Copy for Mr. Alexander Holtzoff, Secretary.

Wednesday, September 10, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

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Wednesday, September 10, 1941.

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

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

The Chairman. Rule 36.

RULE 36

The Chairman. That parallels Rule 36 of the Civil Rules.

Mr. Robinson. Yes. It has to do with admission of facts and genuineness of documents. The present federal law has no provision on this subject.

The idea of the rule, so far as criminal cases are concerned, is the idea of allowing parties to request admissions of facts and genuineness of documents. The idea is that if it can be worked into the criminal procedure it would tend to simplify that procedure. The proposed rule protects the party toward whom the request is directed where that matter is privileged against disclosure. For instance, in lines 11, 12,

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and 13 the effort was made to obtain that protection.

Beginning at line 9:

"Each of the matters of which an admission is requested, except matters which are privileged against disclosure by the Constitution or laws of the United States, shall be deemed admitted unless"--

And then we go on to a clause which I am sure is subject to question as to what shall be done if the parties refuse the admission.

Beginning with line 12:

"--shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully or should not as a matter of privilege or of legal right either admit or deny those matters."

Then the last clause (b) provides that this admission shall have effect only for the purpose of the pending action and cannot be used as an admission for any other purpose or for any other proceeding.

The main difference from the civil rules is in lines 17, 18, and 19, which I have just read, providing that the party may refuse such an admission on the ground that he should not as a matter of privilege or of legal right make any such admission.

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by whom the trial shall be held if the jury trial is waived. You know that in some states it provides specifically that trial shall be by the judge. In others it is that the trial shall be by a judge except in certain cases, and in those shall be three judges.

I am not insisting on this or moving it, but I am suggesting that the reporter could put in a specific provision of one sort or another to that effect.

There is a Pennsylvania case which held that although, as far as the situation was concerned, the jury might be waived, there was no statutory provision for the trial by any tribunal without a jury. Therefore the waiver was effective, but no tribunal was provided to try the case. We may as well take care of a situation of that sort by mentioning the tribunal.

The Chairman. Aren't there some decisions in the civil cases which hold that a waiver of a jury trial thereby constitutes the judge as referee?

Mr. Holtzoff. That is in civil cases.

The Chairman. Of course, that does not apply here.

Mr. Holtzoff. No. It does not now apply in civil cases.

Mr. Seasongood. Is it permissible to discuss (a)?

The Chairman. Under Rule 39?

Mr. Seasongood. Yes.

The Chairman. Certainly.

3 Mr. Seasongood. I want to call attention towards recognizing the statutes of the United States. There is the question of the comment on the failure of the accused to testify.

There is a statute of the United States which specifically says that in a trial by indictment, information or complaint

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that there may be statutes where you get the trial by jury where you would not have it under the Constitution.

Mr. Holtzoff. I cannot conceive of any such case.

Mr. Wechsler. There are none.

Mr. Crane. Well, suppose there is no statute. What is the harm of having it in because you would not make any rule that would supersede an Act of Congress.

Mr. Robinson. Yes, we can.

Mr. Crane. Yes, after they pass these.

Mr. Longsdorf. There is another aspect that I have in mind. I may be a bit technical about it, but it seems to me that when the law of Congress provides that a trial shall be before a jury it to some extent refers to the Constitution of the tribunal, not merely to the procedure before that tribunal.

5 Now, can we go beyond the procedure to the extent of taking in the constitution of the tribunal before whom the procedure is had? If that is too technical, just let it pass, but I wanted to raise the question. Maybe that is the reason why this language is incorporated.

Mr. Youngquist. I suppose we could do that, because after all that is a part of our practice, isn't it? The procedure is the practice. The constitution of the tribunal may have to be a part of the practice.

Mr. Longsdorf. But as I said, it may be considered very technical.

Mr. Seasongood. Perhaps it is enough to callthis to the attention of the reporter, but it seems to me to present a very serious problem.

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Mr. Youngquist. Maybe it may help if in the construing of these rules the courts are admonished by the Supreme Court not to have any intention of going beyond what probably they might.

Mr. Holtzoff. I think the words "recognized by a statute" should go out.

Mr. Crane. I think the word "preserved" should go out.

Mr. Glueck. It says "shall be preserved" as though we were legislating on the Constitution.

Mr. Wechsler. People may say that "It was fine what you did about preserving the Constitution."

Mr. Holtzoff. I think it has a good moral effect.

Mr. Crane. Then why not put in the constitutional language if you are going to do that?

Mr. Medalie. I do not think we should patronize the Constitution.

Mr. Dean. Another possibility is to put in another rule and call it "Trial by Jury." After the first clause where the right of trial by jury is declared and "that the Constitution shall be preserved inviolate and that the defendant may prior to or during the course of the trial waive a jury trial," with a specific clause.

The Chairman. I think the reporter has the point of view of the committee.

Mr. Medalie. I cannot get quite reconciled to the idea of voicing our approval of the Constitution. I do not think it requires our approval, and I think we are presumptuous in saying it.

The Chairman. I would agree with you if I had not

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Mr. Medalie. It is almost universal.

Mr. Crane. That is the reason why it is bad.

Mr. Medalie. The defendant may move that the indictment be dismissed; otherwise in a month it goes on for trial.

Mr. Crane. The reason why I say this is that there are many delays and I never could see why the court should not control its criminal calendar the same as it does with its civil calendar. It does control the civil calendar and gets the attorneys to trial and often they are more important than many criminal cases which are to be tried and involve huge sums of money. We have the civil calendar controlled by the court because we are accustomed to it. Sometimes the courts are quite arbitrary in exercising their power over that calendar. They make the attorney general and the corporation counsels in our great cities with millions of dollars at stake get there and try their cases or show a cause as to why they are not ready for trial.

When you come to criminal cases a defendant has nothing to say about it except to come in and move to dismiss, but it is a healthy thing in my opinion in criminal cases to have the court control the calendar and find out why a case is not tried by the prosecutor, or find out whether the delay is caused by the defendant.

Why shouldn't it be done? Of course, I am not saying this about federal courts because I am not as familiar with them.

Further, I understand that there are certain reasons why a witness is not ready, and it may not be necessary to disclose that. I think the courts have recognized that. I am not stating this and asking you to adopt it because it can be remedied right

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away, but personally I could never see why the court should not control the calendar in criminal cases.

Now, I did it myself when I was holding criminal court in New York, and it so happened that the district attorney was a good friend of mine and we adopted that practice. The result was that every indictment was dismissed in open court and the court took the responsibility for it and not leave it with the district attorney. Then you adopt that calendar practice and the court has the responsibility rather than the district attorney. You put it in the hands of the court and then he is to blame for the delays. Then there will not be so many improper reasons for the delays, and most reasons are improper.

It relieves the district attorney of a great responsibility by giving the court control over this calendar. The court can then find out why cases are not tried and if they are not going to be brought to trial they can dismiss them.

It relieves the prosecuting attorney of a great deal of responsibility. That is the reason why I would think that would be best because it would give the court some control outside of the mere motion to dismiss. Anyhow, they are never dismissed.

Mr. Medalie. You are just about wrecking the antitrust division, Judge.

Mr. Wechsler. The motion to dismiss is available only in the case of a defendant who has counsel, anyhow. I think we must be careful not to proceed on the assumption that the great bulk of the defendants in criminal courts are represented by able counsel. Most of them are not represented by counsel at all. Of those who are represented by counsel most of them are not represented by able or industrious counsel for the simple

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reason that lawyers, like everybody else, have to live, and because of the fact that in most of these cases there are no fees.

I know of at least one case in the federal courts not far from Washington where there is now a man who has been in a detention place for 11 months. The reason why he has been there is because the United States Attorney has no desire to bring the case to trial. He has no lawyer or anybody else who understands that there must be a motion to dismiss.

I think it would be a great improvement to provide some method for remedying situations like that.

Mr. Medalie. There is only one way to remedy a situation like that and that is to have your calendar of cases. So far as the district attorneys are concerned, I mean district attorneys who want to get them out of the detention room and clean up the jail calendar. I think that it can be done.

Mr. Youngquist. We have a statute in Minnesota which requires that criminal cases where the defendant is in jail shall be tried first.

Mr. Crane. We have that, too.

Mr. Youngquist. When I was prosecuting attorney out in the country, there the court took charge of the entire calendar, criminal as well as civil; but he always gave particular consideration to the wishes of the prosecuting attorney in setting the criminal calendar, because the prosecuting attorney had so many cases to try that they would do it in that way.

I do not see that the government would be in any danger in having the same rules apply as to the calendars for criminal cases as in civil cases.

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Mr. Crane. How about bail cases? I am not speaking about the Federal Government but the state government for the reasons that I have stated. I do not know about the Federal Government, but I do know that some of these bail cases are very bad indeed, and some of them were held up for years and just lost sight of.

Mr. Holtzoff. I do not think that is true of the United States Attorney's office.

Mr. Crane. No, I do not think so. I said that, but from the bench on the Supreme Court I held court in Kings County and it so happened that the jail was back of the courthouse and I went there and went from cell to cell getting some information, and there was a man there who was never brought to trial for nearly a year and 11 months. I notified the Governor about the district attorney. Reasons are not important now, but there he was.

The courts have nothing to do with these bail cases and nothing is said about it. They are moved by the district attorney.

I am not saying that about the federal system because I would like to know more about it and the Attorney General's practice. I am not advocating what I am saying for the federal courts, but I do think that we should not go along blindly and just go on as we have done because everything seems to be all right and no one has questioned it.

Can't we inquire about it and see if it could not be done on the same basis as the civil procedure where the court has control over the calendar? Then no one is to blame except the court.

Mr. Youngquist. I would like to ask a question. When the

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written accusation is filed, is the case automatically on the calendar?

The Chairman. Mr. Robinson says this originates largely from the experience of the director's office. I would like to ask Mr. Tolman to state, if he will, what the practice is.

Mr. Tolman. I think that as a matter of fact there is a great deal of variance with calendar practice in civil and criminal proceedings in the district court. The difficulty arises because of the conditions in the districts such as Mr. Holtzoff has pointed out before. There are places where the court is held only at stated intervals and when the judge may be in the district for only one or two days. On the other hand there are districts like the Southern District of New York where the court is in session most of the time. It seems that you require differences in calendar practice.

I think that as far as the criminal calendar is concerned there is not any practical difficulty about arrangment. The United States Attorneys and the judges get together and work out a system that is most satisfactory. However, there is once in a while some difficulty. There is some delay in jail cases. In those instances, our office, the Administrative office, has been cooperating with the United States Attorney and the

8 judges to work out such difficulties.

We have found out that if the United States Attorneys, as a practical matter, control the calendars it does not cause trouble because the judges assume that they have that inherent power and the United States Attorneys recognize that they have the inherent power to say what the practice shall be.

I think that though there is occasional trouble the thing

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has worked out very well.

The only thing that I think the committee could do would be to possibly state that the control of the calendar is in the hands of the court, as Judge Crane advocates. I think, as a matter of practice, that the court will leave it, where the situation is satisfactory, in the hands of the United States Attorney.

Mr. Glueck. I inquire whether Mr. Tolman or anyone else in that office has available statistics on the point raised by Mr. Wechsler as to the extent to which there is an unreasonable detention in federal cases.

Mr. Tolman. I do not think we have any statistics with regard to the time intervals.

Mr. Holtzoff. I have some information on that. There have been some delays, I think.

I am in full accord with Mr. Wechsler that there should be some remedy, bearing in mind the fact that the defendant is not representedby counsel. However, my observation has been that delays are not due to United States Attorneys. They are due to two facts: first, the interval between the terms of court in rural districts, and secondly the present inability to waive a jury trial. That may be corrected by the waiver of a jury trial.

There are some cases where the defendant wants to plead guilty or the defendant is awaiting the grand jury.

In one or two districts we have haddelays due to the dislike of the judge to try criminal cases. I have in mind a judge who is not dead, ~~but~~ who would pass all criminal cases over the term, ~~because~~ he had a heavy civil docket. We got the

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United States Attorney in and protested because we had so many prisoners in jail.

In any event, one of the checks we have is that the Bureau of Prisons here in Washington keeps a check on the federal jail population, and the Director of the Bureau of Prisons always calls the Department's attention to a situation where a particular prisoner is being kept in jail too long.

So I do not think you have any trouble except perhaps in isolated cases where the United States Attorney is postponing a case because he wants another case to be tried first; but I think that delays--and there are many of them in jail cases--do not grow out of this situation.

I do think the fact that subject to this inherent power of the court, that the control of the criminal calendar should be with the United States Attorney. The United States Attorney parcels out his cases among his assistants. He knows when the witnesses will be available. You will create havoc by having the court take care of that, having the court set cases in disregard of the assignment of work as between the various assistants of the United States Attorney, and in disregard of the availability of witnesses.

We had one district, and the judge is not there now, where the court set the criminal cases. The trouble was that the United States Attorney or his assistant could not know and if the witness was not there on a particular date the judge arbitrarily dismissed the case. We had all kinds of complaints against that judge because of the way he acted in cases in controlling the criminal calendar.

I do not think any evils occur from the control by the

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United States Attorney, because of the departmental supervision. However, I do think that the matter that Mr. Wechsler called attention to should be taken care of, but I do not think theremedy is in the control of the calendar by the court.

The Chairman. What about this phase of it? I know of a manslaughter case involving the mother of our next-door neighbor where the trial was called and where the case was puton the calendar nine times and then each time when the single witness to the accident from Buffalo came down the prosecutor would adjourn it, with the result that finally the witness said he would not come in.

Mr. Holtzoff. That does not arise in our federal system, because in the federal system most of your cases are investigated by the investigating agency, and you do not have that kind of problem.

Mr. Waite. With respect to that situation, naturally I agree with Judge Crane that the responsibility for the procedure should be centered in the court. I do not know much about the federal situation, but I do know that in the state courts we find that where the responsibility is not on the court that the actual court does not know much about what is going on and the calendar falls down.

The court relies on the prosecutor and the prosecutor perhaps relies on the court to keep the docket up, causing a lag of cases or they forget about it and the files are lost, and in places like Detroit there is truly a scandalous situation.

9 Now, it seems that we might properly center the responsibility on the judge and give him the opportunity to carry out that responsibility effectively by requiring the district attorney

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to file with the judge periodic reports of the status of every criminal case on the docket; when the arrest occurred; when the indictment or other accusation was filed; what the situation is, and in the case of long overdue cases to state why it is not up to date.

I do not know whether it would be in order at this time to do that, and I suspect that it is out of order, but at the present I would like to make a motion to the effect that the reporter consider a section requiring such reports from the district attorney.

Mr. Seasongood. I would like to make a motion, to bring the matter to an immediate head or at least to present something. I move that we write into Rule 40:

> "All pending criminal proceedings shall be placed upon the calendar and precedence shall be given to criminal proceedings."

The Chairman. Aren't we up against the practical difficulty that in many districts where there are more than one judge that one will work on the civil calendar and one will work on the criminal calendar, and it would raise havoc if they were compelled to defer the civil list and the equity list and the admiralty list until all criminal work was disposed of?

Mr. Seasongood. If you say that one judge is working on criminal cases that would not affect the civil cases at all, would it?

The Chairman. It would as you stated it.

Mr. Seasongood. With the two judges, for example?

The Chairman. Yes, as you stated it, because it would call for all criminal matters to be disposed of before any other

matter could be taken up.

Mr. Crane. I did not mean that.

The Chairman. Couldn't we incorporate Mr. Waite's idea in it?

Mr. Crane. Yes, I think it is a good idea. I made that suggestion and I included jail cases, but as long as you have the judge exercising discretion that is all right, but why have a judge sitting in court and have nothing controlled by him except the defendant's move to dismiss and have the control in the absolute discretion of the district attorney? I am not saying the Attorney General, because I am not so familiar with that.

But there in the same court the judge sits on the civil side, in the very same court, and makes the corporation counsel and the attorney general of the state toe the mark in civil cases, where millions of dollars are involved, and we get accustomed to that. There he knows all about it.

Why not that same thing in the criminal case? Those things are all in the open. They are a matter of record and anyone can be heard. After all, publicity is the salvation for a lot of our rights.

Mr. Medalie. I think that we are talking about an imaginary evil.

The Chairman. Would you say that is so in a district like mine where there was no criminal case tried for twoyears?

Mr. Medalie. Did the defendants want them tried or the government want them tried? Or was it that the courts would refuse to try them?

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The Chairman. There was no case tried for two years.

Mr. Medalie. Let me say this: If we are going to draw up rules for criminal cases, what right have we to draw up rules with respect to civil calendars? Can we say here that criminal cases shall have precedence over civil cases? What do we have to say about that? Do we have anything to say about it?

Mr. Glueck. Doesn't the Constitution guarantee a speedy trial?

Mr. Medalie. That is an entirely different matter. We are drawing up rules for criminal procedure, and if we begin to tinker with the whole calendar of the court then we are drawing up rules for civil and criminal procedure. I do not think we have a right to do that.

Mr. Wechsler. The court has jurisdiction over both, and if there is a relationship between the two, to which we call attention, I do not think the court is going to feel that we have exceeded our power in making suggestions involving that situation.

Mr. Medalie. Now, let us see what happens here. In New Jersey you say that for two years no criminal case was tried.

The Chairman. That is what I have been told. However, that was several years ago.

Mr. Medalie. That means that you have a man in jail for two years. I just cannot believe it; it can't be.

The Chairman. Mr. Tolman says that he does not think that there is a single district where that condition prevails now or where due precedence is not given to criminal trials.

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Mr. Medalie. In a civil case either the plaintiff wants a trial or the defendant wants a trial or neither side wants a trial. I never heard of judges getting very much excited about cases in which neither side did not go to trial. The case might have gone on the reserve calendar. That is what happens under the practice that we have in the Southern District, where after three tries and the court is not satisfied it puts the case off the calendar. Nobody is affected by that except the mere listing.

If the government does not want to try the case and the defendant is out on bail and if he is not asking for a trial, I do not think there is anything to get excited about unless the government is corrupt, which is an entirely different proposition.

Mr. Crane. I thinkthat Mr. Waite had a very good suggestion and I think he should make it in the form of a motion.

Mr. Waite. I thought that it was out of order.

I move now that the reporter be requested to draft a section requiring the district attorney to report periodically to the court as to the status of every criminal case listed in the court.

Mr. Glueck. In writing?

Mr. Waite. In writing.

Mr. Glueck. Would you say quarterly?

Mr. Waite. I should say that it should be accompanied by an explanation of the reasons for what may be any undue delay.

Mr. Glueck. Do you want to say periodically, and for the purpose of being more specific would you say quarterly or semi-annually?

Mr. Waite. I would leave it to the reporter to figure

out what may be a practical time.

Mr. Wechsler. I second the motion.

Mr. Holtzoff. The Department of Justice now has a system whereby every United States Attorney every six months sends in an individual report of every case in his office which is older than a certain stipulated period.

Mr. Crane. Then why not have it in the rules? Do you have any objection?

Mr. Holtzoff. No.

Mr. Medalie. Are these reports to be made public? Certainly there may be some reason that they do not wish to disclose.

Mr. Waite. My motion was that it should be made to the judge in order that the judge may have the facts in order that he might more properly carry out his responsibility. That is, it would be a report to the senior district judge for him to know.

Mr. Crane. It would be a court record.

Mr. Seasongood. For administrative purposes.

Mr. Crane. If it is a court record, what is the harm in it? There cannot be, because every lawyer can go in and read every indictment filed and find out the date, and so on. That all is apublic record. Anybody can see your record in court.

Mr. Medalie. As for the reasons given there may be cases where you do not get the correct reasons because they do not want them disclosed. The reason which would be given may be a false reason or a diplomatic reason. We know perfectly well that there are certain reasons why certain cases are not tried

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and which are very good reasons and which you do not want to make public.

Mr. Wechsler. There are also reasons that are bad reasons.

Mr. Waite. The purpose of my motion was to give the judge information upon which to act. I take it that he can call in the district attorney and ask him his reasons for the purpose of finding out what the trouble is. I do not have in mind that this is for the benefit of the defendant but for the benefit of the judge. That is my suggestion.

Mr. Seasongood. I would like to amend the motion that precedence shall be given to criminal proceedings. You have it in the Court of Appeals rules. I do not see why you should not have it here. In our district criminal proceedings are always given precedence. If you do that you would only be following the usual procedure.

Mr. Waite. I suggestthat you do not take this in connection with my motion because it seems to me that they are entirely two different propositions. However, I agree with you in what you say.

The Chairman. Are you ready for the question? That is Mr. Waite's motion.

Mr. Glueck. May I ask a question?

The Chairman. Yes.

Mr. Glueck. How far back in the proceeding is it contemplated that this report shall cover? For instance, would you include the time between the arrest and the formal hearing?

Mr. Waite. Yes, it would cover every criminal case before the court.

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Mr. Glueck. Every step?

Mr. Waite. If the indictment has not been filed the court is entitled to know whether it has been and be in a position to inquire why it has not been.

Mr. Crane. That was not my idea at all. I thought that the court would come into the picture when there was an action brought such as an indictment filed or, in the case of a lesser crime, an information filed.

I am afraid that you are going beyond that. It is not the court's power to say or to see that people are indicted, but it is the court's power and it is the court's jurisdiction after an indictment is filed and before the trial begins to control that. However, I think the other matter is a responsibility of the district attorney or the Attorney General as to whether a man shall be indicted or whether he shall be prosecuted in some instances. We have to leave some of these matters to the discretion of the district attorney.

However, when it comes to the question of an indictment which has been filed and it is a public matter in the court, then the court's jurisdiction begins and I thought Mr. Waite's suggestion, at the beginning at least, was good, that it be sufficient to make reports of all those matters pending in court.

Mr. Waite. Don't you agree that the court is entitled to know how many persons have been arrested?

Mr. Crane. I think that is true, but I think that should come in in other ways by making reports, but not to the court. That is a matter for the grand jury, and although the grand jury is a part of the court, it is not a part of the court's duty

to see whether or not an indictment is found; that is the Attorney General's work or the district attorney's work. I think that we should have ways to limit that report to the court on those matters which the court can see and which the court can control effectively, such as the calendar.

Mr. Medalie. I do not agree with you. One of the things that frequently happens in federal court is that cases often start with the United States Commissioner. A man has been arrested and arraigned before a United States Commissioner and no action has been taken for a long time, or the Commissioner is holding the man for the grand jury, or the defendant is awaiting a hearing before the Commissioner or awaiting action before the grand jury. That man is entitled to action, and if he does not get it he is entitled to a dismissal of the proceeding.

Mr. Crane. That may be.

Mr. Medalie. No, that is a fact which is more important than all this talk about the calendar, which I think exceedingly unnecessary.

Mr. Crane. Then I withdraw my remark.

Mr. Glueck. I think that what we are really getting to--and I think it is very important--is some sort of systematic superintendence of the processes of criminal justice by a neutral agency, by a judge, and if there is anything that the entire process needs it is that. The very fact that there is knowledge on the part of the officials all the way down the line that there is such a person, such a body that may interpose or may ask embarrassing questions, should have a very salutary effect upon the whole thing.

Mr. Holtzoff. The Administrative Office which has been established two years functions largely in matters of that respect in the federal court.

Mr. Medalie. We are dealing with a practical situation. In the case of cases before Commissioners in which no action is taken, or where the Commissioner has taken action and sent the case to the grand jury and no action is taken, we should provide for a procedure for the dismissal of the matter and have it come before the judge for that purpose or have some action taken. I think that is far more important than all we are talking about with respect to calendars where each party is able to take care of himself and where the man is not in jail.

Mr. Crane. I withdraw my objection as to the limitation on Mr. Waite's motion. I agree with it.

Mr. Glueck. May I make a distinction between the work of the Administrative Office and the proposed work of the judge? The Administrative Office deals with processes of justice in large, statistics and such, whereas the courts will deal with particular district attorneys. The judge will deal with specific instances in his court.

Mr. Tolman. The Administrative Office goes much farther than that, and where there is an individual instance of injustice they try to reconcile it.

Mr. Glueck. I do not see how they can do that in individual cases.

Mr. Tolman. They do. In very glaring instances we try to do our best to do something about it or we report it to the circuit council in the circuit, which consists of the circuit

judges. They have a great deal of powerand control of the district in their circuit and they can direct the district judges to remedy any specific situation.

Mr. Glueck. A situation?

Mr. Tolman. Yes. They may not direct specific cases.

Mr. Crane. That is an idea of having it done by administrative procedure outside the courts. It should have been taken care of by the courts long ago.

The Chairman. Are you ready for the question?

Mr. Medalie. Do we have to draft any rule setting forth the procedure before the Commissioners?

Mr. Robinson. That is taken up as a special matter, and the next rule takes up the question of dismissal where there is a delay in prosecution.

The Chairman. Are you ready for the motion?

Those in favor of it say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(Mr. Medalie said "No.")

Mr. Medalie. I wish to be recorded as saying "No" because I think that this is a futile rule.

Mr. Dean. I think that in discussing this question we might get a lot of information with regard to how it would operate in a given district. For instance, a district where you have a single district judge and several other district judges and how it would operate in a district where you have only one. I wonder if we could not get any expression from the senior circuit judges, who meet here the latter part of this month, and also from the Administrative Office as to what

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their real problem is.

The Chairman. Would it not facilitate the matter to get the views of the director of the Administrative Office, who is here, rather than bother a conference which has a very busy calendar which must be disposed of in less than a week?

Mr. Crane. I think, Mr. Dean, that this was just suggested to the reporter. Anyhow, I would like to get more information.

Mr. Glueck. We may get more statistics from the Bureau of Prisoners or Department of Justice, anyhow. I agree with Mr. Dean.

ons?

In fact, in each of these I should prefer to have extracts related to crime surveys, statistical reports or expert opinions than get suggestions made here and there by some judge or some United States Attorney.

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Mr. Robinson. Those will be in the next edition, the next draft.

Mr. Glueck. That would be a tremendous help because then we would have the raw material which would tell us as to the real issues involved, the fighting issue, the evils to be remedied.

Mr. Robinson. We would be getting this draft rather voluminous.

Mr. Seasongood. I would like to move that we add to Rule 40:

"Precedence, save and except in exceptional instances, shall be given to criminal proceedings, but where there is more than one district judge in a division, criminal and civil cases may be tried concurrently."

The Chairman. Is the motion seconded?

Mr. Orfield. Second.

Mr. Youngquist. I would be afraid of that.

The Chairman. May we have it put then in the form of an instruction to the Reporter to draft a rule embodying that provision? I think it would be well to get it before us.

Mr. Seasongood. That is perfectly agreeable to me.

The Chairman. All those in favor of the motion say aye.

(The motion was agreed to.)

The Chairman. That brings us to Rule 42, gentlemen.

Mr. Dession. Mr. Chairman, before we leave this I want to suggest a possible rule directed to this same problem of delay. I do not know what you will think of it but it occurs to me that inasmuch as most of our defendants are pleading guilty and one source of delay is the fact that in any important division of a

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district there may not be a criminal term for some months coming up, when a man is there ready to plead guilty and waiting, is there any reason why we could not provide this: If a prisoner wants to plead guilty, wants to waive jury trial, so the only problem now is to get him arraigned, why could not he be taken before the court which would be in session in some other division of that district, possibly even in the next district, in any case the nearest court which is now in session having a criminal term, so that he could be arraigned, plead guilty, and start serving his time, if any, or if he is going to be on probation, why leave him waiting in a county jail several months simply because there is no court?

Now this has been done in England, I understand. I do not know that it has been done in the United States. Maybe it has somewhere.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. Mr. Chairman, may I borrow your word "invite" and invite Mr. Dession to inspect the system we use in California. I do not think we can do it here, but we might look at it. There, a plea of guilty may be interposed to the complaint lodged before a committing magistrate, and if the complaint is sufficient as an information, it, with the plea of guilty, is certified to the superior court to verify the sufficiency of the complaint as an information, and then pass sentence on the plea of guilty.

Now, it took a great deal of trouble to get that introduced in California, and I do think it is working pretty well.

The Chairman. Mr. Holtzoff suggests that the United States Commissioners are not all up to that grade.

Mr. Longsdorf. Oh, I know.

The Chairman. That is, practically.

Mr. Holtzoff. That is, practically.

Mr. Longsdorf. I doubt that it can be done.

The Chairman. Why not optional, and let a judge perhaps designate such commissioners as are willing to perform such function?

Mr. Holtzoff. It seems to me that the suggestion that a plea of guilty could be taken in any division of the district would solve the problem much more effectively. Except perhaps in the month of August the judge is almost always in session in one division or another for some time every month, and we do have a statute which guarantees to the defendant a right to be tried in the division in which he is indicted, but if he wants to waive indictment or ~~wants to waive or~~ wants to plead guilty after he is indicted I think there ought to be a provision whereby he can be brought from one division to another, and that would obviate a lot of delays.

Mr. Dession. I think it would.

Mr. Youngquist. I have an impression that is permissible now. At least it is done in some districts.

Mr. Holtzoff. It is done in some districts. In one of the districts of Georgia they have a practice which grew up as a matter of ~~mistake~~ gradual development, that no matter which division the court is sitting in, the grand jury hears cases from all divisions, can indict for the whole district, and then they distribute those indictments among the various divisions, but the arraignments have to be made in the divisions.

Mr. Dession. That is the hitch, yes.

Mr. Holtzoff. Unless a defendant waives his right to be arraigned in a particular division. Now of course the defendant who is not represented by counsel does not know that he can waive that right and he just stays in jail and waits until the court comes to his division, and for that reason I think this proposal is a very excellent one.

The Chairman. Are you ready for the motion?

(The motion was agreed to.)

The Chairman. Rule 42.

Mr. Robinson. This has already been dealt with at least in part in our discussions, "Consolidations; Separate Trials."

Looking at line 8, paragraph (b), first, does that or does it not change the present federal law?

The Chairman. I wonder why that cannot be combined with the one we had last night.

Mr. Robinson. That is joinder of offenders. This is a matter of joinder of offences or of trials.

Mr. Dean. I think we also discussed consolidation of separate indictments. though, did we not, under that section last night?

Mr. Youngquist. Yes.

Mr. Crane. What number?

The Chairman. Rules 20 and 21.

Mr. Holtzoff. I think this was consolidated and made a subparagraph under 20.

Mr. Robinson. Now, 20 is just the joinder of defendants. That would be the inference. We have another rule on the joinder of offences, but I suppose--

Mr. Holtzoff (interposing). Well, wouldn't it be a good

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idea to have joinder of offences. joinder of defendants, consolidation of trials and separation of trials all in a single rule, possibly divided into paragraphs?

Mr. Robinson. That is what I think would be desirable, yes.

Mr. Holtzoff. I so move, Mr. Chairman.

Mr. Wechsler. Seconded.

The Chairman. Any discussion?

(The motion was agreed to.)

The Chairman. Is there any discussion on this rule before we pass it to the Reporter for combining?

Mr. Medalie. Why do we say "involving a common question of law or fact," when we have a statute, section 557 of Title 18?

Mr. Robinson. It is set out there.

Mr. Medalie. Yes. It has language that is seasoned and under which we have operated pretty well for almost a century.

Mr. Holtzoff. I am just wondering whether if we do not put that into the rules that statute would not be deemed repealed, because these rules have the effect of an act of Congress.

Mr. Medalie. Yes. Why do we have to repeal the statute? We want to keep it alive in the rule, and this is a seasoned statute that has worked magnificently.

The Chairman. It is suggested we use the language of 557 rather than the one we commonly use in civil actions, "the common question of law and fact."

Mr. Robinson. I would like to say to Mr. Medalie that every provision of section 557 will be written in whatever rule

we draft, as far as that is concerned, and the plan is to go a little bit beyond some of the provisions of 557 with regard to liberality of joinder.

Mr. Medalie. Well, have we made it more liberal in this Rule 42?

Mr. Robinson. This section 557 is set out on your left page.

Mr. Medalie. Yes.

Mr. Robinson. In connection with several rules and this consolidation of joinder rule in one rule will mean that whatever provisions of 557 are not taken care of here and are taken care of in some other rule will be brought together in one joint or uniform comprehensive rule.

Mr. Medalie. What is the nature of the language--'common question of law or fact"?

Mr. Robinson. Well, that was just again to submit to you the Civil Rule so you could see whether or not you thought there was any carry-over and desired analogy to follow.

Mr. Medalie. (Reading)

"two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences."

I think that is broader than this "common question of law or fact."

Mr. Longsdorf. Yes.

The Chairman. It is understood that the rule as redrafted will safeguard all of section 557.

Mr. Robinson. That is right.

Mr. Youngquist. May I ask a question of the Reporter?

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You say 'when criminal proceedings * * * are pending." I suppose that means criminal proceedings against a single individual or group of defendants?

Mr. Robinson. Line, please.

Mr. Glueck. The first line.

Mr. Robinson. That would have to be, yes, and will be so stated when the rule is drafted.

Mr. Dean. What is the necessity for the phrase of section 557 which says 'which may be properly joined"? Isn't 557 without that also a classification of what is proper to join?

Mr. Robinson. It seems to me so, and certainly that clause gives the same difficulty in interpreting this act of 1853.

Mr. Dean. I do not recall, but in reading it here, it does not mean much to me, because then you would have to resort back to a large body of case law to determine what you mean, and what may be.

Mr. Robinson. That is right. There has been difficulty in the case law on that.

Mr. Wechsler. There has been difficulty.

Mr. Robinson. Yes. I have observed it.

Mr. Dean. Isn't this sufficient to indicate what is properly joinable?

Mr. Robinson. I think so. In other words, you are familiar with the California statute. There is a discussion comparing this statute with the California statute. Roland Perkins of Iowa made a careful study of it in the Iowa LAW REVIEW some years ago and he pointed out that the California

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statute omits that clause and otherwise is more comprehensive than this. We had that on the other question yesterday, too.

Mr. Dean. I suggest then if we retain 557 we might very well consider omitting that phrase.

Mr. Robinson. That is what we have done.

Mr. Dean. And just use this language of the statute.

Mr. Medalie. Yes, I think we could leave that out.

The Chairman. All right.

Mr. Robinson. It sort of begs the question.

Mr. Medalie. The definition is in the section.

Mr. Dean. Yes.

The Chairman. Go to Rule 43.

Mr. Youngquist. Does 42 (b) change the present practice with regard to separate trials?

Mr. Robinson. That is the question I asked of Mr. Medalie. I would like to know what your view is on that.

Mr. Medalie. Well, that is all for the benefit of the defendant except occasionally for the benefit of the Government when having indicted 8 people one of them has made a perfectly legitimate bargain with the Government to be helpful, and either not to be prosecuted or to be treated with leniency if he becomes a witness or gives other aid. That has been in operation all the time and nobody can ever be prejudiced by not being tried, nor can any defendant be prejudiced when he is tried because someone else is not tried with him, because that other person might never have been indicted with him, even though properly indictable.

Mr. Robinson. The question was whether this was the present law.

Mr. Medalie. I understand that it is.

Mr. Youngquist. I assume it to be a law, but I wanted to make sure.

The Chairman. Any other remarks?

Mr. Longsdorf. Before we pass 42 I want to call attention, and this is for the benefit of the Reporter, if he needs it--I doubt that. There are consolidation statutes all over the United States and a lot of them are very loosely drawn, ambiguous, and the lawyers and sometimes the courts have managed to get confused between consolidation of cases and consolidation of trials, which leaves the two consolidated cases separate to all intents and purposes but merely tried together.

Now on the civil side I know that there were a lot of reported cases where the courts had to straighten that thing out. I think just a little bit of care in the choice of words would prevent that sort of thing happening.

Mr. Robinson. In Massachusetts they handle that very well. (Commonwealth v. McMichael.)

Mr. Longsdorf. Down in Texas they have got a consolidation statute that is just tricky. The consolidation there results in two civil cases being merged into one, and if you did that in a federal criminal case you would amend both indictments.

Mr. Robinson. That is right.

Mr. Medalie. I would call attention again to the excellent New York statute of recent vintage (1936), section 279 of the Code of Criminal Procedure of New York, which was the result of a study of all the existing federal and state

statutes having the same object in view,and having the benefit of all that experience it has worked well and nobody has found any hole in it.

Mr. Robinson. Judge Crane used that statute very effectively in the Lucciano case.

Mr. Medalie. The statute was really prepared with a view to Lucciano.

Mr. Glueck. Now it comes out!

The Chairman. Rule 43, gentlemen.

Mr. Robinson. This question of how far we should go with rules of evidence has been decided on the conservative side, subject to your amendments. The reason for that is, first, the Civil Rules as you see are quite conservative, and this rule stays closely to the Civil Rule on the same subject.

The second reason is, as you know, the American Law Institute is now engaged in a restatement of the law of evidence, of which Mr. Morgan is reporter and therefore it will be a good job, and I think it would be a little bit presumtuous of us to go more far in drafting a rule on evidence until we have the benefit of what that American Law Institute draft will contain; so apart from that as a general statement, I do not believe I have anything further to say--it is just subject to your own examination--except to call your attention to rule 43, page 4, on the right, to recommendations that have come in from various sources, one with regard to the exclusion of illegally obtained evidence, and the other with regard to comment by the court and counsel on the failure of the defendant to take the stand.

In other words, rule 43 (a). At the end of 43 (a), for

your consideration, the proposal reads:

"Evidence shall not be excluded solely because of the fact that in a search or a seizure or other method by which it was obtained there was a failure due to error made in good faith and the exercise of due care to meet all the requirements of the law. Admissibility in each case shall be subject to the discretion of the court. The issue of admissibility shall be raised and determined prior to the trial."

Of course probably that last sentence should be amended, "unless no previous knowledge thereof had been secured by the defendant."

Mr. Holtzoff. I am very much afraid of that, and personally I am in favor of this rule as it is now proposed, but I am afraid that the first paragraph of page 4 might result in Congress rejecting these rules if that paragraph were in them, because it has been the traditional rule of the federal courts as distinguished from many States that evidence illegally obtained is inadmissible. Justice Holmes has emphasized the reason for that, and while there is much that is cogent that may be said in support of the Reporter's draft, and if we were the final arbiter, I would vote for it, I am afraid Congress would reject these rules if this paragraph stays in.

Mr. Robinson. May I suggest for your attention that to consider this question carefully requires discrimination between the types of cases of illegally obtained evidence. There are of course cases in which the violation of the rights of the individual are very serious, very flagrant, and which is inexcusable. On the other hand a case that was called to my

attention at Baltimore in a conference there with the United States attorney a few weeks ago involved a search warrant in which the only mistake was, although the location of the house to be searched was clear enough to particularize it in all details, there was one detail in which the description did not happen to be accurate; that is, it was stated to be on a certain road, whereas that road had had its name changed just a short distance away and was called another road; and the result was that although the search and seizure were made by the officers of the law with due respect for the rights of the individual as far as they could discover them, still that error meant that when the case came up before Judge Chestnut, by the way--and he of course properly following precedent,--he threw the whole case out.

Now in considering this matter of illegally obtained evidence I hope you will distinguish between the cases in which there is a flagrant violation, the sort Mr. Justice Holmes mentioned, that you referred to, as contrasted with what I should say is a technical rule which affords no room whatever for emotionalism to come in to cloud our practical reason.

Mr. Holtzoff. I think Judge Chestnut, for whom I have a tremendous amount of admiration, should not have vacated the warrant.

Mr. Robinson. Suppressed the evidence. It was not vacating the warrant.

Mr. Holtzoff. Well, he should not have suppressed the evidence. I do not think the misdescription of a street by using the old name instead of the new name of the street should have been held sufficient ground for suppressing the

evidence.

Mr. Robinson. That was not quite the case, but even if it was probably he was following the precedents very carefully.

Mr. Holtzoff. Well, assuming however that evidence is illegally obtained, to revolutionize a doctrine that has been sanctioned by the outstanding members of the Supreme Court for years and years, including the present Chief Justice, I am afraid is going to lead us into trouble.

Mr. Crane. I think that you are right about that. Excuse me for putting it that way. I am quite convinced you are. Not only that but the question has been emphasized to make it conspicuous in New York State because we refused to follow--repeatedly refused to follow, openly, the Supreme Court rule in the Allen case away back in 100-something.

Mr. Medalie. An address.

Mr. Crane. Yes, where they broke into an office and took all his private papers and violated every rule of security of your own.

Mr. Medalie. Lottery records.

Mr. Crane. Lottery records and things of that kind. The State court would not inquire into how evidence was obtained, and it was all permitted in evidence. Now, that has not been the rule in the federal courts, and they have a practice, as we all know, of striking out or prohibiting such evidence beforehand and making you return the property and making an order that it shall not be received in evidence, and it is so emphasized by the difference of opinion on the subject, and it is openly done, because when Cardozo was in our court, and afterwards when he was down here and I suppose had to follow

this rule, we discussed it openly, and deliberately refused to follow the Supreme Court on that particular.

Mr. Medalie. You followed Wigmore instead?

Mr. Crane. Well, don't say that, now. My, grief! Don't get me going on that. (Laughter.) It has been done so openly that I would feel uncomfortable, because there is much to be said for this Supreme Court rule. We followed our own precedents and reasons for it, and yet I would not feel comfortable sitting here and voting to do anything contrary to what the United States Supreme Court has decided.

Mr. Glueck. Not only that, Mr. Chairman, but in the mental climate or the political climate of today it seems to me we ought to go very slow in modifying in any way any constitutional safeguard.

Of course, as I think I pointed out previously, and of course you all know this, it always struck me as a very glaring inconsistency of the federal practice that you can kidnap the defendant himself into the jurisdiction and then try him and that is all right, but if you merely seize his papers, that is all wrong. It seems to me the former is an a fortiori case, and I agree with Judge Crane and with Mr. Holtzoff that we had better go very slow on this thing.

There are arguments on both sides, and I have some doubt whether even the very careful language used in lines 4 and 5 of rule 42 on page 4 would not be abused in practice; that is, whether you could not draw in under that formula some "rather dirty business," nevertheless, to use Mr. Justice Holmes' classic remark.

Mr. Robinson. I would be very glad to withdraw it.

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Mr. Crane. That remark was on wire-tapping.

Mr. Glueck. Wire-tapping, yes, but it is all in the family.

Mr. Robinson. We could discuss elsewhere the rest of the rule, but if that is the sentiment of the committee, I would be very glad to withdraw it. It was just my duty, I think, to place the matter before you, because we were requested to.

Mr. Crane. Yes.

Mr. Robinson. And especially with the New York jurisdiction heard from, which is just what we wanted to hear from, because of the two cases of Devore and Adams which they had there, I would suggest we save time, Mr. Chairman, by simply striking this as not being within the scope of our work.

The Chairman. Does someone move to strike 43 (a)?

Mr. Holtzoff. I so move, Mr. Chairman.

Mr. Medalie. 43 (a)?

The Chairman. That is on page 4.

Mr. Longsdorf. Mr. Chairman, before we get a motion on that, here is a thing that has been confronting us all the way through these rules and always will: There are a lot of things governed by laws which are alike in civil and criminal cases, and when you go down to lay out a rule on evidence like 43 of the Civil Rules and then lay down another rule for evidence in the criminal rules, I doubt whether human wit and ingenuity are equal to the task of keeping out of trouble.

Now, I do not want to stir up anything by quoting Dean Wigmore. He has a pretty high standing. I had a letter from him while the Civil Rules were under consideration, and he indicated pretty plainly that he thought evidence was a hot stick

to pick up. Those however are not his words, they are mine.

Mr. Youngquist. I think with respect to 43- (a) we ought to keep thinking about it.

Mr. Medalie. That is the supplement, 43 (a)?

Mr. Holtzoff. That is on page 4.

Mr. Dean. On page 4 of 43.

Mr. Youngquist. That is the one I refer to, yes. I think we ought to keep thinking of it to see if we can devise some amelioration of the harshness of the rule, so far as the Government is concerned, that now obtains. We might consider putting something in, but I am going to vote for the motion.

Mr. Robinson. That is, to strike out at this time.

Mr. Youngquist. Yes.

Mr. Waite. Mr. Chairman, in respect to that motion to strike out, is it intended to cover lines 7 and 8? There seem to be two matters covered by 43 (a). One is the admissibility of the evidence and the other is the point at which the objection must be raised. I take it that that last sentence, "The issue of admissibility shall be raised and determined prior to the trial," is far broader than the rest of the section.

I do not know whether it was intended to be, or not, but there is that very serious and somewhat disputed question as to whether an objection must be raised prior to the trial or may be raised during the trial. I think we might consider that separately from the rest of the problem.

Mr. Medalie. I understand we have judicial decisions on that which generally require the raising of that issue--that is, by motion to suppress--prior to the trial, and the courts

have also held that when your attention was first called to it at the trial--

Mr. Robinson. That is, the defendant's attention?

Mr. Medalie. Yes. Then he may take advantage of it at the trial. That is that Wall case. I will think of it in a minute--one of the early cases in the Supreme Court of the United States.

Mr. Dession. The Weeks case?

Mr. Medalie. No. Weeks was the first case that brought the thing up.

Mr. Waite. People against Adams?

Mr. Medalie. People against Adams simply said that New York could do that sort of thing.

Mr. Waite. The Adams case if I remember right strongly intimated that you have got to raise the question before the trial, and in the Weeks case they said you did not need to.

Mr. Medalie. The Adams case was a New York case that went up on writ of error to the Supreme Court.

Mr. Waite. Yes.

Mr. Medalie. They were not deciding, though they said practically whatever New York said on that was all right. That is the net effect of that case. In Weeks they were free to decide the federal rule.

Then came a case shortly after that, about 1918 or 1919, in the Supreme Court, which said that while you had to raise the question before trial, it being called to your attention that a government agent had sneaked into the man's office and gotten a job and in that way gotten out the documents, and he could not know it until the trial, that raising the objection at

the trial was timely. I think that is what they held, and along that line it was allowed--a reasonable chance for the defendant to raise the question if he did not know about it.

Mr. Robinson. That was the clause that you heard me use when I read it in line 8.

Mr. Medalie. Now, for that reason I do not think we need deal with it at all, because judicial decision takes care of that judicial experience, will go along with it or modify it, and we ought not to straitjacket these things in first.

Mr. Glueck. That is right.

Mr. Waite. It seems to me we ought to have a rule one way or another so that the matter is settled, even if the rule simply repeats what has already been said in judicial decisions. Of course many of our rules here do simply do that.

Mr. Medalie. It is really a difficult thing.

Mr. Glueck. Yes.

Mr. Medalie. In matters of that kind, it is difficult to predict what the future experience might teach us by way of modifying existing rules. I do not think we ought to take a chance on that.

Mr. Glueck. For instance, suppose that the defendant does not discover that this happened until after verdict and judgment. I do not think there are any decisions on that yet, but after all it cuts to the substance of his case.

Mr. Waite. In one state there is a court decision, if that goes in without objection, you cannot take advantage of it later on, no matter why you did not object.

Mr. Glueck. Even though he shows that it was no fault of his not to have known about it earlier?

Mr. Waite. Yes. It has gone in without objection.

The Chairman. Now, are you ready for a vote on the motion to strike rule 43 (a) on page 4?

(The motion was agreed to.)

The Chairman. What is your pleasure with respect to the last section, 43 (d), on page 4?

Mr. Medalie. Well, have we passed on 43 (a) on the first page?

Mr. Robinson. We will go back to that.

Mr. Medalie. Oh, all right.

Mr. Seasongood. Like Mr. Coolidge said of the preacher who preached on "sin", I am against it. I am against this 43 (b). I do not believe it is constitutional. I know the Chairman does not want any long argument, and I won't make any. I think it is both unconstitutional and unjust.

Mr. Youngquist. (a) or (b)?

The Chairman. (b).

Mr. Seasongood. (b).

Mr. Robinson. The supplement.

Mr. Seasongood. I think it is unjust because a person may not be guilty of the particular crime but if he takes the stand he may be asked about previous convictions, and it is quite possible the jury will say, 'Well, if this bird has been in trouble so many times before, it won't hurt to put him in again," whereas he may be guiltless of the particular offence.

I also think it is unconstitutional, because nobody may be required to be a witness against himself, and if the court and/or the prosecutor may urge that there is something against him from his failure to testify he is in effect required to

testify. The statute of the United States as I read it before says that he may at his request and not otherwise, carrying out the constitutional provision.

We have a special provision in Ohio, which I mentioned also on this point of depositions, which it might be all right to refer to for the convenience of the committee. That is Article I, section 10, which says:

> "Provision may be made by law for the taking of the deposition by the accused or by the State to be used for or against the accused, of any witness whose attendance cannot be had at the trial, on which, securing to the accused means and opportunity to be present in person with counsel at the taking of such deposition and to examine the witness face to face, as fully and in the same manner as if in court."

I thought the Reporter might have that to follow.

Mr. Robinson. Yes.

Mr. Seasongood. Now this is where it comes in:

> "No person shall be compelled in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel."

There has been a decision of the Supreme Court of South Dakota, which I can supply. I do not believe I have it noted here, but there is one that is reported in A.L.R. 2.

Mr. Robinson. We have it.

Mr. Seasongood. You have it?

Mr. Robinson. Yes.

Mr. Seasongood. In which it was held that, in the absence

of a constitutional provision the permitting of the court to comment or counsel to comment on the failure of the defendant to testify is a violation of his constitutional privilege.

Now, this is going to be one of the most controversial things that you will raise. It is not of enough importance to my mind to warrant inclusion, even if it were otherwise satisfactory, because we have been told the United States secures convictions or at least persons are found guilty or plead guilty in 92 or 94 percent, and where you have got so much that is useful and good I do not see the use of injecting this controversial question, which is very serious. I mean in the light of this Bruno case which I referred to before, and what we know to be the temper of our Supreme Court to uphold to the utmost the constitutional privileges, the Bill of Rights, and the privileges of the citizen, I think it would be a mistake to include it.

Mr. Waite. Mr. Chairman, I do not need to point out to this group that the unconstitutionality of that provision is highly disputable, and I think that if we here think that it is a desirable provision we ought to leave the question of the constitutionality to the Court where it belongs, because there is sufficient uncertainty of its unconstitutionality to justify our giving it approval.

Well, if any of you were present at the American Law Institute where this provision or a similar provision was discussed, you may remember that I am very vigourously in favor of it, and it was approved at that meeting, but I would like to suggest this, that if we adopt it, as I hope we will, we meet the objection that Mr. Seasongood raises.

The basic objection from the point of view of practicality of such a provision is that if the witness does take the stand he will be questioned as to his prior convictions on the ostensible ground of attacking his credibility, and that is the reason that is given by many defense attorneys for keeping their particular witness off the stand.

So I move that if we adopt it we add to it a proviso that if the witness does take the stand he shall not be cross-examined as to his prior criminal record.

Mr. Wechsler. Then you have a law as well as a provision.(?)

Mr. Waite. You have a certain amount of loss, and I question how much loss that is. The question is whether that interrogation of him as to his criminal record is really proper. It is really not an ostensible breakdown of his credibility, it is an attempt to get into evidence what is not properly to be put into evidence--his prior record.

Mr. Crane. I think the amplification of this statute in our State, which is that they shall not comment, and the judge shall instruct the jury that they must not draw any inference of guilt, that it is continuously disobeyed by the juries, because it is inconsistent with human nature--something stated, of which the defendant has personal knowledge, and is so connected with him that he sometimes is the only one who would know whether it were true or false, and how can the minds of 12 ordinary men, with the transactions as they are conducted in life, be impartial to a man who knowing this, having this special knowledge, refuses to open his mouth?

And therefore I think it works--I know from experience that it has worked great harm to a defendant, moreso than

bringing up all his past criminal record, that he has refused to take the stand, and the attorneys will not take the responsibility of advising their man not to take the stand in the big cases, but in the big cases in New York where a man has refused to take the stand it has damned him and convicted him more than the evidence against him. If he had come forward and said, "I am guilty. I am awfully sorry. I have made an awful mistake. Show me some mercy." He would probably be acquitted in spite of his plea.

But when he just went out, kept his mouth shut, and was through with it, it has worked just the other way, so I am in favor of this, except I do fear the comment end of it by the judge and by the prosecution, because that many times is going to go too far. I would like to see, personally--it is only a suggestion--that he may take the stand, and the jury may draw such inferences as the human mind would draw under such circumstances, but that we had better let it stay there.

When the judge begins to comment and the prosecutor begins to comment you do not know how the changes will be rung upon it, will be very unfair. Now the main objection from my experience is not because of the criminal record but sad to say of men who have been willing--big men, clean men, for a sum, or in one instance in a case I was on personally when I was a young man at the bar where a contractor had a million dollars for laying sewers in the City of Brooklyn and he only laid one block, and they indicted him. They said he had bribed the comptroller. I defended the comptroller.

He never had more than $10,000 in his life. I in my ignorance of youth supposed he was telling me all about it,

and his bank account was all right, but they sprung at the end of the week a bank account of $50,000 or $60,000, and he said he would go to jail before he would tell where he got that money--told me so. But now it turned out, and it was true, too, that he had never taken a bribe, and I acquitted him, but all the same he did not tell where he got the $50,000, when I put him on the stand; but the $40,000--he was a bookmaker for the mayor and most of the officials of the city, and he had a list of what he paid them, and letters, and everything else, and he did not want to take the stand, he would rather go to jail than peach on all his friends and associates. And what are you going to do? So there are lots of reasons.

In another instance a father was appointed to protect his son. So I think it is a wise thing to say, let them draw the ordinary inference--anybody. If a man does not want to take the stand, well, it is up to him, and let him stand for the inferences, but when you come to ringing the changes as a prosecutor will do--should do, perhaps- in a court, I do not know; I am afraid of it.

Mr. Youngquist. Mr. Chairman, I was going to say, I think so long as we have in the Constitution the provision, he shall not be compelled to testify against himself, we should not by indirection undertake to weaken that protection. So far as the practical side of it, as Judge Crane has said, in a number of cases that I have tried in which the defendant did not testify, I found it wholly unnecessary for counsel to comment or for the court to comment. The jury made their own comments after they got into the jury room.

I have never found it to be any serious obstacle to

getting a conviction in a proper case. About six years ago I with a group of other attorneys were defending one of the few cases in which I have been on the defense, a man in a very important criminal case, and there we had the problem confronting us, whether to put the defendant on the stand or not. In fact he would have been the only witness. We finally reached the conclusion that he should not be put on the stand, and that I think is one of the hardest decisions I ever made, so far as I was concerned, by reason of my past experience as a prosecutor and my knowledge that, as Judge Crane has indicated, the failure to take the stand is the most damning evidence against the defendant in the eyes of the jury.

So I do not think we need this. If we put it in you may be sure of one thing--there will be fireworks in Congress, as brilliant as on any other provision that we undertake to recommend.

Mr. Seasongood. Fire-works in the Supreme Court.

Mr. Youngquist. We will never get that far.

Mr. Longsdorf. May I add to that, Mr. Chairman? With apology to Mr. Waite, I know we all want these things in, in a way that will be just, but I think we ought to be very wary about passing on to the Supreme Court a doubtful and dangerous constitutional question that does not come up in the regular order of litigation.

We might embarrass the Supreme Court by forcing it in the consideration of these rules to decide a question that is not ready to be decided, even by implication.

Mr. Wechsler. May I ask a question, Mr. Chairman, about the operation of a provision of this sort in jurisdictions where

it is the law? Does the permissibility of this inference in any way relieve the prosecution of the burden of establishing a prima facie case against the defendant without the benefit of this inference?

Mr. Medalie. No.

The Chairman. I come from a very conservative State that is so conservative that by judicial decision they won't compel a man who never made a salary of more than $7,500 a year but who has visible means of from 8 to 10 million dollars to tell a legislative committee where he got it! So I say it is a conservative State so far as private rights are concerned.

Nevertheless we have had this statute for 30 or 40 years, and I have never known of a case where it has worked any injustice to the defendant but on the contrary it gives him a chance that otherwise his counsel might not let him take if the statute were not there--the very issue that Mr. Youngquist raised, of counsel having to make that decision.

This statute helps the counsel make that decision.

Mr. Longsdorf. Mr. Chairman, we have in California the constitutional provision, lately amended in that respect a few years ago, almost identical with the one Mr. Seasongood read to you, and the legislature has supplemented it with appropriate legislation, and the judges and the district attorneys do now comment upon the failure to testify, and I will venture to say that in my opinion the sentiment of the public throughout the State approves that, and I think the judges approve it.

I think the concensus of opinion is that by suitable comment on the failure to testify the court very often protects the defendant against damaging inferences. I know that

is what some of the judges think. They have said so to me.

The Chairman. This is the type of question that we could discuss indefinitely. We all have convictions on it.

Mr. Longsdorf. But we did have to amend our Constitution to get it done.

Mr. Youngquist. You did?

Mr. Seasongood. So did we.

The Chairman. Are you ready to vote on it?

Mr. Medalie. Before you vote on it I just want to be recorded on one thing in connection with this. What has been said about the need of it is due wholly to a belief that is not well founded.

The prosecution does not lose cases because the defendant does not take the stand and the district attorney is not allowed to comment on it.

Mr. Crane. Right.

Mr. Medalie. If he loses his case it is because he hasn't a good case, it is not a convincing case. Now it is a fact as everybody here has pointed out that that jury knows the defendant has not taken the stand if not even a word is uttered by anybody, that he is the one person who could speak, and no matter what is said to them by the judge they even go so far as to discuss the fact that he did not take the stand.

There is no need for this rule comparable to the dangers of putting it on the books. Now, as to Mr. Waite's suggestion, making a concession to defendants, which as I understand is the English rule, that if the defendant takes the stand he cannot be asked about prior convictions, is nothing but a windfall for habitual criminals and men who have been previously

convicted. In most criminal cases the defendant does take the stand.

Now, what you are doing if you put in this additional proviso is protecting a man with a record, who is going to take the stand anyhow, against an inquiry as to his credibility or his character, and I do not think we ought to do that.

Mr. Waite. Well, I think myself we ought to do that independently of this rule, but my suggestion is that we can get this rule accepted more readily if we have that proviso attached to it.

Mr. Youngquist. At too great a cost though I think to the prosecution.

Mr. Medalie. You say that was not the English rule?

Mr. Holtzoff. In England they cross-examine a defendant as to his prior convictions if he takes the stand.

Mr. Medalie. I understood they do not.

Mr. Seasongood. I understood not.

Mr. Waite. That was my understanding.

Mr. Crane. They have it limited in some way, I know that.

Mr. Seasongood. Yes.

Mr. Holtzoff. There may be a very recent change.

Mr. Crane. I agree fully, just speaking from experience and not from books, that there is difficulty with convicting a defendant when he does not take the stand. The evidence must be strong enough to convict him, and this present rule now works greatly to his detriment if he does not take the stand. I am sure of that, and yet it does seem ridiculous that we could not put into the English language what absolutely

takes effect, for reasons I have stated, that the jury make that strong evidence against him when he refuses to answer the accusation, the facts of which he knows.

Mr. Youngquist. There is nothing in the rule, is there, Fred, outside of this supplement to 43 (b),dealing with consideration of the fact of his failure to take the stand?

Mr. Robinson. No, there is not.

Mr. Youngquist. Mr. Chairman, if there is no other motion pending, to bring it to a head I move that we--

Mr. Waite (interposing). I have a motion, Mr. Youngquist, that before we pass on this, to adopt it or reject it, we amend it by adding the proviso, if he does take the stand he shall not be cross-examined as to his previous criminal record.

Mr. Wechsler. May I ask if Professor Waite would accept an amendment to that proposal, that further consideration be given to other protection with reference to impeachment that it might be desirable to provide?

Mr. Waite. Why, certainly.

Mr. Wechsler. I am not sure. I intended to support that motion, but I am not sure that the single item of protection to which you have referred would satisfy me.

Mr. Waite. Yes, I would be very glad to accept that.

The Chairman. You have heard Mr. Waite's motion.

(The motion was LOST.)

The Chairman. Are you ready for the motion on the rule as it stands? We have a motion to strike.

Mr. Youngquist. Yes.

Mr. Glueck. I move it be stricken out, Mr. Chairman.

Mr. Youngquist. Second.

Mr. Crane. What is the motion?

The Chairman. The motion now is to strike this rule (b) as written.

Mr. Youngquist. The supplement.

Mr. Robinson. Just one word, here. It is not my duty to speak for or against it, but it is my duty to report to the Committee. I have not had a chance yet because the discussion has not called for any information from the Reporter's office, but I should say this is presented because it has been recommended from a good many sources. All the crime surveys have endorsed this proposal, and the various studies such as the Attorney General's survey of crime, and the studies of the judicial section of the American Bar Association, so there is quite a bit of popular sentiment on the matter, that I thought I ought to mention to you as no doubt within your consideration.

One other point has not been mentioned that I can state briefly. At the meeting in New York in June, at which general problems were considered by the annual conference of the Second Judicial Circuit, the question came up of the effect of the present state of the law in police activities, and the view was stated there or pointed out that "third degree" by police officers has a distinct relationship to this rule, that the existence of the rule, the absolute immunity of a defendant from making any statement or being called upon to answer anything in a court tends to cause police officers to beat them up and otherwise violate their rights, because a defendant can say, "You can't make me talk. I don't have to say anything. If I don't talk now it can't be commented on

later in court." That relationship was commented on and discussed with pyrotechnics on both side.

Mr. Crane. Who was telling you that? Who was telling you that?

Mr. Robinson. I am sure I remember who.

Mr. Crane. Did he ever have a criminal case in his life?

Mr. Robinson. Oh, yes.

Mr. Youngquist. Where was this? at the conference?

Mr. Crane. The man was most strongly imposed upon, I reply. What was that?

Mr. Robinson. The National Commission on Law Enforcement and Observance.is the chief source of that view.

Mr. Medalie. I think it is a paper view not founded on experience with the police.

Mr. Crane. I do not think that is any reason for it.

Mr. Dean. If he were beaten up wouldn't he be much more inclined to tell about it on the witness stand?

Mr. Crane. Surely.

Mr. Robinson. Oh, no. That is not the question, at all. It is not a matter of his not wanting to tell about being beaten up.

Mr. Medalie. The Commission is supposed to have studied this constitutional question very thoroughly, and therefore they said "They will beat the fellow up before they get to the court."

Mr. Robinson. That is a very striking statement of the views presented to the Commission.

Mr. Dean. Have you considered the fact that the way that is now worded, "comment by the court," that it produces a lack

of uniformity? If I were a judge and I were commenting on it, I would make an entirely different comment on his refusal to take the stand.

Mr. Crane. That is the point.

Mr. Dean. To-wit--I would say, "Gentlemen, he may have very good reasons,"--I would say it underlined if possible--"for not taking the stand." Now that is one form of comment.

Another form of comment by the court would be adverse to the defendant. In other words, as it is now written--and I think I have seen it in other forms--I do not recall--that inference may be drawn on something.

Mr. Robinson. As to form, this is a form commonly proposed.

Mr. Holtzoff. I would like to supplement Mr. Robinson's enumeration of the various organizations that have endorsed this proposal, by saying that the Attorney General of the United States has on a number of occasions recommended legislation similar to this proposed rule.

Mr. Robinson. Successive attorneys general.

Mr. Holtzoff. Successive attorneys general.

Mr. Crane. What has happened to them? What has happened to the recommendations?

Mr. Holtzoff. The bill did not pass.

Mr. Medalie. I think that is a good caveat for this rule.

Mr. Dean. I think that is the best argument against it.

Mr. Orfield. I would like a point of information. The code of evidence of the American Law Institute suggests the Reporter's rule as Rule 201. I was wondering what the 1941 meeting had done with that rule.

The Chairman. Do you remember, Mr. Waite? Were you at

that meeting?

Mr. Waite. I could not hear Mr. Orfield's comment.

Mr. Orfield. What did the 1941 meeting of the American Law Institute do with the proposed rule of the code of evidence, section 201, which states the Reporter's rule, does it not?

Mr. Waite. Yes. During the period I was there they did not get to it, and I do not think they got to it afterwards. I am not sure of that. I might say this, that at an earlier meeting of the Institute the matter was brought in by the committee. There were 9 on the committee, and there were 7 different ideas as to what should be done. Some of them thought there should be no comment. Some of them thought that everybody should be allowed to comment. One man thought the judge should be allowed to comment but nobody else. Another one felt the prosecutor should comment but nobody else. Another thought that only the counsel for the defense should be allowed to comment, and if he did comment then the others might be allowed to make comment.

Well, the matter came to the floor of the Institute and was very vociferously if not intelligently discussed and the ultimate vote as I remember it was 92 to 45 in favor of the rule as it is proposed here.

Mr. Crane. Why not go the whole way with it? A judge from the northern part of the State came down to New York City to hold court and they gave him the criminal court. and so when the prosecution closed their evidence the defendant's counsel arose and very respectfully said, "We rest." "Well," he said, "aren't you going to put any evidence in?" He says,

"No." "Well, then," he says, "I shall have to direct a verdict of guilty"--which he did. (Laughter.)

I was requested to go see him and tell him this was a criminal case--which I did.

Mr. Wechsler. If the jury is permitted to draw the inference which Judge Crane calls the "normal inference", and if the court is to be permitted to comment generally on the evidence, then I do not see the plausibility of refusing to permit the court to comment upon this item of evidence, because actually the failure of the defendant to take the stand is now becoming an item of evidence in the case, which as a matter of logic it is; so I should think that the particular provision here with reference to comment should go out in any event and that we should take up the general problem of comment by the court when we get to it, since there is a power to comment in the federal courts now.

On the other hand, with reference to the substantive provision itself, apart from the comment part of it, I find it hard to make up my own mind, for this reason: Everybody agrees that an inference is drawn. The effect of the rule that it shall not be drawn is that the jury is required to disobey the instructions of the court or else an occasional jury which is conscientious abides by the instruction of the court, with the result that certain inequality is produced in the administration depending upon that one fact about the attitude of the particular jury.

On the other hand, in spite of the fact that I am therefore disposed to favor this on some conditions, if it stands in its nude form as at present without protection that Prof. Waite's proposal injected into it, I should feel obliged to

oppose it, because it amounts to compulsion.

(The question is called for.)

The Chairman. All those in favor of striking the rule under discussion say aye.

(With a show of hands, the motion was agreed to.)

Mr. Crane. Now, I am voting that way just at present. I think sometime perhaps something will be done with it, but I think we had better not get into this mix-up just now when we are preparing something for the Supreme Court, and let it develop so as to be taken up later on by an addition, if sentiment is strongly in that direction. The American Institute is trying to deal with it. The American Bar Association is.

Mr. Waite. Mr. Chairman, a while ago you suggested we might bring matters in the alternative to the Court. I myself feel that we are making a great mistake in rejecting this. I think it will bring criticism on our whole proposal. We will be considered unduly conservative and anachronistic, which will hurt everything we have done.

At any rate there is undeniably a very strong sentiment outside of this room in favor of some such provision as 43 (b). I would like to move therefore that the Reporter be authorized to bring in an alternative section for submission to the Court.

Mr. Glueck. Second.

The Chairman. An alternative to what?

Mr. Waite. That is, bring it in in two forms.

Mr. Wechsler. An optional section.

Mr. Waite. An optional section such as we brought in and authorized him to bring in in one other respect--I have

forgotten now what it was.

The Chairman. I am wondering how we could do that. In the other instance, we agreed that the subject matter should be covered but suggested two ways in which it might be covered. Now, here, by a very preponderant vote, the Committee have indicated a desire not to cover the subject. The matter might be canvassed by taking the matter informally up with the Chief Justice to see whether he would desire to have us submit it for their consideration. Our report of course to them will be confidential and they can tell us very briefly whether they want it in or not.

Mr. Wechsler. Mr. Chairman, I wonder if we could have a separate vote on Mr. Waite's proposal as a proposal rather than as an amendment?

The Chairman. I see no objection to that.

Mr. Wechsler. That is, that there be a rule of the sort that Mr. Waite has in mind, which will convey maybe the same thing, but there might be some opposition to the amendment by some people who prefer this proposal in its present form.

The Chairman. Mr. Waite moves that rule 43 (b) be submitted in the present form, plus--

Mr. Waite (interposing). Plus the proviso against cross-examination as to his previous record.

Mr. Glueck. You mean you want to make it broader, do you not, Mr. Wechsler?

Mr. Wechsler. Further protection as to impeachment, to really think through the impeachment problem so that what we would do in effect is this--we would not close our eyes to the fact that juries draw these inferences, and that to set

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ourselves sternly against having juries draw the inferences may be asking more of human nature than we can ask, with the result that we get into a situation which in practice is paradoxical and unequal in administration but which on the other hand facing the problem as such would attempt to work out protections for the defendant with reference to the great problem of impeachment, where I think the real problem exists, and I am not content to see it confined to a criminal record, because I think there are other situations in which the defendant is in an unpopular position where if he takes the stand he can be cross-examined in a way that will destroy him on an unjustifiable ground.

Mr. Glueck. Suppose for instance this were limited to comment by the court, and suppose the court were required in line with what Mr. Dean suggested to comment on the various reasonable interpretations of the defendant's failure to take the stand; he might have good reasons as well as a bad one, and so forth. Now, that is the sort of thing you have in mind I take it among the various possible protections.

Mr. Wechsler. I can see a provision of this sort which in actual administration would be a very civilized thing and which would avoid what seems to me the sham of the present situation. I am not impressed with the argument that we should not sanction this because it happens anyhow. The very fact that it happens when it is not now sanctioned by law seems to me to point to a problem that calls for very serious attention, and therefore I have in mind that it may be possible to devise some method of dealing with the problem that will be true to the facts of life and will not significantly diminish

the burden that the prosecution has of establishing a case without this inference, and still will avoid the sham of the present situation and protect the defendant.

The Chairman. Now, you have heard the motion as made by Mr. Waite, enlarged by Mr. Wechsler.

(The motion is LOST.)

Mr. Glueck. In general, Mr. Chairman, are we precluded forever from reconsidering certain aspects of this whole business?

The Chairman. Oh, no.

Mr. Crane. I am very doubtful about it. I wrote just the other way to Mr. Holtzoff when I wrote him with reference to this. I am very much perplexed about it. I do not know, and I am just voting this way now to be safe, that is all. I would like to see it discussed further on more information, or perhaps have them speak to the Court about it as you suggest, to see how far we should go in adopting a question of this kind.

I think it is not answered by saying that some of the States are using it, because I would like to see what happens in more of our large populous cities.

Mr. Longsdorf. Mr. Chairman.

The Chairman. Mr. Longsdorf.

Mr. Longsdorf. May I explain my No vote?

The Chairman. Well, I do not think we need it, because these votes are all tentative.

Mr. Longsdorf. Well, all right, then.

The Chairman. And that goes to this motion and to all the other motions. I do not think any of us should feel bound, having voted one way, and that you have to continue to vote

that way. I think it all ought to be left entirely open.

Now, may we dispose of the rest of this rule? Is there anything else?

Mr. Robinson. Paragraph (a), "Form and Admissibility."

The Chairman. Going back to page 1 of the rule.

Mr. Robinson. Rule 43 (a), page 1, admissibility. The only question that should receive your consideration is in line 5. "Admissibility under the" should be "under the Constitution and laws of the United States," just leaving out the bracket and substituting "laws" for "statutes".

Mr. Medalie. Why do we need this subdivision?

Mr. Robinson. Well, that is just for you to decide.

Mr. Holtzoff. I think this is very desirable for this reason, George, because the Civil Rules have introduced more liberal rules of evidence than have ever obtained or prevailed in the federal courts heretofore.

The civil rule--and this is the same--provides that if either under the federal or the state law evidence is admissible it may be admitted. In other words, whichever of the two rules favors admissibility should prevail in the federal courts.

Mr. Medalie. Well, that is the question of privilege.

Mr. Holtzoff. I beg pardon?

Mr. Medalie. Confidential communications. Suppose the federal law is, as some people consider, illiberal. That is, it is a rule of exclusion.

Mr. Holtzoff. Yes.

Mr. Medalie. And the state law permits it, or the other way around, which is supposed to be the liberal rule. Wigmore thought rules of exclusion sometimes were exceedingly

enlightening.

The Chairman. The rule that lets evidence in is the favored rule.

Mr. Medalie. That is what this rule provides for?

Mr. Robinson. That is right.

Mr. Holtzoff. Yes.

Mr. Medalie. That is supposed to be the more liberal attitude? By "liberal" you mean letting it in?

Mr. Holtzoff. Yes.

Mr. Medalie. That does not necessarily mean liberal.

The Chairman. Oh, no.

Mr. Medalie. That might be conservative rather than liberal. I think they bit off too much in the civil rule.

Mr. Wechsler. Well, anyhow, Mr. Chairman, the problem is not the same here as it was in the Civil Rules. I can see a reasonable basis for the rule that in civil litigation to favor admissibility in general is sound, if the exclusionary rules, except those that are so universally accepted that they everywhere obtain, do more harm than good; but I do not see that in criminal litigation at all, because there are a number of rules of evidence which are special rules designed to take account of the special protections that are required in criminal cases.

For example there is a rule of evidence enacted by Congress which has been interpreted to preclude the admission of evidence obtained by wire-tapping. Under this rule we would adopt the law in those States that holds the evidence admissible, and thus abandon the policy of an act of Congress because some particular State happens to have adopted a different policy

with reference to its own courts. I do not see how for a moment we can on all the complex issues of criminal evidence once and for all favor admissibility wherever there is a rule sanctioning admissibility, even though that may have merit in civil cases.

I do not pass on that at this time. I think we have no escape from following one of three courses of action. I think we can leave evidence entirely alone under these rules. There is no compulsion on us to take them up. I think second that we can examine the special rules of evidence in criminal cases that exist in acts of Congress or by federal decision and decide whether we want to change any of them, or propose that any of them be changed, or, third, we can develop a code of evidence.

Now I think the third proposal or possibility is as impractical as the first--I mean, is as impractical as this approach. I think the first is a practical view of it but may result in leaving untouched problems in connection with which we could be helpful.

Therefore I would propose that the problem of criminal evidence be surveyed by the Reporter with attention to whether or not there are particular rules of evidence in the federal courts that ought to be touched by the rules. If there are we can consider them, when the question comes up. For example there is a special rule of evidence in perjury. I think it is an utterly nonsensical rule of evidence. I think it should be abolished.

I have in mind the two-witness rule and further question as to the possibility of obtaining a conviction by proving

inconsistent statements of the defendant. I think perhaps that second aspect of the rule was demolished by the opinion of Mr. Justice Murphy at the last term; I am not sure. That is typical of anachronistic rules of evidence in criminal cases that survive in the federal system. If we can get rid of them perhaps we ought to do it, but I do not think we ought to follow this method, and I do not think we ought to draft a code of evidence and perhaps we ought to leave the whole subject of evidence untouched.

Mr. Youngquist. If we do that, what rules of evidence will prevail?

Mr. Wechsler. Those rules which now prevail. There is I admit the same doubt in particular situations, whether the federal rule prevails or whether the rule of the State in which the court is sitting prevails.

Mr. Youngquist. Normally the rule of the State in which the court is sitting prevails, but then we have these constitutional prohibitions such as we are adopting, which you mentioned, which modify the State rule to that extent.

Mr. Wechsler. There may be other special statutory rules that supersede.

Mr. Youngquist. Yes.

Mr. Medalie. When you talked about perjury you really were not talking of rules of evidence. You were talking about a rule for testing the sufficiency of a case.

Mr. Wechsler. Well, I think it is a rule of evidence.

Mr. Medalie. Is it?

Mr. Wechsler. I think it is.

Mr. Youngquist. No.

Mr. Medalie. I should not call it that.

Mr. Wechsler. It is a rule.

Mr. Medalie. Let us take the accomplice rule we have in States. You cannot go to the jury unless the accomplice has some form of corroboration.

Mr. Youngquist. Yes, that is right.

Mr. Medalie. Also on the corpus delicti, you have got a rule that is not the rule of evidence but a rule requiring certain evidence before you can go to a jury.

Mr. Crane. You have got to have some corroboration.

It is half past 12.

The Chairman. Judge Crane's motion prevails.

(Whereupon, at 12:30 p.m., the Committee recessed until 1:30 p.m. of the same day.)

NJC

AFTERNOON SESSION

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

Present: Same as the morning session.

The Chairman. Let us proceed.

Mr. Crane. I made a suggestion in reference to this question of the evidence in criminal cases by quoting or referring to what we had in the State of New York, saying that the rules of evidence in civil cases are applicable to those of criminal cases except as modified by this code, and I should think that that would cover it here and would take in the rules of evidence in civil cases in the Federal courts and not leave it open to something that the States might have.

Mr. Medalie. You now have rules of evidence in civil cases covering the practice in Federal courts. That rule is a rule which also abrogates rules of evidence in the Federal courts where there are rules of exclusion, whenever there is a state rule that is a rule of admissibility.

Mr. Crane. Can we improve on it?

Mr. Medalie. I thought we said we did not want this kind of thing in which the state courts could admit evidence excluded under existing rules or statutes.

Mr. Crane. You have to adopt rules applicable in the criminal courts.

Mr. Medalie. If you adopt no rules of evidence, you adopt whatever existing rules of evidence are in criminal cases in the Federal courts.

Mr. Youngquist. Isn't this the situation now? The applicable rules in criminal cases in the Federal courts are those of

the state courts except as they may be affected by a specific Federal statute, such as wire tapping that we spoke about? Isn't that the case?

Mr. Medalie. Yes.

Mr. Dession. I think that is changed a little. In a general way they are supposed to be following the rules of the States, but I think the fact is that the Federal district judges are feeling fairly free to pick and choose. I think they are developing a common law of their own. I do not mean that they are not following the State in a good many instances, but I do not think they feel obliged to whenever they do not like the state rule.

I am bothered by this section because this restricts your Federal court where there is a state act, where usually there won't be -- in general there is no statute. Now, the alternative is to follow the law of the State.

Do we want to tie the Federal judge down to the rule of the particular State in which he is sitting? I do not think so. I would rather leave him free, as he is now, to work out the best common law he can.

The Chairman. How about the Tompkins case? Wouldn't that come in?

Mr. Wechsler. I do not think the Tompkins case comes in, because they are prepared to proceed with this as a procedural problem.

Mr. Seasongood. I feel very definitely you should not, along the lines suggested by Mr. Wechsler before luncheon, adopt the Federal rules on that in the United States courts. The difference between civil cases and criminal is manifest.

Under the case of Erie against Tompkins it is intended that questions of law shall be tried by the laws of the State, in order that the removed case may be reached with about the same results as if it had not been removed.

In criminal law you are dealing with crimes, and your Federal law should be uniform, and your man should not be found guilty under one state of evidence in one jurisdiction and not in another. It works against uniformity in your Federal cases.

The Chairman. But have we anything that can be called a Federal code of criminal law?

Mr. Seasongood. Well, maybe we should have some, as suggested, but I do not think any blanket taking over the rules of the State would be consonant with the idea of getting uniform Federal practice. I think it would be a very happy result if a thing were a crime by reason of some particular evidence in one circuit and not in another.

Mr. Wechsler. If it might be a solution, Mr. Chairman, I should like to advance this tentatively and hesitantly: Take the following action. First have a study made of typical Federal evidence problems, in which I assure you there are some problems, and have them brought to our attention for our consideration and perhaps for a settlement by particular rule; but there will inevitably be a large residue of problems that will not receive attention in that way, and those we would not want to take up in detail.

They could be handled not by this kind of adjustment, but, following Mr. Dession's suggestions, by following the general rule in the Funk and Wolfle cases.

That would be one to achieve relatively broad conception of admissibility, but would still require the consideration by the courts of particular problems as they arise, free from the limitations of the particular state rules in the jurisdiction in which they are sitting.

In other words, we would say we cannot develop a Federal code of evidence because it is too big a job. It is a job as big as the rest of the undertaking, but we can set forth a formula which would set the stage for such, and that is precisely what the Supreme Court had in those two cases.

Mr. Youngquist. Wouldn't that have the disadvantage that neither the United States Attorney nor the attorney for the defendant would ever know what he is going to be confronted with?

Mr. Wechsler. That is the situation at the present time, Mr. Youngquist, and we will continue it.

Mr. Youngquist. If I understand correctly, the judges are supposed to follow the state rules of evidence.

Mr. Wechsler. Subject to the qualifications that were read into that duty by the Funk and Wolfle cases.

Mr. Youngquist. How extensive will the qualifications be?

Mr. Wechsler. Well, as I recollect -- and it is difficult to phrase this simply -- the point of those cases was that the judges should be free to follow rules which have achieved dominance in the system throughout the country, without regard to whether they are applied in the particular jurisdiction in which the court is sitting; or, more specifically, whether they were applied in 1789, which was the crucial test in the earlier cases.

Mr. Glueck. What do they mean by "dominance" in that

connection? They do not mean numerical dominance, so many States for this rule?

Mr. Wechsler. No. I think what they meant is this. You might have a common law rule of evidence which time had cast into the discard. The statutes indicated that there had been large-spread acceptance of another rule. The Federal courts were to be free, without legislation, to accept that view, but I do not think it was conceived of in terms of a counting of heads, but in terms of judicial practice.

The Chairman. Didn't it mean, roughly, to follow the majority rule as laid down in Wigmore?

Mr. Dean. Rather than Wigmore himself.

Mr. Holtzoff. Wigmore is in the minority a great deal on those controverted questions.

Mr. Seasongood. That is no objection. A minority is very frequently right.

Mr. Youngquist. I do not see why we should establish a different basis for the admissibility of evidence than that established by your civil rules, with a single exception, that we should give effect to the specific Federal statutes relating to the exclusion or admission of evidence.

The Chairman. Wouldn't it be well, though, in view of the suggestion that we ought to have some of those specific situations before us, to have a study made and pass this for the time being?

Mr. Holtzoff. I would like to ask a question. If we follow the civil rules it just occurs to me that, for example, in such a case as admissibility of evidence illegally obtained a Federal court in New York would have to admit it and a Federal

court in some other State would exclude it. That would be an undesirable result.

Mr. Wechsler. Precisely. That is the trouble with this proposal.

Mr. Dean. I think that this A. L. I. Code that is being prepared is the first intensive effort to make a code available. I think it will be available in a few months.

Mr. Wechsler. There is a tentative draft available.

Mr. Dean. And that would justify us in passing this thing a while, together with the other reason mentioned.

The Chairman. All right. We will pass Rule 43 tentatively, while the study is being made by the reporter.

Mr. Holtzoff. I think Rule 43 (b) and (c) deal with a different topic, and I am wondering whether the action just now taken should not be limited to Rule 43 (a), because Rule 43 (a) is the only one that relates to admissibility of evidence.

The Chairman. Let us consider 43 (b). Is there anything in there that is objectionable?

Mr. Seasongood. In line 18 it says that the Government may call a person who is adverse and cross-examine him. You cannot do that with a defendant. He does not have to testify.

Mr. Holtzoff. I think that means a hostile witness. I think that is what this means.

Mr. Youngquist. It means a person other than the defendant.

Mr. Holtzoff. Perhaps that could be clarified by using the word "hostile."

The Chairman. "Call a witness other than the defendant."

3 Mr. Youngquist. We had been using the word "adverse"

contradistinction to the word "defendant." I think that is sufficient.

The Chairman. Is there anything further on (b)?

If not, are there any suggestions on (c)?

Mr. Longsdorf. Did we pass (a)?

The Chairman. No. (a) is resubmitted to the reporter.

Is there anything on (c)?

Mr. Seasongood. Well, at some place we have got to consider this thing that has been raised about not limiting cross-examination to a matter brought out in chief. Is this the place for that?

Mr. Robinson. That again was a thing of great controversy in drafting the civil code, you know.

Mr. Holtzoff. My recollection is that the civil rules as originally submitted to the Supreme Court gave a broader scope of cross-examination, and the Supreme Court changed it before it promulgated the rules and ~~admitted~~ omitted that provision about not limiting cross-examination to matters brought out in chief.

Now, I presume that action in changing the proposed rule was approved by the Supreme Court, and I do not see why it should be any different or broader in criminal cases.

Mr. Seasongood. I do not, either.

The Chairman. There is nothing on (c).

Is there anything on (d)? I take it not.

Mr. Dession. Just one question. Would there be any advantage in giving the court power to require affirmation by the witness rather than an oath where the court had reason to believe that an oath would not mean much to a particular witness?

Mr. Robinson. It is a little hard to amend that (d) in order to bring that idea out.

Mr. Dession. I have two thoughts on the question of an oath, and one I do not advance too seriously, because I am a little doubtful about it myself, but I would rather get rid of the oath and get the magic element out of it, and have everyone affirm, but I do not suppose that tha. is a matter to be worried about too much. I think it would make it a little more modern.

My other question is whether the court ought to be able not to accept an oath in some cases or require an affirmation.

Mr. Robinson. In other words, leave it up to the court rather than up to the witness? This leaves it up to the witness to choose.

Mr. Dession. I would not require him to take an oath. My point is, would it be well not to allow him to take an oath when he wanted to let him take an affirmation instead?

The Chairman. In other words, the court would look at a man and say,"Well, it does not mean anything to this bird. All we will have to take from him is an affirmation."

I have had judges in the middle of an examination suggest that the witness perhaps would like to be resworn and start afresh.

Mr. Robinson. Before a jury?

The Chairman. Yes.

I am afraid that would be a very hard rule to write out, Professor. Do you want to try it?

Mr. Dession. Well, you say at the option either of the court or the witness.

Mr. Holtzoff. If a witness has not much regard for an oath,

he is not going to have any regard for an affirmation.

Mr. Dession. I suppose not.

Mr. Holtzoff. Why have an affirmation?

Mr. Dession. I suppose that would work with a man who is religious or a liar. Of course, if he is a liar he would lie anyway. I suppose the purpose of the oath is to catch that fellow who is worried about the oath and who would lie otherwise.

The Chairman. Is there any question on (e)?

Mr. Medalie. Why do we need it, except that it is in the civil rules, and I wonder why we ever needed it in the civil rules? Whatever created the adoption of that as a civil rule? It is just what judges and lawyers ordinarily do. We do not need a rule on that.

Mr. Longsdorf. Sometimes you do it by documentary evidence.

Mr. Medalie. The things they are allowing in (e) are things they are always doing.

The Chairman. Except in some jurisdictions they have a way of saying they won't receive anything on a motion that is not either documentary or taken from a witness in open court.

RULE 44

The Chairman. All right, gentlemen. We will pass on to Rule 44.

Mr. Robinson. Proof of an official record.

Mr. Seasongood. I do not want to be obstreperous, but 43 (e) says:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits."

Suppose it is of record. Can't you supply it by affidavit? Suppose you plead former jeopardy or something that is a matter of record. Can't you put that in?

Mr. Robinson. Doesn't the next rule take care of that? It is proof of an official record. That proof of an official record happens to be the same as the civil rule. You notice a long list of United States statutes on Rule 44 to the left, in which many special statutes have been passed to authenticate or provide for the admissibility of official records from various Federal officers.

It may be hoped that we can provide by general rule, such as 44 (a), that official records of that sort may be admissible without special statutes. That is one object of the rule.

4 Mr. Seasongood. Well, that is just how it is admitted, isn't it -- the form of authentication of official records? Why can't you just make a motion and report it with an affidavit and attach a certified copy of the record? This says only on matters not of record.

The Chairman. Well, if you have an authenticated copy don't you hand that to the court without any affidavit? It speaks for itself, and you won't need an affidavit if you have a record, or the record might be a record in the present cause, and the court would have it before him and would not have to have it authenticated.

Mr. Seasongood. No. It takes judicial notice of its own records. Well, maybe that is hypercritical.

Mr. Longsdorf. I would like to call attention to that recently enacted statute making composite records admissible when proved by one foundation witness, instead of calling every

person who contributed to the making of the record. That is a pretty important statute, and it opens the way to proving records of that kind without calling a multitude of witnesses from all over the land that they made the original entry which went into the record.

Mr. Robinson. Is that official records?

Mr. Longsdorf. No. I think that includes private as well as official records. The private records would have to have foundation proof by the persons who made the original entries.

Mr. Holtzoff. There is an Act of Congress, passed three years ago, which governs that.

Mr. Robinson. We have that statutory assistance for us now, which lets in the kind of evidence that was very difficult to get heretofore.

The Chairman. Is there anything further on (b) or (c)?

Mr. Medalie. Are you dealing with Rule 45, Subpoena?

The Chairman. 44 (b) and (c).

If there are no suggestions on those, we will proceed with Rule 45.

RULE 45

Mr. Robinson. Here again it is felt that the procedure under the civil rules would be the same. It could very well be the same for criminal cases. So far we have not found any reason for differing.

Mr. Medalie. There is only one question that would be raised, and that is the quashing of a subpoena for the production of documentary evidence:

"Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the

reasonable cost of producing the books, papers, or documents."

Now, that will be a great burden on indigents or poor defendants or those who have extremely limited funds. It is a custom to produce records. If they get into the habit of coming into court and asking them to pay their expenses, you are going to have difficulty, because many of them cannot comply with that.

Mr. Robinson. Of course, this is in the discretion of the court.

Medalie. Yes.

Mr. Robinson. Can't it protect an indigent defendant?

Mr. Medalie. Well, it might.

Mr. Robinson. In cases where the court feels that the party can pay, I suppose it could be well ordered.

Mr. Medalie. Well, you have some difficulty with that. Suppose a man is tried in Trenton and there is a record in Hoboken, and he has not the money to pay for the carting of a load of documents. There is nothing to indicate here how that can be looked after.

Mr. Youngquist. Doesn't the Government pay the cost of subpoenaing witnesses for an indigent defendant?

Mr. Holtzoff. Only the witness' fee, but not the cost of preparing voluminous documents. They pay only the mileage and the fees for a witness' attendance.

Mr. Medalie. But there are defendants who are not indigents; they are simply poor.

Mr. Youngquist. Is that provision for reasonable costs in the civil code now?

Mr. Holtzoff. It is in the civil rules now, I think.

I have considerable doubt as to whether this is proper for the criminal rules.

Mr. Youngquist. Has it ever been the practice, prior to the adoption of the civil rules, to pay reasonable costs?

Mr. Holtzoff. Oh, no. It was along in 1938 when the civil rules were adopted.

Mr. Medalie. Of course, even prior to the adoption of the rules, whenever there was a burdensome or an oppressive one, usually issued by the Government in the course of an investigation before the grand jury, and it took practically all of a man's or corporation's records, a motion would be made to suppress or modify the subpoena or to relieve the witness of much of the burden of it. That has been a recognized practice.

Mr. Youngquist. Oh, yes, that would be proper, but has it ever paid the cost?

Mr. Medalie. I never heard about it.

Mr. Youngquist. I never did, either.

Mr. Medalie. Now, of course, it is recent. If someone wanted me to cart my library and my files down to a courthouse in Philadelphia, I think I would like to be paid all the packing expenses and the cost of the truck and everything else.

Mr. Robinson. I think that Federal Statute 653, Rule 45, page 3, to the left, would help to take care of that. It is a statute for indigent defendants.

Mr. Medalie. The trouble is they are not all indigent. A man making fifty or sixty dollars a week is far from indigent, but he cannot afford those expenses. A small businessman making $5,000 a year is not indigent, but he cannot afford such things.

Mr. Holtzoff. ~~That~~ Rule is limited to the witness fees. It

would not apply to such costs as carting a lot of materials down to the courthouse.

Mr. Youngquist. The trouble is the first clause limits it to witnesses.

Mr. Medalie. Now, there are going to be a lot of nice parties on this that the Government is going to pay on anti-trust preliminary inquiries before grand juries. They have not been paying that, have they, except witness fees?

Mr. Robinson. Do you think the court will make them pay it?

Mr. Medalie. The Court cannot say that the American Telephone & Telegraph Company is not going to be paid for it.

Mr. Robinson. It is left to the option of the court.

Mr. Medalie. I think some day some of these terrible corporations are going to raise a question about it.

Mr. Youngquist. I do not think there is much danger about that.

Mr. Medalie. You mean they are too anxious to sue the Government?

Mr. Youngquist. I am impressed by the statement you made that the defendant who is not indigent but poor may be subjected to what to him is a burden.

Mr. Medalie. It is easy enough for him to parcel out something which is paid in installments, but this has to be paid for at once.

The Chairman. Well, is there a motion one way or another on this last clause?

Mr. Orfield. I move that it be stricken altogether.

Mr. Holtzoff. I second it.

Mr. Medalie. I think there ought to be another provision,

"may quash the subpoena or modify it or give the witness any other relief that is reasonable." For example, instead of having to produce all of his ledgers or all of his correspondence over the last sixteen years.

Mr. Youngquist. Would not the word "modified" be enough?

Mr. Medalie. Yes, "quash or modify."

The Chairman. Are you ready for the vote? All those in favor of the motion as modified say "Aye."

(There was a chorus of ayes.)

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

The motion is carried.

Mr. Longsdorf. Is it desirable to make any provision for releasing papers which are of great value or immediately necessary to the witness, for instance, a promissory note of value, not due but which may become due and require presentment, and be tied up in court, or current records or corporate records?

I have never been able to find anything in the books that dispose of that question or give us much guidance.

Mr. Medalie. I think that ought to be covered. It really represents a definite evil around Federal courts.

Mr. Longsdorf. There was one case where they dragged all the books out of one State and paralyzed the business, not only in criminal cases but in civil cases.

Mr. Medalie. It is a burden in criminal cases, because during the progress of investigation it sometimes covers many months, and not infrequently a year or more. Government counsel has papers brought into the grand jury and keeps them.

Mr. Holtzoff. Iwould like to know what right we have to keep the papers.

Mr. Medalie. The theory is that it is a grand jury record. I doubt that it is a sound theory. It will be brought up in discussion if we do not cover it, and I think we ought to do something about it.

Mr. Longsdorf. We had some books that went up as original exhibits on appeal one time, and through some unaccountable way they got lost. They were engineer's handbooks of great value, and he never did get them back.

The Chairman. Is there any way now of requesting such documents once in possession of the grand jury?

Mr. Medalie. You can make a motion, and you get a cold stare from the judge, district attorney, or United States Attorney, who assures them that they are being worked on.

Mr. Holtzoff. I do not think that is true in all districts. In some districts you won't get a cold stare.

Mr. Dean. There is a recent decision of the district court--I do not know whether it is reported -- in the fertilizer case in ~~district of~~ North Carolina, where the grand jury impounded some records, and they were in the grand jury's custody until the time for trial.

Mr. Holtzoff. Suppose the term of court had ended and the grand jury had adjourned?

Mr. Dean. I think they were deposited with the clerk of the court, but they were in the custody of the grand jury.

Mr. Medalie. Actually, the United States Attorney keeps those papers. There is a reason behind that. In a mail fraud case if you returned the papers to persons who produced them, you would never see them again. On the other hand, there are any number of reputable people who produce papers and can be

trusted. Also, photostatic copies can be made.

Mr. Youngquist. Doesn't that leave it discretionary with the court?

Mr. Medalie. Yes, but I think if we stimulated the court with something to indicate that, it would be better.

The Chairman. Do you want to formulate a proposed rule?

Mr. Medalie. I had better write one overnight. I would rather not do it by casual dictation -- anything that is as complex and technical as this. That might not cover every situation.

Mr. Dean. There are two suggestions I want to make. Is Rule 45 designed to apply to grand jury subpoenas?

Mr. Robinson. I think so.

Mr. Dean. That is what I assumed, but I wanted to make sure.

It is also assumed by everyone that knows subpoena process runs out of the commissioner's office? Is that correct?

Mr. Robinson. It is not provided for here.

Mr. Dean. I just wondered if it might not be read that way and whether we should not make it clear.

Mr. Robinson. Sometimes it is issued ~~to~~ by the clerk of the court under the seal of the court. The commissioner has no seal.

Mr. Medalie. That raises another question of practice. Now, in New York we do not go to the clerk and have him write out the name of the witness that is to be subpoenaed, and I do not think that the defendant in a criminal case ought to be in the position of telling the Government whom he is subpoenaing. The Government does not tell him who they are subpoenaing.

The defendant ought to have the right to issue subpoenas.

He can get the form fro the clerk. In practice in criminal cases in state courts that certainly works.

Actually, in the Southern District we do not have the clerk write who is going to be subpoenaed. He has forms and he uses forms.

Mr. Robinson. The clerk will sign those forms in blank.

Mr. Medalie. Yes, and I do not like to have him put in the position of getting the name. Why should a subpoena for a witness be issued by a clerk in the year 1941?

Mr. Robinson. Don't you think that, much as it is done in state court practice, the clerk can sign the subpoena in blank?

Mr. Medalie. In New York -- I suppose everywhere else -- attorneys issue their own subpoenas.

Mr. Holtzoff. I think that is a minority, just in New York.

Mr. Medalie. I think that is a minority that should be enlarged.

Mr. Seasongood. I do not think so.

Mr. Medalie. You would provide that every witness should become a matter of record?

Mr. Seasongood. It is with us. You have to leave the name with the clerk.

Mr. Robinson. You can see the return at the marshal's office.

Mr. Seasongood. Yes. You can see the praecipe for the witness.

Mr. Youngquist. Under (c) the issue may be made by any person who is a party and there does not need to be a return.

Mr. Longsdorf. May I call attention to what we left

standing in Rule 4? The warrant shall be signed and dated by the clerk, and so forth. That is all you want in the subpoena.

Mr. Medalie. What is the point in having the clerk issue a subpoena?

Mr. Holtzoff. Well, he should issue a subpoena duces tecum, so that the attorney does not issue a long, broad subpoena.

Mr. Medalie. Getting back to our practice in New York, that is exactly what we do.

Mr. Holtzoff. But you do not do it in the Federal court.

Mr. Medalie. The clerk does not protect anybody by issuing a subpoena duces tecum or the ordinary personal subpoena. Nobody gets any protection by what the clerk does. What is accomplished by the clerk's issuing the subpoena practically and actually on the say so of the lawyer? I think it is a very archaic thing.

Mr. Holtzoff. Isn't it intended to protect against unscrupulous lawyers' abuse of process?

Mr. Medalie. Well, an unscrupulous lawyer goes to the clerk and says, "Give me a subpoena duces tecum," leaving in blank the documents to be produced, and then he puts down enough to fill a warehouse.

Where is the protection to the honest witness? I do not think that that practice gives protection to anybody. I do not see why lawyers cannot be trusted.

On the other hand, a person who receives a burdensome subpoena can always move to have it modified. Even if it was not provided, he would still have that right.

Why should a lawyer have to run to the courthouse? I will go back to my district. Suppose he lives in Hudson, Columbia

County. The nearest Federal courthouse is exactly three and a half hours away by train or automobile. Why should he have to go to the clerk of the court and get subpoenas, especially if the case originated in his locality, and he can serve people there. Why should he have to do that?

Mr. Glueck. Doesn't he send his office boy, anyhow?

Mr. Medalie. Well, a lawyer in Hudson, New York, cannot lightly afford, because of the client he is likely to represent, to incur the expense of a railroad ticket to New York and back.

Mr. Youngquist. I think you must have a subpoena issued by the clerk as a foundation for contempt proceedings.

Mr. Medalie. If we provide that you do not need to do that, you can go ahead with that. The foundation for the contempt proceeding is the fact that the person has been served and you have proof of service.

Mr. Youngquist. Of course, you do it in effect, but should you vest a private person with such powers?

Mr. Medalie. He has such powers, except in form.

Mr. Holtzoff. That is the New York State practice.

Mr. Medalie. It works.

Mr. Youngquist. In Minnesota we get a subpoena in blank, whether to a person or a subpoena duces tecum, fill in the name of the person, fill in the documents or objects that we want brought in, and serve it ourself. The clerk issues the subpoena under the seal of the court, and we fill in the name and material.

If we want to make a return, we can. That would be necessary if there were to be contempt proceedings. Otherwise we do not.

Mr. Medalie. See what happens in a New York case. The lawyer takes a pad that is full of subpoenas, ordinary subpoenas, and subpoenas duces tecum, fills it in, sometimes attaches a long list of typewritten sheets giving the details of what he wants. A process server serves it. No return is made. You do not need a return.

If the witness shows up, well and good. If the witness does not comply with it when he takes the stand and produces only part of the papers, you show it to the judge, offer it in evidence, or whatever you wish.

If he fails to appear, you make an application to the court on your affidavit of service with a copy of the subpoena, and the court takes appropriate action.

There is no mystery about the clerk issuing it, particularly when we know that the clerk really does not have anything to do with the subpoena except give someone a blank piece of paper with his own name on it and the seal of the court, collecting a fee on it.

Mr. Waite. I agree with Mr. Medalie that it is only a matter of form, but I think it is a very important matter of form.

If John Citizen gets an order from Attorney Joe Zilch down in the next corner to appear in court at a certain time and testify, he says, "Who the devil is Joe Zilch? I am not concerned with orders from him."

But if he gets that same subpoena from the clerk of the court to appear and testify, his mental reaction is extremely different.

Mr. Medalie. Now, this is what happens in those subpoenas,

according to New York statute. The clerk issues the subpoena, and he can issue it in the name of the court, and also on a subpoena duces tecum he puts down the name of the judge. All you are dealing with then is the form of the subpoena.

Mr. Waite. I agree with you as to the matter of form, but it is an extremely important matter of form whether the man subpoenaed is ordered to appear over the name of the clerk of the court or over the name of the lawyer Joe Zilch.

Mr. Medalie. What difference does it make if it has the name of the Justice of the Supreme Court, whose name is written in the subpoena and whom he has never heard of? He is allowed
7 to add the judge's name without going there.

The Chairman. The attorneys in my State issue subpoenas attested by the Chief Justice, and we sign the name of the clerk of the court and we sign our own name. Were there any abuse of the subpoena power, the punishment of the lawyer is very much more than ordinary, routine infractions of rules, because the court realizes it is something subject to abuse. I have never known of any man in twenty-five years, except one, who was punished for that.

Mr. Waite. It comes out ostensibly over the name of the clerk or some official. That is what I am driving at. I understand that Mr. Medalie's proposition is that any official name is completely dispensed with.

Mr. Medalie. No. Put that in the subpoena to give it all the form and the pomp it needs. They are printed.

Mr. Waite. Perhaps I do not get the point.

The Chairman. We have everything except the actual signature of the clerk, and that is signed by somebody other than

the clerk.

Mr. Waite. I misunderstood.

Mr. Medalie. It was not the form of the subpoena I was concerned with. I was concerned with the need of going to the clerk and paying the fees for the issuance of papers that the lawyer could issue himself in exactly the same form.

Mr. Youngquist. I misunderstood you, too.

Mr. Medalie. I see no need for going to the clerk. I think that outside of metropolitan areas this thing would be just as much appreciated as it is in our large cities, where it is easy to go to the clerk's office.

Mr. Crane. May I ask, with reference to that practice, where the clerk does issue the subpoena and you want ten or fifteen, does he have to sign every subpoena?

The Chairman. Yes.

Mr. Youngquist. With us you may write in any number of names in a single subpoena.

The Chairman. But the subpoena is signed by the clerk per a deputy clerk.

Mr. Crane. He signs one subpoena with all the names in.

Mr. Youngquist. He signs one subpoena in blank, and the attorney may write in the names he likes in the original subpoena.

Mr. Crane. When you come to serve it, you serve him with a copy?

Mr. Youngquist. Yes.

Mr. Crane. What is the value of the clerk's signature?

Mr. Youngquist. My understanding was the same as Mr. Waite's, that the subpoena was not to bear the name of the

clerk or court, simply the name of the attorney.

The Chairman. Precisely the same form except that the clerk does not sign his name -- either by the clerk or the deputy -- but his name is signed by the attorney who issues the subpoena. He puts his name on the right and his own name on the left.

Mr. Medalie. Or with the name of the judge.

Mr. Holtzoff. We do not sign the name of the clerk in the state courts.

Mr. Medalie. That is right.

Mr. Holtzoff. Only the attorney's name.

Mr. Medalie. That is right.

Mr. Holtzoff. But we attest the name of the Justices of the Supreme Court.

Mr. Medalie. As a matter of fact, I cannot even tell you now what the form of a subpoena in New York is, because people come when you serve them, and I do not think anybody looks at it except as a direction to come to court, and they would be scared to death not to come.

The Chairman. I know the one in Delaware better than the one in my own State. It says, "Fail not in penalty of fifty pounds."

Mr. Youngquist. I move that 45 (a) be rewritten to conform to that suggestion.

Mr. Seasongood. In our district you always have subpoenas issued by the clerk. Nobody fills them in later. You have a praecipe for the subpoena mentioning for whom you want the subpoena, and the clerk turns it over to the marshal for service.

The only advantage of this other method is that nobody knows who the subpoena is for. You ought to know. If you know the Government has subpoenaed a witness, then you do not have to subpoena him also. I do not see why there should not be disclosure on both sides as to who the witnesses are.

Mr. Medalie. Is that really the purpose?

Mr. Seasongood. I do not know if that is the purpose, but it is the result. You do know who is subpoenaed. There is no use of having double subpoenas.

Mr. Youngquist. The whole purpose of the subpoena, as I see it, is to bring witnesses into court.

Mr. Medalie. I think originally the clerk issued them because it was good business for the Government or the King, or whoever it was, and he collected fees.

There is another thing broken down now. Your office boy, if he is over 18, can serve a subpoena for you. You do not have to depend on the sheriff or the marshal. If someone in your office wants to serve it, he will do it at 2 a.m. The marshal won't.

Mr. Youngquist. The return of the official is prima facie evidence of the service. You get a party who is not official, an office boy or someone like that, and there may be a question as to the validity of the service.

Mr. Medalie. That does arise occasionally, but rarely. I think it is negligible, however.

Mr. Dean. You have the contract of two methods in the Southern District of California, because there in the state courts all processes are served by boys in the office. When I was office boy I stayed up all night waiting to serve people who

were at the theatre. But when you went into the Federal court you could not do that. You had to make out your praecipe, and the marshal served the subpoena, and the clerk issued it.

Mr. Seasongood. The marshal will serve the subpoena.

The Chairman. You must have a good marshal. I hate to think what would happen in some of the districts if you had to wait for the marshal to serve a witness who did not want to be served.

Mr. Seasongood. We have no trouble in getting process served. They are very accommodating and will go at any time of the day or night.

The Chairman. Well, now, there is a motion, gentlemen. Is there any more discussion?

If not, those infavor of the motion made by Mr. Youngquist say "Aye."

(There was a chorus of ayes.)

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

The motion is carried.

Is there anything further with reference to (b)?

Mr. Dession. I wonder if there ought to be anything governing the procedure that follows bringing this stuff in. I do not think there is any problem where you are not dealing with large volumes of papers, but where you have a large number of papers there is a diversity of rulings.

If a person calling for those cannot see them until the witness is on the stand, it is very time-consuming. Some courts that I know of make orders for inspection before trial. I do not know that there is any uniformity of practice on that, and I am not so sure that there ought not to be some rule.

Mr. Holtzoff. You cannot have inspection before trial in a criminal case.

Mr. Dean. There was one particular case where subpoenas were issued at the instance of the Government, the trial date being fixed. There were three truckloads of documents. The Government then insisted on an inspection of all of these documents. The judge in the meantime had postponed the trial. We fought off the inspection of these documents prior to the trial and then moved also to change the return date of the subpoena.

I think there is something to be said for it in the case of a large number of documents and inspecting them for some reasonable amount of time before you actually put them in.

Mr. Holtzoff. I thought the technical rule is that when you subpoena a document and the document is produced that does not give you the privilege of inspecting it before you put the witness on the stand.

Mr. Dean. This was an inspection two months in advance.

The Chairman. I am curious to know what was the origin of that right to inspect it two months in advance.

Mr. Dean. The subpoena was issued and the trial was to go on May 5th, but it did not. We did not want to give them up. The judge said to give the custody of them to the clerk. We said all right.

The Government said, "We want to look at them."

The judge said, "All right."

The Chairman. Where did the judge get that right?

Mr. Dean. I do not think he had that right, but he ruled against us.

Mr. Holtzoff. I do not think you have a right to look at them until the witness who was subpoenaed comes to the stand with them.

Mr. Dession. That is the decision Judge Caffee followed in the Aluminum case. That is the only decision that deals with the subject. The court dictated an opinion, and it may be published.

Mr. Holtzoff. I think if you had declined to obey the rule and taken a chance of being cited for contempt you would probably have gotten a reversal.

Mr. Medalie. They were being tried in Lexington, Kentucky, and it was not desirable to create a local fuss which would prejudice the jury prior to its being empaneled, which would put you at a disadvantage.

Mr. Dean. That question may arise where it is not so much in advance, but a few days.

Mr. Dession. In the Aluminum case you have another kind of problem. There the court felt that he had to look at every one of these papers and see what he thought the Government was entitled to see. That is all right if you have a few papers.

I think the rule as laid down in most jurisdictions was based on having only one contract or letter. There is no problem on that. The court can look at that and see whether it should be produced, but if you are dealing with a truckload of documents, you have a problem as to how you are going to work this out.

I think there is a problem here with regard to which there should be some kind of rule. I am not prepared to say what it should be.

Mr. Medalie. I think we can risk something like this, and perhaps it can come back for discussion if we like the idea. Can't we provide that the court can make such provision for inspection by a party calling the witness or any other party prior to the witness' taking the stand as to the court may seem fair?

I think that gives fairly wide discretion to the judge and it is fair to counsel and lets the other side in on it.

The Chairman. If you do not, you will waste an intolerable amount of time in cases where there are large volumes.

Mr. Medalie. I think the average judge will ask you, "Why didn't you look these things over before you put the man on the stand? Don't examine these documents now. Put them in evidence, if you know what you want to put in."

I think it would give the judges power they would like t have.

Mr. Dean. Under that rule could a subpoena be issued for prior to the trial date?

Mr. Medalie. No. It should be issued for the trial date, but while the witness is waiting, you can look at them or have your associates look them over.

Mr. Glueck. Make it a little more specific.

Mr. Medalie. Prior to calling the witness.

Mr. Glueck. I think you had better leave that to the draftsman.

Mr. Medalie. Your idea is correct. I think it ought to go in. As a matter of fact, witnesses are subpoenaed to come to court on a particular day. You do not know whether you are going to call them that day or on the hour of their arrival.

You do not control that.

Mr. Youngquist. Shouldn't you, in the truckload cases, ask for an order to be permitted inspection prior to the day of trial?

Mr. Medalie. It would be very desirable.

Mr. Robinson. Now, in order to do that, it is necessary to call a grand jury. This would avoid that. They found the device in the tobacco case that met that situation.

The Chairman. It might be necessary to be represented by a martyr in some case instead of a mere attorney.

Mr. Medalie. It is not an easy thing to tell the secretary of a corporation that he ought to go to jail in the interest of the principal, in the meantime advertising to the locality that the officer of the corporation is going to jail.

I understand the motion is that a rule carrying the ideas under discussion be presented?

The Chairman. That has been adopted.

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The Chairman. Yes, I agree with that.

Now, that brings us to (d).

Mr. Seasongood. Have we got through with this other?

Mr. Holtzoff. Should not that be revised in connection with the revision of deposition procedure, Mr. Chairman?

The Chairman. No.

Mr. Holtzoff. We took action yesterday to provide for deposition procedure, and this relates to that.

The Chairman. But this would stay here under "subpenas," and this is in fact a subpena.

Mr. Glueck. One type of subpena.

Mr. Medalie. Well, this says, "A subpena commanding the production of documentary evidence on the taking of a deposition." Well, that is all right.

Mr. Seasongood. In (c) you have got here that you have to tender the fees for one day's attendance and the mileage allowed by law. I think, again, that might be pretty onerous for a defendant without much money.

Mr. Holtzoff. That is the present rule.

Mr. Seasongood. For any defendant in the federal courts?

Mr. Holtzoff. Yes.

Mr. Seasongood. It is very unjust, I think, because suppose he is acquitted; he cannot recover costs against the United States.

Mr. Holtzoff. Yes, but suppose the witness is indigent or poor and cannot pay his railroad fare to the place where the court is going to be held.

Mr. Dession. That is a frequent problem.

Mr. Holtzoff. That is a very frequent problem.

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Mr. Seasongood. Well, the way it is usually done, by the ordinary statute, or at least our statute in Ohio, is that if he demands it you can.

Mr. Dean. I think that is a good suggestion. If he demands it or requests it. If he is acquitted, in that event he will go down to get his mileage fee.

Mr. Holtzoff. I know, but the poor man may be very dumb and not know his rights.

Mr. Dean. But he is not so dumb that he says, "How do I get there?"

Mr. Holtzoff. What?

Mr. Dean. He is not so dumb that he says, "How do I get there?"

Mr. Holtzoff. There have been cases in Tennessee and Kentucky where some of these mountaineers walk fifty miles to court because they have no money.

Mr. Medalie. And collect mileage; that is the point, is it not?

Mr. Holtzoff. What?

Mr. Medalie. And collect mileage.

The Chairman. In the technical sense.

Mr. Seasongood. It is different in a civil case, I think, because you get your costs from the other person, but if you are in a criminal case you have the constitutional requirement that he may have process for his defense, and here you make him pay the process, pay under all circumstances, and if he is acquitted he cannot get it back.

Mr. Youngquist. That is a burden that every citizen is subject to.

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Mr. Seasongood. Surely, he is subject to it.

Mr. Waite. I should like some information from somebody. Are we talking now about (c)?

The Chairman. Yes, 45.

Mr. Waite. I want to talk about that. I did not realize. There is not much to it, apparently, about just what I had in mind. The last section, as I understand, provides that if the Government thinks I happen to have seen a bank robber in New York they can subpena me to come to New York at my own expense, in the hope of eventually getting it back; but if I have not got the money and have no way of getting there, is that the present practice? That is what I wanted to ask.

Mr. Medalie. I think you can go to the marshal's office of the district in which you were subpenaed, and he will give you your mileage; is that not it?

Mr. Holtzoff. Actually there is no difficulty over it, because the deputy marshal has money that he will advance to the witness. Technically, the Government witness does not collect or is not entitled to mileage until after he appears; but if he is a person who has no money on which to travel, the marshal will advance him the funds while he is serving the subpena, and there never is any practical difficulty on that point.

Mr. Waite. There are a great many persons who assume that they have got to obey orders of the Federal Government under any and all circumstances. Is there any reason why this rule should not be changed to provide that the fees and traveling expenses should be tendered?

Mr. Holtzoff. You mean in the case of Government witnesses?

Mr. Waite. Yes, I think particularly in the case of Government witnesses.

Mr. Holtzoff. Well, the only difficulty is the present accounting system of the Government, that you would have to revolutionize the accounting system in order to comply with that kind of direction.

Mr. Medalie. That is true.

Mr. Waite. I think the Government could change its accounting system more easily than many indigent witnesses could find the means of travel.

Mr. Holtzoff. Well, but actually the marshal will advance the money and take it out of the mileage later on.

Mr. Waite. Then, if he can do it actually, I do not see why we should not provide in here that he shall do it actually.

Mr. Seasongood. This actually says he need not do it.

Mr. Holtzoff. He need not.

Mr. Waite. Yes.

Mr. Holtzoff. Of course, what this does is to perpetuate the existing rule.

Mr. Seasongood. Well, we are finding fault with it.

Mr. Waite. I should like to support Mr. Seasongood's motion on that point.

Mr. Dean. What is it? To strike the last sentence?

Mr. Youngquist. Is it not the general practice in the states as well as by the Federal Government that the fee and mileage need not be tendered to a witness subpenaed under that statute?

Mr. Robinson. That is right.

Mr. Youngquist. That is the rule in Minnesota.

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Mr. Holtzoff. That is the general rule, and you pay him the mileage and the fee after he appears and has testified.

Mr. Youngquist. I should not like to see us depart from so well-established a practice. I imagine one of the reasons for requiring that individual parties tender the fees and mileage in advance is to make sure that the witness will get it, and of course if he is subpenaed by the Government he knows that he is going to get it, and the practical aspect of it from the viewpoint of indigence of the witness is taken care of, as Mr. Holtzoff says, by the advancing of the funds by the marshal.

Mr. Waite. Not always, though, Mr. Youngquist. I have known people subpenaed who did not realize that they could get it in advance, who in one case had to borrow money from a personal finance corporation for two or three percent a month interest to get it, in another case borrowed from friends with a great deal of effort and trouble.

Mr. Youngquist. Well, I should suppose those cases would be so rare that we should not make a rule.

Mr. Waite. Well, is it not a good rule anyhow? That is what I am getting at.

Mr. Seasongood. Why do you want an affirmative rule that you do not have to do it? Then maybe the marshal would say, "I will not give you anything."

Also, you have "or agency thereof." Well, what is an agency of the United States is a very elastic question on which there is great diversity of opinions. You have the Federal Reserve Bank, the Reconstruction Finance Corporation, and there are a million agencies of the Government now. Why should they

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get these special benefits?

Mr. Holtzoff. I do not think that is really applicable in criminal cases.

Mr. Youngquist. Neither "officer" or "agency" should be mentioned.

Mr. Holtzoff. No.

Mr. Youngquist. It should be "on behalf of the United States."

The Chairman. By consent those words on line 25, "or an officer or agency thereof," will be eliminated.

Mr. Youngquist. There cannot be a prosecution by anything but the United States.

Mr. Crane. Does not that language, "need not be tendered," give rise, perhaps, to the claim that it need not be paid?

Mr. Seasongood. Yes. There should be a positive rule that you do not have to do it. The marshal says, "Here you have rules, and all inconsistent laws are repealed, and I do not have to give anybody anything."

Mr. Holtzoff. No. It says "need not be tendered." It means need not be tendered in advance.

Mr. Crane. I read it that way, but it might not be so construed by others.

Mr. Holtzoff. The same rule is in the civil rules, and it has not been construed that way. It has been construed as meaning that you do not have to tender it in advance.

Mr. Crane. Then why not add that, that it need not be tendered in advance?

Mr. Holtzoff. I think that would be an improvement, the words "in advance."

Mr. Crane. Yes.

Mr. Youngquist. I do not think it is.

Mr. Crane. Well, that is what I mean by it. Tautology, but all the same it makes it clear.

Mr. Youngquist. You use the word "tendering" four lines above in the context, which makes it plain that it shall be at the time of the service.

The Chairman. "need not be so tendered."

Mr. Holtzoff. Yes.

The Chairman. You want to tie it back to the preceding sentence?

Mr. Holtzoff. Yes.

Mr. Robinson. All right.

The Chairman. Now, is there any further discussion on this section?

Mr. Waite. I think there is a motion, Mr. Chairman. If I understood Mr. Seasongood, he means to move to strike out that last sentence, and I should like to support it and urge it.

The Chairman. It has been moved and seconded that the last sentence of section (c) commencing on line 24 and ending on line 26 be eliminated. All those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There were a number of noes.)

The Chairman. I shall call for a show of hands of those in favor of the motion.

(There was a show of hands.)

The Chairman. Nine. Carried.

Mr. Seasongood. I do not want to keep up a continuous conversation, but I do just want you to have in mind that you are going to change a practice of long standing by this first part of that rule. As I say, it will come as a great surprise to the Ohio practitioners to say that a subpena in a criminal case can be served by anybody now, and not in the way that it has been done since time immemorial.

Mr. Youngquist. Why should there be any difference between a civil and a criminal?

Mr. Seasongood. Well, there is not. They do not serve a subpena. The marshal serves all subpenas in civil cases too.

Mr. Youngquist. Not under the civil rule. That is specific. This is identical with the civil rule.

Mr. Holtzoff. I wonder if I might move to reconsider the vote just taken. This vote is going to cost the Government a lot of money, because you frequently subpena witnesses, and then you find your case is going to be continued, and you notify your witnesses not to come. Now, if in the meantime you have paid your witnesses fees, I think in the course of a year it is going to mean to the taxpayers a whole lot of money, and it will mean a lot to the anti-trust people.

Mr. Seasongood. How about the defendant? Will he subpena his witnesses the same way? He is less able to do it than the Government, which has lots of money to throw around.

Mr. Dean. He is only one.

Mr. Holtzoff. Well, I will not press it.

Mr. Medalie. I think what is going to happen is this: When this draft comes to the court, the Attorney General who

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represents the court says they cannot afford to have that sentence out, and it can go back.

The Chairman. On the front of this building the slogan is, "Equal justice."

Mr. Medalie. All right.

Mr. Crane. This marble palace of justice.

The Chairman. (d). I have a feeling that I have been up to (d) two or three times lately. I may be slipping a little bit here.

Mr. Robinson. I am sure.

The Chairman. I think I am to (d).

Mr. Seasongood. I am sorry.

The Chairman. All right.

Mr. Seasongood. Perhaps I talk too much.

Mr. Robinson. You made a statement, did you not, Mr. Holtzoff, about it a minute ago?

Mr. Holtzoff. What?

Mr. Robinson. Did you not make a statement about (d) a minute ago?

Mr. Holtzoff. The only statement I made was that perhaps you want to take it up with the rest of the ~~members~~ section.

Mr. Robinson. Oh, that is right.

The Chairman. I think we can dispose of it here. It does not bear on the substance of the deposition; just the subpena.

Mr. Glueck. I should like to inquire about the reason for the magical "40 miles" now. Of course nowadays--

Mr. Youngquist. That is probably one day's travel by horseback.

Mr. Glueck. 40 miles a day. You can do that in an hour

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almost.

Mr. Holtzoff. That, of course, is the civil rule.

Mr. Glueck. That does not make it holy.

Mr. Holtzoff. No, it is not ancient. It is recent.

Mr. Glueck. I mean they must have considered it recently, although I do not know whether they did or not.

Mr. Youngquist. The civil rule does not have that. It is 150 miles.

The Chairman. No. A hundred miles.

Mr. Holtzoff. That is for trial, not for deposition. 40 miles is in the civil rules.

Mr. Glueck. That is a horse-and-buggy rule.

Mr. Youngquist. "40," at the top of page 2, line 3.

Mr. Holtzoff. Yes, that is in the civil rules. I have seen that in the civil rules.

Mr. Youngquist. It says "100 miles."

Mr. Holtzoff. No. "100" is in the case of a subpena for trial. In the case of a subpena for deposition it is 40.

The Chairman. Yes.

Mr. Youngquist. Oh.

The Chairman. That is where we are in error.

Is there anything under (e)?

Mr. Holtzoff. Under (e)?

Mr. Medalie. Well, you have got the same subpena for a hearing or trial.

Mr. Holtzoff. I think under (e) perhaps there is an inadvertence. A subpena in a civil case--and this one is copied from the civil rules--runs only within the district or within a hundred miles, but a subpena in a criminal case today

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runs throughout the country, and we certainly ought to change (e) to correspond, to pitch with the present criminal rule.

Mr. Robinson. That is right.

The Chairman. Then I assume that the same change that will be made with respect to the service in (c) will be made.

Mr. Youngquist. (c)?

The Chairman. Yes.

Mr. Medalie. Will you get the provision here for all issuance of subpenas by courts?

The Chairman. That is what I mean.

Mr. Medalie. Oh, that is what you mean?

The Chairman. The same change.

Mr. Youngquist. Oh, yes.

Mr. Glueck. What are we going to do about this mileage business?

The Chairman. The 40 and 100 miles?

Mr. Glueck. Yes.

The Chairman. I think they are adequate, don't you? They can fix the place of taking depositions almost anywhere. There is no excuse for asking a man to go outside the county.

Mr. Glueck. Then why not 50 instead of 40? That is all I am asking.

Mr. Medalie. It is easy enough on the taking of a deposition; you ought to be as near to the man as you can go.

Mr. Youngquist. But down in Texas you may not find a town within 40 miles from the place of service.

Mr. Medalie. True enough, also, about New Mexico and Arizona.

Mr. Youngquist. There ought to be substituted " a reasonable

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distance."

The Chairman. That would be dangerous. Do you know, Mr. Tolman, what dictated "40 miles"?

Mr. Tolman. I am trying to find what it was. I think it came from some statute. Yes, here it is.

The Chairman. Yes; 648 Code:

> "No witness shall be required, under the provisions of either of sections 646 or 647 of this title, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness"-- and so forth.

Mr. Glueck. What is the age of that statute?

Mr. Medalie. Well, this means that.

Mr. Youngquist. Horseback days.

Mr. Medalie. You can require them to attend.

The Chairman. It was before they had the buggy, even: 1827.

Mr. Medalie. As you have it here, no matter what distance he travels you may require him to attend within the county in which the service was made.

The Chairman. That is right.

Mr. Medalie. If you are taking him out of the county they do not want you to move him more than 40 miles, which is about the width of most small counties.

Mr. Youngquist. I think that is right.

Mr. Longsdorf. Not in California.

6 Mr. Medalie. Then you keep them within the county.

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The Chairman. Is there anything further under (e) (1) and (2)?

Mr. Medalie. Yes. Now, what about this 100-mile limit?

Mr. Holtzoff. I understood that that was to be changed. The subpena runs throughout the United States.

Mr. Robinson. Yes, that is changed.

Mr. Medalie. All right.

Mr. Youngquist. Where is that?

The Chairman. It is in line 49.

Mr. Youngquist. Oh, yes.

Mr. Robinson. Any place within the United States.

Mr. Dean. In the second line why is the word "hearing" in there? Should it not simply be "trial"?

Mr. Medalie. You might have a hearing on a motion for the suppression of evidence. You might have a hearing on any motion.

Mr. Dean. That is right.

Mr. Medalie. Whether the court refuses to hear witnesses or not.

Mr. Robinson. That is right.

Mr. Longsdorf. What is it that comes out there, may I ask, in (e)?

The Chairman. Line 48 will read, "hearing or trial may be served at any place within the United States."

Mr. Longsdorf. Within the United States.

The Chairman. And then the following two lines come out.

Mr. Robinson. Since these rules will be applicable to territory outside the United States, I suppose we shall have to make some arrangement about that.

Mr. Longsdorf. The process would not have any validity outside the United States.

Mr. Medalie. It operates only if the Attorney General wants them in. The defendant cannot get anybody outside the United States prior to subpena going to the consul. We have that here, have we not?

Mr. Youngquist. Yes.

Mr. Medalie. That is on what page, Rule 45 of the left-hand sheets?

The Chairman. Here it is.

Mr. Robinson. The civil rule.

Mr. Medalie. The Act of July 3, 1926, is what arose out of the oil cases.

Mr. Robinson. Yes, I think that is it.

Mr. Medalie. It looks as if no one but the Government can use that.

Mr. Longsdorf. That is true of passports.

Mr. Medalie. What?

Mr. Longsdorf. That is true of passports.

Mr. Medalie. Yes. The Government.

The Chairman. Was there a question raised on that?

Mr. Medalie. No.

The Chairman. (f).

Mr. Medalie. Now, this says "contempt of the court from which the subpena issued."

Mr. Holtzoff. In the light of the change, that has to be changed. In the light of the change we made a while ago this has to be modified.

Mr. Robinson. "the court for which"?

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Mr. Medalie. "contempt of the court"--

Mr. Seasongood. "in the name for which".

Mr. Medalie. "for attendance at which".

Mr. Youngquist. Is there not an error in the citation of section 711, line 57, rule 45, page 3 left?

Mr. Robinson. It should be 712.

Mr. Youngquist. Yes.

Mr. Medalie. 12, 13, 14.

Mr. Robinson. Yes, that is right. Line 57, the last two. 713.

Mr. Medalie. 12, 13, and 14.

Mr. Robinson. You could add 14 to that, yes.

Mr. Longsdorf. Put a dash between 711 and 713, and you will have the same result.

Mr. Robinson. Same result.

Mr. Youngquist. Well, 711 is out?

Mr. Robinson. That is right.

The Chairman. Yes. "712, 713, 714," is the way the end of line 57 will read.

Mr. Medalie. Now, if the language is "contempt of the court for attendance at which the subpena is issued," I think that will cover it.

Mr. Holtzoff. Well, how about subpena duces tecum? The word "attendance" is broad enough, is it?

Mr. Medalie. I think so.

Mr. Robinson. Why not say "for which"?

Mr. Holtzoff. Someone suggested "in the name of which".

Mr. Medalie. Well, that gets down to the form of the subpena.

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The Chairman. "attendance at which," I think.

Mr. Longsdorf. How does that read now, Mr. Chairman?

The Chairman. Line 60, "court for attendance at which the subpena was issued."

Mr. Longsdorf. Does this section include contempt for subpena, to appear for deposition, or are we not going to have that? Well, that is hearings for trial; that is all right.

Mr. Seasongood. Is there any trouble with the Nye case in view of what you have done now with these subpenas? I suppose when the subpena was issued by the clerk it was issued by the court. I do not know why; the Nye case is limited to the time.

Mr. Holtzoff. I do not think the Nye case would affect this. The Nye case merely held that the contempt in order to be punishable must be committed in the presence of the court.

Mr. Seasongood. Yes.

Mr. Holtzoff. Well, the contempt here is failure to appear, and I suppose in the presence of the court.

Mr. Dean. Does the contempt statute contain three or four categories?

Mr. Seasongood. Yes, it does.

Mr. Holtzoff. What?

Mr. Dean. Does not the contempt statute contain three or four categories, one of which is contempts in the presence of the court, which is involved in the Nye case, and one of which covers this very situation?

Mr. Holtzoff. Disobedience to process.

Mr. Dean. Disobedience to process.

Mr. Youngquist. Similar punishment was drawn in the Nye

case.

The Chairman. This subpena here suggested is still the subpena issued by the court. The only difference is, in this case, instead of the clerk signing, another officer of the court, to wit the attorney, signs it, and he signs both the clerk's name and his own name.

Mr. Youngquist. There is one case that we have not covered: that is the subpena for a prisoner without counsel. We have not discussed that.

The Chairman. He has a right to summons, process.

Mr. Holtzoff. The clerk could issue that.

Mr. Medalie. They should both be givenpower to do it. You would have to make it both the clerk and the attorney. That is, either one could do it. Those who prefer a seal on subpenas can go to the clerk.

Mr. Crane. May I ask right there, can you subpena prisoners?

Mr. Robinson. What is that?

Mr. Crane. You spoke of a prisoner.

The Chairman. No. A prisoner without counsel.

Mr. Youngquist. A prisoner without counsel. I am talking about having subpenas signed by the attorney, who is an officer of the court.

Mr. Crane. I see. Yes. I did not understand it.

Mr. Youngquist. I did not make it very clear. I should have said "the accused."

The Chairman. Rule 46.

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RULE 46

Mr. Robinson. That rule provides that exceptions shall be unnecessary. The present federal law is that, while the rule has been that generally an exception was necessary to preserve a ruling of the court for review, it is well recognized that appellate courts may notice plain error not assigned without manifest injustice.

There are two cases on that. In particular that is true on failure to except. Sheridan v. U. S. 112 F. (2d) 503, reversed on February 10, 1941; 61 Supreme Court 619. There the defendants moved for a directed verdict at the close of the entire case but failed to except to its denial. The Circuit Court of Appeals held that for that reason such denial was not assignable as error. On the confession of error the Supreme Court reversed and remanded with directions to consider the sufficiency of the evidence to support its verdict.

Mr. Longsdorf. What was that citation?

Mr. Robinson. The citation was Sheridan v. U. S. 112 F. (2d) 503, the Ninth Circuit, and 61 Supreme Court 619 was the Supreme Court citation. So the status of the present law is as stated. The reason, then, would seem to be now for a change that formal exceptions are somewhat archaic. All that is necessary is that counsel make known to the court what he desires done or his grounds for objecting to the court's action. The proposed rule providing the same procedure as the civil rules seems to me desirable.

Mr. Longsdorf. That was 61, 619?

Mr. Medalie. Now, you have added an additional sentence.

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Mr. Crane. What does that mean?

Mr. Youngquist. Yes. I do not follow you.

Mr. Crane. Make an objection in a manner which will prejudice the cause? Every objection or demurrer prejudices the cause.

Mr. Robinson. I was just going to say, down at the second circuit conference Judge Carroll C. Hincks raised a point which is stated on the right-hand page in Rule 46, page 2. Judge Hincks said there, as quoted in the proceedings of that conference:

> "Certainly the criminal rules should go as far as the civil rules in making formal exceptions unnecessary."

But he believes that they might go further and state that the time of the court should not be taken by exceptions and that in adopting the civil rule its language should be expanded as follows:

> "It is sufficient that a party . . . make known to the court . . . his objection to the action of the court and, if requested by the judge, his grounds therefor."

Judge Hincks points out the irritating waste of time which in his experience has been caused by obstructive counsel who insist in stating their grounds of objection in extenso, thus sometimes bringing extraneous matter before the jury.

Mr. Medalie. It does not need any rule to stop that.

Mr. Crane. No; the judge can attend to that.

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Mr. Medalie. Just say to counsel, "I understand your objection. Now do not argue it any further, and do not make a speech."

Mr. Crane. And if he keeps it up, place him in contempt.

Mr. Seasongood. But the other point is a sound one, in my opinion. On line 7 I would say "take or his objection to the action of the court and, if requested by the court, his grounds therefor."

Frequently you say, "Object," and the court will know what it is and does not want you to make a long palaver of your grounds. If he wants them he should ask for them.

Mr. Medalie. The trouble is on your appeal. No appellate court will pay any attention to an objection where the grounds have not been stated, no matter how the trial court feels about it.

9 Mr. Seasongood. Well, that is your affair.

Mr. Holtzoff. There is another reason, too: I think Government counsel has the right to know the grounds for your objection, because he might concede it in order to prevent the danger of a reversible error being made.

Mr. Medalie. Well, of course that sounds too much like a game. I think it is enough if the court is told why the evidence ought not to go in.

Mr. Crane. Suppose you use the word "exception" under the old practice.

Mr. Medalie. No harm would come.

Mr. Crane. All we have to do is to say, "Exception," and every appellate court has heard it, and we had this up in the Judicial Council trying to follow the federal rule adopted in

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the civil courts. We got it through after it was opposed by every bar association in the state of New York. The city bar association and all the highlights opposed ever taking out the word "exception" simply because it had been used from time immemorial, and it was simply a silly, ridiculous thing.

I prepared a bill and got it to the legislature, and they beat it there, and then they came around the next year, the city bar association, the county bar association, and agreed to it. It takes a long time to get rid of just a word. Now, in other words, if there is error, the appellate courts have likewise to reach it, should reach it, provided it has been called to somebody's attention, and I think in most of the cases they do state the objections, and I do not know as the word "object" need be used, that particular word, if by the record it is shown that there has been some formal statement showing that it is improper and that the lawyer does not want it. In other words, the appellate courts are not to be bound by the use of one particular word. There may be another word in the English language that means as much as "object" does, and certainly "I object" means as much as an exception; not exactly, but enough to call attention to it. They got rid of all these little formal rules which are catch traps for lawyers who do not always stop to think and use the exact word.

Now, we got rid of it, but we had to fight for it, and we adopted in New York--the Judicial Council did, I am speaking of--the federal rule; I do not know exactly which one it was now, but the one, the federal rule adopted, and that was a compromise to get it through the state legislature, and we did.

The Chairman. Was it opposed by the bar, Judge, when it

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came up? Did the bar oppose taking out the word "exception"?

Mr. Crane. Yes.

Mr. Medalie. I do not think the city bar association did.

Mr. Crane. The city bar did.

Mr. Medalie. I know the county lawyers' association did.

Mr. Crane. I can tell you the names of the men. They had a hearing, the Judicial Council.

The Chairman. They like to snap that word "judicial."

Mr. Crane. Yes. And so they had a committee for the city bar, and they opposed it. But to be fair to them let me say that after they got to thinking of it and reasoning and arguing and talking with them, the next year, having beaten the bill the first year, they came around and approved it. But to be fair to them, too, let me state that they modified some part of it, but along the federal rule; and then, being in harmony with the federal practice, it went down a little better, and it was a mighty healthy thing.

Mr. Holtzoff. It seems to me the last sentence of this might perhaps go out.

Mr. Medalie. I move it be stricken.

Mr. Youngquist. I second the motion.

10 Mr. Crane. That is beginning with "and he shall"?

Mr. Glueck. Line 11.

The Chairman. Line 11.

Mr. Crane. Or the whole sentence?

Mr. Glueck. May I inquire as to the meaning of line 9, if he has no opportunity to object?

The Chairman. Well, might we dispose of this other sentence?

Mr. Glueck. Oh, I am sorry.

The Chairman. Is there any question on it?

Mr. Longsdorf. Mr. Chairman, I want to put in something else before we pass to a vote on this. I think there is a slight fault in the civil rule in this regard: If a party has no opportunity to object to a ruling or order at the time it is made, there may be a time left.

Mr. Crane. I will tell you what that means. It is this. At least one instance of it.

The Chairman. What line is that?

Mr. Crane. You see, Judge, actions made at the end of a case--

Mr. Glueck. I am sorry, Mr. Chairman. Let us vote on this first.

The Chairman. May we dispose of the point number 1, beginning with the sentence on line 11? All those in favor of the motion to strike will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Crane. Now may I answer that question that was asked by two of them as to what it means? What it means is that when motion is made at the end of the case and the judge says, "I will take it under consideration" or "I will reserve my decision," and the case is closed, as to whether he is going to dismiss the whole thing, and he then makes a ruling, now it is made just in handing down a decision himself, but that is not in court. I know it applies to that one instance in our state,

and there may be others. I do not think it applies to anything where they are in court in the presence of the judge and could speak and make an objection; but there are instances where he might rule and throw the whole case out. But he reserved his decision. Now, if he makes up his mind that he will not throw the whole case out and gives judgment, they have never had a chance to object to his ruling.

Mr. Longsdorf. Well, that may be perfectly correct, to say he had no opportunity whatever in that case.

Mr. Crane. Yes.

Mr. Longsdorf. But suppose there is some occurrence at the trial which may prejudice the jury, might cause a mistrial or might be corrected, and he did not find out right away, but he found out before the case went to the jury: why not give the judge a chance to make a correction if it can be made?

Mr. Crane. He can do that.

Mr. Longsdorf. So he does have opportunity there?

Mr. Crane. Yes. There is no objection to that. He has got to object in some way in trial, call it to the judge's attention.

Mr. Longsdorf. And give the judge a chance.

Mr. Crane. And the other side too.

Mr. Longsdorf. Yes, and the other side. So we have the insertion of the words "at the time it is made or thereafter." That is a ruling or order of the court.

Mr. Crane. I do not think there is any misunderstanding. Is that not taken from the civil rule?

Mr. Youngquist. Yes.

Mr. Longsdorf. Yes, it is taken from the civil rule, but

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he has precautionary words.

Mr. Crane. Well, it works pretty well now.

Mr. Longsdorf. I do not know that it is very important; I am not pressing it.

The Chairman. Is there anything further, gentlemen, on Rule 46?

(There was no response.)

The Chairman. If not, we shall pass to Rule 47.

RULE 47

11 Mr. Robinson. You find a correction in 47 of an error made by the mimeographers, I think only one in about a hundred thousand pages, so it would be well to give them due credit. At the bottom of the page you find, in some pages, that line 19 is omitted. The corrected page was distributed to you on the first day of the meeting, and I suppose some of you do have it. If you have 19 lines on the page, Rule 47, you have the correct copy. If not, we can give you the corrected page.

Mr. Waite. What should line 19 be?

Mr. Robinson. Line 19 reads, "The number shall be the maximum number which is permitted to the defense."

The Chairman. Each member has a copy of the correctly worded page there, underneath the table of contents page, et cetera.

Mr. Robinson. I believe that that states the present rule.

Mr. Crane. Does it?

Mr. Robinson. With possibly some alteration.

Mr. Medalie. In our district we may not ask a juror a question unless the court specifically permits it; it does

occasionally.

Mr. Robinson. It says "may permit," does it not? Line 2, "The court may permit the defendant or his attorney" to conduct an examination.

Mr. Holtzoff. It says "shall permit."

Mr. Robinson. "May."

The Chairman. "May," it says.

Mr. Holtzoff. Line 5.

Mr. Longsdorf. I might say that Judge St. Sure wishes that the rule might be made mandatory upon the judge to examine the jurors, with the provision that he may allow counsel to present questions to the judge or ask them himself. I am just telling you what Judge St. Sure said. I think "mandatory" is a pretty big word.

Mr. Robinson. What about line 5 there? Does that take care of the point you mention?

Mr. Holtzoff. Line 5 makes it mandatory.

Mr. Robinson. I am just asking him.

Mr. Longsdorf. No, but Judge St. Sure's idea was that it should be made mandatory on the judge to conduct the examination of the jurors and to permit, and so forth, as you have it here.

Mr. Holtzoff. Should not the "shall" in line 5 be changed to "may"?

Mr. Longsdorf. I think not.

Mr. Robinson. It is in the civil rules.

Mr. Holtzoff. Yes.

Mr. Robinson. What is the reason for the change here?

Mr. Holtzoff. Well, in the light of Mr. Medalie's suggestion that in the southern district of New York they do not

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permit counsel to participate in examination.

The Chairman. That is an exception.

Mr. Wechsler. Well, maybe they should. What is the situation on that point? The rules may be changed if there is a reason for it.

Mr. Holtzoff. I wonder if it is not a matter that could be left in the discretion of the court?

Mr. Youngquist. It is here.

Mr. Seasongood. No, it should not be.

Mr. Dean. Suppose the judge says, "You may not ask any questions," and he has not given a decent examination. I think there is a lot to be said for letting counsel go into the qualifications of the jurors.

Mr. Medalie. Of course, this is what you have.

Mr. Robinson. It says, "as it deems proper," line 7. That modifies "shall," does it not?

Mr. Medalie. All this to do about examining jurors arises out of what in some places is a terrible scandal. Now, in our state courts in criminal cases, this last one, the Solomon Mullens case, bribery of public officials, the judge allowed four days for the examination of jurors. Well, that is scandalous.

Some of our best judges in criminal cases in the state courts have allowed a tremendous amount of time for the examination of prospective jurors, and what is done really is not to inquire as to their qualifications or simply simple prejudices but really to harangue them and debate with them and argue with them as to how they would vote under certain conditions.

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Mr. Longsdorf. And insult them.

Mr. Medalie. Supposedly for the purpose of finding out whether they have prejudices. Now, as a matter of fact there never was any original right to examine jurors, and nowhere in any statute, unless in particular states--not in New York, not under the federal--is there any right to examine jurors. The right that is really given is a right to try a challenge actually made for bias or other disqualification. And originally you walked into the courtroom and you saw twelve people in a box; and if you had peremptory challenges allowed you, you would say, "I challenge number 2," and the other fellow
12 would say, "I challenge number 4." Out they go. Others come in. And if you had a challenge for cause you wrote it or, with the permission of the court, stated it. And then you could try the challenge usually by examining the juror on that issue, stating the challenge as for bias or other disqualification.

Now, there has developed out of that a habit of examining jurors in advance, and it has developed, except when restrained by a handful of judges, into this scandal of arguing with jurors and browbeating them and asking them a lot of nonsense.

I think it was Taft who decided to do away with that in the Federal courts if he could, and the rule has been adopted in many districts that the judge shall examine the prospective jurors, and counsel have the opportunity to submit questions to the judge which, if he thinks them proper, he asks the jurors.

Now, on occasion, in important cases, the judge will turn to counsel and say, "You gentlemen are experienced, know the limitations the court has in mind. Will you proceed to examine the jurors?" And with that restriction the examinations are

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brief. After the court is through examining, if counsel have not been accorded the opportunity to examine, additional questions will be suggested orally to the judge, facing the jurors, and to get your answer, but this has cut down very materially the time that it takes to impanel a jury.

The Chairman. Mr. Medalie, I do not think that even exists in any place except New York City.

Mr. Seasongood. I was going to say, it does not take any time with us.

Mr. Medalie. Well, it should not. I think it is outrageous, and it ought to be met either by rule or by the proper exercise of judicial control in those examinations.

Mr. Youngquist. We have that here, Mr. Medalie: "In the latter event, the court may permit the defendant or his attorney to supplement the examination by further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions," and so forth.

Mr. Medalie. I know, but what troubles the bar and those who wish to conform to decent rules and who would not abuse the right to examine jurors is that the court under this rule is not compelled to allow the attorney even the briefest examination of a juror.

Mr. Seasongood. That is not the way it reads.

Mr. Medalie. I think that is how it reads.

Mr. Youngquist. Yes.

Mr. Dean. This first sentence here reads he "may."

Mr. Youngquist. "may" or "shall"?

Mr. Dean. May do one or the other.

Mr. Seasongood. It says may do one or the other. "In the

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latter event, the court shall permit the defendant or his attorney or the attorney for the Government to supplement the examination."

Mr. Dession. By such further inquiries as it deems advisable. That might mean none.

Mr. Medalie. It is only a supplementary examination at most.

Mr. Dean. The court has one of two choices, as I see it: one, to examine the jurors, or, the other, to let the attorneys do it.

Mr. Crane. No, but he may do it himself and then permit some additional questions by the attorney.

Mr. Dean. Suppose the attorney's original decision was urging him to do it himself.

Mr. Crane. Well, then after he gets through he may, I take it--and that is the practice--permit other questions that are suggested by the lawyer and either put those questions himself or permit the lawyer to put them. Over in the southern district I think they do permit other questions. Judge Byers, who was trying that conspiracy case, does it all himself; he will not let anybody. Some of the other judges, when they get through, as you suggest, say, "Would you like to ask some questions?" You ask them or the judge asks them.

Mr. Youngquist. Very little of it.

Mr. Medalie. Very little of it.

Mr. Crane. Very little, but I suppose that is covered here.

Mr. Youngquist. That is exactly what this provides.

Mr. Crane. I think so.

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Mr. Crane. I think so.

Mr. Medalie. Well, of course you have no alternative. "In the latter event,"--that is, after the court itself conducts the examination--"the court shall permit the defendant"--and so
13 forth--"to supplement the examination . . . or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

Mr. Youngquist. That is right.

Mr. Medalie. In other words, under the rule as at present drawn, if the court chooses, counsel just does not open his mouth in the impaneling of the jurors except to suggest something to the judge, if we want it that way. I have been able to get along, and I have tried some pretty long cases, and I have been reasonably satisfied with the kind of jury I got under that condition, but I think many lawyers just do not like it.

Mr. Crane. I think it is a pretty good thing as it is.

The Chairman. As a matter of fact, I am told that the district judges follow very largely the practice in the state courts, and if the state court system is working so a jury can be drawn within a half hour, they let counsel go ahead and ask the questions.

Mr. Medalie. Not in the southern district of New York, and materially not in the eastern district of New York.

The Chairman. I know; that is an exceptional situation. I was surprised by the great difference in the extent of the judges' questioning. For example, I was complaining one day to Judge Orie Phillips that in a civil case I had only three challenges, and he quite vehemently said, "That is ample."

I said, "I cannot see that."

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He then developed in a discussion that in the Tenth Circuit when the judge questions a jury he not only asks them general questions such as, "Do you know the plaintiff or the defendant?" but, having a list of witnesses, asks them if they know any of the witnesses who are going to be called. So when he is through there is really very little; and if they answer they do know them he excuses them. So when he is through with that kind of thoroughgoing talking to the whole jury you rarely have a need for more than three challenges; but if the judge in his examination only asks judicial and superficial questions, three challenges may be utterly inadequate.

Now, where there is such a variance I do not see how you can do anything better than set up some general rule like this and trust that the judge will conform himself to the necessity of the practice as he finds it in his district. This rule was made on the civil side to bring New York into line.

Mr. Crane. The abuses there were terrible.

The Chairman. And still are in the state courts, as I understand it.

Mr. Medalie. In criminal cases. They are terrible.

The Chairman. Well, to some extent in civil cases.

Mr. Medalie. Now, that does not mean that you ought to go to the other extreme. The bar is willing to conform to anything within reason, without being pushed to this extreme where nothing may be asked.

Mr. Longsdorf. Mr. Chairman, may I add for your information, I attended the Ninth Circuit Conference, on which one whole day was spent in discussing proposed rules, and we should have had a transcript of that, but for some reason they did not

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get it; it was supposed to have been filed with Mr. Chandler's office, but it does not appear to be there.

Now, there was a considerable amount of discussion on this very subject. All I can do is sum it up. The district judges of the Ninth Circuit were nearly all there, and they were in agreement that the judge should conduct the examination of the jurors and allow counsel to ask questions, the judge approving them. I know that the same practice is followed in the state courts in California, and I know the abuses were terrific before it was passed.

Mr. Seasongood. Mr. Chairman, I move to strike out in lines 7 to 9 the words "or shall itself submit to the prospective jurors such additional questions as it deems proper."

Mr. Dean. I second that motion.

Mr. Seasongood. I feel, Mr. Chairman, that the right to ask a juror questions yourself is a valuable right. I have seen it happen in a number of cases where you ask a general question to all the jurors, "Do you know the defendant?" They do not say a word. On the other hand, if you look them in the eye and say, "Do you know them?" or any other similar question, they sometimes say they do; and in the ordinary cases, certainly where I have practiced, the impaneling of a jury is not a long process, because if a lawyer has any sense he does not ask any more questions than he has to, because he is very apt to get their ill will.

14 I think in the interest of expedition it is very poorly served and used if it prevents your ascertaining--and certainly in a criminal case--if a juror has any particular prejudice, which you can find out by looking at him when he answers you.

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Now, the court can limit that; you may not ask or may not go to extremes, but let the court clear the way as much as possible by asking a few general questions, and then let the counsel have reasonable opportunity to ask questions themselves, and the court can control it, certainly, if that thing is abused.

Mr. Youngquist. I think that would answer the proposed rule entirely.

Mr. Seasongood. Well, it is the practice.

Mr. Youngquist. Because even when the attorneys themselves make the examination the court may limit the inquiry as it deems proper, in the language used in line 7. He has that right now to limit it; and if the motion is carried he may do one of two things: he may permit the attorneys to conduct the whole examination or he may make an examination himself and then turn the attorneys loose. His only control over the attorneys is to limit the inquiry to such questions as he deems proper. Well, he has got that very right, even though he does not impose himself at all. So that if we are to have anything with regard to that I think we must keep the entire provision as it is.

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I spent one solid week in examination of jurors in the state court in Minnesota.

Mr. Crane. Well, when I got a jury in the Thornton Jenkins Hains case I was criticized because we got the jury in a murder in the first degree case, with 60 reporters present and I do not know how many jurors called, in a day and a half, and I did it by sitting late at night until I tired the attorney for the defendant out. They were drastic measures and of course might have been subject to error, but they used to take two and three weeks. The Thaw case was a

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different case, and so are other cases in our state, which ought to make a shame at the trials, and this perhaps goes too far, but it does correct an abuse. That is very very necessary, and as long as the judge has got discretion I should think we ought to permit him to ask the questions. That is all we could expect.

Mr. Seasongood. If he has discretion he may say, "I am not going to let the counsel ask any questions at all."

Mr. Crane. They do it now. I think Judge Byers did that.

Mr. Glueck. Well, then substitute "and" for "or" if that is your fear: I mean, that he may not let counsel do it at all.

Mr. Medalie. Now, you have another situation here. This is a provision for the examination of jurors, and your provision for challenges does not say a word about challenge for cause. Now, I assume a provision can be made for that and for the trial of those challenges. No judge is in a position to try a challenge interposed by counsel on either side and ask the proper questions, and you cannot provide that in advance. Now, in challenges for cause I think a lawyer ought to have a right to try that challenge.

Mr. Holtzoff. Does that often arise?

Mr. Youngquist. Who ought to have the right?

Mr. Medalie. The lawyer who interposes the challenge for cause.

Mr. Dean. He certainly ought to be able to ask the questions.

The Chairman. Well, he is the only one who effectively

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can do it.

Mr. Medalie. Yes. Now, there is no provision here for either challenges for cause and no provision of course, for that reason, for the trial of a challenge by questions by counsel or cross-examination by the other.

Mr. Holtzoff. Well, actually does that frequently arise, that you have challenges for cause?

Mr. Youngquist. For cause, yes.

Mr. Medalie. Now, what really happens is this. The reason why these long examinations take place is for the purpose of finding, if you can, a basis for a challenge for cause. Sometimes it appears that there is a basis for it. Then you inquire further. If it should appear by the questions of a judge or, if he allows it, by the questions of counsel, that there is a basis for a challenge for cause or for further inquiry to determine whether there is any such basis, counsel ought to be permitted to ask those questions and press it.

The Chairman. Is it not a further fact, Mr. Medalie, that one reason that those objections are not pressed in court is that not one lawyer in twenty knows how to conduct such an examination of a juror?

Mr. Medalie. That is true. Most lawyers do not know how to conduct those examinations.

Mr. Crane. There is no question about that--any more than they know how to cross-examine them.

Mr. Youngquist. Well, I was assuming that there would be provision for challenges for cause somewhere.

Mr. Medalie. Now, there is another thing in here, if I can mention that.

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Mr. Robinson. Under the civil rules I suppose it is understood--

Mr. Medalie. (Interposing) Mr. Chairman, there is something else in here. You have changed the law as to the number of peremptory challenges.

Mr. Robinson. That is on the recommendation of a great many lawyers.

Mr. Medalie. Yes. I know it is. It is six for the government and ten for the defendant.

Mr. Robinson. Well, it varies. The challenges now are in treason and capital cases 20 for the defendant, six for the government; any other felony, 10 for the defendant, six for the government.

Mr. Medalie. That is right.

Mr. Robinson. All other cases, three for the defendant and three for the government: any other, equality of challenges.

Mr. Medalie. I mean outside of capital cases it is six and ten.

The Chairman. Now, gentlemen, we have Mr. Seasongood's motion pending on the second clause of the second sentence, beginning at the end of line 7 and running through to the end of the sentence on line 9. Is there any further discussion of that?

Mr. Holtzoff. What is that?

The Chairman. The motion is to strike beginning with the words"or shall itself" at the end of line 7, running through to the end of the sentence. Is there any other discussion? If not, all those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was a chorus of noes.)

The Chairman. The chair is in doubt. All those in favor of the motion will raise their hands.

(There was a show of hands.)

Mr. Holtzoff. Six.

The Chairman. Opposed.

(There was a show of hands.)

Mr. Holtzoff. Seven.

The Chairman. The motion is lost, six to seven.

Mr. Medalie. I am reminded of a very prominent trial lawyer who challenged for cause. He thought he had cause. He sat down and did not ask any questions of the jury, and the eleventh juror said, "Mr. Ridgeway, you have not asked me whether I know the counsel for the plaintiff."

The lawyer said, "Well, do you?"

And he said, "Yes, sir."

The lawyer asked, "Do you know him very well?"

"Intimately."

And the lawyer sat down. The juror got up to go out, and Mr. Ridgeway said, "Keep your seat. Would to God I could get 12 men who know him."

Mr. Seasongood. Mr. Chairman, is it necessary to have anything in that jurors may be sworn on the voir dire? I just present that for debate.

Mr. Dean. I hate to see this--

Mr. Youngquist. On the voir dire?

The Chairman. I think we should even though it is not

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in the civil rules. I mean I think if it is not here we are going to have a lot of lawyers over in Congress looking for it.

Mr. Dession. I do not see why they should not be. Do you?

Mr. Youngquist. They ought to be.

Mr. Seasongood. I think they ought to be automatically, because if either party requests it he is at a little disadvantage sometimes. Why should they not be sworn automatically on the voir dire?

Mr. Youngquist. Well, was it intended by the civil rules that both should be prohibited?

The Chairman. No.

Mr. Seasongood. Our state practice is that they are only sworn on a voir dire if the person requests that they be sworn. Otherwise they are not.

Mr. Holtzoff. Not everywhere.

Mr. Seasongood. No. I am just mentioning what the Ohio practice is.

Mr. Youngquist. In our state they are sworn as a matter of course. It may be that the practice is so well established that they thought it not necessary to set that forth in the rules.

Mr. Seasongood. No, it is not.

Mr. Youngquist. I think we ought to put it in.

Mr. Robinson. All right.

Mr. Dession. It is done in a great many districts now automatically. I think we ought to do it. We do not want perjury there any more than anywhere else.

Mr. Robinson. Is that in Ohio they are not sworn?

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Mr. Seasongood. They are not sworn unless somebody asks for it. The state statute says that either party may ask that the jurors be sworn touching their qualifications.

Mr. Dession. That brings up another point. I do not think any attorney should have to request such a thing in the presence of the jury.

Mr. Seasongood. Well, that is what I was going to say, that it should be automatic.

Mr. Youngquist. Yes, it should be.

Mr. Seasongood. Rather than having to have them request it. It does not take a minute.

Mr. Youngquist. It may be very important.

Mr. Seasongood. Yes, I think so.

Mr. Dession. Well, one other point on that, Mr. Chairman: When the challenges for cause are taken care of I think we ought to make sure that those challenges do not haveto be made in the presence of the jury. I do not know how often that is done.

Mr. Medalie. They always are.

Mr. Youngquist. Yes.

Mr. Dession. Well, I have been in some courts where they did not have to do it in the presence of the jury.

Mr. Medalie. Really?

Mr. Dession. I think this is a great deal better. There is a stated penalty on making one, if you ~~read~~ b2 it.

Mr. Medalie. Very rarely is a juror challenged for cause if there are no peremptory challenges left.

The Chairman. Not only because of the effect on the individual juror but the effect on your whole group.

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Mr. Dession. Why should it not always be in chambers or the library?

Mr. Seasongood. Except that you have to send the jury out and bring them back again, and all that.

Mr. Holtzoff. Should not that be left to the discretion of the judge, in local practice?

Mr. Seasongood. Going in and out a number of times.

Mr. Robinson. Parading.

The Chairman. They are often challenged that way, are they?

Mr. Seasongood. Sir?

Mr. Holtzoff. I think challenges for cause are very rare, anyway.

Mr. Medalie. No, it develops that there is something about the juror, his connection with a witness, his connection with some--

Mr. Holtzoff. (Interposing) Yes, but you generally excuse him by consent under those circumstances.

Mr. Dession. Well, there is another advantage of doing it outside the jury's presence, I think. You can go ahead and get a more full and thorough discussion of the juror, if you are awake.

Mr. Medalie. You step up to the bench, and the stenographer comes over and begins recording what you are whispering to the judge.

Mr. Seasongood. I think that is horrible. I think all that kind of stuff creates the worst impression on the ordinary person, to have everybody go up and have that hush, hush, hush around with the judge. They think you are fixing up something

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in the trial. I think that whole business ought to be abolished.

Mr. Youngquist. In our state you interpose the challenge for cause openly in the presence of all the jurors and then go on with the examination to establish the cause.

Mr. Medalie. You mean you challenge them before you have cause?

Mr. Youngquist. No.

Mr. Medalie. But you challenge them for cause?

Mr. Youngquist. We permit the preliminary examination for the purpose of determining whether there might be grounds for the challenge for cause, and then we interpose the challenge for cause and either submit the challenge on the answers that have already been given or ask further questions.

Mr. Medalie. Well, that is the draft rule in New York and other states.

Mr. Youngquist. But we were somewhat puzzled about the absence of provision for challenge for cause in the civil rules,

17 which these follow.

Mr. Holtzoff. Well, maybe you ought to have a separate paragraph.

The Chairman. Well, we have agreed on that.

Mr. Medalie. Yes.

The Chairman. That we are going to cover challenges for cause and examination of the jurors in the voir dire.

Mr. Holtzoff. I should like to ask a question about the sentence beginning on line 9. That is not in the civil rule?

Mr. Robinson. That is right.

Mr. Holtzoff. Now, beginning on line 14 you provide for the removal from the jury at any time if it appears that the

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juror has made a false or misleading answer.

Mr. Robinson. Yes.

Mr. Holtzoff. Now, what puzzles me is, What effect will that have upon a plea of former jeopardy in case you try--

Mr. Medalie. (Interposing) Contempt?

Mr. Holtzoff. No, no. In case you try the defendant again, that would result in a mistrial, would it not?

Mr. Medalie. No. If the defendant asks for a mistrial, there is of course no jeopardy. If during the course of the trial it appears that the juror should not sit, you ask that he be thrown out and consent to go on with 11 jurors, and everything is all right.

Mr. Youngquist. If you do not consent and if the government asks that he be thrown out--

Mr. Medalie. Yes, the defendant must consent.

Mr. Holtzoff. But it does not say that.

Mr. Youngquist. And the defendant does not consent.

Mr. Holtzoff. That is what bothers me. It does not say "with the consent of the parties."

Mr. Youngquist. You are stuck with a juror who has given a false answer.

Mr. Medalie. Yes. Well, to begin with, I do not think that sentence is necessary.

Mr. Crane. Neither do I.

Mr. Medalie. I think that the courts have power to punish anybody who misleads the court.

Mr. Crane. Inherent power.

Mr. Medalie. Now, we had that in the Knapp case. When

that juror gave a false answer we did not find out until the jury disagreed, and found that he was interested in the case.

Mr. Crane. Surely.

Mr. Medalie. And Steve Callahan punished him for contempt.

Mr. Youngquist. And there is no question about that. We do not need it. What bothers me is that in case the juror is subject to removal from the jury it leaves you with 11 jurors.

Mr. Holtzoff. That is what bothers me, too.

Mr. Medalie. All right. Now,--

Mr. Youngquist. (Interposing) I do not think that ought to be done.

Mr. Robinson. That section provides for alternate jurors, you know.

Mr. Medalie. You do not always have alternate jurors.

Mr. Holtzoff. Yes, but that is only in big and long trials.

Mr. Medalie. But now look. Let us get this: The defendant is on trial with a jury of 12 and no alternates, and the trial has been going two or three days or two or three weeks. He discovers that there is a man on the jury who swore to get him and in answer to questions said nothing about it. Now, suppose you do not have a mistrial. You go ahead and get a conviction. That conviction ought not to stand. I think you will agree with that, will you not?

Mr. Holtzoff. Yes. But take the reverse situation.

Mr. Medalie. So what is the harm of kicking him off and getting a mistrial?

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Mr. Youngquist. This rule.

Mr. Holtzoff. I am bothered about the reverse situation, Mr. Medalie.

Mr. Youngquist. Yes.

Mr. Holtzoff. Suppose the United States Attorney discovers a juror who gave falseanswers that are prejudicial to the government?

Mr. Seasongood. Yes.

Mr. Holtzoff. Now, under this that juror can be removed.

Mr. Medalie. Yes.

Mr. Holtzoff. Now, I am wondering what effect that would have on a plea of former jeopardy if that is true.

Mr. Medalie. There has been a jeopardy; there is not the slightest doubt about it. The district attorney is stuck. He had better hope for a disagreement so he can try the case over again.

Mr. Holtzoff. Then should not this sentence be modified?

The Chairman. Would not the court have to declare a mistrial?

Mr. Medalie. No; you cannot declare a mistrial without the consent of the defendant.

Mr. Crane. You can never try him again.

Mr. Medalie. I think the solution of the whole business is to leave that sentence out and let the ordinary law take its course.

Mr. Youngquist. I second the motion.

Mr. Robinson. Let me ask about the Minneapolis case in this connection, the Foshay case, you recall.

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Mr. Youngquist. Yes, I was thinking of that. There a juror, a woman, was called as a juror. She testified she did not know the defendant, whereas in fact she had worked as a stenographer for him. That was discovered after the trial was over. I think there was an acquittal or a disagreement. She was prosecuted for contempt of court. I do not remember whether theproceeding was pushed to a conclusion, but it was concluded by the very unfortunate circumstance of this wife and her husband and twochildren placing themselves in a closed car, putting a hose on the exhaust pipe, and committing quadruple suicide.

Mr. Holtzoff. That case went to the Supreme Court.

Mr. Youngquist. Did it?

Mr. Holtzoff. And the conviction for contempt was upheld.

Mr. Robinson. Yes, her conviction was upheld, but the case was lost. She held out, you know, not to convict.

Mr. Wechsler. There was a disagreement.

Mr. Crane. C. C. A. reports it as a conviction.

Mr. Wechsler. There was a disagreement, and then there was a second trial and a conviction.

Mr. Crane. Yes.

Mr. Robinson. The second trial you are talking about. The first trial they lost out on; she was the one juror who held out.

Mr. Youngquist. Yes.

Mr. Robinson. Now, then, suppose the counsel for the state or the defendant find out that there is a juror who has made misstatements there. Is there nothing for counsel to do except just wait until the jury disagrees?

Mr. Medalie. No, the defendant has no trouble. The Government has a constitutional difficulty.

Mr. Youngquist. That is the point.

Mr. Crane. There is a very nice point coming up in that Solomon case.

Mr. Medalie. Oh, you mean Loft? Loft, a witness, getting sick?

Mr. Crane. Yes.

Mr. Medalie. Well, that is another case.

Mr. Crane. That may be technical.

Mr. Youngquist. Did you make a motion on it?

Mr. Medalie. Yes. I moved to strike that sentence beginning, "In the examination of prospective jurors," lines 9 to 16.

Mr. Youngquist. I second the motion.

The Chairman. Is there any discussion?

(There was no response.)

The Chairman. All those in favor will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Medalie. Now let us know what we are deciding on number of peremptory challenges. It is proposed that both sides have the same number of peremptory challenges. It is proposed that both sides have the same number of peremptory challenges.

Mr. Robinson. Yes.

Mr. Holtzoff. Why should not they?

Mr. Medalie. I have no objection. I only want you to decide it. I want to know what you are deciding.

Mr. Holtzoff. But I want to make it clear, though, that all the defendants together have the same number of challenges, and I think that sentence should be clarified. I think that is what it is intended to mean.

Mr. Medalie. If you have a dozen defendants, and some of them do not like some of the rest, their challenges are joint or total.

Mr. Robinson. Yes. The suggested amendment there would be in line 17, "to the defendant or defendants."

Mr. Holtzoff. Yes.

19 Mr. Robinson. "or to his or their attorneys."

Mr. Medalie. Well, now, that is one reason why the disparity in challenges ought perhaps to be maintained. Now, if it is a single defendant I am willing to agree that the number of peremptory challenges should be the same on each side; but if you have a number of defendants, particularly where they are represented by different counsel, I think that justice suggests that they have some extra challenges.

Mr. Robinson. Well, now, how many, Mr. Medalie? That is a practical question.

Mr. Medalie. Six to ten has been a workable thing; we have been working under that for years.

Mr. Holtzoff. Well, maybe we could keep that where there is more than one defendant.

Mr. Medalie. Yes, I think that would be fair enough.

Mr. Holtzoff. Provided where there is one defendant the number shall be the same.

Mr. Medalie. Yes. And also provide that challenges are joint and not several where there is more than one defendant.

That is the language of the New York Code: challenges are joint and not several. Where it is a misdemeanor you have only three challenges.

Mr. Youngquist. Mr. Medalie, would not the possible causes of peremptory challenges by the government be multiplied by the number of defendants--friends, acquaintanceship, relationship, and all that?

Mr. Holtzoff. Those challenges would be for cause, would they not?

Mr. Youngquist. No.

Mr. Medalie. That is mathematical rather than real, is it not? The government has just one cause.

Mr. Robinson. I am satisfied that that objection will be raised whenever these rules come up for consideration at bar committee meetings or in Congress or elsewhere. Therefore I think this committee should do something about it.

Mr. Crane. What? Give the government the number of challenges of each defendant?

Mr. Holtzoff. No.

Mr. Robinson. If there are plural defendants.

Mr. Holtzoff. Not under the federal rule.

Mr. Crane. Oh, yes. I agree with Mr. Medalie.

Mr. Holtzoff. In the light of the reporter's remarks, I will bring this matter to a head. I move that this rule be modified so as to provide that in cases where there is one defendant the government and the defendant shall have the same number of challenges.

Mr. Medalie. I would suggest the minimum, not the

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maximum: six instead of ten.

Mr. Youngquist. In felony cases?

Mr. Medalie. Yes.

Mr. Youngquist. Misdemeanors?

Mr. Medalie. What?

Mr. Youngquist. Capital?'

Mr. Medalie. I know. Then you could disguise the limit in capital offenses, and you put the limit at 20. That is all right.

Mr. Holtzoff. And that in those cases where there is more than one defendant the number that now prevails shall continue; would that not be all right?

Mr. Medalie. That is six and ten, yes.

Mr. Holtzoff. Yes.

Mr. Robinson. Now, how is that? If more than one--

Mr. Holtzoff. I am not trying to phrase the exact wording.

Mr. Robinson. I know, but--

The Chairman. Six to six for one defendant; six to ten where more than one, and in capital cases--

Mr. Medalie. Capital and treason, 20 to a side.

Mr. Dean. Misdemeanors, three and three.

Mr. Robinson. What?

Mr. Dean. Misdemeanors, three and three.

Mr. Holtzoff. Yes.

Mr. Medalie. Well, that is misdemeanors not in the way in which it is defined in some of our statutes. Some of our misdemeanors carry three- and five-year offenses.

Mr. Holtzoff. Embezzlement from a bank is a misdemeanor.

Mr. Medalie. Is a misdemeanor. That is a five-year

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offense. You mean cases where the punishment is not in excess of one year?

Mr. Dean. That is right.

Mr. Medalie. Mr. Robinson?

Mr. Robinson. What is that?

Mr. Medalie. Misdemeanor in the sense that the punishment is not in excess of one year and a fine?

Mr. Robinson. Yes. That is the federal rule.

Mr. Medalie. Is it?

20 Mr. Dean. Now you are going to leave it, in the case of a single defendant in the action, three for the single defendant and three for the government?

The Chairman. Isn't that too little?

Mr. Dean. I think it is.

Mr. Robinson. That is in a misdemeanor case.

The Chairman. Yes. I mean, after all, being sent to jail for a year is not a light thing.

Mr. Robinson. Now we are amending the federal statute, of course, of 1911.

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Mr. Dean. We are doing that also in this draft.

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Mr. Orfield. Do you have challenge for cause?

Mr. Medalie. You do not get many challenges for cause that are ever sustained.

Mr. Youngquist. One reason for the delay in the state courts in examination is that there are quite a number.

Mr. Dean. Not on peremptories.

Mr. Crane. No, they put the juror in the witness box and keep him there for hours. Challenges never cause any trouble.

Mr. Robinson. They do in some states.

Mr. Holtzoff. Theycause a great deal of trouble in some state courts.

Mr. Medalie. What about where you have several defendants?

Mr. Holtzoff. Yes.

Mr. Medalie. If you have 15 defendants you have 90 challenges?

Mr. Holtzoff. Yes.

Mr. Medalie. That is terrible.

Mr. Dean. I wonder if there is any way in which we can take care of that difficulty where you have several defendants. It certainly is a mess. I do not think there is any way that we can touch it.

Mr. Medalie. What about misdemeanors?

The Chairman. Six apiece.

Mr. Medalie. Six and six even with plural defendants?

The Chairman. Yes.

Mr. Medalie. There are few such cases ever tried. Most of the misdemeanors are like the food and drugs and migratory bird cases.

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The Chairman. Any other point on section (a)?

(There was no response.)

The Chairman. Let us take up (b), alternate jurors.

Mr. Medalie. There has been a change made in the alternate juror statute. The statute provides that alternate jurors stay in until the jury retires to deliberate. You have it here until the jury returns with its verdict.

Mr. Robinson. Yes.

Mr. Medalie. This is your problem: the jury retires and deliberates. Let us say it is out 12 hours. One of them gets sick or dies. Should you call back the alternate juror into these deliberations and start at the end instead of at the beginning?

The Chairman. I think you remember the case in which the Mayor and the Commissioners of Newark were tried and which lasted some time and after the jury retired and was locked up for 15 hours one juror developed an acute appendix. There were alternate jurors available.

Mr. Medalie. Let us see what you would do with the alternate. Twelve jurors have retired and are locked up. That means you sequester the alternate. They stay until the conclusion.

Mr. Holtzoff. Yes.

Mr. Medalie. That is simply boring to the two alternates.

Mr. Youngquist. If one of the jurors in the jury room dies, then you bring in the alternate?

Mr. Dean. The judge can do it, and then the juror takes up the deliberations from that point on, but he has missed the

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early discussion.

Mr. Robinson. He is in the custody of the marshal.

Mr. Dean. Would you not have a serious constitutional question there?

Mr. Robinson. The judge would decide it.

Mr. Dean. It seems to me that if you take the alternate into the jury room when you have 12 men then you have more than the 12 because you have a jury of 14 men or 12 men being influenced by the presence of two people who should not be in there. On the other hand, if you sequester them and bring one of them in later because of an accident or something he has then missed the early deliberation.

Mr. Medalie. He has not been present for the whole trial.

Mr. Robinson. Don't you think the decisions on the constitutionality of these alternate juror statutes are sufficient to take care of that?

Mr. Medalie. Do you have any cases which deal with that situation?

Mr. Robinson. Just the broad language.

Mr. Dean. Well, it is a technical objection.

The Chairman. There is one case in Mr. Orfield's state where there was a labor leader on the jury. He convinced them that the jury should organize and get together and elect him chairman. Then they had a secretary and then they agreed that the American principle of majority should rule, and as long as they got seven they were ready for a verdict. Then you would be in trouble.

Mr. Dean. The reason that I say that the cases to which

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he refers there are not applicable is because the alternate juror statute is really making for a jury of 14 men rather than a jury of 12 men. The answer of the courts is that there are just 12 people; it is true that you have two people inside the courtroom, but they are not participating in the deliberations and when they go into the jury room for deliberations then you have only 12 men. That is what I understand is the reply of the courts to the attack upon the alternate juror statute.

Here, however, you introduce a different thing.

Mr. Robinson. I would like to go still further into that law, but I might say this as a matter of personal conviction, that I have been thinking about this for many years. I happened to be on the committee appointed by the federal judge in Indianapolis to consider the civil rules, and this was recommended. The reason why it was suggested that the alternate stay when the jury begins deliberations is because that may be a time when they are needed, but I do think that it is a good plan to consider the constitutional question also.

Mr. Dean. Has any case ever decided the validity of the statute involving the constitution where an alternate juror was in?

Mr. Robinson. No, but I think the language of the decisions is sufficient, at least some of the decisions.

Mr. Dean. It may be.

Mr. Medalie. You have this situation in the event that you have two alternate jurors who do not go in. If you start with 12 and they retire to deliberate and one gets sick or dies, you have a mistrial. Now, the worst thing that could

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happen if we adopt the procedure that you have suggested is that if this is unconstitutional you would have another trial. I think that it is worth that risk.

Mr. Youngquist. That occurs to me in that connection, that you would go through another trial. If you have an alternate juror and send him into the jury room after one has become sick or died, a verdict will be reached unless the jury disagrees. The only thing that the alternate juror has missed is some discussion. He has heard all the evidence and the argument and all of the charge. He is as well fitted as any of the other jurors to decide the case. It seems to me that the fact that he has not been subjected for a time to the opinions and argument of the other jurors does not work any injustice either to the defendant or to the government.

Mr. Medalie. Are you arguing now for the constitutionality of this procedure?

Mr. Youngquist. I think we should do it, in view of the decisions.

Mr. Medalie. That is what I suggested, and if they hold it unconstitutional then we know that we cannot do it, but if they hold that it is then we have done something that is useful.

The Chairman. We can cite cases which have been carried along, because that has often happened and jurors got sick or died.

Any other discussion on this?

(There was no response.)

The Chairman. If not, we will take up Rule 48.

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RULE 48

Mr. Robinson. This refers to the Patton case, I think.

Mr. Glueck. Is there anything in here, Mr. Chairman, as to what kind of materials the jury may have with them in the jury room when they deliberate?

Mr. Medalie. You mean whether they can get the exhibits when they want them?

Mr. Dean. Before we discuss this matter, may I ask a question about the alternate jurors? Don't you change the law with reference to the number of peremptory challenges? My impression was that you had two challenges if you had two alternate jurors.

Mr. Robinson. Line 33, 34, and 35 states it as follows:

> "If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law."

Mr. Dean. If you have two alternate jurors shouldn't you have two peremptory challenges?

Mr. Medalie. I think there is no trouble about getting along with one challenge.

Mr. Dean. Is that the law now?

Mr. Medalie. Yes. It works all right now. No one has objected to it.

Mr. Dean. I just wanted to know whether we are changing the present law.

The Chairman. Is there any other question on Rule 48?

Mr. Seasongood. Just the question of phraseology.

Mr. Longsdorf. There is a case where they waived the

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twelfth juror because of the incapacity or death of him during the trial. Is that sufficiently included in the language of No. 48?

Mr. Seasongood. That is what I was going to say.

Mr. Robinson. Are you thinking of the Patton case, where a juror died?

Mr. Medalie. This sufficiently covers that.

Mr. Robinson. Yes.

Mr. Seasongood. The only question I have is "They may stipulate that the jury shall consist of * * *." That would be in the future. I think that they "may" stipulate before the trial or during the trial. Why keep the civil rule "shall"?

If it is not improved by it or if that is not the proper thing, leave it out. They may stipulate that the jury shall consist of any number less than twelve.

Mr. Dean. Haven't we covered that in this matter we discussed this morning with respect to what the Patton case provided with reference to waiver?

Mr. Seasongood. Is there any harm in saying "before or at any time during the trial"?

Mr . Medalie. Say before or during the trial.

The Chairman. We are only responsible for our part, but in the one court this may cast a doubt on the civil rules and they may say, "What do you mean in the civil rules?" Unless you have something definite, I do not think it would be wise, do you?

Mr. Medalie. I understand that without this rule that may be stipulated in federal cases.

Mr. Holtzoff. Yes.

Mr. Medalie. So if that stipulation is made, the stipulation has this authority of stating the law and does not reduce in any way the extent of your principle.

Mr. Orfield. Why not go as far as the civil rules and provide for a less than unanimous verdict?

Mr. Burke. There is no Supreme Court case on that.

Mr. Orfield. You could do it.

Mr. Glueck. By stipulation?

Mr. Orfield. Yes.

Mr. Waite. I am in favor of this rule but I would like to voice my objection to the fact that these rules of criminal procedure follow the rules in civil cases.

Mr. Robinson. We do not follow them except where they are good.

Mr. Waite. I mean in their order. If for instance in Rule 39 is the provision about waiver of a jury, then you have a lot of extraneous matter and then Rule 48 in which you have a provision that a single juror may be waived. The logical thing to do would be to put all the rules with respect to the jury together.

Mr. Robinson. I do not know what the reason for this order is.

Mr. Dean. I move we strike out Rule 48 and incorporate whatever is in it in Rule 38.

Mr. Waite. Rule 39?

Mr. Youngquist. No, 38, isn't it?

Mr. Robinson. Yes, Rule 38.

The Chairman. On page 2.

Mr. Holtzoff. I second the motion.

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The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(There was no response.)

The Chairman. It is carried.

Mr. Medalie. Are we going to make a provision for what the jury may take into the jury room with them in the way of exhibits?

Mr. Glueck. What is the present federal law on that?

Mr. Holtzoff. It is in the discretion of the court.

Mr. Youngquist. I think it is safer to leave it there.

The Chairman. Is it customary to take the exhibits in?

Mr. Medalie. If the jurors ask.

Mr. Crane. You have to have consent of the court.

Mr. Medalie. That is the usual thing. Counsel are consulted, but I do not know why they are consulted.

Mr. Holtzoff. I have heard of some cases of some requests being refused.

Mr. Crane. I do not think that the indictment is ever submitted to them.

Mr. Medalie. Yes, it is done in mail fraud cases where there are a number of defendants and the jurors cannot actually carry in their heads the number of defendants, and when that is done they read the indictment.

Mr. Dean. That is one place where there is no uniformity. It is a question whether we want to face the music and fix a rule one way or the other on it. What do you think of the whole idea?

Mr. Crane. I think it is a question for the court to see

that nothing improper is being handed to them. I think it is possible to see and judge what is going to the jury so that nothing improper is slipped in by mistake or intention that really should not go to the jury.

Mr. Glueck. If we have a rule on that I should like to suggest this one whether the jury should be permitted to take notes during the course of the trial.

Mr. Robinson. It would be dangerous.

Mr. Glueck. I do not see why it is dangerous.

Mr. Robinson. That is the common law.

Mr. Dean. If jurors are allowed to take them they will go along and take them for the first few days. That is the government's case. Then they get tired. Then they get in the jury room and all they have with them are a few notes of the government's main witnesses and they bring those out and discuss them.

The Chairman. Isn't that taken care of by the courts? They could take down the pertinent dates and figures as a guide to their recollection and not let the jury do it?

Mr. Dean. I don't know.

Mr. Medalie. I have not seen it.

The Chairman. That is done quite often in our state courts when the trials will last over a week; not any shorter.

Mr. Medalie. A very distinguished prosecutor hit on the device of giving each juror a pad and pencil.

Mr. Waite. In a case in which I sat which lasted five weeks if I did not take any notes I would not know anything about it except perhaps a few bare facts.

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Mr. Dean. There is another possibility. I mentioned that other case facetiously, but you get a one-sided picture from these notes. You have a situation where one person who is a good writer will take the notes and the others will ask him, "What do you have on your slip?"

Well, he has got something, and they will take that. I think there is a danger of giving a one-sided picture for what is preserved in the notes.

Mr. Waite. My point wasthat I would have a one-sided picture if I could not take notes.

Mr. Seasongood. The judge can take that into consideration and charge the jury that the notes are evidence and they are not to be given too much weight. In a modern trial you have a great many issues and a great many facts to contend with.

Mr. Youngquist. I think you would get into trouble.

Mr. Holtzoff. I do not think it shouldbe mentioned in the rules.

Mr. Medalie. It is one thing for the juror to take down notes, but he does not get down a fair picture of the evidence. I think we can leave it alone.

The Chairman. I know that in one case one juror spent days taking the judge in various positions and making caricatures of him and distributing them to his fellow jurors.

Mr. Dean. I suggest we leave it out.

Mr. Medalie. I once asked a juror who spent quite some time writing in a little book. This was after the trial, and I asked him what he had taken down about the case, and he said he did not take anything, but every time he thought of something that he wanted to do or to make some telephone call or

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something about some business matter that he would write it down in the book. The attorneys were wondering what he was doing.

Mr. Seasongood. There was a very famous case of a judge who wrote quite industriously in a notebook. After the trial it was found out that all he wrote in the notebook was just "Patience, patience, patience."

May I ask with respect to 48 if you have adopted it as it is.

The Chairman. Substantially the same language.

Mr. Seasongood. I think that is the question Mr. Orfield made. That goes to the point I made and that Mr. Orfield made. That is, doesn't that mean they may only stipulate in advance of the trial, or may they stipulate at any time during the trial where one juror dies or is sick that they may go on with less than 12?

The Chairman. Why not cover that in an instruction to the reporter?

Mr. Seasongood. Well, that is in the civil rules.

Mr.Youngquist. It says that the parties may stipulate that the jury will consist of any number less than 12. In the civil rules it states:

> "That a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Mr. Seasongood. I understand that Mr. Orfield raised the question whether you could stipulate with a less number. If you can stipulate by complete waiver, why can't you stipulate

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for a less number than 12 and say that the verdict of those shall constitute the verdict? Isn't it obvious that if you can waive a jury entirely you can waive a part of a jury?

The Chairman. Is that possible in a criminal suit, for a defendant to do that?

Mr. Dean. Yes, he did it in the Patton case against the United States.

Mr. Seasongood. That means that a stated majority of the jurors shall be taken as the verdict.

Mr. Robinson. I would assume that if you start with 12 jurors you stipulate that seven will control? I do not think that the Patton case establishes that.

Mr. Holtzoff. That is the only authority for a unanimous verdict of less than 12.

Mr. Dean. According to the Supreme Court a jury must consist of 12 members.

Mr. Seasongood. If you can waive the whole, you can waive a part, or a vote of a part.

Mr. Robinson. Can you say that if a jury of 12 goes into a jury room and then seven out of the 12 can control? Can you say that their votes shall control?

Mr. Holtzoff. Isn't it an academic question, because no defendant would ever stipulate to be bound by less than a unanimous verdict?

Mr. Youngquist. He may get it by the grapevine that it stands 7 to 5. He may want to avoid a long trial again and get it over with and he may be willing to take that majority verdict.

Mr. Seasongood. He may figure that it is better to take

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what happens than go through this thing again.

Mr. Orfield. I move we follow the ~~similar~~ civil rule.

The Chairman. To include the last two lines of the rule on the left-hand side of the page.

All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. And those opposed.

(There was a chorus of noes.)

The Chairman. Let us have a show of hands from the ayes.

(There was a show of hands.)

The Chairman. And from the noes.

(There was a show of hands.)

The Chairman. The motion is lost.

Rule 49.

RULE 49

Mr. Robinson. This is merely a test for your opinions as to whether special verdicts and interrogatories are applicable in criminal cases. That requires an expression of your feelings about the matter.

Mr. Medalie. I move we strike this out.

Mr. Dean. I second it.

The Chairman. Is there any discussion on that?

Mr. Medalie. There is a state experience in New York. We have a special verdict provision in our code of criminal procedure, but that applies to a separate trial of an issue like former jeopardy. The judge makes the verdict. You cannot work it out.

The Chairman. That is your constitutional difficulty.

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Mr. Medalie. I think so. It is not necessary, and I think it is much better to get a general verdict than a special verdict. The jury has the responsibility for deciding a man's guilt apart from the mechanical facts.

Mr. Glueck. What kind of verdict can you get other than guilty or not guilty?

Mr. Medalie. You could say whether he had a pistol or not and whether there was a bullet in it and if it struck the defendant in the fourth rib and gangrene set in and that he died and that he knew it and intended it to happen and planned it five weeks. That is a special verdict.

The Chairman. Those in favor of the motion to strike it out say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(There were a number of noes.)

The Chairman. Two noes. Let us hear argument.

Mr. Waite. I would like to say that I think this procedure for special verdicts is very desirable under certain conditions, but not as a common thing, but only in certain circumstances.

Beginning with line 13, this particular provision seems to have cured a great defect in the pre-existing special verdict procedures by taking care of situations where some pre-issue of fact has not been submitted to the jury. That was the difficulty with the special verdict procedure. Now that is covered by this feature so there cannot be any defect in it, and I think that is a good procedure.

Mr. Holtzoff. Why doesn't this special verdict deprive a defendant of his right to a jury trial? He is entitled to have

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the jury say whether he is guilty or not and not merely make a detailed finding of facts.

Mr. Wechsler. This procedure all comes back to the English law and practice in having the jury return special verdicts. It was the major way of reviewing questions of law in criminal cases. It seems to me to be a useful practice in cases where the law is complex and where the general verdict is not nearly as helpful as a recitation of the facts and the rest of the issues in the trial.

I do not think that anybody would want its use to be frequent, and I do not say that in its present form I would approve of it entirely, but I do think that some notion of reserving questions of law for appeal on review other than by the general verdict is desirable.

Mr. Holtzoff. Don't you do that by a motion for a directed verdict in Rule 50?

Mr. Wechsler. No, you do not, because you do not get the jury to resolve those issues. It may make all the difference in the world if you put those issues to the jury discreetly and direct their attention to them. If you ask for a general verdict you see what happens.

Mr. Medalie. The court alone can without the consent of counsel do that.

Mr. Robinson. I would like to get Professor Orfield's view on that.

Mr. Orfield. As I see it it developed historically in taking the power from the jury. The jury had too much power. That was one of the purposes in giving the power to the court.

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Mr. Wechsler. That is only one statement of the function. Didn't it also serve to facilitate appeal to a large number of judges at a time when there was no way to get that review?

The Chairman. Aren't you speaking of a time when there was no other way to get it?

Mr. Wechsler. I made the English point only to illustrate this idea. I do not think the reason for its development in England, or the major reason for its development, is applicable to us, but in reading these English cases I have been impressed by the way in which they proceeded to sharpen legal questions for the consideration of the Court for crown cases reserved.

Mr. Medalie. What was the form of special verdict?

Mr. Wechsler. It is a recitation of facts.

Mr. Medalie. A recitation of facts?

Mr. Longsdorf. Each and every fact in a crime?

Mr. Wechsler. Yes.

Mr. Medalie. Today we have perfected methods for raising any sound legal question in any criminal case.

Apart from the question you raised with respect to indictment, any competent counsel with a handful of prepared requests for instructions can sharply raise any issue relating to any criminal case. I am not talking about frivolous requests for instructions. I am talking about the essential points of the case.

You cannot cite a single exception where a flat question of law in any important phase of the case cannot be raised that way.

Mr. Wechsler. You raise a lot of legal questions today

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by questioning the sufficiency of the evidence to support a perfectly legal conclusion.

Mr. Medalie. But you have a verdict.

Mr. Wechsler. You have a general verdict.

Mr. Medalie. Then you have set forth every fact in the case.

Mr. Wechsler. Therefore what you have to do and what the courts must do is to cull the record to find if there is any substantial evidence to sustain your point.

Mr. Medalie. You must do that in any event for the purpose of determining whether the evidence sustains the verdict or whether or not the judge should submit the case to the jury.

Mr. Wechsler. But if the issue were discreetly submitted to the jury, the jury may find on that particular issue the other way, but the taking of the general verdict is to limit it and then you get this retrospective combing of the record.

Mr. Medalie. They can make a request for a special instruction.

Mr. Wechsler. You said yesterday that you had criminal cases adjudicated on an agreed statement of facts.

Mr. Medalie. No, I did not say that.

Mr. Youngquist. On a stipulation.

Mr. Medalie. I never give my facts away as easily as that. There would be no use in trying cases. There are certain facts that are stipulated; that is, that a particular document was signed by X or that B was to pay a certain amount of money on a certain day to C; or that the books of the corporation disclosed such and such an amount, and things of that sort; or that

a company was incorporated on a certain date and that certain persons were directors of the corporation. They are usually things that the government would probably take two or three tedious days to prove.

Mr. Waite. I think that you are not exactly correct in saying that under that procedure questions of law can be raised under our line of procedure. I have in mind that a special verdict is sometimes markedly more accurate than a general verdict. In a case where the issue was complicated and where the emotional situation is extreme, a special verdict may definitely protect a defendant against an emotional general verdict on the part of the jury.

Mr. Medalie. Well, I think if the jury is so influenced by emotion then the form of the verdict may not make much difference.

Mr. Waite. That is not true. They may often find a general verdict of guilty, but when they are asked to find a special thing and state particular facts they won't find facts contrary to the evidence.

Mr. Medalie. This really does not help that situation at all.

Mr. Waite. We should give the judge the power to require it in situations where it is desirable. I would like to see the defendant or the prosecutor have a special verdict in cases where they want them. I think it should be left to the discretion of the judge. I assume that it would be very rarely used.

Mr. Medalie. Let us see what may happen in the course of the next two or three years. Suppose we get into this war.

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Suppose the sentiment begins to run high against the Vallandighams?

Mr. White. Against whom?

Mr. Medalie. Against the Vallandighams, against the dissenters, people who make speeches.

That is all they need do to make sure these men are taken care of, namely to submit questions for special verdicts. I may dislike Vallandighams, and they won't like them when that is a good reason for protecting them.

Mr. Waite. That is my point, that if you leave it to the jury on a general verdict that is what you will get, but if you require findings of fact specifically, the jury will be called upon to decide those facts more specifically so that you will get a more proper verdict than guilty just on emotion.

Mr. Crane. May I say a word here? This bears upon the whole jury system. It is an outlet for the expression and feelings of the American people which prevents us from breaking out or breaking up. Suppose juries are not always logical and their verdicts may be contrary to the evidence, yet we like the jury system. You may go before a judge, and judges are just, but the jury system is an outlet and that is the reason why we have the jury system instead of the judge. The judge is fair; he is just; he is trained to look at the facts and make logical conclusions and to weigh the evidence. Juries may not do that, but the jury system is a great outlet in America. We may find fault with it, and the prosecutor may find fault with it, and we get absolutely disgusted sometimes with the stupidity of juries. The jury system is good even with its faults and because of its faults.

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Just to give an illustration, when I was prosecutor in Kings County we had to enforce a liquor law, not the prohibition law, but a law closing stores on Sunday and they had to close at 12 o'clock. One Sunday a person went to a place where there was a saloon and asked the man to open it up. It was closed and he called to the owner to come down and open the place and get hima bottle of brandy because his child had heart trouble, and the doctor said he had to take it. Well, the good-hearted Irishman went down and opened the saloon and gave him the bottle of brandy, and he paid for it and went away.

The officer arrested him and we had an assistant prosecutor try the case, and the jury came back and brought in a verdict finding the officer guilty. (Laughter.)

Now then, they had to say something; they just could not stand there and not say anything. That just illustrates that the juries sometimes do things that are not logical and are not perhaps right, but these things arise, nevertheless.

Of course, we have to prosecute and we have to carry out these statutes. We do the best we can and then leave it to the jury. That is the reason why we have juries, and I think it is the jury which has been the bulwark of liberty sometimes in spite of government.

I think that for that reason a verdict of guilty or not guilty as the jury thinks best is about the best we can do. The juries are taken from the people, and in most cases they know the people.

The Chairman. Do we adjourn now?

Mr. Crane. I was just warming up.

Mr. Medalie. Are we going on tomorrow?

The Chairman. Yes.

Mr. Seasongood. How about Thursday?

The Chairman. I think we can tell tonight whether we will finish tomorrow.

(Thereupon, at 4:35 o'clock p. m., a recess was taken until 8 o'clock p. m. of the same day.)

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NJC

NIGHT SESSION

The proceedings were resumed at 8 o'clock p.m., at the expiration of the recess.

RULE 50

The Chairman. All right, gentlemen. Rule 50.

Mr. Seasongood. Mr. Chairman, before we leave the question of the jury, ought there be anything in the rules regarding polling the jury?

The Chairman. Should there be anything regarding polling the jury?

Mr. Medalie. I suppose there could be. It is the most futile thing I ever saw.

The Chairman. The only time I saw it do anything was once when juror No. 5 said, "Yes, we find him guilty because he is a so-and-so." That is the only time I have ever heard any variation, because he could not restrain himself.

But do you think it is worth anything?

Mr. Seasongood. It is a right that is secured in our state practice to any party.

The Chairman. I suppose it is a thing that every judge would do on request, without a doubt.

Mr. Youngquist. I think we could safely leave it to them.

Mr. Robinson. It is a well-established common law procedure.

Mr. Longsdorf. How did it originate in the first place?

Mr. Youngquist. Some suspicious defendant, I suppose.

The Chairman. Wasn't it the object on the part of the Crown to lay the basis of an action against a juror for having reached an improper verdict?

Mr. Longsdorf. I have a faint recollection it was some

such occult as that.

The Chairman. If it is worth anything I think we should put it in.

Mr. Medalie. I was just looking through this very elaborate New York Code of Criminal Procedure. I do not find any provision in here for polling juries.

Mr. Youngquist. I am quite sure we have no such provision in the Minnesota statutes, but it is common practice.

Mr. Crane. I suppose it means that a judge can ask each juror if that is his verdict, so as to be sure they understand what they have done.

Mr. Seasongood. Yes. Any party can ask if that is what they say.

Mr. Crane. Yes. They ask if "That is your verdict," and they take their answer to it, just to make sure it is unanimous; but I should think it was in the power of the court to find out if that was the verdict of all the jurors anyway.

The Chairman. I see no objection to it if anybody thinks it will be of any assistance.

Mr. Youngquist. Well, I should not suppose there would be any need of it, because if anyone wants a poll the judge certain would poll the jury.

The Chairman. The question which is up, gentlemen, is, Shall we have a provision concerning polling the jury?

Mr. Seasongood. Well, let the reporter consider it and see if he thinks of any reason why it should be and if it is contained in any of the state codes.

The Chairman. We will make a note for the reporter to see if it is a common procedure in the code.

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Mr. Orfield. It is covered by Section 336 in the American Institute of Law Code:

"If any juror announces that the verdict as declared by the foreman is not the verdict agreed on or that it was not concurred in by the required number of jurors or that he no longer concurs in it, the court shall cause the jurors to be asked severally if it is their verdict. If the required number answer in the affirmative, the verdict shall then be entered of record and the jury retired from cause. If the required number do not answer in the affirmative, the court may direct them to reconsider their verdict. In any case the court may, on its own motion and on motion of either party, poll the jury."

According to the commentary, something like ten States have that in their statutes.

Mr. Holtzoff. Isn't that inherent?

Mr. Daan. Why do we need a rule to poll a jury?

The Chairman. That is the question which has been raised.

Mr. Seasongood. There is apparently no Federal statute containing that, and they seem to have statutes in a number of States. I do not know whether it is necessary.

The Chairman. Suppose we have a further check made on that by the reporter.

Mr. Longsdorf. Mr. Chairman, I did not understand, when we left here at the last session, whether Rule 49 on special verdicts was retained or discarded.

The Chairman. It was voted down, and then the chair

asked Mr. Orfield and Mr. Wechsler to elaborate their views for information.

You did not discuss that, did you, Mr. Waite?

Mr. Waite. I said a word. I do not know whether you would call it discussing it.

The Chairman. I did not think you were in the negative on that point.

Mr. Waite. Yes.

The Chairman. All right, then, Mr. Waite. Pardon me for overlooking you.

Rule 50.

Mr. Robinson. The present Federal law has been changed by a Supreme Court decision as recently as 1940. Mr. Strine supplied me with this memorandum:

> "The rules have been repeatedly stated that a defendant waives a motion for a directed verdict made at the close of the Government's case by introducing evidence in his behalf and failing to renew the motion at the close of the entire case; that where no motion is made for a directed verdict at the close of the whole case defendant may not raise the sufficiency of the evidence after verdict; and that in the absence of an exception the denial of a motion for a directed verdict at close of whole case may not be renewed on appeal. The Circuit Court of Appeals for the Ninth Circuit announced and followed these rules in Hemphill v. United States, 112 Fed. (2d) 505, and Sheridan v. United States, 112 Fed. (2d) 503,(1940). But both of these cases were reversed by the Supreme Court and remanded (per curiam) with

directions to consider the sufficiency of the evidence to support the verdict."

That was Hemphill, 61 Supreme Court 729, and Sheridan, 61 Supreme Court 619.

In the Sheridan case the Solicitor General confessed error.

It seems, then, that if the defendant moves for a directed verdict at the close of the evidence by the Government and then goes ahead, when the motion is overruled, offers his evidence, and then fails to move for a directed verdict at the close, he is not thereby cut off from the advantage that he otherwise would get if he were to renew it.

Now, that is the rule. I do not know what you consider to be its relation to the new decision. I do not think it makes the rule unnecessary. I notice it follows exactly the civil rule on the subject.

Mr. Wechsler. Well, has the problem that arose in the civil procedure and to which this rule was addressed originally in criminal cases, to wit, the problem of the motion for direction constituting a waiver of jury disposition, which is really what it amounted to, come up? The old procedure was that when the plaintiff and defendant both moved for direction there might be lost the opportunity to offer a defense. Now the Government cannot move for a direction, and therefore I question whether this provision has any point in criminal procedure.

Mr. Robinson. I think that is probably true.

Mr. Crane. That is my idea. I do not see any necessity for it.

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Mr. Holtzoff. Doesn't it have an office, because it goes to a different point, Mr. Wechsler? Namely, whether by moving for a directed verdict at the end of the prosecution's case the defendant waives the right to offer evidence on his behalf.

Mr. Wechsler. Has it ever been suggested that he does?

The Chairman. That is the law in New Jersey.

Mr. Dean. In a criminal case?

The Chairman. Yes.

Mr. Medalie. And applied by Federal judges in New Jersey to criminal cases there.

Mr. Crane. If he moves for a directed verdict at the end of the People's case, he cannot offer evidence.

The Chairman. He cannot offer evidence unless the court grants permission, and it is within the sole discretion of the court.

Mr. Medalie. Did they ever get away with that in a Federal case?

The Chairman. Certainly. Judge Ralstead did it.

Mr. Medalie. I had an experience with him in 1920. He said, "Of course, I deny your motion, but you may offer evidence for the defense."

The Chairman. If he thought that the man was guilty and it was just a waste of the defendant's time, he would deny the motion.

Mr. Medalie. Did the Circuit Court of Appeals ever sustain that?

The Chairman. I do not know that it went up to it.

Mr. Dean. I noticed an approved form in one of the Circuit Court of Appeals in which it appeared that the defendant prayed

for leave to put on his case after making the motion. First he asked for that leave and then asked the court to direct the verdict.

The Chairman. I believe that is the law in Delaware as well.

Mr. Crane. If that is so, you had better have it in there.

Mr. Wechsler. Should there be an additional provision which incorporates the rule of the Hemphill case that the motion need not be renewed at the end of the whole case, having been made at the end of the prosecution's case?

Mr. Dean. Why should the motion be renewed?

Mr. Youngquist. You may have quite a different case at the end of the defense. You may have a stronger case because of the cross-examination of the Government.

Mr. Wechsler. I take it that the point of this provision comes to this. At the end of the whole case, whether the defendant makes a motion or not, the court is obliged to determine that the evidence is sufficient to go to the jury.

Mr. Youngquist. But there is no motion.

Mr. Wechsler. Even in the absence of a motion. That is the effect of these decisions.

Mr. Crane. I think so. I think it is entirely different from a civilcase. If on the evidence there is no crime that has been committed, why should the court say the lawyer waived anything because he failed to make a motion?

In a civil case they both move for a directed verdict, the judge pronounces what he would do, and he decides the case.

Again, in a close case they use it in the courts and say

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The Chairman. I do not see how they could forget to do that any more than forget to put their neckties on.

Mr. Crane. Some of them do not have neckties.

Mr. Medalie. In some cases the judges see to it that no case goes to the jury if the evidence is insufficient. That is the determination he is bound to make in a criminal case, regardless of whether formalities are mentioned with regard to calling his attention to anything. The only formula you need is, "I move for a directed verdict on the ground that the Government has failed to prove the case charged in the indictment." That is all you need.

The Chairman. True enough, but if you really want to win your motion, you go on to tell the judge wherein the Government failed to prove its case. If you just say that the average judge says, "He is going through that as a formula," just like some people go to church every Sunday, but if a man puts up an impassioned plea and explains where the vital link in the chain is missing, the judge is likely to pay attention to him.

Mr. Medalie. Very often he says, "I do not want to hear any argument. Let it go to the jury." Judges have said it to the best of counsel.

I do not think it is necessary to call the judge's attention to the insufficiency of evidence in a criminal case. Everybody should assume that a judge hearing a criminal case is following the evidence and that he knows whether every essential element of the crime has been established.

Mr. Youngquist. Isn't this decision of 1940 to the effect that the question of the sufficiency of evidence may be raised at appeal, even without motion?

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Mr. Robinson. At the end of the case. If there was one at the end of the State's case, that is sufficient.

The Chairman. There has to be one somewhere.

Mr. Robinson. Yes.

Mr. Youngquist. All we are providing here is that if he makes one at the end of the State's case he may go on and introduce evidence.

Mr. Robinson. That is right.

Mr. Youngquist. Then by (b) he is not required to make a motion at the end of the case, but it simply provides that if he does make a motion,and if it is denied or if for any reason it is not granted, he may bring it up again within ten days, and then get an order of the court.

It does not touch the question of review at all, nor is there anything in it that either requires or makes unnecessary a motion at the close of all the evidence.

Mr. Robinson. Our point then would be whether or not to incorporate this latest Supreme Court ~~position~~ decision in the matter.

Mr. Youngquist. But that deals only with renewal on appeal, and is that withinour jurisdiction?

Mr. Wechsler. But I venture to say, Mr. Chairman, that

4 the principle of that Supreme Court decision, which is that it is judicial duty to notice plain error, whether or not assigned, would be applied in a case where no motion had been made at the end of the prosecution's case if the evidence was insufficient; and therefore we would be drafting with reference to facts rather than to the principle of that decision, if you follow Mr. Youngquist's suggestion.

Mr. Youngquist. Even (a) says nothing about requiring a

motion for a directed verdict.

Mr. Wechsler. That is true.

Mr. Youngquist. It simply saves his right -- he who makes such a motion -- to proceed with his case and proceed with his evidence, and that is all, and I do not think that we should, in these rules, tell the court that it is his duty to direct a verdict if the evidence does not appear to be sufficient, even though counsel makes no motion. That we must assume he would do of his own motion.

Mr. Holtzoff. I do not think the error of insufficiency is always a plain error, such as was contemplated in that case. I have in mind a case tried by the Government recently here in the District which took several weeks to try. At the end of the entire case it appeared that there was some purely technical link in the chain of evidence that the United States Attorney or the special assistant trying the case had failed to put in -- a purely technical omission.

Now, a motion for a directed verdict was made based on that omission. The case was immediately reopened and the missing link was supplied.

Now, suppose no motion had been made and the case had gone to the jury and there was a conviction, as there was, and on appeal it was sought to raise the point of insufficiency. Now, that would have been a gross injustice, because here was an error which could easily have been cured if attention had been called to it, and yet the evidence was not sufficient to make out a case.

Mr. Youngquist. That would put on the defendant the burden of calling attention to omissions in the Government's

case.

Mr. Holtzoff. Yes.

Mr. Wechsler. I think the answer is as it was given by Mr. Medalie a while ago, that it would be sufficient under the most technical practice if counsel for the defendant moved to dismiss on the ground that the evidence was insufficient.

The Chairman. Not in my State.

Mr. Wechsler. The record would not then show that he pointed to this particular link in the prosecution's evidence.

Mr. Holtzoff. I do not claim that he would have to call attention to this missing link.

Mr. Wechsler. If you do not claim that counsel would have to call attention to that particular missing link, then I do not see the point of your objection, because if we regularize the practice in this way, that at the end of the prosecution's case the judge knew that it was h is duty to consider the sufficiency of the evidence, then a friendly judge would turn to defendant's counsel and say, "Do you wish to address yourself to the sufficiency of the evidence?"

I think that is what Judge Crane would do under the present practice if I were counsel and failed to make the motion. Then, if defense counsel does not know what to say -- that is a common difficulty that arises when a defendant is poorly represented, but it would be the judge's --

The Chairman. Take the case that Mr. Holtzoff put. If counsel gets up and says,"I object to it on the ground that the evidence is incompetent, irrelevant, and immaterial," or whatever the sacred formula is in New York --

Mr. Medalie. It is not sacred in New York.

The Chairman. It does not make any difference what it is. You have to state wherein the question is improper, and we are supposed to do it in one sentence instead of making a speech.

Similarly, in a motion for a directed verdict we are supposed,to have that motion carry any weight, to state the reason or reasons for our motion. In a lawsuit it would be a motion for a nonsuit, and we state our grounds for the motion are one, two, three, four, and five, and having stated our propositions of law, we argue it.

Similarly, in a criminal case we must state that we move for a directed verdict on the following grounds, and state the reasons.

The court is entitled to know what is in counsel's mind.

Mr. Wechsler. Then, the practice that you refer to is more technical than I had supposed it to be, but I still think this principle is a desirable principle, even though it would be a reform in your State.

The Chairman. The point I want to make is that I donot think it is technical. I think it is doing the fair thing to the court. We can get so interested in the Government or the defendant that we fail to remember that the tryer of facts has a few rights.

Mr. Wechsler. Is it unfair to ask the court to follow the evidence sufficiently to be satisfied that a prima facie case has been made or, subsequently, that there is a case for the jury?

The Chairman. Well, it is not an easy thing in some types of cases. I am speaking more on the civil side rather than criminal cases, because I do not know much about criminal law,

if anything. It is a very hard thing in some types of cases for a judge to know if a case has been made out. Suppose a case goes on a week, two weeks, or three weeks, and it involves technical proof. He is entitled to the benefit of what is in counsel's mind.

Mr. Medalie. You are not talking about the defendant being treated fairly. You are talking about the judge being treated fairly.

The Chairman. Absolutely.

Mr. Youngquist. That is what he said.

Mr. Medalie. I do not think we ought to do that kind of thing.

The Chairman. I do not think he is a goat. I think he is the representative of justice.

Mr. Medalie. The judge makes an erroneous decision in the best of good faith, and he might have been saved that if counsel had done certain things. Nevertheless, if he made an erroneous decision, it is not a question of being just to the judge. Nothing happens to the judge. Something happens to the judgment, but, worse than that, something happens to the defendant that should not have happened to him. That is all we are concerned with.

Mr. Seasongood. That is not true. I had the same thought Mr. Holtzoff had. The defendant would be found guilty, but if there is some technical or slight thing that was not proved, it could be proved in two minutes if it had been proved, surely that defendant would not be acquitted.

Mr. Medalie. You do not get a reversal in something like that. In New York there was a case once in which there was only

a question of proving that Canal Street or some such thing was in the County of New York, and it was not proved.

Mr. Wechsler. I think the way to cure that is to provide a rule for trivial defects in evidence, but in order to save that situation, if we eliminate any action on this point we are defeating the defendant's claim in a case where there is substantial deficiency in it.

The Chairman. May we check this sentence by sentence and see where it gets us?

Is there any objection to the first sentence?

"A defendant who moves for a directed verdict at the close of the evidence offered by the Government may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made."

That changes the rule of common law. It seems to me it is a sound change.

Is there any objection to that? (Silence.)

Now, the next sentence seems to me not so properly in criminal rule. I may be wrong.

"A motion for a directed verdict which is not granted is not a waiver of trial by jury."

Does that not more relate to the civil rule, where there are cross motions for a directed verdict? Some States hold that it resolves the case and there is no question of law for the court?

Mr. Longsdorf. That is correct.

The Chairman. If that is so, it does not belong here.

Mr. Medalie. It is not applicable to criminal cases.

Mr. Seasongood. I thought you said that if in your State you make such a motion you may not offer evidence?

The Chairman. That is right. This changes that and gives him the right to offer evidence, which I think he should have.

Mr. Seasongood. Surely.

The Chairman. By common consent, the second sentence, starting on line 6, will come out.

"A motion for a directed verdict shall state the specific grounds therefor."

That I think is only fair to the trial court.

Mr. Wechsler. That is the sentence that really gets into the problem that we were largely discussing.

Mr. Crane. That brings it up because it is implied in this, but we have not said that the judge should indicate that a motion for a directed verdict should be made. Of course, that comes up largely on the question of appeal, Mr. Chairman, and not so much here. It is a question of what the appellate court reviews.

Are we going to deal with the question of appeals here, do you think?

The Chairman. That, of course, is going to be one question on which we will have to have instructions from the court.

Mr. Crane. I do not want to digress, but in connection with this -- this, of course, would be a question of what the court will review on appeal -- there must be a motion for a directed verdict if they are going to review sufficiency of evidence.

The Chairman. I think it is proper here, because in my State if a man said, "I move for a directed verdict," and sat

down, the court would treat him as if he had been sitting down all the time.

Mr. Crane. The first part, yes.

The Chairman. No; the last sentence. In other words, for a motion to mean anything, he must state the specific reasons.

Mr. Crane. It would seem to imply that a motion for a directed verdict should be made. I was thinking, when it comes to a question of appeal, and we deal with appeals, then we will have to form our practice so that the court will review it. The reason I am quite interested in that is that our State of New York has gone wrong if they come to the question of appeal, and I do not want it to happen here, and that is that on a demurrer to an indictment the sufficiency of it, of course, is raised and can be cited as a question of law. I am simply saying that as we go along here we must bear in mind what the procedure must be.

Mr. Youngquist. Is this matter dealt with in the rules on appeals?

Mr. Crane. No.

The Chairman. This is probably part of the trial procedure.

Mr. Orfield. It was suggested by the Solicitor General in his ruling that it was not.

Mr. Youngquist. But we do have the Supreme Court ruling of last year that defines the scope with reference to the motion for a directed verdict.

Mr. Wechsler. That decision is not under the rules, though.

The Chairman. Is there any objection to the last sentence in paragraph (a)?

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Mr. Wechsler. I think the last sentence, though desirable practice, is probably incompatible with the provision I should like to see incorporated; and perhaps to bring the matter to a head and to avoid the error I am trying to safeguard defendants from, I ought to move that there be a rule drafted which would embody the following principle: that at the end of the prosecution's case, and again at the end of the whole case, it would be the affirmative duty of the court to consider and determine the sufficiency of the evidence. I do not suggest that as the artistic language.

The Chairman. Without motion.

Mr. Youngquist. That is so obviously the duty of the court, anyway, that we should not put it in the rules.

6 Mr. Wechsler. If it is the duty of the court anyway, then I do not see the point of a sentence that says an omission for a direction.

Mr. Medalie. It has a value, and that is such a thing as calling the court's attention to failing to prove that a company was incorporated, that a particular street was in a particular town, and so on.

Mr. Robinson. What about venue?

Mr. Medalie. That applies to venue. That was a case where venue was overlooked by both sides.

The Chairman. Our courts, with their very technical rules, Mr. Wechsler, do exactly what you want.

Mr. Wechsler. Most courts do.

The Chairman. Because I have heard the judge say to counsel, before he could get onhis feet, "Your motion for a directed verdict is granted."

Mr. Wechsler. As a matter of fact, Mr. Chairman, I think if we adopted the proposal that I make, when you take that in conjunction with another rule that we have already adopted, we get the result that I would like to see. We have adopted a rule that there need not be an exception to an objection --

Mr. Robinson. Isn't that a common confusion between the exception and the objection? What we are doing is to remove the necessity of exceptions, but not the necessity for an objection.

Mr. Wechsler. That is precisely my point. We said there must be an objection. The effect of my suggested rule must be that the court, of its own motion, should stop it and say, "Is the evidence sufficient?"

If at that point he turns to defense counsel and says, "Have you any objection to the sufficiency of evidence?" and the defendant's counsel says, "No, I have none," then it seems to me that by virtue of this rule, and the earlier rule on the objection, you would probably reach a situation where the technical defect on the evidence would not be sufficient to reverse; but, on the other hand, the rule puts the court on notice that he should think of the necessity.

The Chairman. You are going so far to protect poor defense counsel that youare, I think, ignoring the fact that with a particularly long and technical case the judge may even more need protection and advice of counsel as to what is going on, by way of summary of the evidence.

Mr. Wechsler. Let him ask for it, then.

Mr. Waite. I am not clear in my own mind what the objection to this is yet. Why shouldn't he be required to state the

ground of his objection?

Mr. Medalie. We are dealing with the consequences if it has not been done.

Mr. Dean. We are looking at it with the view of the appellate court.

Mr. Seasongood. We are looking at it for a substantial matter. You do not know what may be regarded in the appellate court as material or not material. There may be something else other than the examples you have given. There may be something which is a failure of proof, and there would have been no trouble about proving it at all, but it is a material part of the case. There is no reason why they should not make a motion for a directed verdict and state the specific ground. He owes that to the court.

Mr. Medalie. The appellate court won't reverse for trifles.

Mr. Seasongood. No, but what is a trifle is a matter of opinion.

Mr. Medalie. Let us take a case which was a proceeding on misrepresentation. If there was no proof that misrepresentation was made or intended, that case ought to be reversed.

Mr. Wechsler. If it is to be reversed the way to do that is to lay a foundation for it by articulating the proposition that the judge at the trial should determine the issue then, even though the motion is not made.

Mr. Youngquist. Must not we assume that in such a case, where the very gist of the offense was not proved, the judge would, of his own motion, dismiss?

Mr. Medalie. He should, and if he did not there ought to

be a reversal, regardless of these formulas.

Mr. Youngquist. Well, we are not talking about the appellate procedure, as I understand it. What we are talking about now, as I understand it,on the basis of Mr. Wechsler's suggestion, is to state in these rules that it shall be the duty of the court, on its own motion, to direct a verdict at the close of the Government's case or at the close of the State's case, without a motion on the part of the defendant.

It seems to me that is wholly superfluous. I do agree that if a motion is made it ought to be made on some ground, and if there is a ground the ground ought to be specified.

There is this one question present which deals with the scope of the appeal. If specific grounds are stated in the motion for a directed verdict, is the defendant limited to a consideration by the appellate court of those grounds only? That may present a problem.

Mr. Medalie. There is something that can cover it with respect to the appellate court's right to review and its right to take action -- that is a provision -- and it may exist; I do not know; I know in our circuit they do that sort of thing in a very clear case -- notwithstanding the raising of the question by proper formula or procedure below, notwithstanding even the omission of an assignment of error where there is a very clear error which goes to the very gist or rule of the case, they will reverse.

Mr. Longsdorf. Yes, but what is a clear error?

Mr. Medalie. Well, I will give it to you again. In a mail fraud case there was no evidence that the parties ever intended to set forth the matters alleged in the indictment.

Mr. Burke. It was my impression that in the original discussion we started to consider the effect not of the failure to make a motion to direct a verdict but the failure to renew a motion, assuming that the motion had been made at the end of the People's case, at the close of the presentation of the testimony on the part of the defendant.

The Chairman. Well, I think that would be the next thing we would have to cover from here.

If we are tentatively agreed thus far -- and I say that word "tentatively" very hesitatingly, in view of Mr. Wechsler's objection -- I think we might go on and have a motion to instruct the reporter to prepare a further sentence in this rule which would carry out the effect of this recent case.

Mr. Burke. The thought I had in mind in that connection was that, assuming that the district attorney failed to make a prima facie case and the court failed to observe the lack of the prima facie case, it certainly would not be a great fault on the part of inept counsel for the defendant in also omitting something that in a similar case, in the hands of competent counsel, might free the defendant in a like situation in another court.

The Chairman. Now, we are presuming there an inept counsel and an inept court and a very shrewd prosecutor. Can we frame our rules to meet such unusual cases?

Mr. Wechsler. In most cases, Mr. Chairman, the motion is made, and therefore the issue to which my proposition is directed does not arise. By hypothesis, we are dealing with a case which is badly represented, or with a case which is, for some other reason, exceptional in that respect. That is the case that I want to deal with, and I may say again, in answer to what Mr. Burke

said, that I believe the principle of that Supreme Court decision not to rest upon the ground that the motion was made at the end of the People's case, but, rather to rest upon the ground of an affirmative duty on the court to protect the defendant with respect to the sufficiency of the evidence.

Now, the strength with which the courts use that issue may be indicated by the fact that while the Solicitor General confessed error in one of those cases, another one of them was opposed, and a colleague of mine in the Department had the burden of maintaining the Government's position with respect to the case, in which we felt that the evidence was so strong that we ought not consent to a reversal.

I can only say that the Chief Justice, on the argument of that case, administered one of the most vigorous findings to the gentleman who represented the Government that I have ever heard administered in open court. The entire argument lasted, in substance, three and a half minutes.

The Chief asked only why the trial judge should not have considered the sufficiency of the evidence, and we were only able to say, "Well, the evidence is very sufficient." The Chief said, "Nevertheless, it should have been considered."

The case was reversed.

I think we would be giving effect to the underlying principle of that decision, which is that there is or should be an affirmative duty on the court in this type of situation.

Mr. Holtzoff. Isn't the underlying principle of that decision that a patent and plain error will be considered by the appellate court even if the question was not properly saved for review, rather than that it is the duty of the court,

on his own motion, ~~because of~~ to consider the sufficiency or insufficiency of the evidence?

Mr. Wechsler. I say, if the trial judge knows that he will be reversed if he overlooks a plain error, I suppose he infers that it is his duty to look for a plain error.

I would be in accord with some draft of a rule that qualified this duty in terms of some adjective, such as "plain" or some other adjective designed to indicate that.

If it was a trivial error, the judge is not supposed to marshal the evidence himself, but I am interested in the principle of the duty which I think is embodied in what I regard as a progressive decision by the court.

Mr. Crane. I think you will find in the codes that this is a matter dealt with from the following viewpoints. The appellate courts have required these things because they refused to review.

You take our intermediate court. It can review the evidence and grant a new trial, in its discretion, but you come to the Court of Appeals, and there it was that it had to be a question of law, and that was raised by an exception or by some motion.

I should think that we ought to come back here, in fairness to the bar, at the beginning, and tell them what they must do. Has he got to move? If he has moved, is it something he does because he wants to do it? Do we require it because it must be done to preserve his rights on appeal, that he make a motionto direct a verdict or should make a motion to direct a verdict?

I did not understand that it is necessary in a criminal case for a court that reviews facts. I did not know it was

necessary to make a motion to dismiss an indictment, as it is called in some instances, or to direct a verdict as it is called in others, in States that have intermediate courts, and the court that reviewed the facts would review them without the necessity of that motion or an exception to that denial.

It is a different thing when you come to courts that can only review questions of law, as the Court of Appeals in my State does.

I take it that the Circuit Court of Appeals reviews facts, does it not?

Mr. Holtzoff. No. Facts are not reviewed in the Federal courts in criminal cases.

Mr. Crane. Don't they review them at all?

Mr. Holtzoff. No.

Mr. Crane. Then you have to have a question on law presented by a motion. Of course, sufficiency of evidence is always a question of law.

Mr. Wechsler. The jurisdiction of the Circuit Court of Appeals is the same as --

Mr. Crane. They do review the facts as to sufficiency of evidence, because that is always a question of law. What I meant was that we did not used to consider the question of law unless there was a motion made and an exception taken.

The Chairman. May we refer this section back to the reporter to redraft it and incorporate in it the decision of this recent Supreme Court case?

Mr. Longsdorf. I am very glad to have it referred back, but I am not clear in my mind about certain things, and I would like to be straightened up. Am I in order?

The Chairman. All right.

8 Mr. Longsdorf. I do not understand that this Sheridan case and the Hemphill case -- I cannot make up my mind without looking at those cases -- have dispensed with the necessity of claiming formal exceptions. I think they should be dispensed with, but I do not know whether those decisions did make that unnecessary.

Now, we have a civil rule that made it unnecessary. Don't we want the same kind of rule here?

Then, following that, may I be informed whether or not Rule 46 stood or, as I understood, was dropped because it was no longer necessary?

Mr. Robinson. Just the last give lines of Rule 46 was dropped.

Mr. Longsdorf. That is all right, then. The rest of it stands?

Mr. Robinson. Yes.

Mr. Longsdorf. Very well, then.

Mr. Dean. If this is to be recast, may I make one suggestion, and that is that in that first sentence there should be somewhere contained a statement of the duty of the trial court when a motion is made. Now it is completely omitted, and I suggest that if we should come to the conclusion that a motion should be made,either at the end of the Government's case or at the end of the entire case, we should also add at the end of the first sentence, "And it shall be the duty of the trial court to direct a verdict if there is no substantial evidence of guilt."

We say he makes the motion, but we do not give any test to

the court affirmatively.

Mr. Medalie. Section 410 of the New York Code deals with this very sensibly and I think meets all the situations:

"If at any time after the evidence on either side is closed the court deems it insufficient to warrant conviction * * * it may advise the jury to acquit the defendant thereof, and they must follow the advice."

Mr. Holtzoff. If you do not make a motion, in spite of that provision you lose the right to review the point in the Court of Appeals, do you not?

Mr. Medalie. Can't this be written without the use of the word "may" and say "shall"?

Mr. Orfield. Section 321 of the American Law Institute Code of Criminal Procedure reads:

"If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the defendant shall, direct the jury to acquit the defendant."

Mr. Longsdorf. That is quite a different thing.

Mr. Medalie. Then it can be done at either time and does not involve these questions ofwaiver.

Mr. Crane. It simply expresses what is the duty of the judge.

Mr. Dean. I think we still ought to emphasize the duty of the trial court to do it at the end of the Government's case, for this reason. The defendant has the alternative of appealing directly from the error growing out of the judge's failure to sustain his motion, or he can put on his case. Now, ifhe puts on

his case after the judge has made an error in refusing to sustain his motion, on cross-examination the Government brings out a lot of things from the defense witness. That fact should not deprive a defendant from going back to that original motion at the end of the Government's case and raising that point.

Mr. Crane. I do not think that has ever been done.

Mr. Medalie. If the defendant supplies the missing link, there is a case.

Mr. Dean. How can you say that cures the error?

Mr. Medalie. It does not. The error no longer counts.

Mr. Dean. What you are saying is that by putting on his case the defendant waives his right to take advantage of the error.

Mr. Medalie. No. All we say is that an error has been committed. At the time the defendant made the motion at the close of the prosecution's case, there was no case. Had he offered no evidence, there still would have been no case.

Now, from the viewpoint of the administration of justice, at the close of the entire case on both sides there now is enough evidence.

Mr. Burke. But the question we were considering was in the event that at the conclusion of the defendant's case there still was not enough evidence.

Mr. Medalie. You have a new point there. At the end of the defendant's case there was no evidence to establish his guilt.

Mr. Burke. Failure of counsel to renew his motion again is not much of a solution to a defendant committed to a penal institution.

Mr. Medalie. His conviction ought not to be sustained if there is not sufficient evidence.

Mr. Dean. I still cannot understand why, if the judge has made an obvious error in overruling the motion for a directed verdict at the end of the Government's case, you cannot preserve that point.

The Chairman. This is not a game. At the end of the defendant's case all proof of guilt is in. The man is guilty.

Mr. Dean. All right. Now, the judge says, when you make your motion for a directed verdict, "I know you are going to put in a case anyway. I am going to overrule you. I know you are right, but the trial has gone on too long. The newspapers are full of it. I have got to go on with it. I cannot take the responsibility for it."

You are saying that the judge at that point has no obligation as a matter of law to dismiss that case.

Mr. Holtzoff. Do you claim that if he fails erroneously to dismiss the case and yet if additional evidence is produced by the defendant which makes the prosecution's case a conviction should be reversed?

Mr. Dean. I am taking them one at a time. First of all, you have the case. When you get to this stage of the proceedings why shouldn't you preserve that error?

The Chairman. You can.

Mr. Dean. I do not see it.

The Chairman. You make yourmotion for a directed verdict and state your grounds, and the court overrules you.

9 The Chairman. And then you appeal. If you know that your witnesses are going on and are going to prove the Government's

case, it is your duty as counsel to stop them.

Mr. Burke. If the defendant elects to go ahead and present testimony that aids the Government in making a prima facie case, then the facts and the law and justice are sustained; but if at the end of his defense the situation is the same, so far as the legal aspect of the case is concerned, as it was at the close of the case of the prosecution, then the failure of inept counsel, by reason of his lack of ability to renew the motion--

Mr. Dean. That is a different matter motion, and I agree with Mr. Burke on that.

The Chairman. But he does not agree with you.

Mr. Dean. That is all right.

Mr. Medalie. This is a common situation that arises in cases in New York. We have a rule that requires that an accomplice be corroborated, and without such corroboration the accomplice's testimony is insufficient. The defendant takes the stand and, almost invariably, either on direct examination or cross-examination or both, he supplies the necessary corroboration. There is a case.

Mr. Dean. Particularly on cross-examination.

Mr. Medalie. And justice requires that that case go to the jury.

Mr. Seasongood. I would like to add that this motion be made in the absence of the jury.

The Chairman. Is there any objection to that being considered in the redraft of the rule?

Mr. Medalie. Isn't it the law that the motion may be made in the absence of the jury if the court permits it?

Mr. Seasongood. Yes, but he does not permit it.

Mr. Medalie. You want it as a matter of right that the jury must walk out when counsel says, "I want to make a motion."

Mr. Holtzoff. In the District here they make it out of the hearing of the jury. They step up to the bench.

Mr. Crane. Is the defendant present?

Mr. Seasongood. The defendant is present, but the jury is not present. They send the jury out. We have it all the time in our State. If you make a motion in a Federal court in our State it is a very good thing. If the jury hears the motion and the court says, "It is overruled," then the jury says, "He is guilty."

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The Chairman. That sneer is futile.

Mr. Crane. He argues with you and shows you your error.

The Chairman. No; he can do it in just three words; he can say, "You are overruled" insuch a way as to impress the jury with the belief that you are just a nitwit. That one word "overruled" is deadly, in the way it is uttered. And in civil cases it is just as bad.

All right; we have covered the general thought we want incorporated in this redraft.

Mr. Wechsler. Before you pass this,may I say one word? Professor Waite has suggested a formula which I think might incorporate the thought I had inmind and also the views of the other side. It wouldbe in these terms: That a motion for directed verdict shall state the specific grounds thereof, but failure of the attorney for the defense to make such a motion shall not relieve the trial judge of the obligation to dismiss on his own motion if the evidence is plainly insufficient.

That would incorporate the plain error conception.

Mr. Medalie. If you will add "as to the substantial elements of the defense", indicating that it does not cover technical oversights.

Mr. Seasongood. I think it is very unfair to the court. The ordinary way is that the counsel says, "The plaintiff rests", or the defendant starts in. So the court thinks there is enough evidence to go to the jury, and does not give the matter much thought. He is entitled to have it presented to him inan orderly way, with all the assistance counsel can give to him.

The Chairman. And especially if he has spent all his time

during the preceding four weeks in writing longhand letters, and if he has not followed the matter carefully!

Mr. Seth. I do not see any reason for putting part (b) in if you are going to put on the judge the duty of deciding pronto at the end of the plaintiff's case whether the case should go to thejury.

Mr. Crane. He can reserve.

Mr. Medalie. Even if he does reserve you have your motion for new trial.

Mr. Holtzoff. But the motion for new trial is discretionary.

Mr. Medalie. If the evidence is insufficient. I know that the court can or cannot grant it, but you preserve the right.

Mr. Waite. On (a) --

The Chairman. Pardon me, gentlemen; we are back on (a) again.

Mr. Waite. I did not quite get Mr. Seasongood's proposition. As I understood it, it was that the motion for directed verdict must be made in the absence of the jury. If I may inject a little bit of experience of my own, I do not think that such a position is always wise. I was defending a man in a case in which the prosecuting attorney was a man named Wagenheimer, a prosecutor notoriously able to play on the feelings of the jury. In the defense we had to rely on the State's evidence. At the conclusion of the State's evidence I made a motion to dismiss for lack of evidence, and I argued it as fluently and as specifically as I was capable of doing. The motion was not granted.

The prosecutor made his opening speech very, very brief, saving his flamboyant oratory for his reply to me. I, having already made my speech to the jury, although ostensibly to the judge, did not make any speech at all; and the prosecutor did not have anything to reply to. And I must confess that no one was more surprised than I when the jury disagreed.

But there is certainly an advantage in being able to make the motion in the presence of the jury, and I should hate to see that taken away.

Mr. Seasongood. I believe I stated that it may be made.

Mr. Holtzoff. From the point of view of the jury there is a difference between a motion for new trial and the right to move for a directed verdict before the jury.

Mr. Medalie. And to move it on the ground that the court committed error in the admission of evidence.

The Chairman. Do you not want to protect the right of the defendant to get a directed verdict?

Mr. Medalie. I am practicing in the courts, and I assume when I represent a defendant that I am going to get adverse rulings.

From that point of view I thought we should figure what we should do here: "Note for the jury and the judge"!

Mr. Youngquist. As I read this, its only purpose is to give the court an opportunity, even after the evidence is in and the case is submitted, to grant the motion for directed verdict and end it right there.

Mr. Crane. Yes; but the defendant does not have to make another motion. If the judge has reserved the decision he has got to make the motion; he has to decide it; he has got to move.

Mr. Holtzoff. What this really is, is if a judgment is non obstante veredicto.

Mr. Medalie. In New York there has been adopted a practice in civil cases that the defendant moves for a directed verdict or the defendant moves the court to direct a verdict, and the court says, "I will reserve decision on that motion, but I will submit the case to the jury."

There is a reason for that, which is that if the judge should be wrong in his decision to take the case away from the jury the appellate court can correct his error even when he sets the verdict aside later and grants the motion, decision of which he reserved, to take the case away from the jury, and can reinstate the verdict.

You know the practice. It is a very practical thing, when the judge is in doubt about it,

Mr. Crane. In civil cases, but not in criminal cases.

Mr. Medalie. No; not in a criminal case, because you cannot reinstate the verdict in a criminal case.

Mr. Seth. Did you ever hear of the Slocum case, the steamer that burned? Here it is.

Mr. Seasongood. Let us take a vote.

The Chairman. It has already been acted upon.

Mr. Seasongood. There is only one thing about (b). This practice obtains in the civil rules. I am under the strong impression, and am practically certain, that there was a question whether that might be done in criminal cases. In some oil prosecution case the court had a long trial of four weeks or four months, and the defendants made a motion for an acquittal. The court said, "I want to have all of this written out

and I want to go over the evidence and see whether there is any evidence to go to the jury. So I am going to let it go to the jury, reserving the right to grant the motion if there should be a finding of guilty."

There was a finding of guilty by the jury; but nevertheless the judge entered a judgment of acquittal.

The case was taken by the Government to the Supreme Court; and,as I remember, they divided four and four on the question. You are familiar with the case, no doubt.

Mr. Robinson. The Socony-Vacuum case, at Madison, Wisconsin.

Mr. Seasongood. Yes; that was the case. I am just calling attention to whether it should be done.

The Chairman. Do you think it desirable if it can be done?

Mr. Seasongood. Yes; very desirable.

Mr.Robinson. The Attorney General in his report in 1938 condemned that very bitterly.

Mr. Seasongood. What is his ground?

Mr.Robinson. On the position that it permits the court to usurp the powers of the jury.

Mr. Holtzoff. I do not think that was the Attorney General.

Mr. Robinson. Well, Mr. Thurman Arnold.

Mr. Seasongood. If the judge acquits after there has been a four months' trial, why, that is the end of it. The defendants are all out. He may say, "I should like to think about this thing more, and let it go to the jury and see what they do, and I will have all of it written out and I will pass on it" -- and enter a judgment of acquittal notwithstanding the

verdict.

Mr. Crane. Has that been done?

Mr. Seasongood. As I say, that was done in the oil case in Wisconsin.

Mr. Crane. What was wrong about it?

Mr. Seasongood. The Supreme Court divided four and four as to whether it may be done.

Mr. Orfield. Did the court pass upon that question in the Supreme Court?

Mr. Seasongood. I do not think they wrote an opinion; did they?

Mr. Holtzoff. No; they do not write opinions. when they divide evenly.

Mr. Robinson. This is the case of ex parte United States, that being the case in the Supreme Court. The Circuit Court of Appeals held that the district judge has inherent power to reserve his ruling on a motion for directed verdict and, after the jury returns a verdict of guilty, to enter a judgment dismissing the indictment for insufficiency of the evidence.

The case was affirmed by an equally divided court -- United States vs. Stone, 308 U. S. 519.

Mr. Holtzoff. It is better to perpetuate that in the rules.

The Chairman. Is there any doubt as to preserving (b) in this rule?

Mr. Crane. Yes; I do not like (b).

The Chairman. Then let us put it to a vote.

Mr. Crane. I meant the phraseology of it: "within ten days after the reception of a verdict, a defendant who has moved for a directed verdict may move to have the verdict and any

judgment entered thereon set aside * * *."

In other words, would you have to move again? If the judge has reserve his decision he has got to decide it. The defendant does not have again to move.

The Chairman. He does not reserve it.

Mr. Crane. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

The Chairman. In other words, as a matter of law he reserves it. Now to bring it officially to his attention so that he will do something about it, you have to make a motion.

Mr.Crane. You have to move again?

The Chairman. Yes.

Mr. Crane. When a judge reserves a decision until the end of the case and says, "You have made your motion and I am going to decide it; I will reserve this decision, and in the meantime we shall let the defendant go ahead," does the defendant have to move again in order to get it done?

The Chairman. Yes; for the reason that if you do not require him to make a motion he would be regarded as considering such a motion in every case in which a verdict had been entered.

Mr.Crane. No; when he reserves it --

The Chairman. He does not reserve it. The law says he reserves it automatically. He is deemed to have reserved it.

Mr. Crane. You have the thing all wrong. When a judge

takes a motion to dismiss, and directs a verdict, the judge decides it then and there; or if he does not he says, "I will reserve it, and I am not deciding it now."

He does not sit there like a mummy. He says, "I will reserve the decision on that question."

The Chairman. That is not our case. The judge denies the motion, and the jury brings in a verdict.

Mr. Medalie. Judge Crane wants to go further.

Mr. Crane. No.

The Chairman. In spite of all of that having happened and the judge having ruled adversely on the motion to direct a verdict, he is deemed in law to have the power, if application is made in ten days, to take it up.

Mr. Crane. That is not what is said here:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted" -- he does not do anything, he does not deny it, he does not grant it -- "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

If he has the power if it has been denied, why do you not say that after the verdict they can always raise the question again?

The Chairman. If motion is made within ten days. That is what this rule tries to say. Perhaps it does not say it well.

Mr. Crane. I say with all due respect, that this is too confused a way. You have a lawyer trying a case before a judge; and he makes a motion, and the judge is bound to rule on it, the

same as he rules when exceptions or objections are taken. If he denies it, that is a denial. We understand that.

But suppose he does not do anything? Why, then he has got to decide it some time. He cannot sleep on it, and his duty is to decide it, and not to have the lawyer move again to wake him up, and say, "You have not decided that motion of mine."

That is the part I am speaking of. Why should he make another motion?

The other part is this: Suppose you make a motion for directed verdict, as you do at the end of the case, and the judge says, "I deny it", and an exception is taken in all due and proper form. You go through and get a verdict of the jury. Now that case is closed.

When we come to motions that may be made after the verdict, that is the time to say that you can then move for various grounds, and one of them is that the evidence was not sufficient to go to the jury.

Why should we put all of it on this complicated form here?

Mr. Youngquist. That is just what this does in case the motion is denied.

Mr. Medalie. No; this goes farther.

Mr. Youngquist. If the motion is denied the defendant may at any time within ten days after the reception of a verdict move for a directed verdict.

Mr. Crane. Why does he move for a directed verdict?

Mr. Youngquist. Just a short-cut.

Mr. Crane. What he does is to move to set it aside because there is no evidence to sustain it.

Mr. Youngquist. There is more than that.

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Mr. Medalie. There is something else. There has been a disagreement, and the court can still grant the motion for directed verdict. That is what this says.

The Chairman. Is that the language?

Mr. Crane. That is the language; but let us not get this so mixed up that we cannot understand it. The criminal law should be simple. Let us not complicate it with all the intricacies of the civil practice. The criminal law is simple. The cases are complicated, as you get them in the Federal courts, but the practice is the simplest thing in the world.

The Chairman. By common consent, then, we will refer this back to the Reporter.

Mr. Seasongood. This says "in every case". I think that is a bad way to do it, because the judge will overrule the motion every time. It seems to me that the judge ought to have the privilege of leaving it to the jury, reserving the right to enter judgment.

Mr. Medalie. Your idea is that if he wants to he may reserve decision on the motion?

Mr. Seasongood. Yes.

Mr. Medalie. And then take action either after verdict or after disagreement, and take his own sweet time about it, so that you do not tell him that he has to decide within ten days a case that took him two months to study.

Mr. Youngquist. He does not have to decide within ten days.

Mr. Crane. Why should you have to move him again?

Mr. Holtzoff. That is an automatic reservation. Suppose he has denied the motion, and the case goes to the jury: There

is a fiction of reservation so he can raise it later.

Mr. Medalie. Mr. Seasongood says there is one thing worth doing, and that is when the judge says, "I reserve the right to decide later" we should reserve the right to enter this disagreement.

The other question is whether we should make the provision that is in the civil practice rules, that the court is deemed to make reservation even if he did not.

Mr. Crane. May I ask a question? Because really I cannot see this at all. Here you are doing the same thing, and every judge who has had any criminal practice has been doing the same thing that you are trying to express here as something new. A judge tries a case, and the defendant is found guilty. All the motions you can think of have been made and denied. Every code and proceeding has an arrested judgment, and a motion on the insufficiency of the indictment can always be made after a verdict. Why do you have to talk about a reservation or a supposed reservation? You can always make a motion, even after verdict, that the indictment or the evidence was not sufficient.

Mr. Seasongood. You run into some trouble with the Constitution, do you not? There is that old case to the effect that you cannot later enter judgment -- the right of trial by jury.

Mr. Crane. Can you assume that the judge has reserved the question when he has not? Can you get around the Constitution in that way?

Mr. Seasongood. No; that is what I say.

Mr. Holtzoff. But when this is for the defendant's benefit there is no constitutional question involved. This

reservation is for the benefit of the defendant.

Mr. Dean. In the redraft of this thing cannot we later consider the wording of this phrase, if we are not going to require a motion?

Mr. Burke. Is not that what Judge Stone sought to do?

Mr. Crane. His act is a reservation, except he does not require the defendant to move again.

But I say that when the judge has decided it, then to stick in something by which he is supposed to reserve the question, when he has not, in order that he may move thereafter for some reason, why not come out and say that the defendant may always enter a motion within 30 or 40 days for relief?

Mr. Dean. I see your point; because this language says that it is reserved. And then you say that it is not reserved at all but that you have to make a motion.

Mr. Crane. That is the point.

Mr. Medalie. I move that it is the concensus of opinion of this committee that the judge shall have the power expressly to reserve decision on a motion for directed verdict and to grant the motion either after there is a verdict of guilty or after the jury has reported its disagreement.

Mr. Seasongood. I second the motion.

Mr. Seth. That is all right.

Mr. Medalie. Then we can take up the rest of it afterwards.

Mr. Holtzoff. I should like to amend that so that the judge shall have a similar power even after he has denied the motion.

Mr. Medalie. Let us take that up separately.

Mr. Burke. Mr. Chairman, does not that in some juris-

dictions give an opportunity, assuming there is some merit to the motion made, simply to pass the burden, shall we say, for the time being on the possibility that there may be an acquittal which will solve the whole thing? On the other hand, if there is a verdict of guilty the defendant has suffered all the humiliation and additional embarrassment that comes from something that might possibly have been decided as a matter of law.

The Chairman. There is no doubt about that. But on the other hand, if you have a judge who will not make up his mind, is not the defendant better off if he has a chance to get after that judge again on a subsequent motion?

Of course I am going beyond your motion now.

Mr. Medalie. Yes; you are way beyond it.

The Chairman. Are you ready to vote on Mr. Medalie's motion, which is that the trial judge shall have the right to reserve decision on motio for directed verdict, and in the meantime let the case go to the jury and a verdict of guilty come in or a disagreement?

Mr. Mdealie. That is right.

The Chairman. Are you ready to vote on the motion?

Mr. Crane. And decide the motion after that.

The Chairman. After the verdict or disagreement.

Mr. Crane. Yes.

The Chairman. Are you ready for a vote on that motion? That does not preclude us from voting further.

Are you ready for a vote on that?

(The motion was agreed to.)

The Chairman. Who voted "no"? Two? Very well.

Mr. Holtzoff. I should like to move that we go one step

further and provide in the rule that even if a motion for directed verdict is denied, after the verdict comes in or if there is a disagreement, the judge shall have jurisdiction or authority to entertain a motion or a renewal motion for directed verdict, and pass upon it and grant the motion as though he were doing it before the jury went out.

Mr. Crane. I have no objection to that; that states what you mean.

The Chairman. Is the motion seconded?

Mr. Seasongood. I second the motion.

The Chairman. Are you ready to vote on the motion?

(The motion was agreed to.)

Mr. Crane. I think what you mean now is very clear. My objection is not based on that.

The Chairman. All right. May the Reporter begin to do some drafting on the basis of that?

Now, Rule 51.

Mr. Robinson. Rule 51 provides for instructions to the jury and provides when objections are to be noted.

Mr. Medalie. Before we start to consider that may I correct an error of mine? I misadvised the committee. It may not have been noticed. But there is a provision in the New York Code for the polling of the jury.

The Chairman. Very good.

Mr. Seasongood. That is the reason I brought it up. I know there are provisions in some States.

The Chairman. We will clear up all of them.

Mr. Medalie. That is section 450.

The Chairman. Very well; now we are on Rule 51.

Mr. Seth. I think we voted on that.

Mr. Robinson. The four points are, first, that the party requesting the instructions may file his written request for them; second, the judge shall inform counsel of his proposed action with regard to such requests prior to the arguments of counsel to the jury; third, the party must object before the jury retires if he wishes to save any question with regard to an instruction given or refused; and, fourth and finally, opportunity must be given him to make his objections outside of the hearing of the jury.

Mr. Medalie. May I make some comments on this?

The Chairman. Yes.

Mr. Medalie. In the southern district of New York we have a rule which provides that you may [redacted] spring requests for instructions on the trial judge after you finish your summation. You must not have them in, in writing, before summations begin -- that is, at the close of the evidence.

Here you provide, "At the close of the evidence or at such earlier time during the trial." In that event Government counsel would be at a distinct disadvantage in being required to submit requests for instructions too early in the case. The night of the day the trial is closing is about as early a time as you can finally make up your mind on what ought to be submitted to the court; because then you can come fairly near knowing the state of the record. If you are required to do it a week earlier or at the close of the Government's case you are not really being given a fair chance, when you are precluded from submitting these requests thereafter.

For that reason I move that the words "or at such earlier

time during the trial as the court reasonably directs" be stricken from the draft of this rule.

Mr.Dean. I second the motion.

Mr.Robinson. Would that restrict them to waiting until after the evidence is closed before they can submit motions?

Mr. Medalie. No. The court directs, "I wish to have requests for prayers in before the summations."

In the southern district of New York you do not submit anything. You catch the judge all unawares by standing up and saying, "I except to your Honor's instructions so and so, and I ask your Honor to charge as follows." Or without an exception you just go ahead and run off a few on him. It is argued that he does not have time to reflect, and that obviously that is unfair and does not result in a fair trial.

The rule in the southern district is a very practical way. It is a rule under which cases have been tried by skilled counsel; and it works no hardship, although at times it is an inconvenience.

The Chairman. Is it not the custom for the attorney to say, if it is a long case and if he has a lot of requests, "These are not complete, but these are what I have in mind to hand to the court"?

Mr. Medalie. Yes. A device I tried is that in a long case, about a week before the trial is finished and the evidence is in I have it appear in the record, "Your Honor, may I hand in my requests to charge, which are substantially complete, with the privilege of putting in three or four more prior to summation?"

In other words, I make a record of it to show the

appellate court that I did not catch the judge unawares and that I gave him plenty of time to study them.

The Chairman. And so that he cannot state, "I have just been confronted with voluminous requests."

Mr. Medalie. I might say there is also another thing in connection with a request to review ~~the~~ a requested charge. The appellate court will not review requested instructions for error if, even timely, you have requested 120 instructions. The judge just cannot meet that burden. Sensible counsel will limit them to 25 or so at the most.

You cannot do that here. You leave it to the court.

Mr. Crane. Would it help the court to write out the charge for him?

Mr. Medalie. No; that would leave out the oratory and harangue.

Mr. Crane. I do not see any reason why it could not be given to the court as a request. But it is not my business.

Mr.Dean. May I suggest that instead of striking out the words "or at such earlier time during the trial as the court reasonably directs" you simply strike out the words "at such earlier time during the trial", and have it read "or as the court reasonably directs"?

Mr.Robinson. That is what I was speaking of a moment ago.

The Chairman. You should do so before the summation starts. If he takes it after that he is not being fair.

Mr. Youngquist. You are undertaking to say "Not later than at the close of the evidence."

Mr. Medalie. I really intended it to be before the addresses to the jury. That is important; because in a long

case the evidence may close on Friday. You come back on Monday morning to sum up. That gives you time to prepare. Or the evidence may close at half-past eleven on Tuesday and the court may say, "Well, we have had a long time of it, and counsel want to have a chance to prepare summations. The jury will come back tomorrow morning at 10 o'clock."

Ten o'clock the next morning is the right time to give the instructions.

The Chairman. Is that fair to the court?

Mr. Medalie. Yes.

The Chairman. I do not think so. If you need the week-end to prepare the requests, he needs the week-end to sift them out.

Mr. Medalie. No; I am assuming that the judge is a moderately competent person, that he has some notion of what the case is about and what legal propositions are involved. A court has ample time during the hour or the few days in which counsel sum up to examine those instructions; and no matter what we think of our own persuasive speeches we know that frequently the judges are either reading the instructions or writing their intended instructions or attending to their personal correspondence. It is perfectly fair to the court.

The Chairman. Do you mean you let the arguments go on without any interruption ~~because~~ irrespective of what opposing counsel says?

Mr. Medalie. I do not interrupt opposing counsel.

The Chairman. Never?

Mr. Medalie. No.

The Chairman. Well, you are in a well-behaved jurisdiction!

Mr. Medalie. We are; counsel behave themselves in our jurisdiction.

Mr. Youngquist. The second sentence of this requires that the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury -- before the arguments begin.

Mr. Medalie. I was coming to that, but I should like to get rid of this "prior to summation".

The Chairman. I really think that is unfair.

Mr.Dean. Why don't you say, "after the close of the evidence", instead of "at the close of the evidence"?

Mr. Medalie. Because you do not fix the time. The rule of the southern district of New York has been found to be a good and workable rule.

Mr. Holtzoff. How about the rules in other districts?

Mr. Medalie. If it is a good and workable rule in that district it is good anywhere else.

Mr.Seasongood. How would it be to say, "as soon as the evidence is concluded or as soon as the court may direct"? It is in our code that any party may ask for written instructions after the close of the evidence or at the close of the evidence; and we say that if those instructions are correct they must be given in those words, or if they are not given in those words it is reversable error.

But our Federal court has always taken the view -- and I think quite properly -- of not being bound by that statute, that if they give the substance of the requested charge in the general charge that is all that can be asked.

Mr. Medalie. It is both the New York rule and the Feder-

al rule.

Mr. Youngquist. And the Minnesota rule.

Mr. Seasongood. That is the way it should be. The special charges go into the jury; but our Federal court simply says, "We satisfy that if we give the substance"; and the idea is to attract the court's attention to subjects on which you want him to charge.

Mr. Medalie. There is nothing to indicate here that the court is bound to follow the language of the requested instructions.

Mr.Seasongood. I think you should put that in.

Mr. Medalie. You do not need that in Federal cases.

Mr. Holtzoff. This is the language of the civil rule, and the civil rule has not been construed to require the court to follow the language of the request. So that you take the construction of the civil rule as a guide to the construction of the proposed language.

Mr.Crane. Suppose you are going to submit all the requests?

Mr. Medalie. Please do not say "all". We do not submit many requests.

Mr. Crane. If the judge charges incorrectly you can except to it; but can you ask him to rule if the requested instruction is correct?

Mr. Medalie. Yes. But also you are not making it impossible, after the judge has made his ruling and his charge to the jury, to get up and say, "I except to your Honor's charge of so and so."

Mr. Youngquist. You have that beginning i line 7:

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"No party may assign as error the giving or the failure to give an instruction 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. Medalie. Won't you come back to mine?

Mr. Youngquist. Yes; that is what I am doing.

Mr. Seasongood. Would you object to putting in the words "in substance set forth in the request"? Because this way it looks as if you have an ambiguity, to make the court charge in the specific language of the instructions.

Mr. Medalie. I think what Mr. Holtzoff said as to the substance of the civil rule is correct.

Mr.Robinson. The substance would be as set forth, and not in the same words.

Mr. Youngquist. I move that after the word "evidence" in line 2 there be inserted the words "or as soon thereafter as the court may direct."

That is in the second line.

The Chairman. You have heard the motion. Are there any remarks?

(The motion was agreed to.)

Mr.Medalie. Now the next point.

Mr. Seasongood. What is the objection to having it at the close of the evidence?

Mr. Medalie. The court might want to give you a little more time, and we let him give you that.

"The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury."

I have practiced law in jurisdictions where the court

does not do that, and I found myself perfectly comfortable.

Mr. Holtzoff. The Federal courts do that in civil cases. Why should not they do it in criminal cases?

Mr. Medalie. I do not know why they were ever called upon to do it in civil cases.

The Chairman. The idea is to please the lawyers in the 26 States of the Union in which counsel sum up after the judge has charged the jury. It is almost impossible for us to conceive that that should be done in any civilized community; but there are 26 States of the Union in which that regularly happens. The charge precedes the summations. There are 26 States in which that happens.

Mr. Medalie. I think that is a good racket!

Mr. Crane. Does that really happen? It is hard to believe.

Mr. Medalie. And then you can answer it.

The Chairman. He ends up by yelling louder than any man ever has.

Mr. Medalie. No man here has thus far used any strong language, but I wish to put on the record the fact that I think that is a hell of a practice.

Mr. Holtzoff. I think that all of us recognize that we must take into consideration the practices in the various States if we want to get these rules passed.

The Chairman. There is a district on the Atlantic seaboard, not very far from where we are now, in which after the judge addresses the jury the counsel sum up. As I say, it is almost unbelievable. In that State in the State courts the judge has to charge the jury in every case, "Gentlemen, you are

the sole judges of the law as well as of the facts, and what I say is not to be your sole and controlling guide."

Mr. Youngquist. That is our rule in libel cases, but only in libel cases.

The Chairman. That is the rule in all cases, by the constitution of Maryland.

Mr. Crane. We had a judge in Westchester who followed the rule in this way: He said, "Gentlemen of the jury, it is my duty to charge the law, but it is your duty to be the sole judges of the facts. But I think if you give the plaintiff something you will not be going far wrong"!

Mr. Holtzoff. I do not see how on earth the court is going to find time to inform counsel of his proposed action on requests, prior to their arguments.

Mr.Robinson. In my State they just put on a "G" for "Given" and a "R" for "Refused".

Mr. Holtzoff. But that takes a little time, and the court is not getting the benefit of the requests himself.

Mr.Robinson. That is why the first sentence was drawn to read "or at such earlier time during the trial as the court reasonably directs". You have rather put the first sentence out of gear with the second, by your motion.

Mr. Youngquist. You cannot expect counsel to submit all their requests before the close of the evidence; but I do not think it unreasonable to ask the court to inform counsel of its proposed action on the requests before the summations begin. It is wholly within his control. And I am sure that counsel would not object to being given a few more hours in which to prepare their summations, if the court wants that time

to study the requests.

Mr. Holtzoff. May I mention the practice in the District of Columbia? In the District of Columbia, after the evidence is closed the parties present their requests -- they call them prayers in this jurisdiction -- and they argue and discuss them with the judge, and during their discussion or argument the judge indicates what his ruling may be. That process may take half an hour or half a day. Then the summations start. There is some merit in that practice.

Mr. Medalie. We cannot afford to take that much time in our district. They keep us moving.

Mr. Holtzoff. Perhaps New York judges can speak faster.

Mr. Medalie. They must -- not that they can.

The Chairman. You do not do this in civil cases in New York?

Mr. Medalie. No.

The Chairman. Neither do we. If I asked a judge in our district court to tell me what his rulings on my requests were he would just laugh at me.

Mr. Seasongood. Nevertheless it is a very fair thing, because it is very embarrassing for counsel to argue on the line that the judge will charge this way, and then the court charges differently. It makes counsel's argument ridiculous.

Mr. Medalie. That may be theoretically so.

Mr. Seasongood. No; it is practically so.

Mr. Medalie. But counsel are rather careful to avoid those pitfalls.

The Chairman. Gentlemen, I think this must stay in, in view of the situation in over half of the States of the Union.

We are getting up against a practical situation.

Mr. Seth. I think it is important to know how the judge decides.

Mr. Seasongood. He writes "G" or "R".

Mr. Moltzoff. Or he may raise the question.

Mr. Youngquist. It is simply for the information of counsel, for their guidance in making their arguments. That is all. It is not a part of the proceedings. I think it is all right as it is.

Mr. Medalie. You have indicated that we must accept this.

The Chairman. I think so.

Mr. Medalie. Then let me bring up the next point. Counsel takes his objection -- we call them exceptions -- to the instructions, and it is stated here that he must state the grounds of his objection.

In New York you do not do any arguing with the judge when he is instructing the jury. You just state what your exception is. That is calling his attention to it sufficiently. If you are to engage in an argument with the judge after he has instructed the jury you are getting what we consider around New York as a disorderly proceeding.

The Chairman. No; the jury has retired, and then you step up to the bench, and the stenographer is still present, and you say, "I except, your Honor, to that part of your charge in which you dealt with the burden of proof in an arson case."

Mr. Medalie. It says, "Before the jury retires."

The Chairman. But out of the hearing of the jury.

Mr. Crane. I am not familiar with this practice. When the jury is out of hearing then you have this colloquy with the court. Then does thejudge call back the jury and charge them again?

The Chairman. If the judge thinks, upon reflection, that he missed the point of the charge he will call them back and say, "My attention been called to a point which perhaps I ought to clear up."

Mr.Crane. I thought it meant after they had retired for good.

Mr.Seth. No.

Mr. Youngquist. In our State it quite often happens that an additional charge be given after the objections have been made and the colloquy has occurred. I think that is a good idea.

The Chairman. Yes.

Does the rule stand, or are there any further suggestions? If there is nothing further we will pass on to Rule 52.

Mr.Seasongood. I should like to have it phrased so that-- perhaps it does not read that way, but it seems to me that it might mean that you have to give the very instructions that are asked.

Mr. Holtzoff. No. The corresponding civil rule has not been so construed.

The Chairman. That you must give them or must not give them?

Mr. Seasongood. As I said before, I do not think that you have to follow the statute practice that the judge has to give the instruction exactly as you request it, but it should

be enough that the judge gives the substance in his general charge.

Mr. Crane. I think that is understood.

The Chairman. Just to cover that, may we have it understood that the Reporter will reinvestigate that particular point under the civil rules; and if there is any doubt about it I think it will be covered.

Mr.Waite. I thoroughly agree with Mr.Seasongood there. I wonder if we could not simplify it by making it read this way: "may file written requests that the court instruct the jury on the law substantially as set forth in the requests."

Mr. Seasongood. That is what I suggested before -- or in substance.

The Chairman. Will the Reporter bear that in mind?

Mr.Robinson. Yes, sir.

Mr. Seth. Perhaps the word "modification" could be inserted in there and would take care of that: "giving, modifying, or failure to give."

I know cases on that, that I have mentioned.

The Chairman. Are we ready for No. 52?

Mr.Medalie. I move that it be stricken.

Mr. Holtzoff. I second the motion.

Mr.Robinson. Of course that is a new idea where trial is by the court.

Mr. Crane. That is the civil rule.

Mr. Waite. I should like to ask the reporter what he had in mind in line 5: "and in granting or refusing interlocutory injunctions". Where did you get those, in a criminal case?

Mr. Robinson. That was carefully discussed, and it was decided that it should be left in so that if the members of the committee thought there were any proceedings of a supplemental nature in which injunctions might be involved it could be left in. Of course it is doubtful if there is such a possibility.

Mr. Waite. I am asking in good faith and out of ignorance if there is ever any such thing as an interlocutory injunction in a criminal proceeding.

Mr. Seth. A later rule mentions a case in which there might be an injunction.

The Chairman. Where an injunction was issued on complaint of breach of peace-- enjoining that the man must perpetually behave himself.

Mr. Youngquist. I suppose some of these rules were put in just for the information of the committee, with the expectation that they would be stricken.

Mr. Robinson. Certainly, if there is no possibility of it.

Mr. Youngquist. I do not see any.

Mr. Robinson. Then that is out.

The Chairman. Rule 52. Do you want to say anything further?

Mr. Robinson. No. In fact, in New York some judges expressed the fear that this rule would be included in the criminal rules. Because they said they thought no judge should have to set forth his findings of fact, especially when the trial was by the court. They said that would be an impossible burden on the judge.

The Chairman. Is there anything further to be said by

the committee?

Mr. Burke. Why is it possible and desirable in civil cases but impossible in criminal cases?

Mr. Medalie. I think it is due to the fact that appellate courts want to make their jobs easier, and the only possibility they have is where there has not been a jury trial. Also the Federal courts in my district never have liked findings in civil cases.

The Chairman. The motion is to strike out Rule 52.

(The motion was agreed to.)

The Chairman. Did I interrupt you, Mr. Seasongood?

Mr. Seasongood. I have forgotten the ~~lore~~ law on the subject; but you get a more thorough review, in civil cases ~~that~~ if the jury has ~~weighed~~ waived, when you have findings of fact than when you do not. Unless you ask for separate findings of fact -- I am not speaking very accurately; but it is just in the back of my head that you have a better review if you ask for findings of fact than if you do not.

Mr. Holtzoff. That is right.

Mr. Seasongood. It may be that the same thing would be true in a criminal case. I do not know.

The Chairman. Rule 54.

Mr. Youngquist. I take it there is no Rule 53?

The Chairman. No.

Mr. Robinson. No, sir. It had to do with masters, and we could not see how masters had a place in criminal cases.

The Chairman. I cannot, either.

Mr. Holtzoff. I am wondering whether Rule 54 has any application to criminal cases. Perhaps it has not, in its

present form. I move that we strike out No. 54.

Mr. Medalie. Including the cost provision.

Mr. Holtzoff. Yes.

Mr. Crane. Oh, yes; surely.

Mr. Medalie. It is not safe to commit crimes if you have to pay the costs!

Mr. Seth. So the rule goes out as a whole.

The Chairman. What is the present rule as to costs?

Mr. Medalie. There are special statutory provisions assessing the costs of prosecutions.

The Chairman. Could it not be summarized in a short paragraph like that?

Mr. Medalie. If you have specific statutes dealing with particular cases, then you have it. You have not abrogated it.

Mr. Holtzoff. Ordinarily the judge may impose costs as a fine, in his discretion.

Mr. Crane. In a criminal case?

Mr. Holtzoff. Yes. It does not do any good ordinarily; all we do is to accumulate thousands of unpaid judgments for costs, and we do not know what to do with them.

Mr. Youngquist. That applies only to judgments rendered?

Mr. Crane. Yes; that is only where there is a fine imposed.

Mr. Medalie. Where is that?

Mr. Youngquist. Page 1, on the left. That applies only in a prosecution for fine or forfeiture? Oh, I beg your pardon -- the latter part of it applies to offenses.

Pages 1 and 2 are reversed there.

Mr. Medalie. It is discretionary in cases not capital. For murder or treason you do not pay costs!

Mr. Youngquist. You may figure that the man may be hung and therefore could not pay. What do costs mean?

Mr. Medalie. It is the act of May 8, 1792.

Mr. Youngquist. In our State we do not assess costs against a defendant in a criminal case; and in view of the fact that if the defendant is acquitted he may not tax costs against the Government, I do not know why it should not work reciprocally.

Mr. Wechsler. I think this statute has been used primarily in criminal contempt cases, as a matter of fact, and in other cases in which corporations are defendants, and where the thing has been used.

The Chairman. Rule 58.

Mr. Medalie. What have we done? Are we satisfied about costs going out?

The Chairman. Yes; Rule 54 is out, by common consent.

Now Rule 58.

Mr. Robinson. In Rule 58 we have some information here on the present Federal law. The judgment in a criminal case is the sentence.

"After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived * * sentence shall be imposed without delay, * * *."

Of course that is in the criminal appeals rules.

Mr. Seasongood. Excuse me, please. Does it not say "impose sentence unless there is a motion for new trial?"

Those rules are at 292 U.S. It is my recollection that they do not impose sentence if a motion for new trial is pending or is about to be filed.

Mr.Robinson. You are speaking of the statute; are you?

Mr. Seasongood. No; I am speaking of the criminal appeals rules as given in the back of 292 U.S. Perhaps we can get that, can we not?

Mr. Wechsler. That is the provision of the criminal appeals rules.

Mr. Robinson. Oh, the criminal appeals rules?

Mr. Seasongood. Yes.

Mr. Robinson. We have them here.

Mr. Youngquist. In line 4 shouldn't we strike out "special verdict"?

Mr. Medalie. Don't you want to begin after the semicolon in line 3, and down to line 6 of Rule 49? I move that that be stricken.

Mr. Youngquist. Before you come to that in line 4 you should strike out "a special verdict in the form of a special" and insert the word "the".

Mr. Robinson. It is "upon the general".

Mr. Youngquist. "Upon the verdict".

Mr. Holtzoff. How are you modifying line 2? Because you do not enter judgment until after sentence.

Mr. Crane. The sentence is the judgment; is it not?

Mr. Holtzoff. Yes; that is right.

Mr. Medalie. No; the clerk could not enter anything until the judge sentences, after verdict.

Mr. Holtzoff. In the present Federal procedure, which was

modified two or three years ago, after the judge pronounces sentence orally in open court then the clerk fills out a written judgment. For many years we did not have that, and we had a good many ambiguous sentences. So the clerk was finally required to write them out.

Mr. Orfield. A sentence is a penalty; is it not?

Mr. Holtzoff. A sentence is a penalty pronounced by the judge in open court. Then a written document is signed by the court, ~~requiring~~ stating the sentence and acting also as a commitment.

Mr. Medalie. Don't we want to provide, "After verdict and sentence, judgment shall be entered by the clerk in accordance therewith?"

Mr. Wechsler. I understand that the Reporter is going to draft a more elaborate provision with reference to sentence, anyhow. He referred to it yesterday in colloquy with Mr. Glueck. It seems to me that Rule 58 would play such a minor part in a statement about the total sentence problem, if it should be handled by the rules, that it is hardly worth while to consider this phase of it separately.

Mr.Robinson. I asked Mr. Glueck to give us his recommendations on that subject -- if you want to proceed with the letter he wrote, in which he stated some of his ideas. I said I hoped he would be able to stay and to present those to you. But he had to leave.

Mr. Wechsler. I see. You meant today. I thought you still had the problem under consideration; I misunderstood.

Mr.Robinson. Oh, no; it is still under consideration, all right.

Mr.Medalie. In the meantime can't we simplify what we

have here?

Mr. Robinson. Yes; but it is much more extended than this.

Mr. Youngquist. I was wrong in my suggestion, because that is dealing only with answers coupled with interrogatories.

The Chairman. Those are out.

Mr. Woltzoff. Yes.

Mr. Medalie. I think that after the semicolon everything to the end of the first sentence would have to go out.

Mr. Youngquist. That is right.

Mr. Medalie. I would take the words "after sentence is imposed by the court" --

The Chairman. Will you read the first clause as you have it?

Mr.Medalie. "After verdict and sentence".

The Chairman. Verdict of the jury?

Mr. Medalie. It might be the judge's.

"After the verdict of the jury or finding by the judge, as the case may be, and sentence thereon, judgment shall be entered forthwith by the clerk in conformity therewith."

The Chairman. The rest of the sentence is out?

Mr. Medalie. Yes.

The next sentence I do not understand: "But when the court directs entry of judgment of guilty or for other remedy"-- are there other remedies?

Mr.Woltzoff. No; I cannot recall a case.

Mr. Medalie. There is no forfeiture any more. That is 1789.

Mr.Robinson. Of course sometimes we have statutes --

at least in the State practice -- where you have an injunction rather closely wrapped up in a judgment -- padlocking a nuisance, or something of that kind.

Mr. Woltzoff. There is no such situation in the Federal law, I think.

Mr. Robinson. I do not know. Under the alcohol administration act -- but that is not criminal.

Mr. Woltzoff. No; that is a separate forfeiture proceeding.

Mr. Seth. Mr. Medalie, you mentioned the situation where there is a seizure of property, and I asked whether the forfeiture of the property was accomplished by a libel procedure upon land. Am I right about that? If there a separate libel to forfeit the property?

Mr. Medalie. Yes; there is a separate libel.

Mr. Seth. And it is not forfeited, as I understand.

Mr. Medalie. No; I do not understand so.

All right; that is cleared up.

Mr. Seasongood. I come back to the proposition that it is beyond our jurisdiction, because the order of the court is with respect to rules prior to or including the verdict or finding of guilty or not guilty. According to our minutes that is where we are stopped.

Mr. Youngquist. I thought at our meeting in January we decided we would go beyond that -- tentatively, at least.

Mr. Seasongood. My second point is that this is already covered by the rules on appeals, 297 U.S. 61.

Mr. Seth. Is that Rule 1 or Rule 2 of the Criminal Appeals? I cannot remember which it is.

Mr. Seasongood. My notation is "1", but I am not sure which is correct. As I read that you do not have the sentence if a motion for new trial is pending.

Mr.Robinson. Are you assuming that the criminal appeals rules will be binding on whatever we do here? We can consider them if the Court wishes us to do so, but that would not bind us.

Mr. Seasongood. After the Court has adopted those, would it not be rather peculiar?

Mr.Robinson. No; those rules are adopted with the view that they are being changed from time to time.

Mr. Seasongood. Of course I think there is good reason for not entering the sentence until the motion for new trial is disposed of.

Mr. Seth. I raised the question in my letter to the Reporter whether we should go into those rules. I think the whole scheme should be adopted in one set of rules, the same as was done with the civil rules. But I am not sure that we are committed to that task.

The Chairman. We are not, as our reference now stands.

But it was agreed the first day we met here that we should keep the thought in mind in case the Court should ask us to do so; and at least among the circuit court judges there has been talk of the desirability of doing it, because they are finding that the civil appeals practice is simpler now than the criminal appeals practice.

Mr. Seth. Moreover, there are some proceedings in the civil appeals rules that would be an entirely different procedure than what these criminal appeals rules would be, if

that were left as an entirely separate code, and if we stopped at that point. For instance, there ought to be some kind of a section in our code indicating what should be the ground of a motion for new trial -- those that have been recognized according to the usages of courts of law. I think the rule is good and ought to be specific.

At any rate, there is no provision in the criminal appeals rules of the grounds upon which a motion for new trial can be granted. They provide when the motion must be made, but they do not tell us anything more about it.

Mr. Seasongood. I should like to direct the attention of the brethren to the question of whether the sentence should be immediately on the return of the verdict of the jury or whether it should await the motion for new trial. Of course in a civil case you do not enter judgment until you either sustain the verdict --

The Chairman. What are the advantages both ways?

Mr. Seasongood. The advantage that it is expeditious. You sentence him as soon as you have the verdict of the jury.

Mr. Holtzoff. I think that should be in the discretion of the court. Of course, ordinarily if the court were seriously to entertain a motion for new trial -- which does not ordinarily happen in a criminal case -- he would postpone sentence. But some judges pronounce sentence immediately after the return of the verdict, at the end of the trial. But I think this should be clearly in the discretion of the court.

Mr. Wechsler. Is it not our purpose to introduce the idea of an investigatory probation as an aid to the court in sentencing? I do not see how any of that can work if you

sentence a man immediately after verdict.

Mr. Holtzoff. I agree with you that the ideal thing is to have a pre-sentence investigation in every case. But in many districts they make the pre-sentence investigation before the trial; a probation officer does that. That is done so as to have the facts ready in case of conviction.

Mr. Wechsler. Is that frequently done?

Mr. Holtzoff. In some districts.

Mr. Wechsler. That seems an incredible procedure.

Mr. Holtzoff. In any event it does seem to me, Mr. Wechsler, that the pendency of the motion for new trial is the test. But it is the making of the pre-sentence investigation that is important.

Mr. Wechsler. At least if you contemplate having such an investigation it indicates that sentence immediately after judgment should be outlawed -- as I think it should be.

Mr. Medalie. It should not be outlawed, because in many cases it does not matter how good or bad the defendant is; he just must go to jail for the crime he has committed.

For instance, a very responsible member of the community, a man who was known as a church member and the head of charity drives and the head of a corporation, or anything else you wish, is convicted of a crime. You do not hesitate with what is to be done with him. You intend to reform him.

Mr. Youngquist. Mr. Medalie's suggestion was that judgment be entered after sentence.

Mr. Medalie. Yes; it has to be.

Mr. Seasongood. Now we are talking about whether the sentence should be entered immediately on the finding of

guilty.

Mr. Holtzoff. Take an antitrust case. There is no question of a man's morals; no such question as that is involved. The judge knows whether he wishes to impose sentence, and all that sort of thing.

The Chairman. Gentlemen, it is quarter past ten.

Mr. Seth. Can't we have the criminal appeals rule with respect to reserving sentence ready for us in the morning?

Mr.Robinson. I thought that all the criminal appeals rules are here in the books.

Mr. Seth. Perhaps they are.

Mr.Robinson. Under Rule 72 they are all written out in the books.

The Chairman. Gentlemen, what time is it your pleasure that we meet in the morning?

Mr. Medalie. Ten o'clock. It is not a pleasure to come in late, but every morning I am compelled to handle a number of telephone calls to New York, and I cannot do that by 9.30.

Mr. Waite. At the rate we are going, can't we start at 10 o'clock and get through?

The Chairman. I have been looking ahead, and I notice that 65 to 69 are blanks. That is quite comforting. So if we assemble expeditiously at 10 o'clock I think we may be able to finish during the day -- possibly during the afternoon.

Mr. Wechsler. May I ask if you intend, in the present state of uncertainty as to our jurisdiction over appellate proceedings, to consider the subsequent rules here which relate to appellate problems?

The Chairman. I should hope very much that we might;

because I imagine that one of the things the Chief Justice doubtless will ask me is, "Have you anything really to suggest?" We cannot tell that until we have had our discussion here.

We have the memorial here prepared for Professor Baker, which is now ready to be signed. If you will step to the desk and sign in alphabetical order, we would like to get that on its way as soon as possible.

Mr. Dession. Is it safe to make engagements for the afternoon?

The Chairman. I think we shall have to leave in the afternoon. We may have a short lunch.

(Thereupon, at 10.15 o'clock p.m., a recess was taken until Thursday, September 11, 1941, at 10 o'clock a.m.)
