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Washington, D. C.,

Monday, January 12, 1942 .

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

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

Present:

Arthur T. Vanderbilt, Chairman

James J. Robinson, Reporter

Alexander Holtzoff, Secretary

Leland Tolman, Assistant Secretary

George J. Burke

Frederick E. Crane

Gordon Dean

George H. Dession

Sheldon Glueck

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McClellan

G. Aaron Youngquist

George Longsdorf

Herbert Wechsler

Fred E. Strine

Marks Alexander

P R O C E E D I N G S

The Chairman (Arthur T. Vanderbilt). Gentlemen, the reporter requests that as usual we keep our respective seats throughout the conference, so as to make his work a bit easier.

We are very happy to have Judge McClellan with us today.

I think everybody is here except Judge Burns.

Mr. Robinson, do you want to start with the discussion from the beginning?

Mr. Robinson. Beginning with rule 1?

The Chairman. Rule 1.

Mr. Robinson. This rule might be called the "Youngquist Rule." You will recall that at our meeting in September Mr. Youngquist felt there should be a rule in which could be placed matters of construction, definition, and application, and it has been the effort to meet that request, which seemed to meet with approval by the other members of the Committee. The extent to which that has been successful of course is for you to say. You have the rule, there, before you. Is it in the supplementary material?

Mr. Longsdorf. Yes.

Mr. Robinson. That was probably sent out in supplementary material which you received subsequent to the books.

Mr. Youngquist. Yes.

Mr. Robinson. Those of you who have not opened that to my work probably have not yet set it in its right place.

Mr. Glueck. I just wanted to raise the question about the congressional mandate. Does anyone have that bill here in which

The Chairman. I do not take it they would be surrendering them. It would be going in as a portion of the whole thing, but that is a matter that can be decided later. It is merely a question for the style committee. Are there any other comments on paragraph (a)?

Mr. Seasongood. Isn't this the last session before you send the things out?

The Chairman. I would assume that the style committee's function would mean, if we follow the precedent of the present Constitution, that when we think we have agreed upon a set of rules, then the style committee will do their work, and we will find, if we follow the precedent of the Federal Constitution, we will agree to a lot of things that we never suspected.

All right, if there is nothing further, we will proceed to paragraph (b).

Mr. Robinson. That, you will observe, takes expressions from paragraph (a) which have been condensed or shortened in paragraph (a), and extends them, including of course (b) (2), which as you will observe takes in the matter which aroused considerable discussion at our former meeting, namely, To what district courts shall the rules apply? Mr. Holtzoff prepared a rule 2 on that, and if paragraph (b) (2) is used, it is suggested that it would supersede rule 2 in your draft.

Mr. Youngquist. It is suggested that it would do what?

Mr. Robinson. That it would supersede rule 2.

Mr. Youngquist. Yes.

Mr. Robinson. 2 could then be omitted.

Mr. Crane. Where is that?

Mr. Robinson. That is your second.

Mr. Crane. I see.

Mr. Glueck. There are some items in this (b), however, which are not referred to in (a), aren't there--for instance, "committing magistrate"?

Mr. Robinson. That is included in (a) 5 and 6, also at line 15, paragraph (b) (3):

"'Committing magistrate' includes United States Commissioner* * *"

I think the combination of rule 1, paragraph (a) lines 5 and 6, with (in rule 1) paragraph (b), lines 15, 16, and 17, takes care of that. Doesn't it, Mr. Glueck?

Mr. Glueck. I mean, you said that this is merely an expansion of items mentioned in (a).

Mr. Robinson. Yes.

Mr. Glueck. But you see this is a generic term. It includes commissioners and other types of committing magistrates, doesn't it?

Mr. Robinson. Yes.

Mr. Glueck. This is line 15.

Mr. Robinson. Yes, that is true.

Mr. Glueck. What other types do we have in the Federal judiciary?

Mr. Robinson. That is done to incorporate the provisions of the federal statute on that subject. If you are familiar with that statute, you know that that lets in justices of the peace, United States Commissioners, judges of state courts, and mayors of cities.

Mr. Glueck. Oh, yes.

Mr. Robinson. And of course we do not want to include all

that list at this point, so that simply tacks on to the statute.

Mr. Crane. May I ask about (1), "determination of the question of guilt".

> "'Determination of the question of guilt' includes a verdict, a finding of guilty or not guilty by the court if a jury has been waived, and a plea of guilty."

Now, what about the other plea of nolo contendre? Isn't that also a plea?

Mr. Robinson. You see, Judge Crane, what we were again trying to do was to follow the language of the enabling act under which we operate. Those are its words, you see.

In your appendix you have-

> "Any or all proceedings prior to verdict or finding of guilty or not guilty by the court if a jury has been waived, and by a plea of guilty."

Mr. Crane. I think there might be a question raised whether a man has been found guilty if he has pleaded nolo contendre. He may, and he may go to jail. You would not want to have a definition that excludes anything of that kind?

Mr. Robinson. I go back again to what Mr. Youngquist presented at our last meeting. It is not exactly the idea to make the words mean what we say they mean, but it is to interpret our use of them here rather than attempt a finite definition. Isn't that right, Mr. Youngquist?

Mr. Youngquist. Yes, so as to obviate the need of scattering definitions throughout the rest of the rules. I have noted the same point that Judge Crane has, whether nolo contendre should be included. Strictly, it is not a determination of the question of guilt.

Mr. Medalie. That means that how you are to put in this nolo contendre addition is left to the committee on style, is that it?

The Chairman. I think that is right. It is a matter of weaving it in.

Mr. Crane. Yes.

The Chairman. I take it we need not spend time on it.

All right, (b) (2). Do you want to compare that with the proposed language for this rule 2, which apparently we do not need if this stands?

Mr. Holtzoff. It is the same thing.

Mr. Longsdorf. Mr. Chairman, I see something in rule 2 that I think ought to be questioned. The district courts in Alaska and the Canal Zone have jurisdiction over territorial crimes. In Alaska the district court has it, and in the Canal Zone the justice or some form of inferior court has jurisdiction over those. I think we ought to be careful not to use language which might draw those territorial crimes and the proceeding into these rules.

Mr. Holtzoff. I think we should draw them in. We have the same situation in theDistrict of Columbia. In the District of Columbia all local crimes are tried in the district court, because the district court is a combination state-federal court, and that is true of the district court of Alaska and the district court in the Canal Zone. Now, in the district court in the District of Columbia they use the same procedure for federal offences and local offences. It would be very confusing to have two sets of proceedings.

Mr. Longsdorf. So they do in Alaska, but they do not, in

the Canal Zone, as I understand it.

Mr. Holtzoff. No, in the Canal Zone they do. The judge of the district court in the Canal Zone handles all criminal offences, and it seems to me if these rules are going to be applicable to Alaska and the Canal Zone--and I venture to say they should--they should be as applicable to local offences or territorial offences as they are to federal offences, because you would not want the same court to use two sets of procedure.

Mr. Longsdorf. I came away from reading that Canal Zone criminal procedure act with the impression that there were justices of the peace down there who had certain trial jurisdiction.

Mr. Holtzoff. Well, there are justices of the peace and there is a police court, just as there is a police court here in the District of Columbia for the trial of minor offences, but all felonies in the District of Columbia are tried in the District Court irrespective of whether they are federal offences or are cognizable under a statute of purely local application, and the procedure is the same in all cases.

To have two sets of procedures would be exceedingly confusing.

The Chairman. Is there anything further on that point, gentlemen?

Mr. Seasongood. Is the question up as to whether they are applicable to the Canal Zone? That is part of this, isn't it? I notice that this Governor wrote, in a letter of August 27:

"It is recalled that a similar situation arose following the passage of the act of March 8, 1934, empower-

ing the Supreme Court to prescribe rules of practice in proceedings in criminal cases after verdict, and the general rules promulgated under the 1934 act were not extended to the Canal Zone, nor were there any special rules prescribed for the Zone."

Is there any inconsistency in having these "after verdict" not apply to the Canal Zone, and then having ours apply to the Canal Zone?

Mr. Holtzoff. Well, I think the Supreme Court could well extend the rules afterward to the Canal Zone. It has that power. It did not do it originally when it promulgated those rules, but the district judge of the Canal Zone is very anxious to have these rules applicable to his court, and of course he is in a much better position to determine that question than the Governor of the Canal Zone. The Governor of the Canal Zone is a military governor, and he is too casual and sporadic in his contacts with the district court. I do not think that on a matter of this kind his opinion should be preferred to that of the district judge.

Mr. Seasongood. The only point that occurred to me in reading the letters was this. Here is Wheeler, acting Governor, too, and he makes a serious question:

"When Congress, by the act of June 19, 1934, empowered the Supreme Court to prescribe rules of practice and procedure in civil cases, it was provided such rules should be for the district courts of the United States, a phrase construed in the Mookeeney case as excluding territorial courts such as the United States District Court for the District of the Canal Zone."

I just raise the question--I do not pretend to know the answer--whether it is confusing to have your criminal rules apply to the Canal Zone and your civil rules not apply, and your rules after verdict not apply.

Mr. Holtzoff. Well, the Supreme Court has authority to apply them, so that there is no lack of power. We might perhaps suggest that the whole body of rules be extended to the Canal Zone. Certainly the district judge wants to see that done.

Mr. Youngquist. And the district judge suggests no reason why there should be an exception made in the Canal Zone.

Mr. Holtzoff. Yes.

Mr. Youngquist. We have this situation, Mr. Seasongood. The statute that we are working under now includes by name the Canal Zone, which the statute on civil rules did not, and I should think we ought in the first instance at least to include the Canal Zone with the others.

Mr. Seasongood. I do not say we should not. I just present the question whether there will be any lack of harmony in the district court rules, having one set apply, the other not applying.

Mr. Glueck. Isn't that a matter of notifying the Supreme Court about this business of "after the verdict" and leaving it to them, rather than us?

The Chairman. Yes.

Mr. Glueck. We can't do anything about it in rules, certainly.

The Chairman. May we leave it, then, with a note to be made, to go to the Court, when our report is filed, calling the

Court's attention to this difference between the district, here, and applying it to the appellate rules?

Mr. Seasongood. Yes.

The Chairman. The next question is on (b) (3).

Mr. Holtzoff. There is a matter for the committee on style, in line 16, "any" I think ought to be "every".

Mr. Dean. Mr. Chairman, before we pass to that I would like to suggest that the question be acted upon as to whether these rules should apply to the Virgin Islands. That would be the only one that it was not applicable to under this.

Mr. Holtzoff. The reason this draft doesn't include the Virgin Islands, Mr. Dean, is that the district attorney for the Virgin Islands objected. Personally, I should have put the Virgin Islands in.

Mr. Dean. I would like to see some of the other United States attorneys--we have had about five in the last six or seven years--give some of their impressions, and also the district judge.

Mr. Holtzoff. I corresponded with the district attorneys, those dealing with the territories and possessions, and asked each of them to get the opinions of the parties interested, and all I got from the Virgin Islands was a letter stating that he did not think the rule ought to apply to the Virgin Islands; but I should be inclined further to extend them.

Mr. Dean. I would like to see it left open, anyway, and not excluded at this meeting. On the basis of the information we have here, I do not think it is sufficient to exclude them.

The Chairman. You move they be included?

Mr. Dean. I would like to move that, yes.

Mr. Holtzoff. I second the motion, Mr. Chairman.

The Chairman. Is there any discussion.

(The motion was AGREED TO.)

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

Mr. Glueck. That is a matter of style, Mr. Chairman.

The Chairman. Yes.

Mr. Glueck. But there is still the point, that I did not make very well--that in lines 5 and 6 in (a) we speak only of commissioners. Now, the question is whether item (3) under (b) shouldn't be "United States Commissioners, including other committing magistrates", instead of the way it is put here.

The Chairman. Or, alternatively, that in line 6 we refer to "committing magistrates"?

Mr. Glueck. Yes.

Mr. Holtzoff. I prefer the other alternative, because to say "the commissioner" shall include committing magistrates is a "title" definition, which gives to a word a meaning other than the proper one.

Mr. Glueck. You are right. It is rather far-fetched. I prefer yours.

The Chairman. You make that as a motion?

Mr. Glueck. I so move.

The Chairman. It is moved and seconded that the words in line 6, "United States Commissioners", be changed to read "committing magistrates".

Mr. Crane. Yes, line 6?

The Chairman. Line 6, going back to rule 1.

Mr. Waite. Mr. Chairman, that raises in my mind a question which is frankly predicated on ignorance. Are there any

proceedings before United States Commissioners which should be included in (a), which would not be within their functions as committing magistrates?

Mr. Holtzoff. Yes, there are.

Mr. Dean. Yes, there are a few.

Mr. Waite. Then if it were changed to "committing magistrates" it would limit the other functions.

Mr. Holtzoff. In supporting that motion, I overlooked the fact that the United States Commissioners, by a recent act, have certain trial jurisdiction. In other words, the United States Commissioners sit as committing magistrates. They also have trial jurisdiction over petty offences committed on federal reservations.

The Chairman. Could we not say, then, "United States Commissioners and other committing magistrates"?

Mr. Seth. Right.

Mr. Holtzoff. Then are there other limits to the words "United States Commissioners"? It limits them, doesn't it, to their functions as committing magistrates? You say "United States Commissioners."

Mr. Glueck. We would say, "and committing magistrates".

The Chairman. All right.

Mr. Crane. How have we got that now, Mr. Chairman?

The Chairman. Tentatively, subject to a motion by somebody, "before United States Commissioners and committing magistrates." Is there any objection to that?

Mr. Robinson. I think that is all right.

(The amendment was AGREED TO.)

Mr. Glueck. Then the question arises, Mr. Chairman,

whether, with that amendment, item (3) under (b) is still necessary.

Mr. Robinson. I would go back to the statement made a moment ago to the effect that that is based on the federal statute in which many types of committing magistrates are authorized by law, and I believe that (3) should be retained in order to show that we are not interfering with that statute in any way.

That has been considered pretty carefully--I think it was at our meeting in September--and I think we decided we had better leave the justice of the peace alone.

Mr. Holtzoff. I believe we should leave them alone, but is the definition necessary? Isn't the phrase "committing magistrate" a term of art, so that you do not have to define it?

Mr. Robinson. Not when it is defined by statute, I believe.

Mr. Dean. It is not defined by statute, though, is it?

Mr. Holtzoff. No.

Mr. Dean. Doesn't the statute simply list the titles of people who do act as committing magistrates, without attempting to define the words?

Mr. Robinson. They are defined--I mean, included in the statute under that general heading.

Mr. Dean. Would it run counter to any style we have generally adopted, to refer specifically to that statute, saying, "'committing magistrate' shall include all those officials designated in section so-and-so, title," etc.?

Mr. Holtzoff. I do not think we should refer to that statute, because Congress might pass some other act in the future, naming some other committing magistrates. I think it

would be a dangerous thing to incorporate a statute by reference.

Mr. Dean. Quite right.

Mr. Glueck. If the term were ever litigated, they would consult that other statute, though, wouldn't they?

Mr. Holtzoff. I would rather feel as Mr. Glueck does, that this is surplus.

Mr. Glueck. I so move.

Mr. Holtzoff. I second.

The Chairman. It is moved and seconded that (3) (b) be deleted.

(The motion was AGREED TO.)

Mr. Seasongood. I do not want to be fussy, but on this ought we not to say, "United States Commissioners and other committing magistrates"?

The Chairman. I suggested it.

Mr. Seasongood. Because you say here, in (3), "committing magistrates" includes United States Commissinners and any others.

The Chairman. That is going out.

Mr. Robinson. That is going out.

Mr. Holtzoff. That is going out.

Mr. Seasongood. I know, but if "committing magistrate" includes United States Commissioners, then we ought to say here, "United States Commissioners and other committing magistrates."

Mr. Youngquist. The reason for it is, as I understand it, that the United States Commissioners have jurisdiction over petty offences, which is above and beyond their jurisdiction as committing magistrates; and if you insert the word "other",

that might be construed to apply to them only in their capacity as committing magistrates, and not in their function under the petty offences law.

Mr. Seth. Are we going to include those petty-offence rules that the Supreme Court has already promulgated, in this?

Mr. Longsdorf. They are not in this book.

Mr. Seth. I mean, are they to be included in our rules?

Mr. Holtzoff. They should be a part of these, in order that these rules may be complete.

Mr. Seth. Yes, but they have already promulgated those rules.

Mr. Youngquist. Yes, they are in the appendix, here.

Mr. Seth. Well.

Mr. Longsdorf. Mr. Chairman, upon this question of committing magistrates, I think you will agree that section 591 of Title 18 is the section which grants jurisdiction to those enumerated state officers who may be committing magistrates. If I am right about that, it is of course beyond our reach to alter that in any way, and the statute cannot be superseded by anything we do.

It may be, in view of that, that we ought to be careful to avoid any possible misunderstanding in these rules.

Mr. Glueck. What is meant really is, in line 6, "United States Commissioners in their capacity as magistrates," is that right?

Mr. Holtzoff. Yes.

Mr. Glueck. That is the limitation intended. Why can't we say something like that, and then say, "and other committing magistrates"?

The Chairman. Or say, "before committing magistrates, including United States Commissioners"?

Mr. Robinson. I think you are getting back almost to reinstating this. Before you get through with it, I think that is what you will be driven to.

Mr. Holtzoff. Isn't that a matter for the committee on style?

Mr. Glueck. Yes, I think so.

Mr. Holtzoff. Because they know what we want, it is just a question of the phraseology.

The Chairman. Does someone move to refer that?

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

(The motion was seconded and was AGREED TO.)

The Chairman. Now we come to (b) (4).

Mr. Holtzoff. I suggest that that is also surplusage, and that the same disposition be made of this as was made of (3).

I move we strike out (4), "party". The word "party" is a word of art, you do not have to define it.

Mr. Medalie. I second the motion.

The Chairman. I missed the motion. Will you restate it.

Mr. Holtzoff. I move we strike out (4), on the ground that the word "party" is a word of art, and that to define it is surplusage.

Mr. Robinson. I might say that was based on a discussion at the former meeting, at which there seemed to be some doubt on the part of some of the members of the Committee, whether or not "party" would clearly include the United States. Now, if there is no doubt, of course, this should go out.

Mr. Holtzoff. I do not think there is any question about

what the word "party" means.

Mr. Robinson. Well, the point was raised, and we just put it in here for your consideration. Of course, it is immaterial whether it goes out or stays in. If you think it is unnecessary, it ought to go out.

Mr. Youngquist. We ordinarily use the word "party" in connection with civil proceedings, and the word "prosecution" and "the accused" in criminal proceedings. Perhaps that was the reason.

Mr. Holtzoff. The word "party" is used in criminal proceedings, Mr. Youngquist, the same.

Mr. Youngquist. Under the old style, I mean, that I was accustomed to when I was practicing criminal law.

Mr. Crane. I do not see what you need that for. "Party means the United States or a defendant. The United States, by its consent, can be a defendant, can't it?

Mr. Holtzoff. This is criminal.

Mr. Crane. Oh, criminal. That's right. Well, what do we want it for?

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

Mr. Crane. "The party proceeded against."

The Chairman. There is a motion to strike (b) (4). Is there any other discussion?

(The motion was duly AGREED TO.)

The Chairman. (b) (5).

Mr. Crane. That is too broad, isn't it, "any paper filed"?

Mr. Medalie. It includes a notice of appearance.

The Chairman. And it does not exclude oral pleas.

Mr. Crane. No.

The Chairman. Which are pleadings, as much as any paper.

Mr. Holtzoff. I think the only pleadings are the accusation, by indictment or information, and the plea; just as in a civil case, your pleadings are the complaint, answer, and reply. Any motion that you make is not a "pleading".

Mr. Crane. I should think that did not need definition any more than the dictionary words we are using here need definition.

Mr. Robinson. That, too, was raised by some member of the research group, here, because the previous discussion at one of the meetings resulted in a difference of opinion as to what the word "pleadings" meant.

Mr. Crane. I think there was more discussion as to what form the pleadings should take.

Mr. Robinson. There was that, also, but if you will notice the transcript, there--

Mr. Crane. We are using English words here, and we have not attempted to define them, as to whether they meant something, and I should think the same would be true of "pleadings." All of us have been using "pleadings" all our professinnal life. I should think it is a little dangerous to try to define it, when it has a definition pretty well understood in criminal nomenclature.

Mr. Robinson. May I ask a little information on this point, Mr. Holtzoff? When you say the pleadings include only the written accusation, the indictment, or the information--

Mr. Crane (interposing). He means, of course, oral pleadings, too.

Mr. Holtzoff. Well--and the defendant's plea, too.

Mr. Robinson. And the defendant's plea, is that your view, too?

Mr. Crane. Yes.

Mr. Robinson. It should not go beyond that?

Mr. Crane. Sure; you take the motions that are made--any motion in respect to grand jury minutes, or a change of venue, or anything else; those are not pleadings. Bills of particulars required by our rules are not pleadings.

Mr. Medalie. Is there any purpose served by this definition? Is there anything that comes up in the rules where the word "pleadings" is used, that requires definition?

Mr. Robinson. I think maybe, Mr. Medalie, that is a point that I do not think you can really define, yourself, until you see what is in the rules.

The Chairman. Tentatively, may we put the motion, subject to the matter being reconsidered if it becomes necessary later? You have heard the motion to strike (b) (5).

(The motion was duly AGREED TO.)

The Chairman. Subdivision (c) (1).

Mr. Robinson. That subsection is based on rule 81, (d) and (3), of the first tentative draft, which in turn came largely from the civil rules.

It would seem that this would be the opportunity, Mr. Youngquist, to include matters of this sort in a general rule, rather than wait until practically the end of our drafting to make such definitions or limitations or applications. That is the reason it is here.

Mr. Youngquist. I think it should be.

Mr. Glueck. I think as a matter of fact when it comes to

really drafting, rule 1 ought to be drafted last, to see what this grab bag will include and exclude.

Mr. Robinson. That is exactly right. In fact, it ought to be considered by this Committee last. I was just thinking, we are probably starting at it backwards by considering it now.

The Chairman. We are doing very well.

Mr. Robinson. Yes. We are saying things that will need to be said later, also. Now, Mr. Youngquist's point a minute ago, when he said he would like to include this point and that point in this rule, shows exactly what the rule is for, and things are to be put in it as the need arises, and things that are not needed are to be left out, as it becomes apparent they are not needed, here.

I wonder if the Committee agrees that such a rule is necessary. I am inclined to agree with Mr. Youngquist's suggestion at our last meeting, that we probably should have a rule of application, of definition, and construction.

Mr. Crane. I think we ought to reconsider that.

Mr. Robinson. In other words, we might not need the rule, at all.

Mr. Crane. I think it ought to be reconsidered.

Mr. Holtzoff. I am strongly opposed to definitions in a statute.

Mr. Crane. So am I.

Mr. Holtzoff. And that is also applicable to rules, and I think there has been a rather undesirable tendency in recent years to have a long list of definitions in a statute. I think one of two things happens as a result--you either define words that need no definition, or else you attach a definition

which distorts the usual meaning of the word; and I have noticed a good many statutory definitions doing that. I do not say we should have no definitions at all, but we should have just as few as possible, it seems to me, and only where there is a real necessity for it.

The Chairman. Can't we consider that matter at the end?

Mr. Crane. I think so. We can then consider this question of definitions.

The Chairman. I take it that, as at our meeting in September, all our votes are purely tentative on these matters, so if we vote now we are not foreclosing ourselves.

Referring to the last line, beginning on line 30, is there any point that that might be extended to cover territorial legislation, or, I mean, these outlying possessions, or is that sufficient as it is now? You know the answer to that, Mr. Holtzoff.

Mr. Holtzoff. Of course, the sole purpose of the sentence as now drafted and as it is found in the civil rules is to provide that the words "statutes of the United States" include those acts of Congress which are locally applicable here in the District of Columbia. Now, the District of Columbia has no separate legislature, the Congress legislates for the District.

The territories other than the Canal Zone have their own legislative bodies, so that there are territorial statutes in the various territories, of local application, that are passed by the territorial legislature. Now, I must say that I am not sure whether--I do not think the words "statutes of the United States" should include those.

The Chairman. No, I meant, should there be any provision

added, referring to the territorial legislation?

Mr. Dean. I think it is wise. There is a decision, Mr. Holtzoff, you remember, by the Judge of the United States District Court for China, in which, operating under the laws of the United States, he makes applicable to Shanghai the divorce laws of Alaska and the criminal laws of the District of Columbia!

Mr. Holtzoff. Yes.

Mr. Dean. On the theory that those are laws of the United States. Now, I think some other judge might also say those are "statutes of the United States" in a very broad sense, so I suggest some reference to either excluding or including the territorial statutes.

Mr. Holtzoff. You do not have to exclude them, because this definition seems to me to exclude them by necessary implication.

The Chairman. May we refer back to the Reporter of the staff, the question of whether there should not be an added sentence to cover the question of territorial laws, and let it go at that?

If there is no further comment, we will pass on to rule 3, rule 2 having been--

Mr. Robinson. That is tentative.

Mr. Holtzoff. I am not sure rule 2 ought to go out. I just wanted to raise a question.

The Chairman. All right. I thought--

Mr. Holtzoff (interposing). Because the thought was, the definition of the district court in rule 1 makes rule 2 unnecessary; but how about "United States Commissioners and committing magistrates" in these territories? If we leave rule 2

out, we will create a question as to whether proceedings before commissioners in Alaska for example or the Canal Zone or Hawaii or Porto Rico will be governed by these rules. I am a little bothered about that.

The Chairman. You are anticipating, I take it, that rule (1) (b) will eventually go out?

Mr. Holtzoff. No, even if 1 (b) stays, rule 1 (b) is sufficient, so far as the first sentence of rule 2 is concerned, but it does not cover the commissioners in these territories, which are covered by the second sentence of rule 2.

The Chairman. Let me put a question this way, then: Is there any objection to the substance of rule 2, holding tentatively the question as to whether or not it is duplicated by 1 (b) (2)?

Mr. Robinson. Of course, the motion has been made in regard to the Virgin Islands. There would still have to be that change made in rule 2, if that is in.

Mr. Longsdorf. Mr. Chairman, there is another thing to be considered in connection with rule 2. There is a decision in the Supreme Court of the United States--I cannot cite it now, by name--that criminal proceedings in the United States district courts of Alaska are governed by the Criminal Procedure Code of Alaska and not by the federal statutes; and there is a Ninth Circuit decision following that.

Mr. Holtzoff. If these rules are adopted and made applicable to Alaska, they will supersede that.

Mr. Longsdorf. They will supersede that. I am calling attention to that.

The Chairman. All right, if there is no objection, rule 2

will stand tentatively, with the Virgin Islands included.

Mr. Seasongood. May I call attention to the fact that in the act it says"the supreme courts of Hawaii and Puerto Rico," and we just make it the district courts of Hawaii and Puerto Rico, is that right?

Mr. Holtzoff. I think that is all right, because the supreme court of Hawaii has only appellate jurisdiction and not trial jurisdiction.

Mr. Seasongood. Why do they say here, "in the supreme courts of Hawaii and Puerto Rico", then?

Mr. Holtzoff. I think I can tell you a bit of history back of that.

Mr. Seasongood. Well, if it is of no importance I do not care, but it is just a variance between the rules and the act.

Mr. Holtzoff. That court was listed in the act of 1933 conferring authority on the Supreme Court to make rules of criminal appeals. Our enabling act is the same in its phraseology, and I think the necessary distinction was not drawn which should have been.

Mr. Glueck. It is a matter of draftsmanship.

Mr. Holtzoff. I think it is a matter of draftsmanship. I think I am guilty of a mistake.

Mr. McClellan. Do you want to strike out the word "other"? Do you want to strike out that word in the next to the last line in rule 2, to be consistent?

Mr. Holtzoff. Strike out the word "other" in line 5 of rule 2.

The Chairman. If there is no objection, that will be done.

Mr. Robinson. That is the point Mr. Seasongood raised a minute ago, under rule 1 (a), line 6, I believe.

Mr. Seasongood. It ought to be considered in connection with the other.

The Chairman. It is the identical question, is it not?

Mr. Seasongood. Yes.

The Chairman. It is a matter for the committee on style.

Mr. Seasongood. Will the "supreme court and district courts of Hawaii and Puerto Rico" go to the same committee?

The Chairman. Yes. Make a note, there.

Mr. Glueck. I think, apart from the definition, even if this is only repetitious, since it deals with the geographic jurisdiction of the rules, it ought to stand on its own bottom as a separate section.

Mr. Robinson. Where would you put it, Sheldon? Do you think it should come in as the very first rule of the whole code, or just where?

Mr. Glueck. Probably.

Mr. Robinson. That was our idea.

The Chairman. I like Mr. Waite's thought on it, starting the rules as they are, with proper definition of policy.

Mr. Robinson. So do I.

The Chairman. Your suggestion can be left to the committee on style, and if there are no further questions, we will go on to rule 3.

Mr. Robinson. Rule 3 is a repetition of the rule 3 in the first tentative draft, which referred to that, and which received the consideration of this Committee, with a change which Mr. Longsdorf felt to be necessary. That change was the

adding of the words-

"or by arrest without a warrant."

In a later rule, the term "written accusation" is defined, where it is stated to include indictment, information, or a complaint, so that clause of the former rule 3, the first tentative draft is not repeated at this point.

I think there may be a question, too, of including a definition of "written accusation", or, that is, stating what it includes, in a rule 1, if we have a rule 1, defining terms; but now, apart from that, the rule 3 as you have it now in lines 1 and 2, down to and including the word "accusation", is the same as rule 3 was in the first tentative draft, which was on the point passed by the committee, and as to the addition, "or by arrest without a warrant", I should like to ask Mr. Longsdorf to state his reason for wishing to have that added, if you will.

Mr. Waite. Mr. Chairman, before we go into that, may I call attention to the fact that rule 23, alternative, is essentially the same as rule 3, but that the alternative to rule 23 is more broadly and specifically stated. I wonder if we cannot consider rule 3 and an alternative 23 together, since they seem to cover precisely the same point.

Mr. Glueck. Rule 23, as it stands, deals with the method of starting the wheels rolling, and the alternative rule really deals with the question of time for the purpose of tolling the statute of limitations, so aren't there really two different points, there? I admit there is some overlapping.

Mr. Waite. I should say they are essentially the same thing, Sheldon. One says a criminal proceeding may be commenced

by filing a written accusation or by an arrest without a warrant; the other says a criminal proceeding is commenced by filing an indictment or an information, and when the defendant has been arrested. You see, 23 is broader, but it would seem to duplicate No. 3.

Mr. Holtzoff. Mr. Chairman, I am very much troubled by the phrase "by an arrest without a warrant". It seems to me that a proceeding is commenced either by the filing of a complaint and the issuance of a warrant, or, if the arrest is without a warrant, when the prisoner is arraigned and the complaint is filed. Our enabling statute does not authorize the formulation of an entire code of criminal procedure. It only authorizes the rules to regulate proceedings in court.

Now, when a man is arrested without a warrant the criminal proceeding is not commenced. The criminal proceeding is commenced when the arresting officer presents a complaint to the committing magistrate and only then can they be arrested without a warrant.

Therefore, we move that the phrase, "or arrest without a warrant", be stricken out.

Mr. Longsdorf. Mr. Chairman, I have not yet responded to Mr. Robinson's suggestion that I explain those words.

My only notion in putting them in was that the originating act in the prosecution may be either a complaint followed by an arrest or an arrest followed by a complaint. I think, as a commencing proceeding, the two of them are more or less coupled. A complaint does not accomplish very much until you have got the prisoner personally within the jurisdiction of the committing magistrate or of the court. An arrest does not accomplish

much unless you follow it up with a complaint, and jurisdictionally then it is the combination of the two that is the originating process.

Mr. Holtzoff. But the court gets no jurisdiction of the proceeding--the proceeding in the court is not started, until some document is presented to the court. When a person is arrested, there is no proceeding pending until he is taken before the magistrate or a complaint is filed. As a practical matter, you will get a lot of complications if you give the court jurisdiction at that point, because if you do, then you can never release your prisoner.

Mr. Longsdorf. Are we doing so?

Mr. Holtzoff. Once he says "I arrest you," he could not let the prisoner go. Our statute permits us to regulate court proceedings.

Mr. Medalie. I know, but there, you see, you start too late. I think you, Mr. Longsdorf, started too early. The arrest does not take the court into this business.

Mr. Holtzoff. That is right.

Mr. Medalie. And the court can get into this function before a complaint is filed, namely, with arraignment upon an arrest, because after the arraignment, the presentation of the defendant to the magistrate, then the court, the magistrate, may do certain things.

Mr. Holtzoff. But the complaint is filed at that time, isn't it?

Mr. Medalie. Not necessarily. It is filed after there has been palaver and goodness knows what else.

Mr. Holtzoff. Well, I would accept your--

Mr. Medalie (continuing). There is another point about it. The magistrate may not even have taken a complaint, and nevertheless have madea commitment, and he may have fixed bail and have done other things which of course he should not do until a complaint is filed, but nevertheless having done that, there is a proceeding pending before him, and it would be unrealistic to exclude everything that happens before him until he very properly orders a complaint to be drawn and receives it.

Now, for example, when a complaint is drawn and before it is filed, it must be signed and sworn to by the affiant or the complainant. That is a part of the judicial procedure, too, and yet a complaint has not yet been filed.

Mr. Holtzoff. I would be glad to accept an amendment to my motion, so that this rule 3 should read:

> "A criminal proceeding may be commenced by filing a written accusation or by arraigning a prisoner before a committing magistrate."

Mr. Medalie. "Upon arraignment"?

Mr. Crane. May I ask this? I do not know, and so I am just asking, now, a question to get information. You see a statute of limitations sometimes is quite a question, as to whether the prosecution has been brought within 5 or 10 years, or the 3 years, 2, years, or whatever it happens to be. Now, in civil matters that is sometimes started by an arrest by the sheriff, and in criminal matters may that not be started by arrest before the complaint, and satisfy the language?

Mr. Holtzoff. The arrest does not toll the statute of limitations. The filing of a complaint does.

Mr. Crane. Does it depend entirely upon the complaint, the

filing?

Mr. Holtzoff. That is my understanding.

Mr. Youngquist. I have difficulty understanding, I think, the commencement of the criminal proceeding other than defining the event which tolls the statute of limitations. Why do we have to say when a criminal proceeding commences, except for that purpose?

Mr. Crane. A question of that sort has arisen in New York in recent matters in criminal prosecution. I had it only incidentally. I had to adjourn a hearing I am in with the Attorney General.

Mr. Dean. Mr. Chairman, my impression is that under the present law, in the federal system, the statute is not tolled by the filing. Is that true, that it is tolled by the filing of the complaint before the United States Commissioner? I think not.

Mr. Holtzoff. I was under the impression it was.

Mr. Dean. No, not except in tax cases, where there is a special statute, on income-tax proceedings, and there it is specifically provided that the statute shall start to run on the filing of the complaint before the commissioner; but otherwise you have to wait for indictment. That is my impression, at least.

Mr. Crane. But it is a kind of open question.

Mr. Dean. Right.

Mr. Holtzoff. I think that the commissioner's complaint does not toll the statute, and in order to toll the statute you have to find an indictment or file an information, if the crime is prosecuted by indictment or information.

The Chairman. Now, gentlemen, we seem to be getting somewhat afield. We have rule 3 and rule 23, and alternative rule 23. Suppose we try to dispose of one or the other. I suggest we take alternative 23, and see whether you want that, or not.

Mr. Medalie. May I ask why we want it with respect to statutes of limitation? These rules of procedure cannot do anything about statutes of limitation, can they?

Mr. Youngquist. Yes, they can.

Mr. Medalie. Can they?

Mr. Youngquist. Yes. They become law, if Congress does not change them.

Mr. Medalie. I did not get that.

Mr. Youngquist. Under the act of 1940, when these rules are prescribed by the Supreme Court and submitted to Congress, and Congress takes no action upon them, they become law, so far as superseding other statutory matter in conflict.

Mr. Holtzoff. But they have to be limited to procedural matters.

Mr. Youngquist. Oh, yes.

The Chairman. This is a procedural matter.

Mr. Holtzoff. I am not so sure.

Mr. Glueck. It is substantive, because it fixes the crime.

Mr. Holtzoff. I think in a criminal case the statute is more than any set of rules.

Mr. Medalie. May I suggest this. I can see that there may be controversy on both sides of this, as to whether it is procedural or substantive. I think this is something we have

a right to legislate on, through rules, if we define the time when the criminal proceeding is commenced and do not use the words with respect to the statute of limitations, then since we define the word "commenced," that has definite reference to anything that deals with the commencement, and if we are wrong in thinking that this is applicable to the statute of limitations, we will avoid derision by its exclusion in this alternative rule 23. And I think we are touchy about being the subject of derision. We are supposedly experts.

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MR. CRANE: Therefore, you would favor Rule 23 at the top of that page?

THE CHAIRMAN: Yes.

MR. GLUECK: If that be so, I would much rather--

MR. MEDALIE: With the addition "arraignment before a magistrate."

MR. GLUECK: Well, do you think that is necessary to mention at all? For what purpose is it necessary outside of this "statute of limitations"?

MR. MEDALIE: Well, we are defining what happens before a magistrate in various places here. One of them is the defendant's rights to be advised that he may have counsel. Another right that goes with the criminal proceeding is the right to have reasonable bail fixed. In other words, we define what is applicable to any proceedings in a court, in any judicial tribunal or agency, by fixing the time.

MR. HOLTZOFF: May I say this, while I personally have presumed they were always procedural, nevertheless, under the civil rules they are fairly held to be substantive because the federal courts under the Erie Railroad v. Tompkins followed the State statute of limitations. I infer from that it must be regarded as substantive, because the substantive law is followed by the federal courts in some cases, and, therefore, the statute of limitations would be regarded as substantive, it seems to me, in criminal cases.

THE CHAIRMAN: At any rate, Mr. Medalie, as to Rule 23 you are suggesting we add the "arraignment before a magistrate"?

MR. MEDALIE: Yes.

MR. LONGSDORF: The first, or alternate?

MR. MEDALIE: "Arraignment" is sufficient, isn't it?

MR. YOUNGQUIST: An indictment or information when it first appears before a magistrate.

MR. MEDALIE: I suggest that would do it.

THE CHAIRMAN: "By bringing it before the committing magistrate."

MR. HOLTZOFF: "Or appearance before." "Or appearance by the defendant before a committing magistrate."

MR. MEDALIE: "Or appearance by defendant before a committing magistrate."

MR. LONGSDORF: No, I think that smacks of voluntary appearance.

MR. MEDALIE: Well, why not?

MR. LONGSDORF: It is too much.

MR. SETH: "Bringing before" I think is better.

MR. YOUNGQUIST: Sometimes he comes by summons, doesn't he?

MR. MEDALIE: Yes.

MR. YOUNGQUIST: Would it appear better to say "when he first appears before a magistrate"?

MR. LONGSDORF: I don't think it is very weighty.

THE CHAIRMAN: Well, of course the Committee on Style--the question is now to add the words "or appearance before a committing magistrate."

MR. HOLTZOFF: "Appearance of the defendant." We are on Rule 3 now.

MR. MEDALIE: Twenty-three, I think.

THE CHAIRMAN: Rule 23.

MR. MEDALIE: "Or the appearance of the defendant before a

committing magistrate." The appearance of the defendant.

MR. SEASONGOOD: Is that in the first sentence?

MR. MEDALIE: I think so, because the district judge would have no jurisdiction except--

THE CHAIRMAN: As to committing magistrate.

MR. MEDALIE: Yes, but in the proceeding before the district judge it has reached a committing magistrate who would have no jurisdiction until either indictment or information.

MR. CRANE: You can never get enough to cover circumstances that may arise. You cannot foresee them. A man may stop in to see the judge and tell him he is not guilty.

MR. MEDALIE: Instead of using the word "appearance" alone we say the "appearance of the defendant."

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MR. CRANE: Yes.

MR. MEDALIE: It is a viewpoint, anyway, that he is a defendant when he appears. Now, how he becomes a defendant, he may be arrested by an F.B.I. man and brought on. But if he just walks in and says "Good morning, Judge," that isn't the appearance of the defendant.

MR. YOUNGQUIST: I am still bothered about running athwart the present rules when we say "the proceeding is commenced by filing a written accusation."

MR. WECHSLER: It occurs to me, Mr. Chairman, that there is another phase of this problem that is perhaps more important than the statutes of limitation phase. If a criminal proceeding can be deemed to have commenced earlier than the filing of the written accusation, or the appearance of the defendant before the committing magistrate, then it would follow, I take it, that the court would have jurisdiction under the enabling Act to address

itself to the duty to produce the defendant before a committing magistrate, and to the right--generally, to the rights of the defendant following arest. Now, in my mind it is a doubtful question whether under the statute the court can go that far. If the court can go that far I would be strongly in favor of drafting rules to meet the situation. If the court cannot go that far then I see no point in the rule other than its possible effect on the statute of limitation, and with respect to its effect on the statute of limitation I do not believe, as a matter of policy, that it is desirable to hold the statute to the appearance of the defendant before a magistrate rather than to the filing of the written accusation, which I understand to be the present law. Therefore, I suggest that we consider the question of our jurisdiction as the basic question before us, and if we decide, or if it has been decided against jurisdiction, it would drop the rule. That is, against jurisdiction from the time of arrest.

MR. MEDALIE: I think this overlooks what I have pointed out, that even though the defendant does not insist on the filing of a complaint, or overlooks it, or proceeds informally, he still has certain rights with respect to bail and counsel, notification of friends and relatives, and other things. Those rights are important rights, and we ought to make sure under the rules that there is compulsion on the part of the magistrate to see that the defendant knows those rights.

MR. WECHSLER: But those are covered by specific rules, Mr. Medalie.

MR. MEDALIE: But if the case is not covered by the specific rules, what rules have we? We want to be sure that there is no

question but what the case is pending before him.

MR. WECHSLER: But it would not be necessary to put a rule so stating. The rule before the committing magistrate would be beyond the power of the court unless the case is pending there, but I don't think you have to affirm the jurisdiction by rule.

MR. YOUNGQUIST: Doesn't the language applying to any and all criminal proceedings cover all that we are talking about?

MR. MEDALIE: Well, what we are dealing with is a case where, by common consent or oversight or failure of a committing magistrate to insist on the filing of a complaint, the rules of criminal procedure still would be applicable even though the rights have been waived or overlooked.

MR. YOUNGQUIST: It is a proceeding, nonetheless.

MR. MEDALIE: Probably so, but it would be better if there were no question about it. In addition to that, if we have the power to legislate on the statute of limitations, we are thereby doing it.

MR. WECHSLER: We may be doing it the wrong way.

MR. MEDALIE: I don't know that we have the right to do it at all.

MR. YOUNGQUIST: If you place that limitation upon the commencement of a proceeding, then when we come to the search warrant, which we are not including in the rules, we have something that occurs before there is any written accusation and before there is any appearance. It would make the rules inconsistent in that respect. I think it would be much better to omit all reference to what constitutes the commencement of a criminal proceeding. We do have it definitely in the statutes and the decisions. We don't need to restate that. And I think

we would be much safer if we omit entirely any definition of the commencement of a criminal proceeding, and, I so move.

MR. LONGSDORF: Seconded.

MR. MEDALIE: There is a difference between a criminal proceeding and a criminal prosecution. I think that is really the point, isn't it? In other words, you may have a search warrant without any pending against anybody.

MR. YOUNGQUIST: Yes.

MR. MEDALIE: You may have a grand jury inquiry without a prosecution impending, but it is a criminal proceeding. In other words, the motion is that we mind our own business on the statute of limitations.

THE CHAIRMAN: Your motion, I take it, is we drop Rule 3, Rule 23, and Rule 23-A. Any further discussion?

MR. GLUECK: I think, Mr. Chairman, we ought to give serious attention to what Mr. Wechsler mentioned. I think if there is any area here in which we can really bring about a thoroughgoing reform, I would be certain to insist on that, if this were a State proceeding; it is quite a vague borderline area, right around arrest and bail, and the opportunity to have counsel at a certain stage, and what the police do in extorting a confession.

THE CHAIRMAN: That is where the dirty work happens.

MR. GLUECK: That is where the dirty work happens. Now--the question is--I think Mr. Wechsler is in some doubt as to whether that is in our jurisdiction.

MR. WECHSLER: Well, the question in my mind is whether we can say that a proceeding has been commenced before a United States Commissioner at the time of arrest, relying on the duty

to bring the arrested person before a commissioner. It is not clear to me that we cannot, under that language--I agree that if it is possible to do so we ought to reach inthat area, and I don't know whether there is any legislative history of the enabling Act that would answer the question.

MR. HOLTZOFF: There isn't any. But that is a question that does not have to be decided at this moment.

MR. CRANE: How would that conflict with Rule 3?

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

Opposed, "no."

(The motion was carried.)

THE CHAIRMAN: All right, gentlemen, we had better recess at this time.

(There followed a short recess.)

THE CHAIRMAN: Rule 4, gentlemen.

Mr. Robinson: Rule 4 has been the special production of Mr. Longsdorf, so I would like to have him state it.

MR. LONGSDORF: I think that the reasons for it are rather plain. It is quite possible, I think we all agree, that we might overlook something. It is not desirable to leave the impression that we did not think of that possibility. So we ought to have some sort of rule of that kind, but it seems to be covered in the concluding clause of Rule 10, which is much shortened and simplified and suits me better than the original draft.

THE CHAIRMAN: That is 10-B.

MR. LONGSDORF: 10-B. The language of 10-B, by the way, is largely borrowed from section 377 of Title 28 of the U. S. Code; "Usages and Principles of Law" seems to have a meaning pretty

well fixed by construction.

MR. HOLTZOFF: I would rather see Rule 10-B adopted than Rule 4, because Rule 4 would give rise to a good many questions. It provides that any matter not covered by the rules or statutes shall be governed by the "usage and practice prevalent heretofore in the courts of the United States." Well, of course, that practically goes back to the conformity principle, because on matters of that kind the federal courts followed State courts in a lot of ~~conclusions~~ procedures.

MR. LONGSDORF: Not in criminal cases.

MR. HOLTZOFF: Oh, yes.

MR. LONGSDORF: Well, to some extent. I said I was better satisfied with 10-B than I was with the original.

MR. HOLTZOFF: Now, on 10-B you need the last clause "agreeable to the usages and principles of law."

MR. LONGSDORF: Or due processes of law.

MR. HOLTZOFF: You know in the civil rules there is no provision as to what happens as to any point not covered by the rules. There is a provision that the courts may adopt the local rules not inconsistent with the general rules, and we have that covered somewhat in 10-A, and I think somewhat better than the civil rules. In the concluding phrase "agreeable to the usages and principles of law," you create a question. Does that mean they have to follow pre-existing procedure? So I prefer 10-B, as you do, but I should like to go further and strike out of 10-B that last clause "agreeable to the usages and principles of law."

MR. WECHSLER: There ought to be some standard, should there not?

MR. HOLTZOFF: Well, I go back to the civil rules. There hasn't been any difficulty because of the lack of a standard, a theory being that if there are any questions those can be covered by the local rules. If you have a standard--the difficulty of this standard is it is so ambiguous.

MR. WECHSLER: I was not defending this standard.

MR. HOLTZOFF: I am afraid this standard would be a source of difficulty.

MR. WECHSLER: Yes.

MR. HOLTZOFF: But I don't believe it is necessary to have any standard because if points arise they can be covered by the local rules. There is no difficulty that I know of arising out of such a situation. While this may give rise to litigation. So I move we adopt Rule 10-B with the omission of the words "agreeable to the usages and principles of law."

MR. WECHSLER: I second it.

MR. ROBINSON: It is a provision that matters not taken care of by the State criminal code shall be taken care of by the civil code. In many cases that helps to save situations. Criminal proceedings in State practice. In our work here are we taking care of eventualities of that sort? Obviously we could not follow the analogy of the State statutes of that sort. But, first, is there a need of some saving clause of that sort?

MR. HOLTZOFF: Well, the experience in the civil rules seems to indicate there is no need.

MR. WECHSLER: There is one difficulty. There may be some federal statutes which would not be affected by these rules which, under the blanket provision, such as 10-B, one would

think if it had any effect it would have the effect of abrogating all existing statutes, leaving all questions open to determination de novo by the courts. I don't think we ought to do that, and I don't think Congress would want to do it.

MR. HOLTZOFF: This might be modified to read "not inconsistent with these rules, or with existing statutes that are not superseded by these rules."

MR. WECHSLER: Would it not be better to provide that where these rules do not prescribe the governing rule the court shall proceeding according to Acts of Congress, if any; if not, according to local rule; and if no local rule, then to introduce the standard which is proposed later here, of evidence, which is derived from the ~~Wulvul~~ Wolfle case. I don't know what rule that is in, but it is designed to give the court freedom in the adoption of rules of evidence. The same might be done for rules of procedure.

MR. HOLTZOFF: I doubt whether there is any need for your first alternative. I doubt whether there is any need. The experience on the civil rules indicate there is no problem.

MR. CRANE: If anything happens you have to leave it to the court. We had a judge of the criminal courts of New York who had in his desk the other code, and he was always reversed, he could not get either right. Now, you have these rules, and you have to leave it. If this does not cover it, and the statute does not cover it, what is the judge going to do? He is going to do just as he pleases.

THE CHAIRMAN: I was wondering why if the civil rules have worked very well for four years in this respect, we are not justified in repeating that very language. If there has been

no trouble raised on the civil side, why fear it on the criminal side? It is very simple, in all cases not provided for by rule the district court may regulate the practice in any manner not inconsistent with this rule, and let it go at that.

MR. LONGSDORF: Well, Mr. Chairman, the purpose was not to regulate the rule-making power of the district courts, but to provide for possible situations where neither these rules nor any local rule met the situation.

THE CHAIRMAN: The judge then makes them up.

MR. LONGSDORF: No. If I might have that section 377, Title 28, read, perhaps that would shed a little light on it. I wanted to get in something corresponding to that statute which enabled the courts to devise processes necessary to the exercise of their jurisdiction. Perhaps we don't need this. If not, let it go out. But I would like to explain the purpose of putting it in, that if these rules and the local rules had made no provision, then to mark it in language similar to that of section 377 what we might do.

MR. HOLTZOFF: Isn't that more of a theoretical question?

MR. LONGSDORF: Perhaps it is.

MR. HOLTZOFF: Because no such difficulty has been presented by the civil rules. And I suggest we follow the Chairman's suggestion that we adopt the language of the civil rules.

MR. LONGSDORF: Well, I think if you leave it out, the courts will do it, anyway.

MR. MEDALIE: Well, Mr. Chairman, I understand Mr. Longsdorf's view to be this, it is one thing to say the local courts may make rules not inconsistent with these rules over

something that has not been provided for, they have the power to make those rules. Then you have the situation where neither we nor the district courts have made provision. Then what happens there? You get this situation. What shall the district attorney do? What shall counsel for the defendant do in following the proceeding? What rules written or unwritten should they follow?

And that is an area that ought to be covered in some way.

THE CHAIRMAN: It was not covered in the civil rules.

MR. HOLTZOFF: It was not covered in the civil rules. And there is no trouble as a result of it.

MR. MEDALIE: I know we never have troubles in criminal proceedings because it is the most informal proceedings in the world, and nobody's rights are seriously violated, and strangers find out by asking the clerk "What do we usually do around here?" And, the judge usually asks. But still the question might arise, and if you want to draw up a scientific set of rules covering all areas, there ought to be specific provision for that area not covered by rules.

MR. HOLTZOFF: It was not under the civil rules.

MR. MEDALIE: But they were not as scientific as we are here pretending to be.

5 THE CHAIRMAN: I wonder if we don't have it in mind if a certain type of judge will always find necessity for making a particular rule, whereas, if he didn't have that particular authority he would muddle through without framing a particular rule?

I have in mind a judge who would always be troubledby that particular type of power. If it was given to him he would want

to exercise it every Monday morning. Other judges would not be troubled by it, Monday, Tuesday, Wednesday, or Thursday, but if they had to exercise it, they would say, "Well, we have got to do this and do that."

MR. WECHSLER: There is another point, though, Mr. Chairman. Under the civil rules, as I understand it, if there is no applicable rule and no applicable federal statute, then the conformity Act applies.

MR. HOLTZOFF: No, the conformity Act is repealed.

MR. WECHSLER: In toto?

MR. HOLTZOFF: Yes. The conformity Act is repealed not only pro tanto on points covered by the rules, but it is repealed in toto. There was some question in the earlier decisions under the rule.

MR. WECHSLER: Isn't this doctrine of gaps in the law anyhow pretty much of a fiction under modern law? I have been trying to find gaps, but I cannot find them so far.

MR. WAITE: Well, considering it has been repealed, do the federal courts feel absolutely without obligation to look to State law?

MR. HOLTZOFF: Not only do they feel without obligation to look to the State law, but they would feel it did not govern and they would not follow it even if attorneys called attention to it. In other words, State procedure is no longer part of it.

MR. SETH: The civil rule, Rule 83, does provide "Nevertheless may regulate their practice in any manner not inconsistent with these rules."

MR. HOLTZOFF: That is the language suggested by the

Chairman that we adopt here.

MR. SETH: I think we ought to adopt the same language. And that is part of the authority to make rules. That is in the section on authority to make rules.

MR. HOLTZOFF: You see that 83 is broader than just authority to make rules. They may make them for a particular case.

MR. YOUNGQUIST: It seems to me we would be better off in using for the purpose of Rule 4, 10-B--10-A, standing substantially as it is.

MR. HOLTZOFF: 10-B has that clause--

MR. YOUNGQUIST: Oh, strike that out, yes; strike that out.

THE CHAIRMAN: Well, if you do that, do you impair the civil rules which have consistently, as I understand it, avoided going back to State practice?

MR. YOUNGQUIST: It is only that some suggestion was made at the last meeting here that some restriction be put.

MR. HOLTZOFF: Couldn't we confine it to include the first sentence of Rule 83, and make that the first sentence of Rule 10-A?

MR. YOUNGQUIST: I say "yes," but I doubt it, because as the Chairman says, that might be construed as an implication and covering a lot of rules we don't need.

MR. HOLTZOFF: I think the Chairman was facetious.

THE CHAIRMAN: Well, I am serious, too.

Well, may we have a rule as to Rule 4? I think it is generally agreed that 10-B, or some combination of civil rules, is preferable.

MR. YOUNGQUIST: I move that Rule 4 be substituted with

what now appears as Rule 10-B, striking the words "agreeable to the usages and principles of law."

THE CHAIRMAN: Is that seconded?

MR. WECHSLER: Seconded.

THE CHAIRMAN: Discussion?

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

Opposed, "no."

The motion seems to be carried.

MR. HOLTZOFF: Well, does that exclude the consideration of Rule 83?

THE CHAIRMAN: No. We are just passing Rule 4.

MR. HOLTZOFF: Well, we adopted the 10-B as an alternative.

THE CHAIRMAN: It will all come up again.

We will proceed to Rule 5.

MR. ROBINSON: The Committee, in the September meeting, gave instructions as to what it wanted to have done. Mr. Holtzoff had those instructions in mind, and we asked him to prepare to present Rule 5.

MR. HOLTZOFF: Well, Rule 5 is practically the same rule that was included in the first draft with the exception of the addition of the first sentence, namely, that "No indictment or information shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

And that is now part of the statutory law. The balance we adopted at the September meeting.

MR. GREEN: I would like to suggest for the Committee on Style the question of whether "in matter of" should not be omitted. That rather sounds to me like it should be in

substance "in form only."

MR. HOLTZOFF: I think that is a very good suggestion.

THE CHAIRMAN: Are there any questions?

MR. MEDALIE: Well, this is practically the standard statute.

MR. HOLTZOFF: Yes.

THE CHAIRMAN: If there is no further discussion, all those in favor of Rule 5 say "aye."

Opposed, "no."

(Motion carried.)

THE CHAIRMAN: I would like to ask the Reporter if it would be possible that Rule 5 might follow immediately Rule 1-A. I think it is like Rule 1-A, it sets the tone and the pace, and it might be helpful to the court and Congress and the litigants generally.

MR. ROBINSON: Well, if Rule 1-A is still alive, I think it can be done.

THE CHAIRMAN: That was Rule 1-B that was being overhauled there.

MR. ROBINSON: I think that is a good suggestion, and if Rule 1-A is left, I think it should be there.

THE CHAIRMAN: Well, if Rule 1-A is not there, let us put Rule 5 there. That is with the idea of getting it in earlier.

Any objection on that?

If not, we will go to Rule 6.

MR. HOLTZOFF: Well, that rule is identical with the civil rule, the purpose being that both trial practices, such as on a question of exceptions, shall be the same. It merely eliminates the necessity of noting an exception if an objection has been

overruled, or noting an exception if the court has refused to grant a requested charge. That is the same procedure that is now followed on the civil side.

THE CHAIRMAN: Any discussion?

If not, all those in favor say "aye."

Opposed, "no."

Carried.

MR. ROBINSON: Rule 7 is really left as a blank spot for the Committee's use if they see fit to do so by incorporating the material contained in Rule 10 of the first draft, which had to do with the form in pleadings, caption, names of parties, adoption by reference, and exhibits in pleadings. That is Rule 10 of the first draft.

There has been an inclination of this Committee, and the prior Committee, not to be very explicit as to the contents of pleadings. Some might consider that as largely a clerical matter, and in view of the fact that so many more pleadings in criminal proceedings are oral then written it was suggested that the former old Rule 10 might well be left out.

THE CHAIRMAN: Rule 10 followed the civil rule. Is that right?

MR. ROBINSON: Yes.

MR. HOLTZOFF: I am rather inclined to agree with the suggestion just made by the Reporter that perhaps that rule is surplussage in criminal cases.

MR. ROBINSON: Just for information on that point, why would it be unnecessary in criminal although it is necessary in civil? Or do you think it was unnecessary there also?

MR. HOLTZOFF: Well, there are so many more pleadings and

papers in a civil case. I don't see that it does any harm. I have no objection to it particularly, but I don't think it is of any importance.

Now, you don't have a caption in that indictment, by the way. It is not customary to have captions.

MR. MEDALIE: No captions. You just begin with a long sentence, and you go along with 20 pages and finish with the sentence at the end.

THE CHAIRMAN: Why wouldn't it be a good thing to have paragraphs and number there? Is there any reason why an indictment should read like a prerogative writ?

MR. MEDALIE: No need at all. After a while you get through reading an indictment, and if it is a long one you know what it has and has not got. And if it is a short one, you know what it is about even though they don't specify anything.

MR. ROBINSON: You might note the indictment by George Z. Medalie here in the Mitchell case in the appendix of forms and see whether that is an excellent example to follow, or otherwise.

MR. HOLTZOFF: Doesn't that go to the form of indictments rather than this rule?

MR. MEDALIE: Where is that?

MR. LONGSDORF: Page 38.

MR. ROBINSON: Page 38; that is right.

One purpose of having that indictment here was to show the difficulty of a simplified form, certainly a short form of indictment, in an income tax case.

MR. MEDALIE: The real reason indictments in income tax cases are long is that the United States Attorney usually finds

it easier to do them the way Peyton used to want to have them done in the Department of Justice years ago. That avoided arguments with anybody, so the feeling was, and the form now in the United States Attorney's office, and after a while he said, "Oh, let it go and do it that way."

MR. ROBINSON: What suggestions would you pass on that Mitchell indictment, Mr. Medalie? Do you think, as the Chairman suggests, it might be well to number the paragraphs?

MR. MEDALIE: Well, suppose they didn't number the paragraphs? What happened? You see, the only reason for numbering paragraphs in civil pleadings is that when you draw up a complaint the defendant knows what to deny, so it is a convenience to number the paragraphs. In indictments you don't have to deal with the particular paragraph or any allegation in the pleading you file. There is no need for any numbered paragraph. Now, the only time you might want to do it is when you make a motion for a bill of particulars.

THE CHAIRMAN: You don't need any rule for the adoption of an exhibit by reference.

MR. MEDALIE: It has been done all the time.

THE CHAIRMAN: Then you don't need the rule.

MR. MEDALIE: I don't think so.

THE CHAIRMAN: Then, let us not have it. Unless someone wants it. All right.

Rule 8.

MR. ROBINSON: This is the same rule that was before us in September. The only correction or changes to be made would be in line 21, that blank may be filled "action under Rule 80." Rule 80, which we will come to in due course, and strike out in

so the rest of that line.

MR. WAITE: Mr. Reporter, I notice what seems to me to be an inconsistency between Rule 6, paragraph A, and Rule 95. Rule 95 provides that Saturdays and Sundays need not be counted in a seven-day period, but this says it shall not be counted at all.

MR. ROBINSON: This is part of the criminal rules.

MR. WAITE: I wonder if there shouldn't be something in here to make it obvious that Rule 6 and Rule 95 do not apply to the same group of rules. Each one of them says the time of computation is provided with respect to these rules.

THE CHAIRMAN: Why shouldn't they be made identical?

MR. HOLTZOFF: I think we might change Rule 95 to correspond, because then you would have the same basis of computation in all branches of criminal as well as civil procedure.

THE CHAIRMAN: Well, why not leave out 95?

MR. WAITE: Well, I gathered from the Reporter he was trying to accomplish a different purpose in 95.

MR. HOLTZOFF: It would be very confusing to lawyers. I think we ought to have the same rule throughout.

MR. MEDALIE: There is something else in that connection. You have something else as to computation of time. One is forward and one is backward. One rule is that certain things shall be done within so many days, for example, after the plea has been entered. Then you have a rule which says that a motion shall be made on five days' notice, or four days' notice, or three days' notice, or two days' notice. The exclusions, you see, then lengthen the time of a party making a motion, to his disadvantage.

What have you against that? Now, I haven't analyzed the

language carefully enough to say whether that is safeguarded. In other words, time running backwards, you probably don't want days excluded, that is, because it restricts the time during which you may do something. In other words, if today I must make a motion rendered in five days, that is, on Friday, and a legal holiday intervenes, then I may not have made that motion today, I may have made it Saturday. Which is a hardship to the person making the motion. And these rules should not impose that hardship.

Now, when something is to be done later, no hardship is imposed on another party by giving the party 20 days plus a holiday or a Sunday.

Now, these are the practical difficulties that do arise.

THE CHAIRMAN: It will only mean one day.

MR. MEDALIE: It is the very difference between having to make a motion on Saturday, or having to make a motion on Monday. And sometimes the time is very short.

MR. HOLTZOFF: Well, I was going to raise a similar point on the length of time for serving a motion, that you have in mind.

THE CHAIRMAN: Let us see if we can go on. I have noted under Rule 95, the second paragraph, to bring that up as a question when we get to it, Mr. Waite.

MR. McLELLAN: Do you omit that second paragraph in 95?

THE CHAIRMAN: No, we are just holding it. We are due to read it when we get there.

MR. MEDALIE: In Rule 8-A, "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute," you leave out the local rule of

the district court?

THE CHAIRMAN: Shall we change that, the Committee on Style?

MR. MEDALIE: These are local rules?

THE CHAIRMAN: By any rule.

MR. MEDALIE: Yes. By any rule.

THE CHAIRMAN: Any further suggestions on 8-A?

MR. SEASONGOOD: I thought we had up once the question of holidays. There are some federal holidays, aren't there?

MR. HOLTZOFF: No; Congress has no constitutional authority to declare a holiday.

MR. SEASONGOOD: Then it is just the State where the court is sitting.

MR. YOUNGQUIST: On Rule 95, is that second paragraph taken from section 13?

MR. HOLTZOFF: Yes. I think it is taken from that.

MR. YOUNGQUIST: That refers to holidays under federal law.

MR. HOLTZOFF: Well, the only holidays under federal law are the District of Columbia. Also the territories.

THE CHAIRMAN: That would explain itself.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: In B, you suggested, Mr. Robinson, leaving out the latter part of line 21, beginning with the word "except," to the end of the line?

MR. ROBINSON: That is right.

THE CHAIRMAN: Are there any further suggestions on B? If not, we will go on to C.

MR. YOUNGQUIST: That leaves off the last two lines

beginning with the word "except"?

MR. ROBINSON: No.

THE CHAIRMAN: "Except as stated in subdivisions thereof."

MR. HOLTZOFF: You leave that out?

MR. ROBINSON: Yes, they are out.

THE CHAIRMAN: Paragraph C.

MR. MEDALIE: Well, there is where I had my trouble.

MR. HOLTZOFF: That is similar to the civil rule. In other words, the effect of this is to abolish the term as the yardstick of time and specifically operates for the doing of particular things and making particular motions as specified.

MR. MEDALIE: I am talking about excluding holidays. Five days' notice of motion.

MR. HOLTZOFF: That is in D.

MR. MEDALIE: Oh, excuse me.

THE CHAIRMAN: If there is nothing further to be said on C, we will pass that as accepted.

MR. HOLTZOFF: I would like to say a word about D.

THE CHAIRMAN: Then C is accepted.

Then, let us proceed with D.

MR. HOLTZOFF: I have the same thought as Mr. Medalie has, but go a bit further. Because what are you going to do in rural districts where a man is indicted today and goes to trial tomorrow? If he has to give five days' notice, one of two things happens, either he is deprived of the opportunity to make a motion, or the case has to go over the term. I suggest that there ought to be some authority in the court to fix a different time, by rule.

MR. SEASONGOOD: It is in there, isn't it?

MR. HOLTZOFF: Well, it says "by order of the court." Then it says, "Such an order may, for cause shown, be made on ex parte application."

MR. MEDALIE: Why not say "by order or rule of the court"?

MR. HOLTZOFF: That is my point. "By order or rule of the court.

THE CHAIRMAN: By rule or order of the court.

MR. HOLTZOFF: By rule or order of the court.

THE CHAIRMAN: Any objection to that?

If not, that is adopted.

Any other suggestions on D?

MR. WAITE: Mr. Chairman, we are having somewhat of a discussion here in connection with D, the last two or three lines, 37, 38, 39, "Affidavits may be served not later than one day before the hearing." Does that mean even if there was a hearing on Friday the affidavit may be served on Thursday? That is what I took it to mean, but I wanted to be sure.

MR. ROBINSON: That is the same language as the civil Rule 6-D again on this point. We are trying to follow just the same language.

MR. WAITE: If that is what it means, then I am clear on it.

MR. ROBINSON: In line 37 strike out the following: "and, except as otherwise provided in Rule ___." Because there is no exception.

MR. MEDALIE: Strike out "except as otherwise provided"?

MR. ROBINSON: Yes.

THE CHAIRMAN: If there is no further question, we will move on to E.

MR. YOUNGQUIST: Is it necessary to put after the line 39 the phrase "or requires"?

MR. ROBINSON: You don't think so?

MR. YOUNGQUIST: I don't think so, no.

THE CHAIRMAN: Rule 8-E.

MR. MEDALIE: How does that go?

MR. HOLTZOFF: I don't see why you need that in criminal procedure. This is one of the civil rules, but I don't see that it would play a part in criminal proceedings, and I move to strike it out.

MR. ROBINSON: How about summons, summons by magistrate mailed, or something of that kind?

MR. HOLTZOFF: This does not refer to service of actual process. This refers to papers in the proceedings.

MR. ROBINSON: It refers to the time.

THE CHAIRMAN: Suppose the district attorney wants to send a notice out to some defendant or defendant's attorney in some little town 150 miles away from where the district attorney is, why shouldn't he have the right to do it by mail, and, if he does it by mail, why shouldn't he have the extra time?

MR. HOLTZOFF: He would have the right to do it by mail. There is another rule that covers that.

THE CHAIRMAN: Well, if he does he should have a little more time, shouldn't he?

MR. HOLTZOFF: I never could understand why there should be more time than for a personal service.

THE CHAIRMAN: That goes right back to lawyers' psychology. Something that is delivered by mail.

MR. HOLTZOFF: Well, you penalize the defendant's counsel,

then, don't you? He wants to serve some paper by mail, but he doesn't do it sufficiently in advance. You impose a burden on counsel.

MR. HOLTZOFF: Suppose you were serving a motion. D provides that you must give five days unless the rule otherwise provides. E says if you serve by mail, you must give three days more.

MR. YOUNGQUIST: No. "Whenever a party has the right or is required to do some act or take some proceedings, and the notice shall be served by mail, then you shall have three days."

MR. MEDALIE: What does this refer to? What act is to be done? I cannot visualize this.

MR. HOLTZOFF: This has a real foundation in civil rules, because you have to serve an answer to a complaint or reply to a counterclaim, and additional time is needed for that purpose.

MR. MEDALIE: Well, what are you called on to do in a criminal case?

MR. ROBINSON: May I suggest, Mr. Chairman, that we follow our usual procedure and proceed to determine whether there is anything that does apply, and if there is nothing that it may be stricken out.

THE CHAIRMAN: On the motion of the Reporter, thosein favor say "aye."

Opposed, "no."

9 We will strike unless necessary.

May we adjourn for lunch now?

MR. YOUNGQUIST: I second the motion.

MR. WAITE: Mr. Chairman, has it been decided yet whether

we are going to have evening meetings?

THE CHAIRMAN: That was understood.

MR. WAITE: I am perfectly satisfied with that.

MR. MEDALIE: I think there is a reasonable prospect of finishing by Thursday morning, is there not?

MR. HOLTZOFF: Yes.

MR. MEDALIE: I have arranged my appointments to finish on Thursday.

THE CHAIRMAN: Well, we are willing to have long evening sessions.

MR. YOUNGQUIST: So am I. I am willing to have long evening sessions.

(Thereupon, at 1 p. m., a recess was taken until 2 p. m., of the same day.)

AFTER RECESS

(The Committee was called to order at 2 p. m.)

THE CHAIRMAN: All right, gentlemen.

Rule 9.

MR. ROBINSON: Rule 9 has been worked by Mr. Strine, so I would like to ask him to present it.

MR. STRINE: Rule 9 provides that where the process is a summons, the court may dispense with the presence of the defendant and allow him to proceed by his attorney for the defendant's convenience. It does not prevent the continuation of the trial. We have a suggestion to transpose a few sentences, put the second sentence, beginning in line 5, first.

MR. HOLTZOFF: Then you could condense the introductory words in the second sentence, couldn't you?

MR. STRINE: Yes.

MR. HOLTZOFF: And say "Where the process issued is a summons."

MR. STRINE: Yes.

MR. HOLTZOFF: In other words, you would state the general rule first, and the exception second?

MR. STRINE: Yes. And also in line 10 omit the words "nullify the trial or."

MR. LONGSDORF: What was that change?

MR. STRINE: Line 10, eliminate the words "nullify the trial or."

"Shall not prevent the continuation."

THE CHAIRMAN: I am asking a question out of ignorance. Is noncapital an accepted word?

MR. HOLTZOFF: I don't know. I was going to suggest that

the Style Committee ought to change that.

THE CHAIRMAN: Is it a dictionary word?

MR. STRINE: I think it is.

MR. CRANE: Sometimes they confuse that with other things.

MR. HOLTZOFF: I was going to suggest, there are some cases in the federal statutes where it is optional.

THE CHAIRMAN: Then, as I understand it, we strike out from lines 1 and 2, "in any criminal proceeding where," and in place of "where" substitute the word "If." Then that whole sentence comes at the end of the paragraph.

Line 8, the Committee on Style could operate on the word "noncapital."

MR. STRINE: At the end, I might also suggest "return of verdict."

THE CHAIRMAN: Before "verdict," "the return of the verdict."

MR. STRINE: Yes.

THE CHAIRMAN: Line 10, "Nullify the trial or" should come out.

MR. CRANE: I think that is rather important. In some case where a defendant got ou--

THE CHAIRMAN: I suppose in line 11 if you say "reception of the verdict," we could use the same words in line 8?

MR. STRINE: Yes.

THE CHAIRMAN: In line 11 it is "reception." "Return" is the word, I guess, is it not, rather than "reception"?

MR. SETH: Yes.

THE CHAIRMAN: Are there any further suggestions on Rule 9?

MR. SEASONGOOD: I raise the question, suppose he is sick. It says in noncapital cases where the defendant is not in custody.

MR. CRANE: He can only have it suspended with his consent, you know.

MR. SEASONGOOD: I mean he might rather want to get through with it, and let it go on, even though he couldn't be there.

MR. CRANE: I don't think he can consent in those cases. I don't think he can consent in a capital case, can he?

MR. SEASONGOOD: No, not in a capital case.

MR. YOUNGQUIST: If he were absent because of illness would that make it voluntary?

MR. SEASONGOOD: No.

THE CHAIRMAN: And I think he has a right to be there. And that would not postpone the case.

MR. MEDALIE: Of course, you have a practical way of working this out.

As I recall, the time this came up more recently, about 1939, Judge Campbell of New York was trying a case, the defendant did not like the way it was going and just walked off. They continued the trial. Now, you say here where the defendant is not in custody. Well, now, the defendant thinks the trial is not going very well, he is quite a desperado, and breaks out of the hands of the marshall. I think that case ought to be covered, too. We are dealing with flight, and flight by forcible means would have no more meaning.

MR. YOUNGQUIST: After he has broken away he is no longer in custody.

MR. MEDALIE: During the trial the defendant is either in custody or is not in custody. That is, he is on bail or he is in the custody of the marshall, or the detention house.

THE CHAIRMAN: You would strike off the clause "where the defendant is not in custody"?

MR. MEDALIE: Yes.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Is there any discussion on that?

All those in favor of striking the words of lines 8 and 9, "where the defendant is not in custody" say "aye."

Opposed, "no."

Carried.

MR. HOLTZOFF: You have to substitute for the word "his voluntary absence," or "defendant's voluntary absence.

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: Oh, yes, that is right.

THE CHAIRMAN: All right.

MR. MEDALIE: What about sentence? Did you deliberately leave out sentence?

MR. HOLTZOFF: You cannot sentence the person.

MR. MEDALIE: Why not? You can try him in absentia here. Why can't you sentence?

MR. LONGSDORF: You have to bring him back and resentence him when you get him, if you do.

MR. WECHSLER: How about the plea? Is that covered by this?

MR. YOUNGQUIST: Well, getting back to the point Mr. Medalie made, certainly if a fine could be collected in a defendant's absence, I don't know any reason why sentence could

not be imposed.

MR. MEDALIE: I don't, either.

MR. GLUECK: He may have the right of a showing of mitigation of sentence.

MR. MEDALIE: He has a right to confront his witnesses, too. Why don't we say "to and including judgment"? Judgment, of course, is sentence.

MR. HOLTZOFF: I am just wondering whether or not that is a violation of due process. I don't know whether it is or not, but it is bothering me. After all, this rule is intended in the situation where during part of the trial the defendant walks out, and the trial continues. But when it comes to sentencing--

MR. MEDALIE: It might be risky, yes.

THE CHAIRMAN: I think we had better leave it out.

MR. MEDALIE: I do, too.

MR. CRANE: I have in mind a case where a witness looked very much like a defendant, and the defendant was in the wash room. The judge called the jury back and gave his charge over again. Now, that is the way these things happen.

MR. HOLTZOFF: It happened in one case where one defendant walked out for a few hours, his absence was not noted, then he came back. The question arose whether that nullified the trial.

THE CHAIRMAN: All those in favor of Rule 9 as thus amended say "aye."

MR. WECHSLER: I am sorry, I didn't get the amendment.

THE CHAIRMAN: No, as amended, these various suggestions which I read before, not the last one, which was withdrawn.

MR. WECHSLER: Well, may I have an opportunity to suggest that the arraignment be specifically included?

THE CHAIRMAN: Well, they are, where the summons is the method. Do you want to go on warrant, too?

MR. WECHSLER: Yes. In other words, I would like to see a general rule that a defendant has the right to be present at the arraignment, pleading, and at every stage of the trial and at the verdict and sentence, - not the language, but the substance of that thought, - subject to the exceptions indicated here.

MR. ROBINSON: That came up particularly in matters of officers of a corporation, particularly in trust cases, where on an arraignment day a defendant might have to come clear across the country just to be present for the formality of arraignment, so this was designed where summons was used, and in cases where it was permitted by the court. This is designed to avoid that unnecessary travel. His lawyer must be present, anyway.

MR. HOLTZOFF: Well, Rule 50 covers the same point in cases of processes other than summons, and it seems to me that there is an overlapping between Rule 9 and Rule 50. Perhaps the two rules ought to be combined into one.

MR. ROBINSON: Well, if you will just defer action on 50 until Rule 51 is presented. It is in the hands of the mimeographer, and is to be in our hands later this afternoon.

THE CHAIRMAN: Mr. Wechsler, will you hold your suggestions on that until we come to it in regular sequence, then?

MR. WECHSLER: Yes.

MR. ROBINSON: It is pretty difficult not to have some

overlapping, and for that reason we would like to work the whole thing out together.

THE CHAIRMAN: Have we voted that Rule 9? I think we have.

Rule 10.

11 MR. ROBINSON: Rule 10 begins the rules with respect to district courts. You will recall that at the September meeting the Committee felt that since the administrative office of the United States courts is available, that we should make use, of course, of those services, and in view of the fact, too, that some of the activities are under way in that office and through the conference of the senior circuit judges, we wanted to be sure that our work and theirs would be coordinated. We have in mind we would call on Mr. Tolman to represent the administrative office and ours in working on those rules that affect a court's clerks and dockets, rules 10, 11, and 12, and so I think it would be well at this time, Mr. Chairman, to have Mr. Tolman present--

THE CHAIRMAN: Mr. Tolman, will you come forward.

MR. TOLMAN: This rule is drafted simply to meet the wishes of the committee, as they were expressed at the last meeting.

In the first place, we avoided any direct statement that the district court may make rules, and it was suggested we might put it in this negative way. I don't know whether it will do that or not, but that was our purpose.

The second was to make some sort of rules whereby copies would be readily available, and so for that purpose we have provided that copies of all local rules be sent to the Library

of the United States Supreme Court, and also the libraries of the Department of Justice, and we are admonished to make arrangements for publication of all local rules. I talked to Mr. Chandler, and I have permission to say he will make it and they should be in the office to prevent them, so all members of the bar can have them, and we will try to adjust our appropriations to meet that requirement. However, if the rules are printed by private printers, as they sometimes are, and where the arrangement is satisfactory, and they are not charging too much, we thought we might be able to continue using that method.

MR. YOUNGQUIST: Does this contemplate the original draft of the rules shall go to three places?

MR. TOLMAN: Yes. That is the thought. I suppose it might be made clearer.

MR. HOLTZOFF: It says copies; it does not say originals.

MR. TOLMAN: The Library of the Supreme Court is very anxious to have a complete set of the local rules, and that takes in the corresponding civil rule which requires that copies of all rules and amendments be sent to the Supreme Court. And I thought we might as well state here that the rules go to the Library. The same way with the Department of Justice, which have required that copies be sent to them. I think that it is important for them to have them right away. I have no objection to deleting that.

MR. HOLTZOFF: We will get them anyway, whether it is in the rule or not.

MR. YOUNGQUIST: I was just wondering, you are the litigant in part of those cases, and you get copies, and the defendant does not. I am just wondering whether it has the

appearance of favoritism; just the appearance of it was what I was thinking of.

THE CHAIRMAN: If the copies were sent to the administrative office, will they be more likely to do it?

MR. HOLTZOFF: I think it is a good idea. We will see that they get them.

THE CHAIRMAN: The chance of your getting them are better if they only have to send them to one place.

MR. LONGSDORF: Mr. Chairman, will these local rules, when so filed, be judicial notice before appellate courts?

MR. HOLTZOFF: I have never known of a question to arise. They always are.

MR. LONGSDORF: I cannot tell you right where they are, but I feel sure there are some decisions, old ones, where the appellate courts refused to take judicial notice of the local rule.

MR. ROBINSON: You might keep that in mind and see to it that we do catch that, if it needs to be caught.

THE CHAIRMAN: I don't think there is any real problem nowdays in view of the wide scope of judicial notice. There is judicial notice of so many things.

Well, do you think that would be proper to delete out the reference to libraries?

MR. HOLTZOFF: Yes, I do.

THE CHAIRMAN: If there is no objection--

MR. SETH: Shouldn't the proper circuit courts of appeal be inserted? Shouldn't a copy go to the clerk of the court?

THE CHAIRMAN: Wouldn't the administrative office be sure to send it there?

MR. SETH: I don't know.

MR. LONGSDORF: I know some of the circuit courts have rules requiring district courts to submit their rules.

MR. TOLMAN: I believe that was one of the provisions of the old equity rules. It didn't make any difference. They automatically approved anything. It simply bothered them and therefore we didn't put it in the corresponding rules, civil rules. Mr. Holtzoff suggests that the lines 4 and 5 might as well come out.

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

Any further suggestions on 10-A?

All those in favor of it as amended say "aye."

Opposed, "no."

(Motion carried.)

THE CHAIRMAN: That brings us to 10-B, which we have considered before, and with respect to which we have deleted the last half of line 16 and line 17, reading "and agreeable to the usages and principles of law."

Anything further on Rule 10-B?

MR. YOUNGQUIST: We transferred that Rule 4.

THE CHAIRMAN: It was then transferred and made Rule 4. I am just wondering whether it will fit better where it is.

MR. ROBINSON: That may be.

THE CHAIRMAN: What do you thinkabout that, gentlemen? Isn't it better where it is?

MR. MEDALIE: I think so.

MR. HOLTZOFF: I think it is better where it is.

THE CHAIRMAN: Will someone move that it stay there, then?

MR. HOLTZOFF: I so move.

12 MR. MEDALIE: I second it.

THE CHAIRMAN: It is moved and seconded that Rule 10 be retained in its presence place.

Those in favor say "aye."

Opposed, "no."

Carried.

That brings us, then, to Rule 11. 11-A.

Any question on that?

MR. TOLMAN: This is taken from the corresponding civil rule. That in turn comes from old equity rule, which has its origin in a statute which states courts of admiralty and courts of equity shall be deemed always open.

MR. MEDALIE: Hasn't there been any question of the courts being always open?

MR. TOLMAN: There has been. There apparently was a case back in 1919, I believe, when there was a question raised as to whether an order for a new trial made by a district court between terms was properly granted when there was a local rule of court that the courts should take daily adjournments of its session between terms of court, and the Supreme Court held that that local rule was valid.

THE CHAIRMAN: Wasn't the court of equity the only court that was always deemed open?

MR. TOLMAN: Yes.

MR. HOLTZOFF: There is a lot of delay caused by these rules, isn't there?

MR. LONGSDORF: Mr. Chairman, do you want to add arrangements in Rule 11-A?

THE CHAIRMAN: I am trying to puzzle out why the court should not be open for all purposes. Why should it be limited?

MR. TOLMAN: Would you call the court open when it was not having a formal session?

MR. DEAN: Where the judge is not there but the clerk is there and you want to file a motion, such as for a new trial, is it sufficient to file it with the clerk?

MR. ROBINSON: The latter rule applies that there may be an arraignment.

MR. DEAN: But only before a judge.

MR. ROBINSON: That has to be before a judge.

MR. DEAN: This means, I take it, that the judge need not be there physically in the courthouse, either in chambers or in the courtroom.

MR. GLUECK: Does this cover the arraignment, trial, and sentencing?

MR. TOLMAN: It does. It is rathera strange wording. I think we might stick to the old language.

MR. HOLTZOFF: My notion was we might conform to the civil rule, because this relates to the clerk's office generally, and we ought to have one rule, the civil rule.

THE CHAIRMAN: Anything further?

All those in favor, say "aye."

Opposed, "no."

Carried.

11-B.

MR. TOLMAN: 11-B is also taken from the criminal rule. The exception has been put in for private chamber proceedings in cases under the juvenile delinquency act.

MR. HOLTZOFF: It is a matter of style.

MR. CRANE: The defendant is not required to be present in some trials; he may be absent, but the trial shall be conducted in open court.

THE CHAIRMAN: That is what it says.

MR. CRANE: Yes. It says all trials which require the presence of defendant. Aren't there some trials which do not require the presence of defendant?

MR. HOLTZOFF: It says all trials.

MR. CRANE: I was thinking of proceedings where his presence was not required, but which ought to be in open court. Other proceedings. The court, in other words, is required to conduct proceedings in open court when the defendant is required to be present. Is that so?

MR. GLUECK: This means when the defendant has a right to be present.

MR. TOLMAN: I suppose it would be better to word it that way.

THE CHAIRMAN: All trials at which defendant is required to be present.

MR. CRANE: If he is not required,--

MR. HOLTZOFF: In other words, you can argue a motion in chambers.

MR. CRANE: He is not required to be presentin capital cases--misdemesnor cases--is he required to be present?

MR. TOLMAN: I think he is.

MR. DEAN: We have just provided in a previous rule that where it is by summons it may be by counsel.

THE CHAIRMAN: Why, as a matter of policy, should all

these proceedings in criminal cases be in open court rather than chambers?

MR. HOLTZOFF: Suppose a prisoner is brought in late in the afternoon, and the judge is in chambers. Why should it be required that the judge shall go to open court?

MR. CRANE: You say it must be open court when the defendant is required to be present. Now, certainly, there are certain trials that should be done without the defendant being required to be present.

MR. HOLTZOFF: Why not just limit this to all trials?

MR. CRANE: Now, you have got it; you have got it.

MR. TOLMAN: There is a lot of sympathy in chambers.

MR. ROBINSON: Some motions, I suppose, ought to be in open court, like a petition to dismiss.

THE CHAIRMAN: I go to the other extreme. I don't know why they shouldn't all be required to be done in open court.

MR. HOLTZOFF: When you do that you make it impossible for the judge to hear anything outside of the term.

MR. McLELLAN: Sometimes you have four or five matters coming in. If you are working in chambers it seems too bad to have to go down and open up.

MR. CRANE: I don't see why you say "which require the presence of the defendant shall be conducted in open court."

MR. HOLTZOFF: Why not just limit it that all trials shall be conducted in open court?

MR. YOUNGQUIST: I would limit that. I think the judge has suggested all trials and proceedings that require the presence of the defendant.

MR. CRANE: No, that require the presence of the defendant,

because there are many things that you cannot do in open court.

MR. YOUNGQUIST: How about this: All proceedings that require the presence of the defendant, and all trials shall be held in open court?

MR. MEDALIE: An arraignment requires the presence of defendant. If the judge is decent enough to have it at 6 p. m. I don't know why he should be required to get the janitor and open up, and all of that. All you are dealing with is the defendant's rights, but since you are dealing with the defendant's rights, and the constitutional rights, you don't need to bother. In the normal course, trials will be held in the courtroom, and if the defendant doesn't like it, he does not have to fall back on a rule like this. Those things take care of themselves. Are we afraid the judge is going to be a crook and do something in secret? Many things are done that way by judges in chambers. The newspapers raise a great howl, but what has been done is for the convenience of both parties.

MR. ROBINSON: The incidents you have mentioned are where counsel for defendant is present.

MR. DEAN: The right to speedy and public trial means, I take it, that it is to be held in the open courtroom.

THE CHAIRMAN: The civil rules require that all trials on their merit shall be tried in open court. Other proceedings may be conducted by the judge in chambers, and so forth.

MR. MEDALIE: Where else are you going to conduct? Wherever the judge conducts the trial is the local court. This is not old English law. Anywhere that a trial is conducted is the courtroom.

MR. SEASONGOOD: I think it ought to be in open court.

MR. BURKE: What are the other things that may be done by the judge in chambers without the presence of the clerk or other court officials?

MR. HOLTZOFF: I should think the arraignment of a hearing of a motion.

MR. BURKE: Without the clerk?

MR. HOLTZOFF: Yes.

MR. GLUECK: Who would record?

MR. HOLTZOFF: I suppose the judge could make a record.

MR. GLUECK: Then you get into that difficulty about whether he knew he had the right to counsel, and so on. You remember that difficulty.

MR. HOLTZOFF: Well, then, he has got to make a record.

MR. SEASONGOOD: All you are asking it for is for the convenience of the judge. I think you ought to have it in open court.

MR. HOLTZOFF: It is not only for the convenience of the judge. The courtroom may be locked and the janitor may not be around.

MR. SETH: Mr. Chairman, in lieu of the language which requires the presence of the defendant, I suggest a question which involves the determination of the question of guilt; which is already defined, in open court.

MR. GLUECK: That would rule out, however, a public hearing on the question of sentence. Now, is that desirable?

MR. SETH: I think after he is convicted, it doesn't make much difference.

MR. GLUECK: I think it ought to make much difference.

MR. CRANE: I think all trials should be conducted in

open court.

MR. HOLTZOFF: Isn't the imposition of sentence part of the trial?

MR. CRANE: We consider it as such. I never heard of anybody being sentenced except in open court.

MR. ROBINSON: And you don't want to.

MR. CRANE: And I don't want to.

THE CHAIRMAN: Why aren't we on safe ground if we follow the civil rule, all trials shall be conducted in open court. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials, but no hearing other than one ex parte shall be conducted outside the district without the consent of all the parties.

MR. McLELLAN: I don't think so. I don't think you want to sentence a man--I regard a trial as a place where you resolve the facts and the law, the judge presiding.

MR. CRANE: You can appeal from the verdict.

THE CHAIRMAN: Well, then, would you add "all trials on their merits, and sentence, shall be held in open court"?

MR. GLUECK: Trial on the merits on the civil side might include both the trial of the issue of guilt and innocence, and the result of the hearing in mitigation or relation of sentence may also be a hearing on the merits of the sentence.

MR. MEDALIE: In court.

MR. GLUECK: Yes.

MR. MEDALIE: I don't think that is what you want, is it? I think from the things you have been interested in for a long time, you know the importance of manythings with respect to

sentence that ought not to be in the courtroom.

MR. GLUECK: That may well be. I want the court to consider the data on which he is to act.

MR. MEDALIE: Now, about sentences, there are a number of judges experienced in criminal cases who take sentences very, very seriously, and some of them--well, one of them, for instance, comes to the courthouse very, very early. He invites the man's wife, or his mother, to come into chambers; or his employer.

MR. CRANE: And then goes out and gives him the limit.

MR. MEDALIE: That may be. But I think it is recognized that many things with respect to sentence ought not to be done in the courtroom.

MR. GLUECK: But I think the final act ought to be in the courtroom.

MR. MEDALIE: All the judge has to do is to walk in and say "Ten years." All the other things that are important can be done in chambers.

MR. CRANE: I would hesitate to ask trial and judgment of sentence, because I never heard of any sentence of judgment being imposed except in open court. In fact, it is so much a part of the trial--as I say, you cannot appeal, you cannot make a move, until you get a sentence.

THE CHAIRMAN: If you have a civil rule, and we don't have one, the first thing you are going to do is to get out to the lawyers to see what we left out, and then figure out why we left them out.

14 MR. SEASONGOOD: The essence of criminal procedure ought to be open, to my mind. You ought to hear the arguments, and

everything else these people can say in process of criminal justice. And I don't like this chambers business.

MR. MEDALIE: We have elaborate probation systems in a few places in this country. Some of them are very well worked out. For example, in New York--you have some in Kings that I am not raising local questions--there are other places in the country; that is done tolerably well in Boston, is it not?

MR. GLUECK: Tolerably.

MR. MEDALIE: The subject is so personal to the defendant, his family, the people he works with, the discussion with the probation officer where the judge gets so much of his information, those things ought not to be for public consumption. Most people don't want it for public consumption; and social workers generally don't want it for public consumption.

MR. GLUECK: On the other hand, it is also deemed desirable for the judge to put himself on record as to the reasons why he sentenced as he did, evento motivating his opinion in a special opinion.

MR. MEDALIE: Well, I don't know that that is desirable. And I don't know that rationalizing does any good. It is simply something to pick apart, whether it is a lenient sentence or a stiffer sentence.

MR. SEASONGOOD: You don't want someone to whisper to the judge and then he gives a life sentence. I think it ought to be a public act.

MR. MEDALIE: I don't thinkso. That is not the experience of people who have had something to do with the prosecution.

MR. SEASONGOOD: I am speaking of the common people.

MR. MEDALIE: The public does not get suspicious about

judges who do that.

MR. SEASONGOOD: Oh, yes.

MR. MEDALIE: I don't thinkso. The judge will say in open court, "Now, I have seen the relatives, I have had a talk with the employer, I have talked this over with the probation officer, and I think so and so." Now, that all says of record that it has been done in chambers, and without a public hearing, and it would be a terrific loss if we impose on judges a compulsion to make public what ought to be private.

I will give you an example of one thing that caused a lot of distress. As a result of the Hines' trial, the probation officer's report was submitted and then published in the newspapers. It caused terrible distress to the man's family because it told all about the defendant's mistress. That never should have happened. It is all right to do that to the defendant. It is not right to do that to his wife or those children.

MR. CRANE: We ought not to particularize too much. We have a judge there in New York who is very fine, and he looks the part, and he explained his sentence once by saying this: "When you appeared before me I knew you were guilty, and I told you if you were convicted I would give you the limit. You took your chances and you lost." He was reversed. And he was reversed on the ground that that was a species of judicial gamble.

MR. SEASONGOOD: They couldn't have reversed it if he had said that all in private, and just said, "This is your sentence."

MR. CRANE: But I don't think we need to be too exact about this, because I think the practice has been everything

is conducted in public except perhaps this probation matter.

MR. GLUECK: I don't approve of reading the probation report in public, by any means.

MR. CRANE: I tell you how that probation system comes in. Where I think it is a very valuable thing indeed is in the suspended sentence. You get the history of a man and his family and everything connected with him, and much of it is given to the judge in his chambers, and the judge suspends sentence. A suspended sentence means he can send for him any time, any time, on just a whim, and send him up.

MR. HOLTZOFF: That isn't the federal system.

MR. CRANE: No. They criticized it one time, and it was found out there was just one percent of those men with suspended sentence who ever came back. And you would be surprised at the young men in New York today who hold honored positions who had 18, 19, 20, or 21 had sentences suspended on them. I talked to the president of one of the big companies in New York, and he told me about something that happened 30 years ago.

You have to leave something to the trial judge, and if he is the kind of man the public is suspicious of, you had better get him off the bench.

MR. MEDALIE: I have seen these things. I think just as Judge Crane says, we ought to leave these things to the judge.

MR. GLUECK: I was going to say, would you object to merely stating what is already necessary, all trials shall be conducted in open court? All other acts or proceedings may be done or conducted by a judge in chambers.

MR. MEDALIE: Well, the imposition of a sentence is always

in court, and should be; but the court is wherever the court holds the court.

THE CHAIRMAN: Yes, but there is a difference between that and just saying--if it is open court, other people have the right--

MR. MEDALIE: No,it isn't. In New York we have some cases, old ones, in dealing with the question of public trials, that say the judge has the right in certain cases that attract a morbid public interest, he has a right to close the courts to everybody but litigants or their counsel. And that should be so.

MR. YOUNGQUIST: I was going to make that suggestion with respect to the preceding clause. There are cases where obscene and lascivious acts are involved which should not be
15 washed in public, where the public should be excluded.

MR. CRANE: You haven't got to put that in the rule. Leave that to the judge.

MR. YOUNGQUIST: If you say that all trials must be conducted in open court, then we leave the judge no recourse, and I think we must.

MR. CRANE: You have the same thing in the civil cases, Blank against Blank, a relative of the gentleman right down here in Washington, and one of the worst cases you could imagine. He gave an anonymous name, and it was not heard in open court. But it was a civil case between man and wife.

MR. GLUECK: Well, I know of an instance where that happened, it was not only in open court, but the court was crowded with a lot of hangers-on, and the judge even tried to help the district attorney out in this rape case involving a

girl of twelve. This poor girl sat up on the stand in front of all of us and described minutely just exactly what the accused did, and so forth. It was distressing. And, of course, I suppose in the long run we must leave that to the discretion of judges in the definition of open court.

THE CHAIRMAN: We have in my State trial in open court, and the judges control that by saying, "We will let a certain number of people in," and the sergeant-at-arms controls that. Children and people who have no business there are excluded. And as offsetting the danger of private trial, I think that he ought to use some discretion.

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Mr. Medalie. Isn't this intended only for the protection of the defendant -- this business of having a public trial?

Mr. Youngquist. He has that right by the Constitution.

Mr. Medalie. The defendant has that right by the Constitution, so you need not put it in for him. The only reason for putting it in is that the court shall be compelled to hold a public hearing in which the public is admitted, except in the morbid cases, where admittedly the court has the right to exclude the public.

Mr. Holtzoff. I can conceive of an espionage case involving national defense secrets where you might want to exclude the public.

The Chairman. The judge will know how to take care of that.

Is there anything else intended other than the presentation of the trial and the actual imposition of the sentence?

Mr. Medalie. I should think that would cover the whole thing.

The Chairman. Does that cover it?

Mr. McLellan. I hope that it does, and I do not know that it does not, but I do not see any necessity for the rule at all. A defendant, if he wants it, is entitled to a public trial, to a trial in open court. He will get it whether we put it in the rules or not.

The Chairman. I have in mind two factors on that. No. 1: The people who parallel our rules with the civil rules will ask why they were not paralleled.

Secondly: I have in mind the gentlemen in Congress who will have to approve the rules before they become effective,

and they will look through them from beginning to end to see if there is any place where we have not done anerything that we should do to protect the interests of the defendant.

Those are the two things that are bothering me.

Mr. McLellan. May I ask you something? You get a rule here and then you get a question as to what is open court.

Suppose a judge is sitting in his chambers at night, doing some work, and the District Attorney calls up and says, "They want to take a man away tomorrow. They have others going. Will you sentence him?"

I say, "Yes, I will sentence him. Bring him in the room adjoining my office. The doors may be open, the reporters may be notified, the clerk in the office may come in, but I am not going down three or four flights of stairs and walk into a court room about it."

Is that a sentence in open court?

The Chairman. There is no question about it.

Mr. Holtzoff. I do not think "open court" necessarily means the court room.

The Chairman. That is covered, if I can give it to you, by the civil rules. The civil rules say that they shall be conducted in open court and, so far as convenient, in a regular court room.

Clearly, there you would not be required at 6 o'clock at night, to take an elevator and go downstairs and summon a half dozen people; but the very fact that reporters are called in, and the clerk, and the marshal, and whoever is around, renders that an open court.

Mr. Holtzoff. Why should not we borrow that language?

The Chairman. I think we should. That is why I am suggesting it.

Mr. Youngquist. We decided at the last meeting to eliminate that.

Mr. Glueck. Because the purose here seems to me to be to stress that there are many things that can be done not in open court, why not omit the first sentence and say, "acts or proceedings other than the trial and imposition of sentence may be done," et cetera, "in chambers."

Mr. Holtzoff. If you do that in juvenile delinquency cases --

Mr. Glueck. Isn't it understood that this pertains only to adult cases?

Mr. Holtzoff. Oh, no. I think that express exception is very necessary, because otherwise you would have to bring juvenile delinquency cases into open court.

The Chairman. I think we might well make this proviso in the beginning: "With the exception of juvenile delinquency," and then take substantially the language of the civil rule.

Mr. Glueck. Why not make it read: "All trials shall be conducted and sentences pronounced"?

Mr. Wechsler. I would like to come back to the question of arraignment, so that that question may be put. I realize that there is a division on it. I would like to be able to record myself in favor of arraignment in open court.

Mr. Holtzoff. Wouldn't you create a difficulty for a defendant? Sometimes he might postpone arraignment over a week end.

Mr. Wechsler. Unless the defendant were represented by

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counsel, I would prefer to create that difficulty than to create the other difficulties that I think may be created by foregoing arraignment in open court.

Mr. Holtzoff. Going back to this, in addition to "shall be held in open court," you ought to add, "insofar as practicable in open court," as stated in the civil rules, because that will do away with the possibility of someone saying "open court" is the court room.

The Chairman. Let us get an expression of opinion on Mr. Wechsler's motion, which is to include arraignment in open court. Is there any discussion of that suggestion?

Mr. Youngquist. I cannot see any need for it. That is the only thing.

Mr. Medalie. All that can be involved there that is of any consequence to the defendant is the fixing of bail, isn't it?

Mr. Wechsler. In a case where the defendant is represented by counsel, I agree that there is no need for it. In a case where the defendant is not represented by counsel that seems to me a case in which the court should be and is under an affirmative duty to explain the charge to the defendant and to advise him of his right to counsel and to offer to provide counsel for him. I think it is a guarantee that those things will be done in every case and become matters of record, as they should become matters of record, and it ought to be done in open court for that reason.

The absence of the clerk means in effect the absence of an actual record.

Mr. Medalie. Let me suggest a simple case. There are

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many petty offenses where a person is arrested at unseemly hours. His arraignment ought to be possible. His release, even on nominal bail, ought to be possible. By insisting that arraignments be made only in open court, this large number of defendants who are not criminals are subjected to unjust inconvenience. It ought not to be done.

Mr. Waite. I think there is an uncertainty as to just what is meant by "arraignment." I have thought of it as something quite different from what Mr. Medalie is now talking about.

Mr. Wechsler. So have I.

Mr. Holtzoff. Arraignment is pleading to an indictment or to information.

Mr. Wechler. That is what I thought. I think he meant something else.

Mr. Medalie. I have used it in the popular sense in which it is used in the court house. You are quite right in making the distinction.

However, let us say a man has been brought down from Poughkeepsie to New York, and he is brought down on a Saturday afternoon on a matter so unimportant except that it violates a federal statute. He ought not to have to come to court --

Mr. Waite. You are now using "arraignment" in the technical sense.

Mr. Medalie. He can use both, if he wants to.

Mr. Waite. We are discussing whether it should be in open court or not. If by "arraignment" we mean the kind of thing you are talking about, which I have never considered arraignment, I might vote one way. If by "arraignment" we mean what the

word technically and properly used means, then I would vote the other way.

We have to decide what we are talking about before we vote.

Mr. Medalie. Take the case I am talking about. A man violates a technical federal statute and a government man arrests him and the man prefers being brought before the judge on a Saturday afternoon to have an arraignment then and there in his chambers. He is told what the charge is, he is told what the indictment and the information contains, and he says, "I want to plead guilty. Please fix bail and let me out."

That is an arraignment.

Mr. Waite. There has been an indictment?

Mr. Medalie. Yes.

Mr. Waite. Yes, I would call that an arraignment.

Mr. Medalie. I think under those conditions -- and there are many such cases -- it is to the interest of the defendant that there be an arraignment and that he does not wait for the rig marole of a court session. He may be in jail. That is one thing.

The other thing that is equally important to him is his personal convenience. He ought not have to come down a distance of 60, 80, or 150 miles to the federal court house again. It is not worth it either to the Government or to him.

Mr. Waite. Why would he be coming down again? He would come down especially to be arraigned, would he not?

Mr. Medalie. Yes. Let us get this situation. He has been arrested and he is brought in before a judge. He does not want to be released on bail and then come back two days later to plead to the indictment.

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Mr. Waite. But he cannot plead unless he has been indicted.

Mr. Medalie. Say he has been.

Mr. Waite. You mean arrested after the indictment?

Mr. Medalie. Yes.

Mr. Waite. Oh, yes.

Mr. Medalie. There are many such cases. He ought not to have to come twice.

Mr. Wechsler. I agree that there are cases where it is advantageous to have that occur in chambers, but I do not see how you can reach those things without at the same time freeing a system from a formal inquiry which in the great bulk of cases seems to make for protection of a defendant's rights.

Mr. Medalie. As a matter of convenience to the courts and to the judges, most defendants are formally arraigned in a court room. Obviously the judge does not want to have his chambers overflowing with defendants and with marshals and with government agents, so actually most of that -- almost all of that -- takes place in the court room.

There is not any danger of anything hidden or surreptitious, because a record has to be made -- that is, a plea has to be entered -- and it is in the first book, which is in the docket.

I do not know what public interest is furthered by insisting that in all cases it must be in the court room.

Mr. Waite. I have in mind an Illinois case that came up not so very long ago. The defendant asked leave to withdraw his plea of guilty, and in the hearing he contended that the judge had persuaded him to make that plea of guilty in an improper way.

Now, if you can have your arraignment in chambers you might

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have a lot of questions about that sort of thing, as to just what the judge said and what he did not say.

Mr. Medalie. I am aware of cases where defendants have made that their claim for the withdrawal of a plea of guilty, on the ground that they were misled in open court by both the District Attorney and the judge. Nothing stopped that claim.

Mr. Waite. But at least, the point is, you have a little more evidence as to what did transpire.

Mr. Medalie. I think what is involved there is that the sum total of such cases against the unnecessary inconvenience to a considerable number of people makes it unnecessary to make that provision and create that other inconvenience against the occasional case. Now, I do not believe that in a district court, say in the Southern District of New York, which is a very busy one, and it has a tremendous number of criminal cases, you get more than one or two claims of that sort during the course of a whole year, if that many.

Mr. Holtzoff. Mr. Chairman, I would like to add a comment to the suggestion made by Mr. Wechsler on the question of protection of defendants. It seems to me that the defendant can be fully as well protected by a proceeding in chambers as he can by a proceeding in open court. Of course, there has to be a record made.

There is another rule here that provides for making a record on the question of counsel, and the fact that the arraignment takes place in chambers when it does would not eliminate the requirement of keeping that record.

Mr. Wechsler. That means a record is made --

Mr. Holtzoff. The record can be made right in chambers.

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The judge can make the record, or have his secretary make it, or he can send for the deputy clerk or the clerk in chambers.

Mr. Wechsler. The rule as it stands does not require the presence of the clerk or other court official.

Mr. Holtzoff. I suppose the judge's secretary is just as competent to make the record.

Mr. Medalie. So is the judge.

Mr. Holtzoff. So is the judge.

Mr. Medalie. I have seen many records made by the judge, who picks up the indictment and scrawls something on the back of it and puts his initials there. It is just as effective as a notation made by an official more painstakingly in a large book.

Mr. Holtzoff. As a matter of fact, those are better, because we found many years ago there were a good many sentences recorded by court clerks that were incorrect, and we adopted a rule that required the judge to sign the sentence.

The Chairman. We have a motion by Mr. Wechler, seconded by Mr. Waite.

Mr. Waite. I did not, but I will.

The Chairman. With respect to arraignment in open court.

Mr. Burke. I thought he coupled with his observation the question of whether the respondent was represented by counsel or not.

Mr. Wechler. I did, sir.

The Chairman. To include in this proposed rule arraignment when the defendant is not represented by counsel.

Mr. Medalie. May I say a word as to that?

The Chairman. Surely.

10m

Mr. Medalie. I think in the type of case I referred to --

The Chairman. A migratory bird case?

Mr. Medalie. Yes. A man is a fool to waste his money on counsel.

The Chairman. You have the motion. All those in favor of it say "Aye."

Mr. Holtzoff. What are we voting on?

The Chairman. We are voting on Mr. Wechsler's motion to include in those things that must be done in open court -- arraignment where the defendant is not represented by counsel.

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

The Chair is in doubt, largely because of the noise on my right.

All in favor of the motion raise their hands. There are eight in favor.

Opposed, six. It is eight to six. It is carried.

Mr. Medalie. I think you will find the bar is going to think we were very impractical in doing this.

The Chairman. It is tentative. There is still a chance to repent.

I take it that the rule will then read about in this form, if the amendments that have been discussed are acceptable:

"Except as otherwise permitted by the Act of June 16, 1938, chapter 486, section 3, 52 Statutes 765 (U. S. C., Title 18, section 923) relating to juvenile delinquents" --

Mr. Holtzoff. That ought to be "persons charged with juvenile delinquency." A person is not a delinquent until he is convicted.

The Chairman. That is what the statute relates to, however.

Do not change it.

(Continuing) "all trials upon the merits" --

Mr. Glueck. Wouldn't you begin with "all arraignments"?

The Chairman. "All arraignments and all trials" --

Mr. Glueck. Pardon me. "All arraignments where the defendant is not represented by counsel, trials" --

The Chairman. 'And all trials shall be conducted and sentences imposed in open court."

The second sentence will read just as it is.

Are there any remarks on the motion?

If not, all those in favor say "Aye." Opposed, "No." The motion is carried.

Rule 11(c).

Mr. Glueck. May I raise a preliminary point, Mr. Chairman?

The Chairman. Surely.

Mr. Glueck. I was wondering whether, for the benefit of the final shot we will take at the whole business, it would not be wise to record a division on all votes, so that we would see, as we glanced down the list at six-to-eight votes, and so on, that that is the thing we would focus our heavy artillery on?

The Chairman. That is the reason why I stated it.

Mr. Medalie. I would like to reserve the privilege, on this particular thing on which we just voted, of preparing a minority report.

Mr. Glueck. I thought it might help us later on. Months may pass. If we had a list which showed a practical unanimity on one hand, then we could regard that as practically finished with except for editorial revision. Then we would get busy on

the matters that we are really divided on.

Do you think that might be a good idea?

The Chairman. I think it is a good idea. Mr. Medalie expressed a desire to file a memorandum with the committee.

Mr. Medalie. Surely.

The Chairman. I take it there is no objection?

Mr. Medalie. That is, if you finally adopt that provision as to arraignments.

I would rather file a memorandum than have some member of the bar ask me, when these rules are promulgated, "Haven't you fellows any practical sense? How do you think justice is administered?"

I want to be able to say that "I told you so."

The Chairman. We have another difficulty here. As chairman I know I have not any right to vote, but I notice that the reporter does not vote. I think he as a member of the committee has a right to vote and should vote.

Mr. Youngquist. Aren't you a member of the committee, Mr. Chairman?

The Chairman. I think I am, but I did not know if I had the right to vote.

Mr. Medalie. You have a right to vote.

You have brought up subdivision (c).

Mr. Youngquist. Before you go to (c), I suppose that (b) now will cover the cases where a man is arraigned and sentenced on an information where he waives a jury and pleads guilty in order to get the thing out of the way and begin to serve his time?

Mr. Holtzoff. Yes.

Mr. Medalie. Or pay his two dollars.

Mr. Youngquist. The case where the information and the waiver of jury trial is usually used is the case where the man has been before the Grand Jury, is held in jail, knows he is guilty, and wants to begin to serve his time. That is the kind of case I am talking about, but that, I think, will be covered by the rule as it now stands.

Mr. Glueck. Does not the term "trial" include the plea of guilty?

Mr. Holtzoff. No. The word "arraignment" covers this.

Mr. Chairman, you were going to adopt the last clause of the civil rule.

The Chairman. No; this last sentence here.

Mr. Holtzoff. I mean the last clause --

The Chairman. That is right.

Mr. Holtzoff. No; there is more there.

Mr. McLellan. Is that the one about in the court room?

The Chairman. What was your question?

Mr. McLellan. I am wondering whether Mr. Holtzoff is talking about an omission in reference to open court, in a court room except when inconvenient, or something of that kind? Is that the thing you have in mind?

Mr. Holtzoff. Yes.

The Chairman. The words in the civil rules are "And so far as convenient, in a regular court room."

Howard
fls

That was understood, I think, to be approved.

Are there any questions on (c)? That parallels the civil rule.

Mr. Medalie. Does the second sentence meet anything that actually happens in criminal cases?

Mr. Holtzoff. Yes.

Mr. Medalie. What?

Mr. Holtzoff. We have one district in the Middle West where the district judges have taken the position that they may not sign an order or even hand down a decision if they are physically present in a division of the district other than the division in which the case is pending. That has created a lot of delay and a lot of difficulty.

Most judges do not accept that interpretation, I venture to say. It is a wrong interpretation, but they do interpret their authority that way. That is why it is useful to have the phrase "within or without the district."

Mr. Medalie. That is not what I was referring to. In subdivision (c) --

Mr. Holtzoff. I beg your pardon. I thought you were talking about the second sentence.

Mr. Medalie. I will just tell you what I mean. The second sentence of subdivision (c) provides for "proceedings in the clerk's office which do not require allowance or order of the court."

What I am asking is, What sort of situation is that? I do not know of any criminal cases, or, at least, I can't think of any, where that would be applicable. I know that happens in civil cases, but I do not know how that happens in criminal cases.

Mr. Holtzoff. In many districts the clerk takes bail.

Mr. Medalie. Does he?

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Mr. Holtzoff. In a good many cases.

Mr. Medalie. Physically?

Mr. Holtzoff. No, but he takes it after the judge fixes it.

Mr. Seasongood. It says "which do not require allowance."

Mr. Medalie. It says motions "are grantable of course by the clerk."

What kind of motion do you know that is "grantable of course by the clerk" in a criminal case?

The taking of bail is nothing more than receiving a deposit either of a paper or of money or of security, but what motion is "grantable of course by the clerk"? I know of none.

Mr. Youngquist. I have noted the same question on my copy. I could not think of anything the clerk could have to do with this in a criminal case, and I do not think it looks well in the rules.

Mr. Medalie. That is right.

Mr. McClellan. Would it cure it any if you left out "all motions, applications, and other," and say, "all proceedings in the clerk's office"? Would that cover this bail business?

Mr. Medalie. I do not think you need it, because clerical acts can be performed by the clerk without judicial action or without requiring the rule, just like the making of entries in the book.

Mr. Youngquist. I move, Mr. Chairman, that the last sentence of (b) be stricken, and if the reporter finds some use for it let it be later reconsidered.

Mr. Glueck. I second it.

The Chairman. You have heard the motion. All those in

favor say "Aye." Opposed, "No." The motion is carried.

That takes us to Rule 12.

Mr. Youngquist. I have a notation on Rule 12, Mr. Chairman. So long as we have the administrator's office and the Attorney General, we do not need Rule 12.

Mr. Medalie. I do not think we need Rule 12.

Mr. Glueck. Isn't that a matter of the administrator's office sending memoranda to the different clerks?

The Chairman. May we pass that until Mr. Tolman comes back? He is out on the telephone. May we pass 12 and 13 for the moment and go on to Rule 14?

Mr. Robinson. This deals mainly with the form of indictments and informations. You will recall that it was decided at our last meeting that instead of trying to catalogue in a rule the essential parts of an information, we should have the rule stated generally.

As You will see, it is when you come to the chapter on indictments and informations that you have forms to supplement or, rather, to illustrate the rule.

Clearly, in that connection, it would be desirable to include what the civil rules included in civil rule 84, pointing out that forms contained in the Appendix of Forms are indicative and illustrative rather than controlling or mandatory.

That is the object of this general rule. There are still, as you know, in this first chapter, which is devoted to general proceedings --

The Chairman. I notice the language of this rule is more modest than the language of rule 84.

Mr. Robinson. In one of our conferences in the reporter's

research staff it was decided that those words "simplicity" and "brevity" were a pious wish and for that reason should be dropped.

Do you know about that, Mr. Longsdorf?

Mr. Longsdorf. I think you took my words. I have used them once or twice. Pious wishes are not wrong.

Mr. Robinson. Do you have any objection to restoring it to the way I had it?

Mr. Longsdorf. Not a bit.

The Court. That keeps the language of Civil Rule 84.

Mr. Robinson. I will put it that it is the wish of the Committee that rule 84 be incorporated as rule 14.

The Chairman. I merely raise the question. I would like to have the thoughts of the Committee on it. Have you the language of the Civil Rule before you?

Mr. Wechsler. What is contemplated in the way of forms? That those forms that are included in this draft are used or that there shall be a fairly complete set of forms at the end?

Mr. Robinson. The present draft includes a set of forms which you find tabulated. You notice that form page 1 of that appendix gives you a form which is annotated on pages 2 and 3, with regard to each allocation and the form of indictment. That is placed there for your consideration.

When we come to the rule on indictments and informations, chapter 3, rules 30 and 31, we will have to determine the matter of the extent to which the form shall be used supplementing the rule.

Mr. Wechsler. May I suggest then, Mr.Chairman, that we pass over this rule 14 until we discover what part forms actually play

in the finished product?

Mr. Robinson. Well, I can say as a general matter that our present policy is this: that there will be just as much a resort to forms in criminal rules as there is in the civil rules.

In the civil rules they have a rather complete series of forms, but, of course, the statement is repeated that it is to be understood that those forms are not binding but are merely illustrative. That will be our plan now, subject to instructions from the Committee to the contrary.

Will that help now? Do you want specimen forms for each thing before you would feel that rule 14 can be passed on?

Mr. Wechsler. No. My only thought was that, depending on how complete the forms are, when we know how complete the forms are we will be in a better position to know whether they should be referred to in the rules at all.

Mr. Waite. Are you going to have a permissive rule to the effect that indictments may be in accord with the following forms? This rule just says that these forms are not obligatory. There is nothing in here that I see that says those forms shall be used.

Mr. Robinson. I think that clause you speak of should be written into the rule on the contents of indictments and informations, and I wish that you would suggest it.

Mr. Waite. It is not in rule 30 at present.

Mr. Robinson. Well, you will appreciate the fact by this time, no doubt, that the plan of farming out these rules and having a good many people work on them has led to some adversities and rearrangements that will have to be taken care of.

Mr. Crane. Would we think so well of that nice short form

6 that you can put in your vest-pocket?

Mr. Robinson. I think you will be pleased with it. We have a short form, and the Mimeographing was being finished on it this morning.

Mr. Chairman, as I understand it, the wish is that we defer any further consideration of rule 14 until we have forms.

Mr. Youngquist. I suggest that 14 stand, and then we come back to it, if necessary, until we get the form.

The Chairman. You so move?

Mr. Youngquist. Yes.

Mr. Holtzoff. I second the motion.

The Chairman. Is there any further discussion?

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

Of course, this is all purely tentative.

Now that we have Mr. Tolman back, may we go back to rule 12? Will you outline this rule 12, Mr. Tolman?

Mr. Tolman. We had some question about just exactly what we should propose to the Committee on the subject of books kept by the clerks, and we decided that the only subject that could appropriately be regulated by rule was the one relating to dockets, so this rule is confined to the subject of dockets.

Of course, the clerks keep a great many other records, but they are all so intermingled. The minute books are not separated as to whether they are civil or criminal, and the order books are usually kept together, and the indices are in such a state of flux at the present time that, all in all, we thought perhaps it would be best not to have too much regulation.

The rule we have here on the clerk's criminal docket is

7 modeled on the civil rule corresponding to it. We have tried to make it so that every proceeding that is reported to the court will be entered in the clerk's criminal docket. That would include any case in which the defendant is held to answer in the District Court, even though an indictment or information may not yet have been filed.

We have tried to make the specification that what the docket is to contain is general, but to include all the more important things, and also it will give the judge discretion to ask that other things may be included.

The form and the style docket have been left in the discretion of the administrative office.

We are now working with the clerks of court regarding the types of dockets that they keep and making some improvements, and we find that it takes a long time and that it is a very difficult thing to do.

We feel probably it is better to let it work along slowly than to do everything all at once. There is a good deal of difference in districts. It may be that no uniform style of docket is possible.

On this general subject of books kept by the clerk and the type of clerical work that is done in the clerks' offices, there has been a very careful study made by the Bureau of Administrative Management -- the Division of Administrative Management in the Bureau of the Budget -- and they have made a written report and a number of detailed recommendations. Those recommendations are the basis for our discussions with the clerks.

We are trying to work slowly toward accomplishing them, or such as them as seem to be practicable. In the meantime our

principal hope is that you won't make rules that will be too hard and fast on these subjects.

Mr. Holtzoff. Somebody made the suggestion, while you were out of the room, that even this was too much and that we should leave the whole matter to the administrative office.

Mr. Tolman. It might be possible.

Mr. Youngquist. I feel very definitely that that is the job of the administrative office and not the job of the advisory committee or the Supreme Court to detail the manner in which a clerk shall keep a record in his office.

Then, too, if we embalm these rules, or if the Supreme Court does, you may find later that it is advisable to use some other method, and you would have to get an amendment of the rule.

I imagine that the administrative office would rather let that matter be left out.

Mr. Tolman. I do not know exactly what Mr. Chandler would say to that, but I think he would sympathize with that point of view.

There is perhaps only one advantage that I can think of in having a rule on this subject, and that is that we will have very strong sanction for asking the clerk to keep records of all criminal proceedings before them.

Mr. Holtzoff. Do you need that sanction?

The Chairman. I think that is more than offset by the danger of becoming fixed and not susceptible to change.

Mr. Medalie. Furthermore, we are not expert on this. It requires a lot of study to be able to say what is a good method of keeping records. We will never know without a great deal of

9 study, and we ought not to pretend to be expert when really we are not.

Mr. Tolman. I will be glad, if you want to take that action, to report it to Mr. Chandler and see if he thinks that there is anything at all that he would like to have done by rule, and if he can't think of anything, I will report that back to you, if that is agreeable.

The Chairman. It is moved and seconded that tentatively rule 12 be dropped.

Are there any remarks? If not, all in favor say "Aye." Opposed, "No." The motion is carried.

Rule 13 deals with stenographers.

Mr. Tolman. I think on this subject probably Mr. Holtzoff is more qualified to speak than I am. No rule was proposed on the subject. There is in the Civil Rules a rule dealing with the subject of stenographers that provides for the appointment by the Court for the official court reporters, who are to be paid by litigants.

The Judicial Conference at its last session approved legislation that would establish for all Federal courts a unified and adequately financed system of salaried shorthand reporters, which is the thing that the Federal courts now lack.

Mr. Crane. What provision are you going to make? I think it a terrible thing that you can have a trial anywhere without any record to protect the rights of the defendant.

Mr. Tolman. I think that everyone agrees with Judge Crane on that. The question is whether it would not be better to wait for a little while, to see whether that legislation won't

8 move along. If it looks as if it might bog down, we may have

RO to do something about it.

Mr. Crane. Is it in Congress?

Mr. Tolman. I think it is before the Bureau of the Budget, on the question of whether the President approves of it.

Mr. Holtzoff. The bill has been drawn and was drawn by the administrative office in cooperation with the Department of Justice, and it has been approved by the Judicial Conference. It has been approved by the Attorney General. We are planning to submit the bill to the Congress, but, in accordance with the usual procedure, before we can do that we have to secure the approval of the Bureau of the Budget, and it is now before the Bureau of the Budget. As soon as the Bureau of the Budget acts, we are planning to submit it to the Congress.

Mr. Crane. They have not a surplus.

Mr. Dession. Does the bill provide for a record in all cases?

Mr. Holtzoff. Yes. The bill is a good deal like the law in existence in most states. It provides for a salaried reporter, who will report all trials.

Mr. Crane. I did not catch that.

Mr. Holtzoff. The bill provides for a system of salaried reporters, who are required to attend and report all trials.

Mr. Crane. Civil and criminal?

Mr. Holtzoff. Yes, civil and criminal.

Mr. Dession. To take it down in shorthand?

Mr. Holtzoff. Yes. Then any party desiring to get a copy of the transcript, for the purposes of appeal or for some other purpose, pays just for his copy.

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There is also another provision that if a defendant in a criminal case is found to be impecunious, he may receive a copy of the transcript for the purpose of an appeal without charge; and in that case the bill provides that the Government shall pay the reporters for the copy. So that an indigent defendant is very well protected under that bill.

Mr. Crane. Have you any general idea what that means in expense to the Government?

Mr. Holtzoff. It means somewhere in the neighborhood of a half million dollars, probably. I do not know exactly. The financial offices of our department are at this very time making a computation for the Bureau of the Budget as to how much it will cost, but I think it will probably run in the neighborhood of a half million dollars, more or less, for the entire United States.

Mr. Seth. But the litigants pay five dollars more for each suit filed. Instead of paying five dollars, they pay ten. That would make up for some of it.

Mr. Seasongood. Why not have a rule on it and then take it out if the law is passed?

Mr. Holtzoff. If you have a rule on this, the rule will be very much limited, because I do not suppose that by a rule of procedure the Supreme Court could create an office and provide that the person holding office shall receive a salary. It would take legislation to go that far.

Mr. Robinson. Are you sure of that? We have had the same question on the matter of the public defender, the extent to which we can fix our rules so that they will apply if and when the public defender system is created. Here it is a question of

what needs to be done. Perhaps by a little preparation, even if there should be action one way or the other, it might be well to take care of the situation.

Mr. Holtzoff. But we will need no rule on the subject if salaried court reporters are provided for.

The Chairman. If they do not provide for salaried reporters, ought we not to adopt some such rule as the rule contained in the Civil Rules?

Mr. Holtzoff. I think so, but I think we might leave it until the next session.

The Chairman. Do you make a motion to that effect?

Mr. Holtzoff. I do.

The Chairman. It has been moved and seconded that we leave this subject until our next meeting.

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

Mr. Crane. I feel quite strongly on that, and every Federal judge does, I think. I think the time has come where the practice should be what it is to a great extent in the East. There should be a system of having a stenographer there to give some dignity to a trial. We are talking so much about fighting and dying for freedom and liberty. We should be very careful that that freedom and liberty are something that are orderly and in accordance with justice, and I think that this is one of those little things that were overlooked, and an innocent defendant might suffer from it.

I hope it won't be passed indefinitely and forgotten and left entirely to the rule in effect.

Mr. Holtzoff. The Department of Justice is pressing the

legislation, and in his Annual Report the Attorney General makes mention of this subject in rather emphatic language and recommends the enactment of the legislation. The AnnualReport was issued very recently.

The Chairman. That takes us to Rule 15.

Mr. Glueck. I move that that rule be pushed back somewhere to Rule 1, perhaps to be consolidated, because it seems to be of the same type of subject matter as the statement regarding construction, definition, and application in Rule 1.

Mr. McClellan. I second the motion.

The Chairman. It has been moved and seconded.

Is there any discussion? The motion is that the rule, if possible, be made part of Rule 1.

Mr. Robinson. May I ask this question in connection with that? I take it that our draft here, where it seems proper to us, should follow along with the customary order of drafting statutes, or, in fact, Rules of Civil Procedure, so that Rules 15 and 16, namely, title and citation and effective date, will come pretty well toward the end at least of that chapter, which is devoted to the general topics.

Mr. Holtzoff. I think that ought to come at the very end of the rules or at the very beginning of the rules.

Mr. Robinson. Well, do you consider chapter 1 not at the beginning? You have the question whether you want chapter 1 to be the last chapter or whether you want to split it.

Mr. Holtzoff. Well, the Civil Rules have the corresponding rule at the very end.

Mr. Robinson. Yes, they do.

Mr. Holtzoff. But it seems to me to be illogical, perhaps,

14 to insert somewhere in the middle of the rules those subjects. They ought to be either at the very opening of the rules or at the close.

Mr. Wechsler. I move that it be referred to the Committee on Style.

The Chairman. The substitute motion is that it be referred to the Committee on Style. All those in favor of the substitute motion say "Aye." Opposed, "No." The motion is carried.

Mr. Seasongood. I suppose we did agree to it, because it says so, but that abbreviation looks funny to me. It is a small thing, but it looks so funny to me.

Mr. Longsdorf. The Civil Rules did not specify any abbreviation.

The Chairman. Rule 16.

Mr. Holtzoff. I think comments made with respect to Rule 15 are equally applicable to Rule 16.

The Chairman. If there is no objection, that will be the action with respect to Rule 16.

We will now proceed to Chapter II, Rule 20.

Mr. Robinson. This first chapter has referred to general matters -- "General Provisions," it has been called -- and at this time we take up what is strictly the chronological order, a chapter on complaint, warrant or summons, hearing and bail.

The Chairman. There are two here. The correct one is entitled, "Chapter II. Complaint, Warrant or Summons, Hearing and Bail," is that correct?

Mr. Robinson. Yes.

The Chairman. Rule 20.

Mr. Robinson. That is based on the American Law Institute.

It has been in Mr. Longsdorf's hands for his consideration.

What do you have to say on it, Mr. Longsdorf?

Mr. Longsdorf. Not very much. Section 591 of Title 18 empowers the United States Commissioners and certain state judges and magistrates to act as committing magistrates and tells what they may do, following the usages of the state courts.

Now, the usages of the state courts have been amalgamated, if I may use that word, by the American Law Institute in its draft of the corresponding matter. You will find that in the American Law Institute Code, in Section 40 and the following sections of that Code.

Mr. Holtzoff. I have a question with regard to Rule 20(a). I am wondering if there is not a gap there. It seems to me that perhaps there ought to be some express provision for a complaint.

Mr. Robinson. I was coming to that just now. There is no provision in Section 591 for the contents of the complaint, and that is left entirely to the state procedure.

I attempted a draft covering the form and contents, the requisites of a complaint. It does not appear in this book at this time, and I wish that the rule may be considered with that in mind.

Mr. Holtzoff. Well, entirely aside from the form of the complaint --

Mr. Robinson. You think there ought to be mention of the word "complaint" in (a)?

Mr. Holtzoff. Yes.

Mr. Robinson. I think so, too.

Mr. Holtzoff. I think we ought to make provision in Rule

20(a) for a complaint, and then the rule as to the contents we can consider later.

With that point in mind I suggest that in Rule 20(a), in line 4, after the word "warrant," the following shall be inserted:

"The arresting officer shall forthwith file a complaint, unless a complaint has been theretofore filed."

Then start the word "The" with a capital letter.

Mr. Crane. I think it should be the other way: "If a complaint has not been filed, he should file one."

Mr. Holtzoff. If the arrest is pursuant to a warrant, the complaint had been previously filed. If the arrest is without a warrant, the arresting officer brings the prisoner before a commissioner, and there ought to be a provision for his filing a complaint.

Mr. Robinson. Why not make a separate sentence of it?

Mr. Youngquist. It would be very awkward. Is that that the arresting officer shall file a complaint?

Mr. Crane. Yes.

Mr. Youngquist. We are putting that in a sentence that deals with arrest with a warrant.

Mr. Longsdorf. Won't you unburden the syntaxes considerably if you put the necessity of filing a complaint immediately after --

The Chairman. Don't we all understand what is to be done?

Mr. Longsdorf. Yes.

The Chairman. It is solely a matter of language for the Committee on Style.

Is there a motion to insert a provision about filing the

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complaint where arrest has been made without warrant? We will then refer it to the Committee on Style.

Mr. Holtzoff. I so move.

Mr. Longsdorf. I second it.

The Chairman. Is there any discussion?

Those in favor say "Aye." Opposed, "No." It is carried.

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The Chairman. Now, 20(b).

Mr. Longsdorf. I move that that be changed to read this way: that if a person waives preliminary examination, he would be held by the magistrate to answer to the District Court of the United States, which by law has cognizance of the offense, and shall either be held in custody or, in proper case, be admitted to bail as provided by law.

That might not be necessary in view of another rule, but I think it should go in.

Mr. Holtzoff. I am wondering, if you put that in, whether you do not leave a gap for cases that are tried by the magistrate. In the rule as it now stands you make it sufficiently broad as to cover both types of cases.

Mr. Longsdorf. Well, I do not think that we ought to carry the trials by magistrates --

Mr. Holtzoff. No, I mean trials by United States commissioners.

Mr. Longsdorf. Yes, I mean trials by United States commissioners, too. I do not think we should carry these proceedings at allinto this rule. I think it should be separate for each of the rules. It is preliminary examination. Besides, the statute calls for an information in those proceedings which are tried before United States commissioners on Federal reservations, national parks, and the like.

Mr. Holtzoff. Not the statute.

Mr. Longsdorf. 18 U.S.C. 576.

Mr. Holtzoff. As far as I know, the statute does not require an information.

Mr. Robinson. It is the rule to withhold information where

there is a complaint.

Mr. Holtzoff. Yes, and we have secured an informal construction that the word "information" in these rules is broad enough to fit.

The Chairman. What is the matter with this as it stands?

Mr. Holtzoff. I think it is all right now.

The Chairman. The motion is to approve striking out the words in line 9 "in proper cases." Are there any remarks?

Mr. Longsdorf. I was not paying attention at the moment, for which I apologize.

The Chairman. It has been moved that we strike out the words in line 9, "or in proper cases," because it goes on to say, "being admitted to bail by law."

Mr. McLellan. You do not want to strike out the "or."

The Chairman. No; just the words "in proper cases."

All those in favor of the motion say Aye; those opposed, No. The motion is carried.

Now, Rule 20(c).

Mr. Seth. Should there not be some mention there of admission to bail pending hearing? The commissioner should admit a man to bail if he is going to continue the hearing for six days temporarily.

The Chairman. You would add that at the end of line 16? "Admitting him to bail according to law in the meantime," or some such language?

Mr. Seth. Yes.

Mr. Holtzoff. I do not think we ought to have a six-day mandatory limitation.

Mr. Seth. That was merely carried in from the A.L.I. rules.

Mr. Holtzoff. That may be so, but I think it is a dangerous rule, even though it is there, because I know of any number of cases where with the defendant's consent a hearing has been postponed for more than six days and the defendant has been out on bail in the meantime, and it might cause considerable inconvenience to all concerned to make a mandatory six-day period. It may be that the American Law Institute Code had some state statute in mind.

Mr. Longsdorf. It did. Some states have a limit of six days.

Mr. Crane. What is the purpose of any limitation at all?

Mr. Holtzoff. I do not see any purpose.

Mr. Crane. I do not see any. If a man is a judge, magistrate, or commissioner, it is his duty to put it down for such time as is reasonable.

Mr. Holtzoff. I think the New York Code has a provision that an examination shall not be postponed for more than forty-eight hours at a time without the defendant's consent, but I do not think we need that here.

Mr. Crane. When you have a provision for bail here, I do not see the necessity for it. In other words, you turn him over to a magistrate or an official as though he were a mere automaton who had to measure up to a chalk mark, and you leave no discretion for certain developments that we do not know anything about.

The Chairman. What is the motion?

Mr. Crane. That we strike out the time limit.

Mr. Youngquist. Are you not going to make any provision for the protection of the defendant in case the Government seeks

a long postponement of the hearing?

The Chairman. I think that is a danger.

Mr. Crane. Could we say "within a reasonable time"?

Mr. Glueck. "For a reasonable time." That is one of those elastic expressions.

Mr. Medalie. This is the situation you really face in practice, especially in the busy districts: The United States Attorney has someone arrested, or a Government agent has someone arrested and then brings the United States Attorney in on it. The case is more elaborate than the so-called complaint before the commissioner would indicate. It requires much preparation.

The Government -- that is, the United States Attorney and the Government agent -- has no intention whatsoever of presenting that case at a public hearing. It does not intend to permit the defendant to cross-examine its main witness or main witnesses and get a chance to examine the exhibits. Accordingly, the commissioner fixes a day as far off as he can without protest.

If the defendant is unable to get bail, he may get some redress by a writ of habeas corpus. If he has given bail, he usually does not trouble, because the only way to raise that point is to have his surety surrender him and get the writ of habeas corpus.

While that is going on, the United States Attorney, with the aid of the Post Office Inspector or the F.B.I. man, proceeds to an elaborate investigation and a building up of the case largely through the Grand Jury process, and so these proceedings drag. Now, practically, these proceedings ought not

be permitted to drag, and you might say the man ought never be arrested; but very frequently he ought to be, and the Government should get a chance to build up its case. Now, there is only one way on earth in which that can be performed.

If you have a provision that a man must be discharged at the end of six days, which in effect this is, unless it means nothing, then you have nothing to do in the case of the defendant except to subject himself to the annoyance, inconvenience, and delay of surrendering himself and suing out a writ of habeas corpus to determine whether he has been unjustly treated.

This provision actually does not do anybody any good unless he is prepared to stay in jail and test it by a writ. If this is interpreted to mean that at the end of the two days or the six days the case ends, why, that is exactly what you do not want to do, because you may be turning criminals loose.

Mr. Crane. It ought to go out, then.

Mr. McLellan. I think we are all agreed. I thought the only question was whether we would substitute "for a reasonable time."

Mr. Crane. "Postpone the examination for a reasonable time."

The Chairman. I think Mr. Glueck moved that.

Mr. Glueck. Yes.

The Chairman. It has been moved and seconded that line 15 read "examination for a reasonable time, in the meantime admitting to bail as provided by law."

Mr. McLellan. You do not want to say "reasonable time or times," so that you could have more than one continuance; or is that involved?

The Chairman. I think that is inferred.

Mr. McLellan. All right, sir.

Mr. Longsdorf. There are twelve states which have that two day, six day limit, or something near it, and then a number of others have ten days.

Mr. Medalie. That is the total. I think we are agreed that it is unworkable.

Mr. Longsdorf. I did not particularly favor it.

Mr. Medalie. Did you say, "in the meantime admitting him to bail"?

The Chairman. "As provided by law."

Mr. Medalie. That is all right.

The Chairman. All those in favor of paragraph 20(c) as amended, say Aye; those opposed, No. The Ayes have it, and the motion is carried.

Now we go to Section 20(d).

Mr. Longsdorf. Before we pass on, may I venture to suggest a change somewhat in the language here? This provides that the magistrate shall proceed to examine the case. It does not provide for or say anything about a waiver. I think the phrase, "to examine the case," is perhaps not solicitous, and I want to move this substitute for lines 11 and 12 -- everything in lines 11 and 12 up to the comma in line 12:

"Unless the defendant waives preliminary examination, the magistrate shall proceed promptly to hold a hearing in order to determine whether there is sufficient ground to hold the defendant to answer to the charge against him."

Mr. Robinson. Do you think that that harmonizes with (d)?

Mr. Holtzoff. I am going to suggest that (d) is in part

repetitious when we come to that.

Mr. Crane. May I say a word about that? We do not have to make rules saying that the magistrate shall hold a defendant only when there is sufficient evidence or a prima facie case against him; that is the law; he could not hold him otherwise. That is substantive law; that is not procedural.

Mr. Holtzoff. I was only suggesting that it is perhaps a matter for the Committee on Style.

Mr. Crane. If he does hold him, if a prima facie case is made out, that is substantive law. If a prima facie case is not made out, the case is discharged. I suggest that this is better than what you suggest, with all due respect to your wisdom, knowledge, and literary style.

Mr. Holtzoff. Perhaps it is. I had a question as to the phrase "examine the case." He holds a hearing; he does not examine the case.

Mr. Crane. They always say "There is a case against the fellow."

Mr. Longsdorf. May I invite your attention to Section 21(d)?

Mr. Holtzoff. I just questioned the phrase "examine the case." I sort of had a feeling that it was not felicitous. That is why I suggested "unless the defendant waives preliminary examination."

Mr. Crane. I think that is very clear and direct -- examine the case against the fellow on the complaint filed against him. That is good, plain Anglo-Saxon.

Mr. Glueck. Of course, the thing is called a preliminary hearing. I suppose that is what Mr. Holtzoff has in mind. We

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all know what is meant by "examination."

Mr. Holtzoff. I was wondering whether that was not a colloquialism.

Mr. Crane. If it is a colloquialism, it is very applicable.

Mr. Holtzoff. It will clear up the whole thing if we leave the matter to the Committee on Style.

Mr. Waite. The Code uses the phrase "examine the case." Personally I think it does not make the slightest bit of difference at all whether we say "examine the case" or use some other phraseology.

Mr. Longsdorf. I agree with that.

Mr. Crane. Style ruins many an opinion.

Mr. Medalie. When you say "examine the case," you mean "hear the evidence," do you not?

Mr. Holtzoff. Yes.

Mr. Medalie. Why do we not say it, then?

Mr. Holtzoff. That is what my suggestion amounts to.

Mr. Crane. Let us leave it to the Committee on Style.

The Chairman. The next is 20(d).

Mr. Robinson. Will you explain that, Mr. Longsdorf?

Mr. Longsdorf. If we are going to insert matter in the previous portions of 20 about waiver, then it may be that (d) will be unnecessary.

Mr. Waite. With respect to 20(d), I should like to raise a question which goes far beneath the style and is an extremely important one of substance. I notice in lines 25, 26, and 27 that it reads:

"The defendant shall not enter any plea, and no statement made by him before the commiting magistrate unless

made in the presence of his counsel shall be used against him at the trial."

We are providing that he may have counsel if he wants to, and we are also providing that the examination may be conducted without counsel. We are providing that he shall make or may make statements, and to say that if he elects to proceed with the counsel any statement that he may make can be used, it seems to me, is a bit of an absurdity.

The Chairman. And discourages the use of counsel.

Mr. Waite. It does.

Section 48 of the Institute Code, from which these are more or less t aken, reads this way:

"Nothing herein contained shall prevent the state from giving in evidence at the trial any admission or confession or other statement of the defendant made at any time, which by law is admissible as evidence against such person."

In order to bring the matter up, regardless of the form in which it is expressed, which I think is at present unimportant, I suggest that beginning in line 25

"no statement made by him before the committing magistrate unless made in the presence of his counsel shall be used against him in the trial"

be omitted and that there be substituted the equivalent of that provision in Section 48 of the Code, that

"Nothing shall prevent the state from giving in e vidence at the trial any admission or confession or other statement of the defendant made at any time, which by law is admissible as evidence against such person."

Mr. Holtzoff. Mr. Chairman, I am in full accord with

everything that Professor Waite has stated, but it does not seem to me that we need that affirmative statement that is contained in the Institute Code. Therefore, subscribing as I do to everything that has just been said, I move as a substitute --

Mr. Waite. I will accept your change in my motion.

Mr. Holtzoff. Then, my motion would be that we strike out the sentence beginning with line 25 in Rule 20(d).

Mr. Medalie. I second that motion.

The Chairman. That is, strike out the entire last sentence?

Mr. Medalie. Of (d).

The Chairman. Do you accept that, Mr. Waite?

Mr. Waite. To strike everything that follows the phrase, "The defendant shall not enter any plea"?

Mr. Robinson. United States Attorney Douglas McGregor was here and worked with us for some time. Mr. McGregor stated his experience in hearings before commissioners. He said that when you bring in a defendant before a magistrate, the charge is read to him, and he is asked to plead guilty or not guilty, the plea does not give him anything anyway with regard to the advancement of the case or handling of the case and is unfair to the defendant.

He told us that as a United States Attorney, in observing its operation in a good many cases, he thinks that a defendant should not be required to plead guilty or not guilty at that time. He thinks it is unfair when, say, a plea of guilty is entered, to have it used against the defendant in court, especially if he was not represented by counsel at the time when he entered the plea of guilty.

Mr. Holtzoff. I think I misstated my motion. I have your

thought in mind. My motion was to leave out the second clause of the sentence beginning on line 25; that is, leave so much of the sentence as says

"The defendant shall not enter any plea"

and strike out the remainder.

Mr. Robinson. Yes. I was speaking of Mr. Waite's motion.

Mr. Crane. I do not get what your motion is, now. Strike out what?

Mr. Holtzoff. Strike out on line 25 --

The Chairman. Beginning with the words "No statement" and ending with the sentence on line 27.

Mr. Medalie. I can see the wisdom of Mr. McGregor's observation. The magistrate has nothing to do with the plea of guilty or not guilty, and furthermore the defendant has no opportunity to have determined technically whether he is guilty or not guilty.

As to the rest, including the Institute statement, according to all state rules, the fact is that any statement made by a defendant to a committing magistrate, unless it is in violation of some safeguarding rule, is admissible against him in evidence, and it did not require a procedural rule to make it admissible. Therefore, I think the Institute statement is surplusage.

Now, practically before magistrates it frequently happens that after the defendant has been informed of his rights -- "You need not say anything if you do not want to, but anything you say will be used against you, and you are entitled to counsel" -- he says, "Judge, I don't need any counsel. I am guilty and want to get through with this thing. I stole the pocketbook." That

12 should be admissible against him, but there ought to be no rules that make it impossible to take such a statement. Practical experience shows the wisdom of the rule that makes it admissible. He has been safeguarded as to his rights. He has been warned: "Any statement you make will be used against you." I think that is the practical experience before all magistrates, whether in Federal cases or in state cases.

The Chairman. All those in favor of the motion --

Mr. Medalie. Before you put that question, there is one other thing I want to call attention to.

Under the procedure in our state, Judge Crane, the defendant has to be warned of his rights not to make any statement; and if a statement is made by him, he has to be told before he makes it that it may be used against him. We may want to put that statement in.

The Chairman. All those in favor of the substitute motion say Aye; those opposed, No. The motion is carried.

Do you want to make a motion on this latest point?

Mr. Medalie. Without my stating the language, and leaving it to the Committee on Style, it is that the magistrate shall be required to advise the defendant that he is entitled to counsel and that any statement made by him may be used against him.

Mr. Crane. Do we not have that in Rule 23?

Mr. Medalie. Have we? If there is some rule, this is not necessary. But does it not apply right here at the beginning?

Mr. Holtzoff. I think it does. I venture to say that if your motion is repetitious, it does not do any harm; and if it is not repetitious, it is very important.

13 Mr. Medalie. If it is repetitious, it can be taken out of a later section.

The Chairman. Rule 21.

Mr. Waite. Before we get to Rule 21, I want to move an addition to Rule 20, which will unquestionably classify me with the radicals, if there be any others in this group.

I should like to see added a section (e), which would read this way, in essence:

"Whenever any person has been brought before a committing magistrate, as provided in Rule 20, and has been advised of his right to counsel and of his right to waive hearing or to have hearing, the magistrate may interrogate him concerning his participation in the alleged offense or concerning his whereabouts and activities at the time of the alleged offense. Before the magistrate does so interrogate the defendant, he shall inform the defendant that he is under no obligation whatsoever to answer the magistrate's questions, but that if he does answer, his answers may be used as evidence in subsequent proceedings, and that if he declines to answer, the fact of his refusal may be used in so far as the rules of evidence permit."

Now, I am, of course, perfectly well aware of the conventional proposition that that would be unconstitutional because it compels a defendant to incriminate himself. But, after all, that is a disputable matter very definitely whether that is compelling him to incriminate himself, and if so, whether it is compelling him to do so within the prohibition of the constitution.

It is a matter which can only be decided by judicial inter-

14 pretation.

This much is sure: If the Supreme Court adopts such a rule as that, the Supreme Court is not later going to say that the rule is unconstitutional. I think it would be well to consider the matter here not on the ground whether it is constitutional or unconstitutional. We should not decide that for the court; we should leave it to the court to consider it on its merits.

The merits amount simply to this: Is it wise -- regardless of the constitutionality, I think we ought to leave it to the court -- is it wise to allow a magistrate to interrogate the defendant after he has told the defendant that he need not answer, that he is under no compulsion to answer, but that if he does not answer, the fact that he does not answer may be used against him? Personally, I think it is a very wise, forward-looking step.

Mr. Crane. In connection with that, I was going to bring up here at the proper time and review what Mr. Glueck said about the questioning by police.

I think what you suggest has some merit, but I think you go too far. I think -- and I advocated it in our state but did not get it much further than the legislature -- that we ought to wipe out this third degree business and say that no confession made to a police officer shall ever be received in evidence unless the confession was made before a magistrate. That does protect the defendant, because if they can take the man to a police station and question him before a captain or other police officers, they could at least take him before a magistrate. If you keep out all the confessions made to police

officers under the circumstances I have indicated, it knocks in the head, of course, the temptation to indulge in the third degree. Then, if he wanted to, he might make a confession before a magistrate under at least some form of judicial process.

I go half-way with you in this: that then the magistrate can examine him when he is willing to make a voluntary statement. I would not want to go with you by saying that the magistrate could question him and could compel him to make it. It would be compulsion if his refusal to answer could be used against him.

Mr. Waite. That is where I take definite issue with you, and that is what I think we should leave to the Supreme Court.

Mr. Medalie. I think there is a temptation and that you remove the temptation by saying, "If this man wants to make a statement, take him before a magistrate."

What you have in mind is good, but I think you can't press it too far. Think that over, now; you do not have to answer it immediately.

Mr. Holtzoff. I think that if this motion of Professor Waite's were adopted, these rules would have very little chance of getting through Congress. Therefore, I am against it.

Mr. Medalie. I do not think the Supreme Court wants us to pass the buck to them. I think we must make up our own minds on the thing. I do not think we ought to do one of the things for which the President was criticized, when he said he was doubtful of the constitutionality of certain proposed legislation but would let the Court pass on it. I do not think we should do that. In any event, I do not like it, legally, to dispose of as an important a suggestion as this, particularly

the one that relates to the interrogation of the defendant, if he is not penalized by having offered in evidence against him what we had all supposed could not be, his refusal to answer, because those things cannot be offered against him according to the decisions, except where he had already testified and later refused to testify on the ground that it might incriminate him. There is a Supreme Court decision to that effect.

I think, however, that the provision with respect to the examination of the defendant after the complaint has been presented to him is another matter, and I think that is worth debating.

I therefore move that Mr. Waite's proposal be typewritten, so that we may examine it at the evening session, and that we now take our recess.

The Chairman. The motion is improper, in that it involves two separate subject matters.

Mr. Medalie. I realize that.

Mr. Crane. I second the latter part of it.

The Chairman. If we stop at 4:30, don't you think we ought to start earlier?

(There was then an informal discussion among the members of the Committee which was not recorded. The following then occurred:)

The Chairman. I see that we are about to suffer our first serious disagreement, so I think we had better yield and adjourn now until 8 o'clock, but be prepared to do a reasonable amount of work then.

Mr. Holtzoff. Don't you want to finish Section (d)?

The Chairman. I had understood that a motion to adjourn

was not debatable, but we seemingly have abolished all rules of parliamentary law here.

Mr. Holtzoff. I think the first two sentences of 20(d) are repetitious of what goes before.

The Chairman. We have finished that.

Mr. Holtzoff. Were they stricken out?

The Chairman. Yes. We had finished with 20(d) and were on 21. Now we are up to 20(c), which has been submitted by Mr. Waite, and which we will have written out for tonight's session at 8 o'clock.

Mr. Medalie. If it is your intention and your suggestion to us that we should sit later tomorrow, and if you can tell us that now, we can make arrangements to conform with that rule.

The Chairman. I am forewarned by statements made during the morning session and statements made during lunch that if we do not get in the work in the first three days, we are likely to lack a quorum during the latter part of the week.

Mr. Medalie. Can we decide that we will sit tomorrow until 5 or 5:30?

The Chairman. All right. Let us make tomorrow afternoon's session a little longer -- 5 or 5:30. We will begin at 10 o'clock tomorrow morning.

Mr. Medalie. And at 8 o'clock this evening?

The Chairman. Yes. We will recess until 8 o'clock.

(At 4:35 o'clock p. m. a recess was taken until 8 o'clock p. m. of the same date.)

EVENING SESSION

The Committee reconvened at 8 o'clock p. m., upon the expiration of the recess.

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The Chairman. Mr. Waite said he might be a few minutes late, so we will postpone consideration of his 21(e) until he arrives and will go on with Rule 21.

Is there any comment on 21(a)?

Mr. Robinson. I would like to state this, Mr. Chairman: that it is based on the American Law Institute Code. I had Mr. Longsdorf examine the American Law Institute Code with a view to seeing how much of it is adaptable for our rules. Of course, we have made various studies of it, but we wanted to get his views, and this rule represents one rule which Mr. Longsdorf thinks may well be taken from the American Law Institute Code.

It may be well to have him state his reasons for taking these paragraphs out, if there is any particular statement on that point.

Mr. Longsdorf. The weightiest reason I have for it is that the procedure before a committing magistrate is made by Section 59 of Title 18 to conform to the usages of the state courts. Accordingly, I concluded that the usage of the state courts, as formulated by the American Law Institute Code, was about the best model I could get, and I used them, compressing them as much as possible to agree with what we are trying to do here in the way of brevity in the rules. I did not put all of them in, because some of them appeared to be unnecessary in our Code, but I got the essentials in -- all that I could -- and I did so with some liberality, so that the Committee could strike out what it wanted, if it deemed there was anything that it did not want.

Mr. Robinson. Of the 400 sections that are in the American

19 7 Law Institute Code, Mr. Longsdorf has found about 70 are rules that we may draw analogies from in our Federal Code. That does not represent its whole contribution, because many sections which we do not draw directly from are parallel and, of course, have their influence.

Mr. Longsdorf. I should like to add that in the American Law Institute Code there are more than 200 sections on topics that we cannot deal with, such as appeals, which are covered by Criminal Court of Appeals rules, venue, change of venue, and things like that.

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

Mr. Holtzoff. There is a misprint in line 24. That is undoubtedly meant to be "self-incrimination."

Mr. Robinson. I don't know.

Mr. Longsdorf. I have seen "self-crimination" used as much as "self-incrimination."

Mr. Robinson. I think that is something for the Committee on Form.

Mr. Crane. I think "self-incrimination" is the general usage.

Mr. Seasongood. If he testifies, he can't be made to incriminate himself. He can be cross-examined. Any witness subjects himself to cross-examination about previous convictions, or anything else. Why should he give up his privilege against self-incrimination?

Mr. Longsdorf. Well, Mr. Seasongood, you will have to deal with the range of cross-examination on provious convictions when you get into the evidence rules.

Mr. Holtzoff. Is not the last clause surplusage? That

goes without saying, because it is contained in the Constitution.

Mr. Seasongood. It depends on what kind of rule you have and how he testifies.

Mr. Longsdorf. Of course, if he testifies, he is subject to cross-examination.

Mr. Holtzoff. I move that we strike out the second sentence.

Mr. Robinson. Is that sentence from the A.L.I. Code?

Mr. Longsdorf. Yes. I can read that if you wish to hear it.

Mr. Seasongood. It is entirely ambiguous in this form.

The Chairman. All those in favor of the motion to strike the last sentence say Aye; those opposed, No. The motion is carried unanimously.

Now, 21(b).

Mr. Holtzoff. I think that that is surplusage, and I move to strike that out. I think that is something entirely in the discretion --

The Chairman. It is permissive, but it is surprising the number of judges who never think of exercising the right, when they really would be helpful to counsel on one side or the other.

Mr. Longsdorf. That is the reason why I put it in.

Mr. Holtzoff. Is there any magistrate who feels he is without that authority?

Mr. Session. Yes. In my state they rarely do it.

Mr. Longsdorf. The A.L.I. Code has that in it.

The Chairman. And it works for both the Government and the defendant. It is something that gives either side the

21 right.

Mr. Robinson. In line 9, is that possible -- to keep all witnesses separate from one another? If you had twenty witnesses, could you put them in different rooms?

The Chairman. You might put them in different corners and have somebody watch them. They manage to do that pretty well in the English courts.

Mr. Robinson. That does not mean they are separate from one another; they are just separate from the witness.

Mr. Crane. You can place them separate from one another. You would be surprised how they copy one another's stories.

The Chairman. You could have ten of them in one room with an officer there to tell them not to talk to one another.

Mr. Crane. It only says "may"; it does not say "you must." There comes a time when the other witnesses repeat what the first witness has said.

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

Mr. Medalie. The word "prisoner." The defendant is frequently not a prisoner.

Mr. Youngquist. It should be "defendant."

Mr. Holtzoff. "Except the defendant."

Mr. Seth. And the last clause, "The Government witnesses may be cross-examined by counsel."

Mr. Holtzoff. What is the necessity or need of (c)? Isn't that obvious?

2 Mr. Seasongood. Before you get to (c), isn't that a matter for agreement by the Style Committee?

Mr. Crane. If you are going to say anything, you had better complete it.

22 Mr. Dession. Suppose a defendant walked out of a preliminary examination. Is there any reason why you could not continue?

Mr. Longsdorf. I suppose the sole reason why it is so worded in the A.L.I. Code is that the preliminary examination is really brought on by the Government, and the draftsmen of the A.L.I. Code thought, of course, that the Government could examine the witnesses and that it was not necessary to say anything about it -- just extend an equal privilege to the defendant; probably something of that kind.

The Chairman. On (c), I think that point is well taken for cross-examining his own witnesses.

Mr. Holtzoff. (c) might be deleted entirely. I do not see that it serves any useful purpose.

Mr. Longsdorf. Would you put in the words "all Government witnesses"?

Mr. Holtzoff. It seems to me that that goes without saying. That is probably regular procedure in examining witnesses. I move that we strike (c) out.

The Chairman. I do not think it adds much.

Mr. Glueck. I second the motion.

Mr. Crane. Why not leave it: "All witnesses subject to preliminary examination shall be cross-examined by the defendant"?

Mr. Medalie. I think you ought to keep it in. You must define the functions of the magistrate, because if the magistrate thinks that all he is supposed to do is find out if someone committed a crime, and he stops there, he is not doing enough.

The Chairman. May we not strike from the word "defendant"

23 on, in the middle of line 12?

Mr. Crane. "And the witnesses against him may be examined by him or his counsel."

Mr. Youngquist. Why not say "may be cross-examined" and strike out "by defendant or his counsel"?

Mr. Holtzoff. Well, isn't that implied?

Mr. Longsdorf. I don't think anything is implied by the Code.

Mr. Dession. Is there not still a minor defect here? He is supposed to be present, but if he voluntarily absents himself is there any reason why the preliminary hearing should have to stop?

Mr. Holtzoff. We permit a defendant to absent himself from trial. We certainly should not make examination before a commissioner more rigid than we do at trial.

Mr. Seth. Why not have it read: "The defendant shall have the right to be present at the examination of all witnesses"?

Mr. Holtzoff. Yes, that will take care of it.

The Chairman. As I understand it, we want the defendant to cross-examine Government witnesses.

Mr. Seth. "Cross-examine witnesses against him."

Mr. Youngquist. Sometimes a defendant puts on his own witnesses at a preliminary hearing.

Mr. Crane. "The witnesses against him." "Cross-examine the witnesses against him."

Mr. Youngquist. What about the Government's right to cross-examine witnesses for him? I am wondering whether by giving the defendant alone -- expressing the right to the defendant to cross-examine, we might by implication exclude the

right of the Government to cross-examine.

Mr. McClellan. Why don't you stop with the word "defendant"?

The Chairman. I think that is the simplest thing. Mr. Medalie urges that you have to tell magistrates they have the right to cross-examine.

Mr. Medalie. He has a right to be present at the examination, he has a right to call witnesses, he has a right, as the Government has, to examine witnesses against him.

Mr. Holtzoff. "The defendant shall have the right to be present at the examination, to cross-examine witnesses against him, and to call witnesses in his own behalf."

Mr. Medalie. If you say "to call witnesses in his own behalf," why not say, "both sides shall have the right to cross-examine adverse witnesses"?

Mr. Longsdorf. The right to call is in Section 21(a); you do not need it here.

Mr. Medalie. All right. "The defendant shall have the right to be present at the examination of all witnesses."

Mr. Longsdorf. "Of all witnesses, and they may be cross-examined."

Mr. Holtzoff. "The defendant shall have the right to be present at the examination and to call witnesses in his own behalf. All witnesses shall be subject to cross-examination."

Mr. Youngquist. "They may call witnesses."

Mr. Holtzoff. In the light of (a), I do not see the need of paragraph (c). Everything that you need in (c) is also covered in (a).

Mr. Medalie. The magistrate might think all he has to do

is look at the complaint to see if it charges a crime, and see if the witness so testifies as he did in his deposition and bill, and say, "He has got a case; don't waste my time."

Mr. Seasongood. Many of them just believe the cop, and that is the end of it.

Mr. Holtzoff. I think (a) covers that point. It says "The United States may call witnesses."

Mr. Medalie. That is about calling the witnesses.

The Chairman. In line 3, after the word "examination," put a period. Let it say, "witnesses may be subjected to cross-examination."

Mr. Medalie. That is all right.

Mr. Holtzoff. "Such witnesses shall be subject to cross-examination."

Mr. Medalie. In (a) you still use the word "prisoner." Where did that Britisism come from? The British call every defendant a prisoner.

The Chairman. Make that "defendant" instead of "prisoner."

Mr. Medalie. Do you want to say in (a) "All witnesses including the defendant"?

Mr. Robinson. You will have to have a new title: "Calling an Examination of All Witnesses."

Mr. Crane. I prefer to leave it as it is in (c) and just state the fact that the defendant may be present and cross-examine the witnesses.

The Chairman. We all agree on what is meant. Suppose we leave this to the Committee on Style -- (a) and (c).

Mr. Crane. I do not think it needs much alteration; I think it reads pretty well.

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Mr. Medalie. (c) really ought to go into (a).

The Chairman. I think so.

Mr. Holtzoff. That is all right.

Mr. Longsdorf. That is all right.

The Chairman. Is that acceptable?

Mr. Holtzoff. Yes.

The Chairman. (d).

Mr. Longsdorf. How do you propose to combine them?

The Chairman. We will let the Style Committee decide that.

Mr. Longsdorf. All right.

The Chairman. 21(d).

Mr. Crane. "If from the testimony heard." I think "heard" might come out. The magistrate might not have heard anything.

Mr. Holtzoff. The word "testimony" is limited to oral testimony.

Mr. Crane. We could say, "If by the evidence it appears."

Mr. Medalie. Or "If it appears to the magistrate."

Mr. Crane. "If by the evidence it appears that the magistrate is satisfied."

Mr. Medalie. I think that is the language usually used.

Mr. Longsdorf. I think that is better language.

The Chairman. "If by the evidence the magistrate is satisfied that the offense has been committed under the laws of the United States * * * "

Mr. Medalie. "District Court of the United States which by law has cognizance."

Mr. Seth. The offense may have been committed in one

27 place, and the hearing held in New York.

Mr. Holtzoff. But there would have to be a removal proceeding.

I think that clause is surplusage.

The Chairman. "To the District Court of the United States which by law has cognizance."

Mr. Longsdorf. We have a remnant of that conformity rule in Section 591, and the rule for it ought to come out, and the only way to take it out is to take it out by words in these rules, otherwise you will have forty-eight different kinds of preliminary proceedings in the Federal courts.

Mr. Holtzoff. I am just referring to this clause in line 19: "which by law has cognizance of the offense."

I appreciate that Section 591 is a very old statute and is rather ponderously framed. Do we want to perpetuate that?

Mr. Youngquist. Would it be enough to say "have the prisoner answer to the proper District Court"?

Mr. Medalie. Four times in that division you have the word "prisoner."

Mr. Longsdorf. Yes, that ought to be changed each time.

Mr. Holtzoff. As a matter of fact, all you need to say is "Hold the defendant to answer."

The Chairman. Unless the defendant gives bail.

Mr. Crane. You could leave it to the District Court.

The Chairman. Unless there is objection, the words in line 19, "which by law have cognizance of the offense," will be deleted, and it seems to me we can shorten the next line, 20.

Mr. Longsdorf. If you take that phrase out of there, we ought to go back and take it out of this other section over

here, where it was added in 20.

Mr. Holtzoff. I suppose the Style Committee can take care of that.

The Chairman. In which line?

Mr. Longsdorf. In line 8, Rule 20(b), that very language was inserted at the suggestion --

Mr. Robinson. That was left out. You suggested it be put in, but we left it out.

Mr. Medalie. May I call your attention to the fact that in 20 we have the word "prisoner" many times?

Mr. Holtzoff. "Custody" ought to be "custody of the marshal," ought it not?

Mr. Crane. That is the only one he can be committed to.

Mr. Holtzoff. I don't suppose you need it.

The Chairman. Can't we shorten line 20 and say, "Unless the defendant is admitted to bail"?

Mr. McLellan. "Unless he gives bail."

The Chairman. "Unless the defendant gives bail" is better yet; "and shall commit him to custody unless the defendant --"

Mr. McLellan (interposing). "Unless he gives bail."

Mr. Medalie. Have we a substitute provision for "fixing bail"?

Mr. Holtzoff. Yes.

Mr. Longsdorf. "Unless he gives bail." That will do it.

The Chairman. "Unless it appears that no offense was committed or there is no probable cause to believe the defendant guilty, he shall be discharged."

Mr. Holtzoff. I suggest changing that around a little. Because the way this is phrased seems to put the burden of

proof on the defendant. I think that it ought to read:

"If it does not appear that an offense was committed or that there is probable cause to believe the defendant guilty, he shall be discharged."

That would shift the burden of proof onto the prosecution.

Mr. Youngquist. How would it be to put a period instead of a semicolon after the word "bail" and say, "otherwise he may be discharged"?

Mr. Holtzoff. There might be a question as to what it refers back to.

Mr. Youngquist. It refers back to the several propositions: is in custody or gives bail.

Mr. Holtzoff. Grammatically, the word "otherwise" would refer back to the last phrase, "unless he gives bail." I think you have a grammatical difficulty there.

Mr. Youngquist. Possibly you have. I have it so cut up here, I can't tell.

Mr. Holtzoff. That is why I am stressing: "If it does not appear that an offense was committed or that there is probable cause."

Mr. McLellan. You want an "and" for that "or" there.

Mr. Glueck. In either event.

Mr. McLellan. "If it does not appear that an offense was committed."

Mr. Holtzoff. "Or that there is not probable cause to believe that an offense was committed."

Mr. Wechsler. No. It should be "and." Both have to appear.

Mr. Holtzoff. That ought to be "and." That is right. I

can see it now.

Mr. Crane. "If it appears that no offense was committed."

Mr. McClellan. If it does not appear, then an offense was committed.

Mr. Holtzoff. It should be 'or."

Mr. Youngquist. Are we starting that out "unless it appears"?

Mr. McClellan. It is still "and."

Mr. Crane. I think it is "and," because if it appears that no offense was committed, you don't need anything more.

Mr. Glueck. He is changing it. He says, "If it does not appear," which makes it "and." Both conditions must then be satisfied.

I would like to inquire of somebody why it is --

Mr. Robinson. Strike out "either." "If it does not appear that an offense was committed and that there is probable cause to believe the defendant guilty."

Mr. Seasongood. Mr. Chairman, I would like to call attention to the fact that you change in line 15 "The magistrate must be satisfied," and here you say, "If it does not appear."

I am no criminal specialist, but I think probably it is more accurate to say, "If it appears," rather than, "If he is satisfied."

I don't know whether he has to be satisfied if there is not a difference between "appears" and "satisfied." Anyway, you have got to be consistent about it and do it in both places.

The Chairman. That is what makes me favor Mr. Youngquist's suggestion: "Otherwise he would be discharged."

Mr. McClellan. Yes, I think that is sufficient.

Mr. Seasongood. I am making the point that in line 15 you change it to say, "If the magistrate is satisfied," and I think it is probably more accurate to say, "If it appears to the magistrate."

Mr. Holtzoff. Does not the word "satisfied" apply a heavier burden than the prosecution should be required to bear?

Mr. Dession. Probable cause is the only term involved here.

The Chairman. That suggestion originated with Mr. Medalie.

Mr. Medalie. Yes. I don't know what the word "appears" means in the law.

Mr. Dession. Well, if it seems to him; that is what it means.

Mr. Longsdorf. "If it appears" came out of the A.L.I. Code.

Mr. Medalie. Instead of saying it in terms of the magistrate, it could be stated impersonally. First of all, you must establish by evidence that a crime has been committed.

The Chairman. "The evidence shows."

Mr. Medalie. Secondly, there must be sufficient to establish probable cause, and that is not in terms of the magistrate. For example, take an ordinary question of fact in a jury trial or when a case is tried by a judge without a jury. You do not state that a case is established if the judge or the jury is satisfied that such and such a fact is a fact. A case is established if the facts establish the case.

Mr. Holtzoff. Why not say, "If by the evidence it appears," without saying "The magistrate."

The Chairman. "If the evidence shows"?

Mr. Holtzoff. Yes. "If the evidence shows."

Mr. Crane. "If the evidence shows that an offense has been committed."

Mr. Glueck. I would like to ask a legal question here. Suppose the defendant appeals right after the preliminary examination, on the ground that the evidence does not show that there is probable cause?

Mr. Medalie. He can't. His only test is by habeas corpus or lack of jurisdiction.

Mr. Glueck. Suppose under habeas corpus he does it.

Mr. Holtzoff. By that time the District Attorney could take the case before the Grand Jury and get an indictment.

Mr. Glueck. What would be the issue before the Court? How much more would be required?

Mr. Crane. Prima facie.

Mr. Medalie. Enough to satisfy anybody.

Mr. McLellan. Some substantial evidence is all that would be required.

Mr. Crane. You seem to make a distinction between proving the offense before the magistrate and probable cause that the defendant committed it.

Mr. Glueck. We do not qualify the offense part with "probable," do we?

Mr. Crane. No, but on the whole evidence, whether the crime has been committed or the defendant committed it -- on the whole evidence, a prima facie case, it appears that the defendant is guilty of committing a crime, then you hold the prisoner for the trial.

Mr. Medalie. In New York State a man cannot be convicted on the uncorroborated testimony of his accomplice or his uncorroborated confession, but he may be held to answer on the uncorroborated evidence of the accomplice or on the uncorroborated confession.

Mr. Glueck. In what kind of case can't a man be convicted on uncorroborated testimony?

Mr. Medalie. In New York we have a statute providing for that.

Mr. Glueck. That does not apply in the Federal courts.

Mr. Crane. In murder in the first degree I think it is followed in the Federal courts. In murder in the first degree the death of the victim must be proved by direct evidence. There can never be any question about the death of the deceased--the death of the person alleged to be dead; that must be proved by direct evidence.

There is a distinction, but I don't know that they have made a distinction before a magistrate or a prima facie case, that you first have to prove from positive evidence that a crime has been committed and then that the defendant was probably guilty of committing it. You do have that distinction when it comes to the arresting police officer. Any of us can arrest a person who is committing a felony, but we have to prove there that a felony was committed; if we do not, we are in trouble. But a police officer can arrest on the probable cause of the commission of a felony -- of the defendant doing it. He has got this discretion. I may be wrong about it, but I never knew it -- if the evidence shows that an offense has been committed and there is probable cause to believe that the defen-

dant committed it. If there is going to be that distinction, I don't think we mean that by that language.

Mr. Medalie. I think we do, Judge, and again I go back to my New York examples. In New York, by statute-- and you know I have argued such cases before you when you were on the bench -- one can't be convicted on the uncorroborated testimony of an accomplice.

Mr. Crane. Right.

Mr. Medalie. The crime may nevertheless be proved by the accomplice before a magistrate. That is not a method of convicting a man, but the testimony is sufficient to establish, for the magistrate's purpose, that the crime has been committed.

Mr. Crane. That is my point.

Mr. Medalie. A magistrate may in his discretion say, "There is no use of my holding this man, because you can't have corroboration of the accomplice."

Mr. Crane. My point is whether a prima facie case is made out.

Mr. Medalie. Judge, the same thing applies to your corpus delicti case.

Mr. Crane. I think it is just a question of language. I think it means this, and I think we are safe in saying this: that when he appears before the magistrate, a crime has been committed, and the defendant is probably guilty of committing it. Using "probable cause" in there, you have something in there that makes a distinction.

Mr. McLellan. If there is probable cause that this man has committed a crime, then you have got it.

Mr. Youngquist. I would suggest this language: "If it appears from the evidence that an offense has been committed and that there is probable cause to believe that the defendant," and so forth. Won't that cover everything you want to say?

Mr. Holtzoff. That is practically what we have now. What we have now is: "If the evidence shows that an offense has been committed against the laws of the United States, and there is --"

Mr. Glueck. Why not leave out the first part and say: "If there is probable cause to believe that the defendant has committed an offense against the laws of the United States"?

Mr. Crane. That takes care of the whole thing.

Mr. Medalie. How does that compare with the Institute provision?

Mr. Crane. "If it appears upon the evidence that the defendant has committed the crime charged." How is that?

Mr. McLellan. Yes.

Mr. Medalie. The comment says that Subsection (d) is taken from 54 and 55 of the Law Institute Code of Criminal Procedure.

Mr. Longsdorf. Shall I read the Law Institute on that?

Mr. Medalie. May we have read, Mr. Chairman, the Institute Code provisions?

The Chairman. Yes.

Mr. Longsdorf. Section 54 of the A.L.I. Code:

"After hearing the evidence and the statement of the defendant, in case he has made one, or his testimony, in case he has testified, if it appears either that an offense has not been committed or that, if committed, there

is no probable cause to believe the defendant guilty thereof, the magistrate shall order that he be discharged.", That is 54. Then, the positive of that comes in 55:

"If it appears that any offense has been committed and that there is probable cause to believe the defendant guilty thereof, the magistrate shall hold him to answer."

Mr. Glueck. May I interrupt there? That means, as I understand it, that if the magistrate has doubt, either because of facts or law, as to whether an offense has or has not been committed, that does not cover that situation, does it?

Mr. Holtzoff. Of course, if he has any doubt, this being a preliminary hearing, he should not hold the defendant.

Mr. Glueck. This says, "If he finds an offense has been committed." That means he must; there is no probability or possibility about that.

Mr. Longsdorf. I beg your pardon. As this reads --

Mr. Dession. I think there is a very real distinction. I think to eliminate any question of whether we should try to change rules, we should use one familiar rule and stick to it.

6 Why not say, "If there is probable cause to believe that an offense has been committed, and if there is probable cause to believe that the defendant has committed it"?

The Chairman. Why can't we not do what Mr. Glueck says and combine the two?

Mr. Dession. Someone might argue that probable cause on issue No. 1 plus probable cause on issue No. 2 is an inference on an inference and that it is not good enough if you combine the two.

Mr. Crane. "If there be probable cause to believe that

the offense charged has been committed."

Mr. Youngquist. We are arguing from the well established distinction between a showing and an offense. It must appear that an offense has been committed.

There need be for the purpose of binding him over only a showing of probable cause that the defendant committed it. That is the distinction that was recognized by this language here and a distinction that, I think, should be preserved.

Mr. Crane. If a man comes up and says, "A man stopped me in the street and robbed me of my pocketbook," there is just as much question whether that happened as there is whether the man did it himself. It may be a question of identification, for the purpose of putting the fellow in jail. There may be grave doubt as to whether any crime was committed at all.

Mr. Youngquist. Take murder, for instance. A dead body is found, and the circumstances are such as to make it conclusive that it was murder. You may not be able to prove conclusively who did it, as you would have to do on the trial. There is a great difference between the finding of guilt and the finding of probable cause that a man committed an offense--probable cause to the extent that would warrant binding him over for investigation by the Grand Jury.

Mr. Crane. Suppose there were two persons in a room, man and wife. She threatened to commit suicide. She is dead, and the pistol is found. The man is arrested. He is charged with murder and is convicted down in Nassau County. He appeals it to the Court of Appeals.

What are you going to do? He says that she committed suicide, and he so testifies, but he is convicted of murder in

the first degree. If she did commit suicide, there is no crime. It is all one. I think what we mean here is just this: that if there is a prima facie case made out of crime committed by the defendant, he is to be held.

Mr. Holtzoff. In that case should not the magistrate bind the defendant over, even though he is not absolutely convinced?

Mr. Crane. Oh, there is no question about that.

Mr. Medalie. Or you can go further than that. A palpable liar by prima facie evidence charges the defendant with commission of an offense, and in his false testimony, which nobody in the magistrate's presence is willing to believe, covers every element that constitutes a crime. It is the duty of the magistrate to throw that case out.

Mr. Holtzoff. If he does not believe that testimony, yes.

Mr. Crane. In the strikes of the Brooklyn Rapid Transit Company, James Quigley, siding with the strikers, discharged them. The railroad had stenographers in court to take down the testimony, and the Appellate Court removed him from the bench. He was removed from the bench because he simply said he did not believe the testimony and would not hold them. It was his duty, although he did not believe it, to hold them. They removed him.

Mr. McLellan. Wasn't that on the ground that he did believe them but said he didn't?

Mr. Crane. No, it was on the ground whether he believed them or not. A prima facie case had been made out, as Mr. Medalie says, and he should have held them.

Mr. Medalie. I had a similar case for removal in the First Department, not the Second. I could not remove them on the ground that they did not believe the prima facie case, but

on another ground. In other words, the Appellate Division, First Department, does not agree.

Mr. Seasongood. I think this must have been stated in standard textbooks and introduced.

Mr. Medalie. The Institute Code has the two alternative provisions that have been read.

Mr. Glueck. As to the first, Mr. Medalie, if I recall correctly, they did not qualify the offense part with any matter of probability; they just say an offense has been committed.

Mr. Medalie. An offense has not been committed.

Mr. Glueck. Or has not. That is a different way of

7 stating it.

Mr. Medalie. If not committed, then there is no probable cause to consider the defendant guilty.

Mr. Glueck. They do not use the probability item until they come to the defendant.

Mr. Wechsler. Even though the statutes do not use the probability item on the commission of the offense, as a matter of simple logic the probability item is the crucial item, and it ought to be, because if you have a case of conflicting evidence as to whether the crime was committed, that ought to be determined by the magistrate on preliminary hearing.

Then, it seems to me, we ought to depart from traditional language. Therefore, I think Judge Crane's proposal is right and that the draft should appear that way.

Mr. Medalie. I think we are departing from fundamental criminal law, and we ought not to depart from fundamental criminal law on this point. That has been a fundamental of our law all the time; it has never been changed. In other words, we are changing the law.

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Mr. Holtzoff. I am not so sure.

Mr. Wechsler. We are changing the checks, but I do not think we are changing the law that will apply.

Mr. Medalie. I think so.

Mr. Holtzoff. I am not so sure that we are changing the law that would apply; because if you present before a United States commissioner enough evidence showing that a crime has probably been committed and that the defendant has probably committed it, I do not think the commissioner would be justified in discharging the defendant.

Mr. McLellan. When he does find probable cause that the defendant committed the crime with which he is charged, he has covered everything that he needs to cover.

Mr. Holtzoff. I think so.

Mr. McLellan. After all, when you get it stated in a negative form you have to say something different.

Mr. Wechsler. The evidence in the preliminary hearing is to show that there is a substantial complaint or, rather, that the complaint that is filed rests upon substantial grounds. Probable cause is the language that designates substantial grounds, and that is all we are concerned with.

Mr. Medalie. Probable cause has always been used in connection with the defendant's connection with the crime.

Mr. Holtzoff. Aren't you stating the New York rule rather than the common-law rule?

Mr. Wechsler. Most of the statutes say as Mr. Medalie says. They do contain this verbal differentiation between showing the commission of the crime and probable cause to believe that the defendant committed it, but I have always felt

that that was simply a traditional differentiation. These statutes copy one another in the sequence of development, and I do not believe as a logical matter the differentiation is tenable, whether the statutes mean what they say in pointing to such a differentiation. This seems to me to be a place where in a very minor way we can clarify what is traditional confusion in the law, and I think we ought to do so.

Mr. Holtzoff. Does not that bring us back to the suggestion --

The Chairman. Have we progressed to the point where we are willing to vote on whether we agree on the substance of this proposition, namely, that the issue of probable cause shall apply to the commission of the offense? Are you ready to vote on that? Because until we are, we cannot frame a rule.

All those in favor of the lawsbeing stated in that form, say "aye"; opposed "no". (Putting the question.)

I think the ayes have it, with two votes in the negative.

Mr. Youngquist. On that one I should like to have my vote registered, because it is a violation of the standards of practice.

Mr. Medalie. Mine, too.

The Chairman. Both are registered.

Mr. Dession. Do you feel that this would be changing the practice or merely the statement?

Mr. Medalie. I think it changes the law.

Mr. Dession. I want to differentiate between the way you think the New York statement is applied before magistrates and on habeas corpus. Would this change it or not?

Mr. Medalie. No; in New York, on habeas corpus you must

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prove that the offense has been committed and that there is something in the way of evidence to indicate that the defendant probably committed it. That is the New York test.

Mr. Holtzoff. Before United States commissioners you do not make out as much of a case as you would do before a magistrate in New York City, I think.

Mr. Medalie. Before United States commissioners you do not do anything; and if we try to put down in a code or set of rules what goes on before United States commissioners we would put in a blank page.

Mr. Crane. We are just dealing with our own difficulties here; actually there is no difficulty. In any United States court the difficulties we are making here for ourselves do not arise at all. But when you get this case before you and are hearing it, no matter where you are as a judge, the whole thing comes down to this: Has it been shown prima facie that the defendant has committed the crime with which he is charged -- larceny or stealing of some kind.

Mr. Gleuck. Suppose some one raises the issue that this is not a crime because of the legal interpretation of a statute: Do they ever raise it that early, in real life?

Mr. Holtzoff. They do not, before United States commissioners. I am not sure what the practice before magistrates is.

Mr. Wechsler. I think that in that event the magistrate should hold the man for determination.

Mr. Dession. Yes; but I should like to know what the policy should be.

The Chairman. We have to express all views on the matter

of law. I should like to suggestthat we refer this matter back to the Reporter, to give us a fresh start tomorrow morning. Because my draft has been so marked and re-marked that I cannot decipher it very well.

Mr. Medalie. Before you vote on that, there is another provision or element in the Institute code which we left out. A man may be charged with one offense and the evidence may show that he committed another. Even under code state practice he may be held for the other offense.

Mr. Youngquist. That is here, George.

Mr. Medalie. Does it use "no"? The code uses the words "any offense". In other words, it need not be the offense charged.

Mr. Glueck. Must it be an offense of the same nature, or comprehended within it?

Mr. Holtzoff. Oh, no.

The Chairman. Someone attempted a few minutes ago to restrict this to the offense that has been charged.

Mr. Medalie. Oh, no; that is not even the practice in the various States.

Mr. Glueck. Suppose a man is being examined for embezzlement, and it comes out that he committed a murder?

Mr. Holtzoff. You can hold him.

Mr. Glueck. You can?

Mr. Holtzoff. Surely.

Mr. Medalie. It is an extreme case, but you can hold him.

The Chairman. Gentlemen, this is getting too complicated. I think we should refer it back to the Reporter.

Can you have it for us by tomorrow or perhaps the next day?

Mr. Robinson. Yes.

Mr. Glueck. Let me ask the Reporter to find out for us what phrases are generally used in the State statutes.

Mr. Robinson. Yes; we will do that.

Mr. Longsdorf. You can find them in here.

The Chairman. May we come now to Rule 21 (e)?

Mr. Medalie. That is the established, business-like procedure.

The Chairman. Why do we use, in line 29, both the words "bonds" and "recognizances"?

Mr. Holtzoff. They are two different things. The bond is signed only by the surety, and the recognizance is signed by both the principal and the surety -- no; I am wrong.

Mr. Youngquist. As I understand it, a rec gnizance is signed by the defendant.

Mr. McLellan. And sometimes he is recognized without signing anything.

TheChairman. It is done orally very often in court.

Mr. McLellan. Yes.

Mr. Youngquist. Elsewhere in the rules you will find the word "undertaking" alone used.

Mr. Holtzoff. It should not be used.

The Chairman. The point I make is that if we use the phrase "bonds or recognizances" in line 29, why should not we use it in line 30?

Mr. Holtzoff. I guess we should.

Mr. Seth. Do you mean recognizances of witnesses?

The Chairman. Yes.

Mr. Seth. Witnesses are not usually put under bond.

The Chairman. I understand they did. You do in the State court.

Mr. Holtzoff. Witnesses are sometimes put under bond, and for failure to give bond they are committed.

Mr. Seth. That is right.

The Chairman. Shouldn't we insert the word "bonds"?

Mr. Seth. That is right.

Mr. Medalie. No; you do not need it: "together with the originals of bonds or recognizances of bail for thedefendant" -- you do not need "prisoner" -- "and witnesses".

The Chairman. Are there any further suggestions?

Mr. Longsdorf. You want to take out all after "witnesses", don't you?

Mr. Medalie. No.

Mr. Seth. "appear or testify".

Mr. Longsdorf. Yes; "appear or testify" will do it.

The Chairman. Are there any further corrections in 21 (e)? If not, all those in favor of the paragraph as amended say "aye".

The motion was carried.

The Chairman. Rule 21 (f).

Mr. Holtzoff. It seems to me that (f) is unnecessary and should be stricken, for this reason: (a), (b), (c), (d), and (e) set forth what the procedure shall be. Therefore, (f), which says that the State procedure shall not be followed, becomes surplusage.

Mr. Crane. I do not see what we want (f) for.

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

Mr. Longsdorf. I am pretty well agreed to that. The only reason I put that in is because we are endeavoring to get rid of the statement contained in 591. If we have done that, we do not need this.

Mr. Holtzoff. I think we have done it.

The Chairman. It might be the first paragraph in our annotations; it might be very good as a note.

Is there a motion made?

Mr. Holtzoff. I move to strike out (f), and to make it a part of the annotation.

The motion was carried.

The Chairman. Now we come to Rule --

Mr. Longsdorf. But I want to put in a word there. I do not think that our commas should contain asseverations of law. It ought to be ~~a request~~ request in the form of a note ~~saying~~ what we will do.

The Chairman. Yes; that is understood.

Now let us consider Rule 22 (a).

Mr. Robinson. Mr. Holtzoff worked out that rule at the last meeting.

Mr. Holtzoff. Rule 22 (a) contains the provision about when a summons shall be issued. It is substantially in the form agreed upon at the last meeting.

Mr. Longsdorf. Should not some of these commissioner warrants require approval by the United States attorney?

Mr. Holtzoff. The law does not require that the United States attorney approve the warrant, but that the departmental practice forbids an arresting officer to file a complaint

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unless the UnitedStates attorney first approves the complaint. But that is a matter of departmental practice rather than any statutory requirement.

Shall I go on?

The Chairman. Are there any suggestions with respect to (a)?

Mr. Wechsler. I should like to ask a question.

Mr. Medalie. In line 7 you use the words "service to the marshal or some other officer". It is sufficient if you say "to an officer authorized by law to serve it".

Mr. Holtzoff. I think that is so.

The Chairman. "To an officer"?

Mr. Holtzoff. Yes.

The Chairman. Do we use others than the marshal, as a matter of fact?

Mr. Holtzoff. Yes; we do. For instance, investigating officers like F.B.I. agents or narcotic agents will file a complaint and get a warrant and serve a warrant.

Mr. Wechsler. Mr. Chairman, I have forgotten the point of the proviso for directions by the court. You are dealing with cases before a committing magistrate, in the first sentence. How would you get a direction from the court?

Mr. Longsdorf. This covers both cases.

Mr. Youngquist. Here is the language we suggested at the former meeting:

"A summons in lieu of a warrant may be issued by the committing magistrate or by the clerk, upon the order of the court."

I think that explains it.

Mr. Holtzoff. In other words, the committing magistrate should not have the right to issue only a summons when the United States attorney requests a warrant. That is a privilege which should be reserved for the court.

That is the thought back of this.

Mr. Wechsler. I understood the point about the United States attorney; but Mr. Youngquist has answered my thought about the court. It refers to the clerk, rather than to the committing magistrate.

Mr. Youngquist. I am wondering if in lines 4 and 5 the attorney should not be mentioned before the court. "If the UnitedStates attorney" -- should it read this way?

"If the United States attorney so requests or the court so directs".

Will not the matter come up before the attorney, first, in point of time?

Mr. Holtzoff. I think you are right.

Mr. Youngquist. And should not the attorney be mentioned first, in the normal sequence of time? Is there any objection to that change?

Mr. Wechsler. For the committee on style, Mr. Chairman, would not the second sentence be adequate as a proviso to the first? There would be a comma after "warrant" in line 4, and it would read:

"Unless the United States attorney requests or the court directs that a summons be issued instead".

The Chairman. That seems good.

Mr. Holtzoff. Yes.

The Chairman. If there is nothing further on 22 (a)

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we shall go to 22 (b).

Mr. Holtzoff. 22 (b) merely deals with the form of the warrant and with the form of the summons, substantially as agreed upon at the last meeting. It is very largely formal.

The Chairman. Are there any questions? If not, we shall move on to 22 (c).

Mr. Medalie. There is one trouble with 22 (b) (2): When the summons is issued by a committing magistrate, is his a court? Is the summons to be in the same form as the warrant? Provision is made that the warrant shall contain the name of the court. Thesummons is issued by a committing magistrate and cannot be in the name of a court because he is not a court and does not hold a court.

Mr. Holtzoff. But perhaps in line 14 no harm would be accomplished if we just leave out the words "contain the name of the court and".

Mr. Crane. I do not get that. Why shouldn't the summons contain the name of a court?

Mr. Holtzoff. Because the United States commissioner is not a court; he is only a magistrate.

Mr. Crane. It always has been limited to a court, I think. He may not issue it as a court, but it has the name of a court on it.

Mr. Medalie. Suppose he is presiding as a magistrate, but not a commissioner: If not a commissioner, nevertheless he has certain powers underthe statute; has he not? He is a State official. Let us say that Mr. La Guardia decides to issue process for some violation of a Federal law in connection with defense work. He is the mayor, and he decides to issue

process. He is not a part of the District Court for the Southern District or the Eastern District of New York.

Mr. Holtzoff. I do not recall whether commissioners' warrants contain the name of a court. Do you?

Mr. Medalie. I do not.

Mr. Holtzoff. I do not think they do, either.

Mr. Medalie. Apart from that, you have other magistrates who are not commissioners.

Mr. Holtzoff. I think all this can be cured by changing line 14 so as to strike out the words "the name of the court and".

Mr. Medalie. The warrant should have the name of the court and also, if issued by a magistrate, should have the name of the magistrate.

Mr. Seth. That is right.

The Chairman. That you get from line 18.

Mr. Holtzoff. But your point would be met by leaving out the name of the court, in line 14.

Mr. Medalie. But I do not want to leave it out; because it ought to be in, when you are dealing with a court.

Mr. Holtzoff. The Chairman says that line 18 brings in the name of the court. It must have the name of the court. He might say, "Bring him before me", and sign it "John C. Knox, District Judge." But that does not give the name of the court, which might be, let us say, the District Court for the Southern District of New York.

The Chairman. Line 14 says he must name the court or the committing magistrate.

Mr. Longsdorf. Is not the State magistrate, if he sits

in connection with the committing of a Federal crime, a part of the Federal court?

Mr. Holtzoff. No.

Mr. Longsdorf. Does not the statute make him that?

Mr. Holtzoff. No; I do not think so. He is not a part of the Federal court. He is just given certain authority to do a limited act. I do not think he is a part of the Federal court.

Mr. Medalie. If my mayor should decide to issue process, he would not do so by virtue of the Federal court. He would do so by virtue of his own dignity and power, God bless him.

Mr. Glueck. The United States statute makes him a magistrate, and therefore an arm of the court.

The Chairman. Gentlemen, what is your pleasure with respect to Mr. Holtzoff's suggestion as to line 14, "the name of the court" -- the words which he says should be deleted?

Mr. Robinson. I agree with Mr. Medalie about that -- that we should not delete them just in order to get away from the name of the committing magistrate.

The Chairman. We have it in line 18.

Mr. Robinson. I do not think so.

The Chairman. It says "brought before the court"-- and thus names the court.

Mr. Wechsler. What would be the harm in putting in the word "magistrate" after "court" in line 14?

Mr. Crane. Have you ever seen one of these summonses? Has any one here seen one of them?

Mr. Glueck. Yes.

Mr. Crane. Has every one seen a summons? Have you, Mr.

Holtzoff?

Mr. Holtzoff. I do not recall.

Mr. Crane. I am asking how many members of the committee have seen a summons. I do not think I have. I think they are talking about something we do not know much about.

Mr. Glueck. Apropos, I think we ought to have some of these documents in here, so that we may look at them.

Mr. Crane. Yes; I think so, too.

Mr. McLellan. Of course they are very common in Massachusetts.

Mr. Glueck. Why not adopt Mr. Wechsler's suggestion, and insert "magistrate" after "court" in line 14?

Mr. Crane. I do not think we should decide on things we have not seen or do not know about. May we get one and find out what has been done with a summons that has been issued?

Mr. Robinson. I may say that when the original draft was prepared it was drafted with a summons there; so we followed it.

Mr. Crane. I do not think we should decide on forms until we see what forms are being used.

Mr. Seasongood. I think so, too.

Mr. Dession. I have seen a Federal form used to suit the occasion. You put the caption on at the top, and you use the usual form, and then you let it be served by the marshal in the usual way, and you sit back and see what happens.

Mr. Medalie. I move that in line 14, after the words "the name of the court" there be inserted the words "or of the magistrate".

The Chairman. The committing magistrate?

Mr. Medalie. Yes.

The Chairman. The motion is to insert in line 14, after the word "court", the words "or of the committing magistrate".

Mr. Medalie. Yes; "or of the committing magistrate."

Mr. Seasongood. If it is the universal practice to have the name of the court, why strike it out? It is all the more impressive with the name of the court.

Mr. Holtzoff. I am just reminded that commissioner's warrants do not have the name of the court, but they have the name of the district in which the commissioner is sitting.

Mr. Crane. Let us go to work and see about these things; because we do not want to write forms based on something which

7 does not exist.

Mr. McLellan. He sees a warrant, not a summons.

Mr. Medalie. This is what happens in the case of a magistrate, whether he be the kind that you have in the city of New York or in Chicago or in any other place where he is merely a justice of the peace. He has a lot of papers which simply say "justice of the peace" or "city magistrate of the City of New York", or whatever it may be. He has a piece of paper which designates who and what he is. He does not simply tear off a piece of paper and write out, "Arrest John Jones for bootlegging".

Mr. Holtzoff. Then it should not be the name of the committing magistrate, but the title; should it not?

Mr. Medalie. Well, he does not issue it as a court. John Smith, city magistrate of the City of New York, in issuing a warrant or, if you will, a summons, under section 22, does not issue it as a court. He issues it because he is a person who, holding a certain office, gets the powers of a Federal committing magistrate.

Mr. Seth. Would it not be well to separate (b) into "warrants issued out of a court" and "warrants issued by the committing magistrate"? Would it not be better to place them in separate paragraphs?

Mr. Holtzoff. Very few warrants are issued by the court.

Mr. Seth. I mean where the indictment or written accusation is filed in court.

Mr. Holtzoff. There is a separate rule as to warrants issued out of a court, upon a warrant or information.

Mr. Seth. This covers both of them.

The Chairman. I think Mr. Seth's point is well taken. At least in the first sentence we should deal with the warrant out of a court; and then if we need a separate sentence to tell whether the warrant issued by magistrates differs from it, we can do that; and then the summons follows.

Mr. Seth. That is right.

The Chairman. Is that suggestion agreeable? If it is, we can refer that back to the Reporter, for restatement.

Mr. Medalie. All right.

The Chairman. Very well; then we pass on to Rule 22 (c).

Mr. Dession. In (b) should not we state something about the penalty for disobedience of the summons-- under penalty of law, or something of that sort?

Mr. Holtzoff. No. If a person does not respond to a summons, he should be arrested.

Mr. Robinson. The code makes it an offense to disobey a summons.

Mr. Holtzoff. The summons is for the defendant's convenience. You issue a summons instead of arresting him. If he

does not choose to obey the summons, then you just issue a warrant and pick him up.

Mr. Dession. Yes; and you will be changing some more law if you put a penalty on him on a summons. At the present time if you issue a summons against an individual you do not have to show probable cause against a summons--

Mr. Medalie. They are against corporations.

Mr. Dession. Yes; they are; I have used them.

Mr. Holtzoff. Against individuals?

Mr.Dession. Well, there is no law against writing out a piece of paper and getting a marshal to serve it; is there? It is like writing a letter. A good many district attorneys use the telephone, and say, "Will you come in?" There is no law against that; but I do not think it has any binding effect if a man does not choose to come in. That would be changing that, if we put a penalty on it.

Mr. Robinson. It would not be a technical summons, anyway.

Mr. Dession. Well, call it what you like.

The Chairman. All right; Rule 22 (c).

Mr. Holtzoff. That is just a statement as to who shall have authority.

Mr. Medalie. Why say "the United States marshal and his deputy"? Is it not sufficient to say, "an officer authorized by law to do so"? The number of officers who will have the authority to execute process will increase in the next year or two.

Mr. Holtzoff. It may be that under the circumstances we can well dispense with paragraph (c). Even though I

drafted it I see no reason why we cannot dispense with it.

The Chairman. I think we can.

Mr. Medalie. All right; I will agree that it goes out.

The Chairman. It is moved and seconded that the paragraph be deleted.

Mr. Crane. It looks good. You have nothing to say who serves it. Why not leave it in-- "served by a United States marshal"? The rules say it takes a marshal to serve them.

Mr. Medalie. There are others besides marshals who can do that.

Mr. Crane. It looks good here. You have a warrant and you have the provision for issuing a summons, but you do not say that a marshal can do it.

The Chairman. In line 7, back of that, there is the provision to cover that-- rule 22(a), line 7.

Gentlemen, did we take care of the subsection? Did we vote on that? All in favor of the motion to strike, say "aye".

Mr. Seth. The civil rules require that it be served by a marshal or some one specially appointed. I think we should have a provision similar to that; I think such a provision should be placed here.

Mr. Holtzoff. In drafting subparagraph (c) I did follow the pattern of the corresponding civil rule.

Mr. Seth. That is right.

Mr. Holtzoff. The corresponding civil rule being that all process shall be served by the marshal or his deputy or some person appointed by the court.

Mr. Seth. Yes -- except subpoenas.

Mr. Holtzoff. Yes, except subpoenas.

9 The Chairman. You have made the suggestion about summons.

Mr. Seth. I think a summons should follow the civil rule. A summons may be served by any one appointed to make service.

Mr. Medalie. And that is followed in the State courts. Usually the complainant is given the summons.

Mr. Holtzoff. Yes; but you do not ordinarily have the complainant in a Federal case.

Mr. Medalie. You might; you might get an officer who has no power to arrest, like a food and drug inspector.

Mr. Holtzoff. Yes; but why give him a summons?

Mr. Medalie. Because he is the complainant; he makes the affidavit on which the magistrate acts.

Mr. Longsdorf. Mr. Chairman, I think we ought to step a little cautiously in dealing with the summons. The use of summons and the criminal process I think originated in the John Kelsoe case. I think that was the first one in the United States. It is commonly cited. Judge Dehaven, in California, a good many years ago found one way to bring in a corporation in answer to an accustion of commission of a crime, and he resorted to section 716 of the Revised Statutes, which is now section 377 of Title 28, and which authorizes the court to devise any process necessary to exercise the acts in its jurisdiction.

So he devised a summons in that case, and that case has been followed, and it was followed in a very peculiar situation inNorth Dakota, in the John Gunn Brewing Company case, where the defendant was a corporation of Wisconsin, and the information or indictment was filed in North Dakota. There was no way for the marshal of North Dakota to serve a summons in

Wisconsin. So the John Gunn case extended the doctrine of the Kelsoe case, and the judge directed that the summons should run to the marshal of the district of Wisconsin, and be by him served in return. And that was upheld by the circuit court of appeals.

So that kind of a summons does not have any exact counterpart on the civil side, and that is the doctrine of summons, I believe, that is followed in the United States courts. I could not find anything else but those two cases which illustrate that.

Mr. Medalie. As against that, you have something that has developed over the last thirty-odd years in the State courts, particularly in the large centers, where it is found in practice that a summons serves all the purposes of a warrant, without any need for harassment, and gives this additional safeguard for the enforcement of the law. But where there is doubt whether a crime has been committed or whether the defendant committed it, the magistrate is willing to hear the case and see whether he can make up his mind that a crime has been committed.

There are so many cases of that kind, and justice is done so substantially in those cases, that we ought to have that done in the Federal courts. Without summonses in Federal criminal procedure, you would have a situation in which the Federal courts would be just a whole generation behind the State courts; and that ought not go on.

The Chairman. Gentlemen, what is your pleasure with respect to subsection (c), both as to the language there and as to the suggestion now made with respect to inserting a provision

concerning the services of summons?

Mr. Seasongood. Mr. Chairman, why is it not covered by subdivision (a) and probably in subdivision (c), for the service of a subpoena being specially designated? Why is it not covered by them?

The Chairman. It struck me that it was, but some one has raised objection.

Mr. Seth. It is specifically in the civil rules, and I think it is highly important. In our district you may have an offense, and the marshal may travel 400 miles making a round trip to make service. There ought to be a designation of some one to serve summons -- not to make an arrest, but to serve summons.

The Chairman. If we want to maintain the parallel we would go back in section (a) and restore the language "the marshal or some other officer authorized by law to serve"; because that is the language -- "the marshal or person specially appointed to serve". That is the language of civil rule 4 (a).

Mr. Seth. That is right. But that ought not to extend to the warrant. The warrant ought to go to the marshal or officer.

Mr. Medalie. The words "marshal or officer authorized by law to serve" cover it.

Mr. Seth. Yes; they do.

The Chairman. Section 4 (c) of the civil rules provides as follows:

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

may be served as provided in rule 45. Special appointments to serve process shall be made freely and substantially the same as when travel fees will result."

Mr. McLellan. May I ask a question-- because I have not been here before.

The Chairman. Yes, Judge.

Mr. McLellan. Have you given thought to permitting a summons in a criminal case, which of course may be followed at any time by a warrant for arrest-- have you given thought to service of a summons in a criminal case by mere mailing?

Mr. Holtzoff. If we do not put in any provision as to how the summons shall be served, it might well be served by mail.

Mr. McLellan. Because it is in the interest of the defendant that you use the summons any way; and why is it not sufficient if by registered mail you send it to him? Then if he does not respond you can send it by an authorized officer, and then make an arrest.

That would do away with any necessity for the court, as under the civil rules, to authorize some one other than an officer to make the service.

Had you considered that?

The Chairman. I think it was mentioned at the first session, but I do not think we came to any conclusion about it.

Mr. McLellan. I do not want to delay the proceedings.

The Chairman. I think it is important, Judge.

Mr. McLellan. But a summons in a criminal case is quite different fromthat in a civil case, of course.

The Chairman. Can we agree as to section (c) as it stands, plus a provision for liberal service for the summons,

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perhaps, including the mail servicethat JudgeMcLellan refers to?

Mr. Holtzoff. I am wondering if it is necessary to have any provision at all with respect to how a summons shall be served. It is a mere notice given to the defendant, in his own interest, to come into court, so as to avoid being arrested.

11 Mr. Crane. Will every one know that? Will everybody know it? You and I and the rest of us know it, but would everyone else know it?

The Chairman. That is exactly the point. If it may be served by mail, why not say so?

Mr. Youngquist. That is in the comment on this very rule.

Mr. McLellan. I did not see it.

Mr. Youngquist. It is the last paragraph but one.

Mr. McLellan. I had not seen it.

Mr. Wechsler. Can there be a general formula as to how the summons may be served in any way reasonably calculated to bring it to the actual attention of the defendant? Then you have advised the bar what you intend.

Mr. McLellan. They would not dare send it by mail, even under that.

Mr. Medalie. That is right. I should like to make a motion that would carry out the purpose of Judge McLellan's suggestion. I move that at the appropriate place the following be included:

"A summons may be served by any person designated by the court or the magistrate for that purpose. It may also be served by mail by the magistrate or by the clerk of the court,

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when so directed by the court."

The Chairman. Would you say "by registered mail"?

Mr. McLellan. No.

The Chairman. "By mail"?

Mr. McLellan. Yes.

The Chairman. I think that would come at the end of (d); I think it would also require the addition of some language at the end of (c)-- (c) being by whom executed, and (d) being how executed -- if that can be divided easily enough to bring about that purpose.

Is there anydiscussion on the motion? All those in favor say "aye".

The motion was carried.

The Chairman. Is there any discussion of (d)?

Mr. Longsdorf. Mr. Chairman, can that be recast in form so that we shall have another copy of it? It is rather inconvenient as it is.

The Chairman. Subparagraph (d)?

Mr. Longsdorf. Yes, both those additions.

The Chairman. (c) and (d)?

Mr. Longsdorf. Yes; because it is rather hard to interline all that matter.

The Chairman. All right. That brings us to subsection (e).

Mr. Holtzoff. Subsection (e) is exactly in the language agreed upon at the last meeting.

Mr. Longsdorf. Mr. Chairman, (e) purports to extend -- I mentioned the procedure of issuing summons in those two cases; and (e) purports to extend the territorial range of summons

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throughout the State, when the State contains several districts. Let us be quite sure that that does not extend the jurisdiction of the district court.

Mr. Holtzoff. It does not extend thejurisdiction of a court. It merely eliminates the necessity of a removal proceeding from one district to another district of the same State, and that is perfectly logical; because if a person is charged with a State offense he can be arrested in any county of the State and can be carried to any other county, without any extradition proceedings.

Mr. Medalie. I should like to ask this question -- excuse me, but I had a specific technical thing in mind there.

Mr. Longsdorf. Certainly; go ahead.

Mr. Medalie. A man is indicted in the eastern district of New York; he is in the western district of New York -- that is, he is indicted in Brooklyn, and he lives in Buffalo. The marshal of the eastern district has no power, as I understand it, to execute process except in the eastern district.

Mr. Holtzoff. No; that has been changed by a statute which was passed at our request about four or five years ago.

Mr. Medalie. Has it? All right; fine. You fellows think of everything. That answers my question. You mean that the Brooklyn marshal can go to Buffalo and pinch the poor fellow?

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Mr. Holtzoff. We had that difficulty.

Mr. Medalie. That is different. Shades of Harry Weinberger!

The Chairman. Very different. Shades of Harry Weinberger, and ghost of Judge Clark!

All right; go on to section (f).

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Mr. Dession. I should like to raise one question now, which may be settled later.

The Chairman. Very well; go ahead.

Mr. Dession. We are dealing with summons. As I understand it, a summons to a corporation is enforceable through contempt proceedings. A summons against an individual is not. Should we spell out the legal results that follow from serving one of these things?

Mr. Longsdorf. Yes; I think so.

Mr. Dession. There is no certainty about it.

Mr. Medalie. Do you mean provision that would say, "wilful failure to respond to a summons shall be deemed contempt of court"?

Mr. Dession. We are talking about a summons, without differentiating between summons to a corporation, which in existing practice is enforceable, I believe, and a summons against an individual, which, in existing practice, is not enforceable, as I understand.

Mr. Medalie. If we agree that "summons" as provided for in this section, does not mean anything except an opportunity to a defendant to avoid arrest, then of course the contempt provisions would be inapplicable. By providing here that wilful disobedience to a summons, wilful failure to respond to a summons, shall constitute contempt, would we do something which, by these rules, the rules have the power to enact?

Mr. Holtzoff. I do not believe we should make that a contempt; because that means if a person fails to appear in response to a summons he can be punished first for the crime for which the summons was issued and then again for failure to

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1 respond to a summons.

Mr. Dession. You can do that with a corporation; that can be done now. The only reason is, I suppose, that it may be the only way to get a corporation to respond by an actual person.

Mr. Medalie. Of course I can understand in that connection that the fact is that the practice -- not the law, but the practice -- with respect to summonses by our magistrates in State court cases is such that a person is rarely, if ever, fined for disobedience. When the magistrate becomes disgusted because of the person's failure to respond, he issues a warrant. That applies even to parking tickets.

Mr. Glueck. Is the summons process within the meaning of (e)?

Mr. Holtzoff. Oh, yes.

Mr. Longsdorf. Why not?

Mr. Holtzoff. Actually when they desire to summons a corporation they do not bother to issue a summons, but they telephone the attorney for the corporation.

Mr. Seth. What happens if the corporation does not pay attention to a summons?

Mr. Dession. Then you can issue a warrant for the arrest of the president of the corporation.

Mr. Longsdorf. Mr. Chairman, before we pass over (e) let me call attention to this:

"All process other than a subpoena may be executed or served anywhere within the territorial limits of the State in which the district court is held."

What becomes of the John Gunn case, in which the summons

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was not served within the district, and could not have been?

Mr. Holtzoff. This provision changes the law.

Mr. Longsdorf. Then you could not get the John Gunn Brewing Company into North Dakota.

Mr. Robinson. In order to meet that point, how about the amendment called 59 (e), which has been considered by Mr. Longsdorf and the rest of us?

Mr. Holtsoff. 59 (e)?

Mr.Robinson. Well, this is 22 (e). I will have 59 (e) in a moment:

"All process otherthan a subpoena may be executed or served anywhere within the territorial limits" --

And so forth. Then the second sentence is as follows:

"A subpoena may be served within the territorial limits provided in rule" --

That is to be filled in with "59 (e)" at that point, if you have not already filled it in --

", and a summons may be served wherever the court may order it to be served."

Mr. Medalie. You would get outside the State, if that language is as broad as that.

Mr.Robinson. That is right. Why not? That would meet the Gunn case that Mr. Longsdorf is speaking of.

Mr. Medalie. It would meet that case, but it would cause horrible inconvenience if a judge in Portland, Maine, issued a summons to a man in San Diego, California. I think that is

2 rather serious business.

Mr. Longsdorf. I think we should differentiate between summonses to corporations and summonses to natural persons.

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Mr. Medalie. Let me say a little more there, please: It would cause horrible inconvenience if a judge at Sitka, Alaska issued a summons to a man in Key West, Florida!

Mr. Holtzoff. I do not believe that a summons should have any different territorial extent than a warrant; because a warrant is issued if a summons does not bring fruit. The two ought to be coterminous.

Mr. Seth. How about the corporation? For instance, there were the proceedings in Denver oroginally for violation of the anti-trust law, and they issued summonses in 16 States.

Mr.Robinson. That would be changing the law, then, if we did not amend the rules as suggested.

Mr. Seth. That is right.

Mr. Longsdorf. That is my point exactly.

Mr. Seth. You cannot remove them; you cannot do anything unless you allow them to run outside the State of jurisdiction. I agree that they should not be dragged around.

The Chairman. It begins to appear that if we have to get some new name for the summons against an individual we are going to be all mixed up with the practice that has grown up for summonses against corporations and the legal effect of serving them and the places where you can serve them and the penalties for not responding. I think we are talking about two different kinds of animals, but are giving them the same name.

Mr. Robinson. Mr. Chairman, would it take care of it in line 37 to say:

"All process other than a subpoena or summons to a corporation" --

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And then, following that, to say:

"A summons to a corporation may be served wherever the court may direct"?

Then, in line 40, we could say:

"Within the territorial limits provided in Rule 59 (e), and a summons to a corporation may be served",

and so forth.

The Chairman. Well, gentlemen --

Mr. Holtzoff. Mr. Chairman, I think that would do it.

The Chairman. I think so.

Mr. Seasongood. What is the "and so forth"?

Mr. Robinson. To finish the sentence there:

"may be served wherever the court may order it to be served."

The Chairman. What is your pleasure with respect to (e) as thus amended? Is there any discussion?

Those in favor of the subsection as amended will say "aye".

The motion was carried.

3 The Chairman. That brings us to 22 (f).

Mr. Medalie. In subsection (f) we say:

"The officer executing or serving the process shall make proof of service thereof".

I think the word "proof" is not what we want. A certificate is what we want.

Mr. Seasongood. Return.

Mr. Holtzoff. Return.

Mr. Robinson. That is right; that is a good technical word.

Mr. Seasongood. "Shall make prompt return thereof".

Mr. Holtzoff. "Shall make return thereof to the court of the United States".

Mr.Robinson. Strike out "proof of service" and substitute "return" in line 42.

The Chairman. That brings us to Rule 23, which I think we disposed of.

Mr. Holtzoff. Yes; we did.

The Chairman. Very well; now Rule 24.

Mr. Robinson. Rules 24, 25, 26, 27 and 28: I shall ask Mr. Strine to present that matter to us, because he worked on those rules.

Mr. Strine. The following five rules are drafted to conform to Rule 21 and other rules, and might eventually be subsections of one rule instead of separate rules. The committee has received a number of letters from various Federal judges stating that the present procedure on bail is satisfactory; and I suppose the only questions on bail are the questions of professional bondsmen and sureties on a number of bonds beyond their worth, and perhaps the giving of bonds to habitual criminals who commit crimes when they are out on bail.

The breaking of bail is covered by statute.

In non-capital cases the defendant shall be admitted to bail, and in capital cases he may be admitted to bail in the discretion of the court or judge.

The rules drafted here have not attempted to cover those statutes or to make any change.

As to the qualification question, we have endeavored to cover that in Rule 26.

The first rule here on bail -- Rule 24 -- refers to the

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amount of bail, and it merely provides that when a defendant is admitted to bail the magistrate shall fix bail in such amount as in his judgment will insure the presence of the defendant, having regard to the nature of the offense, the financial ability of the defendant to give bail, and the likelihood of the defendant's absconding.

The first two of those have been expressed in the cases, and the third we have added.

The Chairman. May the first two words in line 2 be deleted?

Mr. Holtzoff. Yes.

Mr. McLellan. Yes.

Mr. Wechsler. Which rule is that?

The Chairman. Rule 24.

Mr. Holtzoff. In the same line, Mr. Chairman, the words "in such amount" I think might be stricken out, and just the word "such" left, so as to read:

"The amount thereof shall be such as" -- * * * .

Mr. Seasongood. Yes.

Mr. Dession. Yes.

Mr. Seth. Should not either this rule or Rule 22 contain the provision with respect to a judge's endorsing on the warrant the amount of the bond, when the indictment is returned and a warrant is issued? That is the common practice, at least. He takes the indictment and endorses the amount of the bond, and the marshal takes bond or bail.

Mr. Medalie. You do not want to compel the judge or magistrate to do that, do you? You want to permit him to do it; do you not?

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Mr. Seth. Yes, authorize him to do it.

Mr. Medalie. Because he may want to know more about it.

Mr. Seth. Yes.

Mr. Medalie. Otherwise some other judge or magistrate having the power to fix bail would follow that, and be compelled to.

Mr. Seth. Yes; but in the ordinary case he just endorses the amount on the indictment, as a matter of fact.

Mr. Burke. Mr. Chairman, in that connection since we are considering Rule 22 again, I have been wondering, since we are considering the service of summons upon a corporation merely. It is my recollection that in many instances corporations residing in foreign States have been made respondents, and also the individual officers -- John Jones because he happened to be president, and Sam Smith, Treasurer. I am wondering if we are not going to run into a little conflict there between personal interests and purely corporate interests if we make it apply exclusively to corporations.

The Chairman. At the present time can an individual be summoned into a district not in the State in which he resides?

Mr. Holtzoff. No; he cannot be summoned even into a district in which he does not reside or in the same or a different State.

Mr. Seth. He can be arrested and removed; that is all.

The Chairman. Can he be brought in by warrant fromanother State?

Mr. Holtzoff. No.

Mr. Burke. But here you make provision for serviceof a summons on a corporate entity; and as I recall, in such cases

they have also included the managing officers and directors of the corporation.

The Chairman. I am wondering how they got them in, Mr. Burke.

Mr. Burke. As individuals.

The Chairman. But getting back to the existing practice, and quite apart from our rule, I wonder how they got the individual defendants to come up from Texas.

Mr. Seth. They arrested them, and removed them.

Mr. Burke. They arrested them.

Mr. Holtzoff. In other words they had to put them through a removal.

Mr. Seth. Unless they came voluntarily -- and usually they do.

Mr. Burke. My thought was whether this might be construed by district attorneys as not permitting the same service of summons that would be available to a corporate defendant.

Mr. Holtzoff. No; we have a rule on removal from one State to another, that I think would cover that point.

Mr. Burke. But that is for removal.

Mr. Holtzoff. That is the only way you can bring a natural person from one district to another, now; you have to have a removal proceeding.

Mr. Youngquist. I do not think you would ever serve a summons on an individual living outside of the State in which the court is located.

The Chairman. In other words it would have to be taken care of on a removal proceeding.

Mr. Youngquist. Or by warrant.

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The Chairman. Yes, or by warrant.

Are there any further questions on Rule 24?

Mr. Holtzoff. In line 3, Mr. Chairman, just as a matter of phraseology, I think the word "official" is not a word of art. It should be "officer"; that is a word of art.

Mr. Youngquist. I have: "court or committing magistrate" in mine.

Mr. Medalie. When bail is fixed by a district judge, is it fixed by him as the district judge or as the court?

Mr. Holtzoff. It is fixed by him as the court, unless he is sitting as the committing magistrate.

Mr. Medalie. Then why do we not say as Mr. Youngquist suggests?

Mr. Holtzoff. That is all right.

Mr. Medalie. "By the court or committing magistrate".

Mr. Holtzoff. Yes.

Mr. Medalie. And strike out the words "official admitting to bail", and insert "or committing magistrate".

The Chairman. Yes.

Mr. Medalie. Then I have the further suggestion to make it read,"will insure his presence at the trial or hearing, having regard", and so forth.

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The Chairman. His presence?

Mr. Medalie. We have other appearances, in practice, than at the trial or hearing. Sometimes the defendant is required to appear on calendar calls.

Mr. Seth. Yes, and for arraignment.

Mr. Medalie. Even though there is no actual trial; there may or may not be a trial on the day set for a trial.

The Chairman. That is true.

Mr. Medalie. I think the language "in the criminal proceeding" is sufficient.

The Chairman. Yes.

Mr. Holtzoff. "His presence in the criminal proceeding".

The Chairman. You do not even need that.

Mr. Holtzoff. Just "his presence".

The Chairman. Then, as I understand it, the rule will read:

"When the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the court or committing magistrate will insure his presence, having regard to the nature of the offense, his financial ability to give bail, and the likelihood of his absconding."

Is that correct?

Mr. Holtzoff. Is "absconding" the correct word? I thought that was generally used with respect to a debtor, and not a defendant. I would suggest the words "of his failure to appear."

The Chairman. Before we knock this word out, let us be sure about it.

Mr. Holtzoff. You speak of "the absconding debtor".

The Chairman. Is that your thought in the matter, gentlemen?

Mr. Seth. And his mere failure to come into court might not be "absconding". He might still be in town.

Mr. Holtzoff. That is not "absconding".

Mr. Strine. How about "the likelihood of his becoming a fugitive"?

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The Chairman. Or "failure to appear".

Mr. Holtzoff. I think that is it.

Mr. Medalie. What would you say of "the likelihood of his failure to appear"?

Mr. Holtzoff. Yes.

The Chairman. Are there any other suggestions?

Mr. Glueck. There seem to be so many "his's". I should prefer to go back, and to say, at the beginning of line 4, "the presence of the defendant." That would help omit so many of the "his's".

The Chairman. Very well. Allthose in favor of the rule as amended say "aye".

The motion was carried.

The Chairman. Rule 25.

Mr. Strine. The purpose of the rule is to eliminate unqualified sureties. It requires all personal sureties to justify by affidavit describing the property in respect of which they propose to justify as to their sufficiency, to set forth all encumbrances thereon, and to state the number and amounts of any other bail bonds on which they are surety, and which are still outstanding.

The rule then requires that sureties, whether personal or corporate, shall give any other information which may be required, and also as to whether a contract of indemnity exists between them or the defendant or any third person. The rule then provides that the officer taking the bail can, in his discretion, refuse to accept any surety not qualified.

Mr. Medalie. You have in the notation on the next page the statement:

"Sureties who have been indemnified have been refused both where the contract of indemnity is with the defendant,* * * and where it is third persons."

I know that the old English rule was that a surety was supposed to be one who, without security, and solely out of confidence in the defendant, went on the bond. That is neither the American rule nor the American practice nor our theory. We recognize that if a man has a little house in the suburbs, and the surety company thinks the man who has a house in the suburbs is a pretty good risk, but nevertheless it takes the house as indemnity -- which it should do -- that is still a good bond.

In our practice we also think that if that man's uncle or mother-in-law puts up his or her house or a handful of securities, or assigns her savings bank book for the purpose, that also is good. In other words, the court cannot do what it should be able to do in having the intermediary-- the surety company or the individual, but more often the surety company-- do this. It is not the purpose to keep people in jail. When it is not necessary to keep them injail, to feed them, and to keep them fromtheir employment and business, we do not want them injail.

Mr. Holtzoff. A professional bondsman is much more responsible than an individual bondsman who might happen to be a relative or friend of the defendant.

Mr. Medalie. That is true. When a $5,000 bail is forfeited we know the bondsman or surety company will run all the way up to Canada and bring the man back by main force, without paying any attention at all to extradition treaties.

Mr.Glueck. How many of these bonds ever are collected upon?

Mr. Medalie. Most of them, where we have the surety practice and where the Government is painstaking about listing qualified surety companies. Isn't that so, Alex?

Mr. Holtzoff. Why, yes. We collect on many more surety company bonds, for forfeiture, than on individual bonds. Certainly the average surety company would not give a bond for the ordinary defendant without commonly being indemnified by some one.

Mr. Medalie. Let me ask the purpose of the original note. Was there a catch in the rule?

Mr. Strine. No. The holding in those cases was not that the bond was invalid or the contract no good. It simply was to the effect that the surety should have an interest in seeing that the defendant is produced; and a surety who has been indemnified does not have that interest. Therefore he may not be a good surety, and the court should consider that point.

Mr. Holtzoff. That is not the present practice, Mr. Strine; I amquite certain of that. Those cases are fairly old.

Mr. Strine. Yes.

Mr. Medalie. This rule, as I understand it, recognizes an indemnified surety. In fact it would be bad business for the investors of the country if a surety company could not take indemnity.

Mr.Strine. The rule does not prohibit that, but it merely provides that the facts should be disclosed.

Mr. Medalie. Is not the real purpose of the disclosure that the Government shall find out whether the surety company

is getting some of the loot that the defendant is charged with stealing or acquiring by fraud, or whether the fund shall be available, in the event of his conviction, for payment of a fine-- or whatever other nefarious idea the Department of Justice has?

Mr. Holtzoff. As a matter of fact-- and I think we ought to require the disclosure-- it seems to me we should require disclosure of the defendant's assets and liabilities in order to see how good the bond is.

Mr. Medalie. But once ina while, when some of the New York evening papers used to conduct drives against crime waves-- campaigns doubtless duplicated in other parts of the country-- they usually began by drawing up articles for criminal law reform, and this was usually one of the things that they brought up-- that the bondsman gets a part of the loot, on bail. I suppose that has been partially true, but not true today to such an extent as to require this.

Mr. Holtzoff. I do not think it should be required.

Mr. Medalie. In any event I should like to suggest this: If the district attorney or the Post Office Department or the F.B.I. believes that the defendant has loot which he turned over to a surety, all that needs to be done is to issue a subpoena for that surety or one of its officers to appear before the grand jury and, under oath, state their knowledge about the matter. Then they have all the information they need.

Accordingly, I move to strike out the provision for the disclosure of the details on the indemnity.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. Before we vote onthat motion I should like to ask Mr. Medalie a question about the New York professional bondsman law. Does not the indemnity provision appear in the

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New York professional bondsman law?

Mr. Medalie. I hate to say so, but I cannot tell you.

Mr. Longsdorf. Does it not apply only to professional bondsmen, and not to suroty companies?

Mr.Medalie. I am sorry I cannot tell you. Really, in the last 20 years I do not believe I twice got bail for a defendant. Usually some other lawyer did that. So I do not know.

Mr. Holtzoff. Here in the District of Columbia, surety companies are not accustomed to write bail bonds. They have professional bondsmen. They render the same services that are rendered by surety companies, let us say, in New York. The Government always is better off if the bond is written by a professional bondsman, because the bondsman will go after the defendant if he becomes a fugitive; and also the bondsman is much more likely to pay his bond in case of default--much more likely than is a surety that is not a professional bondsman--because the professional bondsman wants to keep his credit good. So I do not think we should discourage professional bondsmen.

Mr. Longsdorf. In California the professional bondsman is regulated by the insurance code.

Mr. Holtzoff. Well, that is not the case here.

Mr. Longsdorf. And I think the same is practically true in New York. So it may be proper in the insurance code to require a professional bondsman to disclose how much he has indemnified. It has a bearing on his worth.

But here I think it is a different question.

8 Mr. Holtzoff. It may be all right under the insurance law, but I do not think it has any place here.

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Mr. Longsdorf. I think that is where the idea came from, but I do not know whether it should apply to surety companies. Perhaps not.

The Chairman. May we, in passing on the pending motion, leave it subject to Mr. Holtzoff's or Mr. Strine's checking up with the department as to whether they think it necessary?

Mr. Holtzoff. Oh, I am sure the department does not think it necessary.

The Chairman. Then, with that before us, may we have a vote to strike the second sentence, the sentence beginning in line 9 and ending in line 13?

The motion was carried.

Mr. Holtzoff. I desire to call attention to a minor matter, Mr. Chairman. In line 4 the word "undertaking" is used. I am wondering whether we should not use the word "bond". I do not think they use the word "undertaking" in the Federal courts. Do they? An undertaking is a document that is not signed by the principal, but only by a surety. I think we ought to use the word "bond".

Mr. Strine. I believe "bond" would be the better word.

Mr. Holtzoff. I think so.

The Chairman. Or where the bail is tendered?

Mr. Holtzoff. Yes.

Mr. Dession. Right after "tender" I should like to add the words "and are in good standing". I think that should be inserted. The way you have it there, it is simply forthwith approved. They may get awfully sour before they catch on.

The Chairman. That is covered by the quarterly statement of the Treasury Department as to what are good sureties, and

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giving their respectiveamounts.

Mr. Dession. I say, "and are ingood standing". The way you have it stated, if they once qualify they are eligible, no matter how bad they may become.

The Chairman. That is not so; because the list comes out each quarter.

Mr. Dession. I know; but why have it contrary to the practice?

Mr. Youngquist. Can you substitute "are" for "have been" -- in other words, can you change the tense?

Mr. Dession. That is what I said.

TheChairman. Oh, I see.

Mr. Burke. You might reinsert the last sentence-- the sentence appearing in lines 13, 14 and 15-- which would accomplish the same purpose.

The Chairman. I did not understand your suggestion.

Mr. Burke. I say you might, instead of striking out all the balance of the paragraph --

Mr. Holtzoff. We did not strike all of it out.

Mr. Burke. I understood you to say you would strike all of it out.

The Chairman. No, just from line 9 to line 13 -- the sentence beginning in line 9 and ending in line 13.

Mr. Burke. Well, that is all right. The provision there gives the official the authority, in his discretion, to accept or refuse it if it fails to comply with the requirements of law.

9 Mr. Seasongood. That is only the affidavit -- from the statement made in the affidavit; and the surety does not have to

make the affidavit.

My change is simply, afterthe word "tendered" in line 4, to put in the words "and are in good standing".

Mr. Youngquist. The suggestion I made was with respect to line 2. Will not that do the same thing?

Mr. Holtzoff. I think so -- if you change "have been" to "are".

The Chairman. That would make it read this way, then, as I understand:

"corporate sureties which are approved as provided by law".

Is that correct?

Mr. Holtzoff. Yes.

Mr. Seasongood. I do not think so. Why not say they are ingood standing? They may have been approved a year ago. This is perfectly clear, and they are ingood standing.

The other says that if they are once approved they are eligible.

The Chairman. All right.

Mr. Glueck. In the Committee on Style the word "such" in line 13 was not approved. It refers back to "such official admitting to bail."

Mr. Holtzoff. That ought to be "officer" rather than "official".

Mr.Glueck. All right.

Mr. Seth. The word "such" could go out.

The Chairman. "Any officer approving bail or admitting to bail".

All right. All those infavor of Rule 25 as amended say

"aye".

Mr. Waite. Before you put that motion, I thought you were going to call for any further comments on it.

The Chairman. Pardon me.

Mr. Waite. I think we should have one provision that was threshed out at very considerable length before the American Law Institute, and finally was agreed on. This requires that a surety be qualified, but it does not say what constitutes qualification. I suggest that we add to Rule 25 something the substance of which would be as follows:

"Sureties, other than corporations referred to, shall be considered not qualified unless the individual worth of a single surety or the collective worth of the sureties, if there be more than one, exclusive of other liabilities and the property exempt from execution, is greater than the amount of the particular undertaking."

The idea is to preclude acceptance of one man on a very considerable number of current obligations-- a man whose worth is not sufficient to take care of all of them by any stretch of the imagination.

All of us remember the Chicago surety who was accepted on $120,000 worth of current bail bonds, when his total assets consisted of an undivided one-third interest in a $3,000 equity.

Mr. Holtzoff. Does not the last sentence of the rule, as now phrased, cover that thought, Mr. Waite?

Mr. Waite. No. It says that he must be qualified and the official may refuse to accept an unqualified person; but it does not indicate what constitutes qualification.

My idea is that qualification should require a net worth

in excess of the particular undertaking.

Mr. Holtzoff. Is not that obvious-- that a person must be able to pay his obligations?

Mr.Glueck. That has not been obvious in all the State crime surveys, but I do not know about the Federal practice.

Mr. Holtzoff. Of course during the prohibition era we did have dozens of bondsmen who used the same piece of property to justify each bond; but that situation is met by the preceding provisions of the rule as now phrased.

Mr. Waite. I cannot find that in it, Mr. Holtzoff. That is what I was looking for.

The Chairman. I agree with you, Mr. Waite. In other words, with a particular bond he qualifies, but he does not disclose how many other bonds he is on at the particular moment.

Mr. Holtzoff. But take the latter part of the first sentence, lines 8 and 9. That very information is required.

Mr. Glueck. The words used are "or otherwise" --"setting forth the encumbrances thereon by mortgage, judgment or otherwise and the number and amount of other undertakings".

Mr. Waite. This says that he must demonstrate what his worth is, but it does not say what his worth must be in order to qualify him. That is the point I am trying to make.

Mr. Holtzoff. The point is that if all you want is full disclosure, this requires him to disclose what other bonds he has written.

Mr. Waite. But it does not say that the officer may not accept him after he has disclosed -- even though the officer finds he is surety on a dozen bonds that he could not possibly pay.

Mr. Holtzoff. Is not that obvious?

Mr. Waite. You may say it is foolish, but it does not prove so.

Mr. Holtzoff. Is not that an obvious conclusion?

Mr. Waite. No. I could find for you records in a score of cities of men who have been accepted on bond after bond after bond, when they could not possibly pay one.

Mr. Holtzoff. That is because this information was not disclosed.

Mr. Waite. No; it was perfectly well known, but still they were accepted.

Mr. Holtzoff. I see.

Mr. Waite. That is why I think some affirmative provision is desirable.

Mr. Seasongood. I agree with Mr. Waite. Did we strike out from line 9 down to the end of the paragraph?

The Chairman. No; from line 9 to line 13; and if Mr. Waite's motion is accepted, I think substitute motions should be made for something to go in in place of that sentence.

Mr. Seasongood. I think the substance of Mr. Waite's motion is desirable, but I think it is a little too long.

Mr. Waite. I had no pride of authorship; but if the substance is met I think it can be phrased by the Reporter.

Mr. Holtzoff. How about saying, "If it appears that the net worth of the surety is less than the amount of the bond, he shall not be accepted"?

Mr. Waite. Correct.

Mr. Robinson. What Mr. Waite talks about and what is in lines 9 to 13 are not the same thing, of course.

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Mr. Waite. Oh, no.

Mr. Medalie. You have something here that I should like to see amended; and it covers the situation as to whether the surety has sufficient qualifications overand above his liabilsurety. Lines 13 to 15 cover the property qualifications of the ity. surety.

Now these words, if I may take that up in that connection:

"Such official may in his discretion refuse to accept any surety who, from the statements contained in the affidavit, does notappear to be qualified."

The word "qualified" is rather broad. "Qualified" means having sufficient in the way of assets over and above liabilities present and contingent, to meet the possible de- 12 fault in the bond.

I think there is enough there, but I should like to suggest that other changes are necessary in there:

"Such official".

There is no reference to any official.

Mr. Glueck. That has been chan ed. It now reads: "Any officer admitting to bail."

Mr. Medalie. What about the words "may, in his discretion"? I think he must, and I think we should say "shall".

Mr.Glueck. I think we say "Any officer admitting to bail shall refuse to accept."

Is that Mr.Waite's suggestion?

Mr.Waite. No; I was going to make that suggestion afterwards -- that he be required to refuse a man who is not qualified. But as it now stands it does not define what "qualified" is.

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Mr. Medalie. Would it not be better not to define it? We leave out many considerations when we begin to define.

Mr. Waite. I think they have proved by experience that it is necessary to preclude him by rule from accepting any man whose net worth is not at least equal to the amount of the undertaking; because they have disregarded the obvious thing; time and time and time again they have accepted men who are not qualified, according to that definition of "qualified".

Mr. Medalie. That would apply to individuals, but it would not apply to surety companies who obviously operate on an insurance basis.

Mr. Waite. That is all my suggestion is-- as to individuals other than the surety companies.

Mr. Medalie. Yes; I think that is all right.

There is only one other thing I may say in that connection. I agree with you. But talking about the language "from the statements contained in the affidavit", I do not think a judge or magistrate should be limited to the affidavit.

Mr. Waite. I agree with you there.

Mr. Medalie. I think-- and this is the procedure: On occasion the judge or magistrate may interrogate the individual surety and may ask him the precise questions one would ask when a surety is required to justify.

This language limits his action to the affidavit. It may be a perjured affidavit.

Mr. Waite. No; my motion had nothing to do with that at all, but my motion is that, regardless of whether the man has qualified, the individual shall not be considered asqualified unless he has sufficient assets.

Mr. Medalie. I agree.

Mr.Glueck. The surety companies do not have to make an affidavit. Would it be better to say "suitable", instead of "qualified"?

Mr. Medalie. What is that?

Mr. Glueck. Would it be better to say "suitable" instead of "qualified"?

Mr. Medalie. No; "qualified" is the word of art, is it not, as to sureties?

Mr. Holtzoff. Yes; it is.

Mr. Glueck. We passed over, somewhat cavalierly, the point the Reporter has made: that a number of courts regard professional bondsmen as an evil, and evidently there are decisions in many placesthat the professional personal bondsman is an evil because probably he has some arrangement with the criminal, or is a party to his acts in some way. I do not know whether we ought to ignore the possibility of refusing a man a personal bond because he has a professional bondsman.

Mr. Holtzoff. I do not think that is the experience of the department.

Mr. Glueck. But it is in the cases.

Mr. Holtzoff. But they are rather old cases.

Mr. Medalie. Today the old individual professional bondsman no longer acts as a surety. What these boys have done is this: They have gotten themselves some money--eithertheir own savings or the savings of friends and relatives-- and they put that up as indemnity with the surety company. Then they become steerers for the surety company, and become licensed bondsmen in New York and other places.

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Mr. Holtzoff. But surety companies do not write bail bonds; for instance, in the District of Columbia they still have professional bondsmen, and that is the only kind of bondsmen you can get, unless the defendant has a personal friend; because in this city surety companies do not ordinarily write bail bonds.

I know it is true in Denver and in a great many Federal courts that the bulk of the bail bonds are written by professional bondsmen. In Baltimore and in New York the surety companies write bail bonds, but that is not the case in the

/1 majority of districts.

Mr. Seasongood. As a matter of fact, in the southern district, after conviction, they will not accept surety bonds; they require a personal bond. I never knew the reason for that, but they do.

Mr. Medalie. In your district?

Mr. Seasongood. Yes. They require a personal bond.

Mr. Holtzoff. If you do away with personal bonds you will make it impossible for many defendants to get bond, and they will have to stay in jail.

Mr. Medalie. I think so.

Mr. Seasongood. Evidently this is aimed against professional bondsmen and the accompanying evils.

Mr. Holtzoff. Yes, but not because a man is a professional bondsman, but because he has taken on too many bonds at once, and not because there is an evil in a professional bondsman per se.

The Chairman. When he does that he is doing nothing different from what a surety company is.

Mr. Seasongood. Of course a surety company is in that business, and is under State supervision, and has to disclose its assets. But here is a fellow who has a dozen bonds outstanding. It is just his luck if they have not been forfeited.

Mr. Holtzoff. But you will deprive many a poor defendant of the opportunity to give bail if you deprive him of the right to use a professional bondsman instead of a surety company or a personal friend.

Mr. Medalie. I think we safeguard it sufficiently if we look after the qualification of the professional bondsman or personal surety by the test suggested by Professor Waite.

Mr. Seth. Yes.

Mr. Waite. Mr. Chairman, I am afraid my motion has gotten sidetracked in the shuffle. Let me make it over again in somewhat different form.

The Chairman. Yes. Before you do so, I wonder if we can approve the change in the last sentence, so it will read "any officer admitting to bail".

Mr. Dession. What line is that?

The Chairman. Line 13: "Any officer approving bail shall refuse to accept any surety who, from the statements contained in the affidavit, or otherwise, does not appear to be qualified."

Mr. Seth. Could you strike out the words "from the statements contained in the affidavit", and leave it "who does not appear to be qualified"?

Mr. Medalie. That would be better.

The Chairman. Leave it all out?

Mr. Medalie. Yes.

The Chairman. Does that suggest the right of the magistrate to go beyond the papers before him?

Mr. Holtzoff. I should think so.

The Chairman. All right. All in favor of the sentence as thus amended say "aye".

The motion was carried.

The Chairman. Now we go to Mr.Waite's motion.

Mr. Waite. I make it in this form: that the Reporter be requested to include in the revision of this section a provision to the effect that non-corporate sureties shall not be considered acceptable unless their net worth is in excess of the particular undertaking.

Mr.Seth. You do not mean each surety's net worth?

Mr. Seasongood. That would not be enough.

Mr. Glueck. That gives a premium to the insurance companies; does it not?

Mr.Seasongood. Suppose he is on a number of outstanding bonds?

Mr. Waite. I was making that against the background of my previous motion, which was that his worth, exclusive of other liabilities and the property exempt from execution on his other bonds, would be greater than the amount of the particular undertaking.

Mr. Seasongood. It is usual to make it double the amount of the bond, because his real estate might shrink in its value or worth. That is not the test. They usually make it double.

Mr. Waite. I am predicating that on the discussion we previously had; and after threshing it around pro and con, the

general opinion was that it wassufficient if we could show enough, within the meaning of net worth, in excess of the particular obligation.

Mr. Seasongood. I do not think they would like that; becausethe bond might last for quite a while, and he might not be worth it. That is discretionary in the State courts; they make it double the amount of the obligation. In the Federal courts, the court has discretion for the amount of the bond.

Mr. Waite. This would simply preclude him from accepting anything less.

Mr. Glueck. I should like to know whether there is a real abuse on this score in the Federal practice.

Mr. Holtzoff. I think there was a real abuse during the prohibition era. I do not think there has been any general abuse since the repeal of the prohibition amendment.

Mr. McLellan. I wonder how common the practice is, such as we have in Massachusetts, to require that in individual cases there may be as many as two sureties on a bond.

Mr. Holtzoff. I do not know how common it is, but I know it is not done in the District of Columbia; because where they have a professional bondsman, the one bondsman writes the bond.

Mr. Crane. It is rather hard to get, too, sometimes.

Mr. Seasongood. They require two, both owning real estate, in the southern district.

Mr. McLellan. Yes, but not in the case of a corporate surety.

Mr. Seasongood. Oh, no.

Mr. McLellan. Yes. I think that is rather common practice.

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Mr. Holtzoff. I think that in a great many districts in case of bail a single bondsman is accepted.

Mr. McLellan. Then he should have a net worth, as you use the term, well beyond the amount of his undertaking.

Mr. Holtzoff. Yes.

Mr. Medalie. I think also there should be language dealing with his contingent liabilities. Instead of laying

3 down a rule or a measure, just indicate something like this: "does not appear to be qualified, either by reason of his net worth or his contingent liability."

Mr. Holtzoff. In computing his net worth you deduct his contingent liabilities; do you not?

Mr. Medalie. Do you?

Mr. Youngquist. It does not become a liability until bond is forfeited.

Mr. Robinson. Bankruptcy is accounted a liability; is it not?

Mr. Holtzoff. Even before a default.

Mr. Youngquist. I think you would have to specify what you mean here by a liability if you want the court to take it into account. I do not suppose a professional bondsman keeps track of all the contingent liabilities; does he?

Mr. McLellan. Why not this: "does not appear to be qualified by reason of his net worth and contingent liabilities, including his liabilities on other bonds"?

Mr. Waite. The only trouble is -- if any one will read th A.L.I. rule entitled "Sufficiency of Surety":

"If there is only one surety, he shall be worth the amour specified in the undertaking, exclusive of the amount of any

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other undertaking on which he may be principal or surety,and exclusive of property exempt from execution, and over and above all liabilities. If there are several sureties theyshall in the aggregate be worth that amount exclusive of the amount of their undertakings and of the exemptions and liabilities mentioned above."

Mr.Crane. What is the matter with adopting that?

Mr. Seth. I think so.

Mr. Holtzoff. In other words, if we do not deduct the amount of the bonds that he has written, and charge them off as liabilities?

Mr. Waite. Heshall be worth the amount specified in the undertaking, exclusive of the amount of any other undertakings on which he may be principal or surety.

Mr. Seth. What is that number, Professor?

Mr. Waite. No. 78.

Mr.Glueck. It means the opposite, but it is not very well stated.

Mr. Waite. As you say, it is not very well stated; and that is why I was trying to restate it in my draft. But I know what it was intended to mean.

Mr. Holtzoff. Should a professional bondsman be required to have sufficient assets to meet all the bonds on which he is surety, at one time?

Mr. Waite. It depends on what you mean by "professional bondsman". Do you mean a surety?

Mr. Holtzoff. No, an individual. Should he be required to have sufficient assets to meet all of the bonds at one time?

Mr.Waite. That is what that was intended to mean.

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Mr. Holtzoff. I am wondering whether that is not too onerous a requirement.

Mr. Seasongood. I think we can get ourselves into a lot of trouble on this, Mr. Chairman, with a lot of courts. The courts take care of this, and they have their own rules to justify it.

Mr. Crane. I agree. Do you think it would be well to make a hard and fast rule about a matter about which a judge is supposed to have some judgment? We have men on the bench who are supposed to have some judgment and discretion and experience. Why should we tell them what to do?

Mr. Medalie. The failure is rather with the magistrates. What actually happens, so far as judges are concerned, is that if the District Attorney does not think the surety is any good, you will hear a roar out of him. That is how it actually works.

Mr. Holtzoff. I do not think we should have a hard and fast, rigid qualification.

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

Mr. Crane. I want to be sure I understand it. Do I understand that the effect of the motion is that we treat a contingent liability of a surety just as we treat an absolute liability?

Mr. Holtzoff. Yes.

The Chairman. Yes; that is the motion.

Mr. Crane. I understand it now.

The Chairman. All those in favor of the motion say "aye" opposed "no". (Putting the question). The motion seems to be lost.

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Mr. Crane. I agree that some consideration should be given to his contingent liabilities, and not treat them as actual.

Mr. Glueck. Let me say that in the Federal practice, where you really have a superintendent of justice, as it were, in this new office of the administrator of the Federal courts, I do not think you are likely to get in this field the abuse that the surveys have shown in State practice.

Mr. Holtzoff. I agree with Mr. Glueck; and Mr. Medalie has said that if the bond is bad you will hear about it from the United States attorney.

Mr. Medalie. Yes. There is only one trouble: The commissioner in some outlying county, being a good fellow in his own county, might take bonds that he ought not take. Do not forget also that inview of the fact that in some of the cities you occasionally have untrustworthy magistrates-- although not lawyers-- who may admit to bail in some of these cases, so that you may get abuse.

But the answer is that you get rid of them; and there again you will hear from the district attorney and from the newspapers.

The Chairman. Very well, gentlemen.

Rule 26 appears to be a very simple one.

Mr. Holtzoff. Just as matter of phraseology I think we should substitute the word "bond" for "undertaking".

Mr.Crane. How about Rule No. 25?

The Chairman. That was accepted; Rule 25 was modified and accepted. Mr. Waite made a motion which was lost.

Mr. Crane. I see.

Mr. Medalie. You have some difficulty in Rule 26 because of the limitation of the word "returned". One of the difficulties is that if bail lasts only to the day of verdict, and the defendant is convicted, and the judge says, "I will impose sentence ten days from today, and I want to continue the defendant on bail," under this language he must give a new bond.

Mr. Holtzoff. Why not substitute for the phrase "until a verdict is returned" the words "until the proceeding is finally terminated"?

The Chairman. That is too much; it would go to appeal.

Mr. Medalie. "Until judgment"?

Mr. Holtzoff. Suppose a case is nolle prossed?

Mr. Crane. That is a judgment; is it not?

Mr. Holtzoff. No; there is no judgment when there is a nolle prosse.

Mr. Medalie. It says "during the pendency of the criminal proceeding." If it is nolle prossed, there is no longer a pendency of the criminal proceeding.

The Chairman. "Until judgment is rendered"? Is that the language, instead of "verdict"?

Mr. McLellan. Why not say, instead of "during", "throughout the pendency of the criminal proceeding"?

Mr. Medalie. Because you are dealing with the question of appeal. You raise a question.

Mr. Holtzoff. Is there any danger, if you put it that way, that some one will construe this to mean that the judge may not commit the defendant when he is convicted?

Mr. Medalie. No. A judge always has power to revoke

bail.

Mr. Holtzoff. But this says, "shall be continued". I am just wondering whether that language --

Mr. Medalie. "Unless otherwise ordered."

What you have in mind here is "any recognizance or bail shall, unless otherwise ordered".

Mr. Holtzoff. "Shall, unless otherwise ordered", will meet my point.

The Chairman. Do we state "during the pendency of the criminal proceeding"?

Mr.Seasongood. No.

The Chairman. Or do we go on?

Mr. Holtzoff. "Until judgment is entered"?

Mr. Crane. That would be my idea.

Mr. Youngquist. Make him put up a new bond.

Mr. Holtzoff. In line 2 I think it should be "shall continue in effect", instead of "continuing".

The Chairman. All right.

Mr. Holtzoff. And in lines 1 and 2 you say, "Any bail"; change that to "bail", instead of "undertaking for bail."

The Chairman. Then would it read:

"Any recognizance for bail shall, unless otherwise ordered, continue in effect during the pendency of the criminal proceeding until the judgment"?

Mr. Medalie. "Until judgment."

The Chairman. "Until judgment"?

Mr. Holtzoff. Yes; "until judgment".

The Chairman. And then a comma, and then the words "unless better security is required or unless the defendant is

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surrendered"? Is not that all you need?

Mr. Medalie. Yes.

Mr. Holtzoff. Yes.

Mr. Seth. Would not the words "unless otherwise ordered" belong down among the exceptions?

Mr. Medalie. We want the continuance.

The Chairman. I think you are right on that, Mr. Seth.

Mr. McLellan. Yes; that is redundant. You have the words "unless otherwise ordered" up above.

Mr. Medalie. There is another provision besides requiring better security. The court may want to commit the defendant.

Mr. Seth. Yes: "unless the court otherwise orders."

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The Chairman. The idea is that you have the same thing in two places.

Mr. Holtzoff. Just where would you have it?

The Chairman. At the end.

Mr. Holtzoff. At the very end?

The Chairman. Yes.

Are there any further suggestions?

Mr. Medalie. I think we should make it clear that the court has the power, immediately after verdict, to commit the defendant.

Mr. Seth. Yes.

Mr. Medalie. And when we say "and unless otherwise ordered" -- "after verdict, or at any other time."

Mr. Holtzoff. I am afraid that if you put "unless otherwise ordered" at the tail end the phrase would not serve the purpose intended.

Mr. Crane. It has a different meaning there.

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Mr. Medalie. You see there is another situation in which the court may want to commit the defendant, and that is during the trial or when the jury takes the case.

Mr. Longsdorf. It is frequently done.

The Chairman. Let us put the words "or otherwise ordered" after the first "unless". See how this sounds to you:

"Any recognizance or bail shall continue ineffect during the pendency of the criminal proceeding, until judgment, unless the courtshall otherwise order, or unless better security is required, or unless the defendant is surrendered."

Mr. Glueck. Why not follow with "unless the courtshall otherwise order"?

Mr. Seasongood. Yes; because that would cover the others; would it not?

The Chairman. I guess it would.

Mr. Holtzoff. It would not cover the contingency of the defendant's being surrendered.

Mr. Medalie. You also must permit for thesurrender of the defendant.

Mr. Youngquist. That is an act of the surety.

Mr. Medalie. It is not recognized here. Do you mean the surety would have the right anyhow?

Mr. Youngquist. Yes.

Mr. Medalie. And we do not need to mention it?

Mr. Youngquist. Yes.

Mr. Medalie. I suppose so.

The Chairman. It would not do any harm to say "unless the court should otherwise order or unless the defendant is surrendered".

Mr. Seth. That is right.

The Chairman. And leave out the mention of increase of bail.

Mr. Seth. Yes, making it different.

The Chairman. Are you ready for the question? (Putting the question:)

The motion was carried.

The Chairman. Rule 27.

Mr. Holtzoff. We have the same word "undertaking". How about if there is a breach of the bail?

Mr. Medalie. You make this mandatory, and it should not be. I can give you cases showing that it should not be.

The Chairman. Make it "may".

Mr. Holtzoff. Yes. But I think it should be mandatory on motion of the United States attorney.

Mr. Medalie. No; because the United States attorney may just be mad at the defendant, and we have seen them get mad at the defendant and do unwise things. If a case is set for May 1st, and if the defendant did not get the notice, and does not show up, there has been a breach; becausethe breach does not depend on the valid excuses the defendant may have -- for instance, if he thought he did not need to attend, because he was told there would not be a trial or because he was told the calendar was full. The court ordinarily does not forfeit bail. Sometimes it does. Sometimes, on a bail, the judges forfeit your jack. The judge calls the calendar; and for every defendant who does not appear there is a forfeiture, and the surety companies and the bondsmen come in, and then there is a wholesale remission of forfeitures. But the court does not

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have to remit.

Mr. Youngquist. A week ago today there was a decision by the Supreme Court of the United States in the matter of forfeiture in a case where there was a wilful breach. The court held under the statute that there be no remission. What was that?

Mr. Holtzoff. That case construed the present statute relating to remission of forfeiture. The statute reads that the court may remit the forfeiture on the application of the surety if the default was not wilful. There have been cases in the circuit court of appeals, back and forth, as to what is meant by the default being wilful -- whether that meant the default of the surety or the default of the defendant; and now it has been held -- and before that it was held in the Fourth Circuit -- that it means default of the defendant, and not the default of the surety. That is the one that is referred to. I do not think that particularly applies to this rule.

Mr. Youngquist. Yes. I just could not r call it.

The Chairman. Let me read Rule 27 as it now seems to stand:

"If there is a breach, the court may enter a judgment declaring the bail and any money or security that have been deposited as bail forfeited. The surety may thereafter apply to the court for a remission of the forfeiture as provided by law. The application for remission shall be filed prior to the trial or within 90 days thereafter."

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Mr. Holtzoff. Is the 90-day period now provided in the law?

Mr. Strine. The law does not fix any period now.

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Mr. Holtzoff. I thought not.

Mr. Medalie. There is one trouble even with the word "may", which seems to be necessary even for the most casual breaches -- which are important-- and that is that there is no provision for mandatory forfeiture where it is clearly indicated that there should be a forfeiture.

The Chairman. It is up to the judge.

Mr. Medalie. Yes; it is up to the judge. But if the judge wants to make a wrong judgment, I think we must just face it on occasion.

Mr. Holtzoff. I do not think we should have any limitation on the right to apply for remission of the forfeiture. The existing law has no limitation at all. I do not know of any evil or abuse that makes any such limitation desirable.

The Chairman. Why was 90 days fixed, Mr. Strine?

Mr. Strine. As Mr. Holtzoff stated, no limitation seems to be stated now. The 90 days was fixed merely as some reasonable time.

Mr. Crane. In our State I think we have one year.

Mr. Medalie. One trouble was found with forfeitures during the era of prohibition, when surety companies did wholesale business. They did not discover, until a long time after the forfeiture, that there had been one; and sometimes there were cases of very grave injustice to the surety companies because of that.

Mr. Holtzoff. I move that we strike out all time limitation, because existing law contains none, and no abuses have developed under existing law.

Mr. Medalie. Do you want to strike out all after the

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comma in line 5, after "existing law"?

Mr. Holtzoff. Yes.

Mr. Medalie. I so move.

Mr. Holtzoff. I second the motion.

Mr. Glueck. Here again, Mr. Chairman, in many States there have been grave abuses with reference to the business of removal of a forfeiture. You know that, Mr. Robinson. After the State has gone to all the trouble to try to collect on these forfeited bonds, somebody with a little political influence moves to remove the forfeitures, and the whole thing is off.

Mr. Holtzoff. Federal judges are not subject to political influence.

Mr. Glueck. I did not have that in mind; I was merely indicating that there is an abuse.

Mr. Holtzoff. But not in the Federal courts.

Mr. Glueck. But I think in the Federal courts, again, it probably will not be a real problem. As a matter of fact the only evidence we have, unfortunately, is evidence as to State courts. No one has made a survey of the practice in Federal courts.

The Chairman. In addition to the changes I read, we now have added the striking out of all the last line and a half, from the word "law" in line 5.

Are you ready for the question on the whole rule?

Mr. Seasongood. I think Mr. Medalie's idea was that we should have a positive entering of judgment unless good cause i shown.

Mr. Medalie. I think this should be studied a little.

Mr. Seasongood. "He shall, unless good cause is shown

forfeit the bond."

Mr. Youngquist. The same thing is true when he applies for forfeit.

Mr. Medalie. I am not satisfied with this, even with the changes which have been made,-- changes which I think I understand. I think there should be conditions under which forfeitures should be granted.

The Chairman. What about Mr. Seasongood's suggestion: "shall be entered unless good cause be shown to the contrary"?

Mr. Medalie. I think that might meet it; and, after all, our judges are not a blood-thirsty crowd trying to oppress people. In bail bond matters they have been on the whole pretty fair to defendants and sureties. I think that risk is a better risk than leaving out all mandatory provisions.

The Chairman. Shall we say, "shall enter judgment", and then at the end of the sentence say,"unless good cause be shown to the contrary"?

Mr.Crane. Do you have to give notice to them?

Mr. Youngquist. No.

Mr. Crane. Then "good cause to the contrary" means you would have to give them some notice; does it not?

The Chairman. I think so.

Mr. Crane. If you are going to do that, why not give a trial? I think automatically there should be a judgment unless they apply, themselves, in some way to be released from the forfeiture. I think the burden should be upon the bondsman.

The Chairman. Put it in the next sentence, in this way: "The surety may thereafter apply to the court for remission of the forfeiture on good cause shown."

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Mr.Crane. Yes; put it there; that is a little better.

Mr.Glueck. Then you are striking it out before?

The Chairman. Yes.

Mr. McClellan. Have you restored the "shall"?

The Chairman. Yes: "If there is a breach, the court shall enter judgment declaring the bail or any money or securities that have been deposited as bail forfeited. The surety may thereafter apply to the court for remission of the forfeiture on good cause shown."

11 How is that?

Mr. Medalie. I think you need another provision for other purposes; and that is this.

Mr. Youngquist. Before you come to that, let me raise this point: Under the law, as it is now, there may be no remission in case of a wilful default. So if we leave this "as provided by law", that should stay in, I think.

Mr. Holtzoff. I think you open the door if you say "for good cause shown."

Mr.Seth. I think the words "for good cause shown" should be up at the other end of the sentence.

Mr. Holtzoff. I should like to say that this changes the practice. Today if there is a default, judgment is not automatically entered. A forfeiture is declared automatically by the court on motion of the United States attorney, but later on a proceeding in the nature of a scire facias has to be brought by the United States attorney in order to enter judgment on the forfeiture.

I am not objecting to simplifying that procedure, but I do want to call attention to the fact that you are providing

a change with respect to forfeiture, in comparison with the existing procedure; and I think it should be known that this is being done.

The Chairman. If you have to bring a proceeding, then there is no objectionto the phrase "on good cause shown" being inthe first sentence.

Mr. Glueck. Is it preferable to have tobring a proceeding?

Mr. Holtzoff. Here is what happens, as I understand it: A bond is declared forfeited, and ordinarily some time elapses before another proceeding is brought to enter judgment on the forfeiture. If he thenshows up within a few days the forfeiture is set aside.

Mr. Crane. Our procedure is to give a bond that you are going to produce the body of the defendant; and if you do not produce the body of the defendant the bond is forfeited, and we enter judgment upon it. That is the procedure, right there on that day.

The Chairman. Right there on that day.

Mr. Crane. Right there on that day. If there be any reason -- and there are thousands of them -- why bond should not be forfeited and judgment entered, that can be stated.

Mr. Holtzoff. That is not the present procedure. A motion has to be filed. They used to call it scire facias.

Mr. Crane. I would wipe it out; it is no good.

Mr. Holtzoff. But he should have notice.

Mr. Crane. Why should he get it? He has to produce the body of the defendant, and he has failed to do so.

Mr. Holtzoff. He may nothave known that the case was set for trial.

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Mr. Crane. Then the forfeiture is made, and the judge hears the excuse.

Mr. Holtzoff. But under the remission statute the judge may not set aside a judgment unless the defendant's default was not wilful; so that the surety's excuse is not sufficient. You are getting into a little difficulty here, and you may be causing an occasional hardship to an innocent surety.

Mr. Robinson. Of course you are getting back to the common law procedure of estreat, where they brought the bond out from the judgment files and put it into the bond files, and collected at once.

Mr. Holtzoff. I am not objecting to the change--

Mr. Crane. Mine is simplified. It is known. The fellow who puts up the money takes the risk. It is his business; and as soon as he fails to produce the defendant he has to pay. What is the good of serving him with notice? Let him come forward and state it. In the State of New York we enter judgment, and we have no difficulty; and we give them a year to get out of it.

Mr. Medalie. Let me tell you some things I wrote down while you were talking. First, I do not think a breach is material in most cases. In such cases the Government's interest has not been affected, and the Government has not had any loss. There should not be a forfeiture. It is purely a clerical inadvertence, for all practical purposes. The man is available; he wants to come; he simply did not get a notice.

Suppose we had this: "The court shall declare the bail forfeited. The forfeiture may be remitted for good cause, and

11 where the forfeiture has not been remitted judgment shall be

entered on reasonable notice to the surety or to the defendant--

That is, the defendant has to put up his own money --

"unless the forfeiture was wilful or the interests of the United States were materially affected by the breach."

Mr. Holtzoff. Do you mean unless the default was wilful?

Mr. Medalie. Yes; "unless the default was wilful or the interests of the United States were materially affected by the breach" or by the "default".

Mr. McLellan. Whose default?

Mr. Medalie. The defendant's.

Mr. Robinson. Of course you want to guard against using this to postpone the day of trial.

Mr. Medalie. Then the interests of the United States are materially affected, and the judge would so find.

Mr. Robinson. Would he?

Mr. Medalie. I think so. If he did not, after hearing the evidence, make a provision to cover that.

Mr. Crane. Have we covered all that?

Mr. Robinson. I think so.

The Chairman. We shall have the Reporter write that up.

We have just one more rule in this chapter -- 28 -- if we want to cover it.

Mr. Holtzoff. Do we need Rule 28?

Mr. Strine. I do not think so, Mr. Holtzoff.

Mr. Holtzoff. Then I move to strike it out.

Mr. Crane. I move to strike it out.

The Chairman. Is there any discussion of that-- to strik out Rule 28?

Mr. Wechsler. Mr. Chairman, before we leave the subject bail, let me put one question: Is it intended to preclude th

possibility of releasing the defendant on his own recognizance or the undertaking of his counsel to produce him, without the filing of a bond?

Mr. Holtzoff. The word "recognizance" is used farther back -- which indicates, it seems to me, that such a course is permissible.

Mr. Wechsler. It is not covered by the basic rule on preliminary examination.

Mr. Holtzoff. I think it is. The word "recognizance" is used there; is it not?

Mr. Wechsler. Let us look at the language. It is Rule 21 (d), lines 20 and 21:

"shall commit him to custody, unless the offense is bailable and the prisoner is admitted to and gives bail."

I do not think you will find it is used consistently; and if it is the intention to allow the practice -- as I think it should be -- I merely suggest that the Reporter check the rules to see if that possibility obtains.

Mr. Holtzoff. It is the common practice in juvenile delinquency cases to release the defendant either on his own recognizance or in the custody of his parents.

Mr. Wechsler. I think it is the common practice, and should be available in other cases as well.

Mr. Holtzoff. Oh, yes.

The Chairman. Do you want to vote on Rule 28 before we go into this matter of Mr. Wechsler's? Is there any objection to the motion to strike?

The motion was carried.

The Chairman. Do you want to make a motion on this other

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matter?

Mr. Waite. Mr. Chairman, if Mr.Wechsler will consent,

12 may I ask a question before we go back to that?

The Chairman. Surely.

Mr.Waite. I do not know enough about the Federal situation to have any judgment of the desirability of this matter; therefore I am asking the question.

In the Institute code they have a provision to this effect:

"No undertaking--

bail bond --

"shall be invalid, nor shall any person be discharged from his undertaking, nor a forfeiture thereof be stayed, nor shall any judgment thereon be stayed, set aside, or reversed, or the collection of any such judgment be barred or defeated by reason of any defect of form, omission of recital or of condition, failure to note or record the default of any principal or surety, or because of any other irregularity" --

And so forth; I shall not read the rest of it.

Mr. Holtzoff. We have no evil that needs to be redressed by any such provision as that.

The Chairman. We have just one or two other small provisions on the matter, which we can take up in the morning.

Mr. Waite. Mr. Chairman, we still have the matter of Mr. Wechsler's.

The Chairman. Yes; go ahead, Mr.Wechsler.

Mr. Wechsler. My motion, Mr. Chairman, was quite simple: that the rules provide for release of the defendant on his own recognizance or on the recognizance of his counsel or the custody of his counsel or his parents, perhaps, without the filing

of a bond. I do not think the rules as now drafted clearly permit that, and I think they should.

Mr. Robinson. I think they should, certainly; I will second that motion, if it is a motion.

Mr. Wechsler. It is a motion.

The Chairman. Gentlemen, you have heard the motion.

Mr. Medalie. Are you including counsel?

Mr. Wechsler. I did not address myself to the form of it, Mr. Medalie. I think it should be as broad as possible.

Mr. Medalie. Yes; but do not ever bring in a lawyer to guarantee the appearance of a defendant. Any sensible counsel goes up to the judge and whispers to him, "I do not do that kind of thing."

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

The motion was carried.

The Chairman. We are due at 12:15 tomorrow, as I think was announced while all of you were here, over at the Court of Appeals, for luncheon. Was that stated?

Mr. Robinson. No, sir.

Mr. Crane. No; I did not hear it.

The Chairman. About two weeks ago Judge Justin Miller invited the committee to luncheon, to meet the judges of the Court of Appeals and, I think, some others. So if there is no objection we shall be at the Court of Appeals at 12:15 tomorrow.

Mr. Medalie. We start at 10 o'clock tomorrow; do we?

The Chairman. Yes.

Mr. Medalie. And we continue until 5 o'clock?

The Chairman. We continue until 12 o'clock, and then

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go to the luncheon. I suppose we should get back here by two o'clock, and then continue until five, and then resume again at eight o'clock. We are making progress.

I received a summons that takes me to the O.P.M. tomorrow morning at ten o'clock; and will you designate some one to preside tomorrow for an hour or so until I get here? I have no choice but to go.

Judge Crane, will you resume your customary presiding responsibilities?

Mr. Crane. Anything you say.

The Chairman. Very well, gentlemen; we adjourn for the evening.

(Thereupon, at 11 o'clock p.m., an adjournment was taken until tomorrow, Tuesday, January 13, 1942, at 10 o'clock a.m.)