MINUTES OF MEETINGS

OF

ADVISORY COMMITTEE ON RULES

OF CRIMINAL PROCEDURE

New York, New York
February 19, 1943

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK CITY

MINUTES OF MEETINGS
OF
ADVISORY COMMITTEE ON RULES
OF CRIMINAL PROCEDURE

New York, New York,
Friday, February 19, 1943.

The Advisory Committee met at 10:30 a. m. in Room 1904, United States Court House, Foley Square, New York City.

Present:

Arthur T. Vanderbilt, Chairman,
Alexander Holtzoff, Secretary,
James J. Robinson, Reporter,
George J. Burke,
Frederick E. Crane,
Gordon E. Dean,
George H. Dession,
Sheldon Glueck,
George F. Longsdorf,
Hugh McLellan,
Lester B. Orfield,
Murray Seasongood,
J. O. Seth,
John B. Waite,
Herbert Wechsler,
G. Aaron Youngquist,
George Z. Medalie,
John J. Burns.

Mrs. Elizabeth Peterson,
William Holloran.

THE CHAIRMAN: We are still short three members from the West, but Mr. Burke says those western trains have a way of being anywhere from three to eight hours late; so I think we had better go ahead. Does anybody have a different idea?

(No response.)

THE CHAIRMAN: Well, I would suggest that we start with Rule 1 and give everybody a chance to make any comment that they want on it; and as soon as we have exhausted that rule we will move on tothe next one.

Does anybody desire to be heard on Rule 1?

MR. HOLTZOFF: Mr. Chairman, I move we adopt Rule 1 in its present form as it stands in the Reporter's draft.

MR. WECHSLER: I would like to ask a question about it, Mr. Chairman: How about the problem of proceedings before State magistrates now provided by the Executive Code? I would like to know what the status is. That jurisdiction is preserved, I believe.

MR. HOLTZOFF: It seems to me that in view of the fact that the rules are silent on this point, therefore these proceedings do not apply to State magistrates. Isn't that a necessary difference?

MR. DESSION: Wasn't this our thought, Mr. Reporter, that we did not want to encourage the use of

State magistrates? We were not clear that we could abolish their existing power, and so the thought was that the rules would be drawn without reference to them until we came to a last definition section somewhere, and where there could be an indication notewise that, of course, there is the statute.

MR. ROBINSON: That is right. And then you find that is done in Rule 52 (a) too. I suppose while we are thinking of 52 it should be understood that that blank in Rule 1 is to be filled inwith "52," because that is the rule that takes care of it.

MR. WECHSLER: In other words, we preserve that section of the Code that deals with that?

MR. HOLTZOFF: That is right.

MR. WECHSLER: That answers my question.

THE CHAIRMAN: Are there any other questions or comments on Rule 1 before the motion is put?

(No response.)

THE CHAIRMAN: If not, are you ready for the motion? All those in favor of adopting Rule 1 as printed and inserting the figures "52" in line 4, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

I take it if there are any comments on the notes as to a particular rule that we should dispose of them at the same time.

Are there any comments on the notes to Rule 1?

(No response.)

THE CHAIRMAN: If not, we will pass to Rule 2.

MR. HOLTZOFF: Mr. Chairman, I would like to move that we adopt the corresponding rule of Tentative Draft 5, which reads: "These rules shall be construed to secure the just, speedy and inexpensive disposition of criminal cases." It seemed to me that that was simpler and briefer than either the present Rule 2 or the alternative Rule 2.

MR. ROBINSON: In other words, those are the words of the Civil Rules, Alex. You think they should be carried over here as they are there?

MR. HOLTZOFF: Yes. We adopted them in Tentative Draft 5, and I thought they were pretty good.

MR. ROBINSON: There was some objection to the word "speedy." It was thought in criminal matters, as I remember the discussion, as the transcript shows - it was felt that the talk about speedy justice might lead some people to say that we are fixing up a streamline railroad to the penitentiary, and that would not be a fortunate word to use in this connection, although it might be all

right for Civil Rules.

MR. HOLTZOFF: But the Sixth Amendment to the Constitution uses the word "speedy." It states that the defendant shall be entitled to a speedy trial; so it seems to me that would answer that objection.

THE CHAIRMAN: Does the language you suggest parallel the language of the Civil Rule?

MR. HOLTZOFF: Yes, Mr. Chairman.

MR. CRANE: What is particularly wrong about this one?

MR. HOLTZOFF: Well, I would like to say this with respect to the other wording we adopted at our meeting the last time: My thought was that it had two advantages; first, it had the advantage of being briefer than this one, and it also had the advantage of paralleling the Civil Rules. Now, it seems to me that the aim of the administration of justice should be the same on the civil side as on the criminal side, and, therefore, this is one of those instances where it seemed logical and desirable to have the same type of rule for both civil and criminal.

MR. CRANE: Except in civil cases, of course, you can do many things by the consent of the parties which you cannot do in criminal. For instance, as to the elimination of unjustifiable expense and delay, unjustifiable expense may be eliminated by the consent of

the parties. You cannot justify that in criminal procedure. In fact, they do not provide for any expense at all when you print your record on appeal. Why don't we leave it in?

THE CHAIRMAN: That is covered, Judge Crane.

MR. CRANE: I am saying, why isn't the rule as it is now good?

MR. MEDALIE: It is too good. In the fifth draft you had everything in there without having two sentences. For example, your first sentence in your sixth draft deals only with the word "just." And here you put in the word "just" in one sentence along with the rest.

THE CHAIRMAN: The rule that Mr. Holtzoff was thinking about is on page 2 of the notes that were recently distributed. It is down at the bottom of the page.

MR. McLELLAN: Mr. Chairman, I move the adoption of Rule 2 as it appears in the fifth draft.

MR. MEDALIE: I second the motion.

MR. ROBINSON: May I make a comment, Mr. Chairman, please? I would like to have this clear to the Committee that the effort has been made by those of us working on this draft to incorporate only what was in the fifth draft unless modified by the Court's Memorandum of June 10, 1942, or by some definite action of the Committee.

T. D. 6, is offered as an effort to meet what seems to be the wishes of most of the Committee, both for a rule of construction which gives promise of having some favorable effect upon the adoption and the interpretation of the criminal rules," and for other reasons stated. So I have no objection whatever to the motion.

MR. HOLTZOFF: It seems to me that the wishes of the Committee were represented in the motion that was passed last time in adopting the rule as it was framed in Tentative Draft 5.

MR. ROBINSON: That is where I have a query.

MR. HOLTZOFF: It seems to me the majority must have voted for it, otherwise it would not have been adopted.

MR. ROBINSON: There was so much discussion about it, it must have been one of those referred back to the Reporter's office for consideration.

MR. CRANE: You are only expressing something that is just a matter of opinion. It does not mean much anyway. The courts will function just the same, and I do not see what the objection is to this. There is nothing vital about it. It is here, and you have other things which are more important than this.

THE CHAIRMAN: We have before us Judge McLellan's motion, which is to accept the language of the fifth tentative draft that is set forth in the middle of page 2

which is unjustifiable. You do not have it all out. If it is unjustifiable it ought not to be there at all.

MR. YOUNGQUIST: Strike out "unjustifiable," too.

MR. ORFIELD: I think this was the statement the Reporter was seeking a minute ago. This is from the Court's Memorandum, Rule 2 (reading from Court's Memorandum). That is in the last part of the Court's Memorandum.

MR. GLUECK: I think, Mr. Chairman, that means that the rule, as suggested by Mr. Holtzoff, does not say very much. It just uses the familiar expression of "just, speedy and inexpensive disposition," whereas, certainly, the alternative Rule 2 sketches in the details of the meaning of those phrases.

MR. HOLTZOFF: But the civil rule which was approved by the Supreme Court just uses "just, speedy and inexpensive." Apparently it was found satisfactory by the Supreme Court in connection with the Civil Rules.

MR. ROBINSON: Mr. Chairman, may I make a suggestion: I would like to have Mr. Seasongood make his suggestion of how he thinks it should be changed and let us submit that later. The motion has been made and carried.

THE CHAIRMAN: No.

MR. HOLTZOFF: It has not been carried.

MR. ROBINSON: Mr. Wechsler's motion is still pending?

THE CHAIRMAN: Yes. There is a motion to which Mr. Seasongood interposed an observation.

MR. HOLTZOFF: I think it was in the nature of a motion to amend, was it not?

THE CHAIRMAN: I did not get that. Was it?

MR. SEASONGOOD: Whatever you call it. I was just suggesting whether it would be an improvement to say on line 4, "and to lessen expense and delay" instead of saying "and the elimination of unjustifiable expense and delay."

MR. CRANE: May I say a further word about that? I think the time is coming when you are going to increase the expense of criminal prosecution. You are not going to put all the burden upon a man to print, or have him stuck with the cost. I have weighed all these questions. All we do is eliminate that which is unjustifiable. If it is unjustifiable it is unjustifiable. There is no use of lessening it.

THE CHAIRMAN: As I get it, Mr. Seasongood's motion is to amend Rule 2 by striking the words "the elimination of unjustifiable" and to substitute in place thereof the words "to lessen." Is that correct, Mr. Seasongood?

the rule in its present form. Are there any remarks?

MR. GLUECK: Mr. Chairman, is it in order at this stage to consider alternative Rule 2?

THE CHAIRMAN: Yes, indeed.

MR. GLUECK: I would like to hear Mr. Dession on his alternative Rule 2.

THE CHAIRMAN: Rule 2 is on page 4, the alternative rules.

MR. DESSION: I think the only difference is that the alternative Rule 2 is designed to try and say a little more, and particularly to highlight such major changes as these rules make in existing procedure. I feel that the choice in a matter of this kind is between, say, a brief statement which in its context is relatively meaningless, and an attempt to really say something. That is about all there is. I think beyond that it speaks for itself. It is just a question of which sounds better.

MR. HOLTZOFF: I call for the question, Mr. Chairman.

THE CHAIRMAN: If there is no further discussion, all those who are in favor of Mr. Wechsler's motion to adopt Rule 2 say "Aye."

(Chorus of "Ayes.")

Opposed, "No."

(No response.)

MR. HOLTZOFF: Yes.

MR. MEDALIE: The other is not definition.

MR. HOLTZOFF: Definition should be in the present tense. I move we change "shall be" to "is."

MR. MEDALIE: I second it.

MR. YOUNGQUIST: The first "shall be"?

THE CHAIRMAN: Yes, in line 1. The motion is to change the words "shall be" in line 1 to "is." Are there any remarks? If not, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. HOLTZOFF: Mr. Chairman, I move we strike out the last five words of this rule, the words "and filed with the commissioner." I think that is a detail that is not necessary.

dz MR. WECHSLER: Where would it be filed?

MR. HOLTZOFF: This is a definition. The filing is no part of a definition. We there define what a complaint is. The filing is no part of the definition of what constitutes a complaint. That is the reason I am suggesting that those words be stricken out.

MR. MEDALIE: You do not want to get rid of the provision because it is important that the defendant or

his counsel have a chance to read the complaint when they come around. They ought not to be told it is not in the commissioner's office. You can meet that by putting a period after the first word in line 4 - "commissioner," and then going ahead and saying, "It shall be filed with the commissioner."

MR. ROBINSON: Mr. Youngquist sent in a suggestion along that line, George, which was - and Mr. Youngquist, you check me on this quotation - as I remember it, strike out "a commissioner" in line 3-4, so you would say, "be affirmed before and filed with the commissioner," instead of no expression on the subject.

MR. HOLTZOFF: No, but that does not meet the point.

MR. ROBINSON: I appreciate that, Alex.

MR. HOLTZOFF: Mr. Medalie's suggestion would meet my point. I just did not want to see filing being a part of the definition.

MR. WECHSLER: If there should be favorable consideration for proposed Additional Rule 3, on page 4, Note to Rule 2, which is something that the Committee would have to pass on anyhow, then this problem would be eliminated because that states that the complaint shall be filed with the commissioner. It might be helpful to consider that issue first and then come back to this.

On page 4, Note to Rule 2, there is a Proposed Additional Rule 3, which I believe is submitted by Mr. Dession.

MR. HOLTZOFF: I do not think I have it.

MR. DESSION: It is on page 4, Note to Rule 2. This would be inserted between the present Rules 2 and 3.

You will remember we originally had a rule like this which spoke in terms of commencing a proceeding. We took that out of, I think it was, the first part of, or early in the proceedings, because there were some fears and justifiable, I think, that if we spoke in terms of commencing, we would be directly affecting the question of the statute of limitations, the question of when jeopardy attaches, and so on. We were not, as I recall, prepared at that time to determine just how we would be affecting those questions and just what we wanted to do if we did affect them.

Now, since then there has been a little discussion on that. I think in the light of the looking into this question that the Reporter and I have done since, and the substance of that is embodied in the notes following this proposed new rule, that we could safely speak in terms of initiating a prosecution. We avoid the term of "commencing a proceeding," which is the real hazard, and it is a hazard, and I think if we do this we may be confident that

we are not affecting any of those problems; that we simply explain at this early point the various ways in which prosecutions may get under way, and it serves as an introduction of what is to follow. Its chief point is to indicate at the outset the types of moves, if you will, which are possible under the rules. That is its purpose.

MR. LONGSDORF: Mr. Chairman, it seems to me those words "and file with the commissioner" are definitive in their nature and purpose. An unfiled complaint would not be a complaint.

THE CHAIRMAN: May we, so we do not get confused, address ourselves first to this Additional Rule 3 because, as Mr. Wechsler points out, if that is to be adopted, then we have another problem with Rule 3. So may we address ourselves first to a consideration of Additional Rule 3, which appears on page 4 of the Note to Rule 2?

MR. HOLTZOFF: Mr. Chairman, I want to call attention to the fact that we had, as Mr. Dession mentioned, a good many discussions, rather detailed discussions, on the question of whether we ought to have any rule at all on how a criminal proceeding is begun, and we voted not to have any.

I am just wondering what advantage is gained by this new rule? While I appreciate the fact it does not use the word ~~he wants~~ and, therefore, he gets away from

the technical word of art, even so, I am wondering whether any advantage is gained by having this rule as to the Initiation of Prosecution?

MR. GLUECK: I think there is a definite advantage to state at the outset the various ways in which you can get the wheels moving, and the whole rule amounts to just four and a half lines. I think there would be a definite advantage.

MR. WECHSLER: It seems to me it fits in with the scheme of the whole job, Mr. Chairman. It indicates the branches that subsequently spread out and receive detailed treatment.

MR. HOLTZOFF: I am afraid that on this question of the statute of limitations some people might successfully argue that the word "initiate" means the same thing as "commence," and I have that same problem.

MR. MEDALIE: Take it at the worst: Suppose the effect of this rule is that the statute is tolled by filing a complaint before a commissioner?

MR. HOLTZOFF: I have no objection to that.

Mr. MEDALIE: Would there be any objection?

MR. HOLTZOFF: I would not have any objection, but I want to call attention to the fact that it comes back to that same point.

MR. MEDALIE: I think our difficulty was that we

did not feel that we had the authority to determine when the statute of limitations should be tolled and that would be a dangerous question, to be worked out on the basis of an interpretation of the statute, but if this changes the result any of that statute, I have no feeling against it.

MR. DESSION: We have something of a precedent on this too, as noted here in the A. L. I. restatement of the law of torts. They were worried about this very problem, and they adopted the same formula which we are proposing here.

MR. YOUNGQUIST: Worried about the problem of the statute of limitations?

MR. DESSION: Exactly; and they finally adopted this particular language formula which we are advocating here. In the commentaries to those rules you will find discussion on that.

MR. ROBINSON: At our discussion in the last meeting, one factor which entered into your decision this way, I believe, was that the civil rules had not quite taken the responsibility of stating when a civil proceeding commenced.

MR. HOLTZOFF: Yes, there is a civil rule about that. It says that the statute is ~~commenced to be~~ tolled by the filing of a complaint.

MR. ROBINSON: That is, it was felt that there

could not be a comparable provision for that. That is the reason, and because of certain factors you mentioned, some of which we put in the notes.

MR. YOUNGQUIST: This proposed alternative or Additional Rule 3 is really descriptive rather than substantive, isn't it?

MR. DESSION: That is its purpose, I should say, descriptive.

MR. YOUNGQUIST: I was wondering whether we would be justified, for the purpose of describing the proceeding, in putting in a rule that might, by any possibility, even raise the question as to when a prosecution has been commenced.

MR. DESSION: I do not think there is much danger, really, because some of your statutes of limitations explicitly say that the proceeding is commenced by the filing of an indictment, and so on. We have case law to the effect that the filing of a complaint does not commence the tolling of the statute.

MR. HOLTZOFF: Yes, but these rules will change the case law that is inconsistent with them and they will change any statute which is inconsistent.

MR. YOUNGQUIST: That is what bothers me, whether a rule is going to drive the courts and the lawyers to the cases to find out whether there has been a change. I would

have no objection to the description of how this proceeding is started, or initiated, or commenced. I should not like to see us do anything that might, by any possibility, raise a question.

THE CHAIRMAN: But might it not be well to have one or two rules that we could refer to when we get before Congress, to show we were giving the prisoner a break?

MR. HOLTZOFF: I do not see how this gives the prisoner a break.

THE CHAIRMAN: This would be interpreted immediately as tolling the statute. I have no doubt of that.

MR. HOLTZOFF: It would be, perhaps.

MR. WECHSLER: It would be debateable as to whether we had a right to change the language of the statute of limitations.

THE CHAIRMAN: We can say we have not done it, but I am convinced that the first district court that has a chance to deal with this rule will say that we have.

MR. LONGSDORF: Mr. Chairman, doesn't the Committee think that the danger that this may be construed as altering the statute of limitations is a little bit exaggerated? I do not think we are going to touch the statute of limitations, in connection with criminal matters - and they require the filing of an indictment --

MR. WECHSLER: What is the language of the statute of limitations?

MR. LONGSDORF: (Continuing) -- with any such construction as this.

MR. HOLZTOFF: It takes an indictment to toll the statute.

MR. LONGSDORF: No; usually it commences once the indictment is filed, within three years.

MR. WECHSLER: It seems to me that is an explicit answer to the problem. It does not speak --

MR. HOLTZOFF: It is, if it is really substantive law; but if it is a rule of procedure, then that statute might be deemed to have been changed by this rule, because all inconsistent procedural statutes will be superseded by these rules.

MR. MEDALIE: You would have to assume the statute of limitations is purely procedural before you could change the statute of limitations.

MR. HOLTZOFF: There is no dispute but that it is is procedural.

MR. MEDALIE: Of course, by definition, you are right, but even definitions fall before common sense, don't they?

THE CHAIRMAN: Or congressional prejudice.

MR. YOUNGQUIST: They fall before Congress. I do

not think we dare touch it.

MR. HOLTZOFF: I mean, for some purposes, the statute of limitations is considered to be substantive; for other purposes, procedural.

MR. MEDALIE: We call the statute of limitations procedural, but you know how essential they are and what they mean to the right on the part of the Government to do something to somebody.

MR. HOLTZOFF: They are procedural rules.

MR. MEDALIE: You can call it procedural, but we are really legislating on a matter that is none of our business. So all I can say then is that although I cannot answer you on the point of definition, there must be something wrong with the definition.

MR. HOLTZOFF: If that is so, aren't we safe in not adopting this language?

MR. MEDALIE: I think we had better keep our hands off anything that affects the statute of limitations.

MR. WECHSLER: Is there anything to prevent us putting in the commentaries a statement that we proceeded on the assumption that the statute of limitations was outside our jurisdiction and would not be affected by this; that this is purely a descriptive rule to indicate the way to get the machinery moving?

MR. HOLTZOFF: What is the advantage of advocating

the rule?

MR. WECHSLER: Communication of information; that is all.

MR. CRANE: May I ask a question? This provides in Rule 3 for a complaint, states what a complaint is and where it is filed. You have in the rules also what an indictment is, haven't you?

MR. ROBINSON: Rule 7.

THE CHAIRMAN: Yes, Rule 7.

MR. CRANE: All through our rules we state the process.

MR. HOLTZOFF: This is surplusage really, isn't it?

MR. CRANE: I do not think this adds anything to it. You have the complaint and you have the indictment stated, and also when one can be used instead of the other in district courts. What else is there to add?

MR. DESSION: Mr. Reporter, do our rules make it clear that a prosecution may be actually begun by indictment without going through these earlier stages? I raise that question because I am not sure, offhand, whether they do or not.

MR. HOLTZOFF: I think they do.

MR. DESSION: Or is it only by implication?

MR. WECHSLER: I do not think the rules indicate

what the function of each of these three documents is, although it is known.

MR. CRANE: I think we could obtain a far-reaching effect if we got rid of this mass of decisions on when a prosecution is commenced or, at least, the statute of limitations begins to toll. There ought to be something definite in the law regarding it, but I do not know as we can do that. If we do it, I think we ought to do it openly.

MR. HOLTZOFF: I should like to direct attention to Rule 7 (a), the first sentence. That indicates that the procedure is as Judge Crane has just stated.

MR. DESSION: It seems to me Alex, that it does that only by implication and that no one would necessarily draw that implication unless he was very familiar with existing practices and took it for granted we were not changing it because we were expressly so providing, but it does not say here this may be the first move.

MR. HOLTZOFF: I do not think you have to spell it out quite that much.

MR. DESSION: Well, I don't know.

MR. YOUNGQUIST: Oftentimes, in both Federal and State courts, the indictment is the first move. In fact, in some districts, that is a more common way of procedure, and it seems to me that the provisions with respect to

complaint and hearing before the commissioner resulting, as they do, under Rule 5, in the commissioner holding the accused, if necessary, in the district court, makes it quite clear that while the function of the complaint and the preliminary hearing is either the discharge of the accused or his being held over, nevertheless, a trial system - in the first sentence of Rule 7 - that provides that offenses shall be prosecuted in the district court by indictment or information, makes it entirely clear that the preliminary hearing is not a prerequisite. And then too, I think, that the common understanding of the bench and the bar, and that is really the normal way of doing it, is that the practical purpose of having a preliminary hearing is to have a defendant available when the indictment is returned or information filed. In view of that, we could be pretty sure there would not be any misunderstanding about that.

MR. DESSION: I think the odds are that way.

MR. WECHSLER: Perhaps some point would be made by qualifying Rule 3 as it stands by a clause analogous to that in Rule 7 (a), "Proceedings before a United States commissioner shall be initiated by a complaint, setting forth the essential facts constituting the offense charged made upon oath or affirmation." I think, really, it is stylistic matter. It is not a matter of substance in any

sense at all.

THE CHAIRMAN: I think that is preferable, and that would eliminate Rule 3 (a).

MR. HOLTZOFF: Yes.

THE CHAIRMAN: It gives you a rule, then, that is a rule of action rather than mere definition.

MR. HOLTZOFF: Yes, I think that would be better.

MR. SEASONGOOD: Will you restate that, Mr. Wechsler?

THE CHAIRMAN: So that we we can get it in tentative form for voting on it, if that be the wish of the meeting.

MR. WECHSLER: It would begin, "Proceedings before a United States Commissioner shall be initiated by a complaint."

MR. HOLTZOFF: Wouldn't you say "A proceeding" rather than "Proceedings"?

MR. WECHSLER: "A proceeding," yes; 'setting forth the essential facts constituing the offense charged made upon oath or affirmation" period.

MR. LONGSDORF: I think you left out "written" there.

MR. WECHSLER: "In writing."

MR. HOLTZOFF: I do not think you need that "oath or affirmation." There is a definition later on,

in the definitions, that "oath" shall include 'affirmation".

THE CHAIRMAN: That is correct.

MR. WAITE: Mr. Chairman, I confess I am lost on this discussion. As I gathered it, first Rule 4 uses the word "complaint"; "When a complaint is filed.' Now Rule 3 purports to define the term "complaint". Do I gather that the objection is that we ought not simply to define it but we ought to say that that is the way of starting a prosecution? If so, that certainly affects the statute of limitations.

MR. HOLTZOFF: No.

MR. WECHSLER: We ought to show that the complaint is the document to get things moving before a United States commissioner. We ought to indicate what the function is.

MR. WAITE: If all we want is a definition of the word "complaint" as that word is used in Rule 4, I do not see what is wrong with Rule 3 as it is there.

MR. HOLTZOFF: I would like to say this, Mr. Waite, that Mr. Wechsler's formula meets the objection that we might be unintentionally affecting the statute of limitations, because if we say, "A proceeding before a United States commissioner may be initiated," nobody can say that that constitutes the tolling of the statute of limitations.

The way the Additional Rule 3 is phrased there

might be that danger, because it is phrased, "A prosecution may be instituted by the filing of a complaint."

MR. WAITE: I was talking about original Rule 3, which is nothing in the world but a definition.

THE CHAIRMAN: I think this started before you came in. We commenced a discussion of original Rule 3. Then the question was raised as to whether we should not give consideration, before we did that, to Proposed Additional Rule 3, which is on page 4 of the Note to Rule 2, and that is how this discussion came about.

MR. WAITE: I understand the discussion is whether we shall adopt Additional Rule 3 rather than original Rule 3?

MR. DESSION: No.

THE CHAIRMAN: No; that would be 4. The last suggestion now is that we can eliminate the adoption of Additional Rule 3 by making Rule 3 as here stated in the form of something more than a definition, making it a rule of action, and indicating that proceedings do not have to be started by complaint, but when there is a complaint before a commissioner it shall take the form of a written statement of the essential facts, and so forth.

MR. HOLTZOFF: I wonder if we could have Mr. Wechsler state his proposal again.

MR. WECHSLER: I would do it this way: "A

proceeding before a United States commissioner shall be initiated by written complaint, setting forth upon oath the essential facts constituting the offense charged."

THE CHAIRMAN: That seems to be complete. If everyone is willing, we have the last five words. Is there any question as to whether or not they should stay in? If so, may we dispose of that particular question of the filing with the commissioner? Is that regarded by anybody as essential?

MR. CRANE: Are you going to eliminate it altogether?

THE CHAIRMAN: That is the question, whether or not we should. It is not in Mr. Wechsler's motion.

MR. WECHSLER: I thought it was implied by the language, Mr. Chairman.

MR. CRANE: What is the harm in having it in?

MR. DEAN: Couldn't it be changed, "by filing a written complaint"?

MR. WECHSLER: Yes, I accept that; "by filing"; "shall be initiated by filing a written complaint."

MR. YOUNGQUIST: May I raise a question? Must the complaint under this language be sworn to before the commissioner?

MR. HOLTZOFF: No, not under this language.

MR. YOUNGQUIST: Should it not be?

MR. HOLTZOFF: Why should that be indispensable, so long as it is a sworn complaint?

MR. YOUNGQUIST: A complaint sworn to before a notary public and brought before the commissioner for action would be, I think, a very novel procedure.

MR. HOLTZOFF: It would be novel, but I do not see why it could not be.

MR. YOUNGQUIST: I do not think we ought to introduce novelties of that sort, because the complaining witness ought to appear before the commissioner in person and make his complaint and swear to it.

MR. DEAN: I think your point is well taken.

MR. WECHSLER: So do I.

MR. DEAN: Informalities.

MR. YOUNGQUIST: You cannot introduce such informalities as a complaint sworn to before a notary public.

MR. LONGSDORF: Mr. Chairman, how are we going to take care of the procedure which follows an arrest without a warrant and the taking of the prisoner before a commissioner?

MR. HOLTZOFF: There is another rule on that.

MR. LONGSDORF: Is that covered?

MR. HOLTZOFF: Yes, that is covered by another rule.

MR. LONGSDORF: Yes, I remember, that is covered.

MR. WECHSLER: There the proceeding would be initiated by complying with the rule and filing the complaint.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Are there any comments on Mr. Wechsler's motion?

MR. WECHSLER: I think Mr. Youngquist's point is a good point and we have to meet it.

MR. YOUNGQUIST: Don't you think we ought to have that sworn to before the commissioner?

MR. WECHSLER: Yes; I did not mean to vary that.

MR. CRANE: I do not mean to delay you, and I do not want to talk too much, but I don't quite understand the emphasis placed upon the procedure. What is the necessity of our stating when a proceeding commences?

THE CHAIRMAN: We are eliminating that now, Judge, under this proposed rule. This rule would take the place of Rule 3, and I take it also do away with the necessity of Additional Rule 3. So we save all that motion.

Might we have that re-read?

MR. WECHSLER: "A proceeding before a United States commissioner shall be initiated by filing a written complaint, setting forth upon oath the essential facts

constituting the offense charged."

Now, that at least has to be revised to meet Mr. Youngquist's point.

THE CHAIRMAN: Oath taken before a commissioner.

MR. DEAN: Can't it be revised by adding after the word "complaint", "a written complaint sworn to before the commissioner"?

MR. WECHSLER: Yes.

MR. DEAN: "and setting forth the essential facts".

MR. CRANE: Is there some other matter before the commissioner that would result in arrest? That is not a proceeding. What I am getting at is, I cannot see what we are talking about. You file a complaint. I agree, it should be on oath before the commissioner, and it may result immediately in the man being brought in by a summons or something of the kind. Is there anybody in doubt that is a proceeding?

What is the use ofcalling it a proceeding, or initiating a proceeding, or getting into dispute on what a proceeding is? A complaint is filed, and we describe the complaint, and it states an offense, and we state everything that follows - that is all stated in our rules - and the same applies to an indictment. Why should we go back to try to define what a proceeding is; whether it is

or whether it is not a proceeding? If a man is brought in and he cannot get bail, he will understand it is a proceeding.

MR. WECHSLER: The thought was, Judge, to get away from a merely definitive rule about what a complaint is and get a rule which speaks in terms of the action to be taken.

MR. CRANE: Why describe it and call it an action? It is an action if it results in somebody moving; something is done on the strength of it; and it simply is not a description; it is a statement that that is a complaint, and we state what the complaint is - it is a statement charging an offense, sworn to before the commissioner, and after that the commissioner issues process as provided for by these rules.

THE CHAIRMAN: Isn't one of the reasons for inserting it to show that not every criminal proceeding shall start with a complaint?

MR. CRANE: I did not understand.

THE CHAIRMAN: Wasn't that one of the objectives in mind?

MR. DESSION: Yes.

THE CHAIRMAN: That language suggested by Mr. Wechsler would indicate that all criminal proceedings do not commence with a complaint.

MR. CRANE: That may explain it to me. I am only asking for information. I wanted to understand it; that is all.

MR. WAITE: Mr. Chairman, I am still lost. I do not see the purpose of this rule. I do not see any objection to it as it is formulated, but I do not see the purpose of it.

THE CHAIRMAN: As I gather - I am only interpreting, and that is a very dangerous thing - the Additional Rule 3 was designed to be a guidepost, indicating possible methods by which criminal proceedings might get under way; complaint, indictment or information. It was then suggested that we might eliminate the necessity for Additional Rule 3 if we had appropriate language in Rule 3 itself indicating, with respect to complaints, what we have clearly indicated with respect to indictments, the method of commencing a proceeding and, further, that it was not the only method of commencing a criminal proceeding.

MR. WAITE: I think Rule 3, as it stands as a definition, is innocuous. Frankly, I do not see any point in saying that it may be started in this way. I do not think we get anything, and we do seem to cause a lot of trouble by it.

MR. MEDALIE: Do I understand, Mr. Waite, you do not think that either the complaint should be defined or

the initiation of the proceeding described?

MR. WAITE: No, I do not say it should not be defined. I just say I do not see any point in saying that the proceeding is initiated by a complaint. That seems to me to raise questions as to what it means, and there is no point in putting it in. I do not think we ought to put it in.

MR. MEDALIE: I think you agree, don't you, that it is necessary to set forth the requirements of a complaint?

MR. WAITE: I am going to suggest later on --

MR. MEDALIE: That is, the essential facts, for example, instead of the language of the statute?

MR. WAITE: Even if we define complaint, it leaves this question in my mind: I frankly do not know whether a complaint in the Federal courts has to be on information and belief or on an allegation of fact. I just do not know that, but it seems to me if we are going to define complaint we ought to say specifically that it shall be one way or the other.

MR. MEDALIE: That is what we do in Rule 3, in whatever form it takes.

MR. WAITE: No, I do not see it in Rule 3.

MR. MEDALIE: We require a statement of the essential facts on oath.

MR. SEASONGOOD: "Oath"is a word within definite meaning. It may be either a positive oath or on information and belief.

MR. WECHSLER: Isn't that a separate problem we have to resolve?

MR. SEASONGOOD: Yes.

MR. WAITE: I am just answering Mr. Medalie's question.

MR. WECHSLER: In answer to you, I would like to state my purpose in suggesting this language. I would like Rule 3 to be more than just a definition of a complaint. I would like to have it state what the function of a complaint is. We do that with indictment and we do it with information, and it seems to me we have a definite need for Additional Rule 3 because no place is there a definition of complaint stated. We are not doing it merely to state a term, but to make our rules stylistically uniform in describing what the paper involved is and what the different purpose in the proceeding is.

MR. MEDALIE: There is one problem I find here, while I like your idea. We say a proceeding is initiated before the Commissioner when the complaint is filed and we define what we mean by complaint. The fact is a prisoner is brought before a commissioner; he has been arrested; there has not been a complaint. Now, it is the

commissioner's duty to hold some kind of proceeding in the drawing up of a complaint, and during that proceeding he acts as a judicial officer and has certain authority. For example, as is known in the State codes, and is the common law, the magistrate proceeds to interrogate the prisoner; he has to sign the complaint; and he has authority to interrogate him and put him under oath preliminarily.

Now, we do not go into all that detail, but while that is going on the commissioner is functioning, and yet by the alternative that has just been proposed there is no proceeding pending before him, which is not the fact, and we do not intend that to be the fact.

MR. YOUNGQUIST: Mr. Seasongood and I were just discussing that between ourselves, and it seems to me that the proceeding is begun, initiated, or commenced, or started, or whatever the word is that we want to use, when the complaint is filed. Until that time there is no proceeding. The matter of arrest would not be a prosecution.

However, Mr. Chairman, I think that before we are through, we will probably revert to this principal Rule 3 as it is, with a few changes to make it a little more readable.

MR. CRANE: I move we adopt it as it is.

THE CHAIRMAN: Now, we have several unseconded

motions, of course.

MR. MEDALIE: I do not think we want to rush this and I do not think we want to delay it. I think our trouble is that we are trying to provide for too much. There will be many gaps if we adopt Rule 3 - the gaps are implicit - but if we adopt Rule 3 as restated, we have deliberately created a gap, that is, we have provided that the commissioner has no jurisdiction over the thing necessarily before him before the complaint is drawn. By the alternative proposal that was suggested by Mr. Wechsler, I think we are creating a defect in the magistrate's power, which we ought not to deliberately create, and I think, defective as it may be, because of gaps - casus omissus - that necessarily come into the preparation of rules, it is better to leave it as it was originally.

I move the adoption, if it has not been moved yet, of Rule 3 as originally stated.

MR. CRANE: I just moved it.

MR. MEDALIE: I am sorry.

MR. HOLTZOFF: I move a couple of verbal amendments, which you will probably accept. Change "shall be" to "is".

THE CHAIRMAN: That has already been done.

MR. HOLTZOFF: And leave out the last five words

and make a separate sentence of that, "It shall be filed with the commissioner."

THE CHAIRMAN: Should we not also strike out "shallbe" in the third line?

MR. YOUNGQUIST: Yes, "and shall be".

MR. HOLTZOFF: Yes, "and shall be"; and strike out the words "or affirmation".

MR. SEASONGOOD: How is it going to read then?

THE CHAIRMAN: It will read, "The complaint is a written statement of the essential facts constituting the offense charged made upon oath before a commissioner. It shall be filed with the commissioner."

MR. WAITE: I wonder, Mr. Chairman, if voting in favor of that motion, as I am ready to do, would preclude further amendment providing whether it shall be on information and belief or on specific assertion of knowledge?

THE CHAIRMAN: No.

MR. WAITE: I haven't any idea which it ought to be, but I think the rule should state one way or the other.

THE CHAIRMAN: I think we ought to cover that separately.

MR. MEDALIE: I think it could be considered separately, and if it is to be covered, it can be covered --

MR. WAITE: I meant "considered".

MR. MEDALIE: I have some ideas too, because we have had some principles in our various State courts resolved by decision rather than by statute.

THE CHAIRMAN: May we get a vote, if we can, on the motion as is and then proceed to Mr. Waite's problem?

The motion is to adopt Rule 3 in this form: "The complaint is a written statement of the essential facts constituting the offense charged made upon oath before a commissioner. It shall be filed with the commissioner."

MR. WECHSLER: Mr. Chairman, was there no second to my motion?

THE CHAIRMAN: I think not.

MR. MEDALIE: You say "made upon oath with the commissioner"?

THE CHAIRMAN: No; "made upon oath before a commissioner."

MR. DEAN: You are leaving out "or affirmation" as necessarily implied?

THE CHAIRMAN: It is covered by definition subsequently anyway. "It shall be filed with the commissioner" is the concluding sentence.

Are there any further remarks on the motion? If not, all those in favor say "Aye"; opposed "No."

Two in the negative; all the rest in the affirmative. The motion is carried.

Now may we proceed to a discussion of the question raised by Mr. Waite as to whether or not the words "upon oath" mean upon direct oath or upon information and belief under oath?

MR. HOLTOZFF: I would like to make a motion to clear up the matter by suggesting that we add a sentence to this rule to read as follows, "The oath may be made upon information and belief."

MR. MEDALIE: Without saying more about it?

MR. HOLTZOFF: Yes.

MR. DESSION: It seems to me that would aggravate your problem.

MR. HOLTZOFF: Yes, it would. It should set forth the source of the information and the grounds of the belief.

MR. MEDALIE: I will assume the motion was seconded and address myself to the general subject. We will have some other motions before we get through on the subject matter, I am sure.

There are some things we had better leave to the courts, to their experience and their practical judgment. You cannot cover everything.

In New York we do not define information and

dz

belief in criminal cases. It causes the courts some trouble, and the trouble that was caused in this State, which has a large experience with criminal procedure, arose out of John Doe proceedings. Mr. Jerome, whom you may recall as having been the first of the great district attorneys around here, was quite busy with John Doe proceedings until someone defied one of the subpoenas. A John Doe proceeding was simply a proceeding against nobody in particular, and it was all on complaint filed on information and belief. The Coutt of Appeals of this State - that was People ex rel Livingston v. White, I think it was, 186 New York, comparatively ancient, but that is only 1904 or 1905 - said that you must name the person; if you don't know his name, you must describe him. They did not say you cannot have information and belief but they indicated that you ought to set forth the sources of your information, the grounds for your belief and the specific data.

Now, that is all right, that can be defined, therefore, but the way to define it is by judicial experience. I think we ought to leave it alone. Today some men come in, Government agents, and make an affidavit and either they say positively, in terms of the statute, that the defendant committed a crime, which they give in statutory language, or they say on information and belief

that he did so or that he did a specific act on information and belief, and set forth nothing further. If we want to cover the whole subject, and all the variations that are possible, I think we are taking on an immense job. I think we ought to leave it alone.

If some day one of us wants to raise the question, we will tell a witness not to appear, and he will be punished for contempt, and we will test it. I did that for Controller Travis about 20 years ago when, after testifying, he was asked a question or about to be asked a question which I knew that he would be wise not to answer. He declined to answer on the ground that the magistrate had no jurisdiction to inquire. Then there was an order to punish him for contempt, and there was a habeas corpus, and the Appellate Division said that there was no proceeding, the complaint was insufficient to give the magistrate jurisdiction.

The courts will find out as they go along. You cannot define it, I think. We ought not to attempt to define it all.

MR. HOLTZOFF: Of course, it does lead to frustration, doesn't it? You go on for weeks and then all of a sudden you find that all you have done has gone for naught.

MR. MEDALIE: You can draw up rules and make

definitions and if, after a few weeks, you decide there is a flaw in the proceeding, the same thing will happen, and you will have to test it.

MR. HOLTZOFF: I think so.

MR. WAITE: I am worried about something more immediate than what Mr. Medalie is suggesting. Suppose when we get these rules done I should be before a bar association - and I hope to heavens I never shall be - and they say to me with respect to the complaint, may it be on information and belief or must it be on a specific statement? And I say, "Well, gentlemen, the Rules Committee thought it was not well to decide that and, therefore, we don't know. That is going to be left to the courts to decide some other time." Aren't they going to say, "What in thunder were you doing when you drew up these rules?"

MR. WECHSLER: Isn't there something of an answer to that, John? The complaint must show probable cause - that is always the test - and in so far as a magistrate is given any instructions, he is not to do anything unless he is satisfied there is probable cause. On some occasions allegations, even sworn to on information and belief, would not constitute probable cause, speaking of probable cause non-technically. In other situations they would.

And isn't that what George means by leaving it to

be worked out judicially?

MR. WAITE: Am I not right that in some states an information to the effect that the complainant is informed and does believe that John Doe did this, that and the other thing, is invalid and ineffective?

MR. WECHSLER: Yes.

MR. WAITE: In other states that is perfectly valid. Now, it seems to me that we have got to choose one or the other. I should hate to stand up before young people and say, "Yes, I know that there are these two diametrically opposite rules, I know in Michigan it is one thing and in Ohio it is another thing, and we just did not like to decide which it should be, so we left that to the courts to decide."

MR. HOLTZOFF: Mr. Waite, I am just trying to figure out whether that is the kind of question that is apt to be asked in a bar association.

MR. WAITE: It is the first thing that occurred to me when I considered this proposal and sent it to Jim.

MR. CRANE: You do not know the Bar Association of New York City. You cannot answer half of their questions and no one attempts to.

MR. SEASONGOOD: It is not a question of what the bar associations ask. I made this same suggestion to the Reporter and evidently it did not find favor, but we are

supposed to bring about rules that operate for uniformity. That is one of our great objects. Now, why should you have it in one state one way and in another state another way, and leave it indefinite, when you can resolve the situation? There were certainly old cases where information and belief alone was not sufficient. You had to state the grounds of your information. I do not see any objection to resolving that ambiguity and not having it operate one way in one place and another way in another place, and thus leave the question open.

MR. ROBINSON: Mr. Seasongood, you referred to sending in a proposal like Mr. Waite's. I think that requires a word of explanation.

MR. SEASONGOOD: You did not have to adopt every suggestion I made. Most of them were wrong, I am sure.

MR. ROBINSON: No. On that point, you see, again I felt bound by Draft 5. I want it raised here; and I raised it this way with Mr. Holtzoff, and Mr. Holtzoff opposed inserting it. I am glad it is being brought up here. I would like to state my personal opinion, for what it is worth. I agree with what you say and Mr. Waite says. I have raised the same point. I think it is unfortunate. I think you will notice in new Rule 3, page 2, it is stated at the bottom of the page, "Some states permit the complaint to be made on information and belief;

others require personal knowledge," citing Mr. Longsdorf's book there as authority for that.

It seems to me that this is a place where diversity in State procedure should be resolved in favor of uniformity and, therefore, it seems to me it ought to be definitely answered. And I think Mr. Holtzoff, or someone who is familiar with present practice, told me that sometimes a Federal investigating officer will make the complaint as though it were on personal knowledge, although, as a matter of fact, he does not have personal knowledge. In other words, there is some evasion, some indirectness. Now, that I think we should correct, and personally I would like to see in the rules, though, of course, my opinion is just one of eighteen, I would like to see a provision that a complaint may be filed on information and belief.

I think the Ruroede case, George, from your jurisdiction, is an example of the unfortunate results that follow when a Federal judge - who was it; Judge Augustus Hand? - of course, he was not the judge in the district court, but he decided the Ruroede case on appeal --

MR. HOLTZOFF: That was decided by Judge Ray.

MR. ROBINSON: Yes.

MR. MEDALIE: So it does not belong in this district.

MR. HOLTZOFF: He was sitting down here.

MR. ROBINSON: It was really a miscarriage of justice, I think, because New York State followed him. I think it is unfortunate because the decision was to the effect that there must be direct information, personal knowledge. And I too feel that Mr. Holtzoff's suggestion is unfortunate - that it would be necessary or desirable in a complaint to set out the source of your information - because we all know as a practical matter that an investigating officer frequently receives information for which he cannot disclose the source without a gross breach of faith and miscarriage of justice.

MR. MEDALIE: Let me answer that.

Mr. ROBINSON: On the other hand, if he, as an officer, says he has been reliably informed and believes that John Smith did commit a certain offense, then signs that and swears to it, if we give him any standing at all as an officer, why shouldn't we accept his word on that without requiring that you must have anybody come in from out in the gutter somewhere, and if he willswear to the thing as firsthand knowledge, then we accept his complaint and prefer that type of initiatory complaint to the other type, namely, having a responsible Federal officer say, "I am informed and believe"?

MR. MEDALIE: It is a long question and I do not

know whether I can answer it.

MR. HOLTZOFF: May I state my motion?

MR. MEDALIE: Please, before I forget this, I want to ask you one question, Jim. At the conclusion of a hearing before a magistrate, can he make a finding of probable cause on information and belief? The answer obviously is no.

MR. ROBINSON: No; the answeris yes, under State practice. John and I are both familiar with that.

MR. MEDALIE: You mean you make a finding after a hearing?

MR. ROBINSON: Yes.

MR. MEDALIE: You mean witnesses have been called and they have testified to information? Is that what you mean?

MR. ROBINSON: We are talking about the complaint.

MR. MEDALIE: No, no; I am talking about a hearing.

MR. ROBINSON: Yes, sometimes that is true.

MR. MEDALIE: Oh, no, that cannot be.

MR. HOLTZOFF: No.

MR. MEDALIE: No, that is not true.

MR. ROBINSON: It is true.

MR. MEDALIE: No, not a hearing. On a hearing, look, I will give you what I think about this, on a hearing

the magistrate may not hold except on the testimony of witnesses, obviously witnesses who tell what they saw and heard and what they know. A witness cannot appear before a magistrate, any more than he could before a judge, and say, as effective testimony, that Alex Holtzoff told me so-and-so. That does not go.

If It does not go for the purposes of holding him, establishing the probable cause, I do not see why it should go for the purpose of issuing a warrant.

Let us see practically how it operates --

MR. HOLTZOFF: And there is another thing --

MR. MEDALIE: Let me tell you how that operates, first, that is, how we operate in New York.

MR. ROBINSON: George, you are talking about the hearing. I am talking about the complaint.

MR. MEDALIE: Yes, I know.

MR. ROBINSON: You are off the point I am talking about.

MR. MEDALIE: I am testing your complaint by what you must work with at a hearing because --

MR. ROBINSON: Well, let me say --

MR. MEDALIE: Wait a minute. Wait just one minute, and I will show you.

MR. ROBINSON: All right, all right.

MR. MEDALIE: Please. You are worried about

disclosure by an agent of confidential information?

MR. ROBINSON: Oh, no, that is just part of it.

MR. MEDALIE: To the extent that you are worried about the disclosure by an agent of confidential information, you know you cannot hold a person if the agent has no personal knowledge at all; he cannot even testify. So what have you accomplished? You have held a man, you have arrested a man, and you don't dare hold a hearing.

MR. ROBINSON: Oh, yes, you can.

MR. MEDALIE: Why, how can you hold a hearing if he cannot disclose who it is who gave him the information?

MR. HOLTZOFF: Let me interject this suggestion. It is a well-recognized practice, and approved practice, for agents to obtain warrants on information obtained or secured by them from confidential informants. Now, a requirement in this rule stated that if the complaint is made on information and belief it must set forth the source of the information and the grounds for the belief. I made the motion, and I certainly do not construe that requirement as meaning that the name of the informant must be stated. I think that, say, an alcohol tax agent in his complaint may state that, "I was informed by a confidential informant that" --

MR. MEDALIE: Do they say that?

MR. HOLTZOFF: (Continuing) -- "the defendant is operating a still on a premises."

MR. MEDALIE: My goodness, then, I have practiced wrongfully for the 30-odd years that I have been at the bar. I always thought that when you said "on information and belief" you had to give the name of your informant.

MR. HOLTZOFF: Oh, no.

MR. MEDALIE: We have practiced under the wrong rules, haven't we?

MR. HOLTZOFF: If you abolish confidential informants.

MR. MEDALIE: I would like to abolish them but we have no letters of -- what do they call them, for the Bastille?

MR. HOLTZOFF: Letters of cachet.

MR. MEDALIE: Letters of cachet.

MR. HOLTZOFF: Oh, but you frequently have to act on information received from a confidential informant, and certainly it will be very bad for the administration of justice if you cannot.

MR. MEDALIE: It would be very bad for the administration of justice if you could lose your liberty on information that comes from confidential informants.

MR. HOLTZOFF: Only for a warrant to be issued.

MR. MEDALIE: Only a warrant? That is pretty

serious.

MR. HOLTZOFF: No, I think that much less is required for the issuance of a warrant than is required for holding a person at a preliminary hearing.

MR. ROBINSON: That is right.

THE CHAIRMAN: Let us see if we cannot get that motion.

MR. CRANE: I agree with him, and I do not want to do a lot of talking, but we have been talking about that down here.

MR. BURKE: I just suggested the hope that we would still function with fairly competent judges who would have some understanding of some of the problems that we are not creating de novo.

MR. CRANE: I was thinking along that line. Aren't we trying to put the judge -- he ought to be competent, coming out of all these law schools where these professors sit; he must be a very competent man, I should think, at least he would have some common sense -- aren't we trying to put the judge in a straitjacket? I do not want to put him in a straitjacket. I should say that he might consider the information and belief, knowing who the man was, what his function was, and other things, perhaps sufficient to create a probable cause, as the phrase has been used here.

It would be ridiculous to require a man who knows the facts to state them on information and belief. If a man says, "I was walking along the street with my wife and somebody assaulted her, on information and belief," you would think he was crazy, because that is a case where he would have stated the facts, and there must be cases where he must have, and would be expected to state, the facts.

On the other hand, there may be cases where an officer will state the facts and it would not be wise, perhaps, to give all the names, all the information he had, but yet the information would be such that the magistrate would know that it would justify his issuing a summons or warrant.

I should think we ought to leave it to the judge, if we can.

THE CHAIRMAN: May we have a motion?

MR. YOUNGQUIST: I am going to make a motion.

THE CHAIRMAN: Mr. Youngquist.

MR. YOUNGQUIST: May I preface it with the remark that I think the question should be divided into two parts, first, whether a complaint on information and belief should be permitted; second, if it be permitted, then whether anything more than the oath on information and belief shall be required.

I move that provision be made for complaint on information and belief as well as upon direct knowledge.

MR. MEDALIE: Seconded.

THE CHAIRMAN: You heard the motion, which is a matter of principle, with the language still to be reduced.

MR. YOUNGQUIST: True.

THE CHAIRMAN: Those in favor of the motion?

MR. GLUECK: Mr. Chairman, before voting, I should like to ask George, what is the difference in degree of proof required in getting a complaint and proof for binding over? Where would you draw the line?

MR. MEDALIE: Notwithstanding what has been said, there is no difference because, as tested by habeas corpus, the simple way that comes up: A man is arrested and the warden makes his return and produces the complaint. If the complaint does not set forth a crime on oath and, in New York, on knowledge --

MR. GLUECK: Personal knowledge of the facts?

MR. MEDALIE: (Continuing) -- the man is turned out. In any event, you must always establish the prima facie elements that constitute the offense, whether for a holding or for an arrest.

MR. GLUECK: Then what is the purpose of the preliminary hearing? Is it to review the action of the

official who issued the warrant?

MR. MEDALIE: Assuming that the warrant is based on sufficient affidavits, that is, setting forth prima facie to the commissioner an offense, the essential thing, as indicated by all the procedures, is that you may by examining the witness show that he is wrong.

MR. GLUECK: A little more thorough inquiry.

MR. MEDALIE: Yes, you might find out it is not so.

MR. HOLTZOFF: Well, I am inclined to differ with that for this reason: The warrant may be issued on reasonable grounds to believe that the defendant has committed the crime with which he is charged. Now, at the preliminary hearing, musn't something more be established than just that?

MR. WECHSLER: No.

MR. MEDALIE: I will show you why that is incorrect.

MR. WECHSLER: Our rules provide just that.

MR. MEDALIE: It depends on this --

MR. WECHSLER: Mr. Chairman, let us have the question -- go ahead, George.

MR. MEDALIE: Suppose you went and made an arrest, or an agent made an arrest; he did not see the act which constitutes the crime; someone told him so; but

what this person told him comes to information of facts, detailed facts, on someone's knowledge.

MR. HOLTZOFF: Yes; but under the rules of evidence that would not be admissible.

MR. MEDALIE: No.

MR. HOLTZOFF: That is different.

MR. MEDALIE: No.

MR. HOLTZOFF: That is why it does not take as much to get a warrant.

MR. MEDALIE: You are going too fast now. In other words, the test is always that someone knows that the particular crime has been committed.

MR. HOLTZOFF: That is right.

MR. MEDALIE: That is so whether an arrest is made; that is so whether a warrant is issued; and that is so when a holding is made; is that right? You always come to the same thing.

MR. HOLTZOFF: I cannot answer your question yes or no.

1z MR. GLUECK: How about reasonable grounds for believing that a felony has been committed?

MR. MEDALIE: Even without a warrant the officer making the arrest must have had information, even though he does not personally know, which establishes that the crime was committed. Now, the reasonable ground is

that he does not know himself, but he has the reasonable grounds because someone told him so.

MR. HOLTZOFF: But to get a warrant he does not have to present competent evidence, whereason ~~to hold~~ the preliminary hearing the rules of evidence apply, and he has to present competent evidence to establish probable cause.

MR. MEDALIE: The point about the issuance of a warrant is that it does require competent evidence in the form of a deposition.

MR. HOLTZOFF: But it may be hearsay. The rules of evidence do not apply.

MR. MEDALIE: The hearsay is allowed because of the information and belief rule. The only possible protection that you may then have is that at least you would have reliable hearsay. For hearsay to have any value, the hearsay itself must be as reliable as evidence.

MR. HOLTZOFF: But even the reliable hearsay would not be admissible.

THE CHAIRMAN: Gentlemen, we are not getting anywhere.

MR. YOUNGQUIST: Mr. Chairman, may I speak to my motion?

MR. GLUECK: May I have it stated?

THE CHAIRMAN: The request is that you state your

motion.

MR. YOUNGQUIST: The motion is that provision be made for complaints on information and belief. Practically all, or at least a great many, of the prosecutions under the Federal rules are initiated subject to and after investigation by a Federal authority. Their information is upon belief rather than upon knowledge when they come to file a complaint and seek a warrant. We can be fairly sure, I think, that their information would be reliable before they do seek a warrant. If we do not have a provision for the issuance of a warrant on a complaint sworn to on information and belief, I think the processes of prosecution are going to be pretty badly stalled in a great many instances; so as a practical matter I think it necessary; and the question before us now is whether we are going to adopt the New York rule as espoused by Mr. Medalie, or the rule which is prevalent in a number of other states, which permits the issuance of warrants on complaints sworn to on information and belief. We have got to make our choice between the two.

And since it is the established practice, at least in some jurisdictions, to permit the making of the complaint on information and belief, I think that there is even greater reason for adopting that in the Federal procedure because the fact that almost invariably prior

investigation by a duly authorized Government representative has been made before a warrant is sought at all. That is the basis for my motion.

MR. WECHSLER: Mr. Chairman, may I convert the question I was going to put to Alex? On the one hand you have got an organization in the Federal law for arrest without a warrant. Its scope was defined by Sheldon a while ago. I am troubled by this consequence if we make too tight the rule for getting the warrant that you simply force the bureau and other law-enforcing agencies to make an arrest without a warrant. That does not seem to me a net gain. But the obverse of the difficulty is this: Since our rules require that a man arrested on a warrant be brought right in and be given a preliminary hearing, what is the advantage of authorizing his arrest upon a basis which will not authorize his binding over? That is George's point.

Now, coming to the specific thing that Alex talked of, the confidential informant problem, if a man won't be bound over because of what a confidential informant told an agent, then, speaking specifically of the bureau, Alex, what is the advantage of a procedure which authorizes his arrest on the basis of the information supplied by a confidential informant?

MR. HOLTZOFF: Because between the time of arrest

and the time of the preliminary hearing other evidence may be procured.

MR. WECHSLER: But under these rules that is forthwith.

MR. HOLTZOFF: Yes, but the preliminary hearing may be continued, and sometimes it is. But if there is no possibility of arresting a person, he may become a fugitive. You can get your complaint on information and belief, file an information and belief, get your warrant, and by the time the hearing is held you will get additional evidence.

Now, I still want to make my point, and although the substantive requirement or the rule of substantive law for getting a warrant may be the same as that required at the preliminary hearing, actually there is a difference, because the agent cannot testify to hearsay at the preliminary hearing. But in his deposition or complaint on which the warrant is issued, hearsay, if it is deemed reliable by the magistrate, may be accepted. There is that very important feature.

MR. WECHSLER: But isn't the confidential informant's part of it really a small part of it?

MR. HOLTZOFF: Of course.

MR. WECHSLER: The big part is that if an agent in Kansas City may get information on a teletype which

indicates he will have to make an arrest, he will have to make the arrest with or without a warrant, and by and large, it seems to me preferable to have it made with a warrant.

MR. HOLTZOFF: Precisely.

MR. WECHSLER: But that will give him a day or two days or five days if the hearing is adjourned to bring the witnesses on in order to bind the man over.

MR. HOLTZOFF: Yes.

MR. WECHSLER: That is the point?

MR. HOLTZOFF: That is the point.

MR. WECHSLER: In those terms it seems to me sound to authorize it on information and belief.

MR. YOUNGQUIST: One of the two primary purposes of a warrant is to get the accused arrested.

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: And if that process were to be delayed by the bringing before the magistrate persons who have personal knowledge of the facts constituting the offense, the delay might result in the defendant's getting away.

MR. HOLTZOFF: Mr. Youngquist, why don't you put your motion in the form of exact phraseology? Then we can kill two birds with one stone.

MR. WECHSLER: Actually, responding to what you say, you ought to allow information and belief when there

is a danger of the man being a fugitive, and not allow it otherwise.

MR. YOUNGQUIST: You can't discriminate between cases as a practical matter.

MR. WAITE: Herbert, let me give you a practical illustration: Here is a Detroit city detective. He investigates and finds a dozen people, no one of whom alone can specifically determine the criminal. But out of the dozen he knows who the criminal is, but he can't find that man and go out and arrest him forthwith. He wants to get a warrant issued. Now, what happens is that he goes before the magistrate, and on information and belief he repeats what he got from the dozen people. If he had to bring all those twelve people in before he could get the warrant issued, it would be a bit of an absurdity. But he goes in with his information and belief; the warrant is issued; the man is brought in; and then before he can be held, each one of these twelve people has to be brought in.

MR. MEDALIE: Would you be satisfied if a detective appeared before the magistrate and simply in general terms told him he had information to the effect that X committed a particular crime?

MR. WAITE: Oh, no. He must set forth the details and his specification, but he sets it forth on information and belief.

MR. MEDALIE: Assuming we are prepared to adopt an information and belief basis for warrants, why shouldn't this motion make provision for setting forth the sources of the information and the grounds for belief?

MR. WAITE: That is Mr. Youngquist's second motion. He wants to get the preliminary matter disposed of first.

MR. MEDALIE: This second motion is really more important than the first.

MR. YOUNGQUIST: I move that Rule 3 read as follows: "The complaint is a written statement of the essential facts constituting the offense charged, made upon oath before a commissioner and filed with him. The oath may be made upon information and belief."

MR. HOLTZOFF: We have already disposed of the first sentence by splitting it in two. You don't want to change that, do you?

MR. YOUNGQUIST: Yes, I do, because otherwise it would make a very awkward construction.

Mr. WAITE: Can't we let the style go for the moment and decide your last several words, "The oath may be made upon information and belief"?

MR. YOUNGQUIST: That is the gist.

MR. WAITE: Just so we won't get off on a question of style at this moment.

THE CHAIRMAN: Now, we have had a long discussion of it.

MR. MEDALIE: May I move an amendment?

THE CHAIRMAN: Yes.

MR. MEDALIE: That the language read: "The oath may be made on information and belief" and also say, "The complaint shall set forth the sources of the information and the ground for the belief."

THE CHAIRMAN: Is the amendment seconded?

MR. DEAN: I second it.

THE CHAIRMAN: Any remarks on the amendment?

MR. SETH: Mr. Chairman, arent these complaints supposed to be made under the penalty of perjury?

MR. HOLTZOFF: Of course.

MR. SETH: Now, on information and belief I don't think you could ever prosecute anybody for perjury.

MR. HOLTZOFF: They are made on information and belief constantly.

MR.GLUECK: Or imagination.

MR. HOLTZOFF: In most Federal courts they are not made by private complaints. The agent almost invariably has to make it on information and belief.

MR. SETH: What does the Constitution say, on oath?

MR. HOLTZOFF: On oath.

MR. SETH: I believe in standing with the Constitution a little bit.

MR. HOLTZOFF: It is still on oath. That is still in compliance with the constitution.

MR. DEAN: As a practical problem, it probably never occurred.

MR. YOUNGQUIST: This motion of Mr. Medalie's, as I understand, would require setting forth in the affidavit the names of the persons from whom the information is obtained.

MR. MEDALIE: And the substance of the information.

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: Mr. Medalie --

MR. YOUNGQUIST: Just a minute. That, it seems to me, would be a very serious handicap to prosecutions.

MR. MEDALIE: That is the least that we require in an ordinary motion for a bill of particulars; and if you are not going to require that much when you arrest a man I think you are throwing all processes out.

MR. WAITE: Mr. Medalie, I wonder if you haven't got two things confused there. I certainly would go the whole distance with you that it must set forth the facts which he believes and is informed of; but if you mean that he has got to set forth the particular individuals from

whom he got that statement of facts, then I do not go along with you. I would have to vote against your motion.

MR. HOLTZOFF: How about a confidential informant?

MR. MEDALIE: There is no such thing. That is a fiction created by public officials who were scared to death that somebody was going to kidnap their witnesses or shoot them. That is one of the things which we are met with so often. That is an excuse for putting more and more arbitrary power in the hands of public officials who are not going to tell what we ought to know about judicially. I do not think that is a good argument. It is overdone.

MR. HOLTZOFF: I think that is pretty dangerous.

MR. SEASONGOOD: Mr. Chairman, I would like to ask, would that amendment reverse existing practice?

MR. HOLTZOFF: I think it would reverse existing practice in most jurisdictions.

MR. ROBINSON: I do not think so.

MR. HOLTZOFF: Most Federal complaints are on information and belief without disclosing the sources.

Mr. ROBINSON: In the states now the Federal district court follows the State practice.

MR. YOUNGQUIST: What is the State practice in general on this question of whether complaints may be made upon information and belief, and if they be so made that they set out the sources?

MR. ROBINSON: I would say that that practice predominates over the other type.

MR. YOUNGQUIST: Which?

MR. ROBINSON: That is on information and belief. They do not require the source to be stated.

MR. YOUNGQUIST: The prevailing practice is that complaints may be made upon information and belief without setting forth the sources?

MR. HOLTZOFF: I know that is the prevailing Federal practice.

MR. SEASONGOOD: That is why I asked. If you are going to reverse that, you will have a lot of controversy and trouble.

MR. WAITE: That is the conventional practice now.

MR. MEDALIE: I would like to know how you would deal with this other suggestion that has been made. A complaint must be made on oath, obviously, because if it is false you can prosecute for perjury. Now, how can you prove perjury if you do not even know what the claim is as to how the information is gotten? This oath would be just a joke. On information and belief John Jones committed the crime of kidnapping on such-and-such a date and place, of such a person. That is all it says.

MR. HOLTZOFF: That is the predominant practice.

MR. MEDALIE: It is a terrible practice.

MR. WAITE: How would you prosecute for perjury in the prevailing jurisdictions now? It is getting along perfectly satisfactory.

MR. MEDALIE: You are calling it "prevailing." I do not think it can be prevailing. But where you do require the setting forth of the source of your information, then you can at least call someone who might say, "I never told this man any such thing."

MR. WAITE: I do not recall any jurisdictions that require that.

THE CHAIRMAN: May we have a vote on Mr. Medalie's amendment to Mr. Youngquist's motion?

MR. McLELLAN: Mr. Chairman, I do not want to delay you, but I do want to understand something before I vote on it. My understanding is that there are some jurisdictions where a complaint must be made on personal knowledge. There are other jurisdictions where it may be made upon information and belief where the sources of the information and belief are stated, and there are other jurisdictions where it may be made simply upon information and belief. My difficulty with Mr. Youngquist's original motion is that when you state that it is sufficient if a complaint is made upon information and belief, that that rule will be subject to different interpretations in

different jurisdictions. One jurisdiction will interpret it as meaning upon information and belief by the source of the information as stated; in another jurisdiction where the rule has been the other way, it will be interpreted as it simply states, information and belief, without giving the sources. So if you pass the original motion to amend on Mr. Youngquist, you will then be in a position where you have one practice in one jurisdiction and another in another.

On the other hand, if you cure it, as Mr. Medalie suggests, you will interfere quite seriously with the administration of justice in criminal matters. I had a little experience along those lines myself, and I know perfectly well that there are quite a number of cases where it is not practicable for a prosecuting officer to divulge the information which he had received from some source. If he does it, he won't get any information from that source again or other like sources. That is the reason - and I like to have some reason for what I said before - that I fear, lonely as I may be, I shall have to vote for the Rule 3 substantially as originally drafted in Draft 6. It is a real problem that you are facing when you say that the complaint must state the sources of the information. And if you do not say that, then you have got two interpretations in different jurisdictions according to

whether you are in a district or state where they think information and belief means information and belief stating the sources of the information.

I hope I have not delayed you.

THE CHAIRMAN: Not at all.

MR. WAITE: Judge McLellan, is there any jurisdiction that you know of that requires the sources to be stated? I do not know of any.

MR. McLELLAN: I think so. I think if you asked me to state the particular jurisdiction, I think there is a general feeling that there are numerous jurisdictions where it is held that a bill in equity on information and belief, or a complaint on information and belief, means the stating of information and belief and the sources of that information.

MR. HOLTZOFF: That is in the New York rule.

MR. WAITE: In criminal procedure?

MR. HOLTZOFF: In criminal procedure too.

MR. McLELLAN: They are all mixed up in it.

MR. GLUECK: Is the administration of Federal criminal justice any worse in New York than in other jurisdictions because of this requirement of the statement of the sources?

MR. HOLTZOFF: I think I can answer that question by saying that while that is the requirement

of the New York State law, it is frequently not complied with in the Federal courts in New York.

MR. DEAN: How about the State courts? Does it work in the State courts?

MR. HOLTZOFF: That I do not know.

MR. MEDALIE: It works very well in the State courts, and the requirement is very rigid here.

MR. ROBINSON: There are more witnesses assassinated in New York, and in Chicago, of course, than anywhere else.

MR. MEDALIE: No, that is not so.

MR. McLELLAN: I think the problem is different than a state problem, as Mr. Holtzoff well knows from his familiarity with it.

MR. HOLTZOFF: The problem is different because Federal prosecutions are almost always ~~invariably~~ started on the instigation of a Federal investigating officer; whereas the average State prosecution is started on the complaint of a private person, and there it is only proper to hold the private person to a greater degree of proof.

MR. MEDALIE: May I make one comment about the assassination of witnesses? Witnesses have usually been assassinated in New York, Chicago and in smaller communities where only an indictment has been filed and the names have not been given. In other words, the man who was accused of

crime knows who the witnesses are or are going to be. You do not have to give him a list of witnesses to tell him who are going to testify against him.

MR. WAITE: Tom Dewey had to keep them pretty well hidden.

MR. ROBINSON: He had to take two floors of the Woolworth Building to keep them safe.

THE CHAIRMAN: The question is on Mr. Medalie's amendment. All those in favor of Mr. Medalie's amendment say "Aye."

(Chorus of "Ayes.")

All opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The issue is in doubt. All those in favor raise hands.

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

THE CHAIRMAN: Lost, 5 to 9.

The question is now on Mr. Youngquist's motion: All those in favor --

MR. SEASONGOOD: Excuse me. What will that be then? You won't say anything about information and belief? Just information and belief, but it won't state what constitutes it?

THE CHAIRMAN: That is correct.

MR. HOLTZOFF: Then we have the objection made by Judge McLellan that that might be subject to interpretation.

THE CHAIRMAN: And that becomes a factor in voting on this motion.

MR. SEASONGOOD: Would it do any good to state generally the sources of information?

MR. DEAN: Another possibility is to state the grounds of belief without stating the sources of information. That cuts it in half.

MR. SEASONGOOD: That might be a good one.

MR. MEDALIE: You are going to have an awful lot of trouble in explaining that away.

MR. WAITE: I would like to second Mr. Dean's motion, to read "stating generally the grounds of belief."

MR. CRANE: May I ask a question?

THE CHAIRMAN: Mr. Crane.

MR. CRANE: I was going to ask this: Has anybody experienced in all the prosecutions throughout this country in the Federal courts - I do not know about the State courts - has anybody experienced any difficulty with matters as they stand? Who has found that it has worked badly just as it is now? Why not leave it alone?

MR. YOUNGQUIST: The difficulty is, as I understand it, in some states like New York, for instance, the practice is one way, and under the present Federal procedure that

practice is supposed to be followed. In other states the practice is different; it is the other way.

MR. CRANE: I am asking, has any criminal escaped because of it, that you know of, or because of that suffered any harm?

MR. DESSION: I believe the answer to your question is no, Judge.

MR. CRANE: Then why bother with it, on a practical question that you can't deal with? We have got to let it be worked out by the different communities.

MR. WAITE: I would suggest this, Judge Crane, that these rules are supposed to indicate to district attorneys and commissioners what they shall or shall not do. Now, Judge McLellan's very argument makes that point, it seems to me. He is afraid to say "on information and belief," because it will leave a problem for the courts to determine. If we just do not say anything, we leave for the courts a much greater problem for them to determine; and any district attorney reading this rule as it is now phrased is not going to know that it must be made on oath specifically, or on information and belief. One way or another, we ought to tell the district attorney or the commissioner what the rule is.

MR. CRANE: I agree with you and, logically, there is no answer to it, of course; but thereare many

things in actual practice that you cannot formulate a rule for or put in the form of a rule; and I am afraid you are going to have trouble whichever way you go.

MR. WAITE: But you do have rules existing in the states.

MR. YOUNGQUIST: Did Mr. Dean make a motion?

MR. DEAN: I thought it was out of order. Yours was still pending.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: We have pending Mr. Youngquist's motion. If there is nothing further, let us proceed to a vote on it. All those in favor of that motion say "Aye."

(Chorus of "Ayes.")

Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be lost.

MR. WAITE: I would like to make a substitute motion.

MR. SEASONGOOD: I think the idea was that we should first have Mr. Youngquist's motion and then decide whether we want to go further. That is the way I understood it.

THE CHAIRMAN: Mr. Youngquist's motion came as an amendment to Rule 3 as adopted.

MR. HOLTZOFF: I understand this vote to mean

that we shall be silent on the question?

THE CHAIRMAN: We revert back to Rule 3 as adopted.

MR. YOUNGQUIST: I would move, Mr. Chairman, that there be added to Rule 3 this language: "The oath may be made upon information and belief, stating generally the grounds thereof."

MR. SEASONGOOD: Seconded.

THE CHAIRMAN: All those in favor of that motion say 'Aye.'

(Chorus of "Ayes.")

Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

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

THE CHAIRMAN: The motion is carried.

MR. CRANE: I want to ask this: I think that the substance of what is stated in that motion is correct, but I do not want to vote for it if it means that it is going to be put in the rule, because I think we ought to leave it alone so that they can work it out any way they see fit. I think there are a lot of things one cannot put in a rule; and one has more trouble trying to codify it, as

we had in the State here.

MR. McLELLAN: May we have another show of hands?

THE CHAIRMAN: Yes. All those in favor of the latest motion of Mr. Youngquist raise hands.

(After a show of hands the Chairman announced the vote to be 6 in favor; 10 opposed.)

THE CHAIRMAN: The motion is lost.

MR. HOLTZOFF: I suppose that that means that the rule be left as it is?

THE CHAIRMAN: That is exactly what it means.

MR. McLELLAN: Have we passed Rule 3?

THE CHAIRMAN: Rule 3 is passed until someone makes a motion.

MR. HOLTZOFF: Yes.

MR. McLELLAN: We have not voted on Rule 3?

THE CHAIRMAN: Yes, prior to Mr. Youngquist's motion. We are told that if we get up to lunch before 12:30 we will be much better off than if we delay.

MR. MEDALIE: May I make one motion before you leave this Rule 3. I think that all practice requires that the bench and bar have a notion of what we left out, and I think an approppiate notation ought to go in.

THE CHAIRMAN: If there is no objection, that will be considered adopted.

MR. CRANE: What will the notation be?

MR. MEDALIE: We will have to pass it around.

(Whereupon, at 12:30 o'clock p. m. a recess was taken to 1:15 o'clock p. m.)

AFTERNOON SESSION

THE CHAIRMAN: The meeting is called to order. Several of our members have raised the question as to our hours of servitude, and I would like to get the views of the membersof the Committee. One purpose in starting on Friday was that so we might have a recess on Sunday, except for the work that the Reporter and the Committee on Style may have to do, as a result of Friday's and Saturday's deliberations, so that when the rest of us come back on Monday we will be rather fresh, and I had hoped we might get along and finish in four days without evening sessions, but I have come to the conclusion, as a result of this morning's pace, in which we covered 5 per cent of our rules, three out of sixty, that I am a tremendous optimist.

MR. DEAN: Why don't you reserve judgment on that issue until we finish out this afternoon?

THE CHAIRMAN: I would like to know whether we will free tonight or not.

MR. CRANE: I think it had better wait. I suggest that we do not meet tonight. I see by the papers that the Mayor was not satisfied with the blackout last night and he proposes to have another tonightat half-past nine. That means you would all have to go in the hall and

spend an hour there, because all these lights are going to be out and the elevators stopped. Now, for the hour you might have before that, from eight to nine, or half-past nine, it would not pay to submit to all that inconvenience. So I do not think you ought to be here tonight. I saw that in this morning's press.

THE CHAIRMAN: Yes, you are correct. How would it be if we went on this afternoon, say, until five-thirty? Is that too late?

(A chorus of "Noes.")

THE CHAIRMAN: We will say five-thirty and reserve our decision as to what we will do tomorrow night.

MR. McLELLAN: May I ask, is it the plan to finish on Tuesday? I ask that question because reservations are not easy to get now.

MR. LONGSDORF: I think that is pretty important. I should like to know that, too.

THE CHAIRMAN: I had hoped we could. That depends upon you gentlemen and, as someone said before lunch, if we could change over from being senators and become congressmen, with some limitation on our debate, we might make better progress, but it ill becomes me to suggest it.

MR. WAITE: We might do what we do with our City Council. We are allowed to speak not more than twice on any one motion without consent of the Council, and there

are various other limitations.

MR. HOLTZOFF: I am afraid here the group will not withhold consent, will they?

THE CHAIRMAN: The only thing that the Chair can say is that the threat of evening sesssions and a Sunday session hangs over all of us.

Rule No. 4, paragraph (a). Any comment?

MR. HOLTZOFF: That first word should be "If," I think, rather than "When".

MR. ROBINSON: Some stylists on the Committee, Alex, think it would be better not to have the rules beginning with "If"; and the proposal came, I believe, as a matter of style from the members of the Committee, that "When" would be preferable to "If". That is just a matter of choice.

MR. HOLTZOFF: It depends on the context. Sometimes "When" is preferable to "If" but here I think the word should be "If".

MR. YOUNGQUIST: Why not leave that to the Committee on Style, Mr. Chairman?

MR. GLUECK: That is right.

THE CHAIRMAN: All right.

MR. SEASONGOOD: I move the adoption of Rule 4 (a).

MR. YOUNGQUIST: I want to ask one or two questions. I note in lines 4 and 6 the word "accused" is

used whereas ordinarily we use "defendant". I prefer "accused" but I think we ought to be consistent. And we also use in line 6 the words "United States attorney". I thought we had decided to drop that designation and say "attorney for the Government."

MR. ROBINSON: The point in the first case, if I may answer that question, is that he is not yet a defendant; he is just an accused. After there is a charge filed against him, and he becomes a defendant, then we say "defendant".

MR. YOUNGQUIST: How about "United States attorney"?

MR. ROBINSON: The wishes of the Committee were that that should be referred to the United States attorney. We have tried to follow that, I believe.

MR. YOUNGQUIST: I thought it was "attorney for the Government"?

MR. DEAN: It should be "attorney for the Government" because "United States attorney" is limited.

MR. ROBINSON: We followed what the decision of the Committee was. If it happens to be the other way around, we will make it "attorney for the Government."

MR. LONGSDORF: In line 15 the word 'defendant" is used.

MR. ROBINSON: Mrs. Peterson reminds me it was to

"United States attorney" only where we meant United States attorney, and there are several situations where that is true, including this one. We did that with this idea: We did not want anybody,an attorney for the Government, a private prosecutor, perhaps hired to assist the Government, to have this power.

MR. HOLTZOFF: You do not have private prosecutors but sometimes you have special assistants to the Attorney General in charge of a case, and I thought in that case, in the case of a special assistant, it should be "attorney for the Government" rather than"United States attorney." The simpler way, to obviate all difficulty, would be to say "attorney for the Government." That is the reason for it in this place.

MR. YOUNGQUIST: I think it should be changed to "attorney for the Government."

MR. DEAN: Seconded.

MR. YOUNGQUIST: When you come to this matter of "accused" you will have to be consistent on this, when you come to the matter of issuing a subpoena, which has to be good throughout the country. You want any attorney for the Government to have that power also?

MR. HOLTZOFF: Let us take one rule at a time.

MR. ROBINSON: Let us take one question at a time, because we will have to be consistent about it. It

was felt that in this rule that the provision --

THE CHAIRMAN: That is Rule 4 (c) (2)?

MR. ROBINSON: It was felt there that rather than give a United States commissioner such extensive powers that he should be restricted to authorization or direction by the -- yes, that is at line 15 -- by the United States attorney himself.

MR. HOLTZOFF: I think that ought to be "attorney for the Government" also.

THE CHAIRMAN: Take one paragraph at a time.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: You make that motion, Mr. Youngquist, on the "attorney for the Government"?

MR. YOUNGQUIST: I do.

MR. WECHSLER: Seconded.

THE CHAIRMAN: All in favor say "Aye"; opposed "Nay".

Carried.

Anything else?

MR. YOUNGQUIST: In line 12 shouldn't the word "may" be "shall"?

MR. SEASONGOOD: I have the same inquiry. I felt it should.

MR. ROBINSON: I think we quote the Supreme Court Memorandum on that.

MR. HOLTZOFF: I would like to say a word about the Supreme Court Memorandum, because it was ~~purported to be~~ explained to me by the Chief Justice. The Chief Justice told me that that memorandum was prepared at his direction and it consisted of questions raised by any one of the justices, and he said those are matters that occur only casually to the various justices as they went along and did not represent any definite views on the part of the members of the Court. I think in weighing the suggestion in that memorandum we ought to have the Chief Justice's observations as to the purpose.

MR. ROBINSON: There is a further thing to be considered in connection with this rule. If a defendant fails to obey, as required by the summons - that would be the first summons, I take it - are you going to make it mandatory on the commissioner to issue a warrant? It is possible, I suppose, isn't it, another summons can be issued. Suppose they find some good reason why he has not appeared?

MR. HOLTZOFF: I think the issuance of the summons is a favor to the defendant anyway. If he has been granted one favor, I think that should end it.

MR. ROBINSON: The question is what the Commissioner should be compelled to do. You are changing a discretionary act to a mandatory one, and our general

policy has been not to put any binding directions on commissioners or district courts.

If you wish to make it mandatory, it is all right. It isn't merely a matter of style between "may" and "shall"; it is a matter of substance. The reason for the "may" is substantive. If it is inadequate, of course, change it to to "shall."

MR. HOLTZOFF: I think that should be done because the United States Attorney ought to be entitled to get his warrant.

THE CHAIRMAN: Is there a motion on it?

MR. SEASONGOOD: I move that it be changed to "shall".

THE CHAIRMAN: It is moved and seconded. All those in favor say "Aye"; opposed "No."

Carried.

MR. SEASONGOOD: As a matter of phraseology, I would suggest "shall be issued" rather than "shall issue".

THE CHAIRMAN: No. We always speak of an injunction "going" and a summons "issuing".

MR. SEASONGOOD: Isn't that a colloquialism?

THE CHAIRMAN: No, it is good law English.

MR. YOUNGQUIST: It is out in our jurisdiction.

THE CHAIRMAN: (b) --

MR. SEASONGOOD: Doesn't the commissioner have

contempt power? Has that been considered? Or do you simply say he issues a warrant instead of a summons?

MR. HOLTZOFF: I think we discussed that last time and we thought that there should not be any punishment of any kind for failure to answer a summons, as I recall the decision which we reached, because, if the defendant does not appear in response to a summons, he will issue a warrant to bring him in.

MR. SEASONGOOD: I had in mind the Chief Justice's comment.

MR. YOUNGQUIST: I think that was the conclusion.

MR. SEASONGOOD: After you had the Chief Justice's comment?

MR. DEAN: No; prior.

MR. HOLTZOFF: No, but I think the Chief Justice's comment was really in the nature of a query rather than in the nature of what he would like the rule to provide.

MR. WECHSLER: What is the answer to the query?

MR. HOLTZOFF: The answer would be no.

MR. WECHSLER: Then the comment should show it, shouldn't it?

MR. HOLTZOFF: Oh, yes.

MR. SEASONGOOD: I think at some stage we ought to take up all these suggestions, after we have gone through the rules, and see how far we have considered these

suggestions.

THE CHAIRMAN: I understand they have all been considered by the Reporter.

MR. ROBINSON: That is right.

THE CHAIRMAN: He has studied every one.

MR. ROBINSON: We spent about a month and a half, I think, or more on them.

MR. SEASONGOOD: If we haven't followed them, why?

MR. ROBINSON: We have followed them, really.

MR. DEAN: It does call for an appeal, doesn't it, on contempt?

MR. ROBINSON: I am trying to remember, Gordon, where we do take care of that. We do have a rule on contempt but we did not mention "commissioner" in it. Isn't the law well settled thatcommissioners do not have contempt powers? It is pretty well settled law that they do not have contempt powers.

MR. LONGSODORF: That is fully covered by Section 385.

MR. HOLTZOFF: A commissioner has no general authority.

MR. LONGSDORF: In any part of the United States.

MR. ROBINSON: He cannot hold court and there is no reason why he should contempt powers.

MR. SEASONGOOD: He could refer you to a district judge. All he can do, you say, for failure to obey a summons, is to issue a warrant. Does that mean he is through? Maybe it is enough.

MR. YOUNGQUIST: That is, I believe, what we concluded.

THE CHAIRMAN: We did.

Do I hear a motion on (b) (1)?

MR. HOLTZOFF: I move we strike out the words beginning on line 17 "and shall have attached to it a certified copy of the complaint."

MR. YOUNGQUIST: I second the motion.

MR. ROBINSON: You want to change the present law?

MR. HOLTZOFF: No, I do not. A warrant today does not have a certified copy of the complaint attached to it.

MR. WECHSLER: Doesn't the statute so require?

MR. ROBINSON: Yes, the statute expressly says so.

MR. HOLTZOFF: The statute says that in another connection.

MR. ROBINSON: It applies here. You would be changing the statute if you did that.

MR. YOUNGQUIST: May I ask a question?

MR. WECHSLER: The reason for that statute has just been suggested to me, because if the warrant goes to

another commissioner who has to have before me the charge so he can handle it.

MR. YOUNGQUIST: But you do not have to have that attached to the warrant when you are serving the warrant.

MR. ROBINSON: That is what the statute says.

MR. YOUNGQUIST: It does not.

MR. WECHSLER: This is Section 595: "It shall be the duty of the marshal, his deputy or other officer who may arrest a person" - this deals with the arrest on a warrant - "to take the defendant before the nearest United States commissioner," and so on, "of hearing, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached" --

MR. YOUNGQUIST: "Upon the arrest of the accused"?

MR. WECHSLER: Yes.

(Continuing) -- "the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him."

MR. YOUNGQUIST: If I understand --

MR. WECHSLER: You get it attached on the return.

MR. YOUNGQUIST: Your return, yes.

MR. HOLTZOFF: That is all right; there is no objection to it; but according to this rule you would have to attach it when you issued it.

THE CHAIRMAN: Read that first sentence again.

MR. WECHSLER: "It shall be the duty of the marshal, his deputy or other officer who may arrest a person charged with any crime or offense to take the defendant before the nearest United States commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him."

THE CHAIRMAN: So it would have to be in here unless we are changing the law.

MR. YOUNGQUIST: No.

MR. LONGSDORF: I would like to ask the Reporter what he understands this ambiguous statute to mean.

MR. WECHSLER: That is 595?

MR. LONGSDORF: Yes.

MR. WECHSLER: That is complimentary to 591. You have to read them together to know what they mean, if you

can know.

MR. HOLTZOFF: I have looked the point up, because I know it is not the practice, in serving a warrant, to have the complaint attached, and I find it has been held by the courts that the purpose of attaching a copy of the complaint to the warrant is to enable a commissioner, other than the one who issues the warrant, to hold a preliminary hearing. In other words, you do not attach the complaint to the warrant when you issue the warrant. The marshal does not have to have it when he makes service, but if, after arresting the defendant, the marshal is going to take the defendant to a commissioner other than the one who issued the warrant, he has to attach a certified copy of the complaint to the warrant in making his return, because otherwise the other commissioner cannot hold a hearing.

My objection to this provision is this: Not only does it make a change in the law, but it creates a practical difficulty, namely, that if perchance the marshal should fail to attach a certified copy of the complaint to the warrant, somebody might claim that the arrest was illegal. This might go to the legality of the arrest.

MR. LONGSODORF: Doesn't the statute say it has to be attached?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: Yes, I think it does.

MR. WECHSLER: 595 says what I read.

MR. HOLTZOFF: It has never been construed in accordance with the construction put on it by the Reporter.

MR. SEASONGOOD: That was my understanding, that the complaints were not ordinarily attached to the warrants. What about 591?

MR. WECHSLER: 591, as far as I can see, throws no light on the subject.

MR. SEASONGOOD: Would it be permissible to read that once more?

THE CHAIRMAN: Apparently it is one of those things the Government has waived for itself.

MR. HOLTZOFF: I think you have to read that whole section rather than this sentence taken out of its context.

MR. YOUNGQUIST: I do not suppose, Mr. Reporter, there is any requirement in the law that a copy of the indictment be attached to the warrant?

THE CHAIRMAN: No.

MR. SEASONGOOD: What does this mean, officer or magistrate --

MR. YOUNGQUIST: May I proceed? What is the difference?

MR. ROBINSON: I think there is a clear difference.

Our idea here is that the commissioner shall issue warrants which may be returned to other commissioners. In indictment cases, of course, the warrant and the indictment and all papers connected with the case come back to the court from which the indictment issued.

MR. YOUNGQUIST: In the case of removal proceedings?

MR. ROBINSON: On an indictment?

MR. DEAN: In that case it is sent separately along with the warrant to the marshal in the fugitive's jurisdiction.

MR. YOUNGQUIST: That is what I was trying to bring out.

MR. DEAN: Not required to be sent but it is sent, because they could not make probable cause in that jurisdiction without a certified copy of the indictment.

MR. ROBINSON: Our rule provides that, too.

THE CHAIRMAN: Do you find anything to shock your faith in necessity?

MR. SEASONGOOD: I do not know; it just says, "and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint."

MR. WECHSLER: That is what the rule has.

MR. HOLTZOFF: But the rest of the sentence throws light on the purpose of that.

THE CHAIRMAN: It does. It reinforces the question. Read it again, Alex.

MR. WAITE: I find I need some information on this. It is possible, is it not, under our rules, for a number of copies of a particular warrant to be issued and put in the hands of the various possible arresting officers. Would this mean that a certified copy of the complaint must be attached to each one of the 12 or 20 or 50 copies of the warrant that have been issued?

MR. ROBINSON: Why not, John?

MR. WAITE: I am asking for information. I am not ready to say why not.

MR. ROBINSON: It would mean that, wouldn't it?

THE CHAIRMAN: And the purpose, I take it, is to let the fellow know what it is all about.

MR. HOLTZOFF: We say the statute ought to be changed then, and we have authority to change it, because the statute is a dead letter if the statute means what the Reporter feels it means.

MR. YOUNGQUIST: I assume that the great majority of warrants are issued within the jurisdiction of the officer issuing them and the return is made to him.

MR. SETH: And they permit these warrants to go a hundred miles from the place they are issued now, into another district.

MR. YOUNGQUIST: Yes, but I say in the great majority of cases they are returned to the officer issuing them. In other cases there is no need at all for attaching a copy of the complaint. It is not customary in State practice to have anything more than a warrant for the arrest, simply advising the defendant of the offense with which he is charged.

THE CHAIRMAN: Why shouldn't the man who is being taken away from his work bench have some notion of what it is all about, so while he is on the way there he can collect his thoughts?

MR. YOUNGQUIST: The warrant gives a chance --

THE CHAIRMAN: But it does not tell you anything.

MR. DEAN: It does not tell you anything, and that is the trouble with it.

MR. ROBINSON: Section 192.

MR. YOUNGQUIST: You would find that it makes a lot of paper work.

THE CHAIRMAN: I know, but it is not for the man who is arrested many times, but for the fellow for whom it is a novel experience, to have something to guide him, something on which he may put his thoughts while he is on his way to the hoosegow.

MR. WAITE: I have to ask another question to make up my mind on this. Is it your understanding we have

no power whatsoever to alter any existing statute?

THE CHAIRMAN: Oh, yes, we have.

MR. WAITE: Must our rules conform absolutely to the existing statutes?

THE CHAIRMAN: No, we have full authority to recommend rules which change any statutes relating to procedure.

MR. WAITE: So the fact that the present statute requires determination does not bind us?

THE CHAIRMAN: No, doesn't bind us at all.

MR. ROBINSON: The only question is whether we see reason for repealing or superseding the present statute. If there is any reason, we should.

MR. WAITE: Is there any provision in any state now? It is not true in our State; you do not have to attach a copy of the complaint to the warrant.

MR. ROBINSON: I think your American Law Institute Code, of course, requires it.

MR. WAITE: That is not a State provision. I don't remember it.

MR. YOUNGQUIST: In (c) (3), relating to the service of the warrant, I notice that the officer making the arrest "shall upon request show the warrant to the defendant as sonn as possible." It begins, "The warrant shall be executed by the arrest of the defendant." That is

on page 2 of Rule 4. "The officer need not have the warrant in his possession at the time of the arrest, but he shall upon request show the warrant to the defendant as soon as possible."

Here a copy of the complaint is to be attached for the purpose of apprising the defendant of the cause of his arrest, and it would be necessary, to carry out that idea, to furnish a copy of the warrant and the complaint to the accused at the time of the arrest.

THE CHAIRMAN: Isn't that provision designed to meet the case where the arresting officer comes across a man unprepared to arrest him - meets him by accident, so to speak?

MR. YOUNGQUIST: The first sentence says simply this, "The warrant shall be executed by the arrest of the defendant." And the second clause of the next sentence applies both to that case and to the case where he does not have the warrant at the time, that is that "he shall upon request show the warrant to the defendant." That is the usual, customary practice in making arrests, and if we are to make effect the suggestion that the defendant should be apprised in detail of the cause of his arrest, it would have to be done either by the officer reading the whole thing to him or giving him a copy of it.

THE CHAIRMAN: Isn't this parallel to the situation

that existed so many years in civil actions, where, in many states your action was started merely by filing the summons, and the complaint came later? And then, when we got up to the point where stenographers were more common, that was changed in most jurisdictions and the summons and complaint were served at the same time.

MR. HOLTZOFF: I think there is a difference, Mr. Chairman, because the warrant in a criminal case specifies the charge. A summons in a civil case does not specify the nature of the cause of action.

MR. WAITE: Mr. Chairman, it might perhaps be illuminating if I were to read the American Law Institute provision. It says: "The warrant of arrest shall (a) be in writing and in the name of the state, commonwealth or people;

"(b) set forth substantially the nature of the offense;

"(b) demand that the person against whom the complaint was made be arrested and brought before the magistrate issuing the warrant or, if he is absent or unable to act, before the nearest or most accessible magistrate in the same county;

(d) specify the name of the person to be arrested or, if his name is not known to the magistrate, designate such person without any name from description

dz

from which he can be identified with reasonable certainty;

"(e) state the date when issued and the municipality or county where issued; and

"(f) be signed by the magistrate, with the title of his judicial office.

"The warrant shall be executed only by a peace officer and may be executed in any county by any peace officer in the state."

It does not require any attachment of the complaint. It simply says the warrant shall state the nature of the complaint.

MR. SEASONGOOD: Mr. Chairman, if we are agreed that the present statute does require this attaching of a certified copy, unless there is some strong reason for changing it, we should not change the statute, because you just provoke a lot of controversy.

MR. HOLTZOFF: I do not think you would provoke controversy, because the present statute is never followed.

MR. SEASONGOOD: All right, then, but if you do put it in, you do change the existing practice, and the only reason adduced is that it is inconvenient. The other argument is, after all, it is not too much to say that you should give a man who is arrested some information about what it is all about.

I would say we should not change it and introduce

a controversial issue when there is no substantial point to changing it.

MR. HOLTZOFF: I think we would be changing the present practice if we adopted the rule in its present form, because, whatever the statute may be, it is a very old statute, I believe, it is certainly, I repeat, not a present practice.

THE CHAIRMAN: "It is old and, therefore, bad."

MR. HOLTZOFF: But as Mr. Youngquist said, this is not the present practice. It is not the practice to attach it.

MR. DEAN: I do not see how it would hurt to attach it.

MR. HOLTZOFF: It would not, but if you leave it as it is now, failure to attach it might affect the validity of the warrant.

MR. YOUNGQUIST: I think we have gone as far as we can toward convincing him. Let us have a vote on it.

MR. LONGSDORF: May I ask a question first? Is there a provision in any of the Federal rules prescribing the procedure to be followed when the warrant is issued by one commissioner, and the prisoner is taken before another one for hearing?

MR. ROBINSON: It is in this rule, in the next sentence. We thought of that, and that is the very problem

we tried to meet by his provision. Suppose you have a warrant issued by one commissioner, without attaching a copy of the complaint, and the man is arrested a hundred miles away, in another state, and brought in before a commissioner in that place? In that case the commissioner has nothing before him. However, where a copy of the complaint is attached to the warrant, the warrant plus the complaint will be right there before the commissioner.

MR. LONGSDORF: Have we covered the procedural jurisdiction on that Section 595? I don't know.

MR. ROBINSON: We have supplemented it and we have more or less built our rules around it, and we have got that. It seems to me you will have a very real problem if you do not require something of this kind. Then you are going to have this confusion, as I explained, where a defendant is arrested and brought before some commissioner other than the one who issued the warrant.

MR. LONGSDORF: You would not have the complaint and could not certify it.

MR. ROBINSON: He would not know anything about it. He would have to try and locate the first commissioner and get a copy of the complaint, and all your ideas of expedition and simplicity of procedure would be just thrown out of the window to that extent, I should think.

THE CHAIRMAN: The motion is to strike, beginning

dz

on line 17, from the word "and" to the end of the sentence in line 18.

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

(Chorus of "Ayes.")

Opposed, "No."

(Chorus of "Noes.")

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

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

The motion is lost.

MR. DEAN: I should like to make another suggestion on this section, and that is that the warrant should contain the time of issuance, particularly in view of our requirement that he shall be brought before the nearest committing magistrate in a reasonable time. I think it should appear on the face of the document when it was issued, in case it might not be served for a month.

MR. LONGSDORF: Might not be; that is true.

MR. HOLTZOFF: The date on the warrant would not help the question of bringing the defendant within a reasonable time before the Commissioner, because you are interested in the time of service, not in the time of issuance.

MR. DEAN: That is true. It would not completely cover my situation. Is there any reason why the date should not appear thereon, or would it automatically appear?

MR. HOLTZOFF: It would automatically appear. Every paper is dated.

MR. DEAN: If that is so, then the point is academic.

MR. McLELLAN: Mr. Chairman, I move the adoption --

THE CHAIRMAN: That was covered by the Committee on Forms.

MR. McLELLAN: I move the adopt of Rule 4 (b) (1).

MR. WECHSLER: Seconded.

MR. DESSION: May I raise one question on that? This section does not say to whom it shall be directed. In the preceding section we talk about delivery to the marshal or other person authorized by law. Our form simply directs it to the marshal. Marshals sometimes have been confused, when they received a warrant directed to the marshal, as to whether it would be all right for an FBI man to serve it. Is it worth dignifying, that confusion, by specifying in here the warrant shall be directed to the marshal or other person authorized by law?

MR. HOLTZOFF: Don't you think that the preceding paragraph, the next to the last sentence, really covers it?

MR. DESSION: Well, I think it ought to, but I do

know of at least one instance where a marshal has been confused, and perhaps there have been others. It is directed to him and he does not know whether he can hand it over to somebody else.

Might I ask the Chairman of the Sub-Committee on Forms whether the warrant is directed generally? It is, is it not?

MR. DEAN: It is directed differently according to the forms that are in use, some to the marshal of the district, some to the United States marshal or any of his deputies. Those are two, I think, that are commonly used.

MR. SEASONGOOD: Doesn't (c) (1) take care of that? It shall be executed by the marshal or some other officer authorized by law?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Line 28 and following.

Are there any further questions on the motion to adopt Rule 4 (b) (1)?

If not, all those in favor of the motion say "Aye"; opposed "No."

Carried.

Paragraph(2), gentlemen. Any questions there?

MR. YOUNGQUIST: That we have in the rule of Draft 5, provision for an acknowledgment of service.

MR. ROBINSON: Yes, lines 20 to 22, "It shall be accompanied by a form of acknowledgment of service to be signed and returned as directed to the commissioner."

MR. YOUNGQUIST: What if he doesn't sign it?

MR. ROBINSON: What if he doesn't sign it?

MR. YOUNGQUIST: Where is the accused if he doesn't sign it?

MR. HOLTZOFF: We are dealing with "Summons" now?

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: In other words, you wish to leave out the words "to be signed"?

MR. YOUNGQUIST: I would certainly wish to leave out the entire sentence.

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: And simply provide instead, "The summons shall be returned to the commissioner"; and then you might add, if you want, "with acknowledgment or proof of service."

MR. MEDALIE: Well, you have another subdivision that deals with that.

MR. YOUNGQUIST: We have specified to make it with proof of service. I do not think it is practicable to use the acknowledgment method.

THE CHAIRMAN: Wouldn't that come in under

Rule (c) (4)?

MR. MEDALIE: Yes.

THE CHAIRMAN: Line 57.

MR. HOLTZOFF: I think you could afford to leave out the whole second sentence without substituting anything for it.

MR. YOUNGQUIST: Yes, you could; that is right.

THE CHAIRMAN: Is that the motion?

MR. YOUNGQUIST: Yes, that is the motion. Thank you.

THE CHAIRMAN: You move to strike out --

MR. ROBINSON: Of course - pardon me just a moment - you are assuming the summons is delivered to the person. Now, suppose he just has a copy left at the last usual place of residence and he comes in an hour or two later and finds it? Why shouldn't he be allowed to send in the signed acknowledgment to the commissioner without having to have another service of what was delivered to him? In other words, why do you think everything --

MR. YOUNGQUIST: The service --

MR. DEAN: Does not have to be personal.

MR. ROBINSON: Surely, it does not have to be at all personal. Say a summons is delivered to John Jones' home, he isn't in, it is left there, but attached to it is a form of acknowledgment of service, and when he does come

in, why wouldn't it be simpler to let him send it in?

I think the way we handled it in Draft 5 is all right. I do not understand the reason for the change.

MR. HOLTZOFF: What is the advantage of the requirement? You can have the acknowledgment tacked on or not, as you please, but why should it be in the rules?

MR. ROBINSON: There are a lot of things left out of the rules.

MR. HOLTZOFF: I call for the question on this motion.

MR. ROBINSON: What is the rule in civil cases for summonses?

MR. HOLTZOFF: There is no provision for formal acknowledgment; just a general requirement for proof of service, and proof can be in the form of an affidavit of service, or marshal's certificate, or anything.

THE CHAIRMAN: The motion is to adopt Rule 4 (b) (2) by striking the second sentence beginning on line 24.

All those in favor of the motion say "Aye"; opposed, "No."

Unanimously carried.

Rule 4 (c) (1).

MR. HOLTZOFF: I rule that that be adopted, Mr. Chairman?

THE CHAIRMAN: Any remarks?

MR. SEASONGOOD: Yes, I have some questions. "may be served by any person authorized to serve a summons in a civil action." Does that make it sufficiently clear that the only person who could serve a summons in a civil action is the marshal? I understand in New York you have other persons.

MR. HOLTZOFF: No; but this would be a Federal rule. Under the Federal rules the summons in a civil action may be served either by a marshal or by any person designated by the Court for that purpose and, of course, I do not think that this is intended or can be construed as intending to adopt the State rule. This is adopted as a Federal rule for actions --

MR. SEASONGOOD: You mean as prescribed in the civil rules of procedure?

MR. HOLTZOFF: Yes, I would say so. I see no objection to changing it.

THE CHAIRMAN: We have not followed a policy of incorporation by reference, have we? I mean, expressly.

MR. ROBINSON: No.

MR. DEAN: And it refers to rules. I do not think they ever refer to civil rules.

MR. ROBINSON: This is the only place we have done it.

MR. SEASONGOOD: If everybody thinks that is

dz

sufficiently clear, all right. I thought it raised a question of whether a summons in a civil action was a somewhat indefinite and variable thing.

MR. HOLTZOFF: The Federal rules are quite clear on how a summons in a civil action must be served, and this obviously refers to a civil action in a United States court.

MR. SEASONGOOD: Why shouldn't the summons be served by the marshal or other person authorized to serve a warrant? Why should there be any difference?

MR. WECHSLER: Isn't that because a summons is much less important in a criminal proceeding than in a civil proceeding? There is always power to issue a warrant.

MR. SEASONGOOD: Did somebody move the adoption of that?

MR. HOLTZOFF: I did.

MR. McLELLAN: I second the motion.

MR. MEDALIE: But it is vague, as has just been pointed out; I don't know whether the State practice is followed or the Federal practice is followed.

THE CHAIRMAN: We will assume it meant Federal practice.

MR. YOUNGQUIST: I think we have references like that in a number of places in the rules.

MR. HOLTZOFF: Yes, and I assume it is the Federal practice every time we have such a reference.

MR. DESSION: Do we mean to preclude the mailing of summons?

MR. HOLTZOFF: We passed on that last time.

MR. ROBINSON: It is provided for in (3) for mailing it to the defendant. It is in here, mailing.

THE CHAIRMAN: What is your pleasure, gentlemen, with this question that has been raised as to the sentence beginning on line 29?

MR. DEAN: I suggest it be changed to read "to serve a summons in a civil action in a district court."

THE CHAIRMAN: Is that seconded?

MR. SEASONGOOD: Yes.

MR. HOLTZOFF: "in a district court of the United States", if you want to be exact.

MR. YOUNGQUIST: I wonder whether we are not going to find ourselves confronted by that same problem time and again?

MR. ROBINSON: The Committee, in adopting this language at the last meeting, based it on Civil Rule 4 (c) "By Whom Served." - in which fashion:

"Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose."

MR. YOUNGQUIST: To avoid repetition -- isn't it a matter of style -- wherever civil actions are used, I

suggest we add, "shall mean a civil action in a district court of the United States."

MR. ROBINSON: Take that up under Rule 52.

THE CHAIRMAN: Take that up afterwards.

Are there any further questions? If not, all those in favor of 4 (c) (1) say "Aye"; opposed, "No."

Carried.

4 (c) (2).

MR. LONGSDORF: I have a question I should like to ask about that and on which I should like to get the sense of the Committee.

The provision in line 34, "within the territorial limits of the state or within 100 miles of the place where the warrant or summons is issued." That might in some cases cause the warrant or summons to return outside of the district. Question might be raised whether that was an extension of the jurisdiction of the United States district court into a district in another state. Now, I know what the civil rules have provided, that is, that the summons runs throughout the state which contains the district. I would like to hear more about that.

MR. HOLTZOFF: We can change the practice by these rules.

MR. LONGSDORF: I know you can, but you cannot enlarge a federal district to run into another state.

dz

MR. HOLTZOFF: This does not enlarge the jurisdiction of the court. This merely affects the place and manner of service of process, and if it could be done in connection with the civil rules, and it was done there --

MR. LONGSDORF: Not outside of the state. Within the state.

MR. HOLTZOFF: Well, but the state is not the unit in the Federal judicial system. It is the district.

THE CHAIRMAN: Can't you serve the summons outside the jurisdiction of the district, in New York or Pennsylvania?

MR. HOLTZOFF: Oh, no. You could subpoena.

THE CHAIRMAN: I know; you mean up to a hundred miles?

MR. HOLTZOFF: You can serve under the civil rules a summons, --

MR. LONGSDORF: Anywhere within the state, if it contains several districts.

MR. HOLTZOFF: But outside the district in which a case is pending.

MR. LONGSDORF: Yes, but so long as you stay in the state.

MR. YOUNGQUIST: But the district is the jurisdictional unit and not a state and, therefore, if you can go outside the district, why may you not go outside of

dz

the state?

MR. LONGSDORF: I think there is a sound reason for it, for the restriction in civil cases. Since I am obliged to express my opinion before the other members of the Committee on it, I think there is a sound reason for that restriction in civil cases, because many of them depend upon diversity of citizenship, and you might hale a man into the state and destroy the diversity, if you let the summons run out in a civil case, but in a criminal case I do not think that applies.

MR. HOLTZOFF: No, I do not think service of the summons has anything to do with diversity.

THE CHAIRMAN: Doesn't that bring to mind Mr. Medalie's analogy of the crooks running back and forth across the Hudson River?

MR. WECHSLER: Yes.

THE CHAIRMAN: We do not want to go back on that, do we? Let us pass it.

MR. BURNS: What can the commissioner do about a corporation?

MR. HOLTZOFF: Summons them.

THE CHAIRMAN: Summons them.

MR. BURNS: When it is summoned, he cannot bind it over. A corporation has no place in the commissioner's jurisdiction, in my judgment. He cannot bind the corporation

over. He cannot bind it or do anything. Summons to a corporation ought to be in under itself.

MR. LONGSDORF: As a matter of fact, the summons to a corporation in another district or in another state has been used for years.

MR. BURNS: But not before a commissioner. That is a difference.

MR. LONGSDORF: Not before a commissioner?

MR. BURNS: The commissioner cannot do anything with the corporation when he summons it.

MR. YOUNGQUIST: I am asking --

MR. LONGSDORF: No, that is true.

MR. YOUNGQUIST: (Continuing) -- for information; I don't know. Is there no such thing as a preliminary hearing for a corporation?

MR. BURNS: No binding it over.

MR. MEDALIE: Why not?

MR. YOUNGQUIST: Why not?

MR. BURNS: I never heard of it. In the anti-trust cases, and we have had a lot of them out our way, they just sued them out in Denver, the indictment is simply returned.

MR. HOLTZOFF: How about your pure food law? You can have a preliminary hearing.

MR. YOUNGQUIST: I don't know. I never knew any

reason why a corporation is different from an individual defendant, so far as jurisdiction of and procedure before a commissioner is concerned. I may be wrong.

MR. LONGSDORF: You cannot bring the corporation before the commissioner like you can the body of the prisoner.

MR. DESSION: Why not? The same way you bring it before a court. It could appear by attorney or in some way like that.

MR. YOUNGQUIST: That is true, but isn't the corporation required to give bond to appear?

MR. LONGSDORF: Have to have a hearing before you can require bond, unless it is voluntary, and then somebody has to approve it.

MR. DESSION: Doesn't a subpoena to a corporation require an officer to appear? You could punish an officer for contempt.

MR. HOLTZOFF: You could not punish an officer for contempt for failure to respond to a subpoena directed to a corporation.

MR. DESSION: I think you can.

MR. HOLTZOFF: Only if it is directed to him also.

MR. DESSION: No, it does not have to be directed to him.

MR. WECHSLER: What is the point of a preliminary hearing where there is a corporation which is a potential defendant?

MR. LONGSDORF: As a practical matter, you do not bother about it, but I do not think you could have one.

MR. WECHSLER: What purpose could it possibly serve? There is nobody to be arrested, and therefore nobody to be bound.

MR. MEDALIE: It is a way of presenting a case to the grand jury.

MR. WECHSLER: But you can go directly to the grand jury.

MR. MEDALIE: But it is the commissioner's way of getting a case to the grand jury. The United States attorney could independently do it.

You know, some day all this procedure that we take for granted, which is not provided for by rules, will change. In our counties throughout the country a certain amount of business comes to the grand jury that the district attorney never heard about. We are proceeding on the assumption that the district attorney creates all the business which, for the moment, is correct. The time may come when it will come in by ordinary police processes.

MR. WECHSLER: Well, the rule could be changed.

MR. MEDALIE: Why should we wait that long?

MR. McLELLAN: When you summon a corporation and the corporation appears before the commissioner, what takes place then? What can he do?

MR. ROBINSON: The commissioner could throw it out, if it were a charge that the corporation should not be brought into district court on. In other words, just bailing a defendant or holding him over is not the only thing that a commissioner may do.

MR. HOLTZOFF: Suppose the commissioner throws the complaint out? The United States attorney can still proceed.

MR. MEDALIE: Of course he can, but he may not be interested, because there may be a complainant other than the United States, and that raises the question. Some day the people will take an interest in this Government and bring business to your commissioners.

MR. BURNS: What can the commissioner do to the corporation?

MR. MEDALIE: He cannot do anything. It is simply a matter of his passing the papers on to the grand jury or not passing them on to the g rand jury.

MR. YOUNGQUIST: Can he bind over?

MR. BURNS: No.

MR. ROBINSON: He can dismiss.

MR. McLELLAN: The dismissal does not amount to

anything.

MR. DEAN: Can he require the attendance of the president of a corporation, for example, when it is directed to the corporation?

MR. DESSION: A commissioner has no contempt powers, so I do not see any use.

MR. MEDALIE: Isn't it simply a matter of procedure? The corporations themselves are not going to object. They get a summons to come down to see whether they have violated that statute, whatever it may be, and if they have not, it will be dismissed; if they have, it will be sent to the judge having jurisdiction to be tried.

MR. McLELLAN: I cannot see any good in it. I do not see that the commissioner can do anything against the corporation, and the fact of dismissing it is of no significance.

MR. YOUNGQUIST: May I ask this question;or two questions, really? Perhaps Alex can answer them. Was there ever a warrant issued by a commissioner against a corporation?

MR. HOLTZOFF: I donot know, but I never heard of any.

MR. YOUNGQUIST: Or a corporation ever bound over to a grand jury?

MR. HOLTZOFF: I never heard of any such case.

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

MR. MEDALIE: There is another possibility. Suppose a corporation had individuals engaged in a violation of the law? Put them all in as defendants. Suppose there is search and seizure with a search warrant? It might be convenient to have search warrant proceedings before a commissioner. I mean, that would be incidental to the other matter.

1z MR. HOLTZOFF: Yes, but this would not be affected by the second sentence.

MR. ROBINSON: I think a part of the reason for that provision is that if we do not put it in criticism will come to us to the effect that we are overlooking what can be done by the commissioner, because in the codes and other rules of procedure you always have provisions for warrants for individual defendants and for corporations.

MR. McLELLAN: Warrant for a corporation?

MR. ROBINSON: Well, a summons, if you want to put it that way; or, dealing with them as defendants in criminal cases, what needs to be done about the corporation? Of course, if we left it out here it will just be assumed we overlooked it.

THE CHAIRMAN: According to this you can bring the corporation in from any distance within the United States.

MR. DEAN: That is right.

MR. ROBINSON: If the United States attorney orders it.

MR. WECHSLER: I move this sentence be eliminated, Mr. Chairman, if the motion is in order.

MR. YOUNGQUIST: What was the motion?

MR. WECHSLER: Strike out the sentence "A summons to a corporation."

MR. DEAN: Do you also wish to strike in lines 32 and 33 "other than a summons to a corporation"?

MR. WECHSLER: Yes, I do.

MR. YOUNGQUIST: Take it out?

MR. WECHSLER: Yes, take it out.

THE CHAIRMAN: The motion is to delete from lines 32 and 33 the words "other than a summons to a corporation". Also, the last sentence of this section beginning on line 35 and running through to line 38.

MR. YOUNGQUIST: The first two lines will then read: "A warrant or a summons may be executed or served anywhere within the territorial limits," and so forth.

THE CHAIRMAN: Yes.

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

(Chorus of "Ayes.")

Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: Two votes in the negative.

Rule 4 (c) (3). Any suggestions or comments?

MR. SEASONGOOD: In lines 49 and 50 I have a comment: It states, "some person of suitable age and discretion." Shouldn't it be "an adult person" instead? What is the suitable age?

MR. YOUNGQUIST: May I make a comment?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: I have a note here in our Tentative Draft 5 which simply provides that the summons may be served in the same manner as in a civil action. And the civil rules take care of all that. So that will take care of your point.

MR. DESSION: The difficulty was that the civil rules provided various manners of service under circumstances that do not obtain in a criminal case; so we could not incorporate all of it.

MR. SEASONGOOD: Could we hear what they provided?

MR. HOLTZOFF: There is no provision for mailing a summons in the civil rules. If you incorporate the civil practice by reference you will eliminate the provision contained in this sentence about mailing a summons.

MR. YOUNGQUIST: Leave that last clause in. Simply substitute for the first clause for personal service

the civil action procedure.

MR. HOLTZOFF: I think that will be all right.

MR. SEASONGOOD: Before we do that, has anybody got the civil rules?

MR. ROBINSON: Mr. Dession, that was a point that you thought should be spelled out more explicitly than in Draft 5?

MR. DESSION: Yes; as I recall there were provisions in the civil rule which we clearly did not want to incorporate because it could not be applicable. My thought was that we had better spell out the portion we wanted.

MR. SEASONGOOD: I have the civil rules here. The point here is that service shall be made on a person other than an infant or incompetent person, or leaving copies at his dwelling house with some person of suitable age and discretion residing therein.

MR. ROBINSON: It would look like that is pretty poor draftsmanship, wouldn't you think, Aaron?

MR. YOUNGQUIST: Yes. I can see the point, because we may want to serve a summons on a minor.

MR. SEASONGOOD: It is in the civil rules, but it must be a terribly indefinite thing, "a person of suitable age and discretion." How are you goint to determine that?

MR. YOUNGQUIST: I think that that is a very common provision in the State statutes. I know it reads exactly that way in the Minnesota statutes. I am not familiar with the statutes of the other states, but perhaps some of you can recall.

MR. SETH: A summons is merely an invitation, anyhow. You do not have to obey it. It does not make much difference.

MR. ROBINSON: I suppose, to follow through, Mr. Seth, you want the last sentence stricken out here which applies to a corporation.

MR. LONGSDORF: The last sentence of (c) (3) ought to go out too?

MR. ROBINSON: Yes.

THE CHAIRMAN: By consent the last sentence commencing at line 51 will be stricken.

MR. YOUNGQUIST: Wait a minute. We still have in (2), Mr. Chairman, the provision for service of a warrant or a summons, and that is not limited to individuals.

MR. DEAN: That is correct.

THE CHAIRMAN: But this is served on a corporate defendant.

MR. YOUNGQUIST: Yes, I know. But we provide with respect to the summons - to go back to 4 (a) - that

provides for the issuance of a summons instead of a warrant, and that applies to corporations as well as to individuals. Likewise in (c) (2).

THE CHAIRMAN: I see the point. Well now, are there any further questions on 4 (c) (3) with respect to the manner of service?

MR. CRANE: Leaving the last sentence in?

THE CHAIRMAN: Leaving it in.

MR. WECHSLER: I have one, Mr. Chairman. Lines 44, 45 and 46 seem to me unnecessarily cumbersome. Starting with line 43 I would suggest that that sentence be reformulated as follows: 'When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued.' It seems to me unnecessary to deal with the case of flight, because if the information must be given at the time of the arrest, it may be given even when there is flight and after the fugitive has been found or the flight ended.

MR. WAITE: That raises a question of what you mean by the phrase "time of the arrest."

MR. WECHSLER: Yes.

MR. WAITE: Is it the time you started to seize him or the time you have effectively seized him?

MR. WECHSLER: I would say, John, that if it is

easy to seize him, tell him first; but if it is hard to seize him, tell him second.

MR. WAITE: There have been some unfortunate cases holding that the arrest occurred before he was seized.

MR. WECHSLER: I do not think I would be worried about that problem, though the main thing is that a fellow ought to be told, and usually is.

MR. WAITE: Well, why change this? It seems to me this is explicit and the other raises a possibility of doubt.

MR. WECHSLER: In the case of flight here, you see, there is no obligation ever to tell him what he is arrested for.

MR. WAITE: Oh, I did not read it that way. I agree with you that should not be.

MR. CRANE: I second Mr. Wechsler's motion.

THE CHAIRMAN: May we have it repeated, Mr. Wechsler?

MR. WECHSLER: "When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued."

MR. HOLTZOFF: I think the first word of the sentence ought to be "If"; not "When".

MR. WECHSLER: That raises an abiding stylistic issue. I would rather get the substance of my point across, Alex, and cover that later.

THE CHAIRMAN: Is there any comment on the motion to rephrase?

MR. McLELLAN: Will you read the complete sentence?

MR. WECHSLER: At line 44 insert after the word "defendant", "at the time" instead of "of the cause." It would read: "When the officer does not have the warrant in his possession, he shall inform the defendant at the time of the arrest of the crime with which he is charged and the fact that a warrant has been issued."

MR. McLELLAN: Well, when you say --

MR. WECHSLER: Oh, I gave you an incorrect answer. You should really start striking out with the words "of the cause".

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

(Chorus of "Ayes.")

All those opposed say "No."

(No response.)

Are there any questions on this section as amended? All those in favor of adopting --

MR. SEASONGOOD: May I interrupt. At the end do

1z

you think it is fair just to say it should be mailed to the corporation? Of course, it might be opened by some insignificant person who might not realize the importance of it. Wouldn't it be good to add to line 56 "for the attention of an officer or a managing agent"? If you just mail it to the corporation generally, it might go to some clerk or unimportant person who would not realize the importance of it.

MR. McLELLAN: I cannot see, Mr. Chairman, the necessity for that last sentence about service on a corporation. I do not see any sense in a commissioner summoning the corporation.

MR. DEAN: That is your difficulty. I wonder if we should leave (c) (2) the way it is, because as (c) (2) now reads, as I understand it, you can serve a corporation, a summons on a corporation, if you do it within the minutes set forth in that paragraph, namely, within the state or within 100 miles of the place where the warrant or summons is issued.

THE CHAIRMAN: That is right.

MR. DEAN: You do not want that, do you?

MR. McLELLAN: I do not think that a corporation has any business before a commissioner.

MR. SETH: I agree with that.

MR. DEAN: Then I think we should devote our

1z

attention to (c) (2) then, because as it now reads you can serve the corporation within those limits.

MR. WECHSLER: Why do anything about (c) (2), because it never happened; and if you just keep quiet about it you are all right.

MR. DEAN: All right.

MR. SETH: I second the motion to close the motion.

THE CHAIRMAN: That is a motion to strike the sentence commencing on line 51 and ending on line 56?

MR. SETH: Yes.

MR. WAITE: If we strike that, how would a summons be served on a corporation?

MR. DEAN: It won't be.

MR. ROBINSON: It could not.

MR. SETH: When we get to indictments, it could be.

THE CHAIRMAN: You are not bringing corporations in before commissioners.

MR. CRANE: Do I understand then that the corporation can be dealt with by indictment but never in any other way?

MR. YOUNGQUIST: Or information.

MR. CRANE: What is the objection to it? If the Attorney General wants to, if they want to go before a

1z

commissioner, is there any objection to that?

MR. HOLTZOFF: Ordinarily they do not do that, because commissioners' proceedings are only used for the purpose of binding over a defendant.

MR. CRANE: He can dismiss it.

MR. HOLTZOFF: Well, a dismissal in a binding over proceeding, of course, is of no importance to anyone. It does not bind the prosecution.

MR. MEDALIE: It is. It is not a matter of binding. The Government may want to thrash the thing out and find out the whys and wherefores.

MR. CRANE: That is just it. Give him an opportunity to thrash it out. I do not see any harm in it.

MR. YOUNQUIST: They can in any case. I mean, as it stands now, they could always use a warrant issued by a commissioner against a corporation.

MR. CRANE: I know, but here you say as to the individual defendant, you will have a summons just to have him come in and see what he has done. Why shouldn't you use the same process for a corporation? The same rules apply to it.

MR. HOLTZOFF: Isn't that a difference, though, Judge? The purpose of a summons procedure as to an individual is to make it possible to proceed against him without locking him up. It is a favor to him. But you do

12

not have that problem with a corporation, because you do not lock a corporation up anyway.

MR. CRANE: Aren't these proceedings ever dismissed as to the individual?

MR. HOLTZOFF: Yes.

MR. CRANE: Why couldn't a corporation have the same privilege?

MR. WECHSLER: There is no need to dismiss it as to the corporation because the corporation is not going to be locked up.

MR. CRANE: It is a criminal proceeding just the same.

MR. DEAN: But nothing can happen to a corporation before a commissioner. In other words, you can't take bail from it; you can't bind it over.

MR. ROBINSON: The Judge says you can dismiss.

MR. CRANE: I am simply saying that a criminal prosecution is a criminal prosecution. An individual may escape the stigma of being charged with a crime. It is not a matter of being locked up alone. Also, he may explain so that he would not be locked up and would not be charged with a crime.

MR. McLELLAN: But he cannot do anything else than dismiss.

MR. CRANE: And, I may say, that is a good deal.

lz

MR. McLELLAN: No matter how guilty the corporation is, the effect of what the commissioner does is a dismissal.

MR. HOLTZOFF: He cannot bind the corporation over.

MR. McLELLAN: No.

MR. ROBINSON: Everybody seems to agree that the provisions are harmless. I have not heard anybody say that they are really harmful.

MR. YOUNGQUIST: That would be superfluous, certainly, if a corporation is never proceeded against before a commissioner.

MR. ROBINSON: I think I know of one instance which took place in Indiana with respect to the Automobile Stamp Tax Act. There were some corporations which had trucks or properties that did not have the $5 stamp on the windshield. The commissioner has been calling them in, and the question has been on the part of the United States attorney whether they should be proceeded against before the grand jury, and the commissioner has been turning them loose --

MR. CRANE: Would that be extra-judicial proceedings?

MR. HOLTZOFF: I think the whole proceeding is extra-judicial.

MR. ROBINSON: It is serving a very useful purpose

MR. WECHSLER: You have got a time when the whole

1z

commissioner system is under attack, and nobody takes it seriously, and the general feeling is that commissioners are not officers who perform really responsible functions; and at this particular moment, to expect them to perform a highly technical function in dealing with corporations seems to me unrealistic.

MR. YOUNGQUIST: What is the motion now, Mr. Chairman?

THE CHAIRMAN: The motion is to s trike the sentence beginning at line 51 through line 56.

MR. HOLTZOFF: I call for the question.

MR. CRANE: I do not see why you should not take the word "summons" out. If the summons does not mean anything to the corporation, let us go the whole hog and take it out.

MR. DEAN: It might be a summons to an individual.

THE CHAIRMAN: In line 32 we have already stricken the words "other than a summons to a corporation".

MR. CRANE: Yes, we have taken that out. But I have no objection to it if you get it so it is all right.

THE CHAIRMAN: I think Judge Crane has got a point there.

MR. YOUNGQUIST: What we should do, Mr. Chairman, is go back to 4 (a) in lines 6, 7 and 8, "U on the request of the United States attorney or of the complainant the

1z

commissioner may issue a summons instead of a warrant" against an individual, and limit there, or, rather, exclude "corporations" there and then you have got that out.

MR. HOLTZOFF: I do not think you need that addition in 4 (a). I would leave 4 (a) as it stands and make a correction in 4 (c) (2).

MR. MEDALIE: I do not think you are right there, Aaron, because the choice of issuing a summons instead of a warrant can apply only to individuals, because you cannot issue a warrant against a corporation.

THE CHAIRMAN: All right. The motion now is to strike lines 51 through 56.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

Carried.

The motion now is to adopt 4 (c) (3) as amended.

MR. WECHSLER: There is one stylistic point, Mr. Chairman. At line 47 the word "defendant" is used, and I thought it was determined to call him the accused at this point.

MR. CRANE: Also line 40.

MR. ROBINSON: Well, the accusation has been

1z

filed this time. Therefore he is a defendant. That is our distinction.

THE CHAIRMAN: Yes.

MR. MEDALIE: Then in line 47 you do not need "individual defendant"; "upon a defendant".

THE CHAIRMAN: Correct.

MR. MEDALIE: Change "an" to "a" and strike "individual".

THE CHAIRMAN: Done by consent.

MR. GLUECK: May I suggest the insertion of "or" in line 48 before the word "by"?

THE CHAIRMAN: Yes.

MR. DESSION: Have we stricken the word "individual"?

MR. MEDALIE: Yes.

THE CHAIRMAN: All those in favor of this section as amended say "Aye."

(Chorus of "Ayes.")

Opposed?

(No response.)

Carried.

MR. LONGSDORF: May I ask a question? Are we going to transfer into some other rule this language now stricken out, beginning with line 51 to line 56?

MR. DEAN: Yes.

1z

THE CHAIRMAN: Any comments on Section (4)?

MR. HOLTZOFF: Yes, Mr. Chairman. I want to make a motion that goes to the substance of this rule. This rule would require every warrant to be returned within a reasonable time irrespective of whether it has been served or not. I think that the rule should be that a warrant should be returned promptly after service, but that it can remain outstanding until it is served. There are two very important practical reasons for it. In the first place, if the marshal returns the warrant and there is no other warrant outstanding, if the fugitive is afterwardspicked up, he is being arrested without a warrant, and it is like an arrest without a warrant, which changes the status of the officer making the arrest.

And, in the second place, - and that is a very important consideration - there is a harboring statute in the Federal code making it a crime to harbor a fugitive against ~~due~~ where process is outstanding. If the warrant is returned and there is no process outstanding, a person can harbor that fugitive to his heart's content without violating any law, whereas if he harbors him while processes ~~are~~ is outstanding, it is a crime.

Therefore I move to strike out paragraph (4) and to substitute the following therefor:

"Promptly after service an officer to whom a

warrant is delivered for execution, or any person to whom a summons is delivered for service, shall make a return to the commissioner by whom the process was issued."

MR. MEDALIE: Suppose the summons is returned on a particular day, which is the only way a summons can operate?

MR. DEAN: We so provided.

MR. MEDALIE: When is the return made?

MR. HOLTZOFF: Promptly after service.

MR. MEDALIE: Suppose it is not served. Suppose a summons is returned March 1st. He has not been served. What do you do with it?

MR. HOLTZOFF: I am perfectly willing to have a different requirement as to returns for a summons. I am not much interested in that. I am particularly concerned about the returns on a warrant. I know we have been confronted with that practically. From a practical standpoint many marshals for a long time have followed the direction of their own courts to return a warrant non est if it has not been executed. We issued instructions a number of years ago that under those circumstances immediately another warrant should be obtained in order that the warrant should be outstanding, so when the fugitive is apprehended there is a warrant out for his arrest. Now, it would be simpler just not to require a

return until the warrant is executed.

Now, George, I am perfectly willing to accept that amendment to cover the summons situation. I am really interested in not requiring the return of the warrant.

MR. ROBINSON: Alex, let me ask you this: As I understand it, we may know that a defendant is not present in a certain district; nevertheless, the formula has gone through of finding a complaint in that district, having a warrant issued, having the warrant returned non est, and then proceeding from there to removal proceedings. Now, the Department of Justice, as I understand it, the FBI particularly, have complained that that is a useless ritual that they would like to see our Committee correct.

MR. HOLTZOFF: That comes under a different rule.

MR. ROBINSON: This clause would correct it, probably.

MR. HOLTZOFF: No.

MR. ROBINSON: What rule do you think does correct that?

MR. HOLTZOFF: That relates to removal proceedings, and we take care of that under our removal rule.

MR. ROBINSON: I am not so sure about that.

MR. HOLTZOFF: The point I am trying to make is that a return of a warrant should not be compulsory if it is not executed. Of course, the United States Attorney can

state to the marshal, "I want you to return this warrant because I am going to nolle pross this case." But under this rule a return of the warrant would be compulsory, and that is what we have been trying to avoid for years.

MR. MEDALIE: What provision do you make for the cancellation of outstanding warrants?

MR. HOLTZOFF: In all fugitive cases we want warrants outstanding in order to be able to prosecute under the harboring statute; and also in order to protect the officer when he picks up the fugitive so that he can have the authority --

MR. MEDALIE: Wait. I want to know what you do about cancelling warrants. How do you cancel a warrant? Have you made any provision for it?

MR. HOLTZOFF: The answer would be this, that if a case is nolle prossed the marshal would return the warrant.

MR. MEDALIE: Let us see what happens in a commissioner's office. There are about 300 warrants outstanding; if you have been a commissioner about six years, what does he do with that accumulated stuff? Does he ever go over it to see if things have otherwise been disposed of, or if the United States attorney has --

MR. HOLTZOFF: I don't think the commissioner does a thing, actually.

MR. MEDALIE: Of course. Something ought to be done about going over these outstanding warrants. I will bet there are 25,000 outstanding warrants in the United States against persons whom no one is going to proceed against.

MR. HOLTZOFF: I am willing to leave that to the administrative office.

MR. MEDALIE: No; that is up to us.

MR. HOLTZOFF: Isn't that a different problem, George? After we take care of this we might add an additional sentence or an additional paragraph, as you may choose, to take care of that point. But that is a different point.

MR. MEDALIE: What would you do about it? I am willing to wait for its being drawn. But what would you do about it?

MR. DEAN: I might suggest, Mr. Chairman, that Alex make a draft of this and take into consideration George's suggestion about the summons and present it tomorrow morning.

THE CHAIRMAN: So moved. Unanimously carried.

MR. ROBINSON: About the harboring statute, Alex and I are debating that still. I do not think the statute amounts to what he says it does.

THE CHAIRMAN: All right; we will dispose of that

the first thing tomorrow morning.

Rule 5 (a). Any comment?

MR. HOLTZOFF: Mr. Chairman, I have some verbal suggestions that do not change the substance of it except in a slight manner. This provision requires an officer making an arrest to take the person arrested before the nearest available commissioner. Now, that might possibly be construed as abrogating or repealing the present authority to take the arrested person before a State magistrate. Now, that would be a very unfortunate result. So I want to suggest --

MR. ROBINSON: That is taken care of, Alex, under 52. It expressly says it does not apply.

MR. HOLTZOFF: I know, but each rule would have to be read together. Somebody reads 5 (a) and he might not know about 52.

MR. ROBINSON: You can't say it all at once.

THE CHAIRMAN: It comes in under the affirmation.

MR. HOLTZOFF: I would like to make a motion to take care of this point. I think most of you will agree that that would be a desirable way of handling it. In line 6, after the word "commissioner" insert "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. YOUNGQUIST: I would like to know just what

is in 52 to cover this.

MR. ROBINSON: Can we wait until we get there?

MR. HOLTZOFF: I think it is better not to leave things hanging like this.

MR. ROBINSON: Well, that is a long story. We have spent a lot of time in trying to harmonize 591, its provisions for justices of the peace, and all this long list of State magistrates and judges in such a way that we could work it in to our rules. We finally decided, I think, that the only clear thing to do would be to confine our work to United States commissioners as committing magistrates and leave 591 to take care of --

MR. HOLTZOFF: Then, if that is so, we had better leave out that sentence, because that sentence seems to change the law. There is a definite requirement that an arrested person must be brought before the nearest available commissioner. I know perfectly well that most people having to operate under this rule will assume that that destroys the present authority to take the arrested person before a justice of the peace or a State magistrate. Now, that may be of no importance in the big metropolitan centers; but it is of importance in the large, sparsely-settled districts like Montana, or the northern district of Texas, or California, or Nevada, or New Mexico.

MR. ROBINSON: Mr. Seth presented it quite

effectively at two or three of our previous meetings.

MR. HOLTZOFF: Here you say he shall be taken before the nearest available commissioner. That is what I think is --

MR. ROBINSON: So far as the Federal system is concerned.

MR. HOLTZOFF: No, no. Here is an FBI agent; he arrests somebody; he sees this rule. He says, "I have got to take my prisoner before the United States commissioner."

MR. WECHSLER: I do not think there is any answer to Alex's point.

MR. DEAN: What is the language you suggest?

MR. HOLTZOFF: I suggest insert "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. LONGSDORF: Mr. Chairman, may I be heard at this point?

THE CHAIRMAN: Yes.

MR. LONGSDORF: I am afraid we are assuming something to be true which may not be true. If I am wrong, I want to be set right. The Reporter says that we can't deal with the procedure before State officers acting as committing magistrates under a statute of the United States. I agree that we cannot take away the power they have to act as committing magistrates; but I feel, and

shall until my mind is changed, that we can regulate to some extent the procedure which they shall follow when they are acting under the authority of a statute of the United States; and when we come down to Rule 52 I would like to be heard on that, because I think there is a simpler way of handling this thing. I do not want to interject that discussion into the present one because it will get complex.

MR. WECHSLER: Mr. Chairman, isn't the solution to this that we will not be changing existing law in any respect; so it does not make any difference whether we have got power technically to recommend a rule relating to proceedings before State magistrates acting as Federal committing magistrates or not, if the rule that we recommend is what is now in Section 591, Title 18? So I am not worried about the jurisdictional point; but I am worried about Alex's point that this tells the officer to do something contrary to what present law tells him to do; and, therefore, it seems to me there is more question of the legality of this than there is of the --

MR. ROBINSON: May I interrupt? May I suggest, Mr. Wechsler, if you make this change that Alex suggests you are going to have to do the same thing to a half dozen other rules. We will have to go back to the work we have done and keep adding those words.

MR. HOLTZOFF: I do not think so.

MR. ROBINSON: Nothing has required more time and attention in the office of the Reporter than this very question. Nothing took more time at our meetings.

MR. HOLTZOFF: This sentence would deprive them of their power.

MR. ROBINSON: I do not think it does, Alex.

MR. WECHSLER: What do you think this sentence means?

MR. ROBINSON: Could he be taken before anybody else than a United States commissioner? Now, we are not talking about what can be done in a State court or what can be done by State magistrates. Of course, part of our trouble comes from the Supreme Court's memorandum of June 20, 1942. In that memorandum they object to the use or term "committing magistrate" in order to avoid this catalog of a United States commissioner or a justice of the peace or a district court judge or a Supreme Court judge, or all those that are listed in 591 - a list of 10 or 15 --

MR. HOLTZOFF: Well --

MR. ROBINSON: Just a minute, Alex. The Supreme Court's Memorandum suggested that the term "committing magistrate" which we used in our last draft is not a term of art, and does not have technical significance, or something to that effect. Now, that was our shorthand term

for all this catalog of 591. So we were prevented from using that term "committing magistrate" or, at least, we felt we were; and so everywhere you turn you have got that difficulty if you try to reach over in 591 under State procedure.

MR. WECHSLER: But why wouldn't it have been a simple response to the Court's question to define "committing magistrate" as meaning any officer authorized by Section 591 of Title 18 to bind over persons charged with crime against the United States?

MR. ROBINSON: That was inserted, and I think that was drafted that way at one time and rejected.

MR. WECHSLER: What was wrong with it?

MR. ROBINSON: I don't know. Two or three things.

MR. WECHSLER: What was one of them?

MR. ROBINSON: Well, am I under cross-examination here or something like that?

THE CHAIRMAN: Well, we are trying to find out what the objection is.

MR. ROBINSON: Well, they have been put in the notes.

MR. HOLTZOFF: The court did not raise any objection. The court propounded the ~~theory~~ whether or not the term "committing magistrate" was or was not a word of art.

MR. McLELLAN: We haven't got it in here anyway.

MR. HOLTZOFF: I have got it in here without the use of those words.

MR. ROBINSON: Oh, here is Mr. Dession. George, you were out of the room when we discussed this point. Alex has proposed an amendment here to Rule 5 -- did you hear it before you left?

MR. HOLTZOFF: I will read it if you wish me to read it again. My motion is to insert in line 6 after the word "commissioner" the words "or other officer empowered to commit persons charged with offenses against the laws of the United States."

I do not know whether you heard that before you went out.

MR. DESSION: Yes, I heard it.

MR. ROBINSON: Now, the point I wanted to bring before Herb and Alex and Gordon particularly here was this: They asked about the difficulties we had in trying to find a shorthand term that would not be "committing magistrates" and yet would include everything in 591, would keep within our jurisdiction; and I have answered that to the effect that at our conference, you remember, specifically on this subject, we thought the simplest way and the clearest way to do would be simply to say that we are making rules for United States commissioners. We will not in any way

supersede 591, but we will, and we will make it understood, that 591 is still to apply as to officers other than United States commissioners.

Now, am I stating it accurately or not?

MR. DESSION: Yes. I am trying to recall now just what the series of difficulties were that led us to that conclusion. One point is that a similar change should be made in other sections dealing with the preliminary hearing to conform.

MR. HOLTZOFF: No; the point is that it is all right to limit our rules of procedure as to the conduct of preliminary hearings to commissioners only. But here we have a duty --

MR. DESSION: I do not see why, Alex. The magistrates have the power now to hold preliminary hearings.

MR. HOLTZOFF: But the point is this, George: This sentence if adopted in its present form would make it mandatory upon every arresting officer to bring his prisoner before a commissioner. Under existing law he may also bring him before a local magistrate. This would take away that option from him, and that is something that everybody agrees is undesirable.

MR. CRANE: Why couldn't you just add "other committing officer"?

MR. HOLTZOFF: That is what my motion amounts to.

MR. CRANE: State what you have got, will you, please?

MR. HOLTZOFF: "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. ROBINSON: Now, if we do that, Judge Crane, it will seem we are superseding 591 as to all the other powers there stated.

MR. LONGSDORF: I agree with that entirely, but I think we could do something with the State magistrates to produce uniformity.

MR. ROBINSON: We are trying to make these uniform Federal rules so far as committing magistrates' functions are concerned; we are trying to restrict these rules to United States commissioners, and so with warrants and summonses.

MR. CRANE: Yes, but you are dealing with a warrant here, aren't you?

MR. ROBINSON: Yes.

MR. CRANE: Not really the commissioner. What do you do with it?

MR. ROBINSON: Have it brought back to the commissioner. Now, I have gone into it quite extensively. I do not know how many weeks we spent on it; but I just want you to know we have given it due consideration, and I

tried to explain it in the notes at Rule 1, page 6, Reporter's Memorandum, Lines 2-3:

"'United States commissioners' is substituted for 'committing magistrates' because of the comment on the latter express in the Court's Memorandum (page 1, paragraph (1), and page 16, first paragraph), and because the enabling act of June 29, 1940 authorizes rules to be made for 'proceedings before United States commissioners,' and omits reference to justices of the peace and the other types of 'magistrates' enumerated in U. S. C., Title 18, s 591. It will nevertheless be necessary to state in Rule 52 (Application and Exception), in the last chapter of this draft that the term 'commissioner' is not used to exclude state magistrates or judges from continuing to exercise similar powers under section 591. In other words, it is not intended that the rules shall attempt to take away from justices of the peace and the other state magistrates the powers now given them by section 591. In the application and exclusion rule it will probably be desirable to provide that the United States district judge is included in the term 'commissioner', when performing the duties mentioned in section 591, and that he, therefore, unlike the state magistrates, is to follow the procedure provided by these rules. There is no serious practical difficulty in confining the rules to commissioners. There

are about 1,080 United States commissioners, but there are only about 35 justices of the peace and other state magistrates who are performing to any considerable extent under section 591 the duties which are usually performed by the commissioner."

I got those figures from the Administrative Office. And those are the reasons that were stated for offering the draft in this shape. Now, I can suggest that Alex can accomplish all he wants to do here by saying that in Rule 52 we do make a suitable application and exception clause if it is not in there now.

MR. HOLTZOFF: No, that would not suit because this rule is a direction to officers, and it will go out in this form as a direction to all arresting officers, and they would not know anything about Rule 52.

MR. WECHSLER: That is the point, exactly. It is not a rule dealing with the powers of magistrates.

MR. ROBINSON: But if you examine the other rule, gentlemen, you will find if you write these words in here you will have to write them in in several other places.

MR. HOLTZOFF: I do not think so.

THE CHAIRMAN: You will have to write them in the heading in Rule 5.

MR. ROBINSON: Yes.

MR. HOLTZOFF: My objection rests on the fact that this is phrased as a direction to the arresting officer. Now, if it is phrased as a direction to the arresting officer, it has to be correctly drawn ~~in~~ as an accurate direction, and he is not going to look into Rule 52. He may not know anything about Rule 52.

MR. ROBINSON: If you apply the same tests you will find the same thing applies.

MR. CRANE: As long as we are all agreed that you are right, that it applies to the other officers as well as commissioners, is there any harm, except in style, to include it?

MR. ROBINSON: Yes.

MR. DESSION: There is another possible point. My objection to writing in the other magistrates goes a little beyond yours, Jim. Now, in the first place, if we make a procedure which is supposed to be applicable to these local magistrates, most of them are not going to hear about it; they are not going to know what it is; and I think more often they will follow their own. So to that extent I think it is futile to make a procedure for them unless we have to. Now, I would prefer not to make one for them and leave them dangling with whatever that statute gives them, and let us hope that they will rarely be used, if ever.

THE CHAIRMAN: Why couldn't you put an asterisk there, footnote the whole thing, and avoid all this cumbersome language?

MR. WECHSLER: You can't have a sentence which says, "Bring him before the nearest commissioner" if what you mean is bring him before the nearest commissioner or somebody else.

MR. HOLTZOFF: My objection is that this will go out to every arresting officer and he will think that the law has been changed. It is not in the form of a procedural rule. This is in the form of a direction to the arresting officers.

MR. GLUECK: He can get other instructions from the FBI, and so forth.

MR. HOLTZOFF: Yes; but why have a misleading rule?

MR. ROBINSON: Alex, if you put that in here you will be leaving them to infer that 591 is repealed or superseded except as to this point.

MR. HOLTZOFF: No, Jim, you see elsewhere you have tried very hard to cover everything that is included in 591. That is included in one of your notes. I believe you have everything in 591 and 595 except this.

MR. ROBINSON: We had this same problem and got into a jam on the Court's Memorandum on it. Mr. Dession --

MR. DEAN: As I recall, the Court's Memorandum you used the term "committing magistrate." You had not defined it.

MR. ROBINSON: My point is this: If you put the words in here, you have to write those same words in at other points, otherwise it will seem that you have accepted only part of 591 and abrogated or superseded the others.

MR. WAITE: Jim, isn't the fundamental trouble that under the heading "Proceedings Before the Commissioner" you have included directions to the arresting officer? That first section hasn't anything to do with the proceedings before the commissioner; under the ordinary statutes it is included under the duty of the arresting officer. As soon as he has made the arrest he must take the man before somebody. Then, proceedings before that person is something entirely different.

MR. ROBINSON: What about striking out the word "shall" and using the word "is", just as a description of what is done in the statute? What about that?

MR. WAITE: That will be all right.

MR. ROBINSON: How about that, Alex?

MR. HOLTZOFF: What is that?

MR. ROBINSON: Striking the word "shall" and using the word "is"? Substitute for "shall," a mandatory clause, by merely the descriptive thing.

MR. WAITE: I misunderstood you. That would not do the trick. As it now stands it says that the officer is limited. He must take the person before a commissioner and nobody else. That is the direction. Now, I question whether we want that to be a direction at all.

MR. ROBINSON: Alone we don't.

MR. WAITE: The only reason we are having trouble here is that you hooked it up with the proceedings before the commissioner. Why don't you make one section that the officer shall take the man wherever you wanted him to be taken, and then have another rule that the proceedings before the commissioner shall be thus-and-so?

MR. WECHSLER: Mr. Chairman, I think Mr. Seth has a proposal that solves it very easily and meets Alex's point. That is, let 5 (a) be as it is, but put it as a qualification - shall take the man before the nearest available commissioner unless one of the other officer specified in Section 591 is more accessible.

MR. HOLTZOFF: That would not do, for this reason: Let us take this particular instance. Suppose a man is arrested in the Bronx by an FBI agent; the City Magistrate's Court in the Bronx is more accessible than the United States commissioner in Manhattan, and in that case he will take him down to the United States commissioner.

MR. SETH: He violates the law.

MR. WECHSLER: I think Mr. Seth is right. He does violate the law.

MR. HOLTZOFF: We ordinarily use a state magistrate where the commissioner is too far away or is not available, or is home sick, for example. But you do not want to make it mandatory to take the prisoner to the nearest magnistrate. As a matter of fact, you may not know who is the nearest justice of the peace, and you would not care. Well, I think I would rather stick to my motion.

MR. WAITE: Mr. Chairman, unless that motion was seconded, I would like to limit the debate by suggesting that Rule 5 (a) be taken out of Rule 5 and made Rule 4 (a) under the title "Instructions to the Arresting Officer." I do not care how it is phrased.

MR. YOUNGQUIST: You would not make it 4 (a), would you?

MR. WAITE: I don't care.

MR. HOLTZOFF: But that would not completely cure the trouble because it is still worded as a mandatory direction. I agree with you that it might be better to --

MR. WAITE: Well, to add your suggestion in there. Include yours. Then you don't have to worry about proceedings before other people. This just tells him where he would take the fellow.

MR. HOLTZOFF: I would be glad to accept that as an amendment to my motion.

MR. WECHSLER: I still do not see the need for that when by and large that is going to apply to commissioners.

MR. CRANE: I do not either.

MR. HOLTZOFF: The question has been called for, Mr. Chairman.

THE CHAIRMAN: The motion has not been seconded.

MR. DEAN: I second it.

THE CHAIRMAN: This motion has been seconded.

MR. LONGSDORF: May I hear the motion again, please?

MR. HOLTZOFF: That we insert after the word "commissioner" in line 6 the following: "or other officer empowered to commit persons charged with offenses against the laws of the United States."

MR. WAITE: And didn't you accept my amendment that it be taken out of this title "Proceedings Before the Commissioner"?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: And add it to the preceding rule?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Under the title of what?

MR. WAITE: "Duty of Arresting Officer."

MR. HOLTZOFF: That would be a good title.

MR. WECHSLER: Would you accept an alternative to yours, that instead of shifting it we keep it where it is and change the title of 5 to read "Proceedings Upon Arrest and Before the Commissioner"?

MR. LONGSDORF: That would answer it, I think.

MR. ROBINSON: We would be right where we were, before the commissioner.

MR. BURNS: Let us have two motions, first on the question of amending the language, and the second one on where you will put it.

MR. ROBINSON: We agree on the first. We are going to amend the language.

THE CHAIRMAN: That motion has not been put yet.

MR. LONGSDORF: Does the motion now invite a transfer to 4?

THE CHAIRMAN: No. The motion was to add these words in line 6.

All those in favor say "Aye."

(Chorus of "Ayes.")

Opposed?

MR. WAITE: I can't vote in favor of that if you are going to leave that in this place.

MR. YOUNGQUIST: I think the transfer was included in the motion.

MR. WAITE: That is what I thought.

THE CHAIRMAN: Well, if it would make you feel better, we can move it to the end of Rule 4 and give it a new caption as indicated, namely, "Instructions to the Arresting Officer" --

MR. WAITE: "Duty of Arresting Officer."

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: May I suggest, Mr. Chairman, that the language in line 8 - this is purely verbal - should read "shall make and file with the commissioner" rather than "file before the commissioner".

MR. DEAN: Seconded.

MR. HOLTZOFF: How are you changing it?

MR. YOUNGQUIST: "shall make and file with the commissioner".

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. GLUECK: May I inquire as to whether what we have done is affected at all by Rule 52, lines 19 and 20, which reads: "The rules do not apply to a criminal proceeding before any other officer acting as a committing magistrate"?

MR. HOLTZOFF: I think the two are not inconsistent.

MR. GLUECK: I don't know. But might they not be interpreted as --

MR. WECHSLER: Suppose we hold that until we get to it.

MR. GLUECK: All right, we will hold it.

MR. WECHSLER: I have got another point on 5 (a). The difficulty is this: The rule now states what I understand to be the judicial interpretation of 591 in providing that a person shall be taken without unnecessary delay before the committing magistrate. But we have another provision of law particularly applicable to the FBI in Title 5 of the Code. I think it is 300 (a), which uses the word "immediately" instead of the words "without unnecessary delay." And then in section 593 of Title 18 we have got a provision particularly applicable to liquor cases which uses the word "forthwith". In other words, you have three different statutory definitions.

MR. HOLTZOFF: Don't you think they all mean the same thing?

MR. WECHSLER: No.

MR. HOLTZOFF: I always construed them the same way.

MR. WECHSLER: I move that the word "immediately" be substituted for "without unnecessary delay."

THE CHAIRMAN: You heard the motion. If there is no further comment, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

MR. McLELLAN: I will take a count on that.

THE CHAIRMAN: All right. All those in favor of the motion show hands.

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

THE CHAIRMAN: Tie vote. I call on the members of the Committee to vote.

All those in favor say "Aye."

mz MR. CRANE: Tell me what it is.

THE CHAIRMAN: That is where you have "without unnecessary delay" Mr. Wechsler calls attention to the fact that perhaps in one of the statutes somewhere else is the word "forthwith" and in a third statute is the word "immediately"; and he moves to substitute "immediately"

for the words "without unnecessary delay".

All those in favor of the word "immediately" say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

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

The motion is lost.

MR. WECHSLER: I still have another problem, Mr. Chairman. In line 8 should there be any provision as to when the complaint shall be filed with the commissioner when the arrest is made without a warrant?

MR. YOUNGQUIST: You might say "forthwith" there.

MR. WECHSLER: I move that the word "forthwith" be inserted between "shall" and "file" in line 8.

MR. YOUNGQUIST: I second the motion.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: Then you have "forthwith" and

"with the commissioner".

MR. ROBINSON: That is right; two "withs".

MR. WECHSLER: There it should follow the word "shall".

THE CHAIRMAN: We are now at 5 (b) which later on will be called (a).

MR. HOLTZOFF: Mr. Chairman, a suggestion in lines 13 and 14: "He shall also inform the defendant that any statement made by him may be used in evidence at the trial." In Tentative Draft 5 we had the phraseology: "He shall also inform the defendant that any statement made by him may be used against him." I think that is preferable.

MR. MEDALIE: It is. I had that marked.

MR. YOUNGQUIST: I had the same note.

MR. HOLTZOFF: And there is a reason for it because they may use it in other ways than just in evidence.

MR. YOUNGQUIST: They might use it in a preliminary hearing.

MR. HOLTZOFF: Or use it as leads to get other evidence.

MR. ROBINSON: The only thing to consider is you are probably changing the common law on that. Mr. Pendleton Howard this summer worked with us and with me, and

on this particular point he told of being present in England when some counsel stated before the Lord Chief Justice or some functionary that the law is the defendant should not make a statement because he said it might be used against him, and the judge rebuked him and said that never was the common law and is not now; the law is that any statement may be used in evidence at the trial, and he went on and explained that it might be in favor of the defendant. He might make a statement that would show he was not guilty. Therefore when a trial came along whatever he said could have been stated for him.

MR. MEDALIE: Who was this learned judge, and does what he said appear in any book?

MR. ROBINSON: Well, he says it appears in all the books.

MR. MEDALIE: I think he is wrong about it. I think when a British judge pontificates to counsel, English counsel just sit up and do not talk back like American lawyers, so he got away there with it.

MR. DEAN: I think he should be informed that in all probability it would be used against him, or without doubt.

MR. WECHSLER: If he told the defendant it would be used in evidence, but the defendant thought it might be used in his own behalf, you will be misleading the

defendant.

MR. YOUNGQUIST: You are permitting him to make a statement in his favor at the trial.

MR. ROBINSON: You need not say that it shall be.

MR. YOUNGQUIST: It is permissive to both sides.

MR. HOLTZOFF: This would make hearsay out of it.

MR. DEAN: It seems to me when you say "in evidence at the trial" you are using the lawyer's language where this is to be used against the man that is punished, but if you say this other, he will understand it.

MR. ROBINSON: Do you assume that every man that is brought in is guilty?

MR. McLELLAN: You do not think that could be put in, that statement, in his defense? That is new law to me.

MR. ROBINSON: It is frequently used; a statement that he did not oppose a confession when some witness made a statement before him just after his arrest, Aaron, and you know it is a common situation too, where the defendant is arrested, have witnesses brought in and say, "That is the man that shot me," and he does not say anything, but the fact that he does not say anything may be used at the trial for him. Or if he said, "I did not do it." That too could be used at the trial.

MR. McLELLAN: We have been reading different

books.

THE CHAIRMAN: Is the motion to strike the words "in evidence at the trial" and substitute "against him"?

MR. HOLTZOFF: Yes.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

We will proceed to 5 (c). Is there any comment on 5 (c)? If not all those in favor of 5 (c) --

MR. YOUNGQUIST: I have two or three comments. First in line 20 why do we have the words "without unnecessary delay"? I ask that of the Reporter.

MR. ROBINSON: On line 17 that blank should be Rule 45 and on line 32 it would be the same. That is the "Bail" rule.

THE CHAIRMAN: What was your question?

MR. YOUNGQUIST: In line 20 what is the purpose of the phrase "without unnecessary delay"? As I understand it, the commissioner simply binds the defendant over to the district court and he has to wait until the next term.

MR. ROBINSON: That too comes from the Supreme

Court's Memorandum.

MR. YOUNGQUIST: I must disagree with the Supreme Court, then, because all the commissioner does is to bind him over. He cannot say whether it shall be with or without unnecessary delay. That all depends upon the district court, when it acts and when its turn comes. I move that the words "without unnecessary delay" be stricken.

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: May I ask you to help us and consider what the court's objection is at page 16, paragraph 5 (c) of this memorandum. Obviously we need to meet it, I think. The rule should be explicit as respects of the term of the district court the person is held to answer. Under the rule as now framedthe court could hold him for a term ten years distant.

MR. YOUNGQUIST: Well, if he binds him over to the district court, he is required to send the files to the district court forthwith, or without unnecessary delay, or immediately, although I do not remember which, and then immediately the district court has jurisdiction, and if we are going to give instructions to anybody it ought to be to the district court, because after the binding over process is done the commissioner is through.

MR. ROBINSON: It says that the commissioner

should hold him for appearance at the next term.

MR. YOUNGQUIST: No.

MR. McLELLAN: Is the Court doing this, or are we doing it?

THE CHAIRMAN: Gentlemen, isn't that covered fully by line 32; "After holding the defendant to answer or discharing him the commissioner shall transmit promptly to the clerk of the district court the complaint," and so forth. Isn't that covered by the word 'promptly"?

MR. LONGSDORF: Wasn't that objection made to prevent the magistrate or commissioner holding that complaint on ice and binding over when he got ready to do it? Doesn't it mean that he shall, without unnecessary delay, hold him to answer to the district court? In which event all we have to do is transpose the words "without unnecessary delay" to follow immediately after "shall"; "shall without unnecessary delay".

MR. YOUNGQUIST: But this is on waiver of preliminary hearing.

MR. LONGSDORF: Yes, if he waives. "without unnecessary delay" qualifies the word "answer", as it is now. I think it should qualify what the commissioner shall do.

MR. HOLTZOFF: I don't think you need that, Mr. Longsdorf. It seems to me binding over all follows

automatically if the preliminary hearing is waived.

MR. ROBINSON: I think part of the trouble is with some state practice under the state statutes. Frequently a magistrate binds over the defendant for the next term of court; binds him over to the next term; and that is the way it used to be and was for 75 years or so in our state, with the result that a defendant would have to lie in jail frequently during the rest of the current term and into the next term before he could be tried; a very difficult provision, of course. So in many of these state codes they have gotten away from that by providing that a defendant may be bound over by the magistrate or justice of the peace for trial at the current term.

MR. CRANE: For the purpose of the preliminary examination, he cannot do anything else but hold him.

MR. ROBINSON: Certainly we do not want to have it understood he could bind him over for the next term.

MR. CRANE: You could transpose this and say "without unnecessary delay he is held," and so forth.

MR. HOLTZOFF: Under the Federal procedure the binding over is not to any particular term. He just binds him over.

MR. BURNS: He is held to answer, which is a technical term of art. What does he do? He says, "You go and appear before the district court."

MR. McLELLAN: Would it be a good sop to strike out "without unnecessary delay" and put in the words "in due course"?

MR. CRANE: I think he ought to do it right away.

MR. SEASONGOOD: It is not what he does that the Supreme Court meant. The Supreme Court says the rule should be explicit as to what term.

MR. HOLTZOFF: But under the Federal procedure the holding is not for any particular term of the district court. Am I right about that, Judge?

MR. GLUECK: I do not see why "forthwith" would not do it here.

MR. YOUNGQUIST: That is not what the court is driving at.

MR. HOLTZOFF: Of course these comments were not, as I explained earlier, made by the court as a group. The individual members of the court suggested these as queries.

MR. SEASONGOOD: Who made this one?

MR. ROBINSON: I do not know. We were not told.

MR. YOUNGQUIST: I understand that, but my view is that the comment of the court has no place in this particular provision and therefore the Committee should, with its knowledge of the practice and of the procedure, and with the provision that the Chairman pointed out in lines 32 and 33, proceed in an orderly fashion and strike

out the words "without unnecessary delay".

MR. WECHSLER: Mr. Chairman, there is one thing about the comment of the court that will be consoling to us. You remember we got two memoranda from the court, one purporting to contain an aggregate of comments and the second one was sent to us with the statement that those were comments that came in late, and they apparently were comments of only one justice therefore, and this particular one is raised only in that second memorandum.

MR. SEASONGOOD: He is going to have a vote as to whether the rules you submit will be approved.

MR. HOLTZOFF: I think it is understood that these were tentative comments.

MR. SEASONGOOD: Let me go back: This says that the rule should be explicit as to what term of the district court he is to be held to answer. Under the rule as now framed the commissioner could hold him for appearance at a term ten years distant. Jim says they do sometimes hold them to answer at the succeeding term.

MR. ROBINSON: That is state practice.

MR. SEASONGOOD: But that is not Federal practice?

MR. HOLTZOFF: It is not the Federal practice.

MR. ROBINSON: I suppose some state magistrates do it.

THE CHAIRMAN: Can we have a comment which makes

it very clear that the Federal practice is not to hold over to the next term of court and that the commissioners are expected to comply with that statute?

MR. BURNS: What is the procedure, say in the sparsely settled portions of this country, where there is an arrest about June when the district court is going on its vacation and may not convene again until September and the defendant is not able to raise bail?

MR. SETH: He goes to jail.

MR. BURNS: Is that different from the state practice? What would the footnote show? What is the difference between the state and Federal?

MR. HOLTZOFF: My understanding is that in some states the commitment is to answer at the next term, so even if there is a current term, the case cannot be taken up. Am I right in that? Of course, that is not the Federal practice.

MR. SETH: Why not put in here "without regard to the term of the district court"?

MR. ROBINSON: We have a statement somewhat to that effect.

MR. HOLTZOFF: The motion is strike out the words entirely.

MR. McLELLAN: I move as an amendment, without the slightest idea at all of getting more than one vote,

that those words go out and there be substituted for them the words "in due course".

MR. WAITE: I will second it.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. I will call for a show of hands.

(After a showof hands the Chairman announced the vote to be 9 in favor; 4 opposed.)

MR. SETH: In line 27 the first words --

MR. YOUNGQUIST: Before we get to line 27, may I call attention to line 24. Isn't it customary to say "The defendant may cross-examine the witnesses against him," rather than "any witness"?

MR. HOLTZOFF: Yes.

MR. SEASONGOOD: And is it necessary to say "in person or by counsel"; because if the defendant can do it, he can do it by counsel.

MR. BURNS: Oh, yes, I think so. You have not said "by his counsel" in dealing with waivers and all these other matters.

MR. SETH: Line 27, the first word in the line, shouldn't that be "the offense charged"?

MR. YOUNGQUIST: Isn't it the practice that if it appears on the preliminary hearing that the defendant has committed an offense other than that charged, that the commissioner has authority to bind him over?

MR. SETH: You have to file a new complaint and start over again.

MR. YOUNGQUIST: I think not, but I may be wrong. That is my impression.

MR. HOLTZOFF: I think not. I think the complaint is used only to start the proceedings in motion.

MR. GLUECK: Suppose the complaint is for tax evasion and then it is found he murdered somebody. Can he bind him over?

MR. HOLTZOFF: Yes.

MR. WAITE: There are a good many decisions holding that he can be prosecuted against for any offense which the commissioner finds there is sufficient evidence to justify. Then there are cases to the contrary, too.

THE CHAIRMAN: Which way does the weight run?

MR. WAITE: That I do not know.

MR. HOLTZOFF: This is a practical situation: Suppose a person is arrested and charged with violating one section of the liquor laws and the evidence shows he violated some other section; for example, if he is charged with transportation but the evidence shows he is guilty of

possession; he can still be bound over even though the complaint charges a different offense than the one the evidence shows.

MR. MEDALIE: I have so understood it.

MR. SETH: Without an opportunity to know what he is charged with?

MR. MEDALIE: He finds out during the examination. The only trouble about that is that from the viewpoint of pleading he has not been protected. That is, you did not give him a paper telling him the precise thing that enters into the equivalent of a judgment, which is the magistrate's decision to hold him; but our attitude in matters of that kind is simply to permit, by the analogy of the rule in civil cases, an amendment.

MR. SETH: If it be for drinking too much coffee, they can get you on sugar?

MR. MEDALIE: Just about.

MR. CRANE: I see you have the words "without unnecessary delay" there.

MR. HOLTZOFF: We ought to correspond that with the other, Judge, and also to be done "in due course."

MR. CRANE: "in due course" sounds like a commercial paper. I should think "without unnecessary delay" is more appropriate for these court proceedings than "due course". I do not mean to criticize anyone,

but I mean it does not quite fit; "immediately" or "forthwith"; but not "due course". In using "due course" you think of these statutes on commercial paper "in due course" and "without recourse".

MR. McLELLAN: But you cannot say as a practical matter it must be "immediately" or "without unnecessary delay"; and the words "in due course", which I criticized myself, do prevent it seems to me any likelihood of any such 10-year delay as the court had in mind, or at least one of the justices in his memorandum.

MR. DEAN: Why should it not be "immediately"? That is one thing I did not understand about that motion that was adopted. That modifies the action of the commissioner and it should be "immediately". During that debate we were talking about two different things. Judge Crane pointed out the importance of acting immediately when there was a waiver, of some of us talked about the additional problem as to when he should be held to answer.

MR. McLELLAN: But it was the latter thing the court was talking about.

MR. CRANE: Don't you think "immediately" would be better there? Where a man waives, there is nothing the commissioner can do otherwise. He must hold him immediately. Why should he wait a month?

MR. DEAN: Despite the 9 to 4 vote, I do not

think we have answered the problem of the court. And I do not think we have answered Judge Crane's point that there is no reason why the commissioner should delay one second. "Due course" indicates considerable delay.

MR. McLELLAN: I would not put in "in due course" as applied to the duty of the commissioner to hold.

MR. DEAN: Doesn't it read that way, Judge, now?

MR. McLELLAN: No. "hold him to answer in due course".

MR. WAITE: "immediately hold him to answer"; as soon as he is proceeded against.

MR. SEASONGOOD: But that might not be until the next term.

MR. McLELLAN: That is right.

MR. BURNS: Why not "immediately to answer in due course"?

MR. WECHSLER: "the commissioner shall forthwith hold him to answer in due course."

MR. BURNS: I think that is better and quicker.

MR. WECHSLER: Then if we go back to line 22, the suggestion is to put in "forthwith" after "shall"?

MR. DEAN: I think that helps it a little.

THE CHAIRMAN: There is no motion, just conversation.

MR. WECHSLER: I make the motion.

THE CHAIRMAN: Do the words 'without unnecessary delay" in line 20 come out?

MR. HOLTZOFF: Yes; "in due course" to be substituted, it seems to me, under Judge McLellan's motion, which was carried 9 to 4.

MR. DEAN: May I make a motion that line 20 read "the commissioner shall forthwith hold him to answer in due course to the district court"?

MR. SEASONGOOD: Can you say "as soon as possible"? "due course" does not mean a thing to me. It is just words. Excuse me for saying so.

MR. McLELLAN: It is words, but good words, I think. "Immediately" won't go.

MR. SEASONGOOD: I did not say "immediately". I would say "as soon as possible".

MR. DEAN: I do not think there ought to be a time indication when he is supposed to answer to the district court because the action of the commissioner does not indicate any time. That time is indicated by when the grand jury meets and returns an indictment. "in due course" is all right from that standpoint.

MR. MEDALIE: Holding a person for a term by a magistrate carries something else with it, because the code provisions that if at the next term of the court he has not been indicted he may make a motion to be discharged

from custody. That has been done. But there is not anything any fellow can do when he waives and he waits on the district court except being indicted or making a motion when he gets tired of waiting.

THE CHAIRMAN: Now we have Mr. Dean's motion on line 20. Will you give it?

MR. DEAN: "the commissioner shall forthwith hold him to answer".

MR. HOLTZWORTH: "in due course"?

MR. CRANE: While we are reconsidering, cannot we leave those words out and just say "hold him to answer to the district court"?

MR. DEAN: That is my preference.

THE CHAIRMAN: Will you restate your motion so we can all get it?

MR. DEAN: "the commissioner shall forthwith hold him to answer in the district court."

MR. CRANE: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed "No."

(Chorus of "Noes.")

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

Now we come to the question on line 28.

MR. HOLTZOFF: On line 28 "without unnecessary delay" is subject to the same objection as the same words were in line 20, so those words should be stricken out.

MR. CRANE: I so move.

MR. McLELLAN: Does the "forthwith" go in?

MR. MEDALIE: Yes. You want the same language, of course.

THE CHAIRMAN: The motion is to delete in lines 28 and 29 the words "without unnecessary delay" and insert "forthwith".

MR. BURNS: After "shall".

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed "No."

Carried.

MR. HOLTZOFF: Before you reach the line 30, the line "otherwise the commissioner", and so forth, ought to start a new sentence, as a matter of grammar. I think that is necessary.

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

MR. ROBINSON: That was our language the last time. Why not keep it?

MR. YOUNGQUIST: That is good enough.

MR. HOLTZOFF: Is that a comma or a semicolon?

MR. YOUNGQUIST: A semicolon.

MR. MEDALIE: In line 30, if that discretion as to bail bond with or without surety means discretion as to bail, I think it is all wrong.

MR. YOUNGQUIST: I have a suggestion on that, George, that I have written out, which is in line with what you say. I would suggest that lines 30 and 31 read, "The Commissioner may admit a defendant to bail as provided by Rule 45."

MR. BURNS: Yes.

MR. MEDALIE: All right.

THE CHAIRMAN: Is that seconded?

MR. HOLTZOFF: I second it.

MR. MEDALIE: Why do we say "may", because I don't want any doubt?

MR. HOLTZOFF: Suppose it is a murder case?

MR. MEDALIE: Then there is no doubt about it.

MR. HOLTZOFF: But if you say "shall admit" that would make it mandatory for him to admit to bail in a murder case.

MR. MEDALIE: Then "except in capital cases".

MR. WECHSLER: If Rule 45 says no bail in capital cases, isn't that sufficient?

MR. SETH: Wouldn't it be better to say "The

defendant may be admitted to bail as provided in Rule 45"?

MR. YOUNGQUIST: If we substitute the "shall" for "may" that will take care of it as permitted in Rule 45, as Rule 45 does not admit to bail in a capital case.

MR. ROBINSON: You are kind of chasing yourself around a stump, aren't you? "shall admit except as provided in Rule 45"? Here is Rule 45: "A person arrested for an offense not punishable by death shall be admitted to bail."

MR. HOLTZOFF: Why not say, "The commissioner shall admit the defendant to bail in cases defined in Rule 45"?

MR. BURNS: "in accordance with Rule 45."

MR. HOLTZOFF: But if you say "shall admit him to bail" that seems to me to make it mandatory in all cases.

MR. YOUNGQUIST: It is substantive in Rule 45.

THE CHAIRMAN: Referring to Rule 45 (a) (1): "A person arrested for an offense not punishable by death shall be admitted to bail"?

MR. MEDALIE: Everything is in there except the alternative of bail with or without a surety. I do not think Rule 45 covers bail without a surety.

MR. ROBINSON: But elsewhere I think it is covered.

MR. WECHSLER: It should be in there, anyway.

MR. YOUNGQUIST: That is in Rule 45 (c), and that is a bond or cash or securities.

MR. MEDALIE: But that is not clear.

MR. YOUNGQUIST: "may require * * * one or more sureties". That covers everything.

MR. MEDALIE: That does not mean he can dispense with a surety. That simply indicates he can require one surety or two sureties. What we intended on page 2 of Rule 5, line 30, was that the commissioner could take bail without any surety, and it does not appear in Rule 45. If that were to appear in Rule 45, then you could strike that sentence in line 31.

MR. HOLTZOFF: Doesn't that belong in Rule 45 rather than here?

MR. MEDALIE: Yes. Put it in Rule 45 and we delete this other from Rule 5.

MR. ROBINSON: We talked about it and I will tell you why;we tried to get away from the term "his own recognizance."

MR. YOUNGQUIST: Line 31 it is?

MR. MEDALIE: Line 31 says one or more sureties, though it does not say "no surety".

MR. ROBINSON: Here is the idea, as you will see when we get to Rule 45, if you have not already read it

with that point in mind: The idea is to have a defendant always give a bail bond so he will be in black and white and there will be some record in the court's files showing that he has given a bond.

MR. McLELLAN: That won't work. Suppose he wants to put up cash?

MR. ROBINSON: That is provided, too.

MR. MEDALIE: It is in Rule 45.

MR. YOUNGQUIST: I think I can dispose of this matter of Rule 5 by amending my motion to strike out the sentence appearing in lines 30, 31 and 32 relating to bail. It is all covered by Rule 45.

MR. MEDALIE: But it is not all covered by Rule 45.

MR. YOUNGQUIST: But whatever changes should be made I think should be made in Rule 45.

MR. MEDALIE: Yes, but I did not want to get rid of this indulgence to the defendant in Rule 5 until we have provided for it in Rule 45.

MR. ROBINSON: I say then one sentence will finish that point. It is this, that every defendant who is released without cash or other type of security of that kind, if he is released that way, he shall give a bail bond. The question is whether or not on that bail bond he shall have surety.

MR. MEDALIE: That is right.

MR. ROBINSON: Now if he is released on a bail bond without surety, that means on his own recognizance.

MR. MEDALIE: Where does it say that?

MR. HOLTZOFF: Section 45 (c) I think supports the Reporter's point.

MR. MEDALIE: What is the objection to saying that he may dispense with sureties altogether if that is what we mean to say instead of having any doubt about it?

MR. HOLTZOFF: I would be in favor of it.

MR. ROBINSON: There is no doubt about it.

MR. MEDALIE: I have doubt.

MR. ROBINSON: When we get to Rule 45 let us see.

MR. MEDALIE: But I won't remember it.

MR. YOUNGQUIST: I will write it in now.

THE CHAIRMAN: The motion is to strike the sentence on lines 30 to 32.

MR. BURNS: I would like to be heard. Why not state what the commissioner's duty is about; admit to bail and refer to Rule 45? After all, you are trying to lay down the steps that are taken before the commissioner. Why not say he shall admit to bail as provided in Rule 45? The case where there is any problem is one out of a million because the normal procedure is to admit to bail if the defendant has the means.

MR. YOUNGQUIST: It seems to me we are repeating again what we have already said in Rule 45. That covers the entire situation and covers the case of every person arrested for an offense.

MR. BURNS: That is important as an instruction to the commissioner. We ought to leave it in here.

MR. YOUNGQUIST: Of course the commissioner will have to refer to the entire rules in order to know his duties and powers and authority under them. The rule is going to be long enough, anyway. I personally should very much prefer to avoid repetition, and it would be considered repetition.

MR. BURNS: There is a motion to strike out, I suppose. Did somebody second it?

THE CHAIRMAN: It was seconded.

MR. CRANE: I should make a motion to amend it. I don't see any harm in saying that bail may be furnished according to Rule 45. You refer back to the rule. You do not state anything more but just make a reference to it and it completes the situation.

THE CHAIRMAN: You mean so that the attorney who has only an occasional criminal case will get his instructions?

MR. CRANE: Yes. It cannot take more than a line.

THE CHAIRMAN: Do you move that change?

MR. BURNS: I move that, yes.

MR. McLELLAN: May I ask Mr. Robinson whether there is any provision anywhere in the rules, except this sentence you have been talking about, purporting to give authority to the commissioner, as such, to admit to bail?

THE CHAIRMAN: Oh, yes.

MR. McLELLAN: That is all right then.

MR. MEDALIE: Where is it?

MR. YOUNGQUIST: Rule 45.

THE CHAIRMAN: Rule 45 says the commissioner, the court or the judge may.

MR. McLELLAN: What part of 45?

THE CHAIRMAN: Line 31 of page 2.

MR. MEDALIE: No. It tells what he does when he takes bail, but it does not say he shall take bail. No where does that appear.

MR. YOUNGQUIST: Line 3 I think covers it. "A person arrested for an offense not punishable by death shall be admitted to bail." That begins from the moment of his arrest until the time of his conviction.

MR. CRANE: But this says the commissioner may do it. So this calls attention to it, and that is all, and I don't see why it did not make it clear in doing it.

THE CHAIRMAN: Your motion is to have the sentence read, "The commissioner shall admit a defendant

to bail as provided by Rule 45"?

MR. CRANE: I second it.

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

(Chorus of "Ayes.)

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

MR. WECHSLER: Mr. Chairman, the sentence in lines 21 and 22 it seems to me are a little cumbersome. Wouldn't it be saying thesame thing if that read "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time" instead of saying"either immediately or after postponement for a reasonable time"?

MR. ROBINSON: Those were the words of our fifth draft. You just want to change them, do you?

MR. WECHSLER: Exactly. It seems to me if he is told he has to do it within a reasonable time he knows he can do it immediately.

THE CHAIRMAN: I think this language hits at definitely certain evils which have existed in some districts in drifting along while they are waiting to get more evidence.

MR. HOLTZOFF: No. What they generally do is to have one continuance because the commissioner can take two

fees.

THE CHAIRMAN: Unless the FBI wants him to do it while they are gathering evidence.

MR. HOLTZOFF: No; because ordinarily by that time the case would be presented to the grand jury, if they wait long enough for a hearing.

MR. BURNS: Did you make that as a formal motion?

MR. WECHSLER: Yes.

MR. BURNS: I second it.

MR. WECHSLER: "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time" and take out "either immediately or after postponement for a reasonable time."

MR. ROBINSON: You leave the point behind, don't you, Herb, of the time in which the defendant could prepare his defense. That was argued so strongly at the last meeting. You ought to say that he shall be given adequate time to prepare his defense and see his lawyer.

MR. WECHSLER: This gives the commissioner that chance. He can do it immediately or after postponement. You have to leave some discretion. My modification says he is to act within a reasonable time.

MR. ROBINSON: You do not get the idea in there that this commissioner needs to give the defendant reasonable time. Let us put it in there.

MR. BURNS: Why not say this: Take Mr. Wechsler's motion and then add "after providing the defendant an adequate opportunity for preparing his defense."

MR. WECHSLER: Exactly. I accept that.

MR. HOLTZOFF: You do not need to put it that way because there is no defense, as such, in a preliminary hearing.

MR. BURNS: There is. He has been arrested.

MR. ROBINSON: That is the same question they were dealing with in this courthouse before Judge Hincks' Committee, dealing with the question of the commissioner, and it was pointed out there that a lot of our trouble with commissioner proceedings is we do not distinguish between the two functions of the commissioner, namely, while he is acting as a binding-over authority as distinguished from the one when he is trying a petty offense as a trial magistrate. When he is merely binding over you have something like the grand jury proceedings. It is merely a charge.

MR. BURNS: But time and again a defendant can be held for the grand jury and they turn in no bail. It is after all part of the judicial process and certainly he ought to be entitled to put on his witnesses.

MR. HOLTZOFF: We have all that there.

MR. CRANE: We are just talking here. Isn't that just what happens; if he does not waive the commissioner may hear it or the magistrate may hear it immediately, or you give him a reasonable time?

MR. HOLTZOFF: You do not call it a defense.

MR. CRANE: It is not a defense but he can hear the charge or the evidence as to the charge immediately or within a reasonable time.

MR. ROBINSON: Therefore you think it should be left out or put in?

MR. CRANE: I did not criticize any motion, but it strikes me that is what really happens. No matter what you say, he will hear it at once. He will say, "Go on and let us hear the case" or he will give a reasonable time.

MR. BURNS: What they are trying to aim at, it seems to me, is two things: First, the evil of unreasonable postponements; and, second, that he ought to be given an opportunity to present his side.

MR. HOLTZOFF: Mr. Wechsler's motion merely improves the English of the provision without changing its meaning.

MR. WECHSLER: I did not purport to change the meaning, but it just seemed cumbersome to me.

MR. SEASONGOOD: I think you had better leave out

there "immediately or after postponement", because you say in (b) that he has to allow the defendant a reasonable time to consult counsel, and if you say here "immediately" there is an inconsistency.

MR. WECHSLER: If you say "within a reasonable time", that is all right.

MR. HOLTZOFF: I call for the question on Mr. Wechsler's motion, Mr. Chairman.

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

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed "No."

(Chorus of "Noes.)

THE CHAIRMAN: There has to be a showing of hands.

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

THE CHAIRMAN: The motion is carried.

dz MR. YOUNGQUIST: May I have the exact language?

MR. WECHSLER: "If the defendant does not waive examination the commissioner shall hear the evidence within a reasonable time." That is the substitute for the sentence in lines 21 to 23.

THE CHAIRMAN: Anything further on this section?

MR. HOLTZOFF: Mr. Chairman, I move to strike out the last sentence of the section. I think it is unnecessary. It is one of those minor matters that can be handled by the Administrative Office.

THE CHAIRMAN: How could the Administrative Office handle that?

MR. HOLTZOFF: Oh, the Administrative Office issues instructions as to how papers shall be filed, how they shall be transmitted, and so on.

MR. ROBINSON: Isn't that a very good provision? Hear you have a commissioner where over in district A, we will say, issuing a warrant, and it is executed in district B, at a point a hundred miles away, and the return is had before a commissioner in that district. Now, what would be more natural than for the commissioner before whom the accused is brought to be required to notify the original commissioner, so he can find out what happened about this complaint that was filed before him and this warrant that was issued by him? Isn't that reasonable, that a process issued by a court should come back to that court?

MR. HOLTZOFF: It doesn't now. I do not think it is of any interest to the commissioner. He is through when he issues the warrant, unless the person is brought before him later on.

MR. ROBINSON: That is one of the troubles with

the commissioner practice too. There are lots of tag ends that are loose. There is no connected procedure.

MR. LONGSDORF: Isn't that because of some experiences had with commissioners who issued the complaint and had no record of what the document was and therefore they could not make up their accounts properly?

MR. HOLTZOFF: No, because the commissioner charges so much for issuing the warrant. Now, he has no other charge he can make in the same case unless later on the prisoner is brought before him, when he makes a charge for conducting the hearing.

Now, I think this requirement may satisfy the commissioner's curiosity ~~too.~~ It serves ~~an un~~useful purpose.

MR. GLUECK: It really might just as well say that the commissioner shall keep copies in triplicate. It is that sort of thing.

MR. HOLTZOFF: Exactly.

MR. ROBINSON: I discussed this sentencewith the members of the Administrative Office and they seemed to think it would help in keeping accounts and handling the administration of the commissioner's office.

MR. HOLTZOFF: If it does that, they can issue an instruction.

MR. ROBINSON: What is the objection to it, Alex?

MR. HOLTZOFF: My objection is this, because we ought not to bog down these rules with provisions as to petty administrative matters of this kind. If we can take out one here and another there, and so on, why, we can condense the rules considerably.

MR. GLUECK: I second the motion, Mr. Chairman.

THE CHAIRMAN: You have heard the motion, to strike out the last sentence, beginning on line 38. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is again in doubt. Show of hands. All those in favor?

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

The motion is lost.

A motion is now in order to adopt 5 (c) as amended.

MR. WAITE: Mr. Chairman, before you bring that up, I would like, pro forma, to propose an addition to this Rule 5. I say pro forma because I know perfectly well it will be lost, and I do not say thatas Judge McLellan did with the idea perhaps that then it will be carried, but I want it in the record, and if you will

permit me, I would like to explain why I make this proposal now and why I make several others that I am going to bring up later.

I have had Jim put around mimeograph copies of the proposal. You have one up there.

Proposal, Rule 5 (b). I say I would like to explain I want to bring it up even though I do not think it will carry. My idea of the purpose of these rules is three-fold.

In the first place, we want to codify certain practices; in the second place, we want to make clear those practices which are not now clear; and, in the third place, we want to add practices which might be desirable, and which haven't been followed.

It seems to me that when you put this out to the public we ought to put out things which seem reasonably wise in order to give the bar a chance to comment. If we put something in that the bar does not like, we will hear from it and we can take it out, but if we put in something which is only fairly wise, there will be a great many members of the bar who have never thought of it. There are lots of things in here that certainly I would probably accede to as wise, that I have never thought of. We ought to give them a chance to express themselves, and if we think of something they might like, that might be wise, it is

better to call their attention to it than to leave it out.

Now, one of the proposals that has been advocated time and time again, and advocated by men of very considerable prestige, is this proposal 5 (b). I do not care anything about the form of it. The gist of it is that at the preliminary hearing the commissioner may interrogate the accused, after giving him full warning that he is under no obligation whatsoever to answer. If that explanation is given, that he is under no obligation to answer and that what he says may be used against him, it cannot possibly be called compulsory self-incrimination. On the other hand, it is a procedure which will undoubtedly elicit a great deal of evidence that might not otherwise be developed. It is a procedure that is followed informally in my own district, and I must say it is perfectly astounding the number of trials that it has saved because of the confessions of guilt that are immediately elicited in that way.

I know that there is a strong desire on the part of a great deal of the bar for something of this sort and I therefore propose that we put it in, with the idea that if the bar does not like it, it will strike it, but at least we will give them a chance to say whether they like it or do not like it.

My motion is that we add to Rule 5 (b)

substantially as it is written in this mimeographed matter.

MR. LONGSDORF: Mr. Chairman, may I ask a question of Mr. Waite? There is nothing in here about whether that shall or shall not be reduced to writing.

MR. WAITE: No, that had not occurred to me. I do not know that I have any particular interest in that point.

MR. LONGSDORF: There are lots of state laws that require reduction to writing of the testimony taken, that is, translated into depositions.

MR. WAITE: I certainly would not object to that addition, if anybody thinks it is wise.

MR. LONGSDORF: I mentioned it because I thought somebody would ask about it.

MR. HOLTZOFF: The motion has not been seconded.

MR. DESSION: I second it.

MR. CRANE: I second it, for discussion, at least.

MR. SEASONGOOD: The point suggests itself to me, in opposition, is that the magistrate, if the person refused to answer questions, would draw an inference that he should bind him over.

MR. CRANE: The reason I seconded it was this: It came up in connection with this so-called investigation as to third degree, and some of us who have had something to do with it were troubled with it in our state. I made

two or three addresses before some bar associations and had suggested that I was not satisfied with the rule of leaving the question to juries. That is, you go further than anything you adopt here, and therefore they should never permit any testimony of a police officer as a confession made to him by a defendant when arrested at any time; and that the defendant may be questioned or his confession or statement taken before a committing magistrate for the first time.

That was going pretty far, and I do not advocate it, may I say, because it is a law, a rule that we have in our own state, but it certainly is the only way to cure the evil of leaving the question to so many people who never saw a criminal in their lives and never saw a criminal court, and the objection to it is that a question of fact should be left between the officer and the defendant. I advocated that there shall be no testimony from any officer, captain of police or anybody like that.

MR. HOLTZOFF: That is not included in this.

MR. CRANE: No, I know it is not. I mentioned that the way to meet that would be to have such a condition as this, which is that the committing magistrate, which is the continental way, should ask all these questions. That is the way in all hearings in civil law, because the one who does the questioning is the judge, not

the police officer. This is along that line. This is a live question and certainly if you are going to let the officer take his testimony too, that is volunteered, and let him testify in court, that is volunteered too.

MR. BURNS: Mr. Reporter, I think it is an excellent suggestion, but I wonder if we ought not to take into account what effect this would be likely to have on the rules in Congress. I think this is a rule which would never survive congressional attack.

MR. WAITE: I have an idea that if I were as persuasive as Mr. Medalie, for instance, knowing what I do about the actual processes, that I could go before a group in Congress and persuade them. I could not do it, but I think Mr. Medalie, if I could persuade him to go before Congress, could persuade them to adopt it.

MR. HOLTZOFF: I am afraid you do not know the Judiciary Committee. You would never get them to O.K. any set of rules that had a provision of this kind.

In so far as the continental system is concerned, my understanding is that these magistrates, or whatever they call them --

MR. WAITE: May I interrupt just long enough to say that I do not propose anything like the continental system?

MR. HOLTZOFF: I understand that.

MR. WAITE: And I hope nobody will suppose this is that kind of thing and get tough.

MR. HOLTZOFF: No, but I just wanted to make this comment, that they are professional men who devote their whole time to making investigations and questioning arrested persons. After all, many of the United States commissioners are insurance agents, real estate agents, postmasters, and many of them have only half a dozen cases a year in their capacity as commissioners, and I think they would do a lot of harm too, caused by asking questions in a bungling way.

MR. WAITE: My idea is simply this, that what we want to do by our criminal trials is to elicit the truth, and if we can elicit the truth without harm to the justice of the matter, we ought to do it, and I cannot see, if you say to the accused that, "You do not have to answer," and if you go further and say that his failure to answer, say, by implication, that his refusal to answer shall not be used against him - now, I bring that in because this matter was up once before in a committee, on which I was functioning, and the proposal was that we should go further and that he should be told that if he did answer, his answers might be used against him and, moreover, if he refused to answer, his failure to answer might be used against him, and the argument was that that really coerced

him into answering, and I am perfectly willing to agree to that. So I carefully left out of it any provision that his failure to answer might be used against him, but if he is told carefully that he need not answer, if he does not want to, and he is warned to keep his mouth shut, then he cannot possibly say he is being coerced within the meaning of the Constitution.

And it does seem to me that the examining magistrate's questions are a fair and legitimate, and certainly effective in many cases, way of eliciting the truth. The policeman can ask questions, the prosecuting attorney can ask questions, everybody can ask questions but the examining magistrate, and if he asks them under circumstances where there is no abuse, it seems to me that is the logical way to handle it.

MR. HOLTZOFF: I wonder if you are not overlooking the fact that the magistrate knows nothing about the case? He hasn't enough of the background of the case to enable him to conduct a really intelligent interrogation. I think that the average United States attorney would be afraid to have this kind of interrogation conducted, for fear that some bungling questions might spoil his case for him.

MR. WAITE: There I would say that there are two fallacies. In the first place, I agree that the magistrate might not be expert in doing it, but that is no reason why

he should not attempt. Now, your suggestion that he should bungle the case is a suggestion that the prosecuting attorney has a case where he does not want the truth to come out, and I flatly disagree with that. Whatever the magistrate asks, he will ask to elicit the truth, and if an answer comes out that is derogatory of the man's guilt, such as that he is innocent, so much the better, even if the prosecuting attorney cannot get a conviction in those cases.

I want to go further, if I may. You speak about Congress. I don't know whether it would go through or not, but I think if we feel it is a good rule, we ought to put it in. In fact, I would go so far as to say that even if we are doubtful about it being a good rule, if we think it might be a good rule, we ought to put it in in order to give the other people a chance to comment on it and throw it out, if they don't like it, rather than leave it out because we are afraid they are going to throw it out.

MR. HOLTZOFF: Congress is not going to strike out one rule or another. They might attack a rule like this and, as a result of this rule, they may chuck our whole set of rules into the wastebasket.

MR. WAITE: I cannot conceive that we have to get something that is so integrally perfect that Congress will take it all or nothing. If that is so, we might just

as well quit right now.

MR. CRANE: I do not want you to be misled about my seconding of the motion. I seconded it merely for the purpose of developing discussion. There is another thing to think about, and I used to think of it one way until I was familiar with criminal trials, and since then my thought has been changed, and that is this idea that a man need not testify against himself and that there should be no presumption against him in case he does, presumption of guilt; and, I repeat, I used to think that was a terrible thing, because the mind immediately reaches the conclusion that he is guilty if he won't testify. But my experience has changed my mind, and I think that is a salutory rule, although I think perhaps modified by public opinion somewhat, because I have known men who have been brave enough to take the rap, as it is called, to protect some members of their own family.

I know of a man who did it here in this city, to protect the reputation of many, many high officials, and he was a good man, he was not a gangster; and I have seen three instances of that, where it was a silly thing perhaps to do, but they did it, and it prevented more damage than anything that had happened - just the conviction of those men. And there are two sides to all those questions and it may be we have to go slow in saying that

a man can be questioned when the law gives him the privilege of keeping his mouth shut, even if he goes to jail for it, and that perhaps might be his privilege of having a magistrate questioning him or anybody else. Why, if he takes the stand, if he testifies, or makes a statement before the magistrate, the magistrate can question him now to his heart's content - he waives his privilege as soon as he testifies. If he appears before the commissioner and testifies, he can be questioned. It is only when he wants to keep quiet and say nothing that the problem arises, and I do not know as I would want to force him to do it.

I say those are things to which there are two sides. They are great human questions; not so much a matter of law. As happens so many times, you have theories which are perfect but human nature breaks under them, and you have to get on middle ground.

MR. WAITE: Your opposition is a little different from the opposition of Mr. William S. Forrest, when I brought it up once before. He said, "Why, Waite, that is a perfectly atrocious rule, because the amateur criminal will tell the truth and he will be caught thereby; the expert will know how to lie and you cannot get him, and it is not fair to get the amateur if you cannot get the expert."

MR. CRANE: That may be true, but I have seen very

few cases in this state where a man did not take the stand and the presumption was not against him in the minds of the jury, and they convicted him; but whether or not he should be questioned, if he wants to keep quiet, he can take the risk is another matter.

MR. WAITE: I did not propose he be put on the stand.

MR. CRANE: No.

MR. WAITE: I do not propose that he should be required to answer. This is nothing --

MR. CRANE: True.

MR. WAITE: (Continuing) -- perfect, but I am not going to direct he be questioned when he fails to take the stand in court.

MR. CRANE: That is all linked up together, and they are difficult questions. I am only stating from experience what my feeling is, because I started out with the idea, and I have seen these things happen.

And, of course, when they speak of Congress, I agree with what has been said here, you take the Congress, you take the Legislature, why, they are just men like ourselves, they are all citizens, they just reflect what we feel around here. They are no different because they are up in Albany or down in Washington; they are just fellow men. They speak what is in their hearts, they feel

what is in their hearts, and they respond to us, not the books they have read; they respond to what they have seen in human life round about them, in the cities, in the country, or anywhere else, and I find they come pretty near - unless it is simply a legal question - they come pretty near answering to what the people feel about it.

MR. HOLTZOFF: I call for the question, Mr. Chairman.

MR. CRANE: Now that we have had our say, I withdraw my second.

MR. HOLTZOFF: There were two seconds.

MR. CRANE: Oh, were there two?

MR. LONGSDORF: Can't we leave it up to the court? The court will pass on it before it goes to Congress.

MR. HOLTZOFF: Yes, but we are submitting a set of rules that are recommendations to the court.

MR. LONGSDORF: And the question is whether we want to recommend a rule such as this.

THE CHAIRMAN: I think it was definitely said at our last meeting in Washington that any member of the Committee or any group of members of the Committee would have the right to submit an addendum of rules that they would have liked to have submitted to the court, even though they do not meet with the acceptance of the majority of the Committee, and I think it is very much in order that

the right should be accorded. I think our primary obligation is to the court to submit to them our best judgment. They may conclude what one member or what a minority submits has more wisdom in it than the majority of the Committee. If they do, that is what they will submit in turn to Congress.

I do think there is something very real to what Mr. Holtzoff said about the attitude of Congress. I happened to be in attendance at some of the hearings on the civil rules - I had been asked to come down and make a very brief statement - and I know at one stage of the game how near the whole set of civil rules came to being wrecked. It was just a fortuitous circumstance that one man happened to be in the room who could talk the language of the Judiciary Committee, and I think at times he played them pretty hard, but he got them back and the rules went through. But that is an exceedingly difficult Committee to talk to, because it is made up of city lawyers and country lawyers, from the east, south, north and west, and you have really just got to know the combination.

(Discussion off the record.)

MR. WECHSLER: May I ask Mr. Waite one question before this come to a vote?

THE CHAIRMAN: Yes.

MR. WECHSLER: Why do you think this interrogation

by the magistrate under all these limitations is better than the ordinary kind of police interrogation that you get now, subject to the type of limitation that the Committee has already voted on, on police interrogation in one of our rules?

MR. WAITE: I will put it frankly, partly because I find so many defense attorneys are scared to death of it. Men like William S. Forrest -- perhaps you know who he was -- of Chicago --

MR. WECHSLER: Yes.

MR. WAITE: (Continuing) -- the ablest defense counsel I ever knew of, a man of absolutely unquestionable integrity, was opposed to it on just exactly that ground, that it would result in a great many convictions, not unfair convictions, except as he defined "unfair," which was that anything was unfair which was not precisely in accordance with the rules of law. The rules of law are now that you cannot interrogate and, therefore, to allow interrogation would be unfair, and inasmuch as it would result in convictions, it would be unfair. I have heard so much of that expressed fear.

MR. WECHSLER: That is not the point of my question. The point of it was that you now have a typical form of police interrogation of arrested defendants, and while that somehow is accompanied by abuse, I think we

could hit against that danger and do so in the rule that used to be an accompaniment to 5 and has been transposed. It seems to me that your theory must be that you want to shift the normal inquisitorial function that accompanies arrest from the police to the magistrate.

MR. WAITE: No, not at all. It is a matter of psychology. Apparently, I don't know why, I will have to admit that, but it does seem to be the fact that a man will often answer questions under those circumstances where he will not answer to the police. We can see how that psychology has grown up, though I do not purport to explain it, but it does seem to be the fact. Of course, if the police use a rubber hose on him, why, of course, he is going to answer, but if the police do not use it, he is much more likely to answer to the magistrate than he is to the police, and I have in mind of course not simply questions, "Are you guilty?" but here is a burglary charge:

"Q Where were you that night? A Well, I was in Jim Smith's blind pig.

"Q Who was with you? A Tom, Dick and Harry."

Now, those are fabrications on the spur of the moment. When it comes to the trial, he is appalled, and his attorney is appalled, to discover that Jim Smith's blind pig was raided the night before and it wasn't open

that night. Therefore he has to figure out some other place where he was at that time. And if Tom, Dick and Harry were in jail that night, he has got to figure up some other companions, and when he does figure them up, and what he says at the trial is contrasted with what he said at the time of the magistrate's interrogation, the jury is quite likely to get at the truth much more accurately than if he had not been asked in the magistrate's examination and had not answered, and it seems to be the fact that they do answer those questions.

MR. WECHSLER: I think the defendant is much more apt to answer the police, if he is questioned properly after he is arrested, than he is to answer the magistrate after he has seen his lawyer.

MR. McLELLAN: But he hasn't seen his lawyer. He is in what he thinks is a courtroom and he is scared to death and is afraid if he doesn't answer something that the magistrate will draw an inference against him. It isn't fair to him.

MR. SEASONGOOD: Which he will.

THE CHAIRMAN: You have heard the argument, which has been rather full. Are we ready for a vote?

MR. HOLTZOFF: I call for the question.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

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

MR. YOUNGQUIST: Before a vote is taken, Mr. Chairman, on Rule 5 (b) as it now is, I just want to call attention to the sentence beginning in line 32. In view of the fact that we have now provided that a copy of the complaint shall be attached to the warrant, we can omit a lot of that language, but perhaps that should go to the Committee on Style rather than take the time now. I merely call it to your attention.

THE CHAIRMAN: Will you keep it in mind, Mr. Youngquist?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of Rule 5 (c) as amended say "Aye." Opposed "No."

Carried.

We will proceed to Rule 6.

MR. WECHSLER: Mr. Chairman, there is a point in the commentary on Rule 5. Do you want to hear that?

THE CHAIRMAN: Yes, indeed.

MR. WECHSLER: I call attention to Subdivision (a) of the commentary, which is to be reworded. That

deals with the point about United States commissioners that we passed on. Down in the middle of the page, "Note to Subdivisions (b) and (c)," there is this statement: "It is the Federal practice to give a defendant a preliminary examination although no provision of the Constitution and no statute requires it."

I do not understand that to be true, that no statute requires it. It seems to me that 18, 591 (3) and (5), and quite specifically the provision in Title 5, dealing with the FBI, do require binding over for preliminary examination.

MR. ROBINSON: Yes, Herbert, we have studied that carefully and we will be glad to talk it over with you.

MR. WECHSLER: All I mean by preliminary hearing is the duty to bring the person arrested before a magistrate, who can discharge him if there isn't probable cause or, if there is probable cause, who can admit him to bail or hold him. This says that is not required by statute. It seems to me it is required by at least four statutes.

THE CHAIRMAN: Suppose Mr. Robinson, Mr. Dession, Mr. Holtzoff and yourself canvass that situation and bring it up later.

Rule 6. Any questions on (a)?

MR. HOLTZOFF: Mr. Chairman, I have a question as to the form of that rule. I think it is all right in substance. I rather like the form in which it appeared in Tentative Draft No. 5, and I think it is preferable, and I suggest that it be reworded to read as follows: "The court shall order a grand jury to be summoned at such times as the public interest may require. The grand jury shall consist of not less than 16 nor more than 23 persons."

MR. ROBINSON: Of course, you first sentence is not in Draft 5. You more or less intimated it was.

MR. HOLTZOFF: I meant the second sentence was, George, but the first, I think, was not. My suggestion relates to the phraseology of the first sentence. I think it ought to be in the singular rather than in the plural, and I think the second sentence ought to read in the same manner as it did in Draft 5.

MR. SETH: The first sentence was intended to provide that two or more grand juries might be going on at the same time, wasn't it?

MR. DEAN: The statute, as I recall, says that can be in some districts and not in others. How many are you allowed in this district?

MR. MEDALIE: All you want. This courthouse just crawls with grand juries.

MR. DEAN: I think in the Northern District of Illinois they can have only three, or something like that. There are statutory limitations or something.

MR. MEDALIE: There is one other thing that I think we leave out. This does not say what you do with a grand jury when you have it, how long you can keep it.

MR. ROBINSON: Yes, it does.

MR. HOLTZOFF: Yes, I think it does.

MR. ROBINSON: Very clearly and specifically.

MR. MEDALIE: Oh, I overlooked that. Where is that?

MR. HOLTZOFF: Line 59.

MR. MEDALIE: Wait a minute. Let me make sure.

MR. SETH: 59 and 60.

MR. HOLTZOFF: Lines 59 to 61.

MR. MEDALIE: Well, as the tenure of power is not affected by the beginning or the ending of the term, when does its term end?

MR. HOLTZOFF: It says, "A grand jury shall serve until dismissed by the court but no grand jury shall serve more than eighteen months."

MR. MEDALIE: That is very, very well covered.

THE CHAIRMAN: Any further comments on section (a)?

MR. YOUNGQUIST: Is that proposal that "The court

shall order a grand jury to be summoned" --

MR. HOLTZOFF: "at such times as the" --

MR. YOUNGQUIST: (Continuing) -- "at such times as the public interest may require"?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I second the motion.

MR. ROBINSON: I would like to speak against the motion. It is hard for me to see why we need so many particular or specific statutes on that subject for certain districts whereas the requirement is shown to be a generally needed requirement in other districts. We have run through the United States Code here, and we find for the Southern District of New York and for certain other districts which have a population of over 400,000 or something of that kind that they may have such-and-such grand juries and a very long and involved statute providing for more than one grand jury at various places.

MR. YOUNGQUIST: May I interrupt just to say that my interpretation of it is that under the provision "order a grand jury at such times" the court may order any number it chooses to.

MR. ROBINSON: I understood you to say "at such time."

MR. YOUNGQUIST: "such times".

MR. ROBINSON: What is the objection to leaving

it as "grand juries" then? Why couldn't the court order two grand juries at the same time?

MR. HOLTZOFF: They could. I then putting it in the singular would give the power to the court --

MR. ROBINSON: We considered that very carefully and we felt, Alex, unless we made it "grand juries" it would not be clear to the bench and bar that we do mean that there may be more than one grand jury sitting at the same time.

MR. HOLTZOFF: But "and in such number" is very ambiguous and may give rise to the thought that meant number of members of the grand jury.

MR. ROBINSON: I thought you had us add that, didn't you, George?

MR. DESSION: No, I don't recall.

THE CHAIRMAN: Doesn't the phrase "in such number" when taken with the second sentence make it perfectly clear that there may be more than one grand jury at a time?

MR. DEAN: I should think so.

MR. LONGSDORF: I had that idea.

MR. DEAN: I thought this authorized any number of grand juries you wanted in any district.

MR. HOLTZOFF: I thought "in such number" meant the number of grand jurors.

MR. LONGSDORF: No.

MR. DEAN: No, no.

MR. LONGSDORF: I didn't think so.

MR. ROBINSON: If it is perfectly clear, as Aaron suggests --

MR. HOLTZOFF: It is not clear to me.

MR. ROBINSON: (Continuing) -- and it is such a revolutionary idea in a good many places, we do have trouble because I do not think this statute provided for a grand jury summoned at one term to be held over by the court so as to take care of investigations begun at that term but not completed until a subsequent term.

Now, the Supreme Court has at least two cases on the docket now, the Evaporated Milk case, from George Longsdorf's district, and also the Johnson case from Chicago, in which those statutes have got the court into some bad snarls.

MR. HOLTZOFF: You take care of that in 6 (g).

MR. ROBINSON: Just hold that moment. You will find that is involved in this paragraph as well as later ones.

In other words, we want it to be clear that a district judge does not have to wait until a term of court has adjourned and another term has begun before he can call another grand jury.

MR. YOUNGQUIST: I was confused by that phrase "in such number". Let me suggest, in order that there may be no question about the meaning, that you say, "The court shall order one or more grand juries to be summoned at such times as the public interest may require."

MR. ROBINSON: Our question is one of style. You have one "grand juries", haven't you? Is that construction satisfactory to you?

MR. YOUNGQUIST: I would rather sacrificestyle to clarity.

THE CHAIRMAN: "in such number" is certainly ambiguous.

MR. DEAN: I think this would clear it up, "The court shall order one or more grand juries".

MR. YOUNGQUIST: Yes, I would be glad to accept that.

MR. ROBINSON: No one objects stylistically?

THE CHAIRMAN: The motion is to substitute, "order one or more grand juries to be summoned at such times as the public interest may require", and strike out "and in such number". Is that agreeable to you?

MR. ROBINSON: Is that part of the motion, to strike out, Aaron?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: What was the next sentence?

MR. HOLTZOFF: The next sentence, I suggest, should read as it does in Tentative Draft 5, "The grand jury shall consist of not less than 16 nor more than 23 persons."

My reason for objecting to the present wording is this, that the present wording provides how many shall be summoned but it does not say how many the grand jury shall consist of. Therefore I think we would do better to revert to Tentative Draft 5, which is clear rather than ambiguous.

MR. DEAN: Seconded.

THE CHAIRMAN: I don't quite follow that.

MR. MEDALIE: This is pretty well drawn. It provides that you call a certain number of persons but out of that number of persons you must produce not less than 16 nor more than 23. You might call 50.

MR. HOLTZOFF: Wait a minute. There is no direction here as to --

MR. MEDALIE: What constitutes the grand jury.

MR. YOUNGQUIST: That is right.

MR. HOLTZOFF: Whereas in Draft 5 we define it.

THE CHAIRMAN: The way I read it, it isn't more than 23 nor less than 16.

MR. YOUNGQUIST: Suppose he calls 23 and only 15 show up?

THE CHAIRMAN: He hasn't got a grand jury.

MR. ROBINSON: No; he has to have that many members.

MR. YOUNGQUIST: I know in our statutes and I think it is quite general, there is a very specific description of what a jury, a grand jury, consists of, just about as Alex says, that a grand jury shall consist of not more than 16 nor less than 23 members. That is all there is to it.

MR. HOLTZOFF: That is what we decided last time.

MR. YOUNGQUIST: You describe what a grand jury is, having previously given the court authority to order a grand jury summoned. One ties in with the other.

THE CHAIRMAN: Hasn't the point been made that it should provide that there shall be a sufficient number called as the experience in that district indicates is necessary to net not less than 16?

MR. MEDALIE: It is really important for this reason. I can show you that in New York State. I had one experience, impaneling a grand jury in Albany, way back in 1928. Under the statute applicable there, the commissioner of jurors picked 23 men, and whichever of those showed up constituted the grand jury.

In New York and Kings counties the commissioner of jurors under a court order brings in a panel and out

of that panel the court picks 23.

MR. HOLTZOFF: My point is we nowhere in this present form define what the grand jury shall consist of.

MR. ROBINSON: The word "members" takes care of that, with a little amount of common sense.

MR. DEAN: The statute, in substance, contains this provision about calling of grand jurors:

> "If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury."

MR. HOLTZOFF: I should like to preserve the definition in our fifth draft, namely, defining who shall constitute a grand jury, "The grand jury shall consist of not less than 16 nor more than 23 persons." If you want to add anything about directing the summoning, I do not object.

MR. ROBINSON: This says, "to provide not less than 16 members", and that will be the minimum, "nor more than 23", which will be the maximum.

MR. HOLTZOFF: But that is a lefthanded way of

get at it.

MR. SEASONGOOD: Strike out the words "to provide" and say "that there shall be"; would that do it?

MR. HOLTZOFF: The way it is phrased now, it is a sort of lefthanded way.

MR. DEAN: This provides that they shall be summoned so that there shall be not less than 16 nor more than 23 members for each grand jury.

MR. YOUNGQUIST: You still have no direct definition.

MR. ROBINSON: The statute defines it. We are not changing the statute.

MR. HOLTZOFF: This is supposed to supersede the statute.

MR. ROBINSON: Not at all.

MR. YOUNGQUIST: I would suggest the second sentence be stricken entirely. You don't need it. The statute says how many there shall be and how they shall be called, and we all know every judge in every district knows how many to call for in order to have the required number.

MR. CRANE: Why don't you say, "to provide for a grand jury of not less than 16 nor more than 23"? That is what you have said, but it just makes it a little clearer.

THE CHAIRMAN: "to provide a grand jury of not less than 16 nor more than 23 members"; is that all right?

MR. HOLTZOFF: I think you ought to have a definition of "grand jury."

THE CHAIRMAN: You have it.

MR. HOLTZOFF: No.

THE CHAIRMAN: Not less than 16 nor more than 23 qualified voters picked by the court.

MR. ROBINSON: Well, the Reporter must have had some purpose in changing the language of the preceding draft.

THE CHAIRMAN: He wanted to get more than 23 called because if 23 were called, they might be scaled down to less than 16.

MR. ROBINSON: That is right.

THE CHAIRMAN: Anyway, he thinks a full jury of 23 is better than a skinny jury of 16. That is what he is trying to say here, I think.

MR. ROBINSON: We did have some requests or recommendations coming in from district judges to the effect that the number of persons they felt they could call for grand jury duty was more restricted than they felt it should be. They wanted some express statute that they could summon -- if it was a situation where they thought they needed to call 50 people in in order to get 16

that they could summons 50.

MR. HOLTZOFF: There is no limitation of the number they can call.

MR. ROBINSON: More than that, if there are going to be more than one grand jury sitting at a time, they would have to call an additional number of prospective members.

MR. HOLTZOFF: They can call as many as they wish. The civil rules, for example, do not provide how many petit jurors shall be called. They call more than 23 and they select 23 of those called.

MR. CRANE: It is only a question of language.

MR. BURNS: Isn't it simpler to provide for not less than 16 nor more than 23 members as required to constitute a grand jury?

MR. HOLTZOFF: My motion, Judge, was to substitute a definition we had in a previous draft so we would have a substantive statement of what a grand jury is - the grand jury shall not consist of less than 16 nor more than 23 members.

MR. MEDALIE: The trouble is you have a statute and a rule, both of which deal with all the details. Once you adopt the rule, it supersedes the statute, because it cannot be, by this legislation which approves the rule, or where there is no legislation, which is the same thing,

that you have a rule and a statute in crime matters. You have two legal statements on it. That is not good legislation. That is not good rule making. You have to have one or the other. If you are going to fall back on this statute, you don't need a rule.

MR. ROBINSON: I don't think you need it.

MR. DEAN: You could eliminate the second sentence. The first sentence is necessary because you completely change a companion statute dealing with number of grand juries, but you could pretty well, it seems to me, omit the second sentence and just rely on your statute, which is clear.

MR. MEDALIE: The bar won't know about a fundamental thing like that. Really, they don't know.

MR. HOLTZOFF: I think it ought to be in, yes.

MR. DEAN: One thing the statute does, which every jury plan, both petit and grand, has tried to get away from for years, there is no excuse for the bystander types picked in the Middle West. I don't know whether it is different in the East.

MR. ROBINSON: Here, you see, this statute provides for bystander grand jurors too. It is right here in Section 419, Title 28.

MR. DEAN: To improve the situation for grand juries, just as you need to have it improved for petit

juries in many jurisdictions, we had better state that there shall be enough summoned so you will not have to call bystander grand jurors. I think that bystander business is a relic of the dark ages.

MR. HOLTZOFF: Put in the definition of grand jury as I think it should be and then add a sentence to take care of your point.

MR. ROBINSON: It isn't necessary. This takes care of both.

MR. DEAN: No.

MR. HOLTZOFF: You have no definition of a grand jury.

MR. DEAN: Why are you unwilling to say so as to provide that there shall be not less than 16 nor more than 23 members?

MR. ROBINSON: All right with me.

MR. HOLTZOFF: After this explanation, Mr. Seasongood, suppose we define grand jury and then add that "The court shall direct that a sufficient number of qualified persons be called for that purpose"?

MR. SETH: I move it be left as it is.

THE CHAIRMAN: I see what they are aiming at. I would like to suggest adding, "to provide not less than 16 nor more than 23 members for each grand jury without the use of talesmen" because I think it is terrible to use

bystanders on a grand jury, and if that is done anywhere we ought to definitely put in language that precludes it.

MR. HOLTZOFF: Is that ever done in the grand jury?

MR. ROBINSON: The statute permits it.

MR. MEDALIE: It has been done around here with petit jurors - very rarely, but it has been done.

MR. YOUNGQUIST: The grand jury?

MR. MEDALIE: No, it has never been done around here, to my knowledge, with the grand jury.

THE CHAIRMAN: The statute permits it?

MR. ROBINSON: The statute clearly permits it.

THE CHAIRMAN: If you put in "without the use of talesmen" that avoids it.

MR. ROBINSON: This permits a district judge to avoid it, without talking about talesmen, or whatever we call them.

Remember, we are working on the fundamental philosophy of calling in to the district judge an adequate number to make the machinery work right, so we are saying to him, "You can avoid bystander jurors by dismissing them until you make up a sufficient panel to make up as many grand juries as you need."

MR. HOLTZOFF: My understanding of the statute is that bystanders may not be used for grand juries.

MR. SETH: That is what I thought.

MR. HOLTZOFF: According to Section 419 of Title 28 you can use bystanders as talesmen for petit juries but not for grand juries.

MR. ROBINSON: I do not see why not, in the light of the last sentence.

MR. HOLTZOFF: That is an optional matter.

MR. ROBINSON: "And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

MR. HOLTZOFF: No.

MR. ROBINSON: "To summon a sufficient number of persons for that purpose."

MR. HOLTZOFF: Read the preceding sentence. It says "not from bystanders."

MR. McLELLAN: In practice I know what that means: If they get a lot of grand jurors in and enough of them have excuses so that you do not have 23, you summon more.

MR. HOLTZOFF: Yes, but not from bystanders.

MR. McLELLAN: But not from bystanders.

MR. CRANE: Why don't you say, "not less than 16 nor more than 23 members, who must constitute the grand jury"?

MR. HOLTZOFF: All right.

MR. CRANE: "who must constitute the grand jury."

MR. HOLTZOFF: I am sure you don't use talesmen for a grand jury.

MR. CRANE: Wouldn't it be all right to say, "not less than 16 nor more 23 members, who must constitute each grand jury"?

MR. MEDALIE: No, because if you do that, you have frozen your grand jury, and if one goes off you no longer have a grand jury, because you say "which must constitute the grand jury." Suppose there were 18 required and you had a grand jury of 18 --

MR. CRANE: You haven't summoned sufficient; you can summon more.

MR. MEDALIE: Let us say you have 18 now and that constitutes your grand jury. You say, "This must constitute the grand jury." That means 18 must constitute the grand jury and that means if one gets sick or dies or is excused or thrown off because he is corrupt, then you have no grand jury, in that language.

THE CHAIRMAN: Wasn't that the thought, that they are supposed to start with 23, and if seven may get bumped off, and you would still have a grand jury?

MR. MEDALIE: Yes, but Judge Crane's language

freezes the grand jury at that number, and there is no grand jury if the number goes down.

MR. CRANE: You can say "and which number must constitute".

MR. MEDALIE: That would be the same language.

MR. BURNS: Why do you have to say anything about constituting the grand juror? Why isn't this language adequate?

MR. MEDALIE: The language which Alex read makes it very clear, covers everything the statute covers, with these additions about ordering more than one grand jury, if you want to, in very simple language. It would cover everything that is in the statutes.

MR. ROBINSON: That is a large order.

MR. MEDALIE: I mean everything that has been read now, including this business about bystanders.

THE CHAIRMAN: We have our first sentence decided upon. Can we get to an agreement on the second?

MR. GLUECK: Why can't you split the second one into two sentences, saying, "Each grand jury shall consist of not less than 16 nor more than 23 persons. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement"?

MR. HOLTZOFF: Just for that purpose?

MR. GLUECK: Or something like it.

MR. HOLTZOFF: I am in favor of that.

THE CHAIRMAN: Do you second Mr. Glueck's motion?

MR. McLELLAN: I second it.

THE CHAIRMAN: Any remarks? All those in favor of that motion say "Aye"?

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. WAITE: I am curious about one thing, Mr. Chairman: Suppose they summon a sufficient number to constitute a grand jury of at least 16, but so many of them are released that there are not 16 left, then can they call in talesmen?

MR. HOLTZOFF: No. Under the present statute you can't use talesmen.

MR. ROBINSON: I would like to withhold the final word on that, Alex. There may be other statutes involved.

THE CHAIRMAN: Let us adopt it tentatively then.

MR. WECHSLER: How does it read?

MR. GLUECK: The second sentence is: "The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement"; the requirement having been previously that each grand

jury shall consist of not less than 16 nor more than 23 persons.

THE CHAIRMAN: All right. May we proceed --

MR. SEASONGOOD: I have something.

THE CHAIRMAN: Yes?

MR. SEASONGOOD: I notice in the Court's Memorandum on page 3 there are further questions as to whether the grand jury considered in its present form and in the present numberof grand jurymen is too cumbersome, as there has been inquiry into the qualifications of grand jurors, and whether the present statute which adopts the qualifications of the state in which the grand jury sits should be modified. Should Federal courts be bound by the poll tax qualifications existing in so many states; and there is a reference to the Conference of the Committee of Senior Circuit Judges on those questions. I do not think we should pass that without consideration. It should be considered.

MR. HOLTZOFF: I want to call attention to this fact, Mr. Seasongood: The Conference of Senior Circuit Judges appointed a committee some time ago headed by Judge Knox to study the question of jury selection. That committee has made a report recently in which it proposed uniform qualifications for Federal jurors throughout the United States, and a uniform system for summoning

veniremen. So it seems to me that perhaps the Supreme Court's question on that point might be answered by the suggestion that that is a matter that is being studied by Judge Knox's committee.

MR. WECHSLER: But the Court knew that. They referred to the committee.

MR. HOLTZOFF: Yes. Therefore there is nothing we can do about it.

MR. SEASONGOOD: They ask whether the jury in its present number is not too cumbersome.

MR. HOLTZOFF: As to the first question, there have been a number of suggestions. I know Judge Hincks' committee, which is studying the question of United States commissioners, among other things, has made a tenative suggestion that the number of the grand jury should be reduced; that the grand jury should be smaller.

MR. SEASONGOOD: I think it is something the Court has asked us to consider, and I do not think we ought to pass it without doing so.

MR. YOUNGQUIST: Mr. Chairman, didn't we decide this at the last meeting, that in view of the work of the Committee of the Judges, this Committee should await the conclusions and recommendations of that Committee before undertaking to specify qualifications and number of grand jurors?

1z

MR. WECHSLER: That report is in.

MR. YOUNGQUIST: It is in now, yes.

THE CHAIRMAN: Did they recommend a change in the number of grand jurors?

MR. HOLTZOFF: No. The qualifications of grand jurors.

MR. SETH: We can't go into that.

MR. MEDALIE: Alex, did you mention the Hincks' conference?

MR. HOLTZOFF: Yes; but they have not submitted any report.

MR. MEDALIE: I gathered that Judge Hincks's associates, the other four district judges, were a little cold toward it; isn't that so?

MR. HOLTZOFF: They were. There is nothing in Judge Knox's committee report which would change the number of the grand jury.

MR. YOUNGQUIST: What about qualifications?

MR. HOLTZOFF: It deals with qualifications, but we do not deal with the subject of qualifications. Therefore there is no overlapping of our work with the work of Judge Knox's committee.

MR. YOUNGQUIST: That would be a matter of statute, then?

MR. HOLTZOFF: Yes.

MR. ROBINSON: Isn't it true that the qualifications of the grand jury are determined largely by the laws of the states, Illinois and elsewhere?

MR. HOLTZOFF: Qualifications to serve on a jury. The law provides that the qualifications of jurors shall be the same as those of the states. The bystander rule is a Federal rule of practice. Now, Judge Knox's committee reports a proposed bill to have uniform qualifications for Federal jurors. But that is a subject which we are not touching in these rules.

MR. ROBINSON: We spent a page on that in the notes, Rule 6, page 4.

MR. YOUNGQUIST: It seems to me, Mr. Chairman, that in view of the fact that we ought to have specific Federal statutes defining qualifications and the method of summoning jurors, that should apply alike in civil and criminal cases, as Alex suggested and as the Committee suggested, and the same qualifications should likewise apply to grand jurors as apply to petit jurors. Now it seems that we cannot deal with the subject in these rules, nor can the civil rules deal with it. It must be a matter of statute, and with that explanation I think the comment of the Court would be satisfied.

MR. HOLTZOFF: Yes.

MR. WECHSLER: But it need not be. Because while

1z

our jurisdiction and the civil committees rules jurisdiction is separated by the distinction between civil and criminal cases, the Court's jurisdiction to formulate rules is not. In other words, the Court could put into effect the Knox plan by submission to the Congress as provided by the statute --

MR. HOLTZOFF: I am not so sure about that, because I am not so sure that qualifications of a person who serves on a jury is a matter of pleading, practice or procedure. And the field of rule making is only pleading, practice and procedure.

MR. GLUECK: If you are right that this is substantive, why did the Court ask us to consider the size of the jury?

MR. HOLTZOFF: I want to say this, as I said before, that these were tentative suggestions that occurred to the individual members of the Court, and I was warned and cautioned by the Chief Justice that these were not thought through and well considered suggestions, or representative views of the Court. They were just points that occurred to individual judges as they went along and as they jotted down tentatively.

MR. GLUECK: Mr. Chairman, I think this raises a very important policy question of this Committee. There must be quite a number of reforms that we may believe

in personally, such as reducing the size of the grand jury; and the question is, what shall we do with those?

THE CHAIRMAN: Those come in in the Addendum that we talked about before.

MR. GLUECK: As individuals?

THE CHAIRMAN: Or as collective groups. Mr. A likes rule so-and-so, Mr. B, C and D like the other.

MR. GLUECK: That takes care of rule, but it does not take care of recommendations as to substantive reforms.

THE CHAIRMAN: I do not think we have any right to propose anything beyond pleading, practice or procedure. I thought we had agreed that matters dealing with officers, creation of new officers, were outside of our scope.

MR. GLUECK: That is true; but take specifically the question under discussion: Suppose we conclude that it is our experience that a grand jury consisting of 12 does the job just as well and does it more cheaply. Now, what are we going to do with such a conclusion if we should agree to that?

MR. HOLTZOFF: I think that is a rule of practice, and we could act on it.

MR. WECHSLER: If the size of the grand jury were a matter of procedure rather than practice, then I

1z

do not see why the qualifications of jurors is not a matter of procedure. I think they both are.

MR. DEAN: Are they proceedings before the district court or before the United States commissioners? That is our test, isn't it?

MR. HOLTZOFF: I think it is within the scope of our authority, but I think it would be a major mistake to go into that.

MR. GLUECK: That is another issue.

MR. SETH: Anything we put in there should be just an expression of our views.

THE CHAIRMAN: Aren't the grand jurors drawn specially? They do not come from the ordinary panel, do they?

MR. McLELLAN: The answer is "Yes" to both. Usually we draw a grand jury and then we draw petit jurors.

MR. YOUNGQUIST: From the same list.

MR. McLELLAN: But there are plenty of jurisdictions where they draw a lot of jurors and design some to petit jury work and others for grand jury work.

THE CHAIRMAN: To be a grand juror in my state you have to be either a Grand Mason or a High Knight of Columbus, the clerk being one and the jury commissioner another. That went on for a couple of years until the

12

judges discovered it and said, "You have got to sprinkle some ordinary citizens in the grand jury. It does not look right."

MR. WECHSLER: Mr. Chairman, I would like to make my view clear on the record as to this jury thing: I think there is a practical difficulty of proposing separate rules for criminal and civil cases. That is a difficulty for us, but it is not a difficulty for the Court, because they could propose the whole thing, having rule-making power in both civil and criminal cases. Now, it may be that the Court had in mind in putting this in that memorandum, getting a recommendation from both the standing Civil Committee and the Criminal Committee, and possibly putting the Knox plan into effect if it is sound by rule. It may be that it is just a casual thought that occurred to somebody noticing that we had not touched the subject. I think it would be sound on a matter of such importance to the Committee to take a position on the Knox Report, which is one of the best jobs I have ever seen emanate from a body of that kind. I personally would like to do it. But if the Committee thinks it should not be, I think the Court ought to be told what the reason is. I think the criminal-civil thing is an inadequate reason, since the two committees could jointly cover the field. Now, the proposition that it is

1z

controversial, that we should not touch it, is quite another thing.

MR. HOLTZOFF: I suggest this, that perhaps we could pass this matter, and after the members of the Committee have had an opportunity to acquaint themselves with the contents of the Knox Report - some of them may not have had that opportunity - at the conclusion of our labors we will take a vote on whether we want to make any concurrence or dissent or recommendation.

MR. MEDALIE: I thought it was distributed.

MR. ROBINSON: It was.

MR. SETH: I read it on the train yesterday, and it is a good report.

MR. HOLTZOFF: It is an excellent report.

MR. WECHSLER: Mr. Chairman, to bring the thing to a head, I will make a motion:

The motion is that there be added to these rules the substance of the Knox recommendation; that it be submitted to the Court separately from the rest with the statement to the effect that there is no point in the Court's adopting it in the criminal rules unless they are also prepared to adopt it on the civil side in the exercise of their rule-making power under the Civil Act.

MR. SETH: That report does not deal with number

1z

at all?

MR. WECHSLER: No, just qualifications.

MR. YOUNGQUIST: I am hardly in a position to vote on that, not having read the report.

THE CHAIRMAN: Will someone second it?

MR. GLUECK: I will second it.

THE CHAIRMAN: Then may we have a motion to lay on the table so as to give those members of the Committee who are not acquainted with the report an opportunity to study it; but let us not bring it up too late.

MR. HOLTZOFF: Seconded.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

With Judge Knox right here in the building, if there is a shortage of these reports we may be able to get enough of them to accommodate everybody here.

MR. ROBINSON: I can telephone to Washington and bring a lot here by Sunday.

THE CHAIRMAN: We will ask Judge Knox's secretary.

Now may we proceed to 6 (b) (1).

MR. GLUECK: In line 1, Mr. Chairman, I suggest

iz

the insertion of the word "for" before "a defendant" just for the sake of clarity.

THE CHAIRMAN: Why can't the defendant himself do it?

MR. GLUECK: Is that the intention?

THE CHAIRMAN: Yes. And everywhere we say "defendant" it is understood he may do these things through his attorney.

MR. GLUECK: I withdraw that.

MR. HOLTZOFF: I move the adoption of this rule, Mr. Chairman.

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

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

MR. WAITE: I would like to suggest to the Committee on Style that in line 13, the first word "is" should be changed to the past tense. The whole provision is that the defendant who has been held, already has been held to answer, may challenge an individual juror on the ground that the juror was not legally --

MR. HOLTZOFF: Pardon me. Held to answer by the commissioner, that means.

MR. WAITE: Then I question the whole thing. How in the world is a man who has been held by the commissioner, add who does not appear before the grand

12

jury, going to know whether a grand jury is or is not qualified?

MR. SETH: This is in case he does know.

MR. McLELLAN: It states "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court."

Now, may I ask this question" "and shall be tried by the court." What does that mean?

MR. MEDALIE: This is what actually happens. There is a courtroom, and you have got your 50 members of the panel, and then they pick 23; and before they are sworn a lawyer may get up and say, "Representing John Jones, who has been held to answer; I challenge Juror so-and-so on the ground that he is not a citizen of the United States, not a resident of the State of New York; he does not have the proper qualifications and is not a resident of the district." And there may be other grounds.

MR. McLELLAN: What is going to happen to the man who has a like right, theoretical right, but has not been held?

MR. MEDALIE: Then he has not the right if he has not been held.

MR. SETH: I think there is a provision later on.

MR. YOUNGQUIST: This rule is the counterpart of a common statutory provision --

1z

MR. McLELLAN: I understand.

THE CHAIRMAN: Did you raise a question, Mr. Waite, on 6 (b) (1)?

MR. WAITE: I guess that is answered.

THE CHAIRMAN: Are there any further questions on (b) (1). If not, all those in favor of it say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(No response.)

THE CHAIRMAN: Carried.

6 (b) (2). Any questions?

MR. SEASONGOOD: Yes. I am against that. I do not think that is a good provision that if there is a disqualified person and it appears that more than 12 joined in the indictment, that it is all right. Presumably that is not true with jurors; but if there is poison in the air, why, the virus is supposed to spread, and if the person who is disqualified participated in the deliberations, he may have induced many of the others to join in the indictment. I do not think that is a good provision at all.

MR. MEDALIE: He may, in fact, be the grand jury. The grand jury, we agreed a moment ago, is the district attorney and one or two grand jurors.

THE CHAIRMAN: Isn't this the law as is?

1z

MR. HOLTZOFF: This is the law as is. It was passed, I think, at the request of Attorney General Mitchell.

MR. SEASONGOOD: Isn't that a different rule than we have in an ordinary jury case? One disqualified juror may have participated in the deliberations and very actively induced the indictment.

MR. BURNS: Suppose you had a case where a defendant was indicted and was able to show beyond all doubt that one of the grand jurors was a person who had a long-standing grudge against him, it seems to me they ought to vacate the indictment.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think this relates to a disqualified person sitting on a grand jury. That is just a person who does not have the statutory qualifications.

MR. MEDALIE: It does not affect a biased person.

MR. SEASONGOOD: One of your grounds of challenge in (b) (1) is if a state of mind exists that may prevent him from acting impartially.

MR. HOLTZOFF: That is bias.

MR. SEASONGOOD: Why, certainly.

MR. HOLTZOFF: But (b) (2) does not relate to a biased grand juror; just with respect to the statutory regulations.

1z

MR. SEASONGOOD: He may be disqualified for bias.

MR. DEAN: He could have been challenged; yet he is in there.

MR. MEDALIE: If that is not clear, we ought to be clear as to what we mean to say in both cases. Do we mean only legal qualification or do we also mean --

MR. HOLTZOFF: Yes.

MR. MEDALIE: I know, but Mr. Seasongood does not agree with you. Do we mean only legal qualifications or do we also mean the state of mind itself? And if we say it in one place we ought to say it in both places; or if we are wrong in one place we are wrong as to both places.

MR. HOLTZOFF: Look back to line 13. It differentiates "legally qualified" and "state of mind".

MR. MEDALIE: Yes. If we want it, we want it in both places.

MR. BURNS: If 6 (b) (2) were applicable only to legal disqualifications, I would not object to it.

MR. WECHSLER: If 6 (b) (2) stands there is no provision for a motion to dismiss on the ground that there was a biased juror.

MR. HOLTZOFF: Is there today?

MR. WECHSLER: Yes.

1z

MR. MEDALIE: I can see a flaw in what I said before. When you impanel a petit jury in a civil or criminal case, you may challenge for bias. After the verdict you may discover the bias, but it is no good to you. In other words, the way this is drawn, you challenge for bias before the man gets a chance to sit. Once he sits you may not challenge for bias. I think the analogy is probably what dictated the structure here.

THE CHAIRMAN: But that is not sound.

MR. McLELLAN: You mean you cannot base an application for a new trial in a civil action upon bias of a juror?

MR. MEDALIE: Can you?

MR. McLELLAN: Yes.

MR. MEDALIE: I doubt it very much.

THE CHAIRMAN: You cannot set the verdict aside automatically, but it is a matter of appeal to the trial judge.

MR. BURNS: It is a basis for a motion for a new trial in our state.

MR. DEAN: How about a plea in abatement?

MR. MEDALIE: The plea in abatement is covered by (b) (2), isn't it?

MR. DEAN: I would think so.

MR. WECHSLER: Is there a plea in abatement now

on the ground that a grand juror was biased?

MR. DEAN: I do not know of any cases, but you have one for prejudicial conduct on the part of the prosecutor. Now, if you had equally prejudicial remarks made by a hostile enemy of yours who sat as a grand juror, I do not know why it would not equally color that verdict of the grand jury. I do not know of any cases, but I do not see why there should not be any cases.

MR. WECHSLER: Whatever the present law may be, wouldn't we want the law to be that after indictment the defendant would have a remedy to attack the indictment on the ground of bias by a grand juror?

MR. SEASONGOOD: I think an indictment is a serious thing, and I do not see why you can't be indicted by a sufficient number of qualified persons.

THE CHAIRMAN: You mean that if there is one man in there who set out to get you, that that should not be a ground for your having a right to move to set aside that indictment?

MR. DEAN: The only penalty is that the Government has to get a new indictment.

THE CHAIRMAN: Do you believe that they should have a right to set aside the indictment?

MR. SEASONGOOD: Sure I do.

MR. MEDALIE: May I point this out: You know,

we must consider the theories of grand juries. We are not accustomed to the idea of the district attorney walking in with a bundle of cases and start presenting them to a lot of clean slates. As a matter of fact, the grand jury sometimes thinks up one or two of its own, decides, for example, that the city administration is crooked, and that is all there is to it, and they are going to find out, or that corruption exists in the Prohibition Unit or the Alcohol Tax Unit, or what have you, and go after it pretty vigorously and insist on investigation. As a result there is the indictment. I do not think indictments ought to be vitiated on that ground. There you have got very definite biases. I think those are biases you have to put up with, and some of them are mighty wholesome. I think you are striking at the foundation of the grand jury system. They are busybodies; they have a right to be. That is what we want them for.

MR. SETH: Isn't a grand juror supposed to bring before the grand jury facts within his knowledge, whether they are presented to him by the United States attorney or anyone? Isn't he supposed to be more or less biased?

MR. MEDALIE: I think so.

MR. GLUECK: That is what you mean by a presentment, don't you?

MR. MEDALIE: Yes. That is a wholesome bias.

MR. BURNS: How about the bias where a grand juror is deliberately out to get someone?

MR. MEDALIE: Well, let us say this fellow is a friend of, say, Sam Seabury, and he decides that the Commissioner of Licenses is a crook, and he is going to get after him; he is a Republican or a mugwump Democrat but not a regular Democrat; and he goes after him with a bias, and he can't get it over unless he gets evidence which is presented to the grand jury which convinces them that there is probable cause to believe that that man committed a crime. I do not think that is a very terrible thing. I think it is a thing we ought not to interfere with. In fact, it is something to encourage. Now, they make mistakes. These runaway grand juries make mistakes sometimes, but it seems to me they do good work too.

MR. BURNS: How would you allow a proceeding to raise the issue as to whether all the grand jurors were citizens, and yet not allow the proceeding to test whether or not this grand jury made a fair presentment?

MR. HOLTZOFF: A trial juror has to be impartial. I do not understand that a grand juror has to be.

MR. MEDALIE: Another thing, you may file an affidavit of prejudice against a judge. All right, you have been indulged; he is out. Now, the next judge you get, you have got to take. Or, having filed no affidavit

of prejudice, you may find out, and often do, that the judge is very much prejudiced. What can you do about it? You have got to have a judicial system made up of human beings, and if you are going to attack it every time because a man happens to be human instead of an adding machine, you are going to hamper the administration of justice. I think we can take a few unfair indictments once in a while, and most of them are not so unfair when they are prejudiced, either.

MR. BURNS: But you permit challenge in advance --

MR. MEDALIE: Before the hearing. You have got that with your petit jury.

MR. BURNS: That is based on the efficiency consideration that you mentioned?

MR. MEDALIE: I think so. Once you get going, don't upset it. But before you get going, you have something to say about the organization of the judicial body. I think that comes near enough to meeting all needs; you will never get perfection on it.

MR. BURNS: Did you want to limit it to legal disqualification?

MR. ROBINSON: This is simply what the Committee adopted at the last meeting.

MR. HOLTZOFF: How about inserting the words "legally disqualified" in line 21? Wouldn't that do away

with any question?

MR. DEAN: That would, if we wanted it that way. That would do it.

MR. SEASONGOOD: In the statute it is "unqualified," which may mean something different. That means he does not possess the qualifications necessary to make him a juror.

MR. HOLTZOFF: That is what this really should be limited to. If the statute says "unqualified", maybe we ought to follow the language of the statute.

MR. MEDALIE: If we use the words "legally disqualified", don't we use clear language?

MR. YOUNGQUIST: I think so.

THE CHAIRMAN: What do you say to the case, where George, A's most violent political enemy - let us take it out of business quarrels or a little business skullduggery; let us put it right down into practical politics - A's violent political enemy gets himself acquainted with the foreman of the grand jury and spends six or eight weeks wining and dining him and his fellows on the executive committee and ultimately brings about an indictment. Shouldn't A have a chance to go to the court andshow up that particular situation?

MR. MEDALIE: No. All the trouble comes from taking extreme examples. Suppose he is his most violent

political enemy just because he thinks he is a crook and has gotten rich at public expense, robbed the treasury, extorted money from citizens having relations with the Government. It sounds bad if you put it one way; I think it sounds fine if you put it still the opposite way.

THE CHAIRMAN: Let me give you an actual case. Down in Ocean County, New Jersey, where we have as corrupt a political machine as Hague runs in Hudson County, the corrupt political boss indicted the editor of the only county newspaper with a real circulation just because he was trying to end the numbers racket and slot machine racket and all that sort of thing. Now, we have a proceeding in our state when that sort of situation arises to certiorari that indictment to trial in the Supreme Court. That has always been effective. If that fellow ever had to go to trial on that indictment of that grand jury, and before the petit jury and the judge in that county, he would have had ten years up his back; and I just do not like that thought.

MR. HOLTZOFF: What sort of charge was made against him?

THE CHAIRMAN: Criminal libel, and a few other things like that. I do not recall what they were. The charge is immaterial when you are on a grand jury. That is exactly what Mayor Hague is doing today to Mayor Donovan

of Bayonne. He has fixed up a fake vice scandal in Bayonne where none existed any more than in any city; the City of Bayonne is decently governed; but Mayor Donovan decided to back Governor Edison. That made a heretic out of him; and Hague went out to get Donovan and Donovan's family and all the other commissioners; and that is up on one of the certioraries which they are taking now, before a commissioner. It looks to me as if there should be some redress for that kind of a condition of anarchy.

MR. BURNS: That is true, but you never catch it with a false indictment. A man never gets his good name back.

MR. McLELLAN: What I wonder, Mr. Chairman, is if you would not cure the trouble if you changed the word "disqualified" in line 21 and the word "disqualified" in line 24 to read "unqualified".

MR. MEDALIE: It would if we knew what you meant by it. If you mean by that to include Mr. Seasongood's idea --

MR. SEASONGOOD: No, I think "unqualified" would mean something different. "Unqualified" would mean he would not have the qualifications for a juror, and "disqualified" for bias.

MR. MEDALIE: Instead of thinking of the words that we want to pick, let us stick to the idea first: Do

we wish (b) (2) to cover a case of bias and hostility? If we do, we will find the words. But let us make sure we agree on the idea.

MR. SEASONGOOD: I suppose there will be some difficulty changing a statute. The statute is there. It has been there since 1934.

MR. McLELLAN: I think we have changed it somewhat already.

MR. MEDALIE: I think we have the power to do this kind of thing if we think it is the right thing to do; but let us decide whether we want to deal with the situation of bias after an indictment has been found. If we agree, we will find the words.

MR. GLUECK: Why don't you make a motion one way or the other?

MR. MEDALIE: I am content now, after this discussion, to leave it as it is; that is, bias before the jury is impaneled but no bias after the jury votes. I may be wrong about it. This says that now.

MR. ROBINSON: I wish we knew what the evil was that the Attorney General was aiming at.

MR. HOLTZOFF: I will tell you what the Attorney General was aiming at. In two or three cases where we had a perfectly good indictment, somebody discovered that a grand juror was not qualified either by not being a

resident of the proper county or the district, or something of that sort, and pleas in abatement were sustained.

MR. YOUNGQUIST: Legal disqualification?

MR. HOLTZOFF: Yes, legal disqualification; and it seems like a miscarriage of justice to reverse a conviction or sustain a plea in abatement on the ground that it was found at a later date that one of the grand jurors was lacking in legal qualifications to serve on the grand jury where, actually, there was a sufficient number who voted for the indictment who were legally qualified. That was the evil aimed at.

MR. GLUECK: That merely means you have some delay in the prosecution. You can draw up a new indictment.

MR. HOLTZOFF: Well, you have got to get your witnesses back, which is a hardship on them; the statute of limitations may have run; any number of things.

MR. MEDALIE: Yes, and you may be dealing with a case that took two months to present to the grand jury.

MR. GLUECK: But all this refers to unqualified jurors.

MR. MEDALIE: Exactly. That is all the statute was intended to cover.

MR. GLUECK: But Arthur's question is, shouldn't it be broader? Shouldn't it include actual bias?

MR. BURNS: May I put an amendment. I think we

raised this question before. I move that line 18 be amended by inserting after the words "on the" the words "ground of legal disqualification"; and inserting in line 19 after the word "juror", "or where a state of mind exists on his part which may prevent him from acting impartially"; and then amend --

THE CHAIRMAN: It should be past tense.

MR. BURNS: (Continuing) -- then amend line 31 by inserting after the word "more", "legally qualified". So that the limitation on the power of the court to dismiss would be as to legal disqualification alone.

MR. SEASONGOOD: I do not see why you do not take the language of the statute and call him "unqualified." It seems to me better.

MR. BURNS: Are we certain that "unqualified" in the statute takes care of the situation of bias?

MR. HOLTZOFF: It was not intended to.

THE CHAIRMAN: But your language does.

MR. BURNS: Yes, I would accept that.

dz MR. SEASONGOOD: I would like to take the bias part and call the other fellow unqualified, which is the language of the statute and, really, to my mind, means a little something different than"disqualified".

MR. BURNS: I think that is right.

MR. SEASONGOOD: The Committee on Style, with the

idea, could lick that into shape.

THE CHAIRMAN: I think that raises the issue very clearly. You move that, Judge?

MR. BURNS: I move that, yes.

MR. DESSION: Seconded.

MR. MEDALIE: The real point is the state of mind existing that prevents him from acting impartially. That is the question before us.

MR. WAITE: I got a little lost on it.

MR. BURNS: As amended it would read, "A motion to dismiss the indictment may be based on objections to the array or on the ground of the legal disqualification of an individual juror or that a state of mind existed on his part which prevented him from acting impartially, if not previously determined upon challenge."

And then change in line 21 "disqualified" to read "unqualified".

MR. HOLTZOFF: I call for the question.

MR. YOUNGQUIST: Do I understand that means, with respect to the second change, that if there are 12 or more jurors, after deducting the number who are qualified, whether legally disqualified or biased --

MR. BURNS: Oh, no. That applies only to legal disqualification.

MR. McLELLAN: Would you help me out by reading

your language again of the first three lines?

MR. BURNS: "A motion to dismiss the indictment may be based on objections to the array or on the ground of legal disqualification of an individual juror or that a state of mind existed on his part which prevented him from acting impartially, if not previously determined upon challenge."

MR. McLELLAN: Would you listen to this, and I think it may be wrong, and it means a couple of more words, instead of "on the disqualification", "on the lack of qualification"?

MR. GLUECK: That is what I had in mind.

MR. BURNS: That is better.

MR. ROBINSON: That is supposed to be the same thing as "unqualified".

THE CHAIRMAN: It is an easier way of stating it.

Are you ready for the question, gentlemen?

MR. MEDALIE: I will be disappointed if you do not debate that very serious problem, because I may be all wrong in my last case on it.

MR. HOLTZOFF: It seems to me we understand the question thoroughly. We might as well vote on it.

MR. WECHSLER: Are we very sure that there is no remedy after indictment now under the present law on the ground of bias of a grand juror?

MR. DEAN: There is some question, I think. I know of a couple of cases.

MR. ORFIELD: Certainly under our new rules they have a right.

MR. WECHSLER: In a matter as doubtful as this, I would fight to keep the existing law, because I feel no conviction to change it.

MR. McLELLAN: We have it in this motion.

MR. WECHSLER: No, this motion would make a motion available after indictment for bias of the grand jurors, as was read by Judge Burns.

MR. McLELLAN: I think that is the law, but by virtue of no statute. I think that statute cut off the attack upon the --

MR. WECHSLER: That does not apply.

MR. McLELLAN: Does not apply.

MR. WECHSLER: I quite agree, but apart from that, I did not know what the law was.

MR. McLELLAN: By the use of the word "may" instead of "shall" we get back to what the law is, I think, that it is discretionary with the trial judge as to what he will rule.

MR. WECHSLER: I am not afraid of that part of it. I am afraid of the bias language.

MR. YOUNGQUIST: I am not quite sure, but I was

under the impression that after the grand jury returns an indictment, the only disqualification that was ground for a challenge or for a motion to dismiss on the ground of disqualification was legal disqualification in the sense that he was not a citizen or resident or something of the sort and did not include bias.

MR. McLELLAN: I dare say you are right in many jurisdictions, but all I know is what is around me, and we have a notion the other way in Massachusetts.

MR. MEDALIE: May I interrupt you for a moment? Arthur, isn't it a fact that indictments of the kind that were found in either Ocean County or in whatever county Bayonne happens to be are usually the products of the prosecutor? A political prosecutor, part of a political machine, can procure such an indictment from a perfectly impartial grand jury.

Now, I have in mind something that came up here --

THE CHAIRMAN: In neither case was there an impartial grand jury. In Ocean County the grand jury is Republican and in Hudson County it is Democratic; both strictly machine products.

MR. MEDALIE: Oh, but didn't you have a prosecutor who belonged to either of the two parties?

THE CHAIRMAN: Surely.

MR. MEDALIE: Let me give you an example -- I will

give you two examples. Recently, within the year - to say nothing about the correctness of the decision, and I do not claim that it was incorrect - the grand jury of one of the counties of this city refused to find an indictment against a prominent political person. You know the case to which I refer and I do not need to bandy the man's name around after this thing is over. Now, in the public mind the idea was two-fold, as indicated by editorials. One was that the district attorney was biased, and I do not say he was biased, and the other was that the grand jury came from a group that belonged to this political leader's following. Now, that is one kind of case.

Another case: About six or seven years ago or eight years ago, an aftermath of the Seabury Investigation, a person who had testified against a man by the name of Flynn, a public official of the Bronx, but not the political leader, was indicted in New York County for perjury. Now, there you had two things in the public mind, that the grand jury probably had a lot of politicians on it who normally would below to the prevailing political party, and the other was that the district attorney was a Tammany man.

Now, your feeling then seems to be in the public mind, and very often in fact when you get that kind of

indictment, it is more largely, though not exclusively, the product of the political attitude of the prosecutor.

Now, no matter what you do here, you will never meet that evil. That is one of the hazards of government.

Now, next, and again I say this without adopting anything that has been said on the subject, it is frequently said, naturally by Republicans, that the present National Administration gets even with people by having them indicted for income tax or what not. I think at least it is overstated but in the public mind the idea is that it is the Administration, the local or National Administration, that succeeds in doing these things. I do not think the evil is so much in the grand jury, if these things exist, as it is with the public officials, if in fact they do exist, as they do on occasions.

MR. GLUECK: But, George, wouldn't you say that nevertheless if we give them one more hurdle that they have to jump, we would reduce this evil?

MR. MEDALIE: You are taking a pebble off the road instead of all the tacks that have been strewn on it for the last three miles.

MR. HOLTZOFF: My objection to this proposal is this, that it will enable defendants to try the grand jury, and if the defendant is in a position to hire expensive counsel --

MR. MEDALIE: And good investigators.

MR. HOLTZOFF: Yes, he will just keep trying grand juries, and the chances are, in most cases it won't do him any good or get him anywhere.

THE CHAIRMAN: He tries it to the judge; he does not try it to a jury; and he is not going to bring that up unless he has a very good case.

MR. MEDALIE: So he takes it --

THE CHAIRMAN: That is the complete answer to it.

MR. MEDALIE: So he takes it to a judge who is, from his point of view, impartial; from the grand jury's point of view, biased.

MR. HOLTZOFF: Yes; but that will be also a ground for assigned error. On appeal you will have that whole thing reviewed again.

THE CHAIRMAN: Let us face facts very realistically, and I will give you one concrete example. Every meat packing concern in the United States was advised by its counsel that the AAA Act was unconstitutional. There wasn't a one of them that dared to desist from paying millions, and in some cases tens and perhaps hundreds of millions of dollars of taxes, although they were all told by counsel that that act was unconstitutional, because they were afraid that they would be picked up by one of the 15 or 16 or 18 other Federal agencies which were looking

them over, including Uncle Sam's Income Tax Division. And they had to wait until a couple of concerns went bankrupt, so that the receiver could test the constitutionality of the Agricultural Administration Act.

I cite that as illustrating the tremendous and growing force of the Federal departments collectively when they get after a man. If they get after anybody, he might just as well fold up and quit doing business.

MR. MEDALIE: And you have no redress.

MR. HOLTZOFF: This rule would not help him.

THE CHAIRMAN: This rule would help him all right because he would get a trial before a judge, and you have every belief that if you get before a judge with newspaper reporters present in the courtroom, that the man is going to get a square deal or come as near to it as we will ever get this side of Heaven.

MR. HOLTZOFF: And don't you think it would be used for dilatory purposes?

MR. DEAN: It isn't a charge that is lightly made. If you have to practice before that judge, you are not going to come in there --

THE CHAIRMAN: With a lot of flimflam stuff.

MR. McLELLAN: I think it might be well to consider whether this objection to the indictment can be taken after the verdict of conviction. I do not think they

should be permitted to attack an indictment for bias of a member of the grand jury after there has been a trial and the finding of guilt.

THE CHAIRMAN: I agree with you thoroughly.

MR. McLELLAN: Have you covered that?

MR. HOLTZOFF: But I am afraid --

THE CHAIRMAN: My thought was that this was a right that a man has to attack the indictment before he goes on to trial.

MR. McLELLAN: Yes, and that he ought not to be allowed to do it after conviction.

THE CHAIRMAN: I agree with you.

MR. McLELLAN: We have not covered that.

MR. BURNS: This is a motion to dismiss the indictment, so it must be before --

MR. MEDALIE: It is part of the judgment roll.

MR. BURNS: Failure to grant this motion might be ground for reversing a conviction.

MR. McLELLAN: I would provide that it should not be.

MR. MEDALIE: What is the good of it? Because, if a wrong judgment was made, why shouldn't it be reversed?

MR. McLELLAN: Because, as a practical matter, the man has had his chance and had a jury find beyond reasonable doubt he is guilty, and that is a different

thing from putting him to trial when he does not want to go to trial upon an indictment procured through the bias of somebody on the jury.

MR. HOLTZOFF: I would be willing to vote for Judge Burns' amendment, if the provision that you indicate was added to it.

MR. McLELLAN: I do not believe Judge Burns would be against that.

MR. BURNS: No, no; I would be in favor of it.

THE CHAIRMAN: If he had to raise this issue in advance of trial, and the judge decided against him, and the court of appeals thought there was merit to it, why shouldn't he have the benefit of that? I do not think he should be permitted to wait until after trial and the adverse verdict to raise the issue.

MR. HOLTZOFF: But in the meantime the petit jury finds him guilty beyond a reasonable doubt. Should he be allowed --

MR. McLELLAN: I can see two sides to it. I can see the Chairman's viewpoint.

THE CHAIRMAN: My only thought on that is that where an injustice has been done, in the opinion of the circuit court of appeals, and they cannot find a point to pin the necessary reversal on, on the evidence, this other ground would be there.

MR. McLELLAN: I don't know; if he has had a fair trial before a petit jury --

MR. SEASONGOOD: What is the scope of review on appeal from that? It is a question of fact before a jury.

MR. McLELLAN: That is conclusive, as a question of fact.

THE CHAIRMAN: It would depend on the individual judge. It would be a good bet with some judges to take that up.

MR. WECHSLER: Isn't it true that a plea in abatement is not a ground for reversal?

MR. HOLTZOFF: That is right.

MR. DEAN: There is a real distinction there, because one goes to thefairness of the original charge and the other goes to the fairness of the trial. Whether the charge is fair or unfair, you do not care about the circumstances of that by the time you get to trial, and if you have been convicted by an impartial petit jury, I think it is an entirely different situation, I agree with you.

MR. YOUNGQUIST: Doesn't that same principle apply to the proceeding before the trial judge? What is the difference?

MR. DEAN: I think a man ought to have an opportunity before he is put to the expense and trouble

and possible jeopardy of a trial to have brought before him a charge that was not born of malice.

MR. WECHSLER: Just carrying one step further George's point, that there is a difference between challenge and plea in abatement after the indictment is found, there is an even larger difference after trial. Those are not isolated conditions for research, but there seem to be two cases in the annotations here that bear on this. One is a case in which the prosecutor was a member of the grand jury, but which, I take it, was meant the man who preferred the charge. That was in 1871. It was held no ground for plea in abatement.

There is another case in 1887, where one of the grand jurors had been a petit juror in a previous trial, in which there had been a verdict of conviction. That was held ground for plea in abatement.

MR. ROBINSON: The later one is the Egan case?

MR. DEAN: What is the 1887 case?

MR. ROBINSON: Egan, 30 Fed. 608.

MR. SEASONGOOD: Haven't we gone as far as we can in that tonight, Mr. Chairman?

MR. HOLTZOFF: So I suggest that we take a vote on the general idea and let the Drafting Committee draft something and that we look at it again, when it comes up.

MR. WECHSLER: Shouldn't we take a vote on the

principle of the thing?

MR. SEASONGOOD: Yes.

MR. WECHSLER: It seems to me we are pretty well agreed. There may be no drafting needed.

MR. SEASONGOOD: The motion of Judge Burns is before us, and it may be understood that when the rule is drafted it will have a provision in it to the effect that after verdict of conviction, it may not be done. I think we could vote on that.

THE CHAIRMAN: With that understanding, are you ready for the motion? If so, all those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed.

(Chorus of "Noes.")

THE CHAIRMAN: This Committee constantly fools me, so I have to call for a show of hands.

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

THE CHAIRMAN: 8 to 7.

Gentlemen, it is getting very near to six o'clock. What time do you suggest we meet in the morning.

(Discussion re adjournment.)

(Whereupon, at 6:00 p. m. an adjournment was taken to February 20, 1943, at 10:00 o'clock a. m.)
