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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

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AFTERNOON SESSION

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AFTER RECESS

The proceedings were resumed at 1:40 o'clock p.m., at the expiration of the recess.

The Chairman. All right, gentlemen. We proceed to Chapter V, Rule 14.

Mr. Seasongood. Mr. Chairman, everybody is in a good humor. May I go back a minute? I am not going to hurry you with this Rule 7.

Mr. Robinson. Rule (c).

Mr. Seasongood. But I just want to call your attention to what I had in mind. It was in the back of my head that there was a case, and Mr. Tolman helped me to find the one that I meant. This was a case in 121 Fed. 2d, 235, and in that case a member of the Labor Relations Board--it was Mr. Smith--had taken an active part in attempting to boycott someone before he sat on the case; and the court of appeals ordered that the case be sent back to determine whether he was disqualified. Now, they say, at page 239:

> "The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

So it seems to me to be in point for the proposition that if a grand juror has participated in the deliberations and induced the others to return the indictment you ought not to leave this as we have it here. It ought not to be written in. I am

not going to say any more about it, but it does seem to me to be a case in point.

The Chairman. Well, do you want to make a motion?

Mr. Seasongood. I did, and it was voted down.

The Chairman. Oh.

Mr. Seasongood. I do not know whether this case will induce anybody to ask for a reconsideration or not.

Mr. McLellan. You and I were pretty lonesome on that.

Mr. Seasongood. No; we jad Judge Burns with us.

Mr. Burns. Was that in the Third Circuit?

Mr. Seasongood. Yes, that was in the Berkshire Knitting Mills case.

Mr. Wechsler. I was with you.

Mr. Seasongood. What?

Mr. Wechsler. I voted with you.

Mr. Seasongood. Oh; one more.

Mr. Holtzoff. Of course, that case does not apply to the law as it now stands, because there is a statute on jurors that would make that case inapplicable to grand juries.

Mr. McLellan. Yes, but the trouble with us is that statute.

Mr. Seasongood. There is no reason for promulgating the statute if we would disapprove of it.

Mr. Holtzoff. Yes.

Mr. Dession. How could we re-word the thing in order to take care of that? Now, the jurors' votes will not be recorded, will they?

Mr. Seasongood. Yes, they are to be recorded, according to this rule.

Mr. McLellan. Only on voting for the names.

Mr. Dession. If we get around that, I guess there will be no trouble with it.

Mr. McLellan. Yes.

Mr. Seasongood. The point is that it is not merely the vote, but this is the whole subject here. You cannot measure quantitatively the effect.

The Chairman. Your position is that one rotten apple spoils the basket?

Mr. Seasongood. Yes.

Mr. Holtzoff. But suppose you have a grand juror who is only legally disqualified, not for bias but because he is of the wrong age or a resident of the wrong district.

Mr. McLellan. Over 65, as the book shows.

Mr. Holtzoff. Yes, or suppose he resides across the line in the adjoining district, or something of that sort. Surely you should not invalidate the indictment.

Mr. Seasongood. Would it do, then, to say, "No indictment need be dismissed on the ground": that is, does not have to be, but it might be?

Mr. Medalie. I like the idea of letting judges make up their minds as to whether an injustice has been done.

Mr. Seasongood. After all, all you have to do is to indict him over again; that is not so hard.

Mr. Holtzoff. Unless the statute of limitations has run.

Mr. Medalie. If they indicted him so late that the statute has run, there is no harm in throwing it out on any technicality.

Mr. Holtzoff. Well, the federal statute of limitations is rather short, shorter than those of many of the states.

Mr. Medalie. That is wrong in most states.

Mr. Dession. The court could take that into account in deciding it, I should think.

Mr. Medalie. That is right. He could.

Mr. Seasongood. Yes. In other words, I would rather leave it to the court to say; not to say that it shall. You make it positive that no indictment shall be dismissed on that ground.

Mr. McLellan. We cannot get much from these gentlemen, Mr. Seasongood, but I wonder if we could not get that word "shall" in the 38th line of that rule changed to "need".

Mr. Seasongood. Yes, we could say "an indictment need".

Mr. McLellan. "No indictment need be".

2 Mr. Seasongood. Oh, yes.

Mr. Waite. After all, the indictment is not a conviction; it does not do anything more than to indicate that there is enough evidence to justify putting a man on trial, and I do not think it is a serious matter if there was a slight objection of that sort to it. I do not think I would vote even for "need be". I think I would leave that mandatory.

Mr. Seasongood. I cannot agree with you that it is not a serious matter. I think it is a very serious matter.

Mr. McLellan. In order to take a hopeless shot at it, I move that "shall" in that line shall be changed to "need".

Mr. Burns. I second it.

Mr. Waite. What line is that?

Mr. McLellan. That is line 38.

The Chairman. Line 38, Rule 7, page 2.

Mr. Dession. That is an improvement, I think.

The Chairman. Is it seconded?

Mr. Seasongood. Yes.

The Chairman. Are there any remarks? All those in favor say "aye". Opposed, "no". The motion is carried.

Now, we have a re-draft.

Mr. Seasongood. That is the advantage of taking things up after lunch.

The Chairman. A re-draft of Rule 12 is before you, gentlemen. Are there any suggestions?

Mr. Youngquist. I move to adopt it.

Mr. Robinson. I will second it.

The Chairman. It is moved and seconded. All those in favor say "aye". Opposed, "no". Carried.

Now, I think we are on Rule 14.

Mr. McLellan. I move the adoption of Rule 14.

Mr. Holtzoff. I second the motion.

Mr. Robinson. May I make the suggestion, Judge: on line 4 would it not be desirable to strike out "or copies": that is, "A copy of the indictment"?

The Chairman. Yes.

Mr. Robinson. And then after the word "request" strike out "or upon order", so that the sentence would read, "A copy of the indictment or information shall be delivered to him upon his request."

Mr. Seasongood. I was going to move to strike out "upon his request". I do not see why you have to request it. It seems to me if you get an ordinary summons they leave a copy of it with you. Why do you have to request it? You may not know enough to request it. I think you should give a copy of an indictment.

Mr. Robinson. What if he does not want it, just like having a lawyer if he does not want a lawyer?

Mr. Seasongood. What?

Mr. Robinson. Like if it is a long indictment.

Mr. Seasongood. Why do you give a man a copy of a summons and leave them with him?

Mr. Robinson. That is to get him to do something.

Mr. Dean. You do not have to leave it for him; get it back.

Mr. Seasongood. I do not think he ought to have to request it. He may not have sense enough to request it.

Mr. Holtzoff. Nine times out of ten he does not want it; he does not get it and he does not want it because the charge is stated to him in open court, and the judge asks him if he wants a lawyer, and he says, "No, I don't. I'm guilty," and he gets a better comprehension of what he is charged with by the statement made in open court than he would by reading the indictment if it was handed to him.

Mr. Burns. How about saying a copy shall be made available to the defendant?

Mr. Robinson. That is about the same thing, is it not, Judge?

Mr. Burns. Except that you do not have to go through the formality of actually handing it to him.

The Chairman. No, because that does not mean he would have it; he may just be given the right to look at it.

Mr. Robinson. That is right.

Mr. Medalie. Nobody will ask for it except those who know the rules, which means that only one of these fool lawyers will ever ask for it.

Mr. Waite. If we would provide that it shall be given to him, would we not also have to provide that subsequent convictions should not be reversed if it were not given to him? I would be afraid of a provision that it must be given to him unless we had some such safeguard there, because it would be appalling if convictions were reversed on that ground.

I notice that the Institute Code has this language:

> "He shall be furnished with a copy 24 hours before he is called upon to plead thereto. A failure to furnish such copy shall not affect the validity of subsequent proceedings against the defendant if he pleads to the indictment or information."

The Chairman. If we leave it in its present form you avoid all of those difficulties.

Mr. Waite. Yes, so I should rather have it as it is.

Mr. Medalie. All right.

Mr. Wechsler. Mr. Chairman, I move that the sentence beginning on line 3 and ending on line 4, "He may waive," be stricken, because, in the first place, I think that would be the law without the sentence; and in the second place, I do not think a man ought to be arraigned without having a charge stated to him. I agree about reading the indictment, but I do not think--

Mr. Robinson (interposing). Well, Mr. Wechsler, you know how commonly lawyers for defense will say, "The defendant waives the reading of the indictment, and the Court may enter a plea of not guilty".

Mr. Holtzoff. Ordinarily, indictments are not read, and nobody worries about it.

Mr. McLellan. The charges speak.

Mr. Holtzoff. Yes, the charges speak.

3 Mr. Medalie. This provides for it.

Mr. Holtzoff. Yes.

Mr. Wechsler. The first sentence indicates that the indictment need not be read; it is enough under the first sentence if the charge be stated.

Mr. Holtzoff. That is right.

Mr. Robinson. Again, sometimes a lawyer does not even care to have it stated.

Mr. Medalie. Why do you need a formal waiving of the statement?

Mr. Wechsler. It is not a problem, Mr. Robinson, and it seems to me that to make it one is wrong.

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

The Chairman. Are there any remarks? All those in favor say "aye". Opposed "no". Carried.

It is moved and seconded that the rule as amended with the changes also in the last sentence be adopted. All those in favor say "aye". Opposed, "no". Carried.

Rule 15.

Mr. Robinson. Mr. Youngquist needs to be heard on that, and he is not here.

Mr. Seasongood. Here he comes.

Mr. Robinson. Just in time.

Mr. Holtzoff. Do you want to be heard on 15?

Mr. Seasongood. You are in contempt for not answering the summons.

Mr. Holtzoff. Do you wish to be heard on 15?

Mr. Youngquist. I do to this extent. Has this re-draft been distributed?

Mr. Robinson. There is a re-draft, the second copy of 15, that has been distributed, so be sure you are not using the first draft. You can tell whether or not you have the substitute draft by reading the title. The title of Rule 15 of the draft that has been substituted, which you need to have then, is, "Pleas and Motions; Demurrers and Special Pleas Abolished."

Mr. Seasongood. We are just getting it; it is just being distributed to us.

Mr. Robinson. That is the second draft, (indicating).

Mr. Youngquist. I should say, Mr. Chairman, that this is the substance of what the committee agreed upon in New York, but it was just with some rearrangements; that is all. No change atall in 15 (a).

Mr. Robinson. No, sir.

Mr. Youngquist. Of the draft that is being distributed.

The Chairman. Are there any questions on 15 (a)?

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. It has been moved and seconded that 15(a) be adopted. Are there any remarks?

(There was no response.)

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

Mr. Youngquist. All we have in (b) is, I suggest, that the last sentence be thrown down below where it more properly belongs, it seems to me.

Mr. Holtzoff. Yes.

The Chairman. You mean to throw it from where it is now?

Mr. Youngquist. Yes.

Mr. Robinson. The second draft.

The Chairman. Oh, the second draft is all right, I take it; is that what you mean?

Mr. Holtzoff. Yes, the second draft is all right.

Mr. Youngquist. Oh, yes.

Mr. Holtzoff. This has all been taken care of in the second draft.

Mr. Robinson. There is no need to pay any attention to the first draft because there is a rearrangement of the same.

Mr. Youngquist. All right.

The Chairman. Are there any questions on (b)? Do I hear a motion?

Mr. Holtzoff. I move its adoption.

Mr. Robinson. I second the motion.

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

Mr. Seasongood. I do not want to be hypercritical, but is there a general issue in a criminal case?

Mr. Robinson. A plea of not guilty raises a general issue, does it not?

Mr. Youngquist. Yes. That, I think, is a word of art.

Mr. Seasongood. Is it?

Mr. Youngquist. In criminal procedure.

Mr. Seasongood. All right.

Mr. Youngquist. The general issue; is that raised by a plea of not guilty?

Mr. Burns. Would "on the merits" be any better?

Mr. Seasongood. Yes, I think so.

Mr. Robinson. It would not be--pardon me.

Mr. Seasongood. Well, if it is perfectly definite, all right.

Mr. McLellan. Does everyone agree to "on the merits"?

Mr. Seasongood. I do not know. I do not pretend to know, but I never heard "the general issue" in a criminal case. "Trial of the merits", is that?

Mr. Burns. I will offer a motion.

Mr. Robinson. May I say a word about it, Mr. Burns?

Mr. Burns. Yes, sir.

Mr. Robinson. I hope I am not in error on it.

Mr. Holtzoff. Are we on (c)?

Mr. Robinson. No, we are on (b).

The Chairman. Line 11.

Mr. Robinson. "the general issue" there means: it is used here, as Mr. Youngquist has said, to apply to anything that is up for trial after a plea of not guilty. Now, that is different from saying "on the merits", because, as we noticed before in criminal pleadings, almost anything can be brought up under the general issue. Maybe a defendant will plead not guilty, and his only defense will be former jeopardy, something like that, which I do not think could be on the merits, although it is a general issue; and our idea was, and the result of all the work we have done on this rule in the Style Committee and in the General Committee meetings was, to have all matters that are capable of determination through the trial of the general issue rather than before trial by motion.

Mr. McLellan. Does the general issue cover the issue of

former jeopardy?

Mr. Robinson. Yes.

Mr. Youngquist. Yes, it does.

Mr. Robinson. It covers about everything, judge. Of course there is great diversity among the districts on that.

Mr. McLellan. That is just it.

Mr. Burns. Suppose you just said, "capable of determination before the trial".

Mr. Dean. I think that is all you need.

Mr. Youngquist. Then you should say, "the trial of the indictment or information," because there may be a trial of the issue of former jeopardy, for instance, which would be a trial.

Mr. Waite. Would the phrase "before the trial of the general issue" leave any doubt? If it is dubious we ought to change it. If it is not dubious it seems to me we get ourselves into difficulty trying to change it.

Mr. Dean. The difficulty is, the word of art in civil cases has been applied to criminal cases. I think it is more a matter of style. I do not think it would leave any doubt.

Mr. Waite. It is more common, I think, in criminal cases.

Mr. Medalie. Mr. Dean, I think Blackstone applied it in criminal cases.

Mr. Dean. Yes.

Mr. Holtzoff. I think it is a word of art in criminal cases, is it not?

Mr. Dean. I do not think it would leave any doubt in anybody's mind as to what we meant if we left it in there.

Mr. Waite. I wonder, in view of the fact that we have 60 rules to cover and we have done 14 so far, if we ought not to

leave to the Committee on Style, questions of verbiage that do not raise any question of policy at all.

Mr. Longsdorf. May I add the suggestion to that: Would the members of the committee, after we rise from this meeting, look these rules over carefully, if they have time and can squeeze it out, and send in any questions of that kind to be determined by the Committee on Style, and if the committee be continued or convened for the purpose of ruling on things like that, would that be in order?

Mr. McLellan. I do not want to be obstinate, but I am going to move that the words "of the general issue" be stricken, as the promptest way of raising this question.

Mr. Seasongood. I second it.

The Chairman. Seconded? Was it seconded?

Mr. Seasongood. Yes.

The Chairman. Are there any remarks?

Mr. Medalie. I should like to amend that amendment by providing that the words "general issue" be "the indictment or information".

The Chairman. Is that seconded?

Mr. McLellan. You strike out the words "of the general issue," according to your amendment still, and then you say what?

Mr. Medalie. "of the indictment or information," as Mr. Youngquist suggested.

Mr. McLellan. "the trial of the indictment or information"?

Mr. Youngquist. I suggested that as an alternative to what Mr. Burns proposed. I like this language better. It serves the same purpose.

Mr. Longsdorf. Would it do if we were to say "before the

trial of facts upon the general issue"?

Mr. Youngquist. I do not think that would help any.

Mr. Longsdorf. I do not know whether it would. It would not help me.

Mr. Robinson. Question.

The Chairman. Mr. Medalie is not seconded.

Mr. Seasongood. I second it.

Mr. Youngquist. It was accepted by the mover.

The Chairman. Was it? All right. Then the motion is on Judge McLellan's amendment as amended by Mr. Medalie. All those in favor of the amendment say "aye". Opposed, "no".

I call for a show of hands, all those in favor. Five. Opposed? Seven. Lost.

Mr. McLellan. So you are going to leave in the words "of the general issue"?

The Chairman. It seems so.

Mr. McLellan. Yes.

The Chairman. The motion on the section as it stands: All those in favor of (b) in its present form say "aye". Opposed, "no". Carried.

Mr. Dean. I should still like to raise this question: We have "trial of the general issue", and then we have "trial" following it. Is that apt to make any confusion? Do we mean something different there? If we do not, why do we not say, "trial" in both places?

Mr. McLellan. That is what I thought.

Mr. Longsdorf. Because the words "general issue" are qualifying words in this connection and are not needed in the others. That is my view.

it
? Mr. Dean. Is/not there qualifying?

Mr. McLellan. It is not clear to me that the phrase "general issue" is a word of art as applied to criminal cases; that is, it was not until Mr. Holtzoff told me the contrary.

Mr. Holtzoff. No. I raised the question. I did not mean to make a positive statement. I asked the question for information. I do not know.

Mr. McLellan. Well, I do not know. Of course, I think Mr. Dean is right about it.

The Chairman. All right. I move that the reporter be asked to look into this question to see whether it is a general word of art.

Mr. McLellan. All right.

5 Mr. Dean. If it is, let us use it in both places.

The Chairman. What?

Mr. Dean. If it is a word of art, let us use it in both places.

The Chairman. All right. With that understanding we pass on to (c) (1).

Mr. McLellan. I move its adoption.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor say "aye". Opposed, "no". Carried.

(c)(2).

Mr. Seasongood. Have you adopted this rule that the questions of phraseology should not be brought up? I mean in (1), "The motion" you have referred to, and you said, " Motions", and so you have now "The motion". It ought to be "A motion"; should it not be?

Mr. Holtzoff. Yes, that ought to be "A".

The Chairman. In (1).

Mr. Youngquist. It is in (b), Mr. Seasongood, "motions shall be used in their place."

Mr. Holtzoff. There is a line 13.

Mr. Seasongood. It is (c). In (c)(1) you have "The motion". You said, "Motions" and "The motions", and we have no motion before referred to.

The Chairman. "A motion".

Mr. Holtzoff. Say, "A motion".

Mr. Seasongood. All right.

Mr. Burns. In line 19 does "motion before trial" mean before trial of the general issue?

Mr. Youngquist. Yes.

Mr. Seasongood. What line is that?

The Chairman. It must mean that.

Mr. McLellan. Do you want to get that put in there again?

Mr. Burns. I shall refer that to the Committee on Style.

Mr. Holtzoff. The next few words indicate that, I think.

The Chairman. All right. If there are no other questions we shall take a vote on (c)(2). All those in favor say "aye". Opposed "no". Carried.

(c) (3).

Mr. McLellan. You are all satisfied with that, are you?

Mr. Holtzoff. Yes.

The Chairman. With (2), Judge?

Mr. McLellan. Yes. "All other objections with respect to the indictment or information shall be made by motion before trial and before or after or with the plea". I am not sure about that.

The Chairman. Why was that tie put in there? I ask the committee: "and before or after or with the plea but within such reasonable time as the court shall fix"?

Mr. Robinson. I think the idea was to simulate it to the civil rule, and that you can bring up objections preferably together.

Mr. Medalie. If you choose, at the time that you plead not guilty, you may also plead double jeopardy by motion.

Mr. Robinson. That cannot be done, of course.

Mr. Holtzoff. At the present time you have to make your motion.

Mr. Medalie. Draw your plea.

Mr. Robinson. That is a source of frequent delays in the trial, it seems, preparatory to trial: file one motion today and get it ruled on next week, and another motion, and another motion. The idea here is to move the thing along by having the objections heard at the same time so far as practicable and fair.

Mr. McLellan. Well, do you regard double jeopardy as an objection with respect to the indictment--

Mr. Youngquist. No.

Mr. McLellan. --or information? Or to the institution of the prosecution?

Mr. Youngquist. No.

Mr. Medalie. Well, you do to the institution of the prosecution.

Mr. Seasongood. Yes, I think so.

Mr. Burns. Yes, certainly.

Mr. Youngquist. Yes, of course.

Mr. McLellan. Then do you mean that that must be heard

before trial?

Mr. Medalie. No. If you choose you can have it at the trial.

Mr. McLellan. It says "shall" here.

Mr. Medalie. Trial of the general issue. That sufficiently covers it.

Mr. Burns. Doesn't that mean the "trial" in line 19 has a different meaning than "trial" used in (b) where motions are mentioned?

The Chairman. I am having difficulty with that "and" in line 19. I do not see how you can have a motion before trial and also have it "and before or after or with the plea".

Mr. Youngquist. Well, a man is arraigned, and under this he may make his motions before he pleads, or he may make his motion at the time he pleads not guilty, or he may make his motion after he pleads. It was intended to give considerable latitude with respect to making of motions but at the same time require that all motions that are to be made shall be heard together for the purpose of avoiding delay. That is what we were discussing in New York, and that is what this embodies.

Mr. McLellan. Yes, but you require him to raise these objections by motion, do you not?

The Chairman. Yes. "before trial" they say.

Mr. McLellan. That was before trial; and may some of those be of such a character as to raise an issue of fact? If so, are you going to have two jury trials?

Mr. Robinson. It is possible.

Mr. Medalie. What was intended there was rather that you be permitted to make such motions, but if you made the motion.

VCB

Mr. McLellan. It says "shall".

Mr. Dean. Yes, it says "shall".

Mr. Holtzoff. I think what was intended by the phrase "institution of the prosecution" were such matters as you now bring up by a plea in abatement.

Mr. Robinson. That is right. I do not know that I agree.

Mr. Holtzoff. Rather than by plea in bar. I do not know whether the language is sufficiently felicitous to convey that thought, but that was the sub-committee's purpose, to substitute a motion for a plea in abatement.

Mr. McLellan. That, we have already done.

Mr. Holtzoff. I beg your pardon.

Mr. McLellan. We have already done that.

Mr. Holtzoff. Well, but we have abolished pleas in abatement.

Mr. McLellan. Yes.

Mr. Holtzoff. And this is an affirmative provision requiring such motions to be made before the trial but permitting them to be made after pleading guilty or not guilty, although in that way changing the practice, which requires you today to raise these points before the plea of guilty or not guilty. I can conceive that perhaps the phrase "institution of the prosecution" might not be accurate there.

Mr. McLellan. It just seems to me that something should be done by way of a re-writing of that in some way.

The Chairman. Judge, I do not see how a motion can be required to be made before trial--

Mr. Dean (interposing). Double jeopardy.

The Chairman. --and then go on to say, "and before or after."

vcb

Mr. Robinson. "plea"?

Mr. Holtzoff. Instead of "and before", it might have been clear if you said "either before or after plea".

Mr. Robinson. But it comes with "or with". We have three alternatives.

Mr. Holtzoff. We wanted to get away from the present requirement which provides that you must raise these points before you plead, and you get an extension of time to plead for the purpose of making these motions.

The Chairman. Yes.

Mr. Burns. Well, if you had said "shall be made before or after or with the plea but by motion before trial," and then have it clear what you mean by "trial", which it seems to me from the context means the trial on the merits.

Mr. Holtzoff. That is right.

Mr. Robinson. It would be all right to insert "trial of the general issue", would it not, Mr. Youngquist, again?

Mr. Holtzoff. I do not know.

Mr. Robinson, Why not, if they insist. I do not think it is necessary, but if he wants it.

The Chairman. I think if you revise the order as Judge Burns now suggests you would clarify that line 19 considerably. Ifthere is no objection we shall ask the committee to do it.

Mr. Medalie. Now let me get that again. I want to make sure. How is that?

The Chairman. "shall be made before or after or with the plea but before the"--

Mr. Burns. "but by motion before trial".

The Chairman. "but by motion before the trial".

Mr. Robinson. It would still have to be "by motion before or after or with the plea".

The Chairman. Yes, "but before the trial".

Mr. McLellan. What does "the plea" mean there?

Mr. Youngquist. Guilty or not guilty. Not guilty.

Mr. Medalie. Plea of not guilty.

Mr. McLellan. Are you going to permit these things to be heard after the man has been found guilty?

Mr. Robinson. Oh, no.

Mr. Holtzoff. No.

The Chairman. This is his pleading. He is pleading guilty or not guilty.

Mr. Dean. It is limited to that, then. I think the judge has a point, because our pleas include the plea of guilty up above. This only contemplates a motion in the event that the plea is not guilty.

The Chairman. That is right.

Mr. Holtzoff. Yes, in order to say there "after plea of"--

Mr. Youngquist. It may be made before the plea.

Mr. Holtzoff. Before or after?

Mr. Youngquist. Yes.

Mr. Holtzoff. No.

The Chairman. No.

Mr. Youngquist. And if the defendant intends not to plead not guilty he would naturally make his motion before the plea, as he may under this rule.

The Chairman. I take it we are all agreed on what we want to accomplish here. May we pass it to the committee and then move on to (c)(3)?

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Mr. Dean. Did we agree on former jeopardy, Mr. Chairman?

Mr. Medalie. You mean as to whether or not you can dispose of the issue of double jeopardy by a motion?

Mr. Dean. Whether you must.

Mr. Robinson. Just a little bit further, now, if you will notice here, the next clause provides that if the request is denied for trial by jury he shall have the right to withdraw the motion. Now, perhaps there will be certain defenses raised by plea on which there should be a specific right to withdraw the motion. I am mentioning that in connection with the question that I think is in the back of your mind. If you are entitled to trial by jury on the issue of double jeopardy, you find in the next clause there, at lines 26 and 27, that he shall have the right to withdraw the motion if he wants a certain issue tried by a jury, which means then he will have the right to trial by a jury at the trial of that issue--of the whole issue.

Mr. Holtzoff. I think the subcommittee will have to work on that.

Mr. Dean. That is not at all clear from this. As this reads now, you could--you must raise by motion double jeopardy, as I read it.

Mr. Holtzoff. I do not think so. It was not so intended, although there may be that view.

Mr. Medalie. As he reads it.

Mr. Dean. I know it was not intended that way. I know that.

Mr. Youngquist. There is danger of that.

Mr. Medalie. Yes.

Mr. Youngquist. The committee was thinking only of the objections to the indictment itself.

Mr. Medalie. And also got itself in a jam because it would not use the words "in bar or abatement."

Mr. Holtzoff. Yes.

Mr. Medalie. And that is why it used those words that cause us more trouble than ever: "or to the institution of the prosecution".

Mr. Robinson. That is right.

Mr. Medalie. Had we stuck to good old language and said, "in bar or abatement," we would have had less trouble.

Mr. Longsdorf. Yes.

Mr. Youngquist. That is right. I join in the contention.

The Chairman. Are we moving on to (c)(3)?

Mr. Medalie. We shall have to re-do (2).

The Chairman. All right. Let us go on to (c)(3). Are there any questions on (c)(3)?

Mr. Burns. I should like to find out whether or not it is intended that where a defendant has a right to trial by jury the court is given by this rule the power to dispense with it.

Mr. Robinson. No, the answer is clearly no, Judge, because if he thinks he has a right to trial by jury and the court thinks he has not a right to trial by a jury, and the court denies it, he may still withdraw his motion, whereupon it comes under the plea of not guilty, and he gets a trial by a jury at the trial, so he not denied the right to trial by jury.

Mr. Medalie. Let us put it this way: He makes a motion to dismiss on the ground of double jeopardy. The court says,

"I will try that issue, but if you want a trial of that issue I will try it without a jury."

He says, "No. I want a jury trial."

The court says, "All right. I will not hear it. It can be tried at the trial of the general issue."

Mr. Robinson. That is it.

Mr. Longsdorf. Do you not think we ought to meet that?

Mr. Medalie. But if he is willing to he can go ahead and try it without a jury on that issue of double jeopardy, and if it is decided against him he is through.

Mr. Robinson. That is right.

The Chairman. Is there anything further on (c) (3)?

Mr. Burns. Yes, I have another question.

The Chairman. All right, Judge.

Mr. Burns. Is it true, Mr. Robinson, that any issue as to which a defendant has a right to trial by jury under the Constitution may now be raised by a plea of not guilty?

Mr.Medalie. We had no doubt about that.

Mr. Robinson. Yes. I do not think so. I do not know of any.

Mr. Burns. Well, I do not, because otherwise this next clause may raise some difficulty.

Mr. Seth. I should think so.

Mr. Longsdorf. I think the common-law right of trial by jury is extended to trial on special pleas in bar: former

8 acquittal or conviction.

Mr. Burns. Why not say, "Under a plea of not guilty, when any motion before trial raises an issue of fact as to which the defendant is entitled to trial by jury, it shall be tried by a

jury or by the court if the defendant consents, but if he does not consent he shall have the right to withdraw his motion"?

Mr. Robinson. The only difficulty raised by your question, Mr. Burns, is, automatically you are assuming what the practice is in the various districts with regard to what can be proved under a plea of not guilty. Now, there is no answer to that because there is great variety.

Mr. Burns. It seems to me it may well raise a difficult question, then, for the reason that we do, by the manner in which this is written, make the distinction between issues of fact triable under a plea of not guilty and all other issues of fact.

Mr. Robinson. That is right.

Mr. Burns. And we allocate a constitutional right to trial by jury on the first group and not the second.

Mr. Robinson. No, it is not our doing it. It is leaving it to the judge to do it. That was the action of the committee. They said, "That is a question. We had better not try to decide it." The only other way would be to try to decide it by a catalog of enumeration, which would be deadly, of course. Let the judge decide it when it comes up, whether or not it is an issue that raises a right to trial by jury. Is that not satisfactory.

Mr. Burns. Well, except it may be subjected to the criticism that you are apparently giving the court the power to try an issue of fact.

Mr. Robinson. That is not possible.

Mr. Burns. With or without a jury, regardless of constitutional right.

Mr. Youngquist. No.

Mr. Robinson. That is not possible under this provision. The defendant always has his right to trial by jury.

Mr. McLellan. In order that I may understand this and see in my own mind whether we ought not to have some more work done on it, I should like to ask a question: We have provided that matters that formerly could be raised by a plea in abatement may be raised on motion. Now, if a thing had to be raised by a plea in abatement, it now has to be raised on motion. Do you take care of a defendant who wants his jury trial upon the motion which is the equivalent of a plea in abatement by providing that he may withdraw his motion? When it is withdrawn can he then raise, under what you are pleased to call the general issue, a matter which had to be pleaded formerly in abatement?

Mr. Robinson. Do you want to answer that?

Mr. Medalie. Matters raised by plea in abatement could not be raised at the trial of a general issue.

Mr. Robinson. I do not think so.

Mr. Medalie. Matters that could be raised by plea in bar could be raised by trial of the general issue.

Mr. McLellan. Well, but I am talking about abatement. Are you going to deprive a man of his motion which is the equivalent of a plea in abatement--

Mr. Robinson. (Interposing) It is elastic.

Mr. McLellan. (Continuing) --by saying that he may withdraw his motion if he wants his jury trial and then, without saying that he may raise it upon what you please to call general issue, deprive him of what at common law would be his plea in

abatement?

Mr. Holtzoff. Is the defendant entitled to a jury trial on a plea in abatement?

Mr. McLellan. If a question of fact is involved he is.

Mr. Seth. Yes.

Mr. McLellan. He is with us.

Mr. Youngquist. Is he?

Mr. Robinson. When a juror is disqualified? A grand juror?

Mr. McLellan. Certain pleas in abatement that raise an issue of fact are triable by jury, as I understand it. Do you not so understand it?

Mr. Medalie. I am not sure about that.

Mr. Waite. Mr. Robinson, in this clause (3) you had the matter stated about the way Judge Burns wanted it.

Mr. Robinson. That was before the Committee on Style, Mr. Waite.

Mr. Waite. Do you remember why you changed that?

Mr. McLellan. I think it was changed because there was something the matter with it.

Mr. Robinson. I think on the whole this is a great improvement.

Mr. Waite. You do not remember why you changed that?

Mr. Robinson. I expect I can get it if you want it.

Mr. Waite. No, I am not particular.

Mr. McLellan. Then you are satisfied with this rule as it is?

Mr. Robinson. Yes, I am.

Mr. McLellan. Are you satisfied that you do not deprive a man of his right to raise by motion matters that theretofore

he could have raised by a plea in abatement? I think you are depriving him.

Mr. Youngquist. And have a jury trial, you mean?

Mr. McLellan. Yes.

Mr. Youngquist. On pleas in abatement would a defendant be entitled to a jury trial?

Mr. McLellan. Any plea in abatement that involves the proof of facts.

Mr. Youngquist. Such as Mr. Medalie suggested, disqualification of a juror? I was of the impression, as Mr. Medalie said, that you had a right to trial by jury on pleas in bar but
9 not on pleas in abatement.

Mr. Holtzoff. I think the subcommittee--

Mr. McLellan. Well, but I have always been taught, because that is our Massachusetts practice, that on any plea in bar, in abatement, involving an issue of fact, either party is entitled to trial by jury.

The Chairman. Judge, would you turn back to the original draft of 15 under (c) (3) and see if it is not covered in that? It seems to me it is there.

Mr. Wechsler. I think that meets the problem, Mr. Chairman.

The Chairman. What?

Mr. Wechsler. That meets the problem.

The Chairman. In other words, turn to your original draft of (c) (3):

> "When a motion in advance of trial raises an issue of fact, the defendant is entitled to a trial by jury if the issue could properly be raised at the trial under a plea of not guilty. All other issues of fact raised on

motions in advance of trial may be tried as the court shall direct by affidavit or otherwise and with or without a jury."

Does that cover what you want?

Mr. McLellan. Yes.

The Chairman. (Reading:)

"When an issue has been tried and determined in advance of trial, the determination shall control the subsequent course of the proceeding."

Mr. McLellan. No, sir, it does not. It very distinctly does not, because I am talking about a case where there is a motion the equivalent of a former plea in abatement, where an issue of fact is involved, and neither the old rule nor the new rule includes that.

Mr. Medalie. Do you understand that on a plea in abatement which has to be decided before trial it is triable under the general issue?

Mr. McLellan. Yes.

Mr. Medalie. That a defendant has a constitutional right to jury trial?

Mr. McLellan. I am not ready to put in the word "constitutional," but in practice he is afforded, with us, a trial of an issue of fact upon plea in abatement, and we have got so far in the old practice in Massachusetts as to saying that if he wants to take that bite of his cherry it may be the only bite that he will have.

Mr. Holtzoff. I think the subcommittee proceeded in its draft on the opposite assumption, and maybe the subcommittee was wrong, but in the subcommittee we assumed that there was

no right to a jury trial on a plea in abatement.

Mr. McLellan. Did you ever see any authority to that effect?

Mr. Holtzoff. I personally have not. I do not know.

Mr. Youngquist. Judge, would not No. (3) of the old draft meet it?

Mr. McLellan. No, because it says there, "the defendant is entitled to trial by jury if the issue could properly be raised".

Mr. Youngquist. I see.

Mr. McLellan. (Continuing) "at the trial under a plea of not guilty."

Mr. Youngquist. Yes.

Mr. McLellan. Now, matters of abatement could not be so relied upon.

I hate like the deuce to hold you up this way.

Mr. Youngquist. That is all right.

The Chairman. These are important.

Mr. Holtzoff. This is an important point.

Mr. Youngquist. May I make a suggestion?

The Chairman. How am I to dispose of it? Let us see if we can get it.

Mr. McLellan. Well, if I am wrong on the matter of jury trial on a plea in abatement that involves questions of fact, we will go on.

Mr. Robinson. I should like to ask this question, Judge, on that: Do you read this to provide that a defendant can be deprived of trial by jury just automatically by the rule, or do you not understand that it is still within the power of the

trial judge to grant him a trial or not grant him a trial, as the judge thinks the law requires?

Mr. McLellan. Oh.

Mr. Robinson. Therefore this question comes before you.

Mr. McLellan. Yes, but the right to a trial by jury is not a permissive; it is an absolute right.

The Chairman. He either has it or he has not.

Mr. McLellan. Yes, that is it.

Mr. Youngquist. I will make a motion, Mr. Chairman.

Mr. Robinson. All right. Go ahead.

Mr. Youngquist. I move, Mr. Chairman, that (c) (3) be re-referred to the committee for study in the light of the--

The Chairman. --discussion.

Mr. Youngquist. --suggestions that have been made.

Mr. McLellan. I second it.

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

Mr. Seth. Does not the Government want a right to trial by jury on some of these issues?

Mr. McLellan. I think that is a very pertinent suggestion. Sometimes they do.

Mr. Seth. They ought to have the right. They have a right to trial by jury, do you not understand?

Mr. Robinson. Again, that would be in the power of a judge under the rule, not the United States attorney.

Mr. Seth. I say, would not the Government want to try some of these issues--is it possible the Government may want to try some of these in advance by jury?

10 The Chairman. Yes.

Mr. Holtzoff. Yes.

Mr. Seth. Ought not that to be taken into consideration in the redraft?

Mr. Robinson. It was taken into consideration in the redraft. I think I am speaking for all members of the subcommittee; there are eight, I think.

Mr. Seth. Where does it show you?

Mr. Robinson. It is up to the judge. The judge may do it.

Mr. Seth. But maybe the Government does not want the judge to do it.

Mr. McLellan. That is no answer when you are dealing with this kind of thing, as to what the judge may in his discretion do.

Mr. Robinson. No, it is not that; it is for the judge to interpret what the law is in his jurisdiction at that time, and if he thinks that there is a right to a trial by jury on a plea in abatement or if he understands the United States attorney to wish to have a trial by jury. I do not think the Government has a right to trial by jury at any time, does it?

Mr. McLellan. Oh, yes, indeed. It is not a constitutional right, but they have it.

Mr. Dean. The right of trial by jury on this plea in abatement, if there is a right of trial by jury, would not vary with the districts.

Mr. Seth. No.

Mr. Dean. It seems to me that our research must go into the question of whether or not we have a constitutional right to a trial by jury on a factual issue raised by the plea in abatement, and I think if that can be disposed of--I do not know

that there are decisions on it.

Mr. Waite. I found something about that in the Institute commentary. The Institute's provision is: "All issues whether of law or fact which arise on a motion to quash shall be tried by the court." And then there is a footnote that says, "In states, if any, in which this section would be unconstitutional as to issues concerning former jeopardy or pardon or immunity"--

Mr. Robinson. Now, that is exactly the point.

Mr. Waite. In states, if any, in which this section would be unconstitutional in those respects, then you have to change it.

Mr. Dean. That will not vary among the federal districts.

Mr. Robinson. Oh, yes, it does, in districts where they are apparently influenced by the state practice.

Mr. Dean. That will not vary among the federal districts.

Mr. Holtzoff. Well, this whole matter has been referred to the subcommittee.

Mr. McLellan. It is the same question in every district, only they may decide it right in one district and wrong in another.

Mr. Dean. Exactly. There is only one Constitution, in other words.

Mr. Robinson. That still leaves the decisions varying.

Mr. Dean. If they do, I do not know what the status of it is, and I would proceed on the assumption--

The Chairman. All right. It is referred back.

Now let us go on, gentlemen, to (c) (4) on page 2.

Mr. McLellan. Well, then there is authority that it must be tried by jury.

Mr. Holtzoff. I move the adoption of (c) (4).

The Chairman. Seconded?

Mr. Waite. I second it.

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

Rule 16.

Mr. Waite. I want to ask a question about that. We have abolished pleas except plea of guilty or not guilty and nolo contendere, and then line 2 says, "In pleading an official document".

Mr. Holtzoff. I think that refers to the indictment or information.

The Chairman. Are there any questions on 16 (a)?

Mr. Holtzoff. I move its adoption, Mr. Chairman.

Mr. Dean. I second the motion.

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

(The motionwas carried.)

The Chairman. 16 (b).

Mr. Seasongood. Phraseology there in (b): you refer to a judgment or decision or order, and then you say "sufficient to aver the judgment or decision". It ought to be--

Mr. Youngquist. --"or order".

Mr. Holtzoff. "or order".

Mr. Seasongood. Yes. And isn't that a little summary, to say, "aver" a judgment? "aver rendition of the judgment, decision, or order".

Mr. Burns. "allege," you mean.

Mr. Seasongood. Sir?

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Mr. Burns. "allege".

Mr. Seasongood. I did not get that. What is it?

Mr. Burns. "allege"; isn't that the word?

Mr. Seth. Rather than "aver".

Mr. Burns. Than "aver": "allege".

Mr. Seasongood. Yes.

Mr. Burns. I should like to raise a question, merely because Professor Waite and I were put off the track a bit by the title, "Pleading Special Matters." That carries an inference that there are special pleas of the defendant. We think of some headnote that will not carry that connotation.

Mr. Youngquist. I have noted here on my notes, "Pleading Judgments and Official Documents." That is rather lengthy, though.

Mr. Holtzoff. You could say "Alleging".

Mr. Burns. Yes.

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Mr. Burns. Yes.

Mr. Holtzoff. Or "Allegation".

Mr. Burns. "Allegation of Special Matters."

Mr. Holtzoff. "Allegation of Special Matters."

Mr. Medalie. Yes.

Mr. Youngquist. I move that 16(b) is altered and approved.

Mr. Holtzoff. I second the motion.

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

Mr. Medalie. The word "aver" is changed to "allege" in both (a) and (b); is that right?

The Chairman. That is right.

Rule 17. 17(a). Is there any question on (a)?

Mr. Holtzoff. I move its adoption.

Mr. Seth. I second it.

The Chairman. All those in favor say "Aye". Opposed, "No." (The motion was carried.)

17(b).

Mr. Seasongood. Could any of these be served by mail, and is it sufficiently covered if they are? "may be served by mail"?

Mr. Medalie. The manner of service is as provided in civil cases, which means you can make a motion by mailing your notice of motion and affidavits.

Mr. Seasongood. Can you always do that, in all cases?

Mr. Medalie. I am quite sure any motion may be made in a civil case by mail, yes.

The Chairman. Are there any remarks on (b)?

Mr. Holtzoff. I move its adoption, Mr. Chairman.

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Mr. Burns. I second the motion.

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

(The motion was carried.)

The Chairman. Are there any remarks on (c)?

Mr. Holtzoff. I move its adoption.

Mr. Medalie. I second it.

Mr. Youngquist. I second it.

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

Rule 18. Consider first the first paragraph up through line 9.

Mr. McLellan. I assume, in the first place, that this so-called pretrial procedure is of such a character that under a formal rule the defendant is entitled to be present; am I right about that?

The Chairman. There is no doubt about that, is there?

Mr. Holtzoff. Oh, the defendant? No.

Mr. Youngquist. The last sentence provides the rule shall not be invoked in case of any defendant who is not represented by counsel. Would that cover it?

Mr. McLellan. Yes, but you said before that at every stage of the proceeding the defendant is entitled to be present.

Mr. Youngquist. Oh.

Mr. McLellan. Now you have this language. Now, which do you mean, that he may be present or he need not be?

Mr. Holtzoff. No, I do not think that he would be entitled to be present under that presence rule, because that

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relates to every stage of the trial, Judge.

Mr. Youngquist. "proceeding," it says.

Mr. McLellan. It says, "proceeding."

Mr. Holtzoff. That was not as we had it.

Mr. McLellan. And if admissions are to be made on his behalf at a pretrial hearing why should not he be entitled to be present?

Mr. Holtzoff. No; it says "at every stage of the trial," and the Rule 12 relates to presence of the defendant, and as the rule is now framed it would not relate to pretrial.

Mr. McLellan. I thought we had the word "proceeding."

Mr. Youngquist. That was in connection with attorneys.

The Chairman. Rule 12 will be revised; we have not got it back yet.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. Yes.

Mr. Holtzoff. And we adopted it.

The Chairman. In its revised form.

Mr. Robinson. Yes.

Mr. Holtzoff. Judge, we had in mind this: the defendant is not entitled to be present in court on the argument of a motion.

Mr. McLellan. I know that.

Mr. Holtzoff. But you think he should be entitled to be present at the pretrial?

Mr. McLellan. I certainly do if admissions are to be made on his behalf by his counsel, if you are going to have pretrial in criminal cases.

Mr. Holtzoff. I think so.

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Mr. Burns. An order will be issued that will preclude him from raising defenses.

The Chairman. That is right.

Mr. McLellan. Yes.

Mr. Seth. He must be present.

Mr. McLellan. "If." If pretrial is advisable.

Mr. Medalie. Without pretrial the district attorney and the defendant may enter into a stipulation concerning the conduct of the trial and the dispensing with proof of certain things or accepting substitutes for proof. It is done regularly; sometimes instigated by the defendant, especially in long cases. In some of these long financial cases it is not unusual to enter into a stipulation that no evidence shall be given as to the accuracy of certain books, and that no evidence be given to lay a foundation for the admissibility of those books, or that these books named so-and-so, so-and-so, and so-and-so, shall be deemed in evidence. If you do not have the defendant around he does not even know the admission was made. I do not see any danger if the defendant is not around when counsel enters into an arrangement of that sort.

Mr. Seasongood. The danger is that he may say--it is an infraction of his constitutional rights, for instance, to limit the number of expert witnesses and character witnesses. That is a right he would have to waive himself, I think, under the Constitution, as part of his proof of facts.

Mr. Burns. It is my opinion that the pretrial procedure developed in civil causes because of the long delay between the filing of a proceeding and ultimate trial, which was due, I know in Massachusetts, largely to automobile litigation, where

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a lot of valuable time was wasted. At one time there was a lapse of four years between the entering of a suit and reaching it for trial, which was in many cases a substantial denial of justice, and they embarked upon a pretrial procedure that has worked very well: clearing up such questions as to whether it was a public highway and getting agreements as to experts and the like; and I think it is peculiarly adapted for thetrial of civil causes. I have very serious doubts as to whether it is adaptable for the trial of criminal causes, and I do not know whether there exists any such clogging of the docket as would make it advisable for us to tinker with a situation that may affect the liberties of an individual quite seriously. A lot of it is done anyway, as Mr. Medalie pointed out, by stipulation; a lot of it is done in chambers with the trial judge. But I query if we want to put any official imprimatur upon the practice.

Mr. Holtzoff. Well, Judge, I should like to say something about that. I know it has been tried on a criminal docket. After the civil rule was adopted, a judge in the eastern district of Virginia thought that he would, just on his own motion, adapt to criminal cases the pretrial procedure as prescribed by the civil rules; and he describes how in one instance by a pretrial session of a day or so he cut down to about a day and a half's trial a conspiracy case that was expected to take several weeks to try.

Now, the pretrial rule just is not mandatory, just as the pretrial rule in the civil rules is mandatory. I would agree with you that we should not have a mandatory rule, but this is a step forward. There is a lot of sentiment in favor of it,

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and so long as we leave this safeguard, first, that it is permissive, and second we provide--

Mr. McLellan (interposing). He means permissive for the defendant.

Mr. Youngquist. No.

Mr. Holtzoff. For the judge. Well, for both.

Mr. Seasongood. We use the word "invite". We changed the word to "invite".

Mr. Holtzoff. And we also provided in the last sentence that the rule shall not be invoked in the case of a defendant not represented by counsel, so as to avoid the very danger which you point out.

Mr. McLellan. He may invite them now, may he not, without any rule?

Mr. Holtzoff. Yes, but could not that same thing have been said about the pretrial rule in the civil rules? They could have done it, but there was that impetus that was created.

Mr. McLellan. But under the civil rules they have to come.

Mr. Medalie. Yes.

Mr. Holtzoff. Oh, yes, but I mean so far as the district courts are concerned the civil rule is optional.

Mr. Burke. Mr. Chairman, there is not much to change in this and the previous rule except in this one particular:

"The court may, although all the attorneys do not consent, make such order not violative of the legal or constitutional privilege, for discovery and inspection, and for such other aid to the expeditious conduct of the trial as may be just."

That is not in the original draft, and we discussed quite

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at some length even the invitation feature of this pretrial procedure. I think that would nullify to a considerable extent the merit of the original rule.

The Chairman. In other words, this makes it really involuntary.

Mr. Burke. Well, the question of its being involuntary is not of so much importance as the right.

Mr. Burns. It is the kind of party to which you are invited.

Mr. Holtzoff. I should be glad to second the motion to strike the sentence out because I have been against it.

Mr. Medalie. What sentence?

Mr. Holtzoff. The sentence beginning on line 12.

Mr. Youngquist. What happened with respect to that, Mr. Chairman, was that the rule as originally drawn provided for discovery, and the subcommittee thought it should not appear in that form, and the matter was referred to a sub-subcommittee, and this sentence was evolved to supplant the discovery provision in the rule as originally drawn? Is that it?

Mr. Holtzoff. That is accurate. I was the sub-subcommittee. I put it in under instructions of the subcommittee, and I made a stylistic revision, although personally I do not think there should be any discovery in a criminal case.

Mr. Dession. Well, I am going to second your motion, not because I do not agree with the latter part of that, but because I do not think it belongs in here.

Mr. Holtzoff. I have not made the motion; I did not feel free to make it. But if somebody makes it I shall vote for it.

Mr. McLellan. I am going to make a motion, if I may, that

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may save time, though I suspect it will not: I move that Rule 18 be not adopted.

Mr. Burns. I second the motion.

Mr. Robinson. May I add just at this point, before it goes to a vote: It happens that a lawyer was in my office just two days ago. He has been an assistant United States attorney for a great many years and was also a state prosecuting attorney and has tried a great many important cases in the Middle West, and he is over here now assisting a Senator in some work here. He saw this rule, and he said, "I wish we had had it in the case involving some illegal paving allegations, misuse of Government funds in connection with the paving of some streets in a certain subdivision." He said, "For two or three days in the federal court there we had to sit by while records were introduced of the plats and various other real estate matters that nobody paid any attention to, including the jury. It just killed that much of our time and the jury's time." He said, "If we had had a rule like that it would have given something of an impetus and something of an opening for us to get together with the judge and get some stipulation."

Mr. Medalie. Why did not the judge call them up and say--

Mr. Robinson. I am not arguing with you about it. I am just telling you. That is just what the man said.

The Chairman. There is the answer, Mr. Medalie. Many judges will not do it.

Mr. Robinson. Surely.

The Chairman. There are many judges who are still bucking against pretrial procedure in civil cases, and unless you have something that the district attorney can point to, or even

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defense counsel, there are many district judges who will not make any advance.

Mr. Waite. It strikes me that this is a rule that might easily do some good and could not conceivably do any harm, so I am all for having it.

Mr. Medalie. I think this rule is useless unless you strike out the word "invite" and say "require".

Now, the reason for that is this: You invite a lawyer to come. He does not have to come. I have seen district attorneys refuse to attend when the judge is inviting or when he is giving them a direction he did not like, when some kind of hostility was on. If the lawyers must come--they are not compelled to make an agreement, but they must attend the session, and if a lawyer does not have to come in person: he can send anybody from his office, but then you have a conference. Now, whether it should be had depends on whether the matter is brought to the attention of the court by either side enough to induce him to say you ought to hold this kind of conference.

Mr. Robinson. You presented the point, did you not, Mr. Medalie, in one of the former meetings of the Advisory Committee, and we voted it down; and you think probably it ought to require reconsideration?

Mr. Medalie. No; only the word "invite".

Mr. Robinson. You are still against it?

Mr. Medalie. I would rather have that in opposition to this rule than to have nothing.

Mr. Holtzoff. I call for the question.

Mr. Waite. Will you phrase the question so we will know which way we are voting?

The Chairman. Yes, sir. The question is on Judge McLellan's motion to strike the entire rule.

Mr. Medalie. My amendment is that the word "invite" be stricken, the word "require" be inserted, and that the rule be adopted in that form.

The Chairman. Is the amendment seconded?

Mr. Seasongood. Why do you not wait and see whether they want the rule or whether they do not?

The Chairman. That is simpler.

Mr. McLellan. That was my purpose in putting it, I thought.

The Chairman. All right. Let us vote on Judge McLellan's motion to strike the entire rule 18. All those in favor say "Aye." Opposed, "No."

Let us have a show of hands. Those in favor of the motion? Opposed?

(There was a show of hands.)

Mr. McLellan. That is what I suspected.

Darrow
fls.
2:50pm
5/19.

DARROW
gibsn
fls
Maxsn
2:50pm
5/19/42

The Chairman. 3 to 11. I hate to call for hands, but some of you gentlemen have such good voices.

All right. Mr. Medalie has made a motion to strike the word "invite" in line 2 and substitute the word "inquire".

Mr. Burke. It carries, of course, an element that has no place in this.

The Chairman. That was the decision of the committee originally, but everything is tentative until we sign on the dotted line.

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

I would say the motion is lost.

Mr. Holtzoff. I think Mr. Burke had a motion to strike out the sentence on line--

Mr. Burke. Yes; I should make the motion that the word "The" on line 12, and extending to include the word "just" in line 15, be stricken.

Mr. Dession. I will second that.

Mr. Seasongood. That is the sentence, "The court may," isn't it?

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

Unanimously carried.

Mr. Burns. I have a comment on line 7.

In some of these mail fraud cases the trial develops into a battle of parades.

The defense parades a number of character witnesses, and it is my experience that the judge pretty quickly puts a stop to it, but the Government has a parade of its own which is very

effective, and that is a parade of victims, the widows and orphans, so I would like to insert in paragraph (3), "The number of expert witnesses, complaining witnesses, and character witnesses."

Now, that is really taken care of by the clause, "Such other matters", but in view of the fact character witnesses have been pointed out I think it would be well to put in "complaining witnesses" too.

Mr. Youngquist. Won't the court take care of that?

Mr. Burns. They take care of the char-

Mr. Youngquist. I have had took care of complaining witn.

Mr. Burns. And I ha ey didn't.

Mr. Dean. I second t

Mr. Medalie. Do you mean by "complaining witnesses" the ones who are described as victims?

Mr. Burns. Yes. I put victims in, because that has become a work of art.

Mr. Waite. Mr. Chairman, in line 13 do I understand that is to be put in somewhere else?

The Chairman. No.

Mr. Waite. Well, unless they are to be put in somewhere else I want to vote no on the motion.

Mr. Burns. It is just a more accurate way, on the point I made, to say "expert witnesses, character witnesses, or other witnesses who are to give testimony of a cumulative nature". Because that is the real objection to it.

Mr. Dean. That's right.

Mr. Holtzoff. I don't think that is the objection to it.

I think the objection to it is--

The Chairman. Is the motion seconded?

Mr. Dean. Seconded.

The Chairman. All those in favor say "Aye." Opposed? Carried.

Mr. Seasongood. I would like to move to insert in line 3, after the word "conference", the words "at which the defendant shall be present".

The Chairman. "* * at which the defendant may be present", giving permission, not compelling him.

Mr. Seasongood. All right.

Mr. Holtzoff. I second it.

The Chairman. Any remarks?

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

Carried.

Rule 19.

Mr. Robinson. May I say a word about that, Mr. Chairman, a brief word?

The Chairman. Surely.

Mr. Robinson. The question is whether or not these rules should have something on continuance.

Of course there are arguments both ways.

The reason for it is--one consideration, I think, the American Law Institute Code, which is a rather complete code of criminal procedure, has quite a bit of attention given to it, and I think this is the only subject in which we have not made some provision in connection with this set of rules which is not--this would be the only omission we would make. That is, I think we have touched everything in this set of rules which

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is touched in the American Institute Code.

I suppose the delay in federal courts due to improper use of continuances is not very great.

You may wish to vote the rule out. It is just here for your consideration.

On the other hand, if there is now or may be a desire to avoid delays due to the improper requests for continuances, it may be considered.

The strongest recommendation we have comes from here in the District of Columbia.

We are told that in moving the calendar along the United States attorney is continuously met by the objection, "Oh, this
2 is the first time it is up." If defendant's counsel move for a continuance on account of an absent witness, defendant's counsel feel they are entitled to one continuance anyway, even though the jurors are present, all the witnesses are present, and the court's trial may be interfered with by such a motion.

The only other point that might be noted is lines 14, 15, 16, and 17 , which is the statute that is used in a good many states.

It is designed to accomplish two or three things, the particular one being--the active one, I think--to permit the judge to arrange his calendar.

Suppose there is a motion on account of a witness absent on account of illness. The statutes require in several states that there be a statement by a physician stating when the witness will be available, permitting the court to adjust the calendar properly and to avoid a misuse of the purpose of the continuance.

That is all I have to say.

Mr. Holtzoff. This rule was not acted on by the Committee on Style?

Mr. Robinson. No.

Mr. Holtzoff. Now I am going to move that this rule be not adopted for the reason that the question of continuance, it seems to me, should be left to the discretion of the district judge; whether he should require a certain kind of certificate or affidavit is something that a judge can determine without being told by rule.

Now, as the Reporter said, there hasn't been a great deal on continuances.

Now, it is a fact that some of the judges in the district courts are very liberal. Now, this rule is not going to stop liberality.

I don't think matters of detail which ordinarily are disposed of by the judges should be put into the rules and I move that this rule be not adopted.

Mr. Longsdorf. I second the motion.

The Chairman. Any discussion?

Mr. Seasongood. I had thought to move to strike out the first sentence. That seems obvious. Why doesn't this place some limitation on the right to ask for a continuance that would help the judge?

Mr. Holtzoff. Well, shouldn't you leave that authority to the judge's discretion or to local rules?

The Chairman. Any further discussion?

Mr. Medalie. There is one other thing in connection with this section that I think is very, very bad, and that is that

if because of the absence of a witness a continuance is asked, an admission that the witness would testify a certain way is enough to cause a denial of that motion.

Mr. McLellan. Even to require denial of it.

Mr. Seasongood. It says he may be impeached too.

Mr. Medalie. Of course if the district attorney asks for a continuance on the ground that his witness is away, can you get an adjournment?

Mr. Robinson. This is a very common statute and I know it operates very effectively in state courts.

Mr. Holtzoff. There is no such statute now in the federal courts to require opposing parties to accept an admission rather than evidence.

You can kill a case by admitting certain facts.

Mr. Robinson. In some states it is worse than that. If the party opposing wants to admit the truth, not that the witness will testify--

Mr. Holtzoff. No. You destroy the force of my testimony.

If one of my witnesses was ill and you deny me a continuance, you admit that if that witness was present he would testify so and so, why, that does not make any impression on the jury. And you can destroy the testimony.

Mr. Robinson. Sometimes you do and sometimes you don't. There are arguments both ways.

Mr. Waite. I think this is a very effective rule in stiffening the backbone of the judges and giving them something they can rely on when otherwise they do not like to oppose the attorneys before them.

Mr. Longsdorf. If we throw it out we don't have to have a

discussion on it. If we leave it in, then we can deal with statutes, can't we?

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

There is a motion to strike Rule 19.

Opposed, "No."

Mr. Robinson. May we ask whether we cannot have a vote--

Mr. Longsdorf. We haven't had our vote yet.

Mr. Robinson. (continuing) --on continuances; whether we have any rule on continuances?

The Chairman. Let us finish getting the vote on this. This is a motion now to strike Rule 19 (a).

Now, all those in favor show hands.

One, two, three, four, five, six, seven, eight.

Opposed? One, two, three, four, five.

The motion is carried.

Mr. Wechsler. I think there ought to be a rule. This is a condition on which the votes might differ, that there be a rule that provides for the contingency of continuance.

Mr. Medalie. I think you cannot have provision unless you have provision for the automatic condition of the calendar. And the calendar depends on whether the district attorney controls it or the court controls it.

If the district attorney controls it you cannot have this kind of thing.

Mr. Holtzoff. It is a matter that varies from district to district.

The Chairman. If there is no further motion we will go on to 19 (b) of which we have a second draft that has just been furnished.

Mr. Robinson. This is drawn in accordance with the vote of the Committee, not unanimous vote but substantial vote, that there should be a rule, which I think is based in part on the requests that have come before this Committee for a rule.

A careful check has been made of United States Attorneys by Douglas McGregor.

Out of 52, 39 answered that there should be in these rules some provision in case of alibi. 13 say no.

United States Department of Justice Committee says that the Committee has decided in favor of a rule to give the prosecutor notice of alibi.

The Post Office inspectors are overwhelmingly in favor of a rule requiring defendant to give notice of alibi.

And we have a discussion from Judge Duffy of Wisconsin of a case in which the lack of alibi was the cause of a miscarriage of justice.

We have other authority on that and that is the reason for including it. It is for your consideration.

Mr. Medalie. What did the United States attorney for New York say?

Mr. Robinson. Let us see what he says. (Examines papers.)

New York did not answer, according to this poll.

Mr. Medalie. I will speak very briefly. There are two kinds of alibi notices.

One is the case in which the district attorney initiates the proceeding. He moves that the defendant furnish a statement to the effect that he was not present at the place charged in the indictment at the time stated, that he was elsewhere, and the names of the witnesses by whom he intends

to prove it.

The other method is that the defendant before he offers proof shall initiate something, that is, he shall give notice that he intends to prove an alibi; he must give the place and time and the names of the witnesses.

Those are the two methods.

Mr. Robinson. The first is New York only, and the other is the other 13 states--14 have it, and the others are different.

Mr. Medalie. I believed for some time that it was futile. I had a change of heart and told the Reporter I would ask the district attorney of New York, where there are more cases dealing with alibi than any other place in the country. It cannot be otherwise.

Mr. Holtzoff. More than Chicago?

Mr. Medalie. More than Chicago.

Mr. Burns. That is civic pride.

Mr. Medalie. It is pride.

The Chairman. We will forgive you for boasting.

Mr. Medalie. In view of the fact that that has been, by common acceptance, an efficiently run office during the past few years--

The Chairman. Some time back it was.

Mr. Medalie. I took the matter up with that office and I asked if its experienced trial assistants who had had experience in that matter would have a conference with me, and it was so arranged.

They said that it is not worth bothering with in more than one case in fifty.

The assistant in charge of what is called the General Sessions Bureau, the member that tries jury cases, he says he advises not to bother with it, it is not worth while, a good job can be done by good cross-examination.

Mr. Robinson. It is a poor statute, is it?

Mr. Medalie. No, it is a good statute. They don't get much good out of it.

I checked up further with the head of another bureau who is a very scholarly man who has had occasion to see what the results are. He does not see any very substantial advantage to it.

Mr. Holtzoff. Have you had a chance to check with Michigan and Ohio?

Mr. Medalie. No. In all my travels I have gone no farther than New York City on it.

Mr. Dession. All New York people do that.

Mr. Medalie. One of the assistants thought there was some good in it but admitted he never used it.

Now, I see from these statistics we are getting in answer to questionnaires, the indications are that we ought to have such a statute, but I have been unable to find enough evidence from answers to questionnaires that it actually did much good.

Mr. Burns. Of course you never could find out, because its real worth would be in the alibi defenses that were not raised.

Mr. Robinson. That is right. It is preventative.

Mr. Waite. There is one case in our county where it worked well, and I know of at least one case in Ohio where it worked well.

Now, as Judge Burns says, how many fraudulent defenses it warded off, we have no way of knowing.

Mr. Medalie. Well, they seem to offer alibi defenses in those States where you have it.

Mr. Waite. This won't stop it.

Mr. Medalie. If this does not do much good, in view of the large amount of debate it will create, I should not like to see the adoption of our rules endangered.

Mr. Holtzoff. Well, wouldn't it be a good thing to have this rule go out in preliminary draft so it might be commented on? We can withdraw it if the comments are adverse, before we submit it.

I think that is one of the purposes of submitting a preliminary draft.

Mr. Waite. And if we do not put it in we will be criticized for being entirely too conservative.

Mr. Medalie. How about those two examples? I don't find many.

Mr. Holtzoff. Isn't it a fact--

4 Mr. Medalie. Don't divert me from seeking specific examples.

Mr. Holtzoff. But we don't know how much perjury has been eliminated.

Mr. Longsdorf. May I ask a question?

I am not indicating that I am against the rule, but the first one is a simple rule: May the Government compel a defendant to say where he was at a given time?

Has the defendant the right to decline to state where he was at the time?

Mr. Holtzoff. I think he has.

Mr. Longsdorf. That is what I wanted to know first.

Mr. Medalie. They cannot prohibit him from testifying. They can prohibit him from calling the witnesses under the statute.

Mr. Longsdorf. He has a constitutional right to decline to state where he was at the time of an offense. And if he has that right, can you take it away from him indirectly by providing that if he does not file a motion stating where he was, that he cannot at the trial show that he was not at the scene of the crime?

Mr. Waite. On what did he perhaps predicate his right not to say where he was? Of course he can say he cannot be compelled to incriminate himself but does he have a right to refuse to say where he was if that is not incriminating?

Mr. Holtzoff. Well, I think this would require him to give notice that he was at a certain place if he intends to give evidence on it.

Mr. Longsdorf. But your rule provides that he must in particular state where he was.

Mr. Dean. That will be binding on him if he does.

Mr. Seasongood. What?

Mr. Dean. That will be binding on him if he does.

Mr. Seasongood. It will either be binding on him or against him.

The Chairman. Wouldn't a good man be helped by this?

Mr. Longsdorf. I am not answering whether he would be helped but whether a man can be compelled to state where he was--now, can you provide a condition that he shall do that?

Because that is what your rule does.

The Chairman. Well, you could have a requirement that his plea must state his position exactly, as we do in a civil case, couldn't you? You could have a system of required pleas.

Mr. Longsdorf. I doubt if you could have one that would make it necessary for him to furnish evidence.

Mr. Burns. Well, if there is any compulsion, isn't there compulsion to furnish evidence which will not incriminate him but save him harmless?

Mr. McLellan. Well, of course you are getting off into a line of cases where they held that, even though a man was compelled to state that he was at a downtown hotel, that they may incriminate him as to an offense that took place up in Harlem.

Mr. Holtzoff. Judge, are you considering this--

Mr. McLellan. All I am doing is trying to learn something.

Mr. Holtzoff. I have had nothing to do with drafting this particular rule.

As I construe it, they wanted to require the defendant, if he intends to offer evidence, to state in advance what it is going to be--in other words, if he does not intend to divulge where he was--he does not do it in advance, he intends to do it at the trial.

Mr. Longsdorf. The rule says he must state where he was.

Mr. Dean. Shouldn't the requirement be changed around a little and require first that the Government furnish proof of the exact place of the commission of the offense?

Then if he wishes to raise the defense of alibi, then he

must state where he was at that time.

Now, this is put in reverse. In other words, if he wants to raise the defense of alibi he asks the Government to specify, but at the time he asks that he must first state where he was.

I can conceive of the Government's changing its specification to agree as to where the offense took place, to correspond with where he was.

Mr. Holtzoff. Can't you see the defendant doing the same thing if the Government moves first?

Mr. Dean. I grant that, but the Government should state where that offense took place.

The Chairman. Wouldn't he be able to get that anyway by a bill of particulars?

Mr. Youngquist. That is what this provides for.

The Chairman. But what Mr. Dean is suggesting is that that should come first, the Government should state where it lays the crime.

Mr. Dean. They ought to do it in the indictment anyway.

Mr. Holtzoff. Doesn't that go into the details of the rule rather than the basic question of whether we ought to have a rule?

Mr. Dean. I think it is more than a detail.

Mr. Medalie. Your indictment says January 1. Why should the defendant have to make up his mind until the Government states where it was? Suppose he tells where he was on January 1 and the Government says, "Oh, excuse me, we mean January 8"?

The Chairman. Is there any objection to the proposition that the Government should state the time and place first?

Mr. Wechsler. What is the consequence of that statement,

Mr. Chairman? Is the Government held strictly to prove that time and place?

Mr. Medalie. The time must come when the Government can be justly required to make up its mind, just as the time must come when the defendant can be justly required to make up his mind.

Mr. Dean. The law can be changed by saying the defendant shall then testify as exactly as possible the time and place where he was at the time specified.

Mr. Wechsler. Well, will the rule hold the Government specifically to the time specified by the Government?

Mr. Burns. It does not say so.

Mr. Medalie. May I say one other thing in this connection: Most defendants are in no position to get anything started because they are not really represented by counsel, except on paper.

If the Government is really interested in finding out where the man was or wants to prepare for that kind of thing, it should indicate which particular place is concerned.

When it doesn't, it ought to initiate the proceeding and should initiate it by calling defendant's attention to the fact that it claims a crime was committed at the time and place which it now specifies, and require him to give the place that he was at at that particular time.

Then he is called upon to move, instead of having a lot of time wasted in matters in which the Government has no concern at all.

That is the New York idea and I think it is a sound one.

Mr. Holtzoff. I would suggest, Mr. Chairman, we take a

vote on the principle of whether we should have that alibi rule first.

Mr. Medalie. That sounds very logical but it is not, because if one alibi rule is sound and the other is not, I don't think you can indicate by the adoption of any principle.

Mr. Longsdorf. Unless they vote against.

Mr. Medalie. I move the New York alibi rule as a basis of discussion.

Mr. Longsdorf. I think it is desirable to see whether the majority want an alibi rule.

The Chairman. The motion is that we favor an alibi rule in principle.

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

The ayes raise hands, please. One, two, three, four--

Opposed? One, two, three--

Seven to three.

Mr. Medalie. Several of us not voting.

The Chairman. Obviously.

Now the question is, what alibi rule?

Mr. Medalie. I move that we consider the adoption of the New York alibi rule requiring the district attorney to initiate the proceedings.

Mr. Dean. I second that motion.

Mr. Robinson. May I speak on that?

The Chairman. Surely.

Mr. Robinson. We have made a careful study of every alibi rule in the United States.

There are 14 statutes.

We summarized all that in your second draft. Not the

details, but the principles of law.

We included a copy of the New York statute, a copy that came from the District Court Committee in Oklahoma which seemed to be based largely on the Oklahoma statute, and you have also had for consideration the Indiana statute.

Now, we have examined the New York statute. It is different from all other statutes, the Ohio statute and the Michigan statute, the Indiana statute, and the rest of them. And it requires that the thing be started out--with due respect to my colleague, Mr. Medalie, here--backed by the opinion of those who have examined those statutes--that somehow the Government has to smell it out before it starts an investigation.

The district attorney otherwise is going to have to wait and get along without it, apparently, without any notice of alibi.

I suppose one way he could do it would be if he would just print a form and say to each defendant, "Now, if you are going to prove an alibi you will have to tell me about it." Otherwise the United States attorney or state's attorney will think there is likely to be an alibi and he will inquire about it.

I think that is the only reason why New York is the only state which has adopted the statute, and I think perhaps that is the reason why the New York statute is a failure.

Mr. Medalie. I did not say it was a failure. You have a first-class district attorney's office that has established its competence, and it finds that the use of an alibi statute does not work.

That does not mean that this one is effective because of

its procedure.

Mr. Robinson. I am saying this as to Mr. Dean's suggestion there about studying the New York statute, the Style Committee have considered the statute. We have exhausted the possibilities, and to move a thing of that kind is simply to move a reconsideration of something that has been dropped by us.

Mr. Dean. In the first place, I don't think that we have exhausted anything because the New York statute has never been in a draft for our study.

Mr. Robinson. Yes, it was.

Mr. Dean. Oh, then I missed it.

Mr. Medalie. The New York statute was proposed in the last afternoon of the meeting of our subcommittee.

Mr. Dean. And the draft was to be based principally on that.

Mr. Medalie. Yes.

Mr. Robinson. The New York statute was distributed.

Mr. Dean. We didn't have it here.

6 Mr. Robinson. I think you did in your first draft or second draft. I can take time to look it up.

Mr. Seth. It is in the third draft, Rule 51 (e), based on the New York Code.

Mr. Dean. Well, I did not recall that we had turned down the New York procedure or really considered it.

Mr. Holtzoff. We considered it but reached no conclusion on the statute if my recollection serves me right.

Mr. Medalie. You are right.

Mr. Dean. I think in your alibi situation it is not a

question of the Government smelling out an alibi or not smelling it out and playing safe by distributing advance copies of the request. I think if the Government has got a case and has plenty of witnesses who know just where the fellow was, that is, has three or four cops to testify, it is not going to worry about an alibi.

Mr. Holtzoff. It is going to worry about a fake alibi, because it is always used at the last day of the trial. It has to prevent an alibi at a time when it is unable to meet it.

I recall that we had before us Mr. Alexander from one of the Illinois districts, telling where they had to bring witnesses by airplane across the country.

And sometimes the prosecution may not be fortunate enough to locate witnesses of that type at a moment's notice.

So I do not see what harm there is to a defendant who is not going to introduce a perjured alibi--how such a defendant, if he is required to give notice in advance so the Government will check the alibi--with an honest defendant the chances are the United States attorney will nolle pros the case.

Under the New York rule it really deflates or reduces to zero really the idea of alibi notice because it requires the prosecution to start first by saying, "Well, we are going to prove that the crime was committed at such and such a time. Are you going to claim you were somewhere else?"

That practically invites an alibi.

Mr. Medalie. It is invited anyhow by the indictment or information, isn't it?

Mr. Holtzoff. I can conceive of only one thing--

Mr. Medalie. Unless you are assuming the Government does

not mean what it says in the indictment when it fixes the time and place.

Mr. Holtzoff. Well, I can see one advantage to the defendant, because a poorly represented defendant may not be aware of his rights, but I think provision should be made in the rule where that is the fact, that he shall suffer no consequences.

Mr. Dean. Well, since our motion is not carried to adopt the New York pattern, might it be well to proceed with this draft and see if we can switch it around so that the Government must give exact notice of the time and place?

The Chairman. Give us your suggestion.

Mr. Dean. That would be an amendment of line 32 by striking out the words "in the motion" and insert "the defendant shall then specify".

The Chairman. 32 or 31?

Mr. Dean. 32--"the defendant shall then specify", and go on, using line 33, and then knock out in line 34 "alleged in the indictment or information", and simply say "specified".

Because there you are speaking of a specification in the notice from the Government rather than the allegation placed in the indictment or information.

The Chairman. Will you read it as it will be?

Mr. Dean. "The defendant shall then specify as exactly as possible the place where he proposes to prove that he was at the time specified."

Mr. Holtzoff. Specified by the Government?

Mr. Dean. Specified by indictment or information.

Mr. Longsdorf. I did not hear what you said last.

"Specified by the Government", I think will do it.

Mr. Holtzoff. Then it may be we could omit the next sentence, in the light of your amendment, on which I am in full accord.

The Chairman. The long sentence beginning on 35?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "Upon a hearing of the motion"--that line 35.

Mr. Holtzoff. I don't think you will need any further sentence if Mr. Dean's amendment is adopted.

Mr. Dean. I don't think you will need the sentence.

Mr. Longsdorf. I would like to suggest that--

The Chairman. Wait just a minute, Mr. Longsdorf. I think Mr. Dean has an amendment.

Mr. Longsdorf. I beg your pardon. I did not hear it.

7 Mr. Holtzoff. I think the rest of it is all right, is it not, Mr. Dean?

Mr. Dean. The defendant does not exactly--yes, he does too. I think probably it is.

Mr. Longsdorf. Well, Mr. Dean, don't you want to have something in at the end of the first sentence about/having there been a compliance with the defendant's motion for specification?

Mr. Youngquist. Wouldn't it be better to say, "When the Government has complied with the order the defendant shall"?

Mr. Dean. Yes, better.

Mr. Medalie. Where is this?

Mr. Dean. Line 32.

Mr. Holtzoff. "When the Government has complied with such order", you want to say.

The Chairman. "* * defendant shall".

Mr. Medalie. You are dealing with an order?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "* * the defendant shall specify".

Mr. Holtzoff. You don't need the word "then".

Mr. Seth. What happens if the Government does not comply?

Mr. Holtzoff. Then the defendant would not be required.

Mr. Medalie. You are going to compel the defendant to do certain things and if he does not do them he suffers certain disabilities, but the Government may go ahead and ignore the request.

Mr. Longsdorf. I don't think it may, because the Government--if the court requires the Government to speak, it must speak or be in contempt, I would say.

Mr. Wechsler. Well, must the Government issue this order?

The Chairman. I think we are getting this in shape. I will entertain a motion that this be referred to Mr. Dean as drawn.

Mr. Holtzoff. I so move.

Mr. Seth. I second the motion.

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

Motion carried.

The next is Rule 20 (a).

These we had apparently well agreed upon, had we not?

Mr. Holtzoff. Yes, we had. And they were very carefully studied by the Committee on Style.

The Chairman. Would you like the Committee to be advised?

Mr. Holtzoff. We think so. So far as this rule is concerned, anyway.

Mr. Seth. In 20 (c), if that is in order, should the Government be permitted to use a deposition because a witness is more than 100 miles away from the place of trial?

Mr. Holtzoff. No, it should not. We were going to strike that out. That crept in by error.

The Chairman. May we stick to (a) for a minute?

Are there any questions on 20 (a)?

That is a long rule. It will take time to read it.

Mr. Longsdorf. I move the adoption of the Rule 20 (a).

Mr. Holtzoff. I second the motion.

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

20 (b).

Mr. Seth. 20 (b) does not seem to make provision for the expenses of the defendant not in custody.

Mr. Longsdorf. How about expense of attorney for defendant not in custody?

Mr. Seth. That is my idea exactly.

Mr. Holtzoff. I think the last sentence covers it. I know it was intended to.

Mr. Medalie. Pays the expenses, not fees.

Mr. Holtzoff. I mean the sentence beginning on line 34. I know the intention was to cover that item.

Mr. Wechsler. Well, suppose we say, "defendant and defendant's attorney". The line will apply when the defendant is in custody and not in custody.

Mr. Holtzoff. Yes.

Mr. Seth. How about an attorney for the defendant in custody, then?

Mr. Medalie. That is what this includes.

Mr. Holtzoff. An attorney for the defendant in custody?

Mr. Seth. Yes.

Mr. Holtzoff. That's right.

Mr. Wechsler. It should read, "shall pay in advance to a defendant not in custody and to defendant's attorney".

Mr. Holtzoff. Yes.

Mr. Wechsler. Which will cover the attorney for the defendant who is in custody and not in custody.

Mr. Seth. You would strike that out in line 35?

Mr. Wechsler. No; after that, instead of "his attorney" say "and to the attorney for the defendant".

Mr. Longsdorf. You don't pay the expenses of the defendant in custody because he would be taken there anyway?

Mr. Seth. That is right. It is a free ride.

The Chairman. That sentence might be a little clearer if you would put defendant's attorney first, and "defendant not in custody" second.

Mr. Longsdorf. Yes. Yes, sir.

The Chairman. Are there any other suggestions on (b)?

If not, all those in favor of (b) say "Aye." Opposed, "No."

Carried.

On (c) I believe there is a correction, is there not?

Mr. Robinson. Yes. On line 40, "100" is to be stricken out and "500" placed there.

Mr. Holtzoff. No. No distance at all.

Mr. Robinson. No distance. As in the civil rules?

Mr. Holtzoff. No. Criminal procedure runs across the

country. We will strike out everything after the first four words on line 40. That is, strike the rest of that line; and strike out the first seven words on line 41--or, six words, I mean to say.

Mr. Medalie. Which?

Mr. Holtzoff. "* * the witness is outside of the United States".

Mr. Medalie. What about the 100 miles, and, where dead?

Mr. Holtzoff. "* * * dead, or that the witness is outside of the United States".

And strike out everything relating to "a greater distance than 100 miles".

The Chairman. Are there any other questions on (c)?

Mr. Holtzoff. I move its adoption.

The Chairman. Second?

Mr. Seth. I second it.

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

We now come to (d). Unless there is objection that will stand approved.

Mr. Longsdorf. There might be some objection. "* * in the manner provided in civil cases." Civil cases of course provide for taking of depositions on notice. May be it is not necessary to more than call attention to that, and that is all I intended to do. "The manner provided in civil cases." That means the manner of taking.

Mr. Dean. One question on (c).

You might have a witness who was very much alive and within 100 miles and still outside of the United States.

Mr. Holtzoff. We leave the words "outside of the United States."

The Chairman. It reads, "or is out of the United States."

Mr. Wechsler. Mr. Chairman, I do not understand the provision beginning on line 46, "or, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

I have some question about that, particularly in view of the broad use to which depositions may be put under (c), although you will observe that under (a) the taking of depositions is limited to the case where the prospective witness may be unable to attend, where it appears that he may be unable to attend or prevented from attending.

That (c) contemplates a situation where that expectation proves to be wrong, the witness who was not expected to be able to attend does attend, and (c) goes so far as to allow the deposition to be used as independent evidence testified to in the deposition, even though the witness is there.

Mr. Holtzoff. That language was taken from the civil rules.

Mr. Wechsler. I know it.

Mr. Holtzoff. That is the reason it is there.

Mr. Wechsler. I move it be stricken.

Mr. Holtzoff. I have no objection to striking it.

Mr. Longsdorf. Might there not be circumstances--I cannot think of any at the moment--but might there not be circumstances in which the court would think it proper that

depositions be used?

Mr. Dession. You cannot do that now, I think.

Mr. Holtzoff. That is from line 46 to line 49; is that right, Professor?

Mr. Wechsler. Yes.

Mr. Medalie. Is there a motion to strike that?

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

Carried.

Now we are back to (d), which I believe has been approved.

Mr. Youngquist. May I raise one question?

The Chairman. On (d)?

Mr. Youngquist. (b)--(c).

The Chairman. Yes.

Mr. Youngquist. Suppose a deposition has been taken and the defendant, having caused it to be taken, has served a subpoena on the witness who gave the deposition. The witness fails to appear in response to the subpoena.

Should the defendant not be obliged to use the deposition notwithstanding?

Mr. Holtzoff. That is, because the party has been unable to procure the attendance of the witness.

Mr. Youngquist. Is that broad enough--well, perhaps it is. All right.

The Chairman. All right, (d), gentlemen.

Mr. Longsdorf. What was the change in that?

The Chairman. In (d)?

Mr. Longsdorf. Yes.

The Chairman. I think there is no change so far.

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Mr. Longsdorf. Well, I don't know what it means.

Mr. Holtzoff. It means that the machinery for taking depositions shall be the same as in civil cases.

Mr. Longsdorf. That does not mean you can take them on oral interrogatories, of course.

Mr. Seasongood. We have a paragraph (f) which deals with written interrogatories if the defendant is taking the deposition.

Mr. Longsdorf. All right. The deposition may be taken as provided in civil cases.

The Chairman. I think it needs clarification. We know what it means.

Mr. Longsdorf. Might it be well to say, "In the taking of depositions, the manner provided in civil cases shall be followed"?

We don't want to give the idea that you can take them on notice without order of the court.

The Chairman. Can you say, "Where a deposition has been ordered," so it does not create that idea?

Mr. Longsdorf. Yes.

Mr. Medalie. Now may I ask another question: Lines 15 and 16, what do you mean by "the particular class or group to which he belongs"?

Mr. Longsdorf. 15 and 16?

Mr. Medalie. Of Rule 20.

Mr. Holtzoff. I think we had that up in the subcommittee.

Suppose you want to take a person whose name you do not know but whom you can describe, for instance, the janitor of a particular building.

Mr. Medalie. What about "the particular class or group to which he belongs"?

Mr. Holtzoff. It applies. Suppose it is the crew of a particular vessel, you don't know their names.

Mr. Youngquist. Or the officers of a corporation.

Mr. Longsdorf. Mr. Chairman, you get into an awful mess--well, he has to be identified, anyhow, doesn't he?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Then why not strike out the "class or group to which he belongs"?

Mr. Holtzoff. "* * * or, if the name is not known, a description sufficient to identify him".

Strike out the rest?

Mr. Longsdorf. Is that in the civil rules?

Mr. Holtzoff. This is taken from the civil rule.

Mr. Medalie. You are going to have the deposition of somebody in that crew, you don't know who; is that what it means?

Mr. Holtzoff. Yes.

9 Mr. Medalie. How can you take such a deposition?

The Chairman. It is very common in civil cases.

Mr. Medalie. A member of a crew, without knowing who he is?

Mr. Longsdorf. They have to find him to take his deposition, don't they? Then why don't they go find him?

Mr. Holtzoff. I have no objection to having those words go out, "or the particular class or group to which he belongs".

Mr. Medalie. I move to strike those words.

Mr. Waite. Seconded.

The Chairman. Moved and seconded that the words "or the particular class or group to which he belongs" be stricken.

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

Carried.

What is your pleasure with (d) as amended? All those in favor say "Aye." Opposed, "No."

Carried.

Go to (e).

Mr. Holtzoff. I move the adoption of (e).

Mr. Medalie. Written interrogatories when--

Mr. Youngquist. You are on (e).

Mr. Longsdorf. I move the adoption of (e).

Mr. Holtzoff. Seconded.

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

Carried.

Now, what was your question?

Mr. Medalie. This says the deposition of defendant to be taken on interrogatories.

Mr. Holtzoff. The compensation rule prevents the taking of interrogatories--

Mr. Longsdorf. I move the adoption of (f).

The Chairman. Does this rule give the defendant that option? That should not be, should it?

Mr. Youngquist. No.

Mr. Medalie. The defendant--the court may direct--

Mr. Longsdorf. If the defendant so moves.

Mr. Holtzoff. At the defendant's request.

Mr. Seasongood. Why do you say the court should not have the right--it is at the instance of the defendant. Maybe he

would like to get out of jail for a while, but why shouldn't the court say, "It is enough for your purposes to take it on oral interrogatories"?

Mr. Longsdorf. Oh, I think if he wants the benefit of a written examination that that is good.

Mr. Holtzoff. I was thinking of a situation where the witness was at a different place and it was being used as an excuse for a continuance.

Mr. Longsdorf. It is all in the discretion of the court, even if the defendant requests.

Mr. Holtzoff. Suppose he does not request and the court says, "We can send written interrogatories by air mail instead of giving you a continuance"?

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Mr. Dession. The difficulty is that this may be a rather stupid person, so that he does not understand written interrogatories.

The Chairman. Written interrogatories are unsatisfactory to the most intelligent witnesses, largely because you cannot anticipate what the answers willbe.

Mr. Holtzoff. I had in mind the possibility of this being used as a means of dilatory tactics.

Mr. Medalie. I move to strike out the words "in its discretion" in line 63.

Mr. Holtzoff. How is that amended, now?

The Chairman. "May at the defendant's request."

Mr. McLellan. May I ask whether this matter of taking depositions is at all discretionary with the court?

Mr. Holtzoff. Yes. Take the first sentence of the rule, the word "may."

Mr. Medalie. At present you can go up to Nova Scotia to take a deposition of the defendant, and he must give it to you.

Mr. Holtzoff. At present it is discretionary.

Mr. Medalie. Is it?

Mr. Youngquist. No.

Mr. Holtzoff. It is discretionary.

Mr. Medalie. It used to be on account of you that we used to go all over the world to take depositions.

Mr. Seth. Line 5 says the court may.

Mr. Holtzoff. In a criminal case, if the defendant wants to take depositions,he makes application to the court. He cannot take them on notice, as I understand it.

Mr. Medalie. That is right.

Mr. Holtzoff. That makes it discretionary.

Mr. Medalie. No. The defendant finds he needs a material witness or that he is necessary. The court has no right to deny the motion.

Mr. Holtzoff. He has a right to deny it if he thinks it is not made in good faith.

Mr. Medalie. Yes. That is different.

Mr. McLellan. I think this rule is good in that it leaves it to the discretion of the court.

The Chairman. I suggest that we have about a five-minute recess.

(A short recess was had, after which the following occurred:)

The Chairman. Rule 21 (a).

Mr. Dession. Mr. Chairman, before we leave the last section, the one on depositions, the one on written interrogatories, I gather the civil rule referred to there is Rule 31, which in general seems workable, but there are one or two things in it that would not make too much sense.

It starts off, "A party desiring to take the deposition of a person upon written interrogatories shall serve upon every other party, with a notice stating the name and address of the person, the name and descriptive title"--a lot of that is going to be in the order which he has already obtained--the names of the respective people to be interrogated, the addresses, and the officer before whom it is to be done.

According to Rule 31, all this has to be done in a notice that he serves to the other party. It would not do any harm, but --

Mr. Holtzoff. Your order merely grants you permission to take the deposition of John Smith in Timbuktu before you serve notice that you are going to take the deposition on such and such a date in such and such a building before such and such a person.

Mr. Dession. But under the civil rules he would first serve this to the other party. In criminal practice he first goes to the court and he gives him the order. Maybe he gives notice before that, maybe not.

Mr. Holtzoff. I think it will work in criminal procedure.

Mr. Dession. I think it can be made to work.

The Chairman. Do you suggest that we evolve our own, in preference to this suggestion?

Mr. Dession. I think it would sound better.

Mr. McLellan. Would it be better to change the word "taken" in line 62 to the word "ordered"?

The Chairman. In line 62, substitute "ordered" for "taken" in Rule 20.

If there is no objection, that will stand.

Coming back to Mr. Dession's suggestion, do you think there is enough to be gained by evolving our own rule to make it worth while, rather than refer it back--

Mr. Dession. There is stylistic point I mentioned.

Let me see if the matter of the time limits is workable with an ordinary defendant:

> "Within ten days thereafter a party so served may serve cross-interrogatories upon the party to take the deposition. Within five days thereafter the latter may serve redirect interrogatories upon a party who is

served cross-interrogatories. Within three days after being served with redirect interrogatories, a party may serve recross interrogatories."

That is the civil set-up.

Mr. Waite. What are you reading that from?

Mr. Dession. This is the civil rule which we have just incorporated in our set-up.

Mr. Holtzoff. I do not see why that set-up would not be applicable to written interrogatories and depositions in criminal cases. There should be no difference.

Mr. Dession. My question is whether you like the time limit. If you do, it is applicable.

The Chairman. Five days is standard.

Mr. Holtzoff. Yes, and it can be extendedby the judge if it is too short.

Mr. Youngquist. The cross interrogatories are served after ten days. Then the defendant serves redirect after five days. Isn't that it?

Mr. Dession. That is it.

Mr. Holtzoff. But the judge has discretion to grant longer time if need be.

The Chairman. 21 (a). Is there any question on that?

Mr. Robinson. That is Civil Rule 40.

Mr. Medalie. That again raises the question of the practice where the district attorney makes up his own calendar.

Mr. Holtzoff. In those districts where the United States Attorney makes up his own calendar, if I thought that this rule took that authority from the United States Attorney I would

object to it very strenuously, but I thought that the rule was so general that it was not intended to work that change. If you think it might be so construed--

Mr. Robinson. In all our previous drafts we tried to have that in mind.

Mr. Medalie. You have two situations. One is in the large districts, where you have more than one part of the court operating at a time and a particular part of the court given over exclusively to criminal business. The other is where one part of the court or one term of the court operates for all business. This would seem to be applicable to the court operating for all business in one term in one part of the court.

Mr. McLellan. Would there be any harm in changing the word "shall" to "may," so that it reads:

"The district courts may by rule or otherwise provide for placing criminal proceedings upon appropriate calendars," so as to leave it up to the large districts to permit the general practice that is now in vogue to be continued?

Mr. Holtzoff. I would like to see that change. If there is any doubt about the construction of this rule, I would like to make certain--

The Chairman. That would meet your objection?

Mr. Medalie. What is that?

Mr. McLellan. "May by rule."

Mr. Medalie. You have added nothing.

Mr. Seasongood. What is the sense of the first sentence? Why do you need that?

Mr. McLellan. Except that you have something below that is desirable.

Mr. Seasongood. You can leave that in, but the first sentence is something he has a right to do.

Mr. McLellan. All it does is that it calls the matter to the judge's attention. Some of the district attorneys think that they have a legal right to decide what they will try and get up their own calendars. This gives the court the power to do the contrary, but does not require him to do it.

Mr. Seasongood. How can there be any question that the court has a right to assign the order of business?

Mr. McLellan. I do not think there is any question about it, but I think that would be a good thing for some district attorneys to read.

Mr. Burns. Isn't it true, Judge, that in case of a conflict the district attorney may announce that he has no more cases to present at this session and the judge can do nothing about it?

Mr. McLellan. I am not willing to say that that is so. I am not at all sure that he may not say to the district attorney, "But there is the case of United States against X that ought to be disposed of.

I had an experience like that once, where I was for the defendant, and the United States Attorney said he would not try it until so and so, and I said, "I do not see why you should not try it next week." The judge said, "I don't, either."

Mr. Burns. But that is the power of the judge to dismiss the case. If you look at it as a judge in a two-party controversy, if the district attorney does not desire to bring it forward I do not think the judge has the power to bring it forward.

Mr. McLellan. There is a little difference of opinion on that.

The Chairman. In my district, in the last two weeks, a judge said to a district attorney, when there was a breakdown of the calendar, that there might be worse district attorneys than there was there, but he had not been able to find out, from investigation here at Washington, where that was. Next week he had a calendar of fifty cases ready for trial.

Mr. Holtzoff. About a year ago a Federal Judge in Chicago who was holding criminal court sent for all the prisoners who had been in jail for a certain time and said to the United States Attorney, "You will try a case today or I will discharge the prisoners," and he discharged a half dozen prisoners.

We thought that was drastic. He should have given the United States Attorney some leeway and some notice, but I do not think he was lacking in power to do it.

Mr. McLellan. Anyway, what is the harm in saying that the district courts may by rule or otherwise provide for a calendar? If they have not the power, ought not they to have it?

The Chairman. The next sentence troubles me more. Suppose you have single judge districts and you have a large number of criminal trials. Does that mean you are going to go term after term without trying the civil cases?

Mr. Holtzoff. There is a principle now that all judges follow in single judge districts. They put the criminal cases at the head of the list. It actually does not work any trouble.

Mr. Youngquist. I thought we had the words "as far as practicable" at the end of that.

Mr. Holtzoff. I thought we did.

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Mr. McLellan. "Shall as far as practicable."

Mr. Holtzoff. Now that you mention that, it recalls it to my mind.

Mr. Robinson. I do not know how that got out, if it did.

Mr. Youngquist. At the end of the second sentence.

The Chairman. After the word "shall" insert the words "as far as practicable."

If there is no objection, those changes in the first and second sentences will be regarded as accepted.

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

Mr. Youngquist. "May by rule or otherwise"?

The Chairman. That is right.

Mr. Seth. Why not leave out "rule or otherwise"? Why not say "may provide"?

Mr. McLellan. I think that is better.

3 Mr. Medalie. The calendar is either a general calendar or a special calendar for criminal cases, is it not?

The Chairman. Yes.

Mr. Medalie. What is provided for?

The Chairman. It is a mild declaration of the court's right to be the boss of the institution.

Mr. McLellan. It might prove helpful at times.

I move that it be adopted as modified, if it has not been done.

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

(b).

Mr. Robinson. Mr. Youngquist, don't you have a suggestion by which some words can be saved?

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Mr. Youngquist. Is that a general question or a specific one?

Mr. Robinson. A specific one. I believe you indicated to me that you can drop a couple of lines there.

Mr. Youngquist. It is not of sufficient important to stop for it.

Mr. Holtzoff. I move we adopted 21 (b).

Mr. Robinson. I second it.

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

Mr. Waite. I notice in the beginning of the books, under "Notes," there is a note suggesting that the Advisory Committee considerrecommending that the Administrative Office seek from the Judicial Conference an authorization along the following lines.

That is a proposal that I made last time. It was a proposal that was in the new court act. My original proposal was that the judge should require a report of the status of each criminal case begun, and it was suggested that that was not wise, in view of the activitiesof the Administrative Office.

I would be perfectly satisfied--it seems to me it is a wise thing--that we should ask the Administrative Office to plan out some provision for a report of the status of various cases, so that the judge may know what is being tried and what is not being tried.

Mr. Holtzoff. Why shouldn't you leave this to the Administrative Office and to the Judicial Conference, which is a sort of board of directors to which the Administrative Office is responsible?

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Mr. Waite. What did you ask?

Mr. Holtzoff. Why shouldn't we leave this whole subject to them? Why should we take any action?

Mr. Waite. You say why should we not leave it to them?

Mr. Holtzoff. Yes, why should we not leave it to them, instead of taking any action on it ourselves?

Mr. Waite. I think it would be desirable to suggest to them that we think it is wise. Now, they may not agree with us, but there cannot be any objection, if that be our opinion, to our expressing our opinion to them.

Mr. Youngquist. I should hesitate to omit 21 (b). After all, it is certainly within the province of the court to see that criminal cases that are pending in his court shall be brought on for trial expeditiously.

Mr. Waite. This is not a proposal to omit 21 (b). This is a proposal to supplement 21 (b) by suggesting that the Administrative Office ask the Judicial Conference for some procedure by which the judge may know what the status of the case is, so that he can insist on its being tried.

The Chairman. That is the note at the beginning of the volume.

I wonder if we can hold that until we come to the notes?

Mr. Waite. I am perfectly willing to hold it.

Mr. Seasongood. In 21 (b) don't you have to give notice to the judge before whom the case is pending? It seems to me a pretty arbitrary thing to go in there and take it out of his hands in advance of any notice to him.

Mr. Holtzoff. I think he has a right to do it, because the senior circuit judge has certain administrative powers.

Mr. Longsdorf. Mr. Chairman, I do not know how this 21 (b) may impinge on the activities of counsel. They might have something to say about this.

The Chairman. They would, but it could not conflict with this.

Mr. Longsdorf. I do not think it would. They are not supposed to interfere with district judges. Sometimes they get their feelings hurt and think it has been done, but I do not think it is true.

Mr. Seasongood. This is a very drastic provision. You go right over the head of the judge before whom it is pending and you provide notice to the United States Attorney and to the defendant's attorney, but say nothing about the judge before whom it is pending.

The Chairman. Yes, but, as a matterof fact, Mr. Seasongood, he will in every case you can imagine consult with the district judge.

Mr. Holtzoff. I move we adopt 21 (b).

Mr. Youngquist. We did.

The Chairman. Yes, we did.

22 (a).

Mr. McLellan. Do you need to provide any rules for change of venue?

Mr. Holtzoff. There is no such thing as a change in venue under existing practice, and there never has been, so far as I know, in the Federal courts. This is an innovation, and a rather radical innovation, but I must confess that I think there is some merit in it.

Mr. Dean. I think it is an important change. At the

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present time the only remedy that you have is to file an affidavit of prejudice possibly against the judge and then to get a new judge for that same district. That is an awful job. This is the only way you can get a case into another district from a district where the community may be hostile.

Mr. Holtzoff. I must say that when the idea was first broached some time ago I was rather appalled about it, but I have thought about it since and I am inclined to think that it has a good deal of justice to it, and I do not see how the Government would be prejudiced.

Mr. Waite. Do you mean that it cannot be done now?

Mr. Dean. No.

Mr. Waite. I am all for it.

Mr. Dean. The big obstacle is the constitutional provision which requires that the trial be in the district where the offense was committed, so this is apparently drawn on the assumption that when the motion is made by the defendant that constitutes a waiver of that right.

Mr. Holtzoff. That constitutional guarantee is a privilege.

Mr. Waite. Our courts have even held that you can get a change on the motion of the prosecution.

Mr. Seth. Our statute provides for it.

Mr. Waite. So does ours, but the Constitution says it must be in the county.

Mr. Holtzoff. I want to move to strike out the second sentence, beginning on line 10.

Mr. Seasongood. I second the motion.

Mr. Medalie. Before you get to that question, may I take up one question?

Beginning on line 6, after the semicolon, "or if the indictment or information shows that the offense charged was committed in more than one district, the court may on motion transfer the proceeding to any other district," et cetera. It does not state on what ground.

You have provided for prejudice. The other is convenience.

Mr. Longsdorf. It can only be done on defendant's motion.

Mr. Holtzoff. "The court may on motion."

Mr. Youngquist. That construction is wrong.

Mr. Holtzoff. That ought to be "on defendant's motion."

Mr. Medalie. I am assuming that, but why should the defendant's motion be granted except on grounds we recognize?

Mr. Holtzoff. In the interest of justice.

Mr. Medalie. What is that?

The Chairman. I read the two clauses together; else why are they in the same sentence?

Mr. Dean. I do not think you need the clause at all, because the only event in which you want one transferred from one district to another is when you cannot get an impartial trial in one district, regardless of the fact that it was committed in more than one district.

Mr. McLellan. Suppose all the available witnesses are in the other district and the other district has jurisdiction because the offense was committed there. Wouldn't that be convenience?

Mr. Medalie. Yes; the convenience of witnesses, the saving of expenses.

Mr. Holtzoff. Do you want to enumerate all possibilities, because you cannot exhaust them? You ought to have a general

formula. Otherwise you will have a restricted enumeration.

Mr. Medalie. Do you want to say "in furtherance of justice"?

Mr. Holtzoff. Yes.

Mr. Longsdorf. If you are going to change the place of trials for convenience of witnesses and you restrict the right to make a motion on that ground to a defendant, it is not going to work properly. The Government has already chosen the district for purposes which it deems are right and correct. Now, are you going to let the defendant move that it be transferred to some other place because he thinks it should be?

Mr. Medalie. The judge decides. He says, "As I am informed, the prosecution has one hundred witnesses who live in Madison, Wisconsin."

Mr. Holtzoff. I think we can leave that to the judge's discretion. I think it is a fact that he does do that where there is a continuous offense, like mailing a letter, which may involve a district many hundred miles away from home, because that is where the letter was delivered.

The Chairman. What was the suggestinn on this? Was there any specific change recommended?

Mr. Holtzoff. "In the interest of justice," in line 8.

Mr. Medalie. Say, "where required in the interest of justice."

It will read, "The court may on defendant's motion, where required in the interest of justice."

Mr. Holtzoff. "If required."

Mr. Medalie. "If required in the interest of justice."

We won't put it on grounds of convenience.

Mr. Youngquist. Wouldn't it be better to put it at the end of the sentence?

Mr. Medalie. Anywhere you want it, so long as some ground is stated.

Mr. Holtzoff. You have it too far away.

The Chairman. Someone is going to make a motion addressed to line 10. It seems to me that sentence must stay in if you are going to transfer from one circuit to another, because there is a very high degree of etiquette involved in that situation.

Mr. Holtzoff. The reason I was planning to move to strike out that sentence is this. Here is a judge who expects to pass on a motion. Why should the senior circuit judge participate in passing on that motion? That might disqualify him from hearing the appeal later on.

The Chairman. I do not think so. Why should that disqualify him?

Mr. Holtzoff. If he has sat on a motion in a case wouldn't that disqualify him from hearing the appeal?

Mr. McLellan. Not on that kind of motion.

The Chairman. No. It has nothing to do with the merits. I do not think cases any more than judges should be shunted around from district to district.

Mr. Holtzoff. My objection is not very strong. I shall not press it, Mr. Chairman.

The Chairman. Are there any other remarks?

Mr. Longsdorf. I would like to be heard on this. I question the policy of making rules on this subject until we know more about it, until we have information on how badly it is needed and how often it is needed, and how frequently these

conditions occur that call for this remedy. I think we are stepping a bit in the dark. This is the first appearance of this to my knowledge, but I am afraid of this.

Mr. Medalie. Mr. Chairman, I would like to point this out. Provisions for change of venue in the state practice are rarely invoked. They may be invoked once or twice in the large jurisdictions in the course of a year,perhaps not at all in the course of a year; and yet occasion may arise where in the interest of justice it will arise in important cases. Though used seldom, the fact that there is a use for it is enough to justify the continuance of the statute.

Not infrequently I have been asked, not only by laymen but by lawyers who do not have much to do with practice either in Federal courts or in criminal courts at all,"Can't this Federal case be transferred to another district?"

They assume that it can, because the natural assumption is that such a transfer or change of venue has been provided for. It is really shocking that, in the sense of justice, there is no provision made for it.

The Chairman. And the cases where this arises are very important cases.

Mr. Medalie. Yes. Now, for example, you may have a case where the local prejudice is strong so that it includes the judge. Nevertheless, today you have no basis for doing anything about it, but if you had this provision, then you could make your motion, state your grounds, not having them seriously contested except as a matter of form, and then if he denied your motion you would have something on which to go up, and which would not be a frivolous ground for a reversal.

Mr. Holtzoff. I want to say this: that I took the liberty of talking to some of my associates in the Department of Justice, and we informally, without dissent, all thought that this was a desirable innovation, because we do recognize that sometimes an injustice is done to defendants, unintentionally, to be sure, but sometimes it is done or hardship caused, in view of the fact that in many instances the Government has a choice of venue where the crime might have been committed in two or three districts.

If an injustice is done, like indicting a person in Alabama who is a resident of Chicago and may have mailed a piece of obscene literature to Alabama, and he is to be brought to Alabama for trial, I can see that there are situations where justice might be promoted by such a rule. It will all be within the control of the court, of course, so that if there is any attempt to abuse this provision, the courts will control it.

Mr. Youngquist. Are you referring to the Anti-Trust Division?

Mr. Holtzoff. I was not referring to the Anti-Trust Division.

Mr. McLellan. I move the adoption of Rule 22 (a) as modified.

Mr. Holtzoff. I second the motion.

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

22 (b).

Mr. Dean. On 22(a), I think we ought to change the wording in line 3 to conform to the wording in line 8, and say "defendant's motion." That is just a minor change.

Mr. Holtzoff. In line 17 you can strike out, I think, the

first five words. You do not need the statement "under seal of the court."

I move that we adopt 22 (b).

Mr. Youngquist. (a) as it now reads is, "The court may on defendant's motion" the same as down in line 8?

Mr. Holtzoff. Yes.

The Chairman. All those in favor of 22 (b) say "Aye." Opposed, "No." The motion is carried.

Mr. Waite. I just want to ask a question, not to raise a discussion. As it originally stood, it provided the trial might be in any district in which the offense had been committed. The court could move from one district to another. Do I understand it has now been changed so that the court has no power to move it from one district to another except on defendant's motion, even though it was committed in both districts and could have been tried in either district?

Mr. Youngquist. The Government chose its district, so it has no complaint.

Mr. Medalie. Of course, that means that the tobacco cases would have been moved from Lexington to somewhere in North Carolina, where there was a large number of tobacco growers.

Mr. Holtzoff. Provided the judge would have granted the motion. Do not overlook that proviso.

Mr. McLellan. Is the effect of 23 to take away from the Attorney General or the United States Attorney the right to nolle pros without stating his reason?

Mr. Holtzoff. It does, and I am dubious about that.

Mr. McLellan. I am dubious, and I am dubious about whether it brings about that result.

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Mr. Seasongood. We had a considerable discussion on whether you could dismiss without permission of the court. It was resolved this way.

Mr. McLellan. That he can do it, but can he do it now in the light of this rule, if we pass it, without stating his reasons?

5 Mr. Holtzoff. I am afraid if this rule is adopted in the present form he cannot do it without stating his reasons.

Mr. McLellan. It might be so construed.

Mr. Holtzoff. I think so. Personally, I voted against requiring him to state his reasons, and I am still of the same opinion.

Mr. McLellan. I move that we strike Rule 23.

The Chairman. We all have now copies of Rule 23.

Mr. Holtzoff. The first paragraph is not changed. I am wondering whether you want to restrict your motion to stating the reasons thereof, because there should be some provision of the rules that nolle pros would be entered.

Mr. McLellan. That would exist if you do not have any rule about it.

Mr. Holtzoff. I presume so.

The Chairman. You think that the Attorney General or the district attorney should have the right to dismiss without any reasons being given?

Mr. McLellan. I do, although I am familiar with the view to the contrary in statutes in some jurisdictions requiring the reasons to be stated.

Mr. Robinson. Do they ever dismiss without giving reasons now?

Mr. McLellan. Oh, yes.

Mr. Holtzoff. That is the usual practice.

Mr. Robinson. I will modify my question: Where there is quite a bit of public interest. I am thinking of those cases in Indianapolis where the Attorney General stated his reasons--

Mr. Holtzoff. It is done sometimes, but those are the exceptional cases.

Mr. Robinson. This apparently follows the state practice in many States.

Mr. Waite. Is there any reason why the prosecuting attorney or the United States Attorney should not file his reasons for dismissal?

Mr. Longsdorf. There were reasons in the Southern District of California, that Mr. Holtzoff can state better than I can, because he is familiar with it.

Mr. Holtzoff. That is a very good example.

Mr. Waite. That does not explain it to me.

Mr. Longsdorf. Mr. Holtzoff is more familiar with the facts than I am. There were reasons of state why one should be nolled and one should be prosecuted. The reasons of state could not be disclosed in court and could not be made of public record.

Mr. Medalie. Do you remember what was stated in the nolle? You did not draw the nolle?

Mr. Holtzoff. No, I did not.

Mr. Longsdorf. In the Ninth Circuit Conference last summer it was taken up, and it was understood there that if the reasons had been given they would not have been substantial ones that motivated the action.

The Chairman. I am troubled as to why the Attorney General not to mention many district attorneys, should nullify the work of the grand jury without stating the reasons. I thought there was a good deal of shedding of blood over that.

Mr. Holtzoff. If you refer to the English practice, I would like to refer to the fact that that power rested only in the Attorney General.

The Chairman. Without giving reasons?

Mr. Holtzoff. Without giving reasons.

Mr. McLellan. That has been the general practice until recently in some States. By reason of local abuses, they passed statutes.

Mr. Holtzoff. Wasn't that due to the fact that the local prosecutor is generally an elected official?

Mr. Medalie. And constitutionally independent.

Mr. Holtzoff. And constitutionally independent, but as United States Attorney, as the statute provides, he acts under the supervision of the Attorney General.

Mr. Medalie. The President can remove him.

Mr. McLellan. Don't you think, Mr. Medalie, that it is better that the old practice should continue of letting the Attorney General dismiss?

Mr. Waite. I am satisfied that dismissal ought not to be made without reason, and if there is a reason, I do not see why in the world it should not be stated.

Mr. McLellan. Sometimes it is rather difficult to state it.

Mr. Seasongood. This represents a compromise. When we discussed it before there was a considerable number, including

myself, who stated there should be no dismissal without the consent of the court.

Mr. McLellan. The trouble is the court does not know anything about the case.

Mr. Seasongood. You make a showing to the court why you want it dismissed, and the court says all right. That is the practice in our court.

The prosecutor says, "I want to dismiss this case." The Court says, "No. I have something to say about it. You go ahead with the case."

Mr. Medalie. Generally speaking, throughout the country in our Federal cases there are practically no nolles without a statement of the reason,practice has developed.

Mr. Holtzoff. That is not correct. That may have been so so far as you yourself as United States Attorney--

Mr. Medalie. I never nolled without giving the reason.

Mr. Holtzoff. What happens is that a nolle is filed. For example, a United States Attorney filed a nolle in the Davis case. I do not think he stated the reasons.

Mr. Youngquist. It was in the newspapers.

The Chairman. What is the Department of Justice going to say about giving this power to the district attorney?

Mr. Holtzoff. The district attorney has power today. Of course, administratively we are requiring the district attorney to get power from the Attorney General--

Mr. Medalie. Our district excepted.

Mr. Holtzoff. There are two exceptions, the Southern District of New York and the District of Columbia.

The reason for the exception in the District of Columbia

is that they have relatively minor cases that elsewhere would be tried in the state courts.

I would assume that if this rule were adopted, or any rule were adopted, giving authority to the United States Attorney to nolle pros, that would not deprive him of the administrative provision or deprive the Department of Justice of the right to control this.

Mr. Medalie. Nobody ought to ask the Attorney General personally to give a reason.

Mr. Holtzoff. That is right.

Mr. Medalie. And signed personally by the Attorney General or the Solicitor General, "No reason is necessary." That will take care of cases involving state or public reasons.

Mr. Holtzoff. We do not want to have the order or nolle pros itself signed in Washington in every case.

The Chairman. If you gentlemen who have had experience with it are sure it is all right--Judge McLellan, Mr. Medalie, Mr. Burns, Mr. Seth, and the others here--

Mr. Waite. I think (b) takes care of that. If there are reasons of state, then the court has power under (b) to order it dismissed in the furtherance of justice. No reason needs to be given.

Mr. Longsdorf. It was not in the interest of state that that Russian was nolled down in California.

Mr. Holtzoff. What happens is this: that practically in every case the Attorney General would endorse the order and would say, "Reasons: Insufficient evidence to convict," or something of that sort, because the usual reason why it is nolle prossed--

Mr. Medalie. Just a minute on that. I might be willing, if I were United States Attorney, to nolle an indictment for reasons of state, stated to me through the Attorney General's Office, on a representation made by the State Department, knowing that I had a perfectly good case; but I do not think I would be willing to state that I had no case when I had a case.

Mr. Holtzoff. I was not referring to that case and I was not suggesting that you would, but I said in the average case when a nolle pros is entered, it is entered because the United States Attorney finds he cannot make out a case. Either a witness has died or, on subsequent investigation, some element of the case falls down and he enters a nolle pros. That is the reason for nolle prossing cases ordinarily when they are nolle prossed. So the only statement of reasons you would have would be that the United States Attorney has insufficient proof.

Mr. Medalie. That would not be a reason; that would be a conclusion.

Mr. Holtzoff. You would not expect him to write an essay?

Mr. Medalie. No. He states briefly that the case against this man depended on witnesses so and so and so and so, who claimed to have seen him in the vicinity of the bank. Two of them cannot be found and the other one is dead.

The Chairman. I think we ought to understand the rule.

Mr. Burns. It seems to me that this is one of the largest powers lodged in any single individual, although not quite as great as the power of the President to pardon. It apparently has worked out fairly well, but I take it that a district

attorney would follow the policy of stating it,for his own protection, on the record, because nolles have been the subject of political overturns and charges of corruption. Certainly in Massachusetts corruption was the reason why the statutory change was made, requiring a statement of the reason being endorsed on the paper.

We ought to look upon it as though we were dealing with a code of conduct, and it is little enough to require of the district attorney or the Attorney General to state, when he exercises this extraordinary power, what are the factors that motivated it--that is, so far as the merits are concerned.

I am a little bit disturbed by the use of the term "dismissal." Is that a word of art in Federal cases?

Mr. Holtzoff. No. We use that as an English synonym for "nolle pros," in an effort to get away from Latin expressions.

The Chairman. We have been asked to keep away from unnecessary Latin.

Mr. Waite. To bring the matter to a head, I move that 23 (a) be adopted.

Mr. Holtzoff. There is a motion by Judge McLellan.

Mr. McLellan. I will withdraw that.

Mr. Youngquist. I second the motion.

Mr. Longsdorf. I think we ought to qualify that motion to read that the district attorney ought to be saved the necessity of giving reasons.

The Chairman. Do you want to move to strike that line out, to raise that issue?

Mr. Longsdorf. Since it is a custom to state the reason in practically all cases, why not delete "with a statement of

the reasons therefor"?

Mr.Holtzoff. I second the motion.

The Chairman. Let us get that issue disposed of.

Mr. Waite. This is a motion?

Mr. Longsdorf. This is a motion to amend.

Mr. Robinson. I do not think we can move on that without considering (b). I think Mr. Waite stated that where there are good reasons the court can consent. You might amend (b) by striking out line 8.

Mr. Holtzoff. I do not think the court has a right to dismiss a case on general grounds. He can only dismiss on well-recognized grounds, like want of prosecution, insufficiency of evidence, or something of that sort. Otherwise a judge could dismiss a case because he objects to a particular law.

Mr. Medalie. You mean you would like to strike out "in the furtherance of justice" as being meaningless?

Mr. Holtzoff. Yes, but I do not want to make that motion yet, because we have not reached that paragraph.

Mr. Seasongood. I feel on this (a) that it is something not only that should do justice, but that should have the appearance of justice. I think it creates a very bad impression on the ordinary person to have a solemn accusation which has been made just dismissed without ever knowing what the reason was for it. I know of instances where the dismissal has been very improper.

Mr. Holtzoff. You mean in the state courts?

Mr. Seasongood. No, sir. I mean in the Federal courts, where there have been election frauds and where there have

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been income tax frauds, and somebody got those cases dismissed. That is a fact.

Mr. Waite. In the Glasser cases, too.

Mr. Youngquist. I have prosecuted for many years, and I am not aware of any case that I moved the dismissal of without stating the reasonfor it.

8 Mr. Seasongood. It is good practice.

Mr. Youngquist. And it is well to state the reason for it.

Mr. Seasongood. Because you are a good prosecutor. It should be done.

Mr. Medalie. I recall one case when in the interest of justice a nolle was filed without a reason stated. Some years ago, when Colonel Cathey was United States Attorney in our district, he was not ready with a case, and very eminent counsel appeared for the defendants, and the district judge, who later was a very distinguished circuit judge--not naming him--ordered it for trial, set a date, and said, "You be ready to try your case on Monday." Thereupon, at Colonel Cathey's direction, the Assistant United States Attorney nolled the case, without giving any reasons, then re-indicted, and in due course of proper preparation, tried and convicted the defendants.

Mr. Seasongood. You can have the statement, "with reasons, unless the court shall order that the same shall not be stated."

The Chairman. The question is first on Mr. Longsdorf's motion to delete the words "with a statement of the reasons therefor," in line 4.

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

The ayes please show hands. The noes. That motion is defeated.

Now, the motion is to adopt (a) in its present form.

All those in favor say "Aye." Opposed, "No." It is carried.

Now we come to (b).

Mr. McLellan. Do you want in (a) to make it perfectly explicit that the power to nolle pros is taken away from the Attorney General unless he does it and accompanies it by his reasons, or is that clear enough, anyway?

Mr. Youngquist. This is the only authority to dismiss. This provides how he may dismiss.

The Chairman. Do you think the Attorney General should have a different rule applied to him than to the district attorney?

Mr. McLellan. No, I do not, but does this clearly enough take away, because that is what you intend to do, the old right to nolle pros a case?

Mr. Holtzoff. I am inclined to say I think it does.

Mr. McLellan. One more thing, and then I will stop. Is there any reason for making a different rule in the case of an indictment than in the case of an information?

Mr. Youngquist. There is, of course, a difference in source. The indictment is found by the grand jury. The information is found by the United States Attorney. But I do perceive any reason on that ground for distinguishing between the two. Each is of equal dignity.

The Chairman. He would make less mistakes than a grand jury. He should.

Mr. McLellan. All right.

The Chairman. What about (b)?

Mr. Holtzoff. I move we strike out the last six words, "or in the furtherance of justice."

Mr. Waite. I second it.

Mr. Holtzoff. It is so general that I do not think anybody knows what it means. If it means what it purports to mean, that would confer a plenary power on the court which it does not now possess and which I do not think it should have--dismiss an indictment for whatever reasons he sees fit.

Mr. Robinson. Should we limit the power of a judge to dismiss solely for want of prosecution?

Mr. Holtzoff. There are a lot of other grounds.

Mr. Robinson. Why not strike out everything after "information"?

The Chairman. Why do we have the words "any proceeding"?

Mr. Holtzoff. You do not dismiss a proceeding; you dismiss an indictment.

Mr. Youngquist. Do we need (b)?

Mr. Seasongood. I do not see why you need it. (a) relates to the power of the prosecution to dismiss.

Mr. Robinson. I believe the request made by some member of this committee was that if you do not recognize that the court has the power expressly, it might be assumed that the rule means that only the United States Attorney can dismiss.

Mr. Holtzoff. The judge can set the case for trial, and if the United States Attorney is not ready, he can dismiss or direct a verdict.

I move we strike out (b).

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Mr. McLellan. You move we strike out (b)?

Mr. Burns. And then change the rule to read "dismissal by the Attorney General or the United States Attorney."

Mr. Medalie. I do not understand that. If the district attorney is not ready and the defendant has been waiting around and cannot get a trial and the judge wants to dismiss, that dismissal would arise from want of prosecution.

Mr. Youngquist. I was going to suggest, if it be necessary,and I am not at all sure it is, we should give the reason for dismissal as want of prosecution.

Mr. Longsdorf. How are you going to insure a speedy trial?

Mr. Youngquist. I think it is inherent in the court, because of the constitutional provision for a speedy trial. I do not think we need (b) at all; but if it serves any purpose, it should merely provide dismissal of the motion for want of prosecution.

Mr. Burns. The difficulty is that if you deal with the court's power simply from the point of view of want of prosecution, it may be taken that you have stated by your silence that there is no other power of dismissal residing in the court.

Mr. Youngquist. I move that (b) be stricken.

Mr. Waite. I second the motion.

Mr. Medalie. There are other powers. There are motions to quash.

Mr. Waite. In view of what Mr. Robinson says about the fear that by giving certain power to the attorney to file we

9 may be thought to be taking it away from the court, I move that we adopt as a substitute for (b) a section (b) to read

as follows:

"Nothing in these rules shall be construed to limit the power of the court to dismiss an indictment or information."

Then that power, whatever it is now, will continue, neither limited nor increased.

Mr. Holtzoff. I would rather see the whole paragraph go out, because I cannot see the necessity for a provision of that kind.

Mr. Waite. Well, I do not see it, but in view of the fact that some people do think that we might be deemed to have limited the court's power, I think we had better play safe.

Mr. Burns. Is it fair to say that where you have dealt with the power of the United States Attorney to dismiss you have dealt with the power of the court to dismiss?

Mr. Waite. No, but some people think so.

Mr. Holtzoff. It does not belong in this rule.

Mr. Youngquist. If we had said that a prosecution may be dismissed by the Attorney General or the United States Attorney, that might be exclusive of other means, but we merely provide here that the United States Attorney or the Attorney General may file a dismissal.

Mr. Medalie. I do not think we have an inclusive set of rules if we do not deal with the court's power to dismiss.

Mr. Holtzoff. You mean for want of prosecution?

Mr. Medalie. Yes. That is an old established code, is it not?

Mr. Holtzoff. I thinkthat ought to go in a different rule.

Mr. Medalie. It does not matter. You can put them in two separate rules if you want to.

Mr. Longsdorf. That is under dismissals, and that comprehends all kinds.

The Chairman. Well, we have a motion, gentlemen, to strike (b). Is there anything further to be said?

Mr. Waite. Was my amendment seconded?

Mr. McLellan. Yes. I seconded it.

Mr. Waite. I move a substitute motion to strike--

The Chairman. May we have that repeated?

Mr. Waite. The substitute motion was to adopt (b), reading: "Nothing in these rules shall be construed to limit the power of the court to dismiss an indictment or information."

Then whatever that power is, we let it stand.

Mr. Holtzoff. That might be construed to be a source of power. That is what bothers me.

Mr. Youngquist. No; it could not be construed to be that.

The Chairman. It creates nothing.

Mr. Youngquist. It is simply a statement that whatever power there is is limited.

Mr. Holtzoff. I think that is the correct construction, but there is another construction.

Mr. Youngquist. I made my motion to strike the entire rule because I think it is not necessary.

The Chairman. You have heard Mr. Waite's substitute motion. All those in favor say "Aye." Opposed, "No."

All in favor show hands. Four. Opposed, eight. The motion is lost.

Now the motion to strike (b): All those in favor of the

Mr. Youngquist. The vote on that proposition was nine to seven.

Mr. Seasongood. I thought it was not overwhelming.

Who signs them?

Mr. Holtzoff. The attorney signs them. There has been no trouble with that in New York. I know New York has had that practice for a long time.

Mr. McLellan. What do the civil rules provide about this?

Mr. Holtzoff. The civil rules do not provide for the issuance of the subpoena by the attorney.

Mr. McLellan. It is issued by the clerk?

Mr. Holtzoff. It is issued by the clerk.

Mr. McLellan. I move that from (a) there be stricken, in the fourth line, the words "or by the attorney for one of the parties."

Mr. Seasongood. Seconded.

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

All those in favor raise their hands. Five. Opposed, four. The motion is carried.

Mr. Holtzoff. An attorney is an officer of the court.

The Chairman. There is no harm done. Each district will do what has been done according to the state practice. Mr. Seasongood can go back to Ohio, knowing that the subpoena process in his State is safe.

Mr. Seasongood. I do not think it is of enough importance to start a controversial issue. A lot of people to whom this is totally unfamiliar will say, "How are you going to have attorneys issue subpoenas in Federal cases?"

Mr. Medalie. Don't we issue subpoenas in civil cases?

Mr. Holtzoff. Not in the Federal courts. The civil rules provide that the clerks shall issue them.

Mr. Medalie. All I know is that when I have a trial my witnesses are there. I do not know how they were brought there.

Mr. Seasongood. They will say, "Why should you have something special in the criminal rules that is not in the civil rules?" That is another reason for questioning it.

The Chairman. (a) has been adopted.

Now we got to (b).

Mr. Holtzoff. I move that (b) be adopted.

Mr. McLellan. I second the motion.

Mr. Medalie. Referring to line 11, with reference to the motion to quash, I think the words "in any event at or before the time specified in the subpoena for compliance therewith" are an unnecessary restriction.

Mr. Seasongood. It may be very unjust, too. You might have a forthwith subpoena.

Mr. Holtzoff. It does not say before the time. It is at or before the time.

Mr. Medalie. I know, but you may not be able to get half started to examine the list that is in the subpoena duces tecum.

The Chairman. General Motors Company subpoenaed me, on five hours' notice, to produce all the books of practically every industry in Linden. I could not possibly get my papers in shape to get there. I got an associate to appear and tell them that I could not do it. He said, "Tomorrow you come before the district judge and I will tell you why." It would have been truckloads of stuff.

Mr. Medalie. Then, the civil rule is a bad rule.

The Chairman. There is one case where I could not have complied with it. Of course, the judge would have relaxed the rule, but why should we have a rule that requires relaxation?

Mr. Medalie. You postpone the time, and in the meantime you move to quash.

Mr. Holtzoff. Yes. Of course, I do not think any harm would be done by striking out that clause in lines 11 and 12.

Mr. Burns. I second the motion. Question.

The Chairman. From the word "and" in line 11 to the word "therewith" in line 12. All those in favor of the section as thus amended say "Aye." Opposed, "No." The motion is carried.

Are there any questions on (c)?

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

(d) (1).

Mr. Seasongood. The United States does not have to tender mileage under existing practice.

Mr. Holtzoff. It does not have to. It pays when the witness shows up.

The Chairman. Are there any questions on (d) (1)?

If not, all those in favor say "Aye." Opposed, "No." The motion is carried.

(d) (2). All those in favor of (d) (2) say "Aye." Opposed, "No." The motion is carried.

(e) (1). All those in favor of (e) (1) say "Aye." Opposed, "No." The motion is carried.

Mr. Youngquist. I have a question. What about subpoena duces tecum? I suppose this covers it?

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Mr. Medalie. Yes, it does.

The Chairman. And (e) (2).

Mr. Seasongood I suppose that means something, but not to me. I suppose you ought to know what that means, but I do not.

The Chairman. It is a civil rule.

All those in favor of (e) (2) say "Aye." Opposed, "No." The motion is carried.

(f). All those in favor of (f) say "Aye."

Mr. Longsdorf. What is the use of that? You do not need to declare whatis a contempt of court.

Mr. Holtzoff. It is in the civil rules.

11 Mr. Youngquist. I think something has been omitted there. At least, my idea was that it should have been deemed a contempt of the court out of which a subpoena issued.

Mr. Robinson. That is the language of the civil rule as you stated. I think it should be made to conform.

Mr. Seasongood. Why do you say "may be deemed"? It is, isn't it?

Mr. Robinson. That is the civil rule language.

Mr. Seasongood. I can't help that.

Mr. McLellan. You summon the witness. He does not appear. You go to the judge and you want the man adjudged in contempt. If the judge finds that the witness was in a position to give no material testimony, he does not adjudge him in contempt.

Mr. Dean. This says "without adequate excuse." If he is without adequate excuse--

Mr. Burns. And without adequate testimony.

Mr. Holtzoff. This is the civil rule, and it seems to me it would be rather strange to have a different rule on the

consequences of a witness' failure to appear in criminal cases.

Mr. McLellan. If you have "may" it is all right, but what do you add to a contempt of court in order to get it up to the civil rule?

Mr Youngquist. My idea was that what we needed it for was to say which court you would deem it to be in contempt of in the case of a deposition, for instance. Therefore, I have suggested that there be added at the end of line 47 the words "out of which the subpoena issued." That is the civil rule.

Mr. Longsdorf. May I offer an amendment by suggesting that the word "deemed" be altered to read "prosecuted as"? The deeming is going to be done when the prosecution is conducted.

Mr. Holtzoff. I do not like the word "prosecuted" there.

Mr. Longsdorf. I do not like the word "deemed."

Mr. McLellan. Why depart from the civil rules?

Mr. Orfield. Isn't this a matter of substantive law rather than procedural law?

Mr. Holtzoff. Why not have the same rule as the civil rule?

Mr. Youngquist. I move that there be added after the word "court," in line 47, the words, "from which the subpoena issued."

The Chairman. Is that seconded?

Mr. Holtzoff. I second it.

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

All those in favor of (f) as amended say "Aye." Opposed, "No."

All those in favor show hands. Six. Opposed, four. The

motion is carried.

Mr. Dean. May I go back to something that bothers me a little bit, Mr. Chairman, on Rule 24 (b), lines 16, 17, and 18? We provide that the court may order an inspection of the documents prior to the time when they are to be produced in response to the subpoena duces tecum and to determine the admissibility in evidence of the documents.

I do not think "admissibility" is the word, because I do not see how the court can determine on their admissibility. That would depend in many cases on what witness is on the stand, and so forth.

I think what we need is "their relevancy to the cause or to the case generally," if it means anything.

The Chairman. Their relevancy as evidence?

Mr. Burns. Why not take away that power? After all, its relevancy is going to be determined by how the trial develops. It seems to me that this has to do with inspection rather than passing on the relevancy.

Mr. Dean. It could only be relevant to the case generally. It could never be relevant to the particular issues. I know we do not mean "admissibility."

Mr. McLellan. Can we say "relevant to the proceeding"?

Mr. Burns. Is there any procedure whereby relevancy is determined in advance. I think it is quite proper to consider the availability of documents to both sides. That is just a question of mechanics, but to pass on legal questions in advance of trial would seem to me to be a concept that does not have any basis on the needs of the defendant or the Government.

Mr. Youngquist. What was sought to be done here was to permit examination of the documents under subpoena before they were offered in evidence and at the same time to safeguard against fishing expeditions.

Mr. Burns. Yes, but this is really part of a pretrial procedure.

Mr. Dean. It is only one part of it.

Mr. McLellan. What do you suggest going out?

Mr. Burns. I move that it be stricken so that it will read, in line 17, "and may permit the documents or portions thereof to be inspected by the respective parties and their attorneys."

Mr. Dean. Where did this come from, Mr. Reporter?

Mr. Holtzoff. We had it in the Subcommittee on Style. One of the members of the Subcommittee on Style suggested it and I am sure--

Mr. Dean. I do not recall this question of admissibility.

Mr. Dession. I do not, either.

Mr. Holtzoff. Not the question of admissibility, but this provision.

Mr. Medalie. We were certainly dealing with the idea of getting relieved of the oppressive character of a subpoena, of calling for the production of several carloads of books, papers, and records which the other side was going to keep in the courthouse.

Mr. Dean. I remember the general problem of getting the documents and looking at them, but the determination of the admissibility is something new to me.

Mr. Youngquist. The fact is we did not discuss that part

of it, according to my recollection. I, and I think the rest of us, assumed that there should be some safeguard against a fishing expedition, and therefore we had to fix some standard that the court could follow in form.

Mr. Dession. My recollection is that was the feeling, but we did not fix this standard, because this is not workable.

Mr. Medalie. We have some kind of standard here when we provide for quashing or modifying if compliance is unreasonable or oppressive.

The Chairman. Judge Burns, will you repeat your amendment?

Mr. Burns. Beginning line 17, "evidence and may upon their production permit the documents or portions thereof to be inspected by the respective parties or their attorneys."

Mr. Medalie. "documents or objects".

Mr. Burns. Yes. "such books, documents, or objects, or such portions thereof."

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

We have come to a new chapter, so I suggest that we adjourn until 8 o'clock this evening.

(Thereupon, at 5:35 o'clock p.m., a recess was had until 8 o'clock p.m.)

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Tues.

EVENING SESSION

The proceedings were resumed at 8:10 o'clock p. m., at the expiration of the recess.

The Chairman. All right, gentlemen; I think we have a quorum. We start with Rule 25.

Mr. Robinson. Trial by jury.

The Chairman. (a). Are there any questions?

Mr. Orfield. Does that include summary offenses? Are there not some cases --

Mr. Longsdorf. What are we on?

Mr. Orfield. 25 (a). Should not all cases be tried by jury no matter how petty they are?

Mr. Holtzoff. Well, in the District Courts, all the cases, all criminal cases, including all Federal cases. All criminal cases.

Mr. Longsdorf. There is an obscure statute down in Title 33 of the United States Code that provides for summary trial. I do not think it is used very much, but if this is universal in its application that will be wiped out. I do not think anybody will ever discover it.

Mr. Holtzoff. I was not familiar with the statute providing for jury trials.

Mr. Longsdorf. Very few people are, and I discovered it only by accident. Anyway, it is there.

Mr. Robinson. It is in the navigation offenses, Mr. Longsdorf?

Mr. Longsdorf. Yes, in the navigation section.

Mr. Youngquist. Is it used?

Mr. Holtzoff. No, I do not think people know what its exis-

tence is.

Mr. Youngquist. Why should you not repeal it?

Mr. Longsdorf. I find two cases only reported under it.

Mr. Youngquist. It might be well for the Reporter to make a note of that and show that it is repealed.

Mr. Robinson. Repeal the statute?

Mr. Youngquist. Do you want to make a note of its repeal?

The Chairman. All those in favor of 25 (a) respond "Aye." Opposed, "No." Carried.

Mr. Longsdorf. Consent of the defendant?

Mr. Youngquist. I suppose that the consent of the government must be required before there may be a waiver of jury trial. I am objecting to that.

Mr. Robinson. You are against it.

Mr. Longsdorf. Well, in that statute I spoke of the consent of the government is given by Congress, and the defendant consents by -- he does not have to consent either, so that is all right.

Mr. Youngquist. In view of the reversal here this afternoon on another matter, I am just calling attention to it now.

The Chairman. 25 (b). That looks easy. All those in favor say "Aye."

(There was a chorus of ayes; the motion was carried.)

The Chairman. 25 (c). All in favor say "Aye."

Mr. Longsdorf. Should not "may" be changed to "shall"?

Mr. Medalie. No.

Mr. Holtzoff. No. Oh, we do not want to make it compulsory.

Mr. Longsdorf. No, I think not, but I just asked.

The Chairman. I declare the rule adopted in toto.

3 Rule 26. (a).

Mr. Seasongood. This was the subject of discussion, was it not, and I suppose represents the prevailing opinion? My own feeling was that the defendant ought to have the right to examine the jurors himself.

Mr. Medalie. This is so well established now in Federal practice, we have all accepted it and seem to be able to live under it. If we go across the street to the state court we do the other thing.

Mr. Longsdorf. I do not believe the district judges would like to accept this if it was worded in the way that Mr. Seasongood intimates.

Mr.Seasongood. I think it is a serious deprivation not to have the right to examine the jury, myself.

Mr. Medalie. It really is not serious.

Mr. Longsdorf. I do not think they will deny the privilege.

Mr. Medalie. I do not think it is serious.

Mr. Holtzoff. I move the adoption of 25 (a).

Mr. Seasongood. Now wait. If you are going to adopt it, it says "or the attorney for the government." "may permit the defendant or his attorney or the attorney for the government to conduct."

Mr. Medalie. If you give it to the one, give it to the other.

Mr. Seasongood. Say "or."

Mr. Longsdorf. "or" to "and" in line 5.

Mr. Medalie. Yes.

Mr. Youngquist. Yes, "and". In line 3?

Mr. Seasongood. Yes.

The Chairman. And in line 5.

Mr. Medalie. Only in line 5.

The Chairman. Why not 3?

Mr. Medalie. Oh, that is right; it should be in line 2 and in line 5.

The Chairman. No. He said "or his attorney."

Mr. Holtzoff. "and the attorney."

The Chairman. "and the attorney for the government" in line 5.

Mr. Medalie. All right. I get it.

The Chairman. All in favor of 26 (a) say "Aye." Opposed, "No." Carried.

26 (b).

Mr. Burke. Does that represent any change, Mr. Chairman?

The Chairman. What? (a) or (b)?

Mr. Burke. (b).

Mr. Holtzoff. Yes, I think it does.

Mr. Robinson. It does considerable. It raises the number of preemptory challenges in misdemeanors from three to six, for one thing.

Mr. Longsdorf. Do you want to reword line 10?

Mr. Robinson. Wait a minute. Where is that change?

Mr. Medalie. No.

Mr. Longsdorf. "each side." "each defendant"?

Mr. Holtzoff. No. "each side."

Mr. Longsdorf. "each side." All right.

Mr. Wechsler. Well, it reduces the number of preemptory challenges, does it not?

Mr. Holtzoff. No.

Mr. Wechsler. Where there are joint defendants?

Mr. Burke. In misdemeanor cases.

Mr. Robinson. No; there are just 3.

Mr. Wechsler. 3 to a defendant or 3 to a side?

Mr. Longsdorf. What does the next to the last sentence mean, then?

Mr. Seasongood. 3 to a side?

Mr. Holtzoff. I think that raises the number of preemptory challenges, does it not?

Mr. Youngquist. From the present law or from the rule, you mean?

Mr. Holtzoff. From the present law, does it not?

Mr. Longsdorf. What is the result of the fourth sentence compared with the first?

Mr. Dean. 3-3 in misdemeanor.

Mr. Medalie. You mean in all cases except capital cases if there is more than one defendant the defendants should be jointly entitled to 10 preemptory challenges and the government to 6?

Mr. Holtzoff. Yes.

Mr. Medalie. That is what we left out there. We gave it all to the defendants and gave nothing extra to the government.

Mr. Longsdorf. Suppose there were 3; they get 30, and in a capital case only 20?

Mr. Medalie. No, no. "jointly entitled to 10."

Mr. Longsdorf. Oh, yes.

Mr. Medalie. I think you have to add at the end of line 16 that in that case where the defendants jointly get 10 the government gets 6.

Mr. Holtzoff. No, because that is covered by the second

6 sentence.

Mr. Youngquist. That includes your misdemeanors too, Mr. Longsdorf.

Mr. Longsdorf. Yes.

Mr. Youngquist. Where the government has only 3 I do not think you need to make any omission, because the preceding sentence will control the number of challenges to the government.

Mr. Longsdorf. Yes.

The Chairman. Why the peculiar change in phraseology in the second sentence as distinguished from the first and third? In the capital case each side has 20, and in the misdemeanor case each side has 3, and when you come to felonies you say 6 to the government and 6 to the defendant. I mean why did you change your language, instead of saying there again "each side shall have"? Just a matter of style.

Mr. Youngquist. Oh.

Mr. Robinson. I have changed that. I wonder if I might ask you about it and see if this reads right, striking out "In a capital case" and say, "If the offense charged is punishable by death each side shall have 20 preemptory challenges." All right. "On the trial of all other felonies the government shall have 6 preemptory challenges and the defendant 6."

The Chairman. Well, why not "each side have 6"?

Mr. Youngquist. Yes.

Mr. Robinson. All right, "each side have 6".

Mr. Medalie. No, no.

Mr. Youngquist. That is right.

Mr. Medalie. The idea is that if you have your one defendant in a felony case he gets 6 challenges. If you have two or

more defendants then the challenges are joined, and they have 10.

The Chairman. That is covered later.

Mr. Robinson. That is later, yes.

Mr. McLellan. But is not 10 a great many challenges in a misdemeanor case?

Mr. Medalie. This is a special provision they have made on account of their anti-trust cases.

Mr. Youngquist. Here is an inconsistency, though, and it arises out of the fact that in the previous draft that we had there were 6 preemptories in misdemeanors as well as in felonies other than capital offenses. The giving of defendants jointly 10 preemptory challenges in all cases not punishable by death results in giving each defendant 5 challenges in a misdemeanor. That is the effect of it.

Mr. Dean. If there are two?

Mr. Youngquist. I mean if there are two of them, whereas they would have the right only to 3 each if they were tried alone or separately.

The Chairman. Can we agree on the substance of it and then let the form get fixed up later?

Mr. Robinson. Yes, I have the form here.

The Chairman. Let us not take time on it. 20 in capital cases; is that agreeable?

Mr. Robinson. That is right.

Mr. Holtzoff. Yes.

The Chairman. Any consent?

Mr. Seasongood. I know it is just form, but why can you not strike out "All challenges shall be tried by the court"? Who else

could possibly try them?

Mr. Youngquist. Yes.

Mr. Holtzoff. In some states they have triers to try them.

Mr. Youngquist. They do in our states. The court appoints three men as triers, and they try challenges to the individual jurors.

Mr. Seasongood. It is not in the civil rules.

Mr. Longsdorf. Is there any other state that clings to that, Mr. Youngquist?

Mr. Youngquist. I do not know.

Mr. McLellan. In Mr. Medalie's state I think the clerk does it.

Mr. Medalie. What is that?

Mr. McLellan. Is not the jury examined before the clerk without the judge present in your state?

Mr. Medalie. Oh, no. Well, that is in civil cases.

Mr. McLellan. Yes.

Mr. Medalie. The judge says, "Examine your jury before the clerk," but if you insisted that you did not want it that way you could examine the jurors before the judge.

Mr. Longsdorf. No, but in Minnesota they appoint other triers.

Mr. Dean. Do you ever have triers of fact except where the challenge is for cause?

Mr. Youngquist. I beg your pardon?

Mr. Dean. Do you ever have triers of fact except where the challenge is for cause, and does that not raise the question whether it is appropriate here where we are speaking of preemptory challenges?

Mr. Youngquist. No, I do not think it should be here.

Mr. Dean. Yes, that would be my suggestion, that we take it out here.

Mr. McLellan. I think so too.

Mr. Longsdorf. Yes, only the challenges for cause were tried by triers.

Mr. McLellan. Yes, that is right.

Mr. Medalie. Yes, but the judge has to make a ruling on a preemptory challenge.

Mr. Youngquist. No.

Mr. Medalie. For instance, whether you have any left, whether your challenge is preemptory or for cause.

Mr. Youngquist. That would not be a trial of the challenge, Mr. Medalie.

Mr. Medalie. That is right.

Mr. McLellan. I move we strike out the last sentence in (b).

Mr. Youngquist. I second the motion.

Mr. Dean. I second it.

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

Are there any other challenges in this section?

Mr. Holtzoff. We have not agreed on the substance yet.

The Chairman. I understood it was 20 in capital cases, 6 in felonies, 3 in misdemeanors, and then for the defendants when there are more than one 6 in capital cases, 10 jointly.

Mr. Holtzoff. That would not do in misdemeanor cases.

Mr. Medalie. No.

Mr. Holtzoff. Because, suppose you have two defendants in a misdemeanor case. If they are tried jointly they get 10 chal-

lenges; if they are tried individually they get 3 each. There is something wrong with that.

Mr. Medalie. Give them 6 in misdemeanors. Give the defense having more than one defendant 6 in misdemeanors and 10 in felonies.

Mr. Holtzoff. That is all right.

Mr. Dean. That would be right.

Mr. Longsdorf. Yes, but some of those anti-trust cases that we are talking about are misdemeanor cases with felony punishments.

Mr. Medalie. No, not felony punishments; that increases the number of their challenges from 3 to 6.

The Chairman. All right. Are we all agreed on that, so we can have a motion?

Mr. McLellan. I am not. I should like to strike out the last sentence remaining and not do anything with plurality of defendants at all.

Mr. Medalie. That is not practicable.

Mr. Holtzoff. What is the present law?

Mr. McLellan. Well, that is the present law.

Mr. Dean. That is the present law.

Mr. Youngquist. No. The present law is this: Where there are several defendants the parties on each side -- I beg your pardon. The present law is that they shall be deemed a single party for the purpose of all challenges.

Mr. McLellan. That is the present law, and why should it not be? Of course I know about your anti-trust cases, but if you make a special provision, a change in your law, a general change to cover those, you get plurality of defendants, each

defendant getting more in a misdemeanor case than the others would.

I move to strike out that last sentence.

Mr. Youngquist. Well, we propose to limit the joint challenges in misdemeanor cases to 6, in any event, so they could not possibly get more than if they were tried separately.

Mr. McLellan. Oh, you are going to change it from 3 to 6?

The Chairman. Yes.

Mr. Youngquist. No. According to the law as it now stands there would be an aggregate of 10 challenges in the felony cases and an aggregate of 6 in the misdemeanor cases.

Mr. Longsdorf. And under the last sentence if there are 3 defendants or less they would get more than was their due.

Mr. Youngquist. Not now.

The Chairman. No.

Mr. Youngquist. Not with this change that we are talking about.

Mr. Dean. They would get less.

Mr. Longsdorf. May I have the change again?

The Chairman. There are 3 when you are alone, and when you are with more than one there are 6. If there are only two of you you cannot get more than 3 apiece. If there are three you are down to 2, etc., so they have not gained anything.

Mr. Longsdorf. I suppose you would say in the last sentence, "In all except capital cases if there are more than three defendants."

Mr. Robinson. That is too far.

Mr. Longsdorf. Well, that would equalize that with the second sentence.

Mr. Robinson. What is the section here now at the present moment?

Mr. Holtzoff. What are we agreeing on?

Mr. Youngquist. That change.

Mr. Holtzoff. 6 in misdemeanor cases for joint defendants, 10 in felonies.

The Chairman. That is right.

Mr. McLellan. I have to ask one thing: On the trial of a misdemeanor each side shall be entitled to 3 preemptory challenges, does that stand?

The Chairman. That is right.

Mr. McLellan. In all except capital cases -- which would include misdemeanors, of course --

Mr. Dean. That is right.

Mr. McLellan. -- if there is more than one defendant the defendants shall be entitled to 10 preemptory challenges?

The Chairman. We are limiting that, as I understand it, to felony cases.

Mr. Medalie. 6 for misdemeanors.

Mr. Youngquist. No.

Mr. McLellan. To be rewritten.

Mr. Medalie. 6 for misdemeanors, 10 for felonies.

The Chairman. 10 where there are joint defendants and 6 in misdemeanor cases.

Mr. Dean. Where there are joint defendants?

The Chairman. Where there are joint defendants.

Mr. Youngquist. That is right.

The Chairman. All those in favor of that motion as thus amplified, say "Aye." Opposed, "No."

13 Mr. Medalie. 6 in misdemeanors, 10 in felonies, where there are more than one.

The Chairman. We shall proceed. Alternate jurors.

Mr. Longsdorf. Where there are multiple defendants.

Mr. Medalie. Yes, where there is more than one defendant.

Mr. Robinson. That is a small change of style, striking out that "shall."

The Chairman. Yes.

Mr. McLellan. You are holding an alternate juror until the verdict is rendered?

Mr. Robinson. That is right.

Mr. McLellan. That is the California practice. I think they ought to be discharged when the twelve men retire.

The Chairman. We had a two months' trial in the City Commissioners of Newark. After the jury had retired one of the jurors developed an acute appendix and was taken to the hospital. We had to do the whole job over again.

Mr. McLellan. Yes, but the deliberations of a jury are supposed to be joint, and if you add somebody after they have been deliberating for a while you are treading on dangerous ground.

Mr. Longsdorf. The California court had that up on constitutional questions.

Mr. McLellan. And they let it by.

Mr.Longsdorf. More than twice, and there the conclusion was that it was the ultimate conclusion of the jury that constituted the deliberations, and hence there were only twelve there when the verdict was rendered, and that the deliberations had up to the time when the sick juror retired were not a part of the deliberations that entered into the verdict. That was the atti-

14 tude of the California courts when this precise constitutional question was raised.

Mr. McLellan. I know it.

Mr. Longsdorf. That the deliberations were participated in by twelve jurors.

Mr. McLellan. Well, if everybody likes it I will not change it.

Mr. Youngquist. Attention should be called to the fact that we provide that not more than four alternate jurors shall be called. That is an increase over the number that was proposed at the last meeting of the Advisory Committee.

Mr. Robinson. I move the adoption of the section.

The Chairman. Why was four agreed on?

Mr. Youngquist. That was your suggestion, George.

Mr. Robinson. Your suggestion.

Mr. Holtzoff. No; I think it was Mr. Dean's suggestion.

Mr. Dean. No, it was not, but I went along with it. Why limit it to two, in other words? The present statute says two.

Mr. Longsdorf. Well, they are not required to call four. They might, but they do not need to.

Mr. Dean. They may. What can you lose? The average judge would not call four unless the case were exceptionally long.

Mr. McLellan. I think that is all right.

The Chairman. Do you think it is all right to have four?

Mr. McLellan. Yes.

Mr. Robinson. Yes.

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

Mr. Waite. Mr. Chairman, before we drop this may we go back

to (b)? I want just to raise this question. Line 13 says, "On the trial of a misdemeanor each side shall be entitled to 3 preemptory challenges." Now, obviously that word "misdemeanor" is one of distinctly uncertain connotation. There is the general connotation that a misdemeanor is an offense that is punished in a minor way. There is the statute that says that such and such offense is a misdemeanor and punishable by up to five years in the penitentiary. It seems to me we have got to be precise in line 13, because I doubt if we mean that where a man can be punished by five years imprisonment he is to have only 3 preemptory challenges.

Mr. Holtzoff. I think that is the present law.

Mr. Dean. That is the present law.

Mr. Holtzoff. There is only one such offense --

Mr. Medalie. You have 6 in the group.

Mr. Holtzoff. He ought to have 6 then.

Mr. Wechsler. Why would it not be better to change this to use the formula that we have always used when this problem was up, namely: "punishable by not more than a year of imprisonment," and abolish the phase of the existing law that distinguishes between felonies and misdemeanors?

Mr. Robinson. The federal statute, section 541, is quite plain in defininining felonies and misdemeanors.

Mr. Wechsler. You mean the general definition.

Mr. Robinson. That is right.

Mr. Medalie. But there are specific provisions.

Mr. Wechsler. But there are specific designations.

Mr. Waite. I notice that in other cases we changed from "misdemeanor" to make it read "in cases where the penalty is so

and so and so and so."

Mr. Holtzoff. I agree with Mr. Waite that that would be better.

Mr. Waite. I suggest that this be left to the Reporter to change accordingly.

The Chairman. Is there any objection?

Mr. Longsdorf. Punishable by fine and imprisonment of less than one year.

Mr. Dean. If we do this we are going to take care of the situation where it is labeled a misdemeanor in the statute and yet a misdemeanor under our definition would not be a felony.

Mr. Wechsler. Well, we are not going to define "misdemeanor."

Mr. Holtzoff. There would be a change there also.

Mr. Dean. How are you going to define "felony"?

Mr. Wechsler. More than a year.

Mr. Dean. Felony is more than a year. Oh, I see.

Mr. Youngquist. You would not use either label, "felony" or "misdemeanor."

Mr. Robinson. That is the statutory definition.

Mr. Dean. Neither "felony" or "misdemeanor": you would use neither term?

Mr. Wechsler. Yes, that is right.

The Chairman. All right. We turn to Rule 27.

Mr. Waite. Mr. Chairman, before we come to that I want to propose something that I do not think will get very far, and I shall not argue it, but which I should at least like to have proposed go into the record. We all know what a tremendous amount of trouble the state courts are having with the taking of

photographs in the court rooms and the broadcasting of proceedings, and that sort of thing. I wonder if anybody here saw that movie, "Roxy Hart"?

Mr. Dean. I did.

Mr. Waite. It was one of the most delightfully ironic presentations of a criminal procedure imaginable, and there they had the reporters rushing up and taking pictures, and the judge would hop up on the bench and stand up and pose in front of the cameras and then go back and sit down, and they had a broadcaster working. And you know, of course, that the Chicago Bar Association has worked for years and finally got the Chicago judges to adopt a rule prohibiting that sort of thing. I am perfectly well aware that we do not need any rule for the federal judges, but I think it would be a very good thing if we could put a rule in here as an example to the state courts: that we could take the leadership and that the state courts will adopt it.

So at least for the sake of the record I should like to propose an additional section -- it would be 26 (a) -- reading essentially as follows; I do not care about the language:

Conduct of Trial.

The taking of photographs in the court room or in chambers while judicial proceedings are being held therein shall not be permitted, nor shall any radio broadcasting of such proceedings or parts thereof be permitted.

I move that such a section be included in the rules.

Mr. Youngquist. I think we have enough to do with the rules governing federal courts, Mr. Waite.

Mr. Waite. Well, as I say, I did not expect to get anywhere with it. I think it would be a very desirable and appropriate

rule, but I will not spend time arguing it.

The Chairman. Has there ever been a case where the district court has violated the proprieties in this respect?

Mr. Waite. Not that I ever heard of.

Mr. McLellan. In 1932 when I went over there to the Federal Building one of the judges came to me and said, "There is a man here who wants to take your picture in the court room, and I told him it is all right."

I said, "You can go and tell him something different. It can't be done."

Up to that time whenever anybody wanted to take a picture of a judge I think he took it. It has not been done since. But now, such is the desire for having pictures taken that they say, "Court is adjourned," and then they all stand up and have their pictures taken, and I walk out before the camera man gets to me.

Mr. Holtzoff. But you would not want to have a rule on the subject?

Mr. McLellan. I do not think it belongs in the rules. Let the individual judge do as he is amind to, I think.

Mr. Waite. You do not really mean that you would be willing to have a judge permit the taking of photographs during the proceedings, and broadcasting from the court room?

Mr. McLellan. I should be very sorry if he did it, but I am not sure that I should want, if I had the power, to prohibit him from doing it.

Mr. Holtzoff. It seems to me you might as well have a rule that there shall be no boisterous conduct in the court room. It is not the sort of subject that should be treated of in rules of procedure.

Mr. Waite. That is not an analogy at all, because the Chicago Bar Association worked for years to get that through, and yet there has always been the rule that there should be no boisterous conduct in the Chicago courts.

Mr. Youngquist. While I agree with your aim, I think it is an admonition among all courts as they have been doing, but I do not think it comes quite within the scope of our job here, because it is not known in the federal courts.

Mr. Waite. As I say, the Massachusetts courts set a good example in that way, but I am not pressing it.

The Chairman. All right. Now we have this rule on evidence.

Mr. Robinson. I should like to hear from Mr. Youngquist. I understand he has just talked about this matter with Mr. Morgan.

Mr. Youngquist. This rule on evidence troubled the committee up in New York a great deal and has been troubling me ever since. As you know, the civil rules -- Rule 43, which appears at the bottom of the page -- make admissible all evidence which may be admitted under the statutes or in equity suits or under the rules of evidence applied in courts of general jurisdiction of the state in which the court is held, and they favor the rule that is most liberal toward the admissibility of the evidence in effect.

Under the conformity statute the trial of criminal cases in federal courts is not governed by the rules of evidence in the state in which the court sits, as I understand it.

Mr. McLellan. As of some century ago.

Mr. Robinson. Yes.

Mr. Wechsler. Subject to modification under the Funk case.

Mr. Youngquist. Yes, from time to time. There was proposed

the rule that appears at the top of the page, which in effect leaves it wide open to be governed by the principles of the common law as interpreted and applied by the federal courts in the light of reason and experience. The trouble with that seemed to be that it just furnished no guide at all, either to the court or to counsel in the preparation of his case, or on the trial of the case.

Mr. Holtzoff. It gives the federal courts a chance to develop their own common law, does it not?

Mr. Youngquist. Yes.

Mr. McLellan. Which they are doing anyway.

Mr. Youngquist. But in the meantime everybody would be in a very difficult situation over a long period of years, probably. Last week I was at the American Law Institute in Philadelphia. I tried to get there in time to listen to the discussion of Professor Morgan's code of evidence, but I did not. However, I got hold of Professor Morgan the day afterward, the day I was there, and talked the matter over with him. They had a somewhat simpler problem in the civil rules because they already had some body of rules relating to evidence in equity cases, and equity cases are not under the conformity statute, and he recognized that there were very serious difficulties.

Finally, in the course of the discussion one or the other of us suggested that, after all, evidence is evidence whether it is in a criminal case or in a civil case; and, since the civil rule has worked out pretty well -- Mr. Mitchell tells me so and Professor Morgan tells me so -- there seemed to be no reason why we could not adopt, either by statement or by reference, the civil rule with respect to the admissibility of evidence, and

I made that proposal not as a motion yet, but I lay it on the table for discussion.

Mr. Holtzoff. May I ask a question about that: If you follow the civil rule what happens then to the federal rule excluding illegally obtained evidence in those states in which the state courts admit that kind of evidence? Would you do away with the federal rule on that point?

Mr. Youngquist. As I understand it, we have taken care of that in our rules here.

Mr. Holtzoff. How?

Mr. Youngquist. By search warrants, searches and seizures.

Mr. Holtzoff. Oh, I see.

Mr. Youngquist. We have taken care of that by a separate rule.

Mr. Holtzoff. I see.

Mr. Waite. You would not have that problem anyhow, because there it is excluded under the theory that the federal constitution makes it inadmissible, and that being an interpretation of the federal constitution they could not admit it simply because some state court interprets its state constitution differently.

Mr. Holtzoff. Yes, but --

Mr. Medalie (interposing). Let me read you something interesting in the New York statute, code of criminal procedure, section 392:

"The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code."

A good working rule.

Mr. Longsdorf. The same thing in California.

Mr. Holtzoff. Well, I think that would do it, because our

search warrant rule, as you know, takes care of that.

Mr. Medalie. "except as otherwise provided."

The Chairman. How much does that advance you in view of the fact that the civil rules do not define "evidence"?

Mr. Wechsler. Mr.Chairman, they do. Civil Rule 43 does. That is on the first page of Rule 27 in the old tentative rule.

Mr. Longsdorf. Mr. Chairman, at an appropriate time I should like to be heard in opposition to Mr. Youngquist's proposal before a motion is made.

The Chairman. All right.

Mr. Youngquist. Will you read me that language, Mr. Medalie?

Mr. Medalie (reading).

"The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code."

Of course you are dealing with the corpus delicti.

Mr. Wechsler. Mr. Medalie, may I point out one defect in that proposal which seems to me clear? This is the Chairman's point. If you had a code of civil evidence in the federal system comparable to the set of rules which you have in the State of New York, I think there would be something to be said for it, but you have not got it. What you have got is a general rule favoring admissibility. So that your proposal would be practically the same as the adoption of Civil Rule 43. It would mean that the general rule favors admissibility unless in these rules some rule of exclusion or incompetence were prescribed.

Now, I would bitterly oppose any general rule in these rules in favor of admissibility because it seems to me that the considerations in civil proceedings which argue strongly in favor of a system of almost free proof -- which it seems to me is the under-

lying premise of the civil rule, to get as close to a system of free proof as you can -- just do not apply in criminal proceedings, where there is a constant struggle to reconcile those limiting factors making for exclusion -- protection of the defendant -- with the general rational argument in favor of admissibility. I think if we wanted to draft a code of evidence, which we obviously cannot do, that we would have to go through the whole field of evidence and decide when the general principle that all relevant evidence should be admitted should yield to some special rule of exclusion for the protection of defendants. We simply cannot do that, but the rules of evidence as a whole do do that to a considerable extent in connection with the whole field of criminal evidence.

If we leave the thing in something like the status of this first proposed rule, we at least invite the court to make that judgment in the light of traditional principles as the particular occasion arises. Similarly, if we adopted a rule of conformity we would at least incorporate the state resolution of that issue, that abiding issue in criminal cases; but if we revert to civil rules or to a general rule favoring admissibility we are just throwing that consideration out of the window.

Mr. Medalie. I think not. May I answer that?

Mr. Youngquist. I should like to say something on that.

Mr. Medalie. If you don't mind.

The Chairman. Just a minute, gentlemen. One at a time.

Mr. Medalie. May I answer that?

I think, Mr. Wechsler, your argument overlooks a reality. I have tried a fair number of federal criminal cases in recent years, and if anybody will tell me there are rules of evidence

that are based on any other theory than, "We'll take the evidence and see what it is," I should like to hear it. I know for all practical purposes anything that can shed any light on a case is normally received, and when received the doubt is resolved by the circuit court of appeals in favor of its reception.

Mr. Wechsler. How about the confessions rule?

Mr. Medalie. That is a specific thing applicable to criminal cases. I will tell you what I have in mind, and I think that is why the civil rule is good. It permits the federal courts to develop by judicial decision a set of liberal rules of evidence, the rule of exclusion operating only in cases of obvious injustice. Now, there are so many things with respect to the admissibility of evidence that relate to things that are supposedly prejudicial, for instance, that you can fairly trust the courts to make a judgment which could not be determined by any rules that you can draw up; and if you took the rules, let us say, in the second circuit of New York or of Connecticut or Vermont you would get a variety of specific applications of rules and a judgment as to their application, rather than any definite principles.

Now, if we said that the rules of evidence in civil cases are applicable also to criminal cases, in so far as they are applicable, you would have all that you needed, and the rest would be left to judge-made law, which is good enough law. When it comes to the privileges involved in testimony -- lawyer and client, doctor and patient, et cetera,-- there must be some standard that ought to be applicable to both the classes of cases, and you cannot have one set of rules in civil cases and another in criminal cases. When it comes to hearsay -- or what

is commonly taken for hearsay -- and the exceptions to the hearsay rule, or the so-called exceptions, there should be uniformity. The number of cases where you have a specific rule applicable to criminal cases really could be counted on the fingers of one hand.

Mr. Wechsler. But the point of my disagreement with you is this: Certainly one could take the confessions rule and the accomplices rule and the conspiracy rule and a few other special rules that are supposed to have primary applicability to criminal cases, and we could formulate such rules. It seems to me that under your formulation you would have to do that, because otherwise --

Mr. Medalie (interposing). You would not. You have federal decisions that are pretty well worked out.

Mr. Wechsler. No, but the trouble is this.

Mr. Medalie. On confessions, for example, or bargains with the district attorney -- like the whiskey cases in 99 U.S. where the district attorney made a bargain with the defendant, and things of that sort -- all of those things have been decided by judge-made law developed in the federal courts.

Mr. Wechsler. Let us consider what your present judge-made law is; I do not mean on the specific point, but Judge McLellan pointed out here a while ago, except where statutes provide otherwise the basic rule, as I understand it, is that the state law governs, as of some earlier date, be it the date of admission of the state to the Union or some other arbitrarily defined date. Except under the Funk and the Wolf cases the situation given as of that earlier date may be modified by the Supreme Court applying general principles of common law envisaged in the light of reason and ex-

perience. That is about as close as I can come to stating what I understand the present general rule to be.

Mr. Medalie. Would you not want it that way?

Mr. Wechsler. That is all it is, but if you really closely analyze existing decisions, they vary depending upon the state law and moreover depending upon the state law as of the time the state was admitted, unless the court purports to exercise its exceptional power to modify under the Funk and the Wolf cases.

Now, that is a tremendously abstruse standard that nobody sees any merit in, but it is the standard in the light of which you should read existing federal decisions on points of evidence. I know they are not read that way, and I know that the courts do not always proceed in the light of that underlying rule, but when it gets to a close question it is articulated in those terms. I think we ought to junk that because it is much too complex. It is impossible to follow.

Mr. Medalie. It is not complex; it is vague, because you are leaving it all to the court, if you will, to say what is a fair rule of evidence that will aid in the administration of justice, instead of adopting a rule. Now, the fact is that today the rules of evidence are not the rules of evidence that I studied, either in the law school or that I thought I knew as a young lawyer when I looked up all the cases.

The Chairman. Mr. Medalie, may I interrupt a minute? As I gather, there is no report from the committee on style.

Mr. Robinson. No, there is not.

Mr. Medalie. That is right.

The Chairman. We are starting out without any help from that august group.

Mr. Robinson. Yes.

The Chairman. We are back now on the same general problem that confronted the civil rules committee.

Mr. Wechsler. Mr. Chairman, if I may add one thing, I think there is one other body of help that we ought to have that we have not got: I think we ought to have a report on what the existing statutory rules of federal evidence are. Now, there are such statutory rules.

Mr. Holtzoff. Not very many.

Mr. Wechsler. Not very many, but there are such, and I do not think that we are actually in a position to make anything more than the most tentative determination of the general principles here until we know what is now in the existing statutes, because those statutes, if they represent nothing else, represent those situations in which there has been a congressional policy formulated on the general idea of conformity.

Mr. Holtzoff. I think the principal federal evidence statute is one that relates to the admissibility of documentary evidence.

Mr. Medalie. That is a formulistic rule.

Mr. Dean. There are several.

Mr. Holtzoff. Formulistic regulations may indicate rights of persons. It is a statute passed about five or six years ago.

Mr. Medalie. Well, we hardly want to change that.

9 Mr. Wechsler. It is a very important statute.

Mr. Holtzoff. There are only a half dozen statutes relating to evidence.

Mr. Robinson. Not over that; none of them very extensive.

Mr. Medalie. I favor leaving the rules of evidence in an

extremely uncertain state.

Mr. Holtzoff. I do too.

Mr. Medalie. And that is because in the last few years -- that is, the last twenty years and certainly in the last ten, and still more in the last five or six -- the courts have begun to deal with evidence in a more realistic way because they found all this twaddle about evidence has not gotten them anywhere. They have not found any more truth as a result of it, and they are prepared to scrap their learning on it and deal with it as they go along, to see how things work.

Mr. Holtzoff. Are you going to make a motion to adopt it?

Mr. Medalie. Yes, I was just going to move that Civil Rule 43 be adopted.

Mr. Orfield. I second the motion.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. I ask to be heard before that is done, if you please, Mr. Chairman.

Mr. McLellan. I hope that will not be done easily.

Mr. Longsdorf. When the federal civil rule was adopted the statutory provision of the Judiciary Act of 1789 made the local law the rule of decision in the federal courts, and that has been very much strengthened by the decision in the Erie Railroad case. So there was a sound reason for following the local rules in some instances, as laid down in Civil Rule 43.

In other words, the substance of the cause of action or defense in a civil case more or less required certain proof according to the laws of the state which provided the substance of the cause of action. I think there was a sound reason for putting that language into Civil Rule 43. Now, there may have been, at

any rate.

Now, there is no similar reason that underlies the federal criminal law, because the local laws in no sense or degree pervade the criminal law of the United States. So that if we followed the local rules of evidence pervaded in that manner by the local laws, we would have some unfit rules. I think for that reason that we ought not to make the local laws of evidence applicable in federal criminal proceedings except to the extent that the courts might adopt them if they were proper and fitted to the case.

It seems to me that this Principal Rule 70 of Tentative Draft 3 leaves it open to the courts to do just that thing. I know it is vague, but unless you have a code of evidence it necessarily will be vague, broad in terms.

I think the best thing we could do would be to adopt this rule at the top of the page on which Rule 27 begins and let all the rest of it go. Sometime perhaps we shall have a perfected code of evidence. We do not have it now. If we drag in the local rules of evidence of the different states, as is done in Civil Rule 43, we shall presently have a set of rules of evidence just as reverse and confusing as the practice was under the old conformity act of 1872, and we tried for twenty-five years to get rid of that.

Mr. Holtzoff. Mr. Chairman, in order to bring this rule up for consideration I move as a substitute for Mr. Medalie's motion the first paragraph under Rule 27, entitled "Principal Rule, Rule 70 of Tentative Draft 3."

Mr. McLellan. I second that motion.

Mr. Youngquist. As a substitute motion?

Mr. Longsdorf. Will that motion be repeated, please?

Mr. Youngquist. May I say a word, Mr. Chairman?

The Chairman. Mr. Youngquist.

Mr. Longsdorf. Will you please repeat that motion?

Mr. Youngquist. It will be very short.

The Chairman. The motion made by Mr. Holtzoff is a substitute for the pending motion. The pending motion is to adopt Civil Rule 43. Mr. Holtzoff's substitute is to adopt Rule 70 of Tentative Draft 3.

Mr. Longsdorf. I shall have something to say on that.

The Chairman. Mr. Youngquist.

Mr. Youngquist. I wanted to say only this: I think there is no distinction -- save in the cases with respect to search and seizure and entrapment and a few things like that that can be taken care of by special rule -- between the evidence in civil cases and the evidence in criminal cases. Both purposes have just one end, that is, to ascertain the truth; and when you have that end in mind there can be no distinction between the admissibility of evidence in the civil cases on the one hand and criminal cases on the other. Those special instances where special protection is needed are supplied by what we already have in the first instance in our search and seizure rule. Furthermore, I think it would be most unfortunate, now that the civil rules have been adopted and the criminal rules of procedure are about to be promulgated, if the federal courts should be laboring under the burden of trying cases under two separate sets of rules of evidence, when the one thing that they are seeking in both classes of cases is the fact and the truth.

Mr. Wechsler. I think there is one flaw in the position

there, and that is that you never can go simply at the truth without taking risks of making errors that may fall one way or the other, and that really is the essence of my point. A wise judge in making his decisions in a criminal case will, it seems to me, make them with a view far more to protection of the defendant than a wise judge in a civil case having to make the same judgments will favor avoiding risks to one side rather than to the other. But it seems to me that we are in judicial administration, and if you just ask yourself when otherwise relevant evidence should be excluded on the ground that it is unduly prejudicial and consider how you would make that judgment in a criminal case and in a civil case and how you might make it differently in the two types of cases, I think that I shall have illustrated my point.

Mr. Youngquist. I think that the judge's attitude is not going to be very much influenced by whichever rule we adopt. He is going to receive it under circumstances that it will stand up on appeal, or he is going to reject it. But I wonder how the rule here proposed -- that is, the principles of common law interpreted and applied by federal courts in the light of reason and experience -- is going to serve as a bar in any fashion to a judge of the latter class that we speak of, who should be restrained, perhaps, from receiving too much evidence in a criminal case.

Mr. Wechsler. I do not think this is ideal, but I do think that the common-law principles of evidence constitute a fairly fertile system and by and large a fairly instructive system. That, of course, is a real question, but I do not think it is a destructive question because I have in mind, when I speak of the common-law principles of evidence, a tradition of two hundred

years, the rational side of which is embodied in a treatise like Duncan's Treatise on Evidence, and the authoritative side of which is embodied in a treatise like Wigmore's Treatise on Evidence; and I think by and large, if you look at either of those volumes, works, that there is material to work on there, and the kind of material that will focus the chief attention on the real interests it is his job to safeguard. I do not think it is ideal, but if forced to make a choice between it and the alternative principle of favoring admissibility and pointing toward free proof, I have no doubt which choice I would make.

Mr. Holtzoff. I should like to see the federal courts have an opportunity to develop in the course of years a unified body of evidence. That is why I am intrigued by this first rule.

Mr. Youngquist. That is a laudable object, but I think we would be in a terrible situation while that process is going on.

Mr. Holtzoff. I do not think it holds any terrors for us.

The Chairman. Gentlemen, have we not canvassed the situation pretty fully? I mean there are two schools of thought, and you cannot belong to both on the same subject.

Mr. Longsdorf. Mr. Chairman, may I have leave to give Mr. Youngquist an illustration of where his theory would lead us to? I think a little pragmatics will not hurt us. In California a wife cannot testify in a criminal case against her husband; either for or against him. That is in diametric conflict with the Funk rule. Now, which are you going to follow if you adopt Civil Rule 43?

Mr. Dession. Well, you will follow the equity rule in California.

Mr. Holtzoff. I call for the question, Mr. Chairman.

11 The Chairman. The question is on Mr. Holtzoff's substitute motion to adopt Rule 70 of Tentative Draft 3. All those in favor of that motion, substitute motion, --

Mr. Wechsler. What is the motion? To adopt Rule 70?

The Chairman. To adopt Rule 70 of Tentative Draft No. 3, the one printed at the top of our page. All those in favor of that motion say "Aye." Opposed, "No."

Let us have a show of hands.

Mr. Medalie. I am changing my mind. I will go along with those that fear that neither will be adopted.

The Chairman. Eight. Opposed? Three. Eight to three. It is adopted.

Mr. Medalie. Of course, by voting for this I withdrew my insistence on the other.

Mr. Holtzoff. There are some verbal changes in it.

Mr. Medalie. I prefer to have one of these rather than something different.

The Chairman. Than nothing.

Mr. Holtzoff. Mr. Chairman, there are some verbal changes in it that are needed, but I think they can be left up to the subcommittee on style.

The Chairman. All right. Now does this take us into the remaining parts of Civil Rule 43?

Mr. Holtzoff. No.

Mr. Medalie. No. That is out.

The Chairman. "Scope of Examination and Cross-Examination." "Record" --

Mr. Holtzoff. I do not think we need that any more.

The Chairman. Professor Wigmore.

Mr. Wechsler. That raises another point, now that this good start has been made.

The Chairman. Ah, you are sneaking up on us with the second motion.

Mr. Wechsler. The next point is this: Rule 70 as it now stands perpetuates any existing federal statute. There are a number of existing federal statutes which in turn send us back to the states for the governing rules, that would be perpetuated under this draft. I am not sure that this committee, seeing those rules, would want to be sent back to the state for the governing rule. I think, for example, that that is the rule on competency generally, is it not, that it is determined by state law?

Mr. Dession. It is, although abrogated by the recent cases--for a while.

Mr. Wechsler. And therefore I renew my proposal of earlier that there be prepared a complete statement of existing statutory rules and that it be considered with a view to determining how many of those rules should be perpetuated in their present form and how many of them, because they are treated separately now, should be treated separately in the rules but in some different way than the present statute.

The Chairman. How many should be recommended for repeal.

Mr. Wechsler. Yes.

Mr. Longsdorf. If that is a proposal for research and further consideration, I should like to second the motion.

Mr. Youngquist. And further consideration?

Mr. Longsdorf. By this committee.

Mr. Holtzoff. We have already acted on this general rule.

Mr. Longsdorf. I know, but Mr. Wechsler's proposal is a

supplement to this rule.

Mr. Robinson. Mr. Longsdorf, you recall that while we were making all this study of federal statutes on evidence I placed in your hands and returned to you the address of Judge Wilbur made in California.

Mr. Longsdorf. I recall, yes.

Mr. Robinson. Calling attention to points that have been made here this evening, and I asked you at that time to select the very type of thing that Mr. Wechsler is talking about.

Mr. Longsdorf. Yes.

Mr. Robinson. And I understood you to say that you did not find any opportunity for such selection.

Mr. Longsdorf. Because Judge Wilbur's perplexities grew out
12 of the fact that not a single state within the ninth circuit was admitted at the time that the Judiciary Act of 1789 was passed.

Mr. Robinson. Well, I do not know.

Mr. Longsdorf. And consequently they adopted common-law rules of each state dated from the time that state was admitted, and the diversities of rule that grew out of that were simply confusion.

Mr. Robinson. I am not trying to talk about Judge Wilbur, but I am trying to talk about your research study of federal statutes on evidence and the opportunity for doing what Mr. Wechsler has suggested, namely, picking on details which the Congress --

Mr. Longsdorf (interposing). Well, there were specific rules.

Mr. Robinson. Just a second if you want me to state it.

Mr. Longsdorf. All right.

Mr. Robinson. -- which Congress has passed special statutes on with respect to evidence. To begin with you found those statutes very fragmentary and very few, did you not?

Mr. Longsdorf. Yes.

Mr. Robinson. And you were not able to find any federal statutes or federal rules that could be used as a definite supplement to Rule 7; is that not true?

Mr. Longsdorf. There were specific rules, but there were no general rules that had a datum point capable of reduction to generality of statement.

Darrow
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9:10pm

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Mr. Holtzoff. All that Mr. Wechsler wants is that a summary be made of all of the federal statutes dealing with the rules of evidence, and I think that is a very reasonable request.

Mr. Robinson. Certainly, I am not disputing that, but I am just saying the study has already been made. We can draw together in a very short time the points Mr. Wechsler speaks of, but I must suggest, in the light of Mr. Longsdorf's research study and the study of the research staff, that there is very little of that kind.

Mr. Holtzoff. Well, let us have the little that there is.

Mr. Robinson. Yes. I don't suppose you want any--I have to check it up tonight.

Mr. Longsdorf. Question on Mr. Wechsler's motion.

The Chairman. The question was for the collection of these rules to see what there is for scrapping.

Mr. Wechsler. My point is that we should do something about it.

Mr. Longsdorf. I can state this, Civil Procedure Rule 44 contains, with respect to evidence or proof of public documents, a great number of those federal statutes.

In addition to that there has been enacted recently by Congress another rule providing for the kind of proof they will admit for a composite document offered in evidence, like books of account made up by many different entry men.

Now, that rule does not need any aid from this Committee, and the aid that needs to be given to the other existing statutes has already been provided in Civil Rule 44, which I think is a good one.

g2

I don't know that we need carry that recent rule about composite documents into this code.

I do think, however, that it would be a fine idea to make a note perhaps which would await those evidence statutes.

Mr. Holtzoff. I call for the question on Mr. Wechsler's motion.

The Chairman. You were arguing for Mr. Wechsler's motion?

Mr. Longsdorf. I am simply illustrating what the aim was.

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

Carried.

Mr. Medalie. I wonder if we could consider for a moment one possible amendment of the old rule, and that is on line 5, "except when a Federal statute", add parenthetically "(except a statute in conformity with state rules)".

That will avoid much of our difficulty.

Mr. Youngquist. I understood the search that was to be made would incorporate that.

Mr. Medalie. No.

Mr. Holtzoff. There is an act of Congress which is independent of state rules.

The Chairman. Can't we wait, gentlemen, until we have the statutory material before us to talk about instead of guessing about it?

Mr. Robinson. You can have it tomorrow.

Mr. Longsdorf. That is good.

Mr. Medalie. That is good.

The Chairman. Rule 28.

Mr. Holtzoff. In the light of the action that we took in

adopting Rule 70, I think that Rule 28 (a) will have to go out.

Mr. Youngquist. 28?

Mr. Holtzoff. 28 (a).

Mr. Youngquist. All the rest of 27 goes out?

Mr. Holtzoff. Yes.

The Chairman. 28, paragraph (a).

Mr. Medalie. Let us deal with that when we get to it.

The Chairman. We are here. Rule 28, paragraph (a).

Mr. Medalie. Haven't you rule 27, paragraph (b)?

Mr. Robinson. It does necessarily follow that (b), (c), (d), and (e) should go out just because (a) does.

The Chairman. That was the question I asked.

Mr. Robinson. I would like to have Mr. Youngquist's answer on that.

Mr. Longsdorf. I did not mean that Civil Rule 43 (b), (c), (d), and (e) should go out.

Mr. Holtzoff. I doubt where you would need that, because that has become surplusage since the rule we have just adopted is sort of a blanket rule.

Mr. Robinson. I beg your pardon. I have studied this just as carefully as I could for a good many months. I may be wrong, of course, but it seems to me what we have adopted compares only to 43 (a). Now, 43 (b), (c), and (d)--

Mr. Longsdorf. Mr. Chairman, the rules were aimed at (a).

The Chairman. Let us go back.

Mr. Medalie. 27 (b). Is that right?

The Chairman. That is right.

Mr. McLellan. I move that Rule 43 (b) be not adopted.

Mr. Wechsler. Seconded.

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Mr. Dean. Can I inquire whether that is part of the civil rules?

Mr. Robinson. Yes.

May we have your reasons, Judge?

Mr. McLellan. Because I think that 70 sufficiently covers the situation.

Mr. Holtzoff. Another point is, this relates to calling an adverse party.

In a criminal case you do not call an adverse party, so that paragraph would not be suitable.

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

Carried.

43 (c).

Mr. McLellan. I move that 43 (c) be not adopted.

Mr. Medalie. That is 27.

Mr. McLellan. 43. 43.

Mr. Medalie. We have it here as 27 (c).

Mr. Longsdorf. We had better make the record straight. This is 43 (c) as it appears appended to 27.

The Chairman. We all know we are talking about lines 23 to 33. The motion is to strike.

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

Carried.

Mr. Medalie. Isn't (d) the law?

Mr. Robinson. I move it be stricken.

Mr. Holtzoff. Seconded.

The Chairman. It is moved and seconded that (d) be stricken.

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

Carried.

All those in favor of striking (e) say "Aye." Opposed, "No."

Carried.

Now we are cutting out 43.

Mr. Holtzoff. I move to strike 28 (a) because that is also getting at the general rules of evidence.

Mr. Robinson. 28 (a) is the American Law Institute Code of Evidence, Tentative Draft 2, and it is based, I think to some extent, on this Funk case that has been discussed.

Mr. Medalie. But we are not drawing up rules of evidence. I move to strike it.

Mr. Longsdorf. I see no reason why we should not add this as complementary.

Mr. McLellan. I would like to know what Mr. Wechsler thinks about striking 28 (a).

Mr. Wechsler. I am sorry. I have been inattentive.

Mr. Holtzoff. Wouldn't this rule about husband and wife, physician and patient, and so on--it makes all of them qualified witnesses.

Mr. Medalie. They are qualified as to some evidence. They may be disqualified as to other things.

Mr. McLellan. Delete that rule?

Mr. Wechsler. I would be in favor of striking it.

Mr. McLellan. All right.

The Chairman. Is there a motion.

Mr. Medalie. I move to strike.

Mr. Wechsler. Seconded.

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

Carried.

Mr. Medalie. The same motion as to (b).

Mr. Holtzoff. I second the motion.

Mr. Robinson. (b) and (c) may go out like the rest of them, but it is based on a letter to Chairman Vanderbilt by Judge Van Buren Perry in which he suggests we consider it as to how they shall administer the oath.

Mr. Youngquist. He has that right, anyway, doesn't he?

Mr. Holtzoff. I move we leave it to the district judge.

Mr. Medalie. Seconded.

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

Carried.

Mr. Robinson. Now, Rule 43 (d) is based on the American Law Institute Code of Evidence which has been endorsed by the American Law Institute.

I suppose that is based on state law.

Mr. Longsdorf. Have we passed (c)?

The Chairman. Yes.

Mr. Robinson. The section is considered desirable as a means of aiding the court, and in preparing in advance of trial.

In this way such preparation may be done with less surprise and with less partisanship on the part of witnesses.

Mr. Medalie. How does that get into the civil rules.

Mr. Robinson. It is not the civil rules. That is the American Law Institute. It is just now being considered at Philadelphia this past week.

Mr. Longsdorf. I don't see anything in that pertinent to the power of the court to limit the number of experts who may be called.

The Chairman. That is covered in pre-trial practice.

Mr. Longsdorf. Suppose it was not covered in pre-trial and the judge gets tired of the parade.

The Chairman. I don't think we ought to try to cover that rule.

Mr. Robinson. That is one way he can stop it. The judge may appoint one or more expert witnesses of his own selection.

Mr. Medalie. How often do you have expert witnesses in criminal cases in federal court?

Mr. Holtzoff. You very often have ballistics and handwriting experts, F.B.I. experts from their laboratory frequently testify in criminal cases.

Mr. McLellan. Handwriting.

Mr. Medalie. Handwriting, yes.

Mr. Waite. Insanity cases.

Mr. Medalie. Insanity rarely.

Mr. Waite. I will quote you, Mr. Medalie, it might come up very rarely indeed, but when it does come up it is important.

Mr. Medalie. This is no great calamity. An expert witness is no calamity.

Mr. Waite. But the right to call even partisan witnesses is extremely important.

Mr. Medalie. The trial might take a little longer and be a little more grotesque.

Mr. Waite. This goes further than that. It allows the court to call the witnesses himself.

g8

Mr. Robinson. It provides that parties on each side may agree and recommend such expert to the court.

Mr. McLellan. Who is going to pay him?

Mr. Dean. That is not in the rule.

Mr. Holtzoff. Mr. McLellan raises a question as to who is going to pay this expert.

Mr. Medalie. Well, he is tremendously flattered and it gives him great pride.

Mr. Longsdorf. Mr. Chairman, the same judges will try these criminal cases who have tried patent cases, and they know all about experts.

Mr. Youngquist. I would like to ask a question about it.

If an expert is appointed by the court, may the parties offer as witnesses their own experts?

Mr. Medalie. Oh, yes.

Mr. Robinson. Oh, yes. That is provided in lines 23 and 24.

I am familiar with the practice under this type of statute. I have handled it. It has been quite successful.

The Chairman. Who pays for it?

Mr. Robinson. The state courts pay for it.

Mr. Waite. The witness would have to tell anyhow if you subpoenaed him.

Mr. Youngquist. He would have to tell what he knows but he would not have to educate you.

Mr. McLellan. If he has an opinion he must give it, if the court is mean enough to make him, but he cannot study the facts.

Mr. Medalie. Is there a move to adopt this?

g9

Mr. Youngquist. I move it be adopted.

Mr. Medalie. I would like to change the title, then, to "Expert Witnesses" instead of "Witnesses", at the top.

"Rule 28. Expert Witnesses."

Mr. Holtzoff. I would like to suggest a change before this motion is voted on, that very last sentence, I think we can strike out everything after the middle of line 24. Strike out the rest of it.

The rest of it would require each party to submit a list of his expert witnesses.

Mr. Robinson. I think Professor Morgan makes a very good report. Have you read his report?

Mr. Holtzoff. No, I have not.

Mr. Robinson. I understand you, Judge, and a good many others disagree with it, but this part of it is really a part that should have support.

It is not just Professor Morgan's report either, it is really part of the uniform act.

Mr. Holtzoff. I do not believe you should be required to give the names of your witnesses in advance.

Mr. Robinson. Well, each side gives the other. The Government gives the defendant its witnesses.

Mr. Holtzoff. I don't believe either of them should give his witnesses.

Mr. Robinson. What you say does not seem consistent in view of your pre-trial procedure.

Mr. Holtzoff. Pre-trial procedure does not exchange the names of witnesses.

Mr. Robinson. But it is preparation in advance to find

the truth.

You recognize the fact that in the heat of a trial you cannot find out all there is to be found out about an expert or some of the witnesses.

This is designed to call off the present threat to scientific investigation by the fake expert.

I have seen some of their work, many of you have, no doubt, and when they come into a courtroom that is the first time the State has seen them; the first time the Government has seen them.

A little advance notice of who this person is is a great help in getting ready to cross-examine and in helping otherwise.

Mr. Holtzoff. I don't think we have any trouble, as a practical matter, with that.

Mr. Longsdorf. If there has been a pre-trial proceeding imposing limitation on experts, this sentence has no office.

If there has been no pre-trial proceeding, then you would like to be informed.

Mr. McLellan. The pre-trial proceeding provides only for limiting the number. This provides for giving the names to the adverse party.

The Chairman. Why shouldn't we let the bench and bar of the country have a whack at this to find out whether they like it or not?

Mr. Robinson. That's right. Give them a chance.

Mr. Holtzoff. I would like to see stricken out that last provision.

Mr. Waite. If the bar does not like it they will have a chance to strike it out.

gll

Mr. Seasongood. I don't think we ought to make a suggestion that is not practical if there is no money to pay these experts.

The Chairman. Very often you can get a criminal to pay costs. That is the way it is handled in England.

In civil cases the parties are required to agree on expert witnesses and share the cost, and I understand they do it by practical agreement in many of their criminal proceedings.

Mr. Youngquist. I do not think there would be much trouble getting Congress to appropriate money because this would expedite trials.

4 Mr. Holtzoff. I disagree with you there.

Well, Mr. Chairman, I move to strike out the last clause beginning on line 24 after "selected".

I am in favor of this rule with that stricken out.

Mr. Waite. There is a motion to amend.

The Chairman. The amending motion is to strike from line 24.

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

The motion is lost.

The motion now pending is to adopt Rule 28 (d) as drafted.

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

Carried.

Mr. Longsdorf. But, Mr. Chairman, that is no longer 28 (d).

The Chairman. It becomes 28. (a), (b), and (c) are out.

Rule 29.

Mr. Waite. Mr. Chairman, here comes the Bolshevik again, but this time I really hope to get somewhere.

The Chairman. "Proof of Official Record." Is that the one?

Mr. Waite. No; I want to suggest either an addition to this rule, or another rule to this effect, that the trial court shall have power in its discretion when the necessities of justice so require to call witnesses to the stand, to interrogate witnesses called by either party, and, on its own initiative, to exclude testimony which is clearly inadmissible.

Now, as a matter of fact most of those things are already the federal rule.

It has been held that the court can exclude testimony on its own initiative, and it has been held that the court can interrogate witnesses.

And there are a number of federal cases holding that the court can call a witness.

But a while ago a case came up before Judge Tuttle in Detroit that had been tried for six weeks.

There were two witnesses, a man and his wife, in the courtroom. There was real reason to believe that they could throw light upon the whole case and clarify it very remarkably, but for some reason each side was afraid to call them. Neither side wanted them called, and Judge Tuttle, believing that he should produce the truth to the jury more clearly if they were called than otherwise, did call them, and their testimony undoubtedly led to the final decision by the jury.

That case went to the Court of Appeals and was reversed, which was in conflict with the apparently well established federal rule.

Now, unfortunately, before I came here I could not find

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the citation of that case but Mr. Burke bears me out that the case did occur and, inasmuch as there is that somewhat uncertain situation, I think we ought to clarify it by the rule.

Mr. McLellan. Was this a criminal case?

Mr. Waite. What is that?

Mr. McLellan. Was this a criminal case?

Mr. Waite. No. That was a civil case.

If the rule is as I have stated it here, then there certainly cannot be any objection to putting it in the rules.

If it is not clear, then there is definite wisdom in putting it in the rules.

Mr. Holtzoff. It is a little difficult for me at the moment to conceive of a situation where in a criminal case this might be applicable.

Mr. Youngquist. I can give you an example in Minneapolis within the past month, a murder case.

There had been an autopsy conducted by two physicians.

The State called one physician, did not call the other, who was pathologist at the University of Minnesota.

The defendant was prodding the prosecution all through the trial to call that witness, Dr. McCarthy.

The State did not and the defense did not, both afraid to call the witness, just the situation which you described.

Mr. Holtzoff. The testimony of that state pathologist would have been unfavorable to the prosecution?

Mr. Youngquist. The jury convicted.

Mr. Holtzoff. I am kind of afraid of a situation where a judge would overrule counsel, so to speak, and call a witness.

Mr. McLellan. You are doing too much for the wisdom of

the judge. The lawyers ought to know.

Mr. Waite. Is there any objection to the power of the judge to call the witness if he thinks it will elicit the truth?

Mr. Medalie. Well, this Michigan case held that a judge has no power to call a witness? Did it make that general rule?

Mr. Waite. I cannot find out.

Mr. Burke, you probably know more about it than I do.

Mr. Burke. The type of case.

Mr. Waite. They ruled the court had no power.

Mr. Medalie. But Wigmore says the judge may call a witness.

Mr. Waite. Yes, may call a witness, exclude undesirable evidence, or may take a view of a place or thing. Lack of this power will never be denied so long as the bench retains its true sense. Courts have sometimes been led astray, however, by the no-comment, no-manifestation-of-opinion rule.

Mr. Holtzoff. Well, the judges frequently ask questions, of course. And the only thing is, I sort of hesitate to see an invitation in these rules to a judge to call his own witnesses.

The Chairman. Will you read that proposed rule again and let us have it clause by clause?

Mr. Waite. Yes. "The trial court shall have power in its discretion when the necessities of justice so require to call witnesses to the stand, interrogate witnesses called by either party"--

The Chairman. Let us stop on that one.

I think the only way to do is get a vote on each of these broad spots.

Mr. Medalie. No. I think not.

I think the question is whether we want to vote on that kind of a question or not, or, let the courts run things their own way, because we know from the conduct of cases that rules including those of the appellate courts, vary according to the circumstances of the case.

I don't think we ought to attempt to formulate in detail any portion of the rules of evidence simply because here and there some court makes a cock-eyed decision.

Mr. Waite. After all, this is a rule of procedure, I should say, and not a rule of evidence.

Mr. Medalie. That is the same thing.

Mr. Waite. It is no more a rule of evidence than the one we just adopted.

Mr. Medalie. If we attempted to cover every situation where the court goes off a little, and to correct it, we would be publishing a code.

Mr. Waite. We have just adopted one rule which gives the court powers that it did not have before.

I am suggesting now that we make explicit another rule which makes certain the powers.

Mr. Medalie. I think that is a detail, and if we go into details of that kind we are going to get ourselves into a mass of detail which we ought to avoid.

Mr. Waite. Well, now, the very fact that the proposal is disputed here indicates that the bar should have some opinion on it, and, gentlemen, we will make a great mistake if we put nothing into this except that which we wholeheartedly approve.

If we put in matters which we can approve, that will give the bar a chance to criticize or take them out, but if we do not

put things in it will be much more difficult for them to put in things the bar wants and which we ought to put in there.

I think we ought to err on the part of putting in proposals rather than leaving them out, and I think we are going to be much more criticized for what we leave out than for what we put in.

Mr. Wechsler. Mr. Chairman, I would like to add an amendment to Mr. Waite's proposal and add that any witness so called may be cross-examined both by the Government and by the defendants.

Mr. Waite. I accept that.

Mr. Medalie. Isn't that the law as you understand it?

Mr. Wechsler. Yes.

Mr. Medalie. Why do you want it in?

Mr. Wechsler. Because I view Mr. Waite's proposal as declaratory of existing law.

Mr. Medalie. If you are going to put everything that is in existing law in, you are going to have an awful mess.

Mr. Wechsler. That is a special situation and we ought to have it complete on that situation.

Mr. Burns. I would like to make a point that even though it is declaratory of existing law, it strikes me it sins against symmetry.

The question will arise, Why have you picked out a lot of other details?

Mr. Medalie. I agree, Mr. Chairman.

The Chairman. The question is, Mr. Waite moves the adoption of his rule.

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

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The motion seems to be lost. The motion is lost.

Rule 29.

Mr. Robinson. That started out as Rule 44 of the civil rules, in an effort to see how much of the civil rule would be applicable to criminal cases, and this is what is left.

Mr. Medalie. I move to strike it.

Mr. Holtzoff. I second the motion.

Mr. Medalie. That is the law, in all probability.

Mr. Dession. It is. There is no difference.

Mr. Holtzoff. With the rule we adopted, it seems to me that Rule 29 becomes no longer necessary.

Mr. Medalie. Let me tell you something--

Mr. McLellan. Didn't you move something?

Mr. Medalie. Let me tell you something; in a case in my district, if you recall, the Circuit Court of Appeals of my circuit, just out of its head and with a wealth of experience, went on to tell us how you can put in a lot of evidence about book entries and corporate evidence without breaking your neck and having to call a million witnesses.

In other words, you trust our Circuit Court of Appeals. There may be one or two who won't do it from time to time. It should be a practical matter without going through a lot of useless ritual.

6 Now, I will trust the courts to put this thing through without rules, statutes, or anything else.

Mr. Youngquist. In view of what we have adopted, however, it would be inconsistent to have the rule in.

The Chairman. The motion is to strike.

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

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Does 30 (b) change the existing law?

Mr. Holtzoff. 30 (b) is the verdict--non obstante veridicto in criminal cases.

The Chairman. Any questions on 31?

Mr. Holtzoff. I move its adoption.

Mr. Medalie. I second it.

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

Carried.

32.

Mr. Medalie. I move its adoption.

Mr. Robinson. Seconded.

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

Carried.

Mr. McLellan. May I ask one question?

The Chairman. Certainly.

Mr. McLellan. Rule 32, "When the verdict is rendered * * the jury may be polled at the request of any party".

Would it be well to add, "or at the court's own motion"?

Mr. Dession. Or should it be "shall"?

Mr. McLellan. I would not make it "shall".

Mr. Medalie. I think that is the rule for polling juries. It must be done if a party requests it. That is the present rule.

Mr. McLellan. I don't so understand it. I think it is discretionary.

Mr. Medalie. But they always accede to the request, which makes it, in effect, a mandatory request.

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The Chairman. Shall we add "on the court's own motion"?

Mr. McLellan. I say, "of the court's own motion".

The Chairman. "of the court's own motion". That is better.

Mr. Medalie. That is after "party" in line 3?

Mr. McLellan. "or of the court's own motion".

The Chairman. Mr. Waite has a question?

Mr. Waite. If you allow me to orate at this time, I assure you I haven't another question during the meeting.

Mr. McLellan. Everybody likes to hear you.

Mr. Waite. Well, you have at least got to admit that I have endeavored to liberalize the rules.

This one, for the sake of the record--I think it has been discussed before, but I want to relieve my own conscience now by proposing it. I am offering it here. I don't know quite where it should go. I don't suggest any particular place where it should go:

"If the defendant takes the stand as a witness in his own behalf he may be cross-examined like any other witness concerning any testimony so given by him but he shall not be interrogated by counsel for the prosecution concerning his previous criminal record nor concerning other matters affecting his personal credibility.

"The fact that the defendant does not take the witness stand to testify in his own behalf may be considered by the jury and may be commented on by the judge, the prosecuting attorney, or the counsel for the defense."

Now, I might say that that provision was fought out in one of the American Law Institute meetings, discussed in all

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all its angles, and the vote was two to one in favor of it; so it would scarcely be true to say the bar does not want it, that the bar has repudiated it, because I think the Institute generally is a fair cross-section of the bar, and, I might say that those who opposed it were not opposed to the comment as such.

There were various propositions. Some people thought that the judge ought to be allowed to comment but that the attorneys should not; and of the group who opposed this broader motion, many of those would have been willing to allow some sort of comment.

So I think it is fair to say that the vote for allowing comment was three or four to one, to those opposed.

7 There came before the Institute meeting--one of the objections before the Institute meeting was that what kept the defendant off the stand oftentimes was his fear that he would be interrogated as to his past criminal record, and so I thought we might take care of that by this first draft or provision that if he does take the stand he cannot be interrogated as to matters adversely affecting his personal credibility, and therefore he has not got that excuse for not taking the stand, and upon that basis, the whole idea of compulsion seems to me to fall out.

Mr. Medalie. Of course that carries out part of the English view on that subject.

My experience has been, although I have indulged in it rarely, that defendants are kept off the stand even when they have no criminal records but are otherwise perfectly respectable persons. They too have been kept off the stand.

Now, this deals only with a special privilege to professional criminals to stay off the stand, or, to go on the stand, rather. I misspoke.

I mean special advantage in professional criminals' going on the stand.

Now, a perfectly respectable man, other than the fact that he has committed this particular offense, who deems it advisable not to go on the stand, is subject to comment which the professional criminal might avoid.

I do not think that is a practical thing. The idea that people who stay off the stand are only criminals previously convicted is not correct.

Mr. Seasongood. We have had this up before. We discussed it very elaborately.

Mr. Waite. I am making the motion only pro forma, as a matter of fact. I am making it chiefly because when this matter comes before the public I want to feel perfectly free to criticize, so far as I am able, what I consider the lack in the rules as proposed.

The Chairman. The question is called for.

Mr. Waite. It was not supported.

Mr. Orfield. I will second it.

Mr. Burns. Is it true that you would not advocate the first clause if it were not for your advocacy of the second?

Mr. Waite. Perhaps that is true. I had not thought that through.

Mr. Seasongood. There is a very serious constitutional question involved.

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

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Opposed, "No."

The motion seems to be lost. The motion is lost.

Rule 33.

Mr. Holtzoff. I think we have a revised draft that has been laid on the table before everyone.

The Chairman. It was distributed yesterday.

Mr. Holtzoff. There is no difference in the phraseology--I mean there is no difference in the substance but only a difference to simplify phraseology.

Mr. McLellan. How about another district in the same state?

Mr. Holtzoff. I think the reason that has not been covered here is because now that we have made it possible for a warrant to run throughout the state, no removal proceeding will be necessary so long as it is in the same state.

The Chairman. Now may we look at (a) and see if there are any questions on the redraft of (a)?

Mr. McLellan. I move the adoption of 33 (a).

Mr. Robinson. I second it.

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

Carried.

Now 33 (b).

Mr. McLellan. I move the adoption of 33 (b).

Mr. Holtzoff. I second the motion.

Mr. Youngquist. I have one question.

In the latter part of 33 (b) it is provided if the defendant pleads not guilty the clerk shall transfer the papers back to the court in which the proceeding is commenced, and be

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restored to the docket of that court.

In line 23 we say he may waive the right to be tried in the district where the information was filed and consent to be tried--wait a minute; I am sorry. I misread it.

The Chairman. Any further questions on (b)?

If not, all those in favor say "Aye." Opposed, "No."

Carried.

Rule 33.

Mr. Holtzoff. We had 33. 34.

The Chairman. Pardon me. 34.

Mr. Burns. I would like to ask a question about 33 (b).

The Chairman. 33 (b), Judge?

Mr. Burns. If he desires to plead guilty or nolo contendere he may waive the right--"in writing waive the right and consent to be tried in the district"--

Mr. Youngquist. The words "and consent" should be stricken out.

Mr. Holtzoff. That was a typographical error and some of the copies did not have it stricken out.

Mr. Burns. "waive the right".

Mr. Youngquist. "waive the right to be tried in the district in which the crime is alleged to have been committed and consent to disposition of the case in the district in which he has been arrested".

Mr. Burns. In the last clause--in case he runs out on his bargain, is it? If the defendant pleads not guilty?

Mr. Holtzoff. He does not have this privilege if he pleads not guilty.

Mr. Burns. Oh, it is transferred only after he desires

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to plead guilty?

Mr. Holtzoff. That is right. Then suppose he changes his mind.

Mr. Burns. Is that the part in the last sentence, in case he changes his mind?

Mr. Holtzoff. Yes.

8 Mr. Burns. Can some improvement be made so he will be bound?

Mr. Wechsler. Suppose we change the language, "if the defendant subsequently desires to plead not guilty"?

Mr. McLellan. Well, on that you are giving him inferentially the right to withdraw a plea of guilty.

He can do that only with the consent of the court.

Mr. Youngquist. I move that the last four lines be stricken.

Mr. Burns. I mean, it starts out as though you are dealing with a particular kind of individual who wants to stay put, and then you provide for an alternative where he has actually played ducks and drakes with the prosecution.

Mr. Holtzoff. What I had in mind was this: Suppose he notifies all concerned that he is going to plead guilty and asks that the case be transferred.

The case is transferred, he is then arraigned and he says, "I plead not guilty."

Mr. Medalie. It seems to me--I reread this today--that once a defendant has actually written, "I plead guilty," and acknowledged it, I would not have the records of the court passing across the country and back again if he changes his mind or gets new lawyers, or whatever else.

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Mr. Burns. This would be just another technicality to put the Government to great expense.

It might not advantage him in the end but it may take months sometimes.

Mr. Holtzoff. I have in mind it may be used in minor cases where a man might be a resident of a place far away from the place where the proceeding is instituted, and he says, "Well, I am going to plead guilty anyway. I would like to plead guilty here instead of having to go half way across the continent."

Mr. Medalie. Suppose he can get a year for it. That is also a minor case, but a year is a long time if you are not used to it.

Mr. Wechsler. Can it be made to read, "The defendant may plead guilty," instead of having all this language, "if the defendant desires"?

He would have to say, "I want to plead guilty." He would be brought into court and plead.

Mr. Burns. Isn't there something in Mr. Medalie's position, that before you start this unusual process you ought to have it in writing?

Mr. Youngquist. Can't we provide that the district court in which he is may accept his plea of guilty?

Mr. Holtzoff. We don't want to do that unless the district attorneys agree.

Mr. Medalie. If he wants to change, you can poke the plea under his nose, from California, in New York.

Mr. Holtzoff. Even though he is going to plead guilty and stick to his plea, this is the thought, that he can do this

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only with both United States attorneys' consent, because we don't want to run up against a situation where a defendant runs where he expects to get a lawyer and then pleads guilty there.

Mr. Medalie. Let us say the man is indicted in New York and that he is picked up in California.

His lawyer figures out it costs a lot of money to go to New York; he would rather get the fee--put it on the worst basis you want to--and then he is 3,000 miles away from home.

Now, all he has to do is file a paper which says he is guilty.

Now, then, either we succeed in accommodating him, as we probably will, by having it disposed of out there in California, or, at the worst, the same thing happens to him by having to go back to New York, but he cannot get all the papers sent on from New York and then say, "I changed my mind. I don't like the judge who is sitting today. I will not plead guilty."

The Chairman. Your motion is to send this back for redrafting in line with your discussion?

Mr. Medalie. Yes.

Mr. Longsdorf. Mr. Chairman, can a man plead guilty by writing something on a piece of paper and mailing it to a distant court?

Mr. Burns. No, but he can make an admission in writing.

Mr. Medalie. That is what I had in mind. That is enough.

The Chairman. It is moved and seconded that this particular subsection be submitted to the subcommittee for rewriting.

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

Carried.

Now, Rule 33.

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Mr. McLellan. 34.

The Chairman. Pardon me, 34. I have a double section here.

Mr. McLellan. I move the adoption of Rule 34 (a).

Mr. Holtzoff. I second that motion.

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

Mr. Longsdorf. Mr. Chairman, I want to suggest a slight amendment in line 2 which now reads, "In cases in which a warrant of search and seizure is authorized by law".

I would like to have substituted for the word "cases" the words "criminal prosecutions".

It is quite possible, I think, that there might be search warrants issued when no criminal prosecution was contemplated.

The Chairman. Why not say "Where" or "When"?

Mr. Longsdorf. Either one; "When a warrant of search and seizure is authorized".

I don't want to extend this into a general rule.

Mr. Holtzoff. Oh, search warrants are very frequently issued where there is no criminal prosecution.

9 Mr. Longsdorf. That is what I want to avoid.

The Chairman. Subject to that change, the motion is to adopt.

Substitute in line 2, in place of "In cases in which" the word "Where".

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

Carried.

Mr. Longsdorf. I have in mind that line in section 33, Title 28, which limits that particular chapter and preserves all existing federal laws.

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I don't want to supersede that because I don't know what it means if we would do that.

Mr. Medalie. What are we superseding?

Mr. Longsdorf. That search warrant in the Act of 1917.

Mr. Burns. Well, isn't it fair to say this clause is applicable in its contents only to criminal cases?

Mr. Longsdorf. I think so.

Mr. McLellan. It could not have any effect except in criminal proceedings.

Mr. Longsdorf. I want to leave the law as to when a search warrant may issue, out of this rule.

The Chairman. Have we a motion on (b)?

Mr. Holtzoff. I move it be adopted.

Mr. Robinson. I second that motion.

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

Carried.

Now, (c).

Mr. Waite. Before we vote on that I would like to ask a question about it.

As I interpret that first sentence, if officers should seize a boatload of heroin or a batch of time bombs under a defective warrant, the court would have to order the return of the property to the person from whom it is received.

Is that correct?

Mr. Medalie. Yes. But I pity the fellow who took it back.

Mr. Holtzoff. I think that is existing law, as I understand it.

Mr. Waite. It is the law in Michigan also, and our Supreme

Court wishes to Heaven they had never thought about it.

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

Mr. Longsdorf. Before we vote on (c) I want to suggest something, Mr. Chairman.

There may be motions to suppress evidence which has not been obtained by means of an illegal or an unwarranted search warrant.

I don't suppose that this subsection (c) should be construed to deny the right to make a motion to suppress that kind of evidence.

Mr. Youngquist. That is taken care of by lines 45 and 46, "or if the seizure was made without a warrant that the property was illegally seized."

Mr. Longsdorf. Suppose it was evidence in violation of the wire-tapping law, there would not be any search warrant there. You can move to suppress that.

Mr. Holtzoff. You just object to its introduction.

Mr. Longsdorf. All right. I want to see that that right is preserved. I want to be sure that the construction of this is going to be all right.

Mr. Youngquist. Mr. Longsdorf, this relates only to property.

Mr. Longsdorf. Only to property obtained with a search warrant.

Mr. Youngquist. Or seizures.

Mr. Longsdorf. I see, "illegally or if the seizure was made without a warrant".

Mr. Youngquist. That is covered.

Mr. Longsdorf. All right.

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The Chairman. All those in favor of this motion on (c), say "Aye." Opposed, "No."

Mr. Wechsler. Is this a vote on (c)?

The Chairman. Yes.

Mr. Wechsler. I am sorry. There is one point on (c), the sentence on lines 41 and 42, "A defendant may on like grounds move to suppress any evidence procured thereunder."

I understand that that sentence could considerably enlarge the existing law as is declared in decisions of circuit courts of appeal, there being no authoritative Supreme Court decision, although the matter is discussed in a recent decision under the wire-tapping statute.

The question is whether the motion to suppress may only be made by the person who had possession of the property illegally seized and whose rights were violated by the seizure, or, whether the motion may be made by any defendant.

I am not sure what I think the law should be but I thought I would call attention to the fact that there is a change as the law is now indicated under the decisions.

Mr. Youngquist. I thought that was the purpose of our sub-committee at New York. You may not have been there.

Mr. Wechsler. That is the one I missed.

It was broadened in this way?

Mr. Youngquist. To give any defendant the right to move to suppress.

That may be too broad. It is broader than existing law. It is only where defendant's right has been interfered with with reference to his property that he can have the evidence suppressed.

Mr. Wechsler. That is the existing law as I understand it.

Mr. Youngquist. Yes. But that goes beyond it.

Mr. Medalie. Suppose there is unlawful search and seizure of my room in the hotel and they find there a letter from you to me telling me how I may blow up the Capitol, or something of that sort, and your handwriting is proved.

Ought you to have any right to suppress that evidence?

Mr. Youngquist. It is illegal search and seizure, and the Constitution broadly prohibits unreasonable searches and seizures.

My thought is that evidence obtained by violation of the Constitution should be susceptible of suppression.

Mr. Medalie. But by violation of the rights of the person who is concerned. You have no right, in my property. I am the only one who has.

Mr. Holtzoff. It is a personal privilege.

Mr. Youngquist. I am taking the border view.

Mr. Holtzoff. I move we strike out the sentence beginning on line 41.

Mr. Medalie. I second it.

The Chairman. It is moved and seconded.

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

Carried.

Rule 35.

Mr. Youngquist. Some changes will have to be made elsewhere in the rule by reason of this elision.

Mr. Burns. Is there any motion here to suppress evidence?

Mr. Youngquist. This was broad enough to cover it before. I think it was all included in that one sentence.

Mr. Burns. Is a motion to suppress a prerequisite to

offering an objection to its use in a trial?

Mr. Holtzoff. We have that, beginning on line 51. My understanding is that sentence embodies the existing law.

Mr. Youngquist. What I had in mind, Mr. Burns, was that this would have to be rewritten in part to state the proposition you speak of.

Mr. Dean. Does it say that a motion to suppress evidence is a prerequisite or is a condition to objecting to the admissibility on the trial?

Mr. Medalie. I understood that you really agreed with the proposition as I put it, that is, when my property is illegally seized from me and it is used against you, you agree that I can make a motion but that you cannot?

Mr. Youngquist. No, I did not. I put my decision on the border ground, that everything that is obtained as evidence in violation of the Constitution should not be used.

Mr. Medalie. Used against anybody?

Mr. Youngquist. Anybody--

Mr. Burns. Can a defendant move to suppress the evidence?

Mr. Holtzoff. He can move for return of the property.

Mr. Medalie. If we haven't it by this deletion, we ought to have it.

Mr. Holtzoff. We haven't interfered with it. The only limitation we have made by the deletion is the one you have mentioned.

Mr. McLellan. I think that ought to go to the subcommittee. If the right is not preserved by reason of that deletion, it should be restored.

The Chairman. So ordered.

Rule 35 (a). Any question on (a)?

Mr. Medalie. The Reporter suggests I make a brief statement.

The Chairman. Let us not, unless somebody questions your handiwork.

Mr. McLellan. I move the adoption of 35 (a).

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. The only question I have in mind is whether that is limited too closely--well, suppose a scurrilous and libelous paper is filed in court and it is under the eye of the court with a file mark on it, and one of counsel in court or some person calls attention to it.

Now, he sees and hears that and he knows from the files that it is there.

Mr. Medalie. He does not.

I can take the back that you use to back up your legal papers. I am a vicious person that wants to pin something on you, and I put in some scurrilous remarks about the judge, put it back, and, on the basis of that, you get 60 days, according to what you are proposing there.

Now, the judge did not see anything but the paper and he did not see you do it.

Mr. Longsdorf. I thought someone called attention to it.

Mr. Medalie. And the judge saw it. That comes under this rule (a).

Mr. Burns. Suppose a particularly vicious ruling is made by a judge, and counsel comments openly.

The judge, being a little hard of hearing, does not get it, but is told by the bailiff.

Under the present law may the judge, to vindicate the courtroom presence, impose a contempt forthwith?

Mr. Wechsler. Not without a finding that the defendant made the statement.

Mr. Burns. And he must have a hearing.

Mr. Wechsler. Yes.

Mr. Medalie. You don't need a hearing if the judge knows it to be a fact and he certifies that it is a fact of his own knowledge, but when he does not know it but only infers it, the defendant is entitled to a hearing.

The Chairman. The motion is on 35 (a).

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

Carried.

We now go to 35 (b).

Mr. Wechsler. I have got a lot of questions about 35 (b), Mr. Chairman.

Mr. Longsdorf. I have a few, and Mr. Seasongood too, I think.

Mr. Wechsler. I would like to ask Mr. Medalie the following first:

What is the meaning of the limitation on line 7, "prosecuted by the court to assert its authority"?

And I would like to know, secondly--

The Chairman. Well, let us get one at a time.

Mr. Medalie. Well, now, wait a minute.

We went back to Rule 107--is it, the old rule?

Mr. Youngquist. 87, I think it was.

May I ask, was this drafted at a subcommittee meeting?

Mr. Holtzoff. No, it was not. I don't think so.

Mr. Medalie. I do not recognize the language.

11 Mr. Holtzoff. The language, "to assert its authority"--

Mr. Robinson. I would like to have Miss Peterson make a statement.

Miss Peterson. That old section (b) was left to be redrafted in the Reporter's office and so it was redrafted on the basis of McCann v. United States, 80 Federal (2d) 11, and the language is in that case, and it is--the case to which Mr. Wechsler referred at the first meeting of the committee--and the whole purpose of the change here is to provide a device by which the defendant can be assured that he is being prosecuted for a criminal and not civil offense.

Mr. Holtzoff. That may be all right for a court opinion but it is a different thing to put it in a rule.

Mr. Medalie. Would you like to strike out the rest of the line?

Mr. Burns. Why not say "any criminal contempt"?

Mr. Medalie. I think we are in agreement on that.

Mr. Holtzoff. There are some criminal contempts which do not come under (a) but which do not require notice.

Mr. Wechsler. Which are they?

Mr. Holtzoff. I think you brought that question up in the McGovern case.

Mr. Medalie. No. That is something else. McGovern had his notice, although he did not have it in writing.

The district attorney said to the jury, "The Government presents," and so on, and McGovern heard it.

Mr. Holtzoff. This will require summons in the McGovern case, if you continue to read on.

Mr. Medalie. I think they are talking about the first sentence in (b).

The first sentence in (b) is entirely consistent with the McGovern case.

Mr. Holtzoff. You have to read it with the context. It says, "the notice provided herein," which requires a summons.

Mr. Medalie. Unless the defendant dispenses with it in some way,as he did in the McGovern case.

Mr. Dean. Well, it would have been simple anyway, wouldn't it, to have made a written one anyway?

Mr. Medalie. Yes. His lawyer was waiting around to see what would happen in the grand jury, and when we got through with the grand jury we all walked down before Judge Wilson.

Mr. McLellan. I hate, Mr. Chairman, to take the time on this, but I am ignorant on it.

Do you mean to indicate here that every kind of a criminal contempt other than that mentioned in (a) requires that the defendant may have a jury trial?

Mr. Wechsler. No.

Mr. Medalie. No.

Mr. McLellan. Haven't you said so?

Mr. Medalie. That is stated, and I have it marked as something I don't agree to.

The Chairman. May we agree on your objection to lines 6, 7, and 8 first?

Mr. Youngquist. I move the words "prosecuted by the court to assert its authority" be stricken in line 7, and in line 8 that the words "proceeded against" be stricken and the word "prosecuted" inserted.

Mr. Holtzoff. I second the motion.

Mr. Medalie. I agree with that.

Mr. Wechsler. I third it.

The Chairman. Judge Burns suggested we start the sentence with "A criminal contempt except as provided in section (a)".

Mr. Longsdorf. I thought Judge Burns suggested "Any criminal contempt." I like that better.

Mr. Wechsler. "Any criminal contempt except as provided in section (a)".

The Chairman. That is right.

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

Carried.

Now, Mr. Wechsler?

Mr. Medalie. On line 9 shouldn't it be changed to "make"?

Mr. Wechsler. On this sentence starting on line 9, if that is up for discussion, all of this charges existing practice, including the practice which is specifically provided under the Clayton Act which allows such prosecution on information filed by either the United States attorney or by a private person.

Mr. Holtzoff. Isn't that taken care of in (c)?

Mr. Wechsler. No. (c) should go out entirely. I think that will be clear when we come to it.

Now, I understand what Miss Peterson meant with this sentence in adopting the rule of the McCann case.

The point is briefly this, in contempts which involve disobedience to a court order there is inherent ambiguity in the nature of a contempt proceeding as to whether it is for

civil or for criminal contempt.

That problem came up acutely in the Gompers case, and it has come up again ever since, and when it comes up it requires usually after the event an examination of the proceedings from all angles to discover whether it was a proceeding for criminal contempt or whether it was a proceeding for so-called civil contempt which would be purged by compliance with the order and which might allow a compensatory judgment to the private party prosecuting.

Since he had that problem, the judge in the McCann case decided it would be a fine thing if the defendant knew in advance whether it was intended to be civil or criminal.

It was a fine idea and he suggested that it be met by requiring that the court enter an order when it was the intention to prosecute criminally for the contempt, as distinguished from
12 a civil proceeding based on the contempt.

He did not of course intend to modify the rule under the Clayton Act where there is a statutory provision expressly allowing a private individual to file an information, but he was addressing himself to some other cases.

I noticed there was a decision subsequent to the McCann case which loosened up the rule a little bit.

I am not clear what we should do about it, and my suggestion that the McCann case be examined was not that the rule laid down should be adopted, because I don't know whether it should be adopted or not.

Mr. Burns. Don't you have three cases of contempt, where the judge saw or heard; second, where it involved disobedience to a court order; and, third, when it would include the

procedure under the Clayton Act?

Mr. Wechsler. But it is decidedly in the court order that the ambiguity exists.

I think when you have a case of misbehavior other than a violation of a court order there is never any ambiguity. If it is punishable under a statute, it must be a criminal case.

Mr. Burns. Isn't it true that you have the ambiguity principally in connection with violation of a court order?

Mr. Wechsler. Exclusively.

Mr. Burns. Exclusively. Whether civil or criminal.

Mr. Wechsler. Right.

Mr. Burns. Well, there is nothing we could do.

Mr. Wechsler. Well, we might say where the contempt is based on violation of a court order, then this proceeding in line 9 may exist.

Mr. Burns. And then leave the Clayton Act unchanged.

Mr. Holtzoff. You don't mean for contempt in violation of a court order?

Mr. Wechsler. I am talking about those violations of a court order which constitute contempt, which is governed by law.

I think the thing is complicated enough, Mr. Chairman, so that it ought to have more attention before being considered here.

I don't think we could quite act on this text.

The Chairman. The motion is to refer it back to the committee.

Mr. Medalie. Let us see what we have done with it before it goes back to the committee.

Mr. Longsdorf. Might I make an explanation which I think would enable us a little more intelligently to re-refer it?

Now, I think the underlying trouble here was that the Clayton Act, which dealt with injunctions only and the disobedience thereof, they attempted in that to provide a method of distinguishing those disobedient contempts which were also criminal acts.

The difficulty with that statute was that it did not constitute all of the contempts constituting a crime.

Then, apparently to save themselves from something--I don't know exactly what--the Clayton Act provided in section 387 of Title 28 that that should not apply to government cases.

For the government cases wherein there was a disobedience contempt constituting crime, the Congress provided they should be according to the prevalent uses of courts of equity. I am not certain about law.

Now, the disobedience contempts, many of them had no punitive authority in the judgment of the court.

Well, now, those different kinds of contempt have become pretty badly scrambled, as Mr. Wechsler pointed out, and I think our principal task is to disentangle the procedure imposed by the Clayton Act from the solid law of contempt proceedings.

Mr. Wechsler. You would not change the jury act?

Mr. Longsdorf. No.

Mr. Holtzoff. I think Mr. Medalie had a suggestion.

Mr. Medalie. I may have lost it.

What I would like to do on this is what the folks here would like to have done. Then I think we can do the writing. But if we want to debate what the rules ought to be, we ought

to take a month to do it.

Mr. Wechsler. May I make a substitute proposal as to what this rule should contain?

First, it should continue the existing law insofar as the existing law permits the prosecution for criminal contempt to be instituted on information filed by a United States attorney or by a private party interested in the case.

Second, the jury trial provision of the Clayton Act should be retained.

That is as controversial a matter as was ever passed through Congress involving labor relations and it ought not to be changed by this committee.

Third, that in cases involving a violation of a court order, where there is this inherent ambiguity as to the nature of the proceeding, we want to adopt something that recognizes that when the proceeding is intended to be for criminal contempt, it be so designated.

13 I do not think we need to go so far as to require a court order under the second circuit rule, but I do think if there is an information filed and an affidavit and an order to show cause issued thereon, that certainly by the time you reach the "show cause" stage, the order ought to state; not merely that he should be punished for a contempt, which perpetuates the ambiguity.

Those are the things I think that ought to guide the redrafting of this rule.

Mr. Longsdorf. May I add to that--and I wish Mr. Wechsler would notice this and object if it is wrong and give me his reasons--I would like to add to that language which will draw

in those excepted cases now found in 387 if that contempt is also a crime, and subject them to the same kind of procedure.

The Clayton Act requirements I think are strictly procedural, and I don't see any reason why they should be made an exception.

Mr. Wechsler. I don't remember the jury trial provision of the Clayton Act well enough to know if it is limited to contempts in violation of orders which also constitute crime.

Mr. Holtzoff. Don't let us try to enlarge or narrow the jury trial provision.

Mr. Longsdorf. That is just the point--

Mr. Youngquist. Mr. Chairman, might I suggest that Mr. Wechsler and Mr. Longsdorf assist the chairman of the subcommittee to redraft the rule for presentation tomorrow?

Mr. Longsdorf. I will be glad to.

Mr. McLellan. There is a sentence near the end of (b) which reads, "Trial shall be without a jury unless the person charged demands a jury trial."

I think that should be changed by the addition of the words "is entitled to and", so that that sentence will read: "Trial shall be without a jury unless the person charged is entitled to and demands a jury trial."

There are numerous cases where he is not entitled to a jury trial which do not come within subdivision (a) of Rule 35.

Mr. Medalie. I agree with that.

Mr. Longsdorf. I agree with that.

The Chairman. Well, the motion, which I take it is consented to, is that the matter be referred back to the subcommittee. And will Mr. Medalie, Mr. Wechsler, and Mr.

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Longsdorf assist the subcommittee?

Mr. Medalie. How many special draft jobs have I between now and tomorrow morning?

The Chairman. This is the only one, I think.

Mr. Robinson. We will relieve you of the rest.

The Chairman. This brings us to a break and a new chapter, so I think we had better adjourn.

Mr. Longsdorf. Mr. Chairman, can't we dispose of (c)? Mr. Wechsler thinks that ought to be thrown out.

Mr. Wechsler. (c) has no place here, Mr. Chairman. I understand it to refer to the crime of obstruction of justice, which covers certain kinds of contemptuous behavior not included within the criminal contempt statute, particularly as that statute was defined in the Nye case.

There are certain kinds of obstructions which, after the Nye case, were considered to be contempts, but they still constituted breaches of the law.

Mr. Holtzoff. I agree with Mr. Wechsler, (c) should go out.

Mr. Wechsler. So there is no need for it in those cases. It is just an excuse for a prosecution of a crime.

The Chairman. If there is no objection we will adjourn until tomorrow morning.

What time shall we meet?

Mr. Orfield: Ten?

The Chairman. Well, we have quite a lot of work if we are going to get through tomorrow. We have covered eleven rule tonight.

The rules which come on now are general in nature until

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they come on to the appeal rules.

14 Mr. Medalie. For a three-day session we are five rules behind schedule on the assumption that we meet tomorrow night.

The Chairman. Well, the only reason I am presenting the question is I know that some of the members would like to get away tomorrow night, and I thought to make sure of that we might start at 9:30.

That seems to be against the constitutional privileges of the members of the New York bar.

Mr. McLellan. Make it 10:00 o'clock, Mr. Chairman.

The Chairman. All right. We will make it 10:00 o'clock sharp.

(Thereupon, at 10:40 o'clock p.m., a recess was taken until the following day, Wednesday, May 20, 1942, at 10:00 o'clock a.m.)

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