoid that repetition.

THE CHAIRMAN: That again is a question of why should we, if the word means nothing different, vary from the civil rules.

MR. GLUECK: Merely because of the improvement in language I should say.

THE CHAIRMAN: I am going to have General Mitchell write me a letter when this is all over, asking me why we did certain little things with words. I have one or two such letters that I haven't answered. I am going to refer him to the makers of the motions. In other words, he is very proud, his whole committee is, of their rules. He is going to say "Why did you change in line 4 'perform' to 'carry out'?" We will say "We didn't like your tautology."

MR. GLUECK: Well, why not?

MR. HOLTZOFF: I think in drafting rules or statutes you should use the same words to express the same meaning whenever it recurs. I know that is not good stylistically in writing, but I think in drafting documents it is a good rule to follow because otherwise you will have somebody say "The draftsman must have meant something when he used varying expressions."

MR. YOUNGQUIST: In other words precision is pref-

erable to usage.

MR. GLUECK: Could there be any doubt as to the fact that "carry out" means the same as "perform"?

MR. HOLTZOFF: There is a rule of statutory construction that if you vary your words that you mean to vary your meaning. So I think it is a mistake to vary the words.

MR. DEAN: It seems to me if we are going to get through here tomorrow night, we had better let matters of style go to the Committee on Style.

THE CHAIRMAN: Do you make that as a motion, Mr. Glueck?

MR. GLUECK: I make that as the motion.

THE CHAIRMAN: Moved and seconded that in line 4 the word "perform" be changed to "carry out." All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

Any further suggestions?

MR. SEASONGOOD: In line 5 I would suggest inserting after "returned," "or a finding of guilt made."

THE CHAIRMAN: "Returned or" what?

MR. SEASONGOOD: "or a finding of guiltmade".

In other words, you have taken care of only the return of the verdict. There are some things required to be done only after a return of a verdict. There might not be a verdict.

MR. McLELLAN: Why not say "after verdict or finding of guilt"?

MR. SEASONGOOD: All right, yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of"Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Any further suggestions? All those in favor of Rule 23(a) as amended, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. WAITE: Before we go to the next rule I want to introduce a proposed additional rule. I don't know just where it should come but it comes in here as well as anywhere. The idea is to get approval or disapproval of the proposal, even though this is not the precise place it should go.

I think each one of you has a copy of the various rules that I have proposed, one of those mimeographed copies. If you want to look at that and read it, it is Rule 23-2, if you care to read that, I don't think I need to say anything more about it. We can just act on that. It is on the second page, Mr. Seasongood.

THE CHAIRMAN: Would you be content to stop in line 4 with "publicity" and not bring in these other things, Mr. Waite? You might get one vote more.

MR. WAITE: You couldn't stop there. That is not a complete sentence.

THE CHAIRMAN: I mean strike out "which is derogatory of the dignity of the judicial proceeding or may interfere with the accurate settlement of the issues." I think the taking of photographs for publicity covers everything you have, and the subsequent words weaken it rather than strengthen it.

MR. WAITE: I certainly have no feeling that I should insist on that, but if it would go through with the rest of it I would rather have it go through that way.

THE CHAIRMAN: Why don't you make your motion in the present form then? Certainly this would prevent a Hauptmann trial.

MR. WAITE: I will make the motion in the present form; and if it does not go through, I will move it

without those words.

THE CHAIRMAN: Is the motion seconded?

MR. DESSION: Seconded.

THE CHAIRMAN: Any remarks?

MR. SEASONGOOD: I would just like to know whether this it right or it isn't? Of course a United States Judge ought to have a sense of fitness. You oughtn't to tell him how to conduct his courtroom.

MR. CRANE: May I show you how we handled that in this State. Way back in the Thornton case, tried before me, involving murder in the first degree. That was a very celebrated case and one in which the press was very much interested. I do not know how any other judge ought to have handled it but the way I handled it, and I had the cooperation of the press, was to send for, I sent for Cobb and a few of the other reporters before we started the case and I told them what I desired. I provided places for them in the courtroom and made it as convenient for them as possible. They agreed among themselves that any man of the press who took a photograph in the courtroom would be dealt with by them, and there was not a photograph taken in the six weeks of that trial, not a photograph taken in a case that appeared in every newspaper in the country. They handled it just as I requested, having stated the reasons why I wanted them to

handle it in that way, but the New York World beat me to it, because they took a picture of a famous case tried over here in Manhattan, a picture of a courtroom, and put my head on the judge, and featured the picture as a photograph of what happened in the Thornton case.

So I do not know what you are going to do to prevent publicity, but I think it is a terrible practice; I think it is frightful. I have in mind one case where a judge was making a charge to the jury in a famous case and as he got through reading the charge, sheet by sheet he passed it down to the reporters behind the curtain.

We have all these things and certainly a judge ought to have some common sense.

MR. HOLTZOFF: Judge, don't you think this ought to be left to the judge's sense of fitness rather than to any rules?

MR. CRANE: We had the same thing at the judicial council in the State, meeting in Buffalo, of which I was chairman, and we had all these tabloid papers and others come before us, and we finally left it that way.

It is a great temptation on the part of a good many lawyers to yield to it and yet the better judges do not do it. I think it is prohibited here under an understanding among the judges in New York City. I do not think they allow it at all, and they get along pretty well too.

MR. SETH: We have a district court rule all through the Tenth Circuit which is very much like this.

MR. GLUECK: Do you know of any such abuses in the Federal courts at all?

MR. McLELLAN: I think we can very briefly say that there are more difficulties possible where publicity of this kind is permitted than we might at first imagine. I can remember that in the Spring of 1932 a man came to me and said "This is only a matter of form, sir, but we are going to take your photograph on the bench." And I said "Only a matter of form?" And he said "Yes." He said"the senior district judge has said it may be done." "Well," I said, "I am going to be there and I say it cannot be done." Well, he went back to Jim Lowell, who was a very, very dear friend of mine, for whom I had acted as counsel in years gone by, and he came in and he said "What's the matter with you?" I said "No pictures while I am in the courtroom, Jim, and you can just do what you want to do about it." He said "Do you feel about it strongly?" I said "Do I talk as though I did?" And he said "You do." He said, "By heaven, I won't have any more pictures, either." With that beginning, we do not have any pictures in our court. I do not mean we had them in the course of a trial, but any time they wanted to take a picture of the judge on the bench, they

got away with it.

I think the rule is a good one.

THE CHAIRMAN: We not only have it in our district but we had it in the district in which the Hauptmann and Hall-Mills cases were tried. Experience shows us that sometimes a judge will not pay attention to such a rule when he is anxious to receive publicity.

MR. MEDALIE: I think even counsel should follow that practice. I have refused during recess to have myself photographed in the courtroom. I will not permit the photographing of a defendant in the courtroom when I represent him. There is a room down in the cellar where the reporters hang out and when he wants his photograph taken he can go down and have it taken.

MR. SEASONGOOD: All I think of is whether it is a reflection on the judges. After all, a United States judge ought to have enough sense of fitness to know what is right without our telling him. And is it within the scope of our activities here?

THE CHAIRMAN: I think it is.

MR. McLELLAN: In the Willie trial, that I tried for a year, every now and then - that was in the State court in Massachusetts - the judge, who had been a politician, would let the reporters come in and take the pictures of the lawyers examining the witnesses. Now we are not

guardians for the State courts but I think this kind of rule would have the effect of preventing this kind of thing everywhere, but I am going to vote against the rule unless the deletions suggested by the chairman are made.

MR. SETH: Make that a substitute motion.

THE CHAIRMAN: In the fourth line, Mr. Waite, if you would change "and which" to "that" I think you have something, because I misunderstood it. "Any other activity which is designed for purposes of publicity that is derogatory of the dignity of the judicial proceeding".

MR. WAITE: I would make that change, certainly, if that makes it clearer.

MR. CRANE: What can the picture be taken for except for purposes of publicity?

THE CHAIRMAN: The language of the first clause, judge, deals with photographs; the second clause with broadcasting, and then the third is any other activity that is designed for purposes of publicity.

MR. CRANE: Oh, I see. I beg your pardon.

MR. WAITE: If that makes it clear, I am willing to accept it. I would make it "any other activities designed for publicity when those activities are derogatory of the dignity of the court."

MR. MEDALIE: I think you run into trouble there. In the first place, the presence of the reporters is de-

signed for publicity. They have a right to be in the courtroom.

MR. WAITE: But that is not derogatory of the dignity of the court.

MR. MEDALIE: But the way they do it is terrible. You see, what you do in these important trials, the press comes, descends on the judge, and he consents to have arrangements made for them, tables are set up for them, and then they are there and they begin. They even have a telegraph machine clicking there. Now they do not operate it while the court is in session, of course. Every other two minutes the jury's attention is distracted by a reporter writing something and handing it to a boy, a Western Union messenger boy, who rushes out, and another comes in, and another reporter gives him something. Now that is all designed for publicity. Do we intend to prohibit that? I should not mind seeing it prohibited.

THE CHAIRMAN: No, I should think you could at least advance it to the stage of having the Supreme Court consider it.

MR. YOUNGQUIST: Mr. Chairman, it seems to me that the connection which this provision would have with procedure, and procedure is what we are dealing with, is so tenuous, well, I am unable to perceive it.

THE CHAIRMAN: I think that goes to procedure, too. You cannot have good procedure with those sideshows going on.

MR. YOUNGQUIST: Procedure means, on the one hand, what is done by the prosecution and, on the other hand, what is done by the defense.

THE CHAIRMAN: And the jury.

MR. YOUNGQUIST: And by the jury, yes, but here we are talking about what is to be done by what you might call strangers to the court. They do not affect the procedure, as such, in any event. I think, too, that we might much better leave matters of that sort to the conference of the senior circuit judges and the various judicial conferences in the circuits or districts of the States.

MR. SEASONGOOD: May I add, Mr. Chairman, what is the use of our doing something that is already in the Code of Ethics of the American Bar Association - judicial ethics - which was drafted by Chief Justice Taft? You already have the declaration that it is unethical.

THE CHAIRMAN: That is not binding on the judges, is it?

MR. SEASONGOOD: No, it is not.

MR. MEDALIE: Specifically, I object to two things, that you know are the cause of scandal. One is photographing and the other is broadcasting.

MR. CRANE: I am in favor of what has been stated, but I think when you come to "any other activity" you are going to get into trouble, or you may open the door to it.

MR. WECHSLER: Suppose the word "similar" were substituted for the word "other"?

MR. CRANE: Take pictures and broadcasting from the courtroom.

MR. WAITE: I go to the extent of thinking any activity which is an interference to the accurate ascertainment of justice ought to be prohibited,and ought to be prohibited by rule. I would like to have it voted on in that way, so if it loses in that form, I will put it in the other form.

MR. WECHSLER: Would you accept an amendment?

MR. CRANE: I agree with Mr. Waite except it is hard to determine what other activities are. Who is going to determine that? I agree with you fully, but I do think that is very dangerous, to leave that open that way.

THE CHAIRMAN: Mr. Waite, Mr. Wechsler suggests in place of "any other' in line 4, the words "or similar activities."

MR. WECHSLER: "any similar activities."

THE CHAIRMAN: "or any similar activities"

rather than the words "any other."

MR. WAITE: I would like to preclude any activity which interferes with the accurate ascertainment of justice.

MR. ROBINSON: Could you tell us what the American Bar Association's canons provide?

MR. WAITE: Yes, that covers broadcasting of court proceedings calculated to detract from their essential dignity, degrade the court and create misconception.

MR. ROBINSON: There is nothing about "any other activities".

MR. WAITE: No.

MR. ROBINSON: In the American Law --

MR. WAITE: No. Mine is better than that.

MR. YOUNGQUIST: Doesn't it sound paradoxical to say the court shall not permit anything to be done that degrades the court?

MR. SEASONGOOD: Before you pass this, will anybody say he knows of a single United States judge who has allowed radio broadcasting from his court, or allowed the taking of photographs in court?

MR. DEAN: United States commissioners frequently did.

THE CHAIRMAN: Off the record.

(Discussion off the record.)

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: All those in favor of Mr. Waite's motion say "Aye."

MR. McLELLAN: You mean as is?

MR. DEAN: With the change the Chairman stated.

THE CHAIRMAN: With the words "any similar activities" instead of the word "other" in line 4.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. CRANE: I am here in spirit but not in words.

MR. McLELLAN: That is it.

THE CHAIRMAN: We will have a show of hands.

(After a show of hands the Chairman announced the vote to be 4 in favor; 10 opposed. Motion lost.)

MR. WAITE: Now, Mr. Chairman, I suggest that the words beginning in line 4, following the first word after the comma be stricken out - the words "in that" on the fourth line, and the fifth line, and the sixth line, and the seventh line, down to the word "shall."

THE CHAIRMAN: So it will read "The prohibited photographs and broadcasting shall not be permitted by the court"?

MR. WAITE: Yes," the taking of photographs dur-

ing the progress of judicial proceedings and/or the radio broadcasting of judicial proceedings shall not be permitted by the court."

THE CHAIRMAN: Are you ready for the motion?

MR. WECHSLER: That is all there is to the motion?

MR. WAITE: Yes.

THE CHAIRMAN: Yes.

MR. McLELLAN: Just forbidding the doing of two things, without that "publicity purposes" in it at all?

THE CHAIRMAN: All out. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

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

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

THE CHAIRMAN: Carried.

MR. McLELLAN: I wish I could have that rule read by somebody, as to how we passed it. I do not think I have any trouble with that at all.

THE CHAIRMAN: "The taking of photographs in

the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings shall not be permitted by the court."

MR. HOLTZOFF: I would like to ask a question about that radio broadcasting of judicial proceedings. This does not say radio broadcasting from the courtroom. Does this mean if a news commentator from the studios of Radio City summarizes a trial, he will come within the prohibition of this rule? Well, it would, under literal construction.

MR. BURNS: No, that is not the broadcasting of the judicial proceedings.

MR. YOUNGQUIST: May I suggest what you probably want to say is the taking of photographs or radio broadcasting in the courtroom.

MR. HOLTZOFF: That is different. That is what you should do.

MR. GLUECK: What they do is to put it on a wax record, if they can get away with it, in the courtroom, and then rebroadcast it.

MR. BURNS: That would be a violation of the rule as written, just like publishing the photographs.

MR. MEDALIE: Off the record.

(Discussion off the record.)

MR. HOLTZOFF: It seems to me, certainly, that

this ought to be amended to make it clear it is radio broadcasting from the courtroom.

MR. WAITE: I think it is perfectly clear by implication.

MR. HOLTZOFF: I think it certainly does not say that,"radio broadcasting of the judicial proceedings." It doesn't say from the courtroom.

MR. ROBINSON: What about the title?

MR. HOLTZOFF: The title does not limit the text.

THE CHAIRMAN: The Committee on Style will confer with Mr. Waite, and I am sure that will be cleared up.

MR. CRANE: That is all you mean, isn't it?

MR. WAITE: Yes.

THE CHAIRMAN: Rule 24, please. Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. WECHSLER: There is this point which is raised in the Memorandum of the Court that ought to be considered. If you will look down to lines 6 and 7 and following, it says "by the principles of the common law

> as interpreted and applied by the courts of the United States in the light of reason and experience."

This memorandum is as follows:

> "Unless it is desired to freeze the common law rules of evidence, shouldn't the phraseology of line 6 be changed by inserting before the word 'interpre-

ted' something like 'they shall be'?"

In other words, it is not the rules as interpreted in the past but the rules as they may be or shall be interpreted by the courts of the United States in the light of reason and experience.

MR. ROBINSON: Did you check on the former draft of that? I am not sure but what the former draft was insufficient. This looks to the future, as indicated by line 5. Therefore the Court's Memorandum would not apply to this draft as it did to the other. I think that is true.

MR. WECHSLER: No; just as a matter of language, "shall be governed" is the clause that lays down the rule.

MR. BURNS: I second the motion.

MR. HOLTZOFF: I think "as they may be" is better than "they shall be." Insert after the word "as" in line 7 the words "they may be."

MR. WECHSLER: That is all right.

MR. HOLTZOFF: I second the motion.

MR. CRANE: Is there a motion? I do not want to interfere with the motion.

MR. YOUNGQUIST: I would like to ask a question on the motion.

THE CHAIRMAN: All right.

MR. YOUNGQUIST: "as interpreted and applied by the courts of the United States." That would necessarily include the court that is passing on the admissibility of the evidence in the current case. Doesn't that leave the thing entirely wide open?

MR. WECHSLER: I think it does, Aaron, but I think it is all right.

MR. YOUNGQUIST: Then I would suggest that you strike out the words "as interpreted and applied by the courts of the United States."

THE CHAIRMAN: Mr. Robinson?

MR. ROBINSON: The point of that was that in the draft before the court the words "in the light of reason and experience" had been omitted inadvertently, I think, or improvidently, for reasons that need not be stated here. Therefore the court did not have before it the words "in the light of reason and experience." Now that they are added --

MR. CRANE: I was going to object to those words.

MR. ROBINSON: They were added in order to take care of this objection by the court, and because it was felt that the committee had voted they be included because of the Funk and Wolfle cases.

MR. CRANE: Does that mean that every court in the United States would have to abide by "in the light of

reason and experience"? Who is going to determine it? How is the court going to apply this rule, by saying that is the authority of the United States Supreme Court, and that is the authority of the United States Circuit Court of Appeals, and decide it was not in the light of reason and experience?

MR. ROBINSON: That is the language of the Chief Justice.

MR. CRANE: I know it is; it may be his language, but I think there may be objection to it.

MR. WECHSLER: I think Judge Crane's point ought to be answered specifically, and it isn't as difficult as it looks against the background, Judge. There are decisions holding that in criminal cases the rules of evidence applicable in Federal courts are the rules of the common law as they existed at the time of the admission of the state to the union. There are three or four cases laying down that rule. Within the last few years the Supreme Court to avoid that rule which took everything back to the past, modified it by saying that the court was not bound to go back to the date of the admission but to look to the whole development of the law of evidence in the states and in England and by statute, and consider developments or modifications of the law in those terms. So this formula is really the formula. There are two fairly

recent Supreme Court opinions written by Chief Justice Stone.

MR. CRANE: Suppose you get all these authorities? As a lawyer you would have to form your opinion whether it is the proper authority. When you came to hand a judge an authority and you had to decide what really has been declared the law by the authorities, you would say that any one authority is not in the light - this is courts of the United States; nothing about the states, but in the courts of the United States - in the light of reason and experience. I have some reason for feeling this way, because I feel certain that some cases have been decided not in the light of reason and experience and could not have been decided in the light of reason and experience. I would not want to say so in the rule. The United States Supreme Court has decided cases in the past neither in the light of reason nor experience. I would not say so because I think we ought to put our own experiences aside.

THE CHAIRMAN: Wouldn't Mr. Wechsler's "shall be" cover that?

MR. McLELLAN: I want to make another motion, if I may. That seems to me not polished. At the end of the words "common law," line 7, I move that a period be inserted and that everything thereafter be stricken

from the rule.

MR. WECHSLER: Wouldn't you be afraid, Judge, that would freeze the status quo ante?

MR. CRANE: Yes, I don't want to do that.

MR. McLELLAN: If you want to make it"by the present or current principles of the common law."

THE CHAIRMAN: Then you get the question whether that means the state common law or Federal common law, and somebody mentions Erie Railroad and we are off.

MR. HOLTZOFF: Why not leave out the phrase "in the light of reason and experience," and substitute the words "they may be," or insert the words "they may be" in line 7? It seems to me everything would be accomplished that you want to accomplish, Herbert. "principles of the common law as they may be interpreted and applied by the courts of the United States."

MR. BURNS: And have your footnotes take care of the problem.

MR. MEDALIE: I think you should strike out the words "and applied." If you say the words "principles of the common law as interpreted by the courts of the United States," that presents a perspective. I object to the words "and applied" because that assumes there is a common law of the United States, and when I was a young man, a hundred years ago, it used to be stated

there was no common law of the United States.

MR. WECHSLER: I second the motion to take out "and applied" and then we might work on it from there.

THE CHAIRMAN: Mr. Wechsler, suppose you frame a motion which will cover from line 7 on.

MR. WECHSLER: Could we have a vote on the taking out of "and applied"?

THE CHAIRMAN: The motion is made to delete the words "and applied." All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried unanimously.

MR. MEDALIE: How would it be to say "as now and hereafter interpreted by the courts of the United States"?

THE CHAIRMAN: That sounds a little spiritual.

MR. MEDALIE: What is the trouble, Arthur?

THE CHAIRMAN: It sounds a little churchly, "now and hereafter".

MR. MEDALIE: But the context is far removed.

MR. YOUNGQUIST: "principles of the common law as interpreted" - that means from time to time.

MR. MEDALIE: I was Chamberlaining and not Churchilling.

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THE CHAIRMAN: Doesn't that rule answer here as interpreted by the courts of the United States striking the words "in the light of reason and experience"?

MR. HOLTZOFF: Yes, I would vote on that.

MR. WECHSLER: I think that is so. There is a slight difficulty. That may mean as interpreted in the past.

MR. BURNS: I do not see how we can get by Judge Crane's difficulty; that "in the light of reason and experience" modifies what the courts have done, so you apply only that part of the court's activities which we find now to be in the light of reason and experience.

MR. McLELLAN: I move to strike out the words "in the light of reason and experience".

MR. HOLTZOFF: Second it.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. It is carried.

MR. YOUNGQUIST: Before I vote in the negative on the whole rule I want to repeat the objection that this rule establishes no standard at all for the admission of evidence.

THE CHAIRMAN: May we try first to clear this line 7 which I think still needs a little more?

MR. HOLTZOFF: I move in line 7 after the word "as" there be inserted the words "they may be".

MR. WECHSLER: I do not think if you take out now the words "in the light of reason and experience" the problem exists any longer, does it?

MR. SEASONGOOD: It is worse to say "may be".

MR. WECHSLER: I think I would like to try Judge McLellan's procedure, only I know I won't be as successful as he, but coming back to the words "reason and experience" I call attention to this point: all this rule does, substantially, is it recognizes the rule laid down in the Funk case. The words "reason and experience" are subject to all the objections that we leveled against them, but it nevertheless is true if we leave it in we clearly indicate to the bar that is what we are doing and that is a meaningful thing to do. Accordingly I feel that if the language were "as they may be interpreted by the courts of the United States in the light of reason and experience" we would meet both points and keep the rule that we want to keep.

MR. ROBINSON: I would like to agree with Mr. Wechsler in that, and for these reasons: The committee had a great deal of special study made and time expended by

experts in the field of evidence on this rule. Mr. Pendleton Howard, author of a standard work on commercial law in England, and of course in this country, was in the committee's office there in Washington for over a month examining all the authorities and studying especially the Supreme Court decisions in the matter, and he came to the conclusion that these words, "in the light of reason and experience" really do, on second thought and mature deliberation, have a meaning; something more than a mere pious hope and platitude.

MR. BURNS: Wouldn't that require an additional sentence there, because I think Judge Crane's criticism is valid and if you want to get something which is nothing but a restatement of the laws on the subject, you might say "in interpretation and application of the principles of the common law you could and should be guided by reason and experience." That is what they are trying to say.

MR. HOLTZOFF: I don't think we ought to say that.

MR. ROBINSON: That is the meaning of it.

MR. YOUNGQUIST: Why tell the court that he has to decide questions in the light of reason and experience?

MR. HOLTZOFF: Why should we have a special admonition on it?

MR. SEASONGOOD: I ask a motion to reconsider.

MR. HOLTZOFF: I want to call attention to this --

MR. BURNS: I do not advocate it, but I simply say for purposes of indicating it we might say that.

MR. SEASONGOOD: Is there a motion to reconsider?

THE CHAIRMAN: I think that was Mr. Wechsler's motion.

MR. HOLTZOFF: I would like to say this: that the words "in the light of reason and experience" are taken from two opinions of Chief Justice Stone and they fit in very well and they read very well in the opinions. But it is one thing to write an opinion and another thing to draft a rule. I do not think they are suitable for a rule merely because suitable for a judicial opinion.

MR. SEASONGOOD: We are still with you.

MR. YOUNGQUIST: All Mr. Justice Stone did was to try to justify what the courts have done.

THE CHAIRMAN: Mr. Wechsler has made a motion to reconsider striking out in the last two lines "in the light of reason and experience." All those in favor of the motion say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No".

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. We had

better have a show of hands.

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

THE CHAIRMAN: The motion is lost.

Are you ready for the question on Rule 24 as amended?

MR. DESSION: May we have it reread; the last part?

THE CHAIRMAN: "except when an Act of Congress or these rules otherwise provide, by the principles of the common law as interpreted by the courts of the United States."

MR. HOLTZOFF: Question.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

Rule 24.1 Are there any questions?

MR. HOLTZOFF: Mr. Chairman, on 24.1 I move that the rule be stricken out. I have written a three-page memorandum which is contained in the memorandum of comments, and therefore I do not think it would be appropriate for me to go into this matter at great length.

What this really means is this, as I understand it: that if a defendant is questioned by an officer and he makes a statement to the officer and there is no contention of duress of any kind, but nevertheless he has not, for some reason or other, been brought before a magistrate with sufficient promptness, nevertheless the statement of his shall not be admissible in evidence against him.

MR. WECHSLER: There is one very significant error in your statement.

MR. HOLTZOFF: Let me finish, please.

MR. MEDALIE: No. Point it out now.

MR. WECHSLER: The interrogation must have occurred subsequent to the time when the prisoner should be taken before the commissioner or magistrate. If the statement was made during the time when it was reasonable to hold him, even though the defendant is not afterward taken before the commissioner within the proper time, it is admissible.

MR. HOLTZOFF: I suppose that is so. Suppose there is no claim of duress? If there is a claim of duress and the claim is sustained the statement is out anyway. Now we have a situation where there is no claim of duress but there is an argument or controversy over the question as to when the defendant should have been brought before a magistrate. I do not think that that

should be a ground for excluding this.

MR. MEDALIE: Well, it would be considered on the question of duress. It would have a bearing.

MR. HOLTZOFF: That is right, on the question of duress, but not in and of itself.

MR. MEDALIE: That is right. As I understand it, if you will allow me a minute or so, the way we are drawing this rule it comes to this: we set up the rules how you play the game. Within a certain time you can do certain things. After that you lose your gain or you are penalized just like in football. I don't think we ought to do that.

MR. DEAN: We do that because of the necessity of having some kind of sanction if you are going to lay down the principle.

MR. MEDALIE: I think what you have got is this: A defendant comes in. Evidence is given that he made a statement, and then he claims he was starved, he was worrying, he was held six days in custody instead of 48 hours. Well, that has to be considered.

THE CHAIRMAN: Yes, but what does it mean?

MR. MEDALIE: It is sometimes taken seriously. You remember that case that Judge Brandeis wrote on. They decided the evidence had been obtained under conditions that we roughly callduress.

MR. HOLTZOFF: Evidence obtained by duress is such that the statements are not worthy of credence.

MR. DESSION: Then they should not come in if not worthy of credence.

THE CHAIRMAN: Why should you have to show an extreme case in order to get your right; that a man has to demonstrate he was rubber-hosed. Why should not the fact that the officer had not complied with the principle laid down be enough to exclude that statement?

MR. YOUNGQUIST: In the application of it who is going to determine? How can he determine the dividing point between the permissive period of questioning and the non-permissive period. What standard are you going to apply? The standard of reasonableness perhaps?

MR. BURNS: That is all right.

MR. CRANE: May I ask a question on that?

THE CHAIRMAN: Yes, Judge.

MR. CRANE: This is along the line you are speaking of. It says "shall be admissible". It does not say the jury shall pass upon it later, but it says the evidence "shall be admissible". It says the officer should interrogate him without unnecessary delay. The question comes up, is a statement if it happens before 48 hours before the officer took him before the committing magistrate admissible? Shall a judge determine that?

THE CHAIRMAN: Yes.

MR. MEDALIE: Yes.

THE CHAIRMAN: That is a judge's question.

MR. MEDALIE: I would like to answer Judge Crane on that, and I think that is a defect in the rule. You must deal here, as you deal with other similar things; that is, the judge passes on it in the first instance and it remains a question of fact for the jury.

MR. WECHSLER: No.

MR. HOLTZOFF: No.

MR. MEDALIE: Wait. You take a confession; a confession is offered and the defendant has a right to stop the proceedings, has it, so that a preliminary inquiry is made as to whether or not there was duress. Now the judge does not have to decide the issue completely. If he decides, for example, it is a question of fact whether or not there was duress; whether the man was beaten, and so forth, he can admit it. He nevertheless, when it goes to the jury, submits the question to the jury as to whether or not the man was forced to make the confession. Now if this idea were carried out, assuming to be in favor of the principle of it, and there was a dispute as to whether or not the man had been held longer than --

MR. GLUECK: Unnecessary delay?

MR. MEDALIE: Unnecessary delay, the judge passes

on it in the first instance so he knows he cannot exclude it, and then leaves it to the jury.

MR. WECHSLER: I do not think that should go to the jury, because it is a question of law as to whether the legal duty of the arresting officer to take a man before the commissioner within a reasonable time was fulfilled. It is not a rule that relates to the trustworthiness of the statement. It is a sanction laid down by law.

MR. MEDALIE: Let me put this to you, Judge, for a moment. The judge erroneously admits the statement. Do you say the jury may not pass on it afterwards?

MR. WECHSLER: I say that can be assigned as error and it is prejudicial and ground for reversal.

MR. CRANE: May I ask a question on this? Of course I agree with the sentiment, but I am speaking now as to what actually occurred; suppose it is a question of fact. I mean by that there is a doubt as to whether it was taken within a reasonable time or as soon as possible.

MR. WECHSLER: You mean there is a doubt whether the statement was made in the first three hours or the last 36 hours?

MR. CRANE: Yes. Now the judge admits the evidence, and you say that his failure to rule it out is error, but don't we require all issues of fact to be tried

by the jury?

MR. WECHSLER: Not if they relate to preliminary matters, because the jury would not get the issue of fact involved in whether there was a reasonable search or not. It is on a motion to suppress the evidence or of the particular objection to the admission of the evidence, and I think this should be that kind of question.

MR. BURNS: Or whether the conduct of the defendant was too remote from the crucial time.

MR. DEAN: We want it in the same category, do we not, as the determination of whether a minor has sufficient intelligence to testify, for instance?

MR. WECHSLER: Yes.

Mr. Chairman, I would like to call your attention, because I drafted this rule, to what seems to me the very important limitations on its applicability. I am as sensitive as anybody to the problem that confronts the police in this kind of situation, and I do not regard this rule as proceeding on the assumption that police interrogation is an evil which Mr. Holtzoff suggests in his memorandum in opposition, but I do think you face this problem: You have a historic rule on the duty to take before a magistrate promptly or without unreasonable delay. It is a rule that can be violated and that has been violated and that is violated, and sometimes with the best motive.

In the argument of the Ducktown case in the Supreme Court a couple of months ago, the Court of its own motion on questions from the bench put the question whether a confession made to agents of the Bureau after detention of four days was not inadmissible under the present statutes on the same theory that evidence obtained in an unreasonable search is suppressed. But the Court has not decided that case. I think there is at least a chance when the decision comes down that this, or something even more severe, is the present law. But any attempt to meet the problem in formulating this rule so as to leave untouched statements made to anybody other than a police officer should have that viewpoint. If a man is held unduly long and he makes a statement to a fellow prisoner he is untouched. Consequently it leaves untouched statements made to a police officer which are not in response to interrogation. The only thing it touches is statements made in response to interrogation. I cannot see, in the present state of the law, any justification for the police to hold a man for the purpose of interrogation beyond the period that the statute lays down and that is the thing that this rule is designed to meet by eliminating one incentive.

MR. HOLTZOFF: But this does not say if he is held for the purpose of interrogation.

MR. WECHSLER: It says made "in response to

interrogation". It means if you hold him longer than the statutory period that you gain nothing by interrogating him.

MR. YOUNGQUIST: There are two answers, I think, to that. One is, are statements ever made except in response to questions, and the second point I have in mind is this: Suppose there should be what the court might deem to be an unnecessary delay, but during that period the prisoner makes a wholly voluntary statement in response to a question. This rule absolutely precludes the admission of that statement in evidence, and I think that is very dangerous.

MR. WECHSLER: It is the only way you can eliminate the incentive for holding people for purposes of interrogation.

MR. YOUNGQUIST: The price you pay is much too high.

MR.WECHSLER: That, of course, is a view I fully understand and I do not feel dogmatic on the others, but the Supreme Court I think has laid down this sanction in the interpretation on searches and seizures. State courts have refused to do it, and my own state refuses to do it; and in New York State's constitutional convention the issue was up and they refused to do it. And the argument made by someone was, Why penalize the public if

the constables blunder? Judge Cardozo said, "The striking thing to me is the Federal system has been able to live with the exclusionary rule."

The same thing is true here and I do not believe the Bureau holds people for purposes perhaps except interrogation and this would formalize everything good in the present Federal practice.

MR. HOLTZOFF: But there is an illustration on Mr. Youngquist's remark that this is too high a price: Suppose the interrogation commences within the proper time and the defendant begins to make a confession. Sometimes it takes a defendant several hours to dictate his confession to a stenographer. Before the confession is completed the time for arraigning the defendant before a magistrate may have passed. Would you say then the first part of the confession is admissible and then you have to stop and exclude the part that came later?

MR. BURNS: No.

MR. DEAN: Because if it is voluntary he may make that statement before the commissioner.

MR. HOLTZOFF: No, because by that time he will see a lawyer and won't repeat it.

MR. DESSION: That is the problem.

MR. BURNS: If he was dictating pursuant to a voluntary agreement made within the proper time then you

could say the defendant consented to the extension of that time.

MR. MEDALIE: I think under this rule the court would so rule.

MR. SEASONGOOD: Is it possible a man would have a lawyer during this time?

MR. MEDALIE: Oh, they can keep him out.

MR. SEASONGOOD: If he has a lawyer it would seem ridiculous to exclude it then.

MR. WECHSLER: But they won't have a lawyer present.

MR. DEAN: That is one of the reasons for the rule, because we cannot provide for counsel prior to this point.

MR. WECHSLER: Under this rule they would bring him in and he would get a lawyer and then for their interrogation supplementary it would not be affected by anything but the confession rule.

THE CHAIRMAN: All those in favor of the motion to adopt 24.1 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands, please.

(After a show of hands the Chairman announced the vote to be 8 in favor; 6 opposed.)

THE CHAIRMAN: The motion is carried.

Rule 25. Any suggestions? All those in favor of the rule say "Aye."

MR. YOUNGQUIST: May I raise a question: Haven't we stricken out the corresponding reference to pleading official records?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: Forconsistency should we strike it out here?

MR. HOLTZOFF: No, because the purpose of this rule is to adopt the civil rule as to the mode of certifying an official record, which simplifies the existing law.

MR. MEDALIE: Cannot we have one general rule which deals with matters of evidence of that sort? We have a comparable experience in New York. The Code of Criminal Procedure makes express provision for adopting civil rules wherever applicable, and I think we ought to do that. We ought not to have two rules of evidence on that because they are the same in both criminal and civil cases.

MR. YOUNGQUIST: We have that rule now.

MR. MEDALIE: I know, but when you come to other detail I think we ought not to have an extra code of evidentiary rules.

MR. HOLTZOFF: Isn't that what we are doing here

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in 25, adopting civil rules?

THE CHAIRMAN: I think we would get in a lot of trouble.

MR. McLELLAN: I move the adoption of Rule 25.

MR. HOLTZOFF: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 26.

MR. YOUNGQUIST: I have a question first. I think we can shorten line 9 by striking out "shall have opportunity to" and substitute "may".

MR. HOLTZOFF: Yes.

THE CHAIRMAN: That suggestion is accepted.

MR. SEASONGOOD: I was going to say "shall participate."

MR. HOLTZOFF: Suppose they don't want to participate?

MR. SEASONGOOD: I do not know whether they ought not to, because here again you have the question of the trial not being public. I just raise the question whether they should not participate; whether it ought to be. I am just presenting the question "they shall have to

participate" rather than "have opportunity to".

MR. YOUNGQUIST: Then if they do not you destroy the use of that particular part of the rule.

MR. SEASONGOOD: If the court orders them to they do, don't they?

MR. MEDALIE: Doesn't the difference between "shall have opportunity to" and "may" come to nothing?

MR. ROBINSON: That is right.

MR. MEDALIE: "may" is the same as "shall have opportunity to".

MR. YOUNGQUIST: Substitute "shall" for "may" then. "shall participate." My motion was merely to substitute "may" for "shall have opportunity" to shorten the rule.

THE CHAIRMAN: Let us bring that in focus by motion. All those in favor of the motion to substitute the word "may" for the words "shall have opportunity to" in line 9 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

Are there any further suggestions?

MR. SEASONGOOD: I do not want to protract the thing, but are you satisfied to have that optional? That is

what you have done.

MR. SETH: No.

MR. SEASONGOOD: Why should not they participate? Here is a witness who is going to testify and tell about his duties and everything, and it seems to be an essential part of the trial and you are just introducing your constitutional question.

MR. YOUNGQUIST: Would the instructing of the expert witness as to what his duties are be a part of the trial?

MR. SEASONGOOD: I should think so. He is a witness and he is telling what he has to do, and everything--why wouldn't they be present? Suppose you have a defendant who is not represented by counsel?

MR. GLUECK: What would be the effect if they did not participate?

MR. SEASONGOOD: He might say he did not have his trial in open court and had not been confronted by the witnesses under the Constitution.

MR. YOUNGQUIST: If he did not participate the judge would have no right to.

MR. SETH: I move we reconsider and go back to the original language. It guarantees him an opportunity to participate.

MR. SEASONGOOD: I will second that.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

Now the motion is what?

MR. SETH: That the original language be adopted; it is obligatory that they be given an opportunity to participate.

MR. HOLTZOFF: Isn't that what the word "may" means?

THE CHAIRMAN: The motion is to restore the original language. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I would like to ask the sponsor of this motion whether there is any provision for the payment of the expert selected by the court?

MR. ROBINSON: That is all discussed in the notes, Judge McLellan. May I read the notes?

MR. McLELLAN: But can't you tell me in a word?

MR. ROBINSON: Rule 26, page 5, discusses that at length.

MR. McLELLAN: Is there anything in any rule providing for the payment for an expert chosen by the court?

MR. ROBINSON: No, sir. It seems that legislation, rather than a court rule, should be the source of that provision; but it is clear also that the rule could provide, if you wish it, that such provision may be made that the court may select its experts from either qualified persons employed in appropriate branches of the Government service -- that was the suggestion of Judge Morris of the District, or under such other circumstances with regard to compensation as would avoid any necessity that the court provide special compensation for the witnesses. It is to be observed also that funds for the payment of expert witnesses appointed by the court are occasionally provided by the parties in both American and English courts. In due time experience under the rule might show that provision for such payments by order of the court should be made by Federal statute, as now provided by state statutes, which are cited in the note, and as contemplated by the Uniform Expert Testimony Act, also cited in the note.

MR. BURNS: The trouble with Judge Morris' statement is you are calling in somebody who is really on the Government's side. Have we the power to provide that the

court shall make provision for the payment of experts?

MR. ROBINSON: No, sir. I think not. That would be a matter for Congress by supplementary legislation.

MR. MEDALIE: We may not have the power to provide how it should be paid, but I always understood it was a principle of law that you could not impose on an expert and make him testify unless you arrange to pay him. Doesn't that apply to the court? In other words can the court go right down to Bellevue Hospital or the Medical Center and pick out some eminent alienist and say, "Come down here. You have got to testify"?

MR. BURNS: For two weeks.

MR. MEDALIE: (Continuing) "I know you are giving up an income of $500 or $1000, but you come down and testify."

MR. HOLTZOFF: But the rule has a value because there are occasions when you get eminent experts who are willing to testify.

MR. MEDALIE: I know, but this does not make such provision as you have it now. You speak of them in terms of witnesses. Now if the court can call a witness the witness cannot refuse to come unless there is some provision which says he can refuse.

MR. ROBINSON: George, I don't know whether there is a difference between New York and Washington, but in Washington the question has been put to the St. Elizabeth

staff, and they think there would be no difficulty if alienists are needed, and further they resent the suggestion that a scientific man would be swayed from one side to the other.

MR. MEDALIE: I am not talking about that at all.

MR. ROBINSON: There could be architects and other experts of that type.

MR. MEDALIE: It is not a question of partisanship really. Assume when the judge calls an expert that expert will say what he thinks and not what he is supposed to think.

MR. ROBINSON: Do you think it better for the private litigant to pay the expert?

MR. MEDALIE: No, Jim. You do not understand what I am saying.

MR. ROBINSON: You are talking about prejudice.

MR. MEDALIE: I am not saying that. Will you allow me to say what I want to say.

MR. ROBINSON: Pardon me.

MR. MEDALIE: I am talking about the court coming to the distinguished expert and saying, "You testify for me. You look at this and let me have your opinion, and you write it out so you can come to court and be examined."

MR. ROBINSON: That is not in the rules.

MR. MEDALIE: It comes to that.

MR. HOLTZOFF: The testimony would have to be given in open court.

MR. MEDALIE: Then the court tells him, "You are going to be a witness. You testify to what you think. You are going to come and be a witness," And the man says, "All right. Why don't you pay me?" The only point is you can not appropriate the money, but in so far as it can be the court ought to have the power to direct its payment out of whatever funds are available.

MR. ROBINSON: Would you suggest that as an amendment?

MR. MEDALIE: Yes, certainly. You bristled with hostility when I was agreeing with you.

MR. ROBINSON: That is all right. Herbert says that is a habit of mine.

MR. HOLTZOFF: It would take additional legislation to provide funds but I think there are many instances under which both parties would agree upon the appointment by the court of a Government expert, because there are many bureaus --

MR. MEDALIE: I understand that and I have no trouble with it.

I move that there be added a provision, in language to be prepared, that the court may designate that

out of whatever fund may be available reasonable compensation to be paid for such an expert.

MR. DESSION: I second the motion.

MR. CRANE: May I ask a question, before there is any discussion, as to meaning of this: It says here that the court of its own motion and selection of the parties may select an expert. Has a man got to go if the judge orders him? Can they subpoena any expert now who has nothing to do with the case and does not know the facts, except his knowledge as an expert?

THE CHAIRMAN: It has always been my knowledge that an expert can come to court who is not a witness to the facts and say, "I do not have to testify" and "I won't testify."

MR. McLELLAN: My understanding is a little different; that he can be compelled to testify what he then knows, but cannot be compelled to make a study. That is our rule. He cannot be compelled to answer an expert question where that involves the necessity of making a study. That which he then knows, that opinion he then entertains, he may, in the court's discretion, be ordered to give. But the court is slow at exercising that discretion.

MR. MEDALIE: There are varying decisions.

MR. McLELLAN: I am only talking about this that I know about.

MR. MEDALIE: Jurisdictions differ. I understand in some you can compel them to come.

MR. CRANE: How can you call an expert who does not know a fact except what he knows generally from his profession? How can you deprive him of his earnings and living while he is sitting two or three weeks in court to be examined just because he is a professional man?

MR. McLELLAN: If he has an opinion in his head he can be compelled to give it just as he can be compelled to give a fact, but the matter is discretionary with the judge as to whether he will compel him to give expert testimony without compensation. The court cannot tell him to go and educate himself or study the facts or anything of that kind.

MR. CRANE: I think that would be a pretty dangerous rule, and unconstitutional, if it implies this can be done the way it is here, by this order.

THE CHAIRMAN: I had a case where I offered in court, but not in the presence of the jury, to pay a witness the highest fee he ever got, which he admitted was $500 a day, if I could examine him as a witness, and he refused to be examined. And the court would not force him to be examined.

MR. McLELLAN: I have not said anything inconsistant with that. The court in its discretion can refuse to force

him to give an opinion, but the power to do it is there but he has not the power to make him go and study the facts.

THE CHAIRMAN: This man had written a book, and that book was being used by other experts against me, and I knew, as a fact, that this man had changed his opinion, and I wanted him to state "I no longer entertain that opinion which I entertained six years ago when I wrote the book," on which the other experts relied. I offered $500 for that which would take three minutes, but he refused and the Court would not compel him.

MR. CRANE: Experts cover a wide field. We think of them as doctors but they cover everything from taxation on to everything else, and I should think it ought to be permissive. I would not want to rule that so and so has to testify or say that the court can compel a man to do it.

MR. MEDALIE: Mr. Chairman, I move that after the period in line 12 the following be inserted: "The court shall determine the reasonable compensation of such a witness and direct its payment out of such funds as are obtainable by law."

8 MR. SETH: Seconded.

MR. HOLTZOFF: Mr. Chairman, I would like to say a word about that amendment: At the present time, as Mr. Medalie knows, there are no funds provided by law for

that purpose.

MR. MEDALIE: Isn't there a general fund for court purposes?

MR. HOLTZOFF: There is not. That is the whole trouble. Unfortunately Congress makes its appropriations itemized; so and so much for salaries; so and so much for this or that.

As a matter of fact I think Congress has very good reasons which need not be enlarged upon now for itemizing its appropriations, and I think Mr. Medalie would agree with me. But my objection to this amendment is this: it is an attempt to force Congress to act to make an appropriation for this purpose. I think it might be resented, and therefore I think it is unwise to put that in.

MR. YOUNGQUIST: As I understand it, this motion arose out of the possibility that an employee of the Government might be called as a witness in a prosecution by the Government, and that was not desirable. Could not the whole matter be taken care of by striking from the notes the reference to the use of Government employees?

MR. HOLTZOFF: No.

THE CHAIRMAN: No. I think it was broader than that. This goes to the desire to provide, if possible, some method of paying experts in general.

MR. YOUNGQUIST: But there is not any now. There

is not any fund out of which they can be paid so such provision would be futile; and if Congress should, in the future, provide such funds the payment can be made without sayinganything about it in the rule.

MR. ROBINSON: That is not in the notes. It is in the Reporter's memorandum.

THE CHAIRMAN: The secretary of the committee who occasionally goes up on the Hill to testify and knows the pulse of the Judiciary Committee thinks the Committee would be sore at any such suggestion because they would think it was an attempt to force their hand for an appropriation. In other words, it might be inexpedient from that standpoint.

MR. BURNS: How about a vote?

MR. SEASONGOOD: Couldn't we have a note that it would, in general, be considered desirable if this procedure were followed, but in the absence of appropriation we put it in the rules?

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: This is Mr. Medalie's motion. Those opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those

in favor show hands.

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

THE CHAIRMAN: The motion is carried.

MR. MEDALIE: Judge McLellan made a suggestion on language where the amendment speaks of "such funds as are provided by law" that the "are" be stricken and there be substituted for it "may be".

THE CHAIRMAN: That would be acceptable I take it.

MR. HOLTZOFF: Please read it again.

MR. MEDALIE: "The court shall determine the compensation of such a witness and direct his payment out of such funds as may be provided by law."

THE CHAIRMAN: You have not met Judge Crane's suggestion yet, or his objection, which is that he doubts the right, as I get it, of the court to order any witness to appear without the expert's consent.

MR. CRANE: It says here, "The Court shall appoint any expert witness agreed upon by the parties." I should suppose that should be "may" because they may agree upon somebody. There is no money on the question of insanity, and I know they called Dr. Hamilton once, and he came, and I think that should be met, but even then we say nothing about after the Judge does order it, whether he has to come. I just bring that up as important to the whole matter. I

should think we ought to change it and so modify the line 4 by changing the word "shall" to "may". Because they may have arranged with him and he may be willing to come if they pay him, but I should not think he was bound to.

MR. McLELLAN: I second it.

MR. YOUNGQUIST: Would he not be bound to come by subpoena?

MR. SEASONGOOD: We considered that before and the consensus was the parties have the right to agree on an expert.

MR. CRANE: If we made that "may" it would be much better.

MR. YOUNGQUIST: That would destroy the purpose of this rule.

MR. SEASONGOOD: I think it was generally believed that where the parties agree on experts they have the right to call them and the Court should not have the power to prevent their calling experts, that they might agree upon.

MR. HOLTZOFF: This would not prevent the parties calling their own experts. This refers to the expert being made the court's expert, because the second part of the rule still refers to the parties right to call their own experts.

MR. ROBINSON: But if they had agreed upon an expert witness as the Uniform Expert Testimony Act provides, and various state statutes provide, it is the court's duty to call such witness. The idea Judge Crane expressed is that it would help, and it has helped --

MR. CRANE: Suppose the parties agreed upon an eminent man, but they have not provided for his compensation, is the court bound to appoint him then? And leave it to the judge to find out whether he is willing to come or whether they have arranged to get him? If he has to do that, if they agree upon him, he will easily agree on a man without consulting him.

MR. ROBINSON: Isn't it possible that the court may appoint such man but as a requirement they may have to pay him?

MR. CRANE: You just used the word "may" now.

MR. HOLTZOFF: But there may be no provision for his compensation.

MR. CRANE: Take those men that are assigned in cases; like judges are assigning lawyers now. Many of those cases come up and the question at issue is whether a man is sane. Of course there is no money, but suppose they agree to get an independent doctor. "We will get so and so," and they do not consult him, has the court got to appoint him? You say the court shall appoint the person

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agreed upon. I say it better be "may".

MR. MEDALIE: Just a moment.

THE CHAIRMAN: Is this on this present motion?

MR. MEDALIE: Well, Judge Crane may accept my suggestion. After the period on line 7 insert "An expert witness shall not be appointed by the court unless he consents to act."

MR. CRANE: Sure. I would accept that.

MR. ROBINSON: That takes care of it.

THE CHAIRMAN: All right. You have heard the motion which I take it is seconded. Are there any remarks?

(No response.)

THE CHAIRMAN: All those in favor of the motion--

MR. DEAN: Why should not a subpoena issue to the expert like in that last?

MR. HOLTZOFF: But there is no provision for compensation.

MR. MEDALIE: That is one reason. And the other reason is that there is a mass of decisions, most of which, is correct, if my recollection/hold that you cannot compel an expert to testify. Now there are variations of the decisions from compelling him to come, to compelling him to give the limited testimony that Judge McLellan speaks of, but the bulk of the decisions, as I remember them, is that he is not compelled.

MR. HOLTZOFF: Since we do not guarantee a fee we should not compel him to come against his will.

MR. DEAN: We compel other people to come against their will who contribute more than an expert.

THE CHAIRMAN: There is a real distinction, Gordon, between a man who is a fact witness, without whose presence the trial cannot go on, and experts of whom there are a variety, and this one man does not have to be singled out. He may be on war work or he may be doing work which is more important.

MR. CRANE: And we don't want to get mixed up now with what the war powers are, which are spreading, and we are all for them, but I hope these rules will survive the duration, and these rules apply to peacetimes when the war powers may be gone. I think you can compel an expert under the war powers to do anything.

MR. MEDALIE: I don't think we ought to get anybody for this purpose unless he is cooperative.

THE CHAIRMAN: You have the motion to insert the sentence. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

A VOICE: No.

THE CHAIRMAN: One no. Motion carried.

MR. SEASONGOOD: I would like to move in line 4

to change the last word "appoint" to "call". Why should the court appoint the expert that the parties have agreed upon? It is enough if he is called.

MR. ROBINSON: It makes the appointment official.

THE CHAIRMAN: It is only the appointment that makes him an official as distinguished from a partisan expert. It goes to his standing with the jury, doesn't it?

MR. SEASONGOOD: Well, if the parties agree on the expert then he is the expert for both of them and all the court has to do is let him testify. The idea was, I think, that the court should not prevent the parties from agreeing on their own experts additionally to such as the court might call itself.

MR. ROBINSON: No. He is called a court's expert witness even if the parties agreed on him under the Uniform Expert Testimony Act. That is the idea. He appears as a non-partisan expert, so being appointed by the court makes him the court's expert.

MR. SEASONGOOD: He is not appointed by the court but by the parties if they agree.

MR. ROBINSON: I think we better stick to the language of the Uniform Act on that.

MR. HOLTZOFF: Has the Uniform Act been adopted by any state?

MR. ROBINSON: Yes.

MR. SEASONGOOD: Then you have that question of the court being embarrassed by not being able to pay him.

MR. HOLTZOFF: Except this suggestion of Mr. Medalie's takes care of that. We have the provision that no expert shall be appointed unlesshe consents.

THE CHAIRMAN: Of course the fact that the court appointed will tend to produce the witness in court.

MR. MEDALIE: I can tell you of an experience I had in the Harriman case when I asked Dr. Menas Gregory to look into the question of Harriman's pretense that he was insane. He was serving for the Government and knew our ability to pay him was quite limited. During the course of the preliminary hearing before Judge Caffey, Judge Caffey turned to Dr. Gregory and said, "Now, Doctor, I want you to do so and so for me; make certain inquiries." When the proceedings were finished that day Gregory said to me, "I cannot accept compensation from the Government because I am now working for the court. He had established his own impartiality. Now he was the type of person who would be impartial no matter who retained him, and it is the type of person like Dr. Gregory who will be willing to serve providing he is not imposed on.

MR. ROBINSON: That is right. And I was wondering whether that argument is against the use of the word "may."

MR. HOLTZOFF: No. There is no use having any

man who will not be cooperative.

MR. ROBINSON: In any case, like Gregory's you should say, as well as the court would say, there is $500 a day to be paid out of available funds.

MR. CRANE: No. We have not included that. That motion to pay was abandoned.

MR. HOLTZOFF: No. It was carried.

MR. MEDALIE: I have the language.

MR. ROBINSON: Should not the "shall" be changed to "may"? "The court shall" and so forth.

MR. MEDALIE: That can be "may", and I will agree, because that is a matter of negotiation. If a man is cooperative he can be told by the court.

MR. HOLTZOFF: Is that changed by consent to "may"?

THE CHAIRMAN: Yes.

Now, gentlemen, addressing ourselves to the main subject --

MR. YOUNGQUIST: In lines 10, 11 and 12 the expert witness may be called by the court or by either party or shall be subject to cross-examination by either party. I merely inquire of the Reporter whether it is meant that if the defendant calls a witness under the preceding sentence the defendant may cross-examine him as well as may direct.

MR. BURNS: Strike out "by each party."

MR. HOLTZOFF: Just "shall be subject to cross-examination."

Mr. Chairman, I have a question on line 3.

MR. CRANE: Is that out?

MR. ROBINSON: Let us understand that.

THE CHAIRMAN: Just a minute, gentlemen.

MR. ROBINSON: This is a court's witness, Aaron, you are talking about.

MR. YOUNGQUIST: Called by a party. The witness was appointed and may be called by the court or by either party, and that would raise the question.

MR. DEAN: I think it is a serious question because of the two uses of the word "call". In line 12 we mean call by subpoena, and in line 10 by the use of the word "call" we mean call to the stand.

MR. ROBINSON: Not necessarily, Gordon. The "call" in line 12 does not necessarily mean subpoena.

MR. HOLTZOFF: It seems to me you solve the difficulty if you strike out the words "by each party." "He shall be subject to cross-examination."

THE CHAIRMAN: Why not make it part of the preceding sentence?

MR. McLELLAN: When a witness is called by somebody other than a party, by the court, or even when called by one of the parties but appointed by the court, why should not there

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be that liberality of procedure that amounts to cross-examination?

MR. ROBINSON: That is exactly the point. That is the idea, yes.

MR. YOUNGQUIST: I do not see any particular objection. I just wanted to be sure.

MR. HOLTZOFF: On line 3, Mr. Chairman, I think the word "order" should be "request". I think it is possible to order a party to submit nominations. Suppose the defendant says, "I don't want to make nominations"? "may request" that should be.

MR. MEDALIE: I think that is correct.

MR. ROBINSON: That is the language of the Uniform Act.

MR. HOLTZOFF: I do not care.

THE CHAIRMAN: It should not take the form of an order.

MR. HOLTZOFF: But if you say "order the parties to submit nominations"--

THE CHAIRMAN: And he can send them to jail if they do not comply?

MR. HOLTZOFF: An order directing them to submit? It should be an order giving opportunity.

MR. YOUNGQUIST: Failure to submit would be contempt.

MR. BURNS: But we have used "order" in the word's technical sense in these rules.

MR. CRANE: You have if the parties do not agree.

MR. McLELLAN: But this orders him to submit nominations.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor show hands.

MR. CRANE: Changing "order" to "request"?

MR. HOLTZOFF: Yes.

(After a show of hands the Chairman announced the vote to be 7 in favor and 3 opposed.)

THE CHAIRMAN: The motion is carried.

MR. HOLTZOFF: I have one other point I want to make about this rule. The sentence beginning on line 12 contains a requirement that a party may not call his own expert witnesses without furnishing his adversary in advance with the names of his experts. I am wondering whether that requirement should be imposed. I do not know why the defendant should be required, if he is going

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to have experts of his own, to notify the district attorney in advance who his experts are going to be, and vice versa. I move to strike it out.

THE CHAIRMAN: That is covered and safeguarded by lines 17 and 19.

MR. ROBINSON: Surely.

MR. HOLTZOFF: But it leaves it in the discretion of the court. Unless the court otherwise rules a party must notify his adversary of the names of his experts. I wonder whether that requirement should be imposed.

MR. YOUNGQUIST: Does not the use of the word "also" imply that notice is required only when an expert has been appointed by the court? Is that the intention?

MR. ROBINSON: No, that is not the intention.

MR. HOLTZOFF: I did not so construe that, but in either event I do not think that you should be required against your will to notify your adversary of whom you are going to call.

THE CHAIRMAN: Suppose you have a case where you have handwriting experts, and both of you know all the handwriting experts within 50 miles, and theother fellow goes out to Chicago and brings on a perfect scamp whose reputation out there is well known, and if you have notice who he is you can destroy his testimony, You should have an opportunity to do that.

MR. GLUECK: It is as to his qualifications.

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MR. BURNS: Isn't this aimed at the battle of experts?

MR. DEAN: Certainly it is.

THE CHAIRMAN: All those in favor of the rule as several times amended, say "Aye."

MR. MEDALIE: Just a minute, Mr. Chairman. Just one little thing occurs to me and troubles me a little: I am referring to the clause beginning after the comma in line 13, a rather difficult clause; I know what it means to say; but I wonder whether it should not read "if the court finds reasonable notice has been given to the adverse party"?

THE CHAIRMAN: "has been"; yes.

MR. YOUNGQUIST: Which line?

MR. MEDALIE: On line 14 insert "has been" before the word "given".

MR. HOLTZOFF: Why not leave out the words "the court finds"? I move to strike out the words "the court finds" in line 13 and insert "has been" after the word "notice" in line 14.

MR. ROBINSON: I do not believe that is advisable. I do not see what is to be gained by it. Isn't it, after all, a question for the court as to whether there has been reasonable notice given?

MR. HOLTZOFF: It is a matter of phraseology,

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Jim?

MR. ROBINSON: No, it is not a matter of phraseology. It goes to substance.

MR. YOUNGQUIST: I think we had better leave it in.

MR. BURNS: Suppose we leave it to the Committee on Style?

MR. HOLTZOFF: We can settle it in a moment here. Why not say "if reasonable notice has been given"? Then the court will rule upon the question if the point is raised that reasonable notice has not been given. The court does not have to make an affirmative finding that it has not been given. He passes on the objection based on the fact that reasonable notice has not been given.

MR. YOUNGQUIST: I withdraw my comment.

MR. BURNS: How about substituting "present" for "call"?

MR. YOUNGQUIST: "call" is better, I believe, isn't it, Judge?

THE CHAIRMAN: I am in doubt as to whether there is any motion pending.

MR. MEDALIE: Pardon me, before Mr. Holtzoff interrupted, on line 14 I had moved that the words "has been" be inserted between "notice" and "given".

MR. ROBINSON: That was by consent, I think.

MR. MEDALIE: All right.

MR. HOLTZOFF: And my motion is to strike out at the end of line 13 the words "the court finds".

MR. DEAN: Seconded.

THE CHAIRMAN: Moved and seconded. All those in favor of striking the three words indicated in line 13 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

Now, all those in favor of the rule as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Rule 27 (a).

MR. WECHSLER: Mr. Chairman, before you leave the subject of witnesses, I note in the Court's Memorandum a question about compulsory process as follows:

"In framing this rule has the Committee studied the present statute providing for compulsory process at government expense on behalf of the defendant? At present

the statute provides that witnesses shall be brought from a distance of not more than 100 miles."

Should this be modified either by allowing the court to enlarge the distance in his discretion or otherwise? I have no view on it, but I would like to know the answer.

MR. HOLTZOFF: I have a very strong view on it. I feel it should be enlarged so that compulsory process in favor of the defendant should not be limited to 100 miles. I think the present statute is very unfair. But I do think there should be discretion in the court,because otherwise a defendant might call a hundred witnesses from San Francisco to New York.

MR. YOUNGQUIST: Which rule are we talking about?

MR. WECHSLER: I called attention to a question in this Memorandum of the Court about compulsory process in favor of the defendant, and asked whether anything had been done about it. It is not in any particular rule.

MR. DEAN: Is there any rule that limits it at the present time?

MR. HOLTZOFF: The statute limits it to a hundred miles.

MR. BURNS: I would like a vote on the policy of removing the limitation in the statute.

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MR. HOLTZOFF: I move that we propose a rule to remove the hundred miles limitation on compulsory process in favor of the defendant, but to provide a limitation that in such cases the issue of process shall be in the discretion of the court.

MR. WECHSLER: That is, propose a rule on a right to process within 100 miles and a right, subject to the court's discretion, beyond 100 miles?

MR. HOLTZOFF: Yes.

MR. WECHSLER: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. WAITE: Mr. Chairman, before we take up 27 I want to interpose a proposal in respect to the calling of witnesses by the court. You will find it on that same mimeographed Memorandum that the other one was on. It is the third page, described as Rule 26-2. If you will all be good enough just to read what I have there, I shall not even attempt to argue it.

MR. HOLTZOFF: I would like to ask a question, Mr. Waite, about the second sentence of paragraph (b) of

the rule. You say there that such a witness may be cross-examined by either party concerning the testimony elicited by the trial judge's questioning. That might seem to lead to an implication that he could not be cross-examined as to his credibility. I am quite sure you did not mean that.

MR. WAITE: No. You will notice that (b) - let me put it this way: (a) applies to witnesses who have not been called by the court; and there the cross-examination goes to the whole extent. (b) applies only to additional questions by the court, and the provision is that as to those additional questions he may be cross-examined; but the fact that what the other party elicited would be subject to cross-examination goes without saying.

MR. HOLTZOFF: But suppose a witness is called by your adversary and testifies to matters that are immaterial, and you do not cross-examine him as to his credibility because you do not care about it. Then the court calls him back and elicits some very material damaging testimony. I think you should be allowed to cross-examine him not only concerning the matters which the court questioned him about, but also concerning his credibility.

MR. WAITE: I thought that was implicit. If the provision is that he can be cross-examined concerning

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the testimony elicited by the court as fully as he could be cross-examined had that testimony been elicited by the opposite party, that would indicate to me that if his credibility is important in respect to what was elicited by the judge, he could be cross-examined in respect to his credibility.

MR. YOUNGQUIST: I should think so.

MR. HOLTZOFF: No cross-examination on credibility generally?

MR. CRANE: I think it is antequated, anyway. I think all these strict rules are all going by the board, and I would not try to force them in here. I would say this regarding (b), I never knew a judge on any bench who was restricted in questioning any witness.

MR. WAITE: The reason I put that in, Judge Crane, is because the question has come up at various times, a question by some courts; and it seems to me it can't possibly do any harm; it might possibly do some good.

THE CHAIRMAN: You have 26 state courts where the trial judge cannot question witnesses. That leaks over to the Federal court.

MR. CRANE: That is my ignorance. I did not know that.

THE CHAIRMAN: It does not apply to the Federal courts except as Federal courts sometimes feel hampered by

state practice.

MR. CRANE: I did not know there was ever such a limitation upon any judge in a higher court.

THE CHAIRMAN: It is exactly the same, as everybody knows, that the trial judge should deliver his charge after counsel have summed up to the jury; but there are Federal jurisdictions where the reverse is true due to the influence of state law, where the trial judge gives his so-called charge and then counsel sum up to the jury.

MR. CRANE: Well, have we come to that in our rules? I thought there was some restriction on that. Personally I hate to see a judge limited in his powers.

THE CHAIRMAN: Now, is there any further discussion as to Rule 26-2 (a)?

MR. HOLTZOFF: Isn't that understood? Isn't that an inherent power of the court?

MR. DESSION: It is not always understood.

MR. WAITE: It seems to me if it is an inherent power there is no harm in putting it in. If it has been questioned, there is a widsom in putting it in.

MR. HOLTZOFF: Mr. Waite, am I right that the courts that have questioned it are not Federal courts?

MR. WAITE: No. In Walsh v. The Fidelity-Phenix Company they seriously questioned it. That was a Federal court, a circuit court of appeals.

MR. CRANE: The only thing I am thinking of is this: I know it is a very valuable power in the judge. Suppose the bar should object to it when you circulate these rules in these states where they have it the other way, and it should be stricken out of our rules, then you have an indication that it is improper, and you are going to restrict all those that are now using it. I can see how the bar would very seriously object to a judge questioning at times because I do think sometimes it has been carried too far, but I think it is a power that should not be taken away from a judge; and if you are going to have a bar criticize it or strike it out or not approve it, then by implication the reverse happens.

THE CHAIRMAN: Are there any further remarks on 26-2 (a)?

MR. SEASONGOOD: You are talking about the general idea now, I suppose? If it is carried, there is some language change I wish to mention.

THE CHAIRMAN: All right, let us go to the merits, if we may, first.

All those in favor of 26-2 (a) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Show of hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 8 opposed.)

THE CHAIRMAN: Lost.

Now, 26-2 (b). All those in favor say "Aye."

MR. WECHSLER: Can you have (b) without (a)?

MR. WAITE: Oh, yes, you could have (b) without (a).

MR. YOUNGQUIST: I do not think we need (b).

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

MR. WAITE: Mr. Chairman, may I just ask, I am curious to know what the objection to these two is. It seems to me the accepted rule according to the arguments of a good many of those who voted against it, and this is just for my own information. I want to know what the basis of the opposition is.

MR. BURNS: I will state my reason for it, Mr. Waite: I agree it is an inherent part of the judicial process, and there is no necessity for stating it. You said there is no harm, and there may be wisdom. I think there may be harm in that if we propose it, Congress, where you have a body of men composed of lawyers from all over

the country, may possibly decide that this is not a very good idea. There may be a feeling that judges should be limited, and you may have a vote on it, in which case it seems to me we would be worse off than we are now.

MR. WAITE: Let me ask you this. You and Mr. Holtzoff are not suggesting that there is nothing in these rules that is not already the law? I notice Mr. Holtzoff's suggestion frequently has been that we do not need to state it because it is already the law. Are you suggesting that nothing is in here that is not disputable?

MR. HOLTZOFF: No; my thought has been right along that we do not have to describe everything that goes on in a courtroom, things that are inherent. I certainly do not mean to say that we should not put anything in the rules that is now the law. In fact, most of our rules represent existing laws; but it seems to me that things that are an inherent power of the court in any case, criminal or civil, need not be stated.

MR. WAITE: Haven't you got a good deal in here that is an inherent power of the court?

MR. HOLTZOFF: Maybe. I do not claim to be consistent always..

THE CHAIRMAN: Isn't the real difficulty, Mr. Waite, that there are certain powers which the Federal courts have had but which have been lost in all except

certain states bordering on the Atlantic Ocean which, if you put up to a vote in Congress today, probably would be lost?

MR. WAITE: I am frank to say that I have been perturbed by these rules because they are neither flesh, fowl nor good red herring. They codify some matter without any change at all, and they do not codify other matters, and I am a little perturbed because of the fact that some of the matter we have got in may, by its inclusion, indicate that that which is left is meant to be excluded. I do not like to say this, but I think the whole fundamental basis is wrong.

THE CHAIRMAN: I should be worried about that if we were codifying civil and criminal rules all in one group, so that that argument could be made; but it cannot be successfully made when we are only attempting to make rules as to a certain phase of the law.

MR. WAITE: Now, in this case you have a rule which has been questioned. Wigmore says it is the rule, but it has been questioned in a number of jurisdictions. It has been questioned in the Sixth Circuit Court of Appeals, and we leave it out. Other matters as to which there has been a question we put in. I think the sum total effect of this is going to be that, on the exclusio unis doctrine, we meant to change that rule.

MR. MEDALIE: We have a rule covering evidence that has adopted everything including this, I take it.

MR. WECHSLER: No, just admissibility and competence.

THE CHAIRMAN: May I ask, while we are on this point, if Mr. Waite will write a note to 23-2, and Mr. Wechsler to 24-1?

MR. WECHSLER: Yes, I will be glad to write a note.

MR. WAITE: What do you mean, write a note?

THE CHAIRMAN: A commentary. I mean, if you want to make any change in view of this having been passed in the modified form, we will give it to the Reporter.

MR. WAITE: Oh, yes.

THE CHAIRMAN: And Mr. Wechsler on 24-1.

We now move on to Rule 27 (a).

MR. McLELLAN: I move the adoption of 27 (a).

MR. HOLTZOFF: I second the motion.

MR. WAITE: May I interrupt? I have another proposal at this point, what I have called Rule 26-3. That is the last page of that mimeographed matter. Again, I do not think there will be any point in my arguing it. That is something that is not now the rule. I think myself it should be adopted as the rule. But the particular point is, I do not think it should be kept from consideration

by the bar merely because the majority of this committee perhaps does not approve it. My idea is that where the bar has really desired or given indication that a large part of the bar desires something, we ought at least to ask the court to submit the matter for the bar's opinion. I understand that the court is not going to say it approves all these rules when they are submitted.

MR. HOLTZOFF: No, but we are going to say that we approve them when they are submitted.

MR. WAITE: I take the position that at least we ought to submit rules of possible desirability for the opinion of the bar, on the ground that the bar can strike out anything it does not like; but the bar is not apt to put in things that it does like, because there is no particular proposal on which they can focus their approval.

THE CHAIRMAN: I should see no objection to a rule of this kind being submitted in an addendum, because I do not feel it involves the danger that was involved in the two rules we last discussed. I think there might be a positive danger in submitting 26-2 (a) and (b), but I do not see any danger in this instance.

MR. WAITE: Let me be clear. I have in mind proposing 26-2 to the Court as an addendum. It is understood that we can propose to the Court things that

we think ought to be submitted?

THE CHAIRMAN: Well, I hope it would not be submitted to the bar, because I feel we would lose the right in all of our courts if Congress had a chance to deliberate on it.

MR. WECHSLER: Mr. Chairman, I would like to ask Mr. Waite a question on 26-3, if that is before the Committee now.

THE CHAIRMAN: That is the issue.

MR. WECHSLER: I have been as much troubled by this problem as by any that we have had. I have been particularly troubled by what I understand to be the Criminal Division's position on the issue. The Criminal Division, I believe, - am I right about this, Alex, - says they are against a rule on comments because they do not believe it is necessary. They think the rule draws the inference now.

MR. HOLTZOFF: Exactly.

MR. WECHSLER: That seems to me to be an unacceptable disposition of a tough problem, because if the jury which now by statute must be told not to draw the inference does draw the inference, and if we all think that the law is all right because the jury draws the inference, then I think it is perfectly plain that the statute should be changed, because we are approving juries for doing what

the statute forbids. That seems to me to be an unhappy state of affairs, and in particular it puts a conscientious juror who really tries to dismiss from his mind the fact that the defendant did not testify in a position which the law ought not to put him. Accordingly, while I opposed this originally, I intend to vote for it now, because I think that it will regularize what is the case, in any event, and afford some protections that the present state of things does not afford.

But I am troubled, Mr. Waite, about one problem. I do not want it ever to be possible for the United States to make a sufficient case to go to the jury where the inferences drawn from the defendant's failure to testify are an element in the proof. In other words, I want it to be required that the Government prove its case sufficiently to go to the jury without any inference from the defendant's failure to testify.

Then, in resolving the issues, I think I should like the jury to be able to consider the defendant's failure. Now, I may not have stated that clearly enough --

MR. CRANE: It may seem ridiculous, but we do have judges that try all kinds of cases and some that specialize. I recall one instance of a very eminent judge here in the state who is an extremely fine equity judge. He had never seen a criminal court and never read an

indictment; and they sent him down here, and he got in a criminal case. I was then assistant district attorney, and after the People got through with their case the defendant rested, and the judge said, "Aren't you going to call the defendant?" The defendant's lawyer said, "No." And his Honor said he was obliged to direct a verdict of guilty, which he did. And in order to save the judge's face, I was asked to go in to him to explain to him the Rules of Criminal Procedure, which I did; and, of course, the question came up of former jeopardy, and all that sort of thing, and we had to let the fellow go.

MR. HOLTZOFF: According to this rule you could never cross-examine the defendant as to his credibility, not only as to his criminal record, but any other matter. I think that would be a very dangerous rule. The defendant would be presented to the jury in all instances as a truth-telling individual, and the district attorney could never cross-examine the defendant as to his credibility.

MR. MEDALIE: As a certain famous criminal court judge said around here - there was a slip in the words - he said, "The court of appeals has held in People v. Webster, 136, New York the district attorney can ask the defendant any disgraceful question."

MR. CRANE: I think there is much in what Mr. Wechsler says because it is so contrary to the working of

the human mind, especially where the evidence is such that the defendant does know. He is the only one that can contradict it or explain it, and for him not to take the stand, it is almost impossible or, it seems ridiculous for the judge to say they should dismiss it, or divorce it from their minds and not consider it as bearing upon his guilt or innocence.

MR. BURNS: Would your point be taken care of if, in a motion for judgment of acquittal, the court shall not take into account as part of the affirmative proof the failure of the defendant to take the stand?

MR. WECHSLER: That is what I want.

MR. CRANE: And the only other thing, I think, is with respect to the trial judge and the attorney for the prosecution and the defense commenting upon it. Now, how can the attorney for the defense comment upon the defendant's failure to take the stand except by explaining why he did not; and I think that is very dangerous, isn't it?

MR. WAITE: Judge Crane, I will tell you why I put that in. I happened to be present when the matter was being discussed at the Law Institute meeting. There were nine men on the committee, and they brought in six different reports. One of them thought that the judge should comment but nobody else; another thought the

prosecutor might comment, but nobody else; the third one thought the defense counsel might comment and nobody else. And one of them thought that all three should be allowed to comment, as it is here. And that was argued at great length - I think it took two hours - and finally it was voted upon, 91 to 52, I think it was, in favor of allowing all three to comment. I simply adopted that proposal made there.

MR. CRANE: How can the defense counsel comment if he does not call him? All he can say is, "I want to explain why I have not called him." Is the judge going to stop him?

THE CHAIRMAN: Certainly his explanation cannot be based on any testimony.

MR. MEDALIE: It can be based on the fact that to testify would require his telling all about Mrs. so-and-so - "And neither my client nor I will permit any such thing."

MR. SEASONGOOD: Before we discuss the phraseology, we had, as I remember it, at least a day's discussion of this question, and voted on it, and decided that we did not want to include such a rule.

THE CHAIRMAN: You call for the question?

MR. SEASONGOOD: Well, I am afraid to at this time. Maybe it will be worse if I talk, but I think this

would be a very serious mistake to put it in the rules. We decided that at the last time.

Now, there are two points about it: One is that it is probably unconstitutional, and we know what our Supreme Court does with respect to the rights of citizens - civil liberties, as they call them - and as was pointed out by Judge Crane the day before yesterday, it is very unfair in certain instances. The unconstitutionality of the thing is that if you give him the right to comment on the failure to take the stand, you force the person to take the stand; and there is a decision where they passed such a statute giving the right - I think it was the State of Wisconsin - in which they declared that that was unconstitutional. In our own State of Ohio we amended the Constitution so as to prescribe that they might have the right to testify.

Now, what is the use? If you want to get these rules adopted, it does not matter if the majority of the bar think one way or another when they get into an American Law Institute discussion. The question is, we have got to get these passed by the Congress. We have got these weighty constitutional arguments. What is the sense of putting something in that is going to militate against your rules and prevent an acceptance of the rules, if it is both unfair to the defendant, as was instanced by Judge

Crane the day before yesterday in a case that he mentioned, and there is the serious question of constitutionality. Is there that much value in putting this thing in because somebody likes it?

MR. HOLTZOFF: I agree with you, Mr. Seasongood, that we really endanger the whole set of rules if we put in an innovation of this kind.

MR. McLELLAN: I call for the question.

THE CHAIRMAN: All those in favor of Rule 26-2(a) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be defeated. The motion is lost.

MR. MEDALIE: May I ask whether in our commentary we are going to say something about the exclusion of these things? Certainly outstanding things that have been vigorously debated ought to be referred to in our commentary when we exclude these matters because, among other things, that commentary will be a handbook for these 18 orators who go around the country getting votes for it.

MR. HOLTZOFF: I think that is right.

MR. SEASONGOOD: I think it is very proper to

show that we have considered these different matters, so nobody will say, "Why didn't you consider this or that?"

MR. McLELLAN: I move the adoption of Rule 27 (a), Mr. Chairman.

MR. HOLTZOFF: I second the motion.

MR. SEASONGOOD: Wait a minute. I am sorry to put the brakes on all the time. I have a question of phraseology there beginning with line 10, "The defendant may offer evidence after his motion has been overruled." Of course he may offer evidence.

MR. HOLTZOFF: But there are some states where he may not.

MR. SEASONGOOD: I think what you want is that the defendant does not waive a motion at the close of the Government's case by offering evidence after his motion has been overruled.

MR. HOLTZOFF: Oh, no, he does waive the motion.

MR. SEASONGOOD: I thought you were trying to say he does not under this rule.

MR. HOLTZOFF: No. Suppose the defendant offers evidence, and suppose in the course of his evidence some evidence comes out which fills out some defect in the Government's case, that may be considered later on, and the defendant may not stand on his earlier motion. But what we are trying to say is that if the defendant makes

a motion - he does not have to rest - and the motion is denied, he can still offer evidence.

MR. SEASONGOOD: My gracious, is there any question about that?

MR. McLELLAN: Oh, yes.

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

THE CHAIRMAN: That is true in all of the old strict common law states.

MR. YOUNGQUIST: In many states, including Minnesota, you must rest before you make the motion.

THE CHAIRMAN: All those in favor --

MR. YOUNGQUIST: One moment. In line 6, Mr. Chairman, the last word should be "offenses" rather than "crimes". That is what we have been using.

MR. McLELLAN: Yes.

MR. YOUNGQUIST: And do you want to use the plural in the first sentence? That is a matter of style, really.

MR. ROBINSON: It was used with demurrers and motions to quash.

MR. YOUNGQUIST: All right.

MR. WECHSLER: Then would it be "offense" on line 10, too?

MR. YOUNGQUIST: Yes.

MR. SEASONGOOD: Is this sufficiently clear:

"He may offer evidence to the same extent as if the motion had not been made"? Could anybody say that he has not waived his motion at the close of the Government's case, if that is what you mean to do?

MR. HOLTZOFF: This is practically the civil rule. We adopted the same procedure as the civil rule adopted.

MR. DEAN: It is still not clear, though, if you don't make a motion at the end of the entire evidence, you can still rely on your motion made at the close of the Government's case.

MR. HOLTZOFF: I don't believe so.

MR. CRANE: Suppose he makes no motion at the end of the case, that does not prevent him from raising it in any other way that a crime has not been made out. He can still move for arrest of judgment, can't he?

MR. HOLTZOFF: Oh, yes.

MR. CRANE: Even though he has not made his motion at the end of the case. Now, that is not so in a civil case.

MR. HOLTZOFF: He can move in arrest of judgment, but if he does not make any motion at all, either a motion for acquittal or a motion in arrest of judgment, he may not raise the point on appeal, I take it, unless --

MR. CRANE: Now, is that so?

MR. MEDALIE: I don't think so.

MR. CRANE: Does he ever waive the fact that the crime has not been proved?

MR. MEDALIE: He does not.

MR. HOLTZOFF: I think you have to move for a direction of a verdict or an arrest of judgment in order to save that point for appeal.

MR. SEASONGOOD: But the point is whether you waive your right in saying that the Government did not offer sufficient evidence; so why not say, "may offer evidence" and stop. In other words, when you inject "to the same extent as if the motion had not been made" -- isn't that somewhat ambiguous? Why not just stop and say "may offer evidence"?

MR. MEDALIE: I can only go back to my experience in 1920 before Judge Rellstab, District Court Judge in New Jersey, where I learned all this law that seems so unfamiliar here. I never heard of it until I was told of it in New Jersey; and if the Judge were not a kindly old gentleman, I might have had some real troubles.

THE CHAIRMAN: And if you had been before him on certain days you might have still have had trouble.

MR. MEDALIE: I suppose so.

THE CHAIRMAN: Couldn't you say "may nevertheless

offer evidence"?

MR. SEASONGOOD: Yes; because those words that follow are words of doubtful meaning. When you say "to the same extent" that might mean he does not waive anything.

MR. BURNS: We have provided that no matter what the defendant has done or failed to do, at any time he may raise the defect in the indictment that the Government has not charged the crime. Now, what are we going to say about the failure of the Government to prove a crime? Does he waive that by not raising the motion? Can he raise it by a motion in arrest of judgment? Can he raise it by appeal?

MR. HOLTZOFF: I do not think this is the place to bring that in.

THE CHAIRMAN: Mr. Seasongood, this is the exact language as used in the civil rules.

MR. SEASONGOOD: Well, it is some time since they were adopted, and I do not believe in perpetuating ambiguities.

MR. HOLTZOFF: I do not think it is ambiguous, if I may say so.

MR. SEASONGOOD: I think it is.

THE CHAIRMAN: The only way to settle that is by a motion.

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MR. DEAN: "may nevertheless offer evidence" - is that the motion?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All those in favor of the amendment in lines 13 and 14 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt.

MR. WAITE: Mr. Chairman, will you read that amendment? I haven't it accurately.

THE CHAIRMAN: Yes. Going back to line 12, "is not granted may, without having reserved the right, nevertheless offer evidence"; striking the rest.

All those in favor raise hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 4 opposed.)

THE CHAIRMAN: Carried. 8 to 4.

All those in favor of 27 (a) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Any comment on 27 (b)?

MR. HOLTZOFF: I move its adoption.

MR. LONGSDORF: Wait a minute. I want to raise the same question I raised at a previous meeting, whether the practice of allowing the judge to reserve decision on a motion of this kind will not defeat the purpose of the recent act of May 12th in some cases.

MR. McLELLAN: Have we passed 27 (a).

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Is there any question, Judge?

MR. McLELLAN: None whatever, sir. I thought all we passed was the "nevertheless" part of it.

THE CHAIRMAN: No, there was a second motion after that. Do you want to raise the question?

MR. McLELLAN: No, sir.

THE CHAIRMAN: All right, Mr. Longsdorf.

MR. LONGSDORF: Well then, I understand 27 (a) is adopted. I am talking of 27 (b) now.

THE CHAIRMAN: Yes, 27 (b) is before us.

MR. LONGSDORF: It seems to me if the court has leave to reserve decision on a motion in a case of this kind and submit the case to the jury and get a verdict, that sooner or later we will get into tangles like this Wisconsin oil case, and I think the act of May 12th is a meritorious act, whereby the Government can appeal and get the law settled in some cases where it ought to be settled. It won't jeopardize the prisoner. But if we do

this, all the judge has to do is to pass the buck.

MR. HOLTZOFF: I drew the act of May 12th, and I do not think there is any inconsistency between this rule and that act.

MR. LONGSDORF: I am just raising the question. Let us see where we come out on it.

MR. HOLTZOFF: All this does is to make it possible for a judge in a complicated case to send the case to the jury, and if, afterwards, he comes to the conclusion that he should have directed a verdict, he might then cure or change his prior ruling and direct a verdict instead of requiring the case to be tried all over again. That is all there is to this. It is the same thing as in the civil procedure, and I think it is a very desirable reform.

MR. McLELLAN: Is the language the same?

MR. HOLTZOFF: The language is slightly different, and I think, if I may say so, this language is simpler and an improvement on the language in the civil rule, but it carries the same thought, Judge.

MR. McLELLAN: I move its adoption.

MR. DEAN: Seconded.

MR. YOUNGQUIST: I have some questions. I think we are inconsistent in some places. For instance, we provide that the courts may decide the motion either before

or after the jury has returned a verdict of guilty. This is at line 19 --

MR. HOLTZOFF: The words "of guilty" perhaps should be stricken out.

MR. YOUNGQUIST: Here is what I suggest: "may decide the motion either before the jury has returned a verdict or after it has returned a verdict of guilty."

MR. CRANE: What would you do if they found a verdict of not guilty?

MR. HOLTZOFF: Then the case is over.

MR. CRANE: No. He has not any such power then.

THE CHAIRMAN: Yes, that suggestion is accepted by the Reporter.

MR. YOUNGQUIST: And in the next line I would strike out "because of its inability to agree or for some other reason"; and I would say simply "or has been discharged without having returned a verdict." That takes care of the other case.

THE CHAIRMAN: That is right. That is accepted by the Reporter.

MR. MEDALIE: Where is that?

THE CHAIRMAN: Line 20.

MR. YOUNGQUIST: In line 23 strike out "returns its verdict" because, necessarily, it is discharged after it has returned.

MR. HOLTZOFF: Just to amend your motion, "returns its verdict or is discharged."

MR. YOUNGQUIST: That is what I have, "or".

And in line 27 strike out "direct".

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: So it will read "either order a new trial or the entry of judgment of acquittal."

Now, I think we have too many words in the next sentence. That could be made to read, "If no verdict was returned, the court may order a new trial or the entry of judgment of acquittal."

MR. HOLTZOFF: That is all right.

THE CHAIRMAN: Any further suggestions? If not, all those in favor of Rule 27 (b) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. WAITE: May I ask a question that has not anything to do with the merits of this, but I want some information from people who are more familiar with the practice than I am. Under this rule as we have adopted it, suppose a defendant moves for a directed verdict of acquittal for lack of evidence, and the motion is refused; he does not put any witness on the stand at all; simply

goes to the jury; and the jury brings in a verdict of guilty, - what does he do next? I presume he moves for a new trial?

MR. HOLTZOFF: He does not have to if he does not want to.

MR. WAITE: Can he go up without moving for a new trial?

MR. HOLTZOFF: Yes. A motion like that is not appealable in the Federal courts.

MR. WAITE: Well, if he goes up and the appellate court finds there is insufficient evidence, does the appellate court order a new trial or simply discharge him?

MR. HOLTZOFF: Under this it would have discretion to either order an acquittal or order a new trial.

MR. WAITE: Under this?

MR. HOLTZOFF: At present it orders a new trial, which is a very cumbersome thing.

MR. CRANE: You say under the present rule it has got to order a new trial?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: In every case.

MR. HOLTZOFF: And this would cure that rather undesirable feature.

THE CHAIRMAN: Yes, that is antequated.

Rule 28. Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. SEASONGOOD: The style is bad.

THE CHAIRMAN: Go ahead.

MR. SEASONGOOD: Of course, here again it follows the civil rules, but it is ungrammatical in line 1 when you say "for that purpose" in line 2. It is not grammatical.

MR. HOLTZOFF: Isn't that purpose explained in line 3, Mr. Seasongood?

MR. SEASONGOOD: Is that a purpose - "any party may file written requests that the court instruct the jury", and so forth? Can't you strike it out.

MR. YOUNGQUIST: Is this the civil rule?

MR. SEASONGOOD: Yes, it is. It says "Compare civil rule."

MR. HOLTZOFF: No, I think there was a slight change in the wording. We started out with the civil rule, and then made some slight changes in the wording there.

MR. SEASONGOOD: Can't you strike out "for that purpose"? There is no purpose that has preceded.

MR. HOLTZOFF: I think you are right. You do not need it.

MR. ROBINSON: I would say that Mr. Tolman, who worked with us, of course, until his entry into the Navy, felt we should consider very seriously adopting 51 for this purpose in its entirety, word for word, for Rule 51, because he felt that instructions in criminal cases should be governed by the same principles as in civil cases.

MR. HOLTZOFF: But we went into it at great length last time.

MR. SEASONGOOD: What is the variance between Rule 51 and this?

MR. HOLTZOFF: In Rule 51 there is one rather important difference.

MR. YOUNGQUIST: Will you read 51?

MR. HOLTZOFF: The first sentence is the difference. "At the close of the evidence" - I am reading Rule 51 now - "At the close of the evidence or at such earlier time during the trial as the court reasonably directs".

Now, I think, if my recollection serves me right, it was Mr. Medalie's motion that we change that introductory clause in order to enable counsel to ask for additional time.

MR. YOUNGQUIST: After the close of the evidence?

MR. HOLTZOFF: After the close of the evidence.

And also to prohibit the court from directing the submission of the instructions prior to the close of the evidence. Now, whatever will be the merits of that, I think we thrashed it out at great length last time, and I think I voted against it; but I am perfectly willing to abide by the decision.

MR. YOUNGQUIST: Since we are changing that first sentence, I think I agree with Mr. Seasongood that we ought to make it read better.

THE CHAIRMAN: The motion is to strike out "for that purpose." All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Any further suggestion?

MR. DESSION: I move that a sentence be inserted after that first sentence to read as follows: "Copies of such requests shall be furnished to the adverse party or parties at the same time."

My reason for that is this: It can frequently happen that one party makes a request which, if you knew about, you would want granted, because there may be error if it is not -- the judge may not grant one of those -- if you knew about it at the time you yourself could bring it

up and see that it was given so that there would be no error.

MR. McLELLAN: Mr. Dession, doesn't the rule provide that the court shall inform both counsel of his action --

MR. DESSION: Of his proposed action. But this may be something you have not thought of.

MR. DEAN: I second the motion.

MR. YOUNGQUIST: Will you read that again?

MR. DESSION: "Copies of such requests shall be furnished to the adverse party or parties at the same time."

THE CHAIRMAN: All those in favor say "Aye" --

MR. SEASONGOOD: Can't you say "request with the court and counsel"? It is shorter?

THE CHAIRMAN: Well, the motion really is to get the thought in and, if possible, to mold it in the language of the first sentence. That is what you really want to do?

MR. DESSION: Yes.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried unanimously.

Are there any further suggestions?

MR. CRANE: May I ask a question?

THE CHAIRMAN: Yes, Judge.

MR. CRANE: I am not opposing. I just want to understand the practice. After you have handed in these requests and the judge has passed on them, then, I understand, after the summing up, he also charges the jury. Now, there is no objection, then, to making requests that have not been made before, is there?

THE CHAIRMAN: Oh, yes.

MR. HOLTZOFF: It is done. You do make requests.

MR. CRANE: Well, suppose you have made your requests, but you have not covered the entire charge by your requests, and then suppose the judge charges the jury and he touches on things that are clearly error and have not been requested, and he has not stated --

THE CHAIRMAN: Pardon me, perhaps I could clear it up. Our practice is that our written requests must be handed up to the judge before counsel start to sum up.

MR. CRANE: Yes?

THE CHAIRMAN: And the judge has the time of the summation to be studying them if he is not being bothered by counsel. Then at the conclusion he charges his own charge; and then if he likes your requests he reads them in a loud voice; I mean, if he approves of the law; if he does not, he mumbles them. The ones he is going to deny

he denies by number.

Now, if as a result of that process, with respect to both sets of requests, it develops that something has been omitted, counsel then may step up to the bench and ask the court to consider that, but he does not have to. You can take an exception to the charge --

MR. CRANE: Suppose he has stated something that is not covered by your request because the request does not cover the entire charge, as though you were charging the jury? After all, you make certain requests that you think important and advisable, and he charges them all, and you have no exception; but suppose in his charge to the jury he has omitted something that you have not thought of before --

THE CHAIRMAN: You mean that is erroneous?

MR. CRANE: Yes; and that has not been covered by any request.

THE CHAIRMAN: Then you have an exception.

MR. CRANE: Well, can't you ask him to charge the contrary?

MR. MEDALIE: I raised that point last time, and it has been the practice in this circuit, and it has been indicated in opinions in this circuit as well as by the opinions of the New York court of appeals that you do not get anywhere by just excepting. When you except to what

a judge says you must point out to him what the correct statement is.

MR. BURNS: Shouldn't a note be made on this?

MR. HOLTZOFF: Why not mention it in the note? This only relates to written requests.

THE CHAIRMAN: And a footnote as to what the practice should be or what the practice is.

MR. YOUNGQUIST: Consider a situation like this, for instance: If the judge omits a charge that clearly should have been given and which counsel reasonably assumed ought to have been given, counsel then requests that he give it at the conclusion of the charge; and if he failed to give it it would be error, would it not?

MR. HOLTZOFF: Suppose, for example, the judge overlooks charging on the presumption of innocence. Ordinarily you do not hand up a request on that; you presume the judge will charge it.

THE CHAIRMAN: If he does not?

MR. HOLTZOFF: If he does not, he should be allowed to make the request orally.

MR. McLELLAN: That is an entirely different kind of proceeding.

THE CHAIRMAN: I think we ought to make it clear in the note.

MR. CRANE: Something ought to be said here.

MR. HOLTZOFF: It ought to be said in the note here, perhaps.

MR. WECHSLER: I am not clear about the note business. It seems to me the sentence beginning with line 7 states the rule: "No party may assign as error the giving or the failure to give an instruction" unless he does something. And what he is told to do is to object, stating distinctly the matter to which the objection is directed. Now, I think if you want to, you have got to say one thing more, and that is proposing the charge that you think to be correct.

MR. MEDALIE: Why not put it this way: "stating definitely the matter to which objection is directed," and then add "and the desired instruction if not previously requested"?

MR. YOUNGQUIST: Isn't that taken care of necessarily by line 8, "may assign as error the giving or the failure to give an instruction unless he objects thereto, stating distinctly the matter to which the objection is directed"? He necessarily states what the judge failed to charge.

MR. HOLTZOFF: I would like to suggest this sort of situation. This actually happened in one of the districts of this circuit, although not in this district. A trial judge charged the jury in a criminal case that the

Government must make out its case by a fair preponderance of the evidence. Now, suppose the defendant took an exception to that. Isn't that sufficient without his having to say, "I request your Honor to charge that the burden of proof on the Government is to make out its case beyond a reasonable doubt"?

MR. McLELLAN: Yes, but the careful man, taking his exception, would say, "And I would like to have your Honor charge so-and-so." Now, that request is not in the nature of a request such as we are dealing with here at all. It is simply one of the appropriate ways of taking an exception to the charge either as not containing something that it ought to contain as a whole, or as stating something that is not so.

MR. HOLTZOFF: The thought I had in mind was this --

MR. CRANE: Pardon me. Let me answer you. It is not sufficient to just take an exception, as just stated, because you have got a jury to pass upon a question of guilt or innocence, and that exception does not bring home to them their duty of understanding that a preponderance of evidence is insufficient; that it must be beyond a reasonable doubt; and you cannot leave it there. An appellate court may simply say, "Well, this fellow is guilty anyhow. We won't pay any attention to

it."

MR. HOLTZOFF: What I had in mind was this: Of course, a careful counsel would say, "And I request your Honor to charge so-and-so." But suppose the counsel does not do that? Suppose he merely says, "I except to your Honor's charge that it is sufficient for the Government to make out its case by a fair preponderance of the evidence," and he says nothing else; should he be precluded from raising that point on appeal?

MR. McLELLAN: No.

MR. HOLTZOFF: Well, if we insert the words Mr. Medalie suggests, he might be precluded from raising that on appeal.

MR. McLELLAN: Yes.

MR. BURNS: There are two things to be considered: First, error in the failure to give instructions prior to the charge, and error in giving instructions that are objected to prior to the charge; and we have not dealt with the third situation, which is objections to the charge, and there we don't want any formality except that the objection should be clearly indicated.

Would it meet your point and the other point, after saying "the matter to which the objection is directed", we also say "the grounds of the objection"?

MR. HOLTZOFF: We voted to strike out "the

grounds of the objection" last time merely because it put too much burden upon the defense counsel.

MR. MEDALIE: Look. An objection to the admission of evidence is usually worthless unless the ground is stated.

MR. McLELLAN: Or unless it is obvious.

MR. MEDALIE: I would agree to that. But normally you would way, "But, Mr. Holtzoff, I would like the benefit of your opinion"; and you make an objection. You are normally required to give the grounds of your objection. That is true about evidence. If it is true about evidence it ought to be clearly true about instructions. So you would have the right to give the grounds of the objection provided you did not make a speech about it.

Now, you can, in terms of an objection, say, "I object to your Honor's charging that the jury may convict if the preponderance of evidence is against the defendant, on the ground that they may not find the defendant guilty unless they are satisfied beyond a reasonable doubt."

MR. HOLTZOFF: George, in our original draft of the rule we had the copy of the civil rule which contains the phrase "grounds of the objection." On your motion that was deleted.

MR. MEDALIE: But you still don't follow me.

The reason it was deleted was that I wanted in the rules the right to point out the correct instruction to the judge. I still think we ought to have it, notwithstanding the fact that the word "objection" might cover it.

MR. CRANE: I have something in mind: Suppose you come back to a charge on the rules of conspiracy. Now, they are very much confused many times on that question, and as to how far declarations of one may bind others; and those are delicate matters, and a man not dealing with it all the time is apt to become very confused.

Now, a judge may study the rules of conspiracy, and he may state the rules correctly; but if he fails, or should improperly state the force of declarations, or the weakness of a declaration, it is not sufficient just to say, "I object to your Honor's charge on that. I think your Honor is in error and I take exception." He should be able to state, "I want you to tell this jury that they are not bound by what was stated unless it is first found that there was a concert of action." All those things are necessary.

THE CHAIRMAN: Would that objection of yours be met, Judge, by inserting in line 11, after the words "stating distinctly the matter to which the objection is directed," the words "and the grounds of his objection"?

In other words, you state what you object to and why you object to it.

MR. CRANE: I don't care how you state it.

THE CHAIRMAN: Does that meet it?

MR. CRANE: Yes. I am not phrasing it.

THE CHAIRMAN: Do you think that meets it, Mr. Medalie?

MR. MEDALIE: I am not sure. It would come nearer meeting what I want than the other. I would prefer that counsel have the right, when he thinks the judge is giving an erroneous charge, to point out what he thinks is the correct instruction on that point.

MR. HOLTZOFF: But should it be compulsory upon him?

MR. MEDALIE: I agree it should not be. But I want him to have that opportunity, in any event.

THE CHAIRMAN: He gets that when he states the ground of his objection.

MR. MEDALIE: Yes.

THE CHAIRMAN: Then the motion is to amend in that fashion?

MR. MEDALIE: How will it read?

THE CHAIRMAN: "unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the objection is directed and the

grounds of his objection."

MR. ROBINSON: In our revision of the civil rules, Mr. Chairman, we made some changes in the wording which I think should be followed now. I mean, the civil rules should be followed.

THE CHAIRMAN: How does it read?

MR. ROBINSON: Here it is.

THE CHAIRMAN: The civil rules read "unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

MR. CRANE: That is all right with me.

THE CHAIRMAN: If that is accepted, that may be the motion. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Are there any other suggestions on Rule 28?

MR. SEASONGOOD: Yes. Mr. Chairman, you injected an ambiguity which I did not realize was in this thing. At least, I think there is. Do I understand that this now means that the judge must give the instructions that are submitted? Because with us in the state courts he must, but in the Federal courts they never give an instruction

that is submitted in the language of the instruction. All they have to do is to embody the substance of the instruction.

MR. BURNS: That is right.

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THE CHAIRMAN: He can either put it in the language in which counsel hands it up or he can embody it in the course of his charge, and that is what the experienced judge generally does, and then he will say to counsel at the end, "I have charged your requests 1 to 10, 11 I have denied, and I have charged 12 to 16. Do you agree that I have covered them?" And you are right on the spot. You say yes or no.

MR. YOUNGQUIST: Or sometimes I have given instruction 13 as modified.

MR. SEASONGOOD: I understood you to say the judge reads the instruction and if he likes it, he reads it aloud; if he does not, he mumbles it.

THE CHAIRMAN: That is the way it is sometimes done. The mumbling process is often resorted to to destroy the effect of a good request.

MR. SEASONGOOD: I think if there is any doubt that this may mean that he has to give every instruction requested, I think we should avoid that doubt and put in, on line 4 after "on the law", "substantially as set forth".

MR. BURNS: I do not think that is necessary. It is proposed action upon a request. It is often a way of saying the identical thing.

MR. SEASONGOOD: Then you have a loose construction here "may assign error to the giving or failure to give instruction".

MR. GLUECK: I think the difficulty grows out of the use of the word "instruction".

MR. SEASONGOOD: Well, you could say "substance of an instruction". In other words, if there is any question you are going to perpetuate the idea that the court has to give instructions, as in our State court, that are handed up to the court, I don't want to do it.

THE CHAIRMAN: Isn't that the reason for using the word "request" in line 3 and "instruction" in line 9? And doesn't that clarify it? In other words, the word "instruction", it seems to me, would refer to the substance rather than to the exact wording of the request.

MR. BURNS: How about a note to take care of that?

MR. SEASONGOOD: Is there any objection to saying "on the law substantially" in line 4 - to inserting that? That is all you want.

THE CHAIRMAN: Yes, that would be objectionable,

because that might lead to shading.

MR. SEASONGOOD: That is all you are entitled to. All you can do is ask him to give the substance of the instruction.

THE CHAIRMAN: I guess you are right.

MR. MEDALIE: As I understand it, the judge does not give the instruction in your language; the judge thinks he has done so in substance; you assign the failure to give the instruction as requested in your language as an error; the Circuit Court of Appeals says, "Of course, he didn't give it in your language but he correctly charged the law on the subject. Therefore we overrule your assignment of error on that point."

THE CHAIRMAN: That is right.

MR. YOUNGQUIST: May I point out that "instruction" as used in line 9 is not limited to instructions requested.

MR. McLELLAN: That is right.

MR. YOUNGQUIST: But all instructions.

MR. McLELLAN: And I suggest to cure that that you add "or to the charge".

MR. DEAN: That is what I had in mind.

MR. MEDALIE: You cannot except to the whole charge.

MR. YOUNGQUIST: Is that covered by "the giving

or failure to give an instruction"?

MR. DEAN: No.

MR. McLELLAN: The word "instruction" as used in line does not refer simply to the failure to give a requested instruction or to the giving of an instruction requested by your adversary, but refers to the whole charge.

MR. YOUNGQUIST: That is right.

MR. DEAN: Including one that the judge may have concocted himself.

MR. McLELLAN: Yes.

THE CHAIRMAN: How would that read then?

MR. McLELLAN: "No party may assign as error the giving or failure to give an instruction" --

MR. CRANE: I did not get that. Will you read that again, "No party may assign"?

MR. McLELLAN: "as error the giving or failure to give an instruction or to the contents of the charge unless he objects thereto."

MR. MEDALIE: The way you have it, it would cover the whole charge - an objection to the whole charge - and that is prohibited. You cannot object to the whole charge. You must set out the specific things in it.

MR. McLELLAN: True.

MR. MEDALIE: Or the specific things that are

lacking in it.

MR. McLELLAN: I don't think I have it right yet.

MR. DEAN: Here is a suggested substitute, Judge McLellan. Instead of the word "instruction" say - up in line 8 - after the word "error", "any portion of the charge or omission thereon".

THE CHAIRMAN: "omission therefrom".

MR. MEDALIE: I think that is pretty good.

THE CHAIRMAN: Give that to me again, Mr. Dean.

MR. DEAN: After the word "error" in line 8, insert "any portion of the charge or omission therefrom".

MR. BURNS: Yes, that is it.

MR. DEAN: And scratch out "giving or failure to give an instruction".

MR. McLELLAN: Oh, yes, that does it.

MR. MEDALIE: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. WECHSLER: How about the plain error rule? That is a qualification of this whole business.

MR. HOLTZOFF: I think the plain error rule is

an appellate rule, isn't it?

MR. WECHSLER: No, it is a rule for the guidance of appellate courts as to when they may reverse.

MR. SETH: It applies to other things too.

MR. WECHSLER: Yes, it applies to everything.

MR. SETH: It should be in there some other place.

MR. WECHSLER: Yes, it is in Rule 51. I did not want it to be thought this provision in any way modifies the plain error rule.

MR. HOLTZOFF: No, I think it is clear.

THE CHAIRMAN: Anything else on 28?

MR. SEASONGOOD: As long as there is this question of some places giving the written instructions as handed up, whereas they should be just embodied in the charge, that is, the substance of the instruction, I would still like to suggest inserting in line 4 after the word "law", "substantially", because otherwise, the way this reads literally, it does perpetuate the practice of asking a specific instruction and assigning error to the not giving of that instruction.

THE CHAIRMAN: That is accepted by the Reporter. If there is no objection, that will stand.

MR. MEDALIE: What is the language?

THE CHAIRMAN: "Substantially" on line 4 after

"law".

MR. McLELLAN: You realize you are dealing with what the request may contain?

THE CHAIRMAN: Yes.

MR. McLELLAN: I would let the man make any request he wants to, for particular language, and then follow the common law rule that a failure to give it cannot be grounds for a new trial, if it is given in substance, but I would not cut down what he can ask for.

MR. SEASONGOOD: We always say "We ask your Honor to charge in substance this rule."

MR. McLELLAN: No, we don't put in "substance".

MR. YOUNGQUIST: We don't either.

MR. SEASONGOOD: It is taken care of by that. Counsel may file written requests for instructions, in lines 4 and 5, the court informs counsel of his action upon the requests, which may be giving, which may be refusal, which may be modification; then, when we come down to lines 7 and 8, error may be assigned to any portion of the charge or omission therefrom, which is all-inclusive and covers everything that has gone before. I do not believe we need any further specific --

MR. McLELLAN: You are not striking out the word "proposed" before "action"?

MR. SEASONGOOD: No.

3 MR. McLELLAN: You left it out.

MR. SEASONGOOD: You say he "may not assign as error the giving or failure to give an instruction".

THE CHAIRMAN: What about "substantially"? There seems to be doubt about that.

MR. HOLTZOFF: I do not think that should be there.

THE CHAIRMAN: Let us vote on it one way or the other. All those in favor of the word "substantially" in line 4 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Seems to be lost. The motion is lost.

Are there any further suggestions on Rule 28? If not, are you ready for the motion? All those in favor of the rule as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: The motion is carried.

(Recess from 12.45 to 1.30 p. m.)

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AFTERNOON SESSION

THE CHAIRMAN: Rule 29.

MR. McLELLAN: Mr. Chairman, I suggest, as to 29, in the first instance, that in the third line, before the word "stipulation" there be added the word "written", and that after the word "parties" the words "approved by the court" be added.

THE CHAIRMAN: That is accepted by the Reporter, if there is no objection by any member of the Committee.

Are there any further suggestions on 29 (a)?

MR. McLELLAN: I will keep still hereafter, but why do you want to change the practice, if it is the practice, about sealed verdicts? Heretofore, and in jurisdictions that I know about, if a jury agrees at 11 o'clock at night and the judge isn't there, their verdict is sealed and brought in in open court next morning. Is it preferable that it be returned at night, with all the dangers of something being misunderstood when the verdict is returned not in the presence of the judge?

MR. ROBINSON: Does it say that, Judge?

MR. McLELLAN: It says, "A sealed verdict signed by each juror concurring may be returned".

MR. ROBINSON: "as provided by the court", whenever the judge would say it should be returned.

MR. McLELLAN: I thought this contemplated that the judge may tell them they may sign their verdict, leave it and go away.

MR. ROBINSON: But to return, because we have a provision that the verdict shall be returned in open court. That is in lines 5 and 6.

MR. McLELLAN: I thought this might be regarded as an exception.

MR. ROBINSON: Do you think that should be clearly provided?

MR. BURNS: Why do you need "with the consent of the parties"?

MR. DEAN: It should be an order of the court.

MR. BURNS: Very frequently the 11.35 train, which is the last one, is the compelling factor in the decision.

MR. YOUNGQUIST: What was the change?

MR. McLELLAN: I move to strike out or change, as the case may be, the last sentence.

THE CHAIRMAN: Aren't sealed verdicts common?

MR. McLELLAN: Yes.

MR. SETH: Very, very common.

MR. YOUNGQUIST: In criminal cases?

MR. SETH: We don't have them in criminal cases.

MR. McLELLAN: I never had one in a criminal case

in my life because I always thought I should stick around as long as the jury did, but I know they do it.

MR. CRANE: I never saw a sealed verdict in a felony case.

MR. McLELLAN: In Massachusetts they do it every day or two.

MR. CRANE: If a jury is kept out, they would be apt to come in at any time for instructions.

MR. McLELLAN: Why not leave that to the judge, by leaving it that a verdict must be returned to the judge in open court, and leave out that sentence about a sealed verdict?

MR. ROBINSON: May I ask this, Judge McLellan? Isn't it possible a sealed verdict shall simply be placed in the hands of the clerk until such time as the judge shall require the jury to report, and then for the jury to be present when the sealed verdict is opened?

MR. SETH: That is right.

MR. ROBINSON: That is as I understand it.

MR. HOLTZOFF: Why isn't it better to leave that sentence out and leave the whole matter in the hands of the court?

MR. ROBINSON: We do not have any statute or any decisions that require one thing or the other here, so it is just up to the Committee.

MR. HOLTZOFF: I move we strike out the last sentence.

MR. McLELLAN: I second the motion.

MR. CRANE: On the sealed verdict?

THE CHAIRMAN: Yes.

MR. ROBINSON: Will that be understood, that under these rules a sealed verdict cannot be returned?

MR. HOLTZOFF: No, it will be up to the judge.

MR. BURNS: Shouldn't we mention it, to be sure? Why not deal with it and say it is discretionary with the trial judge? It is a procedure that, in a lot of minor criminal cases, has a lot of advantages, and cite that Massachusetts practice, which is to seal the verdict very frequently in civil cases and not infrequently in criminal cases.

MR. McLELLAN: That is right.

MR. SEASONGOOD: Does the judge ever discharge the jury after they have returned a sealed verdict?

MR. BURNS: That is what the sealed verdict means, they agree; they tell the officer in charge they have agreed and then the foreman takes the verdict and sticks it in his pocket, in an envelope, and then he comes in the next morning, when court opens, and he is asked the ordinary question as to whether the jury has agreed upon a verdict, and they say that they have, and they

render their verdict.

MR. SEASONGOOD: Do you waive your right to poll the jury?

MR. BURNS: Oh, no.

MR. SEASONGOOD: They have been discharged.

MR. BURNS: Oh, no, they have not been discharged.

MR. SEASONGOOD: That is what I asked.

MR. BURNS: They go home; they are excused.

MR. SEASONGOOD: Then you misunderstood my question.

MR. DEAN: I did not understand we are permitting the forman to stick it in his pocket either. It is returned as the court directs, it is returned to the clerk or --

MR. SEASONGOOD: It is not a verdict until the jury comes in and there has been an opportunity for polling after the return of their verdict.

MR. DEAN: That is so, and that would be made clear by this rule.

MR. CRANE: In a civil case he gives it to the clerk and the clerk opens it. I should think, in a criminal case, letting the jury go home, in an important criminal case, it would not be the right thing to do.

MR. WECHSLER: The judge wouldn't do it in a very important case, probably.

MR. ROBINSON: It is required to be signed by

each juror.

MR. YOUNGQUIST: I note that in your Note you say something about the report of the Committee on Selection of Jurors in the Judicial Conference in connection with subdivision (a). Does that report say anything about sealed verdicts?

MR. SETH: No.

MR. HOLTZOFF: That deals with the selection of the jury panel.

MR. ROBINSON: I sent that report to you. I don't recall that it does.

MR. McLELLAN: Under modern practice, where a jury is permitted to do so much more than they could formerly, what is the harm in letting them seal their verdict and bring it in the next morning?

MR. SETH: It just means separation, that is all.

MR. McLELLAN: But I do not think you need to make a rule about that.

MR. ROBINSON: I am afraid if we do not it may be said we did not expect to allow sealed verdicts.

MR. HOLTZOFF: Shouldn't that be left to the individual court or individual judge?

MR. ROBINSON: I don't think so, Alex. I think this is just as much a subject for uniformity, by rule,

as anything else. Do you think there is something the matter with the sentence as it is?

MR. HOLTZOFF: Certainly the consent of the parties should not be required.

MR. ROBINSON: That should not be. I think that is right, but I would require the consent of counsel. In the cases with which I am familiar the judge would ask counsel whether they would allow the jury to separate, and I thought that worked pretty well that way.

MR. HOLTZOFF: Suppose a party said no?

THE CHAIRMAN: Where you say "provided" don't you mean "as directed by"?

MR. ROBINSON: Yes.

THE CHAIRMAN: Indicating the giving of a separate direction each time?

MR. ROBINSON: Probably so.

MR. HOLTZOFF: I do not like to use the word "direct" because that implies --

THE CHAIRMAN: That is right.

MR. HOLTZOFF: Why not say "require" - "as required"?

MR. ROBINSON: As to the time and place of their reporting?

MR. HOLTZOFF: "Prescribed".

MR. YOUNGQUIST: Wouldn't he make an order in

each case, however?

MR. DEAN: Yes.

MR. ROBINSON: Yes.

MR. HOLTZOFF: Wouldn't it be better to say "as permitted by the court"?

MR. ROBINSON: "as ordered by the court"? How would that be?

MR. McLELLAN: I believe "prescribed" covers a little more of the details as to when the jury is to report.

MR. DEAN: Since it isn't returned in open court, it is really an exception to the second sentence, isn't it?

MR. McLELLAN: It is, as it now reads.

MR. DEAN: An exception?

MR. McLELLAN: Yes.

MR. DEAN: I think so too.

MR. McLELLAN: If it is an exception, I don't think that should be made.

MR. DEAN: Therefore shouldn't the third sentence start out, "The court may, however, direct that the verdict be sealed"?

MR. YOUNGQUIST: That won't happen.

MR. HOLTZOFF: Even a sealed verdict is returned in open court.

MR. DEAN: The judge isn't there.

MR. HOLTZOFF: Oh, yes, he is. The judge comes back the next morning and the sealed verdict is opened in the judge's presence and in the presence of the jury.

MR. DEAN: No, but if --

MR. HOLTZOFF: Am I not right about that?

MR. McLELLAN: That is right. When they have agreed upon a verdict - it is after 11 at night - the foreman writes the verdict and then seals it and then, when the jury come in the next morning, they report that sealed verdict.

MR. CRANE: But who holds it? I should think the judge, as in our practice, should provide that it be handed to the officer in charge. The foreman doesn't take it home with him.

MR. ROBINSON: This is based on a Supreme Court case, Strawn v. U. S., 171 U. S. 38. Heiser & Walzer in their textbook on the subject say that the holding of the court is this, "with the consent of counsel, given in open court in the presence of the defendant, a sealed verdict may be returned." That is their statement of the present law.

MR. McLELLAN: That may well mean what your last sentence means, that they can return it without the court being there.

MR. ROBINSON: I don't think so.

MR. GLUECK: The consent pertains to the "sealed" part of it.

MR. CRANE: I do not know about the Federal practice, but I should think it would be a very dangerous practice, taking sealed verdicts, in criminal cases.

3 MR. ROBINSON: No; either in this case or in other Federal cases, the understanding is, if it is a verdict it has to be returned in open court. A sealed verdict merely means there is a deferment of the time at which the jury returns the verdict.

MR. CRANE: There is a big difference between letting a jury go away at night, after a sealed verdict, in a civil case and in a criminal case. I should think we ought to go slow on that in a criminal case.

MR. ROBINSON: After they have signed their verdict, signed their names to it?

MR. McLELLAN: Yes, I think we should go slowly.

MR. CRANE: There may be instructions; the judge should be there for questions on instruction. You have a degree of jeopardy in a criminal case which you do not have in a civil case. You may do as you please in a civil case, but that is not so in a criminal case.

MR. ROBINSON: Judge Burns, do you have some suggestion about this third sentence, or how do you feel

drawn, or should it be left out.

MR. BURNS: I should say, "A sealed verdict signed by each juror concurring may be prescribed by the court" period.

MR. ROBINSON: Would you say "with the consent of the parties"?

MR. BURNS: No, I would strike that out.

MR. ROBINSON: You think the term "sealed verdict" includes the idea that the jury would have to return in open court later?

MR. BURNS: Yes.

MR. HOLTZOFF: I think that is a little ambiguous, the way you have it now.

MR. McLELLAN: I do not think there is any need of requiring every juror to sign it, is there?

MR. ROBINSON: "Signed by the foreman".

MR. BURNS: We don't need it, then. Just "sealed verdict".

MR. CRANE: Judge, do they have sealed verdicts in criminal cases very extensively?

MR. McLELLAN: They do it more or less frequently in small cases, but I never permit any. I have never done it myself, but you can do it, we have always assumed, and some judges do it. I think it would be better not to touch it.

THE CHAIRMAN: Is there any motion?

MR. HOLTZOFF: I make a motion to strike out that sentence about the sealed verdict.

MR. McLELLAN: Seconded.

THE CHAIRMAN: All those in favor of the motion to strike out the sentence beginning on line 5 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried.

MR. BURNS: Isn't it desirable, Mr. Chairman, that there be somewhere in the notes a statement that the sealed verdict procedure is not intended to be eliminated?

MR. ROBINSON: I think, as someone said this morning, a note is not part of the rule and will not be considered as such.

MR. DEAN: The difficulty is we do not know exactly what is meant by a sealed verdict.

MR. ROBINSON: I am telling you what the cases indicate, Gordon. They indicate that they favor delivery of the verdict.

MR. DEAN: Are you going to have any provision with respect to sealed verdicts? I think in view of the difference in practice among the various

States, you have to set it out in extenso, that is, just exactly what is going to be prohibited and what is going to be permitted. That is, you have to provide that a verdict may be sealed, with the permission of the court, and deposited with the clerk as usual at the earliest opportunity, to be returned to the court by the jury in open court. I do not think there is any alternative to that.

MR. ROBINSON: No.

MR. YOUNGQUIST: If we are going to say anything.

MR. DEAN: I agree.

MR. ROBINSON: May we provide "with consent"?

MR. McLELLAN: First let us see whether we want it.

THE CHAIRMAN: This sentence is out now. Let us see if it is the sense of the meeting that we shall insert a sentence which will describe what we are all talking about as a sealed verdict, namely, a verdict or a decision arrived at in a jury room, put in writing, turned over to the clerk, and then the jury returns the next day and presents the verdict to the judge in open court. That is what we mean, isn't it?

MR. MEDALIE: I assume that you are now engaged in only providing for the way in which a sealed verdict shall be handled or arranged for, but has the Committee

committed itself in favor of a sealed verdict?

THE CHAIRMAN: No, no.

MR. McLELLAN: We are against it.

MR. DEAN: We struck out the last sentence.

THE CHAIRMAN: We just struck it out. There seems to be some suggestion that that leaves it ambiguous, that in certain districts they have sealed verdicts, in other districts they have not; that sealed verdict means one thing in one district and another thing in another district.

MR. MEDALIE: Don't we want to have a uniform rule as to whether or not we should have sealed verdicts?

THE CHAIRMAN: We should have a uniform rule to indicate what a sealed verdict is.

MR. MEDALIE: Or whether we should have it.

THE CHAIRMAN: Suppose we take that step first. All those in favor of providing for a sealed verdict --

MR. MEDALIE: I lingered, as you know, and really have no right to speak, but if it is still open to me, may I suggest that the objection to sealed verdicts in criminal cases is that the judge is not around when the jury wants to come back and get certain things, the exhibits, the reading of testimony, additional instructions. I think the sealed verdict is a lazy judge's device, and that is no reflection on any judge who has ever resorted to it.

THE CHAIRMAN: We are on safe ground.

MR. MEDALIE: But it is really a lazy man's way, because hanging around, when the jury is out, is a pretty distressing job, it is very wearing. A judge will stay up with a jury until 11 or 12 o'clock; if he thinks there is a hope of the jury coming in, he will hold them until 1 or 2 o'clock, if he has to. If he doesn't have to, he will do what is frequently done in civil cases. The need for the judge staying around, so testimony may be read, exhibits furnished, and additional instructions given, the need in a criminal case is much greater than in a civil case, and more vital because of what is at stake. In this State it has been the practice, not to have a sealed verdict in a criminal case, because of the obvious recognition of those needs.

MR. HOLTZOFF: Isn't there a danger that a juror may be reached after the jury separates, say, at 12 o'clock at night and before court reconvenes the next morning, and when the jury is polled, that particular juror might change his thoughts as a result of being reached?

MR. MEDALIE: I think that is of minor importance. I would not object to a sealed verdict on that ground. I would object on other grounds, that anything that is so important as a man's life or liberty, requires that a judge should be around to meet those

needs. And we know from experience in criminal cases, especially the difficult ones, the jurors are frequently troubled about things, taking their duties seriously. After they debate the thing they will say, "Well, let us see what the evidence was. What did this witness testify to?" They want to be sure; they ask for its being read. They wish again to look at particular exhibits, and they are confused about instructions sometimes and want to be clear.

MR. CRANE: I have had the experience in criminal cases where the jury was up all night and I slept in the courthouse, and at two o'clock in the morning they came in and had certain portions of the testimony read to them. And I kept the attorneys there with me. They are not sleeping just when the judge decides to go to sleep. They are sometimes taken to a hotel and they cannot agree until the next morning.

I have had them out two days and a night. A judge has to be at hand; he never knows what will happen.

I had a case where, in the midst of the jury's deliberations, one of them was taken dangerously ill. The question was, what to do? I got the lawyers together and obtained their consent, and I got a doctor to go in to the jury room. No harm could come of that so long

as they had given their consent.

If you are engaged in a criminal case, with the public watching you, why should you, as judge, go home and leave the jury? Anything is liable to happen. A judge cannot possibly anticipate what may happen. In a minor case, I concede, it does not amount to anything, but you cannot tell what a minor case may be. It may be minor in its name and it may be very important in its effects. I should think you would go slow on that.

MR. ROBINSON: One district judge, who wrote to the Committee, asked what it was going to provide for as to sealed verdicts and cited a case in which he himself had to go to hismother's bedside - I think she was very ill, perhaps dying - and he had given the jury all the instructions that they needed; and it was merely a matter of their deliberating. He told them, "Gentlemen, you will return your verdict at such and such a time."

MR. McLELLAN: Wouldn't it have been simpler for him to have left word where he could be reached?

MR. ROBINSON: Well, he had to go to some other place, in Massachusetts, to his mother's bedside.

MR. McLELLAN: That is a very unusual case.

THE CHAIRMAN: That would not justify the rule.

MR. MEDALIE: Other things are more overpowering.

THE CHAIRMAN: I think we are ready for the question as to whether we want to provide for any sealed verdicts.

MR. MEDALIE: I move that we make no provision for sealed verdicts.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: We will have a show of hands.

(After a show of hands the Chairman announced the vote to be nine in favor and five opposed.)

MR. BURNS: Now isn't a motion appropriate that we specifically provide against the device of the sealed verdict?

MR. McLELLAN: I move that we do not so provide.

MR. HOLTZOFF: I second the motion.

MR. SEASONGOOD: I thought you had left it up in the air. Did you?

MR. DEAN: That is what it does.

MR. SEASONGOOD: There is no provision one way or the other. Is that what we should do?

THE CHAIRMAN: All those in favor of the motion

say "aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor of the motion raise their hands --

MR. SEASONGOOD: No provision?

THE CHAIRMAN: No provision.

MR. MEDALIE: Or provide one, no sealed verdict.

MR. SEASONGOOD: Provide there is to be none?

MR. HOLTZOFF: No, to make no provision.

MR. SEASONGOOD: We have already decided nine to five --

MR. BURNS: To provide for a sealed verdict --

MR. MEDALIE: No.

MR. BURNS: Not to provide.

THE CHAIRMAN: The motion as I got it was --

MR. BURNS: That we do not provide.

THE CHAIRMAN: -- that we do not provide against it.

MR. HOLTZOFF: In other words, that really is --

MR. SEASONGOOD: Provides that there shall be no sealed verdict.

THE CHAIRMAN: Motion was made that we do not provide.

MR. MEDALIE: Well, that comes to this, that we

get rid of the provision with respect to procedure on sealed verdicts in Rule 29, as we now have it. Now the motion is that we put into Rule 29 a provision prohibiting sealed verdicts.

MR. HOLTZOFF: No, no, that is not the motion.

MR. DEAN: Who made the motion?

MR. HOLTZOFF: George did.

MR. MEDALIE: We decided not to provide for that.

MR. DEAN: Restate it.

MR. McLELLAN: Now the question is whether we provide against it, and I move we do not provide against it.

THE CHAIRMAN: It is moved that we do not provide against a sealed verdict.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: Which, I take it, has the effect of leaving it optional with the judges.

All those in favor of the motion raise their hands.

(Nine hands in favor of the motion; eight hands in opposition.)

MR. WAITE: As I understand it, we just leave the matter of the sealed verdict in the air; the court does not know quite what to do.

MR. HOLTZOFF: Except this, that the court is

permitted to make local rules not inconsistent with these rules. We have a rule authorizing the court to do that and they could cover that matter by local rules, or by practice and so on.

THE CHAIRMAN: Not only do we leave it up in the air there as to whether you can have sealed verdicts, but we leave it up in the air as to what a sealed verdict is.

MR. YOUNGQUIST: I voted rather hesitantly with the majority. I think that was wrong, and I move to reconsider.

MR. MEDALIE: Which, the last motion?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: Is there a second?

MR. SEASONGOOD: Seconded.

MR. MEDALIE: You do not require it in committee. You only require it in large assembly.

THE CHAIRMAN: You have heard the motion to reconsider. I think you are the devil's advocate, George. All those in favor of the motion to reconsider say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: This is a broadminded Committee. The motion prevails. Now, what is the motion?

MR. MEDALIE: The motion that was just passed.

MR. YOUNGQUIST: Judge McLellan's motion. I move that we vote on it again.

THE CHAIRMAN: Judge McLellan's motion was - perhaps you had betterstate it, Judge.

MR. McLELLAN: I move that we make no provision in the rules against sealed verdicts.

THE CHAIRMAN: All those in favor of the motion show hands.

(After a show of hands the Chairman announced the vote to be seven in favor and eight opposed.)

THE CHAIRMAN: The motion is lost.

MR. WAITE: Motion carried or lost?

THE CHAIRMAN: Lost.

Now we still have to go somewhere.

MR. McLELLAN: Now you simply provide against sealed verdicts, don't you?

MR. HOLTZOFF: The rule is silent on the question now.

MR. BURNS: I move there be added to the rule in substance the following phrase, "the device of a sealed verdict is hereby abolished".

MR. MEDALIE: Why do you call it a device?

MR. BURNS: It is referred to as a device. Give it a better word, "the institution".

MR. MEDALIE: Just say "sealed verdict".

MR. BURNS: All right.

MR. MEDALIE: Sealed verdicts are prohibited, that is what you mean to say? Of course.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: All those in favor raise hands.

(After a show of hands the Chairman announced the vote to be six in favor and eight opposed.)

THE CHAIRMAN: The motion is lost.

MR. HOLTZOFF: Now, Mr. Chairman, I move that Rule 29 (a) be adopted in its present form with the amendments that have already been voted.

MR. LONGSDORF: Wait a minute. Mr. Chairman, there is something in there that probably amounts to very little, but I want to call it to your attention. We are providing for a stipulation for a verdict less than unanimous by stating "a majority of the jurors". Then over in Rule 21 we have adopted a rule that the parties may stipulate for a jury of any number less than 12. That might be one. It seems to me maybe --

THE CHAIRMAN: One is a jury that you start the

case with. This is the jury you are intending to provide for.

MR. LONGSDORF: You cannot stipulate that a jury of one can be a majority.

MR. HOLTZOFF: Isn't that de minimus?

MR. LONGSDORF: I will let it go.

6 MR. SEASONGOOD: That is not quite the way it was running in my mind. I was wondering whether you ought not to have with the concurrence of the court in there too.

THE CHAIRMAN: We have that.

MR. SEASONGOOD: Do you put that in?

THE CHAIRMAN: Yes, that is a written stipulation of the parties approved by the court.

MR. SEASONGOOD: Oh, excuse me.

THE CHAIRMAN: That went in very early, on Judge McLellan's motion.

MR. HOLTZOFF: I make a motion that we adopt Rule 29-A in its amended form.

THE CHAIRMAN: Which takes in the first and second sentences?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: With the amendment I have just referred to.

MR. HOLTZOFF: Yes, and the word "written" in

front of the word "stipulation".

MR. SEASONGOOD: That is the same thing we voted on before, isn't it, but you do not say anything about it, that is what it comes to, doesn't it?

MR. HOLTZOFF: That is right.

THE CHAIRMAN: That is right.

MR. SEASONGOOD: I thought the sentiment was we should say something.

MR. MEDALIE: I think the Chair can rule, in view of the various motions that were carried, that the last sentence of Rule 29 (a) is out.

THE CHAIRMAN: It has been voted on.

MR. MEDALIE: What are we moving for again?

MR. HOLTZOFF: I am just moving to adopt that rule in its amended form.

MR. MEDALIE: You mean without the last sentence?

THE CHAIRMAN: By making a negative motion, we have put ourselves in a very unfortunate position.

MR. MEDALIE: I agree.

MR. YOUNGQUIST: Yes. I am wondering if I may make a motion in a little different language, to add a sentence to 29 (a), reading, "Sealed verdicts shall not be permitted"?

MR. DEAN: We have voted on that.

MR. CRANE: Different language.

MR. LONGSDORF: It is the same motion but different language. We voted down a motion that sealed verdicts are prohibited.

MR. MEDALIE: "are hereby abolished".

MR. CRANE: We are just feeling our way.

MR. HOLTZOFF: The motion was amended to read, "Sealed verdicts shall be prohibited", but we voted it down.

MR. DEAN: It may be faster to vote again, Mr. Youngquist.

MR. YOUNGQUIST: Add a sentence to 29 (a), saying, "Sealed verdicts shall not be permitted."

THE CHAIRMAN: All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be seven in favor and eight opposed.)

THE CHAIRMAN: The motion is lost.

MR. HOLTZOFF: I would like to explain my vote and my position on this subject. I think this ought to be taken care of by local rule.

THE CHAIRMAN: You made that very clear.

MR. DEAN: Do you want to make a motion it be handled by local rule?

MR. HOLTZOFF: No, no.

MR. DEAN: That is the effect of it, to leave it

the way it is.

MR. HOLTZOFF: Exactly.

MR. YOUNGQUIST: It seems to be we have exhausted the possibilities, Mr. Chairman.

MR. McLELLAN: Isn't there a motion before the Committee that Rule 29, as modified by the use of the word "written" and so forth, and with the deletion of the last sentence, be adopted?

THE CHAIRMAN: That is right.

MR. McLELLAN: Question.

THE CHAIRMAN: Question on that motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: The motion is unanimously carried.

MR. WAITE: No; I was going to vote no. I was just struggling with it. I think it ought at least say something about sealed verdicts, so that we have thing or the other. We tried to and we could not agree. So I am voting no on it.

MR. MEDALIE: I suppose the best we could do under the circumstances is to get one of our typical deploratory sentences in there, that we deplore them but we are not prohibiting them.

MR. YOUNGQUIST: May I have the privilege of coming back to that later in our sessions?

THE CHAIRMAN: Oh, yes.

29 (b). Any suggestions?

MR. YOUNGQUIST: I would suggest striking out in lines 9 and 10 "upon motion of a defendant or of the Government", and inserting, "at the request of any party".

MR. ROBINSON: I do not see any objection.

THE CHAIRMAN: No objection. That is accepted.

MR. McLELLAN: You leave "upon the court's own motion"?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: Any further suggestions? If not, all those in favor of 29 (b) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. CRANE: May I ask a question on that for my own personal information?

THE CHAIRMAN: Surely.

MR. CRANE: How important is the polling in practice among you gentlemen, as you know it? Is it important enough to be error to refuse to poll or to afford an opportunity of polling? I am asking because in my State, in a recent decision, it was brushed aside altogether. I think it is wrong.

MR. HOLTZOFF: I think there is a recent Supreme Court case in which they held polling was a matter of right.

THE CHAIRMAN: Mr. Robinson hands me a case in 90 Fed. (2d), where they held it was reversible error; Mackett v. U. S., 92 Fed. (2d) 46.

MR. HOLTZOFF: There is a very recent case, within the last few months.

MR. DEAN: Mr. Chairman, I suggest we strike the note to subdivision (a) of Rule 29.

THE CHAIRMAN: By that I take it you mean reworking the note?

MR. DEAN: No. I do not think it is relevant.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed "No".

(No response.)

THE CHAIRMAN: Carried.

MR. CRANE: Strike it out?

MR. McLELLAN: Yes.

MR. YOUNGQUIST: It is relevant, in that it permits the accepting of the verdict of a majority of the jurors rather than a unanimous verdict.

MR. HOLTZOFF: I don't think we ought to include a note of this kind, which is in the form of urging counsel, practically, to accept that kind of procedure.

MR. YOUNGQUIST: I just wanted to point out it was not wholly irrelevant.

MR. McLELLAN: But the motion was carried.

THE CHAIRMAN: Yes.

MR. DEAN: I agree it is relevant, the last few lines.

THE CHAIRMAN: That motion prevailed.

Rule 30 (a). Any suggestions?

MR. MEDALIE: In line 4 you are dealing with "without delay". That means "immediately"?

MR. SETH: It may be "forthwith".

MR. HOLTZOFF: I think this is qualified by the rest of the sentence.

MR. MEDALIE: No, I think not, and the reason I say that is this: Of course if there is to be a pre-sentence investigation there will be delay, but I think the judge is entitled to do a little delaying if he chooses to for a day or a week, regardless of what a pre-sentence investigation will do. He may want to make up his mind how guilty he is.

MR. BURNS: The prosecution may want to find out

to what extent he will cooperate.

MR. DEAN: It is a common practice to let a defendant who is going to trial go on with the trial and not sentence until the sentence is imposed on the remaining defendants.

MR. ROBINSON: We are now assuming a little jurisdiction. We are coming now into that part of our work where we recommend the court that they change or continue this present rule.

MR. MEDALIE: And give them a reason.

MR. YOUNGQUIST: We should not hesitate.

MR. ROBINSON: Not at all.

MR. MEDALIE: Some of us have had experience both in prosecuting and defending, or both, and some, too, in administering the criminal law, and know what is involved. I know that some judges who hold criminal terms or sit in that court that deals only with criminal cases think that the most important part of their function is to decide what to do with the man.

MR. DEAN: It is.

MR. MEDALIE: And this wild newspaper idea of hurrying everybody to jail is not quite what people having responsibilities want to do. I remember judges coming in, when I was United States attorney, wanting to know and asking my advice and taking the time to do all that.

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MR. HOLTZOFF: I would like to explain the origin of those words, because I happen to be familiar with it, in the present Supreme Court rule. They were put in fairly recently, to do away with the practice developed in some districts, especially in banking cases, of postponing the sentence from month to month over a period of several years, until the defendant makes restitution, and then after he has made restitution to strike the case off the docket. We called the Supreme Court's attention to that practice, and I think the words "without delay" were not intended to mean that the sentence must be passed forthwith, the moment the verdict is returned.

MR. MEDALIE: You know perfectly well that an honest young man, just coming on the bench, and having no trial experience with the criminal law, reads this and says "I must sentence this fellow at once."

MR. BURNS: After lunch.

MR. MEDALIE: He does not know all the things you are telling about.

MR. YOUNGQUIST: I was going to suggest "unreasonable".

MR. MEDALIE: By the way, restitution is an important thing in criminal law.

THE CHAIRMAN: The motion is to insert the word

"unreasonable" in line 4, before the word "delay". All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: Is the construction correct: "After conviction, except as provided in Act of Congress relating to probation." Does that relate to the kind of conviction it is, or what?

MR. HOLTZOFF: I don't think you need that "except" clause at all.

MR. YOUNGQUIST: No, we do not need the clause; you are right.

MR. HOLTZOFF: I move to strike out that clause.

MR. MEDALIE: Seconded.

THE CHAIRMAN: Do you ever impose sentence before conviction?

MR. YOUNGQUIST: That is this clause, "except as provided in Act of Congress relating to probation".

THE CHAIRMAN: I am biting my axe a little deeper.

MR. McLELLAN: May I ask this one question: where a witness turns State's evidence, pleads guilty and is to be used as a witness at the trial, a situation to which Mr. Dean probably may have referred, and they do not

want to sentence him until the trial is over, is that a reason for delay, so that this rule is all right when we put in the word "unreasonable"?

MR. HOLTZOFF: Wouldn't that be reasonable under the circumstances?

MR. DEAN: I would think so.

MR. YOUNGQUIST: I move that be stricken "after conviction, except as provided in Act of Congress relating to probation"

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. MEDALIE: Of course that puts you in pretty bad shape, for another reason: "Sentence shall be imposed without unreasonable delay unless the court orders the continuance of the case for a reasonable period for the purpose of pre-sentence investigation." That means that is one of the unreasonable things.

MR. GLUECK: That means that in those cases the court may delay unreasonably.

MR. MEDALIE: I don't think we ought to put the two ideas together.

MR. YOUNGQUIST: I move to strike, beginning line 7, the last word "or", and from there down to the end of the sentence.

MR. BURNS: I second the motion.

MR. YOUNGQUIST: Your pre-sentence investigation is provided for in (b).

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. ROBINSON: Of course you are striking out the sentence which does not have to do with preliminary investigation.

MR. MEDALIE: You do not need it.

MR. HOLTZOFF: Strike out from 7 to 10.

MR. ROBINSON: I thought you said to 14.

MR. YOUNGQUIST: No, to the end of the sentence.

THE CHAIRMAN: Is there anything further?

MR. CRANE: May I ask as to the next sentence? I am only asking for information. Is it necessary for the court to sign the sentence?

MR. HOLTZOFF: Oh yes.

MR. CRANE: In the State court the judge just enters it.

MR. HOLTZOFF: This rule was adopted by the Department of Justice two or three years ago, because we had a number of instances where sentences recorded by the clerk were ambiguous, either because the judge spoke ambiguously or the record was not accurately made; especially a sentence regarding a number of counts as to whether the sentence was consecutive or concurrent.

MR. YOUNGQUIST: These letters were in my division of the Department of Justice, and we had a lot of trouble.

MR. CRANE: That explains it all right.

MR. MEDALIE: I had another point to bring out. Lines 15 to 16: "pending sentence the court may commit the defendant or continue or increase the bail." It does not have the power to reduce his bail. There are situations where the court deems it desirable to reduce a man's bail.

MR. YOUNGQUIST: Do we have to have that sentence at all? You have it marked for execution.

MR. MEDALIE: I second the motion.

THE CHAIRMAN: The motion is to strike the sentence on lines 15 and 16.

MR. SEASONGOOD: Isn't the practice that when he is convicted you have to give another bail? Isn't that the reason you put that in?

MR. SETH: That is right.

MR. MEDALIE: Sometimes you do and sometimes you don't.

THE CHAIRMAN: Isn't that to prevent putting up an additional bond and paying an additional premium?

MR. SEASONGOOD: That is why we put that in there.

MR. SETH: The court ought to have authority to continue the bail.

MR. SEASONGOOD: That is my impression. As soon as he is convicted the bail is through and he has to have another bail.

THE CHAIRMAN: Could not the objection of Mr. Medalie be met by changing the word "increase" to "alter"?

MR. HOLTZOFF: Why not say "reduce"?

MR. BURNS: You might have this situation on bail, where there is a felony and a misdemeanor.

MR. HOLTZOFF: "Pending sentence the court may commit the defendant or continue or increase the amount of bail".

MR. MEDALIE: Let us take an extreme case; a man charged with murder on the high seas and convicted of assault.

MR. HOLTZOFF: I think the words "or reduce" should go in.

MR. McLELLAN: Why not "or change the amount of bail"?

MR. HOLTZOFF: Yes.

MR. MEDALIE: You have another situation: the court may want to let the defendant out on his own recognizance.

MR. HOLTZOFF: "change the amount" would cover it, because he could change it to zero.

MR. MEDALIE: Discharged on his own recognizance means he is let out on no bail.

MR. SEASONGOOD: Why isn't the Chairman's word the best, which is "alter"? You might want to judge who the sureties are.

MR. YOUNGQUIST: I so move.

THE CHAIRMAN: Moved and seconded. All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: Should we not strike out after the word "judge" in line 11 "who imposes sentence"? Isn't that implied?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: And in line 13 I think the word

"other" should be inserted before "reason". "If the defendant is found not guilty or is for any other reason entitled to be discharged".

THE CHAIRMAN: If there is no objection that will stand.

Now all those in favor of Rule 30 (a) say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

Rule 30 (b). Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. YOUNGQUIST: Seconded.

THE CHAIRMAN: All those in favor of 30 (b) say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Any suggestions on Rule 30 (c)?

MR. DESSION: I move to amend line 25, at the bottom of the page, to read as follows: "The defendant's traits and characteristics, his financial condition, and the circumstances", and so forth. My reason for inserting "his financial condition" is as follows: one is these

reports today often do not contain any information on that. I think they should, in order to prevent meaningless fines. There is quite an abuse on that. You have fines that a defendant obviously cannot pay. If we want him imprisoned let the court think of it in the terms of imprisonment and let us get away from any thought of unintended imprisonment.

MR. HOLTZOFF: Cannot that be directed by the judge to the probation officers?

MR. GLUECK: I second the motion.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(Chorus of "Noes".)

THE CHAIRMAN: Carried.

MR. CRANE: Is there any provision in the rules here or the Federal law that you, if you impose a fine, have to add a day in jail for every fine unpaid?

MR. HOLTZOFF: No. It is optional with the judge to provide that he stand committed until the fine is paid. If the judge so provides then the defendant must be imprisoned for at least 30 days. At the end of 30 days he may be examined as to his assets, and if it is found he has no assets with which to pay the fine he is permitted to take the poor convict's oath and is discharged. If he has

assets, then he has to stay in jail until he pays. The dollar a day proposition does not apply.

MR. CRANE: Is that in our rules?

MR. HOLTZOFF: No, that is statutory.

MR. MEDALIE: Mr. Chairman, I have another question to raise about (c). (c) is written on the supposition that the judge knows what the defendant really did. As a matter of fact in 95 per cent of the cases the judge knows nothing more about it than that he is charged with a particular offense because he has pleaded guilty. I know in practice the pre-sentence investigation in this and the Eastern District results in a report which tells about the crime and how it was committed. All that is left out. We do not want to provide for that specifically, because I don't think we ought to go into that kind of thing by telling everything that goes into the pre-sentence investigation, and there ought to be a provision "whatever else the court requires". He has a right to be curious about everything he pleases. We are limiting the pre-sentence investigation and report having only a social outlook and not the judge's outlook on this thing.

THE CHAIRMAN: All right. What language do you suggest?

MR. MEDALIE: "And such other information as

may be required by the judge", in line 28.

THE CHAIRMAN: The motion is to add to the end of the sentence on line 28, "and such other information as may be required by the judge."

MR. HOLTZOFF: "required by the court" shouldn't that be?

THE CHAIRMAN: "Required by the court".

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

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: I have a motion in reference to the next sentence. I move that the word "confidential" in line 29 have inserted after it "except from the defendant and his counsel". I know that is a rather controversial point, but it always seemed to me awfully unfair to the defendant that the judge would have information which may lead the judge to impose a very heavy sentence on the defendant. That information appears in the report and yet the defendant does not know what is in that report. He has no opportunity to answer it. It is sort of a star chamber proposition.

MR. MEDALIE: How about the district attorney? Don't you think he ought to know about it, too?

MR. HOLTZOFF: Yes. I am willing to accept that. I think counsel for both parties, the government and the defendant, should be permitted to have access to the pre-sentence investigation report.

MR. BURNS: Before sentence?

MR. HOLTZOFF: Before sentence. I agree in all other respects that the document should be confidential. It should not be placed in the public records of the court, but I think a defendant who is getting a ten years sentence ought to know what facts were brought against him by probation officers which led the judge to give him ten years, and not put him on probation.

MR. MEDALIE: I think that is sound? We are providing all protective devices on the issue of guilt, and yet when the question of sentence, which may be more important, comes up we permit all kinds of information which may include gossip and all kinds of unreliable dope, and he has not an opportunity to look into it and he might, on examination, persuade the court. This is important.

MR. HOLTZOFF: The important thing is not the determination of guilt or innocence, but the sentence.

THE CHAIRMAN: You want to fix the time so that it is available to him before he is sent away?

MR. HOLTZOFF: Oh yes. Well then, "except that the defendant and the attorneys for the respective parties

shall have access to the report prior to sentence."

MR. McLELLAN: How about saying "except to parties and their counsel"?

MR. HOLTZOFF: That is better.

MR. DESSION: Let me suggest one thought: you recall our chief reason for putting it this way was a ruling about a defendant who had a particularly lurid report on his insane condition, and that has a strong traumatic effect sometimes. I wonder if we could not make this arrangement: let it be shown to opposing counsel, where there are counsel. That I think might avoid harm. If counsel shows his client something that he ought not to that does not have any effect.

MR. McLELLAN: Suppose he has no counsel.

MR. DESSION: Then he should be permitted to see it.

MR. MEDALIE: Let us test that a minute. When we say it shall be kept confidential, except to the defendant or the attorney for the government isn't the exception taken care of when it is shown to counsel for the defendant?

MR. HOLTZOFF: Yes.

MR. MEDALIE: You do not need to make specific provision.

MR. DESSION: I suppose it would be.

MR. MEDALIE: As a matter of fact if the defendant happens to be committed it is only counsel who has a chance to look at it.

MR. DESSION: I think that does take care of it, yes.

MR. ROBINSON: I have a comment to make on this. Mr. Holtzoff and I have debated this matter for many months now. Of course we need not deceive ourselves by stirring up a regular hornet's nest with respect to the people who conduct these investigations. In the files of our committee there are cases, and especially I think of one case, in which a defendant's father said to the probation officer, "My son has caused me trouble for many years. I think it is best for him to do his time and get it over with. That might straighten him out." The defendant'sson was shown that statement by his father and it led to a very serious breach between son and father, and helped to prevent, in the opinion of the people in charge of rehabilitation of the son, any progress, so the probation people and others conducting this investigation will say that this rule is very unfortunate from the standpoint of effective probation work because probation workers will nôt be able to get actual reports, or if they do they will not write them down because they have to protect the source of their information.

The second point - and I will be brief on it, just a sentence or two - has to do with the function of the judge's exercising, with regard to sentencing, lacks this -- and I respect his view on it -- that the due process does continue after conviction, and that the defendant should not have any information brought in to the court in exercising the sentencing power other than information which the defendant himself knows about or is informed about so he may answer it. Those are the two considerations involved here, and I have no suggestion to the committee one way or the other, except those facts ought to be put before you for consideration now and later.

MR. MEDALIE: I would rather you do not speak of it as due process.

MR. ROBINSON: I did not. That is Alex's term. I am quoting him.

MR. HOLTZOFF: No, I do not consider due process requires this.

MR. MEDALIE: Not constitutional due process. I consider it a sort of fair play proposition.

MR. ROBINSON: Whether I get two years or ten is a thing I am much interested in, and I would like to tell the court why I should only get two.

MR. CRANE: This probation system has grown so big it does prevent the judge from seeing anybody on behalf

of the defendant to plead for mercy. Or does it have to be in writing so it can be shown?

MR. HOLTZOFF: No sir. This only relates to the report of the probation officer, and if my amendment is adopted the only effect it would have would be to make the report of the probation officer available to counsel for both parties, and the defendant himself.

MR. CRANE: I came to my chambers one day and saw a lady standing by the door alongside a policeman, with a baby in her arms, and four other children. And I said to my officer, "I had him down for ten years. I cannot send this defendant up for ten years with a family like that." So I said, "Let her come in." She came in. The baby had been borrowed from the party upstairs, and two children from an apartment across the way, and the older one from a tenant below. They had no children. You would not have any record on that. I stuck him with ten years.

MR. HOLTZOFF: I do not think that would be affected by this rule.

MR. DEAN: The court still has that inherent power.

MR. WECHSLER: This leaves unaffected the defendant's right to be heard on sentence?

MR. HOLTZOFF: Oh absolutely.

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MR. WECHSLER: Should not there be anything in here on that?

THE CHAIRMAN: I think there should. I think it can come in on the sentence you are working on. I only know about this thing by hearsay: I know that two of our county judges were sentencing on Monday in my county, and the two of them have the probation officer come out to the house Sunday noon and stay Sunday afternoon and evening, and one of them is a delightful Southerner, and he says: "I just sit there Sunday and I hear the people, and I am just remembering what I have been told before." If the defendant had a right to know what was in that report and then what he said to the judge that system would have some proficiency. He would have an answer to the things in the report he did not agree to. As it is now it is just the wail of the wife and a bad plea of counsel for mercy, which mean nothing to the judge, quite properly.

MR. GLUECK: I had drafted this originally, and I am afraid if you insist upon showing this to the parties you will slow up the entire probation procedure and make it so clumsy and unworkable you might as well do away with it. No one is more desirous of protecting individual rights than I am, and I can assure you that in the better systems individual rights are fully protected in the probation officers' reports. So I would prefer an amendment limiting

the privilege of consultation of these reports to counsel for both parties.

I may also suggest that another section should go in here, in line with the suggestions made, that motions in mitigation or aggravation of sentence are not hereby abolished, or words to that effect.

MR. HOLTZOFF: You cannot have aggravation of sentence.

MR. GLUECK: Well, the prosecutor has something to say about increasing the sentence.

MR. ROBINSON: Before it is imposed?

MR. GLUECK: Before it is imposed.

MR. HOLTZOFF: You mean as to the imposition?

MR.GLUECK: Yes, the imposition.

MR. HOLTZOFF: I think that is another subject. That is no part of this paragraph. This paragraph is limited.

THE CHAIRMAN: Do you accept Mr. Glueck's suggestion about this limiting the right to counsel?

MR. HOLTZOFF: Yes.

MR. GLUECK: If the case is serious enough I think the court will appoint counsel.

MR. HOLTZOFF: Suppose the defendant waives counsel?

MR. DESSION: If the defendant has no lawyer it

is arguable that he is counsel for this purpose himself.

MR. HOLTZOFF: Therefore why limit it to counsel?

THE CHAIRMAN: So as to prevent it being shown in every case and stirring up a lot of trouble.

MR. HOLTZOFF: I don't think we ought to limit counsel from showing the report to his client.

MR. MEDALIE: That is up to him. If he has any sense and there are certain things in there he should not see he won't show it to his client.

MR. HOLTZOFF: Then do not let us limit it. If we say "limited to parties" that would include counsel.

MR. WECHSLER: Could not you have everything you want if you had general disclosure, but power in the court, for good cause, to keep it from the defendant?

MR. HOLTZOFF: I don't think you should, any more than you should be allowed to keep from the defendant any part of the evidence against him.

MR. DESSION: Look. We have conflicting views here. You are speaking of one value which we all recognize, and the other value has been brought out, too, and we have to compromise it.

MR. BURNS: I am affected by experience I had in the Massachusetts probation system, which is an old one, and by and large a pretty good one, and yet time and time again, after a long trial, two weeks or more, a

probation officer would step up with the court, and he had comments on it, and say "This fellow has been known as a bad egg; he has been tapping cops ever since he was 4 or 5 years of age," and even that, if you are aware of it, has a tendency to convict or to affect you. I had no occasion to know where the probation officer misled me, but I have had cases where a situation was important handled in five or ten minutes. It would be desirable to have counsel for the defendant present so he could check up on some of these allegations which may make a difference between two and ten years. I think, as George said, it is a question of fluctuating considerations that are important, and I think a good adjustment is made if you say "defendant's counsel has a right to it" and then have the court have the power to make available to the defendant, if he is not represented by counsel, that information.

MR. HOLTZOFF: Well it seems to me the limitation may be all right in cases where the defendant is represented by counsel, but certainly if he is not represented by counsel he should be allowed to see the report.

MR. MEDALIE: Why don't you leave that to the judge?

MR. YOUNGQUIST: I think we should.

MR. HOLTZOFF: I would move to insert after the

word "confidential" in line 29 the following language: "except that it may be inspected by the attorneys for the parties, and by the defendant if he is not represented by counsel."

MR. MEDALIE: That does not leave it to the judge to say whether he wants a borderline defendant, one he does not know whether he is a criminal or an insane person. That is what you had in mind, wasn't it?

MR. DESSION: That is right.

MR. SEASONGOOD: If you are entitled to be confronted by the witnesses you ought to be entitled to see what is said about you by hearsay.

MR. MEDALIE: It is further than that. The judge says "Ten years". That man may be in jail three years and four months, or he may be in jail ten years. The determination of that goes to another responsible body, the parole board, or what else you happen to have in any particular jurisdiction. They make investigation, and they make determinations and observations, and they do not always tell the defendant. Usually they do not. So this business about being confronted does not always work out in practice.

MR. YOUNGQUIST: As a matter of fact and fairness they ought to know. I would not like it, but would it help any if the inspection was by the defendant who is not

represented by counsel permitted at the discretion of the court? He could then take care of the case you are speaking of, of a borderline case where the man borders on insanity, and all that.

MR. HOLTZOFF: I am thinking of this kind of case, which is much more common: there is a question in the judge's mind whether to send the defendant away for a year and a day or put him on probation. That makes all the difference in the world to this defendant. And the contents of the probation officer's report will probably be the principal factor in swaying the judge on the question whether to put the defendant on probation or send him away for a year and a day. I think irrespective of whether the defendant is represented, that the defendant or his counsel should, as a matter of right, have access to that report.

MR. YOUNGQUIST: That would give counsel, as a matter of right, access.

MR. HOLTZOFF: I am willing to have the limitation to counsel in cases where there is counsel, but I am not willing to have a limitation of any kind where a defendant is not represented by counsel.

MR. YOUNGQUIST: Even in the discretion of the court?

MR. HOLTZOFF: Even in the discretion of the court.

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MR. DESSION: If there is a likelihood of those things being shown to defendants, that means, I think, as Sheldon pointed out, that these pre-sentence reports are not going to be as informative and as accurate.

MR. HOLTZOFF: That is why the social workers will object to my amendment, I know.

MR. GLUECK: I don't think that is an argument.

THE CHAIRMAN: Wouldn't it be the practice by the judge, when he is made aware of that kind of thing he would immediately appoint counsel?

MR. DESSION: I would accept the court's discretion where the defendant has no counsel.

MR. MEDALIE: Let us get another view on that. Sheldon, you wanted all that is in here about pre-sentence investigation?

MR. GLUECK: Yes sir.

MR. MEDALIE: And you wanted a bunch of lawyers to make rules about a matter that social service experts know something about and have much more to learn about. I think I know that field fairly well. I think you know something of my activities there.

MR. GLUECK: Yes.

MR. MEDALIE: I don't think lawyers ought to make rules on it. You are still in the trial and error part of the work, and there is still an awful lot more

to suggest.

MR. GLUECK: That is true, and that is the type of rule we ought to make. Let me point out another possible bad effect of permitting all defendants to see these reports. It would absolutely ruin the desirable constructive relationship between the probation officer and the defendant. If the defendant had read the probation officer's investigation report, in which the officer had said "This man beats his wife, and has never paid his debts," and so forth, how could he later on pretend to be a friend of the defendant's and pretend to rehabilitate him? It runs counter to elementary principles of rehabilitation.

MR. BURNS: You could fix that by shifting the probation officer in charge; having a different one conduct the rehabilitation.

MR. YOUNGQUIST: Suppose you had only one?

MR. GLUECK: And, besides, the whole system would be blackened by that sort of disclosure.

MR. MEDALIE: What I wanted to point out was the unwisdom of lawyers making these rules where you have to find out what to do, and it will operate differently in different districts, anyhow. If the judge is interested in probation, and some are very deeply interested, you will get a good illustration, and he will know what to do

either generally or in particular cases.

THE CHAIRMAN: Gentlemen, you would strike the lines 28, and from there on?

MR. MEDALIE: I would rather just leave it to the judge to make all of his own rules, and let him learn. If the judge does not learn this business, this side of criminal law, he will never be any good on that phase, no matter what rules you draw up.

MR. HOLTZOFF: I am willing to see paragraph (c) go out entirely, but I am not willing, if I can help it, to see --

MR. MEDALIE: Let me tell you something about the early history of probation in New York. Back in 1910 there was one judge of our local criminal courts who was willing to have probation and probation officers, and investigation, and the others scoffed at it, and it went along that way, as you probably know the history of it. The Catholics would send down one representative, and the Jews would send down another, and some Protestant society send down another one, and it was haphazard stuff until Cardinal Hayes got himself an appropriation from the local Catholic charities, and with the permission of the judges set up a trial probation system which operated for a year or two, and it was good, and Cooley, who operated it, was in charge, and then it was accepted, butit took a long time

to educate the judges. What you are dealing with here is an attempt to educate the judiciary, which is responsible for the administration of this law. You will never do it by rules. The business is to educate. All you can ask for is an opportunity to permit it. If you lay down hard and fast rules there is going to be trouble. I think it is enough to let the judge have discretion, and if you do it against his will it is going to be a failure.

MR. GLUECK: I am impressed with your argument, George, except, as I recall the history of this section, the probation people were eager to have a rule of this kind to strengthen their hands in improving probation services throughout the country. Of course I agree a mere rule of this kind will not guarantee that probation will improve all over the country, but that is something they can use in their educational program in the different districts.

MR. MEDALIE: I do not think that is the way to use it. That is my own opinion, because I have seen it other places than here. The way to use it is to keep on educating them.

MR. SETH: Doesn't the last sentence of paragraph (b) leave it entirely in the hands of the judge?

MR. MEDALIE: But we start off with rules as to

what kind of reports shall be drawn. I can imagine many a judge saying to his so-called probation officer, "Just let me know what this fellow is charged with; find out the facts about this case and let me know somthing about his family. Don't give me any of those fancy things." In two or three or four years he may change his rule. If he does not you can write all these rules you please, and if he likes it he agrees. Some judges went in heavy for this, and some accepted it reluctantly and with a sour face.

MR. DEAN: Could not you leave it wide open this way: by changing line 29 to read "after the determination of the question of guilt", and just leave that one sentence?

MR. SETH: That takes care of the whole thing.

MR. DEAN: In other words, that takes in whom it should be available to prior to sentence and afterwards. Leave the last sentence as it is?

THE CHAIRMAN: You mean the sentence commencing on line 28 and continuing down to the word "guilt" on line 30; is that it?

MR. DEAN: Right.

MR. WECHSLER: You just take out the sentence about their being confidential?

MR. DEAN: Leave in "after determination of the

question of guilt."

MR. MEDALIE: I thought you said all after that.

MR. GLUECK: No, "after determination of guilt".

MR. McLELLAN: Just take out one sentence?

MR. DEAN: Yes.

MR. GLUECK: A person now has the status of a convict. The trial is all over. There is no question of due process.

MR. HOLTZOFF: I do not claim there is any question of due process, but there is a spirit of fair play which should make it necessary to tell the defendant.

MR. MEDALIE: Let us get rid of the football rules and see what we can get judges to do that will help rehabilitate defendants.

MR. GLUECK: I would be willing to second that motion.

MR. DEAN: The motion is to strike the sentence beginning on line 28 and running down to 29?

MR. MEDALIE: What about the words "before or after"?

MR. DEAN: You do not need it. It is "after determination".

MR. YOUNGQUIST: What is going to happen? That means it is not open at all before determination of guilt to anyone.

MR. GLUECK: You don't want it to be.

MR. CRANE: You don't need it, then, do you?

MR. WECHSLER: Ordinarily it would not even be made.

MR. BURNS: I suggest an amendment: that is, in line 30, after the words "available to" insert "counsel for the parties and to", and after the word "such", "other persons or agency having a legitimate interest as the court may designate". This gives the absolute right to the parties and discretionary power in the court to make it available to other people.

MR. HOLTZOFF: I second that.

MR. MEDALIE: Doesn't the word "persons" cover that?

THE CHAIRMAN: Your idea is to make it specific?

MR. BURNS: Specific as to counsel, and then discretionary in the court to make it available to others.

MR. GLUECK: Does not the expression "having a legitimate interest" cover it?

MR. BURNS: I do not think so.

MR. YOUNGQUIST: Then would you insert after "available to" "attorneys for the parties and to such others"?

MR. BURNS: Yes.

MR. DEAN: I accept that.

THE CHAIRMAN: The motion now is to strike the sentence on lines 28 and 29, and to insert on line 30 after the word "to" the words "to the attorneys for the parties, and to such other persons".

MR. ROBINSON: Don't we use the word "counsel" rather than"attorneys"?

MR. YOUNGQUIST: We have used the word "attorneys" all the way through.

MR. MEDALIE: A counsel has no status. The attorney is his boss.

MR. YOUNGQUIST: It ought to be "attorneys".

MR. MEDALIE: If you are retained as counsel in a case you are subject to the direction of the attorney, and if you do not like his direction then you get out of the case.

MR. YOUNGQUIST: That is true.

THE CHAIRMAN: All those in favor of the motion say "Aye"

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried unanimously.

Are you ready for a motion on 30(d)?

MR. SEASONGOOD: You say you make the report available to agencies having a legitimate interest, and that

the court can do it without hearing from the defendant. Ought not he have a chance to say that you ought not to make it available, leaving it to the court finally to decide, but at least give him a chance to say whether it should be submitted?

MR. MEDALIE: I do not think it works that way, for various reasons we know: for example, if a man finally gets out of jail and there is still a period hanging over him, it may be arranged that he be turned over to that particular society or agency. He ought to have no say about that.

MR. SEASONGOOD: Suppose you are going to turn him over to the income tax section. Ought not he have a chance to be heard? The court will decide it, but should not he know whether it is going to be done?

MR. WECHSLER: Some reports were made available to me three or four years ago by the judges in the probation service here in General Sessions, and they went back over five or six years, and it was for the State, and those individuals I do not think should be consulted about it, but of course I protected their names. There was no disclosure of names.

MR. SEASONGOOD: It seems to me it would be pretty serious to turn things over to all kinds of agencies the court thinks should be entitled, but the

court at least should have presented arguments why it should not be done.

MR. HOLTZOFF: Don't you think you could trust the judge on that?

MR. SEASONGOOD: No. That would be that they would come in and say "We would like to have the record on this fellow, such and such."

MR. GLUECK: Murray, you would over-turn all the research of the Harvard Law School on things of this kind, if we had to get the consents of 10,000 convicts on this. As a matter of fact, I can assure you, so far as the State practice is concerned — and I do not claim to know about Federal — I know of no single instance of abuse out of permitting consultation by agencies that have a legitimate interest. Today I would say either the parole board, the pardoning authority, district attorneys and occasionally a University research organization which promises to keep the names anonymous and not to disclose any information.

MR. BURNS: Or the juvenile courts.

MR. SEASONGOOD: Yes, but the Federal agencies, there being a million of them, you know how they work. If there is an infraction on one side they turn it over to somebody else who won't give you a break.

MR. HOLTZOFF: There is a ~~provision~~ rule in the

Federal service not to make their reports available to investigative agencies.

MR. SEASONGOOD: But there is no provision here.

MR. HOLTZOFF: No, that is an intramural rule.

THE CHAIRMAN: Did you make a motion on it?

MR. SEASONGOOD: No, there it is not applicable.

THE CHAIRMAN: All those in favor of 30(c) say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried. 30(d). Any suggestions?

MR. GLUECK: I move it be accepted.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No"

(No response.)

THE CHAIRMAN: Carried. 30(e). Any suggestions?

MR. YOUNGQUIST: Do we need the last sentence?

MR. HOLTZOFF: That is, I believe, in the present appellate rules.

MR. YOUNGQUIST: That does not affect my question at all.

MR. ROBINSON: Don't you want the motion or --

MR. WECHSLER: I move its deletion.

MR. HOLTZOFF: Seconded. I think all motions ought to be determined promptly.

THE CHAIRMAN: The motion is to strike the sentence beginning on 39 and ending on line 40. All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

The motion now is to adopt 30(e) as amended.

MR. GLUECK: I so move.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: I suggest, we speak of the imposition or execution of sentence may be suspended or a fine imposed. The sentence includes the imposition of a fine. I would suggest that it be made to read "the imposition or the execution of sentence may be suspended".

MR. HOLTZOFF: You mean delete the words "or a fine be imposed"?

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: In the last two lines, wouldn't it be simpler to say that the entire period of probation shall not exceed five years?

MR. HOLTZOFF: That is better.

MR. CRANE: May I ask a question right there, for information only?

MR. ROBINSON: Of course you are changing some statutes, Aaron.

MR. HOLTZOFF: But not the meaning of the statutes. I think your version does not change the substance.

MR. CRANE: May I ask a question, Mr. Chairman?

THE CHAIRMAN: Yes, Judge Crane.

MR. CRANE: A sentence has been imposed of ten years and then suspended. What happens to it after five years, when the term of probation or any extension shall not exceed five years?

MR. HOLTZOFF: At the end of the five years,

under the Federal statutes, the prisoner is no longer on probation because the Federal statutes prohibit keeping a person on probation for more than five years, but the Federal statute also provides that if at any time during the maximum period for which he could have been sentenced he commits any other crime the court may order him re-arrested.

MR. CRANE: I do not understand that. But you say probation shall not exceed five years.

MR. HOLTZOFF: Yes.

MR. CRANE: That means he has been out five years. What happens when the five years is up? Does he go back and serve the other?

MR. HOLTZOFF: Oh no. The execution of the sentence has been suspended, and under the Federal statute the suspension is good for the maximum period for which he might have been sentenced in the first place.

MR. CRANE: Probation means after five years he would be brought back?

MR. HOLTZOFF: After the five years he can be brought back, but he is no longer subject to the supervisor --

MR. DEAN: What can he be brought back for?

MR. GLUECK: For violation of the conditions of probation.

MR. HOLTZOFF: I think I would rather read you

the exact statute. It is very short.

MR. DEAN: He could always be brought back if he commits another crime. I think five years is the tops, as I recall it.

MR. HOLTZOFF: Five years is the tops, but Section 725 provides: "At any time after the probation period, but within the maximum period for which a defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

MR. CRANE: But then what is the probation?

MR. HOLTZOFF: The probation supervision may not last more than five years, but the suspension of the sentence is a suspension for the entire period for which sentence might have been imposed in the first place.

MR. GLUECK: In other words, Judge, you can be on a suspended sentence without being under probation supervision.

MR. CRANE: That explains it. That means during this five years he has to comply with the rules and regulations of probation. After five years he is free of that, but in the discretion of the judge he may be sentenced.

MR. HOLTZOFF: Yes, that is right.

MR. CRANE: Do you think that is clear? It is all right as you explain it to me. It is clear enough.

THE CHAIRMAN: I doubt if anyone not versed in the intricacies of the Federal probation system reading this rule will get it.

MR. HOLTZOFF: I am afraid not.

THE CHAIRMAN: I think we should strike the whole rule out.

MR. DEAN: Once having stepped into it I think we should.

MR. HOLTZOFF: I have another alternative for that. Instead of doing that, "the imposition or execution of sentence may be suspended and the defendant placed on probation as provided by Act of Congress," instead of inserting the whole probation statute.

MR. LONGSDORF: Yes, that is all right.

MR. HOLTZOFF: And omit the last sentence.

MR. ROBINSON: It might be a good idea. An Act of Congress may include possible legislation that may result from Judge Parker's committee.

MR. WECHSLER: Why not say "as provided by law"?

THE CHAIRMAN: And omit the last sentence?

MR. WECHSLER: Yes.

MR. HOLTZOFF: I so move.

THE CHAIRMAN: It is moved and seconded that the last sentence be stricken and the words "as provided by law" be added to the sentence on line 45. All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No"?

(No response.)

THE CHAIRMAN: So ordered.

MR. SEASONGOOD: Is there any reason why you put that limitation of withdrawing the plea in it? I had a case in the Sixth Circuit where a man pleaded guilty, and upon sentence, and after the case had been affirmed in the Court of Appeals, he was allowed to withdraw his plea. He said he had been imposed upon, as he testified, by the prosecutor.

MR. ROBINSON: That is the present Criminal Appeals Rules in effect. That is Criminal Appeals Rule 2, subdivision (4). "A motion to withdraw a plea of guilty shall be made within ten days after entry of such plea, and before sentence is imposed." That is as amended in 1938.

MR. WECHSLER: If the plea were involuntary it would be vulnerable on habeas corpus.

MR. MEDALIE: You say the court amended the rule. What was it before amended?

MR. ROBINSON: My understanding is -- I do not have it before me --

MR. MEDALIE: But this was an amendment, as you say.

THE CHAIRMAN: No, that is not it, is it?

MR. HOLTZOFF: I don't think there was any change in that.

MR. MEDALIE: That is my impression.

MR. ROBINSON: There is an amendment in this Rule 2 in 1938.

MR. HOLTZOFF: Not on sentence.

MR. ROBINSON: The amendment clause is stated right there.

MR. MEDALIE: If it had been previously amended by the court why cannot the court amend it again on our recommendation?

MR. HOLTZOFF: The 1938 amendment related to another provision. This provision is the original provision as it was. The provision Mr. Robinson read is the same as it was in the original rules.

MR. MEDALIE: Whatever it is, the fact is the court is open to suggestion on the basis of experience, and if we call to the court's attention what has just been called to our attention by Murray it may well be they will agree with this.

MR. WECHSLER: The question is whether it is desirable to provide for withdrawal of the sentence. My own feeling is any real abuse would be reached on habeas corpus, and we ought to leave it there.

MR. YOUNGQUIST: I think that. It is going very far to say they may withdraw the plea after sentence.

MR. SEASONGOOD: There is a reported case. I am certain of it. I don't remember whether he brought it up on habeas corpus, but they decided he should have been allowed to withdraw his plea of guilty in the court of appeals, and they sent it back for that purpose, to allow him to withdraw his plea.

MR. HOLTZOFF: But doesn't it hold he should have been allowed to withdraw his plea of guilty before he was sentenced? The matter came before the Circuit Court of Appeals after the sentence, but the Circuit Court of Appeals held he should have been allowed to withdraw the plea before he had been sentenced.

MR. CRANE: I do not think you can provide for everything. You never know what is going to happen in the future. Now there were three men convicted of an attempt to commit robbery. The trouble was when they got near the bank the cashier with the money never showed up, and they were tried and convicted, and the conviction affirmed by the Appellate Division. Two of them appealed.

The third man did not appeal, and went to Sing Sing for a very long time. When it came before our court we reversed it, and I wrote the opinion. We reversed on the ground there was no attempt to commit a crime proved. So they were, of course, out. What happened to the man who had never taken his appeal? You could not allow that man to stay in jail because there was nothing to do for him, and nobody to represent him, so I put in the opinion that application should be made to the Governor to act as to this man, and Governor Smith acted at once and pardoned him. I do not think we should make rules for all these things. You cannot do it.

THE CHAIRMAN: Is there a motion on?

MR. SEASONGOOD: I wish the Reporter would look up that case in the Sixth Circuit Court of Appeals. It is within the last three years.

THE CHAIRMAN: I think we still have to vote on 30(f). All those in favor of 30(f) as amended say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: All those opposed say "No".

(Chorus of "Noes".)

THE CHAIRMAN: The motion is carried.

MR. WECHSLER: There is something missing in Rule 30. What is missing is the judgment part of the

rule, which is entitled "Sentence and Judgment". There is not anything on the imposition of the judgment or what the judgment is, and there is not the usual provision for allowing the defendant to state reasons, if any there be, why sentence should not be imposed upon him. That is the traditional point at which the defendant gets a chance to say what he has to say on his own behalf.

MR. BURNS: You mean after pleading guilty?

MR. WECHSLER: Yes, after conviction or a plea of guilty.

MR. ROBINSON: The Supreme Court left that out, and the question is whether we should recommend what they left out.

MR. BURNS: Is there any legal significance to "judgment" as a word of art that requires as to deal with that specifically?

MR. MEDALIE: You have this: there is a confusion of words. You say a man is convicted. You say it because the jury found a verdict of guilty. But he has not been convicted. There is simply a verdict against him.

THE CHAIRMAN: Isn't that the reason their authority only extended to rules after judgment?

MR. HOLTZOFF: No, after verdict.

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MR. CRANE: Haven't you got it there in 30 (a)? It says that the judgment shall be signed by the judge who imposes sentence.

MR. WECHSLER: It does not say what the judgment is.

MR. DEAN: I think the confusion flows out of the fact that when the verdict is in the only thing we have left is sentence, and then the judge gets up a written judgment and commitment, which is what we were speaking about, but I would not use the term "judgment".

MR. MEDALIE: That is right. The judgment is a document or court record embodying the verdict or a finding of guilty, and also deciding what to do with it, - that is, suspending sentence, fining, imprisoning, or death, or all of them.

MR. DEAN: We have one of the forms circulated, Form 11, where we attempt to get up a form of judgment and commitment. That is a written recitation of what transpired. There should be a written judgment.

THE CHAIRMAN: May we have a motion covering your point, Mr. Wechsler?

MR. WECHSLER: If I know what the motion should be, Mr. Chairman, I would unhesitatingly make it.

THE CHAIRMAN: Give us the substance.

MR. CRANE: Rule 30 (a) says the judgment shall

be signed by the judge. Do you mean define what the judgment is?

MR. MEDALIE: Well, there are two kinds of judgments: One is a judgment of conviction and the other is a judgment of acquittal. Each is a judgment. As a matter of fact, the judgment of acquittal has to be signed by the judge and entered.

MR. CRANE: It says in lines 12 and 13: "If the defendant is found not guilty or is for any reason entitled to be discharged judgment shall be entered accordingly."

THE CHAIRMAN: If that is there, the only thing you need is the provision with respect to the right to be heard before sentence.

MR. MEDALIE: You think we have sufficiently defined judgment by the last two --

MR. HOLTZOFF: Just a minute. It says: "The judgment setting forth the sentence shall be signed by the judge who imposes sentence and shall be entered by the clerk." Isn't that enough of a definition?

MR. MEDALIE: All right, I am satisfied.

THE CHAIRMAN: Now, the only thing you need is the provision with respect to the right to be heard before sentence.

MR. WECHSLER: Well, maybe if that were changed

to read: "The judgment shall set forth the verdict or finding and the sentence, if any, and shall be signed by the judge who imposes the sentence and shall be entered by the clerk," it would be better.

MR. McLELLAN: Shall set forth the what?

MR. WECHSLER: The verdict or finding.

MR. McLELLAN: Would that include a plea of guilty?

MR. WECHSLER: No.

MR. MEDALIE: That is right. That is not provided for.

THE CHAIRMAN: Your motion now, Mr. Wechsler, is what?

MR. WECHSLER: My motion was that there be included in Rule 30 a definition of a judgment and also a provision according the defendant a right to be heard before sentence is imposed.

MR. HOLTZOFF: But don't you think there is enough of a definition there?

MR. WECHSLER: I am uncertain about that. I thought the Chairman asked to have the full thing stated.

MR. GLUECK: Herbert, as to the first part you suggested: "The judgment shall set forth the verdict" - and what else?

MR. WECHSLER: I said "the verdict or finding";

and Judge McLellan properly pointed out that that would not cover a plea of guilty.

MR. GLUECK: What do you have in mind?

MR. WECHSLER: In a case where a jury is waived. That is the language of the act, verdict or finding to cover the jury-waived case.

MR. GLUECK: I move that that amendment be adopted, Mr. Chairman.

MR. McLELLAN: Seconded.

THE CHAIRMAN: May I have it stated again?

MR. GLUECK: Line 10 of section (a) should read -- do you want to state it, Herbert?

MR. WECHSLER: Yes. "The judgment shall set forth the verdict or finding and the sentence" --

MR. HOLTZOFF: Suppose it is a plea of guilty?

MR. WECHSLER: Well, that is Judge McLellan's point. I have not covered that. I wanted to give you what I had.

THE CHAIRMAN: State it, will you, please?

MR. GLUECK: "the verdict or finding of guilty"?

MR. HOLTZOFF: No; "the verdict or finding".

MR. BURNS: How about "plea of guilty, or verdict or finding"?

MR. WECHSLER: The other way; "verdict or finding or plea of guilty".

MR. MEDALIE: You still haven't got it covered, because you can have a judgment without a plea. You see, it is necessary to define "judgment" in full detail so that you provide for a proper record.

MR. DEAN: It should set forth the plea, we all agree, whether it sets forth anything else or not. It should also set forth the verdict or finding.

MR. YOUNGQUIST: Why not say, "It shall set forth the plea, verdict or finding of guilty"?

MR. DEAN: "the plea, verdict or finding".

MR. MEDALIE: You have got three possible judgments: One is a judgment of guilty; the other is a judgment of not guilty; and the other is simply a judgment getting rid of the indictment without a finding or judgment of guilty or innocent.

MR. YOUNGQUIST: That is taken care of in lines 13 and 14.

MR. MEDALIE: You mean "for any reason entitled to be discharged"?

MR. YOUNGQUIST: Yes.

MR. BURNS: Why doesn't that take care of all of them?

MR. WECHSLER: That only covers the case where the defendant is found not guilty.

MR. BURNS: No; here it says: "If the defendant

is found not guilty or is for any reason entitled to be discharged judgment shall be entered accordingly."

MR. WECHSLER: How about the case where he is not entitled to be discharged?

MR. BURNS: That will be taken care of by "plea or finding".

THE CHAIRMAN: Is that all we really need to provide for?

MR. WECHSLER: No. We have got to change the sentence on line 10 to read: "The judgment shall set forth the verdict, finding or plea of guilty."

MR. YOUNGQUIST: Will you state that again, please?

MR. WECHSLER: All right. "verdict, finding" --

THE CHAIRMAN: Wait. I would like to get that full sentence.

MR. CRANE: Before you do that, may I just say a word about that?

THE CHAIRMAN: Pardon me.

MR. CRANE: I was just thinking whether that is broad enough. Have you got all these various defenses that may be raised? Would a judgment also include those?

MR. WECHSLER: Oh, that is covered, Judge Crane, by the second sentence. That is, whenever the defendant gets off, the end of line 12 is broad enough to cover it.

So we only have to cover the cases where the defendant does not get off, where a sentence is imposed.

THE CHAIRMAN: Now can we get that sentence stated?

MR. YOUNGQUIST: May I suggest something which I think would clarify it? Could we start out with: "The judgment of conviction"?

THE CHAIRMAN: Let us get the motion restated so we can put the question.

MR. WECHSLER: "The judgment of conviction shall set forth the plea, verdict or finding,and sentence, and shall be signed by the judge who imposes sentence."

MR. HOLTZOFF: We omitted "who imposes sentence."

MR. WECHSLER: "shall be signed by the judge and entered by the clerk."

MR. HOLTZOFF: I think that would do it.

THE CHAIRMAN: Yes. Now do you want to give us the other sentence about the right to be heard?

MR. MEDALIE: Wait. Is the next one all right?

MR. WECHSLER: Yes.

MR. ROBINSON: I believe there is a defect there which Gordon Dean and the rest of us on the Committee on Forms have corrected in the form of judgment and commitment. That is, there has to be an adjudication; before they ever set forth the conviction itself, there

must be an adjudication of guilty by the court following the imposition of sentence. So I suggest the word "adjudication" be stated there. That is, "The judgment of conviction shall set forth the plea, verdict or finding of guilty, adjudication of guilty", because until the court accepts a verdict and enters up a judgment or imposes sentence, there is no really final --

THE CHAIRMAN: But isn't that done by the very act of entering judgment?

MR. ROBINSON: No. That is, when the court calls the defendant to the bench or wherever he is placed for sentencing and says, "The verdict has been returned; I adjudge you guilty" - then there should be an opportunity given to state why sentence should not be imposed --

MR. WECHSLER: Mr. Chairman, may I suggest that this go to the Committee on Style in connection with including everything that ought to be in the judgment?

THE CHAIRMAN: Yes. You want to put in also this other thought about the right to speak your piece.

MR. WECHSLER: Yes.

THE CHAIRMAN: May I suggest further that the whole paragraph should be rearranged in chronological order, because you have got your sentencing in the first sentence, and certainly the act of entering the judgment should precede that.

MR. ROBINSON: That is right.

MR. McLELLAN: What was that you last said, Mr. Chairman?

THE CHAIRMAN: I said to rearrange this paragraph so that we have it chronologically.

MR. McLELLAN: What did you say should precede something else?

THE CHAIRMAN: The act of entering the judgment. Wouldn't that come first?

MR. DEAN: The written judgment usually contains a recital of the punishment.

THE CHAIRMAN: I beg your pardon?

MR. DEAN: The written judgment usually contains a recital of the punishment. But might it not be well to have a separate section in Rule 30 called "Judgment" and made section (g)?

THE CHAIRMAN: Leaving the first for "Sentence"?

MR. DEAN: Leaving the first for "Sentence", because everything else that we discussed is prejudgment, really.

MR. CRANE: May I ask one other question which occurs to me which exists in state practice which is not here. Is it possible now for the judge to sentence immediately after the verdict of guilty?

MR. SETH: Yes.

MR. CRANE: Some states require that you cannot do it inside of two days, to give the defendant a chance to at least speak to the judge or state anything, if there is anything in his favor, regarding the sentence.

MR. YOUNGQUIST: Some are anxious to get the sentence imposed and begin serving the term.

THE CHAIRMAN: Won't this be covered by this right to a hearing before sentence?

MR. CRANE: No. This says the judge shall direct sentence at once, in 30 (b).

MR. HOLTZOFF: Of course, Judge, I know that they do this in many cases. In these run-of-the-mine cases in the rural courts, where a court sits for a few days, they generally do not have the interval. They would not have time for it.

MR. MEDALIE: There are so many cases right here in New York, Food and Drug cases, and other cases, many of which are only mala prohibita. The district attorney wants to get through with it, the Government wants to get through with it; there is complete unanimity on it. They do not want delay.

THE CHAIRMAN: I take it then that this will be divided into two sections, (a) dealing with sentence, and (b) dealing with judgment, and incorporate all these various suggestions.

Rule 31 (a).

MR. LONGSDORF: Mr. Chairman, there are five words at the end of line 4, "errors therein at any time." I think that ought to be clarified.

MR. YOUNGQUIST: "at any time" ought to come at line 2.

MR. LONGSDORF: What kind of errors?

MR. YOUNGQUIST: You have got to take it in two bites. If you put "at any time" at the end of line 2, then you have got your proper order.

I have the same question about errors that Mr. Longsdorf has.

MR. LONGSDORF: You can't correct errors of law after the judgment has passed out of his control.

MR. YOUNGQUIST: I thought (a) was intended to deal with clerical mistakes. I don't remember how "errors" got in there; do you?

MR. LONGSDORF: No.

MR. BURNS: I move that the sentence be worded to end with the word "record" in the fourth line.

THE CHAIRMAN: And the words "at any time" go up to line 2?

MR. SEASONGOOD: You may be interested to hear the civil rules. 60 (a). It is headed "Clerical Mistakes." It reads: "Clerical mistakes in judgments, orders, or other

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parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

MR. YOUNGQUIST: I move we adopt the civil rulein the case of 31 (a).

MR. HOLTZOFF: What is the number of the civil rule?

MR. SEASONGOOD: 60 (a).

MR. ROBINSON: This was our revision, of course, at the previous meeting of the Committee.

MR. DEAN: Was it changed in the draft we had?

MR. ROBINSON: Not at all. The sentence is exactly the same. I will read from Tentative Draft 5, if you wish. Our rule in Tentative Draft 5 is really 46 (a):

"Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein may be corrected by the court at any time."

That is the way we worked it out before modifying the civil rule, in those words.

MR. HOLTZOFF: I am inclined to believe that perhaps the safest and best thing is to adopt the civil rule in accordance with the motion just made.

THE CHAIRMAN: The motion is made that we adopt

in place of Rule (a) the civil rule, which reads as follows:

"CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Are you ready for the motion?

MR. McLELLAN: Yes.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any suggestions on Rule 31 (b)?

MR. DESSION: One suggestion, Mr. Chairman: I want to call your attention to the sentence beginning on line 7, which reads: "This rule does not limit the power of a court to entertain a motion or proceeding to modify or vacate a judgment or order."

Now, as you read this paragraph it sounds like a contradiction in terms. We first lay out a restriction of six months in which a motion may be made to vacate or modify a judgment. Then we say: "This rules does not

limit the power of a court to entertain a motion or proceeding to modify or vacate a judgment or order."

Now, the meaning is clear, I think. In the civil rule a substantially similar proviso was inserted in the corresponding provision. The purpose of it in the civil rule was to preserve whatever powers a court had by way of coram nobis, by way of inherent power generally. They did not want to abolish this, and they either did not want or could not agree on how to spell it out. Now, we have done the same thing in this draft. Maybe it is the best way to do it. If we want to spell it out and avoid what looks like a contradiction in terms here, then I propose we spell it out and outline it on page 7 of the note to this rule. I proposed there what would be a new paragraph (c) to this rule, and if we did something like that, we should then strike out this sentence.

THE CHAIRMAN: Strike out the sentence on line 7?

MR. DESSION: That is right. Now, I am not at all sure which way is best, but I think we should consider those alternatives.

MR. YOUNGQUIST: In studying line 7 I had thought that it might be taken care of by adding at the end of the sentence the words "on other grounds."

MR. BURNS: Could you reach a middle ground by limiting that sentence beginning on line 7 to the power of

the court to consider these matters of its own motion? If matters are called to the attention of the court not formally by motion it may act then if the six months have passed; but within the six months it must act on the motion.

MR. DESSION: I might add that the new proposal is, I think, about this: It spells out the kinds of grounds on which the writ of coram nobis is issued, and I think it goes a little beyond some of them. In some of the decisions you find a limitation to what they call extrinsic fraud, and here I have simply put fraud.

THE CHAIRMAN: Mr. Dession, will you put your suggestion in the form of a motion so we can have it specifically before us?

MR. DESSION: I move that the proposed new paragraph (c) be inserted after (b) there, and that the sentence beginning on line 7 be stricken out in paragraph (b).

MR. LONGSDORF: Seconded.

THE CHAIRMAN: Is there any discussion?

MR. SEASONGOOD: Is that motion to strike out (c) and substitute (b)?

THE CHAIRMAN: No. The motion is to strike the sentence in (b) which begins on line 7 and runs through most of line 9, and to substitute for that the new section called (c) which begins on page 7 of the Note to Rule 31,

and to insert that beginning at line 16.

MR. HOLTZOFF: I would like to ask Mr. Dession a question about that. You speak of vacating or modifying a judgment or order on the ground of duress or fraud. How can a judgment or order be entered by duress? I do not visualize that kind of a situation.

MR. DESSION: Well, I am not thinking so much of duress on the court as duress on someone who either acted or failed to act before that court as a result of the duress.

MR. HOLTZOFF: How would that be? Could you give me a suppositious case? I would like to visualize the type of situation.

MR. DESSION: Oh, a defendant might be scared while in custody by being told what was going to happen to him if he did not plead guilty.

MR. BURNS: Take, for example, "Murder, Inc." and those intimidation cases. The duress there was not on the court.

MR. HOLTZOFF: But it speaks of vacating a judgment or order on the ground of duress or fraud. The way it is worded one would think the duress was practiced on the court. I think the language is certainly deceptive.

MR. DESSION: No, I do not think so. Duress does

not modify judgment. Duress is a ground.

MR. HOLTZOFF: The vacation may be made on the ground of duress? Duress against whom?

MR. YOUNGQUIST: I do not think that is very serious; but is it intended by this new paragraph (c) to give a new remedy?

MR. DESSION: I do not think so entirely. I think, coram nobis, at least, in some jurisdictions, has been available where you have had some kinds of fraud.

MR. YOUNGQUIST: May I pursue that a little further? My understanding of the sentence that begins on line 7 of 31 (b) was that it was intended only as a precautionary statement, that the fact that judgments and orders may be vacated for mistake, and so forth, should not be construed that they might not be vacated for some other purpose; and that was why I made the suggestion to add that sentence at the end of it the words "on other grounds."

MR. DESSION: Yes.

MR. YOUNGQUIST: Now, as I understand it, you are proposing that we state affirmatively the right to vacate on something that we have not treated of before?

MR. DESSION: That is correct, yes.

MR. HOLTZOFF: I am inclined to think that is a new remedy. In other words, the defendant could come in at

any time, years afterwards, and say, "Now, I was induced by misrepresentation to plead guilty and I move to vacate the judgment."

MR. WECHSLER: The question is now pending in the Supreme Court as to whether the writ of coram nobis is available in average practice.

MR. DESSION: That is right. It is a difficult question. Now, we can handle this in one or two ways: We cannot attempt to sketch out just what the error is in this kind of relief --

MR. BURNS: Excuse me. Don't the words "prejudicial irregularity" give the court plenty of scope to give relief without spelling it out?

MR. DESSION: It might very well.

MR. HOLTZOFF: I like your proposal of a sentence on line 7 as modified by Mr. Youngquist in preference to this new rule. In other words, preserve whatever power the court has.

MR. YOUNGQUIST: It does not take anything away.

THE CHAIRMAN: We have a motion. Shall we dispose of that? The motion to strike the sentence on lines 7 to 9 and add, as a new paragraph (c), the language on page 7 of our note.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All in favor of the motion show hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 4 opposed.)

THE CHAIRMAN: The motion is carried.

MR. McLELLAN: Does that mean that (c) goes in?

THE CHAIRMAN: (c) goes in.

MR. GLUECK: Does (c) go in with duress or fraud?

MR. LONGSDORF: Well, I understand that the general powers which the court may now have --

MR. SEASONGOOD: Pardon me, before you go to that, I would like to take up the first sentence of (b). I do not understand what that means myself.

THE CHAIRMAN: The first sentence of (b)?

MR. SEASONGOOD: Yes.

THE CHAIRMAN: Yes?

MR. SEASONGOOD: It may have some bearing. It states: "The court may modify or vacate a judgment or an order entered through mistake, inadvertence, surprise, or neglect."

Well, whose is it? Defendant's? If you will look at the civil rule you will find that it reads:

"On motion the court, upon such terms as are

just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

It is not the court's neglect. Whose neglect is it? It cannot be the prosecution.

THE CHAIRMAN: Isn't that provided for?

MR. DEAN: Well, it should say whose neglect, certainly.

MR. HOLTZOFF: I move that we substitute the corresponding sentence of the civil rule for this.

MR. SEASONGOOD: I am not sure that it is appropriate.

MR. YOUNGQUIST: Will you read it again, please?

MR. SEASONGOOD: "MISTAKE; INADVERTENCE; SURPRISE: EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

MR. YOUNGQUIST: Well, you would not want anything in it about "upon such terms as he may deem just", I would not suppose, nor would you want a reference to a legal representative. Otherwise I think it fits the case.

THE CHAIRMAN: Do you want to reread that in the

form in which you recommend it?

MR. SEASONGOOD: I do not recommend it.

MR. YOUONGQUIST: I am more reckless than Murray. I will make this motion, Mr. Chairman, that we substitute the following for the first sentence in 31 (b):

"On motion the court may relieve a defendant from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

MR. ROBINSON: Why don't you go ahead, Aaron? Do you think the rest of it is inappropriate too? We adopted (a), you see, or the Committee did. How far do you want to go with (b) of the civil rule?

MR. WECHSLER: What sort of thing would that cover in a criminal case?

MR. DEAN: That is what I am trying to figure out.

MR. HOLTZOFF: I think a judgment on a bail bond.

MR. DEAN: Suppose you have a judgment of acquittal --

MR. YOUNGQUIST: I said "a defendant".

MR. DEAN: You corrected it, yes.

MR. WECHSLER: Suppose the defendant had a defense that he failed to interpose?

MR. BURNS: Inadvertently; but through neglect it

was not excusable.

MR. MEDALIE: Well, that is not covered by coram nobis, is it?

THE CHAIRMAN: Just a minute. Does your motion stop at that point, Mr. Youngquist?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: You have heard the motion to substitute the language from Civil Rule 60 (b), first sentence, in place of the first sentence of the present 31 (b) of our draft.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Now, where do we move from there?

MR. WAITE: In line 9, Mr. Chairman, the sentence beginning with the last letter there - "A motion prescribed by this rule does not affect the finality of a judgment or suspend its operation."

Now, I cannot find any motions that are prescribed by this rule. I wonder if that was meant to be "permitted".

MR. HOLTZOFF: Yes, that should have been "permitted".

MR. DEAN: Aaron, what you have just read - does that start out "On motion"?

MR. YOUNGQUIST: I think so, yes.

MR. MEDALIE: Mr. Chairman, will someone tell me how you enter a motion through surprise?

MR. WECHSLER: A judgment.

MR. MEDALIE: Well, how do you enter an order or a judgment through surprise? I do not get that. I am having an awful lot of trouble with this because this is the one thing in all the rules I do not visualize. It sounds to me like a lot of words, and I cannot follow it.

MR. WECHSLER: Suppose a defendant failed to make one of the motions required by Rule 12 within the time required because he did not have a lawyer, or because the lawyer was a fool? Is that the sort of thing that might be covered by it?

MR. DEAN: Conceivably, except we have provided for lawyers and everything else.

THE CHAIRMAN: May I suggest in line 10 that the words "prescribed by" might well be supplanted by the word "under"? It would read "a motion under this rule"

MR. ROBINSON: Yes.

THE CHAIRMAN: That is accepted by the Reporter, unless there is an objection.

Are you ready for the question on the section?

MR. MEDALIE: Mr. Chairman, I am not ready, and I want to state - this is a complete confession of ignorance - I do not know what you are talking about. I still cannot visualize this business.

MR. HOLTZOFF: I think Mr. Dession did some work on this.

MR. MEDALIE: Did you?

MR. DESSION: And not on that particular section.

MR. WECHSLER: Mr. Chairman, it occurs to me that George Dession's alternate (c), which was adopted by the Committee, meets everything that might conceivably come under (b); and therefore, if the motion is in order, I move to strike (b) and to substitute therefor what George had as (c) and what the Committee has previously accepted as (c).

MR. BURNS: Don't you put any time limits in (c)?

MR. WECHSLER: That is a separate question.

MR. YOUNGQUIST: There is a time limit in (c), but are we not to put a time limit in (b)?

MR. WECHSLER: I suggested the elimination of (b).

MR. YOUNGQUIST: Entirely?

MR. WECHSLER: Yes, on the theory that it had no application.

MR. HOLTZOFF: I wonder if you are right about that. (c) is limited to duress, fraud, or prejudicial

irregularity.

MR. WECHSLER: Nobody has been able to think of a thing to which (b) might apply.

MR. HOLTZOFF: Yes, I can think of an unusual case. Judgment by default against a surety on a bail bond.

MR. WECHSLER: That would not even be covered.

MR. DEAN: That is a civil proceeding.

MR. HOLTZOFF: That is right.

MR. YOUNGQUIST: I think it would clarify it, perhaps, if we read the rest of Civil Rule 60 (b). The first sentence is the one we adopted: "On motion the court may relieve a defendant from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The civil rule then continues as follows: "The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

That is substantially the last sentence of our present (b). Then it goes on: "A motion under this subdivision does not affect the finality of a judgment or suspend its operation." That is the sentence beginning on line 9 of our present (b).

Then the civil rule continues as follows: "This

rule does not limit the power of a court to entertain an action to relieve a party from a judgment, order, or proceeding," and so forth, and various other things; and that would be the equivalent of the sentence that begins on line 7 of the present (b). I think that (b) as we have it is what we intended to make it; there may be some corrections or adjustments in it; and the only question is whether we shall add to it what George Dession has suggested.

MR. WECHSLER: Isn't the civil rule, Aaron, designed to deal primarily with default judgments?

MR. YOUNGQUIST: With what?

MR. WECHSLER: Default judgments.

MR. YOUNGQUIST: Oh, no. Mistake, inadvertence, surprise, or excusable neglect.

MR. WECHSLER: No; but isn't the evil they were shooting at defaults, default judgments entered --

MR. YOUNGQUIST: That would be included, of course, but certainly not limited to that.

MR. BURNS: You are talking, it seems to me, about a situation where the error, or mistake, or the inadvertence, or surprise, was such that the defendant should be relieved from it, and that he also be relieved from any sentence that has been imposed. Otherwise I see no point to it. If it is just correcting minor errors in

judgment, it seems to me we take care of that in another rule. So you have to assume that this goes right to the very guts of the issue, - the Government against X. Now, if so, why do we need anything except (c), which takes care of it by a general clause - "prejudicial irregularity"? I think all we have to do is to add a time limit to (c).

MR. YOUNGQUIST: What is prejudicial irregularity?

MR. BURNS: That is for the court to decide.

MR. DEAN: Anything you can get in in a motion for a new trial. The court may grant a new trial to the defendant whenever required in the interest of justice. Now, why isn't every conceivable irregularity covered by a motion for a new trial?

MR. WECHSLER: Doesn't that have a time limit?

MR. DESSION: Yes, a very short one. We have got two problems here, I think. The one that George raises - that is, is this language in the first sentence of (b) applicable in criminal cases? The second problem is, what kind of relief do we want to give with no time limit?

MR. YOUNGQUIST: We did make provision in some rule - we have not come to it yet --

MR. WECHSLER: Newly discovered evidence?

MR. YOUNGQUIST: That was it. That that may be raised at any time. Now, are we going to extend that to

everything that might be called a prejudicial irregularity?

MR. BURNS: Isn't there some limitation on it? Do we record it down through the corridors of time?

MR. DESSION: So far as the writ of coram nobis has been used in the state courts and possibly in the Federal courts, there is no time limit. Now, just what that covers in Federal practice is not clear today.

MR. DEAN: It is the only remedy you had left, though, isn't it?

MR. DESSION: That is right. I think that is the only one.

MR. BURNS: I wonder if that should not be left to the pardoning power. It seems to me very undesirable to have the court retain the power, years after the witnesses may have died, to litigate the issue of even prejudicial error in the trial.

MR. WECHSLER: The difficulty, Judge, is that the pardoning authority cannot grant a new trial; and if this were properly worded it would be possible to grant a new trial. I should like to see (c) when we come to (c) qualified in some way so that it will be available only to avert gross miscarriages of justice; some general qualification of some sort. Then, it seems to me, it would be the escape valve that you need and have not had traditionally; and the writ of coram nobis has always been

resurrected to try and provide for the usual complicated litigation when that attempt is made.

MR. BURNS: Why complicate that very important issue of policy with phases drawn from the civil rules, with inadvertence, surprise?

MR. WECHSLER: Well, I am saying that we get our real problem when we start working on (c).

MR. McLELLAN: If you could get rid of (b) and (c) both, it would be nice.

MR. DEAN: Would it clear the deck if we knocked out both? If so, I so move.

MR. BURNS: I second it.

THE CHAIRMAN: The motion now, after a thorough debate, is to strike out 31 (b). All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

I assume now the motion is to reconsider 31 (c).

MR. WECHSLER: That is, the new 31 (c)?

THE CHAIRMAN: The new 31 (c).

MR. HOLTZOFF: You were going to propose a limitation.

MR. WECHSLER: I move that it be reconsidered.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: The motion is carried.

Now, do we have a new 31 (c)?

MR. WECHSLER: I move, Mr. Chairman, an amendment to 31 (c) as proposed by Mr. Dession, as follows:

"The motion shall be made with reasonable diligence after discovery of or convenient opportunity to assert the ground." That is the present language. I move to add these words: "and shall only be granted to avert gross miscarriage of justice."

MR. MEDALIE: Any miscarriage of justice is gross. I do not think there are gradations.

MR. HOLTZOFF: I will agree with that. Leave out the word "gross".

MR. BURNS: If there has been duress, fraud or prejudicial irregularity, there has been a miscarriage of justice.

MR. HOLTZOFF: Not necessarily. The result may not have been.

MR. GLUECK: How about "clear miscarriage of justice"?

THE CHAIRMAN: I think "miscarriage of justice" would be just as good.

MR. WAITE: As the rule stands, does it mean that the court, before it grants the new trial, must find that there was fraud, or that it shall grant the new trial on an allegation of fraud or a miscarriage of justice?

MR. HOLTZOFF: No.

MR. WAITE: That is going to make quite a difference.

MR. WECHSLER: Of course, I do not mean that it should be done on motion, merely on motion.

MR. WAITE: I am just wondering what it does mean. I am perturbed about that, trying to make up my own mind.

THE CHAIRMAN: There is nothing in this rule about a new trial.

MR. SEASONGOOD: That comes later in (d).

MR. WAITE: "may vacate or modify the judgment,"- I assume that would amount to perhaps granting a new trial.

THE CHAIRMAN: I do not see it.

MR. WECHSLER: I think we ought to add another thing, - "upon such terms as may be just."

MR. BURNS: That is in the rule, and it seems to me that is drawn from civil law thinking. What terms

can you impose? Something about a speedy trial? After all, the question is guilt or innocence.

MR. YOUNGQUIST: I think what you are doing is saying that if there is a prejudicial irregularity which the particular judge may think to be such, the defendant may come in after his conviction, after the affirmance by the circuit court of appeals, and before the Supreme Court, and move to vacate the judgment under which he was sentenced, leaving it open for all time; and you are not providing a definition or a guide for the court in his application of that rule. It will just make a big mess.

MR. WECHSLER: Mr. Chairman, may I ask Mr. Dession another question?

THE CHAIRMAN: Yes.

MR. WECHSLER: How would it be in your view, George, to drop this controversial provision, and then to hit the problem on line 33 under motions for a new trial? We take the bold step here of preserving the motion for a new trial based on newly-discovered evidence. Now, suppose you add to that "based on the grounds of fraud or duress" - and I am not sure about other prejudicial irregularity, but let us just take fraud or duress - wouldn't that get what you want?

MR. DESSION: I think it would.

MR. WECHSLER: In that way you hit the issue of

principle, at least, by posing the question as to whether motion for a new trial on the ground of fraud or duress should not be available without a time limit.

MR. SEASONGOOD: Doesn't a man know he has been duressed within three days after he has been convicted?

MR. WECHSLER: But he may not know anything to do anything about it.

THE CHAIRMAN: The suggestion is that we lay this new section (c), which now, after the elimination of (b), I suppose, would be labeled (b), on the table for a few minutes until we have disposed of the rest of this rule; and if there is no objection, that will be done.

Now, may we go on to Rule 31 (c) beginning on line 16?

MR. WECHSLER: But 31 (b) as it stood is out; is that right?

THE CHAIRMAN: That is right. 31 (c), as it now stands, beginning on line 16: Are there any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. YOUNGQUIST: I have a couple of suggestions there on the form of the second sentence, beginning on line 17. I think it would be better to have it read:

"The court may, without regard to whether the term of court at which the sentence was imposed has expired, reduce a sentence upon motion made within 60 days

after sentence," and so forth. That is just a transposition of words.

On line 23 I would suggest the use of the phrase "the entry" in place of "receipt". That would be the entry of the order of the Supreme Court. I do not know who receives the order.

MR. HOLTZOFF: Because the order is entered in the office of the Clerk of the Supreme Court, this refers to the receipt of the order in the office of the clerk of the circuit court of appeals; because, you see, after the order is entered in the Supreme Court denying certiorari, a copy is sent to the office of the clerk of the C.C.A.

MR. SEASONGOOD: How long is it after the entry of the order that the court of appeals receives it?

MR. HOLTZOFF: It may take a little time.

MR. SEASONGOOD: A few days?

MR. HOLTZOFF: I imagine.

MR. SEASONGOOD: You have got a definite date of entry. Why leave it to the uncertainty of the date of the receipt to begin the running of the 60-day period?

MR. HOLTZOFF: Well, I have no objection to it.

THE CHAIRMAN: Well, with that change in lines 18 and 19, are you ready for the motion?

MR. DEAN: Yes.

THE CHAIRMAN: All those in favor of 31 (c)

say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried. 31 (d).

MR. LONGSDORF: Mr. Chairman, there is a line in there about which I would like to have some information. The provision there seems novel to me. Beginning at line 26, "If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment."

If the defendant has waived trial by jury, and has had a trial by the court, does his consent go so far that he agrees to have the judgment set aside and additional testimony taken without going into that which was taken before? Does he agree to that?

MR. HOLTZOFF: This means this: Suppose he moves for a new trial after he has been tried without a jury, the court instead of granting a new trial entirely, may open upthe judgment and take additional testimony.

MR. LONGSDORF: On a fragment of the general issue?

MR. HOLTZOFF: Yes.

MR. LONGSDORF: I just wanted to know. That is the point.

THE CHAIRMAN: Are there any further questions about 31 (d)? If not, all those in favor of 31 (d) say "Aye."

(Chorus of "Ayes.")

MR. WAITE: Just a moment. I have a question. As I read it, a motion for a new trial based on the ground of newly-discovered evidence can be brought up ten years after the judgment?

MR. HOLTZOFF: That is right.

MR. WAITE: I am opposed to it. I think there should be a time limit there such as there is in many states.

MR. WECHSLER: Are we voting on (d) now?

MR. HOLTZOFF: Yes, (d).

MR. BURNS: Without, however, touching your point.

MR. HOLTZOFF: I move its adoption.

MR. LONGSDORF: Seconded.

MR. YOUNGQUIST: Are we on (d)?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: What is the meaning of the phrase in line 38, "made at any time" in view of the fact that we have the same language in line 35?

MR. HOLTZOFF: I do not think you need "made at any time" in line 38. It is redundant.

MR. WECHSLER: Could you have a period after "remand"?

MR. DEAN: Yes.

MR. SETH: Doesn't that in line 38 relateto the remand rather than to the making of the motion?

MR. ROBINSON: That is right.

MR. HOLTZOFF: Well --

MR. ROBINSON: Pardon me, Alex, may I read the Criminal Appeals Rules, Rule 2?

MR. HOLTZOFF: Yes.

MR. ROBINSON: Rule 2, paragraph (3) reads as follows:

"Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within 60 days after final judgment without regard to the expiration of the term at which judgment was rendered unless an appeal has been taken, and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases a motion may be made at any time before execution of the judgment."

MR. LONGSDORF: That is just the point. Remand for that purpose.

MR. HOLTZOFF: I think we have improved this

when we say "remand of the case." It is clear it must be remand for that purpose.

MR. LONGSDORF: But suppose you remand the case without limitation of the purpose, and then the court hears the motion and refuses it -- where does that leave you?

THE CHAIRMAN: May I ask why we need that clause in with reference to the term of court?

MR. SEASONGOOD: We do not. We have abolished that, I think.

THE CHAIRMAN: If you are going to have no term, and the time is indefinite, shouldn't that come out?

MR. DEAN: I think so.

MR. HOLTZOFF: I would like it emphasized that the judgment --

THE CHAIRMAN: Wait a minute. I think that serves the purpose. With that out the sentence would then read:

"A motion for a new trial based soley upon the ground of newly discovered evidence may be made at any time before or after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case."

MR. WECHSLER: That accomplishes one purpose of the present appeal rule, but not the other. The other

purpose is that if you want to make such a motion while the case is on appeal, you have got to make a motion to the appellate court to remand the case to the trial court for that purpose. And the object, I think, is to prevent a defendant from gambling on what the appellate court will do, holding his motion for a new trial until he gets an adjudication on the law.

MR. HOLTZOFF: But doesn't this do it? It says, "on remand of the case."

MR. WECHSLER: You would have to say, "if an appeal was pending the trial court would entertain the motion only on remand of the case for that purpose."

MR. McLELLAN: That is quite a change from granting it, isn't it?

MR. HOLTZOFF: Yes.

MR. McLELLAN: There would not be anything about remanding it, Mr. Wechsler, until the motion had been filed, and there was some indication it was going to be granted.

MR. BURNS: Under this rule, Herbert, is it true that he could still gamble by withholding the filing of his motion until after the mandate?

MR. WECHSLER: I guess the abolishing of the time limit abolishes the reason for the other rule.

THE CHAIRMAN: All right. Then, gentlemen, the

sentence would read, would it not:

"A motion for a new trial based solely upon the ground of newly discovered evidence may be made at any time before or after final judgment, but if an appeal is pending the court may entertain the motion only on remand of the case"?

MR. WECHSLER: Yes.

MR. McLELLAN: I do not know about that. Do you want to have every defendant in a position whereby, upon the mere filing of a motion for a new trial based on the ground of newly discovered evidence, he may get a remand of the case in the circuit court?

They won't give it to him unless they are satisfied he has something proper, but why not let the judge entertain the motion? Perhaps he would not have anything to say, but if the situation were such that he might say something about it, then so hold; then have the case remanded. Did you ever hear of a case on appeal remanded just because a person files that kind of motion?

MR. LONGSDORF: Judge McLellan, am I not right in my present belief that the old practice was not to remand when a motion of that kind was made but merely to grant leave to entertain it? That kept the appeal open if the motion was denied.

MR. McLELLAN: Yes, but I feel rather strongly that you don't want cases sent back from the appellate court every time someone files a motion. Let the court below point out there is something to the motion and indicate enough so a remand would follow. Why not leave the word "grant"?

THE CHAIRMAN: How would you word that sentence?

MR. WECHSLER: Change "entertain" back to "grant", and then a footnote on this will have to explain the intricacies of the practice.

MR. HOLTZOFF: I move the adoption of (d), Mr. Chairman, as modified.

THE CHAIRMAN: All those in favor of the motion, of adopting (d) as modified, say "aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed.

(One "No.")

THE CHAIRMAN: Carried with one dissenting vote. Rule 31 (e).

MR. BURNS: Should we now consider the suggestion of Mr. Wechsler that the motion as a basis for a new trial be extended to duress, and fraud, and other prejudicial irregularities, indicated in the alternative?

THE CHAIRMAN: That comes in after this.

MR. WECHSLER: I can state it in the form of a motion. It involves --

THE CHAIRMAN: First we want to get the order.

MR. WECHSLER: It involves the revision of (d), and the revision would be as follows, on line 30 instead of saying, "on grounds other than newly discovered evidence," you say, "on grounds other than those specified in paragraph (e) of this rule".

I state that only so as to indicate the drafting.

Then paragraph (e) would begin on line 33, in other words, "A motion for a new trial", then, would be a separate paragraph, and it would read as follows, "A motion for a new trial based solely upon the ground of

newly discovered evidence or upon the ground of fraud, duress, or other gross impropriety, may be made at any time." I think that is at least sufficient on that to pose the question of principle that we want to consider.

MR. ROBINSON: That would not include coram nobis.

MR. WECHSLER: I think that is coram nobis.

MR. ROBINSON: No. As I understand coram nobis, coram nobis is fundamentally a relief. Coram nobis is granted where judgment has been entered by the court under circumstances which, if they had been correctly understood or known by the court, would have caused the court not to have entered the judgment. I think that is all that coram nobis amounts to. I am not sure that is not included in the language you suggested. It would not be "fraud, duress, or other gross impropriety".

MR. WECHSLER: Coram nobis is broader than "fraud, duress or gross impropriety".

MR. HOLTZOFF: I think it is the other way.

MR. ROBINSON: That is right, it is the other way.

MR. WECHSLER: You mean it is narrower?

MR. ROBINSON: Yes. Would any court enter judgment if it believed there had been fraud, duress or

gross impropriety?

MR. HOLTZOFF: But suppose after judgment, five years later, somebody claims there was fraud, duress or gross impropriety at the time the judgment was entered?

MR. WECHSLER: But he said coram nobis would raise any matters that would have led the judge not to enter judgment in the first place. I say no judge should enter judgment in the face of fraud, duress or gross impropriety, and that seems to me to be enough to get, maybe too much, as a matter of fact, but it is clear enough.

MR. ROBINSON: This would not cover the common instances of coram nobis.

MR. OPAN: What would it cover?

MR. ROBINSON: For example, suppose it is discovered the defendant was during the trial utterly incapacitated mentally, without information or any knowledge of that whatever until after the conviction? Maybe they found he was intoxicated or otherwise mentally incapacitated.

MR. HOLTZOFF: Would that be gross impropriety?

MR. LONGSDORF: That would be an error of fact.

MR. ROBINSON: That would be a situation which would have led the court not to have conducted the trial

leading up to the judgment, but it would not have been duress, fraud or gross impropriety in any sense of the words that I am acquainted with.

MR. WECHSLER: I think you probably have me there.

MR. DEAN: It would not be covered by the ordinary motion for new trial.

MR. ROBINSON: I think the court would hold that was vulnerable; no voluntary participation of the defendant.

MR. DESSION: Would this help? The grounds are as Jim states them. Under the statute you find the scope of this is the non-observance of some condition of the criminal trial, which the court presumes to have been carried out, the non-observance of which would induce it to stay its hand. And then, in the cases, you find a distinction drawn between insubstantial irregularities and prejudicial irregularities.

MR. BURNS: We are going to get the last word on that pretty soon, aren't we? There are cases pending.

MR. WECHSLER: There are cases.

MR. BURNS: It seems to me the real objection to Mr. Wechsler's proposal is that you present a new basis for action by every convict serving a life sentence;

and if it is desirable to end controversies in the civil side of the law, it is certainly desirable to end controversies on the criminal side. And it is not as though people were without remedies, because more and more the pardoning and parole functioning authorities step into those situations where there has been a miscarriage of justice.

I think you go very far, and I am not in favor of that, when you extend the opportunity for motions for new trial on newly discovered evidence without any limitation. So for that reason, that this is just extreme and is not warranted by any showing of great abuses in the administration of criminal justice, I am against it.

MR. WECHSLER: My point of view on the other side, Judge Burns, is this: I think that under the standard law of habeas corpus which I studied, I might say, as much as anybody, that you now have reached the point where judgment is vulnerable on habeas corpus for these grounds at least and probably for more.

MR. HOLTZOFF: On habeas corpus you try the judge, the trial judge, instead of the defendant. That is what we really do now.

MR. WECHSLER: You cannot award a new trial on habeas corpus, and I really think the law has moved

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to a difficult state by reason of the passion to hold a remedy open, and I think this would take the strain off habeas corpus and would give it to you in a more regular way without anything changing.

I am not sure that even in my motion I would like to see the word "impropriety" changed to "irregularity". I am worried about that.

Do you think that would be better, George?

MR. DESSION: I do not have any great conviction about this yet. I am still worrying about it.

MR. SETH: Wouldn't error be better?

THE CHAIRMAN: Gentlemen, we have been an hour and a half on this rule.

MR. WECHSLER: I think for the purposes of the motion, Mr. Chairman, I will let it stand as "impropriety".

THE CHAIRMAN: I am, frankly, a little bit lost. (a) is adopted; (b) is stricken; (c) stands; (d) was passed.

MR. MEDALIE: Except that he wants to split (d) by putting in (e) at the beginning of line 33, which requires a change on line 30.

THE CHAIRMAN: Now may we have Mr. Wechsler's motion again, so we will all get it and then I will put the question?

MR. WECHSLER: Shall I state it?

THE CHAIRMAN: Will you, please?

MR. WECHSLER: The motion is, on line 30, strike out the words "newly discovered evidence" at the end of the line and substitute "those specified in paragraph (e) of this rule", so that the whole line will read, "based solely on grounds other than those specified in paragraph (e) of this rule".

THE CHAIRMAN: (e) is new?

MR. WECHSLER: (e) is the new (e).

3 THE CHAIRMAN: You are going to make these separate paragraphs, is that it?

MR. WECHSLER: Yes. And (d) after the word "period" on line 33. Then (e) begins at that point, and it reads, "A motion for new trial based solely on the ground of newly discovered evidence", and now I put in the new matter, "or upon the ground of fraud, duress or other gross impropriety". Everything else remains the same.

MR. LONGSDORF: Do you want the word "solely" when you have those other items?

MR. WECHSLER: I guess the word "solely" should go out. "A motion for a new trial based upon the ground of newly discovered evidence or upon the ground of fraud, duress or other gross impropriety" - I guess I do not have to repeat "upon the ground" either, as Mr. Seth says.

MR. LONGSDORF: I think you will have to keep "solely" in there somewhere in order to exclude tne possibility that motions will be offered based on newly discovered evidence and also on some of the conventional grounds for new trial.

MR. HOLTZOFF: Yes.

MR. DEAN: The other grounds are up above, you see.

MR. WECHSLER: I do not think you need "solely". I think it gets it to say that "A motion for a new trial based on the ground of newly discovered evidence, fraud, duress or other gross impropriety may be made at any time."

MR. LONGSDORF: Maybe you are right about that.

THE CHAIRMAN: Gentlemen, you have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: The motion is carried.

MR. YOUNGQUIST: May I have that motion, Mr. Chairman? I was out, answering a telephone call.

THE CHAIRMAN: The motion is to strike the words "newly discovered evidence" on line 30 and substitute at that place the special grounds alleged in line34 in old (d).

MR. YOUNGQUIST: Oh, yes.

THE CHAIRMAN: And then to begin a new paragraph at line 33.

MR. YOUNGQUIST: Yes, I have that.

THE CHAIRMAN: And then to strike out, beginning at line 34, the word "solely" and inserting on line 34, after the word "evidence" these new grounds from lines 33 and 34.

MR. DEAN: Mr. Chairman, I move we lay it on the table until the Supreme Court opinion comes down.

MR. LONGSDORF: That is a pretty good idea.

THE CHAIRMAN: I do not see how we can do that. I have waited for a Supreme Court opinion now eleven months, and I am anxious to have all these rules out of my system before very long.

MR. SETH: On the theory, Gordon, that if the court holds that coram nobis is available, you would not want to tackle it.

MR. DEAN: I would like to see that field explored by the court, as an indication of whether they would entertain such a rule. I think your present rule is too broad and I have to vote against it. But I do not feel satisfied we have completely explored this field of highly prejudicial error, which occurs later on, which I do not like to leave entirely out.

THE CHAIRMAN: Can't we provide for modifying that rule if the court says it is available?

MR. DEAN: Perhaps so.

MR. LONGSDORF: You can make sure when the Bar gets hold of these printed preliminary rules, if the Supreme Court has ruled, with respect to coram nobis, something that clashes with it, they will follow the Supreme Court.

MR. DEAN: That is true.

MR. HOLTZOFF: I am afraid if we adopt a rule we are going to horrify the Bar.

MR. YOUNGQUIST: I am horrified already.

MR. WECHSLER: Do you think it goes beyond the newly revived and elaborated habeas corpus of the last three years?

MR. HOLTZOFF: I am not sure that it does, but I think that has horrified the Bar too.

MR. WECHSLER: That has horrified the Bar but the Supreme Court has done that.

MR. SEASONGOOD: Isn't there an implication in this that it is only the Government that could do it? Isn't there an implication that only the Government could be guilty of fraud, duress or gross impropriety?

MR. WECHSLER: Surely.

MR. DEAN: Or the court.

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MR. SEASONGOOD: Yes, or the court. It is a very serious accusation, made by putting it in.

MR. WECHSLER: Not this government but some government in time to come.

THE CHAIRMAN: You have the question. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Well, you made a lot of noise, but I do not think that covers it. We will have a show of hands.

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

THE CHAIRMAN: Some people were not voting. Let us try it again. All those in favor of this motion show hands.

MR. LONGSDORF: I don't know what the motion is, so I don't want to vote.

THE CHAIRMAN: Do you want me to repeat it?

MR. LONGSDORF: I hate to ask you for it, but I don't know what it is.

THE CHAIRMAN: I am perfectly willing to do it. The motion is to strike out the word "solely" on line 30, and after the words "newly discovered evidence" --

MR. HOLTZOFF: Strike out "newly discovered evidence".

THE CHAIRMAN: Pardon me, you are right. Strike out "newly discovered evidence" on line 30 and insert in place thereof --

MR. HOLTZOFF: "those specified in paragraph (e) of this rule".

THE CHAIRMAN: "those specified in paragraph (e) of this rule", which are those cited now on page 7, and making a paragraph at the end of the sentence on line 33, and then to strike the word "solely" on 34, and to insert after the word "evidence" "and those" --

MR. HOLTZOFF: "or fraud, duress or other gross impropriety".

THE CHAIRMAN: "or prejudicial irregularity", wasn't it?

MR. WECHSLER: No, I changed that.

THE CHAIRMAN: "or other gross irregularity".

MR. HOLTZOFF: "impropriety".

THE CHAIRMAN: "impropriety". That is the motion.

All those in favor show their hands.

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

THE CHAIRMAN: The motion is lost.

Now where are we?

MR. HOLTZOFF: I think we are ready to adopt the rule as it stood.

MR. YOUNGQUIST: Now, Mr. Chairman, I would suggest that we lay that on the table until tomorrow.

THE CHAIRMAN: All right.

MR. SEASONGOOD: Let some hero draft something.

MR. MEDALIE: May I ask this --

MR. YOUNGQUIST: I think we would save time if we leave it until tomorrow.

MR. MEDALIE: Is it our intention to meet once more after the close of tomorrow's session?

MR. HOLTZOFF: No.

MR. MEDALIE: We are through for good?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Yes.

MR. MEDALIE: I think you must do something in the interim between closing these sessions and the submission of these rules to the court, and I think you have to appoint a small sub-committee - the Committee on Adjustments, I would call it - where matters will come up, which may be submitted in connection with the final draft. That is not simply a matter of the Committee on Style. It will really try to find out what it will do about a few odds and ends that we are discussing and have not attended to,

and I have in mind whatever will come up in the interim with respect to this particular Rule 31.

THE CHAIRMAN: Ought we not really to settle those things before we leave?

MR. MEDALIE: If we can.

THE CHAIRMAN: If we cannot do it now, George, we will never do it. We have had two years, and you have to draw a line somewhere. If we do not draw the line pretty soon, we are going to have this with us another full year beyond January 1944.

MR. WECHSLER: Mr. Chairman, would this be possible, that in the event of an exceptional contingency, the Sub-Committee on Style be authorized to circularize the Committee?

THE CHAIRMAN: Oh, that could easily be done, I mean, but it seems to me we ought to, very promptly after this meeting, if we can come to an agreement on the rules, to get this in the hands of the court. I do not think there should be any delay about them. We have had an interval now of, well, over half a year since our last meeting, in which time we have had a tremendous amount of research done by Mr. Robinson, Mr. Dession and the whole staff. I do not think we can drag it. I speak only as one member of the committee. I would not feel that way about it if I did not know that an awful

lot of smart country lawyers are going to take a whack at this. I would much rather they have the material available so that the Committee would have the benefit of their views as fresh minds came to play on this, delighting in finding things to criticise, than some of us who are rather tired.

MR. ROBINSON: Mr. Chairman, this is squarely on that point: This rule, that has been causing us so much trouble, covered an inordinate amount of time - I hesitate to say whether it was a day or more - of a meeting of the Sub-Committee on Style in Mr. Medalie's office. In other words, the Sub-Committee on Style has already wrestled with a large part of this. Am I not right?

MR. DEAN: Except coram nobis, we did not get into that.

MR. ROBINSON: That is so awfully hard.

THE CHAIRMAN: Not if you know what the Supreme Court is going to do.

MR. McLELLAN: If you are through with that, Mr. Chairman, may I understand what has become of (c) on page 7 of Rule 31? Is that in or out?

MR. HOLTZOFF: That is out, as I understand it.

THE CHAIRMAN: That is lost by this last motion, 8 to 7, along with present (d).

MR. McLELLAN: I knew we covered the subject matter but I did not know whether it was out.

THE CHAIRMAN: I take it we are going to ask somebody overnight to wrestle with these two sections.

I wonder, have we disposed of (e)?

MR. WECHSLER: May I just ask for my information, what is it now that remains to be wrestled with in Rule 31?

MR. HOLTZOFF: I do not think there is anything in connection with it.

MR. DESSION: I think there is this, isn't there, Mr. Chairman, we now have in sub-sections like the one in the civil rules?

THE CHAIRMAN: Didn't "new trial" go out, or did (d) stand?

MR. HOLTZOFF: (d) stands.

THE CHAIRMAN: Then I am in error, Judge McLellan.

MR. DEAN: It was laid on the table until tomorrow.

THE CHAIRMAN: I am in error in answering you. (d) in its original form stands until we tackle page 7 again.

MR. WECHSLER: I am still not clear, Mr. Chairman. What are we going to tackle 7 again for?

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MR. McLELLAN: I asked about (c). That is on page 7.

MR. HOLTZOFF: That is out.

THE CHAIRMAN: That is out, at the moment.

MR. WECHSLER: The principle of (c) is in by implication.

MR. McLELLAN: On your motion, when you put something in in lieu of it.

MR. WECHSLER: That is right.

MR. McLELLAN: But we did not pass on (c). However, it is by implication in there.

MR. WECHSLER: Yes. So what we have in 31 is (a), old (c) and old (d) and old (e), which we have not yet considered.

THE CHAIRMAN: That is right.

MR. WECHSLER: And if we do and pass (e), I think we have nothing to worry about.

THE CHAIRMAN: Is there any question on (e)? If not, the motion is --

MR. YOUNGQUIST: Just a moment. I do not want to be captious, but isn't it incomplete? First we say that the court shall arrest judgment and then we say "the motion" without saying that it is a motion in arrest of judgment, "shall be made".

MR. HOLTZOFF: You mean, say "the motion to

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arrest judgment"?

MR. YOUNGQUIST: I have suggested this, "The motion in arrest of judgment shall be made within three days after verdict or finding of guilty" - I prefer "conviction" - "or within such further time as" - conforms with similar language that we used previously - "as the court may fix during the three-day period".

MR. WECHSLER: Don't you want to state what the grounds of the motion are, which the first sentence now gives?

Perhaps that should be changed to read that "A motion in arrest" --

THE CHAIRMAN: "Such motion".

MR. WECHSLER: -- "in arrest of judgment shall be granted" --

MR. BURNS: -- "where the indictment" --

MR. HOLTZOFF: "if the indictment".

MR. WECHSLER: Yes, "if the indictment or information fails to charge an offense or if the court is without jurisdiction of the offense charged".

MR. ROBINSON: You will notice the construction of the subdivisions, each of them starting out with what the court may do, "the court may modify or vacate a judgment"; "the court may correct an illegal sentence"; "the court may grant a new trial"; "the court shall arres

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judgment".

MR. WECHSLER: That is all right. I am not troubled by it as it stands.

THE CHAIRMAN: If there is no objection to those suggestions on 42 and 44, they will be accepted.

All those in favor of the motion as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Suppose we have a five-minute recess?

MR. SEASONGOOD: Just before you do that, while we are still on this, I do not like to be crustaceous, but your caption is not correct. You have "Motions After Judgment". The civil provision is "Relief From Judgment or Order". Is that better? I should think that would be better, because you have a lot of things that are before judgment.

MR. HOLTZOFF: I think since we have motions in arrest of judgment under this heading,"Motions After Judgment" is an erroneous statement.

MR. YOUNGQUIST: Why not state what Murray suggested?

THE CHAIRMAN: What is it you suggested?

MR. SEASONGOOD: "Relief From Judgment or Order."

MR. HOLTZOFF: No; that implies judgment has been entered.

MR. SEASONGOOD: "Judgment or Order."

MR. MEDALIE: That wouldn't do it either.

MR. SEASONGOOD: Well, fix it up the best you can.

THE CHAIRMAN: "Motions After Trial."

MR. MEDALIE: That won't do it.

MR. HOLTZOFF: Why not?

MR. MEDALIE: A, clerical mistakes in orders --

MR. HOLTZOFF: That is after trial.

MR. MEDALIE: Not necessarily.

MR. ROBINSON: You have judgment in every subdivision. Why isn't it a motion after judgment?

MR. MEDALIE: You can have an error in an order before trial.

MR. HOLTZOFF: You are right. I stand corrected.

MR. SEASONGOOD: And then you will have to change it in Rule 35, where you call it the same thing, Jim.

MR. ROBINSON: What about "Final Order"? "Motion After Judgment or Final Order"? That is all you have to add, Murray.

MR. SEASONGOOD: Well, fix it up.

MR. ROBINSON: Don't you?

MR. SEASONGOOD: But whatever you fix up, you will have to cover in Rule 35, with the same title, the same heading.

(Short recess.)

THE CHAIRMAN: All right, gentlemen.

Rule 32, we can dispose of that very promptly. That has been incorporated in another rule.

Rule 33.

MR. WECHSLER: Mr. Chairman, before you go on, I would just like you to assure me I will be free to submit, as a minority opinion, the coram nobis thing that was voted down.

THE CHAIRMAN: Well, it was almost an implied obligation on your part to try to draft a rule that we would adopt.

MR. WECHSLER: No, I did not understand that.

MR. SETH: Yes, it was laid on the table.

THE CHAIRMAN: In other words, we wanted something there but we did not quite get it. Isn't that the feeling?

MR. WECHSLER: I did not understand that. I thought that the thing was voted down.

MR. GLUECK: It was voted down by one vote.

MR. SETH: I do not think it shows there was

any disagreement with the principle you advanced. There is still a desire to do something with it.

MR. YOUNGQUIST: It was voted down.

MR. WECHSLER: I understood it to be a defeat for the proposition.

THE CHAIRMAN: Will you draft something that you like?

MR. WECHSLER: I would like to submit myself the very proposition that was voted down.

THE CHAIRMAN: All right, fine.

MR. YOUNGQUIST: I have to try to write, this evening, something that was cut out of 31.

THE CHAIRMAN: 33 (a), any suggestions?

MR. LONGSDORF: Mr. Chairman, before we go down into the sub-sections of 33, I would like to suggest that we enlarge the heading of the rule, so that it shall read, "Search Warrants and Seizures."

MR. HOLTZOFF: I think that is well taken, Mr. Chairman, because it relates to seizures without warrants, as well.

MR. ROBINSON: Yes.

THE CHAIRMAN: That is accepted by the Reporter.

33 (a). The motion is to adopt. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

33 (b) (1).

MR. WAITE: I have to ask for information on that, Mr. Chairman. Let me put an impossible case. A murder has been committed and there is very considerable evidence that John Doe committed it. We have the bullet with which it was committed, and we know that John Doe has a pistol of the make and calibre and year of the pistol from which the bullet was fired. If we can get hold of his pistol in any way, it may prove that the bullet was fired from that pistol. I have never been able to figure out, under the existing law, any way by which you could legitimately get hold of that pistol.

MR. HOLTZOFF: I am afraid you cannot.

MR. WAITE: Is there anything in this sub-section which would bear on that point?

MR. HOLTZOFF: No, under this, you cannot do it, and you cannot do it under existing law. I think we were very careful not to increase the scope of seizures.

MR. ROBINSON: What about lines 14 and 16?

MR. HOLTZOFF: Oh, on lines 14 and 16, you have to show that what you are looking for, as evidence, is the pistol used in the murder.

MR. WAITE: In my case we do not know whether it has been used. That is what we want to find out.

MR. HOLTZOFF: Exactly, and I do not believe, under existing law, you could, and we intended, as I understand it, to just keep the existing law in this rule. I do not believe you could seize that pistol. Personally I believe you should be allowed to, but I think it would be a very dangerous thing, in view of the feelings people have about searches and seizures.

MR. WAITE: After we have discussed (1), (2) and (3) hereunder, then I am going to propose, for the record, a provision. I will let it go until we discuss (1), (2) and (3).

MR. WECHSLER: I have to ask a question first. Am I assured that Rule 33 (b) does not reduce the grounds upon which a warrant may be issued in time of war under the Espionage Act?

MR. ROBINSON: That is my impression. I have not studied the statute. Isn't that your idea, Mr. Dession?

MR. DESSION: I did not quite get the point.

MR. WECHSLER: I wanted to be assured, George, that 33 (b) does not narrow the grounds upon which a search warrant may be issued in time of war under the Espionage Act.

MR. HOLTZOFF: George Dession worked on this.

MR. DESSION: I don't recall working on this. Someone did.

MR. HOLTZOFF: You prepared this particular draft, I believe.

MR. ROBINSON: I think we had that checked by one of the assistants with those statutes.

MR. WECHSLER: As Judge McLellan points out, under (f), it is indicated that the rule supersedes the Espionage Act of 1917.

MR. ROBINSON: I checked through the statute quite carefully myself. I think we can say that it does cover everything covered in the Act.

MR. WECHSLER: On that assurance I would vote for it, but only on that.

MR. LONGSDORF: It supersedes only part of the Espionage Act, but in line 20, under 33 (b) (3), line 20, it refers to the Espionage Act, and I think that saves it.

MR. WECHSLER: It does, in the form of (3), yes, "any property or any paper possessed, controlled, or designed, or intended for use or which is or has been used in violation of the Act." I just want to be sure that does not narrow the Act.

MR. LONGSDORF: I do not know what is in those other Acts referred to either.

MR. DESSION: That is my understanding, Herb, but I would have to check it up, because I understand this is as broad as that, and the other statutes not superseded are searches in particular instances provided for in other statutes.

MR. YOUNGQUIST: I note that in (3) we speak of "property or any paper"; in the others, (1) and (2), we speak only of "property".

MR. HOLTZOFF: The words "page" and "property" --

MR. YOUNGQUIST: Well, I was thinking, wouldn't it be better to say "property or any paper" in all three cases?

MR. HOLTZOFF: I think "property" is enough, isn't it?

MR. YOUNGQUIST: The only thing I have in mind is, we should not mention "paper" in one case and not in the other, unless we mean to exclude it in (1) and (2).

MR. HOLTZOFF: I think we ought to omit "or any paper possessed" in lines 17 and 18.

MR. ROBINSON: I do not believe we should. In lines 17 and 18 that is the language of the Act, and we had better be specific. A mere paper, that might not be specified as property, or amount to much of anything, still is subject to seizure under the Espionage Act.

MR. YOUNGQUIST: Might not papers be subject to seizure under (1) and (2)?

MR. ROBINSON: Well, "property" would catch that.

MR. YOUNGQUIST: Yes, but you mention "paper" in (3) and you do not mean to exclude it in (1) and (2)?

MR. ROBINSON: Here in (3) you refer to a specific Act, and if you refer to the Act you will see it refers to "paper" specifically.

MR. HOLTZOFF: I am not satisfied. I think your point has not been made. I think we ought to either insert "or paper" in (1) and (2) or strike it out in (3).

MR. ROBINSON: I think the point is made. I would be glad to have you check on the Espionage Act, but I think the point is made --

MR. HOLTZOFF: I am not standing on the Espionage Act.

THE CHAIRMAN: Just a moment. Could we cover it this way? After the colon on line 10, continue to say, "to search for and seize any paper or property:

"(1) Which constitutes the fruits of a violation of a law of the United States.

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense.

"(3) Possessed, controlled, or designed, or intended for use or which is or has been used in violation", etc.

That would save quite a little repetition.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: See what I mean, Jim?

MR. ROBINSON: Yes, that is, "any paper or property" - or "other property", would you say?

MR. CHAIRMAN: Bring this up to here (indicating), "to search for and seize any paper or property:

"(1) Which constitutes * * *.

"(2) Designed or intended for use * * *.

"(3) possessed, controlled, * * *."

MR. ROBINSON: Let us make it "property or paper".

MR. HOLTZOFF: "property or paper".

THE CHAIRMAN: Is there any objection to that suggestion? It would save a lot of words.

Did you get that one, Aaron?

MR. YOUNGQUIST: No.

THE CHAIRMAN: On line 10, strike out the colon, continue "to search for and seize any property or paper", and then start, "(1) Which constitutes * * *", and (2) will start "Designed".

MR. YOUNGQUIST: Would you mind putting the

"which" before the colon? Then you would not have each of these, (1), (2) and (3), starting with "which"?

THE CHAIRMAN: That is a matter of form.

Any question as to the substance of (b)?

MR. WECHSLER: Yes, I have this in response to my own question. I find this provision in the statute. It relates to all the matters which are covered in (1), (2) and (3), and this is the way it is, in the section that covers what is covered under our (1), "in which case it may be taken on the warrant from any house or other place in which it is concealed or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be".

Then under (2) there is another formulation like that, only a little bit different, which reads, "in which case it may be taken on the warrant from any house or other place in which it is concealed or from the person by whom it was used in the commission of the offense, or from any person in whose possession it may be".

And then, in (3), which is the Espionage Act, it says "in which case it may be taken on the warrant from the person violating said section or from any person in whose possession it may be, or from any house or other place in which it is concealed".

MR. HOLTZOFF: Don't you think that amounts to

the same thing?

MR. YOUNGQUIST: Aren't they all taken care of in lines 41 and 42, "It shall command the officer forthwith to search the person or place named for the property specified"?

MR. WECHSLER: Well, but what would you mean, "named"?

MR. YOUNGQUIST: Named in the warrant.

MR. HOLTZOFF: It seems to me those three formulas mean the same thing.

MR. WECHSLER: Can you name any place?

MR. DEAN: I assume any place where you think it is, because I think that is covered by (1), (2) and (3) of the statute; when you come right down to it, you can get it any place where it is.

MR. MEDALIE: You must name and describe the person or place to be searched. That is line 32.

MR. BURNS: We would have to make some amendment of (c) because of our insertion of "or paper" in (b). It seems to me we ought to use "property" throughout, and then down in the Note say that "property" includes paper, or in the headnote "property herein used to include paper". That is just a question of style and accuracy.

MR. YOUNGQUIST: I think the Note would be better.

MR. BURNS: I think so too.

MR. YOUNGQUIST: I do not like to see "property orpaper" down here.

MR. BURNS: Paper is property.

MR. YOUNGQUIST: I move, Mr. Chairman, we strike out the words "or paper" where we inserted them in line 10 and cover that by Note.

MR. HOLTZOFF: What is the motion?

THE CHAIRMAN: Move to strike "or paper". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. MEDALIE: What line was that?

THE CHAIRMAN: Presently in lines 17 and 18 and just moved up to line 10.

MR. ROBINSON: Leaving it in 18?

THE CHAIRMAN: No, leaving that out altogether.

MR. ROBINSON: Just "any property"?

MR. YOUNGQUIST: And then cover "paper" by a Note.

MR. SEASONGOOD: Wouldn't "thing" be more inclusive than "property"?

MR. HOLTZOFF: I think it would.

MR. SEASONGOOD: We used that before in preference

to "object".

MR. ROBINSON: Wouldn't we get ourselves into some danger with lawyers who are suspicious about search warrants? A search warrant to grab anything would be the widest search warrant I have ever heard of.

MR. YOUNGQUIST: It has to be described.

MR. ROBINSON: Oh, yes, but our rule would say "Go out and search and seize anything". I think we should "property".

MR. DEAN: Is there anything you cannot seize, Jim?

MR. ROBINSON: I am suggesting something that would look pretty wide open.

MR. MEDALIE: I move we adopt "thing" instead of "property".

MR. ROBINSON: I am willing to try it, if there is no danger.

MR. BURNS: He has to identify the "thing".

MR. ROBINSON: I mean, danger in just having it in our books or book.

MR. MEDALIE: If you want to be legalistic about your "property", property implies it is attached to some person, corporation, entity or otherwise, and it doesn't matter who owns it, or who has an interest in it, whether it exists with possibility of reverter

or without it.

I think "thing" is better.

MR. SEASONGOOD: Then you would not have to have a note and say it includes "paper"?

THE CHAIRMAN: All those in favor of substituting the word "thing" for the word "property" say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried.

All those in favor of 33 (b) as amended say "Aye."

MR. WAITE: Just a moment. I want to raise this. I am perturbed by the fact that under the existing law, no matter how reasonable a ground you have to believe that evidence of the crime is available, you cannot get the search warrant for it and you cannot search for it without the warrant. In other words, you have no way of getting it. So I would like to propose, regardless of the form in which it is couched, let us consider only the substance of it and not the wording of it, I would like to propose a fourth sub-section essentially like this, that a warrant may issue for search when there is reasonable ground to believe that the thing to be

searched for will constitute evidence of the commission of a crime or of the person who committed it. I know strongly, with reasonable ground to believe, that it will constitute evidence.

MR. HOLTZOFF: No, I think that would be unconstitutional. As I understand it, the Supreme Court has held that you cannot have a search warrant under the Fourth Amendment to search for evidence.

MR. WAITE: They only held it would be unreasonable.

MR. HOLTZOFF: Yes.

MR. WAITE: And if it is unreasonable, it is unconstitutional, I agree with that, but I think that was only one decision, in the Koehler case.

MR. HOLTZOFF: No, there is a more recent one too.

MR. WAITE: I haven't seen that. In the Koehler case it was a passing decision. It was explicit, there is no question about that, but it was not fully argued. It seems to me the court might be very willing to reverse its decision about unreasonableness, and, of course, if it is not unreasonable, it is not unconstitutional. That follows. So I would like to put it up to the Supreme Court, to change its opinion on that. It does seem to me perfectly absurd that when there is reasonable

ground to believe you will get evidence that a crime has been committed, or of the person who committed it, there is absolutely no way to go after that by way of a search warrant.

MR. DEAN: My fear is not the unconstitutional ground. Let us assume it is constitutional. I think it would be the most horrible policy, because if you really want to get a person, all you do is go out and get a search warrant if you think you can find evidence against him.

There is nobody in the United States against whom you cannot find some evidence of violation of some law.

MR. WAITE: If it is on the grounds of reasonable belief, I do not see why you should not have the warrant issued.

THE CHAIRMAN: Gentlemen, you have heard the motion. I think you all understand it. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

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

MR. SETH: What is the motion?

THE CHAIRMAN: The motion now is Mr. Waite's motion to insert a new (4) in 33 (b). All in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

All those in favor of 33 (b) (1), (2) and (3), say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

33 (c). If there are no suggestions - this will have to change that same word "property" to "thing", won't it?

MR. SETH: That is understood.

THE CHAIRMAN: Are there any other suggestions on this section? If not, all those in favor of 33 (c) say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. MEDALIE: Excuse me, you are getting

rid of the word "property" throughout?

THE CHAIRMAN: Yes. That goes throughout the whole rule.

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THE CHAIRMAN: Is there anything on 33(d)? If not, all those in favor of 33(d) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No."

(No response.)

THE CHAIRMAN: Carried.

33 (e).

MR. WAITE: I have some questions on that, Mr. Chairman. In the first place is (e) intended to provide for the return to the applicant of property which it is unlawful for him to possess? Suppose he has been in possession of unregistered cocaine. It is an offense to possess unregistered cocaine. The unregistered cocaine has been taken from him by search without a warrant or it has been seized under a warrant. Now this says he may move for the return of the property and the motion shall be granted. Under certain circumstances does that mean that the court will order the return to him of unregistered cocaine?

MR. ROBINSON: We watched that point and it is somewhere in here.

MR. LONGSDORF: I am able to inform Mr. Waite, too, having examined the cases pretty thoroughly: where the thing taken was not property, because it was an unlawful possession, it could not be returned because under the

statute properties are being returned.

MR. WAITE: In People v. Markshausen they did order the return of unlawful property because, as I read this, this does seem to lack it.

MR. HOLTZOFF: Could not you put in a sentence to bar that?

MR. DESSION: I think I raised the same point at one time but I was voted down on it, and the existing statutes talk as though you were going to return it. In practice, of course, the magistrates will not do that, at least not uniformly; but as it is drawn this says that the opium or machine gun might be returned.

MR. McLELLAN: It does not say it should be. It says shall be or shall not be admissible in evidence.

MR. WECHSLER: Could we say it shall be restored or shall not be admissible? I do not find that.

THE CHAIRMAN: Lines 81 and 82.

MR. MEDALIE: Let us look at it practically. When a narcotic merchant or the possessor of the machine gun makes a motion he does not want the goods back. He wants the evidence suppressed. And when he winds up his order he is not going to end up his order by returning to him, because he will not take possession. To take possession means recommitting the offense. In fact it would be a godsend if he would really retake possession.

MR. WAITE: No. That is exactly what happened in People v. Markshausen, and after he retook possession the court held, because the evidence had been originally discovered through the illegal search, no advantage could be taken of that, and furthermore the officers must remain unaware he was in repossession.

MR. HOLTZOFF: Was that a Federal case?

MR. WAITE: No. But I am trying to find out what this was.

MR. MEDALIE: When was that decided.

MR. WAITE: 1919, the first of the state cases that jumped on the bandwagon of People v. Weeks and held that the evidence could be suppressed or returned.

MR. McLELLAN: May I suggest, Mr. Chairman, and I have not thought of it enough to have confidence in it, that possibly you might change in line 81 the word "shall" to "may" and change the "or" in line 82 to "and"?

MR. DEAN: I think that does it.

MR. MEDALIE: Let us see what that means? That means if he makes a motion to restore the property, that that motion may be denied providing the court suppresses the evidence?

MR. HOLTZOFF: Yes.

MR. McLELLAN: The court may order it restored or not as he sees fit, but, in any event, if the motion is

granted, he shall not permit the evidence to be used.

MR. MEDALIE: Well, take the case of a person from whom property has been taken that is not contraband, but he has a right to possession. Does he have any discretion there?

MR. DEAN: Private letters, for instance?

MR. McLELLAN: I thought you could trust the judge to deal with that and enable him to deal with the exceptional situation on the cocaine.

MR. WECHSLER: Wouldn't it be better to be explicit and say that the property, if not contraband, be restored?

MR. WAITE: I was going to suggest that. The property will be restored if it is not unlawful, and shall not be permissible in evidence.

MR. MEDALIE: Still the same thing.

THE CHAIRMAN: If its possession is not unlawful?

MR. ROBINSON: Sometimes you have a statute saying there cannot be any legal right, almost; it cannot be possessed legally.

MR. WAITE: Then its possession would be unlawful.

MR. DEAN: There is a difference between unlawful possession and contraband. A machine gun and your opium are clearly contraband, but you can have unlawful possession true thereafter.

MR. HOLTZOFF: A machine gun is not contraband if you pay the tax.

MR. DEAN: Under some circumstances it is.

MR. MEDALIE: I want to visualize what you said, Gordon. If I have certain negotiable bonds in my possession which were stolen, and there has been an unlawful seizure, anybody has a right to possess them, even a thief in a certain sense. That is, they are not contraband. Those would be restored to me?

MR. DEAN: It depends on which language you use. If you say "contraband" --

MR. WECHSLER: What you could do would be to say that the thing shall be restored to a person with right to possession.

MR. DEAN: I think you would.

MR. McLELLAN: Then you have the question to try out as to whether the person is entitled as of right.

MR. MEDALIE: He could do that. You could have a nice little replevin to settle that.

MR. WAITE: The possession by the thief would be unlawful, so you would not have restored possession to the applicant.

MR. McLELLAN: Where I differ, I would restore it to the thief.

MR. DEAN: So would I, until in the absence of some

showing somebody else owns it.

MR. BURNS: As between him and the world, so far as the judge knows, he is entitled to it.

MR. MEDALIE: We really owe a duty to honest people here. If a thief has negotiable bonds in his possession, and they are unlawfully seized, of course the evidence ought to be suppressed. We are agreed about that. Ought he to get it back because you cannot go and determine whether he is a thief without an opportunity which ought to be given by the usual proclamations that precede the condemnation in a libel, giving someone a chance to come in and claim it is his.

MR. BURNS: Is that a case of sufficient importance and sufficient frequency?

MR. MEDALIE: If it was your $100,000 worth of bonds the thief had and you were out in San Francisco, you would think so.

MR. BURNS: I am thinking whether we ought to change a smooth flow of that procedure on return to take care of this kind of case. Is it an exempt thing? I think it is a challenge to your judgment on a thief or drug peddler or racketeer, or bootlegger. They are not the same on the restoration of the goods.

MR. HOLTZOFF: It seems to me Judge McLellan's suggestion really covers all these ramifications.

MR. ROBINSON: I think so.

MR. MEDALIE: It says "may be".

MR. LONGSDORF: Mr. Chairman, why should we not make this to read "the property shall be restored to the person from whom it is taken"? You cannot confer title to property; providing he is lawfully entitled to possess it.

MR. HOLTZOFF: Then you have to try the right of possession.

MR. LONGSDORF: If you take that jewelry case out in New York where some dealer in jewelry had the property - Mr. Medalie will remember it - and they tried to litigate the right to it --

MR. HOLTZOFF: Why not leave it the way suggested by Judge McLellan?

MR. LONGSDORF: And the dealer had it wrongly and you could not litigate the title to the peoperty

MR. HOLTZOFF: I second Judge McLellan's motion to change the word "shall" in line 81 and the word in line 82.

MR. WECHSLER: I propose another, "the property shall be restored unless subject to confiscation."

MR. HOLTZOFF: Then you have to restore the property to the thief because that is not subject to confiscation.

MR. WECHSLER: That is right.

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MR. MEDALIE: Let us put it this way: Take another simple case, and instead of bonds a lady's diamond is taken, a diamond tiara. She is now in Europe and you cannot get near her, and being an unawful search it has been taken from the thief and now it is to be given back. That so offends the sense of justice that we cannot allow it.

MR. HOLTZOFF: I think this pending "may be" may do it.

MR. MEDALIE: What determines the "may be"?

MR. ROBINSON: The first part of the line says "If the motion is granted". That is a discretion in the first part, and you surely have to trust to his discretion in the last part. I would like to hear a vote on that, unless you are moving the amendment. If you did, let us get a vote.

MR. MEDALIE: I did move an amendment.

MR. HOLTZOFF: I do not think that he ought to restore the property to the thief if he knows it is stolen.

MR. McLELLAN: We ought not to have a right to try out the question whether the man is a thief or not.

MR. LONGSDORF: You do not know whether he is a thief or not until after he is tried.

MR. McLELLAN: I lean toward what Mr. Wechsler said, if the motion is granted the thing, unless subject to

confiscation, shall be restored.

MR. WAITE: I would rather leave it to the court's discretion. I have come to the conclusion that we cannot phrase it precisely in a way we will all agree, and if the court thinks it ought to be restored to the thief he may do so, and if it is property which is contraband he refuses to restore.

MR. MEDALIE: I think Pegler could write an awfully good article around that, and I think he would be right.

MR. McLELLAN: We have not anything to do with the question as to how that man got the property.

MR. GLUECK: You are assuming it is stolen for the purposes of your argument.

MR. MEDALIE: Oh, we do not know. He claims it was not.

MR. McLELLAN: It is not the place to try that question.

MR. MEDALIE: Let us put it this way, and I will give you a very simple situation that shocks the sense of justice: An affidavit is presented to the commissioner which says, "I am an accomplice of John Smith. With him I entered the unoccupied apartment of Mrs. So and So and stole her jewels" describing them. He now keeps them in his flat on Mulberry Street around the corner here, and

you give the name, but you have incorrectly given his name. They went to the right place, but you have incorrectly stated the address; it is not 83 Mulberry Street; it is 183 Mulberry. That search warrant must be vacated. Now Joe Brown of 183 Mulberry Street gets back those jewels. Why, we are a laughing stock.

MR. GLUECK: At the same time you notify the police that you have properties which are stolen. Let them make an investigation.

MR. WECHSLER: What jurisdiction would the Federal court have to try title between two persons citizens of the same state, just because the property is seized by a Federal officer.

MR. McLELLAN: I should think if they did have it they ought not to entertain it in connection with a motion to put persons in status quo.

MR. LONGSDORF: And morever, Mr.Chairman, a search warrant does not take property; it takes possession. There are things to be restored but no title to be restored. The title stays where it was, and all they can get back is possession, and the only person entitled to that is the one in possession, but not always he.

MR. HOLTZOFF: Suppose it is admittedly stolen. Of course I can appreciate in a case in dispute we should not try title in order to suppress evidence, but suppose it

is admitted the property was stolen, not disputed, and just a technical defect in the warrant or manner or execution: should it be obligatory on the court-

MR. McLELLAN: Possession was wrongfully obtained and the wrong should be undone by restoring the person to the position in which he was before unless, subject to the

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single exception, that if it is subject to confiscation, why, a different consideration prevails.

MR. MEDALIE: Judge, I do not see how we can work it out practically. An order is made for restoration of the thing; that is, the machine gun, jewels, bonds, or the dope. Then the person from whom the thing was seized is told to come on Monday at 12 o'clock to the clerk's office at the court house, when it will be turned over to him, and when he comes here, here are three New York City cops, or three New York State Troopers, and they would go out of the court house with him, and theminute he steps off the Federal territory he is grabbed. Maybe that is the answer. If it is I am satisfied, because almost everything illegal under the Federal law is illegal under the state law.

MR. GLUECK: I think that is the answer.

MR. McLELLAN: Then I second Mr.Wechsler's motion which was that the thing, unless subject to confiscation, shall be restored and it shall not be admissible in evidence.

THE CHAIRMAN: You have heard the motion. All of those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further suggestions on 33(e)?

MR. YOUNGQUIST: In line 75 I think the word "served" should be "executed". A search-warrant is executed rather than served, isn't it?

MR. McLELLAN: Yes, sir; right.

MR. WAITE: I am not clear, Mr. Chairman, why lines 76, 77 and 78 are put in under this which has to do with seizure under search warrant, and the issuing of a search warrant.

MR. HOLTZOFF: This rule is broader than seizure under search warrants, and that is why we just modified the title of the rule to read "Search Warrants and Seizures." This particular subsection relates to illegal seizures of all kinds.

MR. WAITE: And do you think that those three lines sufficiently cover the whole matter in respect of seizure without a warrant?

MR. HOLTZOFF: I believe so.

MR. ROBINSON: I think that is all that was in the

statute. I looked it up, and I am pretty sure.

MR. YOUNGQUIST: All they can do is make a motion for return or suppress evidence.

MR. WAITE: I was wondering whether it does.

MR. YOUNGQUIST: One question: I just want to make sure under this provision that only the person from whom the property was taken may make a motion to suppress; for instance, if a person is different from the defendant, the defendant has no right to make the motion.

MR. HOLTZOFF: I think the present order ought to be preserved.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All in favor of adopting 33 (e) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any questions on 33(f)?

(No response.)

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. SEASONGOOD: I am awfully sorry to interrupt, but under 33(a) I just read here, lines 4 and 5. You say "it may be issued by a judge of the United States or of a state or territorial court of record". I think that would better be phrased "a court of record in a state or territory", because a state court of record might not include a municipal court.

MR. MEDALIE: Excuse me, Murray. I missed the reference.

MR. SEASONGOOD: It says here "it may be issued by" and so forth.

MR. MEDALIE: What line is that?

MR. SEASONGOOD: 4 and 5. "

A state court may be interpreted to be a constitutional court. A municipal court is not strictly a state court of record, but it is a court of record in a state.

MR. HOLTZOFF: Could not we say a Federal judge instead of "judge of the United States"?

MR. ROBINSON: I will read the statute on that:

"A search warrant authorized by this chapter may be issued by a judge of the United States district court or by a judge of a state or territorial court of record or by a United States commissioner for the district wherein the property is located."

MR. DEAN: Do you see his point about that?

MR. SEASONGOOD: A municipal court is not a state court, and surely you do not want to take away the power from the municipal courts.

MR. ROBINSON: To issue a Federal search warrant?

MR. SEASONGOOD: Yes.

MR. ROBINSON: They do not now, do they?

MR. SEASONGOOD: If they do not, then it is all right.

MR. ROBINSON: I never heard of it. Also a commissioner in the district court has the power. Whether you can go to the city court judge I do not know.

MR. SEASONGOOD: Under the statute as you read it I do not think they could. If that is what you want to provide all right; but I supposed a municipal court could issue it if it is a court of record.

MR. HOLTZOFF: What we are doing here is keep the present statute in its exact phraseology, whatever it means.

MR. McLELLAN: I think you are right.

MR. ROBINSON: Even if the committee wanted to, could it go beyond in this case?

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MR. SEASONGOOD: No, I did not want to.

MR. WECHSLER: What is the statute involved?

MR. ROBINSON: Section 611, Title 18. The rule as

written is just a copy from the statute, exactly.

MR. SEASONGOOD: If you want to leave it it is all right with me. I thought any court of record could issue it.

MR. DESSION: Apparently there are some cases holding that municipal magistrates in Alaska at least could not.

MR. SEASONGOOD: That is not a territorial court of record.

MR. DESSION: That apparently was the idea.

THE CHAIRMAN: Do you press the motion, Murray?

MR. SEASONGOOD: No; I am satisfied.

THE CHAIRMAN: Then we will go on to an easy one, Rule 34 (a).

MR. HOLTZOFF: Mr. Chairman, on Rule 34 there is a revised alternative draft prepared by Mr. Dession, and I think perhaps it would be satisfactory to the Reporter and to Mr.Dession if we used the revised alternative rule as the basis to work from.

Would that be satisfactory to you?

MR. ROBINSON: Yes, sir.

MR. DEAN: Page 7 of Rule 34.

MR. HOLTZOFF: No, there is a revised alternative rule.

THE CHAIRMAN: It is distributed separately,

called a supplement to Rule 34.

MR. YOUNGQUIST: There is now a tentative rule 34 (b) in this volume.

MR. HOLTZOFF: There is a revised alternative rule 34.

MR. WECHSLER: Mr. Chairman, before you take this up I would like to ask a question: Has this committee been directed to prepare rules under the Criminal Contempt statute?

MR. ROBINSON: No, sir, no order from the Court.

MR. WECHSLER: If the fact is the Court has not issued an order directing us to prepare a rule or rules it leads me to suspect they do not want us to.

MR. HOLTZOFF: I believe there was either an order or memorandum.

MR. ROBINSON: No; the memorandum assumes, I think, we are going to do something about contempt, but there is no direct order.

MR. GLUECK: Isn't there an implication in that memorandum?

MR. ROBINSON: An implication in that memorandum but there is no order.

MR. MEDALIE: I think anybody drawing up a code or set of rules of procedure that did not provide for how contempt should be punished would be guilty of a serious

omission. You cannot operate a court without such a provision.

MR. WECHSLER: The court held that criminal contempt was not within the original statute. They held that in that case, and then there was an amendment passed authorizing the promulgating of a rule on contempt.

MR. HOLTZOFF: On the statute we communicated with the Chief Justice, and the Chief Justice suggested to us we procure an amendment to the statute, so I presume it was the assumption that the statute having been amended we would act thereon.

MR. WECHSLER: I do not press a position on it but I think the question should be taken into account. They might have thought they would prepare their own rule for contempt so they have been working on it.

MR. MEDALIE: This would help. They could reject it and take their own.

MR. ROBINSON: The Court Memorandumon page 10 has a solid page of instructions to us about a contempt rule, discussing our rule, and therefore I should assume we are to do it.

MR. WECHSLER: That seems to me a good answer.

THE CHAIRMAN: All right. Will you turn to Revised Alternative Rule 34 (a). Is there any question on it?

MR. SEASONGOOD: I move to strike out "certifies". That was the Court's Memorandum. If the court certifies he saw it, that is the end of it. Maybe he did not see it.

MR. MEDALIE: There is a review. The review is by habeas corpus, isn't it? I know summary commitments for contempt are reviewed by habeas corpus.

MR. LONGSDORF: They were in ex parte Terry.

MR. MEDALIE: Yes; and that has been the rule in New York too, and the other states I imagine, and the other kind can go up on appeal. In other words, there has been a trial and findings, and those are reviewed on appeal; but on summary contempt things the courts say you can only review thefact by habeas corpus to the extent that you can review the fact at all.

MR. LONGSDORF: But as in other cases the lack of jurisdiction must appear on the face of the record.

MR. MEDALIE: Which does not give you much.

MR. LONGSDORF: Not much.

MR. BURNS: On habeas corpus would the court try the facts on a contempt?

MR. MEDALIE: There is a limitation on it, I suppose.

THE CHAIRMAN: The suggestion is that the word "certifies that he" be deleted in line 4 and that the words

"and so certifies" be added to line 6. Is there any discussion? If not, all in favor say "Aye."

MR. LONGSDORF: Wait a minute, Mr. Chairman, if you please.

MR. WECHSLER: Is that a double requirement?

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MR. LONGSDORF: Whom is he certifying it to?

MR. HOLTZOFF: If he certifies it, whether the certificate is true or not, it would be final and binding, and I think as I understood Mr. Seasongood's point that ought not to be, and this perhaps, Judge, would cure that.

MR. BURNS: Oh, no, it would not, because he would not have the power unless he saw it and then certified it.

MR. HOLTZOFF: Yes, but under the present rule all he has to do is certify it.

MR. BURNS: Yes, but I think it is simpler and tells the power over contempt more quickly if he just says what he saw, and have nothing about jurisdiction.

THE CHAIRMAN: All right, let us take that out.

MR. MEDALIE: What do you want to take out?

THE CHAIRMAN: Just strike the words "certifies that he" and nothing more.

MR. WECHSLER: Isn't it redundancy if the judge saw and heard the contempt and committed in the immediate view and presence? Doesn't immediate presence mean in the

sight or hearing?

MR. HOLTZOFF: No. He may have seen something and was not in the courtroom.

MR. MEDALIE: Somebody accosts him on the way to court.

MR. WECHSLER: Should it not be that any criminal contempt shall be punishable without hearing if committed in the immediate view of the court?

MR. MEDALIE: Then the court does not know he has to take testimony and the defendant has a right to dispute it. Suppose it is in the courtroom and in the back seat someone socks someone on the jaw and the judge did not see it.

MR. WECHSLER: It is in the technical sense in his presence, but not in his immediate view.

MR. MEDALIE: It is used in that technical sense. It is in the all-embracing eye of the judge. He sees everything up and down the side rows and all over.

MR. YOUNGQUIST: Why not say "the immediate presence"?

MR. WECHSLER: Why not say "presence". If the judge saw and heard it and it is in his presence then it is punishable summarily. "view" does not add anything.

THE CHAIRMAN: Suppose somebody stands back of the judge's screen and calls out some opprobrius name at

him. It is not in his view, but it is in his presence.

MR. WECHSLER: That is right; and under this he could not punish summarily without a hearing unless he saw or heard it.

MR. MEDALIE: That is exactly the protection you are entitled to before being thrown into jail without a hearing. That much you ought to have.

MR. WECHSLER: I agree with that, but I still want to know what "view" means.

MR. MEDALIE: You want to take "immediate view"?

MR. SEASONGOOD: "Immediate view" is a sacred word of old meaning. Anything within the confines of the clerk's office is in the presence of the court. Do you want to do that? If it is in the clerk's office or just outside? It is in his constructive presence. I don't know if in his immediate view, but it is in the presence of the court.

MR. MEDALIE: We wanted to get rid of this constructive presence. If we have not we ought to change it.

MR. SEASONGOOD: That is why I was wondering if "immediate view" is right.

MR. YOUNGQUIST: Are we leaving "saw or heard"?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: Then the rest is not important.

THE CHAIRMAN: Shall it read then "if the judge saw or heard the conduct constituting the contempt and it was committed in the presence of the court"?

MR. WECHSLER: Yes.

MR. SEASONGOOD: "or in the presence of the court". If he heard it. Suppose he heard something out in the hall. That is in his presence. Are you going to let him punish for that summarily?

MR. MEDALIE: Just hearing it is not enough.

MR. SEASONGOOD: But you are saying it is.

MR. MEDALIE: I am agreeing there are flaws in this definition that do not meet our requirement. What we are getting to is a judge really has to have firsthand knowledge, no conjecture.

MR. WAITE: Suppose the witness tips the judge in advance, "just don't see or hear"?

MR. MEDALIE: The judge will have to have a trial. He certainly will.

THE CHAIRMAN: But he turns around and sees the man of course.

MR. WECHSLER: The law really is if the judge has personal knowledge of what was done and who did it, and it was done in the presence of the court, then it is punishable summarily.

MR. MEDALIE: Murray raises another point. What

is the actual presence of the court?

MR. SEASONGOOD: You say "or actual presence".

MR. MEDALIE: In other words you want the judge there when this happens?

MR. HOLTZOFF: You do that when you say "saw and heard". There must be two requirements: he must be in the court and must see and hear the episode.

MR. SETH: Or catch him in the elevator.

MR. MEDALIE: That is what I think. I don't think that has any bearing. Must it be during the proceedings? Suppose the trial just ended?

MR. WECHSLER: Suppose we said "in the courtroom within the sight or hearing of the judge"?

MR. HOLTZOFF: No, because suppose it is the courtroom and the court is not in session.

MR. WECHSLER: Could a judge punish summarily a contempt in chambers?

MR. HOLTZOFF: Suppose the judge was in the courtroom while the court was not in session? He may have remained to talk to somebody in court. That has happened on more than one occasion.

MR. WECHSLER: I do not think that would make him free from punishment.

MR. HOLTZOFF: No, but if you say within his presence in the court you leave the power too broad, don't

you? I think "presence of the court" covers all these concepts.

MR. ROBINSON: Does it cover a case where the litigant comes up to the judge's bench and threatens him with harm if he does not decide a case a certain way?

MR. MEDALIE: I think that would be covered.

MR. HOLTZOFF: If the court is in session.

MR. ROBINSON: Well, even if it is not in session?

MR. HOLTZOFF: Then it would not be.

MR. ROBINSON: It seems to me it should be. You know that case involving the defendant in the prosecution for the assination of Abraham Lincoln. The defense lawyer came up to the judge and said he was going to beat him up.

MR. SEASONGOOD: In one case he said to the judge, "If you decide this way there is going to be the darndest strike you ever heard of."

MR. MEDALIE: I think what set us off going wrong was that decision of the Court of Appeals in New York recently, Rippey writing the opinion, and I think we had that before us at the last session when we were in Washington. That is the basis for this thing.

THE CHAIRMAN: Are you satisfied with it as it now is? Are you ready for the question?

MR. McLELLAN: How is it going to read?

THE CHAIRMAN: "Criminal contempt may be punished

summarily without notice or hearing if the judge saw or heard the conduct constituting the contempt and it was committed in the presence of the court."

MR. DEAN: Physical presence you mean?

MR. SEASONGOOD: Yes, because it has been decided that the presence of the court includes the hallowed precincts of the court; the clerk's office and so forth.

MR. SETH: Which courts are we in the presence of right now? There are lots of courts in this building.

MR. YOUNGQUIST: Does not "the presence of the court" carry the concept of the court being in session?

MR. HOLTZOFF: I think it does.

MR. YOUNGQUIST: Wouldn't it be appropriate in that connection to use the word "physical"?

MR. HOLTZOFF: It seems to me there is a sufficient safeguard in the clause that the judge must see or hear the contemptuous conduct.

MR. BURNS: How about putting the question on the motion?

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now (b).

MR. LONGSDORF: I think we should add to 3 (a) in view of the decision in the Terry case a brief provision that the order imposing punishment or the commitment should be entered of record. Of course I know it will be done, but of course if this is a precept of procedure, should not we say that? It is an ex parte proceeding. There is no case pending and docketed by title. How are you going to get it on the record?

MR. HOLTZOFF: Every order would have to be entered.

THE CHAIRMAN: Does he not have to make an order adjudicating the man in contempt and directing the marshal to do something?

MR. McLELLAN: Yes, sir, the commitment.

MR. LONGSDORF: We say "so certify".

THE CHAIRMAN: That is out.

MR. LONGSDORF: Why don't you say in line 3 "summarily by order"?

MR. WECHSLER: You want to say more than that; you want to say the order shall recite the facts, which is the present law.

MR. LONGSDORF: Why not have a new sentence and say "The order or commitment shall recite the facts and be signed by the judge and entered of record"?

MR. DEAN: So moved.

THE CHAIRMAN: "be punished summarily"?

MR. MEDALIE: No; a new sentence.

MR. BURNS: An order of commitment?

MR. HOLTZOFF: It might not be a commitment. It might be a fine.

MR. BURNS: Well,"The order shall recite the facts, be signed by the judge and entered of record."

THE CHAIRMAN: Let us say "The judge shall enter an order."

MR. HOLTZOFF: The judge signs the order and the clerk enters it.

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THE CHAIRMAN: "The judge shall make an order."

MR. HOLTZOFF: "reciting the facts."

THE CHAIRMAN: "The judge shall sign an order reciting the facts which shall be entered of record."

MR. ROBINSON: "caused to be entered of record."

THE CHAIRMAN: All those in favor of this amendment say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. ROBINSON: I would like to ask one question about that. Is that the end now?

THE CHAIRMAN: That is the end of 34 (a).

MR. ROBINSON: It seems to me that running along on line 4 where you say "saw or heard the conduct constituting contempt" it would be better to leave out the next four words. Don't we make ourselves foolish when we say the judge saw something or could see something that was not committed in the presence of the court?

MR. WECHSLER: Supposing you say "constituting a contempt committed in the presence of the court"?

THE CHAIRMAN: That is all.

MR. McLELLAN: While we are fussing with this, do you want to say, Mr. Chairman, in that sentence, "The judge in case of a finding of guilty shall enter an order"?

MR. DEAN: I think you have to. That is the trouble with the present wording. I would have preferred "an order of contempt shall" and then state what goes in it.

MR. WECHSLER: I would too, and that is the technical language of an order of contempt.

THE CHAIRMAN: Then let us change it back to that.

MR. DEAN: I think we should.

THE CHAIRMAN: All right, let us rephrease it. "The order of contempt shall recite the facts" --

MR. BURNS: "signed by the judge and entered of record"?

MR. ROBINSON: That is good.

THE CHAIRMAN: All right. That is better than the other, and that will stand if there is no objection.

Now 34 (b). Are there any suggestions?

MR. YOUNGQUIST: You have this additional revision.

MR. HOLTZOFF: That is the revised alternative.

MR. SETH: It is not the one in the bound volume?

MR. McLELLAN: May I ask for information whether (b) entitles a person to a jury trial where the charge is that in the corridor of the court house he offered a juror $100 for a verdict?

MR. HOLTZOFF: No. In line 17 -- I wonder if you have the right one? No, you haven't the right one, Judge.

MR. YOUNGQUIST: I was going to kick about that too.

MR. WECHSLER: Judge, here is the rule (handing). You keep it. I am familiar with it.

MR. LONGSDORF: While this is under discussion I find I do not have a copy of that substitute rule. I thought I had it. I thought I put it with my papers and brought it along but evidently I did not. That is the one I am in favor of, because it abolishes this universal rule for a jury trial in criminal contempts, and this one does not but preserves it and extends it.

THE CHAIRMAN: That is not the one we are on.

MR. LONGSDORF: No. We are on 34(b) now, and we should be on the 34 (b) in Mr. Holtzoff's revision.

THE CHAIRMAN: That is right.

Is there any discussion on 34 (b) revised alternative draft?

MR. BURNS: I move its adoption.

MR. SETH: I second the motion.

MR. LONGSDORF: Since I have not got it and some others have not it --

MR. HOLTZOFF: I will give you mine, George.

THE CHAIRMAN: That is the one you said you approved of. Are we ready?

MR. LONGSDORF: I am ready.

THE CHAIRMAN: All those in favor of the motion to adopt 34 (b) revised alternative draft say "Aye".

(Chorus of "Ayes."

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

We will now adjourn for one hour, and then we return to the appellate rules.

(Recess to 7.30 o'clock p.m.)

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THE CHAIRMAN: Rule 36 is all right, isn't it, gentlemen?

MR. SETH: Yes.

THE CHAIRMAN: Jim, does this follow the present rule?

MR. ROBINSON: I think so. On page 10 of Rule 36 in the Reporter's Memorandum it states:

"Rule 36 combines Rule 49, Rule 50, and Rule 57 of Tentative Draft 5. While the combining of these rules, in the interest of the procedural integration of the draft, has necessitated an extensive rearrangement of the material, there have been few changes in the substance of the rules. An additional provision, relating to writs of certiorari, has been made necessary by the Supreme Court's recent amendment of Rule 11 of the Criminal Appeals Rules.

"Subdivision (a) (1) covers those provisions of Rule 49 and of Rule 50 (b), which related to the manner of taking an appeal. All the provisions of Rule 50 (b) relating to the contents of the notice of appeal are incorporated here."

MR. YOUNGQUIST: That includes the requirement that the address of the appellant be stated, line 11?

MR. ROBINSON: That is right. Is that drawn from a former draft?

MR. YOUNGQUIST: No; but is that in the present Criminal Appeals Rules?

MR. ROBINSON: Yes, that is right. I will give you that in just a second.

MR. YOUNGQUIST: Never mind. I cannot see any reason for the address of the appellant.

MR. HOLTZOFF: He might be in jail.

MR. YOUNGQUIST: Well, you are required to state that a little later, the place of confinement, if he is in custody.

MR. ROBINSON: It is in the forms too. You know, the Supreme Court in its appeals rules has forms, and this incorporates the provisions of the forms, what is in them, and what is required by the Court in its appeals rules.

MR. YOUNGQUIST: The only reason I do not object to it is because there may be some reason for it; but at this time I cannot see it.

MR. HOLTZOFF: The present appeals rules have that provision. It is certainly a harmless one.

MR. YOUNGQUIST: I think it is harmless as it is unnecessary.

MR. ROBINSON: Yes, here it is, present appeals rules, paragraph 3 (reading).

MR. YOUNGQUIST: All right. I move the adoption of 36 (a) (1).

MR. WECHSLER: I have some questions about that, Mr. Chairman. In line 5 it seems to me that the word "is" should be "shall be". An appeal shall be taken rather than is taken.

MR. HOLTZOFF: I think that is the form of the civil rules. They use the present instead of the future tense throughout, and that is the reason.

MR. WECHSLER: I think we have used the future tense more than the present tense.

MR. HOLTZOFF: We have not been consistent. "shall be" is what is used in the criminal appeals rules.

MR. YOUNGQUIST: You have "shall" in line 10 where the requirements are more specifically set forth.

MR. WECHSLER: I think it ought to be "shall be" or "may be". "is" seems to me a little bit off key. But it is not important.

Now, as a matter of substance it seems to me that if we are abolishing assignment of errors that we ought to substitute a statement of the points intended to be relied upon. There ought to be something before the brief is filed indicating what the thing is all about.

MR. DEAN: Might that not be done by form?

MR. WECHSLER: I agree with you, it might, because you have got the very thing with respect to the appeal by the Government --

MR. HOLTZOFF: I take the other view of the matter. In an appeal in a civil case you take the appeal by a simple notice, and you do not have any document in which you state your points until you file your brief.

MR. DEAN: That is right.

MR. YOUNGQUIST: Then why do we require that the notice of appeal by the Government to the Supreme Court contain a concise statement of the points?

MR. HOLTZOFF: I would be very glad to see that go out.

MR. WECHSLER: Isn't there something in the Memorandum of the Court indicating that they wanted - well, that may be too strong - suggesting the desirability of a statement of points?

MR. HOLTZOFF: Of course, we must bear in mind the casual nature of some of the suggestions in the Memorandum, I think even in a civil case the appellant is allowed to take an appeal by a simple notice without stating his points; and, a fortiori, the appellant in a criminal case ought to be allowed the same privilege, because if he takes an appeal in a hurry he might overlook some very important point; and if you were to require him to state his points in advance he may lose the advantage of a real point that goes to the substance of the case and which may be worked up later on while the brief is being prepared.

MR. ROBINSON: That is taken care of in Rule 38 (b) (1), incorporating the civil rule 75 (d), statement of points.

MR. HOLTZOFF: That is only required when you do not appeal on the whole record; then you state your points in order that your adversary may know what parts of the record you designate. You do not state your points if you appeal on the whole record. But I think by requiring the appellant to state his points you may deprive him of a very important afterthought, perhaps, but still something that is very important.

MR. WECHSLER: Well, I do not press the point of substance, but I do think it ought to be uniform; and, anyhow, where the appeal is to the Supreme Court, the Supreme Court rules, which call for a jurisdictional statement, require an assignment of error.

MR. ROBINSON: That is right.

MR. WECHSLER: So you do not need it here.

MR. ROBINSON: No.

MR. HOLTZOFF: I would be glad to see it go out from the Supreme Court requirement. I would not want to see it put in for the circuit court of appeals.

MR. ROBINSON: You see, that is lines 16 to 21 on these direct appeals, Herbert; and then on appeals to the C.C.A. it is the citation I just gave you; in other

words, following the civil rules.

THE CHAIRMAN: Why do you need lines 16 to 21?

MR. ROBINSON: Because we hesitate to change that procedure. You notice the civil rules do not. They continued the direct appeal rules.

MR. WECHSLER: You have got to provide for the mode of appeal to the Supreme Court.

MR. HOLTZOFF: We could leave out that sentence, and then the same requirements would apply to both kinds of appeals.

MR. ROBINSON: We do say that we abolish petition for appeal and assignment of errors, and citation; of course, we squarely do that; but we retain jurisdictional statements and the bond on appeal.

MR. WECHSLER: Wouldn't you do better if you said in line 16 "If the appeal is to the Supreme Court," striking out "by the government"? In other words, "If the appeal is to the Supreme Court the notice shall be accompanied by a jurisdictional statement filed as prescribed by the rules of the Supreme Court"?

MR. HOLTZOFF: I think you would.

MR. ROBINSON: You see, there is so much confusion in regard to appeals --

MR. DEAN: May I interrupt, Jim. Why don't you say "If the appeal is directed to the Supreme Court". The

only one it can apply to is the Government.

MR. WECHSLER: I am in favor of that suggestion.

MR. HOLTZOFF: What is it?

MR. DEAN: "If the appeal is directed to the Supreme Court".

MR. HOLTZOFF: Why not just say "is to the Supreme Court"? You do not need "directed".

THE CHAIRMAN: You mean leave out "by the government"?

MR. HOLTZOFF: Yes.

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MR. DEAN: Yes, leave out "by the government".

MR. ROBINSON: I believe it is useful.

MR. DEAN: What is the use of it?

MR. ROBINSON: Well, you will notice from our notes or memoranda that it has not been exactly made crystal clear that the criminal appeals rules apply only to appeals by the defendants. They do not expressly say so themselves. That is clear, of course. But here, by showing that this is an appeal by the Government, then when you get over to the Criminal Appeals Rules --

MR. HOLTZOFF: Yes, but supposing Congress should pass an act allowing direct appeals by defendants. You might as well cover that possibility.

MR. ROBINSON: I do not think so, Alex, because when it does happen the Court itself can amend its rules.

After all, what we are supposed to do here is just make recommendations to the Court about amending these rules.

But let me tell you what I think should be done. I think eventually there should be a unification of direct appeals to the Supreme Court and appeals to the circuit court of appeals. Now, our trouble there is the civil rules.

MR. WECHSLER: No, that is not right. You do not want to unify because in a direct appeal to the Supreme Court you have got the problem of a showing of jurisdiction.

MR. ROBINSON: Well, you have got the problem of the Supreme Court's own rules too.

THE CHAIRMAN: Gentlemen, why this has any place in what are supposed to be district court rules I cannot see.

MR. WECHSLER: I think it would be all right, Mr. Chairman, if we struck out "by the government" and after the word "shall" on line 17 if we struck out "set forth also a concise statement of the points upon which the government intends to rely on the appeal". I think we could strike all that out and say instead "shall be accompanied by a jurisdictional statement, as prescribed by the rules of the Supreme Court."

MR. HOLTZOFF: I second that motion.

MR. YOUNGQUIST: Wait just a minute. On that "accompanied by" - that would mean that the jurisdictional statement would have to be served on the party. You don't want that,Herb.

MR. WECHSLER: I do not see your point. What is wrong with it?

MR. YOUNGQUIST: Well, perhaps it is all right.

THE CHAIRMAN: You have heard the motion. All those in favor say "aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, no.

(No response.)

THE CHAIRMAN: Carried.

Are there any further suggestions on 36 (a) (1)? If not, the motion is --

MR. SEASONGOOD: Just a minute. The Court asks here in their comment whether there is any sound reason that the notice of appeal shall contain a general statement of the nature of the offense. You changed that to say "a general statement of the offense". But does that answer it?

THE CHAIRMAN: I think so.

MR. ROBINSON: We felt so. We followed too the outline of the appellate forms as contained in the summary -- I mean in the Appendix to the Criminal Appeals Rules in

doing that. It calls for the nature and general statement of the offense.

THE CHAIRMAN: Anything further?

MR. WECHSLER: What do you mean by "a concise statement of the judgment or order", Jim? Wouldn't the date of the judgment or order and any sentence imposed be sufficient?

MR. ROBINSON: Well, we just again copied the present rules.

MR. HOLTZOFF: Here is the present rule: "The notice of appeal shall set forth the title of the case, the names and addresses of the appellants and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and if the appellant is in custody the prison where appellant is confined."

MR. DEAN: In other words, it contains just about everything that is contained in the copy of the judgment and commitment?

MR. HOLTZOFF: That is right.

MR. DEAN: I do not see anything added.

MR. WECHSLER: Alex, as you read it it does not say "concise statement of the judgment or order".

MR. HOLTZOFF: No. Those words are not used, but I really think it is the same thing.

MR. YOUNGQUIST: I wonder if it would not be just as well if we followed that rule. I cannot see any justifiable reason for departing from the language the Court has adopted.

MR. SEASONGOOD: Neither do I.

MR. ROBINSON: Well, you have got to have a reason.

MR. YOUNGQUIST: We won't be able to give a reason. I suggest we follow the language of the present rule.

MR. ROBINSON: That is in a form or in the rule.

MR. HOLTZOFF: It is not in the rule. I just read the rule.

MR. YOUNGQUIST: I move, Mr. Chairman, that we conform to the rule as it now stands.

MR. ROBINSON: Well, the form has it.

THE CHAIRMAN: What is the number of that rule, Alex?

MR. HOLTZOFF: Rule 3.

THE CHAIRMAN: I think it would be sufficient, don't you, if we said, "the date of the judgment"?

MR. YOUNGQUIST: I think we ought to follow the rule just as it is.

MR. ROBINSON: The rule says that it shall follow substantially the form here annexed.

MR. HOLTZOFF: The rule itself gives a different

summary than what you have in the present rule.

MR. ROBINSON: You asked me what the sources were. The sources are the rule itself and the official form that is incorporated in the rules and is a part of the rules.

THE CHAIRMAN: The motion now is that we follow the form of the rule as to its contents.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are you ready for the question on Rule 36 (a) (1)? All those in favor of adopting the rule as thus amended, say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Are there any suggestions as to Rule 36 (a) (2)?

MR. HOLTZOFF: I have a suggestion on that. I think it was intended to be covered, probably, by the Reporter, but was overlooked. In line 29 we provide for time to appeal after entry of judgment of conviction. Last spring the Chief Justice called my attention to the

fact that the present Criminal Appeals Rules do not specify any time for the taking of an appeal in a criminal case from any judgment or order, except a judgment of conviction. And he suggested that the present criminal rule should be amended and broadened to include other types or other papers appealed from.

So to cover that point I move that in line 29 we strike out the words "of conviction" after the word "judgment" and substitute therefor the following words "or order appealed from"; and in line 31 we strike out the word "the" in front of the word "appeal" and insert the word "an" in lieu thereof; and after the word "appeal" insert the words "from a judgment of conviction".

MR. YOUNGQUIST: Which line is that?

MR. HOLTZOFF: That will be in line 31.

So that the sentence will read as follows:

"An appeal by a defendant may be taken within 5 days after entry" -- oh, there is just one other change. In line 28 strike out the words "by a defendant" because now the Government may appeal in certain instances. So it would read:

"An appeal may be taken within 5 days after entry of judgment or order appealed from."

MR. YOUNGQUIST: "of the judgment or order appealed from"?

MR. HOLTZOFF: That is O.K.

(Continuing) "but if a motion for a new trial has been made within the time specified in Rule 31 (d), an appeal from the judgment of conviction may be taken within 5 days after entry of the order denying the motion."

MR. ROBINSON: What is the explanation of that?

MR. HOLTZOFF: The explanation of that, Jim, is this, that there are many other documents,or final orders, rather, than judgments of conviction upon which appeals may be taken.

Now, in the case that the Supreme Court had last spring, there was a motion to correct a sentence, I believe, and an appeal was taken from the order denying the motion, and the problem arose as to what the limitation was as to the time for the taking of such an appeal, because the Criminal Appeals Rules, as they now stand limit the time only for appeals from judgments of conviction.

MR. ROBINSON: Well, the sentence, of course, as it is is in this Rule 3, first paragraph.

MR. HOLTZOFF: But the Chief Justice said that rule must be changed.

MR. WECHSLER: Alex, here is a minor point: Did you mean to make the time the same for appeals by the Government as by the defendant?

MR. HOLTZOFF: Oh, no, I did not, because the last

5 sentence takes care of appeal by the Government. Perhaps you ought to leave "by a defendant" in in line 28. Appeals by the Government are taken care of in line 40.

MR. SETH: In view of the changes we have made with respect to the new trials that reference in line 31, Rule 31 (d) ought to be carefully looked at. Some motions may be made years after the entry of judgment.

MR. WECHSLER: I do not see why we bother to say "within the time specified". It cannot be made unless it is made within the time specified.

MR. ROBINSON: That is, again, the language of the present Criminal Appeals Rules.

MR. HOLTZOFF: But I think we can improve that.

THE CHAIRMAN: By striking "within the time specified in Rule 31 (d)"?

MR. HOLTZOFF: Well, I am not so sure. Maybe that is important. Suppose someone makes a motion for a new trial after the time to make it has expired, and the motion is denied. Now, he should not be permitted to take the position that thereby he extended his time to appeal. I think that was the purpose of those words.

MR. SETH: We have got motions for newly-discovered evidence that can be made at any time.

MR. HOLTZOFF: But there are other motions for a new trial.

MR. SETH: But the references will have to be careful.

MR. WECHSLER: Alex, did you say he ought to be able to?

MR. HOLTZOFF: He ought not to be able to.

MR. WECHSLER: But what this does is to permit him to, and he should. He should be permitted to.

MR. HOLTZOFF: I am afraid I do not make my point clear. If he makes his motion for a new trial within the prescribed time the pendency of the motion should extend the time to appeal. But suppose he has not made his motion for a new trial in due time, he has lost his time to appeal; and then later on he makes a motion for a new trial which is not timely, and the motion is denied on the ground that it was not filed in time. Now, that ought not to act as an extension of time for appeal, and that is why those words are needed, I think.

MR. SEASONGOOD: Well, you can just put in "seasonably".

MR. HOLTZOFF: That is all right.

MR. YOUNGQUIST: I think we have in other cases used this language "within the time specified by these rules" or "provided in these rules," making it general --

MR. HOLTZOFF: I think that is better.

MR. YOUNGQUIST: We have done that in some other cases.

MR. WECHSLER: I think it would be easier to say it in a different way. It begins by saying "An appeal by a defendant may be taken within 5 days after entry of judgment." What we want to say here is, if a motion for a new trial within that period - the period referred to is the five days after judgment--

MR. HOLTZOFF: No; it might be five days or an extended period.

MR. ROBINSON: It is a three-day period.

MR. HOLTZOFF: Or an extension granted within the three-day period.

MR. SEASONGOOD: Wouldn't that to it, if you just say "has been seasonably made"?

MR. HOLTZOFF: I think that would do it.

THE CHAIRMAN: What is your pleasure as to this line 30, gentlemen?

MR. SEASONGOOD: I move we insert the word "seasonably" before "made".

MR. HOLTZOFF: "has been seasonably made" and strike out "within the time specified in Rule 31 (d)".

MR. ORFIELD: If we give the Government 30 days why shouldn't we give it to the defendant? Isn't that strange?

MR. HOLTZOFF: No. Under the operations in the Department of Justice no appeal may be taken unless authorized by the Solicitor General. The result is that the United States Attorney has to write in to the Department of Justice, to the Criminal Division, for authority to take an appeal. The Criminal Division reviews the matter and then passes it on to the Solicitor General. The Solicitor General, after approving it, if he does approve it, then notifies the United States Attorney through the Criminal Division granting him authority to appeal. So five days just won't work for the Government. If you grant the Government only five days, here is what they will do. The Department will probably issue an instruction to

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United States Attorneys to appeal in every case.

MR. DEAN: That is what they do now, practically. Practically every case. They just do it automatically. It is just a notice; it does not take five minutes to typewrite, and then they go through the 30 days.

MR. ROBINSON: In connection with that may I say that I went to the Department of Justice and talked to William W. Barron and Oscar Provost on this point, and they said, "We just can't really handle it in less than 30 days." And, in addition to what Alex said, they pointed out that frequently an appeal requires conferences with other Government bureaus or departments to see whether the

question is sufficiently important to take an appeal on; and, of course, they pointed out too that the question comes brand new to Washington, whereas with the defendant, his lawyers have been working with the case and living with it right down through the proceedings, so they are relatively ready to answer the question with respect to appeal. This is their view of it.

MR. WECHSLER: What is the difference if the defendant is not in jail?

MR. DEAN: I just wanted to give Alex a realistic description of what went on.

MR. HOLTZOFF: Wasn't my description accurate?

MR. DEAN: No, I do not think so. We used to take appeals in all cases automatically.

MR. WECHSLER: It took them 30 days to discover whether they meant it, Alex.

MR. HOLTZOFF: Well, in civil cases today there are various different periods of appeal under different statutes, and the Judicial Conference suggested the consolidation of those statutes so as to provide a uniform time to appeal in all civil cases. But I do not think this can be done with criminal appeals.

MR. YOUNGQUIST: I should like to suggest that this committee consider extending both the three-day period and the five-day period to about 10 days. Three days and

five days is an awfully short time within which the defendant may take his appeal. It may be a complicated case and it may become very difficult.

MR. HOLTZOFF: Well, not if you only file a notice of appeal. We are not requiring any statement of the grounds of appeal. We are just requiring a notice.

THE CHAIRMAN: Yes; just a little piece of paper.

MR. GLUECK: Isn't the same true of the Government?

MR. HOLTZOFF: The Government operates differently because of the Solicitor General in these matters.

MR. YOUNGQUIST: The Government needs the 30 days. I haven't any objection to that. But I think the Court when it got at this thing fresh and got the authority was rather impatient about the delays resulting from appeals just went too far in fixing three days and five days as limits.

THE CHAIRMAN: 10 days, you say?

MR. YOUNGQUIST: Yes. I am merely presenting it for consideration.

THE CHAIRMAN: That would be in line 29 and again in line 32.

Do you accept that, Alex?

MR. HOLTZOFF: Yes. I have no objection to that. I accept that.

MR. DEAN: I think that is a good suggestion.

THE CHAIRMAN: Now you have heard the motion, gentlemen, to do a few things to the first sentence in this section. What is your pleasure?

MR. WECHSLER: What is the motion, Mr. Chairman? I lost it.

THE CHAIRMAN: Read the whole sentence of the section, if you will, Mr. Holtzoff.

MR. HOLTZOFF: "An appeal by a defendantmay be taken within 10 days after entry of judgment or order appealed from."

MR. ROBINSON: You do not say "the" judgment, do you?

MR. HOLTZOFF: Somebody asked me to put it in, yes. (Continuing): "but if a motion for a new trial has been seasonably made, an appeal from the judgment of conviction may be taken within 10 days after entry of the order denying the motion."

THE CHAIRMAN: Are you ready for the question?

MR. SEASONGOOD: Mr. Youngquist thinks it should be "made seasonably" instead of "seasonably made".

THE CHAIRMAN: All right. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Are there any further suggestions

on this section?

MR. SEASONGOOD: You say here that if counsel is appointed by the court or not represented by counsel, the court asks him whether he wishes to appeal. And then if the defendant answers in the affirmative you direct the clerk to prepare the papers. If he has counsel I think the brethern will resent it if you let the clerk file the appeal papers.

MR. ROBINSON: But the situation is that counsel appointed by the Court frequently will see the defendant through to conviction so to speak, and then he is not represented by counsel right along but for the appeal, you see.

MR. SEASONGOOD: That is true. You do not have to appoint counsel for the appeal. Couldn't you say "direct the clerk or such counsel", unless you think his employment stops when he is convicted.

MR. HOLTZOFF: His employment stops.

I would like to make it still simpler and to restore the old-fashioned system of noting an appeal in open court. Why not say "If the defendant answers in the affirmative, the court shall direct that an appeal be noted in open court"?

MR. MEDALIE: What good will that do the appellate court?

MR. YOUNGQUIST: This is a very simple and orderly way in which to do it.

MR. HOLTZOFF: There used to be a system of noting appeals in open court.

MR. YOUNGQUIST: That is antiquated.

THE CHAIRMAN: In place of that long phrase "If the defendant answers in the affirmative", couldn't we say "In the event he does" or "If he does the court shall direct", et cetera, in line 36?

MR. HOLTZOFF: Yes, it is a little ponderous.

MR. YOUNGQUIST: I think I would leave it the way it is.

THE CHAIRMAN: All right.

MR. ROBINSON: This has been worked on an awful lot, trying to find a better way.

MR. YOUNGQUIST: In the last sentence I think we should conform the language to that which we used in the beginning - "after entry of a judgment or order appealed from".

MR. HOLTZOFF: I think so.

THE CHAIRMAN: Is there any objection?

(No response.)

THE CHAIRMAN: That will stand.

Is there anything further on this section, gentlemen? If not, all those in favor of 36 (a) (2) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: Mr. Chairman, the discussion in connection with (2) has revealed to me that I was perhaps hasty in suggesting the elimination of "concise statement of the judgment", because in line 13 we speak of the order as well as the judgment; and it probably would not be enough to give the date of the order. We would have to tell what it was about.

MR. ROBINSON: I think that is right, Aaron.

MR. YOUNGQUIST: I did not notice that before.

MR. WECHSLER: Does anybody know an order in a criminal case that is appealable by the defendant other than an order denying a motion to correct sentence?

MR. HOLTZOFF: Well, that is an order. You have got to take care of that.

MR. WECHSLER: I am just curious.

MR. HOLTZOFF: Well, of course, this Rule 36 (a) (1) which contains a statement of what a notice of appeal shall contain applies equally to appeals by the Government as to appeals by the defendant; and appeals by the Government may be from orders sustaining demurrers.

MR. YOUNGQUIST: Now it would be an order dismissing

the indictment.

MR. HOLTZOFF: Yes.

MR. SETH: Shouldn't there be a motion in arrest of judgment stating the time of appeal?

MR. HOLTZOFF: No; because your judgment is not entered if there is a motion pending in arrest of judgment, and your time to appeal starts running from the date of entry of judgment.

MR. ROBINSON: Now --

THE CHAIRMAN: I think Mr. Youngquist had something to add?

MR. YOUNGQUIST: I just wanted to say that I think we must go back to the language that appears now.

THE CHAIRMAN: I thought we agreed to that by consent, to change in 36 (a) (1) that line 13 and restore the original language "concise statement of the judgment or order".

MR. YOUNGQUIST: All right.

THE CHAIRMAN: Giving its date and so forth.

MR. WECHSLER: Do I understand the proposition to be, Alex, that you can't make a motion in arrest of judgment after the entry of judgment?

MR. HOLTZOFF: I always understood that to be the law.

MR. DEAN: Oh, no. You can make a motion in arrest

of judgment. It is an arrest of the execution of the judgment sending the man to the penitentiary.

MR. MEDALIE: I did not understand that.

MR. HOLTZOFF: I do not understand it that way. I understood you have to make the motion before the judgment is entered.

MR. MEDALIE: It is arrest of the entry of a judgment.

MR. DEAN: We don't provide that. We give him so many days in which to make it.

MR. SETH: I think it is that the motion shall be made within three days after verdict or finding of guilty, or within such further time as the court may fix.

MR. MEDALIE: Well, the normal practice when the verdict is in is, you ask the court whether you should make the motions now or whether he will fix a date. If he wants to hear your motions now it means he is going to impose sentence now, which means the entry of the judgment. If he gives you time he postpones the imposition of sentence, which is another way of saying that he postpones the entry of judgment. I do not see how anyone would want three days or just on his own take three days without telling the court he is going to take it. You are bound to ask the court to put the case over.

MR. HOLTZOFF: You arrest not the execution of

the judgment; you arrest the entry.

MR. MEDALIE: That is right.

MR. DEAN: We ought to make that clear, that the judge could not preclude your motion in arrest of judgment by filing an entry of judgment prior to the three-day lapse.

MR. MEDALIE: But you do not lose any rights, because you can still make your motion for a new trial; and so far as your right to appeal is concerned, you appeal from the judgment of conviction. You do not appeal from the order denying the motion in arrest of judgment. So you do not lose any substantive right.

MR. DEAN: Then kick it out. If it does not add anything, kick it out.

MR. YOUNGQUIST: I suppose a diligent defendant might avail himself of it and stay out of jail until his motion is decided.

MR. HOLTZOFF: It is a simple matter for counsel when the verdict comes in to enter a motion in arrest of judgment. He can do that, and then you can expand it later.

MR. MEDALIE: You do not expand it. It is usually decided immediately.

THE CHAIRMAN: All right, gentlemen. Shall we go to 36 (b) (1)?

MR. ROBINSON: 36 (b) (1) is based on Rule 11 (Writs

of Certiorari) of the Criminal Appeals Rules, and is in the same notes as the present Rule 11, Criminal Appeals Rules, down to "judgment" in line 51. From lines 51 to 55, it was necessary to add that because the Supreme Court last week amended its Rule 11 by the provision that is incorporated there, lines 51 to 55.

You notice the amending order is set out in full in your notes of Rule 36, page 12, the order of February 15, 1943, to take care of Alaska, Hawaii, Porto Rico, Canal Zone, or Virgin Islands. So if you can help in getting that new order cut down or stated more accurately than it is in lines 51 to 55, of course, that would be a desirable thing for you to do, to try to state it briefly.

Then, as to 36 (b) (1) "Petition: Contents; Filing; Notice; Record." also is derived from Rule 11 which says that the petition shall be made as prescribed in Rules 38 and 39 of the Supreme Court Rules.

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THE CHAIRMAN: I would suggest, Jim, at the end of 45 we say "as prescribed by its rules", because the phrase "of the court" is a little ambiguous.

MR. ROBINSON: All right.

THE CHAIRMAN: If there is no objection.

MR. YOUNGQUIST: In line 44 the words "of the United States" should be stricken out. We have only one Supreme Court now.

MR. ROBINSON: I was going by their rules on the cover of their folder there.

MR. YOUNGQUIST: In the preceding rule we have spoken of the Supreme Court without the descriptive phrase "of the United States".

MR. ROBINSON: No, it says, "Supreme Court of the United States".

MR. YOUNGQUIST: In the preceding rule.

MR. ROBINSON: Oh, which we just passed?

MR. YOUNGQUIST: Yes, I mean the preceding (a) (1).

MR. ROBINSON: May we should change it there because the Criminal Appeals Rules use the words "Supreme Court of the United States".

MR. YOUNGQUIST: Didn't they have a Supreme Court of the District of Columbia? Maybe that was the reason for it.

MR. HOLTZOFF: They did.

MR. YOUNGQUIST: I cannot see any reason for it then.

MR. SETH: Isn't there a Supreme Court of Porto Rico?

MR. DEAN: There is one in the Hawaiian Islands too.

MR. ROBINSON: Better stick with this then.

THE CHAIRMAN: We know no one is going to petition the Supreme Court of Hawaii or Porto Rico. They know we are talking about the Supreme Court of the United States.

MR. ROBINSON: The order of (b), you see, is made to correspond to the order of (a). (a) is taking the appeal, and (1) is notice of appeal, with the provisions as to petition and contents, filing notice and record. All we have to say about writ of certiorari is simply to look at the Supreme Court Rules.

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: (1) and (2)?

MR. HOLTZOFF: Yes.

MR. GLUECK: I second that.

THE CHAIRMAN: Any questions? If not, all those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 37.

MR. ROBINSON: Rule 37 (a) (1) is new, that is, it was not in our former rule, but is needed for completeness to show what is done, of course, in case of a sentence of death.

MR. MEDALIE: What happens in States other than New York where a person is convicted of murder in the first degree and sentenced to death? Does the court make sure an appeal is taken?

MR. HOLTZOFF: No.

MR. MEDALIE: In New York they make sure an appeal is taken.

MR. HOLTZOFF: They don't in the Federal courts, I am sure.

MR. MEDALIE: No; I am talking about other States. The Federal court hasn't had much experience with death.

MR. YOUNGQUIST: We abolished capital punishment 30-odd years ago, so I don't know.

MR. HOLTZOFF: Don't you have it in Minnesota?

MR. YOUNGQUIST: No.

THE CHAIRMAN: We have a complicated procedure.

You apply to the chancellor for a writ of error, he denies it, and then you go to the Court of Errors and Appeals - I don't know why.

MR. YOUNGQUIST: Why do we have (a) (1)?

MR. ROBINSON: It is supposed to complete and to conform with the corresponding provisions of the rest of the rule, that is, you are talking about "Stay of Execution" - that is your heading - "and Relief Pending Appeal." So first we have, "A sentence of death shall be executed unless an appeal is taken."

2 This rule comes from Rule 52 (a) and 52 (b) in Tentative Draft 5. In 52 (a), of Tentative Draft 5, they start out with "A sentence of imprisonment shall be executed unless an appeal is taken" --

MR. YOUNGQUIST: That goes on, "and the defendant elects * * * to remain in detention." There is a reason for stating that there, but there is none for stating it in (1).

MR. ROBINSON: If there isn't any, it ought to be stricken out.

MR. WECHSLER: I do not see why we should make rules on the execution of sentence anyhow. It is an executive, and not a judicial, matter. It seems to me what we want a rule on is "stay".

THE CHAIRMAN: I think (1) might well come

out.

MR. ROBINSON: Yes, it isn't the execution. We are just trying to save a stay. I state it this way because in our Rule 5 we stated it that way.

MR. YOUNGQUIST: I think it is wrong, wherever it is. It seems to me we have two problems, first, we want to provide that the court may stay execution, whatever it is that is to be executed and, second, we must confront the problem of whether we want the filing of an appeal to operate automatically as a stay. I do not see what else is involved.

The second subdivision of (a) ought to read thus, "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects with the approval of the court to remain in detention or is admitted to bail."

THE CHAIRMAN: (1) is coming out by consent.

MR. ROBINSON: It leaves a gap in your rules, if you strike it out.

MR. MEDALIE: You are providing that a man's sentence is stayed, and he is going out on bail, if it is granted, under certain conditions, but your rules are incomplete, for nothing is said about a stay of execution, when the sentence is death and certain things happen. And the only thing you provide for there is that if a

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notice of appeal is filed, then the sentence must await a determination or disposition of the appeal.

I think it is necessary to have it.

MR. WECHSLER: It should be, "stay of execution of sentence of death pending action on petition for executive clemency". I believe it is not broad enough.

MR. HOLTZOFF: This is an executive matter.

MR. YOUNGQUIST: You mean the stay?

MR. WECHSLER: Sometimes the court should not grant a stay.

MR. DEAN: It is a judicial matter.

MR. ROBINSON: Doesn't Aaron's suggestion take care of your suggestion? Change the word "executed" to "stayed" on line 4, "A sentence of death shall be stayed" - and change "unless" to "when" on line 5 - "when an appeal is taken."

MR. WECHSLER: The court might grant a stay for some other reason than because an appeal is taken.

MR. ROBINSON: That would still be possible. That would not be "executing".

MR. YOUNGQUIST: This is not exclusive. This is simply mandatory, if an appeal is taken.

MR. ROBINSON: That is it.

MR. WECHSLER: Shouldn't we have a rule on

"Stay", articulating the general power to stay execution?

MR. YOUNGQUIST: I would not think so.

MR. WECHSLER: Shouldn't it go something like this, "Execution of a sentence of death or of imprisonment may be stayed by the court," and then go on to add that an appeal and an election, or admission to bail from detention without electing, to serve sentence shall also operate as a stay?

MR. MEDALIE: I don't think you need that. Look, the Executive can always defer the date for execution of sentence, can't he?

MR. WECHSLER: Yes.

MR. MEDALIE: You needn't provide for that, because the end is not judicial. A man is about to die tomorrow, because his appeal has been dismissed, or the Circuit Court of Appeals has affirmed the conviction, and the Supreme Court has denied certiorari, and all the papers are back in the district court. Suppose the date is fixed for tomorrow, and the President works fast and postpones it for a week or a month?

MR. WECHSLER: Suppose he does not?

MR. MEDALIE: It is none of the court's business.

MR. WECHSLER: I don't agree with it.

THE CHAIRMAN: That is the general rule in the Supreme Court, that reprieves are exclusively within the

Executive.

MR. WECHSLER: Is he the only one who has the responsibility where there is a judicial determination? I defer to your judgment.

MR. DEAN: You get stays by the Supreme Court of the United States in cases where they come up from the State courts.

MR. MEDALIE: That is because there is something pending. Anything happened that makes them stay?

MR. DEAN: Stay has been granted when any certiorari has been filed.

MR. MEDALIE: Was there something pending?

MR. DEAN: No, only on advice that something would be.

MR. MEDALIE: That is almost the same thing.

MR. YOUNGQUIST: That is another case, but this does not exclude anything. It simply makes it mandatory to grant a stay if an appeal is taken. Whatever powers the court has to grant a stay beyond that remain unimpaired.

THE CHAIRMAN: If it has any.

MR. YOUNGQUIST: If it has.

MR. DEAN: Certainly it has power to stay pending preparation of a petition for certiorari.

MR. YOUNGQUIST: Yes, after petition is filed.

MR. MEDALIE: That contemplates judicial

proceedings. We do not contemplate doing anything involving Executive action. It is none of our business. The Executive has the means and it can do with them whatever it pleases.

THE CHAIRMAN: That was demonstrated in the Hauptmann case.

MR. WECHSLER: I am not clear on it. Maybe you are right.

MR. YOUNGQUIST: I move, Mr. Chairman, that in (1) and in (2) the words "executed unless" --

MR. ROBINSON: And (3), line 11.

MR. YOUNGQUIST: -- and (3), the words "executed unless" be stricken and the words "stayed if" be substituted.

MR. HOLTZOFF: I thought (1) went out entirely.

MR. MEDALIE: No.

MR. YOUNGQUIST: No, I do not believe it should.

THE CHAIRMAN: If there is no objection, that will stand.

MR. WECHSLER: You don't want to put in anything about a petition, Aaron, for certiorari?

MR. YOUNGQUIST: No; if an appeal is taken, the petition for certiorari would not be an appeal.

MR. WECHSLER: No, I know, but an appeal has been taken; and if it wasn't taken, it must be stayed until the case comes back, I take it.

MR. YOUNGQUIST: Yes. Don't you have to get a new stay in the Supreme Court after affirmance in the Court of Appeals, if it is a death case or imprisonment case?

MR. HOLTZOFF: I do not think your correction will go for (3), Aaron.

MR. YOUNGQUIST: I haven't read (3).

MR. HOLTZOFF: I thought you proposed it.

MR. YOUNGQUIST: I think Jim suggested it. I haven't read (3).

MR. HOLTZOFF: It won't suit (3). It will suit (1) and (2) all right.

THE CHAIRMAN: May we pause just a moment to follow Herbert's question? Is it your thought that we have to include certioraris there?

MR. WECHSLER: I think it is the practice. I think a stay expires when the remittitur goes down from the circuit court of appeals.

MR. HOLTZOFF: That is right, but the present practice is to apply for a stay pending such certiorari.

MR. SEASONGOOD: They apply in the circuit court of appeals to stay the mandate until the certiorari has been heard.

MR. DEAN: That is what is done.

MR. HOLTZOFF: But you make the application in

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the Supreme Court for a stay of mandate. That is governed, really, by a Supreme Court practice.

MR. WECHSLER: Well, it is part of --

MR. SEASONGOOD: It is part of the circuit court of appeals.

MR. WECHSLER: It is part of the rules that we codify.

MR. SEASONGOOD: You ask the circuit court of appeals to stay its mandate until the petition for certiorari has been passed on.

MR. WECHSLER: That is right, you can get it either from the circuit court of appeals or from the Supreme Court Justice.

MR. HOLTZOFF: That is right.

THE CHAIRMAN: That is practice, I suppose, properly to come within certiorari generally, criminal and civil both, better than here.

MR. YOUNGQUIST: If there is any question about it, we should add to (1), "as soon as petition for certiorari is filed".

MR. HOLTZOFF: It is at variance with the Supreme Court rules.

MR. YOUNGQUIST: I would not think it necessary.

MR. HOLTZOFF: I do not think it is necessary.

THE CHAIRMAN: Now we have covered (1) and

(2). What was the question on (3)?

MR. MEDALIE: It is only the language of the first sentence.

MR. HOLTZOFF: The same correction won't be applicable.

MR. MEDALIE: No.

MR. HOLTZOFF: If you will read that, Aaron, you will see that you have --

MR. MEDALIE: I suggest:

"Upon appeal from a judgment to pay a fine or a fine and costs, execution may be stayed by the district court or by the circuit court of appeals upon such terms as the court deems proper."

THE CHAIRMAN: Any other suggestions?

MR. HOLTZOFF: Would you mind reading it again?

MR. MEDALIE: Will the stenographer read it?

(Record read.)

THE CHAIRMAN: Is there any other question that has reference to (3)? Anything else?

MR. MEDALIE: Yes; what is "the registry of the district court"? I don't know what that is.

MR. HOLTZOFF: That is, the clerk has a fund, a trust fund, called "the registry".

MR. MEDALIE: Is it?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Is that by statute?

MR. HOLTZOFF: I don't know whether it is by statute or regulation, but it is a traditional term that dates back, I think, to the beginning of the government, and that phrase is now used in this particular rule.

MR. ROBINSON: It is Rule 5 (Supersedeas) of the Criminal Appeals Rules.

MR. YOUNGQUIST: I move that we adopt it.

THE CHAIRMAN: I think we cover all of (a), then.

MR. MEDALIE: Then there is something the matter with my language, as Herbert points out. "A judgment imposing a fine or a fine and costs" --

THE CHAIRMAN: At the beginning of (3)?

MR. MEDALIE: Yes.

MR. HOLTZOFF: Then you do not need the word "execution". "A judgment imposing a fine or a fine and costs may be stayed".

MR. MEDALIE: I did not put in the word "execution".

MR. HOLTZOFF: I thought you had it --

MR. MEDALIE: Where did I have "execution"?

MR. HOLTZOFF: I took it down wrong, then.

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MR. DEAN: "execution may be stayed" you said.

THE CHAIRMAN: "may be" or "shall be"?

MR. MEDALIE: No. "A judgment" - have we got that? "Upon appeal from a judgment imposing a fine or a fine and costs" --

MR. GLUECK: "execution may be stayed".

MR. MEDALIE: Oh, "execution may be stayed", you are right. What is the matter with that?

MR. HOLTZOFF: If you say "A judgment imposing a fine or a fine and costs", you don't want to say "execution may be stayed".

MR. MEDALIE: What do you want to stay there?

MR. HOLTZOFF: "A judgment imposing a fine or a fine and costs may be stayed".

MR. MEDALIE: What do you stay, when you get a judgment? Suppose I got a judgment against you for $2.50. What have I stayed?

MR. HOLTZOFF: We always say "execution" at the beginning of a sentence, "Execution of the judgment may be" and so on.

MR. MEDALIE: No, you execute the sentence contained in the judgment. That is what we are saying here.

MR. HOLTZOFF: I think I must have gotten it down wrong. How are you going to make it read?

MR. MEDALIE: "On appeal from a judgment" --

MR. HOLTZOFF: I thought you struck out "upon appeal"?

MR. MEDALIE: No, we put it in.

THE CHAIRMAN: Start over, Alex.

MR. MEDALIE: "Upon appeal from a judgment imposing a fine or a fine and costs, execution may be stayed by the district court or by the circuit court of appeals upon such terms as the court deems proper."

MR. YOUNGQUIST: George, would you accept a suggestion, "execution of sentence may be stayed", to conform to the others and to make it a little more accurate?

MR. MEDALIE: Suppose the judgment is to go to prison for 40-odd years, and you cannot pay the fine?

MR. YOUNGQUIST: It is only a fine.

MR. ROBINSON: (3).

MR. MEDALIE: But, you see, you may be sentenced to both imprisonment and a fine.

MR. DEAN: Not under (3).

MR. HOLTZOFF: No; (3) applies to --

MR. ROBINSON: Fine only.

MR. HOLTZOFF: No; also applies to a fine where there is also a sentence of imprisonment.

MR. MEDALIE: That is what I had supposed.

MR. HOLTZOFF: This is an amendment.

MR. MEDALIE: Why get mad about that, when we know we are always sent to jail for ten years and $10,000? That is the standard for passing a green light.

MR. HOLTZOFF: We had a question arising out of a sentence.

MR. YOUNGQUIST: Then that won't do, because you stay the whole thing without qualification.

MR. HOLTZOFF: Yes, that is right.

MR. YOUNGQUIST: What we are trying to do here - it was not clear in my own mind - what we are trying to do here is provide for a stay of execution of a sentence to pay a fine.

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: Or the execution of the sentence to pay a fine where there is also imprisonment imposed.

MR. ROBINSON: That is right.

MR. HOLTZOFF: Until, you see, paragraph (3) was adopted, there was no provision for staying --

MR. MEDALIE: All right. Look, we are all agreed now. "Upon appeal from a judgment which includes the imposition of a fine or a fine and costs, execution of that portion of that sentence imposing a fine or a

fine and costs may be stayed by the district court," etc.

MR. HOLTZOFF: I think you have it accurately, but I think you can condense it somewhat by following the phraseology of the present rule, "A sentence to pay a fine or a fine and costs" - or "execution of a sentence to pay a fine or a fine and costs may be stayed on appeal by the district court or by the circuit court of appeals upon such terms as the court deems proper." Wouldn't that be better, somewhat more condensed?

MR. MEDALIE: Really doesn't make the slightest difference.

MR. YOUNGQUIST: I suggest we leave it to the Reporter to straighten it out.

MR. MEDALIE: All right.

Suppose you get sent to jail and required to pay fine and costs? I don't think splitting it up makes much difference. Only the horror of both in the first subdivision suggested splitting up the penalties, when they really come together?

THE CHAIRMAN: Mustn't (2) and (3) be joined?

MR. MEDALIE: I think so.

MR. HOLTZOFF: No, (2) and (3) are not joined in the present rule.

THE CHAIRMAN: No, but shouldn't they be?

MR. HOLTZOFF: No, there was a contingency which made (3) necessary, because the rules at first provided for a stay of a sentence of imprisonment but there was no provision as to what should happen to the fineing part of such judgment, even though there was an appeal and a stay, and the United States Attorney for the Southern District of New York kept collecting the fines because, he said, "I have no way of stopping collecting fines because there is no stay." So we thought there ought to be provision for a stay and there ought to be more protection, and this was worked out.

MR. MEDALIE: Aaron, aren't most fines imposed whether collected or not in connection with the sentences of imprisonment?

MR. HOLTZOFF: Yes, they are.

MR. YOUNGQUIST: I wouldn't say that.

MR. MEDALIE: Well, plenty of them are.

MR. SEASONGOOD: There are plenty that are not; they are fined for income tax violations without jail sentences.

THE CHAIRMAN: Are you in favor of the adoption of the section with these suggestions? If so, all those in favor say "Aye."

(Chorus of "Ayes.")

MR. ROBINSON: You show the application to the district court is not practicable. How long does it take to show the judge is not around?

MR. HOLTZOFF: We used to get extensions by presenting a consent order, consent signed by counsel.

MR. YOUNGQUIST: Both counsel?

MR. HOLTZOFF: Yes.

MR. SETH: You still do.

MR. HOLTZOFF: Under this, you don't.

MR. DEAN: I don't see anything wrong with this rule. I think it is more orderly. I think you should go to the district judge first. I appreciate the time-saving to the judge.

MR. HOLTZOFF: I am speaking for defense counsel, and if defense counsel don't think --

MR. YOUNGQUIST: No.

MR. HOLTZOFF: -- they are satisfied with it, well, all right.

THE CHAIRMAN: In line 24 shouldn't we mention the circuit justice before the circuit judge, just as a matter of courtesy?

MR. YOUNGQUIST: Isn't the idea behind that the order in which they are approached?

THE CHAIRMAN: You go first to the court, and then to the circuit court, and then to the circuit justice.

MR. YOUNGQUIST: The circuit justice is the last resort, as I understand it.

MR. WECHSLER: This applies only to the period pending appeal to the circuit court of appeals, is that right?

MR. SETH: Yes.

THE CHAIRMAN: Are there any further questions?

MR. YOUNGQUIST: I have one question. The first two words in line 27, you use the past tense. This is a thing that may be done by the district judge. Shouldn't it read, "relief which might be granted by the district court"?

7 MR. MEDALIE: Yes, that is right. Quite right.

MR. ROBINSON: No, I do not see any reason for departing from the uniform rule in the style of it, in those two words.

MR. YOUNGQUIST: It isn't of any importance. I just asked the question. I don't care.

MR. ROBINSON: It seems to me it is grammatically correct.

THE CHAIRMAN: Which might have been granted, if you could have got hold of him.

MR. WECHSLER: What about bail pending petition to the Supreme Court? Is that covered somewhere else, Jim?

MR. ROBINSON: Yes.

MR. WECHSLER: Pending petition for certiorari?

MR. ROBINSON: You mean that appeal on line 25?

MR. DEAN: That does not cover it.

MR. WECHSLER: No, I want to know where there is a provision about the granting of bail pending petition for certiorari.

MR. ROBINSON: Well, have you looked at 45?

MR. WECHSLER: No, I have not. Is that where I should look? We should add to that, when you get to that point, that is, 45 (a) (2),"(3), Bail Upon Appeal. Bail should be allowed pending appeal only if the appeal involve a substantial question." Would you want to add after "appeal" "only if the appeal involve a substantial question"?

MR. YOUNGQUIST: Your appeal is over. Petition for certiorari has been filed.

MR. WECHSLER: I think that belongs here just as much as it belongs in 45 (a) (2). My understanding is that any justice of the Supreme Court can grant bail pending filing of petition, is that right?

MR. HOLTZOFF: Yes, he grant bail pending appeal in the circuit court of appeals in his capacity as a circuit justice.

MR. MEDALIE: You have been convicted; the

circuit court has affirmed; you take a petition for certiorari to the Supreme Court. Can't the circuit court give you bail, or a judge of the circuit court, without having to run down to Washington and bother them?

MR. HOLTZOFF: I think so.

MR. MEDALIE: I understood that.

MR. YOUNGQUIST: Not under this.

MR. MEDALIE: No, but I understood that is the present practice.

MR. YOUNGQUIST: Surely, it is.

MR. MEDALIE: Let us say so.

MR. WECHSLER: But when this refers to circuit justice at 24, does it refer only to the justice who is assigned to the circuit involved or does it refer to any Supreme Court justice?

MR. MEDALIE: The former, I should think, clearly.

MR. YOUNGQUIST: I should think the former.

MR. MEDALIE: This is the circuit justice.

MR. YOUNGQUIST: Shouldn't it be broadened?

MR. HOLTZOFF: It should be "a circuit justice" because they all have equal power. The assigning of the circuit justice to a specific circuit does not limit his jurisdiction.

THE CHAIRMAN: You are supposed to try him first, and if you cannot find him, go on to the next, is that the practice?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Better change that "the" to "a".

MR. WECHSLER: Then don't we have to put in "certiorari" as well as "appeal"?

MR. ROBINSON: I think so. Bettet put it in 45, hadn't we?

MR.WECHSLER: Have to put it here too.

MR. ROBINSON: Put it in line 20, yes, "Bail upon appeal or certiorari".

MR. MEDALIE: You don't have toput all the other stuff in.

You can take your bail on certiorari as a separate provision. "A circuit judge or a circuit justice may admit to bail pending the determination of the petition for writ of certiorari to the Supreme Court."

MR. WECHSLER: "pending the filing and determination".

MR. MEDALIE: "pending the filing".

MR. WECHSLER: Yes, they frequently grant that in their discretion.

MR. MEDALIE: All right.

MR. ROBINSON: Returning to line 24, you are changing "the circuit justice" to "a circuit justice". There is only one circuit justice. "a justice of the Supreme Court" you might say, but there is only one circuit justice.

MR. WECHSLER: In a circuit.

MR. GLUECK: That is true, but I think it is better to say "a justice of the Supreme Court".

MR. DEAN: If you made it "justice of the Supreme Court" it would be easier to do it.

MR. YOUNGQUIST: He is really acting as a circuit justice and not as a justice of the Supreme Court.

MR. GLUECK: That means the one assigned to the circuit, ordinarily.

MR. YOUNGQUIST: Yes, but if they cannot find him, they will take the next one.

MR. SETH: I remember an occasion of that sort when I was in Washington, where I presented a petition to Mr. Justice Butler. It was not in his circuit at all, but no one else was available, so we went there. In that capacity he is acting as a circuit justice and not as a justice of the Supreme Court.

This deals with a matter before it has gotten

through the circuit court of appeals. I think after it is gotten through there, and it is on its way to the Supreme Court, he might be acting in a different capacity, although I would not be sure.

MR. GLUECK: I think it is a lot easier to say "a justice of the Supreme Court".

MR. DEAN: When you make application, you normally make it to the circuit justice. If he were away, you would go to somebody else.

MR. HOLTZOFF: That is a matter of court organization, not a matter of power.

MR. ROBINSON: The Judicial Conference has recommended this as a rule, and three or four circuits have adopted it. Wouldn't it be a good idea to leave it?

MR. DEAN: The circuits could not adopt a rule such as that without the approval of the Supreme Court, could they? I would suggest leaving it "the circuit justice".

THE CHAIRMAN: "the circuit justice", because he sits in the Annual Judicial Conference. In fact he presides at it, I believe.

MR. WECHSLER: It gets us back to whether we are dealing with Supreme Court justices only in their capacity as circuit justices. I do not think we are.

At least I do not think, under the present law; that is the way it has to be dealt with.

MR. YOUNGQUIST: Several circuits have adopted the rule in that form. I wonder whether we should not conform?

MR. HOLTZOFF: Are we sure they have not made any change in adopting the rule?

MRS. PETERSON: I think I can explain why it is in this form. It is the rule practically as it is adopted in the circuits and, of course, so far as they are concerned, they can make rules only for their own circuits. So probably I think the change should be made to justice of the Supreme Court.

MR. YOUNGQUIST: Have you a copy of the rules?

MRS. PETERSON: No, I don't, I am sorry, but I think that is the explanation for the limited language there.

MR. WECHSLER: There is a provision in the Supreme Court Rules on appeal and the rules of appellate --

MR. ROBINSON: We have those right here.

Yes, supersedeas, but I do not see any --

MR. DEAN: It is in the Criminal Rules, 1934 Rules.

MRS. PETERSON: Oh, you mean the general rules?

MR. ROBINSON: Rule 5 is supersedeas.

MR. DEAN: "Bail * * * or by the circuit justice",

that is right. This is the Criminal Rules.

MR. ROBINSON: Criminal Appeals Rules. They use, in Rule 6, on appeal, they use "by the circuit justice". Supreme Court Rules.

MR. GLUECK: I second Mr. Wechsler's motion that they be changed to "a justice of the Supreme Court".

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Are there any further suggestions on (c)?

MR. SEASONGOOD: I just wonder whether there is some inconsistency between 37 (c) and 38 (a)? Because in 38 (a) you say, "The supervision and control of the proceedings on the appeal shall be in the appellate court from the time of the filing with its clerk of the notice of appeal", and here you say, in this 37 (c) that before they can do anything about this you have to show why you could not do it in the district court.

THE CHAIRMAN: You are only going to the district court for relief pending appeal. Isn't that the distinction?

MR. SEASONGOOD: No, you want to enlarge the

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time.

MR. ROBINSON: Merely a sort of emergency thing, isn't it, Murray?

MR. SEASONGOOD: "time for docketing the record on appeal or for any other relief".

MR. ROBINSON: "which might have been granted by the district court".

THE CHAIRMAN: Wasn't the purpose one of convenience, to avoid burdening the court of appeals with matters which were more within the knowledge of the district judge?

MR. ROBINSON: Somewhat.

MR. SEASONGOOD: In 38 (a), it just seems to me that you say the whole business is with the appellate court from the time of the filing of the notice of appeal.

THE CHAIRMAN: Then let us say, "except as provided in Rule 37 (c)", then, to cover that. I think your point is well taken.

MR. LONGSDORF: You jumped a little too fast on that. I think we are not quite clear on this justice of the Supreme Court. What about the chief justice?

MR. HOLTZOFF: He is a justice.

MR. LONGSDORF: There are two kinds of justices, chief justice and associate justice. He is covered by this description?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: May we adopt 37 (c), realizing we have a point to come up in 38 (a)?

MR. MEDALIE: You have another point that Herbert brought up, bail pending the filing and determination of petition for writ of certiorari.

THE CHAIRMAN: I thought you dictated that as a separate paragraph.

MR. MEDALIE: Was it accepted?

MR. DEAN: I thought we fixed it by changing lines 21 and 22 to read "Bail pending appeal or certiorari shall be as provided in these rules", and then come over to 45 (a) (2) later and put in some appropriate language to cover it.

MR. MEDALIE: If it is already done, all right.

MR. WECHSLER: I think we ought to put in on line 25, "pending appeal or petition for writ of certiorari"- put in the words "or petition for writ of certiorari".

THE CHAIRMAN: In line 25?

MR. WECHSLER: Yes.

MR. GLUECK: That is right.

MR. YOUNGQUIST: Change the heading then?

MR. ROBINSON: Yes.

THE CHAIRMAN: "Application for Relief Pending Appeal or Certiorari".

MR. HOLTZOFF: Why not say, "pending review", and then use only one word?

MR. ROBINSON: Applies only to certiorari and not to appeal.

MR. HOLTZOFF: Oh, it applies to both.

MR. ROBINSON: Are you sure it does? Does it, Aaron?

MR. YOUNGQUIST: What?

MR. ROBINSON: Does "review" apply to "appeal"? Does it apply to "appeal" as well as "certiorari" here?

This rule has not carried us beyond the circuit court of appeals, so far as it is prepared, but if we are going to include in it anything to be done after that appeal is finished, then we have to mention it in the heading.

MR. WECHSLER: We might as well put it in, because there is no separate rule.

MR. ROBINSON: That has been done, and I am just pointing this out, I say, the question is about the heading of (c) on line 22.

MR. YOUNGQUIST: The heading should be "certiorari" in both cases.

MR. MEDALIE: You are talking about the heading?

MR. ROBINSON: That is all.

MR. HOLTZOFF: I am suggesting "pending review"

to cover both.

MR. DEAN: Seconded.

MR. YOUNGQUIST: That is better.

THE CHAIRMAN: That will also change the heading in line 2, will it not?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: So our motion will be to change the heading from "Appeal" to "Review" in line 2; same change in line 22; line 24 change "the circuit justice" to "a justice of the Supreme Court"; line 25 to insert after "appeal" the words "or petition for certiorari".

MR. MEDALIE: If you do that on line 25, that means you have to go to the district court.

THE CHAIRMAN: Judge, that is the way you are putting it.

MR. BURNS: That is the reason I thought you made a motion for a separate paragraph.

MR. MEDALIE: That is what I did, so I was surprised.

THE CHAIRMAN: I thought that was agreed to. All those in favor of the Judge's motion say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried. Now give us your motion for the new paragraph.

MR. MEDALIE: It could be a new paragraph.

MR. HOLTZOFF: No, (c).

MR. MEDALIE: Yes. "Pending the filing and the determination of a petition for a writ of certiorari a defendant may be admitted to bail by either the circuit court, a circuit judge or a justice of the Supreme Court."

MR. GLUECK: Don't you want to leave out "either"?

THE CHAIRMAN: Let us use the same language, "by the Circuit Court of Appeals, a circuit judge or a

THE CHAIRMAN: Suppose we hold that until we get to 45 and move it out here.

MR. MEDALIE: All right.

THE CHAIRMAN: Then we go to 38(a). Mr. Seasongood has a suggestion at the end of the first sentence on line 6, "except as provided in Rules 35 or 37(c)". Is that correct?

MR. SEASONGOOD: Yes, if that is what you want to do.

MR. SETH: That is unnecessary, in view of the recognition in lines 8 and 9 that the district court may make orders.

THE CHAIRMAN: No. I do not see that.

MR. SETH: "modify or vacate any order made by the district court".

THE CHAIRMAN: The Appellate Court may do that.

MR. DEAN: "or order the district court". I do not think that does it.

THE CHAIRMAN: No, I do not think that meets the question quite.

MR. YOUNGQUIST: Have we inserted Murray's words in line 6, "except as provided in Rule 37(c)"?

THE CHAIRMAN: Perhaps we better have a motion on it.

MR. YOUNGQUIST: I second the motion.

could be held in chambers. I think it would be harmless error, because the only thing that he was deprived of was the right to perjure himself.

MR. HOLTZOFF: In the District of Columbia they step up to the bench to argue a matter of that kind, and no one can hear but the judge, counsel, and the stenographer who moves up to the bench.

MR. MEDALIE: It is done here. It is done in Brooklyn. It is done all over.

MR. SEASONGOOD: I think it is a horrible practice, to go up to the bench and have everybody whispering. The jury thinks they are fixing up something. I think the trial ought to be in open court.

MR. YOUNGQUIST: Yes; they think it is a conspiracy.

MR. SEASONGOOD: That is right.

THE CHAIRMAN: We do not seem to be getting very far with this rule, gentlemen, and some of us look very tired.

MR. YOUNGQUIST: I do not think we will run into any trouble with it.

THE CHAIRMAN: Now, how do you want it finally?

MR. HOLTZOFF: I move that it be adopted in its present form.

MR. WECHSLER: It has been moved and seconded.

THE CHAIRMAN: Yes, it has.

Now, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Rule 42: Are there any remarks on Rule 42?

MR. YOUNGQUIST: I have a question on line 7. What does "Appearance of counsel" mean preceding "and assignment of counsel shall be made so far as practicable before arraignment"? Why do we need with "Appearance of counsel"?

MR. WECHSLER: I think it should begin "Assignment".

MR. YOUNGQUIST: That is my suggestion.

MR. HOLTZOFF: Yes.

MR. SETH: I think counsel should enter their appearance before arraignment if they can.

MR. ROBINSON: Oh, yes, that is desirable.

MR. SEASONGOOD: If he wants his counsel, he has him.

MR. YOUNGQUIST: He is told or asked at the arraignment if he has counsel.

MR. MEDALIE: If he is assigned he has made an appearance by virtue of his assignment. The assignment

itself creates an appearance.

MR. ROBINSON: This factor enters into it: We are trying to do as much as we can pretrial, which involves having counsel appear · and known as early as possible in the proceedings; so that was the idea of it.

MR. YOUNGQUIST: What good would it do for the rules to tell the defendant he is supposed to have his counsel appear?

MR. HOLTZOFF: I move this rule be adopted with the change suggested.

MR. WECHSLER: Seconded.

THE CHAIRMAN: In the last line I think it should be "shall be made whenever possible." Isn't that better?

MR. ROBINSON: The way it is now it is in line with our idea that a defendant for whom counsel has to be assigned should have the assistance of counsel before arraignment day when he is in court there and the judge says to him, "Now, lawyer so-and-so here at the bar will walk out in my chambers with you and when you come back you can tell us how you want to plead." Aren't we considering that?

MR. HOLTZOFF: But the Chairman's change won't alter that.

THE CHAIRMAN: It is merely a matter of phrasing -

"Assignment of counsel shall be made whenever possible before arraignment."

MR. ROBINSON: I see.

MR. YOUNGQUIST: It is stronger language than you have got, Jim.

MR. SEASONGOOD: I think in the arraignment section you have got something to the effect that he have counsel as soon as possible before arraignment.

MR. HOLTZOFF: "whenever possible before arraignment" is the way the Chairman suggests.

THE CHAIRMAN: I am troubled by the phrase "so far". That is what bothers me.

MR. YOUNGQUIST: How about "shall be made before arraignment whenever possible"?

MR. DEAN: "as long before arraignment as possible." That is what you want, do you?

MR. YOUNGQUIST: I do not think you need that. "before arraignment" - that ought to be in.

MR. ROBINSON: When you say "whenever possible" you are saying --

THE CHAIRMAN: Well, all right; "as long before arraignment as possible."

MR. ROBINSON: Or "as practicable."

THE CHAIRMAN: "as practicable." That would be better.

MR. ROBINSON: I believe that would be better.

THE CHAIRMAN: Are there any further comments?

MR. YOUNGQUIST: Mr. Chairman, does that language by any possibility exclude the assignment of counsel at or after the arraignment?

THE CHAIRMAN: I think not. I think that is covered by the earlier rule. Is it?

MR. WECHSLER: Well, arraignment is stating the charge and calling upon him to plead, and he is not going to be asked to plead without first having had the opportunity to confer with counsel. You want to give him an opportunity to confer with counsel.

MR. SEASONGOOD: Could we just look at that rule for a minute? I have forgotten the number of it.

MR. WECHSLER: Rule 10.

MR. HOLTZOFF: There is nothing about counsel in the arraignment rule.

THE CHAIRMAN: Did you adopt the alternate rule?

MR. HOLTZOFF: No.

MR. ROBINSON: The Committee on Style recommended that, didn't they?

MR. HOLTZOFF: The Committee on Style revised the arraignment rule pursuant to the corrections of the full Committee.

MR. ROBINSON: Shall I state it?

MR. HOLTZOFF: If you wish.

MR. ROBINSON: The way the Committee on Style tentatively raised it is as follows:

"The arraignment shall be conducted in open court and shall consist in reading the indictment or information to the defendant, or, if he consents, by stating to him the substance of the charge and calling upon him to plead thereto. He shall be advised if he is entitled to a copy of the indictment or information, and if he requests it, a copy shall be given to him before he is called upon to plead."

MR. WECHSLER: It is pointed out that there is nothing in there about counsel.

MR. HOLTZOFF: That is right.

MR. DEAN: The question is whether it belongs in arraignment or whether we shall provide for it here.

MR. HOLTZOFF: I think Rule 42 covers it. The second sentence covers this point, doesn't it:

"If the defendant appears in court without counsel the court shall advise him of his right and assign counsel to represent him unless he elects to proceed without counsel or is able to obtain counsel of his choice"?

MR. WECHSLER: Shouldn't we say that the court shall before arraignment advise him of his right?

MR. DEAN: Before accepting his plea? The

arraignment covers several things.

MR. SETH: Before he calls on him to plead?

MR. WECHSLER: I would rather have it before arraignment, before he even states the charge to him.

MR. SEASONGOOD: No --

MR. WECHSLER: Well, that may be unreasonable.

MR. SEASONGOOD: Why does he come into court then?

THE CHAIRMAN: To assign counsel to represent him before arraignment?

MR. YOUNGQUIST: Just a moment. Is that necessary? If the defendant appears in court without counsel, that must be before his arraignment. The first thing that happens is that the court advises him of his right to counsel. And if the defendant hasn't got counsel, the court assigns counsel. That, under this rule, must happen before anything else happens.

MR. WECHSLER: Wouldn't we hit the whole thing if we transposed this rule to just before the rule on arraignment?

MR. YOUNGQUIST: I do not suppose so. The appointment of counsel is not a part of the arraignment.

MR. WECHSLER: No, before arraignment.

THE CHAIRMAN: Suppose voluntary counsel drops out after arraignment, it would be up to the court again

to supply him with counsel.

MR. DEAN: I think it would be safe to leave it here.

MR. WECHSLER: I think that is right. Why don't we just adopt it?

THE CHAIRMAN: All right. All those in favor of the rule as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 43 (a).

MR. MEDALIE: What about that title? Under what title is that word "Place"?

THE CHAIRMAN: These are general provisions.

MR. MEDALIE: There is a general provision, and there is a word "Place." Does this mean venue?

MR. HOLTZOFF: It relates to removals, and --

MR. MEDALIE: Doesn't it all mean venue?

MR. HOLTZOFF: It also includes removals.

MR. MEDALIE: Well, the removal is from where you do not belong. Venue.

MR. WECHSLER: Why don't we call it "Place of Trial"?

MR. DEAN: That seems to be better, George.

MR. MEDALIE: Don't you like "Venue"?

MR. HOLTZOFF: "Venue" is good English. I think "Venue" is the only correct word.

THE CHAIRMAN: Do you move that it be "Venue"?

MR. MEDALIE: Yes.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. ROBINSON: I think it should be "Place of Prosecution" rather than "Place of Trial."

THE CHAIRMAN: This calls for a show of hands. All those in favor of "Venue" raisehands.

(After a show of hands the Chairman announced the vote to be 3 in favor; 6 opposed.)

THE CHAIRMAN: Lost.

MR. DEAN: Can't we get a better word than "Place"?

MR. ROBINSON: "Place of Prosecution."

MR. HOLTZOFF: No, I do not like that.

MR. DEAN: I do not like "Place" standing alone.

MR. WECHSLER: I do not think that "Place of Trial" is really vulnerable to the point about the plea of guilty.

THE CHAIRMAN: All right; "Place of Trial" is proposed. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

MR. MEDALIE: No.

THE CHAIRMAN: Carried with a powerful single dissenting vote.

43 (a).

MR. ROBINSON: That is an introductory subdivision.

MR. HOLTZOFF: I move its adoption, Mr. Chairman.

MR. YOUNGQUIST: The first and second sentences are inconsistent. I think the word "but" should precede "Upon" in line 4. First you say flatly it shall be in the district in which the offense was committed.

MR. ROBINSON: That means the defendant has a right to it, but he may waive it.

MR. YOUNGQUIST: You say it shall be. You say the prosecution shall be in that district, and then you say it can be in another district.

MR. HOLTZOFF: Why not say "Unless upon motion"?

MR. YOUNGQUIST: "But" is better.

MR. WECHSLER: "Except as provided in paragraph (d)"; how about that?

MR. YOUNGQUIST: I think "But" makes it very simple.

MR. DEAN: So do I.

THE CHAIRMAN: What do you think of this suggestion:

"The prosecution shall be in the district in which the offense was committed except as provided in subdivision (d) of this rule"?

MR. ROBINSON: That is the briefest.

MR. YOUNGQUIST: Yes, that is better.

THE CHAIRMAN: If there is no objection, that will stand.

MR. WECHSLER: Now, on the substance of this, Mr. Chairman, is the district in which the offense was committed adequate for the common case where it was committed in more than one district?

MR. HOLTZOFF: Would you say "in a district" instead of "the district"?

MR. DEAN: I would say "the district". The indictment has been returned, hasn't it?

MR. WECHSLER: But this deals with the offense.

THE CHAIRMAN: "the district" seems to state the general proposition.

MR. WECHSLER: I should think it should be "in a district in which the offense was committed."

MR. YOUNGQUIST: That will fit your multiple offense case, but it won't fit the single case where it

was committed in only one district.

MR. ROBINSON: Which is the normal case, I suppose.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: Are you read for the motion on 43(a)?

MR. SEASONGOOD: Don't you have to state the division in the district?

MR. ROBINSON: You do not need to. It doesn't have to be in the division. That is no constitutional requirement.

MR. WECHSLER: What is the point of the division?

MR. SEASONGOOD: Isn't it supposed to --

MR. ROBINSON: I wish you would hold that, Murray, until we get through all of it. You will see we will take care of all of it. My suggestion is that you just defer disposition of it until the end. I believe you will see that we provide that he does get trial in the district unless he voluntarily puts it elsewhere.

MR. HOLTZOFF: In his own division?

MR. ROBINSON: Yes.

MR. YOUNGQUIST: Did we adopt 43 (a)?

MR. WECHSLER: I do not think you have got anything on division.

MR. HOLTZOFF: I move we insert the words "in

the division in which the offense was committed".

MR. YOUNGQUIST: Is that covered somewhere else?

MR. ROBINSON: That is discussed elsewhere. I am just asking you to defer action on it until we get through without doing anything definite now. You will see that we will be better able to dispose of it. It would be reactionary to put in division here because that will be out of line with other provisions made here.

THE CHAIRMAN: All right, we will hold it.

MR. HOLTZOFF: Suppose we adopt it subject to that point?

MR. ROBINSON: Why? Why not just hold it?

THE CHAIRMAN: All right. 43 (b).

MR. SETH: I am in doubt about the first four words, "If the defendant consents". Shouldn't he be arraigned any place before he consents?

MR. HOLTZOFF: No; he is to be arraigned in the division and tried in the division.

MR. SETH: What would you want to do in a district like we have where there are no divisions but about four places of holding court? The court is going to make it wherever he pleases --

MR. HOLTZOFF: The purpose of this rule is to permit a person with his own consent to be arraigned, tried or sentenced in any division.

MR. SETH: Why don't you say so? This seems to imply that he has got to consent to be arraigned.

MR. HOLTZOFF: I think Mr. Seth's point is well taken. Perhaps it would be better if it were made to read, "in any division within the district" instead of "any place of holding court within the district".

MR. ROBINSON: I do not believe that is our idea, Alex.

MR. HOLTZOFF: Yes. That is the purpose of this rule.

MR. YOUNGQUIST: I think it was.

MR. HOLTZOFF: I know, because I am partially responsible for this particular paragraph. We want to make it possible to sentence the defendant or try him outside of his own division so he would not have to sweat in jail for three months or six months.

MR. ROBINSON: Only by consent.

MR. HOLTZOFF: Yes.

MR. SETH: I do not want the rule so worded so that it will hamper a district without divisions.

MR. HOLTZOFF: I move to strike out the words "at any place of holding court", lines 9 and 10, and insert in lieu thereof the following, "in any division".

MR. SEASONGOOD: But Mr. Seth's point is that there are some districts that do not have divisions.

MR. SETH: That is right.

MR. HOLTZOFF: Well, this will meet Mr. Seth's point. He did not want, as I understand it --

MR. SETH: I did not want to hamper the district that hasn't them.

MR. HOLTZOFF: Yes, and this only relates to districts which have divisions.

MR. ROBINSON: No, it does not.

MR. YOUNGQUIST: With that amendment, you mean?

MR. SEASONGOOD: He says you can try him any place in the district if he consents.

MR. HOLTZOFF: No, but we want to strike that out.

MR. YOUNGQUIST: The only purpose of this was to take a man out of the division within the district where he committed the crime and into another division, if he consented, and sentence him there. We do not need to do anything about a district that has no divisions, because it is --

THE CHAIRMAN: The motion then is to strike in lines 9 and 10 the words "place of holding court" and substitute the word "division."

MR. YOUNGQUIST: We ought to have "in any division."

MR. HOLTZOFF: "in any division".

THE CHAIRMAN: "in any division within the district and at any time."

All those in favor of that change say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further questions?

MR. SETH: I should like to suggest the revamping of the whole thing to the Reporter where the district comprises more than one division so it will be strictly limited to that kind of place.

THE CHAIRMAN: Could it mean anything else?

MR. SETH: I do not know, but it is doubtful.

MR. ROBINSON: That was the reason for "any place of holding court". It covers both your district and the others.

MR. HOLTZOFF: You need the defendant's consent where there are several disivions. You do not need his consent where there is only one division.

MR. YOUNGQUIST: Why not follow Mr. Seth's suggestion. Let the Reporter make such amendments as may be required to carry out what we have agreed upon.

MR. SETH: To limit it to districts having more than one division.

MR. YOUNGQUIST: Yes.

MR. ROBINSON: All right.

THE CHAIRMAN: With that understanding we will go on to subsection (c).

MR. HOLTZOFF: I do not think there is any change in this. We worked it out very carefully in Tentative Draft 5.

MR. ROBINSON: That was Rule 33 (a) of Tentative Draft 5.

THE CHAIRMAN: Are there any changes?

MR. HOLTZOFF: I move its adoption. There is no change in this, as I understand it. I went over it very carefully.

MR. DEAN: I should like to ask a question in connection with it that arose in a case I had recently; and that is the question whether subpoena process issues in behalf of a defendant from a commissioner in a removal hearing.

MR. HOLTZOFF: This does not cover that question.

MR. DEAN: It says nothing about it?

MR. HOLTZOFF: It says nothing about it.

MR. DEAN: Now, we have adopted two rules, as I recall, one, Rule 20, which says the subpoena requiring the attendance of a witness at a hearing may be served any place within the United States; and we have also adopted

another rule which says that compulsory process in behalf of a defendant can only be available to about within a hundred miles, I think it was, unless the court makes a special dispensation. Now, are those two not inconsistent?

MR. HOLTZOFF: No compulsory free process that means.

MR. DEAN: It does not say that, though.

MR. HOLTZOFF: Then under our subpoena rule you could bring your witness anywhere you want to.

MR. DEAN: I think we should make that plain in the amendment to Rule 26 in regard to process in behalf of a defendant. Or was that limited to expert witnesses?

MR. HOLTZOFF: That compulsory process to which Herbert referred was compulsory free process in behalf of a defendant.

MR. DEAN: If the Committee understands that, I hope the word "free" is written in.

MR. HOLTZOFF: I do not know if that is the appropriate word, but that is the thought. It means process for indigent defendants.

MR. DEAN: As it stands, then, you could get process in a commissioner's hearing running into any district in the United States; is that correct?

MR. ROBINSON: That is right. That is what you wanted, isn't it?

MR. DEAN: Yes, that is what I would like.

THE CHAIRMAN: Are there any other questions on (c)?

MR. SEASONGOOD: Yes. On line 25 the words "in evidence" I think should be "against him".

MR. ROBINSON: Yes. I remember the English law as stated by Jackson in his book on the "Machinery of Justice," in addition to the English authority which I mentioned to you two or three days in connection with this.

MR. YOUNGQUIST: Substitute "against him" for "in evidence at the trial"?

MR. SEASONGOOD: Yes.

THE CHAIRMAN: That will be accepted in line with our previous rule. That is in line 25.

Is there anything else?

MR. SEASONGOOD: Is that right, to put in the complaint too? Haven't you just talked about indictments and informations?

THE CHAIRMAN: Where is that?

MR. SEASONGOOD: In line 12 of (c).

MR. HOLTZOFF: No, this covers a situation where a complaint is filed before a commissioner. That is what the word "complaint" here refers to.

MR. WECHSLER: Can you now get removal on a complaint?

MR. HOLTZOFF: Yes. This rule would require proof of probable cause to remove on a commissioner's warrant, whereas in case of an indictment, the indictment is conclusive except as to identity. That is the reason for the distinction.

MR. MEDALIE: The indictment is not as conclusive as you think. You can't prove it except by proving he had something to do with the offense.

MR. HOLTZOFF: You have to prove that he is the John Jones referred to in the indictment.

MR. MEDALIE: How do you do that? You want to show that he is the John Jones mentioned in the indictment, the person who peddled the narcotics to a particular person, - how do you do that?

MR. HOLTZOFF: Suppose the indictment says, "John Jones, residing at such-and-such a place"?

MR. MEDALIE: It does not. You do not get away as easy as that. You are going to connect him with a crime, otherwise you do not identify him. Let us take simple: Let us say the indictment is in the Jersey district, and you get a person with an unusual name, Arthur Vanderbilt, for instance. That does not speak for itself. Someone comes in from Newark and says, "I know a fellow around there by the name of Arthur Vanderbilt. Everybody knows him. This is the fellow."

Oh, no. "Dirty Mike" has a right to be Arthur Vanderbilt.

MR. HOLTZOFF: Suppose you have a mail fraud case and you allege the defendants were conducting a stock broker's business in such-and-such a place. Now, all you have to do is to prove they are the people who were conducting this stock broker's business.

MR. MEDALIE: That is right, and you are connecting him with the offense. In a simple offense you have got to prove it as, for example, in the case of a fellow robbing the national bank. How are you going to prove that he is the fellow indicted for robbing the national bank?

MR. HOLTZOFF: Well, of course, identity of names -- isn't that a presumption --

MR. MEDALIE: Oh, no. I will show you the New York Telephone Book.

MR. WECHSLER: Mr. Chairman, there is no motion, and everybody agrees the rule is fine.

MR. DEAN: I have a question.

THE CHAIRMAN: Is this on (c)?

MR. DEAN: Yes. It seems to me we have eliminated one of the things that you must prove in a removal hearing, and that is the jurisdiction of the court asking for it. Now, ordinarily, the certified copy of the

indictment makes out a prima facie case of jurisdiction, not identity - of jurisdiction and probable cause. We have eliminated jurisdiction here. I do not think we should do it. We have spoken here in terms of what makes out a prima facie case rather than the issues which should be determined at the removal hearing. In so doing we have knocked out the issue of jurisdiction. In other words, a certified copy of an indictment might very well be prima facie evidence of jurisdiction, but it should not be conclusive.

MR. MEDALIE: Look. If it is an offense the district court that found the indictment has jurisdiction because the district court may indict any offense provided it was committed within the district.

MR. DEAN: Provided it was, but if it were not?

MR. MEDALIE: But if the indictment says the offense was committed in the Southern District of New York, that should be conclusive.

MR. DEAN: That is prima facie evidence of it.

MR. MEDALIE: That is because the indictment says so.

MR. DEAN: Prima facie evidence?

MR. MEDALIE: Yes.

MR. DEAN: That is right.

MR. HOLTZOFF: I do not think that point should

be raised on removal.

MR. DEAN: Jurisdiction? It is an issue.

MR. HOLTZOFF: I think that should be left to the trial.

MR. DEAN: You are changing the whole law of removal?

MR. YOUNGQUIST: I thought the indictment was conclusive as to everything except the identity.

MR. DEAN: The indictment is conclusive of nothing. The indictment makes out a prima facie case of jurisdiction and probable cause.

MR. ROBINSON: I think the law is that the commissioner cannot go beyond jurisdiction. Can he?

MR. HOLTZOFF: Our rule does change the law on removal. There is no question about it. It changes it in this way -- there is no other issue to be gone into at a removal hearing in a case where there is an indictment. Now, in a case where the removal is on a commissioner's complaint --

MR. DEAN: Oh, but you are wrong. Some persons have not been removed where there is a certified copy of the indictment. Why? Because they put in evidence on their own side showing either, one, that the indictment was no good, therefore there was no probable cause; or, separate evidence that the court did not have jurisdiction because

the offense was not even committed there and the fellow was not there.

MR. HOLTZOFF: But this rule changes the law.

MR. DEAN: I am against it. That is what I am saying. I want to put in the issue of jurisdictionrather than speak in terms of what makes out a prima facie case.

MR. MEDALIE: I think we really ought to exclude that except in cases of complaints and informations.

MR. HOLTZOFF: Well, I move this rule be adopted.

MR. SETH: I second it.

THE CHAIRMAN: It is moved and seconded that (c) be adopted.

MR. YOUNGQUIST: Just a minute. There is a change I could suggest in the last sentence, just to conform with the previous language we have with respect to transmittal of papers by a commissioner, so as to read:

"After a defendant is held for removal or is discharged, the judge issuing the warrant shall transmit to the clerk of the district court in which the prosecution is pending all papers in the proceeding and any bail taken by him."

That makes it conform to the rule, what we did with the commissioner on transmitting papers.

THE CHAIRMAN: With the correction, the motion is to adopt 43 (c).

MR. HOLTZOFF: It should be "the clerk", shouldn't it?

MR. WECHSLER: The clerk? The judge issues the warrant.

MR. HOLTZOFF: You do not want to have the judge do it.

MR. WECHSLER: We don't mention the clerk here at all.

MR. HOLTZOFF: All right.

MR. WECHSLER: Do you want to seriously change this law on removal?

MR. HOLTZOFF: Yes.

MR. WECHSLER: There are two or three cases in the United States Supreme Court --

MR. HOLTZOFF: We thrashed it out in some committee hearing.

MR. WECHSLER: -- showing the reason why it is unfair to preclude a defense at a removal hearing, and the reasons are pretty good reasons.

MR. HOLTZOFF: I thought we voted on all these last time.

MR. WECHSLER: I voted against it last time and I am going to do it again. It is a matter of

preventing abuses.

MR. SETH: I think that is a question of proof, not a question of issue, that is, when you speak in terms of the issue at the removal hearing rather than what the proof shall be at a removal hearing. I think the proof presented by the Government should be fairly slight but I think you ought to give a defendant an opportunity to put on opposing proof, just what the Supreme Court says he has a right to do, and we preclude that by this rule, and we say, "You just cannot do anything."

MR. MEDALIE: You say you cannot do it when there is an indictment?

MR. SETH: That is right.

MR. MEDALIE: I think that is right.

MR. SETH: The hearing can be fairly brief but why preclude the fellow from showing some proof?

MR. MEDALIE: You know that on an indictment, or on any criminal proceeding here in New York, speaking now of the State court, you may remove a man from California, or vice versa, with no other proof than proof of identity. Why should it be different in the Federal court?

MR. SETH: I do not hold a brief for the State court.

THE CHAIRMAN: Gentlemen, we have the motion

still. All those in favor of 43 (c) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The "ayes" seem to have it. The motion is adopted.

Rule 43 (d) (1).

MR. WECHSLER: Mr. Chairman, may I suggest that the Note articulate the change?

MR. SETH: I think it should, because it is revolutionary. It certainly should.

THE CHAIRMAN: 43 (c).

MR. HOLTZOFF: Oh, yes.

THE CHAIRMAN: Make a note of that, Jim.

MR. WECHSLER: It doesn't do it now.

THE CHAIRMAN: 43 (d) is next.

MR. HOLTZOFF: I move the adoption of 43 (d) (1).

THE CHAIRMAN: Is that seconded?

MR. SEASONGOOD: Yes.

THE CHAIRMAN: All those in favor of 43 (d) (1) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No." --

MR. SETH: Ought this to be amended and limited to defendants who have counsel?

MR. HOLTZOFF: This is something that is pretty much in favor of defendants, Mr. Seth.

MR. SETH: It is a waiver of a constitutional right.

MR. YOUNGQUIST: That is only when he pleads guilty or nolle contendere.

MR. ROBINSON: That is right. We provide his plea of guilty now must be only under certain safeguards.

MR. YOUNGQUIST: I do not believe we include he must be represented by counsel, do we? The indictment or information mentions the charge or offense, and he is aware of the nature of it - knows what is going on, in other words.

THE CHAIRMAN: Any motion on this section?

MR. HOLTZOFF: Well, there is a motion to adopt.

THE CHAIRMAN: I mean, is a question raised?

MR. SETH: This is a constitutional right to be tried in the district of the offense and I think he should not waive it without counsel. Doesn't the Constitution say "by a jury of the district"?

MR. ROBINSON: No.

MR. HOLTZOFF: Oh, yes.

MR. ROBINSON: District of plea.

MR. YOUNGQUIST: This does not apply to

trials. It applies only when he wants to plead guilty or nolle contendere.

THE CHAIRMAN: In lines 56 and 57.

MR. HOLTZOFF: That is right. There is no constitutional right involved.

MR. WECHSLER: I wonder about that.

MR. DEAN: What harm is done if he pleads guilty?

MR. SETH: It is his waiver of his right to go back to New York, or something like that, but I move that it be amended to require limiting it to those defendants who have counsel.

THE CHAIRMAN: You have heard the motion.

MR. DEAN: I second it.

MR. WECHSLER: May I state my difficulty with it? If you put that limitation in, and you do not provide for giving him counsel, Mr. Seth, it makes it inapplicable to the average run of defendants.

MR. HOLTZOFF: Those are the ones you want to help by this section, petty offenses.

MR. MEDALIE: Any judge wanting to help a defendant do this, any district attorney wanting to help a defendant do this, would always suggest the appointment of counsel.

MR. WECHSLER: Yes.

MR. HOLTZOFF: Yes; I think that would be

answered.

MR. MEDALIE: So you may provide for him to be represented by counsel, and be sure he will have counsel.

THE CHAIRMAN: All those in favor of Mr. Seth's motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No" --

MR. YOUNGQUIST: No, do we need that here? Because if it comes before the court, he is going to be arraigned, isn't he?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Will he be arraigned before the waiver?

MR. YOUNGQUIST: On the arraignment the statute provides that he shall be advised of his right to counsel, and the court shall assign counsel, if he does not have one. Haven't we already taken care of that?

2 THE CHAIRMAN: As a matter of fact, the counsel rule goes beyond that, doesn't it? It includes it too. The defendant is entitled to have assigned counsel for his defense at every stage of the proceeding. This would be a stage of the proceeding, wouldn't it?

MR. SETH: Yes.

THE CHAIRMAN: That is the beginning of

Rule 42.

MR. WECHSLER: That does not provide for the assignment of counsel at every stage of the proceeding.

THE CHAIRMAN: "If the defendant appears in court without counsel, the court shall advise him of his right of assigned counsel to represent him, unless he elects to proceed without counsel or is able toobtain at his own expense."

MR. WECHSLER: He would never appear in court under this until the removal occurred.

MR. HOLTZOFF: No, that is right.

THE CHAIRMAN: That is true. I think you do need it. I guess you need it.

MR. DEAN: Where would you put it, Mr. Seth?

MR. SETH: I don't know. I leave that up to the Reporter.

MR. MEDALIE: We have language like that for the other waiver. Let us get the other waiver earlier here.

MR. SETH: Waiver of the indictment?

MR. MEDALIE: Yes.

MR. HOLTZOFF: What is the waiver of indictment?

MR.WECHSLER: Suppose after the word "may" on line 54, "may, if represented by counsel, state in writing".

MR. MEDALIE: Yes, that is the language you

have before, "represented by counsel". "He may, if represented by counsel", line 54.

MR. YOUNGQUIST: I think that pretty much destroys the purpose of this provision. The idea was that when a man is in jail somewhere and he wants to get it over, wants to plead guilty, he petitions to be permitted to go somewhere and plead.

MR. DEAN: I think counsel ought to advise him, though, as to whether the judge there is a hard-boiled judge or a soft judge. If he is going to plead guilty in one district, he may take a long rap in certain cases, way out of proportion to what some other judge would do. I think that is one place where he ought to have counsel.

THE CHAIRMAN: We have already voted. All those in favor of Section 43 (d) (1), as amended, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

43 (d) (2). Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. WECHSLER: I ask for a chance to read it, Mr. Chairman.

MR. HOLTZOFF: That is a provision that introduces a change of venue.

MR. MEDALIE: That is anti-trust cases.

MR. SEASONGOOD: You say he may transfer the proceeding if there is such a prejudice against the defendant that he cannot get a fair trial. It would seem to me you have to transfer, if there is such a prejudice against him.

MR. MEDALIE: You know, Gordon, all that the Department has to do, having this provision in mind, is to recite that the offense was committed in the Southern District, and that defeats everything that appears in (2), because it must appear from the indictment that the crime was committed in more than one district.

MR. HOLTZOFF: There are two parts to this rule, George. The first sentence of this rule is just prejudice. You see, there are two parts.

MR. MEDALIE: Oh, you mean, general prejudice?

MR. HOLTZOFF: Yes, and that is really a novelty in Federal procedure.

MR. MEDALIE: That is what people always ask about, and we always tell them no.

MR. HOLTZOFF: Yes, and is always explained. And that ought to be made, because it is a radical departure.

MR. MEDALIE: It seems to me very strange to say, if there is such a violent prejudice against a man that he cannot get a fair trial, that the court may transfer him. If there is such a prejudice that he cannot get a fair trial, the court should transfer him.

MR. HOLTZOFF: Today the court may not do it at all.

MR. YOUNGQUIST: I think it ought to be "shall". It is up to the court to say whether there is prejudice.

THE CHAIRMAN: The motion is to change "may" to "shall" in line 74. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Motion carried.

Are you ready for the question on --

MR. WECHSLER: No, I don't get the drafting of lines 83, 84 and 85, "if the court is satisfied that in the interest of justice the proceeding should be transferred to another district in which the commission of the offense is so alleged".

MR. SETH: That is the way it is in several districts.

MR. MEDALIE: Let us go back to the beginning.

THE CHAIRMAN: The word "so", you mean?

MR. WECHSLER: Yes.

THE CHAIRMAN: That might come out.

MR. MEDALIE: That is an offense committed in more than one district..

MR. YOUNGQUIST: That is it.

MR. WECHSLER: Do you think the word "so" on 84 should be in there?

MR. MEDALIE: "another district in which the commission of the offense is alleged"?

MR. YOUNGQUIST: That is all you need.

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MR. WECHSLER: And you don't need "by the indictment or information".

MR. MEDALIE: No.

THE CHAIRMAN: The motion is to strike out "so" and "by the indictment or information"?

MR. WECHSLER: Yes.

MR. YOUNGQUIST: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. WECHSLER: The next sentence, does the approval of the circuit judge apply to both types of

removal or only the second type?

MR. SETH: The way it is drawn here it applies to both, and we have made it mandatory on the district judge that he has to get somebody else's approval.

MR. WECHSLER: I move this next sentence be stricken.

MR. HOLTZOFF: I second the motion. I never favored it.

MR. MEDALIE: Why do you need the approval of the senior circuit judge, when the case should have been dropped in the first instance and he would have had nothing to say about it?

MR. YOUNGQUIST: I think the reason for that was to prohibit a certain --

MR. HOLTZOFF: I understand the reason for that, George, although I did not favor it, was that the docket of some particular district might be cluttered, and the senior circuit judge would say, "I don't want any cases transferred to this district."

MR. MEDALIE: Suppose the Department decided to give it to him in the first instance? What could he do about it?

MR. HOLTZOFF: I am just stating what I understand to be the reason.

MR. MEDALIE: I do not believe that is a good

reason.

MR. HOLTZOFF: I don't either.

MR. ROBINSON: The reasons are stated in Rule 43, page 11 of the Notes, "Approval of the transfer by the senior circuit judge is required in order to prevent congestion of dockets and consequent delays."

MR. MEDALIE: That is what Alex said.

MR. ROBINSON: "It is intended that the senior circuit judge in approving the transfer should consider merely the state of the docket in the district to which the transfer is sought to be made, the length of time required for the trial, and other matters having to do with the volume of business of the district and circuit and not that he should pass upon the question of whether on the facts of the case any change of venue should be granted."

MR. MEDALIE: I do not see what good it would do him if the Department decided to get an indictment in that district or circuit anyhow.

MR. WECHSLER: There are two possibilities here, one is prejudice, in which event, I suppose, the docket should yield to the more important considerations of fair trial.

MR. HOLTZOFF: Oh, yes, but in picking out which district to transfer to, there might be half a

dozen districts.

MR. WECHSLER: Wouldn't the district judge who is making the order be able to take that into account, in deciding where to transfer to?

MR. HOLTZOFF: I think he will.

MR. MEDALIE: He will ask around.

MR. ROBINSON: Can one district judge send a case into another district without any help from higher up?

MR. HOLTZOFF: He will be able to, if this rule is adopted.

MR. MEDALIE: In state practice you get a change of venue on the ground of legal prejudice. That decision is made by the county judge or a similar judicial officer, and he will send a case, say, from New York County to Tompkins County. He does not ask Tompkins County anything about it, supposedly, but, in fact, he does.

MR. ROBINSON: Surely, he does.

MR. HOLTZOFF: But you do not have to have it in the rule.

MR. MEDALIE: No.

MR. YOUNGQUIST: I think that sentence was intended to apply only to the second situation.

MR. MEDALIE: Yes.

MR. YOUNGQUIST: Not to the prejudice situation.

MR. HOLTZOFF: I don't think you need it for either.

MR. MEDALIE: No, I don't think so.

THE CHAIRMAN: You have the motion to strike the sentence beginning on 85 and ending on 88. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Any further suggestions on this section?

MR. WECHSLER: Don't we want to make the language on 92 to 94 conform to these amendments?

MR. ROBINSON: Yes.

THE CHAIRMAN: That is accepted by the Reporter.

Any further suggestions?

If not, all those in favor of 43 --

MR. WECHSLER: I have one, I regret to say, Mr. Chairman. It seems to me that the portion of the rule dealing with removal really does not belong in a rule on place of trial, and I therefore move that (c) be abstracted from Rule 43, which is entitled "Place of Trial" and made a separate rule entitled "Removal of the Defendants."

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Won't that also include (d)?

MR. SETH: No.

MR. WECHSLER: No, because (d) deals with place of trial.

THE CHAIRMAN: Oh, yes.

MR. WECHSLER: There you are changing the place of trial, but you are not in (c), you are just getting the defendant to the place of trial.

THE CHAIRMAN: The motion is to go back to subdivision (c) and change that, to be included under "Removal".

All those in favor --

MR. ROBINSON: I do not understand the reasons very well.

MR. HOLTZOFF: Why not take a vote on it?

MR. ROBINSON: I don't know how to vote, really.

MR. WECHSLER: The reason is easy to state: That removal of the accused to the place of trial is a different matter from those rules on determining what the place of trial shall be, that is all, and everything else in Rule 43 is about --

MR. ROBINSON: But, pardon me, doesn't it all go to subdivision (a)? That is, the big general principle is that prosecution shall be in the district in which the offense was committed. Here is a fellow

who has committed an offense in district A and he is in district B. The point is, in order to try him, you have to come back to district A.

MR. DEAN: You might have the rule on arrest say, "In order to try the defendant".

MR. ROBINSON: No; removal is just to get him back to that place, which is just a geographical proposition.

MR. SETH: (c) removes the defendant to the indictment and (d) (1) removes the indictment to the defendant.

MR. ROBINSON: Yes; if you change this, you have to change two or three other parts of the rule.

MR. HOLTZOFF: I move the question.

THE CHAIRMAN: The question now is on changing the location of 43 (c) from where it is now to the title under "Removal". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. ROBINSON: To the title on "Removal"? Was that in the motion?

MR. HOLTZOFF: No; to make a separate rule on removal.

THE CHAIRMAN: Oh, to make a separate rule on removal?

MR. DEAN: Where it was to go --

MR. ROBINSON: That was not included, where you wanted to put it.

MR. HOLTZOFF: We will leave that.

MR. ROBINSON: No; that would be part of the intent of this question.

THE CHAIRMAN: All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 7; 3 opposed.)

MR. DEAN: I move that it be called Rule 43 (a) and go in at that point.

MR. WECHSLER: Let us make it Rule 44. They have to be renumbered anyway.

THE CHAIRMAN: They will all have to be renumbered.

MR. ROBINSON: It would not belong there. We will have to put it back to Rule 32, where it was, that is, "Supplementary and Special Proceedings."

MR. MEDALIE: All right.

MR. DEAN: All right.

MR. MEDALIE: What you are doing is putting it in with search warrants and criminal contempt.

MR. ROBINSON: That is right.

THE CHAIRMAN: The question is on 43 (d) (2).

This is the last section we considered.

MR. HOLTZOFF: I move its adoption.

MR. YOUNGQUIST: Wait a minute. You say, "A motion to transfer under any provision of this rule shall be made at or before arraignment" --

MR. SEASONGOOD: That is (e).

THE CHAIRMAN: We haven't come to that yet.

MR. YOUNGQUIST: Oh, I am sorry.

THE CHAIRMAN: We are still on (d) (2), which was not adopted before. We went back to the motion on (c).

MR. WECHSLER: I move its adoption, as amended.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No.")

(No response.)

THE CHAIRMAN: It is carried.

Now we are up to Rule 43 (e), line 95.

MR. YOUNGQUIST: You have, under (d), a provision that a defendant arrested in a district may say that he wishes to plead somewhere else. He cannot be arraigned - he does that because the judge is not available, where he is, and he goes into some other place, where there is a judge - he cannot be arraigned until he gets there, and yet you require that the motion shall be made at or before

arraignment.

MR. ROBINSON: "Or".

MR. HOLTZOFF: "at or before arraignment", doesn't "or" cover that point?

MR. YOUNGQUIST: Or at such other time? I guess that takes care of it.

THE CHAIRMAN: Anything further on (e)?

MR. HOLTZOFF: I move its adoption.

MR. ROBINSON: Seconded.

MR. MEDALIE: Mr. Chairman, I call your attention to the fact that the next rule says time, and so do I.

THE CHAIRMAN: May we pass 43 (e)? All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: That leaves 43 (a) open.

MR. ROBINSON: 43 (a), for your final disposition. It is a very short one.

THE CHAIRMAN: We skipped (a), which dealt with the question of "divisions". The question was raised there on "divisions".

MR. WECHSLER: I propose that we consider now Mr. Holtzoff's motion to insert the words "and division" after "district" in line 3.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. HOLTZOFF: I move the adoption of (43 (a).

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Mr. Medalie's motion to adjourn is carried.

(At 10.55 p. m. an adjournment was taken to February 23, 1943, at 9.30 a. m.)

- -

Met pursuant to adjournment at 9.30 a.m. February 23, 1943.

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THE CHAIRMAN: I think we have a quorum, haven't we?

MR. ROBINSON: Yes.

THE CHAIRMAN: Note the fact that ten members are present, and that we have waited ten minutes.

All right, gentlemen, we will start with Rule 44 (a).

MR.GLUECK: Isn't that just exactly like the No. 5 version?

MR. ROBINSON: No changes whatever, Sheldon.

MR. GLUECK: I move that it be adopted.

MR. SETH: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No.".

(No response.)

THE CHAIRMAN: Carried.

MR. DEAN: Is the same true with reference to (b)?

MR. ROBINSON: Yes. On line 24 it might be noted that "except as provided in Rule (blank)" may be stricken out. That is, put a period after "law".

MR. HOLTZOFF: And I suppose in line 22 you will have to change the number of Rule 31.

THE CHAIRMAN: Just circle it.

All those in favor of 44 (b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

44 (c).

MR. DEAN: What is the situation there?

MR. ROBINSON: No change in the text, as the Reporter's Memorandum states. Just the same as Rule 42 of Tentative Draft 5.

MR. LONGSDORF: Wait a minute. I thought I had something here on line 32.

THE CHAIRMAN: We are not up to that yet. That is (d). Is there a motion on (c)?

MR. McLELLAN: I move its adoption.

MR. DEAN: Is this the only place we refer to terms of court?

MR. ROBINSON: Yes.

THE CHAIRMAN: All right. All those in favor of 44(c) say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. LONGSDORF: That was the one I wanted to --

THE CHAIRMAN: You referred to line 32. Line 32 is in (d).

MR. LONGSDORF: Oh,yes.

THE CHAIRMAN: If there are no objections that will be considered carried.

Now, what is the situation, Jim, with respect to (d)? Is that the same?

MR. ROBINSON: Yes.

MR. McLELLAN: I move its adoption, Mr. Chairman.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any further comments with respect to this rule? Is there any comment on 44(e)?

MR. McLELLAN: I move its adoption, sir.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

We turn now to Rule 45. "Bail."

45 (a) is "Right to Bail." 45 (a) (1) "Before Conviction."

MR. ROBINSON: Mr. Chairman, 45 (a) (1) is Rule 6(a) of Tentative Draft 5.

THE CHAIRMAN: In the same form?

MR. ROBINSON: Yes, sir.

MR. McLELLAN: I move its adoption, sir.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any suggestions on 45 (a) (2)?

MR. SETH: I think it was suggested last night that certiorari be included somewhere in this rule.

MR. ROBINSON: Yes.

MR. HOLTZOFF: That will be inserted in line 11.

MR. SETH: I do not know what was decided last night, except to bring it in here.

MR. HOLTZOFF: In line 11 I suggest we insert the words "or certiorari".

MR. SETH: In two places?

THE CHAIRMAN: After the word "appeal" in line 11. Then I think there is another addition --

MR. YOUNGQUIST: I don't recall where it came from, but this is something we went over yesterday, that pending the filing and determination of a petition for a writ of certiorari the defendant may be admitted to bail by the circuit court of appeals or circuit judge or justice of the Supreme Court.

THE CHAIRMAN: Why isn't that all accomplished by the two words "or certiorari" in line 11 and what follows in the rest of the paragraph?

MR. SETH: We had the same question in 15 as to circuit justice. We had made it justice of the Supreme Court last night at some stage of the proceedings.

MR. YOUNGQUIST: I think it probably would be enough. The only point I think we had in mind was that it did not, strictly speaking, cover the theory between the affirmance of the conviction and the actual filing of the appeal.

THE CHAIRMAN: Maybe we ought to put the "or certiorari" in twice in line 11.

MR. SETH: I would say "case".

THE CHAIRMAN: You mean, in other words, to make it read "pending appeal or ceriorari only if it appears that the case involves" and so forth?

MR. SETH: Yes.

MR. HOLTZOFF: And in line 15 you are changing "the circuit justice" to "a justice of the Supreme Court", are you?

MR. SETH: Yes.

MR. McLELLAN: You really want that, do you?

MR. ROBINSON: I don't want it.

THE CHAIRMAN: The point which motivated that was that very often in the summertime your circuit justice is not available, and there is a sort of understanding to go to the one that is available.

MR. ORFIELD: In line 10 I suppose you want "Upon Review" to cover appeal and certiorari?

MR. HOLTZOFF: Yes.

MR. GLUECK: I move the adoption of(2) as amended.

MR. ROBINSON: May I check on the amendments? How would it read?

THE CHAIRMAN: It would read, then, "Upon Review" in line 10; and in line 11 it would read "pending appeal or certiorari only if it appears that the case involves" - and in line 15 "the circuit justice" is out, substituted by "a justice of the Supreme Court."

MR. ROBINSON: That is the way I have it.

THE CHAIRMAN: All those in favor of 45 (a) (2) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

45(b).

MR. SETH: I move its adoption.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

MR. ROBINSON: In line 27, Mr. Seth, may I ask you whether we could leave out "for good cause"?

MR. SETH: You can leave that out.

MR. YOUNGQUIST: Mr. Reporter, in the last sentence of (b)-I think we had a similar provision in the earlier rule where we state it differently. I suggest that it be made uniform.

MR. ROBINSON: Right.

MR. GLUECK: I think that was in connection with Sentence, Aaron.

MR. YOUNGQUIST: It was after conviction.

MR. HOLTZOFF: Yes - "may be altered".

MR. McLELLAN: May I ask what change was made in (b)?

MR. HOLTZOFF: We struck out the last three words.

THE CHAIRMAN: Yes; and also "the amount of bail

may be altered".

All right, if there are no further suggestions that will be considered carried.

Now (c). Are there any questions?

MR. LONGSDORF: The sentence beginning on line 31 - "The commissioner or court or judge or justice may require as security one or more sureties or cash or securities."

I think it would be a little more accurate to insert after the word "or" on line 32 "may accept cash or securities."

MR. HOLTZOFF: That is right.

MR. YOUNGQUIST: There is another point in that sentence which Mr. Medalie raised. We agreed and provided that it could be without surety on personal recognizance.

MR. HOLTZOFF: Don't you think that is covered by the use of the word "may" at line 31?

MR. YOUNGQUIST: I am simply, in Mr. Medalie's absence, raising the point for him. He thought it did not cover it.

MR. GLUECK: I would like to raise the question of the meaning of the double use of the words "security" and"securities" in line 32. It reads "require as security one or more sureties or cash or securities."

MR. HOLTZOFF: Why not strike out the words "as security"?

MR. GLUECK: Yes.

THE CHAIRMAN: I think so. Right.

MR. YOUNGQUIST: "may require one or more sureties". I tnink that is all right.

MR. ROBINSON: Tne reason for the two words "as security" is this: the committee has said it wishes to see that a defendant may be released upon his own recognizance, and the point here is that the judge or justice, and so forth, may require that as security for the appeal bond which the defendant files, or for the bond which the defendant himself files, without security.

THE CHAIRMAN: I would feel better if we provided expressly here that he might be released on his own recognizance, or whatever the words are. Wouldn't you?

MR. ROBINSON: Yes, if we can get better words. The trouble is to get away from the word "recognizance".

MR. YOUNGQUIST: Why not say "may require bond without surety or with one or more sureties"?

MR. ROBINSON: That is good.

THE CHAIRMAN: Why not put in a second sentence indicating that, following that first sentence?

MR. SETH: "In proper cases no surety need be required" - but he has got to give bond in every instance.

THE CHAIRMAN: Do you have a comment, Judge McLellan?

MR. McLELLAN: I like "security" better because that would cover both sureties, cash or securities.

MR. HOLTZOFF: I wonder if there would not be a confusion because of the use of the word "securities" at the end of the line 32. Do you think there would be?

MR. SETH: There is only one kind of security that can be accepted, and that is a Government bond, as I remember the law.

THE CHAIRMAN: What was your suggestion? How does it read - "in proper cases" - how does your wording go?

MR. SETH: "In proper cases no security need be required."

In lines 34 and 35 why do you retain the "cash and securities" in the district where the bond is given in removal cases? In another place we ordered everything transmitted back to the district.

MR. ROBINSON: Yes. You will notice in the Memorandum, Mr. Seth, I call attention to that, and I state that it was done that way to get the view of this committee as to what should be done about it.

MR. HOLTZOFF: I think it ought to go back to the court where the case is pending.

MR. SETH: That is right. That is where he is to appear.

MR. HOLTZOFF: Why not strike out that clause in line 35 beginning with the word "cash" to the end of the sentence?

MR. SETH: That is right.

MR. YOUNGQUIST: May I suggest this: "In removal proceedings the bail shall accompany the papers". That includes both your bonds --

MR. ROBINSON: That is right.

THE CHAIRMAN: The sentence will then read "In removal proceedings the bail shall accompany the papers pertaining to the case of the defendant"?

MR. ROBINSON: Do you need "of the defendant"?

MR. HOLTZOFF: No. Ending with "pertaining to the case."

MR. ROBINSON: All right.

MR. YOUNGQUIST: Mr. Chairman, I would like to go back to the preceding sentence. I am bothered by the use of the word "securities" at the end of line 32.

MR. ROBINSON: That is a statutory word.

MR. YOUNGQUIST: I know. The trouble is we are using the word "securities" in a different sense from the sentence immediately following.

MR. McLELLAN: Mr. Chairman, may I ask whether any

great harm would be done if we abolished any security except sureties and cash?

MR. SETH: We have the statute authorizing Government bonds to be put up.

MR. McLELLAN: Yes. We know that now.

MR. GLUECK: Why not say "Government bonds", Judge? "cash or Government bonds".

THE CHAIRMAN: "United States Government bonds"?

MR. GLUECK: "United States Government bonds."

MR. HOLTZOFF: That seems to be a good suggestion.

THE CHAIRMAN: Yes.

MR. ROBINSON: Of course, if the statute now should be changed making other things than bonds acceptable --

MR. YOUNGQUIST: Well, the rules will control.

MR. LONGSDORF: Are all Government bonds acceptable under Title 6?

MR. SETH: I don't know. I remember when I was prosecuting the law was that way then.

MR. HOLTZOFF: I think it still is.

MR. LONGSDORF: I doubt whether these non-negotiable ones they are selling now, Series E, F and G, could be used.

THE CHAIRMAN: Why is this second sentence paragraphed anyway?

MR. GLUECK: Yes, that is right. We have not

done that before, have we?

MR. McLELLAN: No.

MR. ROBINSON: The statute you are talking about provides that bonds or notes of the United States may be accepted in lieu of recognizance.

MR. LONGSDORF: That is right.

MR. GLUECK: Let us use the same phraseology.

MR. SETH: Why not put it "United States Government obligations"?

MR. SEASONGOOD: Jim, you may have other bonds which would not fall into the words you mentioned -- what were the words?

THE CHAIRMAN: "bonds or notes".

MR. HOLTZOFF: "bonds or notes of the United States" - is that it?

MR. YOUNGQUIST: Mr. Chairman, why are we troubling ourselves so much with respect to bond on appeal when we did not do that in connection with bonds given at earlier stages of the proceeding?

MR. GLUECK: Because by that time the defendant has already been proven guilty and he has a bigger motive for running away and not showing up.

MR. HOLTZOFF: I have not overlooked the fact that in referring to bail at the earlier stages of the proceeding we incorporate this rule by reference. This is

a general rule that is referred to.

MR. GLUECK: That is right.

MR. YOUNGQUIST: I thought this was on appeal only.

MR. HOLTZOFF: No.

MR. YOUNGQUIST: I am sorry.

THE CHAIRMAN: All right. Then we will omit the paragraphing between the first and second sentences of (c), and it would then read, as I have it: "The commissioner or court or judge or justice may require one or more sureties or may accept cash or United States Government bonds or notes" --

MR. GLUECK: I beg your pardon. I thought that was "or bonds or notes of the United States."

THE CHAIRMAN: "bonds or notes of the United States." Right.

MR. HOLTZOFF: "But in proper cases no security need be required."

THE CHAIRMAN: That is right. "In removal proceedings the bail shall accompany the papers pertaining to the case", striking the rest of that sentence. The last sentence stands.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All those in favor of "(c) as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried unanimously.

45 (d). Is this thesame, Jim?

MR. ROBINSON: I will see.

MR. HOLTZOFF: I move its adoption.

MR. ROBINSON: In the Reporter's Memorandum it takes care of any change that there is.

MR. GLUECK: What is the meaning of the words in line 48 "appears to be qualified."? It does not say to whom. Does that mean the commissioner or court or judge?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: To whoever is accepting bail.

THE CHAIRMAN: Are there any remarks on (d)?

(No response.)

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Carried.

45 (e) (1).

MR. ROBINSON: This is a civil rule again, and the provision here is in accord with the civil rule provision for forfeiture. The theory is that if there is forfeiture,

or discharge of forfeiture, or remission, it shall be handled in the district court; so that if you have, say, a bond before the commissioner that is deposited in the district court,and if there is forfeiture the collection is in the district court. If you have a bond on appeal the bond is still in the control of the district court; forfeiture is had in the district court.

MR. HOLTZOFF: I move its adoption.

MR. YOUNGQUIST: Just a moment. Why can we not, instead of using all these words, say, "shall declare a forfeiture of the bail"?

MR. ROBINSON: What line?

MR. YOUNGQUIST: Line 53.

MR. ROBINSON: That is very good.

THE CHAIRMAN: Does the civil rule use the phrase or expression "jurisdiction of the defendant or of the proceeding", because it seems to me if you had the defendant you would have everything, but the district court might not at the moment have jurisdiction of the proceeding. It might either be before the commissioner or the circuit court.

MR. SETH: Suppose he deposits his bail and then fails to prosecute his appeal with the diligence required, is his bond forfeited in the cirait courtof appeals or in the district court?

THE CHAIRMAN: No, this is in the district court.

I am wondering, in line 52, whether it is not sufficient to say "which has jurisdiction of the defendant", because it might not at the moment have jurisdiction of the proceeding.

MR. SETH: Why not stop with "jurisdiction"?

THE CHAIRMAN: Maybe that is better still.

MR. ROBINSON: That is safer, isn't it?

MR. HOLTZOFF: I want to ask the reporter a question about this: suppose the case is pending before the commissioner, shouldn't the forfeiture be declared by the commissioner? In other words, suppose the defendant is bound over for preliminary examination before the commissioner, if the commissioner takes bail should the district court declare the forfeiture?

MR. ROBINSON: It always does.

MR. SETH: It always does.

MR. YOUNGQUIST: That is the beginning of the enforcement proceeding?

THE CHAIRMAN: I wonder if we could not amend the section to read this way, starting with line 50:

"When there is a breach of condition of any bail"--

MR. YOUNGQUIST: That would be inappropriate, I think--

MR. ROBINSON: Of course, in that case, there is a

bail bond always provided by the defendant for the commissioner, the district court or the court on appeal, so you always have the condition stated in the bond.

MR. YOUNGQUIST: Do you when you deposit cash?

MR. SETH: Yes, you sign a bond too.

MR. HOLTZOFF: I think cash is only in place of a surety.

MR. ROBINSON: That is right. So it is always a breach of the condition of the bond because it is written in the bond.

MR. HOLTZOFF: Mr. Chairman, how are you fixing it now?

THE CHAIRMAN: "When there is a breach of condition of any bond" -- did somebody suggest "bail" was not appropriate?

MR. YOUNGQUIST: I think it is not appropriate.

THE CHAIRMAN: (Continuing) "of any bond the district court" -- let us strike out a little more.

MR. YOUNGQUIST: Couldn't you make that "a bond"? Wouldn't that be more accurate?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Yes. I wanted to cover bonds before the Commissioner. That will do.

MR. HOLTZOFF: "a bond".

THE CHAIRMAN: (Continuing) "the district court

shall declare a forfeiture of the bail."

MR. ROBINSON: Would you leave out "having jurisdiction"?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Why not?

MR. ROBINSON: All right.

MR. YOUNGQUIST: I think that would mean any district court that did have jurisdiction.

MR. ROBINSON: I believe so.

MR. HOLTZOFF: I think that is a necessary implication.

THE CHAIRMAN: It is a little difficult to say when you are talking about proceedings before a commissioner or after the appeal has gone to the circuit court.

Now, all those in favor of this section as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

45 (e) (2).

MR. HOLTZOFF: At line 56 the word "such" I think should be changed to "a".

MR. ROBINSON: I think that is right.

MR. YOUNGQUIST: Is that word "discharged" the

word usually used?

MR. ROBINSON: Yes; that is a statutory word.

MR. HOLTZOFF: I think the word "remit" is used in the statute.

MR. ROBINSON: No; that is a different thing.

MR. HOLTZOFF: Is the word "discharged" used in the statute?

MR. ROBINSON: Yes.

MR. YOUNGQUIST: All right.

MR. SETH: How about "in whole or in part"? Isn't that strange?

THF CHAIRMAN: Yes, it does seem a little queer.

MR. YOUNGQUIST: Does he ever forfeit half a bond or half the amount of the bond, Alex?

MR. HOLTZOFF: I think you can only forfeit the whole bond,as I understand it, but you can remit a part of the forfeiture.

THE CHAIRMAN: That is another thing.

MR. ROBINSON: (Addressing Mrs. Peterson) Do you know where the statute is?

MRS. PETERSON: I think so, yes.

MR. HOLTZOFF: It seems to me that if you can make a partial remission after entry of judgment, I think you ought to be allowed to do the same thing before judgment.

MR. YOUNGQUIST: I think so too.

MR. HOLTZOFF: I am not clear in my own mind as to the use of the word "discharged" and the difference between "discharge" and "remit".

MR. ROBINSON: You have got all that explained in Rule 45, page 7.

MR. HOLTZOFF: What is the explanation?

MR. ROBINSON: You can read it there, or I will read it: "'Discharge' is the release of the liability of the surety in whole or in part before the final adjudication of forfeiture of the bail upon the unexcused default by the defendant. 'Remission" is the release of the surety after entry of final judgment of forfeiture and operates either to stay execution or to refund the collected penalty."

MR. HOLTZOFF: It operates more than to stay execution. It operates to get rid of the obligation, not only to stay execution.

MR. SETH: I still think "in whole or in part" should come out.

MR. McLELLAN: I second the motion. My reason for seconding it is that such a situation will arise very rarely anyway, and it is unnecessary.

MR. DEAN: If there is an appropriate occasion for it that we do not now visualize, let the Court do it.

MR. SETH: Yes, discharge it upon such conditions as the court deems just.

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THE CHAIRMAN: All those in favor of the motion --

MR. LONGSDORF: Just a minute, please. Is that word "notwithstanding" on line 58 a useful word?

THE CHAIRMAN: We are not touching that. We are on line 56 at the moment. We are discussing "in whole or in part" on line 56.

All those in favor of the motion to strike say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed,"No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. HOLTZOFF: In line 57 "when" should be "if".

THE CHAIRMAN: All right, unless there is any objection.

Now, you had something on line 58, Mr. Longsdorf?

MR. LONGSDORF: Well, I was questioning that word "notwithstanding". I was wondering why it was used. I do not know whether it is necessary or whether it is the best word we could use.

MR. YOUNGQUIST: And I think we ought to strike out the "and" in line 58, and substitute a comma, because we have three conditions.

THE CHAIRMAN: Just a minute. Does the "notwithstanding" add anything?

MR. YOUNGQUIST: No. If we want it, it should be "nevertheless" instead of "notwithstanding"; and I do not think we need either.

MR. LONGSDORF: That is implied in what goes before.

MR. GLUECK: What is meant is that it can still be had despite it.

MR. HOLTZOFF: If you leave out the word "notwithstanding" the sense is clear without it.

Was there a motion?

MR. LONGSDORF: Yes.

MR. DEAN: I second it.

THE CHAIRMAN: All right, then, "and" is out in line 58 and "notwithstanding" in the same line, unless there is objection.

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The section will then read:

"The court may direct that a forfeiture be discharged if it appears that there has been no willful default by the defendant, that a trial can be had in the case, and that justice does not require the enforcement of such forfeiture."

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: Why not strike out "in the case"?

THE CHAIRMAN: Where is that?

MR. DEAN: Line 59.

THE CHAIRMAN: Yes. So ordered.

45 (e) (3).

MR. HOLTZOFF: Mr. Chairman, before we pass on - I hate to raise this question - but I think the word "discharged" - I doubt whether it is correctly used, because while the A.L.I. Code distinguishes between "discharge" and "remit", the United States Code uses only the words "remit" and "forfeiture". It does not speak of discharging the forfeiture.

MR. SETH: We will come to that later.

MR. HOLTZOFF: But the word "remit" covers both situations under the United States Code, as I can see it.

MR. ROBINSON: Oh, no, Alex; I do not think so.

MR. SETH: Remission is after the liability is fixed.

MR. ROBINSON: That is right.

MR. HOLTZOFF: You mean only after judgment?

MR. SETH: That is right.

MR. HOLTZOFF: Well, I won't press the point. But the word "discharge" is not used in the United States Code.

MR. McLELLAN: You would not like the word

"rescinded", would you?

MR. YOUNGQUIST: Or "vacated"?

MR. HOLTZOFF: I think that is better than "discharged".

MR. ROBINSON: I do not think so. There is a lot of case law and a lot of statutes involved. I have had Mr. Abihider through Mr. Dession working a great deal on this, and Mr. Abihider took it up with some specaillists in securities, and it has been checked and double-checked in that way.

MR. HOLTZOFF: I am sure the term "discharge of forfeiture" is not used in the United States statutes in connection with forfeiture of bail.

MR. DEAN: Why don't we say " The court may order a forfeiture" in line 55?

MR. HOLTZOFF: Beg pardon?

MR. DEAN: Why don't we say "The court may order a forfeiture" in line 55.

MR. HOLTZOFF: I am questioning the use of the word "discharged".

MR. DEAN: I see.

MR. McLELLAN: Why not say - and this is borrowed from my friend here on the left who always says something good - "The court may vacate or may rescind a forfeiture"?

MR. HOLTZOFF: I think that would be fine.

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MR. ROBINSON: I am sorry, I cannot agree with you. You are probably right and I am probably wrong, but--

MR. DEAN: Pardon me. But what is the matter with "vacate", Jim?

MR. McLELLAN: I am not interested in what investment counselors think about this kind of thing.

MR. ROBINSON: The words "discharge" and "remission" have a long established distinction here, and I do not know why Mr. Holtzoff seems so bent on changing it.

MR. HOLTZOFF: Because the word "discharge" is not used.

MR. YOUNGQUIST: Your point is that we ought to use "remit" in both cases? I think the majority does not agree with that, the question is whether the choice of the word is to be complementary to "remit".

MR. HOLTZOFF: But I prefer to use Judge McLellan's suggestion and use "vacate".

8 MR. YOUNGQUIST: It is a choice between words, and, as I take it from the note, that was given careful study by the A.L.I. and also by Mr. Abihider. If that is established usage, why not leave it?

MR. HOLTZOFF: I second Judge McLellan's motion to substitute "vacate" for "discharge".

MR. SEASONGOOD: If Mr. Robinson says "discharge"

is the language in the cases, why do you want to use something different?

MR. ROBINSON: I cannot be responsible for any of this section if that change is made, because it has all been worked out on that basis, and I will have to check all the cases and statutes again. Mr. Holtzoff has not cited the Federal statute with regard to discharge of forfeiture or vacation of forfeiture. He has not shown us that the term "discharge" is not used.

THE CHAIRMAN: Well, all those in favor of the motion to change the word "discharge" to "vacate" say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The "Noes" seem to have it.

Now may we have a vote on the section as amended. All those in favor of it as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

That brings us to 45(e) (3), "Enforcement of Forfeiture.

MR. HOLTZOFF: I move its adoption, Mr. Chairman.

MR. McLELLAN: I suggest mildly that possibly the

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last sentence "Bail consisting of cash or securities" might be changed to read "Other bail shall be deemed to be the property of the defendant."

MR. ROBINSON: I believe that is right.

MR. SETH: That is right. In other words, you do not want to have anybody claiming it.

MR. HOLTZOFF: And you do not want a separate paragraph at line 67.

MR. ROBINSON: No. I have got that corrected.

Now, I believe, Judge, that that is the language of the civil rules or of the statute; but I should like to check on that. Of course, you may change it if you see fit. I just wanted to put the facts before you on that.

MR. HOLTZOFF: I think this is an improvement.

MR. DEAN: What is the purpose of that in lines 64 to 66?

THE CHAIRMAN: So some third party who has put up cash or securities cannot come in and say "It is mine." It makes very troublesome litigation. I have had a lot of it.

MR. LONGSDORF: It has been tried.

THE CHAIRMAN: Yes, and you are always licked on it, and it makes a lot of fuss.

MR. GLUECK: Apropos of that, while we are on it, we have the expression or word "securities" there on

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line 65.

MR. McLELLAN: That goes out.

THE CHAIRMAN: "Other bail shall be deemed to be the property of the defendant."

MR. GLUECK: Yes, that is right; I am sorry

MR. SETH: In Line 67 we say "the obligor submits to the jurisdiction of the district court". Shouldn't we make it plain that the sureties do too? Whether obligors includes sureties as well --

MR. HOLTZOFF: I thought it did.

MR. ROBINSON: Yes, that is the object of it.

MR. HOLTZOFF: Why not make it plain?

MR. SETH: Why not make it the plural?

MR. HOLTZOFF: "the obligors"?

THE CHAIRMAN: Is "obligors" sufficiently broad to cover the sureties as well?

MR. SETH: I doubt it.

THE CHAIRMAN: I wonder if the distinction is not often made between the obligor and his sureties.

MR. SETH: Distinction between principal and surety, Mr. Chairman.

THE CHAIRMAN: Yes. But I have seen it in cases where they have distinguished between the obligor and the surety. If there is any doubt --

MR. ROBINSON: I believe our position there is

strengthened by the form on "Appearance Bond" that the subcommittee on forms has prepared.

THE CHAIRMAN: All right. Then if there is no objection that will stand.

MR. HOLTZOFF: And it should be "as their agents" in line 70.

MR. McLELLAN: Mr. Chairman, I am awfully sorry. I do not know whether your suggestion is now to withdraw --

THE CHAIRMAN: No, we are letting "obligors" stand.

MR. McLELLAN: You mean the plural?

THE CHAIRMAN: Yes. "the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served."

MR. SETH: Does "the district in which the bond is given"cover removal cases precisely?

MR. ROBINSON: Not quite. Does it?

MR. SETH: No.

THE CHAIRMAN: In which the bond is filed? or is lodged?

MR. HOLTZOFF: Well, in a removal case you have this situation: Suppose a surety in San Francisco gives a removal bond in a case where the removal is to New York. Now, it is not fair to have the surety in San Francisco

submit to the jurisdiction of the New York court.

MR. YOUNGQUIST: Why not? He knows the proceeding is for removal to New York.

MR. SETH: Yes. Why not?

MR. HOLTZOFF: If he was sued on the bond he would have to be sued in San Francisco?

THE CHAIRMAN: Why?

MR. YOUNGQUIST: If it were not for this provision.

MR. HOLTZOFF: If he is sued on the bond, if not for this provision he would have to be sued in San Francisco.

MR. McLELLAN: May I add one thing more?

THE CHAIRMAN: Yes.

MR. McLELLAN: Line 68 "for the district in which the bond is given". Why not say "submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court"?

THE CHAIRMAN: "jurisdiction of the district court" - what came after that, Judge?

MR. McLELLAN: Why not strike out "for the district in which the bond is given"?

MR. SETH: That is right. Of the proper district.

MR. McLELLAN: Could it mean anything else?

MR. SETH: If you used the language "to which the bond is returnable", probably that might do it.

THE CHAIRMAN: I think you are better off without

that.

Is that agreeable?

MR. GLUECK: Yes.

THE CHAIRMAN: All right. Then if there is no objection those words will come out.

MR. YOUNGQUIST: Strike out "for the district in which the bond is given"?

THE CHAIRMAN: Yes.

MR. GLUECK: I think we have to conform the words in lines 75 and 76 and make it plural all the way through. "obligors if their addresses are".

THE CHAIRMAN: That is right.

MR. LONGSDORF: Mr.Chairman, before we pass that word "obligors" I just want to raise this question: I think it is sufficient, but I have an acute recollection of a case where a surety company tried to wriggle out of its liability for summary judgment in an appeal bond --

MR. HOLTZOFF: Don't you think this would cure that?

MR. LONGSDORF: I think it would, but I just want to be sure of that.

MR. HOLTZOFF: I think it would.

MR. SETH: And I think we ought to choke off any further discussions on that.

THE CHAIRMAN: We are on page 3 of Rule 45, sub-

section (e) for the benefit of those gentlemen who just arrived.

MR. GLUECK: I move its adoption as amended.

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: Did we change the second "his" in line 71 to "their"?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: To "their".

MR. ROBINSON: I think it would justify having that read, wouldn't it?

THE CHAIRMAN: Yes. I will read it:

10 "When the forfeiture has not been discharged the court shall on motion enter a judgment of default and execution may be issued to collect the penalty from the obligors on the bond. Other bail shall be deemed to be the property of the defendant."

MR. GLUECK: And run the paragraphs together.

THE CHAIRMAN: Yes, the paragraphs run together.

(Continuing) "By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be

served on the clerk of the court who shall forthwith mail copies to the obligors if their addresses are known."

MR. HOLTZOFF. I move its adoption.

MR. DEAN: Seconded.

THE CHAIRMAN: It is moved and seconded --

MR. SEASONGOOD: It seems rather trifling, but I would rather say "to the obligors to their last known addresses."

MR. LONGSDORF: I think some of the local rules have that in that form. I am not sure.

MR.SEASONGOOD: Then it would be implied, if he did not know the address, he would not mail anything, which might work against --

MR. ROBINSON: Of course, you are changing the civil rules again on that. This is 73(f) of the civil rules.

MR. LOGNSDORF: All right.

THE CHAIRMAN: Now, do you want this changed or not?

MR. SEASONGOOD: I think it is better.

MR. HOLTZOFF: I second Mr. Seasongood's motion.

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

(Chorus of "Ayes."

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

We now move on to 45 (e) (4) at the bottom of page 3 of Rule 45. "Remission of Forfeiture."

MR. GLUECK: Mr. Chairman, I do not know whether the abuse that the surveys have shown up with respect to state practice at all exist in Federal practice. As you know, in state practice perhaps 1/2 of 1 per cent of these forfeited bonds are ever collected, and I was just wondering whether there is anything in these rules to take care of that possibility, or whether it should even be noted with reference to the Federal practice.

What about that, Alex?

MR. HOLTZOFF: Well, in Federal practice we had a lot of uncollected bonds during the prohibition era. We still have them, and they will never be collected. But except for these prohibition bonds we do not have much trouble in the matter. It depends upon the individual United States Attorneys. Some, like Colonel Woodcock, when he was the United States Attorney in Baltimore, the minute there was a forfeiture he issued an execution the next day unless the check was forthcoming. Now, the abuse, if any, or,the difficulty, if any, is just the opposite. The remission statute is so very narrow that in meritorious cases where the surety spends money to hunt

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up the fugitive and bring him to court, the court has no way of remitting the forfeiture, because the present statute is contrued as conferring that power on the court only if the default ~~in~~ principle was not wilful. And of course, it always is. So all sureties in those cases get private bills through Congress for remission of forfeitures.

Now, if we adopt this provision some of those private bills will be unnecessary, and we will extend an inducement to sureties to spend their own money and use their own efforts to help the Government hunt up fugitives, which, after allis what we want done rather than collection of money.

MR. SEASONGOOD: In our jurisdiction the Federal court never remits anything. They just forfeit it and that is all there is to it. They do not remit anything. I do not know whether that is so in other jurisdictions.

MR. HOLTZOFF: Yes, because of the view of The Supreme Court not permitting a remission unless ~~in principle~~ the default was not wilful.

MR. SEASONGOOD: Which made it different?

MR. HOLTZOFF: Yes. And the result is that you have got private bills in Congress, many of which are meritorious.

MR. SETH: In line 78 is the language "enforcing the forfeiture" necessary? Can't you say "the court"? Isn't

that sufficient?

MR. ROBINSON: I think it is.

MR. YOUNGQUIST: What is it?

THE CHAIRMAN: Striking the words in line 78 "enforcing the forfeiture".

Now, is there anything further on this section?

MR. YOUNGQUIST: I think we can improve the language in line 79 by striking out "the same".

MR. ROBINSON: Yes.

THE CHAIRMAN: All those in favor of 45 (e) (4) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

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THE CHAIRMAN: 45 (f).

MR. YOUNGQUIST: I suggest striking out in lines 84 and 85 the words "discharge and".

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: If there is no objection, that will --

MR. HOLTZOFF: Instead of saying, "the court shall by order enter the discharge and exoneration of the obligor", shall we not say, "the court shall exonerate the obligor"?

MR. YOUNGQUIST: All right; that is better.

THE CHAIRMAN: Singular or plural?

MR. HOLTZOFF: Plural.

THE CHAIRMAN: "obligors"?

MR. ROBINSON: "and release any bail deposited" instead of "cash or securities".

THE CHAIRMAN: Yes.

MR. ROBINSON: Or "and release any bail" -- "bail deposited."

MR. HOLTZOFF: "any bail"?

MR. ROBINSON: Leaving the word "deposited" in.

MR. HOLTZOFF: I would say so.

MR. ROBINSON: Aaron, what have you to say about that?

MR. YOUNGQUIST: Yes.

MR. ROBINSON: In?

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MR. YOUNGQUIST: Yes.

Why do we have the word "proper" in line 88?

MR. ROBINSON: Leave it out.

MR. HOLTZOFF: In line 87 the word "also" seems to be in the wrong place. Should it not be, "the surety may also be exonerated"?

MR. YOUNGQUIST: No.

MR. SETH: I would leave it out.

MR. HOLTZOFF: Leave out the "also"?

MR. ROBINSON: Right.

MR. SEASONGOOD: This is just plain ignorance, but in line 86, "any bail deposited", does "bail" there include something more than cash and bonds or does it include a surety obligation?

MR. DEAN: It does, because that refers to obligors.

MR. SEASONGOOD: Then wouldn't you do better to strike out the word "deposited", as was once suggested? You do not think of --

MR. DEAN: That is right.

MR. SEASONGOOD: (Continuing) -- sureties being deposited.

MR. DEAN: That is right.

MR. SEASONGOOD: That came out better than I thought.

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THE CHAIRMAN: The section then reads, "When the condition of the bond has been satisfied or the forfeiture thereof has been discharged or remitted, the court shall by order enter" --

MR. HOLTZOFF: No; "the court shall exonerate".

THE CHAIRMAN: "the court shall exonerate" --

MR. HOLTZOFF: "the obligors."

THE CHAIRMAN: "the obligors and release any bail. The surety may be exonerated by deposit of cash named in the bond, or by surrender of the defendant into custody."

Are you ready for the motion?

MR. LONGSDORF: "Surety" or "sureties"?

MR. SETH: "any surety".

MR. ROBINSON: "A surety".

THE CHAIRMAN: "A surety".

MR. LONGSDORF: "A surety"?

THE CHAIRMAN: Ready for the motion? All those in favor say"aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. WAITE: Mr. Chairman, before we drop these matters, I do not have anything to propose, I would like to ask if the Drafting Committee seriously considered giving to the court the power to refuse bail in certain

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types of cases, where it might seem unwise to release an individual? That has been frequently proposed. You know the widely known case of the man who was out on bail -- four successive bails after four successive convictions -- in order to produce money for his trial in each case. There are a number of examples of that sort. Did the Committee consider them?

MR. ROBINSON: Yes; you have your constitutional problem there, of course.

MR. WAITE: No, because the Federal Constitution, unlike a state constitution, does not make bail a matter of right. It simply says excessive bail shall not be required. Now, many state constitutions make bail a matter of absolute right, but other state constitutions do not make it a right, and in a good many states, in New York, for instance, I was told release on bail is a matter of discretion with the court, and it is supposed to be a very good thing.

MR. ROBINSON: In other words, it is Federal statutes that we would have to supersede.

MR. WAITE: That is right.

MR. HOLTZOFF: I would rather favor Mr. Waite's idea because I can conceive of situations, such as the case of a notorious bank robber, who did not commit an offense that was punishable by capital punishment, and yet robbed

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several banks and might rob another bank if he was released on bail. I would vote for a rule of that kind if somebody proposed it.

MR. WAITE: I had one written out, if anybody is interested in hearing it. It reads this way, "Before conviction,a person arrested for an offense not punishable by death shall be released on bail, provided, however, that if the offense with which he is charged is felonious assault under such circumstances that the victim assaulted shall die, the person who made the assault will be chargeable with murder." That is to get the case where it may turn out to be murder,for which bail would not be allowable, but has not yet been the result. "Or if the person applying for bail was already at liberty under bail at the time of the commission of the offense for which bail is asked, the court may refuse such release on bail when it is believed that such release would be inconsistent with the safety of the public or with the reasonable probability of appearance of the accused at the time of trial." That, perhaps, does not go quite so far as you would be willing to go.

MR. McLELLAN: Does Mr. Waite conceive that you have a right to demand bail for the safety of the public?

MR. SETH: No.

MR. WAITE: What was that, Judge McLellan?

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MR. McLELLAN: Do you think the court has a right to require bail of a character that is large enough to protect the public or to hold a man without bail --

MR. WAITE: That is done.

MR. McLELLAN: (Continuing) -- because of danger to the public?

MR. WAITE: That is done in England, yes, and it is done in a number of states in this country.

MR. McLELLAN: I thought the object of bail was to insure the presence of the defendant at the trial, and that was the only object.

MR. SEASONGOOD: I do not understand under existing law you are entitled to bail as a matter of right after conviction on appeal.

MR. WAITE: This has to do with before conviction.

MR. SEASONGOOD: I had supposed bail was a matter of right under our Federal Constitution.

MR. HOLTZOFF: It is, under the statute, but not under the Constitution.

MR. SEASONGOOD: I say, under the Constitution.

MR. HOLTZOFF: No.

MR. SETH: The practice has been so long continued under the Federal Constitution that I think it would really now be interpreted as a matter of right.

MR. WECHSLER: Isn't the problem always met in

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practice by fixing the amount of bail, Mr. Chairman?

MR. SETH: Violating the Constitution on excessive bail.

MR. HOLTZOFF: In other words, you violate the Constitution in order to enforce it.

MR. MEDALIE: You simply decide it is not excessive. A man who has made two or three million dollars racketeering is likely to run away if his chances of success in his trial are not good and bail is fixed at $50,000. So you make it $350,000.

MR. SEASONGOOD: You say excessive bail shall not be required. Isn't that considered that bail shall be granted to everyone but in no case shall it be excessive. Isn't that the meaning of the Constitution?

MR. YOUNGQUIST: That is the way my mind was running.

MR. MEDALIE: It varies with individuals.

MR. SETH: Where the right is not exclusively given under the Constitution, the court may refuse to release on bail in any amount, and that is the English rule, and I am pretty sure it is the New York rule.

MR. YOUNGQUIST: You are quite right about the English rule. That is not the New York rule, as I understand it, and I am pretty sure it is not the United States rule.

MR. SEASONGOOD: I move we do not adopt that

suggestion, and my reason is, I think that the practical difficulty of getting rules adopted would be very great if you injected that into it.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

Rule 46.

MR. DESSION: Mr. Chairman, may I raise one question before we leave this? Is there any need of saying anything about extension of bail in here? Or does that occur to somebody? I don't know.

MR. MEDALIE: You mean after a man has been convicted?

MR. SETH: Pending sentence?

MR. YOUNGQUIST: We have that in earlier.

MR. HOLTZOFF: We have that in.

MR. DESSION: Is that covered elsewhere?

MR. YOUNGQUIST: Yes.

MR. WAITE: I am not proposing a change, but I would like to ask a question. Judge Hough some years back

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was quite insistent that bail bonds on appeal should carry a provision to the effect that the appellant would vigorously prosecute the appeal, and the idea was, when that man was let out on bail on appeal his whole idea was to delay, and delay, and delay as long as possible. He urged that bail bonds contain a provision for vigorous appeal. Was that considered by the Committee?

MR. HOLTZOFF: Something to that effect is in the form.

MR. MEDALIE: If it is, you don't need it. I know from my own experience when I was United States attorney in this district I recognized that many people got bail on appeal and did nothing about it and put us to a lot of trouble, and so I had the senior circuit judge agree with me that he will not grant bail without seeing us first and giving us a chance to appear; then, if bail were allowed, it would be a condition of the allowance of bail that the appellant bring his case on at a stated time, which meant that if he did not, we were at liberty to move for the discharge of his bail.

MR. YOUNGQUIST: Is that a permissible condition?

MR. MEDALIE: But you do not put it in the bond at all. The man was told, "All right."

MR. YOUNGQUIST: Oh, I see. I thought you put it in the bond.

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MR. MEDALIE: Oh, no, never put it in the bond. The order granting bail stated the condition. The order did, not the bond.

MR. YOUNGQUIST: Shall we convey that suggestion to the United States attorneys by note?

MR. MEDALIE: I think many of them know it. I am quite sure it is known in this district. That practice sticks pretty well.

MR. WAITE: I am not urging the matter, because I am not sure enough in my mind it would be an effective provision, but I did want to know if the draftsman had considered that matter and rejected it or had not considered it.

MR. ROBINSON: We really thought about it, but the difficulties attending it seemed to be too great.

THE CHAIRMAN: I think we should have a note on the point covered by Mr. Medalie.

MR. DEAN: I think so.

THE CHAIRMAN: Rule 46, "Motions."

MR. HOLTZOFF: I move its adoption, Mr. Chairman.

MR. YOUNGQUIST: May I ask about the first line and a half, the purpose of it?

MR. SEASONGOOD: Why can't you say "motions may be made in writing or, if the court permits, orally"?

MR. HOLTZOFF: Yes. Will you state it again?

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MR. SEASONGOOD: I would say "motions may be in writing or, if the court permits," -- "motions may be made in writing or, if the court permits," - between commas - "orally."

MR. ROBINSON: How would this do, line 2, after "motion" strike out the rest of the sentence and insert "shall be by motion in writing or orally, if the court permits," and save a few words?

MR. HOLTZOFF: Leave out "An application to the court for an order" and substitute -- strike out the first part of that and have it read "Motions" --

MR. ROBINSON: No, no. "An application to the court for an order shall be by motion in writing or orally, if the court permit."

MR. YOUNGQUIST: We were questioning the need for the first line and a half, Jim.

MR. SEASONGOOD: Everybody knows what a motion is, don't they? You ask something, move that something be done.

MR. ROBINSON: This comes from the civil rule, I suppose.

MR. MEDALIE: The civil rules must contain elementary definitions which we do not require.

MR. ROBINSON: I believe this fits in with the rest of our rules.

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MR. MEDALIE: I will give you an example. In New York we have our Code of Criminal Procedure and our Civil Practice Act, formerly the Code of Civil Procedure. The Code of Criminal Procedure does not mention these definitions that normally appear in the Civil Practice Act.

MR. SEASONGOOD: You don't need it.

MR. MEDALIE: Experience shows you don't need it.

MR. SEASONGOOD: I think all the things you want aremade by motion. Sometimes you file a petition to intervene, or something like that. I don't know whether that is in criminal cases.

MR. MEDALIE: Of course, if you want to get rid of petition you do everything by motion. That is another matter. I don't see the need for the rule.

MR. DEAN: I move we strike out the rule.

MR. McLELLAN: Seconded.

MR. SEASONGOOD: There is only this. You cannot strike out the rule entirely, can you? Because you do want to know whether motions may be made orally sometimes, or do you think that is so well understood?

MR. DEAN: In our motions to dismiss section we permit it either way - pretrial motions. I think from that it can be assumed that any other motion can be made the same way.

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THE CHAIRMAN: I think we ought to really state some of the elements of the thing. A lot of judges want everything in writing, when there are just a few things which are required to be in writing. There is no sense in requiring a motion to be in writing where it is not necessary.

MR. MEDALIE: Aren't you going to find it difficult to indicate where a motion should be made in writing and where it should be made orally? And don't forget also that this is something that applies to the attorneys for the Government as well as attorneys for defendants. They frequently make oral motions.

MR. SEASONGOOD: On the other hand, it is a short thing, though. I don't know whether it is worth fussing with. It is the same as the civil rule.

MR. LONGSDORF: I think we should give consideration to the fact that we have introduced motions as a form of application by paper for various things in a prosecution for crime, which hitherto were not made that way, and maybe for that reason you need something like that.

MR. ROBINSON: I think that is right.

MR. LONGSDORF: Otherwise I would say you could leave it to the well known principles of law.

MR. ROBINSON: It is supplementary to our Rule 12 and various other rules in which we greatly enlarge the use

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of motions.

MR. SEASONGOOD: This limits the application to motions. I do not know enough to know whether there is anything besides the motion.

MR. McLELLAN: Mr. Chairman, wouldn't we do it quite as well if we did not pass this motion? We have so many different kinds of motions that have really to be made orally, like a motion in the course of trial to strike out evidence, and things of that character, that are all fixed by ordinary practice. It seems to me doubtful whether you want Rule 46.

MR. MEDALIE: Judge, that case you went down to Philadelphia and tried, I was originally in that case and then dropped out before it was tried.

MR. McLELLAN: You did well.

MR. MEDALIE: I know. And a motion was made for a bill of particulars. We got down to Philadelphia and discovered you make it by petition. Fortunately, counsel representing another defendant was a Philadelphia lawyer and knew you did that by petition.

I think there ought to be uniform practice. That is about the one value I see in this provision, that you proceed by motion, that is, that is what it was, orally and not by petition.

MR. McLELLAN: I just don't know the difference

MR. McLELLAN: I just don't know the difference between a petition and a motion; that is, if they file a petition, it would not make much difference whether you called it a motion or not. It seeks something.

MR. ROBINSON: That is right.

MR. MEDALIE: Some things in form and some things in procedure. A petition requires an answer categorically to the allegations. A motion simply requires any answer you care to make by opposing proof, that is, by affidavit. That is the clear distinction in procedure, isn't it? And then in form, a petition is signed and has a supporting affidavit or verification. An affidavit is signed and sworn to in one fell swoop, isn't it. Those are the differences. It is not serious. It is a nuisance to answer a petition because you are bound to answer. If you don't answer, you admit, and so on.

MR. SEASONGOOD: Do you have petitions in criminal cases?

MR. MEDALIE: In Philadelphia they do.

MR. SEASONGOOD: I am not so sure they do not under the rules. We say that certain things may be done by motion, but it is not all-inclusive.

MR. DEAN: I do not think every application you make to the court "shall be made by motion." Just a suggestion, "May we have an order locking up the jury in

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this case?" --

MR. MEDALIE: That is an oral motion.

MR. DEAN: I know, but --

MR. MEDALIE: That is an oral motion.

MR. DEAN: (Continuing) -- it doesn't state with particularity the grounds therefor, and so forth.

MR. YOUNGQUIST: Suppose you apply for a writ of habeas corpus? Do that by motion?

MR. MEDALIE: That is a petition. We do not cover that.

MR. YOUNGQUIST: That is the initiation of a proceeding, really, isn't it?

MR. MEDALIE: Your habeas corpus proceeds by petition and the petition is answered.

MR. HOLTZOFF: But habeas corpus is a civil proceeding. These rules do not apply.

MR. DESSION: Neither do the civil rules.

MR. GLUECK: How would you handle a plea in mitigation of sentence? Would that be a motion?

MR. MEDALIE: No, that would be just a speech.

MR. GLUECK: No, I mean it could be on documents, couldn't it?

MR. MEDALIE: You mean after the session has been imposed?

MR. GLUECK: No, before sentence.

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MR. MEDALIE: Then what you are proceeding on is the district attorney's motion for a judgment, which is oral, by the way, and frequently unexpressed. Right?

MR. WECHSLER: Yes.

MR. McLELLAN: I think we would be sticking our necks out if we say every kind of application to the court for an order shall be by motion.

MR. ROBINSON: Has that been true in the civil rules? That is exactly their words, of course. What is the difference between a civil and a criminal case in that respect?

MR. McLELLAN: I just do not know enough to know all the kinds of applications that may be made to a court for an order, and I am loath to say that all applications for an order shall be made by motion. I did not have very good luck when I picked up a petition for a writ of habeas corpus, as an illustration of my difficulty, but I do not know what kinds of applications there may be.

THE CHAIRMAN: Judge, don't we meet your objection if we strike out the first line and say that "A motion may be in writing or orally, as the court may permit, and may be supported by affidavit"?

MR. YOUNGQUIST: May I read something I wrote here, that carries out that idea? "A motion shall be made in writing unless the court permits it to be made

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orally, and may be supported by affidavit." And then, "It shall state the grounds upon which it is made and the relief sought.

MR. ROBINSON: I am afraid you sacrificed needlessly, Aaron, some words which really have shown that they are useful in the civil rules and would be even more useful in this one.

MR. YOUNGQUIST: What words?

MR. ROBINSON: Setting out with particularity the grounds therefor.

What we are doing is, we are going to try to abolish pleas in atatement, motions to quash, demurrers, pleas in bar, and in doing that we are going to lose, if we do not watch out, some of the safeguards that the courts have built up around those various types of defenses and objections. We find the courts generally - I have the authorities collected from the Federal cases - require not only that various of those devices, especially those that are called dilatory by the courts, must state with particularity what they seek for but almost must be sworn to. Now we are cutting out the requirement of an oath.

MR. YOUNGQUIST: I would suggest then, "It shall state with particularity the grounds upon which it is made and the relief sought."

MR. ROBINSON: That will be all right.

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MR. HOLTZOFF: I move the adoption of Mr. Youngquist's suggestion.

MR. LONGSDORF: Wait a minute. Before we go on to consider that motion, I think these words, "as the court may permit," in this Rule 46, as it stands, and also in Mr. Youngquist's proposed substitute, suggest motions made in the course of trial, which always are oral, require the permission of the court."

MR. YOUNGQUIST: I had in mind, Mr. Longsdorf, it seems to me that if a motion is made orally to strike out evidence as someone suggested, the fact that the court rules on it implies the giving of the permission to make it orally.

MR. LONGSDORF: Of course it does, but when we put this into a rule, a precept for procedure, maybe somebody will think it doesn't warrant that.

MR. YOUNGQUIST: The civil rule says that a motion, unless made during hearing or trial, shall be made in writing.

MR. LONGSDORF: Yes.

MR. YOUNGQUIST: Is that the way to state it or not?

MR. DESSION: It seems to me it is a mistake to use either formulation. It seems to me, as we have it here, it seems to express a desire for a thing, and it also seems

to express the normal grounds for all motions. I don't think we need either.

MR. MEDALIE: You don't even get a bill of particulars in a criminal case, particularly in the Federal court. It does happen that when the judge is trying to push you on to an early trial, you say, "I want to move for a bill of particulars," and we turn to the district attorney and say, "Well, are you giving him one?"

"Well, I don't think I ought to."

Defendant's counsel will say, "Well, I would like to have particulars on this and that. They ought to give it to us."

"Why don't you give it to him?"

"All right, I will give it to him, if he'll be ready two weeks from today."

Very effective, and just what we want, if we could do it all the time, and it would be wonderful, that is, he will get either yes or no to a thing which does not need much debate.

MR. SEASONGOOD: I move that Rule 46 read, "A motion may be made in writing or, if the court permits, orally, and may be supported by affidavit. It shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

MR. HOLTZOFF: I would like to see the words "with

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particularity" go out.

MR. SEASONGOOD: The only thing is, the civil rule says the same.

MR. HOLTZOFF: I know. What bothers me about "particularity" is this, you give an opportunity to deny a motion on a technicality because the grounds are not stated with sufficient particularity.

MR. SEASONGOOD: On the other hand, if you make a blunderbuss motion, and do not tell what you are moving or anything, do you think there is any real danger of it being denied because it does not state with particularity?

MR. HOLTZOFF: The only danger arises when the court wants to deny it and is looking for a ground and uses that as a pretext.

MR. DEAN: I do not think there is that danger so much as the language is unrealistic.

MR. SEASONGOOD: That is so.

MR. DEAN: In many cases, that is to say, you do not state it with particularity and the court does not want you to.

MR. SEASONGOOD: Well, strike out "with particularity".

THE COURT: Was that "in the course of the trial" in your motion?

MR. SEASONGOOD: No.

MR. ROBINSON: I want the record to indicate my views. I think you had better stick closer to the civil rule. "with particularity", for that reason, will have to stay. I will have to protest very vigorously against that.

MR. DEAN: Motions before trial are substituted for pleas in abatement. There is none for during the trial.

THE CHAIRMAN: Let us put that exception back as it is in the civil rules. Will somebody request that? Have you the civil rules before you?

MR. SEASONGOOD: Yes. Of course, in the Rules of Civil Procedure they usually just say a motion -- just says grounds and objects. It doesn't say anything about the particularities.

MR. DEAN: You think there is a problem there, George, of abolishing the petition?

MR. MEDALIE: Yes, I would like it abolished. I think it is one of those funny things that developed in American practice in certain states because some of the boys learned about petitions for starting things in equity, and then they went to such an extreme that often pleadings in common law actions were by petition instead of complaint. Isn't that so, George?

MR. LONGSDORF: Yes, in Nebraska, for instance, --

MR. DEAN: If that is so, couldn't you just leave

the first sentence and scratch the second?

MR. MEDALIE: I like that first sentence for this reason: I would like to see petitions go and have a uniform practice.

MR. ROBINSON: That is right.

MR. DEAN: That is the only argument I see for the rule.

MR. MEDALIE: Do you use petitions in your state for all written motions of any kind?

MR. SEASONGOOD: Well, in civil cases you petition for leave to intervene, and things like that.

MR. MEDALIE: That is because intervention was an equity proceeding originally.

MR. SEASONGOOD: I would not know in a criminal case what you would petition for.

MR. DESSION: You would petition for certiorari.

MR. DEAN: Petition to appear amicus curiae.

MR. MEDALIE: That is also by analogy to the equity procedure.

MR. DEAN: Yes.

MR. HOLTZOFF: For example, on the form of bail bond, petition for admission. One doesn't move for admission.

MR. MEDALIE: And if we want a simplified practice, we ought to arrange to do it by getting rid of those forms, forms of that kind.

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MR. SEASONGOOD: For a writ of certiorari, of course, you need it. I think you have to think that out pretty carefully before you abolish it.

MR. ROBINSON: You have that in civil things, too, so the civil rules develop no difficulty about that.

MR. SEASONGOOD: What?

MR. ROBINSON: They have the same provision, "Application shall be made by motion", and of course that includes writ of certiorari.

MR. DEAN: Do you want to limit this to the trial court? "All applications to the trial court for orders shall be by motion made in writing or orally"?

MR. LONGSDORF: Why do we need to specify?

MR. DEAN: This is for all. This is a miscellaneous section. All special proceedings are by petition and are also, by analogy to the equity practice, all applications for prerogative rights, called petitions.

MR. LONGSDORF: To the king's conscience, really, originally. That is why you petition.

THE CHAIRMAN: Don't we say everything if we say something like this, "A motion may be made in writing or orally, as the court may permit, and may be supported by affidavit. It shall state the grounds therefor and shall set forth the relief sought"?

MR. MEDALIE: How does that make the practice

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uniform?

MR. YOUNGQUIST: To carry out Mr. Medalie's idea, and also to take care of motions during trial, I have noted this down, "An application to the court for an order shall be by motion. Motions other than those made during a hearing or trial shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds therefor and the relief sought."

MR. ROBINSON: I think that is good myself.

MR. HOLTZOFF: I would like "with particularity" to go out.

MR. SETH: Should we add, "and may be supported by affidavit"?

MR. YOUNGQUIST: Do we need that?

MR. ROBINSON: Yes.

MR. YOUNGQUIST: All right. Adding that to the first sentence will be all right.

MR. MEDALIE: If you want to define "Motion" so everybody will know what we mean, you are bound to say that the motion is made either by notice, notice of motion, or order to show cause, because an application for relief by petition cannot be by notice.

THE CHAIRMAN: In my district you make your motion by order to show cause.

MR. HOLTZOFF: There are some districts where you

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do not serve a notice of motion; you just file a motion and the clerk puts it on the calendar and notifies the parties when it will be heard by postal card or otherwise.

MR. MEDALIE: All that the moving party does is make an affidavit, stating the relief he asks?

MR. HOLTZOFF: No, he files what is known as a motion, "so-and-so hereby moves for so-and-so." He files that paper with the clerk and the sets it down for a day and notifies counsel.

MR. MEDALIE: That comes to the same thing as the notice of motion which we have in New York practice. The only difference is, we say, "Please take notice that the undersigned will move."

MR. HOLTZOFF: No, there is one other difference. The notice of motion states the day when the motion will be brought on, but under this system, which prevails in the majority of the districts, the moving party does not know when the motion will be heard. It does not show in his paper; it just says, "the defendant," or "the United States attorney" --

MR. MEDALIE: The rest is up to the clerk and the court.

MR. SEASONGOOD: Isn't the real question whether you want to limit the motion? Let us have a motion on that.

THE CHAIRMAN: Put the question.

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MR. SEASONGOOD: I move that we do not limit,to motions, applications for relief.

THE CHAIRMAN: That is, take the principle that you may ask for relief other than by motion?

MR. SEASONGOOD: Yes. I am afraid to say it, in view of Mr. Medalie's great experience, but still there may be some other kind of thing you would apply for. I do not think you ought to t ry to resolve the things unless you have exhausted all the possibilities.

MR. ROBINSON: To help us vote on that, can't you give us an illustration of what you have in mind, where you think that"motion"would not do?

MR. SEASONGOOD: I do not know whether there would be something that would be sought in some other way in criminal cases.

MR. MEDALIE: Let us see what the civil rules say about that. Do they provide for applications otherwise than by motion?

MR. HOLTZOFF: No; they say that all applications shall be by motion.

MR. MEDALIE: Then the petition is disposed of, isn't it?

MR. SETH: That is right.

MR. HOLTZOFF: Yes.

MR. SEASONGOOD: Yes. Yet undoubtedly there are

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petitions -- why, of course, you petition to intervene and you petition for lots of things.

MR. HOLTZOFF: Under the new rule you should move for leave to intervene. You could file a petition, if you wanted to, but technically you should move.

MR. YOUNGQUIST: Is there any such thing as intervention in criminal proceedings?

MR. HOLTZOFF: No; we now refer to civil cases.

MR. SEASONGOOD: There are certain instances. Maybe you don't, but it is done just the same. Everybody files a petition for intervention.

MR. YOUNGQUIST: By the civil rules that is eliminated, isn't it?

MR. HOLTZOFF: By the civil rules all applications are by motion.

MR. SETH: I move the rule be adopted, with the insertion of the language of the civil rule about motions made during the course of the trial.

MR. ROBINSON: I second that motion.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

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MR. ROBINSON: Have you transposed it, "relief or order"?

THE CHAIRMAN: Yes.

MR. ROBINSON: Or you can transpose that the way it is in the civil rule.

MR. YOUNGQUIST: The civil rule says, "An application to the court for an order" -- it doesn't say anything about relief, except that the motion shall set forth the relief or order sought.

THE CHAIRMAN: I didn't get that, Aaron, the first part of your statement.

MR. YOUNGQUIST: The first part of the statement was that under the civil rules, "An application to the court for an order shall be by motion," and then it prescribes the motion itself shall set forth the order or relief sought.

MR. SEASONGOOD: "relief or order"?

MR. YOUNGQUIST: "relief or order".

MR. SEASONGOOD: What is Mr. Seth's motion, to adopt the same as the civil rule?

THE CHAIRMAN: To adopt our rule but providing that during trial or hearing you can have oral motions.

MR. SEASONGOOD: That is what the civil rules say, "that an order shall be by motion which, unless made during a hearing or trial, shall be made in writing."

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THE CHAIRMAN: That is going to make a lot of your preliminary motions tough from now on, isn't it, for the district attorney?

MR. MEDALIE: Well, nothing stops the court from making orders. There is no prohibition on the courts making orders, is there?

MR. SETH: You can still make them orally with the court's permission.

MR. HOLTZOFF: Would you accept an amendment, Mr. Seth, to strike out the words "with particularity"?

MR. SETH: I would like the "particularity" in it, if it takes the place of a demurrer or a motion to quash an indictment.

THE CHAIRMAN: Let us move on then to Rule 47 in the other book.

MR. HOLTZOFF: I move its adoption. That is the same form as we had before, isn't it, Jim?

MR. ROBINSON: Yes.

MR. SEASONGOOD: I am not in favor of the nolle prosse without the consent of the court.

MR. HOLTZOFF: We debated and passed on that, I thought, last time.

MR. SEASONGOOD: Everything we decided was tentative. If we did, it was a very narrow division, wasn't it?

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MR. HOLTZOFF: Yes.

MR. ROBINSON: Yes.

MR. SEASONGOOD: I would like to have the thing reconsidered. I am against nolle prosse without the consent of the court, because I have seen examples of cases that were nolle prossed, that should not have been nolle prossed. As it is, the judge cannot do a thing about it. I do not want to say anything invidiously, but it has been known that district attorneys, or somebody, have been reached and the case is nolle prossed.

MR. HOLTZOFF: Is that in the Federal courts, those examples?

MR. SEASONGOOD: Yes, I can give you examples in our own jurisdiction. Non-partisan, both sides.

MR. GLUECK: Murray, I would like to ask you whether your suggestion, which I think is a good one, is feasible? Just what do you envisage? Do you envisage that every time a motion for a nolle prosse is made the judge will actually question the D. A. and ask him, "What evidence have you got?" and "Why didn't you get this?" and so on?

MR. SEASONGOOD: "Why do you want to nolle prosse this case? Why do you want to dismiss it?"

MR. HOLTZOFF: There are a lot of nolle prosses in arraignment cases, where the United States attorneys haven't sufficient evidence to secure conviction.

MR. SEASONGOOD: And he tells the court that.

MR. HOLTZOFF: Yes, he just tells the court frankly, "I haven't enough evidence to secure conviction." Then the court's consent is but a rubber stamp.

On the other hand, if you really want the court to go into it, then you would have to have a long argument in each instance, and the court is really at a disadvantage.

MR. SEASONGOOD: I don't want to delay the thing. I don't know whether anybody else feels the same way, so I will just offer it.

MR. SETH: Put your motion.

MR. SEASONGOOD: I make a motion that in line 2, between the words "may file" insert "with the consent of the court first had."

MR. GLUECK: Mr. Chairman, may I ask George Medalie to talk on that point out of the richness of his experience? Do you think it would be feasible for a judge to supervise this problem?

MR. MEDALIE: It would be if he could be both district attorney and judge.

MR. GLUECK: That means it would not be.

MR. MEDALIE: In New Jersey there was a Federal senior district judge, who was judge, the district attorney, the United States Government, and both political parties. He was a high-minded man, a great independent, and, I think,

a perfect nuisance.

THE CHAIRMAN: On all points you have indulged in understatement.

MR. MEDALIE: Now, he really doesn't know, it merely gets down to being officious. In any event, let me state frankly about district attorneys, local district attorneys, who are dominated by a political machine, elected by them after having been nominated by them.

Take New York. The Code of Criminal Procedure provides that the nolle prosse is abolished and that you can dismiss only with the consent of the court. The court gets fooled all the time when there is a political district attorney who wants to do favors. If the district attorney is an honest person, the wrong things won't be done. If he is a dishonest person, he will be able to fool a high-minded judge without any difficulty.

MR. GLUECK: Is there no other device whereby the discretion of the district attorney might be disciplined to some extent?

MR. MEDALIE: There is this: The rule in the Department of Justice, as I understand it, applicable throughout the country except in the Southern District of New York --

MR. HOLTZOFF: And the District of Columbia.

MR. MEDALIE: (Continuing) -- is that no nolle

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shall be entered without the approval of the Department of Justice.

Now, the New York district attorney won't put up with it because he does not see why he, being supposedly an important member of a great bar, should be subject to review by some person having a minor status in the Department of Justice, because that is what it comes to. For example, in bankruptcy cases, he might decide a certain case of concealing assets should be nolle prossed. Then a person who does important, but routine work, and does not have the status of an assistant attorney general, would be passing on his decisions, which would be perfectly absurd because, in practice, it is found he does it mechanistically, that is, he argues about minor points and says there is a prima facie case. You frequently nolle prosse --

MR. WECHSLER: I never knew that to happen, George, that anybody in the Department of Justice argued about a nolle prosse.

MR. MEDALIE: Then you mean that that supervision is nothing?

MR. WECHSLER: Right, George.

MR. MEDALIE: It may be. In any event, the United States attorneys in this district refuse to submit to that. My predecessors refused, I did, and I think my successors did, too, and it works pretty well. I never heard

of any scandal as a result.

THE CHAIRMAN: I would like to hear it from the judge's standpoint. What do you think, Judge McLellan?

MR. McLELLAN: It seems to me it is not practicable to require the consent of the court to a nolle prosse. If you require it, and the judge gives it, it would usually be done without that understanding of the case which the United States attorney himself has. I do not believe that you can carry on a district attorney's office properly if you have to go to the court every time you want to dismiss.

THE CHAIRMAN: Doesn't this rule give us more protection than we now have, the statement as it is presently recorded?

MR. MEDALIE: No. May I ask - I think this is probably silly; you don't mind - it is not your feeling that he may file a dismissal at any time, to the extent of filing it in the course of a trial?

MR. SETH: Yes.

MR. WECHSLER: You can't do that.

MR. HOLTZOFF: Can't you nolle prosse during a trial?

MR. MEDALIE: Not without the consent of the defendant. He is entitled to insist upon a verdict.

MR. HOLTZOFF: Yes.

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MR. GLUECK: On an acquittal.

MR. MEDALIE: During the course of a trial, after a witness has testified in whole or in part, there has been a trial and the interruption of the trial by a nolle is nevertheless a jeopardy.

MR. McLELLAN: That is all right, but there are some defendants that want to have an acquittal, and I do not think that the United States attorney should have the right to nolle prosse a case during trial without the consent of the defendant.

MR. MEDALIE: I think, Judge, that is theoretical. I think most defendants are glad to take that chance, no matter how innocent they are.

MR. McLELLAN: That may be, but I think there are some defendants who would rather have a verdict.

MR. MEDALIE: He is in double jeopardy after the trial begins, so a nolle after the trial beings is an acquittal.

MR. WECHSLER: A nolle is not an acquittal. It is a nolle, and prevents further prosecution; but it is a different thing from an acquittal.

MR. YOUNGQUIST: May I ask whether there have been any such cases where the defendant has insisted on going on with the trial?

MR. SEASONGOOD: He would not ask to go on with

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the trial.

MR. MEDALIE: If you pin me down to a particular case, I could not state it, but I have known cases where the evidence fell far short of a case for the jury on behalf of the defendant, and the United States attorney has said, "I am willing to nolle prosse," and the defendant said, "Not on your life. We will take a directed verdict." I have known of such cases somewhere in my experience.

MR. ROBINSON: Of course, we are abolishing the directed verdict.

MR. MEDALIE: Same thing; judgment of acquittal.

MR. HOLTZOFF: Same thing; judgment of acquittal.

MR. McLELLAN: But if the case has gone along to a point where the United States attorney wants to quit before the case goes to the jury, the defendant has a right to a judgment of acquittal and ought to have it. I don't know whether this takes it away from him or not.

MR. ROBINSON: The question centers around this, Judge, in working over this rule, and that is, just when does the trial judge's control over the case begin with respect to his power of throwing it out of court by dismissal? At what stage in the trial?

MR. McLELLAN: I can tell you what the law is - I have looked it up - in my own limited jurisdiction, and that is, when the first juror's name is called to be

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impaneled.

MR. ROBINSON: From that point on the judge can dismiss?

MR. McLELLAN: From that point on the trial has begun.

MR. GLUECK: For the purpose of double jeopardy, you mean?

MR. McLELLAN: No, it is begun from the standpoint, in a civil case, of the plaintiff not being permitted to discontinue. I think it is begun from the standpoint of the right of the defendant to insist upon his trial.

MR. ROBINSON: From that point on, then, if the United States attorney wished to nolle prosse, that would have to be with the approval of the court.

MR. HOLTZOFF: Approval of the defendant.

MR. McLELLAN: No, the defendant is the man who has the say as to that.

MR. ROBINSON: No, I am talking about the court. If the judge has control of the trial from the time the first juror is sworn, wouldn't it be true then that he would have to approve throwing the case out?

MR. McLELLAN: I do not think it is a question of what the judge's prerogative is. I think it is a question as to what the defendant's right is.

MR. DEAN: He may have a perfectly good jury, he is

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satisfied with it, he is convinced he is going to get an acquittal. The Government right at that point says, 'We won't be able to convict him. We will nolle prosse."

MR. McLELLAN: And it ought not to be permitted.

MR. SEASONGOOD: The court would say, 'No, you don't nolle prosse; but I will instruct a judgment of acquittal" - "I will enter a judgment of acquittal, if you think you cannot convict."

MR. MEDALIE: I think you would be making a new law, and I would object to it.

MR. SEASONGOOD: I would like to hear from some areas other than metropolitan areas. I would like to know what Mr. Seth thinks.

MR. McLELLAN: Can there be any question about it? Can there be any question that when the trial has started that the defendant has a right to completion of trial?

MR. SETH: Not the slightest.

MR. McLELLAN: Or judgment of acquittal, if there is not sufficient evidence?

MR. SETH: No; I mean on the general question of having the judge approve the nolle prosse.

MR. SEASONGOOD: In a civil case you can dismiss the case at anyttme up to decision; that is, it is a matter of right to dismiss; but this is different.

MR. SETH: The judge ought to control his court,

and I strongly favor the requirement, and always have in all these hearings, in having the district judge give his approval.

MR. McLELLAN: I agree fully with Mr. Seth on that.

MR. SEASONGOOD: Of course, I am from out in the country; I would like to know what Mr. Seth has to say.

MR. SETH: I believe the judge should control his court; that when the case has gotten into the district court, in the form of indictment or information, he should have to approve any dismissal.

MR. YOUNGQUIST: Even before trial?

MR. SETH: Even before trial.

MR. SEASONGOOD: May I do one more things which, of course, is merely repeating what the Reporter has said, just emphasizing it a little differently. In the first place, you have to get this to the Supreme Court; you have to get their approval; then you have to get the approval of the bar. Now, the Supreme Court has put something into the Memorandum, the Reporter says, which suggested, "Such a requirement might be desirable and reference was had to a recent decision of the Supreme Court, Young v. United States, 315 U. S.," and then he quotes the language.

MR. DEAN: Is there a motion?

MR. HOLTZOFF: Yes, Mr. Seasongood made a motion.

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MR. SEASONGOOD: And then, the other point is that the Reporter calls attention to the fact that thirty states have this provision, so that there is nothing revolutionary about it, and when you have a majority of the states of the union adopting it, that presents the question of whether you should not give consideration or not to it.

MR. HOLTZOFF: Isn't there a difference between states of the union and the Federal Government. Because in 47 of the states the prosecuting attorney is an elected official, over whom there is no control, and equally, without intending any criticism, he may be subject to political control or political motives, whereas the United States attorney is an appointed official. Now, there is one state in which the states attorney is appointed, and that is Connecticut, and I understand that in Connecticut the states attorney can nolle prosse his own cases without approval of the court.

MR. SEASONGOOD: I don't think it makes much difference whether he is appointed or elected. I know of my own knowledge of where an income tax fraud, that was a raw fraud, was in the hands of the D. A., and Washington told him not to prosecute.

MR. ROBINSON: Since Mr. Holtzoff has raised the point, I think I am justified, I hope I am, in mentioning that I have been a prosecuting attorney in a state, and I

have had the experience of going before the court and asking him to nolle prosse a case. In Indiana it has to be by permission of the court. We are one of the 30 states requiring that approval. The request was refused by the court. He said, "The jury has indicted. It seems to be a case where the evidence ought to be heard by the jury."

The request was the result of an understanding between counsel. It seemed that justice could well be served by a nolle prosse.

The refusal of the court resulted in a conviction, and a proper conviction. It helped to clear the situation up much better than a nolle prosse would, and the judge in that situation exercised a very beneficial restraint on the prosecuting attorney.

MR. YOUNGQUIST: There was a conviction, you say?

MR. ROBINSON: There was a conviction, yes.

MR. HOLTZOFF: I call for the question on Mr. Seasongood's motion.

THE CHAIRMAN: All right; the question is on Mr. Seasongood's motion to insert in line 2 the words -- am I correct -- "with the consent of the court".

MR. HOLTZOFF: "first had"; was that the language?

MR. SEASONGOOD: Yes.

MR. WECHSLER: Do you need "first had"?

MR. SEASONGOOD: I do not suppose you need "first

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had".

MR. WECHSLER: Isn't "with the consent of the court" enough?

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes."

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 8 opposed.)

THE CHAIRMAN: The motion is lost.

MR. DEAN: Mr. Chairman, I move that we insert after the end of line 4 the following, "Such a dismissal may not be filed, however, without the consent of the defendant after the first juror is sworn."

MR. McLELLAN: May I informally suggest that it might be well if you had something about "during a trial," because suppose the trial starts and the jury disagrees, and then after that disagreement they want to nolle prosse, they ought to have the right to do that, hadn't they?

THE CHAIRMAN: Will you reword it, Mr. Dean?

MR. DEAN: That is a little hard to do. "Such a dismissal may not be filed, however, during trial without the consent of the defendant."

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THE CHAIRMAN: Are you ready for the motion? Those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. MEDALIE: No.

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

MR. MEDALIE: You seemed to be doubtful.

THE CHAIRMAN: All those in favor of Rule 47 as amended, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. SEASONGOOD: Have you made it that you don't need the consent of the court then at any time?

THE CHAIRMAN: That is correct, but after trial is started you need the consent of the defendant.

MR. McLELLAN: You did not vote on that, Mr. Chairman, did you?

THE CHAIRMAN: I never vote, except that they did catch me last night with a 5 to 5.

MR. DEAN: Such a dismissal may not be filed during the trial without the consent of the defendant.

THE CHAIRMAN: To answer your question, Judge, if I were the trial judge, consent would not have any meaning. I would be for it, but I am afraid it would degenerate into a formality.

MR. McLELLAN: You would feel it is all right not to have a nolle during the trial without the defendant's consent?

THE CHAIRMAN: Oh yes.

MR. SETH: You will have the disapproval of a great many Judges on that, I think.

THE CHAIRMAN: All right, gentlemen. Rule 48(a). This seems to be formal matters. Are there changes from the old rule?

MR. HOLTZOFF: No. I move the adoption of the whole Rule 48. It is just routine material.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: Any discussion? (No response.) All those in favor say "Aye".

(Chorus of "Ayes".)

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THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried. Rule 49.

MR. YOUNGQUIST: Before we leave 48 may I ask whether provision is made anywhere as to the time of the notice?

MR. HOLTZOFF: Yes, there is provision for five days notice of motion, unless other time is fixed by an order or rule of court. That was in one of the rules we had last night.

THE CHAIRMAN: That was Rule 44(d).

MR. YOUNGQUIST: All right.

MR. MEDALIE: Are you still on 48?

MR. HOLTZOFF: We have already adopted it.

THE CHAIRMAN: We can go back.

MR. MEDALIE: Rule 48(c). That would create a practice in a district as important as this and the Eastern District of having the clerk do a tremendous amount of paper work now done by the attorneys, mostly United States attorneys and attorneys for defendants.

MR. SETH: Well this is the civil rule.

MR. MEDALIE: It is a terrible amount of work.

MR. YOUNGQUIST: How do you do it here, George?

MR. MEDALIE: Your adversary serves you with a copy of the order, or you go and copy it.

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MR. HOLTZOFF: This is the same as the civil rule, and the civil rule is in force in this district.

THE CHAIRMAN: Is it actually enforced here?

MR. MEDALIE: I do not think so.

MR. HOLTZOFF: It is on the books.

THE CHAIRMAN: It is, but it is not used in my State.

MR. MEDALIE: It is not done. I wonder whether we could not ask the clerk of the court what is really operating?

THE CHAIRMAN: But if it is working in both districts should not we go along?

MR. ROBINSON: Most of the clerks say it is handled by a postcard, stamped and sent out. That is the information in the administrative office.

MR. HOLTZOFF: You will find it in 77(d), and this office has not asked to be excused from the civil rule.

MR. MEDALIE: All right.

THE CHAIRMAN: Now Rule 49(a). Any changes in this rule?

MR. HOLTZOFF: No. This is a routine rule, and I move that we adopt it all at one time.

MR. YOUNGQUIST: (b) is not routine. I have no objection to it.

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MR. McLELLAN: I move the adoption of (a).

MR. YOUNGQUIST: Seconded.

THE CHAIRMAN: In line 3 we should strike out the reference to the circuit courts of Appeals, because that is already covered in the appeal rules we adopted last night, so it reads "the district courts may provide".

MR. SEASONGOOD: Does our Court of Appeals Rules say preference shall be granted as far as practicable to criminal proceedings?

MR. DEAN: They should be advanced, as I recall it.

MR. McLELLAN: I move the adoption of (a).

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I move the adoption of (b).

MR. SEASONGOOD: I don't think you ought to do this in any event unless you notify the judge concerned. In line 12 I would insert "tothe judge concerned", but even with that it seems to me a very drastic thing to take a case out of the hands of the judge who is handling it. How does the senior judge know there is not some good

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reason for leaving it there. This is very summary, and I should think a judge would resent it. Certainly if somebody goes to the senior circuit judge and says "You ought to take this away from this judge".

THE CHAIRMAN: My recollection is this was not requested, or at least suggested, by the administrative office.

MR. ROBINSON: Is that right, Mrs. Peterson?

MRS. PETERSON: Yes.

THE CHAIRMAN: Because of the difficulty with the district judges, because many of them conceive themselves to be all on a parity within the district, and if the senior judge does not have some power to control the movement of cases he has no recourse, except resort to the judicial conference of the circuit, which would probably be more embarrassing for the district judge. How does that work practically, Judge McLellan?

MR. McLELLAN: I do not understand this rule as likely to be construed to make any difficulty among the judges, as between the senior judge or the other one. Some judge ought to have the power to order a criminal case on for trial. I don't know who could do it better than the senior judge. In our district we never had any trouble about that. No criminal case belongs to any particular judge, anyway. Here is a case that has been going along,

and perhaps the defendant wants a trial and the United States attorney says "I will give him a trial whenever he wants to", and the senior judge under this rule could be seen and something done. I don't think in our district it would make the slightest difficulty among the judges, one reason being that no criminal case belongs to any particular judge.

MR. DEAN: In some districts, I think the Southern District of California was pointed out as an example, you do not really have an acting senior district judge. They are divided politically, and there is the reluctance for anyone to assume command, and they wanted to give the district judge in that situation a little power so he could assign cases.

MR. SEASONGOOD: This is more than to assign. It says "Make an advancement"or "for the conduct, trial or hearing of the proceeding." The case is pending before a certain judge, and the senior judge comes in and makes an order without any notice to that judge. Somebody tells something to the district judge, and without hearing that judge, who has had the case in charge, goes ahead and makes an order respecting the trial.

MR. DEAN: There isn't that limited to the last part "as will expedite the calendars and promote" and so forth?

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MR. SEASONGOOD: That is very comprehensive, isn't it? That is everything you could do.

MR. HOLTZOFF: In most districts cases are not assigned to the particular judge until they are about to be tried. Most districts have a unified calendar. It is true in the Eastern District and in this district, and in the District of Columbia that a case does not belong to any particular judge until ready for trial.

THE CHAIRMAN: And you will notice, Mr. Seasongood, in lines 10 and 11 it relates to "an indictment or information has been filed". In other words, it does not contemplate interference after trial commenced. I do not think so.

MR. DEAN: It certainly should not.

MR. SEASONGOOD: I do not know that it does. Sometimes there is just a senior district judge by virtue of seniority, the oldest one in terms of service.

THE CHAIRMAN: That is the rule generally, I believe.

MR. SEASONGOOD: All right. Take in our district, we have in the Southern District three; one is Dayton, one in Columbus and one in Cincinnati. The one in Dayton is the senior district judge in point of seniority. According to this he could take any case say from those judges in Cincinnati or in Columbus.

8mk

MR. HOLTZOFF: Under existing law that particular judge has certain authority over the other judges and over the disposition of the docket. The law gives the senior district judge certain authority.

MR. McLELLAN: Does it? It has been changed recently if it does.

MR. HOLTZOFF: I think the Administrative Act refers to the power of the senior district judge, if I am not mistaken.

MR. McLELLAN: The old rule used to be the senior circuit judge could do everything.

MR. SEASONGOOD: I move you insert in line 12 after "notice" "to the judge concerned".

MR. McLELLAN: There is no provision for notice to the judge concerned.

MR. SEASONGOOD: No. I mean to insert it.

THE CHAIRMAN" "to the judge concerned, the United States attorney and the defendant"?

MR. SEASONGOOD: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(Chorus of "Noes".)

THE CHAIRMAN: Show of hands.

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(After a show of hands the Chairman announced the vote to be 2 in favor and 7 opposed.)

THE CHAIRMAN: The motion is lost.

Are there any other suggestions? (No response.) If not all those in favor of 49(b) say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(One "No".)

THE CHAIRMAN: Carried. Rule 50.

MR. HOLTZOFF: There are no changes in this. I move its adoption.

MR. LONGSDORF: That rule corresponds closely to the civil rules, I know, but in the last lines, 9 and 10, as they stand, there is a possibility that no opportunity existed to object to a ruling or order at the time it is made, but an opportunity did occur at a later time, when it might have been corrected. I do not think a man ought to be able to stand by and gamble on the outcome of the case in that way, if he has an opportunity to object at any time.

THE CHAIRMAN: What language do you suggest, Mr. Longsdorf?

MR. LONGSDORF: I had it one time before.

MR. SETH: Why not add "until he has an opportunity to object" at the end of the paragraph?

MR. LONGSDORF: You said what, Mr. Seth?

MR. SETH: Until he has an opportunity to object.

THE CHAIRMAN: The motion is to add "until he has an opportunity to object" at the end of the paragraph. All those in favor of the motion say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(Chorus of "Noes")

MR. YOUNGQUIST: No. I do not understand just what that accomplishes.

THE CHAIRMAN: Mr. Longsdorf says --

MR. YOUNGQUIST: I know what they are driving at, but I do not know whether this language carries that out; just what it accomplishes.

MR. LONGSDORF: If a defendant has no opportunity to object to a ruling or order at the time it is made, or at any other time while it remains curable by the action of the court.

MR. HOLTZOFF: I am opposed to that in substance. Suppose, for example, an error is made today in a long trial, and there is no opportunity to object, and suppose on the next day there was an opportunity but by that time it is water over the dam and counsel has his mind concentrated on something else?

MR. MEDALIE: There would not be an opportunity

then. The only time you have an opportunity after the judge has admitted evidence that should not have gone in, you can stand up at the close of the government's case and blubber your motion to strike. You ought not to be called upon to make those motions after they have sunk into the jury.

MR. WECHSLER: Under Mr. Longsdorf's proposal there would be no basis to claim error on appeal, and I don't think we want that.

MR. McLELLAN: I move a further amendment, Mr. Chairman; that after the words "an objection" in line 9 there be added this: "At that time if made seasonably thereafter", so the last clause shall read "The absence of an objection at that time if seasonably made thereafter does not prejudice him".

MR. SETH: That covers it.

MR. LONGSDORF: That is agreeable.

MR. McLELLAN: What I think of is a case like this: a question is asked; it is answered before there is an opportunity to object. Then there is some kind of talk in the courtroom, so that there is no opportunity for the man who wants to object to take his objection. He ought not to be able to sit around and do nothing and let the court have no knowledge of what is in his mind. He ought to, when an opportunity is presented, make his

objection to it.

MR. HOLTZOFF: Judge, do you think it is well to have a different practice on this in criminal cases than in civil cases?

MR. McLELLAN: Probably not, but I have had trouble in the past when I have read that rule, and I have felt that there ought to be some provision for a person making an objection when he can, if he does not have an opportunity to do it at the time a ruling was made.

MR. WAITE: The illustration Mr. Longsdorf was going to give when he was interrupted?

MR. LONGSDORF: I was going to cite the Glasser case, where it developed one counsel represented two defendants, and as the trial went on it appeared that the cross-examination of a witness would favor one defendant and injure another, both represented by the same counsel. I think you have heard of it, all of you. There might have been an opportunity in that case to correct it.

MR. DEAN: Wouldn't you cure it if you strike out "at the time it is made"?

MR. YOUNGQUIST: That is the suggestion I was going to make.

MR. MEDALIE: Yes sir.

MR. LONGSDORF: Yes, I think that would be all

right.

MR. McLELLAN: I think that is much better than my suggestion.

THE CHAIRMAN: The motion is to strike in lines 8 and 9 the words "at the time it is made". All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: All those opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. SETH: I would like to suggest, at the end of line 7 we change "if" to "until", and strike out "no" in line 8.

MR. GLUECK: That does not sound right.

MR. LONGSDORF: Or do you mean "unless"?

MR. SETH: That is all right.

MR. MEDALIE: Would "unless" be all right?

MR. YOUNGQUIST: Isn't it met by the language we have now?

MR. ROBINSON: I believe so.

MR. SETH: It is all right with me.

THE CHAIRMAN: Are you ready for the motion?

MR. MEDALIE: May I just make a comment?

MR. McLELLAN: Or Mr. Seth's suggestion.

MR. SETH: I withdraw mine.

THE CHAIRMAN: All those in favor of the rule as amended say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: All those opposed "No".

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: I think the word "his" should be changed to "the" shouldn't it?

THE CHAIRMAN: All right.

MR. YOUNGQUIST: Should the word "his" in line 6 be changed to "the"?

MR. MEDALIE: No.

THE CHAIRMAN: 51(a) and (b) seem to be in the same form.

MR. WECHSLER: Mr. Chairman, I have a question on 51. There is no rule specifically dealing with the subject of variance. It has been considered before. I thought that our conclusion was to have a rule, but if we do not have a rule I think the word "variance" ought to be mentioned in 51(a).

MR. ROBINSON: The rule we provided for before was stricken out by the committee. They decided there should not be any rule.

MR. WECHSLER: What was the reason?

MR. ROBINSON: I do not know what the reason

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was. I thought it ought to be in.

MR. HOLTZOFF: My understanding was this, and I thought the action was well founded; that this harmless error rule covers it.

MR. WECHSLER: Then I think the word "variance" ought to be in.

MR. HOLTZOFF: I think you are right about that, to leave no doubt on the subject.

MR. MEDALIE: "Errors, defects and variances"?

MR. WECHSLER: Might it be better to read "Any error, defect or variance which does not affect substantial rights"?

MR. MEDALIE: Yes.

MR. WECHSLER: I wonder if the word "irregularity" would not be better than "defect". I do not know quite what "defect" means.

MR. HOLTZOFF: Does not "defect" include defects on the face of the document. The word "irregularity" would not include it.

MR. WECHSLER: Is "irregularity" included in "error", do you suppose?

MR. MEDALIE: No.

THE CHAIRMAN: "Any defect"?

MR. HOLTZOFF: Why not insert the word "irregularity", but I would not like to see "defect"

stricken out.

MR. YOUNGQUIST: Would not "error" cover that?

MR. WECHSLER: "error" is an error of the judge or court.

MR. LONGSDORFF: An irregularity which did not result from the action of the court presumptively would be an irregularity in the court on the trial.

MR. HOLTZOFF: I see no reason why we should not have the word "irregularity".

MR. LONGSDORFF: Of course that was in the statute because the statute also mentioned indictments.

MR. WECHSLER: I think it would be all-inclusive if it read "any error, defect, variance or irregularity".

MR. MCALLIE: Anything you put in on line 2 must go in on line 4.

MR.ROBINSON: I think it would help if we were to notice the two Federal statutes that this has been prepared by the committee and the sub-committee on style to supplant. And if I am not mistaken in that I would like to read the two statutes.

MR. LONGSDORF: I wish you would.

MR. ROBINSON: The first, Title 28, Section 391:

"On the hearing of any appeal, certiorari or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the

entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the party."

This provision would likewise supplant this other section, Title 18, Section 556:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * *."

Those are the two statutes. I think with the four words we have everything.

MR. SETH: A little broader than the statute.

MR. WECHSLER: Yes, but not unhappily broader.

THE CHAIRMAN: The motion is to adopt 51(a), changing the first line to read "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. ROBINSON: Now (b) is new, submitted by Mr.

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Dession with a memorandum, which you will find at Rule 51, page 3.

MR. HOLTZOFF: I want to say just a word about 51(b): I think there is a great deal of merit in it, but the situation has changed as a result of a Supreme Court decision handed down a week ago in the Johnson case. The Supreme Court stated it would refuse to determine whether a very important point raised by defendent constituted an objection or constituted an improper practice because there was no exception, and the court said, assuming that there was error we won't pass on the matter, because no exceptions were taken. Now the court has been, prior to that, in many cases, taking the position that they will consider an error irrespective of exceptions taken. I am just wondering if that does not indicate an attitude of the Supreme Court, and whether we should not consider that point and possibly strike out "exceptions".

MR. DEAN: For that reason aren't we justified in having this?

MR. HOLTZOFF: They are abolishing exceptions and substituting objections, really. We are requiring a party calling what he deems to be error to the attention of the court.

MR. WECHSLER: Mr. Chairman, I do not think we need to worry about the Johnson case, because, as Mr.

Holtzoff pointed out last night you had a double point; first that there was no exception, and, secondly, this thing was summed up as follows: "We cannot see where any prejudice resulted, even if we assume argument ended", and so forth. I just cannot believe there was any intention to do away with the plain error rule.

MR. HOLTZOFF: But you read the immediately preceding sentence.

MR. LONGSDORF: Isn't that easily explained? The plain error rule in the appellate court was a rule that the court might take notice of an error not assigned, but plain on the record. Of course there it had to be an exception or else they would have taken --

MR. HOLTZOFF: No, but this rule is broader.

MR. DESSION: Perhaps the answer is the plain error rule in any form does not mean that the appellate court has to notice an error not assigned, but usually will do it, and it may in a proper case.

MR. WECHSLER: It is the duty of the court, however, to examine for plain error. There has been a reversal in the Supreme Court on that ground.

MR. DESSION: That is right, but I do not take it to mean the court will do it.

MR. HOLTZOFF: Yes, but in this case they refused to consider the question.

MR. MEDALIE: Because all we are doing in 51(b) is saying they may notice.

MR. DEAN: What the Johnson case says is that it did not affect substantial rights.

MR. HOLTZOFF: They said no exception was taken.

MR. LONGSDORF: I would like to comment on this phase of the rule: it is apparent in the decisions that following the language of that "harmless error" rule which Mr. Robinson just read, some courts have thought it their duty to make an examination of the entire record and take notice of everything that went wrong. They impose enormous labors on themselves, and they probably will continue to do so. I think that it might be wise to frame this "harmless error" rule so it shouldno longer seem to be coupled with the admonition to the judge to scan a long record to see if there is anything of error in it.

MR. HOLTZOFF: I don't think there is any such admonition here.

MR. LONGSDORF: I think the addition is a good one.

MR. HOLTZOFF: I move the adoption of the rule.

MR. YOUNGQUIST: I second the motion, and ask the question. That is, Rule 51 applies, as I understand it, not only to appellate courts but also to trial courts.

MR. LONGSDORF: Yes.

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MR. YOUNGQUIST: And in line 5,"although they were not brought to the attention of the court" includes, I suppose, absence of objection to the trial court, and absence --

MR. GLUECK: Of mention in the brief?

MR. YOUNGQUIST: Of mention in the brief or assignment of error in the appellate court. All right.

MR. DEAN: I assume irregularities and variances to be inserted in line 4?

MR. HOLTZOFF: No, no.

MR. YOUNGQUIST: No.

MR. WECHSLER: An irregularity or variance would there be a plain error, or it would be nothing.

MR. YOUNGQUIST: Then why have it in line 2?

MR. WECHSLER: The meaning is reversed. This says what has to be ground for reversal and (a) says what shall not be ground for reversal.

MR. YOUNGQUIST: I cannot see the distinction, but I am not raising the point.

MR. McLELLAN: Mr. Chairman, inasmuch as I am going to vote against this motion I want to say I have no fault to find with the plain error rule. I believe in it, but I believe it is so mixed up as to when it is applied by the courts that we better leave that problem to the courts and let them deal with it, rather than make it the

subject matter of a rule. That may be a poor reason, but that is the way I feel.

MR. WECHSLER: Don't you think we have abolished it by our other rule on objections, unless we save it here.

MR. McLELLAN: That had not occurred to me.

MR. YOUNGQUIST: You mean 50?

MR. WECHSLER: Yes. I guess it is 50.

MR. MEDALIE: As I understand the plain error rule the attorney for a defendant, either because he does not know or because he is asleep or is unexpert --

MR. DEAN: Or shifted counsel?

MR. MEDALIE: Well suppose the same counsel goes through with the case on appeal and he has inadequately represented the defendant. Suppose as a result of such a defense so conducted the defendant's rights have just been thrown away. You do not want to take it away from a court to do that. Now whether it will do it or not you leave to the court? You don't let them say "We are compelled to ignore this plain error because we are powerless." We don't want them to say that. How they will deal with it other than a sense of justice, their own experience will tell them.

MR. HOLTZOFF: The Ninth Circuit used to say they were powerless, and other circuits I think thought they were, but the Ninth Circuit has said that many a time,

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and I think that is one circumstance that corroborates your point of view.

MR. MEDALIE: Give the court a chance to do what it wishes.

MR. DEAN: I would like to make an amendment, Mr. Chairman. I don't think the plain error rule is really before us if you make this permissive. If it is a plain defect that means it is obvious on its face and the court should take notice of it, so I move to scratch the word "may" in line 5 and insert "shall be".

MR. MEDALIE: I don't think you ought to do that, because everything depends on this: if that court thinks that a conviction ought to stand it is not going to go off and argue the point as to whether or not there was an error as to which no objection was raised, and it was not brought to the court's attention. If it thinks it is an injustice that that particular conviction should stand, then it will take it up if it cares to.

MR. HOLTZOFF: But it has to be prejudicial or affect substantial rights.

MR. MEDALIE: Yes. Many things affect substantial rights, but that does not mean completely so it throws the balance in one direction.

MR. HOLTZOFF: The requirement making it mandatory would place the burden on the appellate court to examine

the entire record for the purpose of determining whether there was plain error, and would relieve counsel of his duty in this connection.

MR. WECHSLER: I understand that to be the law.

MR. YOUNGQUIST: If it is the law we should not declare it so.

MR. WECHSLER: The rubber band inheres in the word "plain".

MR. YOUNGQUIST: It would obligate the court to examine the entire record and find whether there was a plain error. It could not determine whether it was plain without reading the entire record.

MR. McLELLAN: I am going to move an amendment, Mr. Chairman, because I feel somewhat strongly about it; that (b) read "Plain error. That nothing contained in these rules shall deprive any court of the power to notice plain errors and defects affecting substantial rights." The reason I offer it is I do not like to tellthe court that they may notice these things.

MR. MEDALIE: I think that is a better way.

THE CHAIRMAN: Are you dropping the clause "although they were not brought to the attention of the court"?

MR. McLELLAN: I did not put that in, because I am perfectly willing either way, if we can have a change of the substantial nature I have suggested.

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MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: Are those in or out?

MR. WECHSLER: Should there be duty without power? "Power or duty"?

MR. YOUNGQUIST: I would rather have it "power". I would not tell them it was the duty to examine the record in every case.

MR. WECHSLER: But you would, on my basis, leave room for my conception that it is their duty.

MR. YOUNGQUIST: I think it would certainly imply that, and say there is a duty on the court, because we say "nothing shall deprive the court of the duty".

MR. McLELLAN: Power.

MR. YOUNGQUIST: I am using Mr. Wechsler's language; nothing should release them of the duty to examine.

MR. METALIE: I am a little concerned about putting it this way, for the reason that Alex just told us. Some say they have not the power.

MR. HOLTZOFF: The Ninth Circuit used to say they have not the power.

MR. WECHSLER: Were any cases reversed from the Ninth Circuit on that ground by the Supreme Court?

MR. HOLTZOFF: Yes.

MR. LONGSDORF: And the Fifth Circuit says the

rule commands them to examine the whole record.

MR. HOLTZOFF: As I understand the rule, as Judge McLellan has stated it, which struck me so well for a moment, you do not diminish their power, so you leave their power for whatever the particular court says exists today, and what we want to make sure of is they have that power and exercise it, if they choose in their judgment, but if they decide from this we have not given them what they say they have not got we have failed in our purpose in drawing the subdivision.

MR. ORFIELD: Perhaps there is a duty in capital cases and power in other cases.

MR. DEAN: The trouble is the word "plain" means obvious, and so long as we mean that should there not be a requirement the court take notice of any obvious defect affecting substantial rights?

MR. HOLTZOFF: But must they not be also prejudicial defects?

MR. YOUNGQUIST/ Gordon, that would necessitate their reading the entire record.

MR. DEAN: Not if it is obvious.

MR. YOUNGQUIST: Oh, they cannot find the error without reading the record, and after they find it they determine whether it is obvious.

MR. DEAN: My notion is it is one of those

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things that speaks, like a red flag.

MR. McLELLAN: It depends on what else is in the record.

MR. SEASONGOOD: It is obvious if somebody tells you about it, but you don't look at that part of the record unless somebody calls your attention to it.

MR. LONGSDORF: That harmless error rule in the statute was not well drawn, I think. I think that expression "after examination of the entire record" should have been kept out of there. This will supersede that and get rid of it. Can we have a vote on the principle of it? Some want it to be mandatory, and the draft would have to differ if we want that.

MR. HOLTZOFF: Why not vote on Judge McLellan's substitute?

MR. YOUNGQUIST: I think we should vote on Herb's first, because that is the principle.

MR. GLUECK: I would like to understand: does it mean you are imposing a duty on the appellate courts to read the record of the entire case?

MR. DEAN: No, because we have already provided what should be in the record.

MR. WECHSLER: It is the duty to make sufficient examination of the record to satisfy itself that there was no substantial miscarriage of justice. That is what

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I regard the present law to be, and whether you have to read ten pages of the record or 150 pages of the record will vary in particular cases. In the mail fraud case, where you just by scanning the record see there is evidence to support the judgment you would stop there. That is the way the Solicitor-General's office operates, and I think that is the way most circuit courts operate.

MR. McLELLAN: Then is your motion that it be mandatory that the court shall notice plain errors affecting substantial rights of the parties, whether or not called to the attention of the court?

MR. WECHSLER: Yes.

MR. YOUNGQUIST: I would vote for that if it did not involve the reading of the entire record. I cannot see any possible way of the court's discharging that duty without reading the record from beginning to end, because one cannot tell whether the obvious or plain error occurs on page 1, or page 15, or page 1350.

MR. DEAN: Would you vote for it if it involved the printed portion of the record that is provided for here?

THE CHAIRMAN: I think it puts an intolerable burden on the court. We all know most appellate judges don't read the record. Most do not read any part of the record. They get it from the briefs.

MR. SEASONGOOD: I took the pains to ask some

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of the judges in our state court and they say they feel they have to read the whole thing, word for word, hundreds of pages.

MR. YOUNGQUIST: That is a remarkable court.

THE CHAIRMAN: I think they apply facit per alium facit per se.

MR. WECHSLER: Would a cursory examination of the record be sufficient to meet this case?

THE CHAIRMAN: I know of a case in the Circuit Court of Appeals where counsel spent nine months condensing the record, and after the case was over he wanted to get a copy of it, having lost his own copy, and it took nine or ten weeks to find it. They found all the records still in the original box which had been sent, still wrapped with the steel bands the express company put on it, so I know one circuit court of appeals that does not read the records.

MR. MEDALIE: Did they need to read the record?

THE CHAIRMAN: It was a rate case, George, involving the structure of rates in our largest utility company.

MR. MEDALIE: From the briefs on both sides couldn't they really determine what facts or testimony were necessary to notice?

MR. YOUNGQUIST: I call for the question on Mr. Wechsler's motion. Let us be sure we have it. I think

Judge McLellan put it, making it mandatory on the court to read the record.

MR. McLELLAN: Oh no, to notice plain errors and defects affecting substantial rights; the emphasis in his motion, which I am against, was that it be mandatory.

MR. WECHSLER: "Shall" instead of "may".

THE CHAIRMAN: You have the motion. All in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(CHorus of "Noes".)

THE CHAIRMAN: The chair in in doubt. A show of hands.

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

THE CHAIRMAN: The motion is lost.

MR. YOUNGQUIST: I move the adoption of 51(b).

MR. DEAN: In what form is it now? Judge McLellan had a change to make.

MR. McLELLAN: But that was not accepted. I put that in order that I might in a way explain why I am going to vote against this one.

THE CHAIRMAN: The question on 51(b). All those in favor say "Aye".

(Chorus of "Ayes".)

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THE CHAIRMAN: Opposed "No".

MR. McLELLAN: No.

MR. WECHSLER: I wish to be recorded as opposed, because I think it modifies the law.

THE CHAIRMAN: The motion is carried. 52(a)(1). Any questions?

MR. LONGSDORF: I am going to renew my usual objection about including Alaska wholesale in this thing. I do not think it will work.

MR. HOLTZOFF: It seems to me Alaska should be given an opportunity to come in under this. If we exclude Alaska, Alaska is out for good. If we include Alaska in the preliminary draft, then these rules will receive consideration in Alaska, and then if we get adverse returns from Alaska we can strike out Alaska from the final draft.

MR. YOUNGQUIST: I think that was the theory on which they were included at the last meeting.

MR. LONGSDORF: I would include Alaska if the inclusion limited itself to those cases wherein the district courts of Alaska sit as district courts of the United States and exclude them when they sit as district courts of the Territory of Alaska. That is what I am contending for.

MR. HOLTZOFF: I move the adoption of Rule 52(a)(1)

THE CHAIRMAN: You have heard the motion. All

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those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(One "No")

THE CHARMAN: Carried. 52(a)(2).

MR. HOLTZOFF: I move its adoption.

MR. ROBINSON: This term "committing magistrate" is all I want to speak about. As far as I am concerned that is as good a term as we can get to express in a brief way the function performed by the United States commissioner or judge when he is committing a defendant.

MR. WECHSLER: Why don't we meet the problem by saying "any other officer acting under Section 591," and any other sections you want of Title 18, and then you have it direct and you keep the sense.

MR. MEDALIE: What is the harm of the term when it is a term known to the law?

MR. WECHSLER: I thought Jim had objection to the words.

MR. ROBINSON: I had no objection to it, but if anyone does or feels it should be changed, all right.

MR. WECHSLER: I do not press it if you do not want it.

THE CHAIRMAN: This explains itself.

MR. DESSION: Haven't we referred to those

fellows in a different way in different sections; referred to them as "other officers authorized by law"?

MR. HOLTZOFF: That would not be in here, George. We were referring to the State local magistrates.

MR. DESSION: That is what you are referring to here.

MR. HOLTZOFF: No.

MR. YOUNGQUIST: Line 20.

MR. SETH: Wouldn't it be better to change "other" in line 20 to "State"?

MR. DESSION: I think we ought to have a uniform way of referring to these State fellows and use it throughout.

MR. LONGSDORF: There is another way to get at this: if we leave lines 19 and 20 stand we are preserving all the diversity which may now exist in preliminary proceedings between State magistrates in various States. Why could not we strike out of this section lines 19 and 20 and in some other section insert a provision that preliminary proceedings before any State officer acting as a committing magistrate shall conform substantially to the provision of these rules?

MR. ROBINSON: Don't you think that would be pretty indefinite to begin with, George?

MR YOUNGQUIST: I have a deeper objection to it

than that. That is, we cannot expect the State magistrates to be familiar with the Federal criminal rules.

MR. LONGSDORF: I understand that.

MR. YOUNGQUIST: It would impose too much burden on them.

MR. LONGSDORF: Suppose they took down the testimony and reduced it to writing and return it as a deposition what would you do with it? Ignore it? You would not ignore it in California. It would be evidence.

MR. ORFIELD: Could we constitutionally compel State officers to follow any procedure of ours?

MR. LONGSDORF: I suppose we can, as much as we can require them to act for us.

MR. HOLTZOFF: We do not require them to act for us. We give them authority.

MR. DESSION: During the conference before we referred to these people as "other officers with power" and so forth. Then we never mentioned them again, and you bring them before the commissioner, and yet nothing is in the subsequent rules about what the State officer is supposed to do, and so the procedure in these rules should not apply. I think we should have a note to Rule 5 pointing out what happened when you get to that dead end.

MR. YOUNGQUIST: Should not we use the same language in here as we do in 5?

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MR. DESSION: As a matter of clarity, yes.

THE CHAIRMAN: The motion is in describing the State officers to conform to the language of 5, and that the rule be footnoted to 5; is that it?

MR. DESSION: Yes, and probably 5 should be footnoted to this.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: All those in favor of 52(a)(2) as amended say "Aye"

(Chorus of "Ayes")

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Carried unanimously.

MR. WECHSLER: Is the effect of that, Mr. Chairman, that State officers acting as committing magistrates follow the statute as it is?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: 52(b)(1).

MR. YOUNGQUIST: I move its adoption.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

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(No response.)

THE CHAIRMAN: Carried. 52(b)(2).

MR. HOLTZOFF: I move its adoption.

MR. ROBINSON: Seconded.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Carried. 52(b)(3).

MR. WECHSLER: Here you have a problem, Mr. Chairman. If we are to have a rule on material witnesses, which Mr. Holtzoff has drafted but has not yet submitted, then the provision here goes out.

MR. HOLTZOFF: He is right about that.

THE CHAIRMAN: Shall we hold this until we take up the rule on material witnesses?

MR. HOLTZOFF: Yes.

MR. WECHSLER: May I suggest this, Mr. Chairman: that our action be that we approve (3), except to the extent it may be modified by any rule subsequently adopted on the subject.

THE CHAIRMAN: That is the motion. All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

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(No response.)

THE CHAIRMAN: Carried. Rule 52(b)(4).

MR. HOLTZOFF: I move its adoption.

MR. ROBINSON: Seconded.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Unanimously carried. 52(b)(5).

MR. HOLTZOFF: (b)(5) I move we strike out from lines 56 and 57 the words "charged with offenses committed in any State or foreign Territory" as surplusage. All we will have left is "tradition and rendition of fugitives".

MR. ROBINSON: That is very good.

THE CHAIRMAN: All those in favor of 52(b)(5) as amended say "Aye".

MR. SEASONGOOD: Did you suggest we leave out habeas corpus?

MR. HOLTZOFF: No.

MR. SEASONGOOD: Didn't you say before it was a civil remedy?

MR. ROBINSON: The explanation of that is in the note. Maybe it is not sufficient for justifying the inclusion here. As habeas corpus does have such an important part in connection with criminal proceedings, it

was felt if we did not mention it it might seem to somebody to be an oversight.

MR. YOUNGQUIST: Why not say that in the note, and leave it out here?

MR. SEASONGOOD: Because our power is only to deal with criminal rules.

THE CHAIRMAN: If there is no objection we will put it in a footnote.

MR. HOLTZOFF: I move to strike "deportation of aliens" in lines 57 and 58. That is a matter handled by the Department of Justice.

THE CHAIRMAN: And footnote it, you mean?

MR. HOLTZOFF: No. They are reviewed in the courts by a habeas corpus proceeding.

THE CHAIRMAN: Is there any objection?

MR. SEASONGOOD: Striking "deportation of aliens"?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All those in favor of 52(b)(5) as amended say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Carried. 52(c).

MR. ROBINSON: You will observe, as the note states, and the memorandum, that this rule is put in for

the use of the committee, now and hereafter to put into it statutes or proceedings or other details which you think an applications and exclusions rule should contain. Some of the matters have been put in here just to suggest the type of thing that might come in. It is true now under this "application of terms" there are possibly some terms that may be added, and I would like the members of the committee to suggest.

THE CHAIRMAN: Shall we go line by line?

MR. DEAN: I move to strike out that one on line 85, "'indictment' includes information".

MR. HOLTZOFF: Before we get to that I move to strike the sentence immediately preceding "'person' includes partnership and corporation". That is very dangerous, because partnership is not an entity in the criminal law.

MR. ROBINSON: The reason for that is that the United States Code, and also laws of other jurisdictions have that same provision.

MR. YOUNGQUIST: In criminal matters?

MR. ROBINSON: In criminal procedure.

MR. DEAN: A person includes a partnership?

MR. ROBINSON: Yes. I think I can find it.

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

THE CHAIRMAN: "'person' includes partnership and corporation" is stricken.

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MR. HOLTZOFF: And "'indictment' includes information".

MR. SEASONGOOD: You are striking out "'person' includes a corporation"?

MR. HOLTZOFF: You do not need that, because that is what the word "person" means. You do not need to define that "person" includes a corporation.

MR. SEASONGOOD: It is frequently so stated, but it does not always hold. I know a case where they said "any person committing so and so", but the court held a person was not a corporation.

MR. DESSION: I don't think that law is so clear.

MR. SEASONGOOD: I want to raise another question; whether you do not want to include "associations"

MR. HOLTZOFF: You cannot indict an association. Under the civil law you could sue an association, but in criminal law you cannot prosecute an unincorporated association.

THE CHAIRMAN: I guess we will go along faster by motion.

MR. YOUNGQUIST: I move we strike out the words "partnership and".

MR. LONGSDORF: I move we strike out the whole sentence.

THE CHAIRMAN: There is one motion pending; the

motion to strike "partnership and". All in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No"

(No response.)

THE CHAIRMAN: Carried unanimously.

The motion is now to strike the remainder of the sentence. All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(Chorus of "Noes")

THE CHAIRMAN: The chair is in doubt. A show of hands.

MR. DEAN: One reason for striking it is associations cannot be indicted, and partners can be indicted, and they are made parties defendant.

THE CHAIRMAN: All those in favor of striking that raise their hands.

MR. SEASONGOOD: What is the vote on?

THE CHAIRMAN: Part of the sentence was stricken. Now the motion is to strike the rest.

MR. DESSION: May I move to reconsider the motion on the first striking, in view of what Gordon said.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: A motion is made to reconsider the vote on striking the words "partnership and". All

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those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed "no".

(No response.)

THE CHAIRMAN: Motion carried.

MR. YOUNGQUIST: May I ask the question?

MR. WECHSLER: Ifthe sentence goes out isn't it O.K.?

MR. GLUECK: That is the answer.

MR. YOUNGQUIST: Do we use the word "person" initially in the rules?

MR. HOLTZOFF: Yes, we do, and I don't think we require a definition.

MR. ROBINSON: "Search warrant" and "property of a person" is in there.

MR. WECHSLER: I call for the question.

MR. LONGSDORF: Before we put that motion I would like to add a little remark: with respect to the substantive law of crimes, the capacity of the partnership to commit a crime and be indicted for it, we are getting into the substantive law of crimes and outside of the law of procedure, and for that reason I do not think we ought to put so dangerous a clause in it at this place.

THE CHAIRMAN: Are you ready for the motion? All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. WECHSLER: I move to strike out the next "'indictment' includes information".

MR. ROBINSON: Of course that may be all right to strike it out. It is commonly provided by statute, you will notice. We have some very awkward wording in our earlier rules, where we have said "indictment or information".

MR. WECHSLER: But you have said it, and therefore there is no need for this.

MR. ROBINSON: My only question is, could our rules be improved by simply using the term "indictment" as many Codes do, under this section.

MR. GLUECK: No; we distinguished between the two, didn't we?

MR. ROBINSON: At times. Notice the first sentence of (c), the "words or terms used in these rules include if appropriate the words or meaning stated in this rule". The words "if appropriate" as used mean unless the context shows that the words quoted were intended to be used in a more limited sense. This is a common provision of the English Rules Act, and also Criminal Procedure Rules.

MR. WECHSLER: I think it is a bad form of draftsmanship for a job as important as these rules.

THE CHAIRMAN: The motion is to strike the sentence "indictment or information".

All those in favor say "Aye" .

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed "No".

(No response.)

THE CHAIRMAN: Carried.

MR. WECHSLER: I move to strike out the next sentence, too.

MR. ROBINSON: That may go out. I have no objection.

THE CHAIRMAN: That may go out by consent.

MR. MEDALIE: I move to strike out the first sentence of (c), and everything after line 86.

MR. DEAN: Seconded.

MR. MEDALIE: I want to go further than that, everything beginning with line 83.

THE CHAIRMAN: The motion is to strike the first sentence of (c) from lines 68 to 70, and everything which follows to the word "officer".

MR. YOUNGQUIST: Will you say that again?

MR. MEDALIE: The first sentence, which reads "words or terms used in these rules include if appropriate

the words or meaning stated in this rule," and I am willing to leave "'State' includes District of Columbia, Territory and insular possessions", and "Act of Congress", "district judge" and "senior district judge" and "senior circuit judge". After that I don't think we need anything.

MR. ROBINSON: Now let me read Section 1 of Title I of U. S. Code.

MR. MEDALIE: I know, but before you do that --

MR. ROBINSON: Because the same question --

MR. MEDALIE: If you don't mind, let me say that I know a vice has been developed in appending a part of a legal dictionary to almost every act that has recently been passed, and I think it wholly unnecessary.

MR. DEAN: And every regulation.

MR. LONGSDORF: George, you talk as if you came from California.

MR. ROBINSON: Others have been quite dubious about this, and I want to read the section for the sake of the record, and also for our own use. We may leave out something. You just watch. Here is the section:

"In determining the meaning of any act or resolution of the Congress passed subsequent to February 25, 1871, words importing the singular number may extend to and be applied to several persons or things; words importing the plural may include the signular;words importing

masculine gender may be applied to females; the words 'insane person' and 'lunatic' shall include every idiot, non compos, lunatic and insane person; the word 'person' may extend and be applied to partnerships and corporations and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form."

MR. SEASONGOOD: That is not repealed by these rules.

MR. ROBINSON: No.

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MR. ROBINSON: So the question is whether, by analogy, we need something of that sort.

MR. HOLTZOFF: No, I --

MR. ROBINSON: The answer seems to be 'No,' Alex.

THE CHAIRMAN: I am wondering, though, if Mr. Medalie did not shoot a little too much with that shotgun when he left out "oath".

MR. MEDALIE: Well, Mr. Seth called my attention to it. Of course, all the judicial interpretations makes it quite clear.

MR. WECHSLER: The only thing I see that may be needed in what George moved to strike is "affirmation" being included in "oath".

MR. DEAN: My recollection is we said "oath or affirmation."

MR. HOLTZOFF: We took it out.

MR. DEAN: Did we?

MR. HOLTZOFF: Yes.

MR. McLELLAN: I move an amendment to Mr. Medalie's motion, that it be passed, except that the words "'oath' includes affirmation" be retained.

THE CHAIRMAN: Do you accept that, Mr. Medalie?

MR. MEDALIE: I accept the principle. But I prefer to see that provided for in the text, because it

looks awfully crude just to define one term.

MR. ROBINSON: That is right.

MR. WECHSLER: I would accept that so long as it is made clear in the rule.

THE CHAIRMAN: Let us have a vote on that. All those in favor of referring in the rules everywhere we say "Oath" or to an affirmation, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The "Ayes" seem to have it. The "Ayes" have it. The motion is carried.

Then we go back, I take it, to Mr. Medalie's motion. All those in favor of his motion, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now, gentlemen, the hour of lunch has arrived.

MR. WECHSLER: Will you take another question on this, Mr. Chairman, or will you hold it?

THE CHAIRMAN: Yes, indeed.

MR. WECHSLER: At line 72 where it says Act of Congress includes any act of Congress locally applicable to the district, territory,or insular

1z3

possession - now, I don't remember the District Code well enough to know whether it contains provisions that we might not want to include for the District in places where we have referred to "Act of Congress."

MR. HOLTZOFF: The District Code does contain procedural provisions which would necessarily be superseded --

MR. WECHSLER: No; but I am talking about these cases where we have referred to "except as provided by Act of Congress."

I make this motion, Mr. Chairman: I make a motion that the Reporter examine specifically those rules using the words "Act of Congress" to which this definition would apply to be certain that he would not be incorporating into the rules for the District provisions which otherwise ought to be supplanted.

MR. ROBINSON: That has been watched, but we will recheck on that.

MR. LONGSDORF: Will you accept an amendment to that Mr. Wechsler?

MR. WECHSLER: Yes.

MR. LONGSDORF: I would like to extend that provision to the territories too because the same situation would apply.

MR. WECHSLER: I accept that.

THE CHAIRMAN: Are you ready for a motion on 52 (c) as revised, gentlemen? All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

We will recess for lunch until 1:20.

(Whereupon a recess was taken to 1:20 p. m.)

AFTERNOON SESSION

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THE CHAIRMAN: All right, Rule 53.

MR. WECHSLER: Mr. Chairman, I have something that I would like to mention, that I think could be mentioned without a quorum. On Rule 52 (c), the thing we were fussing with before, you have got another problem, it seems to me, in line 70, where you say "'State' includes District of Columbia, territory, and insular possession." The problem I have is that by virtue of that language you have made the rules inapplicable to committing magistrates in the District of Columbia, because our language in the rule is "other than state officers acting as committing magistrates". And I do not see any reason for doing that.

MR. YOUNGQUIST: Mr. Wechsler, we decided to change that language and make it conform to what appears in Rule 5.

MR. WECHSLER: We still have it, though, don't we?

MR. SETH: Are there United States commissioners in the District of Columbia?

MR. DEAN: Yes.

MR. WECHSLER: But the police judges also act as committing magistrates, don't they?

MR. DEAN: It is rarely done, but they could.

MR. WECHSLER: Well, just to test the thing out I am going to make a motion to strike that sentence "'State' includes District of Columbia, territory, and insular possession."

MR. YOUNGQUIST: I would prefer to let that go until Mr. Dession gets back. I cannot find that language, but he referred to something which is to be substituted --

MR. WECHSLER: I believe the substitute language was "state officer".

MR. YOUNGQUIST: 5 (a)?

MR. ROBINSON: 5 (a), line 6, is where Alex got his insertion in there - "nearest available commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. HOLTZOFF: I think it would be very dangerous.

MR. WECHSLER: Mr. Chairman, may I withdraw that motion and suggest that the Reporter consider the problem that I have raised and make any modifications necessary to meet it.

MR. HOLTZOFF: I second that motion.

THE CHAIRMAN: All those in favor of the motion say "Aye.

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

We now go to Rule 53.

MR. HOLTZOFF: I move the adoption of that.

MR. WECHSLER: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 54.

MR. HOLTZOFF: I think it is the same as we had for the tentative draft, and therefore I move its adoption.

MR. LONGSDORF: Seconded.

MR. YOUNGQUIST: Wait a minute.

THE CHAIRMAN: Are there any suggestions?

MR. YOUNGQUIST: No. All right.

MR. WECHSLER: Is the effect of (b) to preserve any statute which is not inconsistent with the rules?

MR. SETH: Yes.

MR. HOLTZOFF: It might have that effect.

MR. WECHSLER: Isn't that what is intended?

MR. HOLTZOFF: I presume so.

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MR. LONGSDORF: A question occurs to me which I asked at a previous meeting, and I would like to know what the Committee thinks about it: Will these local rules of the district courts when promulgated and reported to the Administrative Office, - would that be judicially noticeable by the United States Supreme Court?

MR. HOLTZOFF: I think we passed on that at the last meeting.

MR. LONGSDORF: How did we pass?

MR. HOLTZOFF: I don't recall.

MR. LONGSDORF: Neither do I. I wonder.

MR. HOLTZOFF: I think that the minutes will show. The Reporter has a set of minutes in his office.

MR. GLUECK: But under the rule would they be?

MR. LONGSDORF: Would they be under the rule?

MR. DEAN: I do not think there is any question about it.

MR. WECHSLER: Could a district court make a rule imcompatible with a statute?

THE CHAIRMAN: No.

MR. HOLTZOFF: No.

MR. WECHSLER: Then shouldn't the word "rule" on line 15 be "these rules"?

MR. DEAN: I think it should, because we provide for other types of rules --

MR. WECHSLER: That is with district court rules, and the only thing that is said there is that district court rules shall not be inconsistent with these rules, but there is nothing said about Federal statutes.

MR. HOLTZOFF: I do not think there is a real problem there.

MR. WECHSLER: Why?

MR. DEAN: Isn't it quite a problem?

MR. HOLTZOFF: What would you do? Insert the word "these" in line 15, making it read "these rules"?

MR. WECHSLER: Yes.

MR. HOLTZOFF: I see no objection to that.

MR. LONGSDORF: I suppose regard is had to the fact that in some of these circuits - I think the fourth does it, and I know ours does - the local rules of the district are reported to the conference, O.K'd. by the circuit court of appeals. We are not changing that in any way, are we?

MR. DEAN: No. The fourth circuit has achieved quite a uniformity in the local rules by means of that device.

MR. YOUNGQUIST: Mr. Chairman, the word "rule" as used in line 15 embraces both the district court and circuit court rules in these rules.

MR. WECHSLER: That is my point, and I do not

think it should; because that would mean, it seems to me, that the district court could make rules contrary to existing statutes not superseded by these rules.

MR. YOUNGQUIST: "not inconsistent with these rules or with any applicable statute", in the last line.

MR. WECHSLER: If you go up to lines 3, 4 and 5, you will see that it says: "Rules made by district courts and circuit courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules."

MR. YOUNGQUIST: That is right; but then when you come down to these, the individual judges look to these rules and to the circuit rules and to the district rules; and if they find nothing in them covering the situation, they proceed in any lawful manner not inconsistent with the statutes or these rules. I do not think there is any danger there.

THE CHAIRMAN: Do I hear any amendment?

MR. ROBINSON: Mr. Wechsler, you might ask Mr. Dession about that later.

MR. WECHSLER: I guess that is all right. I am convinced.

THE CHAIRMAN: If not, all those in favor of Rule 54 (a) and (b) say "Aye."

(Chorus of "Ayes.")

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THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 55. Any suggestions? If not --

MR. ROBINSON: Which one?

MR. HOLTZOFF: I move the adoption of Alternative Rule 55.

MR. GLUECK: Seconded.

MR. YOUNGQUIST: It says "are deemed". Wouldn't it be better to say "are to be deemed sufficient", just as a matter of language?

MR. HOLTZOFF: I am willing to accept that amendment?

MR. SEASONGOOD: Can't you just say "are sufficient but not mandatory"?

MR. WECHSLER: To comply with these rules.

MR. HOLTZOFF: Isn't that implied, Herbert?

MR. YOUNGQUIST: Either one. I don't care.

MR. McLELLAN: I like the first one.

THE CHAIRMAN: Isn't the first one simpler?

MR. HOLTZOFF: No; but the meaning is different. The reason why the Sub-Committee on Forms hoped that the alternative rule would be adopted is this: We want a lawyer who follows these forms to feel that he is safe in doing so.

1z11

MR. WECHSLER: I want to know if we have authority to do that, though. That is an interpretation of the rules.

MR. HOLTZOFF: Well, the Supreme Court has authority to do this.

MR. WECHSLER: It has authority to promulgate rules, but --

MR. McLELLAN: I move the adoption of the first Rule 55 as opposed to the alternative rule.

MR. WECHSLER: Seconded.

MR. HOLTZOFF: May I make this very brief explanation: You remember, Judge, in connection with the civil rules there were a number of decisions and questions and debates as to whether one or two of the forms were sufficient. Some lawyers used the forms in the Appendix, and they were confronted with the objection that those forms, perhaps, were not sufficient. I am wondering whether if these rules are accompanied by forms there ought not to be some assurance that a lawyer who relies on these forms won't be thrown out.

MR. GLUECK: But suppose the court later on decides to rule against one of these forms, as it might very well do?

MR. HOLTZOFF: But these forms, if appended to the rules, will have been approved as a part of the rules.

MR. WECHSLER: But I would not like to have to pass on the question as to whether every form complies with every rule, though I have implicit faith in the committee that drafted the forms.

THE CHAIRMAN: Haven't we got another point, that after the court promulgates these rules they do have that force without their specifically saying so?

MR. HOLTZOFF: Yes; that is what most people thought in connection with the civil rules. Then there was a district court decision holding that one of the forms was not sufficient, although the lawyer who filed the complaint based ~~his~~ form and specifically followed the form.

MR. WECHSLER: Suppose the district court was right?

MR. HOLTZOFF: I do not say it was not right.

MR. WECHSLER: Well, to put it another way, that the draftsman of the form was wrong.

MR. HOLTZOFF: Maybe so.

MR. GLUECK: Alex, my point is, will the Supreme Court be willing to bind itself this way?

MR. HOLTZOFF: I don't know. If not, they would say so.

THE CHAIRMAN: Well, you have got the question on Judge McLellan's motion to adopt Rule 55.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. MEDALIE: No.

THE CHAIRMAN: The motion to adopt Rule 55 is carried. Rule 56.

MR. SEASONGOOD: I would not like to make these rules applicable to proceedings then pending. It is a little ex post facto business. Why is it necessary?

MR. SETH: Why not make it like the civil rules where it says something about proceedings thereafter begun might be --

THE CHAIRMAN: What is that provision? Have we got it? Can somebody give us the corresponding civil rule?

MR. YOUNGQUIST: I will check it.

THE CHAIRMAN: While we are waiting for that, may we have approval of Rule 57? It reads:

"These rules may be known and cited as the Federal Rules of Criminal Procedure."

MR. HOLTZOFF: I move its adoption.

MR. SEASONGOOD: You decided not to try to abbreviate it? Why don't you abbreviate it for convenience?

MR. HOLTZOFF: I think it will be abbreviated, but I do not think you should have an official abbreviation.

MR. SEASONGOOD: What about the civil rules?

MR. HOLTZOFF: They do not have an official abbreviation.

MR. ROBINSON: Mr. Chairman, I think there is one important thing in that connection. I have placed it in the Note on Rule 57, page 2, merely for consideration. I have no desire any more than anyone else has to put a stamp on that. I think our rules, the statute under which we operate, has suggested a name for the rules just as the civil rules statute suggested their name. The next paragraph to the bottom of Rule 57, page 2, quotes from the empowering act, empowering the Supreme Court to prescribe Rules of Civil Procedure, using the term "rules in civil procedure". Therefore, Rules of Civil Procedure was a natural thing to use as a name for that set of rules. Our enabling act in the same corresponding provision or place describes our work as empowering the Supreme Court to prescribe rules of procedure in criminal cases.

Further, you will notice in the third paragraph from the bottom of that page that the rules which the Supreme Court have already prescribed are spoken of as "Rules in Criminal Cases". Of course, "after Verdict".

The one thing we might consider, therefore, is calling our rules as our statute does , "Rules of Procedure in Criminal Cases." That would be following the statute.

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That would give us an abbreviation "R. P. C. C.", which would not be confused with "F. R. C. P."

MR. GLUECK: That leaves out "Federal".

MR. ROBINSON: Everybody knows they are Federal rules.

MR. HOLTZOFF: Oh, no. When the book is published, unless the word "Federal" is on the cover, a person who buys the book would like to know if it is Federal rules or Montana rules or New York rules.

MR. MEDALIE: The minute he turns the pages he will know.

MR. YOUNGQUIST: But you may have state rules adopted hereafter on criminal procedure.

MR. ROBINSON: Well, you have the same problem --

MR. McLELLAN: I move the adoption of 57, if it has not already been moved.

MR. DEAN: Do we need 'may" in there? Do we want that? It may be known by any name. It either shall be known as that and may be cited as --

MR. ROBINSON: That is the exact provision in the civil rules,- "These rules may be known and cited as the Federal Rules of Civil Procedure."

MR. HOLTZOFF: "shall be known and may be cited"? Is that the motion?

THE CHAIRMAN: The motion is as stated, unless

1z16

there are other suggestions.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now, may we go back to 56.

MR. SEASONGOOD: Rule 86 of the civil rules reads as follows:

"These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

MR. MEDALIE: That is a very sensible rule. I remember that. I had that in connection with a proceeding for intervention in a case which was sought to be revived by a bill for that purpose, and there was considerable question as to just what the procedure should be in view

of the fact that it revived an ancient case. The proceeding was new. The original case in which the intervention was sought was old; the question was how to proceed, by a new bill in equity or a motion in the old case. Well, nobody cared. The judge did not care, did not want to be bothered with all of this learned stuff that was being thrown at him; he took what he got and he decided the question that came up before him without any regard to the papers.

THE CHAIRMAN: I had a case that was started in 1900, and the judge made us translate the pleadings from the old common law pleadings before the Hilary Rules into modern pleadings so he could understand them without studying them.

MR. SEASONGOOD: As I said before, these relate to criminal matters, and I do not know if you want to give them retrospective application.

THE CHAIRMAN: Would that be retrospective, Murray, in the rule you read?

MR. SEASONGOOD: Oh, no; but that seems to me to be an awfully uncertain thing. It is uncertain enough in civil procedure, but if you are going to do that in criminal procedure it is hazardous, I think.

MR. HOLTZOFF: I do not think this rule is retrospective as we have it in the Reporter's draft.

1z18

This only applies to all future steps taken in court.

MR. SEASONGOOD: They govern all criminal proceedings then ending or thereafter commenced.

MR. DEAN: I think we may get in trouble.

MR. HOLTZOFF: It means this, as I understand it, that all future steps shall be in accordance with this rule. For example, suppose an indictment was filed before these rules take effect. The defendant wants to raise the point that there was an improper person present in the grand jury room. Will he have to file a plea in abatement, as under the old procedure, or will he file a motion as under the new? Now, unless you tell him definitely that these rules apply to all pending proceedings as well as to future proceedings, you are going to leave practictioners out on a limb, so to speak; and some judges might apply one rule and some the other.

MR. WECHSLER: Mr. Chairman, I would like to move this change at lines 5 to 6: "They shall govern all criminal proceedings thereafter commenced, and so far as just and practicable all proceedings then pending."

MR. McLELLAN: Seconded.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. LONGSDORF: May I have that read again, please?

MR. WECHSLER: "They shall govern all criminal proceedings thereafter commenced, and so far as just and practicable all proceedings then pending."

THE CHAIRMAN: Now then, all those in favor of Rule 56 as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

I am wondering if we may take the next few minutes to look at the forms which have been submitted by the Sub-Committee of which Mr. Dean was Chairman and Mr. Holtzoff and Mr. Robinson were members. I wonder whether you want to go through them now or if you have read them and are willing to accept them as they are.

MR. DEAN: I would like to point out one thing in advance that I would change in Forms 6, 8, 9 and 16. The forms are directed to the marshal. The question has been raised, since the Committee met, as to whether that might not be confusing in the event they were not served by an agent of the FBI. Consequently I suggested a

correction in those forms, that it be left blank, and the name of the party to be filled in. If they want it by the marshal, all right; if they want it by an FBI agent, you have to fill that in.

MR. YOUNGQUIST: May I ask a question? Where do the forms appear?

THE CHAIRMAN: In separate pamphlets.

MR. SETH: Wouldn't it be just as well to leave the marshal and to put "or (blank)"? Nine-tenths of them would be the marshal.

THE CHAIRMAN: All right, if there is no objection, that will be the motion as those three forms.

I think this Committee has done an excellent job.

MR. SETH: I think so, too.

THE CHAIRMAN: And we certainly are all indebted to them for splendid work.

Now, are there any comments on Form 1, "Indictment for Sabotage"?

MR. SEASONGOOD: I noted some things, but I do not have a copy.

MR. WECHSLER: Mr. Chairman, these forms when submitted to the court won't have the same status as the rules, will they?

THE CHAIRMAN: I think in the civil rules they said they were submitted as illustrations, didn't they?

1z21

MR. HOLTZOFF: Yes.

MR. WECHSLER: It seems to me it is kind of hard without really studying them against all the rules and some of the changes that may have been made in this session to approve them further than in principle.

THE CHAIRMAN: I had a notion that probably we would get many questions coming back to us from the bench and bar on the forms as we would on the rules.

MR. WECHSLER: I think they should all go out, but I feel some responsibility as to a possible difference between the forms and the rules.

MR. DEAN: I might say this, that a new form probably should go in in addition to these, namely, a form of information in which we show that it is signed by the United States attorney and that it does have the approval of the court. Now, what form of endorsement you would have on the information indicating court approval, I don't know.

MR. SETH: You would just have the recital at the beginning - "The leave of the court having been obtained," et cetera.

MR. DEAN: I see.

MR. SETH: "Comes now the United States attorney, and the leave of the court first had and obtained," and so on.

MR. HOLTZOFF: We are trying to get away from those old fashioned stilted expressions.

MR. SETH: That is the way we used to draw them.

MR. WECHSLER: I do not see anything stilted about "Comes now the United States". It seems to me one of the glories of the language, having the verb in first in some matters.

THE CHAIRMAN: Gentlemen, how do you want to handle the forms? Do you want to run over them one at a time? We have some very important matters to take up that were reserved from our first session and left to the Sub-Committee on Style, and I know some of the members will be leaving around four.

MR. WECHSLER: I suggest that we pass over the forms, Mr. Chairman.

MR.MEDALIE: May I just call your attention to the mail fraud indictment, if I can take a minute on that?

THE CHAIRMAN: Yes.

MR. MEDALIE: "These representations, which the defendants knew to be false at the time they were made".

Now, you know, the mail fraud statute has nothing to do with anything except devising the scheme or artifice to defraud, and has not anything to do with the perfected scheme. "These representations, which the defendants

knew to be false at the time they would be made, were to be as follows" is the correct form of an indictment for mail fraud, because you are dealing with the scheme that they devised.

MR. HOLTZOFF: What change do you want to make?

MR. DEAN: "These representations, which the defendants knew to be false at the time they were made" --

MR. MEDALIE: No, "which the defendants knew would be false at the time they would be made, were to be as follows".

That is the scheme. You cannot allege the scheme in the mail fraud as anything but a scheme. You cannot set it forth as a perfected crime.

THE CHAIRMAN: I am wondering if I might on the forms make this suggestion, that if any member has any comment that he wants to make, that he should submit it in writing to Mr. Dean within a period of -- well, just so that it gets to Mr. Dean by next Monday morning in the mail.

MR. YOUNQUIST: Mr. Seasongood and I have already sent in our comments.

THE CHAIRMAN: Those will stand then.

MR. WECHSLER: Could that be the end of next week, Mr. Chairman?

THE CHAIRMAN: All right, and that suggestion

will be conformed to, namely, that all changes which are proposed in the forms reach Mr. Dean by the end of next week, which will be Saturday, March 6th. Mr. Seasongood's and Mr. Youngquist's suggestions are already in the Reporter's hands.

MR. ROBINSON: Mr. Dean already has Mr. Youngquist's suggestions.

THE CHAIRMAN: Yes.

MR. SEASONGOOD: Do you want to take two minutes to consider what I think is a question of policy which might be well to take up while we are all here?

THE CHAIRMAN: Certainly.

MR. SEASONGOOD: That is Form 19,"Motion for New Trial." The form requires that there be set out the particular testimony that was excluded and that was admitted, and the exact errors in the charge and the refusals. Now, that is just adding matter to the motion for a new trial which ordinarily is not necessary. You just say the court erred in charging the jury; the court erred in failing to charge the jury; the court erred in admission of evidence or exclusion; and then you argue it on the motion for a new trial. This way, if you are going to have to put all that stuff in your motion for a new trial, you will have to make a very elaborate motion which you won't be in a position to make. You won't have the

transcript of the evidence, and it does not serve any purpose.

MR. HOLTZOFF: The Committee voted this morning to include the words "with particularity". I, for one, voted against those words.

MR. MEDALIE: You can have particularity by reference.

MR. DEAN: Under the present procedure, in the case of assigning an error in the court's charge, you must set it forth.

MR. SEASONGOOD: But this is a motion for a new trial to the court.

MR. DEAN: I do not see any reason for not doing it here.

MR. SEASONGOOD: It is an awful burden. You have got to go through the transcript. It used to be hard enough in the assignment of errors, but putting it in a motion for a new trial is just putting in a lot of stuff for no real purpose.

THE CHAIRMAN: And you may not have the transcript.

MR. SETH: The United States attorney ought to know what you are going to raise on the motion.

MR. SEASONGOOD: Well, you will have to argue it when you come before the court. He will know it, won't

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he?

MR. SETH: There may not be enough particularity for him to get ready.

MR. MEDALIE: In this district the practice is to make a motion for a new trial orally. Most of the time it is made immediately upon the rendition of the verdict, and the form is usually this:

"The defendant moves for a new trial on the ground that the indictment does not charge an offense; (2),that the allegations of the indictment have not been proved; (3), that no offense has been proved; (4), on the ground that the court erred in the admission and exclusion of evidence and in the instructions to the jury and refusal to charge the jury as requested; to all of which exceptions are duly noted."

That is a good motion.

MR. SETH: It is generally overruled when it is in that form.

MR. MEDALIE: Yes, because it is unsound, in all probability. But that is the form.

MR. SEASONGOOD: I think you would be putting a very heavy burden on a person to spell this out with particularity.

THE CHAIRMAN: Do you wish to make a motion, Murray?

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MR. SEASONGOOD: Well, if you just state --

MR. DEAN: Just a minute. Would you refer to the witness at all, for example, in "3"?

MR. SEASONGOOD: What is that?

MR. DEAN: Would you refer to the witness at all? Would you give that much of a specification - "The court erred in exluding that portion of the testimony of the witness Richard Roe"? Would you give it that much particularity and stop right there?

MR. SEASONGOOD: I had not thought so, because when you get to your argument you have got to make a showing or your motion is no good.

MR. HOLTZOFF: Then you might as well say, "I move for a new trial on all the grounds on which such a motion ~~is~~ made."

MR. SETH: Exactly. You might just as well say, "I move for a new trial," and then stop.

MR. HOLTZOFF: Of course, in the New York Supreme Court, if my recollection is right, you do that very thing:

"I move to set aside the verdict and for a new trial on all grounds set forth in such-and-such a section of the Code," and stop; but we do not want that; do we?

MR. LONGSDORF: Yes, but the Code specifies a sufficient variety of grounds, so you need not worry there.

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THE CHAIRMAN: Yes, but that is not helpful to your adversary.

MR. DEAN: It seems to me something should be said. Just how far you should particularize I am not certain in my own mind; but I think something should be said and you should have some degree of specification, if the motion for a new trial is going to mean anything, and if it is going to be helpful to the court and to your adversary. Now, in the case of "3" we might think in terms of pointing out the testimony of a particular witness which was excluded. In the case of a long trial with many witnesses it would be pretty tough for your adversary to guess.

And in "4", without specifying the particular testimony of Richard Roe, there should be some mention made that the court erred in admitting certain testimony of the witness Richard Roe.

MR. MEDALIE: I think those words "with particularity" are going to cause us an awful lot of trouble. I think we ought to get back to that and get rid of it.

MR. HOLTZOFF: That is what I argued right along.

MR. WECHSLER: Suppose we eliminate "with particularity" from the rule?

THE CHAIRMAN: What was that?

MR. WECHSLER: I say, why don't we eliminate "with particularity" from the rule? Why don't we, now that the membership has dwindled somewhat?

MR. HOLTZOFF: Well, I would support anybody's motion.

MR. DEAN: I second the motion.

MR. WECHSLER: I think that is a good motion.

THE CHAIRMAN: What?

MR. WECHSLER: My motion.

MR. HOLTZOFF: I second it, to eliminate the wrds "with particularity" from Rule 46.

MR. SEASONGOOD: Why were we so tenacious about that when we were talking about it?

MR. WECHSLER: I don't know.

MR. HOLTZOFF: I call for the question on Mr. Wechsler's motion.

THE CHAIRMAN: You have heard the motion. What is your pleasure? All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor of striking "with particularity" from the rule raise hands.

(After a show of hands the Chairman announced

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the vote to be 8 in favor; 4 opposed.)

THE CHAIRMAN: Carried.

MR. DEAN: That leaves open the question as to whether we are going to indicate any particular degree of particularity in the form.

MR. ROBINSON: Yes, it leaves open a lot of questions.

MR. MEDALIE: Now, if you make a motion to dismiss the indictment on the ground that it fails to state an offense, that is a ground.

MR. DEAN: That is enough.

MR. MEDALIE: Is that particularity?

MR. ROBINSON: What have you done? If you state the grounds, you really have stated it with some particularity.

MR. HOLTZOFF: Suppose you said "on the ground that it does not state facts sufficient to constitute an offense"?

MR. ROBINSON: We have got to be careful about this.

MR. HOLTZOFF: I am in sympathy with the idea that we do not want to increase unnecessary paper work.

MR. SETH: But we certainly do not want a general demurrer sustained.

MR. ROBINSON: That is right.

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MR. SEASONGOOD: The only thing I can say is that the Ohio General Code of Civil Procedure just prescribes the different grounds on which a motion for a new trial may be urged, and we just follow those grounds. We do not particularize at all.

MR. ROBINSON: The Federal Rules of Civil Procedure put that on a different basis, and if we accept only part of the Federal Rules of Civil Procedure and leave out the points -- well, I don't care to argue it at all.

MR. HOLTZOFF: Mr. Chairman, I call attention to the fact that there is no motion before us and there is no discussion in order.

MR. SEASONGOOD: Well, I made an informal motion that the particularities specified in Form 19 be not followed. I would be perfectly satisfied to leave it to the Rules Committee as to what degree of particularity they want to require, if any.

THE CHAIRMAN: Well, if there is nothing further on the forms, may we go back to the items which were referred at the end of our first session to the Sub-Committee on Style.

MR. WECHSLER: Mr. Chairman, I have three rules that I want to propose at some point. They are simple things, and any time that you think proper I will do so.

MR. WAITE: Mr. Chairman, Rule 10 was left up in

the air with the understanding that I would propose the new phrasing for it. I just call your attention to it so you can take it up at the proper time.

MR. HOLTZOFF: Is that the arraignment rule?

MR. WAITE: Yes.

MR. YOUNGQUIST: Herb, I wonder if it would not be better if we took up the matters which were left hanging and diposed of them first before we go to something new. Then we, at least, will have disposed of what the Style Committee worked on.

MR. WECHSLER: I think my statement would not take more than five or ten minutes.

MR. YOUNGQUIST: Then it would not matter. I thought it might take some time.

MR. WECHSLER: I have three things in mindwhich are now in the statute, and my motion is to incorporate the statute in the rules.

THE CHAIRMAN: All right; go ahead.

MR. WECHSLER: I think I can state it very simply, Mr. Chairman: In looking through the statute I have asked myself what is there that is not in the rules, and if it is not in the rules, why isn't it there? So this is part motion and part question, because there may be a good reason.

The first thing is section 632 of Title 28,

which reads as follows - this deals with the defendant as a witness:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

That is the Act of March 16, 1878.

MR. HOLTZOFF: This statute was necessary because it repealed the common law rule; it repealed the prohibition. Now, that common law rule is out. There is no longer any prohibition against a defendant testifying in his own behalf.

MR. WECHSLER: By virtue of the statute.

MR. HOLTZOFF: But the common law rule has gone by the board, so you no longer need to have a rule on that point.

MR. WECHSLER: That may be. Our evidence rule, Rule 24, says that the competency of witnesses shall be governed by the principles of the common law.

MR. YOUNGQUIST: Except when an act of Congress

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or these rules otherwise provide. Doesn't that take care of it?

MR. WECHSLER: So that this provision is preserved?

MR. HOLTZOFF: Yes, it is.

MR. WECHSLER: Then would it be sufficient, instead of incorporating it in the rule - and I make this motion - that the note to that rule specifically note this section; and, indeed, note all the evidence sections at least by reference which are preserved by that rule? I think that would meet my first problem.

MR. HOLTZOFF: I second the motion.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. WECHSLER: My second problem is with respect to section 565 of Title 18, and this I think the Committee considered at an earlier meeting and decided to have a rule on it. It reads as follows:

"In all criminal causes the defendant may be found guilty of any offense the commission of which is

necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged if such attempt be itself a separate offense."

Is there any reason for leaving that out?

MR. HOLTZOFF: I thought myself it ought to be in.

MR. SETH: I move it be incorporated.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. HOLTZOFF: What is the section?

MR. WECHSLER: 565 of Title 18.

And, incidentally, Mr. Chairman, I would like to move one substantive amendment to 565, and that is that conviction on lesser degree, where there are degrees, be permissible. I do not know whether it is under 565.

MR. HOLTZOFF: There aren't any, except in murder.

MR. WECHSLER: Well, there are some.

MR. ROBINSON: We are getting pretty close to substantive law, aren't we?

MR. LONGSDORF: Yes.

MR. YOUNGQUIST: Isn't a lesser degree always included?

MR. WECHSLER: You think it is covered?

MR. YOUNGQUIST: Yes.

MR. WECHSLER: All right, I accept that.

Now, 566 reads as follows:

"On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the causes as to the other defendants may be tried by another jury."

MR. MEDALIE: There is one thing you want to add - "may at any time during their deliberations". That is important, because say at the outset the acquit one of the ten defendants, they have the right to come in and report that and go back and deliberate on the rest. As a matter of fact, that is the practice.

MR. WECHSLER: Well, I move that that be incorporated as a rule with Mr. Medalie's modification.

MR. SETH: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. LONGSDORF: What was the number of that statute?

MR. WECHSLER: That is 566 of Title 18.

Now, the only other one I want to mention I won't put as a motion. I will just call it to the attention of the Committee. It is 567 of Title 18. It is entitled "Qualified Verdicts," and it reads:

"In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

I think it would be sufficient to refer to that in a note.

MR. DEAN: Why should it be limited to those two offenses?

MR. YOUNGQUIST: What about treason?

MR. DEAN: Yes, treason, for example.

MR. WECHSLER: Well, it is a good thing where we have the right --

MR. HOLTZOFF: No, we do not have the right. We cannot change the penalties.

MR. LONGSDORF: It is substantive law, isn't it?

MR. WECHSLER: Yes, I think it is.

MR. DESSION: In some of those statutes you have a penalty ranging from death down. Now, where that is the substantive statute, why wouldn't this be as applicable as it is to any of the cases --

MR. HOLTZOFF: Well, that is a rule of substantive law, and therefore should not be covered by us.

MR. DESSION: I do not see why, Alex. The substantive law provides a range of penalties.

MR.GLUECK: Isn't that to be left to the judge, though? That is sentence.

MR. YOUNGQUIST: Yes, that is a matter of punishment.

MR. GLUECK: It is the indeterminate sentence, ranging all the way from death downward.

MR. DEAN: I think there is a specific provision in the kidnapping law which says that the jury may bring in a verdict of lesser degree, isn't there?

MR. YOUNGQUIST: I do not see how we can do anything about any of these.

MR. HOLTZOFF: I do not, either.

MR. WECHSLER: It might be helpful for the note to bring those provisions together too.

MR. LONGSDORF: May I inquire, - and thereby reveal how bad a memory I have - whether we have any

provisions about verdicts and the forms of verdicts? I did not look through these forms.

MR. HOLTZOFF: Yes, on verdicts generally.

MR. SEASONGOOD: Have we a form?

MR. HOLTZOFF: In a form.

MR. DEAN: Would the Committee like the form?

MR. YOUNGQUIST: I have another question on this subject which Mr. Wechsler propounded. I do not know whether we have anything to do with it or not. May a defendant be convicted on the testimony of an accomplice alone?

MR. MEDALIE: The rule is that he may. The practice is to give a caution to the jury on it.

MR. YOUNGQUIST: That is the common law?

MR. MEDALIE: That is the law of the United States.

MR. DEAN: If in a note we ought to refer to these death statutes, we ought also to refer to one which is not a murder statute, like a killing in connection with a bank robbery, for instance. As I recall, that also carries a death penalty, doesn't it?

MR. MEDALIE: Yes.

MR. DEAN: Killing during flight from a bank robbery on the commission of it.

MR. MEDALIE: Why wouldn't Mr. Wechsler's

suggestion take care of the matter?

MR. DEAN: Yes; I am just adding one matter that might be overlooked.

THE CHAIRMAN: Have we covered all these matters of Mr. Wechsler's and Mr. Youngquist's?

MR. WECHSLER: Yes.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: Mr. Waite.

MR. WAITE: We left Rule 10 open. I was supposed to draft a proposed correction on it.

THE CHAIRMAN: All right; suppose we --

MR. SEASONGOOD: Pardon me, I just wanted to say this: I do not even want to make this suggestion, although it is something that I think would be desirable, but I recognize it is not practicable at all, but, at least, it ought to be brought up. That is, I would like to see a person wrongly convicted, or even acquitted, recover costs against the Government.

MR. HOLTZOFF: There is a provision allowing a person who has been imprisoned pursuant to a judgment of conviction and who is afterwards proven innocent, to recover damages from the Government.

MR. DEAN: What does that mean, a cause of action in the court of claims?

MR. HOLTZOFF: Yes. He can recover up to $5000.

That was a statute, by the way, passed on the recommendation of the Department of Justice about five years ago.

MR. SEASONGOOD: Of course, I do not believe we should put this in, and I do not know whether we should say anything about it. But I think it is violently unjust in this day and age. The Government has got lots of money, and there are cases when some poor person has to pay $1500 or $2000 to print his record and briefs to get acquitted, and he cannot get a nickel of this back.

MR. YOUNGQUIST: In our state we do it by legislative act. In cases of that sort the legislature usually makes an appropriation to cover expenses and also some measure of compensation for the time of his confinement.

MR. HOLTZOFF: We had a private bill introduced also on the recommendation of the Department of Justice to pay a man $5000 who served about six months' or one year's sentence, and afterwards was found to be innocent.

MR. WAITE: Mr. Chairman, I wonder if we ought not to get to these other things, if there is no motion pending?

THE CHAIRMAN: All right.

The first matter I have a note on is 4 (c) (4).

Is the Committee ready to report on that?

MR. MEDALIE: The Secretary of the Committee on Style will report.

MR. HOLTZOFF: The Sub-Committee on Style proposes the following substitute for 4 (c) (4):

"The officer executing a warrant shall make a return thereof to the commissioner or other officer before whom the prisoner is brought pursuant to Rule 5 (a). At the request of the attorney for the government any anexecuted warrant shall be returned to the commissioner by whom it is issued or canceled by the commissioner. The officer to whom a summons is delivered for service shall, prior to the return day, make a return thereof to the commissioner before whom the summons is returned. A warrant returned unexecuted or a summons returned unserved or a duplicate thereof may at any time while the complaint is pending be delivered by the commissioner at the request of the attorney for the government to the marshal or other authorized person for execution or service."

MR. WECHSLER: I move its adoption.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor say 'Aye.'

(Chorus of "Ayes.")

MR. YOUNGQUIST: Wait just a moment. 4 (a) refers to a marshal or other person authorized by law to execute or serve it. We speak here only of "officer." Shouldn't that be expanded to cover the person authorized?

MR. ROBINSON: Where is that, Aaron?

MR. YOUNGQUIST: That is in line 10 of 4 (a).

MR. HOLTZOFF: This says "to the marshal or other authorized person for execution or service".

MR. YOUNGQUIST: You only say "officer".

MR. HOLTZOFF: No, "to the marshal or other authorized person for execution or service."

MR. YOUNGQUIST: I apologize.

MR. HOLTZOFF: No apology is necessary.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

What was the next one? 6?

MR. LONGSDORF: Will it be possible for the Reporter without undue labor to provide us with a draft of this recast sub-section?

THE CHAIRMAN: Yes, they will be given out.

Now, what do we have next?

MR. WECHSLER: How about the change in title, Alex, Rule 5?

MR. HOLTOZFF: I beg your pardon?

MR. MEDALIE: Rule 5, change in title.

MR. HOLTZOFF: Yes.

MR. MEDALIE: Rule 5 became Proceedings Before Arrest."

MR. LONGSDORF: What is the change?

MR. HOLTZOFF: And we changed the title of the entire section, Section II. That commences at Rule 3. The present title is "THE COMPLAINT" and we recommend a change to "PRELIMINARY PROCEEDINGS".

MR. LONGSDORF: That is Rule 5?

MR. HOLTZOFF: No; beginning of Rule 3, and --

MR. MEDALIE: Well, let us deal with that first.

MR. WECHSLER: I move its adoption.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: Then, Rule 5, we recommend retitling, "Procedure Upon Arrest."

MR. WECHSLER: May I state that more fully? What used to be 5 (a), the Committee at one of its early meetings said should be a separate rule. The Sub-Committee's recommendation is that it be separate Rule 5, that it be entitled "Procedure Upon Arrest", and what is now Rule 5

be Rule 6, and the numbers changed thereafter.

MR. HOLTZOFF: That is right.

THE CHAIRMAN: All right. If there is no objection that will stand adopted. That is merely formal.

MR. HOLTZOFF: The next change is also very formal. What is now Rule 5 (b) and (c) will become Rule 6 (a) and (b), and the new rule to be headed "Proceedings Before the Commissioner."

THE CHAIRMAN: All right; if there is no objection that will be considered passed.

MR. DEAN: And the first sub-head thereunder to be "Statement by the Commissioner"?

MR. MEDALIE: That is right.

MR. HOLTZOFF: 7 (d) is next. Re "Motion to Dismiss."

MR. YOUNGQUIST: What number?

MR. HOLTZOFF: 6 (b) (2).

MR. WECHSLER: Old 6.

THE CHAIRMAN: Old 6.

MR. HOLTZOFF: There we are going to submit two alternatives for the Committee to pass on.

MR. WECHSLER: We have a change on 6 (b) (2).

MR. HOLTZOFF: Yes, you are right about that.

MR. WECHSLER: I will read that change if it will help.

MR. HOLTZOFF: All right, if you will.

MR. WECHSLER: Change 6 (b) (2) to read as follows:

"A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, or on the ground that a state of mind existed on his part which prevented him from acting impartially, if not previously determined upon challenge. No indictment need be dismissed on the ground that one or more members of the grand jury was not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in the finding of the indictment."

The essence of the change is to substitute the language "not legally qualified".

THE CHAIRMAN: For "unqualified"?

MR. WECHSLER: For "unqualified" or "disqualified".

MR. WAITE: I have a note indicating that you were going to bring in something about when that objection could be raised, whether it could be raised after conviction. Did you bring in anything of that sort?

MR. WECHSLER: I have no recollection.

MR. WAITE: I have this note, Herbert:

"It was understood that the redraft will contain

provision for non-effect after conviction."

MR. WECHSLER: That is right. There is another clause after the word "indictment" on line 24 that we concocted that was to be presented and which would raise that question, but I haven't got that clause.

MR. YOUNGQUIST: I have that here. I will read it --

THE CHAIRMAN: Is this a separate section you have now?

MR. YOUNGQUIST: No, this is part of the same section.

THE CHAIRMAN: Let us have that.

MR. YOUNGQUIST: "No error in ruling on motion made under this paragraph shall be ground for reversal on appeal."

MR. HOLTZOFF: I second that.

THE CHAIRMAN: All right. We have that combination of Mr. Wechsler's and Mr. Youngquist's motion covering this section. All those --

MR. SEASONGOOD: Please wait a minute. Is that what you want to say? Suppose it is after? Do you want to include "after finding of guilty"? In other words, can you bring this up after he has been convicted?

MR. SETH: Why not put it this way: "Any error in ruling on a motion made after trial shall be considered harmless"?

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MR. WAITE: I should think that would be a better one because I think Mr. Seasongood is right, it ought not to be raised after conviction even though there is an appeal.

MR. SEASONGOOD: I do not know that I am right, but I thought that is what we discussed before.

THE CHAIRMAN: I think it was. You move to substitute that motion, Mr. Seasongood, for the language given by Mr. Youngquist?

MR. SEASONGOOD: You mean Mr. Seth's language? He said it should be considered harmless. I think that might be unhappy phraseology, mightn't it? It would be just as harmful, but you could not avail yourself of it.

MR. SETH: Of course, we have used "harmless error" in some other rule this afternoon.

MR. SEASONGOOD: Wouldn't it be simpler to say "shall not be availed of after conviction" -- "such objection shall not be"?

MR. YOUNGQUIST: You really have two points in mind, haven't you? One is, motion to dismiss on that ground shall not be made after conviction, and the other which the committee, I think, suggests is that a ruling on such a motion shall not be reviewable in any event?

MR. SETH: Ought not to be ground for a new trial either.

MR. YOUNGQUIST: That was the idea, whether right or wrong.

THE CHAIRMAN: Where are we on the motion? Originally we had a motion made by Mr. Wechsler in part and by Mr. Youngquist in part, and a modification that was suggested, but I am not just sure where we are.

MR. YOUNGQUIST: I move, Mr. Chairman, that we first adopt Mr. Wechsler 's motion.

MR. DEAN: Seconded.

MR. YOUNQUIST: Because that is not tied in necessarily with this.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: That is carried.

May we have a re-statement of the part which was involved in the rest of the motion?

MR. MEDALIE: May I put this? I do not know whether you are dealing with this part or not, but I want to cover all the possibilities. "Such a motion shall not be made after trial, nor shall it be a ground for a new trial, and it shall not be reviewable."

MR. SETH: That is all right.

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MR. YOUNGQUIST: That ought to cover it.

MR. SETH: That covers it.

MR. MEDALIE: You shouldn't have to say, "It shall not be ground for new trial." "nor shall its denial be a ground for a new trial." Shall I re-state this?

MR. DEAN: Yes.

THE CHAIRMAN: Will you re-state that, Mr. Medalie?

MR. MEDALIE: Yes. "Such a motion shall not be made after trial, nor shall its denial be a ground for a new trial, and it shall not be reviewable."

MR. SEASONGOOD: Is that quite what you want to say? You make a good point, and the judge says, "I won't give you a new trial" although it is a good point, and you move to review it.

MR. WAITE: The motion is not a ground for a new trial and a decision thereon shall not be reviewable.

MR. SEASONGOOD: Do you want to do that? That is what you want to do; suppose it is a good cause, a man is disqualified, you duly make the motion and the judge overrules you. You haven't any review.

MR. WAITE: That is right. On the other hand, if you think there ought to be a review, then you must provide for a review or say nothing about it.

MR. SETH: After he has gone to the petit jury he ought not be able to kick about the grand jury.

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MR. WAITE: Why don't you strike out the words "and shall not be reviewable". Haven't you the whole thing?

MR. MEDALIE: Re-state it, "such a motion shall not be made after trial nor shall its denial be a ground for a new trial."

THE CHAIRMAN: Are you ready for the question on that motion as last suggested or re-stated by Mr. Medalie? If so, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

MR. HOLTZOFF: Does that complete that?

MR. SEASONGOOD: Suppose you make the motion properly and the judge does not grant it? You are out. Why should that be?

MR. MEDALIE: That is right; I agree with you.

MR. DEAN: Defects in the charge as distinguished from the merits of the case.

MR. MEDALIE: Irregularity in getting him indicted.

THE CHAIRMAN: The next one is Rule 6(2).

MR. HOLTZOFF: That relates to "Secrecy of Proceedings and Disclosure. Now, there are two alternatives that the sub-committee is going to submit for the decision

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of this committee.

MR. DEAN: Which rule again, Alex?

MR. HOLTZOFF: 6 (e).

MR. WECHSLER: Subsection (e), the same rule.

2 MR. HOLTZOFF: "A juror, attorney, interpreter, clerk or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with another judicial proceeding,"

Now, this part will be the same in both alternatives. From here on there are two alternatives. The first alternative is, "or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government."

Now, the other alternative is leaving the first part the same, "or to the defendant or his attorney for the purpose of supplying evidence to support a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government."

The distinction between the two alternatives is this, that the first alternative in effect requires

permission of the court in order to secure a disclosure as to what occurred in the grand jury room, and permission might be granted on a showing that grounds may exist for a motion to dismiss. The second alternative permits such a disclosure to the defendant or his attorney without securing the consent of the court.

MR. MEDALIE: And may we add, in support of the second alternative, that that is what is indicated by various district court decisions as correct practice -- a proper practice.

MR. HOLTZOFF: Well, there is split authority on that.

MR. MEDALIE: Yes, but the weight of authority is that way.

THE CHAIRMAN: We must have one motion or the other to work on.

MR. WECHSLER: I move to adoption of the second, the free disclosure rule.

MR. MEDALIE: Seconded.

MR. SEASONGOOD: Let me just suggest,in the particular case Ihad, it was urged, with some reason I think, that a grand jury may be engaged in the further study of the problem or of an allied problem, and if you are allowed to attack the grand jury, as to its fairness, in the midst of it, it makes it practically impossible to

proceed with the desire to indict further, or might. I think there is something to that.

MR. WECHSLER: You think it should be after the termination of the proceedings?

MR. SEASONGOOD: I think if you put it under the court's control, it is really better, that is, as long as you have stated that there may be some reason to get rid of the grand juror.

MR. MEDALIE: Well, the grand juror would know whether or not that subject matter is still before his body. So we could include a provision that would cover just exactly that, "where the subject matter is no longer under consideration by the grand jury".

MR. DEAN: Do we have a time limit in it now? It escapes me. Do we have a time limit in it now as to when it is disclosed? May it be disclosed before the indictment?

MR. WECHSLER: Doesn't say when.

MR. HOLTZOFF: The only difference is whether you need the consent of the Court or not to interview a grand juror.

MR. DEAN: I don't mean that, Alec. I mean if you adopt the second alternative, could you talk to the grand juror?

MR. HOLTZOFF: Yes.

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MR. DEAN: While they were debating the indictment? If so, isn't Mr. Seasongood's point a good one?

MR. HOLTZOFF: No, after the indictment, because you would be limited to interviewing him for the purpose of supplying evidence to support a motion to dismiss the indictment. So there must be an indictment.

MR. WECHSLER: You could not disclose to the defendant until he had been indicted.

MR. SEASONGOOD: But there may be some defect in the indictment, they might want to indict him all over again, and they would lose the opportunity to do it. I think there is a general feeling, of course, that the proceedings of a grand jury should be kept secret, and any deviation from that will at once excite a good deal of comment. You do not want to allow the secrecy to work an injustice, and if it is enough that you can show the court that you have some reason for it, I think that might be a fair compromise, or as far as you ought to go, because the other thing does have certain practical difficulties, if you can go to a grand juror at any time.

MR. MEDALIE: I must say this, as to the first of the alternatives. The fact is that you are in no position to make a representation to the court unless there has already been a disclosure to you. It is an impractical thing. The first thing is there is nothing you can start

on. Nobody I know of could draw up such a paper under those conditions.

MR. DEAN: The only way you could get the information would be through the witness chair.

MR. MEDALIE: And he isn't there when other things go on, because these things go on in the gap between the appearance of witnesses.

MR. DEAN: And it may be that he is a hostile witness and wouldn't tell you.

MR. WEHSLER: If we could adopt the second alternative, we could adopt Mr. Seasongood's point.

THE CHAIRMAN: I would liketo ask to have the second alternative read completely again, the one that is now pending before us.

MR. HOLTZOFF: "A juror, attorney, interpreter, clerk or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with another judicial proceeding or to the defendant or his attorney for the purpose of supplying evidence to support a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government."

MR. WAITE: Suppose, under that, the Government were indicting secretly. Would it be possible for a grand

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juror to tip off a defendant the minute the indictment came through in order to allow him to escape under pretense that it was done for some other purpose?

MR. MEDALIE: The answer is yes, and that is a defect. We ought to provide against it.

MR. YOUNGQUIST: There are so many things you have to provide against, if you don't put it under the control of the Court, that I think we would have a very bad rule by the time we got through. The rule of secrecy is a pretty well-established rule. We are modifying it by the first alternative to the extent of permittingthe disclosure, if a showing is made to the court only to the extent that there may be grounds for a motion to dismiss. That, I should think, would be sufficient.

MR. MEDALIE: Now, look. Of course, you don't want these disclosures before a defendant is actually apprehended. In fact, those decisions that permit such disclosures provide for the apprehension of the defendant. I think that ought to be provided for here.

MR. YOUNGQUIST: That is just one defendant. All defendants,don't you think?

MR. MEDALIE: The trouble is you might indict sixty defendants, of whom 40 would never be apprehended, and a person would be deprived of his rights,because a disclosure has been made when one defendant has been apprehended and

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he has been shown the indictment.

Under our rules you cannot show him a garbled indictment, but you must show him the whole indictment, so there is complete disclosure when you show him the indictment.

MR. HOLTZOFF: I call for the question on the motion. It seems to me that we all understand the issue, and it is a question --

MR. MEDALIE: I would like to point out again that the first alternative is just perfectly useless.

MR. DEAN: Absolutely.

MR. MEDALIE: Because you will never know if a grand juror doesn't tell you.

THE CHAIRMAN: That is not before us.

MR. SEASONGOOD: This permits a man to disclose how a juror voted, too.

MR. ROBINSON: Destroys the secrecy of the grand jury.

MR. HOLTZOFF: I call for the question.

MR. YOUNQUIST: This is on Mr. Wechsler's motion for the second alternative?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: Giving the right to the defendant to inquire of a juror and the juror to disclose without control of the court.

MR. LONGSDORF: There is one question I want to ask. Is it conceivable that a situation might arise where another court, having judicial proceedings on foot, would want to permit inquiry into what took place before that grand jury? The state court, perhaps, might want to do it. I don't know whether such a situation could arise.

MR. YOUNGQUIST: Isn't that taken care of in the first part?

MR. LONGSODRF: We will come to that. Your rule provides that the Court shall direct. I want to know how we are going to come at it. Shall we then go over to the judge of the United States District Court, in which the grand jury sat, and move him for permission?

MR. MEDALIE: That is what you do now.

MR. HOLTZOFF: Question, Mr. Chairman.

MR. MEDALIE: I did that specifically for Judge Seabury when I was United States Attorney. I got him an order permitting me to give him the grand jury minutes.

THE CHAIRMAN: All right. All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced

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the vote to be five in favor; eight opposed.)

THE CHAIRMAN: The motion is lost five to eight.

MR. HOLTZOFF: I move the adoption of the first alternative.

THE CHAIRMAN: May we have that read again?

MR. HOLTZOFF: " A juror, attorney, interpreter, clerk or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with another judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government."

MR. SEASONGOOD: You have omitted "witness". Have you done that advisedly?

MR. DEAN: That is separately--

MR. YOUNGQUIST: It is all open on witnesses.

MR. GLUECK: You say "upon a showing" and you deliberately leave out the size of the showing.

MR. MEDALIE: I can tell you its size right now. It is like that (indicating).

THE CHAIRMAN: All those in favor of this motion say "Aye."

(Chorus of "Ayes.")

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THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried.

MR. WECHSLER: Mr. Chairman, as a matter of drafting, I am a little worried in that case about disclosure may be made to the attorney for the Government. It seems to me ambiguous as to whether your disclosure may be by the same informant or by a different informant.

MR. HOLTZOFF: I think it is broad enough to include any informant.

MR. WECHSLER: Any one of them?

MR. HOLTZOFF: Yes.

MR. WECHSLER: Disclosure may be made without consent of the court by all the others.

MR. HOLTZOFF: Rule 9 (c) (2).

THE CHAIRMAN: The next is 9 (c) (2).

MR. HOLTZOFF: That relates to return of the warrant, and corresponds to Rule 4 with just necessary variations in phraseology.

"(2). The officer executing a warrant shall forthwith make a return to the court. At the request of the attorney for the Government any unexecuted warrant shall be returned or cancelled by the court. The officer to whom a summons is delivered for service shall, prior to the return day, make a return thereof to the court. A warran

returned unexecuted, or a summons returned unserved, or a duplicate thereof, may at any time while the indictment or information is pending be delivered by the clerk, at the request of the attorney for the government, to the marshal or other authorized person for execution or service."

MR. YOUNGQUIST: That is just exactly the same as the other one?

MR. HOLTZOFF: Yes.

MR. YOUNQUIST: I move its adoption.

MR. WECHSLER: Seconded.

THE CHAIRMAN: All in favor of the motion say "Aye."

(Chorus of "Ayes."

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes."

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: Mr. Medalie and Mr. Holtzoff, I have noted here a change in Rule 7(c).

MR. HOLTZOFF: Yes, you are quite right. I omitted that. I am glad you called attention to it. We recommend the insertion of a new paragraph to be known - or a new subdivision - as (c) in Rule 7. "The information shall be signed by the attorney for the government and may be filed only by leave of the court."

MR. WECHSLER: I move its adoption.

MR. SETH: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: The next rule is 10. Apparently there was some misunderstanding on the part of the subcommittee on style, probably due to an error in our records, because we assumed that we were supposed to prepare a draft of that, and perhaps Mr. Waite had better present his, and we will read ours, and there will be two alternatives.

MR. WAITE: "Rule 10. Arriagnments: A defendant is arraigned by asking him in open court if he has received a copy of theindictment or information, and if it appears either that he has received a copy or that he waives the failure to receive it, by stating to him the substance of the indictment or information, or if he so desire, by reading it to him, and calling on him to plead thereto. The defendant shall not be required to plead to the indictment or information until he has been furnished a copy thereof unless in open court he waives the requirement."

MR. HOLTZOFF: We have substantially the same thing in slightly different language. "Arriagnment shall be conducted in open court and shall consist of reading the

indictment or information to the defendant or, if he consents, of stating to him the substance of the charge and calling on him to plead thereto. He shall be advised that he is entitled to a copy of the indictment or information, and,if he requests it, a copy shall be given to him before he is called upon to plead."

MR. YOUNGQUIST: I move the adoption of the proposal just read by Mr. Holtzoff.

MR. WAITE: I must say that is not the same thing. This tells him he can have a copy if he asks for it. I think he should be given a copy as a matter of course before he is called upon to plead. It strikes me as an absurdity to ask a man to plead to something that he has never seen in writing. Going through all the formalities of indictment, and office detail, and not having a copy of the indictment for him --

MR. HOLTZOFF: Remember all those Mexicans on the New Mexico-Texas border.

MR. WAITE: (Continuing) -- when a man's life or liberty is in jeopardy, I think it is an absurdity to talk about expense.

MR. MEDALIE: How about Mr. Holtzoff's Mexicans down there on the New Mexico and Texas border? You would have to have an interpreter on hand for the language which the defendant understands, if you were going to give him a

copy in every instance. 1235

MR. DEAN: Used to be in Latin.

MR. WAITE: We cannot give him brains, but we can give him something to operate on, if he has brains.

MR. HOLTZOFF: I second Mr. Youngquist's motion, if nobody has seconded it.

MR. SEASONGOOD: Mr.Waite, there is a difference between yours and his, because I think we did agree that it was to be read to him, unless he waived.

MR. YOUNGQUIST: That is right.

MR. SEASONGOOD: You have it written the other way.

MR. WAITE: No; I have "by stating to him the substance of the indictment, or, if he so desires, by reading it to him."

MR. YOUNGQUIST: You said it is to be read unless he waives.

MR. WAITE: I think myself it is much better to state to him the substance, unless he wants to hear it in detail, because he will understand it a lot better.

MR. YOUNGQUIST: There are two things in the motion that I made, that I had proposed previously, but they were both voted down. So I am not raising any question.

THE CHAIRMAN: The question is on the motion read by Mr. Holtzoff. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed say "No."

(One "No.")

THE CHAIRMAN: The motion is carried.

What is the next one?

MR. HOLTZOFF: The next is Rule 12, and, Mr. Chairman,--

MR. WECHSLER: Rule 11.

MR. HOLTZOFF: Is there something on Rule 11?

MR. WECHSLER: Yes.

MR. YOUNGQUIST: Yes.

MR. WECHSLER: I will read it.

MR. YOUNGQUIST: That was referred to the committee on style,

MR. HOLTZOFF: You read it then.

MR. WECHSLER: "A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendre."

MR. HOLTZOFF: Oh, yes.

MR. WECHSLER: "The court may refuse to accept a plea of guilty and shall not accept the plea without first determining that the indictment or information charges an offense and that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

MR. HOLTZOFF: According to my note, this was adopted by the full committee.

MR. WECHSLER: It was, but was referred to us.

MR. ROBINSON: I move its adoption.

MR. YOUNGQUIST: Seconded.

MR. MEDALIE: I want you to know I am opposed to this business of having the court pass on it, but my voting for it is only because the committee has already determined that matter.

MR. HOLTZOFF: I wish to make the same statement on the record.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: The next is Rule 12. I wonder,if it is agreeable to the chairman of the subcommittee, to have Mr. Youngquist report on this rule? I think perhaps Mr. Youngquist could report on this rule better than I could, since he devoted a considerable amount of energy to the drafting of it.

MR. YOUNGQUIST: I think (a) is the same, but I will read it.

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"The pleadings in a criminal proceeding shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere." --

MR. ROBINSON: But we agreed to strike out the "in" in line 2, and make it "after criminal proceedings" rather than "in criminal proceedings".

MR. YOUNGQUIST: Yes. "Demurrers, motions to quash, pleas in abatement, and pleas in bar are abolished, and the defenses and objections which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules." That has previously been adopted.

6 Now, the change occurs principally in (b) (1) in which is incorporated now what was previously in (b) (4). "(b) The Motion Raising Defenses and Objections.

"(1) Defenses and objections raised that might be reviewed. Defects in the institution of the prosecution or in the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant unless for good cause the court permits further motions. Failure to present any such defense or objection then available constitutes a waiver

thereof. The court may, for any cause shown, grant relief from such a waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall always be noted by the court whenever and however brought to its attention."

"(b) (2) When Made. The motion may be made before, with, or after the plea, and shall be made" -- this looks queer -- "and shall be made at arraignment or at such other time as the court and these rules may permit."

MR. ROBINSON: That is right.

MR. MEDALIE: Aaron, don't you think that the provision for the court noting that the indictment does not charge an offense, or that the court does not have jurisdiction, belongs in (2) rather than in (1)?

MR. ROBINSON: (2) is time, George.

MR. MEDALIE: I know that.

MR. YOUNGQUIST: By (1) we foreclose the making of motions on certain grounds, and, to make sure that the right to note a lack of jurisdiction or failure to state an offense is not included in that group, we put it in the same paragraph.

MR. MEDALIE: You are probably right.

MR. WAITE: I would like to raise a question about that. It seems to me there are two ideas hooked together.

There is the court's lack of jurisdiction, actual lack of jurisdiction, which can be taken advantage of at any time, of course, and then there is a failure of the indictment precisely to charge jurisdiction. Our Michigan statute takes care of that by providing that an indictment which fails to charge jurisdiction may be corrected or taken advantage of prior to trial, but that the failure to charge jurisdiction is waived by trial, without objection, and an actual showing of jurisdiction during the course of the trial.

MR. HOLTZOFF: Well, we agree, I believe, that we cannot amend an indictment in the Federal court.

MR. WAITE: That is true enough, but the point is under our statute if the indictment does not show jurisdiction but the trial shows that the court did have jurisdiction, then the validity of the conviction stands. I think it would be a great mistake,after a man has been tried and convicted on the merits and the court has been shown to have actual jurisdiction, to have the whole matter upset because some erroneous phraseology in the indictment itself shows that the jurisdiction was not therein accurately stated.

MR. DEAN: The Michigan statute is really the harmless error statute.

MR. WAITE: Yes.

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MR. HOLTZOFF: I do not know that is very much of a problem, because every indictment in the Federal court alleges that in such and such a district the following was done. I do not know; George, haveyou ever known of any assistant United States attorney who would leave out the words "in the Southern District of New York," or "in such and such a district"?

MR. MEDALIE: We once caught one of those indictments before it was filed.

MR. HOLTZOFF: Oh, yes.

MR. MEDALIE: But then, of course, it was blamed on the stenographer.

MR. WAITE: It seems to me poor drafting, and we would be subject to criticism, if we put in something which ought not to be there merely because the problem does not come up very often.

MR. HOLTZOFF: I think there is an answer to that--this point may be raised at any time, yes -- under our harmless error rule, if the objection to the jurisdiction is of the kind you indbate, it seems to me under the harmless error rule it would be overlooked.

MR. WAITE: I must flatly disagree with that. I think when this says specifically that that may be taken advantage of at any time, that means it is not harmless

7 error.

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MR. HOLTZOFF: I don't think so.

MR. ROBINSON: May I ask this? Doesn't the question center around the type of jurisdictional defect?

MR. DEAN: That is right.

MR. ROBINSON: We have these same two grounds in our motion for assailing the judgment too, and I would not want to debate about it, but personally it seems to me it ought to be specified that it is the jurisdiction of the subject matter which ought to be stated in this rule. I think that would take care of John's objection. It seems to me it should be, because there cannot be any waiver of that.

MR. HOLTZOFF: Suppose the stenographer in copying the indictment drops the words "in such and such a district", that the "crime was committed in such and such a district"? That makes the indictment bad on its face. I think that would be cured by the harmless error rule.

MR. WAITE: I don't agree with you. The rule says it can be taken advantage of at any time. That is my interpretation of what it says.

MR. MEDALIE: It doesn't say the indictment fails to charge. It says "lack of jurisdiction." So if there is a false copy you can get a good copy.

MR. WAITE: What does the first part say?

MR. MEDALIE: This says, "to charge an offense or to show jurisdiction."

MR. WAITE: "or to show jurisdiction". Now, it doesn't show jurisdiction if it leaves out the words "in such and such a district."

MR. MEDALIE: That is, by the very allegations which show that it had no jurisdiction?

MR. WAITE: Yes.

MR. MEDALIE: The venue might be waived.

MR. HOLTZOFF: Oh, no, it is not venue. It is jurisdiction under the Constitution. It may be waived, but it is a constitutional requirement.

MR. WECHSLER: I do not see your problem still. Let us suppose the indictment fails to show jurisdiction. That makes it vulnerable, of course.

MR. WAITE: Yes, I agree with that, that is -- wait a minute.

MR. WECHSLER: I mean, a motion can be addressed to that point.

MR. WAITE: Yes.

MR. WECHSLER: And a motion is addressed to it and the answer is, "Why, it was a stenographer's error in copying the indictment." Wouldn't that be the answer to the motion and wouldn't the motion be denied upon providing the defendant with a true copy? Have you got a real problem?

MR. WAITE: No; but suppose it weren't in the original indictment?

MR. WECHSLER: If it were not in the original indictment, I think the indictment is bad, and there isn't anything in the world we could do to make it good.

MR. ROBINSON: That is right.

MR. WAITE: Even if he has gone to trial and at the trial it was proved that it took place within the jurisdiction of the Court, I think we could do something there. It comes up in the state courts. In the state courts you will have a case where the indictment charges that it took place in Detroit and doesn't say anything about Wayne County. The courts have held time and again that is a faulty indictment, if the objection is made by the proper time. Then it has been held that that failure to allege jurisdiction in the indictment by stating the words "Wayne County" could be taken care of even after conviction; and a statute was passed to the effect that if the jurisdiction were shown in the trial - no objection raised prior to trial - then since there was actual jurisdiction, the fact that it was not alleged in the indictment cannot any longer be taken advantage of. This really leaves that open.

MR. HOLTZOFF: Suppose a Federal indictment says, "In the City of Minneapolis" but fails to say "District of Minnesota"? I think that would be a good indictment,

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wouldn't it?

MR. WECHSLER: No question about it.

MR. YOUNGQUIST: The location of the place of the commission of the offense is jurisdiction. A statement of the facts constituting the offense is likewise jurisdictional, we all agree. If the latter could be cured in the fashion that you prescribed, why should we not, with the same reason, say that the same rule should apply to an indictment that fails to assert an offense? One, it seems to me, is just as important as the other.

MR. WAITE: I would go that far, but I am far from proposing it, because I know I would not get to first base with it, but that distinction has been made in the statute.

MR. WECHSLER: Isn't the answer to your point this thought: that perhaps we might have provided for aider by verdict, or otherwise, meeting the situation which you put? We haven't done so, the present Federal law does not do so, and, therefore, this rule as drawn is responsive to things as they are, and the real way to raise the question which you have would be to propose a rule meeting the problem, as state statutes, as I recollect it, meet it specifically. My only problem would be the problem of constitutionality.

MR. WAITE: Just to raise the point for the record, I move that the rule be rephrased in such way as to provide

that a mere failure to allege the place of jurisdiction shall be cured by verdict after trial on the merits.

THE CHAIRMAN: Motion seconded?

MR. DESSION: I will second that.

THE CHAIRMAN: All those in favor of the motion to amend --

MR. MEDALIE: Excuse me. Would you agree that, nevertheless, it may be taken advantage of by motion before trial?

MR. WAITE: Oh, yes, yes.

MR. MEDALIE: That is cure by trial on the merits?

MR. WECHSLER: It is just an aider rule.

MR. WAITE: That is right.

THE CHAIRMAN: All those in favor of the motion to amend made by Mr. Waite say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. MEDALIE: We lose.

THE CHAIRMAN: A show of hands.

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

THE CHAIRMAN: The motion is lost.

MR. YOUNGQUIST: "(3) Hearing on motion. The court may order hearing of motion whenever in the

opinion of the court a decision in advance of the trial of the general issue may substantially dispose of the whole proceeding or of any part of it. When a motion before trial raises an issue of fact the defendant is entitled to trial by jury if the issue is one which heretofore might have been raised at the trial under a plea of not guilty. All other issues of fact raised by motion before trial may be tried with or without a jury and on affidavits or in such other manner as the court directs. The court may determine the motion or it may order/that the defenses or objections raised by the motion may be submitted for determination at the trial of the general issue."

Then we go on:

"(4) Effect of Determination. The determination of a motion raising a defense or objection before trial of the general issue shall control the subsequent course of the proceeding. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order the defendant held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information."

"(5) Statute to Continue in Effect: The provisions of the Act of May 9, 1942," and so forth "shall

continue in effect and the words 'demurrer', 'motion to quash', 'plea in abatement', 'plea in bar', or 'special plea in bar', shall be interpreted to mean 'motion raising a defense or objection' as provided in this rule."

That is identical with the (5) as in the mimeographed draft.

I move the adoption of Rule 12.

MR. HOLTZOFF: I second the motion.

MR. WECHSLER: May I ask a question, Mr. Chairman, about substance? I would like to ask first whether it is understood that under this rule a defense of double jeopardy, taken as an illustration, must be raised in advance of trial by motion?

MR. DEAN: The answer is yes.

MR. HOLTZOFF: No.

MR. YOUNGQUIST: No. Anything that may be raised by general issue does not have to be made by motion. It may be done by motion.

MR. YOUNGQUIST: "the defects in the institution of the prosecution or in the indictment or information, other than it fails to charge an offense or show jurisdiction, shall be raised only by motion. Failure to present any such defense or objection then available constitutes a waiver thereof." So that is limited to defects in the initiation of the prosecution and in the indictment and

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information."

MR. WECHSLER: Don't we want another sentence in here in substance as follows, "Any matter capable of determination before the trial of the general issue may be raised before trial by motion" as distinguished from "must", because there isn't anything here, it seems to me, that indicates the general permissive point.

I move the insertion of that language before the word "defects" in line 11.

MR. HOLTZOFF: Will you read it?

MR. WECHSLER: The language is -- this is from our previous rule -- "Any matter capable of determination before the trial of the general issue may be raised before trial by motion."

MR. YOUNGQUIST: I, as the mover, agree to the insertion.

THE CHAIRMAN: All those in favor of Rule 12 as reworded and including its amendment, that has just been accepted, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: Mr. Chairman, we have a new rule to propose. We drafted this rule at the direction of the

committee on motion made by Mr. Wechsler, a new rule relating to the commitment of material witnesses. I want to say this, that this rule does not change the existing statutory provisions substantially but it rephrases them in more modern language, and perhaps a little more succinctly.

"The court may require any person, if it appears by affidavit that his testimony is material in any criminal proceeding, to give a recognizance with or without sureties in any amount fixed by the court for his appearance as a witness. Upon a showing by affidavit that it may become impracticable to secure his presence by subpoena, cash bail or bonds, or notes of the United States shall be accepted in lieu of sureties. For failure to give recognizance, such persons may be committed to the custody of a marshal pending the final disposition of the proceeding in which the testimony is needed. His release may be ordered whenever the court finds that he has been detained for an unreasonable length of time." This last sentence that I just now read is new. "The court in its discretion may modify its requirement as to bail at any time."

I move the adoption of this rule.

MR. MEDALIE: You say "affidavit" twice. We need it only once.

MR. HOLTZOFF: I said it twice.

MR. MEDALIE: You need it only once. Whatever is done for the commitment or holding of a material witness is done by affidavit. You do not have to cover the provision twice.

MR. HOLTZOFF: All right.

MR. SETH: Don't you think "commissioner" should be included in the rule as well as "court"?

MR. HOLTZOFF: I am under the impression -- in fact I looked it up the other day -- the commissioner may not commit witnesses. It takes a court order to commit witnesses.

MR. SETH: I think not.

MR. DESSION: Commissioners do it now, I think, Alec.

MR. GLUECK: You say "shall accept bonds" and so forth. Do you want to make that "may accept"?

MR. HOLTZOFF: No; I think if a person is held on a thousand dollars bail and he offers government bond the Court should accept it. It ought not to be optional.

MR. GLUECK: In the other rule we provided "may accept cash or bonds or notes".

MR. MEDALIE: You must make it "must" for a very practicable reason. I remember as far back as 1917 we had a ferocious battle with Percy Gilkes, clerk of the Eastern District Court, because he would not take the

responsibility of keeping $5000 in cash. He said the law does not give him the right to hire a safe deposit box; "I am responsible for it. I won't assume the liability."

MR. GLUECK: That is in Rule 45, page 2.

MR. MEDALIE: I move that the Reporter, by appropriate language, make the receipt of such collateral compulsory.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. HOLTZOFF: It is true that the commissioner is permitted to commit a witness under existing law.

MR. SETH: And the mayors may too, and the magistrates.

MR. HOLTZOFF: That had escaped my mind,but I remember now.

MR. MEDALIE: You can make the thing general.

MR. HOLTZOFF: I do not know that we should. I do not believe United States commissioners ought to be allowed to commit a witness.

MR. MEDALIE: Yes, I think he ought to. And if he is wrong, we can settle it by habeas corpus very quickly.

MR. HOLTZOFF: That is all right.

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THE CHAIRMAN: You are including the commissioner?

MR. HOLTZOFF: "court or commissioner".

THE CHAIRMAN: What about the mayors?

MR. HOLTZOFF: No.

THE CHAIRMAN: All right. You have heard the motion. Any question?

MR. SEASONGOOD: Is that all right, with this taking deposits in?

MR. HOLTZOFF: That would fit in there. I mean, it will be consistent.

MR. ROBINSON: We will have to check and see.

MR. HOLTZOFF: No, it will be consistent.

MR. ROBINSON: It may not. We will have to check.

THE CHAIRMAN: All those in favor, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

I take it the Reporter will be assigned to work this thing in at the proper place.

MR. DESSION: Mr. Chairman, I think we can now strike out Rule 52 (b) (3), which said in effect that these rules did not deal with that subject. Now that we are dealing with it, I think that can go out.

MR. HOLTZOFF: Yes.

MR. DESSION: Isn't that right?

MR. HOLTZOFF: You are quite right.

THE CHAIRMAN: It is moved and seconded that Rule 52 --

MR. DESSION: (b) (3).

MR. GLUECK: Bail for Witnesses.

THE CHAIRMAN: Lines 34 and 35 of that rule be deleted.

MR. GLUECK: Oh, may I amend that? The last part should stay in.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Just want to delete that one part.

MR. HOLTZOFF: "to require bail for the appearance of witnesses under Revised Statutes Section 879", those are the words that go out.

MR. MEDALIE: I have no notion of what is going out. What is it?

MR. HOLTZOFF: Rule 52.

MR. MEDALIE: I have Rule 52, page 3, and I have the line. I know what words are going out, but I do not know what we accomplish, and that is the only trouble with it.

MR. HOLTZOFF: It is not necessary.

MR. MEDALIE: Because I am not sufficiently acquainted with these statutes by their first names.

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MR. HOLTZOFF: We are leaving out the reference to the commitment of witnesses statute, because we have adopted a rule on witnesses.

MR. MEDALIE: Oh, the top part goes out, does it?

MR. HOLTZOFF: No.

MR. DEAN: What goes out?

MR. HOLTZOFF: In lines 34 and 35, the words, "to require bail for the appearance of witnesses under Revised Statutes, Section 879."

MR. DEAN: Is that what goes out?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Is that what you want, Mr. Dession?

MR. DESSION: Yes.

MR. GLUECK: There is no other statute you have to knock out?

MR. HOLTZOFF: There is more that has to go out. I am told that this is the same statute --

MR. GLUECK: I move that it be left to the reporter.

THE CHAIRMAN: Did we pass your last motion? No.

MR. HOLTZOFF: I thought we did.

MR. GLUECK: We did.

THE CHAIRMAN: That is right.

Is that all from the sub-committee on style?

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MR. HOLTZOFF: That is all I have.

MR. MEDALIE: We have covered everything.

MR. DESSION: I think there is one other point -- not from the sub-committee. As I recall, we were going to insert a sentence in Rule 28 providing for the exchange of copies of requests for instructions. Is that correct?

MR. ROBINSON: That is right.

MR. DESSION: I move then that after the first sentence we insert a sentence reading as follows: "Copies of such requests shall at the same time be furnished to the adverse party or parties."

MR. WECHSLER: That was adopted.

MR. HOTLZOFF: That was adopted.

MR. DESSION: I was not aware that we had. If it has, that takes care of it.

MR. WECHSLER: I have notes on some other things, Mr. Chairman. There was to be a rule drafted on compulsory process for the defendant at government expense.

MR. MEDALIE: Yes.

MR. WECHSLER: Its substance was to be that he should have it as of right within the present statutory division of a hundred miles or anywhere with the approval of the court. I do not think we have drafted it, but I move that the reporter draft a rule in those terms.

MR.ROBINSON: Didn't the Chairman ask you to do

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that, Herbert?

MR. WECHSLER: I had hoped you would not raise that plea in abatement. I think it was referred to the sub-committee.

MR. ROBINSON: No, it was Mr. Wechsler.

MR. WECHSLER: It is not a difficult ot controversial thing.

MR. ROBINSON: You send me a draft on it.

MR. HOLTZOFF: We will draft it and we will consult with you.

THE CHAIRMAN: Anything else?

MR. WECHSLER: At some stage in our many proceedings and deliberations did we have up the question of saying that jurors may take notes?

MR. ROBINSON: Yes, we did; that is, it is in Judge Knox's committee's report.

MR. WECHSLER: We have to get to that on the Judge Knox report. That was tabled. I have some other rules. I was directed to draft a provision in Rule 30, providing for a hearing at sentence, and I propose the following language, in which I take no special pride: "Before imposing sentence,the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any relevant data or argument in mitigation of punishment."

MR. SEASONGOOD: Or witnesses too.

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MR. WECHSLER: I was hesitant to give him the right to call witnesses.

MR. ROBINSON: That is the successor of the old common law allocution.

MR. SEASONGOOD: Don't they always let you produce character witnesses?

MR. WECHSLER: I don't know if they have always. What did you want to include? Did you want to include anything the defendant might do, or just let him get started?

MR. SEASONGOOD: Why use the words "any relevant data",on the theory that that would give the court control?

MR. MEDALIE: I think if you go beyond the common law allocution, you take it out of the power of the court to regulate the proceedings before him and subject him to almost everything without any control.

MR. GLUECK: Think what Alex's Mexicans would say about that.

MR. HOLTZOFF: They would say, "Please send me up to ~~Altoona~~ Farm; I would like to get six weeks."

MR. GLUECK: "I like the grub there."

MR. WECHSLER: I appreciate the issue on that, but on the issue I would like to give the defendant an opportunity.

MR. MEDALIE: Do you recall any Federal district court where allocution is practiced?

MR. WECHSLER: No.

MR. MEDALIE: I don't either. Nobody ever uses the word. And did you want to say something, why, of course, you can say it.

I move that allocution be abolished. I have no use for it.

MR. HOLTZOFF: You mean you don't want to have the prisoner asked, "Have you any reason to state" --

MR. MEDALIE: No.

MR. WECHSLER: I think we want that. Every Federal court I know asks the defendant that.

MR. MEDALIE: They don't do it here.

MR. HOLTZOFF: They don't?

MR. MEDALIE: This must be an awful court.

MR. WECHSLER: I stand by the motion, if I get a second for it.

MR. GLUECK: Has he any remedy because he hasn't been asked?

MR. HOLTZOFF: Let us see. There is an old Supreme Court case which held failure to do so is reversible error.

MR. MEDALIE: You mean youhave to send them back to be asked?

MR. HOLTZOFF: No; reversed the conviction. I think later on that case was overruled, but that is the point.

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MR. DEAN. We helped the case along by taking that recital out of the judgment of conviction, because it is a phony.

MR. MEDALIE: It is a phony.

MR. SEASONGOOD: I don't think it ought to be a phony. He can say anything he wants to say in his own behalf. He should be allowed to say what he wants.

THE CHAIRMAN: That is under Mr. Wechsler's motion, isn't it? Has the committee decided it wants this kind of thing?

MR. WECHSLER: The committee has gone no further than to decide that he should be called upon to state any reason, yes.

MR. MEDALIE: I mean did we actually decide that it should be in our rules, did we vote on that part?

MR. WECHSLER: Yes, that was decided. My language goes beyond the mandate in the language and to presenting any relevant document or argument on mitigation of punishment.

MR. ROBINSON: Why not just strike that off.

MR. GLUECK: Suppose he wants to call a psychiatrist? You remember the Leopold case.

MR. MEDALIE: You remember the court wanted to know what to do.

MR. WECHSLER: I change the word "data" to "information presenting any relevant information or argument in mitigation of punishment."

MR. MEDALIE: It is a very unreal thing because if you believe in pre-sentence investigation, and we have provided for that, all that is going to happen there, a person who has the time to devote to it, instead of a judge wondering when he can start a trial and get through with the sentence --

MR. WECHSLER: I must say in proposing this I took to heart the debate yesterday on the ex parte character of the probation report and I did not go for the provision that he may examine the report because that seems to me to be an evil, but this does give him a chance to make

an affirmative case in his own behalf, and I think where we recognize, as we do in our rules, the tremendous importance of sentence, in fact it is the real important question in eighty per cent of the cases, it would be a step forward to do something like this.

MR. GLUECK: I think it is more in the spirit of that recent report recommending the provision as to that.

MR. SEASONGOOD: How does that leave the matter of calling character witnesses?

MR. WECHSLER: It leaves it to the determination by the judge whether that would be a way of obtaining relevant information. I should say it does not give him a right. The language is "before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and present any relevant information or argument in mitigation of punishment."

MR. ROBINSON: "or argument" you say?

MR. WECHSLER: Yes.

THE CHAIRMAN: Isn't that putting a burden on the court?

MR. WECHSLER: I am going to take "argument" out.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Are you going to put any limita-

tion on time? You are only allowed in many courts a half hour for argument.

MR. WECHSLER: I would leave that to the control of the court.

MR. MEDALIE: He would exhaust himself very soon in most cases.

MR. WECHSLER: I think the judge has ample control.

THE CHAIRMAN: Are you ready for the motion?

MR. SEASONGOOD: I don't want to be fussy about words, but "information" would not include character witnesses, would it?

MR. WECHSLER: What the character witnesses would provide I think would be information. But suppose it were admitted all around that the defendant had lived a spotless life and the judge said "I proceed on that assumption," then the character witnesses would have nothing to add.

MR. MEDALIE: I once heard a character witness on a sentence say in answer to the question "Is his reputation good?" say "I believe so."

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Now, gentlemen, are there any other rules to be offered?

MR. YOUNGQUIST: May I take this matter up now: on Rule 12 Mr. Wechsler calls my attention to something that might create a confusion. (b)(2), which speaks of the time for the making of the motion to set aside the indictment is a bit confusing, and what I had in mind was to have that incorporated in (1), and may I move that (2) be stricken and that (b)(1) read, the second sentence:

"Defect in the institution of the prosecution or in the indictment or information other than it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion," --

This is the new matter:

"made before or after the plea but within such reasonable time before trial as the court shall fix."

That was the language that was in the draft we intended to incorporate in this one. It makes no change in the substance but makes it clear what we want to say.

MR. GLUECK: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. WECHSLER: I have another thing, Mr. Chairman, in Rule 38. It was to authorize the Circuit Court of Appeals to dispense with the printing of the record and present it on a typewritten record. I think that is easily achieved by adding th 38(b) a new paragraph entitled (3) to read --

MR. GLUECK: I thought we had that.

MR. WECHSLER: Have we got that in?

THE CHAIRMAN: We agreed in principle but we did not have the language as I recall.

MR. GLUECK: Go ahead.

MR. WECHSLER: I had a note that we had not drafted it.

THE CHAIRMAN: We agreed on principle, that is all.

MR. WECHSLER: Would this do it: "The Circuit Court of Appeals may, for good cause shown, dispense with printing the record and consider the appeal upon the typewritten transcript."

MR. HOLTZOFF: They do it anyway.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: I think we could strike out the words "for good cause shown".

MR. WECHSLER: Yes.

THE CHAIRMAN: That is agreed. Are there any further rules?

MR. WECHSLER: There is my motion on the Knox report on jurors which was laid on the table. The motion was that instead of leaving the qualifications of jurors untouched, that this Committee endorse the Knox report; that it be presented separately to the court with the suggestion that it would not do to incorporate in the criminal rules alone but the court could use its power under both the civil and criminal rules to adopt it.

MR. YOUNGQUIST: When that was under discussion yesterday I announced, and I think some others are in the same situation, that I had not had time to read the Knox report and that that matter should be deferred.

MR. WECHSLER: I thought it was to be deferred until today.

MR. SETH: That report includes a lot about compensation of jurors and things like that, but as to selection it is an excellent report.

MR. LONGSDORF: It seems to me there is a good deal in the Knox report that requires legislation. I am not sure about that.

MR. WECHSLER: I think we agreed at the time it was procedural.

MR. HOLTZOFF: There was some difference of opinion.

MR. WECHSLER: My motion was in reference to qualifications.

MR. GLUECK: Did not Judge Knox propose legislation to accomplish that?

MR. WECHSLER: Yes, but I think the court has the power and I do not like to see the matter have to go to legislation.

MR. LONGSDORF: I do not know whether it would be becoming to us to suggest legislation was necessary, but he suggested it was.

MR. WECHSLER: Well, the court in its memorandum called our attention to the Knox report and directed us to consider it.

THE CHAIRMAN: I think on that about the best we can do is to ask the Washington group to attempt to prepare a rule on that and circulate it for a mail vote. That is about the only effective way of handling it.

MR. SEASONGOOD: I do not think everything in

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that report is so good. They want to lessen the length of service.

THE CHAIRMAN: Did I understand that you, Herbert, did not want a rule on it?

MR. WECHSLER: No. I suggested we draft a rule and keep it separate, because our own authority is not broad enough, but if the Civil Rules Committee and our Committee get together on it, we might do something.

THE CHAIRMAN: All right. Will you broaden your motion to authorize the preparation of a rule by such members as are available in Washington to be circulated promptly to all members of the committee for a mail vote and expression of opinion and then have it incorporated as an addendum to our report?

MR. WECHSLER: Yes, I will make that motion.

MR. LONGSDORF: Would that include a condition that the Civil Rules Committee would be out?

THE CHAIRMAN: No, no. This would be merely a recommendation on our part to the court that this looks good to us from the standpoint of criminal law rules, but we do not recommend it as part of our report because it is not wholly within our jurisdiction.

MR. LONGSDORF: It would not be any use adopting it for criminal rules alone.

THE CHAIRMAN: That is right, but I don't think

we should have to put it up to the Civil Rules Committee, but we just make a recommendation.

MR. WECHSLER: The court could do it or not as the court chooses.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. SEASONGOOD: Should the motion include the matter of the jurors taking notes?

MR. MEDALIE: I think the Administrative Office ought to try to collect some of those notes if they are ever taken and see how funny they really are.

MR. HOLTZOFF: Why should not the jury be permitted to take notes?

MR. MEDALIE: The jury may, but I think they are crazy if they take them.

MR. ROBINSON: If I was sitting as a juror for twenty days or a month, I would take notes if I could.

MR. YOUNGQUIST: Some of them take notes and when they get in the jury room say "I took this down as the man said it." What is the other fellow going to say?

MR. SEASONGOOD: It is easy enough for the judge

to instruct on the notes and say it is no more persuasive than his oral statement of what he remembered the evidence to be.

MR. MEDALIE: If you will note how we occasionally misunderstand what we say to each other in these solemn sessions of our committee, you would not rely on jurors' notes.

THE CHAIRMAN: All right. Suppose we say nothing about jurors taking notes.

MR. SEASONGOOD: That has been regarded notwithstanding the animadversions by a court of my jurisdiction as important by a person interested in the subject.

THE CHAIRMAN: Should not that be within the discretion of the judge? In the ordinary negligence case there is no use of a juror making notes any more than counsel ought to take them, but if it is a long-winded thing, in the nature of an accounting, one intelligent juror might take some notes, not the way our late senior district judge used to do, to give a little pad to all of the jurors on which they drew pictures of the court and the witnesses and counsel, and I was very severely caricatured and my feelings hurt. I don't think there is much in it. I think it has to be left to the judge.

MR. MEDALIE: Yes.

MR. SEASONGOOD: Well, that would be to say jurors

11mh

may take notes in the discretion of the judge.

THE CHAIRMAN: Let somebody make a motion.

MR. SEASONGOOD: I move.

THE CHAIRMAN: Mr. Seasongood moves that jurors be authorized to take notes when the court approves, or an allowance of it by the court.

MR. GLUECK: Seconded.

MR. HOLTZOFF: Is that to go in our rules?

THE CHAIRMAN: No, this is in the other batch of rules. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. DEAN: Why does it go in the other batch?

THE CHAIRMAN: It is in the same category as qualification of jurors. It seems to me we could tuck it in our rules.

MR. SETH: Let it go along with Judge Knox's recommendation.

MR. HOLTZOFF: On the understanding that it goes with Judge Knox's recommendation.

MR. LONGSDORF: Don't you think the rules pertaining to jurors ought to be kept in one group?

MR. DEAN: There may be something in that.

12mh

THE CHAIRMAN: With reference to the various rules the members want to recommend in an addendum, may we fix a time when they may be submitted to the reporter with whatever comments the individual members desire to have attached to them?

MR. ORFIELD: What did we finally decide to do with Rule 31(d)?

THE CHAIRMAN: May I cover that first. Is the end of next week, March 6th, agreeable to everybody for getting in individual rules which the members desire to have submitted in the form of an addendum?

MR. WECHSLER: Is that a reasonable time in relation to what the reporter has to do? I think no individual ought to hold it up but I think we ought to get all the time we need.

THE CHAIRMAN: It depends on how much time we can corral from the reporter.

MR. WECHSLER: It is just the facilties, the mechanics, and so forth.

THE CHAIRMAN: If the Administrative Office is not getting out one of those reports it can be done promptly.

MR. WECHSLER: I have four things to present and I want to get as much time as I can.

THE CHAIRMAN: Well, if it has to stretch over to the 8th, I suppose that will be all right.

MR. WECHSLER: It does not concern me. I can keep in touch with Jim.

THE CHAIRMAN: Are there any other items we should discuss before adjourning?

MR. WAITE: There is one question I would like to raise. We are bound to be called upon to discuss this when it finally comes up from the court, and I am wondering to what extent we ought to consider ourselves bound not to raise criticism of what has been done. For instance, I have had my day in court. There are certain things that are not in that I strongly thought ought to be in and things in that I think ought not to be in. There are things I can say very good about it and some things I can say that would be very critical. Just as a matter of decency how far ought we to keep our mouths shut on the matter of criticism?

MR. HOLTZOFF: It seems to me every member of the committee, except to the extent to which he submits an addendum, is bound by this report. I think we are all bound by majority vote. I don't suppose there is any member here that is satisfied with every rule adopted. I am sure it is true with me. But we have had our day in court and I think everyone has been given full opportunity to have his say, so I think we are all bound not to attack the report.

MR. WAITE: I have in mind this sort of thing: suppose you are asked to, as I probably will be asked, and Dession will undoubtedly be asked, to discuss the report in some sort of a law review article? If I discuss it, item by item, I would have to be critical of some of them unquestionably, even though I have had my day in court. I am inclined to think my best bet would be to say "I won't discuss it."

THE CHAIRMAN: Chief Justice Hughes directed that no member of the Civil Law Rules Committee could write a book on the subject.

MR. GLUECK: I think it was a good ruling.

THE CHAIRMAN: I don't know whether there is any such rule hanging over this committee.

MR. DEAN: That is to prevent making financial capital of it.

MR. WECHSLER: I do not think there ought to be any rule. It seems to me one feels a sense of obligation to the group with which one worked and that works itself out with caution. I would not want to feel absolutely forbidden to criticize a rule I thought was wrong.

THE CHAIRMAN: The question is, are we like a committee of the Privy Council in England that can give the King only one counsel, or can we talk with eighteen different voices?

MR. LONGSDORF: Mr. Chairman, I think we might make a little progress if we would agree to keep out of print. Perhaps in discussion that may be had at a meeting of the Circuit Conference we can talk to the judges with relatively small restraint, but we would not want to print it in the newspapers or anything like that.

THE CHAIRMAN: Except the members of this committee might be helpful in disseminating information about the committee's work.

MR. MEDALIE: We will have to expect invitations from local bar associations and things like that, whether we like it or not, and we will have to go there.

MR. LONGSDORF: We will need to get the support of the bench and bar in order to put momentum behind this thing.

MR. DEAN: I think a little harmony can be created in these presentations by whenever the question comes up pointing out the considerations on both sides. Certainly it is true when there has been a split there have been good reasons on both sides. It seems to me that is an obligation of a committee member rather than to be an advocate for any one position. He should be in a position where he can state the considerations on both sides, and they are there as many of these 8-to-7 votes indicatd.

MR. WECHSLER: For example, some of us are going

to submit separate statements. It seems to me it would be reasonable in talking about the work of the committee to talk about one's own differences as revealed by that separate statement.

THE CHAIRMAN: I think there can be no objection to that, but I am very much troubled, and I am not sure I know the answer, but I am very much troubled by the notion that we might feel free to say "Now on Rule 42 I presented this view but I was overruled," because I think we are going to have a very difficult time to get the rules from Congress anyway, and some over-zealous opponent of the rules might collect a series of addresses made by members of this committee which could absolutely ruin their presentation to the Judiciary Committee.

MR. WAITE: I had in mind even a simpler situation: take the rule that provides a new trial may be granted for newly discovered evidence at any time after verdict. One might feel quite strongly one way or the other about that. One may feel that is too long a time. Is there an impropriety in my, for instance, revealing that in a public discussion?

THE CHAIRMAN: I know that on the case of the Civil Rules Committee there were certain of the members who reached a point which fortunately we have been able to avoid, where they could not talk about each other civilly.

MR. SETH: Is that so?

THE CHAIRMAN: There is no doubt about it. I have had very distinguished members of the committee pay their respectsto each other to me in no uncertain terms. One prominent man described one member of the committee as having the muddiest mind he ever met at the bar. That, I think, is about as insulting a remark as one lawyer could make of another, and yet throughout the presentation of the rules that committee stood as a unit. They differed fundamentally on certain aspects of the rules which have since been very much appreciated by both bench and bar, but which were regarded by certain members, almost a majority, as radical innovations. There really was a tremendous amount of contention in that committee. You are aware of that, aren't you, Alex?

MR. HOLTZOFF: Oh, yes.

THE CHAIRMAN: If Leland Tolman were here, he could, without mentioning names, give you some of the cross currents, and there are still some who, when they talk about their deliberations, get up heat over what they remember.

MR. YOUNGQUIST: Do we have to do this when we speak of these rules - after all, this committee, and I am not speaking of the addenda submitted by individuals - this committee as a body is submitting rules to the court.

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We have been proceeding by majority vote and the majority vote prevails. I should think it not proper for any member to express his individual views with respect to any rule. I should think it proper to discuss, as Gordon suggested, the two sides presented and the reasons for one side and for the other, and let the public know what these considerations were that moved the committee to action. I should think it would be very unwise to indicate what the vote was on any particular rule, especially in view of the very close votes we have had on very many rules.

THE CHAIRMAN: I agree with you thoroughly on that, and for a further reason, that I do not believe many lawyers will realize how controversial some of these rules, which look quite innocent when you just glance at them for the first time, really are, and how much more difficult it is to decide which way to go than it is in the case of merely deciding between a plaintiff and a defendant. Here you have the force of the Government and all of its agencies on one end as against an individual, and I think we have got to pursue the line of argument that Mr. Youngquist suggests to bring out that underlying difficulty of our work.

MR. HOLTZOFF: It seems to me certainly if articles appear or speeches are published by members of this committee objecting to portions of the report then certainly those

will be quoted before the Judiciary Committee and they will be exaggerated.

MR. WAITE: As a matter of fact I am glad to get that answer. It gives me an excuse for refusing to write. That is what I wanted.

MR. SETH: Mr. Chairman, it was said a while ago that some sort of dissents might be filed, by Mr. Wechsler and others, and they reserve the right to argue.

THE CHAIRMAN: They are not really dissents. They are additional rules that they want incorporated.

MR. WECHSLER: That was voted down, Mr. Chairman.

MR. SETH: It seems to me unless the Supreme Court directs that those dissents be distributed along with the rules they ought to be forgotten.

MR. WECHSLER: I think the best way to handle that would be if anybody who wants to submit anything additional, he could write a letter to the Chief Justice and say "I have this additional matter that was rejected by the committee, or which, for some reason or other was not considered by the committee, that I desire to present to the court" and then let the court decide whether to include that in what is distributed or not. I would certainly have no passion to have it distributed.

MR. WAITE: I thought that is what we all agreed.

MR. WECHSLER: I understood it a little differently

that it was intended to include it in the report as an addendum. Either way is all right. I would like the court to consider the four things I have in mind.

MR. YOUNGQUIST: Would anything be submitted to the court that has not been submitted to the committee?

MR. WECHSLER: That has been submitted to the committee? No, that has not, perhaps. I have four things --

MR. YOUNGQUIST: You spoke of it as having been rejected or for some reason not considered by it.

MR. WECHSLER: I did not have anything special in mind. I have in mind the committee decided not to include a rule on something or other. To make my own position clear I state the things I have in mind are the Coram Nobis rule, the discontinuance record, the evidence rule and the plain error rule.

MR. YOUNGQUIST: All that was considered by the committee.

MR. WECHSLER: Yes.

MR. YOUNGQUIST: The only point I had was I don't think anything should be transmitted to the court that had not been considered by the committee.

MR. WECHSLER: I think that is fair.

THE CHAIRMAN: And I think it should all go in one bundle.

MR. WECHSLER: What I would like to do is submit my letter to the reporter and let the reporter circulate it and let as many members of this committee, because there were close votes on all of these things, that choose to join me, join me, so it might not be mine at all but might be the separate statement of other members of the committee, and it seems to me I would like to join Mr. Waite in one thing he wants, and perhaps that would be additional material for the court.

MR. DEAN: Might it not be better, Herbert, because that would indicate the split as between the members to do it the other way?

MR. WECHSLER: But the court is entitled to know that on anything.

MR. DEAN: They do not know it on the ones we have adopted.

MR. WECHSLER: Sure; they have the transcript.

MR. DEAN: Do you think they will study this transcript?

MR. ROBINSON: The Committee on Style, with Mr. Holtzoff acting as secretary, had one more rule or two more.

MR. HOLTZOFF: This one was not left to the Committee on Style.

MR. ROBINSON: The only thing left is this alibi

notice rule which was cut down by the Committee on Style to a brief scope and requires, if you want that read --

THE CHAIRMAN: Yes.

MR. ROBINSON: It reads now: "specification of place and time of committing offense."

MR. WAITE: Ought we not to have a time to submit the rules?

THE CHAIRMAN: Yes, let us have a motion.

MR. WAITE: I move as soon as these resolutions are tabulated and mimeographed that they be submitted as the report of the committee with the addendum that has been referred to, with the same type of forwarding letter.

THE CHAIRMAN: All those in favor of the resolution say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. MEDALIE: How fast do we get there?

THE CHAIRMAN: It depends on what facilities we can get in Washington; first, whether the Administrative Office is getting out one of those quarterly reports and its mimeograph is tied up, and also how fast we get the record of these proceedings and how much help, stenographic and otherwise, we can commandeer.

MR. MEDALIE: What is the outlook, assuming there are normal delays?

THE CHAIRMAN: Two or three weeks.

MR. MEDALIE: When will we reach the Supreme Court?

THE CHAIRMAN: Within two or three weeks.

MR. HOLTZOFF: They took no time at all with the Civil Rules Committee. They just authorized the distribution.

MR. MEDALIE: When were the civil rules distributed? What part of the year?

MR. HOLTZOFF: In the Spring.

MR. MEDALIE: In May? Is it possible we can distribute in May?

MR. HOLTZOFF: I think so.

THE CHAIRMAN: If the court acts.

MR. MEDALIE: If we distribute we must first print, is that right?

THE CHAIRMAN: Yes.

MR. MEDALIE: Have we an adequate appropriation for printing?

MR. SETH: Your hope is to get it to Congress by the next session, in January?

MR. HOLTZOFF: Yes.

MR. MEDALIE: Will the commentary go with the

rules?

THE CHAIRMAN: Oh, yes.

MR. ROBINSON: I solicit the recommendations of the committee again on this question of forms.

THE CHAIRMAN: That is understood.

MR. WECHSLER: How about this problem: I think it is not unlikely when we get home and start thumbing through these pages again we may find just some things overlooked, some inadvertencies. I do not have in mind anything that raises the question of policy. It seems to me this committee would be in difficulty unless some machinery is created to handle that problem. There simply may be changes that have to be made that were not brought out in this process. I think there ought to be a delegation of authority somewhere to make minor changes to take care of inadvertencies and omissions.

MR. WAITE: I think that is a very good idea.

MR. WECHSLER: You are just bound to get something like that.

THE CHAIRMAN: Advising the members of the committee at the end what those changes are so we will all have notice?

MR. WECHSLER: Yes.

MR. HOLTZOFF: Like grammatical changes.

MR. WECHSLER: Yes, or there might be an internal inconsistency.

MR. WAITE: Why not leave that up to the group in Washington?

THE CHAIRMAN: I think the logical thing to do, if members of the committee are available in Washington, to resolve them into an informal committee for that purpose.

MR. MEDALIE: I think there ought to be a final responsible arbiter on that and that ought to be the chairman of this committee.

MR. WECHSLER: That is right.

MR. MEDALIE: I move the supplying of necessary corrections and supplying of obvious omissions, reconciliation of inconsistencies, be left to the Washington members of this committee subject to the decision of the chairman.

MR. LONGSDORF: I second the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. HOLTZOFF: There was just left the alibi rule which was referred to the sub-committee on style. The sub-committee on style condensed it somewhat and it has been suggested thatperhaps a motion might be in order

to authorize the inclusion of this rule in the draft as released by the sub-committee. The sub-committee revised only as to form and not as to substance.

MR. ROBINSON: I make that motion.

MR. WECHSLER: I reserve the right to write what is wrong about that rule.

MR. MEDALIE: You need have no trouble about that. You know my own skepticism about the alibi rules. It won't trouble me in trying to get bar or bench approval for our rules to point out there is a great commotion for alibi rules and that this comes about as near it as anything we can think of.

MR. DEAN: Without being too harsh.

THE CHAIRMAN: Cannot we get this read and approved? Let us get formal action on this. What number is it?

MR. HOLTZOFF: 17.

THE CHAIRMAN: Read it, please.

MR. HOLTZOFF: (Reading) "A defendant charged in an indictment or information may move the court to order the Government to specify in writing, as exactly as possible, the place and time of the offense it proposes to prove. The court shall grant the motion except for cause shown. Upon receipt of the Government's specification the defendant shall promptly

specify in writing as exactly as possible the place where he was at the time specified by the Government. If the defendant fails to make the motion or the specification but offers evidence that he was in a place other than the place shown by the evidence of the Government, the court as a condition to admitting such offered evidence may require the defendant to show cause for his failure."

That is failure to make the motion or specification. (Continuing reading:)

"If the court admits the evidence, with or without objection by the Government, it shall at the request of the Government grant a recess of the trial or permission to the Government to reopen its case or both. At the trial neither party may controvert its specification except for cause shown."

MR. WECHSLER: I move it be rejected.

MR. YOUNGQUIST: The only changes made by the Committee on Style were these. It read:

"If the defendant offers evidence he was at a place other than that specified in the evidence of the Government."

We changed that to read "other than the place shown by the evidence of the Government."

That is the only change. I move its adoption.

MR. ROBINSON: Seconded.

THE CHAIRMAN: It is moved and seconded that the rule be adopted. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

MR. WECHSLER: No.

THE CHAIRMAN: The rule is carried.

Is there anything else to come before the meeting? I notice two of our members, one from down East and one from the West slipping toward the door with their packages.

MR. WECHSLER: Mr. Chairman, was there a ruling on my proposition? I would like to get as much support on my four dissents as I can get. May I circulate my letter to the other members of the committee and may it show those who held the same view?

THE CHAIRMAN: I do not see any objection.

MR. YOUNGQUIST: Why does not the chairman talk to the court and ask how it would want to handle those things.

THE CHAIRMAN: All right, Suppose we do that.

Is there anything else, gentlemen? If not a motion to adjourn seems inevitable.

MR. YOUNGQUIST: I move we adjourn.

MR. HOLTZOFF: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Unanimously carried.

(The Committee adjourned.)

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(Chorus of "Noes".)

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

MR. WECHSLER: May I ask you to explain the motion. Otherwise I cannot vote on it.

THE CHAIRMAN: The point made by Mr. Seasongood was that Section 38(a) as it stands is contradicted by 38(c) because we say here, as the heading indicates, that supervision is vested in the Appellate Court on the filing of the notice of appeal, whereas in 37(c) we provide that certain applications may be made to the district court. So that the action permitted under 37(c) is an exception to the rule laid down in the first sentence of 38(a).

MR. DEAN: That is right.

MR. WECHSLER: Thank you.

MR. SEASONGOOD: It is even worse, because it says if you apply to the circuit court you have to show you applied to the district court, or that you could not have applied or they did not give you the relief you want.

THE CHAIRMAN: With that explanation may we have a new vote on the motion.

All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. DEAN: May I ask the question, was the substance of Rule 37(c) and Rule 38(a) ever in the Supreme Court rules at the same time together?

MR. SEASONGOOD: That is what I was thinking.

MR. DEAN: I know 38(a) was.

THE CHAIRMAN: Mrs. Peterson says no.

MR. DEAN: I am still a little troubled about the apparent conflict. "except as provided" does not quite do it, because you provide so differently on everything.

THE CHAIRMAN: Is 38(a) in the Criminal Appeals Rules?

MR. DEAN: Yes. I don't know whether it is changed, but that is the substance of the wording in there, anyhow.

MR. ROBINSON: 38 is a combination of rules we had in Draft 5. We had five of them; 51 to 56, with no change made in the provisions from our Draft 5.

MR. SEASONGOOD: If you are really going to put the whole business in the Appellate Court after the time the appeal is filed, what is the use of this (c)? You

either do it or don't do it.

MR. HOLTZOFF: Except this: in the big circuits if you want an extension of term to file your record you should not be required to run to the Circuit Court of Appeals. For example, take the Eighth or Ninth Circuits, you have to leave that part of it in the district court.

THE CHAIRMAN: And the circuit court should not be bothered with a matter more in the knowledge of the district judges.

MR. ROBINSON: Judge Whitfield's (?) advice is responsible for our original interest in this provision. He wrote a letter to us in which he called attention to the fact that they are troubled by counsel shopping around to get the lowest bail as between the district court and C.C.A. He says when they come to the C.C.A. they ought to show that the district court first had the chance.

MR. SEASONGOOD: Then it is probably all right the way you have it. At least it is the best you can do. You certainly don't want to make the Circuit Court of Appeals bother about extensions of the record.

MR. DEAN: You do not now. You see in (c) of Rule 38 it gives the time in which the record shall be filed? I take it the district court could not change that. The problem you used to have was the time for filing your bill of exceptions. You could always fix that in the

district court. I don't know what the problem is you want to present to the district court, in view of the fact you do not have bills of exceptions.

MR. HOLTZOFF: But you might have a request for extension of time to file a record.

MR. DEAN: But in (c) you provide it shall be filed in the Appellate Court.

MR. HOLTZOFF: But you may require an extension of a 40-day period.

MR. DEAN: We do not say the district court can grant it.

THE CHAIRMAN: Oh yes you do, in 35.

MR. HOLTZOFF: Line 48 in Rule 38 says it, too.

MR. DEAN: O.K. That answers it.

THE CHAIRMAN: Are there any further questions on 38(a)?

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Carried. 38(b).

MR. HOLTZOFF: That (b) is the same as we worked it out in tentative Draft No. 5.

THE CHAIRMAN: All right. If there are no

suggestions all those in favor of (b) say "Aye".

MR. WECHSLER: No. I wish to say I am opposed to (b)(2), which seems to me to introduce into Federal Criminal Appeals the curse of the distension ... racket; to introduce that evil in the very type of proceeding where I think it is important the appellate courts get the full flavor of the proceeding in the district court, and I believe I suggested at an earlier meeting a device which seemed to me to get the virtues of this rule without the vices. In substance it was that the appellant would designate the portions of the record that he desired to be printed, and the government would designate the portions of the record that it desired to be printed, and the allocation of costs would be as provided by this rule. The only difference is instead of each side printing the part it wanted as an appendix to its brief, they would be printed together, and it seems to me that is a reasonable proposition that meets the difficulties perceived in this system laid down here, without any accompanying evil so far as I can see, so I would like to renew that.

MR. ROBINSON: I would like to ask Mrs. Peterson about what the circuits may have done about that type of printing the record.

MRS. PETERSON: I do not recall any that have exactly that type, but I believe the Ninth Circuit.

MR. WECHSLER: I do not know that it is in force anywhere, but it has always seemed to me a device better than this one.

MR. YOUNGQUIST: How many circuits adopted this procedure?

MR. ROBINSON: About five; the Fourth, the District of Columbia, the First Circuit and the Third Circuit -- four that I know of.

MR. WECHSLER: Do you see any virtue in this that does not inhere in the system I suggested?

MR. HOLTZOFF: Yes, I do, because I am afraid while your system will achieve one purpose, namely, reduction of the expense of printing, it will increase the complication of preparing the record and delay the preparation of the record.

MR. WECHSLER: Why, the appellee and appellant designate what is to be printed. There is no consultation; no need for agreement.

MR. HOLTZOFF: Who does the printing?

MR. WECHSLER: Well, there may be difficulty there, but I should think that can be met.

THE CHAIRMAN: As a matter of fact, Herb, they do exactly what you say when they go from the Circuit Court of Appeals to the Supreme Court. They take the two and weave them together and get a chronological record.

MR. WECHSLER: I feel strongly on this, on the basis of experience.

THE CHAIRMAN: But it does not become quite so forceful in the C.C.A., where there are only three judges and the typewritten record is on the bench and all can get a hand on it.

MR. YOUNGQUIST: I think our individual experiences might yield to the experiences of the judges of the four circuits who adopted this rule.

MR. HOLTZOFF: There is a question of expense. I think a client in poor circumstances would find Judge Parker's rule cheaper than the rule you suggest. They can shop around and get a cheap printer.

MR. WECHSLER: You could still have a system under which the appellant could control the printing and give the appellee the chance to designate, couldn't you?

MR. HOLTZOFF: No, because how would the appellant be paid for printing the appellee's part?

MR. WECHSLER: In fact you would give the appellant the choice of printing.

MR. HOLTZOFF: I think that would work out rather clumsily, in view of the various administrative requirements of the Department of Justice and the Comptroller's rulings. I do not believe the Department

would be in position to pay its share of the printing.

MR. WECHSLER: Maybe the government would have control of the printing. If it has your poor defendant would find itself soaked in the supervised printing by official printers, which is always more expensive, and a trial that took more than a day to try is a very substantial expense.

MR. ORFIELD: Why should there be printing at all? Why not dispense with the printing?

MR. HOLTZOFF: He does not have to print anything if he does not want it.

MR. WECHSLER: You have to print either the whole thing or full parts.

THE CHAIRMAN: He has to print whatever he wants to refer to in his brief.

MR. YOUNGQUIST: "It shall not be necessary to print the record on appeal, except that the appellant shall print, as an appendix to his brief, the judgment appealed from, any opinion or charge of the court, and such other parts of the record material to the questions presented as the appellant desires the court to meet."

So he does not have to print a word of the evidence if he does not want to.

THE CHAIRMAN: If he does not want the court to read it.

MR. WECHSLER: If he cites any question on the evidence he has to print.

MR. YOUNGQUIST: No.

MR. WECHSLER: If he wishes to make a point about the evidence, such as the sufficiency of the evidence, he has to print that.

MR. YOUNGQUIST: To print the evidence?

MR. WECHSLER: He has to print whatever he wants the court to read.

MR. YOUNGQUIST: He can rely on the court's reading it from the record.

MR. WECHSLER: No he cannot, under this rule.

THE CHAIRMAN: No, if he wants to do that he has to do something quite off the record. He has to go to the court and say "Will you be willing to take three typewritten records, or one record."

MR. YOUNGQUIST: I do not understand that portion of the rule in that fashion.

MR. HOLTZOFF: My understanding is under the rule you print as an appendix to your brief whatever portion of the record you want the judges to read, and while the judges are at liberty to refer to any part of the typewritten record, nevertheless they do not feel under any obligation to do it.

MR. YOUNGQUIST: That is true, but if an appellant

wants to take that chance why cannot we?

MR. HOLTZOFF: Oh, he can, yes.

MR. YOUNGQUIST: And I will venture in many cases, especially with the indigent appellants, the court is going to give an opportunity to refer to those parts of the record he wants them to read.

THE CHAIRMAN: Where you have merely a poor but not a pauper client you write to the court or to the clerk and find out whether they are willing to let a typewritten record serve, and they often do it.

MR. YOUNGQUIST: In the circuits where this rule is in force?

THE CHAIRMAN: If you can make a showing that he cannot afford to print what he wants to refer to?

MR. YOUNGQUIST: But I say an appellant can take a chance.

MR. HOLTZOFF: Yes.

MR. DEAN: You just hope.

MR. WECHSLER: I think we ought to go beyond a hope.

MR. DESSION: I think we should, too, because I have seen them turned down.

MR. WECHSLER: I would like to move, first, as a motion, to change this system in the way I described. I do not expect it to pass, but I would like to have a

vote on it.

MR. DESSION: I will second it.

THE CHAIRMAN: Mr. Wechsler's motion is to amend 38(b)(2) --

MR. WECHSLER: I call attention to the fact that the suggestion is embodied in the court's memorandum as well.

MR. ROBINSON: Judge Parker claims his rule operates very successfully, and most lawyers agree to it, and certainly clients will.

MR. WECHSLER: The suggestion I have made is not my own creation. It is a standard criticism of the circuit court rules which has been voiced by critics of that practice, and I think with some success.

MR. YOUNGQUIST: There is nothing to prevent the appellant from printing the entire record, is there?

THE CHAIRMAN: Oh no.

MR. HOLTZOFF: Oh no.

MR. YOUNGQUIST: My recollection is that the civil rules have a provision which permits other methods.

MR. HOLTZOFF: The civil rules are silent on the subject of printing.

MR. YOUNGQUIST: All right. That is that.

MR. HOLTZOFF: They leave it to the individual circuit court of appeals to regulate the matter.

MR. YOUNGQUIST: I would rather do that than to overturn the rules adopted by the four circuits.

MR. HOLTZOFF: Generally regarded as a great advance.

MR. YOUNGQUIST: I prefer this, but if this cannot be carried then I would say follow the civil rules.

THE CHAIRMAN: I think Mr. Wechsler's motion, which is to require the printing of the parts desired by both appellant and respondent in chronological order --

MR. WECHSLER: In a continuous book.

THE CHAIRMAN: In a continuous book, the printing to be supervised by the appellant, --

MR. WECHSLER: I think for the purposes of that motion it could be said that the cost should be allocated between them.

THE CHAIRMAN: With costs allocated. All those in favor of this motion will say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(Chorus of "Noes".)

THE CHAIRMAN: The chair is in doubt. Will the "Ayes" show hands.

(After a show of hands the Chairman announced the vote to five in favor and five opposed.)

THE CHAIRMAN: I will vote against the motion.

That loses it, 6 to 5.

MR. YOUNGQUIST: I move the adoption, then, of (b).

MR. SEASONGOOD: I just want to ask one thing, as a matter of information: this says "the reply brief" on line 27. Suppose you don't want to file a reply brief, but you do want to file additional parts of the record.

THE CHAIRMAN: You can do it.

MR. HOLTZOFF: You make that your reply brief.

MR. SEASONGOOD: What do you say in practice? "I file a reply brief by filing this as an additional appendix"?

MR. HOLTZOFF: Yes.

MR. SETH: In the Tenth Circuit you cannot file a reply brief without permission.

MR. YOUNGQUIST: You had better change the rule then.

MR. SETH: I think that referred to the appellant's reply brief.

THE CHAIRMAN: That is where you save your choicest points.

MR. SEASONGOOD: I don't think you ought to say "the reply brief", because that implies there would be one. "A reply".

THE CHAIRMAN: All right, "a reply brief". If there is no objection that will be accepted.

38(c).

MR. SEASONGOOD: Was (b) carried?

THE CHAIRMAN: Yes.

MR. SEASONGOOD: I did not know there was a vote.

THE CHAIRMAN: I beg your pardon. All those in favor of 38(b) say "Aye"

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(Chorus of "Noes".)

THE CHAIRMAN: A show of hands. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 4 opposed.)

THE CHAIRMAN: 6 to 4; carried. 38(c).

MR. HOLTZOFF: In line 50 we can save four words by striking out the words "for good cause shown".

THE CHAIRMAN: Is there any objection?

(No response.)

THE CHAIRMAN: Then that will be eliminated.

MR. ORFIELD: With respect to line 50, were not too many extensions granted in the past? Wasn't that the reason we had it "for good cause shown"?

THE CHAIRMAN: It sort of stays the hand, what

Mr. Orfield has in mind. You think it should be in?

MR. ORFIELD: Yes, unless --

THE CHAIRMAN: Then it stays in, unless somebody makes the motion.

MR. HOLTZOFF: Then I make the motion to strike out "for good cause shown".

THE CHAIRMAN: Is there any second?

MR. MEDALIE: I second it.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(Chorus of "Noes".)

THE CHAIRMAN: The "Noes" seem to have it. The "Noes" have it. All those in favor of (b) say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried.

MR. WECHSLER: Mr. Chairman, I did not recover adequately from the blow of the previous vote to make the motion that I wanted to make to provide for review on the typewritten transcript by leave of court. The substance of it is that the circuit court may dispense with printing.

THE CHAIRMAN: "for good cause shown". Is that

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seconded?

MR. ORFIELD: I will second it.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Unanimously carried.

I suppose that could go in as (b)(3)?

MR. WECHSLER: Yes.

THE CHAIRMAN: Will you draft that?

38(d). Any remarks or suggestions?

MR. YOUNGQUIST: Do we need the words "at any time"?

THE CHAIRMAN: I suppose that is meant to convey the idea it does not have to be at the beginning of the term, as prevails in so many State courts, when you move to advance. Are there any motions?

MR. SEASONGOOD: Why don't you say that criminal cases shall be advanced for hearing? Isn't that enough?

MR. YOUNGQUIST: I think we worked over that quite a bit before.

MR. HOLTZOFF: Yes. We worked over that, and this is what we agreed upon the last time. There is no change in this paragraph.

THE CHAIRMAN: The difficulty is if you advance

too many things none of them is advanced.

MR. DEAN: Why do we need the first sentence of (d) at all? If we say we are not going to fix the time --

THE CHAIRMAN: That is to avoid any notion you can only set an argument at the beginning of the term, which has been the rule in some circuits.

MR. DEAN: It still leaves it open.

THE CHAIRMAN: Yes, it leaves it open. There was a view that prevailed, in certain circuits at least, that you could only list it for the opening of the term, and this will make it possible where there are only two terms a year in a certain circuit you can do that during a term.

MR. SEASONGOOD: I would like to strike out "the" in line 56 as unnecessary.

MR. HOLTZOFF: I second that.

THE CHAIRMAN: By consent, Mr. Reporter?

MR. ROBINSON: Yes.

THE CHAIRMAN: If there are no further questions, all those in favor of 38(d) as amended say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Those opposed, "No".

(No response.)

THE CHAIRMAN: Unanimously carried.

Rule 39.

MR. ROBINSON: At the head of 39 there should be "Courts and Clerks", as the contents show.

THE CHAIRMAN: This is the same as our old rule, I think.

MR. HOLTZOFF: Yes. I move its adoption.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed. "No".

MR.YOUNGQUIST: We have the words "legal holiday" in line 6. I think we discussed it before. It is a word of rather indefinite meaning, in view of the fact that there are certain national holidays, and other local holidays made by State law. It ought to conform to the State law.

THE CHAIRMAN: Could not that be cleared in the note;that the holidays referred to are the holidays in particular States?

MR. YOUNGQUIST: I would think so.

THE CHAIRMAN: Would you be content with that?

MR. YOUNGQUIST: I would.

MR. SEASONGOOD: If you think that is all right of course I have the same question noted, but I also wanted to call attention to this in Rule 44(a), where you say that a half-holiday shall be considered as other days and

not as a holiday, and wouldn't that make you stay open on Saturday afternoons, then?

MR. ROBINSON: There is a decision on that, you will notice in the notes.

MR. SEASONGOOD: What?

MR. HOLTZOFF: In 44(a) that is merely a formula for computing time. That has nothing to do with keeping the office open. 44(a) just gives the mode of computing time.

MR. SEASONGOOD: Yes, it does.

MR. YOUNGQUIST: That is right.

MR. ROBINSON: The point is are there any provisions for appellate courts and courts comparable to Rule 39; that is district courts and clerks which you just passed. No provisions are proposed, but the rule numbers are pending further consideration.

MR. YOUNGQUIST: Why could we not include such Circuit Court of Appeals in 39?

THE CHAIRMAN: Do you so move?

MR. YOUNGQUIST: I so move.

THE CHAIRMAN: Seconded?

MR. SEASONGOOD: What? That that should be open, too?

MR. YOUNGQUIST: Yes.

MR. ORFIELD: I will second it.

THE CHAIRMAN: All those in favor say "Aye".

(Chorus of "Ayes".)

THE CHAIRMAN: Opposed, "No".

(No response.)

THE CHAIRMAN: Carried. That will require a new rule. Write a new rule.

MR. SEASONGOOD: What is this note going to say about legal holidays? Is it going to say it is governed by the law of the State?

MR. ROBINSON: Yes, governed by the laws of the State. That is consistent with the appellate rules cited there.

MR. SEASONGOOD: But you have four or five States within some circuits. The State wherein the court is sitting?

MR. ROBINSON: 77(c) speaks of office hours, and there is a decision that construction is to be interpreted according to the uses of the community, and after the office is closed papers may be filed with the clerk or judge personally. We can see a trace of analogy there too so that the community holiday would govern, just as community business hours govern.

MRS. PETERSON: That was the case where papers were attempted to be filed on Saturday afternoon, when the clerk's office was closed.

MR. ROBINSON: You have left a problem there by putting 40 into 39. That would mean a chapter with only one rule in it. You might get some expression as to where the rule should be put.

THE CHAIRMAN: Suppose we leave that to the Reporter.

Rule 41.

MR. ROBINSON: This of course is a new chapter. This begins a big chapter on general provisions. Chapter X. Your table of contents shows general provisions applicable all through the rules.

MR. HOLTZOFF: I move the adoption of this. I think we worked it out the last time.

MR. WECHSLER: I notice in the court's memorandum there are some questions raised, particularly about appellate matters that have not been touched. For example, in their note of what used to be Rule 51 they say "some consideration should be given to summary dismissals for failure to comply with rules of the circuit court of appeals or pay fees to the court or print the record. The following has been suggested", and then there is the form. Did you go into that?

MR. ROBINSON: We quoted that for your consideration in the Reporter's memorandum on Rule 38, page 11. I am just going to leave it to the committee.

MR. HOLTZOFF: What is the Reporter's recommendation?

MRS. PETERSON: There is something on page 11 of Rule 38.

MR. ROBINSON: I just cited that to them. What is our recommendation? We do not have any, but there is a suggestion, though, for it, a provision in the rules of the Supreme Court that says that the clerk of the court shall report such a failure and the court shall do what it deems best.

MR. HOLTZOFF: Should not that be the rules of the individual circuit courts of appeals? That is the way the matter seems to me.

THE CHAIRMAN: It might very well be a general rule addressed to the circuit courts of appeals, bringing to their attention the matter of dismissals.

MR. WECHSLER: I move the adoption of this language suggested by the court and reproduced on page 11 of Rule 38.

MR. DESSION: I will second that.

THE CHAIRMAN: All those in favor of the motion say "Aye"; that is, to follow the suggestion just referred to on page 11 of Rule 38.

MR. ROBINSON: By making a separate rule, Herbert?

MR. WECHSLER: Whatever you think, either a separate rule of a subdivision of another rule.

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THE CHAIRMAN: It should come in under the chapter on appeal rules.

MR. YOUNGQUIST: That is the indented matter on page 11?

MR. CHAIRMAN: Yes. Now, are you ready for Rule 41, gentlemen?

MR. DESSION: I want to raise two questions about it first: Now, it would seem that the only qualification on these enumerated stages at which the defendant has a right to be present is the limitation of voluntary absence. Now, I am not clear that that is the present law. Suppose a defendant kicks up such a fuss that it is impossible to try him. Now, what result do we want there?

MR. HOLTZOFF: Has that ever happened to anyone's knowledge?

MR. DESSION: It happened here in New York, I think, or in England.

THE CHAIRMAN: Has that ever happened to your knowledge, George?

MR. MEDALIE: What?

THE CHAIRMAN: Where a fellow raises the devil; he won't let the trial go on.

MR. MEDALIE: Never happened as far as I know.

MR. DESSION: It happened in England in one case

that I remember.

MR. HOLTZOFF: Do we want to legislate for things like that?

MR. DESSION: Now, my other question is whether the instances we have enumerated here are all of them. We have the broad test laid down in the Snyder case whether the presence at a view is required, and in that particular case they decided not, but they laid down a broad due process test which we have not laid down here. Maybe these are all the instances that will ever arise in any case, or all the usual ones, but are we content to leave out a broad formula and simply to enumerate the particulars? Are we simply going to enumerate the particulars stated? I am not going to press that. It is just a question that occurs to me.

MR. ROBINSON: Don't you care to present your Alternative Rule 41 at page 7?

MR. DESSION: Well, that was designed to raise them. I have no particular preference for the language in that alternative rule, but these are the two questions involved. That is on page 7 of the notes.

MR. YOUNGQUIST: I am wondering whether the words "at every stage of the trial" may not include the presence of the defendant at a view.

MR. DESSION: Well, it may include more than we

want it to.

MR. YOUNGQUIST: That is what I was wondering.

MR. DESSION: It would not, for example, be a clear guide as to the --

MR. YOUNGQUIST: Excuse me, but wasn't such a case on its way to the Supreme Court recently decided? Was it the Johnson case?

MR. DESSION: Yes.

MR. HOLTZOFF: They held that it was not prejudicial error in that case.

MR. WECHSLER: I think that involved a different point. George, in the Johnson case, did he voluntarily absent himself?

MR. DESSION: No. They did not let him go in.

MR. HOLTZOFF: In that case there was an objection to a question on cross-examination while he was on the witness stand.

MR. WECHSLER: But that is a different point in the case. One related to the self-incrimination thing and the other related to his absence.

MR. DESSION: I am talking about the latter. The situation was that if he had been there and heard the argument, then there would not have been any use holding the argument because then he would have known how to answer.

MR. HOLTZOFF: Yes; so he was pulled out of the courtroom from the witness stand while he was on cross-examination while counsel were arguing an objection to a question.

MR. DEAN: The principle is pretty narrow when the facts are considered.

MR. HOLTZOFF: My recollection of the opinion was that it was held that it was not prejudicial in that case.

MR. DESSION: Well, I cite that only as an instance of this thought that there may be in particular cases a situation arising that is a little unusual. Maybe a defendant would be entitled from a due process point of view to be present. There may be inferences we have not mentioned here.

MR. DEAN: I think we ought to provide for a view.

MR. YOUNGQUIST: His counsel can be present at the view.

MR. DESSION: Suppose he has no counsel?

MR. DEAN: Or suppose counsel does not know enough about it? Did they hold it was reversible error in the Snyder case?

MR. DESSION: No. I rather favor a broad proposition. The Snyder case reads this way -- I took the

language out -- "Every stage where his presence has a reasonably substantial relationship to the fullness of his opportunity to defend." That is the language in the Snyder case, and you go on and say including the instances we have enumerated here.

MR. HOLTZOFF: The difficulty with that kind of a statement is that it is a sort of specific summary which goes well with an opinion, but it is not a rule in a sense in which you can apply it concretely.

MR. DESSION: Well, it is as much of a rule as the Supreme Court was able to produce to reason from. All you have here is particular instances.

MR. HOLTZOFF: "at every stage of the trial" - that is not a particular instance. That is pretty broad.

MR. DESSION: Well, does it include arguing a motion?

MR. SEASON: Well, perhaps Mr. Dession thinks it is too broad, and in view of the Johnson case it is. You say that the Johnson case says it is immaterial, but if he is deprived of a constitutional right, it could not be immaterial.

MR. HOLTZOFF: By the way, in that particular case the Supreme Court indicated that when a man is represented by good counsel the failure of good counsel to take an objection is a waiver. There was no objection,

apparently, raised to excluding him.

MR. YOUNGQUIST: That is a far cry from some of the original decisions.

MR. HOLTZOFF: That is right.

MR. SEASONGOOD: Well, what do you say the law is? Has he got a right to be present or not?

MR. DESSION: I think it is a case where we need a broad principle, and I see some virtue in including and tacking on the particular instances we are sure about, or leaving it open for unusual situations.

THE CHAIRMAN: Is that "Nocky" Johnson? Is that "Nocky" Johnson of Atlantic City?

MR. SEASONGOOD: Yes, that is the boy; "Atlantic City" Johnson.

As I understand Mr. Dession, his point is whether this is not too broadly stated, in Rule 41. Speaking for myself, I should think it is, because if you are going to say he is entitled to be present at every stage of the trial, then if Johnson had made his objection it would have been good, according to these rules. Now, I do not see why a defendant has to be present when an argument on the law is made.

MR. YOUNGQUIST: I think this phraseology "at every stage of the trial" is what the courts and the statutes have used for many, many years.

MR. DEAN: It is going to be awfully hard to define it if we try to carve out the stages of the trial where he need not be present. If we specify legal arguments, that may not be enough or may not be right.

MR. SEASONGOOD: Has this always been a statute?

MR. DESSION: No. All we have is the principle of confrontation. That is the narrow guide. We know what that means pretty well. Then you have due process, which is broader, and we have decisions with reference to particular things interpreting due process.

MR. YOUNGQUIST: Isn't there an old Federal statute entitling him to be present specifically --

MR. DESSION: I do not know of any statute which spells it out sufficiently for our purpose.

MR. YOUNGQUIST: I think it is quite common in state statutes.

Do you know, Lester?

MR. ORFIELD: I know there is a provision in the American Institute Code.

MR. YOUNGQUIST: Entitling him to be present at every stage of the trial?

MR. ORFIELD: I think that is the familiar language.

MR. SEASONGOOD: Do you want to adopt a rule which says that Johnson has to be present when you argue

a motion on whether evidence is admissible? Do you want that kind of a rule?

MR. HOLTZOFF: In the Johnson case they held that even if, arguendo, the ruling of the court was erroneous, it was not prejudicial under the circumstances of the case. So the Johnson case did not hold that it was proper to exclude the defendant under the circumstances.

MR. SETH: The American Law Institute enumerates the instances at which he must be present: At arraignment, when a plea of guilty is made, at the calling, summation, challenging, impaneling or swearing of the jury, and all proceedings before the court when the jury is present; when evidence is addressed to the court out of the presence of the jury for the purpose of laying a foundation for the introduction of evidence before the jury; at a view by the jury; at the rendition of the verdict.

MR. HOLTZOFF: If this is a correct statement then the Johnson ruling was wrong because the jury was in the box; there was an argument on the admissibility of a question, and the defendant who was under cross-examination was told to leave the courtroom while the admissibility of the question was argued, because the contention was made by the prosecuting attorney that the argument would reveal to the defendant what answer was expected.

MR. SETH: They should have sent the jury out too.

MR. YOUNGQUIST: You see, the argument of an objection is no part of a trial. The making of the objection is, and the ruling upon it, but not the argument.

MR. SEASONGOOD: That is not a stage of the trial?

MR. SETH: That is not a part of the trial.

MR. DEAN: I move we substitute the American Law Institute language for sentence No. 1 in Rule 41, adding "at the imposition of sentence." I think that is omitted.

MR. WECHSLER: I would like to hear that language again.

THE CHAIRMAN: Will you read it aloud?

MR. SETH: "In a prosecution for a felony the defendant shall be present at arraignment, when a plea of guilty is made, at the calling, summaration, challenging, impaneling and swearing of the jury, at all proceedings before the court when the jury is present, when evidence is addressed to the court out of the presence of the jury for the purpose of laying a foundation for the introduction of evidence before the jury; at a view by the jury; at the rendition of the verdict. If the defendant is voluntarily absent at the proceedings mentioned above, except those in clauses (a) and (b)" -- that is, arraignment and pleading not guilty -- "it may be

had in his absence if the court so orders."

THE CHAIRMAN: You have only directed your motion to the first sentence? In other words, you move that that enumeration shall take the place of lines 2 and 3?

MR. DEAN: Yes.

MR. WECHSLER: Don't you think that is pretty cumbersome?

MR. SEASONGOOD: Couldn't you say, "at every stage of the trial except arguments of law"?

MR. HOLTZOFF: You could.

THE CHAIRMAN: "arguments of law not in the presence of the jury." I do not think you should have the defendant bouncing in and out of the courtroom.

MR. YOUNGQUIST: What about presence at a view?

MR. SEASONGOOD: It was suggested that he would be entitled to be present at a view.

MR. DEAN: I withdraw my motion to facilitate the discussion. I do not think it is generally accepted.

MR. WECHSLER: I suggest a counter view, that Rule 41 as it stands is O. K., and that if a defendant is excluded the matter can be handled as it was in the Johnson case under the harmless error rule; and I do not think, as a matter of fact, that Johnson should have been excluded. I think there should have been a retirement for that conference rather than having it in open court. So

even if it runs counter to the Johnson case, I would prefer it as it stands.

MR. MEDALIE: Wouldn't it be all right if we said, "at every stage of the trial except argument of the law"?

MR. WECHSLER: I think he has got a right to be present at the argument of the law.

MR. MEDALIE: It is none of his business.

MR. WECHSLER: I think not.

MR. YOUNGQUIST: It would look rather odd to me to see such an exception in a rule. I move the adoption of the rule, or did you move its adoption?

MR. WECHSLER: Yes.

MR. YOUNGQUIST: I second the motion.

MR. SEASONGOOD: I think that is crippling the prosecution myself, because, you know, it is true that if you get a lying witness and he hears the argument and understands what the pertinency of the evidence is, he conforms his evidence to the law.

MR. WECHSLER: Well, have the argument out of his hearing.

MR. SEASONGOOD: Well, that is all right, but you say "at every stage of the trial." That would still be the trial, wouldn't it?

MR. WECHSLER: I think that kind of discussion