Mr. Tolman's Copy

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Tuesday, May 19, 1942.

MORNING SESSION

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Tuesday, May 19, 1942.

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

Present:

Arthur T. Vanderbilt, Chairman

James J. Robinson, Reporter

Alexander Holtzoff, Secretary

Leland Tolman, Assistant Secretary

George J. Burke

Gordon Dean

George H. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McLellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

John J. Burns

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P R O C E E D I N G S

The Chairman. All right, gentlemen. Let us proceed.

Mr. Holtzoff. I believe we are on Rule 8.

The Chairman. We start with Rule 8, gentlemen. Are there any questions on Rule 8 (a) (1)? If not, we shall pass to (a) (2).

Mr. Holtzoff. Mr. Chairman, I am afraid I shall have to raise a question about (2) beginning in line 17. This is a provision to require that every indictment should give a statutory citation or the citation of the rule under which the prosecution is brought. I do not object to requiring the citation of the rule if the prosecution is based upon an administrative rule, because there are obvious reasons making that desirable. I do not believe that a statutory citation should be required. I have had the law examined to be sure of my ground, and the cases are unanimous today that all the indictment or information must do is to set out the facts constituting an offense. It is not necessary to cite the statute charged to be violated. Sometimes some prosecutors do mention the statutory citations. Some as a matter of facility of reference put it on the margin or on an endorsement. But certainly it ought not to be a requirement.

Now, the effect of this rule would be just to add a technicality which does not now exist. And there is a practical reason: we have all seen indictments sustained on appeal under a statute other than that on which the prosecutor relied in the court below, and certainly a defendant who has been convicted should not be turned loose merely because the prosecutor relied on the wrong statute, if actually a crime has been committed.

Mr. Dean. The last sentence takes care of that, I think.

Mr. Holtzoff. The last sentence does ameliorate the difficulty, but I do not think there should be even a requirement of the citation.

Mr. Burns. Would you change "should" in line 17 to "may"?

Mr. Holtzoff. I have no objection to that, sir, personally.

Mr. McLellan. Suppose you change it to "should preferably."

Mr. Longsdorf. I think that would be good.

Mr. Holtzoff. Change it to "should"?

Mr. McLellan. "should preferably," so as not to make a requirement.

Mr. Holtzoff. Yes.

Mr. Seth. Is it any hardship that the United States Attorney know the law under which he is prosecuting?

The Chairman. You are right.

Mr. Holtzoff. Mr. Wechsler just argued a case in the Supreme Court where he properly sought to sustain a conviction under a statute that the United States Attorney did not cite.

Mr. Youngquist. Why do you say "properly"?

Mr. Holtzoff. Because I think that was quite proper.

Mr. Wechsler. Quite proper.

Mr. Seth. I think in lines 22 and 23 there seems to be intimation that the United States Attorney might be convicted of an intent to mislead the defendant.

Mr. Robinson. That is marked out.

Mr. Seth. Is that marked out?

Mr. Robinson. Well, yes, I should like to suggest that it go out. In line 22 after "omission" strike "does not appear to have been made with intent to mislead the accused or if it".

Mr. Seth. That has covered my objection, but I do think that in this day and generation, where we are going to have laws and regulations, when we have to get a permit to take a drink or anything, why, we had better have them cite the statute.

Mr. Wechsler. There is one important distinction in this subject, Mr. Chairman, I think, between the case that comes up on direct appeal after a demurrer has been sustained to an indictment, and the case that comes up after conviction in the District Court. Where it comes up after conviction it is much easier to find respects in which defense counsel may have been privileged by having his attention focused to one rule of law rather than to another rule of law; but if there has merely been a demurrer and the demurrer has been sustained I cannot see any way in which defense counsel is worse off in the Supreme Court arguing the point of law on which the sufficiency of the indictment turns than if he had made that argument in the first instance in the District Court.

Mr. Holtzoff. In accordance with the suggestion that has been made, I move that we insert the word "preferably" after the word "should" in line 17.

The Chairman. Of course that goes far enough.

Mr. Dean. No.

The Chairman. Why should not the Government tell you what you are accused of and on the basis of what?

Mr. Holtzoff. It has never been the rule and it is not the rule today that an indictment must cite the statute.

The Chairman. That is true, but we are doing a lot of things here that never occurred before.

Mr. Holtzoff. Yes, but we are trying to simplify criminal

procedure.

The Chairman. Well, that is one thing we are trying to do, but we are trying to make it a square, honest game.

Mr. Dean. Another thing, whatever the precedents may be on the subject it seems to me that with this growing body of Federal legislation those precedents do not argue very much, to me, today.

Mr. Burns. There are a hundred agencies now that are minor legislators; they have the power to make new statutes which carry very severe criminal penalties.

Mr. Seth. Why do you say "minor"?

Mr. Holtzoff. I agree that if the prosecution is based upon rule or regulation of an administrative agency there is good reason for requiring a reference to the rule in the indictment. But certainly that should not be the case if it were a statutory prosecution; and my recollection is that at the last meeting of this Committee the trend of the discussion was to limit this requirement to prosecutions based on rules and regulations. That was the concensus of opinion, but unfortunately no motion was made.

The Chairman. What is the hardship of citing the statute?

Mr. Holtzoff. Well, because sometimes you might seek to sustain a conviction on a statute other than that which you have cited.

The Chairman. But should you do it?

Mr. Burns. Why should you get away with it?

Mr. Holtzoff. Oh, I think so.

The Chairman. Oh, no. You indict a man for one thing, on one basis.

Mr. Holtzoff. Well, you indict a man for running a still

without paying a tax. Now, there might be two statutes, each with a slight variation in the phraseology, that that man might have violated. For example, if he ran a still without a license in Indian country he would be violating the statute relating to the Indian country, and he might be violating the Revenue Act. Now, there might be a slight difference in the phraseology of the two statutes.

Mr. Burns. This is the United States attorney, not a commissioner.

Mr. Seth. This is an expert now, presumably.

Mr. Holtzoff. This is not the United States attorney's case, after all; it is the Government that is interested in seeing justice done.

Mr. Youngquist. If the United States wants to see justice done I think it calls for the inclusion of the citation.

Mr. Wechsler. It is interesting in this connection: --

Mr. Holtzoff. I do not think so.

Mr. Youngquist. So far as I am concerned I would rather use the word "shall" instead of "may."

Mr. Seth. So would I.

Mr. Youngquist. But I am satisfied with the word "should" because I have faith that the United States attorneys will follow the admonition even though it be not a compulsion.

Mr. McLellan. But the effect of "should" there is in view of what follows in the next sentence, which is "shall," is it not? Or what? "shall"?

Mr. Seth. Yes.

Mr. Wechsler. Mr. Chairman, nobody questions the proposition that it is sound practice for the United States attorney to

do that, and United States attorneys do do that. They should do that. The question is what the penalty shall be if they fail to do it. Now, everybody agrees, if in consequence of the failure the case is tried on an erroneous theory, evidence is admitted that would not have been admissible on the other theory, or there is a failure to prove some essential point under the other theory, that a conviction cannot stand. But take a case where the proof is the same, where nobody has suffered from it: there I think it is clear that a conviction should be affirmed, and actually this rule would permit it to be affirmed.

Mr. Burns. That is quite right.

The Chairman. There is no harm done in an honest case.

Mr. Youngquist. Say, Mr. Wechsler, should there be included in the last sentence in line 20 after the word "ground" the words "for dismissal or for reversal"?

Mr. Holtzoff. Yes.

Mr. Youngquist. To cover the trial court as well as the appellate court.

Mr. Wechsler. The real point is that it shall not be ground for affirmance, I should think, in view of the trend of the discussion, because that problem always comes up not where a reversal is claimed on that ground but where an affirmance is claimed on that ground.

Mr. Holtzoff. Well, you do not want to change that second sentence, that sentence beginning in line 19?

Mr. Wechsler. No. As it stands I think it would meet my point.

Mr. Holtzoff. Well, I think the word "dismissal" --

Mr. Wechsler. I am not sure it would meet the point of

persons who take the other view.

The Chairman. Well, now, gentlemen.

Mr. Holtzoff. If the word "dismissal" goes in/as Mr. Wechsler suggests, I think that would meet my objection on that.

The Chairman. Where does that go in, Professor? What line?

Mr. Wechsler. Line 20, before "reversal."

Mr. Seth. "dismissal or."

The Chairman. "or for."

Mr. McLellan. Well, you put in "for dismissal."

Mr. Robinson. Say "or for."

Mr. Medalie. "or reversal."

The Chairman. No. "for dismissal or."

Mr. Robinson. Put in the "or for reversal."

Mr. Holtzoff. "or for reversal." I see.

Mr. Wechsler. There might be something said for striking the last sentence, beginning on line 19, particularly if the word "preferably" goes in after "should" on line 17. Then it will be understood as a directory provision, and its legal consequences will be left to the court in particular cases -- legal consequences of failure to comply with this.

Mr. McLellan. All I thought about "preferably" was that it would be a little bit better than the more permissive "may."

Mr. Seth. The last sentence.

Mr. McLellan. But I am inclined to agree with those who think that there should be a requirement that the indictment state the statute, and so on; and if that is so I think that according to Mr. Youngquist's suggestion we should have "shall" for "should" in the seventeenth line.

The Chairman. Does someone move that we substitute "shall"

for "should"?

Mr. McLellan. I so move.

The Chairman. Is that seconded?

Mr. Youngquist. Seconded.

The Chairman. All those in favor of "shall" in line 17 in place of "should," say "Aye." Opposed, "No."

How many noes were there? (There was a show of hands.) The motion is carried.

Now, as I understand it, by consent in line 20 there is an introduction of words, "for dismissal or for reversal."

Mr. Wechsler. Just a moment. "of an indictment or reversal of a conviction."

Mr. Holtzoff. Do we need that?

The Chairman. I should think it makes better English.

Mr. Youngquist. Yes.

The Chairman. "dismissal of the indictment." "or dismissal of the indictment or for reversal of a conviction."

Mr. Youngquist. "indictment or information."

Mr. Robinson. "or information."

The Chairman. "or information."

Mr. Dean. The effect of this, I take it, so far as a proceeding in the district court is concerned, is to give you a right, probably through a bill of particulars if it is not in the indictment, to get it. That is really what we have in the way of penalty, if you call that "penalty."

The Chairman. Is there anything else under this section?

Mr. Medalie. Do we need the language, "does not appear to have been made with intent"?

The Chairman. That is out.

Mr. Medalie. That is out, is it?

The Chairman. Yes, from the word "does" in line 22 through the word "it" in line 23.

Mr. Youngquist. The pronoun "him" should be changed to "defendant" there at the end of line 23: "the defendant," because we do not previously refer to him in that sentence or in the preceding sentence.

Mr. Robinson. If you use the term "defendant" there you had better use it in other places here. In line 19 "accused" should be made "defendant," and in line 15 change "accused" to "defendant."

Mr. Medalie. Yes.

Mr. Youngquist. I thought we were using "defendant" throughout.

Mr. Holtzoff. We were. We are.

4 Mr. Youngquist. Yes. We should here then.

The Chairman. Those changes will be made.

Mr. Robinson. In line 10 "which constitute" should be "constituting." Is this your preference, Dr. Youngquist? "essential facts."

The Chairman. "essential facts constituting the offense charged"?

Mr. Youngquist. I think it is better. Better language.

The Chairman. It follows your thought closer.

Mr. Robinson. And then in line 16 I think we can save three or four words.

Mr. Youngquist. What is that?

Mr. Robinson. "and that he" strike out "may have." "and that he committed it in one or more" strike out "of various,"

leaving it "one or more specified ways"?

Mr. Youngquist. Yes.

TheChairman. All right. We shall proceed to (3).

Mr. Dean. Do we wish to make a similar requirement as to the complaint?

Mr. Holtzoff. We have a separate rule on complaint that a subcommittee is going to bring in later tomorrow.

Mr. Dean. I suggest that for the consideration of the subcommittee, then.

Mr. Holtzoff. What was the suggestion?

Mr. Youngquist. I doubt if we need it.

Mr. Holtzoff. We have a separate rule on complaint.

The Chairman. That will come in later.

Mr. Youngquist. Yes.

The Chairman. All right. (3) Surplusage.

Mr. Longsdorf. Mr. Chairman, how are you going to ascertain whether given words are surplusage without construing the indictment? And if you construe it wrong and strike out the supposed surplusage have you not amended the indictment?

Mr. Robinson. You remember our discussion on that, Mr. Longsdorf?

Mr. Longsdorf. Yes, I do.

Mr. Robinson. It is based largely on the recommendation of George Lindley of Illinois.

Mr. Longsdorf. I remember it.

Mr. Robinson. In which he pointed out that sometimes indictments and informations contain really scurrilous matter or slanderous matter, libelous matter.

Mr. Longsdorf. This is not limited to that.

Mr. Robinson. And it would be clear to the court in such a case what could go out, I should think.

Mr. Medalie. In almost every indictment there is a libel per se; that is true.

Mr. Robinson. To the defendant.

Mr. McLellan. Why give the court the power of its own motion to do it?

Mr. Robinson. Strike that out, Judge, beginning after "court"; strike out the rest of that line and the first two words of the next line, so you would say, "The court may strike surplusage from the indictment or information." That would make your objection still stronger, perhaps, but I think it may go out anyway.

Mr. Longsdorf. My remark was merely to bring that thought to the attention of the committee. I cannot answer it.

Mr. McLellan. I mean to give the court power upon motion, and only upon motion, and not let the judge splash around looking at an indictment and thinking something ought to go out.

Mr. Seth. "on motion of the defendant."

Mr. Youngquist. Strike out "or of its own motion"?

Mr. McLellan. It seems to me.

The Chairman. Is there any objection to that? If not, that will be done.

Mr. Youngquist. Mr. Longsdorf.

Mr. Medalie. Of course that takes care of ex parte Bane, does it not?

Mr. Youngquist. I wonder if your question might not be answered by the fact that if the court does strike that which

is not surplusage it is not stricken because he has no authority to do it?

The Chairman. (b) on page 2. (b) (1).

Mr. Seth. Ought not "person" in line 29 to come out?

The Chairman. I did not get that.

Mr. Burns. "A defendant".

Mr. Seth. Ought not "An accused person" be "A defendant"? Or at least "person' should come out.

The Chairman. Yes.

Mr. Robinson. "A defendant".

Mr. Burns. Is it the intention of (b) (1) to preclude the Government from proceeding by indictment after a waiver?

Mr. Holtzoff. "A defendant". I do not think so. For that reason I am going to suggest that the word "shall" in line 33 be changed to"may".

Mr. Medalie. Yes.

Mr. Burns. Why I raise that question, in the light of what I know about the Anti-Trust Division's practice, they have developed a certain unofficial hierarchy of sin. If you are very bad you will be indicted, but if you are not so bad you may get an information; and frequently businessmen, regarding the traditional meaning--denotation--attached to "indictment," feel a lot better if they may get an information rather than an indictment. Now, under this rule as written they could drop a note to the United States Attorney or file a waiver in the court, and then immediately the United States Attorney would be precluded from proceeding by indictment, even though from his point of view as a prosecutor it may be desirable to proceed by indictment rather than by information.

Mr. Holtzoff. Well, changing the "shall" to "may" I think takes care of that, does it not?

Mr. McLellan. No.

Mr. Seasongood. No.

Mr. Dean. You would have no right to waive, as I take it, in the anti-trust case by virtue of any language in (b) (1), because it is a misdemeanor. This applies only to the prosecution of cases where indictment is guaranteed by the Constitution.

Mr. Wechsler. I think that should be modified, and I suggest a modification.

Mr. Burns. It does not say so.

Mr. Wechsler. A modification in the following terms: that (b) (1) be changed to read:

> "In any case not punishable by death a defendant represented by counsel may consent that the proceeding shall be by information instead of by indictment, and in that event the United States Attorney may file an information."

It seems to me there is no reason to limit the cases in which the indictment is guaranteed by the Constitution nor to require a determination of the scope of the constitutional guarantee.

Mr. Holtzoff. I think you are right. You have certiorari.

Mr. Dean. I second that motion.

Mr. McLellan. Do you think that a defendant, the Government being unwilling, should have the absolute right to waive an indictment and put upon the United States Attorney the right

only to file an information?

Mr. Seth. No.

Mr. Wechsler. No, and therefore I would change the word "shall" to "may" in line 33.

(At this point Mr. Youngquist assumed the chair.)

Mr. Youngquist (acting chairman). It reads, as I have it:

"In any case not punishable by death a defendant not represented by counsel may consent that the proceeding may be by information instead of by indictment, and in that event the United States Attorney may proceed by information."

Mr. Wechsler. Yes.

Mr. Seth. He said, "not represented by counsel."

Mr. McLellan. Yes, but even then--

Mr. Seasongood. You mean "represented." You said, "not represented."

Mr. Youngquist. Oh. "represented". Yes, of course. Thank you.

Mr. McLellan. Even then, are you not in some difficulty, possibly, that if he waives the indictment he cannot be indicted anyway, and then you make it permissive for the United States Attorney to file an information or not?

Mr. Burns. No; he consents to the information, but nevertheless, despite his consent, the United States Attorney may still proceed by indictment.

Mr. McLellan. Yes, but does the language used by Professor Wechsler do it?

Mr. Burns. Will you read it again?

Mr. Youngquist (acting chairman). (Reading):

"In any case not punishable by death a defendant represented by counsel may consent that the proceeding may be by information instead of by indictment, and in that event the United States Attorney may proceed by information."

Mr. Seth. Would it not be better to say plainly in there "with the consent of the defendant and the approval of the United States Attorney"?

Mr. McLellan. I think so.

Mr. Dession. I do not believe you need that. The only right the defendant has under the Constitution is not to be prosecuted except on indictment in certain cases. Now, he can waive that, but he cannot waive anything the prosecutor has. Suppose he does waive it.

Mr. McLellan. I still think so.

Mr. Holtzoff. Your point is that when he does not give his consent he does not file an information, so you do not have to provide for consent.

Mr. Robinson. What is the objection to having two sentences, leaving the last sentence the way it is?

Mr. Seth. Yes.

Mr. Youngquist (acting chairman). Make it "shall"?

Mr. Holtzoff. No, we do not want to make it "shall."

Mr. Robinson. No; we have already changed the "shall" to "may".

Mr. Wechsler. That would not change anything, to leave

the last sentence the way it is.

Mr. Seasongood. Why do you not have the last sentence read, "After the waiver the United States Attorney may file an information or proceed by indictment"?

Mr. Burns. Yes.

Mr. Dean. That is it.

Mr. McLellan. That is it.

Mr. Youngquist (acting chairman). That would be a little shorter.

Mr. McLellan. That does it, does it not, Mr. Seth?

Mr. Seth. I think so.

Mr. Youngquist (acting chairman). All right. If that is agreeable it will so stand.

We come then to (2).

Mr. Seth. That will have to be changed.

Mr. Seasongood. Yes.

Mr. Holtzoff. In (b) (2) I think that we could omit all of line 37 except the first three words, put a period after "district," and strike out the rest of that sentence.

Mr. McLellan. Of course, the first line becomes subject to criticism here.

Mr. Seasongood. Yes.

Mr. Seth. Yes.

Mr. McLellan. In view of the change made in the preceding one, "The court shall then arraign the accused upon the information".

Mr. Robinson. "upon the indictment or information".

Mr. Holtzoff. I wonder if we need (2) at all.

Mr. Wechsler. I do not think we do.

Mr. Holtzoff. I beg your pardon?

Mr. Wechsler. I do not think we need it.

Mr. Holtzoff. I don't either.

I move to strike out (2).

Mr. Youngquist (acting chairman). Is there any objection to striking out (2)?

Mr. Seasongood. Can you do it now in any division of the district?

Mr. Holtzoff. You cannot do it in any division of the district except with the defendant's consent, but if the defendant consents you can do it; so you do not really need (2).

Mr. Robinson. Oh, just a second, Mr. Holtzoff. Remember that is based on the idea that even when the court is not sitting, or in places where the court is not sitting, if there is a defendant in jail you may provide that he may waive indictment, the information may be filed, and the court may act at that time and place even though it is not in term time, even though it is not at the place where the court regularly sits--I suppose any division.

Mr. Holtzoff. The defendant may consent to have the case heard in any place outside of the division, and if you get his consent you can do it; so I do not think you need that provision.

Mr. Robinson. Oh, no; this goes beyond consent. It gives the court power it does not now have.

Mr. Holtzoff. If you limited paragraph (2) just to that thought, I think that would be different.

Mr. Robinson. I think it should be limited there.

Mr. Longsdorf. Is not the intent of paragraph (2) directed to the powers of the court to enable the court to do something

that otherwise it would not do? It is not aimed at what the defendant is going to do at all?

Mr. Holtzoff. No, but that is covered by paragraph (1) the way we now have it, Mr. Longsdorf, is it not?

Mr. Longsdorf. I know, but paragraph (1) as it now stands does not go on and include what may further be done to expedite the case upon a plea of guilty if one is then made. That is what I was getting at.

Mr. Holtzoff. A plea of guilty then becomes the same as any other plea of guilty.

Mr. Youngquist (acting chairman). The only thing, as I see it, in (2) that we need to preserve is the taking of the plea in any division within the district.

Mr. Dean. Exactly.

Mr. Seth. That is right.

Mr. Holtzoff. Why not leave it substituting something to this effect for (2): "In such event if" --

Mr. Robinson. "if an information is filed".

Mr Holtzoff. "if an information is filed the plea may be taken and the case disposed of at any place within the district if the defendant so consents"?

Mr. Longsdorf. Then, if you do it that way, Mr. Holtzoff, why not combine (2) with (1)?

Mr. Seth. That is right.

Mr. Longsdorf. And make it one paragraph.

Mr. Holtzoff. I see no objection to that. I think that is a good idea, really.

Mr. Wechsler. Mr. Chairman, was there not discussion at the meeting of the subcommittee about a proposal to allow a

plea to be taken in other divisions and perhaps even in other districts?

Mr. Holtzoff. We have that under the removal rule. We adopted that in the subcommittee, and that is embodied in this draft, Mr. Wechsler.

Mr. Wechsler. I am wondering if we need any special provision here. Why, in other words, should the leeway on where the plea is taken be greater where an indictment is waived than in the case where there is an indictment?

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Mr. Dession. It should not.

Mr. Longsdorf. There has been considerable correspondence come in to the committee about the desirability of having a way in which cases of that sort could be disposed of properly where the sentence would be small: let the man serve his sentence if he wishes to, and get it cleaned up and avoid the delay that ensued in districts where the court did not sit frequently. There is a lot of that.

Mr. Holtzoff. Yes, we are all for that, but I rather agree with Mr. Wechsler that we do not have a general rule allowing that to be done, even where the defendant is indicted instead of being proceeded with by information.

Mr. Longsdorf. I would agree to that.

Mr. McLellan. Do you need any rule to accomplish that?

Mr. Holtzoff. I do not think you do. I think the defendant may always consent to have his case tried in a division other than that in which he is indicted.

Mr. Robinson. What about outside of term time?

Mr. Dession. Some of them are accustomed to doing it that way. I think it might be well to provide that it can be done.

Mr. Holtzoff. You provide a term ends the day before the next term commences. That is the legal concept of terms under the federal statutes. You do not have such a thing as outside of term time, actually, unless the judge adjourns the term, which a careful judge does not do. He always continues the term.

Mr. McLellan. Do you not abolish terms under the rule?

Mr. Holtzoff. We do not abolish terms; we say that terms

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shall not be used as in derogation of time.

Mr. Longsdorf. Yes, but, Mr. Holtzoff, it may happen that a judge will go up to another division to take care of the business there, and he will not be there to receive the plea and pass the sentence.

Mr. Holtzoff. That is right, but the defendant can consent to be brought up to the other division.

Mr. Longsdorf. Oh, all right; if you put it in somewhere else that way, then we shall have it covered.

Mr. Dean. He may consent, Mr. Holtzoff, but as a practical matter is he going to be taken out of jail and transported by the marshal over to another division of the district if he wishes to enter a plea, unless we write it in here? In other words, the practice is, I think, so much the other way that it would be rather revolutionary, and we want it made certain.

Mr. Holtzoff. Perhaps so, Mr. Dean, but I still think that that ought to be a general provision.

Mr. Dean. I agree.

Mr. Holtzoff. And not limited to that group of cases.

Mr. Dean. Yes, I agree.

Mr. Youngquist (acting chairman). That would come under chapter 5 that relates to arraignment and pleas.

Mr. Holtzoff. So I am going to make a motion at this time to strike out (2) if I may, Mr. Chairman.

Mr. Youngquist (acting chairman). Well, with the understanding that a like provision covering both indictments and informations shall be inserted in chapter 5.

Mr. Holtzoff. Yes.

Mr. Youngquist (acting chairman). Is there any objection?

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(There was no response.)

Mr. Youngquist (acting chairman). (2) is out.

Mr. Robinson. That has to be 5, do you think?

Mr. Holtzoff. I do not know.

Mr. Robinson. Chapter 5?

Mr. Youngquist (acting chairman). Chapter 5.

Mr. Robinson. Very well.

Mr. Longsdorf. What number would this other rule be?

Mr. Robinson. I do not know.

Mr. Longsdorf. It has no number yet.

Mr. Holtzoff. Let us pass that.

Mr. Youngquist (acting chairman). Just make a note of it.

Mr. Longsdorf. All right.

Mr. Youngquist (acting chairman). We come then to (3) of Rule 8(b).

Mr. Medalie. We go to 15.

Mr. Youngquist (acting chairman). 14 or 15.

Mr. Longsdorf. By "fine only," Mr. Chairman, you want to limit that amount or specify the amount. Do all fines come under that?

Mr. Holtzoff. All fines.

Mr. Youngquist (acting chairman). Yes.

Mr. Dean. Yes.

Mr. Waite. I should like to ask this: Why does it restrict amendment of the information to cases where the punishment is not more than a year, even though no additional or different crime is charged and even though substantial rights of the defendant are not prejudiced?

Mr. Holtzoff. I think perhaps I was partially

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responsible for that restriction, because a defendant might hesitate to waive indictment if he knew that any information that was filed against him was subject to amendment. An indictment is not subject to amendment, and if you prosecute a felony by information with the defendant's consent it seems equally responsible that the information should not be subject to amendment. I might say, actually, that the prosecution will not suffer. I checked with those folks in the Department who have active charge of prosecuting cases, and they have never had any real problem arising out of difficulty over amending informations.

Mr. Waite. You mean that they have amended them?

Mr. Holtzoff. I do not know that they have had many cases where it was necessary to. In other words, it is not a problem from a practical standpoint.

Mr. Waite. Well, then they are better than state prosecuting attorneys, because in Michigan where we file an information instead of an indictment they have to amend time and time again, and we have a provision permitting amendment instanter, with a delay in the case, of course, if the defendant has been surprised.

Mr. Holtzoff. Our people hardly ever amend informations, if they ever do; I suppose that sometimes they do.

Mr. Waite. They do not use informations, perhaps, quite as generally.

Mr. Burns. Increasingly.

Mr. Holtzoff. Of course, in your state you use grand juries very rarely. Informations in the Federal courts are only used for minor offenses.

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Mr. Waite. That is it, and if the Federal courts are going to use informations more I wonder if they will not find the right of amendment increasingly necessary. I dislike to see this limitation. If it is a desirable thing, it is a desirable thing in all cases, it seems to me.

Mr. Holtzoff. I know one thing: as I say, the prosecuting officers of the Government do not think the matter is of sufficient importance even to ask for it.

Mr. Waite. If it were not in here at all I should not mind. That would leave the matter open. I hesitate to see a specific limitation to that, because it means that if it is for more than a year then it could not be amended.

Mr. Holtzoff. The answer is, after that they can always file an information unless the statute of limitations has run.

Mr. Burns. I should like to move that the first clause be stricken. I move that (3) be amended by striking out up to the words "or both" on line 41, and beginning the paragraph with, "The court may permit an information to be amended".

Mr. Seth. That is right.

Mr. Seasongood. Why do you provide only before verdict? Why should it not be amended at any time before or after verdict if you are going to give a power of amendment?

(At this point the chairman resumed the chair.)

The Chairman. Suppose a vote be put. All those in favor of Judge Burns' motion say "Aye." Opposed, "No." Carried.

Now, what was your question, Mr. Seasongood?

Mr. Seasongood. Why the right to amend is limited to before verdict or finding of guilty. The usual amendment statute allows amendment at any time.

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Mr. Burns. Even in a criminal statute?

Mr. Seth. No.

Mr. Seasongood. Well, as to that, there is very little on the amendment of criminal statutes, isn't there?

Mr. Robinson. In case of information.

Mr. Burns. I do not know, but it seems to me that you could properly draw a distinction between the civil practice and criminal practice in that respect. I mean, too liberal power of amendment, it seems to me, might very well have a bad effect on the caution and care of a prosecutor. I think if he could amend after verdict it would give him a power which he really does not need.

Mr. Youngquist. Permitting the amendment of pleading in a civil action after the verdict is a pretty liberal rule, and I think it should not be extended to criminal cases.

The Chairman. Is there a motion? Do you make a motion on it?

Mr. Seasongood. No.

The Chairman. All right. Is there anything else on (3)? If not, we move on to Rule 9.

Mr. Robinson. We have got that.

The Chairman. Rule 9(a). Are there any questions on (a)?

Mr. McLellan. Yes. Not a suggestion but a search for information. Under (a) the consolidation of indictments or informations where the defendants are not necessarily charged jointly is permitted; is that right?

Mr. Robinson. That is right.

Mr. McLellan. Does the consolidation mean not an order for trial together, but they become in effect one case? And

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if they do, can you deprive, among other things, any defendant of his right to challenges, to make him join another defendant when he is not charged jointly with responsibility?

Mr. Holtzoff. There is no Constitutional privilege involved, is there, Mr. McLellan?

Mr. McLellan. No, but he is given a right to peremptory challenges. Do you want to deprive him of peremptory challenges and make him join with somebody else in his challenges when he is not charged with the joint wrong?

Mr. Dean. That is a good question.

Mr. Youngquist. I think the purpose of that provision, Judge, was this: In the first sentence we permit a joint indictment "if the offense arose out of the same act or transaction". So that the last sentence is intended merely to proceed by consolidation in the same manner as if they had been indicted together in the first instance.

The Chairman. It relates back, does it not, to the kind of defendants who are mentioned in the first sentence?

Mr. Youngquist. Yes, "If such defendants".

The Chairman. But could you not meet Judge McLellan's point by providing for consolidation for trial, which is different from consolidating indictments? So that you would preserve the right to challenges, and so forth.

Mr. Dean. I wonder if you would preserve it if you referred to consolidation for trial. I think you would almost have to have a specific provision in there.

Mr. Youngquist. I think the purpose, the intention of the subcommittee--at least, it was my intention--was to create by consolidation exactly the situation that would have existed

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had the defendants been jointly indicted in the first instance; and if it is that kind of situation I see no reason why the consolidation should not be complete for all purposes.

Mr. Holtzoff. The use of the word "such" immediately preceding "defendants" limits the last sentence to cases where the defendants might have been joined originally.

Mr. McLellan. Yes, if you are giving the power to join defendants where they are jointly charged, with joint wrong--which is all right--but you are giving the right to join them when there are two or more acts or transactions connected together.

Mr. Dean. That is true.

Mr. McLellan. I think Mr. Vanderbilt has hit it, although I do think that that word "consolidate" has had such a meaning attached to it that you would need some other word than "consolidate". Maybe it ought to be "order to be tried together," or something of that kind.

Mr. Waite. I was going to ask a question. Perhaps that answers it. I was looking at something else when the discussion started. Is the phrase "to consolidate an indictment" a word of art meaning "order two indictments tried jointly"?

Mr. McLellan. In my experience, which is very limited, a consolidation of indictments means making one case out of two cases.

Mr. Seth. Yes, that is right.

Mr. Waite. Well, that is what I thought.

Mr. McLellan. Different from an order that two cases shall be tried together.

Mr. Waite. And that is not the idea that we are trying

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to express here, is it?

Mr. Youngquist. That is the idea some of us were trying to express--at least I.

Mr. Burns. Mr. Holtzoff, from your experience is there any advantage through a technical consolidation that the Government would not have through a simple order of a joint trial?

Mr. Holtzoff. I do not know of any.

Mr. Seth. Could you join the challenges?

Mr. Youngquist. On challenges probably it makes a difference.

Mr. Holtzoff. Your question was limited to an advantage to the Government?

Mr. Burns. To the Government.

Mr. Holtzoff. I do not know of any.

Mr. Burns. Now let me put it the other way: Are there any disadvantages to the defendant apart from cutting down challenges? Is it not true also that he is bound more directly by what counsel for the other joint defendant may do if it is one case?

Mr. Holtzoff. I do not think so, because counsel representing one defendant does not bind other defendants, no matter whether it is one case or several cases tried together.

Mr. McLellan. I do not know about that. I think there is something in Judge Burns' suggestion.

Mr. Holtzoff. Is there?

Mr. Youngquist. Sometimes he does not.

Mr. McLellan. You take two men who are jointly indicted, A and B, and A puts in some evidence that cannot be used

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against B, even though it is in A's defense.

Mr. Medalie. Yes.

Mr. Holtzoff. But would that not be the case, Judge, if A and B were being tried together though on separate indictments?

Mr. Burns. I do not think so.

Mr. McLellan. I doubt if they would go that far. They are going some when they decide, as they do, that A's evidence can be used against B, but I doubt if they would extend it to a case where there are two separate indictments and ordered tried together. But that is for the future.

Mr. Burns. I have an impression from civil procedure that "consolidate" is really a word of art carrying a most significant result so far as the substantive rights of the parties are concerned, or potentially substantive rights, and certainly the procedural rights; and I also have an impression that consolidation is a technicality that has a little aroma of the antiquated procedure.

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Now, it seems to me, from the viewpoint of convenience, that you would attain your substantial objective if you permitted trial together, and on that score I would leave the trial judge with uncontrolled discretion. But I am a little leery of consolidation, frankly, because I do not know what the implications are.

Mr. Medalie. Well, we have consolidation now.

Mr. McLellan. The implications are, I think, that it makes them for all practical purposes one case.

Mr. Medalie. Yes.

Mr. Youngquist. May I suggest, Mr. Chairman, that for the purpose of clarifying the situation we have an expression of opinion on the part of the Committee as to whether it desires that a consolidation of indictments shall, for all purposes, be equivalent to a joint indictment?

Mr. Medalie. It is that in effect, is it not, now?

Mr. Youngquist. If that is what we want, that is one thing, but if it shall be merely a joint trial then we ought to make the changes that have been suggested.

The Chairman. You have brought it here as if it were a joint indictment.

Mr. Youngquist. That is right.

Mr. Holtzoff. Yes.

The Chairman. Now the question is, do you want that view maintained?

Mr. Medalie. Is that not the situation now?

Mr. Robinson. I was just going to say that the words are exactly the words of 18 U.S.C., Section 557--that is the

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joinder statute of 1853 or 1856--which concludes, "and if two or more indictments are found in such cases, the court may order them to be consolidated."

Mr. Burns. Does that include acts or transactions connected together?

Mr. Robinson. Yes.

Mr. Wechsler. No; the joinder provision is broader here than it is in the existing statute.

Mr. McLellan. I thought so.

Mr. Robinson. However, does that specify where, Mr. Wechsler?

The Chairman. In the common-transaction clause, is it not?

Mr. McLellan. Yes. Of course that is the very guts of it.

The Chairman. Which is taken over, I gather, from the civil rules.

Mr. Wechsler. My memory has slipped here. Does the joinder statute, the one that you were reading from, deal with joinder of defendants or with joinder of charges against the same defendant?

Mr. Robinson. Shall I read it?

Mr. Wechsler. Yes, if you please.

Mr. Robinson. (Reading)

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments

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are found in such cases, the court may order them to be consolidated."

Mr. Burns. That is one defendant.

Mr. Youngquist. That is a single defendant.

Mr. Holtzoff. That is a single defendant.

Mr. Robinson. Yes, surely.

Mr. McLellan. Of course; now, I am going to keep still after saying one more thing about this: I would not myself willingly vote that there may be a joinder in a single indictment in a case where all that you have is two or more acts or transactions connected together.

Mr. Seth. I second the motion.

Mr. Wechsler. That is the real advantage presented by the rule.

Mr. Seth. I second it.

Mr. Longsdorf. I should like to add to the Chairman's remarks that on the civil side the consolidation very infrequently makes one case out of two or more, but usually merely tries them together. That is correct, is it not, Judge?

Mr. McLellan. That is not my experience. When we use the word "consolidation" we mean we unite those two cases and make one of them.

Mr. Longsdorf. No; I am speaking of what they actually do. Usually they merely try them together and do not attempt to make them one case.

Mr. McLellan. Often they order that they be tried together, which is not a consolidation order.

Mr. Longsdorf. No. They call it a consolidation, but it is only a union of trial.

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Mr. McLellan. In the case of A and B, whose only connection was that a transaction of each of them arose out of two or more acts or transactions connected together, I should not permit those two to be joined in a single indictment.

Mr. Holtzoff. What is the present statute on joinder of defendants as distinguished from joinder of charges? The one that you read just now is joinder of charges.

Mr. McLellan. That statute does not mean anything, because it says, "where they may be properly joined".

Mr. Robinson. You remember our long discussion of that at a previous meeting, Judge. We found out that that is pretty much nullified by the decisions. It merely means that that is a sort of catchover or hold that the courts can use.

Mr. Holtzoff. But, anyway, that is joinder of the same defendant.

The Chairman. The statute covering joinder of defendants.

Mr. Robinson. That is just what I shall have in a minute. Go ahead with the discussion.

11 Mr. Dean. I think the case-law rule that comes out of this is this: that each defendant you join has to be jointly charged in every offense in every count.

Mr. Wechsler. That is right.

Mr. Dean. You cannot have a defendant charged on counts 1, 3, and 4 but not on the others. It is those matters; we were talking about them.

Mr. Holtzoff. That is right.

Mr. Wechsler. This provision goes beyond the existing law in the respect that it does not require the defendants to be jointly culpable so long as the other conditions are met.

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Mr. Burns. And certainly "connected together" is a rather vague standard. Does it mean the acts or transactions connected in time or connected by some common denominator of culpability or related by some correspondence?

Mr. Wechsler. Mr. Chairman, I should like to speak in defense of this rule as it stands. The language certainly suffers from the ambiguity that Judge Burns just pointed out, but I think it was deliberately chosen in the light of that ambiguity. It is fairly traditional language in civil statutes, and the purpose here, as I recollect, was to broaden permissive joinder in criminal cases to all situations in which there is some common element in the charges against the various defendants that provides a just basis for trying them together.

The way to reach that, as a drafting matter, seems to be to make the basic joinder provision broad in these terms, requiring a connection, if you will, without defining what the connection must be, and then in subsection (c) to provide for a severance, for a separation, in the discretion of the court. That was intended to reach substantially the situation with respect to the scope of permissive joinder that you have in civil cases. Such acts are controlled by the court.

I do not believe that there is any formula short of this that can permit a broad initial joinder subject to that separation, though I believe we can go back to the common-law rule requiring joint liability, or perhaps get part of this by sticking to the "same act or transaction" clause and eliminating the "connected transactions" clause. I do not think that that would narrow this quite as much as the change might seem to indicate, because it would rather sharpen the problem for liti-

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gation into what constitutes the same act as distinguished from connected acts; and, after all, there is no conventional symbol of identity there. The thing is extensible.

Mr. Burns. Mr. Chairman, would not the social policy which Mr. Wechsler is anxious to attain be reached if you provided that both for joinder of defendants and joinder of charges the joinder would be limited to situations where the offenses arose out of the same act or transaction, and then gave to the trial judge unlimited power of consolidation for purposes of trial wherever the acts or transactions were connected?

Mr. Holtzoff. I, for one, believe that we should have very liberal and broad rules on joinder of charges against the same defendant.

Mr. Burns. Yes.

Mr. Holtzoff. I am a little bit fearful of broadening the existing law as to joining defendants, because I do conceive that that may be a source of injustice at times.

Mr. Wechsler. Take the existing law in the situation where the Government charges a conspiracy against a large group of defendants--the commonest type of charge. Now, very frequently there may be a failure of proof of the conspiracy but an abundance of proof that all the defendants charged committed federal crimes in the course of a series of connected transactions. It seems to me that there ought to be permissive joinder in that situation: that failure of proof of conspiracy ought not to require dismissal as to the defendant who was not proved a conspirator where the proof does make out that he committed a crime tied into the general pattern.

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Mr. Burns. That result would be reached by my suggestion.

Mr. Wechsler. I do not think so, in the same aspect, Mr. Burns. There may have been 40 different stockholders, and the Government, in a corporation, brings everybody in on a conspiracy charge. I suppose the findings of conspiracies are made by juries of particular individuals where it would be impossible to convict them merely of the crime of maintaining a still; the finding of conspiracy would not be made.

Mr. Burns. Under my suggestion it would have an indictment of the whole group, an indictment for the separate offenses separately, and then on motion of the Government they would be consolidated together for trial, and then the not guilty verdict or the motion for a directed verdict which the trial justice would have to allow as to the conspiracy indictment, would not prevent the jury's passing on all the subsequent offenses even though they are all joined solely on the use of a still.

Mr. Wechsler. Well, then, it seems to me there is virtue in this suggestion. The Government in the first instance would charge all together, and it seems to me the burden ought to fall on the defendants.

Mr. Holtzoff. Well, where 40 defendants are charged with criminal conspiracy and the evidence does not show conspiracy, and all the 40 defendants ran the still, I think it would be gross injustice to allow the verdict to stand because the evidence may vary, and the jury, having the whole gang of forty, might convict them all, whereas, if they had been separately tried some of them might have been acquitted.

Mr. Wechsler. If you put a case where there is failure

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of conspiracy of all 40, proof as to 35--

Mr. Holtzoff. Well, then, the other five I think ought to be dismissed.

Mr. Wechsler. Why?

Mr. Holtzoff. Because they are prejudiced in the eyes of the jury.

Mr. McLellan. Well, can those five who had nothing to do with the conspiracy and who are not themselves closely connected together, one runs one still and one another,--ought not have to go through a long trial?

Mr. Burns. I think we ought not lose sight of the fact that frequently prosecutors put in a charge to include counts of conspiracy because the judge cannot pass on it until the evidence is in connecting up the various elements.

Mr. McLellan. Why should we say a defendant who is not a conspirator should have to be subject to all the confusion in the minds of the jury that arises out of a rule of evidence as to the admissibility of statements by one conspirator to bind the others?

Mr. Medalie. Judge, I think there is a misconception about that that is prevalent.

A person charged alone with a subsequent offense may have offered against him evidence of the acts or declarations in furtherance of the objective of a commission of an offense by the persons who are not named as defendants.

I will give you a simple example of it--

Mr. McLellan. If they are charged to be conspirators.

Mr. Medalie. Even if they are not. If A is charged with robbery, and that alone is charged, evidence that B and D

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aided him in that robbery may be offered, and, other acts in furtherance may be offered against him.

Mr. Burns. If you prove agency.

Mr. Medalie. Well, you prove it by common action. In fact, the declaration itself in furtherance of that objective itself establishes the connection.

Now, that rule of evidence--

Mr. McLellan. Is evidence of the connection?

Mr. Medalie. Yes.

Now, that rule is applicable even when a conspiracy is not charged and even when the co-conspirators are not named as defendants in the subsequent offense.

Mr. Wechsler. So long as the conspiracy is in fact charged.

Mr. Youngquist. No ch-

I tried one man on Tolman rson and charged con-
spiracy existed between I introduced evidence
of acts and declarations persons who were not
named in the complaint a s received, of course,
under the well-establish

Mr. Burns. What you 'fect is that there is a conspiracy that has not

Mr. Youngquist. Tha

Mr. Medalie. And the rule is, when you commit a crime, every agency connected with the commission of that crime is the subject of proof.

Mr. Burns. But frequently where the conspiracy has been charged the trial judge would admit testimony where there has been no attempt to connect up the action of the defendant.

Mr. Medalie. You need not deal with conspiracy. You take

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the ordinary mail fraud case where there is no conspiracy count. The case is complicated. The judge does not know the connection.

That is all there is to that. And he does not know what may develop. And he says, "I cannot at this stage of the case tell whether or not this will be connected. I can tell later after all the evidence is in and then I can give you a ruling as to whether or not there has been a connection."

In the meantime he says, "I must take it step by step."

Mr. Burns. You are talking about the Southern District of New York.

Mr. Medalie. That is universal. You take any complicated case, a case where there is elaborate conduct out of which you conclude that there has been concerted action by people who commit an offense; you cannot conclude that until the evidence is in, so when the first piece of evidence comes in there is no connection. Later a connection develops.

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Now, these remarks are made by judges frequently in connection with a conspiracy count, but they can be made just as well in connection with a subsequent offense where there is no conspiracy charge.

Now, there was a famous case tried in New York in the summer of 1938, not a federal case, where a famous politician was on trial, and in the first trial of that case the court said, "I cannot take that evidence. You have not established connection." And that happened from time to time.

Well, those of us who had had a wider experience in these more complicated federal cases knew the ruling was wrong, because the district attorney could not prove the connection completely in the first instance, by the first item of that

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evidence; he had to go ahead and complete that.

You know the case I refer to.

Now, that is a common experience, and competent lawyers coming in to try a criminal case object to the evidence on the ground the connection has not been proved. The judge says, "I have to wait to establish the connection."

Mr. Burns. Oh, it seems to me it would require a showing by the district attorney as to what way he expects to make the showing, because a lot of the testimony is admitted when it does not turn out to be connected.

Mr. Medalie. Well, the way the district attorney can make the connection is by a reasonably frank opening to the jury. He says, "I intend to show certain acts," and he has done enough. He cannot do it all by putting all the evidence in at once.

Mr. McLellan. Well, Mr. Chairman, I understand the question to be under Rule 9 (a), whether you are going to permit the defendants to be charged together.

I move that not be adopted.

Mr. Burke. I second it.

Mr. Chairman, may I ask Mr. Holtzoff to repeat again the reasons he assigned as a practical matter?

Mr. Holtzoff. Well, I took the suppositious case that Mr. Wechsler had in mind. Suppose 40 defendants are indicted jointly on a charge of conspiring to violate the liquor law.

Now, conspiracy is established against 35 of the 40. It is shown that each of the other five ran a still independently of each other and independently of the conspiracy.

Now, I think it would be highly prejudicial to join the other 5 defendants and to permit them to be convicted on the

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same trial of the offense of running an illegal still, even though the conspiracy has not been established, because the entire atmosphere of the trial, the evidence of the conspiracy, will naturally be damaging so far as they are concerned in the eyes of the jury, and, unfairly so.

Mr. Burke. Well, that impressed me, Mr. Holtzoff, and perhaps the case of still operators may be a far-fetched one. There are many other cases of even more serious import in which the rights of a man might be more seriously jeopardized.

Mr. Robinson. I would like to make a comment on that motion. If you adopt this motion of course you are reversing the action taken by the Advisory Committee at the first meeting.

At that time you remember we considered this Washington case, State v. Blakely, 70 Pacific (2d) 99, decided in 1937.

You recall in that case there was an indictment for manslaughter in which the defendant A had left a bus parked illegally on the highway.

Defendant B, driving while drunk, collided with the rear end of the bus, killing the deceased.

The question was whether A and B could be joined in the same indictment.

It seemed to me in discussing the case with the Committee that the conclusion of the Washington court that they could not be joined was not right.

In other words, I was agreeing with the position I understand that Judge McLellan is taking now, but the Committee seemed to be very strongly of the opinion that in such cases it should be possible to join defendants.

I believe some of the grounds stated were that here you

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have a transaction that involves substantially the same facts, if you try these men separately you have to have the same group of witnesses come at separate times and testify to substantially the same situation; and besides it was suggested that both of them were concerned in the death and therefore that the case should all be tried together by joining these two defendants.

I just suggest, if the reasons that appealed to you then appeal to you now, you are against the motion.

Mr. Holtzoff. Maybe it is a sober second thought.

Mr. Robinson. That is right.

Mr. McLellan. Well, doesn't Rule 9 (a) go far beyond the Washington case?

Mr. Robinson. In what way, Judge?

Mr. McLellan. "* * or if the offense arose out of the same act or transaction or out of two or more acts or transactions connected together".

Mr. Robinson. I don't believe so, Judge. Since that time you have left this 9 (a) in substantially this form, and the three meetings of the Style Committee also have gone through it and left it this way; and therefore I think we ought to proceed with caution now.

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And I believe it was the view of members of the Committee that the clauses which you read would be necessary to cover the Washington case.

Mr. Longsdorf. Mr. Chairman, may I prompt our reporter. After a good deal of research work had been done on this point didn't we arrive at the conclusion that this states substantially the existing law under section 557 as propounded by the courts? Is this not substantially a carrying forward of 557

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into the rule?

Mr. Robinson. I would like to get the record correct on that. 557 applies to Rule 9 (b). It applies to joinder of charges.

Mr. Longsdorf. I know.

Mr. Robinson. Of course there are federal statutes in regard to joinders and the punishment of accessories, but it is mainly case law that 9 (a) is built on.

Mr. Wechsler. 9 (a) goes beyond any existing case law.

Mr. Robinson. I am not certain of that.

The Chairman. Is the point where it goes beyond the case law that clause where it starts at line 5?

Mr. Wechsler. I don't know of any case law that sustains the preceding clause unless the case in question also falls under the first clause, namely, joint participation.

Mr. Robinson. What about the Washington case?

Mr. Wechsler. I don't believe under federal practice joinder would be permitted in that Washington case.

Mr. Dean. I believe that is right. It is not now possible.

Mr. Wechsler. Right.

Mr. Dean. That is my understanding of it.

The Chairman. May we have a vote on the policy of the thing?

Mr. Seasongood. May I just mention here, I notice in the Ohio Code there are certain actions that may be joined, 11306, and it says, "The causes or actions united must not require different places of trial and except as otherwise provided must affect all the parties of the action."

Then when you come to consolidated actions in 11369, it is

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only if the actions have been joined.

So I don't see why you want to bring in consolidation of different indictments and proceedings.

Mr. Wechsler. But this consolidation is only permissible if the defendants have been joined under the indictment, under the first part of 9 (a), so in that respect it follows the practice you just stated.

Mr. Robinson. Of course that first clause of 9 (a) is so obvious you really don't need to state it.

Mr. Seasongood. It says, if the offense grew out of the same transaction.

Mr. Wechsler. What is the basic joinder provision then, the one you just read?

Mr. Seasongood. This says for joinder you must not require different places of trial and it must affect all the parties to the action.

Mr. Wechsler. In that respect this is a broader provision than the one you read.

Mr. Seasongood. Well, if your civil actions only allow joinder in that limited class of cases, it does not seem to me that federal joinder should be broader.

Mr. Wechsler. But that is one of the narrowest in the country.

Mr. Medalie. In the type of civil litigation which has taken up considerable time in the courts, we have just that situation, derivative stockholders' actions, the directors, some of them liable on one item of waste, misappropriation, and so on; others liable on other items. Some liable jointly, sometimes liable together. But they are all put together in one

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action. That is a common thing going on all the time.

Mr. Wechsler. I do believe there is a provision in what Mr. Seasongood read that should be in here, namely, that different places of trial are not required.

Mr. Burke. What was that, again?

Mr. Wechsler. In the code from which Mr. Seasongood read the joinder provision requires--the joinder provision does not apply if different places of trial are required.

And that should be in here.

Mr. Robinson. It seems to me the federal judge could be trusted to sever wherever required, or, consolidate.

Remember we have paragraph (c) which provides that the court may order separate trials of defendants charged--

Mr. McLellan. But that does not confer any right on the defendant dragged in. He is submitted to the discretion of the judge.

Mr. Youngquist. Is that thought answered by the fact that an indictment must be tried in the district where it is found, and that indictment may not be found in a district unless the offense has been committed within its limits?

Mr. Wechsler. Yes.

The Chairman. To bring it to a head I suggest we have a vote on the first sentence of 9 (a).

All those in favor of the first sentence of 9 (a) say "Aye." Opposed, "No."

Show your hands, please.

Mr. Burns. If I may make a statement, the first sentence of 9 (a) says: "Two or more defendants may be joined in an indictment or information if they are alleged to have partici-

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pated jointly in the same offense."

Mr. Wechsler. That is the first clause, but this brings in the whole business.

The Chairman. Maybe we had better vote again.

All those in favor of the sentence from line 2 to line 6 say "Aye." Opposed, "No."

Show hands for noes? One, two--six.

The motion is carried.

Mr. Waite. That does not necessarily prove anything because I don't know how to vote, and I am not voting either way. I am just completely stumped on the thing.

Mr. McLellan. This is revolutionary.

Mr. Seasongood. How do you know it is carried?

The Chairman. The ayes made an awful lot of noise.

Show hands from the ayes.

From the noes.

Seven to five.

Mr. Longsdorf. I wonder, Mr. Chairman, if the objections might be obviated by the suggestion that you yourself previously made, eliminating the phrase occurring in lines 5 and 6, "or out of two or more acts or transactions connected together."

Mr. Holtzoff. I would vote aye if that were out.

The Chairman. It seems to me that takes care of nine-tenths of your difficulties because if you get the rare case where common offenses arise out of the same transaction, the protection of severance is enough to tide you over.

Mr. McLellan. I think that reaches a good deal, but that last thing about two or more acts connected together--my, I tell you--

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Mr. Robinson. Would it not be well to strike out in that line above too, "the same act"?

Mr. Youngquist. No. That covers a much narrower field. Where you have a similar act, although they may not be combined together under the first clause, you have a quite different situation from that which arises when there are two or more acts or transactions in which they may have participated. It narrows it a great deal.

I have been a little doubtful right along about including two or more acts or transactions although I have supported it.

The Chairman. If we leave that out we are right back to the civil paragraph.

Mr. Youngquist. Well, I move that the phrase, "or out of two or more acts or transactions connected together", appearing in lines 5 and 6, be stricken.

Mr. Holtzoff. I second that motion.

Mr. Robinson. I thought the main objection was to the word "acts", and leaving in "transactions".

Mr. McLellan. Oh, that is a relief to me.

Mr. Robinson. You want the whole clause?

Mr. Youngquist. Yes.

The Chairman. All those in favor of this deletion in lines 5 and 6, say "Aye."

Unanimously carried.

The motion is to strike out of lines 5 and 6 the words, "or two or more acts or transactions connected together".

Mr. Youngquist. I moved that it be stricken.

Mr. Medalie. I dissented.

The Chairman. Do you want to vote?

Mr. Holtzoff. In line 4, Mr. Chairman, the word "offense" should be "offenses", I think.

The Chairman. What?

Mr. Holtzoff. In line 4, the second time the word "offense" occurs, that ought to be "offenses".

"* * if the offenses arose out of the same act".

Mr. Robinson. Are you sure about that?

Mr. Holtzoff. I am. It does not make sense to say "the offense".

Mr. Robinson. I think it does. In this Washington case it does.

Mr. Holtzoff. The same act but two offenses.

Mr. Robinson. No, the same offense.

Mr. Holtzoff. Then you do not need that clause.

Mr. Longsdorf. There were two offenses against the vehicle law but only one against the deceased.

The Chairman. We now come to the second sentence in 9 (a).

Mr. Wechsler. Mr. Chairman, may I interrupt you?

The Chairman. Yes.

Mr. Wechsler. In view of the last clause of the first sentence of (a), I wondered if it might be presumptuous to say that we might save part of that without controversy by formulating something that would be designed to produce this result:

That if substantially the same facts are alleged against each defendant, that then there should be a joint--that is to say, I would like to get the case where substantially the same evidence will be involved but where you may not have the same act or transaction within the indeterminate meaning of "act or transaction" in the second clause.

gl4

It may be the vote will decide that too. I don't mean to press it if it would.

Mr. Youngquist. Can you give us an example?

Mr. Wechsler. Well, take the case that has been talked about, that automobile accident case, it is substantially the same evidence, isn't it? It is all part of one picture. And I don't know whether it is the same act or transaction with respect to liability as the same act or transaction could be construed by a court, but I do know for purposes of proof that constitutes a single story and we also know there would be no unfairness to either defendant in allowing joinder in that case.

Mr. Youngquist. I suppose the situation would be so rare that it would be no hardship on the Government to prosecute them separately.

Mr. Dean. I think it is covered by this, "the same act or transaction".

Mr. Wechsler. Possibly so.

Mr. Waite. I would not think it was covered by that language. I don't know whether it ought to be or not, but I do not think it is.

The Chairman. May I have the question on the second sentence of 9 (a)? With this change, are we all agreeable to it as it is?

Mr. McLellan. Bear in mind the word "transaction" is a word of doubt.

Mr. Seasongood. It hardly would be as to defendants, would it? It refers to two defendants who are joined.

The Chairman. Or where the offenses arose out of the same act or transaction.

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Mr. Burns. I would like to make a motion on the last sentence, to change the language from "the court may consolidate" so as to read "the court may order such indictments or informations tried together."

Mr. McLellan. I second that motion.

Mr. Youngquist. That will hardly do, because we are speaking of a single indictment--"such indictments or informations"? What does that relate to?

6 Mr. Burns. If such defendants are charged separately the court may order.

Mr. Youngquist. Oh, I see.

The Chairman. Any discussion? If not, those in favor say "Aye." Opposed?

Carried.

Mr. Robinson. As a matter of expression, Judge Burns, may I ask why you say that?

Mr. Burns. Well, again I am a little gun-shy of the word "consolidated". Joinder & Severance

The Chairman. All right. We come now to (b).

Mr. Waite. The same change, I think, Mr. Chairman, ought to be made in line 12 that we just made in line 6.

Mr. Youngquist. Before we come to that, ought we not strike out lines 9 and 10, "or out of two or more acts or transactions connected together"?

Mr. Burns. I don't think so, because the same objection is not apparent.

This is where two or more charges are against the same person.

Mr. Youngquist. I see.

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The Chairman. That I think is safe.

Mr. Youngquist. I misapprehended the meaning of it.

The Chairman. All those in favor of Mr. Waite's motion to make the sentence in line 12 conform to line 6, say "Aye." Opposed, "No."

Carried.

(c) is the next.

Mr. Robinson. We have some changes on that. I think Mr. Holtzoff and Mr. Youngquist agreed on this.

Starting with (c), "Separate Trials of Defendants on Charges. Whenever justice requires it, the court may order separate trials of one or more defendants jointly charged and may order separate trials of one or more counts of an indictment or information."

"or of a consolidated proceeding," since we dropped the word, that should go out.

Mr. Waite. You don't like the idea of separating a defendant?

Mr. Robinson. That was yours--

The Chairman. Will you repeat that sentence so we may all get it?

Mr. Robinson. "Whenever justice requires it"--

The Chairman. You do not need the "it".

Mr. Robinson. --"the court may order separate trials of defendants" or "of defendants jointly charged"--

Mr. Youngquist. Or "one or more defendants jointly charged", so we may group them.

Mr. Robinson. Well, that is what Professor Waite was objecting to.

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Mr. Waite. No, I was just objecting to separating the defendant. I think it is hard on them.

Mr. Robinson. That is it. It is a separate trial of one defendant, and it is hard on them.

Mr. Youngquist. "* * may order separate trials of one or more of the defendants".

Mr. Robinson. "* * may order separate trials for one or more defendants jointly charged and may order separate trials of one or more counts of an indictment or information."

The Chairman. Is that an acceptable change?

Mr. Holtzoff. Yes, I think that is all right.

The Chairman. Any questions?

Mr. Seasongood. You see, there are two. You may join them, in (a), if the offense arose out of the same act or transaction. Then, if you join them, can you separate those two? Don't you have to put that in too?

The Chairman. Well, they would be jointly indicted, so you would separate the joint indictment for the purpose of trial.

Mr. Wechsler. I think the word "jointly" is bad there.

Mr. Robinson. "Charged together", would you say?

Mr. Wechsler. Yes.

Mr. Robinson. "Charged together" instead of "jointly charged". All right, "charged together".

The Chairman. We will get the motion read again. It is (c) you are revising. Will you read it again?

Mr. Robinson. "Whenever justice requires, the court may order separate trials for one or more defendants charged together, and may order separate trials of one or more counts of

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an indictment or information."

The same thing--"and may order separate trials"--no--

Mr. Holtzoff. That's right.

Mr. Robinson. How could you have separate trials on one indictment?

Mr. Holtzoff. You separate counts.

Mr. Robinson. Counts; that is right.

The Chairman. Any remarks?

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

Carried.

That moves us to Rule 10.

Mr. Robinson. It should apply to information as well as indictment.

After "indictment" in line 3, insert "or information".

Mr. Longsdorf. I suppose you can dismiss it only when more than one defendant is charged.

Mr. Robinson. I suppose.

Mr. Longsdorf. Somebody might contend for that.

The Chairman. I think you should have "if" in line 2 instead of "as", to make it conform in line 2.

Mr. Robinson. Well, another suggestion has been made, that the court shall;strike out"as justice requires".

7 Mr. Dean. "Whenever" is what you used before.

The Chairman. "Whenever." Is that what you had?

Mr. Youngquist. Yes.

The Chairman. Well, that should conform.

Any other suggestions on 10?

If not, we will go on to 11 (a).

Mr. Robinson. 11, I suppose, will need to be considered

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with the rule on warrants or summons, Rule 4, which we considered in connection with the magistrate.

The instructions of the Committee were to provide that 11 be consolidated--that 11 incorporate by reference, so far as possible, provisions for warrant or summons as contained in Rule 4.

You recall Rule 4 applies to warrant or summons issued by the committing magistrate.

This provides for warrant or summons following indictment or information.

Of course the provisions for the two are largely the same.

So I take it, since you have referred to the subcommittee Rule 4 for reconsideration, the same would apply to Rule 11 after whatever discussion you make here.

Mr. Waite. You remember also, Mr. Robinson, we changed Rule 4 that it should not command the marshal--

Mr. Robinson. Miss Peterson has it as revised by your subcommittee this morning.

Mr. Holtzoff. It is a little different from the other.

A bench warrant is always served by the marshal, so it is not improper to provide that the marshal--

Mr. Waite. You mean that only the marshal can arrest under this--

Mr. Holtzoff. That is the usual practice. It is issued to the marshal. It is never issued to an investigating officer.

Mr. Waite. Suppose the marshal does not find the man but some other officer can find him?

Mr. Holtzoff. Another officer can make an arrest on probable cause for arrest, but ordinarily bench warrants run to

g20

marshals.

Mr. Waite. Well, as a matter of fact you have it provided in Rule 11 that it need not be served by the marshal, because under (c) it says, "The warrant shall be executed and the summons shall be served as provided in Rule 4", and Rule 4 provided that the warrant be executed by the United States marshal or some other officer authorized by law.

Mr. Youngquist. I think that came, Mr. Waite, from the use of similar language in 4 without noticing the different situations.

Mr. Holtzoff. I know that invariable practice is to issue a bench warrant to the marshal and not to the investigating officer.

Mr. Waite. At any rate, either (b)(1) or (c) in 11 should be changed. They are inconsistent as they stand.

Mr. Youngquist. May I suggest, Mr. Chairman, that we now consider Rule 4 which deals with the same subject, and then we can conform Rule 11.

The Chairman. The proposition is really no problem situation because the marshal may deputize anybody.

Mr. Holtzoff. Surely.

The Chairman. All right. We will go back to Rule 4, which has just been distributed.

Mr. McLellan. By the way, in view of the fact that we have eliminated the petty offense, I think we should strike out the provision that in cases triable by the magistrate he may issue a summons--that occurs in line 7, all of line 7, and the first half of line 8.

Mr. Robinson. Do we have to ignore the fact that the

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magistrate does have that power?

Mr. McLellan. Well, he does if he has had it specially conferred upon him.

Mr. Youngquist. We are not dealing at all with these rules with cases triable by the magistrate.

Mr. Robinson. If he has not had the power conferred upon him, line 7 would not apply; it would be one who has power to try.

Mr. Youngquist. That should properly appear in the petty offense rules, and not here.

Mr. McLellan. Have you moved that that be stricken out? If you do, I second it.

Mr. Youngquist. Yes.

Mr. Burke. Are the petty offense rules the only ones that apply to trials by commissioners?

Mr. Robinson. I think nobody knows. The law is so chaotic that no one knows.

The Department of the Interior has created one for most of the national parks, and there is something with regard to navigation offenses.

Mr. Longsdorf. That is not before a commissioner, that is before a court.

Mr. Robinson. What about the law in Alaska?

Mr. Burke. But do those rules which are called the petty offense rules cover all procedures before United States commissioners in all instances where they have trial jurisdiction?

Mr. Holtzoff. No; those rules are specifically related to trial jurisdiction of the commissioner conferred by the Act of 1940, namely, the jurisdiction to try petty offenses.

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Mr. Burke. If that is the situation, should we strike this?

Mr. Robinson. I think not.

Mr. Youngquist. I thought we decided yesterday that the phrase "committing magistrate" related only to preliminary proceedings leading to the indictment or information.

Mr. Burke. I don't know that we concluded that. I think we used that as part of our rationale for abandoning the petty offense rules, but we do have this area of offenses over which commissioners have trial jurisdiction as to which they may need help, I don't know, but which are not covered by the petty offense rules.

8 Mr. Youngquist. Wouldn't we be in this situation:

First, we would be confronted with the necessity of setting up a whole set of rules for trials by commissioners not covered by the rules already adopted by the Supreme Court; then, second, the commissioners would be operating under two sets of rules, some applicable to those covered by the 1940 statute, and these cases covered by the rules that we propose?

Mr. Burke. I think we might.

Mr. Youngquist. I think it would be an impossible situation.

Mr. Burke. But this is in the interests of criminal prosecution. I wonder if the Supreme Court considered these other situations where the commissioners acted as trial judges.

Mr. Holtzoff. I don't know that they did, but I would like to supplement the answer I gave to that question long ago.

The rules relate only to trials before commissioners under the 1940 Act, but it seems to me that the 1940 Act really

supersedes the prior acts conferring jurisdiction on national parks.

There are specific statutes on national parks, then along comes the general statute authorizing the commissioners to try petty offenses committed on any reservation, so I believe the 1940 Act covers any--

Mr. Robinson. Just a minute on that. Isn't it true that since that act was passed there have been other national park acts passed?

Mr. Holtzoff. Yes, but that is really surplusage because the 1940 Act would apply as it was, and it is unnecessary draftsmanship. Nobody amended the bill as it went through.

Mr. Youngquist. Are there any offenses tried by commissioners other than those committed on federal reservations?

Mr. Holtzoff. No, except of course Alaska. In the continental United States, so far as I know, there is no trial jurisdiction vested in commissioners,--except petty offenses on federal reservations.

Mr. Youngquist. Then that seems to answer the question whether there are any offenses triable by commissioners that are not covered by the rules promulgated by the Court, and, that answer would be in the negative.

Mr. Dean. I wish I could be satisfied on that point. If that is the answer, it clears up the situation. If that is not the answer, it is a very unfortunate situation, it seems to me, to have your petty offense rules covering part of the trials, and not the other.

Mr. Holtzoff. What is it you have in mind?

Mr. Dean. I just don't know. I think the committee might

be furnished with something on this trial business.

Mr. Longsdorf. In the research work I made as careful a search of the statutes as I knew how to make to see whether there was any trial jurisdiction in commissioners except those cases characterized by the fact that the offense was committed on federal reservations, and therefore covered by the 1940 Act, and I could find nothing.

Mr. Robinson. That may be sufficient.

Mr. McLellan. The point of the question is whether we should strike out that sentence or let the whole thing go in.

The Chairman. That is right.

Mr. Robinson. We have no jurisdiction in regard to commissioners in the proceedings before them, at least in their dealings with petty offenses. Shouldn't we have a general clause on that, because otherwise our first two or three rules the commissioners might think apply to them?

Mr. Youngquist. I thought we were going to put in a rule on trials by commissioners of petty offense cases. Won't that clarify the situation?

Mr. Longsdorf. I understood that was to be done.

The Chairman. All right, now. Have we a motion?

Mr. McLellan. Well, Mr. Youngquist made one and I seconded it.

The Chairman. The motion is to strike line 7 and the first half of line 8.

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

Carried.

Mr. McLellan. Now, I move the adoption of Rule 4 (a).

Mr. Holtzoff. I second the motion.

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

Carried.

We now come to 4 (b).

Mr. McLellan. I move the adoption of 4 (b)(1).

Mr. Holtzoff. I second the motion.

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

Carried.

Mr. Holtzoff. In (b)(2) do we need the second clause beginning on line 21?

Mr. Youngquist. I think the purpose of that clause is to let the magistrate know whether the defendant is likely to come or not. If he does not sign the recognizance he may choose to issue a warrant for his arrest.

Mr. McLellan. I move the adoption of Rule 4 (b)(2).

Mr. Holtzoff. I second the motion.

9 The Chairman. I might suggest, it might be better to break it into two sentences.

Mr. Youngquist. All right. Strike out the word "and".

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

Unanimously carried, and we move on now to (c).

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

Mr. Youngquist. I think the word "a" should be inserted between the words "serve" and "summons" in line 27.

I make that motion.

Mr. Holtzoff. I second the motion.

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

Carried.

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(c)(2).

Mr. McLellan. I move the adoption of (c)(2).

Mr. Holtzoff. I second the motion.

Mr. Medalie. This just occurs to me. Why do we say "except a subpoena" in line 30?

Mr. Holtzoff. A subpoena runs throughout the United States.

Mr. Medalie. Why do we say "except" it?

According to this, someone just reading this might think you could not serve a subpoena within a hundred miles of the commissioner's office.

Mr. Holtzoff. This says, "any other process except a subpoena", because if you did not except a subpoena this might be taken as a limitation on subpoenas. You have another provision in the subpoena rule that they may be served anywhere in the United States.

Mr. Waite. In view of the fact that this is headed "Warrant or Summons" why do we need the phrase "or any other process"?

I think it ought to be stricken out.

Mr. Youngquist. Is a subpoena a process? That is a doubt that occurs to me.

Mr. Holtzoff. Is a search warrant a process? That is the only other thing I can think of.

Mr. Youngquist. I doubt it.

Mr. Holtzoff. I doubt it too.

Mr. Waite. Inasmuch as this purports to deal only with warrant or summons, I move that in line 30 the words "or any other process except a subpoena" be stricken.

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Mr. Longsdorf. I second that.

Mr. Holtzoff. Then you want to insert that in line 29, don't you, warrant or summons?

Mr. Waite. Yes.

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The Chairman. All those in favor of these amendments say "Aye." Opposed, "No." It is carried.

Is there anything else on this section?

Hadn't we stricken out "by a usual mode of travel"?

3 Mr. Holtzoff. Yes.

Mr. Dean. Did we determine the standard for that?

Mr. Holtzoff. The civil rules do not have any standard, and that has not been a source of trouble, so far as I know.

Mr. Robinson. We struck out "returnable" and put in "issued" yesterday, in line 35.

Mr. Dean. Yes.

The Chairman. All those in favor of striking out "by a usual mode of travel" and substituting "issued" for "returnable" say "Aye." Opposed, "No." The motion is carried.

Are there any further suggestions?

If not, all those in favor of (c) (2) as amended say "Aye." Opposed, "No." The motion is carried.

We now come to (c) (3).

Mr. Robinson. There again, Mr. Youngquist, you have made a change in line 38, striking "practicable" after "arrest" and inserting "as soon as may be." Do you want it this way?

Mr. Youngquist. I must have been out when those things occurred.

"As soon as may be"?

Mr. Robinson. Yes.

Mr. Youngquist. Do we need the words in line 40 "for his arrest"? We have the word "arrest" two or three times in that sentence.

Mr. Holtzoff. It would be for his arrest, I suppose.

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Mr. Youngquist. If at all, yes.

The Chairman. Why do you need it?

Mr. Holtzoff. We do not need it at all.

Mr. Youngquist. Strike out "for his arrest."

Mr. Robinson. The officer is notifying the defendant of the fact that a warrant has been issued for his arrest.

Mr. Medalie. You do not need "for his arrest."

Mr. McLellan. I move the adoption of (c) (3).

Mr. Youngquist. I second the motion.

Mr. Seasongood. I thought we had some question about "the officer shall inform the defendant of the cause of the arrest."

Mr. Youngquist. It is in there.

Mr. Seasongood. There was a good deal of a question about whether he should be informed.

Mr. Holtzoff. I think we agreed to adopt that.

Mr. Seasongood. Did we?

Mr. Holtzoff. I raised the question.

Mr. Dean. We agreed that that was particularly necessary in the case where we had no warrant, but whether it applied to the other was in question.

The Chairman. I think it should be changed to that. Where he shows the warrant, there is no need of making a speech.

Mr. Seasongood. That was my recollection of what occurred.

The Chairman. Why can't that sentence in line 39 say, "but where the officer does not exhibit the warrant at the time of his arrest, he shall inform the defendant"?

Mr. Seasongood. "Where the officer does not have the warrant in his possession at the time of the arrest, he shall."

The Chairman. That is better.

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Mr. Youngquist. May I call attention to the fact that this rule relates only to warrant or summons. I am simply pointing out for consideration whether or not that provision should come in this rule or elsewhere.

Mr. Dession. If it comes in here, it probably would not apply to arrest without a warrant. We are leaving that untouched.

Mr. Holtzoff. That is where the warrant is not in the officer's possession.

Mr. Youngquist. Will you read that?

The Chairman. "Where the officer does not have the

4 warrant in his possession he shall inform the defendant."

Mr. Robinson. "When the officer."

The Chairman. Yes, that is better. All those in favor of (3) as amended say"Aye." Opposed, "No." The motion is carried.

We come now to (4).

Mr. McLellan. I move the adoption of Rule 4 (c) (4).

Mr. Holtzoff. I second the motion.

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

Now, what will we do with Rule 11, in the light of what we have just done with Rule 4? Refer it back to the committee?

Mr. Holtzoff. I do not think that is necessary.

The Chairman. Isn't it necessary?

Mr. Holtzoff. I think it is probably all right as it stands.

I want to make a suggestion on Rule 11 (a). In line 5 I think "or of any other officer of the United States" should go out. That phrase is in Rule 4 because there we are dealing

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with commissioners. Here we are dealing with a bench warrant upon indictment or information, and in that event the United States Attorney should have sole control and no other officer should share it with him.

Mr. Medalie. That is right. You are now in the court and you have a responsible representative of the Government.

TheChairman. Those words will be stricken.

Mr. McLellan. What line is that, please?

The Chairman. Line 5.

Mr. Longsdorf. Mr. Chairman, before we pass line 4, if the defendant is already in custody, of course no bench warrant would need to be issued, and would not be issued. Do you want to put something in to cover that?

TheChairman. Isn't it implied?

Mr. Longsdorf. Beginning on line 2, it reads:

"The clerk upon the filing of an indictment or information shall forthwith issue a warrant as required for each defendant charged therein."

Mr. Medalie. "And not apprehended."

Mr. Longsdorf. "And not in custody."

Mr. Dession. "As required" covers it.

Mr. Holtzoff. I think the words "as required" cover that.

Mr. McLellan. I move the adoption of Rule 11 (a).

Mr. Holtzoff. I second the motion.

Mr. Youngquist. May I ask a question about that? Weren't we going to conform Rule 11 to Rule 4, or not?

The Chairman. I thought we were, but the suggestion was made that it seemed to be implied.

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Mr. Holtzoff. We ought to strike out the requirement of registered mail in line 11.

Mr. Youngquist. The mailing of the summons should come down to (c), because all the clerk does is deliver it to the marshal or officer authorized to serve it. That is what we did in Rule 4.

The Chairman. The motion is to take the last sentence of Rule 11 (a) and drop to the end of (b) (2).

Mr. Youngquist. Not quite. To strike out, in lines 10 and 11, the words beginning with "or he may mail."

Mr. Longsdorf. Before we pass on, let us add to that motion a motion that the word "such," the fourth word in line 7, be taken out, because it does not make sense.

Mr. Dean. It refers back to line 4.

The Chairman. Yes, it refers back to line 4.

Mr. Youngquist. "Direction of the court."

Mr. Longsdorf. Yes, but the direction before is to issue a summons, and the direction here is to issue more than one warrant or summons.

Mr. Holtzoff. I do not think you need "such" there.

Mr. Longsdorf. I do not think "such" does any good.

Mr. Youngquist. What is intended is "direction by the court"--

Mr. Longsdorf. "Similar direction or request," or "likewise upon direction or request, he shall issue more than one warrant."

The Chairman. What is your pleasure with Rule 11 (a)?

Mr. McLellan. Are you sure it is desirable to strike out "or he may mail the summons" andput it down below?

Mr. Youngquist. The reason is that all that (a) relates to is the duty of the clerk to deliver the warrant to the marshal or the officer, and then in (c) we provide that the marshal or the officer may either serve the summons--

Mr. McLellan. You do not want to give the clerk the power, instead of delivering the summons to the marshal, to mail it himself?

Mr. Youngquist. That is right. Leave that up to the officer whose job it is to either serve it in person or serve it my mail.

We do not need the words "United States," do we, in line 9?

Mr. Robinson.. No.

Mr. Youngquist. Question.

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

Now we come to 11 (b) (1).

Mr. Waite. On that I want to ask this. Suppose the warrant is issued commanding the marshal to make the arrest and the marshal hands it over to a deputy marshal, by whom the arrest is made. Could there be any question of the validity of the arrest being made by somebody other than the person commanded?

Mr. Youngquist. Other than the marshal himself, you mean?

The Chairman. Yes.

Mr. McLellan. It is directed to the marshal or his deputy.

Mr. Waite. It says here "shall command the marshal to arrest." That is what I am worried about. Suppose the marshal does not arrest. I think it would be a serious question of the validity of the arrest under that warrant.

Mr. Youngquist. I had always supposed that any act that may be done by an officer may likewise be done, and with the same effect, by his deputy, even though the warrant is directed to the marshal.

Mr. Holtzoff. Actually there is no problem, because if the defendant has been indicted, he can be taken into custody with or without a warrant. So even if a warrant is void or served in an illegal manner, the arrest is legal.

Mr. Waite. That unfortunately is not true, because there is one definite case that I know of, and two others bearing on it, where the arrest was made by virtue of a warrant, and it was held that that was unlawful because of a defect in the warrant; and the defense was then made that the warrant was not necessary, that the arrest could have been made on a felony charge. The court said, "No. Having made the arrest by virtue of the warrant, you cannot now change your ground for arrest."

Mr. Holtzoff. Is that a Federal case?

Mr. Waite. No; it was a state case.

Mr. Holtzoff. I do not believe any Federal court will hold that.

Mr. Waite. Well, you cannot tell. Have there been any cases on it?

Mr. Youngquist. Pardon the interruption, but your statement brought my mind to the fact that in (a) we provide for the delivery of the summons to the marshal or other officer authorized by law to execute it, whereas in (b) the only command is the one given to the marshal.

Mr. Holtzoff. I think that probably was incorporated from Rule 4 (b) and should not be here.

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Mr. Waite. I think we should play safe and make it read the same as in Rule 4. It was meant to read, "command that the person shall be arrested." Then we are safe.

Mr. Youngquist. That is good. Then we should go back there and strike out from lines 9 and 10 the words "or other officer authorized by law to execute it."

Mr. Waite. We do not need to do that if we change (b) (1) to conform to Rule 4.

The Chairman. Should line 15 read, "command that the defendant be arrested"?

Mr. Waite. Yes.

Mr. Holtzoff. I think the rest of that line should be changed. The warrant, in fact, does not read that the defendant be held subject to the order of the court. It should be changed to read, "and to bring him before the court."

Mr. McLellan. "Be arrested and brought before the court."

The Chairman. Are there any further changes in (b) (1)?

If not, those in favor say "Aye." Those opposed say "No." The motion is carried.

(b) (2).

Mr. McLellan. I move the adoption of (b) (2).

Mr. Youngquist. We do not have in (b) (2) the acknowledgment of service provision that we have in Rule 4.

Mr. Holtzoff. Do you need it, because you have an incorporation by reference?

The Chairman. It carries it over.

Mr. Youngquist. Well, the summons shall be in that form. Rule 2 says that the summons shall be as provided in Rule 4. Then we say, in Rule 4, it shall be accompanied by a form of

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acknowledgment.

Mr. Holtzoff. Don't you think that is carried there by necessary implication?

Mr. Youngquist. It is not necessary at all. I was just looking for consistency.

The Chairman. All those in favor of Rule 11 (b) (2) say "Aye." Opposed, "No." The motion is carried.

11 (c).

Mr. Seasongood. That seems to be a duplication of (c) (4) of Rule 4.

Mr. Youngquist. Yes.

Mr. Seasongood. Rule 11 (c) seems to be a duplication of our new Rule 4.

Mr. Robinson. Execution of service is included in (c). It is not merely the return but includes the execution of service.

Mr. Seasongood. It says that the person who receives the summons or serves it shall make return thereof promptly.

Mr. McLellan. Is it the same as Rule 4?

Mr. Holtzoff. It is a lot of surplusage.

Mr. Seasongood. It seems to be.

Mr. Robinson. The first two lines relate to execution and service.

Mr. Seasongood. "Or other person shall make return of the warrant or summons promptly to the clerk."

The only difference is that in one case you say "make return promptly" and in the other one "promptly to the clerk."

Mr. Robinson. In other words, "return" is included in execution and service.

Mr. Seasongood. Yes.

Mr. Dean. It is the fourth subdivision of (c).

Mr. Robinson. Very well.

Mr. McLellan. Do you care very much--I think it is probably nonsense--to add after the words "the warrant shall be executed" the words "and returned," and after the words "the summons shall be served" the words "and returned"?

Mr. Youngquist. Do we have a provision for return?

The Chairman. Wouldn't it be held to carry back to the warrant shall be executed and the summons shall be served and returned?

Mr. Holtzoff. Why not say "the warrant shall be served and returned as provided in Rule 4"? You do not need the two clauses.

The Chairman. Do you speak of serving the warrant?

Mr. Seasongood. "The warrant and the summons shall be served, executed, and returned."

The Chairman. That is better.

Mr. Robinson. Did you say "warrant and summons" or "warrant or summons"?

Mr. Seasongood. "The warrant and summons shall be executed, served, and returned."

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

We move on to Chapter IV, Rule 12.

Mr. Seasongood. Service by mail is rather summary. All you seem to say in Rule 4 (3) is that it shall be served as a summons or by mail. You are establishing a new method of summons, which I am very much in favor of, but is it

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sufficiently defined as to how service shall be made? Don't you have to have some address to the residence?

Mr. Youngquist. Those were the questions that were raised yesterday--the last known address, for instance--but the action taken, if any action was taken, by the committee was simply to provide that it be served by mail, and the reasons given were that it would always issue a warrant.

Mr. Seasongood. But as long as you are providing for service by mail, you ought to make it in some intelligible form, I suppose; and also, if service is complete when mailed or received is important.

Mr. Holtzoff. The only purpose of a summons is an accommodation to the defendant--

Mr. Seasongood. Yes, but let us say you mail it to his business address and he is not there.

Mr. Holtzoff. Then you arrest him.

Mr. Seasongood. If you are giving him some benefit by mail, why shouldn't you give it to him?

Mr. Dean. Isn't it conceivable that he may be cited for contempt?

Mr. Holtzoff. No.

Mr. Dean. Why not?

Mr. Holtzoff. You might as well say that a person is subject to contempt proceedings if a person receives a petition in a civil proceeding and he fails to file an answer.

Mr. Dean. This is from the court, and it is in the same category as a subpoena to the witness.

Mr. Youngquist. It was in line 20 where it said that the summons shall command him to appear.

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Mr. Holtzoff. If he does not comply with the summons, you arrest him.

The Chairman. If he does not get it, what are you going to do?

Mr. Holtzoff. Serve a warrant.

The Chairman. But you cannot send him to jail.

Mr. Dession. We do not say anywhere that it is not an enforceable matter.

Mr. Burke. If there should be five summonses sent to five defendants and one did not get to one of the defendants by mail, would you arrest just the one?

Mr. Dean. As long as it is a command by the court to appear, it seems to me it is enforceable by contempt. If that is the situation, it seems to me we ought to have in here more than the mere mailing of it.

Mr. Holtzoff. If there is danger that he is going to be cited for contempt, you ought to provide against it, because I think the serving of a summons is an accommodation to the defendant. Perhaps you ought to provide that if a defendant fails to appear, a warrant may be issued. If there is a danger left by implication--I do not think there is--we ought to provide against it.

I do not think we ought to have a procedure whereby a defendant shall be punished by contempt for failure to obey a summons. When you get a ticket you do not get punished for not showing up.

Mr. Dession. It depends on what the purpose is. A summons has conveniences for both prosecution and defense. If you are perfectly sure that a man will obey the summons and he

won't run away, why bother to go through the rigmarole of an arrest? That does not mean you do not want him there.

Mr. Dean. It is the nearest thing to a subpoena that I can think of.

Mr. Seasongood. You say you are accommodating the defendant. Then, accommodate him. You do not prescribe how it shall be sent. It should be sent to the last known place of residence.

Mr. Youngquist. I suggested yesterday the last known address.

Mr. Seasongood. Otherwise the attorney will say, "Where shall I mail this? To his business address or to his home?"

Mr. Youngquist. I make two suggestions, Mr. Chairman: One, that we add to line 43 in Rule 4, "or it may be served by mailing to his last known address.

Would that cover what you have in mind?

Mr. Seasongood. Yes.

Mr. Youngquist. Strike out "by mail," and make it: "or it may be served by mailing to his last known address."

Mr. Robinson. Of course, that does not necessarily mean he gets any word about it.

Mr. Seasongood. There is a presumption, ordinarily, that if you address a letter and pay the postage he receives it, according to the cases. It is up to him to show that he has not received it. That is the rule in ordinary communications.

Mr.Youngquist. My other suggestion is that in Rule 4, line 20, in order to obviate the danger of contempt of court--and I am not sure that there may be that danger--we change the word "command" to "advise." That is a pretty soft word.

Mr. McLellan. Then you are going to have the summons read

that way?

The Chairman. "Direct" is a little softer.

Mr. Youngquist. I think it is just as effective as "command."

Mr. Medalie. There is no dignity to a summons if you are just asking, "Do you care to come?

Mr. Dession. It seems to me the problem is what we are trying to accomplish here, Mr. Chairman. The purpose of putting in "summons", I think, is that it is not always necessary to use arrest to bring a man in. When it is not necessary to have him arrested, this is objectionable, but we would still want him to come in.

Mr. Seasongood. Notify him that unless he appears he will be arrested and brought in.

The Chairman. That may be the answer--an intimation that if he does not answer, a man will come after him.

Mr. McLellan. I do not think you need an invitation to invite him to skip out.

Mr. Seasongood. Why not say, "commanding him, under penalty of arrest, to appear"?

Mr.Holtzoff. If you say, "under penalty of arrest," somebody might construe that that failure to appear requires punishment.

Mr. Medalie. It is not a penalty; it is an alternative.

Mr. Dean. Judge McLellan, if you had the word "command" in here, would you cite a man for contempt for failure to appear?

Mr. McLellan. No. I would say, "This is all nonsense. Go get your man."

Mr. Dean. I think that is what would happen in practically all the cases, too. You would issue a warrant.

Mr. Medalie. I think you would find some judicial officers who would feel terribly affronted and wreak vengeance on a man who ignored his summons and put him in jail for contempt.

Mr. Holtzoff. Why couldn't we cover this by a note indicating that the purpose of summons is to save the defendant from arrest; and if he fails to appear, then he would be subject to having a warrant issued? That would make it clear that we do not intend that contempt proceedings may be invoked. You do not have to have it in the rules.

Mr. Dession. You would have an additional charge against him if he was held in contempt.

Mr. Youngquist. Wouldn't it be taken care of by providing at the end that if he failed to appear you would issue a warrant for his arrest, to obviate the intention of a contempt arising?

Mr. Holtzoff. Why wouldn't a note take care of it?

Mr. Youngquist. I think it would.

Mr. Dession. The difference between us is what we want this to achieve.

To bring that to a head, I will move that it is the sense of the committee that the summons shall be enforceable by contempt. I am not moving that we have that in the rule. I want to find out what we intend.

Mr. Waite. I notice that the Institute Code provides: "If the person summoned fails, without good cause, to appear as commanded by the summons, he shall be considered in contempt of court, and may be punished by a fine of not more than twenty dollars."

Mr. McLellan. Is that referring to witnesses?

Mr. Waite. No; this is referring to the kind of summons as a substitute for arrest.

The Chairman. Is there any provision for service by mail?

Mr. Waite. There is no provision for service by mail.

Mr. Dession. I think there should be something with reference to mail if it is to be a compulsory process. If it is not to be, then it is all right.

Mr. Longsdorf. If you are going to make a contempt out of that, which kind of contempt is it going to be when you get to it? A criminal contempt, attended with punishment for a contempt, in addition to what may be falling to the offense, or will it be an enforcive contempt? We are going to get that later, but it might be all right to consider it here.

Mr. Holtzoff. This could not be contempt, because it is not committed in the presence of the court, under the Nye case.

Mr. Dean. There is another section that the Nye case did not deal with.

The Chairman. The motion made by Mr. Dession is that the sense of the committee be that the summons shall be an enforceable process.

Mr. Dean. I will second it.

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

Mr. Medalie. I move that the word "command" be substituted by the words "call upon," so that instead of saying it shall command the defendant, it shall call upon the defendant.

Mr. McLellan. So the summons will read, "X defendant shall be called upon to do so and so"?

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Mr. Medalie. I realize the weakness of language.

8 Mr. McLellan. You command him to come, and then, by your note, you provide that he is not in contempt, but the danger of a warrant is there.

The Chairman. That will be the understanding.

Rule 12, Chapter IV.

I think Mr. Dean has some lingering doubt on that subject?

Mr. Dean. I do not think we take a sensible position when we say, "We command you to appear," and then in the footnote we say that, notwithstanding the statute which makes it punishable, we do not want this to be contempt. It seems to me that is a foolish viewpoint for us to take.

I do not know whether the word "notify," which I regard as a little bit of a weasel word, would cure the situation.

Mr. McLellan. I do not want to interrupt you. May I ask you whether you would be satisfied to have in the summons, "You are summoned to appear," instead of "commanded"?

Mr. Medalie. I think that might do it.

The Chairman. Knowing how we all treat traffic summonses, these defendants will understand just what it means.

Mr. Seasongood. I do not want to be contentious, but when you are summoned to appear, if you do not appear you are in contempt.

The Chairman. You are in default.

Mr. Seasongood. If you are summoned to appear.

Mr. McLellan. That is a subpoena.

Mr. Dession. Isn't it the result of different rules in different districts?

Mr. Seasongood. The subpoena says you are summoned under

penalty of law.

Mr. Holtzoff. No. The subpoena has the word "command."

Mr. McLellan. Some read one way and some the other. If he does not obey one, he is not in contempt. There is a lot more to it.

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

Mr. Dession. I vote "No" just on the ground that it is ambiguous.

The Chairman. The motion is carried.

Now, we are on Rule 12.

Mr. Robinson. Mr. Youngquist, you made suggestions here.

Mr. Youngquist. Read them.

Mr. Robinson. On line 1, instead of "shall be entitled," insert the words "has the right." The defendant has the right to be present at the arraignment.

In line 2, after "arraignment" insert a comma, and strike out "and."

In line 3, just before "verdict," insert "return of the." After "verdict," insert a comma.

In line 6, may I ask the wish of the committee with regard to using the term "capital case"? There is some feeling that we should use "a case punishable by death" rather than "capital case." I think we have done that in our indictment and information rule.

Therefore, to be consistent there, I would suggest that we strike out, in line 6, "in other than capital cases," and insert, "cases not punishable by death," insert a comma, and

strike out "his," the next word, and insert "the defendant's."

In line 8, the third word, change "continuation" to "continuing."

Mr. Holtzoff. You would strike out the second word, "the"?

Mr. Robinson. Do you think so?

Mr. Holtzoff. Yes.

Mr. Robinson. If you do, you would have to strike out the "of" also.

Mr. Holtzoff. "Continuing" is not a noun.

Mr. Robinson. Strike out the "the" and strike out "of."

In line 9, after "appear," strike out "and plead."

Following "counsel," insert "for all purposes."

At the end of that line, strike out "misdemeanor."

In line 10, after the first word, "Cases," insert "punishable by fine or by imprisonment for not more than a year, or both."

Mr. Dean. Where does that go in?

Mr. Robinson. In line 10.

Strike out the rest of the line after "cases" and insert "punishable by fine or by imprisonment for not more than a year."

Mr. Holtzoff. "For not more than one year."

Mr. Robinson. "For not more than one year." That is right.

Then, at the beginning of line 11, insert "the court may, with," and go on with the written consent.

At the end of line 11, strike out "the."

At the beginning of line 12, strike out "court may."

Mr. Seasongood. Couldn't you have that typewritten?

Mr. Robinson. I am almost through.

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In line 12 strike out "the" before "arraignment," and after the word "have" insert "and."

In line 13 strike out the comma after "entered" and the word "and", and substitute "or the trial to be conducted."

Insert "conducted" after "be," and strike out "commenced and continued."

Now, if you wish, I will read it the way it is:

"Rule 12. Presence of Defendant. The defendant has the right to be present at the arraignment, at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. The trial of a misdemeanor will be commenced and continued in the absence of the defendant on the express consent of the defendant or his counsel. In cases not punishable by death the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In cases punishable by fine or by imprisonment for not more than one year, or both, the court may, with the written consent of the defendant that counsel shall act for him, permit arraignment to be had and a plea of not guilty to be entered or the trial to be conducted in the absence of the defendant."

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Mr. Medalie. There is one thing I would like to ask here. You speak, in line 4, of a misdemeanor; and, beginning with line 10, you speak of cases where the penalty does not exceed imprisonment for one year. Don't you mean the same in both cases?

Mr. Robinson. I am not sure of that.

Mr. McLellan. A conspiracy is described as a misdemeanor and is punishable by two years.

Mr. Medalie. Two years, yes. So is the offense of embezzling funds of a national banking association. It is a five-year offense.

Mr. McLellan. Is it necessary?

Mr. Robinson. In other words, you think that the expression used in line 10 should also be used for"misdemeanor"in line 4?

Mr. McLellan. Yes.

Mr. Robinson. That can be done, yes, sir.

Mr. Longsdorf. I think that word "misdemeanor" ought to be restricted, in view of the divers meanings it has in the statutes, or else we are running one thing into another.

Mr. Medalie. Isn't the second sentence, line 4, surplusage?

Mr. Youngquist. I thought the reason for putting that in was Mr. Dean's suggestion with respect to the anti-trust cases, which are called misdemeanor, but the punishments in which may exceed one year.

Mr. Dean. No. They fall in the regular definition. They may not exceed one year.

Mr. Medalie. Under the circumstances, can't we strike the second sentence? Isn't it covered by the last sentence?

Mr. Holtzoff. Yes. It is repetitious.

Mr. Youngquist. I think it is all covered by the last sentence.

Mr. McLellan. I think you are dealing with something that should be typewritten.

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Mr. Robinson. Very well. You will have it this afternoon.

Mr. Longsdorf. Weren't there cases that decided that voluntary absence in a misdemeanor case could be passed over, and in those cases there was no attempt or intent to consent? You are talking about written consent down here, and that is a different type of case, with different situations and different conditions.

Mr. Medalie. You mean you can stop a trial in the case of a defendant who does not show up?

Mr. Longsdorf. In a misdemeanor case.

Mr. Medalie. You have that covered in the third sentence. That covers everything but treason and murder.

Mr. Longsdorf. The last sentence relates only to where written consent appears by counsel.

Mr. Medalie. Where the penalty is a year or less. If he walks out of the courthouse, you can go on in any case except a capital case.

I press the motion to strike out the second sentence.

Mr. Youngquist. I second the motion.

The Chairman. May we have your motion again?

Mr. Medalie. I move to strike the second sentence.

The Chairman. Beginning on line 4 and ending on line 6?

Mr. Medalie. That is right, beginning on line 4 and ending on line 6.

Mr. Youngquist. I second the motion.

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

Mr. Youngquist. This is to be rewritten and submitted to

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us after lunch?

The Chairman. Yes.

Rule 13.

Mr. McLellan. I would like to ask, with reference to 13, what is to be done when the defendant does not want counsel.

Mr. Holtzoff. That contingency is not foreseen here. It ought to be.

Mr. Youngquist. This infers that it is only when he is unable to engage counsel that the court assigns one to him.

Mr. Holtzoff. Suppose he is able to and does not want to?

Mr. Burns. How about inserting after the word "defendant" "if he so desires"?

Mr. Robinson. Who is going to mention the McCann case?

Mr. Seasongood. I think it would be better to say, "The court shall assign counsel to him, unless he desires not to have counsel."

Mr. Dean. Or "if he is unable to engage counsel and desires counsel."

Mr. Seasongood. That would mean that he has to want him, and the other is better, that you assign him one unless he says he does not want one.

Mr. Orfield. What does the word "proceeding" mean in line 2?

Mr. Youngquist. It is intended to be all-inclusive, from the commissioner on. Does that include the appellate proceeding, too?

Mr. Holtzoff. I think so.

Mr. Robinson. It is intended to.

Mr. Youngquist. He is entitled to it, if he can get there.

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The Chairman. What is your suggestion for covering this omission, Judge McLellan?

Mr. McLellan. "If he does not waive counsel and is unable to engage counsel," or something like that.

10 Mr. Medalie. I do not think he has to waive counsel.

Mr. Wechsler. I think Mr. Seasongood's suggestion is good.

Mr. Medalie. He can be without counsel without waiving counsel.

Mr. Seasongood. Unless he states he does not desire to have counsel.

Mr. Waite. I second the motion.

Mr. Robinson. In the McCann case he stated to the court he did not want to have counsel.

Mr. McLellan. Then, the question is still open as to whether he will waive counsel.

Mr. Medalie. McCann had plenty of money, didn't he? It was not a question of his being a pauper.

Mr. Holtzoff. The question in that case was entirely different. The question was whether the judge could accept a waiver of a trial by jury in the absence of the defendant's being represented by counsel. The defendant said he wanted to represent himself. Then he waived a trial by jury.

The Circuit Court of Appeals for the Second Circuit held that the waiver should not have been accepted, in view of the fact that the defendant chose not to be represented by counsel. So I do not think that that case has any bearing upon the question of assigning counsel.

Mr. McLellan. I do not want to prolong the discussinn, but I can conceive of a situation where a man may say that he

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does not want counsel, but the circumstances be such that it could be found, nevertheless, that he did not waive the right to counsel. That is why I mention it, but I do not care.

Mr. Dean. Is there a motion pending?

The Chairman. I do not think we have any motion.

Mr. Medalie. There is a deficiency in this second sentence, and a very practical one. A man sometimes finds himself without counsel at a stage of the case later than the pleading. He ought to have counsel or the opportunity to have him. This does not provide for that.

Mr. Youngquist. Don't you think that would be implied?

Mr. Medalie. I think not. "Upon his arraignment and before he is called upon to plead." Thereafter he is without counsel. Counsel, let us say, is a person who has another engagement.

Mr. Dean. Does not the first sentence take care of it?

Mr. Medalie. He is entitled to counsel, but he won't get it unless the court gives it to him. When you say he is entitled to counsel, that means he is entitled to pick his own lawyer.

Mr. Robinson. The clause "upon his arraignment" was inserted for a reason there.

Mr. Medalie. That is the time to find out, normally. That is the reason. Also, because he does not know what an indictment is. He could not read it if you gave him eighty copies of it. If he could not read it, he could not understand it.

Mr. Robinson. There was a discussion of it, and it was suggested that there should be a provision for counsel down before the commissioner. I think it was agreed that that would

be too wide a requirement, to allow U. S. Commissioners to appoint counsel.

Mr. Medalie. That is a different proposition.

Mr. Robinson. I know it is a different proposition. In dealing with time, you want it at arraignment and at each time after arraignment.

Mr. Medalie. Just say "and thereafter."

Mr. Youngquist. You cannot do that, because the idea was that counsel shall be appointed before he was called upon to plead.

It would be better to add after the word "plead" something to the effect, "to assist him throughout the trial," or something of that sort, together with the suggestion made by Mr. Seasongood, "unless he states that he does not desire counsel," but I think that should stay as it is, Mr. Medalie.

The Chairman. "To assist him throughout the trial." That sounds like good language.

Mr. Medalie. This has to do with the time of assignment. Assume the Court has assigned counsel to him before he is called upon to plead.

The Chairman. This line added, "to assist him throughout the trial" --

Mr. Medalie. It has nothing to do with the time of assignment. The court has already fully discharged his obligations by assigning counsel to him, who is to assist him throughout the trial.

The Chairman. Suppose counsel secured permission to walk out. Under this phrase, the court would have nothing to do with it. I think you ought to have some language, as Judge

McLellan suggests, to say that the defendant may waive his right to counsel.

That was your language, was it not, Judge McLellan?

Mr. McLellan. Something like that.

Mr. Medalie. Let us see if we can do this: "Or to assist him upon the trial," and then add, "but the defendant may waive his right to counsel."

Mr. McLellan. Where are you suggesting that?

Mr. Medalie. At the end of line 4, put a comma, and add, "or to assist him upon the trial."

Mr. McLellan. "Or to"?

Mr. Medalie. "And to." You see, that should relate to the assignment.

Mr. McLellan. You do not want the "and."

The Chairman. Just say "Assist him throughout the trial," and then it is clearly implicit that when counsel number one walks out, the court still has the continuing power and the duty--

Mr. Wechsler. How about the appeal?

The Chairman. I think that is included in the second line, "at every stage of the proceeding."

Mr. Wechsler. I mean the last line, "throughout the trial."

The Chairman. "Throughout the proceeding" is better.

Mr. Holtzoff. How are you making this?

The Chairman. I suggested something to somebody: "To assist him throughout the proceeding."

Mr. McLellan. Is that going to go after the words"called upon to plead"?

The Chairman. Yes, at the end of the rule as now written.

Mr. Wechsler. How does it read as changed?

The Chairman. "If he is unable to engage counsel, the court shall assign counsel to him upon his arraignment in court and before he is called upon to plead, to assist him throughout the proceeding."

Mr. Holtzoff. I suggest that you leave out "his" and "in court." Just say "upon arraignment."

The Chairman. "But he may waive."

Mr. Holtzoff. "But the defendant may waive"?

The Chairman. No. "But he may waive his right to counsel."

Mr. Burns. Why not put that after the word "proceeding" in the second sentence:

"A defendant is entitled to have the assistance of counsel for his defense at every stage of the proceeding, unless he waives this right."

Mr. McLellan. That is a little better.

Mr. Youngquist. That is a little different.

Mr. McLellan. After "throughout the proceeding" put "unless the right to counsel is waived."

Mr. Seasongood. If you introduce that, can there be a waiver, unless he states he does not desire counsel and waives the right to counsel?

Mr. Holtzoff. Isn't that repetitious?

Mr. Seasongood. No, because what amounts to a waiver under the Supreme Court decisions is a matter of difficulty. They want you to say that he is absolutely entitled to it unless he states he does not desire counsel.

Mr. McLellan. Don't we have to leave to judicial decision what constitutes waiver?

Mr. Burns. That is why it seems to me it is better not to

say anything about waiver, but simply to prescribe the practice as we think it should occur; and then in cases where the practice is not followed, let the courts decide whether there was a waiver in the sense of a surrender of the right.

Mr. McLellan. The trouble with something of that kind is that you are telling the judge to assign counsel, and he must assign counsel, if you leave it this way, even though the defendant has said he does not want any lawyer and waives it.

Mr. Burns. I was not defending this text.

Why doesn't Mr. Seasongood's suggestion take care of it?

"The court shall assign counsel to him upon his arraignment in court and before he is called upon to plead, to assist him throughout the proceeding, unless he says he does not desire counsel."

Mr. Longsdorf. I think it better to put in the "unless" clause at the end of the first sentence.

Mr. Youngquist. No. This relates to assignment of counsel.

Mr. Holtzoff. Why not put the "unless" clause at the beginning of the second sentence?

Mr. McLellan. "Unless he refuses or waives counsel."

Mr. Wechsler. Mr. Commissioner, may I suggest this as a resolution?

The Chairman. Surely.

Mr. Wechsler. The first sentence as it stands. A new second sentence, which reads:

"The court shall assign counsel to any defendant who is unable to engage counsel, unless the defendant elects to

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manage his own cause."

A third sentence, which will read:

"Such assignment shall be made upon arraignment and before the defendant is called upon to plead."

Mr. Holtzoff. Shouldn't you use some other word than "manage"?

Mr. Wechsler. I believe the District statute which deals with the subject speaks in terms of management. There is a statute that gives him the right to remand--

The Chairman. It sounds like an impeachment proceeding to me.

Mr. McLellan. You say, "Do you want a lawyer?" You do not say, "Do you want to manage your own case?"

The Chairman. "Try his own case" is the popular phrase.

Mr. Medalie. There is another situation, where he may want to sit around there and sulk.

Mr. Seasongood. He may want to conduct his defense in person.

12 Mr. Medalie. He may not want to conduct any defense. He may just want to sit around.

Mr. Seasongood. He may say, "So far as I am concerned, you can dismiss this."

Mr. Wechsler. "Unless the defendant elects to proceed without counsel."

Mr. Burns. The provision I have here reads: "Before the defendant is arraigned on a charge of felony, if he is without counsel, the court shall, unless the defendant objects, assign him counsel to represent him in the cause."

Mr. Burke. The language of the former rule is that if the defendant voluntarily, and with knowledge of his rights, waives the assistance of counsel.

Mr. Wechsler. The difficulty is that it purports to define when a waiver may occur. As was suggested earlier, that is a conflicting subject under the decisions. I think waiver may sometimes occur when the defendant did not have any knowledge of his rights.

The Chairman. Professor, will you read your suggestion again, with something in place of "manage"?

Mr. Wechsler. "The court shall assign counsel to any defendant who is unable to engage counsel, unless the defendant elects to proceed without counsel."

I would like to eliminate at least two of those three uses of the word "counsel," but that is the sum and substance of it.

Then I think there should be a further sentence that indicates that the assignment shall be ordinarily made upon arraignment. I do not think it should foreclose assignment later in the rare cases where that is desirable. That ought to be the regular point at which it is done, as it is.

Mr. Holtzoff. "Upon arraignment and before the defendant is called upon to plead"?

Mr. Wechsler. Yes.

Mr. Longsdorf. I feel, in view of the recent decisions of the Supreme Court, that whatever the defendant does in the way of rejecting counsel or retaining him, it ought to be made positive and explicit, and I have heard that other cases may be pending that also touch the same subject.

The Chairman. Suppose we have this redrafted.

Mr. Longsdorf. I would like to see this done.

The Chairman. All right. We will adjourn for lunch at this point.

Mr. Waite. Before we do that, may I make one suggestion to the redrafters? In view of the Glasser case, I am a little afraid of the expression, "if he is unable." That may raise a question of whether he is or is not.

I would like to suggest that it should be made to read, "If he asserts that he is unable to engage counsel."

Mr. McLellan. That is contrary to my experience, that they will assert it when they are perfectly able to.

Mr. Waite. I want to avoid all question of the court's failure to appoint on the ground that he is able and the question being carried up. As a matter of fact, whenever he says he is unable, the court does appoint counsel for him, and I think we might as well say that explicitly.

Mr. Seasongood. "If the court finds he is unable."

Mr. Waite. I am afraid even of that, because then he has a chance to appeal on the ground that the court's finding was wrong. I think if he asserts it, it is enough.

The Chairman. We will adjourn for lunch, until about twenty minutes of 2.

(Thereupon, at 1:05 o'clock p.m., a recess was taken until 1:40 o'clock p.m.)