Copy for Mr. Alexander Holtzoff, Secretary.

Tuesday, September 9, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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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; George James Burke, Frederick E. Crane, Gordon Dean, George H. Dession, Sheldon Glueck, George Z. Medalie, Lester B. Orfield, Murray Seasongood, J. O. Seth, Herbert Wechsler, G. Aaron Youngquist, George F. Longsdorf, John B. Waite.

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

I believe we are on Rule 8, page 3, sub-heading (b).

Mr. Holtzoff. I have a question as to the phraseology of that. When you speak of filing one of the following notices, pleas, or motions, that seems to convey the impression, which probably was not intended, that there must be a written plea, because you cannot file an oral plea.

Mr. Youngquist. I have the notation to make it, "Enter or file."

Mr. Robinson. Is "enter or file" satisfactory?

Mr. Youngquist. Yes. That is the suggestion I had.

I had another suggestion. Might we not just say, "A defendant may or shall, as provided hereafter, enter or file one or more of the following notices, pleas, and motions"?

Leave out "for his answer, and defense, to the written accusation."

The Chairman. Could you substitute the word "make" for the words"enter or file"?

Mr. Holtzoff. You cannot make notice.

The Chairman. Would you read your language again, Mr. Youngquist?

Mr. Youngquist. In line 40 strike out the last four words. In line 41 strike out the first five words. Insert after the word "rule" in line 42 the words "enter or".

Mr. Crane. Can we have that read?

Mr. Youngquist. "A defendant may or shall, as provided hereafter in this rule, enter or file one or more of the following notices, pleas, and motions."

Mr. Holtzoff. I do not understand the significance of the phrase "may or shall." It should be either "shall" or "may," not both.

Mr. Robinson. The meaning there is that sometimes it is permissive, sometimes mandatory, according to the substantive provision.

Mr. Holtzoff. Shouldn't you just say "may"? "May or shall" is a little bit confusing.

Mr. Robinson. No, because the "shall" is modified by "as provided hereafter in this rule."

Mr. Youngquist. Theoretically, is not a pleading of guilty or not guilty mandatory?

Mr. Holtzoff. He can remain silent.

Mr. Youngquist. If he does, the court enters a plea of not guilty.

Mr. Holtzoff. I was wondering about the words "may or shall." They give rise to a question in my mind. I may be captious.

The Chairman. I would feel a little more comfortable with the word "may."

Mr. Robinson. Beginning in lines 44 and 45, he shall file a motion, and then on the next page, line 59, he shall enter a plea either of not guilty or a motion to dismiss.

The Chairman. That simply confirms my argument made, because you say in the introductory that he may do some of these things, but later you say he shall.

Mr. Robinson. In line 97 is where the "may" begins.

The Chairman. In other words, "may" indicates choice, but when it comes to certain things, he shall do them. It seems to me we are trying to be a little too meticulous.

Mr. Robinson. Well, maybe I am wrong.

The Chairman. Maybe I am wrong.

Mr. Holtzoff. I move that we strike out the words "or shall" and just leave "may."

The Chairman. Is there objection to that? Just say "may."

The section then reads:

"A defendant may, as provided hereafter in this rule, enter or file one or more of the following notices, pleas, and motions."

Sub-heading (1), Mr. Reporter.

Mr. Robinson. Now, this, of course, has to do with counsel. Naturally, back of our minds is the case of Johnson v. Zerbst and other indications by the Supreme Court that the matter of providing counsel for a defendant in a criminal case

is a jurisdictional matter.

I think, after reading it, you will see what the object is in preparing it as it has been prepared, and therefore it will help us in obtaining that object either by disagreeing aboutputting the provision here or by agreeing with it.

Mr. Holtzoff. I want to make the suggestion that this ought to be perhaps modified considerably. This paragraph puts the burden on the defendant to file a notice that either he has counsel, and if so who that counsel is, or that he does not desire counsel. I do not think a defendant ought to be required to do anything except plead.

As a result of the case of Johnson against Zerbst the Department and the courts have worked out a procedure which had previously been used in some districts but not in others, whereby upon arraignment every prisoner is asked whether he has counsel. If he says no, he is asked whether he can afford to hire one. If he says no, he is informed that the court will appoint one for him if he wants one. He is asked whether he does want one or not. In a great many cases they say no and they waive the right of counsel, and that is made a matter of record.

I suggest that we substitute some such provision as that, requiring the court, in open court, to apprise the defendant of his right to counsel and requiring the court to appoint counsel for him unless he expressly waives such right, which waiver should be made a matter of record, instead of leaving it in this form, which is now putting the burden on the defendant to file a notice in court, where many of them would not be able to prepare a notice.

Mr. Medalie. Isn't this what youreally want? "If at any time the court is satisfied that the defendant is unable to provide himself with counsel or hire counsel or employ counsel, and he is in need of counsel, the court shall appoint one."

Mr. Holtzoff. No; just a little bit more than that.

Under Johnson against Zerbst, which was decided three or four years ago, the Supreme Court went further. The Supreme Court made it the duty of the court to appoint counsel for the defendant unless the defendant expressly waived such right, and therefore the Department worked out, with the aid of the administrative officers of the courts, a procedure whereby each defendant is affirmatively interrogated on arraignment in open court. The court does not wait, as used to be done in some districts, for a defendant to ask for counsel.

Mr. Medalie. The practice in the State of New York has been for years that when a man is arraigned, in nine cases out of ten -- anyway, in a good many cases -- his counsel appears with him when he pleads, but if there is no counsel, it is the judge's duty, required by statute, to inform him that he is entitled to counsel, and that if he has not the ability or means to employ counsel, the court will assign him counsel. That is made a matter of record by the clerk who is there in the court, and it is part of the court record.

Mr. Holtzoff. In the rural Federal courts you will find probably that nine-tenths of the defendants when arraigned have no counsel, and each one of them has to be asked this.

Therefore, I move that we substitute for Rule 8 (b) (1) a provision based on Johnson against Zerbst requiring the court, when the defendant is arraigned, to apprise the defendant of

his constitutional right of counsel and that counsel will be appointed for him if he desires one and is unable financially to secure one, and that counsel will be appointed unless the defendant expressly waives such right in open court.

Mr. Wechsler. I should think that, rather than pass on that motion,we ought to suggest to the reporter the desirability of drafting a section on arraignment, which I do not recall finding in these rules.

Mr. Holtzoff. No, there is not any.

Mr. Wechsler. Which I think should be there, and which would include as part of the procedure on arraignment the appropriate action with reference to counsel.

I direct attention to Chapter 8 of the Law Institute Model Code, the provisions of which I think are reasonably satisfactory for this purpose.

Mr. Holtzoff. If that is so, I am inclined to agree with Mr. Wechsler. Then this provision should just be stricken out.

The Chairman. Or transferred to that.

Mr. Holtzoff. No, because I do not think there ought to be any provision requiring the defendant to file a notice.

The Chairman. The section you are proposing would be transferred to the section on arraignment.

Mr. Holtzoff. That is quite correct, and this section should be stricken out.

The Chairman. This would be, in any event, if your motion were carried.

Mr. Longsdorf. Mr. Chairman, may I ask something for information that is closely related to Johnson against Zerbst.

They know that case pretty well out in the Northern

District of California. The practice in California is laid down in the provisions of the penal code, and what Mr. Holtzoff described is specifically required by statute, but it is also required by statute at the preliminary examination.

Now, the practice in the Northern District of California at the present time, and instructions have been given to the commissioners and they are required by the court to follow it, is to inform the prisoner of his rights and to make note of it and to return in the certificate that that has been done, so as to have a record that will frustrate any more affairs like Johnson against Zerbst.

At the arraignment the same thing is done. That is done all the way through. So that, as they follow the practice now in that district, the record always suffices to show that the prisoner was informed of his rights and either had counsel or an opportunity to provide one.

Mr. Glueck. Mr. Chairman, that raises a question as to how far back in the procedure a prisoner should have counsel in order to be protected. For instance, there may be all sorts of dirty business on the part of the police before he is even brought in for a preliminary examination.

Mr. Longsdorf. Yes. Well, there is another reason why our state practice has that provision. Under a relatively recent amendment of the statutes, the complaint, the original proceeding, if it contains enough, may stand as an information, to which a plea of guilty may be entered, and the committing magistrate, if such a plea is made before him, certifies it to the superior court, which imposes a sentence according to law. We think it is a pretty good sort of a method and cuts short a

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lot of prosecutions.

Mr. Holtzoff. I do not think you would want to have the United States Commissioners clothed with that authority, because a good many of them are not lawyers and most of them are just part-time officers.

Mr. Longsdorf. That is all right, but the complaint never stands for an information until it has the O.K. of a district attorney. If the certificate goes out with an insufficient complaint, the sentence is not passed, but the case goes on for trial.

The Chairman. We have two motions pending now, one by Mr. Holtzoff for the modification of this section, and another by Mr. Wechsler for making it part of the new section on arraignment.

Mr. Holtzoff. I am willing to accept Mr. Wechsler's motion as an amendment to mine.

Mr. Wechsler. I offered it as such.

Mr. Robinson. Before you speak of a new section, it might be well to consider it being in this rule here --

The Chairman. It might be a new section of this rule.

Mr. Robinson. I think in the new rules they call (a), (b), (c) paragraphs, and the (1), (2), (3),(4) are called subdivisions.

The Chairman. We understand what you mean.

All those in favor of the motion as amended say "Aye."

Mr. Medalie. What is the motion?

Mr. Glueck. What about the question I raised about furnishing counsel farther upstream?

The Chairman. That is a different question.

Mr. Medalie. What is the motion?

The Chairman. The motion by Mr. Holtzoff is to recast Rule 8 (b) (1), summarizing it, to provide that the court shall apprise the accused of his right to counsel.

Mr. Crane. At the time of the arraignment.

Mr. Youngquist. I assume that the reporter has included this for the purpose of having on file with the case a signed statement by the defendant that he waives counsel; and when we come to read it, might it not be well to provide that in case the defendant does waive counsel he shall sign that waiver, in order to overcome the Johnson against Zerbst case?

I am simply throwing that out as a suggestion to be considered when we reach that decision.

Mr. Holtzoff. Where the waiver is recorded in open court, there is no trouble. All these troubles arise in cases which were tried before the Zerbst case.

Mr. Crane. I think you will find that if the judges are required to inform him of his rights at the arraignment, the clerk makes a record of that, and if there is no clerk, they are required to make a record of it anyhow. He does not have to enter a written plea. He pleads orally, but the clerk enters it.

The court says, "You have a right to have counsel. If you haven't counsel, we will appoint counsel."

He is informed of his rights. He can tell the court he does not have counsel. We have been assigning them by droves in the city.

Mr. Holtzoff. Or he can say he does not want one. I do not think he should be required to have one.

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Mr. Robinson. This provision is based on the recommendation of the United States Attorney in Baltimore and also on experience I had in New York in the latter part of June.

The United States Attorney in Baltimore states that following Johnson v. Zerbst there is a lot of difficulty with lawyers appearing or purporting to appear for certaindefendants without authority to do so.

4 The United States Attorney told me that he knew of cases there where higher-ups among the defendants had arranged in some way that counsel selected by them should come into court and act as counsel for lower-down defendants, so to speak, although failing to represent the interests of the subordinate defendants and really representing the interests of the more active people, more in control of the defense.

Then, two weeks ago, I was sitting in court up there at an arraignment proceeding and a defendant came up, and the judge asked him if he was represented by counsel, and he said no.

A lawyer who was sitting there at the bar came forward and said, "Your Honor, I thought I was representing this defendant, but, of course, if he wishes to dispense with my services, I will do so."

There was something of a dispute between a lawyer and a defendant at the bar, and finally other arrangements were made.

Because of those two things it seems that it would be desirable to have a written statement by the defendant that John Smith is his lawyer and is representing him in this case. It would foreclose any later disputes about whether or not the defendant was represented, and would make a record which I think would be desirable.

It would be perfectly all right, however, if the Committee passes the present motion.

Mr. Crane. I think what you say is all right, but it does not fit in with the facts as I know them in the Greater City of New York. There are still many hundreds of people who cannot read or write, and a mass of people who cannot speak English, and there is a mass of lawyers 30 per cent of whom ought never to have been admitted to the bar.

You get the same question: Who is representing them? Nobody, if he hasn't any money. If he has, they all scrap over it.

Now, in open court, with the judge there, he speaks, and if he is not satisfied with the lawyer, he gets out and somebody else gets in.

Mr. Holtzoff. You get somewhat similar conditions in the Southwest and the mountain country. There are a lot of Mexicans in the Southwest. Some of the mountaineers cannot sign their names.

Mr. Crane. Thirty or forty-five years ago, when I was holding criminal court in New York, a defendant's lawyer got very impertinent. I told the captain of the court attendants to give him his hat and put him out in the hall. I appointed the lawyer for him. It is drastic, but that is what you have to do sometimes. It is not like the civil end of it. It is rough business, much of it, in these great big cities. You get a lot of lawyers who are as bad as the defendants.

Mr. Seth. I was delayed, Mr. Chairman, and I did not hear the discussion, but I hope the idea here will not be entirely discouraged. If possible, the selection of counsel

should be arranged before arraignment. If not, and the counsel is to do the prisoner any good, there has got to be a second arraignment. Counsel has got to confer with him and possibly talk with witnesses.

Out our way we have a lot of Mexican immigrants who are prosecuted so often for coming across the line from Mexico, and it has created a havoc. They keep them on the border in jail, and the judge goes down there, and they plead guilty, and they put them in jail. There are Indians who cannot sign except with thumb marks.

If counsel is to do any good to indigent defendants, he has got to be given time, and in these places where there are only four or five days of court, I think the idea carried here, possibly with some modification, will really expedite the business by having the counsel proposition arranged before the formal arraignment in some manner. Otherwise you are going to have two arraignments.

Mr. Holtzoff. Of course, what they actually do is this. When the defendant is arraigned and he is asked whether he wants to have counsel appointed and he says yes -- in the majority of cases they say no, but those who say yes -- the court selects a lawyer in the courtroom, and he has him go into the chambers and consult, and maybe an hour or two later he calls the case again, disposing of the docket in the meantime.

Mr. Glueck. Apropos of that, I understand that the Attorney General's office has been recommending in the Federal courts a public defender system.

Mr. Holtzoff. Yes, we have.

Mr. Glueck. Can you tell us the progress of that?

Mr. Holtzoff. Successive attorneys general have been recommending the provision for the office of public defender in the Federal courts. Attorney General Cummings initiated the recommendation. It was followed by Mr. Murphy and by Mr. Jackson. We have drawn a bill to provide for such an office. Bills are pending both in the Senate and the House.

The Senate Judiciary Committee at one time held a hearing on one of these bills, but no favorable action has been taken.

That is really perhaps beyond the scope of this Committee because it is a special office that would have to be created by an act of Congress; but I do hope that we will get that office, because that would solve a good many of these problems.

Mr. Seth. Could not we put in the rules something about "If there is no public defender"?

Mr. Holtzoff. I beg your pardon?

Mr. Seth. Could not we put in the qualification, "If there is no public defender this would happen"?

Mr. Holtzoff. We could put in the provision that if there is a public defender he shall be designated.

Mr. Medalie. Why should he, if the court can find a better lawyer for him? The case may be important enough to pick out one of the best counsel in the district.

Mr. Holtzoff. You can say he may assign the public defender.

Mr. Youngquist. If there is no public defender, the court will assign one.

Mr. Holtzoff. This would have the moral effect of bringing it to their attention.

Mr. Crane. We do not want to write something here that will encourage legislation. We want to write rules that they

will use tomorrow. I do not think we want to put in something as though we are encouraging something of that kind.

Won't the legal aid societies in these big cities help you? I ask because I am on the board of the Legal Aid Society.

Mr. Holtzoff. Not in all cities, because most of them confine themselves to civil matters.

Mr. Medalie. In New York they have a voluntary Legal Aid Society. I am associated with that. The work done there is done in the state courts, in the General Sessions Court.

Mr. Holtzoff. In ~~some~~ the southern districts of New York isn't it the practice for judges to assign former assistant United States attorneys as counsel for indigent prisoners, so that they do get well represented?

Mr. Medalie. In the Southern District of New York the judges assign men who are regularly around that courthouse, who are men of experience, and although they specialize in the practice of the hit-and-miss criminal case, they are very good counsel. The judges have said all the time that they do a pretty good job for these defendants, and they are very conscientious and they are men whom the judges respect. That is the experience in that district. I do not know how it is elsewhere.

That is due largely to the fact that you have in the Southern District developed, over the last fifteen years, at least, judges who encourage good relations with the bar, and if you act decently with the bar, the bar develops decently. If you treat them like riffraff, they act like riffraff.

Mr. Crane. We have probably had fifteen or twenty first degree murder cases in the Court of Appeals a year. I suppose nearly everyone who was tried had counsel assigned, unless it is

some case where they have some money, which is rarely so, and those counsel are exceptionally good.

They allow counsel $500 for the trial and they get another $500 in the Court of Appeals, so that is $1,000.

Mr. Glueck. Well, I agree with you, Judge Crane, that it would be improper to include that in the rules, but it seems to me that it might be mentioned in the commentary that there are advantages in this kind of system.

Mr. Crane. I do not object to that.

Mr. Youngquist. I myself am not convinced on the public defender idea.

Mr. Longsdorf. It seems to me that if we mention public defenders and if Congress provides for a Federal public defender someone will ask which one they are talking about. We have such a system in some states.

The Chairman. It creates an office, and that is not within our jurisdiction.

We have really three matters pending now: Mr. Holtzoff's substitute for this section, Mr. Wechsler's accepted amendment to make it a paragraph in that section, and Mr. Youngquist raises the question whether or not that carries with it the idea that it should be in writing.

Mr. Youngquist. That was not intended as a motion.

The Chairman. May we get the view of the committee on that before we put the question? What is the view of the committee as to whether or not the waiver by the defendant should be in writing?

All those who take the view that it should be in writing say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, no.

(There was a chorus of noes.)

Mr. Glueck. That means that there still would be a formal entry?

The Chairman. Oh, yes.

Mr. Wechsler. It might still be desirable to have administratively such a thing in writing, but in open court the question will be gone into.

Mr. Crane. And a written entry made.

Mr. Holtzoff. That can be left administratively, as he suggests.

Mr. Medalie. There is another thing to be considered in connection with assignment of counsel. Even if the defendant waives, there are times when the judge sees a necessity for appointing counsel. The court should not be required to dispense with counsel simply because the defendant stupidly waives.

Mr. Holtzoff. This would not require the court not to appoint counsel.

The Chairman. This would not bind the court. It would merely bind the defendant.

With regard to the motion made by Mr. Holtzoff and amended by Mr. Wechsler, all those in favor say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, "No." (Silence.)

The motion is carried.

Now, the motion as to the assignment of counsel prior to arraignment.

Mr. Wechsler. Again it seems to me that it is largely an

issue of merger as to whether the rules will go into such matters as the preliminary hearing in general, if there is a preliminary hearing, or to provide for one where there now is not. That problem is not touched by this draft, but it seems to me very important that it should be considered as a whole, and the special question of counsel will be one of the questions that will arise in the course of that consideration, just as I felt that arraignment should be considered as an inevitable incident.

Mr. Holtzoff. Of course, this draft is not intended to be complete --

Mr. Wechsler. No. The point of my remark is directed to the most helpful way to put this suggestion, and it seems to me that it is to point to a process in the trial which the reporter has not yet come to consider and suggest that as a particular point to be considered at the time when he reaches that subject.

Mr. Holtzoff. I agree with Mr. Wechsler that perhaps we could postpone the question of assignment of counsel prior to the arraignment until we come to consider rules for preliminary hearing before commissioners.

Mr. Longsdorf. Furthering Mr. Wechsler's suggestion, the order appointing this Committee does not mention anything about proceedings before commissioners for preliminary examinations, but the Enabling Act of the Supreme Court does mention that. Now, where does that leave us?

Mr. Robinson. The appointment of the Committee expressly incorporates the Enabling Act, does it not?

Mr. Longsdorf. I think so, but I am not sure.

The Chairman. I think we need have no question about that.

Mr. Longsdorf. I have no serious question. I simply want to call it to the attention of the Committee.

The Chairman. Mr. Wechsler, do you make a motion that we have a section or rule dealing with preliminary hearing?

Mr. Wechsler. I do.

Mr. Holtzoff. I second the motion.

Mr. Medalie. Does that mean hearings before the commissioner?

Mr. Holtzoff. Yes.

The Chairman. Preliminary hearings before a commissioner, to make the matter more exact.

Is there any discussion?

Those in favor say "Aye."

(There was a chorus of ayes.)

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

It is carried.

I take it that the question that you raise, Mr. Glueck, will come up --

Mr. Glueck. May I make a general suggestion to the reporter, Mr. Chairman, to consider, and that is that I think that most of us visualize this whole business as an orderly process, having certain traditional steps, and I think it might help if less emphasis were placed on a numerical comparison of the sections of this draft with that of the Civil Code and some stress were placed on a chronological order of the subjects.

Mr. Crane. I agree with that.

Mr. Holtzoff. I do not think, when we have the final draft, we need follow the numbering of the civil rules. I think it was helpful in the preliminary draft for comparison.

The Chairman. I was thinking about that last night a bit, and it seems to me we can very well accomplish what the reporter had in mind by appending to our rules parallel numbers of the civil rules, without burdening ourselves with an artificial order. That is a matter to come up when we come to the redrafting of this whole set.

I think we are ready to come to page 4, Section (b) (2).

Mr. Glueck. It now becomes (1), doesn't it, Mr. Chairman?

Mr. Holtzoff. Suppose we use the number that we have.

The Chairman. We will use these numbers. We will leave it to the reporter to renumber it if necessary.

Mr. Holtzoff. Mr. Medalie called my attention to the fact that the words "affirmative defense," used in paragraph (2) and elsewhere later on, are words that perhaps are not suitable to criminal procedure, because, strictly speaking, there is no such thing as affirmative defense in criminal law, and there ought to be some other word used, the theory being that the prosecution has the burden of proof on every issue.

Mr. Crane. You do not have to say "affirmative defense." If it is affirmative defense, you have to prove it. If it is simply "defense," it would raise reasonable doubt.

Mr. Holtzoff. Did you have some term in mind, Mr. Medalie?

Mr. Medalie. No. I am not inclined to go along with this idea of the defendant having to tell everything that he wants to prove, where the prosecution has not been called upon to do it, notwithstanding the belief that the prosecution tells you everything. In fact, he tells next to nothing.

Let me put it this way. It is claimed in a case that a defendant committed the crime of robbery, that he robbed a bank.

That is all he says. The prosecution may have a theory that someone else did the actual robbery and that, in some remote way, in order to acquire the possession of some bonds or money or anything else, the man in the courtroom had some connection with it that is built up with some circumstantial evidence.

The prosecution does not state that in its pleading and does not give a bill of particulars to that ordinarily. The defendant is not apprised of details of proof or the important elements of proof.

In connection with conspiracy, no matter what the crime is, whether it is mail fraud or extortion or anything you please, outside of stating what generally was done in the way of a scheme for mail fraud, how the defendant carried out the scheme or what the Government claims was his connection with it is never stated.

There is a lot of talk to the effect that the Government tells you everything and the defendant tells you nothing. Common experience is that that is poppycock.

Mr. Glueck. When you are representing a defendant you somehow manage to find out.

Mr. Medalie. That is something else.

Let me say this in that connection, and I have made this remark before. If the case is well prepared on both sides, the Government has a pretty good idea of what defense counsel is going to do in the case or is likely to do or can do, and reasonably forecasts it, and the defendant's counsel is in about the same position with respect to the Government, even though the indictment does not tell him very much, or even if the bill of particulars is calculated to mislead him. It does not make

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very much difference.

Now, this business of affirmative defense in criminal cases is based on the argument that the Government tells the defendant everything and the defendant tells the Government nothing.

Mr. Holtzoff. There are certain things that the defendant has to raise especially, matters that he raises by pleas in abatement and matters in special pleading. The defendant does give notice.

Mr. Medalie. A very comprehensive catalogue of these things has been prepared by the reporter. Actually, about the only thing that the defendant is required to bring up in advance of a trial, even though he may bring up many of the other things or matters, is improper constitution of the grand jury or improper conduct in the grand jury, including the fact that he was compelled to testify against himself when he objected to doing so.

Outside of that, he does not need to bring up anything else. Former jeopardy he does not have to bring up.

Mr. Robinson. I think our question begins just where you left off so far. On former jeopardy, is not that an issue that would well be determined before trial in many cases?

Mr. Medalie. It can be.

Mr. Robinson. We are supposed to be considering possibilities. At the present time it is true that perhaps it cannot be, but is that the best plan? Is it wise for the Government and the defendant to subpoena to court any number of witnesses, a lot of jurors, have them ready here for trial, and then spend hours or days of time arguing questions, probably largely

questions of law in regard to the legal sufficiency of the issue of double jeopardy, which might well have been disposed of before trial without all this expense and delay?

Mr. Medalie. In the first place, I think you enlarge unduly on the amount of time that such an issue would take.

Mr. Robinson. You would not say that it is impossible?

Mr. Medalie. No, but, generally speaking, it takes very little time. Generally speaking, too, it comes up only on occasion.

Now, time does not need to bother us, because I have not seen much time wasted on these things. Prior jeopardy, statute of limitations -- the statute of limitations never takes time --

Mr. Robinson. Alibi, notice of insanity details are often left to trial. Now, is that the best plan, or can we devise a plan which would make a trial a trial and allegations met by issues or denials.

Mr. Medalie. Let me take them one at a time.

Mr. Robinson. All right.

Mr. Medalie. I think the attempt to separate the issue of insanity from the issue of a defendant's guilt, leaving insanity out, is a perverted way of trying the issue of a man's guilt, because the issue of insanity enters into the character of his act to a great extent -- intoxication, for example. It is part and parcel of the case, and it ought not to be chipped up there.

Mr. Holtzoff. How about former jeopardy?

Mr. Medalie. That is routine.

Mr. Holtzoff. I think he certainly ought to be given

notice by a defendant, especially if it is double jeopardy.

Mr. Medalie. You say double jeopardy. Would you say statute of limitations?

Mr. Holtzoff. Yes.

Mr. Medalie. Well, I think it is part and parcel of the case.

Mr. Holtzoff. Well, that is true, because it depends on the date of the prosecution.

Mr. Medalie. No matter what date they give. I can give you a case where if the Government never tries it that issue can come up; that is, whether a subsequent act after the main transaction was part and parcel of the main transaction. If it was, then the claim that the statute runs falls. If it was not, it does, and the case cannot go to the jury and the statute has run.

How are you going to separate that?

Mr. Holtzoff. You cannot.

Mr. Wechsler. May I ask what Mr. Medalie said about the insanity issue? I did not hear the position you took on that.

Mr. Medalie. One of the questions in a criminal case is his intent, not simply the capacity to commit the crime. It is not easy always to segregate intent and insanity or intent and intoxication.

Mr. Robinson. Mr. Dean is familiar with the California practice, in which they do that very thing. They separate the insanity issue. I would like to hear from him on that.

Mr. Dean. In California, if you are going to set up insanity as a defense you must put in a special plea by reason of insanity. If that is your only defense, you rest on that

plea. If you want to plead not guilty, you may put in both pleas.

If you plead not guilty, you may plead not guilty by reason of insanity and not guilty. Then you have a separate hearing in advance of your main trial on the general issue, in which the only issue is, Was the man insane at the time the act was committed?

If that is determined adverse to the accused, then he goes on and has a regular trial on the not guilty plea.

Of course, under that procedure there is one big difficulty. You really must try the case two times, because it is very difficult to tell the circumstances of the crime as they reflect the mental elements that are necessary in the first hearing from the whole factual story you get when you are putting the case on the general issue.

Mr. Wechsler. I have examined the California cases and I am unable to discover, on the basis of the examination, any merit whatever in the separation, because they are all homicide cases to begin with, and the circumstances of the homicide are inescapably detailed in the course of the trial on the issue of insanity,and the ultimate adjudication seems to me to be precisely that which you would have gotten had the prosecution tried its case first and then the special circumstances with reference to the defendant been put in as a matter of defense.

Mr. Holtzoff. In other words, the prosecution has to present its proof twice, practically.

Mr. Dean. That is right.

Mr. Medalie. So has the defendant.

Mr. Waite. Mr. Chairman, I wonder if we could not expedite

this discussion by some explanation from the reporter as to just how he is planning to get this affirmative defense brought forward.

Now, I myself am highly in favor of some revelation of the defendant's defense, if we can work out a practical scheme to do it. That was before the Law Institute Code Committee.

Most of us agreed that it was a desirable thing -- not all of us -- but we could not work out any process by which we could compel the defendant to reveal it.

Now, as I read this, in (2) (c), the defendant, if he wants to assert that not he but somebody else committed the crime, shall file a motion to dismiss the indictment.

I do not see how we are possibly going to work that plan out. He says, "It was Tom Jones who committed the crime and not I, because I was in Akron and not in Cleveland at the time," and he files a motion to dismiss.

Now, suppose he says, "It was Tom Jones and not I, because, though I was present at the place of the crime, I was temporarily paralyzed."

It is exactly the same type of defense. Its only difference is in the character of the evidence.

Or suppose he says, "I was there, and I was not paralyzed, but all the world knows that I stood motionless while Tom Jones committed the crime."

I fail to see the difference between the defense of alibi and the defense of paralysis and the defense that "I did not do it, but somebody else did," and I do not see how he can raise those particular defenses on a motion to dismiss.

Mr. Robinson. Of course, you come from Michigan, and you

have there --

Mr. Waite. I am talking about raising it on a motion to dismiss.

Mr, Robinson. I think it will help the committee if you tell us how you do it in Michigan.

Mr. Waite. I said, to start with, that the Code Committee could not work out any practical scheme.

Mr. Robinson. That is the A. L. I. Code?

Mr. Waite. Yes. All I am saying is that though I think it is a very desirable thing to produce that statement from the defendant if we can, it cannot be done under a motion to dismiss. If you are talking about affirmative defense, that comes under motion to dismiss, and that is very confusing.

Mr. Holtzoff. Why couldn't that be done by requiring that the defendant shall serve notice if he is going to offer evidence to establish alibi? Isn't that in effect in the Michigan and Ohio statutes?

Mr. Waite. He is precluded from putting in evidence unless he has given notice.

Mr. Holtzoff. And you do not have to do it by motion to dismiss.

Mr. Dean. It is not raised by pleading.

The Chairman. We have heard an expression from Mr. Dean and Mr. Wechsler on that California statute. I would like to get Mr. Longdorf's opinion.

Mr. Longsdorf. I have not any experience in criminal practice, which raises a good deal of doubt as to whether I ought to be here, but I live in California and my impression is that that measure which Mr. Dean referred to, making a double-

barreled plea, has not been entirely satisfactory.

The Chairman. Then we have a consensus on that proposition.

I wonder if we could get from our two Michigan members an expression as to whether or not your insanity statute works.

Mr. Waite. It is generally assumed that it works rather well in this way. What happened before that was that the defendant would spring upon the prosecuting attorney an allegation of insanity or witnesses to the effect that he was not at the scene of the crime, and the prosecution had no chance to
9 counter that, had no chance really to have the man examined as to his mental state. He had no chance to look up the witnesses who appeared for the alibi.

We simply picked out two particularly obnoxious types of surprise and required advance notice of them, but it does not come under motion to dismiss --

Mr. Holtzoff. But you do not have separate hearing on insanity?

Mr. Waite. No. It simply precludes the defendant from giving evidence on those two particular lines of defense unless he has previously given notice.

The Chairman. Does that work satisfactorily?

Mr. Waite. Fairly so, yes. There is some consideration -- it has not gotten very far -- of extending it to requiring him not only to give notice if he is going to set up alibi, but give notice of what particular kind of defense he is going to give, which is what I take it the reporter is driving at here.

Mr. Robinson. Yes.

Mr. Medalie. Do you know of any cases where the prosecution has been surprised by an insanity defense?

Mr. Waite. I do not personally.

Mr. Medalie. I do not believe there can be any substantial number of them or any appreciable number of them.

Mr. Waite. I am told by men who have been in office that it happens not infrequently.

Mr. Robinson. It has happened that on the day of trial he would come in with an array of witnesses and alienists, and the prosecution was not prepared.

Mr. Medalie. It surprises me to hear that said, because I cannot imagine any place in the world whichtries more criminal cases than New York and Kings County, and I do not recalla single case when I practiced law where insanity was sprung.

The Chairman. Alibi has been.

Mr. Medalie. I grant you that.

The Chairman. What harm can there be in requiring the defendant to say that "Among my stock in trade I have one little insanity"?

Mr. Crane. I think that comes under separate trial, which we have not come to yet.

Mr. Medalie. That is another question altogether.

Mr. Crane. There is one separate hearing that you do not want to abolish and that you all recognize, which should be stated here, and that is the separate hearing as to whether or not the defendant is sufficiently sane to go on with the trial. That requires a hearing, of course.

Mr. Medalie. The defendant himself raises that. He may prefer to go to the state hospital.

Mr. Crane. They are not all fakes.

Mr. Youngquist. I think this discussion gives point to

what I was trying to bring out yesterday, that we have got to segregate these various affirmative defenses,as they are called. We just cannot treat them all together, because some of them, like former jeopardy, I think are properly disposed of before the trial of the general issue.

Another, notice of alibi, it cannot be a motion to dismiss, because it merely advises the prosecution that this defense will be interposed at trial.

We have just got to segregate and classify the groups into proper compartments.

Mr. Waite. I think this is complicated by the fact that this motion to dismiss raises an issue on the separate hearing--

Mr. Crane. That is the point.

Mr. Waite. I would like to move, therefore, just to bring it to a head for discussion, that the provision be made to read, in substance -- I am not particular about the form of it now -- that if the defendant proposes at the trial to give evidence that he was insane at the time of the commission of the crime or that he could not have committed the crime because he was not at the place of the crime, he must give notice in advance of that fact.

That does not raise an issue. It simply advises the prosecutor what to expect.

The Chairman. That is in lieu of subsection (2) on page 5?

Mr. Waite. Yes.

Mr. Holtzoff. The first sentence would have to stand. This would be a substitution of the second sentence.

Mr. Waite. Yes.

Mr. Holtzoff. I second the motion.

Mr. Wechsler. Is the operative date the date alleged in the indictment or information?

Mr. Waite. Suppose we separate the two motions. I can see a lot of discussion on that alibi proposition.

The first motion is that if he intends to set up the defense that he was insane at the time of the commission of the act, he shall in some proper way give notice thereof.

Then I will make the second motion if we settle this one.

Mr. Robinson. The Michigan statute puts them both in the same section of the statute.

Mr. Crane. Of course, you are taking out the motion to dismiss in the second sentence. They cannot dismiss an accusation on the question of fact.

Mr. Holtzoff. There will still be a motion to dismiss for insufficiency in lieu of the present demurrer.

Mr. Crane. That is a legal question.

Mr. Holtzoff. So that you have to keep the term "motion to dismiss."

Mr. Crane. I was speaking of the motion to dismiss which was included in what Mr. Waite just said. On these issues of fact, you cannot do that.

Mr. Youngquist. The motion to dismiss, when it is provided for, will not include those issues of fact.

Mr. Wechsler. I would like to ask two questions on the insanity problem, Mr. Chairman.

I would like to ask first whether there are any cases in the Federal courts in the last twenty years in which the defense of irresponsibility by reason of insanity was imposed.

Mr. Crane. What?

Mr. Wechsler. Whether there are any cases in the Federal courts where that defense was interposed. Are there a few capital cases?

Mr. Holtzoff. There are quite a few cases. Of course, you had the Harriman case.

Mr. Medalie. That was raised on the ground that he was in such mental condition that he could not consult counsel.

Mr. Holtzoff. There are cases where the defense of insanity has been imposed in non-capital cases.

Mr. Wechsler. I take your word for it, but I have looked for them and not been able to find them.

Mr. Holtzoff. They may not be in the reports. They may

2-1 be unreported cases.

Mr. Wechsler. Assuming that there are such cases, what is the Federal procedure with reference to civil commitment of such persons who raise that defense and who have been found to be insane?

Mr. Holtzoff. There is no Federal procedure. The Federal courts have no authority, except on Federal reservations, to make a civil commitment. All that the Federal court can do is to acquit the defendant if it was found that he was insane at the time that he was alleged to have committed the offense.

Mr. Medalie. Why should not we have provision for that in these rules of procedure?

Mr. Holtzoff. I think that would be a rule of substantive law.

Mr. Medalie. No. That has to do with apprehension and detention of defendants.

Mr. Crane. But the question is, Where would you send them?

Mr. Dean. We have a very adequate one in Springfield.

Mr. Holtzoff. Springfield is used only for those prisoners who become insane while serving a sentence for the crime.

The Chairman. The question is, Do you have capacity?

Mr. Medalie. Could St. Elizabeth's take care of all the cases that could possibly arise in all of the United States?

Mr. Holtzoff. We have the Springfield institute for defective delinquents.

Mr. Medalie. Ordinarily a code of criminal procedure contains a provision of that kind. I have forgotten whether the Institute Codes contain a provision of that kind, but the New York one does.

Mr. Crane. That is part criminal and part civil.

You take any person who is acquitted because he is insane. You do not let him go. The State will take him and commit him.

Mr. Holtzoff. I was going to suggest that we do not need any procedure. We would rather turn them over to the State institution.

Mr. Crane. Two doctors examine them and they are committed inside of twelve hours.

Mr. Medalie. These are the situations that arise. A defendant is unable to consult with counsel because he is insane. The court so finds.

The New York Code of Criminal Procedure provides for his commitment, and he stays until cured, if ever cured, and when cured he is brought back to trial. That has a sense of decency and is a protection to the public.

The other situation arises when, having been acquitted for insanity, he should not be at large. If the State is going to

take care of him under those conditions, well and good.

In New York they do not wait for the physicians to come and certify after his acquittal because he is insane. The jury has said so. Since he has committed a crime, they will take no chance with his being at large. He has to prove later that he is sane. One murder is enough. They do not certify that he is cured unless they are pretty sure he is safe.

Now, a complete code of criminal procedure requires that provision be made for both of those situations.

Mr. Holtzoff. It seems to me that in that second situation if the defendant in a Federal court is acquitted on the ground of insanity it should be the State's responsibility to commit him to an institution, and that is the way the thing is done to day. We would notify the state authorities and turn him over to them.

Mr. Medalie. There is only one trouble with that kind of commitment. A man acquitted on the ground of insanity in New York goes to the State Hospital for the Criminal Insane. He does not belong in one of the state hospitals for the general run of people who are temporarily or permanently mentally ill. He does not belong there and should not go there.

If we really want to make a contribution to criminal law, outside of its legal provisions but in the public interest, we ought to make a provision of that kind, and if our provision in these rules is inadequate, Congress can go ahead and supplement it properly.

Nevertheless, the most important thing to consider is that when you have a man who is insane and is charged with a crime, you just do not turn him loose, and the responsibility for

keeping him in custody is the Federal Government's.

The Chairman. May we hold this issue until we dispose of Mr. Waite's motion, which is to set up a separate sentence in lieu of the second sentence of subsection (2), to provide for notice by the defendant of the defense of insanity.

Are you ready for the question?

All those in favor say "Aye."

(There was a chorus of ayes.)

Opposed, "No." (Silence.)

The motion is carried.

Mr. Medalie. I want it noted that I am going along with it tentatively.

Mr. Wechsler. I do, too.

The Chairman. Do you want to make a motion that the reporter be directed to prepare a rule covering disposition of defendants found to be insane by the jury?

Mr. Medalie. I would like to cover both insanity prior to trial and the case of an acquittal on the ground of insanity and commitments --

Mr. Crane. You have got to deal with them separately, because simply because he is acquitted on the ground that he was insane at the time he committed the crime is not sufficient to keep him in jail.

Mr. Medalie. It is under our code.

Mr. Crane. No. You have to have a finding that he is also insane at that time. A man might be acquitted on the ground that he had his tempestuous insanity, that he shot the girl or shot the man,and that he was perfectly sane when the case came to trial.

A man who is perfectly sane when he goes to jail is not put in the insane asylum because he was insane two years ago when he committed the act.

Mr. Medalie. It has been stated in our decisions that a man may be insane and yet capable of conferring with counsel. Commitment made prior to trial of a person who was insane is a commitment solely on the ground that he cannot consult with counsel. He may be perfectly sane otherwise.

Mr. Crane. When a man's trial comes up the defense may be that he was insane at the time he committed the act. Experts testify that he was suffering with --

Mr. Glueck. Manic depressive insanity.

Mr. Crane. Yes; that at the time he was just crazy, that he did not know what he was doing, but in a month it was all over, and in a month he is perfectly sane.

The finding of the jury is that he was insane at the time he committed the act, that it was not the act of a sane man.

The burden is always on the United States to prove that he was sane at the time he committed the act. If any reasonable doubt has been created, that is all the defendant has to do.

So when you come to the question of a trial happening two years or a year afterward, the jury is not going to pass upon that unless it is required by statute -- as to whether or not he be insane at the time of the trial -- because you can only put a man in the insane asylum who is insane at the time you put him there.

Mr. Glueck. A man does not go to an institution because of acquittal, because that is anomalous. He has been proven not guilty and, theoretically, the second proceeding is required

to determine whether he is insane.

Mr. Medalie. Is that the New York Code?

Mr. Holtzoff. Under the New York Code the judge has to make a finding that the man is insane at that time.

The Chairman. All that is before us now is the suggestion that the reporter prepare such a rule and submit it. Let us not have argument.

Mr. Holtzoff. In my opinion, that ought to be the State's responsibility, rather than the responsibility of the Federal Government.

Mr. Wechsler. I would not like to decide that question.

Mr. Waite. You are familiar with the three different types of state statutes covering that situation.

Mr. Glueck. Apropos of that, may I say that, regarding Mr. Medalie's suggestion, if there is no Federal institution at present available, it seems to me we have no right to draft a rule which envisages such an institution, so may I make a suggestion that this proposed rule contain a provision that upon the acquittal of a person on the ground of insanity, on the ground of irresponsibility by reason of insanity, that fact shall be certified to the appropriate state authority so that they will receive notice, and then they can proceed with civil commitment proceedings.

Mr. Wechsler. It may be desirable for them to have the further adjudication made by the Federal court.

Mr. Glueck. By the Federal court?

Mr. Wechsler. Yes, if it is jurisdictionally possible to do so.

Mr. Glueck. That is the question.

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Mr. Wechsler. There is a question of jurisdiction, yes, but if it is jurisdictionally possible, obvious litigation may be avoided, particularly if the defendant has been examined by alienists during the course of the trial, and if the evidence at the trial bears upon his present condition. That is something for special investigation and a problem to be worked out.

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Mr. Medalie. May I ask whether later in these rules there is provision for acquittal on the ground of insanity?

The Chairman. No.

Mr. Medalie. I think that should go in, to conform with the State practice.

Mr. Waite. Mr. Chairman, before I am asked to vote on any of these motions I want to make an observation about a thing that we all know but none of us has mentioned as yet, and that is that the Federal courts have absolutely no prerogative jurisdiction of wardship. Perhaps Congress might do it. We will not go into so big a discussion as that, I hope.

Mr. Holtzoff. I agree with Mr. Longsdorf on that. I do not think the Federal court has any jurisdiction to commit a person on insanity today.

The Chairman. Suppose we develop this line of thought and then get the rule determined.

Mr. Waite. Mr. Chairman, if it is in order, I should like to make a second part to my motion.

The Chairman. May we have a vote on Mr. Medalie's motion that a rule be prepared on this and submitted by the reporter.

(The motion was agreed to.)

The Chairman. Now, Mr. Waite, will you proceed?

Mr. Waite. I do not care just where this shall come, but my motion is that there be a provision to the effect that if the defendant intends to defend on the ground that he could not have committed the crime because at the time he was at some other place -- in other words, the so-called defense of alibi -- he shall give advance notice of that intention.

Mr. Holtzoff. I second the motion.

The Chairman. Is there any discussion?

Mr. Seasongood. Mr. Chairman, there are several of these defenses. I do not know why we single out these two.

Mr. Waite. I was going to suggest the others later on. I was trying to do it piece-meal because some of them become so complicated. But I had in mind putting in, in our discussion here, everything that is covered in subparagraph 4 of (c).

Mr. Seasongood. That is what I was going to suggest. If notice is given of certain defenses, I understand whether it is in the civil rules or simply by the general practice of the court, the court can determine these things if it wants to in advance of trial. For instance, there might be the defense of settlement in a civil case, and I have known of cases in which the court determined that question in advance of trial, and it is left to the discretion of the court whether he thinks this separate issue can be tried separately so as to save the trial of the whole case.

It was my thought that if we enumerate these different defenses of which we give notice, then the court would have the discretion to try them before trial, if it seems to the court advisable to have that done.

The Chairman. The reporter wishes to check up on that.

Mr. Medalie. The New York provision --

Mr. Seasongood. If that is what Mr. Waite had in mind -- and I judge that it is -- I think we might lump the whole lot of them, rather than to pick out particular ones, and leave it to the discretion of the court whether it should be tried separately to advantage, rather than have all of them in the trial of the whole case.

Mr. Crane. Certainly constitutionally the court cannot try anything as a question of fact outside of the trial of the case; and what bothered me about this was the matter of separate trial on such issues. I suppose when it comes to a matter of a formal plea or a question of law the court could pass upon that, the same as a demurrer. But if there is any question of fact I think there cannot be a separate trial.

The motions being put have not involved that. It simply gives notice.

Mr. Holtzoff. This is only giving notice before trial, and not of a separate trial.

Mr. Crane. Yes; so I understood. I am with him on that.

Mr. Dean. I should like to make a separate motion. In most of the State statutes it is provided -- and I move that it be amended so as to read -- that upon failure to submit advance notice the court may in its discretion exclude the alibi evidence.

The Chairman. Is that agreeable to Mr. Waite?

Mr. Waite. I accept that. That was intended to be implicit in mine.

The Chairman. Does that also apply to the motion on notice in advance?

Mr. Waite. Yes; I understand that.

Mr. Wechsler. I should like to hear from Mr. Waite a justification of the statement. It is a classic issue in the literature, and it has been debated pro and con many times. I think he would be willing to make such a statement.

Mr. Waite. The only justification is the effort to do away with surprise. I have in mind the case of Heime Martin, who

fled to Pennsylvania. They went to Pittsburgh in an effort to extradite him, and he said he could not be expedited because at the time of the murder he had been, so he said, in Pittsburgh, and he brought innumerable witnesses who testified to that effect. The Cleveland authorities got tired of waiting, and they just kidnaped him, and did not wait for the extradition proceedings. He was tried, and at that time he brought out the defense that he did not commit t he murder; but he did not set up the alibi that he was in Pittsburgh, but instead set up the alibi that he was in Akron at the time, and he brought in innumerable witnesses to show that he was inAkron. The prosecution had been warned to a certain extent, and it brought in witnesses to testify that he was in Pittsburgh. The jury, having testimony that he was in both places, decided that he was in neither, and convicted him of the murder in Cleveland.

Mr. Wechsler. What is the situation with reference to the date? Does the date in the document determine the date?

Mr. Waite. There you get the difficulty of the thing. I think the reasons for it are plain, and it is desirable if we can feasibly do it. That is why I separated the motions.

Are you going to require a statement as to where he was at the time, and what time, and a statement of the witnesses by whom he expects to prove it? If you just require a statement that he is going to set up the defense that he was not there at the time, and nothing more, you have not gotten very far.

Mr. Wechsler. Is the prosecution then limited to the date alleged in the indictment, and no other, if the defendant serves that notice?

Mr. Waite. I think it is a desirable thing if we can work

it out, but I am not a proponent of it.

Mr. Holtzoff. Why could we not provide that if a notice of alibi evidence is given by the defendant, that limits the evidence to the date given in the indictment unless the prosecution notifies the defendant that it will rely upon some other date? That would be fair to both parties.

Mr. Wechsler. Of course all this presupposes a crime that is alleged, or an act committed on a single day; and what raises the largest question to my mind is that the Federal offenses are to such a great extent continuing offenses, in which the specification of time is not required at all.

Obviously this would not work in a conspiracy case or a mail fraud case.

Mr. Holtzoff. No; this would apply to such cases as bank robbery or transportation interstate of stolen vehicles on a certain date.

Mr. Wechsler. It would apply to very few Federal offenses, and I should think that robbery and kidnaping would be about the only important ones.

Mr. Waite. Would it not apply to any offense in which the particular date was important?

Mr. Medalie. In the States having alibi defense statutes there must be some experience as to just what cases require alibi defense notice. Obviously they cannot exist in cases in which the crime is committed over a period of six years, or like one that I recently tried in the Federal court, the McKesson & Robbins case, where the alleged mail fraud was committed over a period of twelve years, and had there been an alibi statute theywould not have done anything about it.

Mr. Waite. It is given as a matter of course regardless

of whether they put in any evidence to that effect or not.

Mr. Wechsler. My feeling is that on this stage of the motion such a provision would do infinitely more harm than good, and therefore I shall oppose it unless a memorandum is prepared which indicates that it would be a feasible thing in view of the realities of Federal procesution.

Mr. Holtzoff. It is feasible in respect of all the crimes -- and there are any number of them -- which are committed by commission of a certain act: bank robbery, transportation of stolen property in interstate commerce, kidnapping, and so forth. Of course, alibi would not be used in a conspiracy charge. In other words, wherever the evidence of alibi would be suitable, under the proposed rule you would be required to give notice of it. But in the cases you have in mind the defendant would not use evidence of alibi because it would not be appropriate.

Mr. Medalie. In a conspiracy case, for instance, suppose that one overt act is important -- you need only one, but they allege eight or a dozen: Would you be required to file alibi notice, on your theory as to the overt acts?

Mr. Holtzoff. I suppose you would, just on the overt act, but not on the conspiracy itself.

Mr. Glueck. Would the prosecutor be bound by the one overt act?

Mr. Medalie. Whatever overt act he relied on he would have to prove, or his case would fail.

Mr. Crane. I do not see how this comes up at all; because the defendant would not plead a date unless he was prepared to show that on that date he did not commit the crime. And if he

were going to offer it it would be because of evidence he had in mind showing that he was not there at the time alleged. I do not see how this interests the people. He gives it only as a date he had in mind on which he could not commit the crime if he were not present. He only gives the notice. He is not required to do anything more unless he wants to plead alibi.

Mr. Medalie. I think by this time there must have been enough experience in the various States to give us adequate information as to how this works, and I think we ought to have the benefit of it.

Mr. Holtzoff. Michigan and Ohio have these statutes.

Mr. Dean. There is an article published two years ago-- I do not recall all the details of it-- in the Texas Law Review.

The Chairman. I have it here.

Mr. Dean. It was written by two people down there. They made a canvass of the States having alibi statutes on the statute books, and they made a canvass as to how successful it had been. They also asked how many cases there had been in Texas in the course of a year or two in which it would have been helpful to them. The result, as I recall it, was that the Texas prosecutors did not think such a statute would be helpful to them, but in the case of the States having such a law on their statute books the prosecutors thought it would be helpful.

Mr. Crane. I think we will be influenced somewhat by the attitude of the lawyers generally, and there seems to be some demand for notice of this kind. I do not think, personally, that it is going to do any good, but that is not of any consequence. I think it cannot do any harm. If you are going to

give notice to the defendant, if he does not want to give it, all right. If he does, so much the better. It cannot do any harm. There is nothing unconstitutional about it. I do not see any harm in it.

Mr. Holtzoff. The Attorney General of the United States has for a number of years been recommending legislation requiring notice of alibi.

Mr. Medalie. But the question is how well informed they were when they did it; and we would like to have the benefit of that information; because much of that material has come up in the course of irresponsible newspaper editorials.

Mr. Robinson. We have had every statute in the United States on this subject, and have abstracted the cases, and we have the article of which Mr. Dean speaks. I happen to be familiar with it because I drew the alibi statute for Indiana. That is what it really is. Because if you try to frame a statute to meet all possible developments the statute will have to run about a page and a half. The Michigan statute is quite brief, but it has been criticized for the reason Mr. Wechsler states: It does not give the defendant, on the face of the statute, much of a chance; and it has been criticized on that account.

If you do take into consideration the protection of all the defendant's rights, you will have a rule of a page and a half. Of course we cannot devote a page and a half to the rule on alibi, and another page and a half on insanity, and so on with all the rest of them.

Our problem is how to get this matter organized in such a way as to deal with it rather briefly and compactly, with dis-

cretion in the court, as Mr. Seasongood suggested.

Mr. Crane. Of course you also must be able to meet the emergency which happens only once in a life time -- that a notice may be amended in the discretion of the court, giving proper and due time to the district attorney to meet that change.

These notices are not hard and fast. They are all in the discretion of the court, and they can be met. The only thing we have to be careful about is that we do not soften the thing so that it is not liberal enough to give every one a chance to assert his rights in case of mistake.

Mr. Wechsler. Has any attention been given to the reverse of this matter -- whether the defendant is definitely informed of the position in which the prosecution intends to put him on this when they get to the state of the proof?

Mr. Robinson. It is in the jurisdiction of the court. That is the essential thing. But in our provision we had tried to be fair with the defendant.

Mr. Wechsler. Of course the jurisdiction of a court is only a minor phase of it. The location may come up a hundred times.

Mr. Medalie. The rule provides that the defendant may be given an opportunity to get up a bill of particulars.

The Chairman. Are you ready for the question?

Mr. Longsdorf. Are we dealing with insanity? May the motion be restated?

The Chairman. No; this is alibi alone.

(The motion was agreed to.)

Mr. Waite. Mr. Chairman, prompted by Mr. Seasongood, I should like to make the rest of the motion, which is intended to

cover what the Reporter already had in, but to bring it up on a basis of information rather than on a basis of a motion to dismiss. My motion is this: If the defendant intends to defend on the ground of coercion, self-defense, infancy, or intoxication, he shall give proper notice thereof.

I am not using the words that I hope will appear, but simply am trying to give my idea, when I say "shall give proper notice".

"If he does not give such notice the court may in its discretion refuse to admit evidence of the particular defense."

Mr. Holtzoff. I should like to make an amendment to the motion: to strike out "self-defense" and "intoxication" -- for the reason that I do not think self-defense is affirmative matter. Self-defense is part and parcel of the transaction.

Mr. Medalie. It deals with contributory negligence.

Mr. Holtzoff. Yes; it is part and parcel of the transaction, of the charge the Government makes against the defendant. Of course I think it goes to criminal intent as a matter of evidence rather than affirmative matter. Of course it is not defense except as it denies the presence of ~~reason~~ intent.

Mr. Crane. The same thing can be said as to every one of the others; and so far as a rule on this notice business is concerned -- which is new -- I think if we follow the middle ground, and not the whole, we will be doing a wise thing.

Mr. Robinson. That is right.

Mr. Crane. These rules can always be amended; but let us let the court see how this notice works out. If it works out we can always include these others. Why should we go the whole business, with the result that perhaps none of it is adopted?

They may adopt it for alibi and insanity because experience has taught, as Mr. Waite says, that sometimes that does catch a prosecutor. But the others have been in every case from the time of the commencement of criminal prosecutions down to date: coercion as to admissions, for instance. In every criminal case tried there is a plea that it is an admission but it has been extorted, that the man has been beaten up, or something of that sort -- some true and some false.

I am not against it, but I am saying it is a wise thing to go part way at a time. Insanity has been recommended and talked about by the bar journals and others. Alibi has been recommended by the Attorney General. But I think it is wise to go slowly and see if it works well.

Mr. Medalie. It seems to me that at least three of these items are matters on which no notice is needed for the protection of the prosecution. Of course, self-defense is one of them. The prosecution proceeding in an assault case is prepared for every possibility. Infancy is another -- the question of whether a person is under fourteen years of age. That is all infancy amounts to in Federal courts; and the district attorney is on his guard and knows that he is dealing with a young person whose age he ought to prove.

Intoxication is a variable thing. A man might have been drinking and it might have affected his intent, without his being intoxicated.

If it is a specific act like robbery or assault, the prosecution is prepared to meet everything that comes up with respect to his condition at the time. Notice is not necessary for the protection of the Government.

Mr. Glueck. I am inclined to agree with both the gentlemen who just spoke -- and for the reasons given -- and I think if we examine experience we shall find it is largely in the alibi situation that there have been abuses. I cannot conceive of it in an insanity situation because the prosecutor can always ask for a postponement if he is surprised, and can bring in his own witnesses later.

But in the alibi cases, ever since the existence of large-scale gangsterism and organized crime, I have been increasingly aware of abuses based on surprise. I am willing to go along in so far as insanity and alibi are concerned, but I agree with Judge Crane that we should not overload these.

Mr. Waite. I am not a proponent of any of these things, Mr. Chairman.

The Chairman. I understand.

Mr. Waite. But I want to help the Reporter determine whether as a matter of policy we want to find out to the utmost extent what the defense is going to be, just as in a civil case. For instance, we want to determine whether the defendant is going to set up notice of entrapment, which of course is set up in the Federal court cases time and time again.

Mr. Crane. There is such a difference between the defense in a criminal case and an affirmative defense in a civil case, as of course you know. In a civil case the defendant must prove it by a mere preponderance of the evidence. I suppose that is the rule throughout all the common law jurisdictions and all States. But a defendant is never bound to prove anything. The defendant is never bound to prove any affirmative defense-- we speak of it as "affirmative defense", but any

defense. If he pleads insanity or alibi or anything else you speak of here, all he has to do is to create a reasonable doubt. The people have to prove that there was no coercion and that his act was voluntary.

So it is a different situation. You cannot compare it to the civil practice.

Mr. Waite. I reiterate that. The only point is to determine whether we think it wise to determine the defense that will be made.

Mr. Crane. I agree with that, and I think a step at a time in an innovation is a wise thing. I am with you on alibi and on insanity. I do not see why it should not be, if the defendant is honest. And if he is not, he ought to go to jail anyway.

But I think it unwise to push it any farther.

Mr. Holtzoff. Did you include former jeopardy in your list?

Mr. Waite. No; I did not.

Mr. Medalie. You spoke of entrapment, but there is no question on that. You are dealing with the acts of Government agents, and you do not have to start roaming around to find someone.

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

(The motion was rejected.)

The Chairman. Now that we have covered subsection (2) on page 4 --

Mr. Wechsler. I suggest a motion with reference to immunity and double jeopardy, where it seems to me that the case

for this sort of thing is even st_ronger than it is in cases of insanity and alibi.

Mr. Youngquist. Let me point to two others that fall into the same category, I think, with those: line 83 on page 5, justification and entrapment. I think those should come in, for the reasons that have been given with respect to the ones appearing in subdivision (4) -- that is, coercion and self-defense.

Mr. Crane. I think all those are out.

Mr. Youngquist. This is in subdivision (4).

The Chairman. Have not all the modifications been directed to subsection (2) on page 4?

Mr. Holtzoff. That is right.

The Chairman. I am trying to see if we have not disposed of subsection (2) on page 4, before we go on to subsection (c) at the bottom of the page.

Mr.Holtzoff. I think we have, Mr. Chairman.

Mr. Wechsler. Does that imply that you consider some different procedure with reference to double jeopardy and immunity, or that we have now passed the whole question of notice and affirmative defense?

Mr. Youngquist. No.

The Chairman. I thought it was also in subsection (2), the question of whether the word "affirmative" should come out.

Mr. Crane. I think you are right, Mr. Chairman. I thought our notice covered it broadly, and that we whittled it down to these two things, and that questions of fact should not be required to be tried separately from the main trial.

The Chairman. I think you are correct.

Mr. Wechsler. If that question is open I should like to express a thought about it. In the case of immunity and perhaps also in the case of double jeopardy -- although I am impressed by what Mr. Medalie said -- it seems to me there is frequently justification for separate trial of the issue. It is not unknown to Federal practice. In the Heike case, which was a famous antitrust prosecution, the issue of immunity was tried first. The record fills two volumes. As I recollect, the case went off on that ground. I do not think we should preclude that possibility.

Those two defenses, unlike the two we have dealt with, are actually confession ~~in~~ avoidance. If the position of the defendant is that he is willing to admit the charge in the indictment but claims he has a defense which transcends the charge, it seems to me it would be advantageous to him, particularly in view of the provision as to appeals, to provide some method to get that tried without having the Government prove its case first.

For instance, consider an antitrust case in which it would take the Government a year to prove its case, and in which the only issue is the question of immunity. The same thing may come up in a mail fraud trial, and there are many cases where the only real issue is the issue of immunity. I think we should lay a basis for that.

Mr. Holtzoff. Do you mean also ~~in~~ former jeopardy?

Mr. Wechsler. I am not so clear about that. But in the other I see no occasion for changing that practice.

The Chairman. There is quite a variation in the various Federal districts.

Mr. Wechsler. Yes; I know that.

The Chairman. You cannot tell what is going to be done in one district because of what is done in another.

Mr. Wechsler. I understand that, of course.

Mr. Medalie. Either compel the trial on the separate issue or make the trial of the separate issue a permissible thing.

Mr. Wechsler. I suggested that it be discretionary.

Mr. Medalie. Discretionary with whom?

Mr. Wechsler. With the court.

Mr. Medalie. With the judge, or with the defendant if he chooses to try that separately?

Mr. Wechsler. No; I meant with the court.

Mr. Medalie. Of course, one of the things you want to consider, if this is to be considered, is whether the defendant shall have the choice as to a separate trial; and the other is whether the court shall compel him to have it.

Mr. Wechsler. Yes.

Mr. Medalie. It sometimes happens, where defendants do not get experienced counsel or do not pay the counsel sufficient to have them work hard on the case, that the information frequently comes to the defendant's counsel that he has a defense based on fact that the defendant never thought about. I should not like to see those poor devils deprived of it, and see it used only by defendants who can afford to employ high-priced counsel.

Mr. Wechsler. It might meet the situation to try the issues in reverse order, without making it obligatory. I recognize that possibility.

Mr. Medalie. I think it would be a practical thing, if the defendant is willing to stake his liberty on the trial of the separate issue, to let the court have discretion to do it.

Mr. Wechsler. Of course he might not have to stake his liberty on that. He might devise an issue where he could proceed to the major issue if he lost on the minor one. It is the order of trial which seems to me to have merit.

The Chairman. Will you make a motion on that, definitely?

Mr. Wechsler. I move that further consideration be given to the defenses of immunity and double jeopardy with reference to the desirability of requiring advance notice that the defense will be made, and preserving the power of the court to try those issues separately.

Mr. Holtzoff. In listing those offenses do you want to include former acquittal and former conviction?

Mr. Wechsler. Yes; I mean the classes of offenses.

The Chairman. Do you want to add the same provision as in the earlier motions: Suppression of evidence?

Mr. Wechsler. My feeling is that this is a little more complex. I deliberately put it in the form of suggesting that further study be given to this possibility, because I should not like to commit myself now to the penalty clause.

Mr. Glueck. Specifically, I suppose you mean by "further study" that the procedure in different districts ought to be determined.

Mr. Wechsler. Yes; and that the issues that are retained in any proposal of this sort be articulated and given concrete consideration later.

The Chairman. Are you ready for the motion?

Mr. Longsdorf. Mr. Chairman, I am not ready for the motion. It seems to me that a lot of these defenses fall under what I described yesterday in Blackstone's words as "special pleas in bar." Perhaps we have not disposed of those. If I am wrong I should like to be set right. But it seems to me that it is inherent in the nature of all those special pleas in bar that they raise no issue whatever as to whether the crime was committed. They concede that it was committed, but the defendant says that the time has passed or that it was barred in some way.

Mr. Holtzoff. My understanding is that it is optional with the defendant to file special pleas in bar to raise that point.

Mr. Longsdorf. Yes.

Mr. Holtzoff. He may raise them by a plea of not guilty, as well.

Mr. Longsdorf. Yes.

The Chairman. But if he does not raise it, it can be tried.

Mr. Longsdorf. If he does not raise it, he can be tried on anything that remains available to him.

Mr. Wechsler. That gives point to Mr. Medalie's suggestion of a while ago, that perhaps this ought to be optional with the defendant. That is the effect of existing practice. I meant that that should be a subject of consideration.

Mr. Seasongood. Mr. Chairman, I think it should be set up, because if you merely bring these things in under the general issue then you try the whole case, whereas if you have given

notice in advance and they are things that could be determined in advance of a long trial on the main case, the court should have the opportunity of doing that in its discretion.

Mr. Longsdorf. Yes; I agree.

Mr. Seasongood. Suppose you give notice, and at the end of the trial on the issue you make a motion to dismiss, based on the facts in the motion. It may be overruled. But the advantage is that it gives the court the opportunity of trying out these cases in advance of trying a long case.

Mr. Medalie. Do you want it compulsory?

Mr. Seasongood. I should like to have it compulsory, because then the court would have the privilege of avoiding a long trial.

Mr. Medalie. But I can show you how the defendant might not even know that he had those defenses, and yet they existed. For example, the statute of limitations.

Mr. Seasongood. Why wouldn't he know about the statute of limitations?

Mr. Crane. Sometimes it is very complicated, on a question of fact.

Mr. Seasongood. He knows enough to know whether he is going to claim it.

Mr. Medalie. Oh, no; he does not know. He may not know enough of its significance with respect to a particular act.

The Chairman. But the point is that the court can, in advance of full trial, determine whether the defendant has acted in good faith. If the court thinks so, the court then can allow this issue to be tried.

Mr. Medalie. I think that is giving the courts too much

power.

The Chairman. That is something on which you have not only the ruling of the trial court, but any abuse of discretion would be handled by the appellate court.

Mr. Medalie. I think that is all theoretical. In practice it does not work that way.

Mr. Wechsler. Does our action with reference to insanity and alibi allow sufficient leeway?

Mr. Holtzoff. Yes.

Mr. Crane. In coercion that is part of the crime itself. What you are speaking of now is distinct.

Mr. Holtzoff. Correct.

Mr. Crane. And it has nothing to do with the crime. It is a question of whether the man was in former jeopardy or immunity or whether he served a term for it and was tried and convicted.

Mr. Holtzoff. Yes.

Mr. Crane. That has nothing to do with the crime. All the things Mr. Waite was speaking of involve matters in the prosecution itself -- things for the prosecution to prove.

Mr. Glueck. The same thing applies in the others. For instance, a man says, "Yes; I killed him, but I was a warden acting under a duly executed warrant."

Mr. Crane. But he killed him.

Mr. Glueck. There is some distinction there.

Mr. Medalie. But why should you need, in a case like that, for any practical reason to give notice, when the prosecution knows exactly what happened?

Mr. Youngquist. I do not think you should.

Mr. Seasongood. Because you give the court an opportunity to determine if it should dispose of the case in that way, and thus dispose of a long trial on the merits.

Mr. Crane. I do not think you could do that on justification.

Mr. Seasongood. Perhaps not.

Mr. Crane. Those things involve something different from the crime itself, rather than those you are thinking about.

Mr. Seasongood. But you could have the point of whether this man was a warden and whether the deceased was trying to escape.

The Chairman. That is not the motion. The motion covers former acquittal, immunity, and jeopardy.

Mr. Wechsler. Yes.

Mr. Seth suggests pardon, and I think that should be amended. But I was not going to suggest the statute of limitations, for obvious reasons.

Mr. Medalie. If you are including pardon, I should like to ask this. Suppose through inadvertence, for instance, or lack of knowledge the defendant fails to give notice that he has been pardoned, or suppose through lack of information on the part of counsel or lack of appreciation of the proper procedure counsel does not give notice, and then you have a trial. According to the procedure outlined here, is that man to be convicted?

Mr. Glueck. Would that ever occur in real life?

Mr. Youngquist. Does that occur in real life -- the king's pardon given in advance of the crime?

Mr. Seasongood. It would be in the court's discretion.

Mr. Wechsler. I think in fact there may be much in making this optional with the defendant, just because you do not have a real procedure when your action would be to allow the defense in the case that Mr. Medalie puts.

But in this particular situation that we are dealing with now, even if it were optionalwith the defendant either to interpose the equivalent of a special plea or to raise it under the general issue, we would be in a better situation than if it must be raised under the general issue.

I made no concrete motion, but my thought is that that may well be the resolution.

Mr. Medalie. I would be willing to go along with the idea of making that optional with the defendant, if knowing -- or with his counsel knowing -- that he has what he considers a complete bar to the action, for instance: He ought to have an opportunity speedily to rid himself of the case.

Mr. Wechsler. Should it not be considered by the Reporter before we pass on it?

Mr. Medalie. Yes.

The Chairman. Are you ready to vote on the motion?

(The motion was agreed to.)

The Chairman. We still have outstanding one or two points under subsection (2) on page 5: Limitations, justification, and entrapment. Is there any motion as to that?

Mr. Medalie. Cannot we start with the words "affirmative defenses"?

The Chairman. I thought we eliminated that.

Mr. Holtzoff. We eliminated it by striking out the sentence in subsection (2) which uses it, but we have not eliminated

it from the heading of subsection (c) which we are dealing with now. I think we should do that.

The Chairman. The Reporter agrees that on line 71 we may strike out the word "affirmative".

Mr. Glueck. Line 73.

The Chairman. And wherever the word "affirmative" appears throughout the section.

Mr. Holtzoff. I suggest that "entrapment" and "justification" be stricken out. I do not think that should require notice.

Mr. Crane. Haven't we dealt with all of those by the motions that have already been made? And the rest are all out.

Mr. Seasongood. You must have some way of attacking the indictment.

The Chairman. That stays.

Mr. Holtzoff. With reference to lines 76 and 77 I want to make a suggestion. Misjoinder should not be a ground for dismissal. As a matter of fact, that is in line with a later rule that misjoinder shall not be ground for dismissal, but for dropping the defendant or dropping the count, whatever the case may be.

So I am willing to strike out from lines 76 and 77 the clause "because of misnamed defendant".

Mr. Robinson. I have talked to Mr. Holtzoff about that, and I think he feels that the reason for its being included here was to simplify the procedure so far as possible by including everything under a motion to dismiss. I should be very glad to have his suggestion as to how we shall have the court's attention called to misjoinder or misnaming.

Mr. Holtzoff. I would make a motion to drop the defendant

because of misjoindure or to drop a count because of misjoindure.

Mr.Robinson. In other words you are adding to the motion?

Mr. Holtzoff. Yes.

Mr. Robinson. With this effort to simplify or perhaps by listing all motions under the general motion to dismiss -- misjoindure or whatever it may be -- you think the effort to simplify it by putting it all under the general heading is not possible to achieve?

Mr. Holtzoff. I think the words "motion to dismiss" are misleading, as used in connection with a motion to drop a defendant.

Mr.Robinson. Perhaps our previous answer has taken care of this. I think we struck out the words "to dismiss" at the beginning of rule 7.

Mr. Holtzoff. We say that the defendant shall file a motion to dismiss the indictment or information.

The Chairman. Cannot that be covered by the words "a motion addressed to the indictment or written accusation"?

Mr. Holtzoff. I think that would cover it completely.

The Chairman. Is that assented to generally: "A motion addressed to the indictment"?

Mr. Wechsler. Should not there be a specification as to what the motions are, on the part of the court, as there is with respect to the civil practice?

Mr. Youngquist. I do not see why it is not all right as it stands. If there is a misjoindure, the defendant who is misjoined makes a motion to dismiss. That would result in dismissal as to him -- or the dismissal of a single count. But that is as far as it would go. Otherwise the indictment would stand as to

other defendants and as to other counts.

Mr. Glueck. Then you would have to change the phraseology of 72, because that speaks of the entire document: "A motion addressed to the indictment or to a part thereof".

The Chairman. Then, Mr. Holtzoff, your motion as to 76 and 77 is withdrawn?

Mr. Holtzoff. Yes.

Mr. Medalie. Line 72: "dismiss the indictment or information or written accuastion if he wishes to establish affirmatively".

The Chairman. That is already out.

Mr. Medalie. Yes; "if he claims" --

Mr.Glueck. "If he contends" is better than that, I think.

Mr. Medalie. Do you prefer "contend" to "claim"?

Mr. Youngquist. Would not this do it: "file a motion under the accusation"?

The Chairman. All right; subsection (c) will be passed.

Mr. Seasongood. That is not sufficiently broad, is it? Because if you want to contend that the indictment was improperly obtained -- for instance, that the prosecutor pressed for the indictment --

Mr.Robinson. That would be a violation of statute in most States, would it not?

Mr. Holtzoff. There is no Federal statute-or if the prosecutor was present or participated in the deliberations, or any other irregularities. You must have some means of attacking that.

Mr. Holtzoff. Quite a common claim is that an unauthor-

ized person was present in the grand jury room when the grand jury was deliberating.

Mr. Youngquist. Is all of that taken care of by (1)?

Mr. Seasongood. I do not think so.

The Chairman. Your motion is "where the indictment was improperly obtained", or words to that effect?

Mr. Seasongood. Yes. And then another motion: "where the affidavit is based in positive terms". That was involved in the medical case.

Mr. Medalie. Are we dealing here with the composition of the grand jury and such proceedings before it as would render the indictment illegal?

Mr.Seasongood. Yes. In other words, in order to broaden this I made the suggestion; and the Reporter will know how to broaden it to cover all those matters.

Mr. Robinson. The words "where improperly obtained"?

Mr. Seasongood. I have no particular choice of words.

Mr. Holtzoff. Why not say "obtained in violation of law"?

Mr. Seasongood. Yes; that would be good.

Mr. Medalie. That would cover irregular proceedings and unauthorized persons and bullying by the district attorney, and all the other claims that appear on such motions.

Mr. Seasongood. At least it is intended that there should be some privilege of attacking the indictment.

Mr. Wechsler. Will there be any specification of law with reference to indictments, or will we leave that law as it is? Will there be a rule specifying what makes an indictment invalid and what does not?

Mr. Robinson. It would be a very long rule. I do not

think we should try that.

Mr. Wechsler. Is there not some rule there that needs correction?

Mr. Robinson. Probably, but I do not think it is for us to correct it.

Mr. Wechsler. Why not?

Mr. Robinson. We could put it on the basis -- I would not say it is outside the scope of the committee's work, but it would be a long catalogue, from which there would inevitably be an omission.

Mr.Wechsler. One of the major reforms in the new rules on civil procedure was to cut through some of the red tape regarding what made a pleading insufficient; and I think there may be room for similar work here. I do not assert how much of that is needed, but it seems to me it is a problem.

Mr. Youngquist. It seems to me that all those matters are covered by the decisions; and if we undertake to restate them here we will be in danger of perhaps omitting something that now is the law. In addition to that, as the reporter says, it would make an unduly long rule. I think we can safely leave it in this fashion.

The Chairman. As I understand, all that Mr. Wechsler is arguing for is an investigation of irregularities before the grand jury.

We are getting two separate motions, I believe. May we have a vote on the motion to cover by appropriate language irregularities in obtaining the indictment?

(The motion was agreed to.)

The Chairman. Now a vote onMr. Wechsler's motion that the

Reporter be asked to prepare a memorandum as to the adequacy of the present state of the law on the whole subject of irregularities in the obtaining of indictments. Was that the scope you had in mind?

Mr.Wechsler. I meant it to be a little broader than that: on the factors which now invalidate an indictment, other than its insufficiency to charge a crime.

Mr. Dession. What it comes down to is what was formerly covered by the plea in abatement, that we have already abolished.

Mr.Wechsler. That is right.

The Chairman. Is there any discussion on the motion?

(The motion was agreed to.)

Mr. Crane. I think we should leave out the indictment. I do not want to oppose anything Mr. Wechsler wants, but I think the reporter is about right. We have the form of the indictment, and this deals with the matter of prosecuting it. I think it has been covered quite fully by what Mr. Seasongood just said regarding the motions that you can think of. We could not specify the facts which might make an indictment invalid. But now we have it covered by a motion that anything at all makes it invalid or illegal. When we come to specify what an indictment shall contain and how it shall be obtained I suppose it will mean that there must be affirmative evidence of the crime submitted to a grand jury, and twelve men voting to indict. I do not know what else there is.

Mr. Medalie. We do not do that in Federal cases.

Mr. Crane. I know.

Mr. Wechsler. Suppose it was alleged that the window was open and that some one was listening through the open window?

Mr. Crane. Is not that covered by the motion which has just been made?

Mr. Wechsler. The effect of the motion just made was that we would retain the rule that the indictment would be invalid under such circumstances.

Mr. Crane. If you are going to specify the facts under which an indictment would be invalid you would have to be a prophet. You cannot see the future. There was a case in New York where a porter hid behind a curtain in the grand jury room. It is simply a factual situation. You cannot foresee events and facts. But the motion made was a very good one, and covers everything you can think of that gives the defendant a chance to object to the indictment.

But to specify the facts -- and I am perfectly in sympathy with you -- I do not think is necessary.

The Chairman. The Chairman is in doubt as to the vote on the motion. (Putting the question.)

(The motion was rejected.)

The Chairman. Have we covered --

Mr. Medalie. No; subsection (2) --

The Chairman. Have we covered subsection (1)?

Mr. Medalie. Pardon me.

The Chairman. Very well. Now subsection (2).

Mr. Medalie. I do not believe that the defendant ought to have the right to get a trial on a motion that he was entrapped. That applies to his motion that there is a bar in fact to a conviction because of impossibility -- in the case of alibi.

The Chairman. May we hold that, and dispose of (2)?

Mr. Medalie. They are really all embraced in one theory that the defendant ought not have his case tried on a motion; he should go to trial if the district attorney wants his case tried; also that he did not have the alleged criminal intent at the time he did the act, because of coercion and so forth.

Mr. Youngquist. That is all out; is it not?

Mr.Medalie. Also that any other matter constituting an avoidance or an affirmative defense shall likewise be asserted by the defendant. I think we know what those are, and we should not give him an opportunity to try his case on a motion.

The Chairman. Have not we disposed of everything definitely except statute of limitations, justification, and entrapment? And on that we disposed of those by common consent.

Mr. Medalie. It is my view that on a motion he ought to be permitted to raise the question of former jeopardy, former conviction or acquittal, immunity, or pardon, and have the issue tried.

The Chairman. That we passed on.

Mr. Medalie. And have it disposed of without any opposition --

The Chairman. We passed on that.

Mr. Medalie. I do not think he should have his defenses determined on evidence.

Mr. Seasongood. The jurisdiction of the court is permissible.

Mr. Medalie. That is under (2).

Mr.Seasongood. The rule in civil cases is that if you are pleading a case for jurisdiction you can make a motion to

dismiss, and can supply evidence to show that the court does not have jurisdiction.

Mr.Medalie. That is right.

Mr. Dession. Or in the statute of limitations, where it appears on the face of the indictment.

Mr. Medalie. Yes. I think on motion he should be able to do everything except try his case.

Mr. Dession. That is right.

The Chairman. Lack of jurisdiction, then, as I understand it, stands -- on lines 81 and 82 -- by common consent?

Mr. Medalie. Yes.

The Chairman. What is your view with respect to the statute of limitations?

Mr. Holtzoff. I think that should stand only if it appears on the face of the indictment that the prosecution is barred. I think the defendant should have the privilege of moving to dismiss under those circumstances, but not otherwise.

Mr. Dession. I so move.

The Chairman. The motion is seconded.

(The motion was agreed to.)

The Chairman. Justification.

Mr. Medalie. I think that should go out.

The Chairman. That is out, by common consent.

Entrapment is out by common consent.

That takes us through to No. 3.

Now, (3) -- where there is a bar in fact to a conviction because of impossibility. That is out by common consent, I take it.

Mr. Robinson. What is the difference between a notice

and a motion?

Mr. Dession. Mr. Waite's motion, I believe, would require that if you are going to assert that as one of your defenses you give notice of it in advance.

The Chairman. That the defendant did not have the original criminal intent, because of insanity or intoxication.

Mr. Medalie. Insanity we passed on separately.

The Chairman. How about the last sentence on the page: "Any other matter constituting an avoidance or affirmative defense shall likewise be asserted by the defendant by a motion to dismiss the written accusation."?

Mr. Robinson. That is out, in view of the discussion here.

The Chairman. "The motion to dismiss because of an affirmative defense shall state the facts and shall cite the records, if any, on which the defense is based."

Mr. Medalie. The motion to dismiss, as hereinabove provided.

The Chairman. "Such motion" takes care of all that, and strike out the "affirmative defense" -- "the motion to dismiss because of an affirmative defense" -- and just say "Such motion", striking out the last seven words in line 91.

The next sentence: "The defendant may from time to time file with the court a motion for an order requiring the Government to provide a bill of particulars stating further facts necessary to enable the defendant to prepare his motion to dismiss."

Mr. Seasongood. How about "from time to time"? Can he do it as often as his fancy suggests?

Mr. Holtzoff. I think we should strike out "from time to time".

The Chairman. Yes.

Mr. Youngquist. I have marked it in my notes to eliminate the whole thing.

Mr. Robinson. The only thing is to bear in mind that this will be examined very carefully by lawyers all over the country, and to consider whether we are seeing to it that all the proper tests are made.

Mr. Youngquist. Have not we done that in an earlier rule providing for bills of particulars, not only for the Government?

Mr.Robinson. If it is repetition it should go out.

The Chairman. I do not think it is repetition.

Mr. Medalie. I think you intended this sentence in (a) of the provisions with respect to alibi motions --

Mr. Robinson. That would be one of the instances in which it would be immaterial.

Mr. Crane. Is this the only provision with respect to bills of particulars?

The Chairman. No; but in the other instance it is directed to indictments only.

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

The Chairman. Rule 8, page 2, line 26.

Mr. Youngquist. That takes care of it in both ways; does it?

Mr. Holtzoff. I think it does.

The Chairman. That is with respect to indictments.

Mr. Crane. What else is there?

Mr. Youngquist. 29 -- line 29: "A bill of particulars likewise may be supplied by the defendant voluntarily, or by order of the court if additional details are necessary to give notice to the Government."

Mr. Crane. We questioned that, and there will be a redraft of it.

Mr. Holtzoff. I move that we strike out the sentence beginning with line 93 on page 6.

Mr. Medalie. I second the motion.

Mr. Robinson. At what point are you providing for a bill of particulars for a defendant who wants the information?

Mr. Medalie. If the indictment does not tell him enough about where he is supposed to have been, and when, at the time the crime was committed, he makes a motion for a bill of particulars and states his intention to give alibi evidence.

Mr.Robinson. All right; that line will go out.

The Chairman. By common consent, the sentence beginning on line 93 is eliminated.

Mr. Dession. Might we take out the language and put it back on page 2 of Rule 8: "Defendant gives notice of his intention to move to dismiss"? Because once having gotten this elaboration of the indictment to base his motion to dismiss --

Mr. Medalie. He can make a motion for a further bill of particulars; he can always do that. That is the accepted practice if it is not adequate.

Mr. Dession. But where the bill of particulars is adequate and gives you what you want, but gives you something that you did not see in the indictment in the first place, and consequently gives you grounds for motion to dismiss. So why

could not we say, "notice of the offense alleged, or to enable the defendant to prepare his motion to dismiss"?

Mr. Longsdorf. Would you amend that to read "to prepare a notice or motion to dismiss"?

Mr. Robinson. Where is that added?

Mr. Youngquist. At the end of line 28.

The Chairman. "Or to enable him to prepare a notice or motion". (Putting the question.)

(The motion was agreed to.)

The Chairman. That brings us to (d) on page 6.

Mr. Wechsler. Mr. Chairman, going back to page 2 of Rule 8, may I ask whether there remains the point for the bill of particulars to be supplied by the defendant to give notice of the defense which he is asserting? Was not that related to the affirmative defense provision that went out; and does not the provision as to notice of insanity or alibi, and any further provisions that may go in there, meet this? I refer to lines 29 to 32, page 2, of Rule 8.

Mr. Seth. They went out.

The Chairman. I had a note here: "Judge Crane wanted his own bill of particulars on this, and the Reporter is directed to prepare it."

Mr. Crane. How far they can compel a defendant to disclose the facts.

The Chairman. That is right.

Mr. Wechsler. Of course the discussion today on notice probably has answered that question and has eliminated the need for this provision.

Mr. Holtzoff. Suppose a defense of former jeopardy is

raised by motion, and the prosecution needs some additional particulars.

Mr. Crane. Yes; if there are to be any other affirmative defenses, I see the point of that.

Mr. Holtzoff. I do not think the motion is used very frequently.

Mr. Crane. All I had in mind is that I think there is a point beyond which the Government cannot go in fishing for evidence.

Mr. Wechsler. I agree with you. My point is that the whole occasion for it may have been lost now, anyhow.

The Chairman. I suppose the Reporter will review that in checking over the record.

Now (d).

Mr.Robinson. The word "affirmative" has been stricken out-- in line 98 -- and at any other place where "affirmative" would appear, as defining or qualifying the defense.

TheChairman. Do we say "United States attorney", or do we refer to the "district attorney"?

Mr. Holtzoff. "United States attorney" is the technical name.

Mr. Youngquist. We also use the word "government" throughout the rule. Is that appropriate?

Mr. Holtzoff. I do not think so. I think it ought to be "prosecution", rather than "government". I would use "United States".

Mr. Medalie. The defendants prefer that the word "prosecution" be used, and they use it every once in a while with subtle effect. They do not like the word "government".

Mr. Holtzoff. I think the words "United States" are proper to be used.

Mr. Robinson. I should state to the committee that that question has been carefully considered. We may be wrong in our conclusions. We considered "government", "prosecution", and "United States attorney"; and one by one they were eliminated until we came down to "United States attorney". The statute seems to use "district attorney"; but I understand that the Department of Justice uses "United States attorney", and some States use "UnitedStates attorney".

So the Reporter's office is satisfied that the proper appellation for the United States attorney would be "United States attorney".

Mr. Dession. How about special assistants to the Attorney General and special attorneys?

Mr.Robinson. Would not he then act as an assistant United States attorney?

Mr. Holtzoff. No.

Mr. Youngquist. There is another item for definition, it seems to me.

Mr. Medalie. The statutes use the words "United States attorney" and "district attorney", and yet the certificate of appointment of a United States attorney is "the attorney of the United States in and for such and such a district."

Mr. Seth. Should not we use "attorney for the United States"?

Mr. Youngquist. What bothers me is the use of the word "government".

Mr. Glueck. On page 7 you have an instance of the use of

the word "government".

Mr. Robinson. Probably that would be the place to use "attorney for the United States".

The Chairman. We have two questions. One is whether we shall use the word "government" or the words "United States". It does look a little heavy to use the words "United States". Every one knows what it is.

Mr. Longsdorf. If we use the word "government", I think we should capitalize it.

Mr. Crane. When we make speeches for the Government we say "We, the people". It is the United States.

Mr. Holtzoff. I like the idea of using the words "United States".

Mr. Crane. There are so many different kinds of government, and it is used in so many connections. It does not make any difference to me, but the dignified way is "for the United States".

Mr. Robinson. I think we will get into the same trouble.

The Chairman. Can we use "United States" alone, or must we say "United States of America"?

Mr. Holtzoff. Not necessarily.

Mr. Medalie. After all, there is the U.S.S.R.

The Chairman. Every subpoena bears the words "United States of America". I do not like all these capitals.

Mr. Holtzoff. Why not say "prosecution"?

Mr. Robinson. Mr. Medalie gave the answer to that.

The Chairman. Yes; Mr. Medalie's answer is very sound. Well, gentlemen, let us discuss this at lunch.

Mr. Glueck. It is common to say, "the prosecution can

prove". It sounds almost like "the persecution".

Mr.Medalie. That is the reason.

(Thereupon, at 12.30 o'clock p.m., a recess was taken until 1.30 o'clock p.m., of the same day.)

AFTERNOON SESSION

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

The Chairman. We were up to item 18 on line 97. Is there any comment on that?

Mr. Medalie. You want the word "reply" there?

Mr. Robinson. I do not.

Mr. Holtzoff. I do not think we should have "reply". I do not think the United States Attorney ought to be required to reply to a motion; just go to the bar and argue it. I do not see any need for any document known as a reply.

Mr. Robinson. Did we not pretty well settle that by "answer and reply," two or three things?

Mr. Holtzoff. I think so. I think we did.

The Chairman. Does that strike this whole section out, Mr. Robinson?

Mr. Robinson. Let me have the page.

The Chairman. Page 6.

Mr. Robinson. That is (d)?

The Chairman. (d).

Mr. Robinson. Yes. Well, now, the way we find it working in the alibi notice cases is that frequently a case is ended by the government's conceding that the alibi is good, and therefore the defendant is discharged, the indictment dismissed. Now, I think it would be well for us to have some provision of that sort here.

Mr. Holtzoff. The government just consents to the motion being granted. You do not need that in the rule.

The Chairman. What if the government does not consent?

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Mr. Holtzoff. Then you have a hearing on the motion, but you do not have to have a reply. Of course, if it is alibi it is a little different; alibi would be tried at the trial; but if you mean such motions as go to the jurisdiction, that is like former jeopardy.

Mr. Robinson. As I would see it, what is left of it, (d), we had better knock out "reply" there in 97 following "(d)," before "Motion by the Government. The United States Attorney upon investigation of the defense alleged in the defendant's motion--" Strike out "to dismiss". --"may file a reply in opposition to the defendant's motion."

Mr. Medalie. I do not think you need any of that, because it is like any other motion. If in a civil case I move for a bill of particulars or for the examination of a party or a witness, and my adversary consents to it, does not oppose, that is all there is to it.

Mr. Robinson. How about the second clause, "a reply in opposition," striking out the word "reply"?

Mr. Medalie. Well, he may always oppose the motion, and the way to oppose a motion is by answering affidavits.

Mr. Robinson. All right. What about the next sentence? Do you think there is anything necessary in it?

Mr. Dean. 101?

Mr. Robinson. Yes.

The Chairman. Yes.

Mr. Holtzoff. Should not that come out completely?

Mr. Longsdorf. "motion."

Mr. Holtzoff. Does not this duplicate a provision we have already had? Motion for bill of particulars. As far as the

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second sentence is concerned, I think that should go out, too.

The Chairman. Is it not covered by page 2 of Rule 8?

Mr. Holtzoff. That is what I think.

Mr. Robinson. That is that same, beginning with 26, 29.

Mr. Dean. In lines 29 to 32 on page 2?

Mr. Robinson. I think we could provide for it there if it is not already covered.

The Chairman. I think so.

Mr. Robinson. Yes. All right. ~~Omission~~ Permission to amend; is that covered somewhere?

Mr. Holtzoff. I think that is covered somewhere, is it not, about amendment?

Mr. Robinson. If it is not, we can cover it somewhere else.

Mr. Crane. Yes.

Mr. Robinson. All right.

Mr. Holtzoff. This is not the proper point at which to cover amendments, anyway.

The Chairman. Make a note that that will be somewhere with the accusation.

Mr. Robinson. Well, yes. All right. There is a separate civil rule along amendments.

The Chairman. It may go in that, and the same with 107.

Mr. Robinson. Yes.

Mr. Holtzoff. I think you do not need the first sentence on page 7, either.

Mr. Medalie. There is another point.

Mr. Longsdorf. I did not hear. What did you do with those two words "written accusation" in line 105, page 6?

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Mr. Robinson. We think we can let that go out and take care of whatever may be desirable from it at another place.

Mr. Longsdorf. The whole thing is out?

The Chairman. Out here. Bring it in somewhere under "Amendments."

Mr. Medalie. Now, the next sentence beginning with the word "If" on 109: I do not think you need that, particularly the middle portion of it.

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

Mr. Medalie. It says if the United States Attorney's written reply to the defendant's motion is considered by the court to be insufficient. Of course the defendant's own papers may be insufficient or unpersuasive.

The Chairman. Is not the whole sentence beginning on 109 unnecessary?

Mr. Dean. Right.

The Chairman. Is that not what the court must do?

Mr. Dean. Right.

Mr. Crane. Could not do anything else.

Mr. Youngquist. I think the whole sentence is unnecessary.

Mr. Robinson. So do I. I do not think there is any doubt about it.

Mr. Longsdorf. Is that out?

Mr. Robinson. Yes.

Mr. Longsdorf. And the one beginning on 107, did that go out, too?

Mr. Holtzoff. Yes.

Mr. Robinson. What about 113? According to Mr. Dean's report on the California effort to separate the issue of the

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insanity defense into a separate hearing from the other, probably we should not wish to provide for it.

Mr. Holtzoff. I think--

Mr. Robinson. (Interposing) Pardon me just a minute, Mr. Holtzoff. Let me finish up. I want to get Mr. Medalie's motion then at the same time, if you will excuse me, but Mr. Medalie I understood suggested there might be some of these motions which would require a hearing. Is that right? Would you want to specify here, Mr. Medalie, what they should be?

Mr. Medalie. They would relate to what is covered by pleas in bar or pleas in abatement under the old practice. Now let us limit it, say, to double jeopardy.

Mr. Crane. Say it was specified. The others all involved something connected with the main crime.

Mr. Holtzoff. The defendant is entitled to a jury trial on the issue of double jeopardy under some Supreme Court decisions.

Mr. Crane. What is that?

Mr. Holtzoff. The defendant is entitled to a jury trial on the issue of double jeopardy ~~even if it strikes separately;~~ that is right, isn't it?

Mr. Longsdorf. Yes. There is a decision by Judge Murray in the Ninth on that, a number of years ago, but it was not necessary for him to say that. He said that it did not do any harm to have tried them together, but he felt the proper way would have been to impanel a different jury to try the special plea in bar.

Mr. Holtzoff. But this sentence beginning on line 113

has a function to perform, and it seems to me it ought to stay in, because suppose the defendant pleads double jeopardy affirmatively under the rule we adopted this morning, and he asks for a separate hearing on it. He would be entitled to a jury, and this sentence would cover that situation.

Mr. Crane. The only thing, it is probably too broad, because you are going to have notice now of the alibi and notice of the insanity. Would that also cover that?

Mr. Dean. It would also cover the question of fact raised by a plea in abatement. Where you raised the question of things that happened in the grand jury room you would have to try that out some way.

Mr. Holtzoff. You are not entitled to a jury trial as to that.

Mr. Medalie. No.

Mr. Holtzoff. But you are as to a plea in bar.

Mr. Dean. I am just talking about this sentence here. If you will read it you will see that it does cover that situation.

Mr. Holtzoff. Yes.

Mr. Crane. Too broad.

Mr. Holtzoff. Perhaps it needs rephrasing in order to provide that the defendant will have a jury trial on those issues on which he is entitled by constitutional right to trial by jury, but not on others.

The Chairman. May we leave that to the reporter?

Mr. Glueck. Yes.

Mr. Medalie. I think so.

Mr. Robinson. I am glad to have that recommendation. You do not care to list anything, Mr. Medalie?

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Mr. Medalie. Of course I assume that double jeopardy, immunity, pardon, would certainly come within the plea-in-bar categories. I do not know what else comes there.

Mr. Crane. Dealing with questions of law, I suppose.

Mr. Robinson. In line 115 Mr. Youngquist raised the question about using the term "request of the government." Was it decided that you would wish to have "the attorney for the United States," and do you wish to decide that?

Mr. Holtzoff. The chairman has something to say on that.

The Chairman. I feel that if you use "of the United States" you have no right to use it unless you use the name of the country, "United States of America," and that is a mouthful.

Mr. Crane. "The government" is all right.

Mr. Robinson. Leave "the government." Very well.

Now, the next sentence.

Mr. Longdorf. Only that has a capital on it.

Mr. Holtzoff. I do not think so.

Mr. Youngquist. No.

Mr. Dean. A person.

Mr. Longsdorf. A proper name.

Mr. Youngquist. But it is not a proper name. "The United States of America" is a proper name.

Mr. Longsdorf. Yes, but "the government" to substitute for that is also a proper name in the print shop.

Mr. Holtzoff. If you spell "government" with a cap, you ought to spell "defendant" with a cap.

The Chairman. "The court."

Mr. Crane. Surely; you have to make them equal in the law.

Mr. Longsdorf. There are no signs of that rule in the

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print shop. You do not want to spell "federal" with caps. It clutters up the page with capital letters.

Mr. Holtzoff. The Government Printing Office always capitalizes "Federal."

Mr. Robinson. Do you wish to have that sentence in 115 left in?

Mr. Holtzoff. I think that is not necessary.

Mr. Robinson. You want to withdraw it, do you?

Mr. Holtzoff. All it says is that the judge must decide the motion.

The Chairman. I think it will tie that preceding sentence up when it is revised.

Mr. Robinson. All right. The next is 119:

"If the court overrules the defendant's motion, it shall also enter in its order a provision that the facts--"

Now, at this point is where we try to put the teeth in this advance-notice and other types of pleading of what we did call affirmative defenses. It has been found in the application of the alibi-notice law that some judges are quite timid in upholding the requirement that the defendant may not introduce evidence of which he has not given notice, even though he cannot make a showing of surprise or anything of that sort.

I believe from the experience of the states with the alibi-notice type of procedure that there is not much use for us to provide for alibi notice or insanity notice, any other type of advance notice of a defense, unless we do accompany that with some power in the court to uphold it, and our problem is how to provide for the power of the court.

This line 119 sentence begins, "If the court overrules the

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defendant's motion, it shall also enter in its order a provision that the facts established on the hearing shall be taken as proved at any subsequent trial by the defendant's motion to dismiss."

Mr. Holtzoff. No, but we decided that alibi would not be tried in advance or insanity tried in advance. Those notices are notices as to evidence produced at the trial.

Mr. Robinson. So this will not apply.

Mr. Crane. Then, as to the others, if the defendant fails, nothing need be said, as though they never existed: double jeopardy, warrant, pardon. If he fails, they never existed, so you have not got to have anything of that kind.

Mr. Dean. And if he wins, the case would never go on.

Mr. Crane. I think you would be safe in striking it out.

Mr. Youngquist. One thought occurs to me in that connection. You could, for instance, make it optional with the defendant to plead double jeopardy in advance, and that would not necessarily preclude him from interposing that defense on the trial of the general issue, would it?

Mr. Robinson. That is right.

Mr. Holtzoff. That is fair enough, is it not?

Mr. Youngquist. Yes, it is. I think it is, yes.

Mr. Longsdorf. I should like to question the phrase "or other judicial consideration." It seems to me that takes a pretty large excursion into the law of res adjudicata.

Mr. Glueck. Are you cutting that out?

Mr. Robinson. Both sentences out.

Mr. Glueck. Both sentences out?

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Mr. Longsdorf. Yes, both sentences out.

The Chairman. In line 125 that is poor style. Would it not read a little bit better if we said "not in compliance in good faith"?

Mr. Robinson. We considered that, and maybe we were wrong in putting it in this way. Some adjective.

Mr. Medalie. Why should good faith determine that? In perfect good faith the district attorney might give you a bill of particulars, but it would be inadequate; you would still be entitled to relief. Good faith should not be the sole issue.

Mr. Robinson. Could we trust the court tobe able to distinguish whether or not it should take this action? We might just say he should make such orders as are just. This is copied from the civil rule in part.

Mr. Medalie. Yes.

The Chairman. Your idea would be to eliminate the two words "good faith"?

Mr. Medalie. Yes.

Mr. Holtzoff. I think he is right about that. It is a factual question which you determine by inspection of documents, whether they comply with the court's order.

Mr. Medalie. The question is not whether the district attorney is a nice boy but whether the defendant got what he is entitled to.

Mr. Robinson. Again that is based on the experiences of our courts, and it is with the alibi defense. I think even we use that by way of analogy, experience on it here, and there has been some tendency to evade the requirements of the statute with regard to proving or with regard to filing your information.

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So that is the only reason for it. If that is not a sufficient reason, it should go out.

Mr. Dean. It would not be a sufficient reason, though, since in fact alibi or insanity is now simply a notice; and if any of these statute rules, it seems to me, are to apply to those situations we ought to tie them right in with alibi and insanity. This refers to pleadings or bills of particulars, neither one of which applies to insanity or alibi.

Mr. Robinson. We have not drafted our provision with regard to insanity and alibi as yet, have we? I think we are under instructions to prepare something on that by way of notice.

Mr. Dean. Notice; right.

Mr. Glueck. Notice merely.

Mr. Robinson. We have understood, too, that there will be the power in the parties, in the government or the defendant, to require additional notice to be given or additional information by the respective sides. So this is largely a matter of instructions on how we may make the alibi-notice and insanity-notice requirements effective--not at this point, understand, but where we shall deal with them.

Mr. Dean. Well, my point is: If it is designed to apply to this, too, why do you not specify thatif at any time the court considers that the notice of alibi or insanity is insufficient then it may do so and so? If, on the other hand, it is designed to apply generally to all pleadings and bills of particulars, that is something else.

Mr. Robinson. Well, that would have to be done, of course. There will have to be a distinction, in view of the vote taken

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this morning.

Mr. Holtzoff. Should not the word "pleadings" go out in line 124? I thought we were not using the word "pleadings," in the light of the decision made yesterday.

The Chairman. That is right.

Mr. Dession. I am wondering.

Mr. Youngquist. Motions or bills of particulars, maybe not.

Mr. Holtzoff. Yes.

Mr. Robinson. All right. Let us substitute for "notices"--

Mr. Holtzoff. (Interposing) Or bills of particulars.

Mr. Youngquist. "Motions."

Mr. Robinson. "Motions."

Mr. Holtzoff. "Motions."

Mr. Robinson. "Or bills of particulars." All right.

Mr. Dession. Mr. Reporter, do we really need this section? The power to order a bill of particulars or anything else of that nature would require the power to keep on ordering it until a sufficient compliance has been had, would it not?

Mr. Robinson. Perhaps you are right on that.

Mr. Holtzoff. I think we should have services

Mr. Robinson. The effort was made to make the procedure quite definite, at least for our consideration, and now we can cut out, rather than we could have added.

Mr. Crane. We are going to take that out, then, on 123?

Mr. Longsdorf. 123 onward goes out.

Mr. Robinson. I think so.

The Chairman. Is there not a danger of some district judge

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thinking he may not have this power?

Mr. Holtzoff. I rather doubt that. It is inherent, it seems to me, if you order a bill of particulars and the bill of particulars does not comply with your order, that you could require a further bill.

Mr. Medalie. No, it does not stop.

Mr. Holtzoff. It does not do any harm to leave it in.

Mr. Robinson. My thought was to put it in in our regular bill-of-particulars place; we are planning to have a bill-of-particulars general provision for that.

Mr. Crane. I think it is self-evident, if a judge makes an order, that it has got to be complied with. We have not got to say that the defendant must obey the order.

Mr. Holtzoff. No.

The Chairman. All right. Let us leave it out here, then.

Mr. Robinson. Now, even though this sentence beginning on line 127 is left out here, it touches on the problem I mentioned a while ago: What shall the court do in order to make its orders effective?

Mr. Holtzoff. Should not this sentence be transferred to the rule that you are going to draw on notice of alibi and notice of insanity?

Mr. Dean. I think so.

Mr. Holtzoff. Logically.

Mr. Robinson. Where would we be left on double jeopardy then?

Mr. Holtzoff. Well, I do not see how that applies--oh, well, how would that apply, say, to double jeopardy?

Mr. Robinson. Well, we are going to have a separate hearing

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on it, with the possibility of--

Mr. Crane. (Interposing) Well, if it is found in the defendant's favor, that ends the prosecution. If it is found against him, it does not end the prosecution. The only thing is, he cannot try it over again in the main case. Do you think it necessary to have it so stated?

Mr. Youngquist. I think the only place that is going to arise is in connection with the insanity and alibi.

Mr. Holtzoff. That is why I think it ought to be transferred into that rule.

Mr. Robinson. All right. We will check it with that in mind, see if it cannot be transferred to insanity and alibi defense, or notice. 132 perhaps is unnecessary.

Mr. Holtzoff. I think you ought to add something there. This is the way it is now: "No order of the court, however, shall be deemed to interfere with the assertion at any time of the defense of lack of jurisdiction." I think that is O. K., but you also ought to add "or of failure of the accusation to set forth an offense." That should never be waived.

Mr. Medalie. But it never is waived if there is no jurisdiction.

Mr. Holtzoff. Beg pardon?

Mr. Medalie. There is no jurisdiction. You cannot confer jurisdiction by moving for an order in the case, can you?

Mr. Robinson. No.

Mr. Holtzoff. I think this sentence is intended to convey
6 the thought that nothing that may be done will waive the right to raise the defense of lack of jurisdiction.

Mr. Robinson. At any time.

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Mr. Holtzoff. At any time, but I think the same rule ought to apply to the defendant's right to raise the point that the indictment does not charge a crime.

Mr. Medalie. Well, that is still the law, is it not? At the trial you can raise that question, though you never made a motion.

Mr. Dean. That is right.

Mr. Medalie. The reason you make a motion is that you do not want to have the wait, to wait for a trial, and you do not want to have to stand the uncertainty of trial.

Mr. Holtzoff. But I think it is a good thing to provide for that, Mr. Medalie. Now, the civil rules specifically provide that failure to make such a motion before trial does not waive any point of lack of jurisdiction or sufficiency of the complaint. Now I think this is one point where there ought to be a corresponding provision in the criminal rules to safeguard the defendant's rights.

Mr. Medalie. I do not think you need it. You cannot amend answers, counterclaims, and you cannot amend indictments.

Mr. Youngquist. That is all true.

Mr. Longsdorf. You can waive any jurisdiction except the capacity of the court to entertain that kind of a civil suit. You can waive the venue.

Mr. Medalie. You can waive venue but not jurisdiction.

Mr. Longsdorf. Well, you cannot waive jurisdiction. You are correct in making the distinction, but a lot of people fail to do it.

Mr. Robinson. This sentence was put in here not with the

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idea of adding anything to the legal rights of the parties, or anything of that kind, but just to show anyone who might otherwise object that the point of jurisdiction was not overlooked.

Mr. Longsdorf. Oh, I quite understand that.

Mr. Holtzoff. I think the sentence ought to go out or be enlarged.

Mr. Robinson. I cannot agree with your enlargement, Mr. Holtzoff. I am not sure. Are you considering the possibility of defects that can be cured by verdict, and the fact that during the progress of trial certain defects in the accusation are considered to be waived if there is no motion to quash or anything like that?

Mr. Holtzoff. I am not talking about that. I am talking about failure of the indictment to state an offense. I think that is fundamental.

Mr. Longsdorf. But it does not waive jurisdiction.

Mr. Holtzoff. Suppose the indictment does not charge a crime.

Mr. Robinson. That is still my point. You are familiar with the rules, are you not, that even defects in the accusation--

The Chairman. (Interposing) Let us not argue this. We have a motion. All those in favor of the motion to strike the sentence will say aye.

(There were a number of ayes.)

The Chairman. Those opposed will say no.

(There were a number of noes.)

The Chairman. How many noes were there?

(There was a show of hands.)

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The Chairman. One, two, three, four. The ayes seem to have it. The ayes have it.

Mr. Longsdorf. I think there is a latent ambiguity in that last sentence.

Mr. Holtzoff. Well, but there, if we are silent on the point and we give the defendant the opportunity to move to dismiss, somebody may contend at some time or other that failure to take advantage of the opportunity of the rules of the court is a waiver of his right. I think it is necessary. You are probably right, but the point is that some judge might sometime hold that way, and it would be a wise safeguard.

Mr. Medalie. I think it is better to assume that the judges will--

Mr. Holtzoff. Beg pardon?

Mr. Medalie. I think it is better to assume that the judges are fairly good lawyers and will not make any great mistakes. Suppose you charged a man with mail fraud, or attempted to in an indictment, and failed to allege a scheme to defraud, or what you did allege certainly was not a scheme to defraud. Let us go to the extreme: that in that indictment you charge a scheme to defraud, that is, to pay a man less than the goods were worth, and nothing else; no false representations. Suppose a motion were not made. A man goes to trial. I think the judge would dismiss the indictment.

Mr. Holtzoff. I think he should, but it seems to me--

Mr. Medalie. (Interposing) If he does not, he is trying a case where there is no indictment, practically.

Mr. Holtzoff. The only point is this: that if you are going to safeguard the right to raise the point of lack of

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jurisdiction, you by your silence do not imply that he waives the insufficiency of the indictment.

Mr. Medalie. Look: you are dealing with jurisdiction. I have always understood that that cannot be waived.

Mr. Holtzoff. That is right.

Mr. Medalie. The judge has no power.

Mr. Holtzoff. That is right.

Mr. Medalie. The court has no power. The case is not there. It is no court for purposes of that case, and your silence does not give a power that it does not possess.

Mr. Holtzoff. Then, your thought is that the whole sentence ought to go out?

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

Mr. Holtzoff. I should not mind that so much. My point was that if that sentence stands you also ought to safeguard the defendant as to failure of the indictment.

Mr. Medalie. Well, I raise the question. I move that that sentence be stricken.

Mr. Holtzoff. I second the motion.

Mr. Youngquist. May I suggest that for the sake of uniformity with the civil rules it might be well to leave it in here, expanded as suggested by Mr. Holtzoff, even though it may not strictly be necessary.

Mr. Medalie. There is a reason for putting these things into the civil rules, particularly as to the sufficiency of a pleading, in view of the fact that--

The Chairman. (Interposing) That brings us to section (e).

Mr. Robinson. That ought to be harmless enough to meet

b19

everybody's ideas. That happens to parallel the civil rules, too. You notice Rule 8, too, to the left, of the civil rules.

"Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Do you want that "pleading" out there, Mr. Holtzoff, too?

Mr. Holtzoff. I suppose it should be.

Mr. Robinson. Well, now, wait a minute. Is an indictment a pleading?

Mr. Holtzoff. Yes. No. I suppose that can stay there.

Mr. Robinson. Better leave it.

Mr. Holtzoff. Yes.

Mr. Youngquist. Why not simply say "Pleadings" instead of "Each averment"?

Mr. Holtzoff. That is a good idea. This was just copied from the civil rules, I guess.

Mr. Longsdorf. Strike it out.

Mr. Youngquist. "Pleadings shall be simple, concise, and direct." Or perhaps you should say "Pleadings and motions."

Mr. Robinson. I was trying to follow your recent suggestion there, that we follow the civil rules on points of this kind. You notice the civil rules: this is just exactly the words of the civil rule.

Mr. Youngquist. Well, yes. No, I did not mean--

Mr. Robinson. Do you think there is reason for changing it here?

Mr. Youngquist. I did not mean the words. I mean the substance.

The Chairman. This is a copy of the civil rules.

b20

Mr. Holtzoff. This is a copy of the civil rules.

Mr. Longsdorf. Yes.

Mr. Glueck. I do not think it makes much harm either way.

The Chairman. All right. Now, what about section (2)?

Mr. Holtzoff. I have one suggestion about section (2). The last sentence on page 9 I have a question about. That
8 permits the court to require the government to elect as between counts of an indictment, and that would introduce a technicality that does not now exist.

Suppose a man is indicted on a large number of counts in a mail fraud case. I do not think the court should have authority to say to the district attorney, "Well, you have got to elect as between these counts."

Mr. Medalie. That deals with a very practical experience. The provisions of 8 (e) (2) are now the law of New York, and they work very, very well. Now, in practice in the jury trials before competent judges like Carl Nott, where there are many, many counts, each stating another episode on which the defendant can get another ten years, and he is going to get about 60 if he is convicted on six, and he can even get convicted on 20, it gets confusing to the jury. Now, the judges have had this practical experience. One of the greatest criminal judges is Carl Nott, just retired, General Sessions. It was a matter of practical experience for him to say to the district attorney and to the jury, "Now, look. You don't need any confusion. Let us take out three, four, five of these counts. They are all duplicates of each other, and the case will fall anyhow unless the district attorney has proved at least these, and if he establishes these he has enough. Now the jury will be able

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to follow it, and it can go to the jury on these five or six."

That is the situation that I assume brought about the writing of that particular provision in this subsection.

Mr. Holtzoff. Yes, but the way this is worded this situation may confront the United States Attorney: Suppose we have a mail fraud case, and you have, say, ten counts, one for each indictment, letter and suppose under the way this is worded the judge could say to you, "Well, now, you elect three counts out of the ten," and you elect three, and you do not prove those three. Then where are you?

Mr. Medalie. You will not elect the three that you do not prove. You elect the three that you can prove.

Mr. Holtzoff. Yes, but what is the desirability of giving that authority that does not now exist?

Mr. Medalie. Simplification. It does exist in fact, though not in law.

Mr. Holtzoff. Where it is done by mutual agreement. Practically, the United States Attorney goes ahead and does it at the suggestion of the court, but if the United States Attorney declined to do it the court could not compel him to.

Mr. Medalie. No, but the judge can do it himself by the simple expedient of submitting only a few counts to the jury.

Mr. Holtzoff. Oh, yes.

Mr. Medalie. So that they can understand the case.

Mr. Holtzoff. But do not forget that there are some judges who are not as good as some of the judges in the Southern District of New York.

Mr. Medalie. Then they will not exercise it.

Mr. Holtzoff. Yes, but we have the other type of judges who

b22

try to exercise too much authority; there is that type of federal judge.

Mr. Medalie. Yes, that type of judge will do that, and I have seen one of them do it. They will say, "Well, I guess this is a case, but this is too trivial to be a mail fraud case. This ought not to go to the jury. This does not belong in this court." What are you going to do about it?

Mr. Dean. Does not the pruning process take place later on when you go to submit the counts to the jury?

Mr. Seth. That is right.

Mr. Medalie. Well, this is the time it is done. I assume that is intended.

Mr. Dean. I assume it is not.

Mr. Holtzoff. Not the way it is worded. I should not object to that limitation. The way this phrase is worded I thought it was at the opening of the case.

Mr. Medalie. In other words, you agree that this is practical, then, should be within the power of the judge?

Mr. Dean. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. But you do not want to exercise it until the case goes to the jury?

Mr. Holtzoff. Exactly.

Mr. Medalie. Or at the close of the government's case?

Mr. Holtzoff. Yes.

Mr. Medalie. I would go along with it.

Mr. Robinson. Let us compare that with 42 . I can read that briefly:

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9 "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any defendant, or of any separate issue or of any number of defendants or issues."

That would seem to take care of the case before trial.

Mr. Medalie. Yes.

Mr. Robinson. So this would be during trial.

Mr. Holtzoff. No.

Mr. Dean. No.

Mr. Medalie. At the conclusion of the government's case.

Mr. Holtzoff. At the conclusion of the government's case.

Mr. Robinson. That is right. Well, that is where an election nearly always is made.

Mr. Medalie. Yes, but I should not limit it to an election. I would give the court a reasonable amount of discretion to avoid confusion to the jury, even though election is not necessary.

Mr. Holtzoff. Suppose we leave it to the reporter to rephrase this sentence in the light of this discussion.

Mr. Robinson. Very well.

Mr. Holtzoff. Would that be satisfactory?

Mr. Robinson. If you are sure you understand what you want, Mr. Holtzoff, we can confer about that later.

Mr. Holtzoff. Well, the thought is that this authority should be limited to the close of the government's case or the close of the entire case, with the discretion in the court to make a selection himself.

The Chairman. That would be at a different place in the rules.

b2 4

Mr. Dean. That is right.

The Chairman. Rather than in the pleadings.

Mr. Holtzoff. I think so.

The Chairman. Then if there is no objection that will stand. Is there anything else?

Mr. Medalie. I think you might add the words when you do this, "in the interest of simplifying the issues."

Mr. Robinson. Yes.

Mr. Crane. Well, why put any reason in it at all?

Mr. Medalie. Well, because that is the court's guide.

Mr. Crane. Which would contribute to a fair trial.

Mr. Medalie. All right. I agree. You are right.

Mr. Crane. Surely. "Suppose the defendant and the government"--that is preaching; I do not like that.

Mr. Medalie. All right. That is unanimous.

The Chairman. I think, gentlemen, we have disposed of it.

Mr. Medalie. Oh, I want to ask one question here: Does this subdivision completely take care of the existing statutory regulations on that subject as to joinder and consolidation?

Mr. Robinson. Yes.

Mr. Holtzoff. No. You have another rule on joinder. There is another rule here on joinder.

Mr. Medalie. Well, that is joinder of defendants.

Mr. Wechsler. On parties but not as to counts.

Mr. Medalie. But I mean as to joinder of counts and consolidation.

Mr. Robinson. You are confused. Well, joinder of counts. Well, consolidation for trial is taken care of under 42(a).

b25

Mr. Medalie. Well, you have here, "The court may order written accusations to be consolidated for trial."

Mr. Robinson. That is right. This is on joinder of counts.

Mr. Medalie. Then had we not better take out the consolidation provision and leave that to the consolidation provision which comes later?

Mr. Robinson. I should like to defer that until we come to 42 and see what we get.

Mr. Longsdorf. Do you want to put the joinder of counts down into the consolidations for trial, or wait?

Mr. Robinson. I did not hear your question.

Mr. Longsdorf. Do you mean to put the joinder of counts, the making of several counts--I did not understand--down in or near to the rule on consolidations for trial? Did I understand that wrong? I did not hear distinctly.

Mr. Robinson. What we were talking about, considering it in connection with 42, Rule 42 on "Consolidation; Separate Trials," was that when we come to that we can come back and consider the two together.

10 Mr. Longsdorf. Oh, yes.

Mr. Holtzoff. Do you not have another rule on joinder of separate counts? Joinder of defendants in the same count?

Mr. Medalie. That is different.

Mr. Robinson. Yes, that is different.

Mr. Medalie. And yet all of them could be put together, and lawyers would look for them at the same place.

Mr. Holtzoff. I think so.

Mr. Robinson. There again, while I do not want you to hear me speak of the civil rules too often, at the same time I think

b26

we agree we ought to regard them all the way through, and I am following out the arrangement of the civil rules with respect to separating these two comparable points. So if you will check the civil rules provisions and these, you will see that lawyers who have become accustomed to questions of joinder of parties, joinder of paragraphs of their claims, and so on, in civil matters, will find that this arrangement is in criminal matters comparable to what we have been accustomed to in civil matters as far as such a parallel can be worked out, and I think it is fairly close.

Mr. Wechsler. Do I understand that the answer of the reporter to Mr. Medalie's question was that this provision is not intended to change the present law with respect to joinder of counts except charges of separate crimes made in one indictment?

Mr. Robinson. If he is referring to the federal statute of 1852 or '54, this provision is not based squarely on that statute; that is, it does not copy the words of the statute.

Mr. Wechsler. May I ask, then, if there be a consideration of the differences, if any, and the results, because I think that is a very important question.

Mr. Robinson. Yes, that has been considered quite carefully, Mr. Wechsler, and I regard this rule as a little broader than the statute.

Mr. Wechsler. In what respect, may I ask?

Mr. Robinson. If you will just take the statute and take this rule and go down through it word by word you will find it, I believe.

Mr. Dean. Is the statute set forth here, the present statute?

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Mr. Wechsler. Yes.

Mr. Robinson. Yes.

Mr. Wechsler. It is in on the left-hand side.

Mr. Longsdorf. The court has found some fault with the verbiage of that old statute?

Mr. Robinson. No, it was not based on lack of respect for that statute.

Mr. Longsdorf. No, no, but I say was not the old statute in one or more cases criticized as being a little bit difficult of understanding, incomplete?

Mr. Robinson. Well, I do not know about that.

Mr. Longsdorf. I am not sure.

Mr. Robinson. We have not run into much objection to the old statute. Here is what was done in compiling this section of this rule. California has a very good joinder statute, and one or two other states. New York's so-called Dewey joinder statute under which the Luciano conviction was made, and some other rackets were broken up there, was also considered. So the source of this rule--

Mr. Dean. (Interposing) Mr. Medalie, I can find it for you. It is opposite Rule 42.

Mr. Medalie. Oh, yes. Thanks.

Mr. Robinson. This rule is based on the present federal joinder statute, the California joinder statute, and the New York State joinder statute, and all three were considered in the drafting of the rule. I have not examined each of the other three statutes. I think you will see what the effort was designed to attain. I do not know that I can go into it word by word.

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Mr. Longsdorf. As I recall the federal statutes here, there is nothing in the federal statutes, 557, that provides for separation of trials. That was left to implication. You put it in expressly.

Mr. Holtzoff. The federal statute does not say when there may be joinder. It just says if there are several charges which may properly be joined, you may join them.

Mr. Longsdorf. Yes, but there is another statute that comes into that, another federal statute which specifies--

Mr. Robinson. (Interposing) Severances.

Mr. Longsdorf. --what may be joined in the indictment.

The Chairman. That disposes of it.

Mr. Robinson. I think so.

Mr. Wechsler. Well, it occurred to me that there is a reasonably broad ambiguity in reference to defenses of the
11 same general nature. Now, I know that that language or its equivalent is in the present federal statute. If the purpose is to carry over those interpretations substantially, I know what that means. If the purpose is to achieve some different result, while I am not unwilling to study the California and New York statutes before making up my mind, I do not see that I can make up my mind until I have engaged in that study.

Mr. Robinson. I shall be glad to discuss it with you, too.

Mr. Holtzoff. After all, our decision now is only tentative.

Mr. Seasongood. Yes. I think it is better to make a tentative decision, so the reporter will at least know in a general way what we think.

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Mr. Robinson. I think our next draft may be one that Mr. Vanderbilt has mentioned as one that we shall send out by mail. I think that in the margin it would be well to note the statutes which are either the source of the particular line or clause or other provisions. Now, I plan to do that. I think that will make it a little more convenient for members of the committee in looking up the sources of these statutes. I think with respect to Mr. Wechsler's inquiry I would agree that it is desirable to have such points made available to you as conveniently as possible.

Mr. Medalie. Is the New York statute the Dewey law?

Mr. Robinson. Yes.

Mr. Medalie. It was intended to be an adaptation of federal law and practice on the subject, and I refer to Section 279 of the Code of Criminal Procedure. It is very, very simple. I think you have simplified it further without losing anything that I can observe now.

Mr. Robinson. I have tried to do that.

Mr. Medalie. Yes. I think it is a good job. I should still like to look at it again and see if we have lost anything or added something that might be dangerous, but I doubt if that is so.

Mr. Robinson. I should appreciate it if you would write in about that. And Mr. Wechsler, too, if you will.

The Chairman. Now I think we have covered everything in Rule 8, except I think we must go back to the first page.

Mr. Seasongood. Before you do that may I just cover a small thing? On page 8 in Rule 8 (e)(1), in line 137, I think we have provided for certain notices, havewe not, and I would suggest

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you insert "No technical forms of pleading, notice,"and so forth.

Mr. Robinson. Yes. Very well. Thank you.

The Chairman. And the reading here, "notice," I suppose "motion."

Mr. Robinson. "Motion." All three.

The Chairman. All three singular.

Mr. Robinson. All three singular.

The Chairman. Coming back to the first page of Rule 8, we have left over the taking of a tentative vote as to whether or not we would follow the scheme of the rule as written or the alternative plan suggested by Judge Crane, that the paragraph be remolded to provide that the accusation should state the facts constituting the crime, and we accompany that with a note to the reporter referring in some such form as does the present paragraph to the elements that are generally necessary to constitute a sound indictment as a guide to the district attorney. Are you ready for a tentative vote on this issue?

Mr. Medalie. Before you vote, Mr. Chairman, may I read you Section 275 of the New York Code of Criminal Procedure:

> "The indictment must contain (1) a title of the action specifying the name of the court to which the indictment is presented and the names of the parties, (2) a plain and concise statement of the act constituting the crime, without unnecessary repetition."

The Chairman. Yes.

Mr. Medalie. And under that district attorneys have done everything from what Cropsey has done to prolix indictments, but the simplest form of indictment is possible under this

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section.

Mr. Robinson. Possibly they are afraid of it, as the section perhaps is not definite enough to guide them. Is that not possible?

Mr. Medalie. It is simply fear. They have it in their old forms lying around every district attorney's office. It is so much easier to copy the form than to revise it.

Mr. Youngquist. I have had the same fear, Mr. Medalie. Perhaps you were never assailed with it, but I know that I in drawing indictments have feared to depart from that.

Mr. Medalie. Of course. I know what you mean.

Mr. Youngquist. In the state court. That has been established by practice.

Mr. Medalie. I know. I once instructed my assistants, and did it again and again for about three months when I was United States Attorney, to leave out conspiracy counts. Well, after while they sneaked them in, afraid that they could not offer anything in evidence unless there was a conspiracy count, which of course is not the law.

Mr. Holtzoff. But of course all this fear will be probably done away with if we in an appendix of forms insert four or five forms of simple what we call short-form indictments.

Mr. Medalie. You are drawing the form on mail fraud?

Mr. Holtzoff. Yes.

Mr. Medalie. All right.

Mr. Holtzoff. That was all right.

Mr. Youngquist. Short.

Mr. Robinson. Simple.

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Mr. Holtzoff. Leave out all such words as "feloniously" and "thereupon, to-wit."

Mr. Robinson. You have.

Mr. Medalie. Now, when you draw your form on mail fraud please pick out a complex fraud, so as not to mislead the prosecutors.

Mr. Crane. The difficulty comes because of an antiquated fetish about a criminal indictment, all arising from a time when the courts and people were so cruel to criminals that they found every way in the world to try and beat it, and rightly so. Now we have gonebeyond that so far as the courts of this country go, except in times of, oh, some of the excitement. I do not know of any court that is not trying to be as fair to one side as to the other. I cannot imagine a judge who is not trying to do that. Now, of course that makes play for feelings here and there. That is human nature. But in the main they are wonderful. The courts are wonderful, remain all over the country, and I have known--

Mr. Medalie. (Interposing) That is Blackstonian.

Mr. Crane. Well, it is not a blackout, anyway. Now, if you think of facts constituting the crime--that is what you are bound to do--I do not see any answer to it.

Mr. Glueck. Judge, do you really want to leave out "being instigated by the devil and not having the fear of God before his eyes," and so forth?

Mr. Medalie. It has never been required. It was not even required under common-law pleading.

The Chairman. Now are you ready for the motion?

Mr. Youngquist. I do not know how to vote on it.

b33

Mr. Glueck. The alternative, the short form versus the--

The Chairman. This form presented by the reporter or the short form advocated by Judge Crane and just quoted by Mr. Medalie, to be accompanied by a note for the guidance of the district attorney, giving the substance of this rule.

Mr. Waite. The motion is to adopt a shorter statement instead of the reporter's statement?

The Chairman. Suppose we get it accurately before us. I take it as a motion made by Judge Crane, seconded by Mr. Medalie, for a short form accompanied by an explanatory note. All those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Crane. That is really what you did in the American Law Institute form.

The Chairman. Well, Rule 9 isn't, so we go on to Rule 10.

Mr. Dean. May I make one suggestion there on Rule 8, if you do incorporate in the footnote these various items, that you add the regulation to the statute, following Mr. Medalie's
13 suggestion of yesterday, which I think is very important.

Mr. Holtzoff. I do not think that you ought to require reference to statutes.

Mr. Dean. Well, what are you going to do if you are prosecuting on a departmental regulation and not even the attorneys in the United States Supreme Court when they are arguing can find it?

Mr. Holtzoff. I agree with you on that.

b34

Mr. Medalie. What are we going to do about it?

Mr. Holtzoff. But I do not think we ought to require reference to statutes.

The Chairman. We are not requiring it.

Mr. Medalie. I know, but the rules, departmental or regulations--the word is not "rules." It is "regulations," is it not?

Mr. Dean. Either.

The Chairman. Either "rules" or "regulations"; they are used alternatively.

Mr. Medalie. I think anybody trying a criminal case, whether the indictment is under a rule or regulation, would like to know what the rule or regulation is.

Mr. Holtzoff. You get it by bill of particulars if the United States Attorney is agreeable enough ~~not~~ to refuse to cite it to you when you telephone him.

Mr. Medalie. Well, that might be the answer.

Mr. Dean. What harm? What is the point?

Mr. Glueck. It is only a few words.

Mr. Holtzoff. The harm is this: that if by mistake you omit it from your indictment you might get thrown out ~~of~~ at the trial. You always have to figure on that proposition.

Mr. Glueck. Well, then you start all over again.

Mr. Holtzoff. Not if the statute of limitations has run.

Mr. Wechsler. There is another situation, too. The rule with respect to statutes is that if there is any statute of the United States that sustains the charge the indictment is valid. So that there will not be a civil rule if a violation

of regulations is charged, even though there may be a mistake as to the regulation, so long as there is a proper notice to the defendant to enable him to prepare. I think there is a real issue there.

Mr. Holtzoff. And you get that information by bill of particulars.

Mr. Wechsler. Well, I am not sure that you can unless you say that it should be available. I think the information should be available, under a penalty.

Mr. Medalie. I think there is a reasonable prospect of getting it that way.

Mr. Youngquist. By bill of particulars?

Mr. Medalie. By bill of particulars.

Mr. Youngquist. I do not know.

Mr. Medalie. I should rather leave it for simplicity. The important thing is that people get that knowledge before they go to trial. There is not a lawyer living who knows these rules and regulations, either in the government service or at the bar.

Mr. Robinson. May I ask, Mr. Medalie, do you think a court would grant a bill of particulars if a lawyer would come in and say, "Under what government regulation does this indictment"--

Mr. Crane. (Interposing) Surely. Why not?

Mr. Robinson. What is that?

Mr. Crane. Surely. Why not?

Mr. Robinson. Can we assume that every federal judge would do that?

Mr. Crane. Surely.

Mr. Robinson. Can we assume every lawyer who asks that

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question might not feel that he was rather stultifying himself, at least in some cases, by asking it?

Mr. Crane. He has got to defend his client.

Mr. Robinson. Oh, yes, he has got to do that, and he is supposed to know the law, too, and the regulations.

Mr. Crane. That is a modesty in the bar that I have not run across.

Mr. Medalie. There is still the tradition around the federal courts that if you do not know what to do procedurally you ask the clerk.

Mr. Robinson. What if he does not know?

Mr. Medalie. I have been doing that for twenty-odd years. A lot of things I could not find in the books I would ask the clerk, and he would tell me. Of course I knew that the judge would ask him too, and he would get the same answer.

Mr. Robinson. I think Mr. Dean has a point there. I feel pretty strongly about this because it is very fundamental. I feel we have the responsibility of all these requests that have been coming in here about the short form of indictment. I believe about all we are doing is telling them that the indictment ought to be short, and now again we come back to the question they raised in New York in June at the meeting there: Just how short is "short"?

Mr. Crane. This has been tried out in so many places.

Mr. Robinson. And we had so much trouble in New York. Take the Bogdanoff case there.

Mr. Crane. We have not got as far as Pennsylvania and some of the other states have gone.

Mr. Robinson. I am indebted to this judge named Bogdanoff

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because you are familiar with the law of New York. I think that was one of the first tests under your short-form idea, and I believe the courts sustained it, did they not?

Mr. Crane. Oh, yes.

Mr. Robinson. And yet district attorneys have told me within the fairly recent past that they were afraid to really bring in a short-form indictment.

Mr. Crane. Now, that is where they simply charged the crime, charged John Jones with having committed a crime on the night of so and so. Now, I do not like that, and that is the thing they are criticizing. I think that was proposed first by the American Institute, or one of them, and it got too short.

Now, we have not adopted that. Now, this must state all the facts constituting the crime. I guess "the statute in such case made and provided" was the oldest phraseology. "Against the statute in such case made and provided," and even under the old indictments they never required the statutes. Never.

Mr. Robinson. Well, they did not have the statute; it was a common-law crime.

Mr. Crane. I mean even the full common-law form of indictment never required you to quote the full statute, though always it mentioned the law insuch case made and provided, the statute in such case made and provided.

Mr. Holtzoff. Never cited the statute at common law.

Mr. Crane. Never.

The Chairman. We have voted on this.

Mr. Robinson. On what?

The Chairman. All of this.

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Mr. Crane. Surely.

Mr. Medalie. Except that the question of "rule" or "regulation" came up again.

Mr. Holtzoff. That can be handled by bill of particulars.

Mr. Crane. Surely.

Mr. Medalie. If that is agreed, that is all right. I am

c15 willing to take the chance. I think you have given me the answer.

Mr. Robinson. I shall have to ask for things if I am going to be responsible for drawing any form with your help, such as Mr. Holtzoff suggests, or for delivering a rule plus a commentary, to put into it the details that will be necessary for the district, United States Attorneys, and courts, in any event, to have a little more direct line on what the judge has in mind.

Mr. Medalie. I can send you a copy of the indictment for larceny.

Mr. Robinson. I want to question you, if you will. I should appreciate it a lot if you would assist the reporter's office by giving us a specimen of an indictment which you feel does represent a short statement.

Mr. Crane. I will try to get some of those statements out.

Mr. Robinson. Either opinions or, for instance, to be more specific, take this Massachusetts form, which I regard as a pretty good short form and which this rule is based on, if you would go through it and eliminate the words in it which you think really are in excess.

Mr. Crane. You are tying yourself down--you do not mind my using the expression; there is nothing I know of in the

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Constitution that prevents a fellow from thinking for himself. You are tying yourself down always to something that has been written in the past. Now, just take this: You charge him with any crime you can think of. You just charge him that John Jones is accused of the crime of larceny in a certain degree or murder in the first degree or mail fraud, or whatever you want. Just charge him with the crime. I mean, state that it happened. You can state it in a great deal better than half the time, and I will bet on you, and there would not be a single thing left out. Not a thing. And you can make judges sit up and take notice, because you would not have a flaw in it, and you just state it in your own good, plain English. As you write these rules there is not a thing here that is not clear and understandable. There may be a disagreement as to what the result is. Another thing: If you state it in that good plain English there is not a judge on the bench, if he is awake, but who would appreciate it.

Mr. Medalie. I will send you a batch of short forms prepared by Stanley Fuld, Dewey's assistant.

Mr. Robinson. I have them.

Mr. Medalie. They are pretty good, are they not?

Mr. Robinson. That is right.

Mr. Crane. And he is a very good man, the best in New York, Fuld.

Mr. Medalie. They sent you a batch of them before they were consulted about it.

Mr. Crane. I will get you some from Kings County.

Mr. Robinson. Well, I have plenty of short forms, and I think the Massachusetts short form is the best one I have seen

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from any jurisdiction, and this one is based on that, just one, two, three. I do not want to take up any more time, but I just want to serve notice on Judge Crane or write him a letter.

Mr. Crane. If you are stuck just write to me, and I do not want to present as representative of a human being just a skeleton. We want to put the flesh and clothes on him.

Mr. Robinson. Well, we have got a ghost now.

The Chairman. What about Rule 10?

Mr. Longsdorf. Did you pass Rule 9?

Mr. Crane. Well, there is none there.

Mr. Seasongood. I will raise the question whether any of Rule 9 might be perhaps included: for instance, (d) and (e). As far as (d) is concerned, it seems to me that might be all right for inclusion. That is,the violation of certain regulations might be a federal crime. And then (e) involves the question whether you are going to include contempt or whether you are not. If contempt is in, certainly you can be in contempt for the noncompliance with an order of the court or a judgment of the court. I should like to have that decided, Mr. Chairman, whether we are just to have a general reservation that wherever things are appropriate to contempt, if it is decided to include
16 that, that they will be included at a later time. Perhaps that is the best way to do it.

The Chairman. All right. Mr. Seasongood moves that if we should take up contempt we include a provision or provisions comparable and similar to paragraphs (d) and (e) of Civil Rule 9 set forth on the left-hand page. That is your motion?

Mr. Seasongood. Well, I did not know but that (d) might

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be appropriate anyway.

Mr. Holtzoff. I think it is appropriate anyway, and so is (e).

Mr. Longsdorf. Including double jeopardy, for example, (e) might be used.

Mr. Seasongood. Yes, that is right.

The Chairman. That is true.

Mr. Longsdorf. I think you will find those rules in the A. L. I. code, will you not, Mr. Waite?

Mr. Waite. I am sorry. I was not listening.

Mr. Longsdorf. The preceding rule.

The Chairman. The question is about putting in the rules (d) and (e) under Civil Rule 9 on the left-hand page.

Mr. Longsdorf. Opposite Rule 9.

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Mr. Seasongood. If they can be a party to any crime or defense then it would seem to me they ought to be in.

Mr.Holtzoff. I second the motion.

The Chairman. The motion is not limited as I limited it. I will restate the motion. It is that at an appropriate place we include (d) and (e) of civil rule 9.

The motion was agreed to.

Mr. Robinson. Judge Caffee raised the question, and won his case on the ground that the State was unable to prove that a corporation had been incorporated under the law of a foreign country.

And the legislature of Alabama then passed this statute, which is still on the books there, providing that if a defendant wishes to deny the incorporation of a corporation, as alleged under an indictment, it is necessary that the defendant shall file a notice before trial that it does deny the existence of the corporation. Then on the trial if he does not file such a motion, it is taken as proof, or is established, that the corporation was incorporated as alleged.

Mr. Holtzoff. This might be useful in a Sherman law case where you might have a bunch of corporate defendants; and if you have a technical lawyer for the defense he would insist on producing certificates of incorporation fromhalf a dozen States.

Mr.Robinson. I should say that the statute does not apply to defendants, but only to corporations that may be mentioned, such as owners of property stolen, or something of that kind.

Mr. Holtzoff. I think it should cover this, too.

Mr. Robinson. That is what I should like to know.

Mr. Holtzoff. I move that the Reporter include a rule which in effect would provide that it is not necessary for the prosecution to prove the existence of a corporation, whether such corporation be a defendant or some other corporate entity necessary to be proven, unless the defendant files a special notice requiring such proof.

Mr. Medalie. Let us see. If the corporation is named as a defendant the statutes provide however the corporation shall plead. Some one comes in, in answer to a summons, and pleads the corporation guilty or not guilty. If he does that, does not he admit the corporation as a corporation?

Mr.Holtzoff. I am not sure as to that.

Mr. Youngquist. Could not there be a plea as an entity?

Mr. Medalie. It is like a defendant answering an indictment which states his name as "Joe Smith" without raising any question about it. He cannot say later, "I am not the Joe Smith" unless he pleads it before he answers the indictment.

Mr.Robinson. If you appear for a corporation and plead, you do not require proof of the corporation?

Mr. Medalie. I am not sure.

Mr. Holtzoff. If it is a corporation that is pleaded under an indictment, and if it happens to be a joint stock association, what position is the corporation in?

Mr.Medalie. I do not know. I have never looked into it, and I cannot say.

Mr. Longsdorf. Mr. Medalie is a highly pragmatical sort of a person; but here is a situation in California which caused almost unextricable confusion, because they sued the Postal Telegraph & Cable Company of California, whereas that was not

the right one; it was the New York company. It was two or three years before they got that straightened out.

Suppose they had been indicted in that way?

Mr. Holtzoff. Then the defendant would have pleaded not guilty, on the ground that it was some other corporation.

Mr. Longsdorf. I know; but that is what you do not want to bring about.

Mr. Medalie. I would say the judgment was not enforceable.

Mr. Longsdorf. I know; but you do not want to make that mistake. What would the fine be worth?

Mr. Medalie. Nothing.

Mr. Longsdorf. Well, that was the trouble with the judgment.

Mr. Crane. There must be some way, some rule somewhere, throughout the States or districts that deal with the corporate name. I suppose you have to sue against the corporate name correctly.

I suppose it is a wise thing to do, as we do everywhere else -- just to see what has been customary. They have been prosecuted and sued, and the indictments must show how; and while we may have our own ideas about it, it is just as well to find out how it has been done. I do not know about it; but rather than guess at it, I move we find out.

The Chairman. Very well. Suppose we have a motion to that effect -- to find out what has been the practice, and to incorporate such a rule.

Mr.Crane. Yes.

Mr. Longsdorf. It seems to me that we might have a case

similar to the Postal Telegraph case.

The Chairman. Are you ready for the question?

(The motion was agreed to.)

Mr. Wechsler. Mr. Chairman, in this connection it occurs to me that there are other particular situations comparable to that which has just been determined, as to which similar action may be necessary. In the American Law Institute model code there are some 30 sections following section 154 which are addressed to problems of this sort, where the existing law points to a special situation to be obviated by rule. Let me suggest that similar attention be given at least to the particular ones referred to, that the Law Institute thought sufficiently important to require special attention. It may not be necessary in the Federal practice to take account of some of them or, indeed, any of them, but I think it would be prudent to make sure of that, unless that has already been determined.

Mr. Robinson. Yes; we have been working on it. But our trouble is that we are limited in space. You mentioned 30 sections, did you not?

Mr. Wechsler. Yes.

Mr. Robinson. And the problem is how to contain all of those in something like Judge Crane's indictment, which would be quite brief but would be broad enough to cover the situation.

Mr. Wechsler. In the Law Institute code that situation was not deemed to be important. They have an opening generalization which sets forth the principle which Judge Crane proposed, and then some of the special difficulties are considered and resolved.

I might say that in general I am not inclined to worry

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about questions of space or arrangement. I think these are technicalities that we are supposed to resolve and if possible eliminate.

Mr. Waite. You have spoken several times of space. Are we limited to the number of sections we can have? I think we should put in everything desirable, regardless of the cost to the printer.

Mr. Robinson. Of course, the Chief Justice spoke to us about making them as brief as possible.

Mr. Dession. Should not we handle it in this way: Brevity and simplicity dealing with a particular topic are important; but do we care how many sections we have so long as we have particular sections dealing with the particular problem? It seems to me one dealing with these rules would like to have brevity and simplicity; but do we care how many we have dealing with any particular one?

Mr. Longsdorf. But if we put out a criminal code with 280 sections, someone will get up a complaint in the newspapers that the civil rules were handled in 80 sections, and that we should handle this in a comparable number.

Mr. Seasongood. Would Mr. Wechsler read enough of the ones he mentioned to show us what he is talking about?

Mr. Wechsler. I will read the captions.

Mr.Seasongood. Yes.

Mr. Wechsler. The first section is entitled "Charging the offense"; and it has the general statement of principle which Judge Crane proposed and which we have adopted.

The next deals with "Insufficiency of Indictment and Bill of Particulars". That we have covered.

The next one deals with the name of the defendant and, in particular, with the situation in which the defendant is a corporation.

The next one deals with allegations of name.

The next one deals with allegations of place.

The next one deals with allegations with reference to the means by which a crime is committed.

The next one deals with value and price.

The next one deals with ownership; the next with intent; the next with characterization of the act -- the old problem of using the qualifying words such as "unlawful", "wilfull".

The next one deals with omission of unnecessary matter.

The next one deals with allegations of places and things.

The next one deals with the name of the person other than the defendant.

The next one deals with property described as money.

The next one deals with description of written instruments.

The next one deals with description of written matter.

The next one deals with the meaning of words and phrases.

The next one deals with allegation of prior convictions.

The next one deals with private statutes, which I suppose is roughly equivalent to our regulation problem.

The next one deals with judgment; the next with exceptions -- that is to say, the negation of exceptions in a statute which constitutes a basis of the charge.

The next deals with alternative or disjunctive allegations.

The next one deals with direct allegations.

The next one deals with special problems and special crimes, such as libel, perjury, and so forth.

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The next one deals with offenses divided in degree.

Then they go into misjoindure, duplicity, uncertainty. I think that about exhausts the enumeration.

I do not for a moment say I think all of them are necessary.

Mr. Waite. Mr. Wechsler asked me why they were put in. I think I can answer that. We all agree that section 154, as it was stated, rendered the subsequent sections quite unnecessary from a logical point of view, and we found that a provision similar to section 154 requiring simplicity had been interpreted as requiring this, that, and the other specific allegations. So we went through the pages and took all these various holdings that, despite a desideratum of simplicity, such and such a court has held such and such a thing necessary. And then we enumerate all /those propositions in order to make abundantly clear what was meant by section 154.

Mr. Wechsler. Well, there are particular problems, for instance, in allegations of intent. I have drafted a number of indictments in which that was a special problem -- the principle being whether a special phase of intent was covered or whether some cover-all word was sufficient.

I think we can cover the situation by noting some of the most troublesome and recurrent of the particular issues, and meeting them. In part, indeed, I think the Reporter did that in the draft which he prepared.

Mr. Burke. You are referring now to rule 8?

Mr. Wechsler. Yes. Mr. Chairman, I am not suggesting a revival of that question, but only that this problem must have occurred to the Reporter in working that out; and I do not

think there is an inconsistency between a generalization of the ideal and specific provisions, where the problem is troublesome enough to require attention.

At any rate, my suggestion was only that these others be considered along with the particular one that was the subject of Mr. Holtzoff's motion.

Mr. Glueck. No matter how many of these specific details you put in you will still get litigation to other details within the framework of simplicity; and the question arises whether it would not be better to discuss all these details, along with appropriate citations, in the commentary, by way of warning as to pitfalls, and so forth.

At any rate, I think you are right in saying that the whole problem should be explored.

Mr. Longsdorf. Perhaps some of them should be put in, with the suggestion that they are illustrative and not exclusive, although I do not know whether that works very well.

Mr.Crane. No. The Institute gives the rule and then gives some illustration; and I see no reason why the Reporter could not somewhere state what we think it means or intends, or anything else.

Mr.Glueck. But there is the basic problem alluded to, of course; and we are just fooling ourselves --

Mr. Crane. But you are right in this, of course: That experience teaches that you cannot foresee what every judge is going to do and how wise some judges can be, whether others are not so wise.

Mr. Wechsler. Take a single example: It is often important to a prosecutor to be able to state some things hypothet-

ically and in the alternative. He is unable to state what the actual situation is that he will be able to prove, but he knows he will be able to prove one thing or another that constitutes a crime. That was deemed to be of sufficient importance to be covered in all the civil proposals written about. I do not know whether it is in the civil rules. I know that prosecutors are now uncertain in the Federal practice whether they can do that; and I am not sure whether the simple generalization of plain and concise statements answers that problem.

Mr.Crane. I do not see how, without going into detail -- which is impossible for us to do -- we can meet every situation for a court for every indictment that may be drawn, or get it so that no question ever is raised. It is impossible, anyway. You cannot frame common law pleadings that way. Questions always arise as to how to plead about a corporation or about judgment or anything else. We are not the courts to decide about these questions. We can simply state a rule of what is to be stated. If it is a committee and a corporation it can be stated as a corporation.

Mr. Waite. There is a suggestion here: The court can promulgate rules with commentaries. The legislature cannot promulgate rules with commentaries.

The Chairman. Now may we go on to Rule 10, which seems to follow rather closely the corresponding civil rule.

Mr. Medalie. How much of this do we need now?

Mr. Holtzoff. I do not know whether we need any part of it for criminal rules. I would be inclined to see it go out.

Mr. Crane. So would I.

Mr. Wechsler. Do I understand, Mr. Chairman, that my

motion was rejected?

The Chairman. I did not know you made it as a motion. I thought you wanted the Reporter to consider these items.

Mr. Wechsler. Yes.

The Chairman. Do you want to make that as a motion?

Mr. Wechsler. No; not if the conclusion is that he should consider them.

Mr. Glueck. I do not think you put it in the form of a motion. As I recall you made these suggestions.

Mr. Wechsler. I should like to know what is the judgment of the group as to whether these things should be considered.

The Chairman. Perhaps we should do it by having the motion passed upon.

Mr. Youngquist. I thought that was agreed to.

The Chairman. Suppose we have a motion and get a ruling on it.

Mr.Crane. I understood that it came up in connection with a corporation, and the Reporter was going to look up, at our suggestion, and without a motion, the forms in which indictments had been used and corporations were brought in, and how; and then we would know a little bit more about what to do about it, when we get that information. I understood we passed that by consent.

The Chairman. Yes; that was passed.

Mr. Crane. Then the question came up about what the American Law Institute had as suggestions as to what was unnecessary to be alleged; and we considered that and then stopped, I understood.

The Chairman. No; we went farther than that. The sugges-

tion was made by Mr. Wechsler that there were a very large number of contingencies that were covered by the American Law Institute Code that do not seem to be covered by our code; and at Mr. Seasongood's request he read the headings of some of them.

Mr. Crane. That was a footnote; was it not?

Mr. Wechsler. No; those are actual sections in their code.

The Chairman. And there the matter rests. Let us get some binding situation. Will you make a motion?

Mr. Wechsler. I move that the Reporter give consideration to other situations similar to that presented by the corporation problem, on which we have just acted.

The Chairman. Is there any further discussion? (Putting thequestion.)

(The motion was agreed to.)

The Chairman. Now we have Rule 10 before us.

Mr. Robinson. It has been proposed that the rule be dropped. My problem there is, again, whether if such provisions are desirable in a set of civil rules, they are or are not desirable in a set of criminal rules.

Mr. Holtzoff. There is a difference, because the only pleading you have in the criminal procedure is when you indict an indictment or information. The only other written document we have provided for would be a motion. All the pleas of the defendant are oral. Therefore there is no particular object to be served by Rule 10.

Mr. Robinson. If that is the will of the committee, it is certainly satisfactory to me.

Mr. Youngquist. Was not the word "pleadings" used here

in Rule 10 with the idea of covering motions as well, and not only written accusations?

Mr. Holtzoff. It was my understanding that the defendant might file written pleas, and we modified the prior rule on that point.

Mr. Youngquist. We simply called them notices.

The Chairman. Notices and motions.

Mr. Holtzoff. Then we should not use the word "pleading" because the only pleading we have is the indictment on information.

Mr.Robinson. We should have "notices and motions".

Mr. Holtzoff. Then the rule should have that inserted.

Mr. Robinson. That is the thing to do, then: Line 2, "Every written pleading, notice, or motion."

The Chairman. It goes all the way through. If that is to be the action, would it not be better to ask the Reporter to modify and refer specifically to notices, motions, and so forth?

Mr.Robinson. Very well, sir.

The Chairman. If there is no objection, that will be the order on Rule 10.

Mr. Dession. What is the order?

The Chairman. That instead of using the word "pleading" we refer specifically to the indictment and information and motion.

Mr. Youngquist. I refer to Rule 7 on page 3, which bears on the suggestior I made. It reads as follows:

"The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

So we can let it stand as it is.

Mr. Holtzoff. If you let it stand as it is, is it not somewhat misleading? Because when we speak of pleadings, the impression is created that there are a series of pleadings in a criminal case, such as there are in a civil case.

Mr. Youngquist. You could use the singular, I suppose, as it is used here: "Every pleading".

Mr. Holtzoff. In one case it says "every pleading". In the next sentence it says "the written accusation". The only pleading is the written accusation. So using the two different words creates confusion, because you might think the draftsman had in mind some other pleadings besides the written accusation.

The Chairman. The Reporter suggests that this might be disposed of by referring it back to him, in view of the fact that so many more of our pleadings are written, as compared to those referred to in the first draft.

If that is satisfactory, the next is Rule 11.

Mr. Holtzoff. I think the same situation might be considered in connection with Rule 11.

Mr. Medalie. There is something there that might crop up again: "The signature of an attorney constitutes a certificate by him that he has read the pleading". That is fair enough.

"That to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

Mr. Holtzoff. That is not applicable to a criminal procedure.

Mr. Medalie. "If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be

stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Mr.Holtzoff. You cannot discipline a district attorney for filing an indictment.

The Chairman. Why not?

Mr.Holtzoff. Because the grand jury has found it.

Mr. Medalie. Yes; but he has [redacted] signed it. The district attorney himself cannot refuse to sign any indictment in cases in which he is not convinced that the defendant is guilty and ought to go to jail.

Mr. Robinson. Where do you find that?

Mr. Medalie. Well, it says that he has read the pleading and that there is good ground to support it.

Mr. Robinson. He should not sign it unless he thinks there is good ground to support it; should he?

Mr.Medalie. I think the act should be a ministerial act, after the grand jury returns a true bill. The grand jury might be dumb.

Mr. Holtzoff. We had a case in the past year, in one of the midwestern districts, in which the grand jury found an indictment in a mail fraud case against the advice of the district attorney -- practically a run-away grand jury. They passed a resolution directing the United States Attorney to draft an indictment and present it to them for filing; and of course he had to endorse it "a true bill". But he did not certify it. He should not be held to the requirement --

Mr. Crane. What does this have to do with rules of

pleading, Mr. Chairman?

The Chairman. The purpose of the civil rule was to put an end to the practice in some States of counsel declining to assume responsibility for their pleadings.

Mr.Crane. I do not suppose that any lawyer in a criminal case, no matter who he is -- Mr. Bartlett, former chief justice of my court, was cited for contempt, way back in the early days, for action in a criminal case, although they thought it properly laid, and acted on their best conscience, no doubt. But the judge did not think so.

Of all places in the world you have got to have a brave and courageous bar in criminal prosecutions, on both sides, but particularly for the defense, especially if the defense is unpopular. In many cases the defense is unpopular.

There is a code of ethics thrown in here. If the code of ethics is not to be drawn up here, let the court do it; or the American Bar Association has a code of ethics which is very good indeed.

But I do not think we want to give to the lawyers here a rule of ethics, or to ask that they vouch for everything that is to be filed in the way of pleadings.

This is not stated except from experience. I know of a case in which I did not believe what was told me. I thought it was all wrong. I thought the man was just falsifying to me. And yet it turned out to be absolutely true.

Now, why is a defending lawyer put upon the stand as vouching for or believing everything that is told him? The utmost he is called upon to do is to defend his client so long as he does not intentionally deceive anyone. What his client

has told him may be true and may be false; but many times what you think is not so. You find that you are not as smart as you thought you were, and that what you think is wrong.

I do not like this preaching to the bar in these rules.

Mr. Robinson. This is the same as the civil rules, you understand.

Mr. Crane. I do not care about that.

Mr. Burke. Mr. Reporter, how can you ask a defense lawyer in a criminal case to vouch for the fact that the pleading is not interposed for purposes of delay, when in many cases he does it for delay and for his client's advantage? If a case is charged in a hostile community, you are going to delay it as long as you can.

Mr.Robinson. And the problem does not arise in a civil case?

The Chairman. You do not mean that seriously; because as a defense lawyer I am frank to say that it arises in about 50 per cent of them.

Mr. Seasongood. The rules of ethics say you may not interpose pleadings for purposes of delay.

The Chairman. I mean this. There may be cases you would like to have disposed of the day after you file your answer; but in other cases you are perfectly well satisfied if the judge has gone off the bench for the time being or if there is some reason why you do not get a particular jury in that particular term. There are thousands of reasons that come in, and every lawyer takes advantage of any of them.

Mr. Seth. Every one of them takes an oath not to interpose pleadings for purposes of delay.

The Chairman. I grant that.

Mr. Waite. This states that every pleading shall be signed. The only pleading on the part of the Government which does not need signing -- section 7 specifically provides that the information shall be signed; and this says that the only plea shall be "guilty" or "not guilty", and that may be oral.

So the second section of this, providing that he shall sign his pleading and state his address, has no meaning. I think we might properly just strike this whole section.

Mr. Robinson. Let me raise this problem, which is very acute in many State prosecutions. It may be that the Federal system escapes it. But take the case of motions for continuance, alleging the illness of a witness: In my own experience I have known of lawyers signing statements that the witness is ill, when he actually is not ill and the lawyer knows that he is not ill. In my State we have had to pass a statute to require a physician's certificate that witnesses are ill, because lawyers impose on the court by bringing in motions for continuance.

Mr. Medalie. I think it is the law in every State in the Union, so far as the courts have power over the bar, that when any lawyer brings in such motions he is subject to disciplinary action.

Mr.Robinson. I suppose that is so.

Mr. Crane. We had a prominent lawyer who asked for delay in a case because he could not go on, in the absence of a witness. The district attorney did not believe it. The court demanded that he state the name of the witness; and he did, by stating that his name was Long Green.

Mr.Robinson. The second provision is about swearing to

affidavits of prejudice; in some cases affidavits are signed stating that the judge is prejudiced.

Mr.Crane. And it is the biggest mistake that ever was, psychologically. If you want to try a case, go before the man who is terribly prejudiced against you, and never before your friend. Your friend will bend over backwards and knock the dickens out of you. If you go before your enemy, the worst enemy you have, and your client's worst enemy, and put it right up to him, he will give you a square deal.

Mr. Holtzoff. I move that we strike out section 11.

Mr. Medalie. I second the motion.

Mr. Robinson. I should like to know the ground for it, so that I will understand it from the record when I get it.

Mr. Dean. Is a substitute motion in order?

The Chairman. Yes.

Mr. Dean. I move that we strike everything from line 7 on, and request that the first 6½ lines be made to read "Motions and notice of motion" -- since we have covered information and everything else.

Mr. Holtzoff. I would accept that as a substitute for my motion.

Mr.Crane. Yes; I think that is good.

Mr. Youngquist. Motions are already included by Rule 7?

The Chairman. Yes. I am troubled by one practical consideration. Whether we do it or not, there is going to be a comparing of the two sets of rules, and it is going to be immediately asked whether we are deciding that there is a higher standard of ethical conduct in the trial of civil cases than

in the trial of criminal cases. I think we will be in an awkward position.

Mr. Holtzoff. What bothers me from the standpoint of the United States attorney is that I do not think the United States attorney by signing an indictment ought to be held to vouch for it.

The Chairman. The point I have in mind is either that we should pass the whole subject by in discreet silence or else not fall far short of the standard that has been set up for civil practice.

Mr. Crane. If you are going to represent a client in a civil case and your client owes the money and told you he owes the money, you would not come into court and represent him in an effort to deny that he owed the money, but you would tell him to pay off. You might plead mitigating circumstances, but you would not go into court and try to show that he did not owe the money.

But we know that in England when the defendant told the barrister that he was guilty in a case punishable with death, could the barrister withdraw? No; he decided he could not. He took it before the law lords, and it was discussed. They told him that he should not misrepresent, he should not desert the case, but he should see that at least the defendant is convicted according to the law, and he should stay in the case.

We have an entirely different attitude in a criminal case than we have in a civil case. The man pleaded not guilty. Should he stand by his plea? He knew he was guilty. That is the question right off. That was the trouble. He knew he was guilty, and he pleaded not guilty, to begin with.

Mr. Dession. You do not know that he is guilty just because he says he is guilty. He does not know the law. I have had a case in which a man said he was guilty of burglary, and he was not guilty of it at all.

Mr.Crane. I say there is a different attitude in a criminal case than in a civil case.

Mr. Holtzoff. I think the Chairman's objection might be met by omitting section 11 entirely.

Mr.Robinson. It would not stick out like a sore thumb, but like a thumb that has been cut off!

Mr.Holtzoff. So I withdraw my second of Mr. Dean's amendment.

Mr. Dean. I withdraw my amendment.

The Chairman. Quite frankly, in my State we have never had the slightest trouble with attorneys signing pleadings, until this rule came along; and then our chancellor conceived the idea that all attorneys must sign pleadings in person. All that is the result of civil rule No. 11. It is a lot of poppy-cock, from my personal experience in my State. I cite that to show how the civil rule is being carried over into the criminal rules in my State, and perhaps in other States.

I am impressed by the fact that we cannot hold the district attorney up for endorsing the indictment, and some of the practical difficulties that Judge Crane has pointed out with respect to the defendant's attorney.

Mr.Seth. This refers only to pleadings that the defendant's attorney signs. He does not sign the defendant's pleading of guilty or not guilty.

Mr. Medalie. Rule 11 of the rules of civil procedure

related only to pleadings; did it not?

Mr. Holtzoff. Yes. Therefore there is no necessity for applying this.

Mr. Medalie. Yes; I think so.

Mr. Dean. It points out the basic difficulties when we try to relate civil with criminal. We may have the same situation later on when some one tries to compare the civil and criminal, and actually they should not be compared.

Mr. Wechsler. I think any general student of the subject would be as surprised as I am to see the civil rules adopted as a model for the system of criminal procedure.

Mr. Dession. Yes; I think our duty is to find out what are the problems in the criminal law and to draw a code for them, and to pay no attention to what is in the civil code.

I think the civil code was well drawn in so far as its problems are concerned; and I think we should have a similar attitude.

Mr. Orfield. I used to think the criminal and civil were unlike; but from actual practice I was surprised to find how similar they are.

Mr. Holtzoff. But the attorneys in the courts say they are different.

Mr. Dession. Let me raise another question. In one of our early sections it was provided that all accusations must be signed by the United States attorney. I do not necessarily object to that. But some classes of prosecution are prepared and initiated in Washington by members of the Attorney General's staff. Do you want to require that the local United States attorneys sign those? He does it as a matter of courtesy,

usually.

Mr. Holtzoff. The signing today is no different.

Mr. Dession. Quite as a matter of courtesy.

Mr. Medalie. There is a practical reason for it, too. He is the attorney. There must be a place where you can serve process, and it must be in the district in which the case is pending, and he wants to put himself in as the attorney of record. Is not that the real reason?

Mr. Holtzoff. Yes. All papers on the part of defense counsel may be served on the United States attorney.

Mr. Medalie. And certainly you would not want to serve them on Washington.

Mr. Holtzoff. And from the department's point of view I think it would be just as well, because the department always holds the United States attorney responsible for the prosecutions in his district.

Mr. Dession. I have no feeling one way or the other. I wanted to make sure that that practical problem had been taken care of.

Mr. Holtzoff. Is the motion withdrawn?

The Chairman. Do we have the substitute?

Mr. Dean. I withdraw it.

The Chairman. Then we have the original motion to strike Rule 11 as now prepared. Is there any further discussion?

Mr. Robinson. May we have a further statement of Mr. Holtzoff's reasons?

Mr. Holtzoff. Gladly. I have two reasons: First, on the part of the United States attorney, he should not be required by his signature to an indictment to be held to certify

to the statements contained in the indictment. And so far as defense counsel is concerned it seems to me that Judge Crane has so ably and well summarized the reason that I should hesitate to do so again, except simply by saying that I subscribe to everything Judge Crane has said.

Mr.Crane. Of course he does not sign any plea, as we have now defined it, anyway. And while it may apply to motions, any lawyer who signed a paper that he knew was wrong or had suspicion was wrong would be subject to discipline, anyhow.

Mr.Holtzoff. Since the only pleading is the indictment and the only written document the defendant files is a motion, this rule, which is so important in civil procedure, has no application. Those are the grounds of my motion.

The Chairman. Would it be possible as an alternative that this might be made to apply to motions and notices of motions?

Mr.Holtzoff. Then the civil rules do not hold counsel to the requirements of Rule 11 as to motions, but only hold them as to pleadings. So you would be imposing a greater burden on counsel than is imposed on the civil side of the court.

Mr. Medalie. Rule 11 of the civil rules was intended to stop fake claims and fake defenses. I think that is really the answer.

Mr. Seth. When it comes to a bill of particulars, the United States attorney should be bound when he comes to sign that. That is true.

Mr. Holtzoff. He is bound by the bill of particulars; but the question is whether he should be bound by the certificate.

Mr. Seth. I mean the certificate to it.

Mr.Dean. What is wrong with the certificate? It only says that it is to his best information and belief. He believes there is good ground for it.

Mr. Holtzoff. How about the case which sometimes occurs, in which a grand jury finds an indictment against the advice of the United States attorney?

Mr. Youngquist. That can be taken care of, as the Reporter suggested a while ago, by eliminating indictments from this section.

Mr. Holtzoff. Then all that is left is motions, and there is hardly any reason for such a rule. Rule 11 does not apply to motions in civil cases. Why should it apply to motions in criminal cases?

Mr. Youngquist. Do not motions or pleas of former jeopardy and those things we have been talking about at least fulfill the same office as pleadings in a civil case?

Mr. Holtzoff. I would refer to Judge Crane's remarks on that.

Mr. Youngquist. It is just a question whether we are going to depart wholly from the principle laid down in the rules of civil procedure. I do not see any difference whether we call them pleadings or motions. What we are calling motions are in fact pleadings -- or some of them, at least. And the whole question, it seems to me, is whether we are going to adopt the substance of the civil rule or depart from it entirely. If we are going to depart, we may as well elimina te No. 11 altogether. But if we are going to follow the precedent set by the civil rules, then I think No. 11 should remain. By Rule 7 it is already made applicable to motions and notices.

Mr.Holtzoff. Ever since yesterday morning have we not been getting away quite a bit from civil rules? Perhaps this is another place in which we ought to go away from the civil rules.

Mr.Youngquist. That is the whole question. I do not think it makes any difference whether it is motions or notices or pleadings.

Mr. Holtzoff. No.

Mr. Youngquist. It is just a flat question of whether we should adopt a different position.

Mr. Holtzoff. I think we should adopt a different position because of the different nature of civil proceedings.

Mr.Dean. There is one motion that is designed purely for delay, and that is a motion for continuance.

The Chairman. This is what I was searching for, and Mr. Tolman has been kind enough to come to my relief. The civil rules specifically apply to motions -- 7 (b) (2):

"The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

Mr. Holtzoff. That does not apply to certificates, but only formal motions.

The Chairman. Signing them -- yes; it does.

Mr. Youngquist. What do you mean by "pleadings"?

Mr. Holtzoff. The signature of an attorney constitutes a certificate. Does that apply to motions?

The Chairman. That is what it seems to say.

Mr. Youngquist. That is 7 (b)(2)?

Mr. Holtzoff. Yes.

Mr. Youngquist. "All motions and other papers".

The Chairman. Perhaps we might take Rule 11 by confining it solely to motions and notices of motions, on the ground that indictments are out, for the reasons stated, and that the plea is oral.

Mr. Holtzoff. If it is limited to motions I have no objection.

Mr.Dean. What about motions for continuance?

Mr.Crane. It does not make any difference to me, and you can put in anything you want, and certainly I am going to follow the Chairman in so far as I can. But I do want to say -- and I am so far removed from it that there is nothing personal to me, and I have been on it for nearly half a century -- that it does seem to me that a lawyer as a representative of a client does not have to certify for his client. We have condemned a lawyer for standing before a jury and saying that he knew the man was innocent or he knew the man was guilty. The thing is that he is there to present what his client has, in the best way possible, unless he knows he is doing something deceptive or dishonest or a trick, or something of that kind. So long as he is representing what his client has got he is not called upon to certify to anything; and I think we are carrying this rule too far when we put upon a lawyer -- and I never knew it to exist -- the burden of certifying to the truth or good faith, or that he has got to say to the court, when he presents what his client has to present, that he believes it himself.

I myself feel that way about it. I think you are going a little too far. And yet if the Chairman wants it, I am going to go it.

The Chairman. No; I am debating it mentally.

Mr. Crane. Sometimes I speak forcefully, but that is just my habit. Do not make a mistake and think that that means solid conviction. I will go along with the rest of you, but I just present it for consideration. We do speak freely so that we will get it off our minds.

But I am going along with the rest; and if you are inclined to put it in, I am with you.

The Chairman. No; in the face of the realities of the district attorney's position and the defendant's counsel's position I am inclined to say let us forget it.

Mr.Waite. If at the end of the State's case the defendant's counsel wants to make a motion to dismiss for insufficiency of evidence he has got to make it in writing and sign his name to it and state in effect that it is not made for purposes of delay, and all that sort of thing. I do not believe it was intended to require that that motion be made in writing, but that is the way it reads.

The Chairman. I do not get that.

Mr. Waite. It says: "Every pleading of a defendant represented by an attorney * * * * shall be signed * * * *."

Mr. Youngquist. Where is that?

Mr.Waite. "Every motion and notice of motion of a defendant represented by an attorney and of the Government shall be signed by at least one attorney of record in his individual name, whose address shall be stated."

Mr. Holtzoff. It says "Every pleading". It does not say "Every motion".

Mr. Waite. Yes; but I protested that it did not have

any meaning, so far as "pleadings" are concerned, and the word "motion" was substituted.

Mr. Robinson. But it was made to read, "Every written motion and pleading".

Mr. Waite. Oh, all right.

The Chairman. I personally am won over to Judge Crane's view. Is there any further discussion?

Mr.Robinson. Let me ask Judge Crane one question, please. If it would be possible, would it be agreeable to have the Reporter draft this rule in such a way as to meet every objection suggested by you and Mr. Holtzoff, and then submit it to you?

Mr. Crane. Of course.

Mr. Robinson. Would that be an imposition upon you?

Mr. Crane. Of course not, not at all.

Mr. Holtzoff. Yes.

The Chairman. All right. You have heard the motion made by Mr. Holtzoff.

(The motion was unanimously agreed to.)

The Chairman. Rule 16.

Mr. Medalie. I wonder how United States attorneys feel about this.

Mr. Robinson. Mr. Medalie, to answer your question, the National Association of United States Attorneys has a committee of which the chairman is Mr. McGregor, at Houston, Texas. That committee is to report to our committee its recommendations; so we soon can find out their attitude on any question we put to them.

Mr. Holtzoff. Mr. Medalie, this pre-trial procedure has

been used in criminal cases.

Mr.Medalie. I have used it informally.

Mr. Holtzoff. Yes.

Mr. Medalie. I have sat down with a United States attorney and said,"Can we try this in six months or six weeks?"

Mr. Holtzoff. I know of one case at least where it was done by the judge.

Mr. Robinson. It is on page 3, Rule 16; the recommendations and suggestions are stated, including that of Judge Way, of Virginia. Mr. Tolman's abstract is here.

Mr. Medalie. There is nothing compulsory about this; and let us wind up with an agreement and an order made on that agreement.

Mr. Holtzoff. That is all pre-trial is.

Mr. Medalie. Not in civil cases. Of course it may be in criminal cases.

Mr. Holtzoff. But even in civil cases it is all by agreement, until trial.

The Chairman. No.

Mr. Crane. I have not found it that way.

Mr. Holtzoff. But everything that is done at pre-trial must be by agreement.

Mr. Medalie. Of course you know what happens. The judge tells one of the parties to make a motion to give him the relief he is looking for.

Mr.Robinson. I doubt if the judge would do much of that in a criminal case.

Mr. Medalie. No; they will not do it.

Mr.Crane. It worked pretty well where tried; did it not?

Mr. Robinson. Yes.

The Chairman. That is true in every State in which it has been tried; and once it is adopted the judges who opposed it are the hardest workers under it.

Mr. Medalie. Under Rule 16 there would be no amendments as to pleadings, would there?

Mr. Robinson. That might be in cases in which the alibi notice and insanity notice would be worked out together by counsel. They get their information pooled, and it would be just the place for it.

Mr. Medalie. You have the provision: "The court in its discretion may establish by rule a pre-trial calendar".

Mr. Holtzoff. He does in most districts. I was going to suggest that we might well eliminate that. I should hesitate to see the United States attorney lose control of the calendar. We had one district in which the judge regulated the calendar--with a lot of disastrous results.

Mr. Crane. I wrote you about that. I did it, too, once, when I was holding criminal courts in New York. And it was a great assistance. But of course that is local. It does not take in as wide a scope, with such tremendous cases that run so long, and those with a human element.

Mr. Seth. Is not this last sentence limited to the pre-trial calendar only?

Mr. Holtzoff. Yes.

Mr. Seth. And not the trial calendar?

Mr. Holtzoff. Yes.

The Chairman. Of course you have a provision there that the district attorney shall submit to the court a proposed

calendar for pre-trial discussions; so that you reserve the right to the district attorney to control the calendar, but you make it someone's duty to initiate these proceedings.

Mr. MeDalie. I should think, too, that the defendants ought to have the right to propose preliminaries like this. Every once in a while you get a fellow who does not want to show you a paper. He has raided the office of a corporation and has taken out most of the documents under the guise of searching under a grand jury subpoena. He never has given them back, and then it is found that the district attorney has them. Although ordinarily you get what you ask for, sometimes you have a lot of resistance in the examination of documents. That does not always happen; but when it does happen the defendant ought to have an opportunity, through a procedure like this.

Mr. Youngquist. That is taken care of by Rule 34, "Discovery and Production of Documents."

Mr. Crane. Rule 34?

Mr. Youngquist. Yes.

Mr. Wechsler. It is largely that these pre-trial conferences, if they ever should be established, would assume importance on wholly non-litiguous disposition of cases -- the effectuation of a settlement, in effect, by disposing by plea. It has always seemed to me that such dispositions, which amount to most dispositions in the Federal courts, ought not be viewed with the frown with which they are sometimes viewed; and, second, that the negotiations which lead up to such dispositions might well become a more formal enterprise than ordinarily they are, and specifically that it is a good thing to bring the court into the picture, as well as the United States attorney

and the defendant's counsel.

Therefore, I am wondering, first, whether there is anything in this proposal as it now stands which means that this conference could take place only after a plea of not guilty, in which event I think it would be desirable to change that; and, second, whether it might be desirable even to point by the content of the rule to that possible utility of this pre-trial conference.

Mr. Holtzoff. I do not think this is limited to a subsequent plea of guilty or not guilty. This can be taken at any time. This conference can be had at any time, under the wording of this rule.

Mr. Wechsler. In the civil situation it ordinarily happens after the pleadings have come to an end.

The Chairman. Yes.

Mr. Wechsler. And it points to a trial.

Mr. Holtzoff. I know of one district in which, under the civil rules, they hold pre-trials even before the defendant files his answer. They do that in the District of Oregon.

Mr. Youngquist. The question is whether, however, this takes care of that possibility.

Mr. Wechsler. Of course that is a catch-all. But if you want to point out this function it might be desirable to say something about it in the rule that would afford a clue as to what you have in mind.

The Chairman. Might it be better to point that out as a possibility, rather than to make it a part of the rule itself?

Mr. Wechsler. Under the idea I entertain it might be desirable to go so far as to require that there be a conference

in the presence of the judge with reference to the possibility of a disposition of that sort. Otherwise I assume that the pressure to conduct that conference in the jail or in the district attorney's office is likely to continue, and it may be that the judge will never get in at a stage at which he really could be of help.

Mr. Holtzoff. I think it would not be practicable in a country court where the judge shows up four times or six times a year. You certainly could not stop United States attorneys and defense counsel from conferring in the meantime; and if you could, it would be undesirable to do so.

Mr. Medalie. It would not be practicable in the larger districts.

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Mr. Medalie. That is especially true with a large number.

Mr. Holtzoff. I think you have got to leave the flexibility of this rule just as you would have done in the civil rules.

Mr. Wechsler. You may be right. I do not want to be too strong about this, but what happens now in a case where after all these preliminaries and you have a large number arraigned at one time and it is known that some of them will plead guilty and some of them will plead not guilty. With reference to the men pleading guilty there is always a little discussion over the point that he knows what he is doing or there may be a statement that an arraignment has been made and that the matter is understood, but will not the whole procedure be expedited in having that kind of conference take place not at the bar but in chambers? I realize that this may not fit all cases, but it would fit many cases to have the conference have the informality of the pretrial procedure.

Mr. Holtzoff. Isn't that something for the individual court? Some judges hold pretrial in open court and some in chambers. You have got to give some leeway to the individual court.

Mr. Youngquist. There is nothing to prevent the attorney from suggesting to the court that they hold the pretrial conference after the information is filed.

Mr. Glueck. Will you want the judge in all instances, or in all felony cases present where the district attorney feels a plea of guilty to a lesser offense can be taken than that which was technically permitted--would you want the judge there at that time when this is being discussed and com-

promise is being arrived at?

Mr. Wechsler. I have seen some of the results of those compromises.

Mr. Holtzoff. I do not think you have that in federal courts because you do not have so many crimes of different degrees in federal courts.

Mr. Glueck. That is true.

Mr. Holtzoff. On the other hand in many cases negotiations take place in Washington. You cannot very well stop that.

Mr. Glueck. What about nolle pros.?

Mr. Holtzoff. Nolle pros. is an entirely different proposition. That is always the prerogative of the prosecuting attorney.

Mr. Glueck. You would not introduce any disciplining agency, any judicial agency?

Mr. Holtzoff. No, because there is no problem there actually. You do not have the same problem as in the state court because the United States attorney is a different type of official. He is not an elective official. He is under the Department of Justice rather.

Mr. Glueck. More theoretically I should say.

Mr. Holtzoff. I think it is more than theoretical. I think that some United States attorneys sometimes find the supervision a little irksome.

Mr. Youngquist. It is a very practical situation.

Mr. Wechsler. It may not be possible to achieve it in all instances, but I have no doubt particularly in those courts where probation facilities have been developed more than they have in some of the federal courts that if this kind of pro-

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cedure could be introduced at some early stage with the court operating with the assistance of the probation officer, the flexibility of negotiations and the three-party conference that you would get a lot more disposition that we would be proud of than you get under the present point of view. I pose the point only because it seems to me that where there is a chance to move along progressive lines that it should be taken.

Mr. Holtzoff. I think you are quite right but you cannot frame the work to fit every court and every judge.

Mr. Dean. Maybe we can make it clear so far as the line at which the pretrial procedure is to be used for whatever purpose it is to be used by simply stating "that at any time following the filing of the written accusation the court may" and so on.

Mr. Holtzoff. I think that is a good idea.

Mr. Youngquist. Doesn't it permit that now?

Mr. Dean. I think it does, strictly speaking, but this is suggesting more of what Mr. Wechsler has in mind. That is, that there are various opinions as to where the pretrial procedure would be. It is clear that you can do it at any time after the filing of the written accusation.

The Chairman. Start with the first line and state "at any time after the filing of the written accusation, the court may"?

Mr. Dean. Yes.

The Chairman. You do not mean "in any criminal proceeding"?

Mr. Holtzoff. No.

Mr. Dean. No.

The Chairman. Is that amendment agreeable?

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Mr. Robinson. Yes.

The Chairman. There is no objection to it. It is accepted. We still have open the point Mr. Wechsler has raised which, I think, perhaps may be best pointed out in a note.

Mr. Wechsler. I think so.

The Chairman. Is that agreeable to you?

Mr. Wechsler. Yes.

The Chairman. Then in addition to that we still have the point raised as to who shall prepare this calendar and who shall bring this about, as raised by the last sentence starting with line 21.

Mr. Holtzoff. If you leave out this last sentence then you can go back to the beginning of the rule and you get the answer. Then every United States attorney or defense counsel

2 can ask for it.

Mr. Medalie. There is another reason why I do not think there should be a pretrial calendar. That is it would prevent the attorneys at an early stage before the pretrial calendar is ready in getting the kind of relief or aid they should have. Within a week or two after the plea of not guilty, the United States attorney may say that the corporation, the defendant has a lot of papers," and I do not want to waste a lot of time subpenaing those things before the grand jury." The defendant or the attorney has the papers belonging to the defendant or to the corporation, and he may say, "as early as possible we would like to get to work on it." Then if either side is not helpful to the other, a motion is made to ask the court to set a time when this can be disposed of.

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The Chairman. If we leave that last sentence out, may we insert in line 2 the words to this effect:

"The court may in its discretion or at the request of either party"?

Mr. Holtzoff. That is a good idea.

The Chairman. That would indicate that either the Government or the defendant would have the right to bring that up.

Mr. Medalie. I think you would prefer it "on its own motion or at the request of the attorney".

The Chairman. Yes, that is right. The court may on its own motion or at the request of either party.

Mr. Holtzoff. Yes.

Mr. Robinson. Leaving out "in its discretion"?

Mr. Medalie. Yes, you want the court's discretion.

Mr. Glueck. "In its discretion" would have to come after "either party".

Mr. Crane. If it is on its own motion it would have to be in its discretion.

Mr. Robinson. The "may" is permissive.

The Chairman. The "may" is permissive or "at the request of either party."

Mr. Wechsler. I should like to point out, Mr. Chairman, that as the rule is drafted it refers only to directing the attorneys for the Government and for the defendant to appear. The offenses that I have in mind frequently argue for the appearance of the defendant himself. Should that be included in the rule?

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The Chairman. Would that not be reasonably implied? Very frequently lawyers at the pretrial conferences in civil suits have their clients appear also.

Mr. Youngquist. Where the defendant has no attorney, you mean, Mr. Wechsler?

Mr. Wechsler. Yes. He may have no attorney or he may have one.

Mr. Youngquist. He may or may not.

Mr. Wechsler. Yes.

Mr. Burke. I do not think it would be fair to the defendant or his attorney to be required to appear for a pretrial hearing. That raises the question that I have been considering in connection with this particular matter, the request on the part of the court to the attorney for the defendant to appear when there is a burden upon the attorney for the defendant because of failure to appear in connection with the request of the court, and presumably the rules, I suppose, in the simplified procedure at the time of the trial must be intended there to arrive at the truth with reference to some of the matters under consideration later in the trial, or presumably, as it may be expected in some way to take that advantage toward one side or the other. It seems to me that a joint request of either the defendant, in the event that he has no counsel, or by counsel for the defendant and the district attorney in this type of pretrial arraignment should be necessary.

The Chairman. Or of both?

Mr. Robinson. Or of both? Is that what you mean? Your amendment would be in line with the "direct" motion, "the court

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on its own motion or at the request of either party or both parties"?

Mr. Burke. It seems to me that if it is to be effective it should be at the request of both parties because I can conceive criminal proceeding in connection with matters before a federal court where it was a distinct advantage for the attorney for the defendant to refuse to come into that kind of

3 thing.

The Chairman. Well, he is summoned to a pretrial conference either on the court's motion or at the request of the district attorney. He certainly will not be in any more difficult situation than he is in the ordinary civil case.

Mr. Burke. Except that in some instances he may be trying to conceal something which as a matter of fairness to his client he may not desire to reveal until the appropriate place for it.

The Chairman. I think that very often in civil litigation you have to say frankly that "That is a matter we do not care to discuss at this time." That has often an effect on the other side of encouraging them to prod further by way of deposition. However, I do think that you can take that position and I think it can be done without offense to the judge or to counsel on the other side.

Mr. Burke. It just seemed to me that it would place an unfair burden or responsibility on the defendant which the law does not place upon him now.

The Chairman. On the other hand it seems to me that he has a more than compensating advantage in the right which is given to him to request the court to bring the district attorney in.

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I think it cuts both ways, but the knife in his hand cuts deeper.

Mr. Burke. In that situation there can be no question about it because if the defendant invoked the right to do it he cannot be heard to complain about some extralegal proceeding.

The Chairman. If it is limited to the various points which are itemized here I really do not see how it may hurt.

Mr. Burke. With respect to number 4 the court always handles that matter in any event at the time of trial.

Mr. Holtzoff. That is true but it may be useful to know in advance of the trial what is to be done.

Mr. Burke. That is purely a formal matter but the possibility of obtaining admissions of fact is something different. With documentary proof, that is one thing; but the possibility of obtaining admissions of fact seems to go to something different.

The Chairman. Well, we may get the facts of a survey so that you do not have to call the engineer or the surveyor. It may save a half hour of proof. Then you could take the testimony of a doctor by written letter.

Mr. Medalie. It would also take care of corporations.

The Chairman. To prove that they are corporations.

Mr. Medalie. Or know that you have to prove them.

The Chairman. Or know that you would be obliged to.

Mr. Youngquist. A great many formal matters can be taken care of in that way.

Mr. Medalie. My feeling about attorneys in criminal cases is that you call a man on the phone and say, "Do I have to prove so and so or do you admit it?"

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He says, "Oh, no, you do not have to prove that."

Then if there is any question about it later the court gets you together and there is very little difficulty about it. Most decent lawyers feel that way about it. I hate to try a case against a man if he feels that I am putting him to a terrible expense to establish something about which there is no dispute. I think most lawyers feel that way.

The Chairman. That is not universal.

Mr. Medalie. I think that it is not uncommon.

The Chairman. I agree with you.

Mr. Seasongood. I think the general idea, of course, of pretrial procedure is very excellent, but the matter has to be approached with some caution in criminal cases because you have several things which you do not have in civil cases. That is, you are entitled to the right of trial by jury. You are entitled to be confronted by your witnesses or your accusers. You are entitled to a public and open trial.

Now, I do not know whether you have stated this too broadly to run into the situation where somebody with a question may say that you are taking away his constitutional rights.

I think you have discussed number 2. 3 refers to admissions of fact. Sometimes you use doctors' statements without calling them in, but I doubt whether you could if the person would insist at the trial on repudiating that by the reason of being entitled to be confronted with his accuser. Then in lines 18 and 19 you are limiting the issues for trial to those not disposed of by admissions or agreements of counsel.

That brings to your consideration whether or not you have overstated the matter somewhat.

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Mr. Holtzoff. Not if counsel in the criminal case can stipulate it.

Mr. Medalie. It is stipulated in the trial.

Mr. Seasongood. Yes. A man pleaded guilty to an offense and then he was allowed to change his plea of guilty after he had been sentenced. So I think we have to approach this problem with a great deal of caution and overcome this weakness of this pretrial procedure. Then the judge takes the view that he would like a certain thing to be accomplished or feels it should be accomplished, and then when it is not accomplished and you come to trial he still feels that he is going to make the result coincide with what he wanted accomplished informally.

I think you should have these objections made, and I suppose the Reporter is loaded up with these objections.

The Chairman. Would it meet your objections to provide that the agreement reached at the pretrial shall be signed by both the district attorney and counsel for the defendant? It would really be a stipulation which would be in effect brought about by the intervention of the court rather than merely an order which the court would effect.

Mr. Medalie. The order would contain a recital that the attorneys "have come to an agreement to the following effect." Otherwise the order would mean nothing. Then the court's recital that the parties have agreed is equivalent to the effect that the parties have signed a stipulation.

The Chairman. Well, we are trying to meet the objections raised here.

Mr. Seasongood. I am favorable to it but I wanted to warn of the doubt that has occurred to me and which may occur to

others when these rules are submitted in which they will differentiate between criminal and civil cases.

The Chairman. Practically doesn't that exist, the distinction between civil and criminal cases? Isn't that actually in the mind of the judge as it is in the mind of counsel?

Mr. Seasongood. No. I had a very unfortunate experience in that regard. A judge stated a certain thing was stipulated when it was not stipulated, in a case I have now pending in the Court of Appeals.

Mr. Burke. I am in accord with the procedure. I know what has been done with the congested calendars in the several courts in Detroit since they have been using it in the pretrial docket; but I do feel that if the court on its own motion or at the request of the district attorney summoned the defendant or the defendant and his counsel in, that is something a little different from "directing." If the defendant or his counsel join in that I can see no reasonable excuse for failure to join in that. Then there can be no question about overriding the rights of anyone. Secondly some defendants with financial backing may be visiting in the courtroom while you have a jury or even in the judge's chambers and you have that sort of thing with a pretrial hearing.

Mr. Glueck. Is your motion, Mr. Burke, in connection with the word "direct"?

Mr. Burke. Yes.

Mr. Glueck. Suppose we say "invite the attorneys."

Mr. Seth. Shouldn't we say the defendant's participation is purely voluntary?

Mr. Glueck. Or something of that sort.

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Mr. Seth. That he is not required to participate at all.

Mr. Medalie. The rule here implies it.

There is another situation. Now we have been talking about wholly the disadvantages to the defendant. I think Rule 16 presents very substantial advantages to the defendant in the case of physical evidence. Certainly if he needs documents and things of that sort which are in the possession of the Government he should be in a position to get them. I feel that a large profit in Rule 16 willbe to the defendant.

Mr. Youngquist. I think so, too.

Mr. Burke. But in the hands of competent counsel I cannot assume that the court would permit any disadvantage to be taken of the ignorance of the defendant, which in the hands of incompetent counsel probably would be a disadvantage. I am not familiar with all the states but I can assume that there are times when defendants may not have that type of competent counsel.

Mr. Medalie. If the case is important I think it is unlikely that he would not have one, even though he does not have an expense account. A lot of very capable men who are underpaid are doing very fine work.

Mr. Wechsler. I do not see any reason to assume that counsel for indigent defendants throughout the country will improve appreciably after these rules go into effect.

Mr. Medalie. No, but they are not likely to be assigned to cases of this sort. The indigent defendants usually are found in narcotic cases, counterfeit passing, and such things that you do not have to try on very complicated issues. It is rather rare that there is an indigent defendant in a case that

requires serious preparation.

Mr. Wechsler. Yes, I agree, but you may have reference to offenses that I conceive this rule may not really apply to, but that may not be true in many cases.

Mr. Medalie. Do you have any statistics in mind? In talking about that last night it was stated that of 94 percent of the success that the Government has had in its criminal cases, 92 percent of it is due to pleas of guilty.

Mr. Wechsler. Yes, I had that in mind that most of these are by way of a plea of guilty, and that is likely to continue to be the case.

Mr. Medalie. And it is done without any serious effort on the part of the Government.

Mr. Wechsler. Yes, but I think that the situation presents there a different problem in the administration of criminal justice than in the litigated case with competent counsel.

Mr. Glueck. May I renew my suggestion that the term "invite" be substituted for the term "direct"?

Mr. Seasongood. I second the motion.

The Chairman. The motion is made that in line 2 where the word "direct" is that it be deleted and the word "invite" be substituted.

Does that take care of your objection?

Mr. Glueck. That presupposes acceptance of that invitation on the part of defendant's counsel before it may become a fact.

Mr. Medalie. I may call the district attorney to come in and show me his papers. He may decline.

Mr. Holtzoff. I do not think the district attorney would

decline the invitation. The defendant's counsel may, but I do not think the district attorney would.

Mr. Medalie. Well, probably not, but I would like to make sure.

Mr. Holtzoff. He has the liberty not to.

Mr. Medalie. So has any counsel who appears regularly in court.

The Chairman. I know one district where the district attorney would not hesitate to decline the invitation.

Mr. Medalie. You know it is not easy to get the district attorney to show his papers. Judge, you remember that case. Judge Cardoza wrote an opinion on the Lemon case. Judge Cardoza wrote a very learned opinion upon the history of the district attorney in criminal cases winding up by not showing a single scrap of paper.

I think you have got to compel them to do those things.

Mr. Glueck. I have in mind the possibility that once you establish this procedure that the parties may find it so beneficial that it may become customary. If you use the expression "direct" then you run into all those problems which have been raised.

The Chairman. Gentlemen, you have the two horns of the dilemma. You have got to grab one or the other.

Mr. Crane. Why not make it "request"?

Mr. Burke. It seems to me that anything other than the suggestion made by you would result in compulsion. If it is an invitation that is fine. There is no question about the equity and justice of that; but if the court requests the district attorney or on his own initiative requests the

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defendant and his counsel to appear, then there is no question of his voluntary wish in the matter.

The Chairman. Is there any further discussion?

(There was no response.)

The Chairman. Those in favor of the motion say aye.

Mr. Medalie. What is the motion?

The Chairman. The motion is to delete the term "direct" and substitute the term "invite".

Mr. Medalie. All right.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. And those opposed.

(There was a chorus of noes.)

The Chairman. The noes will have a showing of hands.

(There was a show of hands.)

The Chairman. I will count them. There are five.

We will have a show of hands by the ayes.

(There was a show of hands.)

The motion is carried. It is five to seven.

Taking the last sentence with line 21, that is deleted.

Now we have rule 20.

RULE 20

The Chairman. Any remarks, Mr. Robinson?

Mr. Robinson. Rule 20 deals with permissive joinder of defendants. The first sentence deals with the situation such as you have noticed in the rule 8, page 25, to the left, such as the Sacco-Vanzetti case where you have A and B charged with killing C. That is a case of jointly and mutually committing

the killing, the two acting to kill the deceased. In the second sentence it states:

"Two or more defendants may be accused separately--"

or they may be accused jointly. Two or more defendants may be accused jointly in one count of an indictment or other written accusation if they are alleged to have participated mutually and jointly in the offense.

I will stop on that. As you see, there you have a case of A and B or more parties jointly involved in a given criminal case.

Beginning with line 5, the second sentence:

"Two or more defendants may be accused separately, each in a separate count of the same written accusation, of an offense which has been committed by one or both of them without mutual participation."

An illustration of that is a case which I think is typical, therefore, may be used, and that is the case of State v. Blakeley, 70 P. 2nd, 799, decided in 1937.

That was a case where two defendants were joined in the same count. A was driving an automobile stage along a Pacific highway and B came along behind him. B was driving while intoxicated. A stopped his stage but did not get off the highway, thereby violating that law there. B came from the rear and drove his truck and struck the stage, and his car was thrown over into the far lane of the highway, causing a collision with the car of C which was coming from the opposite direction.

As the result of the collision C was killed.

A and B were not acquainted with each other. There was no connection between them but by their separate violations of the criminal statutes they caused the death of C.

Now, the draftsman in the indictment for involuntary manslaughter joined A and B in the same count of the indictment. That would be an example of two or more defendants committing an offense which is an example of an offense committed by one or both without mutual participation. It is drawn in this way because sometimes it may not be clear before the trial whether or not the two defendants were actually united in their participation or not. So this would permit that type of situation to be taken care of as it may arise.

Mr. Holtzoff. I am wondering whether this does not produce a technicality in our criminal procedure which does not now exist there: the distinction between mutually and joint on the one hand and joint on the other and it may give rise to a lot of laborious running around.

Mr. Crane. I was just thinking that we do not want to plan for the very exceptional cases, do we? I was going to say that I doubt whether we should try to cover the very exceptional cases. The only thing we can do here is to state the general rules.

It is my impression that if we are going to draw these rules to cover these exceptional cases we may introduce more confusion than you have.

Mr. Robinson. There are only two possible cases. That is either A and B acted together jointly or they did not.

If they acted jointly together there is no question but

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that they would be joined in the same count. The facts would be substantially the same.

Mr. Medalie. We are going very far in our criminal code. Why not put them all in?

Mr. Holtzoff. What difference does it make whether they are in the same count or in two different counts? What difference does it make?

Mr. Robinson. You know a misjoinder.

Mr. Holtzoff. It is a technicality.

Mr. Robinson. No, that is not a technicality.

Mr. Crane. You put them all in one indictment.

Mr. Wechsler. Isn't this broader than that because you have the impression in this sentence, as it is drafted, that they may be accused separately, each in a separate count in the same written accusation of an offense which has been committed by one or both of them without mutual participation.

That means that if I am accused of robbery and you are accused of transporting other stolen goods entirely, I can be charged with another section.

Mr. Dean. The difficulty grows out of the offense instead of the acts.

Mr. Robinson. Are you sure about that? I don't think so.

Mr. Dean. Join the offense of robbery or murder? That is much broader than the illustration you give.

Mr. Robinson. Of two of more defendants?

In answer to that, he is talking about murder. I am talking about one offense, the offense of manslaughter. A man was killed by the unlawful act of others; therefore you have the death of C. That crime was committed either by A or B, the

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driver who left the stage on the highway or the truck driver who came from behind while intoxicated.

Mr. Dean. To drop the distinction between offense and acts on the part of both parties, it may or may not be in the same transaction, but isn't your situation so unusual that you do not need this because you could give them in two indictments and the court will consolidate them for trial?

So, if it is designed to cover a very unusual situation, I submit that it is unusual.

Mr. Wechsler. I see the point of your draft but if you have a clause where charges against two or more persons arise out of some act or related acts or events, the charges may be joined in separate counts of the same indictment, or if in separate indictments they may be consolidated for trial.

Mr. Robinson. You are talking about joinder of offenses; I am talking about joinder of defendants.

Mr. Wechsler. No. I am thinking about joinder of defendants, the principle of unity which you have to have in the same indictment where each defendant's act or acts is related to those of the other. That seems to be the principle of the unity of the case.

There is one automobile accident. I think the defendants' joinder should be allowed, but I do not think it should be allowed unless there is that unity in the cases which will point to the unity of action if proved at the trial.

Mr. Robinson. If there is unity of intent.

Mr. Wechsler. I am not thinking about that.

Mr. Robinson. We are clear about this?

Mr. Wechsler. Yes.

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Mr. Robinson. I think it is a well stated term saying that there was mutual acting in the offense. That is taken from this Washington case by Chief Justice Steiner.

Mr. Wechsler. That rule makes either responsible as an accomplice of the other.

Mr. Robinson. No.

Mr. Wechsler. In the first sentence.

The Chairman. Would you read the first sentence, Mr. Robinson?

Mr. Robinson. (Reading)

> "Two or more defendants may be accused jointly in one count of an indictment or other written accusation if they are alleged to have participated mutually and jointly in the offense."

Mr. Crane. Why put "mutually" in there? They participated jointly in the same offense.

Mr. Robinson. In the second sentence it is "without mutual participation."

Mr. Crane. Why do you have it?

Mr. Robinson. Each of them was concerned in the case but they did not participate mutually.

Mr. Crane. What law requires "mutually"? It is simply a question that they joined in the same act.

Mr. Robinson. I do not think so. I am trying to express the unity of intent.

Mr. Crane. Suppose one man breaks in a house with the intent to kill. The other man is there at the same time with the intent to commit assault. They are both guilty of

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burglary and they are acting jointly; but the intent would not make both guilty of manslaughter or both guilty of assault.

Mr. Robinson. No.

Mr. Crane. They are separate crimes. The intent was not sufficient, but you would indict them both for burglary at the same time.

Mr. Youngquist. It seems to me that this is rather rare.

Mr. Crane. That is the point.

Mr. Youngquist. It is not likely to arise. I am afraid that if we try to cover everything, particularly rare cases, we are likely to get into complicated situations.

Mr. Holtzoff. It seems to me that we should leave out the second sentence.

In the first sentence take out the words "mutually and" and permit the joinder of persons who have jointly participated in the offense.

In the Washington case, which you have referred to, there was no joint participation any more than there was mutual participation. That is such a rare case.

Mr. Youngquist. I think the decision of the Washington court was wrong.

Mr. Robinson. There was mutuality in the collision.

Mr. Holtzoff. I move that we strike out the words "mutually and" in the first sentence, and strike out the whole second sentence.

Mr. Youngquist. I second the motion.

Mr. Wechsler. If I may repeat, I think the confusion is in the drafting rather than in the principle. I think it is possible to achieve the result that the Reporter wants without

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the confusion that now is expressed with respect to this language.

Mr. Crane. I think we know what "joint" is.

Mr. Wechsler. I think that it should be possible to achieve that without confusion and to reach a formula to join the counts where the same act or transaction or a series of events is involved.

Mr. Crane. Suppose in an exceptional case they are joined and the court says that they are improperly joined? What is so serious about that? They just separate them. You cannot imagine anyone dismissing that.

Mr. Robinson. You have a rule for that.

Mr. Crane. They just separate them. They move for separation under the rule. What difference does it make?

Mr. Wechsler. The difference is that it is desired to have them tried together and to have a single case of proof and a single disposition of the controversy.

Mr. Crane. It is so exceptional that I think you are going to get more confusion.

Mr. Robinson. There may be some cases where they do not know. There may be a case where either A or B committed a crime and they are jointly responsible.

Mr. Holtzoff. The United States attorney would not indict two people because he did not know which one of the two committed the crime.

Mr. Medalie. It should be possible to sustain the charge on proper proof even though he has got to prove they acted jointly if he is able to know that each of them contributed toward the crime.

023

Mr. Holtzoff. Is this a common situation?

Mr. Robinson. It is common enough to be taken care of.

Mr. Youngquist. Wouldn't it be enough if you leave in the third sentence and say that if there are separate written accusations the two may be consolidated for trial? Then we will avoid the difficulty.

Mr. Wechsler. There you have to define some formula to justify consolidation.

Mr. Holtzoff. Isn't that in the discretion of the court?

Mr. Youngquist. You have the same language in the preceding sentence.

Mr. Robinson. What would you suggest?

Mr. Youngquist. Where they are accused of an offense which has been committed by one or both without mutual participation in one count or other written accusation."

Mr. Robinson. That is pretty nearly incorporating that sentence into the third.

Mr. Youngquist. No, there are separate accusations but in the discretion of the court they may be consolidated at the trial.

Mr. Robinson. Well, I understand the situation. I will drop the matter. I wanted my point to be clear. That may be the situation when the evidence is practically the same. The only question is whether they can be joined in separate counts of the same indictment rather than require them to be accused separately in different indictments. That is all to the second sentence.

Mr. Wechsler. If this were held for redrafting it may be possible to meet Mr. Youngquist's objections and the other

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objections and still make the point that you have in mind.

May I advance a substitute motion that the section be passed for the present, pending reconsideration by the Reporter, rather than let the principle be rejected now?

Mr. Holtzoff. We will accept that substitute.

Mr. Dean. I second the motion.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. No.

(There was no response.)

The Chairman. It is carried.

I take it that the troublesome sentence is the second.

Mr. Robinson. Yes.

The Chairman. "Mutually" seems to be out.

Mr. Robinson. It was just used in the one court and that was in a dissenting opinion.

The Chairman. Now as to the second part of Rule 20.

Mr. Robinson. (Reading)

> "The court may order such separation of joint defendants or such groupings of joint defendants in separate trials as shall be conducive to a fair trial for each defendant and for the Government."

The Chairman. We are agreed on the first part, A, except as to the second sentence.

Mr. Wechsler. May I ask a question about B?

The Chairman. Yes.

Mr. Wechsler. Does the form of B indicate the Reporter's judgment of the complex problems of parties particularly in

large scale transactions like conspiracy and other joint crimes that it does not yield to any rule that may improve the law as it now stands?

Mr. Robinson. The rule could hardly affect substantive law.

Mr. Wechsler. No. I am merely speaking about the joinder of all the parties. It is a standard agreement in many jurisdictions that particularly in conspiracy cases joinder is excessively large and burdensome. I have seen no solution to it.

I wonder if it is your judgment that there is no solution to it by rule other than the retention of the present system which permits the joinder because they are joint offenses vested in the discretion of the court.

Mr. Crane. You cannot make any rule for that because you have those motions enumerated under our statute. You bring up a defendant and then if he wants to make a motion for separate trial he can do so. They come up mostly in murder cases but they have all been denied. There is never any serious problem there.

I do not think that you could formulate any rule whereby the judge could separate, because it all depends upon the facts and circumstances.

There are many of them in which a man makes a motion that he should not be joined with the other defendant, but the majority of them are denied. They depend upon the facts and circumstances. You cannot do more than trust to the good judgment of the judge. After all, you have to leave something to the experience and the judgment of the court.

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Mr. Youngquist. The only other alternative would be to grant separate trials as of right as we had in Minnesota by statute.

Mr. Crane. We had that but you cannot do it. It does not work.

We had separate trials where they brought some witnesses in and proved a man innocent. Then they tried the other party and he got the People's witnesses and proved that he was innocent and both of the guilty men got out.

Mr. Youngquist. I think it is wrong in Minnesota, but that is the only alternative to what is proposed here.

The Chairman. Rule 21.

RULE 21.

Mr. Robinson. Misjoinder and nonjoinder of defendants. (Reading)

> "Misjoinder of defendants is not ground for dismissal of a criminal proceeding. Defendants may be dropped, or in proceedings by information"--

Strike out "or by complaint" because you have struck that out in line 4.

(Reading)

> "Defendants may be added, by order of the court on motion of any defendant."

"Or the United States Attorney" should be added. Then "by motion of any defendant."

The Chairman. Why not say "motion of either party"?

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Mr. Robinson. We have tried to avoid calling the Government a party, as much as possible.

(Reading)

"Any defendant or the United States attorney or of its own initiative, at any stage of the proceeding and on such terms as are just. Any proceeding against a defendant may be severed at any time and proceeded with separately."

The Chairman. Why put in "at any time"?

Mr. Robinson. That is because of the Strewl case in which Judge Learned Hand wrote the opinion. In that case they accused three defendants of conspiracy and then later before the case came to trial they discovered the names of three more defendants. They tried to dismiss as to the first indictment and then bring in a new indictment which would include the defendants first named and then these new defendants.

Mr. Holtzoff. You cannot do that after the trial.

Mr. Robinson. At any time prior to the trial.

Mr. Youngquist. Why not just strike out "at any time"?

Mr. Robinson. Very well.

Mr. Medalie. Yes.

Mr. Seasongood. You want to call them United States attorneys? Is that what you call them? Have we decided on that? Isn't there a special assistant to the Attorney General?

Mr. Youngquist. Why not say "attorney for the Government"? You have an attorney for the defendant.

Mr. Seasongood. Somebody said "attorney for the United States".

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Mr. Holtzoff. The department says "United States Attorney" and the United States attorney is an attorney of record.

Mr. Dession. You have a lot of cases in which the United States attorney does not participate.

Mr. Youngquist. Why not say "attorney for the Government"?

Mr. Seasongood. Let us come to an agreement on it.

Mr. Medalie. Let us dispose of this section first and then we can come to that.

I want to find out why you have this provision only in cases where the prosecution is by information.

Mr. Robinson. You know you cannot amend an indictment.

Mr. Medalie. No. How do you do it when there is an information? Do you have persons who are not at that time under indictment prosecuted by information?

Mr. Robinson. Yes, I think it is possible to bring in new defendants.

Mr. Medalie. Who does it?

Mr. Robinson. The United States attorney.

Mr. Medalie. He really files the new information?

Mr. Robinson. Yes.

Mr. Medalie. He could do that without this.

Mr. Holtzoff. Except for the statute of limitations.

Mr. Medalie. Then you cannot bring in new ones.

Mr. Longsdorf. Do you have to have a formula for new ones?

Mr. Medalie. If you wanted to bring in new ones you file specific information. It is a new information against all of the persons.

Mr. Dean. Was that statement as against the persons in the first information?

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Mr. Medalie. The attorney has filed a new information for the new people and then consolidated the two. I think that is the indicated procedure.

Mr. Dession. Say you do not have enough new defendants to discuss to make up the new indictment.

Mr. Dean. Just name one defendant as the defendant in the second information and invoke the others as in conspiracy.

Mr. Dession. All conspiracies do not have defendants.

Mr. Medalie. I do not think this works.

The Chairman. If it does not work, it is safer to leave it out.

Mr. Medalie. Just file a second information and then consolidate it.

Mr. Robinson. I can get that Strewl case and bring it to your attention.

The Chairman. Suppose we hold that off then.

Mr. Holtzoff. The first sentence should stand.

The Chairman. Yes.

Mr. Medalie. In the last sentence in Rule 21 it states:

> "Any proceeding against a defendant may be severed and proceeded with separately."

Who does the severing?

Mr. Youngquist. The court.

Mr. Medalie. That is one thing which I think should be done now. I do not want to have any doubt about it. I think we should insert "the power of the court."

Mr. Robinson. After the word "severed" insert "by the court"?

030

Mr. Medalie. Yes.

Mr. Youngquist. Isn't that too broad "that any procedure may be severed"?

Mr. Crane. Pardon me. I want to get this amendment straight.

The Chairman. "Any proceeding against a defendant may be severed."

Strike out the words "at any time" and substitute "by the court."

Mr. Youngquist. Isn't that too broad? Aren't there some joint offenses which should not be severed?

Mr. Robinson. I do not think so.

Mr. Holtzoff. It is in the discretion of the court to grant a separate trial.

Mr. Dean. In line 5 cannot we scratch out all the words except the first two?

Mr. Holtzoff. Yes.

Mr. Medalie. Yes.

Mr. Robinson. Just leave in the first two words.

The Chairman. "By order of the court" and strike out the rest.

Mr. Medalie. Wait a minute. If you do that after the jury has been impaneled and the witness has testified, then there is jeopardy and the defendant is safe.

The court is supposed to have some sense as to the significance of his acts. The judge knows that once a witness has been sworn and has begun to testify that there is jeopardy under existing decisions.

The Chairman. That leaves open the question of adding

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defendants, and we will go into this case you mentioned.

Mr. Robinson. Yes.

The Chairman. All right. We will resume at eight o'clock this evening.

(Whereupon, at 4:35 p.m., the committee adjourned until this evening at 8 p.m.)

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NIGHT SESSION

The recess having expired, the Advisory Committee reconvened at 8 p.m., and proceeded further, as follows:

The Chairman. All right, gentlemen.

Rule 26, dealing with depositions and discovery.

Mr. Robinson. Mr. Chairman, I have here with me Mr. Fred S. Strine, who has also helped in the Reporter's office on this subject of depositions. I thought it might be desirable relief for you certainly if not for me if I just had Mr. Strine work initially on your questions this evening in regard to depositions; so we are starting on Rule 26, and any questions you have are in order.

The Chairman. All right, gentlemen, are there any questions on (a)?

Mr. Waite. May I ask the reporter if section 26 anywhere gives to the Government the right to take depositions of witnesses?

Mr. Robinson. I will pass that to Mr. Strine.

Mr. Holtzoff. Line 7.

Mr. Strine. Line 7.

Mr. Waite. I do not know quite what it means, but it says it may take a deposition only when the defendant has taken a deposition.

Mr. Strine. The way the rule is drawn at present it does not give the Government an unlimited right to take depositions. It only gives it a limited right in this particular situation when the defendant has taken depositions.

Mr. Waite. Yes.

Mr. Medalie. That is within the Constitution as we

understand at this moment.

Mr. Crane. That is, the Constitution says the defendant has to be confronted with the witnesses.

The Chairman. I do not think Mr. Strine got Mr. Waite's question at all, so will you give it to him?

Mr. Waite. I know of course that the Constitution requires confrontation. My own opinion has always been that he does not have to be confronted in court by the witness, it is enough if he is given opportunity to cross-examine, and all that sort of thing. Therefore I had hoped that we would take that forward step and give the Government the right to take depositions, assuming that it took the defendant along and gave him the opportunity to confront the witness--to take depositions, under those circumstances, where conditions made it necessary and proper.

Now, I understand from your answer that Rule 26 does not give any such privilege as that.

Mr. Strine. No, it does not.

Mr. Holtzoff. I would like to ask this: How would you meet the confrontation rule if the defendant is in jail? Confrontation is not satisfied with confrontation by defense counsel. There must be confrontation of the defendant in person. Or suppose the defendant is out on bail, who is to bear the travel expense to the place where the deposition is to be taken?

Mr. Waite. I said it might be necessary for the Government, at government expense, to take the defendant to the place where the deposition is to be taken,and confront him with the witness there, but there are times when that would be a practicality

and I think a very desirable thing at times when you cannot get the witnesses to the court.

Mr. Holtzoff. Of course ordinarily since a subpoena in a criminal case runs throughout the country the Government can bring any witness at all to the place of trial if that witness is in the United States, unless of course he is too sick to travel.

Mr. Crane. Mr. Waite, may I ask you this? You said you hoped we would take a forward step, but does confrontation mean that you simply confront the defendant anywhere? I supposed it was to confront him before the triers of the fact, who are the jury, who pass upon the credibility of the witnesses.

Now, I suppose he can waive that, and I suppose that is what you mean when you say "if he applies for deposition," Mr. Strine; then of course he waives it.

Mr. Waite. No, I would not even require him to waive it. "Confrontation" obviously has no absolute meaning. I think we are agreed on that, are we not? For illustration, I do not think we could say here it meant absolutely one thing or another. There is a question of interpretation, and if the courts should say that confrontation meant confrontation before the jury that would block any possibility of depositions; on the other hand it would be perfectly possible and logical and rational in every way for the court to say confrontation does require confrontation in a particular place, but requires just what it says--confrontation--and I would like myself to see us take the step of giving the Government that opportunity and letting the court if he wants to take the onus of putting that restrictive interpretation upon the Constitutional provision.

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Mr. Medalie. I think that is wonderful. Look- you do not need juries. A defendant has been arraigned before a magistrate, and before the magistrate the complainant and the other witnesses testify and the defendant has the opportunity to cross-examine. I am giving a New York law, Judge. The defendant waives examination. Now, you know it is the New York law which is darned conservative, and that says that the deposition of the complainant is admissible in evidence against the defendant; he had the opportunity to require him to be examined, he was there, he could have cross-examined him; he waived.

In a criminal trial if the complainant dies the deposition of the complainant in writing taken before the magistrate is admissible in the jury trial passing on the defendant's guilt. Now then, "confrontation" simply means that the defendant should have the opportunity to do certain things with respect to the witnesses against him who are offered against him at the trial before the jury.

A witness is to be examined. As you, Mr. Waite, suggest, the Government is willing to pay the defendant's expenses to go to St. John, New Brunswick, or Capetown, Africa, or Shanghai, China, and says, "Here is your money; we will pay your transportation and the transportation of your counsel; you can come out there to cross-examine." In other words, everything involved in the reason of the rule has been met by Mr. Waite's suggestion.

That is a reasonable risk, there is no constitutional difficulty involved, and you get rid of a ~~foetus~~ fetus in the criminal law, do you not?

Mr. Crane. Well, except that the spirit of it is this--

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that there is not a step in the felony charge--not a step--that can be taken in the absence of the defendant. He has got to be present at every step. He has got to be there. They cannot do a thing. They cannot hear him before the magistrate.

Mr. Medalie. No, wait a minute, I will give you some decisions. They are purely district court and maybe circuit court decisions. A trial is on before a jury, it has been running for about four weeks; one day the defendant does not show up. Says that tough friend of yours, Senior District Judge Campbell of the Eastern District of New York, "Well, we wanted him here, but he did not show up. Let the trial go on." And the Circuit Court of Appeals of the Second Circuit said he was right.

Mr. Crane. What did the United States Supreme Court say?

Mr. Seasongood. We cannot hear you gentlemen when you talk to each other, over on this side.

Mr. Medalie. You know that decision?

Mr. Holtzoff. Yes.

Mr. Medalie. The attorneys walked out at the trial. It does not stop the trial, according to Judge Campbell's decision, sustained by the C.C.A., Second Circuit.

Mr. Youngquist. Was not that on the theory he had waived his right to be present? I know we have decisions right in Minnesota where the same requirement of the presence of the defendant throughout the trial or proceedings exists, but the court has held that under certain circumstances when the defendant should have been there and could have been there but of his own volition failed to appear, he waived the right of being present; but that is a quite different thing from taking

it away from him.

Mr. Medalie. Well, they do not take it away from him. I do not think waiver is anything more than a rationalization of the whole thing. He has a fair opportunity, which puts no restrictions.

Mr. Robinson. "Privilege."

Mr. Medalie. "Privilege" would be better. -- No he has a right.

Mr. Robinson. It is a privilege too, is it not?

Mr. Medalie. It is both a right and a privilege. No, I think it is a right. I do not want to get into Hovage's categories. You men all know them better than I do. It goes back to 1914. That is a long time.

Mr. Holtzoff. What did he do with the case?

Mr. Medalie. In any event, no man gets rights by flaunting a court.

Mr. Robinson. That is right, he shouldn't.

Mr. Medalie. Now, when the Government is willing to pay his expenses to go to Capetown or Shanghai and puts up the money so he can go, there has been a judicial determination that that is fair. Now, he can go to that trial; the distance he can go, let's see, from Hudson, N.Y., to Manhattan--it also costs him money and expense to get there. Well, let's say that he lives in San Francisco, has been indicted, and is to be tried in New York, that he goes there; but the Government pays his expense. There is a compulsion, but there is no burden. The compulsion is to attend the hearings, that is all.

Mr. Crane. Well, I think your logic probably is good, but what are you going to do with the people of this country that

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have been brought up on the idea that a man goes into a trial on a felony and has to be confronted with the different witnesses? And now we are going to ask them to approve our rule which says that he can be tried on paper depositions taken in some foreign part, with the Government saying that he can go there and listen and conduct the examination if he wants to.

I think you would not get the people of the country, Pennsylvania especially, to follow that.

Mr. Medalie. Judge, you said the people of this country have been brought up on that idea. Well, the people of this country are told about something that happened to be legalistic notions supposedly dating from 1776. They never heard of them.

Mr. Crane. I know.

Mr. Medalie. They think we are crazy, they write editorials in the evening papers telling us so.

Mr. Crane. But that doesn't happen to any of the men around here? You do not mean to include us?

Mr. Medalie. This is a cross-section of the United States and its racial and other groups. They were brought up in school where they were taught these things, too. If they had not gone to those schools and colleges and high schools they never would have been notified.

Mr. Waite. Have you noticed the backwoods of New Jersey and Colorado both approved the idea? You wondered what the people of this country think.

Mr. Crane. Well, that may be, but as I said before, I can see this because here the defendant desired to take a deposition. I suppose that is not one of the certain provisions he cannot waive in the Constitution. We know that.

There are certain things he cannot waive. He could not waive perhaps a partial judge, but there are other things he can waive, and I suppose here if he has to take a deposition of course they could examine him, cross-examine him, and so forth, and then perhaps at the same time and place take other depositions. That would constitute a waiver. But if you go, and have such opposition, in which you are going to pay the expenses of a defendant to go all over the country, I would go a little slow. I would see how it worked out with the criticism on this part of it, and I should think that perhaps would--

Mr. Wechsler. Do I understand this would be limited to cases of necessity? since otherwise if you are going to pay the expenses of the Government to go to where the witness is it would be just as well to pay a witness's expenses to go to where a defendant is.

Mr. Medalie. Well, you cannot make a witness go anywhere. If a witness lives in the Urals or in South Africa or in Asia you cannot make him go.

Mr. Holtzoff. But if he sent the defendant over there, how can he bring him back?

Mr. Wechsler. Induce him to go!

Mr. Medalie. You pay his expense and everything to go to China; suppose the defendant doesn't come back? You have to extradite him.

Mr. Longsdorf. You can do that.

Mr. Crane. They would be taking depositions in the summertime.

Mr. Medalie. And practically it means this--no defendant is going out to cross-examine someone at Shanghai. He is

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sending his lawyer.

Mr. Crane. I should think he would be delighted to go, as he gets out of jail and has a joy-ride and takes his lawyer along at the expense of his Government.

Mr. Dession. Mr. Chairman, what I want to suggest is this: The idea that a defendant is entitled to confront every witness against him, some 200 years ago, was settled the other way. Every hearsay exception which is available in the law of evidence in civil trials is available in criminal trials, now, when hearsay evidence is introduced--a dying declaration, official records, regular entries made in the course of business, and all the rest of the hearsay evidence comes in. That has been settled for 200 years.

There used to be fights about this in the name of confrontation in the early cases in the United States. That is all settled. All right--he is not entitled to be confronted there. Now, in these cases the defendant waives nothing. That evidence is coming in because it has been decided by courts over and over again that there are sufficient reasons in terms of the reasonable possibilities of proof and terms of whatever you like, that that kind of evidence should come in. Now, if we have got to have a waiver from the defendant in a particular case, how do you account for the fact that all of this evidence under existing hearsay exceptions is coming in? It comes in; you all know that.

Now, if that is the case, the only question here is whether the usual conditions of a hearsay exception are being met. In other words, is there a reasonable necessity? Is the opportunity of cross-examination being afforded in so far as

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is reasonably possible under the circumstances with this kind of evidence?

That is my position on that.

Mr. Holtzoff. In support of the constitutional point, you are allowed to introduce evidence given at a prior trial of the same case if the witness has died in the meantime. Now that is not considered a violation of the confrontation rule, so I would draw the inference from that that confrontation does not mean confrontation at the trial.

Mr. Medalie. Well, I would like to go along with you on it, but the confrontation requirements are there. In the example I gave Judge Crane, of the magistrates, a complaint is filed--nothing more than an affidavit--called a complaint or an information, sworn to; the defendant waives examination; the complainant dies. That deposition, complaint, affidavit, whatever you call it, is admissible in evidence against the defendant when he goes to trial before a jury.

There is no magic about cross-examination. You had your chance and you were there to take advantage of the chance. Now, the only thing in Mr. Waite's suggestion is that you give him the chance. Let me put it this way: Even in our district, the Southern District of New York, where we have only one place where the court ordinarily sits, it sometimes happens the court sits in Poughkeepsie, and Alcocks, wanting to establish a tradition, went up to Poughkeepsie, walked into the city hall or courthouse there, wherever it was, and held a federal court.

Now, some people from Manhattan and the Bronx went up. Most people did not. There was the court. The defendants could have come there or they could not.

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Instead of that let us take a bigger area. Let us take any one of the districts--I do not know which is the largest federal district in the United States territorially--the Eastern District of Texas?

Mr. Holtzoff. The Western District of Texas.

Mr. Medalie. The Western District of Texas? Suppose a hearing is arranged there. We know as a matter of fact that most defendants would not attend if a deposition were taken. The lawyer would go. The opportunity is there to go, particularly where the defendant initiates them. Presence is not important.

What really counts is the opportunity to be present, and when the Government under judicial supervision and direction provides the expense to go and come, every possible requirement has been met, has it not?

Mr. Crane. You can see at once that that is not correct, otherwise the Government would try cases of the defendants who ran away, and yet they always insist upon picking them up somehow and waiting until they can get them and bring them in, and yet he gets away and he has had opportunity to be present, but the case does not go on, and I never heard of a defendant being tried for a felony in his absence although he had opportunity to be present.

Mr. Medalie. He has. A defendant may be tried for a felong in his absence at least so far as the law goes now, if he attended the beginning of the trial and if when he sees the case is going against him he walks out and doesn't show up, as in Judge Campbell's decision, affirmed by the C.C.A.--I do not know the name of the case. He walks out and the trial goes on

and goes to a conviction, and it is sustained, not by the Supreme Court, but at least by the C.C.A., Second Circuit.

The Chairman. Mr. Waite, do you make a motion?

Mr. Waite. Yes, but I would like if I may to explain a little further. I do not know that I made one point clear. I think it would be very/a desirable position, as I hope some of the rest of you gentlemen know. It may or may not be constitutional. I think it is constitutional myself, and the discussion here indicates that there is no absolute, and I think it would be a mistake if we tried to decide here whether it was or was not constitutional.

It would be a better thing to do, if you agree with me that it is a desirable thing, provided it is constitutional, to put it in and throw upon the court the onus of holding that it is not constitutional. I am particularly interested in this because as someone said a while ago this set of rules is going to be a standard for the States.

Now, it may be that we do not need that power of depositions particularly where process runs throughout this whole country, but that is not true in the state courts, and I should very much like to see this set up as an example and a standard for the States to follow; and so I move that the Reporter be directed to put into Rule 26--I do not know the phrase tonight--to put into Rule 26 for our consideration next time an appropriate provision giving the Government power to take depositions in case of necessity under conditions where the defendant is given an opportunity to confront the person from whom the deposition is taken.

Mr. Medalie. And the Government's paying the expenses?

Mr. Waite. Yes.

Mr. Medalie. To come and go, for himself and counsel, and necessary clerical expense?

Mr. Waite. Yes.

Mr. Medalie. Let us make it as broad as possible, to put this over.

Mr. Crane. Of course you would also have to define "necessity" would you not?

Mr. Seasongood. Mr. Chairman, I would like leave to speak to the motion if it has been seconded.

The Chairman. Is the motion seconded?

Mr. Crane. I second it.

The Chairman. Proceed.

Mr. Seasongood. I am under the impression we have a special constitutional provision in Ohio which permits this very thing. I am sorry I have not looked it up, but I am almost certain there is such a provision in the amendments to the Ohio Constitution,made in 1912.

There are these differences. I understand we have been told a subpoena on behalf of the United States runs anywhere in the United States, so there is very little necessity for the United States to take depositions, because they can subpoena the witness and bring him to the trial.

The Chairman. Except in the event of sickness?

Mr. Seasongood. Well, that may be. Yes, they cannot if he is sick, but in general they can bring the witness, or if he is sick they should ask for a postponement of the case because a material witness could not be produced.

Of course it is possible that the witness might live in

some country other than the United States, and then in that case you would have a difficulty, but that is rare.

On behalf of the defendant, if you did this you would certainly have to provide the expense for the defendant, his counsel, and you would have to send along some bailiff or court person or whatever you would call him to keep the defendant from staying in the agreeable surroundings in which he finds himself when he once got out, if you have him and his lawyer.

If he did not go, it does seem to me, with deference to the gentlemen who have spoken, that he would not be confronted in a public trial with the witnesses. He would not have to do that. A defendant might say, "A man could testify against me in a deposition off in Kamchatka or somewhere else with a great deal more freedom from restraint or pressure than he would in a federal court with the judge sitting there in his majesty and 12 jurors looking at him to see whether he tells the truth."

Mr. Glueck. Exactly; that is the point.

Mr. Seasongood. I think it would be, with deference to the gentlemen, plainly unconstitutional to provide that.

Now as to the hearsay rule being an exception, the Constitution is to be interpreted in accordance with well recognized rules of law, of which this is one, and at least he is confronted with the person who gives the hearsay testimony; so he is confronted to that extent.

I think you inject a very serious question which is to my mind almost certainly unconstitutional, and that is fortified by the fact that the Ohio Constitution was especially

amended to take care of this thing, where they do take the defendant along. He hasn't any say in the matter. If the State wants to take depositions they take him out of jail and take his lawyer along at their expense and take somebody to keep him so that he will return to his ordinary surroundings; and I do not feel that it is something we ought to stick in.

Mr. Crane. May I ask a question? Where does the money come from? You have to have appropriations, do you not?

Mr. Seasongood. May I mention this also: Won't there be difficulty if he is confined in a penitentiary? Whoever has charge of the penitentiary will say "I am not going to give this man up and run the risk of his not coming back and my being held personally liable for letting him escape."

Mr. Crane. Are the appropriations limited?

Mr. Holtzoff. Of course we have limited appropriations, but if this procedure were established by rule we would get an appropriation in order to meet this contingency.

Mr. Medalie. You could not do it unless you had the money.

Mr. Holtzoff. That is right.

Mr. Medalie. So the question of the money is purely academic, isn't it?

Mr. Crane. Not nowadays!

Mr. Seasongood. They have more money than they ever had.

Mr. Holtzoff. The warden is an officer of the Department of Justice, and the Department would just order the warden to surrender the prisoner for that purpose.

Mr. Crane. Suppose there was not an appropriation and you never have the money, would it be unconstitutional then?

Mr. Medalie. They could not carry it out and meet the

requirements. Now, look, Alex--if your man were in jail, obviously he could not go to Shanghai.

Mr. Holtzoff. No.

Mr. Medalie. Because the minute he stepped out of the 3-mile limit he would tell you and the whole Department to go plumb to hades.

Mr. Holtzoff. That is right.

Mr. Medalie. So you would not do it, if that is the case.

Mr. Holtzoff. No.

Mr. Dession. May I suggest another thing along the same line? No lawyer with any sense would use a deposition if it were feasible to use the witness, because you know perfectly well that there is a preference for witnesses. You can see why.

But I want to separate two issues here; one is the policy issue; the other is the constitutional issue. Now, your constitutional issue I think is a ghost. Now, in the first place, there has never been a statute so far as I know which has purported to authorize the use of depositions by the prosecution in criminal cases; therefore there has never been a judicial test of whether that could be done or not. That question has never been decided to my knowledge.

Now what would be the reason for having such a statute? Well, the reason would be that there are situations where it would be desirable, and I do not have in mind at all a situation where the prosecution could feasibly call a witness.

Mr. Crane. "Could not feasibly call a witness"?

The Chairman. Where he could feasibly call a witness.

Mr. Dession. Yes. Now, as a matter of fact, in the State of New York right now--as I recall the case it is People against Reeves--one may use the certified report of a state analyst as to fingerprints, or a chemist, I forget which, in any case, without producing the witness. The witness is alive, he is within not too many miles of New York City, but nevertheless it is accepted practice under the decisions in that State to introduce his certified report.

The defendant might justifiably say, "Well, why don't you bring this man here? Why don't you bring this man here so we can cross-examine him?" But the State does not have to, and there is no violation of confrontation; which incidentally is a requirement in the State of New York. So that is why I say the constitutional issue I think is a ghost, or, if I go as far as I can go, at least undecided; so I think we ought to talk about policy.

The Chairman. Are you ready for the question?

Mr. Dean. What is the necessity for it? Let us put it that way. What situations arise that make it necessary?

Mr. Dession. That is what I think we should talk about.

Mr. Dean. You have got the case of sickness, the man may be ill. He may be flat on his back for two or three years--an essential witness. I can see that. And what else do you have?

Mr. Medalie. Well, let us take the Dogherty case. The Government broke their necks to bring this fellow Mertens in from Switzerland to the United States. It cost the Government an awful lot of money to get him in here. I do not know how the Government bribed him to get him in here to testify. Mertens

was an important witness in a very important case. There would have been a miscarriage of justice if that man had not testified.

Now, the cases are few and far between, but there are a handful of cases of tremendous public importance that require that we go all over the world to get the witnesses.

The Chairman. I suppose, some of the oil men who were in Paris for years.

Mr. Medalie. Yes. Just think of this fellow Blackmer. He stayed in Paris and practically became an expatriate. He should have been examined. It was an affront to the public sense of justice that that could not be done.

Mr. Seasongood. May I suggest another thing? Excuse me for talking again, I forgot to mention it before. You are going to inject a great deal of delay in the trial of cases if you do this. A defendant could very easily say "I have got to have a witness's testimony at a remote point, and I want to go there," and you will have a long delay before that witness's testimony is obtained.

Mr. Medalie. Yes, sir. He gets it today. Many of you will remember in our bootleg cases of 1931-32 when we grabbed Voltz and wanted to prove he was connected with the ship that brought in the liquor. These defendants would hold up other trials while they made motions to take depositions in Nova Scotia, Newfoundland, and other places of that sort, and we just had to wait. The defendants can hold it up.

Now, when you get to an important case, not a case relating to seizure of a ship or its contents, bootleg contents, but a case involving a prominent public official or a great corporation or a member of the Cabinet, the public sense of

justice requires that we get all that proof, and the public feels frustrated in the sense of confidence in the administration of justice. Justice is defeated. We must do everything we can to uphold public confidence in the successful administration of criminal justice against powerful people; and in that handful of cases, only a handful, we must make this big effort.

Mr. Holtzoff. There is another case, Mr. Dean--in fact, in the case that you refer to, suppose a witness is aged or infirm and there is danger he might pass on before trial, it is useful to be able to take his deposition.

Mr. Dean. I remember one two or three years ago when I was trying a case in the United States Court for Shanghai. The process does not run out of that court to the continent here, and I had to get the fellow over there, and the only way I could do it was to bribe him to take the boat, and he said, "Well, I won't go unless you take my wife and two children with me at Government expense." We finally had to do it. It was the only way we could get him there.

Mr. Medalie. I really believe, if the case arises only once in three or four years, it is important.

Mr. Dean. That is the only one I am acquainted with.

Mr. Medalie. We must restore confidence of the public in the administration of justice. That Blackmer thing was a terrible indictment of the futility of public justice. The rich were protected.

Mr. Crane. Why do you say "restored"? What has happened to it?

Mr. Medalie. Every once in a while a situation like the

Blackmer case arises, and the public is not concerned with what we as lawyers know about constitutional limitations. They are just sore that there should be any impediment in what they regard as sensible methods for the administration of public justice.

Mr. Crane. I do not mean by personal knowledge, now, of course; you know that; but the appeal to the public. I have not heard the public finding any fault particularly with our courts.

Mr. Medalie. Of course they have.

Mr. Seasongood. We get 92 percent convictions in the federal courts.

Mr. Medalie. Not convictions--pleas of guilty. It is the occasional case that brings about an undermining of the public confidence in our processes. Now, that does not obtain in Great Britain. It happens here. It does not happen in continental countries because they have all these devices, and they are not impeded.

Mr. Crane. They do not wait for the witness in continental countries.

Mr. Medalie. But they do justice, they do not do injustice, unless there is a political reason.

Mr. Youngquist. George, the Blackmer case was somewhat different, though. He was indicted and the United States tried to extradite him, and the French Government refused to honor the extradition. That is where the real trouble lay there.

Mr. Medalie. I grant that, and I may have overstated the other situation. The fact remains, Blackmer might have found

a way out had he been examined, if the opportunity was given to the Government to examine him.

Now, you know there are many things about our constitutional provisions that we as lawyers talk about as involving some inherent notion of the American people, but what I notice is the American people think we are crazy when we talk about the Constitution. That is not what we are talking about. We are talking about things that frustrate justice.

We fall back on the Constitution, and the people of this country think the Constitution is just a means by which justice can be frustrated by the rich and the powerful.

Mr. Crane. Well, let's abolish it!

Mr. Medalie. We won't abolish it, but wherever possible we can conform this Constitution as it has been conformed over one hundred odd years to changing needs wherever possible, to bring about the one thing the constitution needs--public support.

Mr. Crane. I saw by the paper tonight that Willkie down here was charged with making a political speech before a committee.

Mr. Medalie. You did not read the paper. He had a right to make his speech. I knew what he was going to say before he said it, and it was probably very sound.

Mr. Crane. Well, all I can say is this: I will go along--I am speaking personally--with Mr. Waite, on anything he wants, but I do say this on the matter of policy: if you are going to have the government taking depositions, it is a change, isn't it?

Mr. Dean. Terrific.

Mr. Crane. Are you not going step by step to try it out, if you adopt what is suggested here by the Reporter, that you are taking it up to Congress, the Government is taking depositions when the defendant wants to take a deposition?

Mr. Youngquist. This present motion goes further than that.

Mr. Crane. I know it does. I am speaking to that first, the matter of policy in adopting it; yet I do not want to stand in the way of anything they want. I will go along.

The Chairman. I think we ought to have a vote.

Mr. Medalie. Judge, you know you have written some of the most ridiculous things that "went along."

Mr. Crane. Well, that is true. It is pretty hard.

Mr. Glueck. There, he was acting as a judge.

Mr. Crane. It is pretty hard to know just how far to go always. You do not want to hold back. I think that is true, and that is the reason I do not want to say anything that will block anything that may be useful and constitutional. We can try it out.

Mr. Medalie. Well, let us try it.

Mr. Crane. But it is awfully hard to try to keep within reasonable bounds and not simply discard everything. We have got a few safeguards left.

Mr. Medalie. Judge, as long as this Government is willing to spend the money to transport a defendant and his counsel--

Mr. Crane (interposing). How do you know they are?

Mr. Medalie. Then they can't get the deposition.

Mr. Crane. Well.

The Chairman. Gentlemen, are you ready for the motion?

Mr. Seasongood. I just want to interject one more thing. When you talk about this constitutional provision, you have in mind, gentlemen, you have a Supreme Court that is solicitous--I won't say too solicitous, whatever my opinion may be--for personal rights and civil liberties, and you are not going to get to first base in my opinion with the United States Supreme Court.

Mr. Crane. No--nor with Congress, either.

Mr. Seasongood. Sir?

Mr. Crane. I do not think you would, with Congress, either.

Mr. Seasongood. Well, the Court has to approve these rules.

The Chairman. Yes--then the Congress, next.

Mr. Dession. Before we vote I think it might be helpful if the Reporter explain to us the provisions of section (d) in this rule, which I think might take care of many of the objections.

Mr. Strine. This section (d) is very much the same as the corresponding Civil Rule. By rule 27, following this, we provide the procedure by which a party may obtain leave to take a deposition. This (d) provides that even if the depositions are taken on an order of the court, before they may be admitted he still must meet these requirements.

Mr. Dession. That is what I mean. You cannot use them just because you take them.

Mr. Strine. That is right.

Mr. Dession. I think the limitations you use should be in mind in voting on this.

Mr. Seasongood. We are not discussing verbiage or

phraseology.

Mr. Dession. Oh, no--the mere substance. When would you be able to use these things? because the discussion should not proceed on the assumption you could always use a deposition just because you had taken it.

The Chairman. The question now is on Mr. Waite's motion.

(The question being put, the Chair is in doubt.)

Mr. Crane. We were discussing this between ourselves.

The Chairman. I think you both missed the vote. You are not voting, Mr. Robinson?

Mr. Robinson. I began voting earlier in our sessions, and I decided I had better be used only in the case of a tie vote.

The Chairman. I have been doing that, but it counts too many of us out.

Mr. Crane. May we not do this: This is new, and it makes you a little thoughtful, and it is not a thing you can just vote and cast off. Can't we just have something drafted to consider it and vote on it later?

Mr. Youngquist. That is the motion.

The Chairman. That is the motion. I was going to suggest that this be drafted first and substituted, but I would like to make this suggestion, that when we get something that really seems to have a command of attention as this does, and where we haven't any direct authority to guide us one way or another in a decision, that we might well consider submitting an optional provision to the Court. We do not want to do it too many times, but I think it would be helpful to let the Court know that we were not just going down a road in the rut but that

we would consider these things when they came up.

I think this really is the first one--perhaps one other--that we have passed upon, of this type, where we might submit optional provisions to the Court for consideration.

Mr. Medalie. Mr. Chairman, I always felt whenever the vote was reasonably close that there was no substantial agreement, that the vote was divided 7 to 4 or 6 to 3 or something of that sort, we were not foreclosed but could take it up again.

The Chairman. That is right. Well, that is true, no matter what the vote is.

Mr. Medalie. I think I have indicated that in matters in which I was with the prevailing group, yet I thought the vote was close, I wanted to think about it again.

The Chairman. Mr. Waite, are you willing? I will declare the motion carried, but are you willing to come forward with another motion to submit optional provisions to the Court?

Mr. Waite. I think that is a very good idea.

The Chairman. Is that seconded?

Mr. Crane. I second it.

Mr. Longsdorf. I second it.

The Chairman. All in favor of the motion--

Mr. Seasongood (interposing) How do you get it optional?

The Chairman. Submit to the Court two alternative plans, one following substantially this, here, and the other, that embodied in Mr. Waite's suggestion. You will get the benefit in that way if the Court approves it going out in the optional form of the widespread discussion of bench and bar, and we will have a volume of opinion that may be worth something to the

Court when we give them the rules, to decide which of the two they will take.

Mr. Wechsler. Does this suggestion, Mr. Chairman, carry with it the thought that when we ultimately submit to the Court, we will submit it in that form, or that in the stage of distribution for criticism we will distribute them in that form?

The Chairman. No, I mean we are only involving ourselves now up to the point of the submission of our draft to the Court, for the purposes of obtaining permission of the Court to distribute it to the bench and bar for criticism.

Mr. Wechsler. Not for purposes of adoption?

The Chairman. That is a method pursued as I recall by the Committee on Civil Rules. Mr. Tolman can confirm that.

Mr. Longsdorf. Now, Mr. Chairman, may I ask a question for information? What is the meaning of the phrase occurring in line 3 of this rule 26, following the words "over any defendant or over property which is involved in the proceeding"?

The Chairman. An action in rem.

Mr. Youngquist. Forfeiture.

Mr. Dean. Which ones would be criminal?

Mr. Medalie. Sometimes property is one of the things involved in a case.

Mr. Longsdorf. A suppression of evidence?

Mr. Medalie. I should say seizure of liquor.

Mr. Longsdorf. Yes.

Mr. Medalie. Or of narcotics.

Mr. Robinson. Slot machines.

Mr. Medalie. Or a case of compulsion, and slot machines--things of that kind, where there is a proceeding with respect

to search and seizure, and controlled by agents at the time of the arrest or before.

Mr. Longsdorf. Or an offence against the customs revenue.

Mr. Youngquist. I am wondering whether that comes within the scope of criminal proceedings. It is merely for the forfeiture of the property. No penalty is imposed upon anyone.

Mr. Medalie. It is a dealing with evidence too.

Mr. Youngquist. That may be, but have you a criminal proceeding?

Mr. Medalie. Sooner or later it gets to be a criminal proceeding.

Mr. Youngquist. Well, not that proceeding.

Mr. Medalie. It may not, unless you have a criminal case.

Mr. Youngquist. Well, is a forfeiture for violation of the internal revenue law let us say a criminal proceeding?

Mr. Holtzoff. No.

Mr. Medalie. It can be, or may not be.

Mr. Holtzoff. It is a libel proceeding. That is civil.

Mr. Youngquist. Not the internal revenue laws. That is not a libel, is it?

Mr. Medalie. These libels arise in a number of ways. One is under the customs law. The other is under your liquor law, the other, under your Food and Drugs act. I do not know how many more. Those are three I think of readily.

Now, they ultimately wind up in criminal cases sometimes, probably very often; the identity of the person connected with the property is established. Then you get questions of search and seizure, which relate to the use of that property, the circumstances attending the seizure as evidence in the criminal

case. To that extent I think it is a part of our business.

Mr. Youngquist. I should doubt it. The act relates to proceedings prior to and including verdict or finding of guilty or not guilty by a court or jury, has been waived, or a plea of guilty in criminal cases in the district courts.

Mr. Medalie. Does it relate to evidence under that, with reference to us? Necessarily it includes us.

Mr. Youngquist. "Rules of Pleading, Practice, and Procedure. With respect to any and all proceedings prior to and including"--

Mr. Medalie. Would not that include evidence and the suppression of evidence?

Mr. Youngquist. Oh, it would include evidence, yes, but is a forfeiture or a libel proceeding a criminal proceeding? It may have a bearing upon a criminal proceeding, but I think it is not itself one.

Mr. Medalie. No, if it is only a libel I am quite sure it does not concern us.

Mr. Robinson. This language, Mr. Youngquist, is probably just involved in a proceeding. It is not necessary the property is involved.

Mr. Youngquist. It must be involved in the criminal proceeding, but how can property be involved in a criminal proceeding?

Mr. Longsdorf. Before you get jurisdiction over the person, what proceeding is there?

Mr. Youngquist. I do not see any.

Mr. Medalie. You are probably right that at that point there isn't any jurisdiction, but once an indictment or

information is filed, then very speedily proceedings start with respect to that property.

Mr. Longsdorf. Then I would strike out the words "over any defendant."

Mr. Wechsler. There has got to be a defendant in order for the other provisions of the deposition procedure to be met. If there is not a defendant there isn't anybody to send traveling around to confront.

Mr. Crane. Except the lawyer.

Mr. Orfield. Isn't this language taken from the Civil Rules?

Mr. Youngquist. Yes, it is.

Mr. Seasongood. Let the reporter make a study of it.

Mr. Medalie. Can we add the words, "or where the criminal proceeding is involved over property that is involved in the proceeding, or where a criminal proceeding is concerned," or whatever the word is that you want to use?

Mr. Youngquist. I should think the reference to property ought to be eliminated entirely.

Mr. Medalie. You mean, still have the same rights?

Mr. Youngquist. On the trial.

Mr. Medalie. And on either side? After indictment, information, or criminal proceeding has been started?

Mr. Youngquist. What do you mean by "the same rights," George?

Mr. Medalie. Well, once a man is arrested or proceeded against--is arrested, arraigned before a commissioner, complaint filed before him, or indictment or information filed, then normally his attorney will make motions with respect to

suppression of evidence, concerning the property involved in the case, if there is property involved in the case. Now, he would have that right even if we didn't have that language.

Mr. Seasongood. Cannot the Reporter make a study? The point has been suggested, whether that is to stay in or not.

Mr. Robinson. There has been some doubt about that from the beginning.

Mr. Longsdorf. Does he not submit himself to the jurisdiction by moving the suppression of evidence?

Mr. Medalie. He is a defendant, otherwise he cannot make a motion, otherwise he has no status.

Mr. Longsdorf. But when he moves, there is jurisdiction of his person?

Mr. Medalie. Of his person?

Mr. Longsdorf. Yes.

Mr. Medalie. He cannot move until he is a defendant. He has no status.

Mr. Longsdorf. He may not be arrested yet.

Mr. Medalie. He cannot make a motion if he is not arrested.

Mr. Wechsler. Is it your point that you want to see this procedure available for motions in the criminal case which relate to property, as for example a motion to recover property which has been unlawfully seized from the defendant, and not only relate to the proceedings on the substantive question of guilt or innocence?

Mr. Medalie. Yes; for example, an automobile is seized going somewhere across Texas, and which has either narcotics coming from Mexico or liquor.

Mr. Longsdorf. Or was stolen in New Mexico.

Mr. Medalie. All right. A criminal case is started, but the seizure has had some relation to the commission of an offence or the attempt to use that property, the automobile or its contents, in connection with a case against him. All he is concerned with is that that property shall not be used as evidence against him if there has been an unlawful search or seizure.

Once he becomes a defendant he can make motions with respect to that property.

Mr. Youngquist. And under this section 26, I suppose he would be permitted to take depositions in support of any proceeding connected with the indictment?

Mr. Medalie. Yes, sir.

Mr. Youngquist. Such for instance as the motion to dismiss on the ground of former jeopardy. And could he not then take a deposition to secure evidence to aid him in suppressing evidence against him?

Mr. Medalie. You have stated it very well.

Mr. Youngquist. So it is covered without any reference to property I think.

Mr. Crane. Would it do any harm to put it in there, though?

Mr. Youngquist. I think it is quite out of place.

The Chairman. Do you move to strike it out?

Mr. Youngquist. I move that the language "or over property which is involved in a proceeding" be stricken out.

Mr. Dean. Second.

Mr. Holtzoff. That is taken from the Civil Rules, and is

intended to cover the situation in the Civil Rules where you start your action by attachment, by levy. Therefore, it seems to me it is not necessary here.

Mr. Medalie. I think Mr. Youngquist's point is quite right, we do not need it, because so long as property is not involved in the criminal proceeding depositions may be taken not only for using same at the trial but for any other purpose in connection with any other proceeding connected with the criminal case.

The Chairman. The phrase goes out by consent.

Anything else on section (a)?

Mr. Seasongood. Well, if you are going to leave it all as it is in lines 5 and 6, isn't that very indefinite? And what does it mean, "subject to any privilege or right secured to the defendant by the Constitution and laws of the United States"? Why is that necessary, or what does it mean?

Mr. Robinson. It certainly would cut off any deposition to be taken by the defendant, himself, it would seem. That would be one clear thing.

Mr. Wechsler. I do not think it ought to be possible to take the deposition of a defendant.

Mr. Robinson. Certainly not.

Mr. Wechsler. I think we ought to leave out the defendant.

Mr. Dean. Right.

Mr. Robinson. Did you understand me to say we do permit the taking of the defendant's deposition?

Mr. Crane. I thought so.

Mr. Dean. Why is it in?

Mr. Youngquist. You first put it in, then you take it

out. You say, "whether a party or not," then you say, "subject to constitutional rights."

Mr. Robinson. It could only be by consent, of course, of the defendant. So he could assert his privilege against self-incrimination. He would not have to submit. It leaves it voluntary with him, that is all.

Mr. Crane. May I ask where you get that? That puzzled me, too. On page 3, at the bottom, you say this:

> "If a defendant waiving his privilege has given a deposition, the deposition shall not be admitted in evidence or otherwise used at the trial unless the defendant testifies at the trial."

Does not that refer to his deposition?

Mr. Robinson. Oh, yes. Oh, yes, if he consents; but the question you see we started off with was, Mr. Seasongood asked, "subject to any privilege or rights secured to the defendant by the constitution or laws of the United States."

Of course under the Constitution he would have the privilege against self-incrimination. He would not have to submit to deposition.

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Mr. Wechsler. What purpose could be served by providing for deposition of the defendant to be taken?

Mr. Holtzoff. Could not a defendant take a deposition of a co-defendant? Suppose a co-defendant was a very old person and there was a doubt as to whether he would live until the trial.

Mr. Wechsler. We are not talking about a defendant taking a deposition of a co-defendant. We are talking about the Government taking the deposition, aren't we?

Mr. Robinson. It does not make any difference. It does not say that.

Mr. Wechsler. Then Mr. Holtzoff has a point. I could not see any reason why the Government should want to take the deposition of the defendant unless the defendant consented.

Mr. Robinson. He might wish to have a self-serving deposition. It might be a fine way to have a defendant pack the record by taking a deposition and then refusing to take the stand.

Mr. Crane. If a defendant, no matter how voluntarily, has given a deposition, why, it is an admission in court or out of court or anywhere. It is like a letter he has written. Why shouldn't it be taken in evidence?

Mr. Robinson. It could be used as an admission if the Government wanted to introduce it.

Mr. Crane. I will speak of it at the time when you reach it.

Mr. Robinson. Well, we have some changes to suggest in lines 52 and 53.

Mr. Youngquist. With that explanation, this language in

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5 and 6 looks all right to me.

Mr. Seasongood. Why not use something more definite than that, because it may be susceptible of a reading that the Government might take the deposition, but he could raise the constitutional point that it could not be used against him at the trial.

Mr. Youngquist. In line 7, that deposition may be taken only at the instance of the defendant.

Mr. Seasongood. Or at the instance of the Government.

Mr. Youngquist. If the defendant has taken the deposition of the witness.

Mr. Seasongood. That is very indefinite, too. It is consistent with an interpretation that if the defendant takes any deposition the Government has a right to take depositions.

Mr. Robinson. His or anybody's.

Mr. Seasongood. Anybody's.

Mr. Robinson. That is a statute I happen to be familiar with. I have taken depositions under it and have had them taken against me, so to speak, where the defendant has requested that the deposition be taken of a state witness. The statute provides in some States that the prosecution may take depositions of the defendant's witnesses.

Mr. Seasongood. That won't do unless the defendant is there. The defendant may take a deposition and send his lawyer to take the deposition. According to this, the Government could then take testimony of witnesses without the defendant being present.

Mr. Robinson. Oh, no. He would have to be present. That would be his privilege and right under the Constitution.

Mr. Youngquist. I do not exactly understand the phrase in line 9, "as a prospective witness for the Government."

Does that mean that if a defendant wants to take a deposition of A and A is a prospective witness for the Government, the Government may also take the deposition of A?

Mr. Dean. Does it mean that same witness, in other words?

Mr. Robinson. It does not mean the same witness. It is not intended to mean that, of course. You cannot have the same person be a witness for the defendant and for the Government.

Mr. Youngquist. You could.

Mr. Robinson. Oh, it is possible.

Mr. Waite. What does that mean? Why would the defendant ever take the deposition of a witness for the Government?

Mr. Robinson. Well, in a case that I happened to be prosecutor in, a statutory rape case, the defendant had the deposition of the girl in the case taken.

Mr. Waite. But did he take the deposition of a witness who was a prospective witness for the Government?

2 Mr. Robinson. That is the way the statute reads. You will find that in the Indiana statute.

Mr. Waite. It does not make sense, even if it is an Indiana statute.

Mr. Medalie. You are falling for an old fallacy as to the proprietorship of a witness. The Government does not own a witness. Anyone may examine the witness. It may be through the Government's interest to examine the witness.

Mr. Dean. How about the prospective witness?

Mr. Medalie. My guess is that the young lady in this particular case would have been a witness for the Government

unless she was a witness for the defendant.

Mr. Youngquist. I should like to ask a question of the reporter. Is it intended by this language that if the defendant takes a deposition of anyone as a witness, the Government is then free to take the deposition of whatever other witnesses it chooses?

Mr. Robinson. That is the statute, yes, on which this is based.

The Chairman. This does not say so.

Mr. Robinson. Beginning at line 7, "or at the instance of the Government, deposition may be taken if the defendant shall take the deposition of a witness who is likely to become a witness for the Government."

Mr. Holtzoff. Why should the defendant take the deposition of a witness who is likely to be a witness for the Government? The defendant would take the deposition of a witness who is likely to be a witness for himself.

Mr. Robinson. It is much along the line of discovery. He wants to know what he is going to have to meet in court.

Mr. Crane. You have not the witness described. If he wants to take the deposition, he can take it and state the reason why. Why should he/guess at it and complicate it by saying that he may be a witness for the Government or that they may call him.

Mr. Youngquist. All the United States Attorney would have to do would be this: After the defendant asks to take the deposition of anybody, all he would have to say is that it is a prospective witness for the Government and open the door for the Government to take all the depositions that they like.

The Chairman. I do not see that that phrase creates anything but trouble.

Mr. Crane. This question about depositions ought to be very plain.

Mr. Wechsler. I would like to know what the answer was to Mr. Youngquist's question of a moment ago. Is it the intention to open the door so that the Government may take the deposition of that witness or any witness?

Mr. Crane. The answer was any witness.

Mr. Seasongood. That is what I objected to.

Mr. Dean. Take a case where you have a defendant in the case where you have other defendants, and this man eventually is going to turn government witness, or he is going to plead guilty or do something. In other words, he is sold out. He is not interested in the case any more, such as Fox in the Davis case. Now, in that situation that man can make the application, really at the instance of the Government, take the deposition, and then the whole full force of the prosecution is turned loose to take the deposition of anyone.

Why should there be a reciprocity in here, "If you dare use this deposition once, then the Government will come down on you"? That is the way I read it. What is the point in that?

Mr. Medalie. Following out what you say, in a mail fraud case the Government uses people who are friendly to the defendant, and when the defendant uses them who owns the witness? There is no such thing as owning a witness or being friendly to either side. The law cannot recognize that. The assumption of the law is that every witness, unless he commits perjury, is going to tell the truth.

Mr. Robinson. Just a minute, now. Why not stick to the case I gave you a minute ago, where the Government's case is going to depend on only one witness?

Mr. Medalie. The Government tells the court she was raped, and she tells the court she was not.

Mr. Robinson. Of course, that is not the situation.

Mr. Medalie. Oh, that has happened. She may have a breach of promise case back of it. The girl wants to have the fellow marry her, and she is willing to testify to certain things under the White Slave Act or otherwise to bring it about.

Mr. Robinson. Isn't the point this: that there are cases that cannot be made except by a certain witness?

Mr. Medalie. Yes.

Mr. Robinson. That is, the prosecution is dependent on the testimony of one witness. That is very commonly true.

There is no need of our imagining the impossible thing when we have our own actual experience at the bar and elsewhere. We have had those cases.

Now, the defendant can, under this statute, which is in effect in one or more States, take the deposition of the witness who is going to be the one witness for the Government or the principal witness for the Government, one who will testify to an essential detail that probably cannot be gotten from any other witness.

Now, the statute simply provides reciprocity there by saying that if the defendant does take a deposition from the witness who is to be the Government's chief witness -- that is not proprietorship but a matter of evidence or proof in a criminal case -- then, as a matter of reciprocity, the Government in

turn may take the deposition of a witness or witnesses who may necessarily be required as a part of the defendant's defense.

Mr. Crane. On what basis can the defendant take the deposition of such a witness?

Mr. Robinson. The statute allows it.

Mr. Crane. What statute? We have not any such statute. Is that an act of Congress?

Mr. Robinson. This is a state statute.

Mr. Medalie. You mean this is a deposition to be taken regardless of whether the person is out of the reach of the subpoena? Is that what you have in mind?

Mr. Robinson. I do not see why that should be necessary.

Mr. Medalie. I do not think a deposition should be taken of a witness who can be reached by subpoena --

Mr. Holtzoff. I think this provides for de bene esse depositions.

Mr. Medalie. It does not say so. If it is de bene esse
3 or a person not subject to subpoena, then you have a different situation altogether, and it does not depend on who is going to qualify a witness.

What we want to provide for is this: that persons who are not within the reach of subpoena or persons who might die or leave the jurisdiction shall, if possible, unless there is a constitutional inhibition, have their depositions taken.

Now, if we keep that in mind we can do justice, unless the Constitution stops us.

If the complainant or the supposed complainant or the injured person in a criminal case is within the jurisdiction, subject to the reach of process, and is not likely to die or

leave the jurisdiction, there is no case made, under any principle of justice, for the taking of the deposition in advance of the trial, unless you want to try the whole case by deposition.

The whole theory of trials is that you shall not take depositions unless the person is without the jurisdiction or about to die or likely to leave the jurisdiction. Now you are putting in something new in the jurisprudence which I do not think you should put in.

Mr. Robinson. May I read the statute now so we will know specifically what we are talking about? It is Section 91, 610, Burns' Indiana Statutes, 1933:

> "Depositions. A defendant, by leave of the court or by written notice to the prosecuting attorney, may take the depositions of witnesses residing within or without the State to be read on the trial, and the request of the defendant for such leave of the court or the giving by him of such notice to the prosecuting attorney shall be deemed a waiver of his constitutional right to object to the taking of depositions of witnesses by the State relative to the same matter to be read on the trial; provided, that leave to take such depositions be given the State or notice of the taking of such depositions be given to the defendant by the prosecuting attorney."

Mr. Medalie. As I understand that, if the defendant chooses to apply for the taking of depositions of persons who may be reached by subpoena, are not likely to die, are not likely to leave the jurisdiction, then the prosecution gets the same right.

Mr. Robinson. That is right. It is a conditional examination.

Mr. Glueck. It is a very difficult situation altogether, because the aim of the whole show is to use this device when you cannot use the regular device of bringing the defendant into court.

Mr. Robinson. That is not the aim. You are familiar with the taking of conditional examinations in civil cases. You want to find out what the other side is going to do on the trial.

Mr. Crane. I think that is the trouble. I think you have the idea of civil practice injected into the criminal procedure.

Mr. Robinson. This is criminal practice.

Mr. Crane. I know, but it brings up the subject we have been discussing here, as to how far the Government can take depositions. It throws the door wide open, because the defendant has waived any objection to taking any deposition.

Mr. Robinson. It has worked for over forty years.

Mr. Medalie. Do we want the Government to take depositions of persons who are available?

Mr. Robinson. It is put up for your consideration.

Mr. Longsdorf. In civil procedure it is for discovery.

Mr. Dession. At the present time if you had a grand jury sitting you could call prospective defendants. They have not been indicted yet, so you can examine them.

Mr. Medalie. Practically, you know, the Government can examine anybody it wants to after indictment and before trial on whatever pretext it has. Subpoenaing people before a grand jury does not cover that pretext, but they cannot use that testimony before a jury.

Mr. Dession. That is right, so the only new feature here is that the thing that results is a deposition instead of grand jury minutes.

For what purposes may these be used as depositions? That is not in Section (a). It is in Section (d).

Mr. Crane. I think it ought to be put up to us in good, clean fashion, and take depositions in the instances where it would be necessary, and let it go at that. I do not see how the defendant can take depositions unless they become necessary within the same rule -- the witness is sick or absent or cannot be obtained at the trial. To go beyond that is getting into the civil end of it, where you simply go into the other side's case to examine anybody, in our State, before trial, but that is a thing you would never think of in a criminal case.

Mr. Seasongood. I think the reporter has stated the matter more broadly than the Indiana statute to which he referred. That Indiana statute says that if the defendant takes a deposition the State may take a deposition on the same matter; but the way the reporter has stated it, if the defendant takes any deposition the Government can take a deposition of any one person or anybody else.

Mr. Robinson. I suppose there should be a few words set in there, a limitation.

Mr. Seasongood. The mere fact that he takes a deposition does not open the world to the prosecution.

The Chairman. Gentlemen, I thought I had understood this when I had read it first. I wonder if we would not save a lot of time if we asked Mr. Robinson to outline what they mean in this Chapter 5, so we can get the scheme of things. I see now

how dumb I was in reading it. I thought this applied to sick witnesses, witnesses who might die before the trial, or very important fellows like Mr. Blackburn who was hiding over in Paris. I see that does not apply to that.

Mr. Robinson. I beg your pardon. It does.

The Chairman. What I thought it applied to is so inconspicuous that it is lost in the shuffle. These rules run to 33.

Mr. Strine. I think it might safe time to refer to Rule 27 first. Rule 27 provides the conditions under which a deposition may be taken.

Up until the present time the only way depositions have been taken in criminal cases has been under the statute, which is Section 624, Title 28, of the Code; and depositions under that section may be taken in cases where the court finds that it is necessary in order to prevent a failure or delay of justice, and in those cases, after so finding, the court may issue an order to take the deposition of a particular witness before a commissioner. Thereafter the deposition may be used in evidence at the criminal case.

Mr. Youngquist. Taken in behalf of the defendant only?

Mr. Strine. Yes.

The Chairman. Mr. Strine, I notice Rule 27 is entitled, "Depositions Before Trial or Pending Appeal," and Rule 26 is entitled, "Depositions Pending Criminal Proceeding."

What is the difference between those two?

Mr. Strine. I think, as a matter of fact, 26 and 27 may very well be in one rule.

Mr. Robinson. We can consolidate them.

The Chairman. Those two headings seem to me to be the same.

Mr. Holtzoff. They are taken from the civil rules, are they not?

Mr. Strine. Yes.

Mr. Holtzoff. Rule 28 in the civil rules pertains to depositions before the action is ~~taken~~ commenced, and Rule 26 relates to depositions after the commencement of the action, and it may perhaps be we do not need Rule 27 here at all.

Mr. Strine. I think either one of the two would be enough.

Mr. Robinson. It is more or less a matter of choice.

Mr. Seasongood. In 27 you have depositions pending appeal.

Mr. Robinson. I would suggest that you direct the reporters to consolidate 26 and 27 in line with the discussions we have had here. I think that will take care of it, unless there is further discussion.

The Chairman. If there is no objection, I think it might be very desirable that we do that.

Will you continue, Mr. Strine?

Mr. Strine. Well, very briefly, Rule 27 adopts what has been the practice in the Federal courts when dedimus potestatum is granted. We provide here that the person desiring to take the deposition first file the request, supported by affidavit, in the district court, showing the reasons why it is necessary to take these depositions. On page 8 these various things are listed.

Mr. Crane. Page 8 of what?

Mr. Strine. It is the first page of Rule 27. It starts in line 7.

After filing that notice and serving a copy on the other side, the other side may oppose it or they may ask for ahearing

before the court, and, if necessary, the court may hold a hearing.

Mr. Glueck. Pardon me just a minute. Apropos of what we were saying before, you notice in line 14 it says, "The reasons for the defendant's inability to produce such persons," and that is narrower, therefore, than 26, which has these two types of depositions, with the additional one also referred to in 14, and this special situation.

Mr. Wechsler. Does not Rule 27 qualify Rule 26, since 27 sets forth what you must show in order to avail yourself of the right which is established in 26? Isn't that correct?

Mr. Strine. That is correct.

Mr. Dean. I do not think it is, because Section (d) of 26 relates to the uses of depositions. There is no such qualification as appears in the affidavit in Rule 27.

Mr. Wechsler. Well, of course, it would not be necessary to be in the provision that determines the use of the deposition, if it was --

Mr. Glueck. The showing you must make.

Mr. Wechsler. Yes, you have got to make the showing to get the deposition, and presumably that exists with reference to all cases in which a deposition has been obtained.

If it is true that Rule 27 is intended to qualify Rule 26, then I think it is unfortunate that the drafting should be in this form.

What we ought to begin with is a statement of the conditions under which depositions should be permitted to be taken. We are just getting to that now.

Second, there ought to be a description of the use to

which depositions could be put, assuming that they had been properly taken. Then I think we would at least know where we stand.

The Chairman. Gentlemen, I have just been discussing with the reporter here both 26 and 27. It is his feeling that we would save a lot of time if we pass both of them by until they have had a chance to reword them and consolidate them. We can not go into matters of phraseology here.

If it is agreeable, we will pass on to Rule 28.

Mr. Seasongood. Before we come to that, may I ask why were 22 to 26 left out? What were those?

Mr. Robinson. Some of them were not applicable at all.

Mr. Seasongood. I assumed not, but what were they?

Mr. Robinson. Interpleader, and so forth.

Mr. Seasongood. I see.

Mr. Strine. Rule 28 merely names the person before whom the deposition may be taken: Subdivision (a), persons within the United States; subdivision (b), persons in foreign countries who may be designated by the court to take depositions; and (c) provides that:

> "No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or who is a relative or employee of such an attorney or counsel, or who is otherwise interested in the proceeding."

The Chairman: That follows word for word, practically, the civil rule.

Mr. Strine. Yes.

The Chairman . 29.

Mr. Strine. Rule 29 would apply to the case where both parties would agree on the necessity of taking the deposition and were willing to stipulate. In such cases, upon application to the court, it is unnecessary --

The Chairman. That likewise follows the civil rule.

Rule 30.

Mr. Strine. Rule 30 provides for the taking of depositions orally and provides that the court may issue various orders to protect the parties.

The Chairman. How does this type of deposition differ from 26 and 27?

Mr. Strine. This is a deposition taken under 26 and 27. This rule covers depositions under that rule. Rule 31 covers interrogatories.

Mr. Glueck. I am just wondering, Mr. Chairman, whether in the process of reworking this topic much of this could not be consolidated as well as simplified in accordance with your general suggestion throughout that you are in favor of brevity. It does seem to me this whole field occupies an altogether disproportionate amount of your draft.

Mr. Robinson. It has the same number of rules as in the civil rules, and we tried to carry the analogy along between the two, criminal and civil.

Mr. Glueck. In civil practice depositions are used much more frequently.

Mr. Robinson. Well, that is true.

The Chairman. As a matter of fact, the amount of space given to the civil rules is much less than you will find in

statutes dealing with the same subject.

Mr. Medalie. In New York we have a handful of civil act provisions, and you know the general rules of practice that relate to that subject. In other words, you can find really the procedure prescribed without going into an awful lot of detail. I would rather, if we could, make reference to the civil practice, whatever it may be, general rules of civil procedure, statutes, or anything else.

All we ought to do here is prescribe the right to take the deposition, and then the taking of depositions and formal matters relating to it ought to be subject to the rules applicable to the taking of depositions, oral or interrogatories, in civil cases.

Mr. Robinson. We made the motion yesterday that we should not refer to civil rules in our rules.

Mr. Medalie. We made the motion yesterday not to prepare our rules in line conformative to the pattern of the civil rules.

Mr. Robinson. Further than that, we agreed not to cite them.

The Chairman. Not to incorporate by reference.

Mr. Medalie. We need not incorporate the rules. All we need to say is, whatever the practice is in connection with civil cases as distinguished from criminal cases shall refer to the practice in criminal cases -- in other words, as to matters of procedure, routine, taking of depositions, the commissioners, the oaths --

Mr. Robinson. You may incorporate by reference.

Mr. Medalie. Without saying "civil rules." Just say, whatever rules are applicable to the taking of the depositions in civil cases, once we allow them to be taken, shall apply in

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criminal cases. I do not think we need to do more than that. Otherwise you have two sets of procedure, word for word.

The right to take them is all we are concerned with. We will adopt the procedure in civil cases, whatever that may be, whether it be by statute, whether it be by rule, or whether it be by common law.

Mr. Youngquist. I am all for that. I suggested that, but you, among others, turned it down.

Mr. Medalie. I will withdraw it.

Mr. Robinson. The motion was not to cite civil rules.

Mr. Glueck. I think what Mr. Medalie means is that where the practice already exists, whether it is in these rules or elsewhere, where it is an accepted practice, all we need to say is --

Mr. Medalie. All we need do here is authorize or not authorize the taking of depositions. The procedure to be followed is the civil procedure.

Mr. Robinson. Let me suggest two facts that have been brought before the committee, one in the Southern District of New York. In one case one of the defendants requested a deposition in Timbuktu and one in Africa, or wherever it might be. It is causing difficulty. It would be open to abuse. That is all the more necessity --

Mr. Medalie. That is only the right to take the deposition. How it shall be taken is determined by the civil rules. If a judge is fool enough to say that an application is made in good faith to take a deposition in Timbuktu, when he knows perfectly well it does not need to be --

Mr. Robinson. We do not seem to be able to dispose of it

that simply.

Mr. Medalie. That is only the right to take the deposition.

Mr. Robinson. You are now talking about the method.

Mr. Medalie. It should be the civil rule method, whatever method that would be.

The Chairman. I object to it on this ground. If you say whatever the civil rule method may be, some of the districts have worked out ancillary rules of their own, and then we begin to form local rules, and that I think gets them into trouble.

It seems to me we were directed to prepare rules of criminal procedure, and the object, among other things, was to have the rules in one compact pamphlet; and even if it takes two or three pages of print, I think it is --

Mr. Medalie. Ten or twelve.

The Chairman. All right, ten or twelve. Here is a whole book of all the criminal rules, in big print, so that I can read them without my glasses. Suppose it takes three or four pages. It is better to have it here.

Mr. Medalie. You said that some districts have ancillary rules. If they can have them under the existing rules of civil procedure, they certainly can have them under the rules of criminal procedure. I do not think there is any trouble involved there. You cannot prohibit those things.

If they are not inconsistent with the rules of civil procedure, they won't be inconsistent with the rules of criminal procedure, particularly if they are written under the same pattern.

Mr. Robinson. Some of the districts are following the same practice.

Mr. Youngquist. I suggest that you set it out, and then if the court would prefer to have it by reference, let the court so indicate. In any case, we have literally fulfilled our duty.

Mr. Medalie. I feel as proud of this as the court does, and I have given more time to it than the court has. I have broken many engagements to do this work, and so has everybody else. I would like this to be a workmanlike job and complete, if it can be done, and I think it can be done.

You talk very earnestly about having lawyers who do civil work do work in criminal cases. I think that is a futile hope of yours, because of the mystery connected with criminal cases. Still, I think it is a mighty good thing to have procedure the same in both branches of trial and litigated practice wherever possible; and here for the first time we have a definite opportunity to make the things about the same.

To do it by a mere repetition of words is wholly unnecessary.

Mr. Crane. It is very easy to do what Mr. Medalie has said, because it saves us the trouble of writing something we seem to have difficulty in writing. If it is so simple, why not have the reporter put it down, and then if it is the same as it is in the civil rules, we can leave it to the Supreme Court either to adopt what we suggest or shorten it by saying, "Refer to the civil rules."

We have wasted two hours in trying to formulate this. If we come around and make it the same as the civil rules, then it will be time enough to say whether we shall adopt them. Let the reporter try his hand at it.

Mr. Youngquist. I so move.

The Chairman. All those in favor of that motion, say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, "No." (Silence.)

It is carried.

Mr. Seasongood. May I ask a question about Rule 29? It reads:

"If the defendant and the attorney for the Government so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions."

Mr. Robinson. It is a civil rule.

Mr. Seasongood. I know it is a civil rule, but here it is to be by order of the court. The court has to grant the leave and everything else.

Mr. Robinson. That is an alternative method of taking depositions.

Mr. Seasongood. It does not seem to me that it ought to lie with them. The court should have some say about whether a deposition should be taken.

Mr. Medalie. Suppose I were district attorney and you were defendant's counsel. You and I sit down and stipulate a fact and we put it in writing and each of us signs his name to it, and that stipulation is offered in evidence. We agree to certain facts.

Instead of that you and I agree that we will appear before Jim Roberts to take a deposition, and that deposition shall be used by either party in whole or in part. You can be a notary public or a mere outsider, having no official designation. We

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can do that in any case.

Mr. Seasongood. It seems to me the court should have some say as to that. Here you provide very scrupulously that the court shall order the taking of depositions. Then in another provision you provide that if they agree they shall take the deposition.

Mr. Medalie. Suppose both sides agree to putting an affidavit in evidence and they sign a stipulation to that effect. The court can take it.

Mr. Crane. I have refused to accept a stipulation in the form of an affidavit agreed to by the district attorney and the defendant's counsel. I put it under the glass of water on my desk and told them I would not receive it. I need not go into the reasons now, but it was a very wise decision.

Mr. Seasongood. I do not want a protracted discussion, but here you have provided with the utmost elaborateness that it should be by the order of the court, and then you say the court has nothing to say about it.

The Chairman. Isn't that the customary procedure in all state practice? They give you a formal way in which you can proceed, but they also say that by stipulation you can take it before anybody, at any time, and on any notice.

Mr. Medalie. I have tried criminal cases where the district attorney and I stipulated facts. Of course, the court could have rejected that stipulation.

Mr. Crane. This will come up in connection with what they are going to write. It can be taken up then, I presume.

Mr. Medalie. In the course of a trial of a case, civil or criminal, one or the other of counsel will rise and will say,

"It is agreed that if John Jones were called he would testify as follows." If material, the court takes it. Now, it is the same thing.

Mr. Seasongood. Well, not exactly, because, as I say, it lies with the prosecution and the defendant's counsel to take depositions at any time, which might be at a remote place, and the court might not like it at all.

Mr. Medalie. It does not affect the rights of either party, and that is what we are primarily concerned with.

Mr. Seasongood. Well, I do not want to argue with you too much.

The Chairman. Now, the suggestion is made by Judge Crane, I think acquiesced in, that the subject of depositions be referred to the reporter, and that will bring us on to the subject of discovery, Rule 34.

Mr. Robinson. Here again you see an effort has been made to present to you a rule which would be adapted to criminal cases so far as possible in a comparative way with the civil rule 34 applying to civil cases.

Whether or not that is possible or practicable is for your consideration. If you feel that discovery cannot be used in criminal cases, you may indicate that.

Mr. Holtzoff. Am I right that this could operate only in favor of the defendant as against the Government and never in favor of the Government as against the defendant, because the defendant could always plead the privilege against self-incrimination?

Mr. Medalie. I do not think so, if you put this modification in: "Order any party or person to permit entry upon

designated land or other property."

Mr. Holtzoff. I have in mind the first part of the rule relating to production of documents. That would operate in favor of the defendant against the Government and not in favor of the Government against the defendant. It is a one-sided proposition.

Mr. Medalie. You do not want the Government to lose any advantages. If the Government has anything in its possession which will aid the defendant, it ought to be produced, if it is true.

Mr. Holtzoff. I agree with that, but should not we condition that on a waiver by the defendant?

Mr. Medalie. No. The production of the truth ought to have no favorites.

The Chairman. Yes, but it should be bilateral.

Mr. Youngquist. If you disclose your evidence to the defendant, it gives him, if he be that kind of person, an opportunity to frame up a defense to meet it.

Mr. Holtzoff. This is not only a question of producing the truth at the trial. This is a way of getting a discovery before the trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the evidence that the Government is going to introduce at the trial.

Mr. Medalie. It is like the old terror, like the terror that if you do certain things they will foment litigation and produce frivolous claims and foment perjury. I do not think we ought to have that terror of the truth.

Mr. Holtzoff. This ought to be bilateral.

Mr. Medalie. There is a constitutional restriction against its being bilateral, and you are practicing law now in criminal cases with that handicap for the Government. Nevertheless, to the extent that the truth is available to both sides, without constitutbnal restriction, it ought to be available.

Mr. Holtzoff. This is not a question of concealing the truth. This is a question as to whether or not the evidence should be revealed -- that is, the prosecution's evidence -- before trial.

I agree with you that a prosecutor should not hold back any evidence that will help a defendant, but this is not limited to that. This rule would permit the defendant to examine into the documents that the prosecution is going to use in support of its case in order to prepare a defense.

Mr. Medalie. He is going to use it, isn't he?

Mr. Holtzoff. I think it might be very legitimate, but it seems to me that ought to be coupled with the waiver against the right of self-incrimination, so that what is sauce for the goose is sauce for the gander. That frequently leads to miscarriage of justice and the concealment of truth.

Mr. Medalie. In other words, the defendant does not produce what he knows; the prosecution produces what it does know. What harm is there in knowing what the prosecutor knows? It is the truth.

Mr. Dean. You know that the prosecution has to put it on at the trial. The defendant does not have to. In view of that burden, why should not the Government give you an opportunity to examine the revolver, for example, which was at the scene of the crime, number so-and-so, so that you have advance notice and

can prove you never heard of it. If it is sprung at you at the trial, you can never make any defense to it.

Mr. Holtzoff. Why should not the defendant, by the same token, allow the prosecutor the opportunity of inspecting some object which the defendant is going to use?

Mr. Dean. But the defendant may never take the stand. He does not have to say anything or reveal anything.

Mr. Medalie. There is another answer to that, and a very practicable one. In the last fifteen years there has developed a procedure which is utterly illegal but is going on day by day in every district in the United States where the United States Attorney is half awake. After he has procured an indictment and before trial he has a grand jury before whom he subpoenas anybody and everything, and he has ample opportunity to do it, so practically you know perfectly well that the United States Attorney is precluded from nothing that he wants to do in the way of finding out any evidence within the territorial limits of the United States, whether it be a person or an object.

Mr. Holtzoff. That is not done in many districts, because in many districts grand juries convene only at intervals.

Mr. Medalie. But where you have real, active criminal litigation going on, this kind of thing becomes important. Grand juries are available, and they do it.

The Chairman. We would not dare put this particular rule forward --

Mr. Medalie. I would dare to do it. I think we might as well be realistic about it. The district attorney always has an adequate excuse for doing it. He is considering whether or not to file a superseding indictment and he is also considering

whether or not to indict somebody for perjury or for obstruction of justice in connection with the pending case, and that is always the reason that they advance when a defendant comes in, or someone connected with him, and asks to be relieved of a subpoena. They assert it and reassert it.

Let us deal with this realistically and not by blueprint, by which we ignore things that are actually going on.

The Government has no handicap whatever in the preparation of a case, because of its power actually exercised of using grand jury process for the examination of everybody, including every one of the defendant's witnesses.

Mr. Holtzoff. But I have in mind the defendant's own papers. If he stands on his right not to produce them, he should not be given the right to examine the Government's papers.

Mr. Medalie. You would not give him a bill of particulars unless he waives the right of self-incrimination.

Mr. Holtzoff. Oh, no. I would give him a bill of particulars, but I would not let him find out what the Government has unless he discloses what he has.

Mr. Medalie. The only thing that is kept from the Government is the defendant's articles. The defendant does not have most of the things that he is going to use at the trial. They belong to other people. There is very little that he has.

Mr. Holtzoff. Take a concealment of assets in bankruptcy cases. The defendant may have books of account. He has a right to refuse to produce them at the trial or before the trial.

On the other hand, suppose the prosecutor was able to obtain some other parts of the records. Why should he be permitted to obtain discovery before the trial of those documents

which the prosecution has unless he is also willing to disclose to the prosecution the documents that he has?

Mr. Medalie. You are simply raising something that is inherent in our whole system, and that is the privilege against self-incrimination.

Mr. Holtzoff. Yes, but this is a new rule. This is not inherent. Should we make this new departure knowing that we have the --

Mr. Medalie. You take the ordinary mail fraud case. You take the ordinary case in which people are indicted in connection with some business transaction which gets into the Federal courts, including anti-trust cases, and you know the defendant has next to nothing in his possession compared with what the Government is able to get hold of against him.

Realistically, the Government has all of the cards and the defendant has next to nothing. What he has in his personal possession is negligible.

If the defendant is a corporation or if he is an officer of the corporation and was indicted in connection with the acts of that corporation, you know perfectly well that that corporation's records are subject to process.

Leaving out the rare case where an individual defendant is indicted in connection with the concealment of assets, as a bankrupt not connected with a corporation, generally speaking the Government gets everything that can possibly be gotten and far more than the defendant could get.

I do not think the rules should be based on the remote prospect of the defendant's having any advantage, because he usually does not have it.

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Mr. Holtzoff. How are you going to protect the Government against a fabrication of testimony to meet documents ~~he~~ it has in ~~his~~ its possession?

Mr. Medalie. If the Government has a document in its possession, there can be no fabrication in respect to that document. If the defendant or his counsel are foolish enough to fabricate evidence about a document, it will insure the defendant's conviction.

Mr. Dean. It seems to me that would refer to another type of rule, which would provide that if the Government is going to put on the case, the defendant should have a right to look at the documents in its possession. After the Government's case is in, if the defendant is going to take the stand and put on his case, then he shall give to the Government at that point such evidence as he relies upon. But to require, in advance of the entire trial, the defendant, who may never take the stand and never put on the defense and is under no obligation to, to give up his case in advance so that it will help the Government to win its case in chief seems to me to be hardly even reciprocal.

9 Mr. Youngquist. That is not proposed by this rule, because the defendant has his constitutional privileges. He is not required to give up everything.

Mr. Robinson. Lines 4 and 5 say that it is subject to the Constitution.

The Chairman. Mr. Holtzoff is arguing for making it bilateral by providing that if the defendant asks for this that would give the other party, namely the Government, the same privileges of discovery.

To bring it to a head, do you make a motion to that effect?

Mr. Holtzoff. I do.

The Chairman. Is there a second?

Mr. Robinson. I will second it.

The Chairman. Is there any further discussion?

All those in favor of Mr. Holtzoff's motion, by appropriate language, to make this section bilateral, respond by saying "Aye."

(There was a chorus of ayes.)

The Chairman. Those opposed, "No."

(There was a chorus of noes.)

The Chairman. The motion is lost.

Mr. Youngquist. I vote "no" because I think we should not have 34 at all.

Mr. Holtzoff. I am willing to go along with that.

Then, I move that we strike out Rule 34.

Mr. Youngquist. I second that motion.

Mr. Medalie. Well, now, in arguing against that motion, when the Government seizes a defendant's papers -- he is in the business and he has not seen most of the papers and there are many, many file cases of his own papers -- if he cannot see them, that is an outrage. When they see the papers of his corporation and he cannot see them, that outrages every sense of justice.

If you strike out Rule 34 you defeat something that satisfies the sense of justice.

Mr. Youngquist. Does not the defendant have a right to examine his own papers?

Mr. Medalie. He has not any right in the world if the court does not give it to him.

Mr. Youngquist. Would not the court give it to him?

Mr. Medalie. No.

Mr. Dean. No. I can testify to that.

Mr. Medalie. And when it does give it to him, it gives it to him under conditions that make it practically impossible to make a thorough study.

The Chairman. Is there any further discussion on the motion to strike the rule?

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

(There was a chorus of ayes.)

The Chairman. Opposed, "No."

(There was a chorus of noes.)

The Chairman. The motion is lost.

Mr. Wechsler. May I ask if there is to be a provision on the special case of investigating grand jury minutes?

Mr. Robinson. I wonder if Mr. Medalie thinks that, beginning at line 6, that would permit them to examine that. They are papers in the possession of the Government.

Mr. Medalie. I am perfectly willing that you include a protective proviso so that the defendant does not examine grand jury minutes.

Mr. Youngquist. That is not covered, because the last clause is "and which are in his possession, custody, or control."

Mr. Medalie. I am also willing that the defendant does not take the statements of witnesses that the district attorney has in his own possession.

Mr. Crane. Those are not papers, either.

Mr. Wechsler. There is a division of authority in the districts that might be resolved by these rules. Without

addressing myself as to how it should be resolved, I know it has caused trouble.

Mr. Medalie. I understand that the only way in which today you can inspect the grand jury minutes in the Federal court is in a motion to show irregularity before a grand jury.

Mr. Wechsler. I think there is some broader authority than that in favor of the inspection.

Mr. Medalie. You can examine them for the purpose of determining whether or not the grand jury had enough evidence for probable cause for indicting the defendant.

Mr. Wechsler. Yes.

Mr. Medalie. Well, that is so limited.

Mr. Holtzoff. In many districts they do not have grand jury minutes. They do not take grand jury minutes in a great many districts.

Mr. Medalie. The ordinary devices for establishing irregularity of procedure before a grand jury -- such as bullying by the district attorney; for instance, the conduct of a person in the Eastern District of New York, who was mentioned in another case in the Supreme Court. I won't mention his name. He was a capable lawyer, very zealous in that particular case-- is by establishing that conduct by affidavits of grand jurors. You have a right to get affidavits of grand jurors once the defendants are apprehended, there being no more purpose in secrecy when everybody is apprehended.

Outside of that I do not know of any respectable authority that permits the obtaining of grand jury minutes or records for the purpose of establishing that the grand jury did not have adequate evidence on which to indict a defendant.

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Now, in New York you have got a peculiar situation. The Code of Criminal Procedure in New York expressly forbids the giving of that kind of information, but the Court of Appeals said that the defendant has a constitutional right to be indicted only on evidence establishing that he has been guilty of a crime.

Therefore, they said, the only way you can find out whether or not that was done is by an inspection of the grand jury minutes, but you cannot have it unless you first show that in all probability he was indicted on a lack of prima facie evidence. Then, in aid of that motion, they gave you access to inspection of the grand jury minutes, and then you could make a motion to dismiss, provided the grand jury minutes established your point.

That was one of the far-fetched things that was established in New York before Judge Crane became an appellate judge.

Mr. Crane. In other words, it is generally denied now.

Mr. Medalie. The judges say the evidence does not establish it.

Mr. Robinson. Is there any statute now?

Mr. Crane. No. It is generally denied. It was granted in Buffalo once, but in New York they generally deny it.

Mr. Dean. Your problem is further complicated by the fact that in some districts the court attempts to impose an oath of secrecy which extends beyond the point at which they are arrested and even beyond the sitting of the court term. There is some practice that it is a secret forever.

10 Mr. Medalie. I understand there was a case in one of the western circuits which dealt with an oath administered to

witnesses to the effect that they would not disclose what they had testified to.

Mr. Youngquist. That is the practice in California.

Mr. Medalie. That might be by statute.

Mr. Youngquist. No. This is a Federal district court.

Mr. Medalie. Then that went to the Circuit Court of Appeals, which sustained a commitment for contempt for a person who refused to take that oath. Certiorari was denied by the Supreme Court. But when the district attorney or assistant district attorney brought a witness before John Knox, I understand that he laughed it off and refused to punish the witness for contempt. So it exists as a terror today, but it is questionable law whether such an oath can be administered to a witness.

Mr. Crane. An indictment in New York must contain the names of all the witnesses on the back of it.

Mr. Medalie. I think that has been ~~established~~ abolished by statute. I was on a committee of the Bar Association which brought about that abolition. They do not have that any more.

Mr. Dean. I think there are serious difficulties in permitting anyone to see the grand jury minutes, because it would be abused. On the other hand, if there are, in fact, irregularities, you have virtually no remedy, particularly if this oath of secrecy applies beyond the court term. That is our problem.

Mr. Medalie. I think we had better not tinker with it. I think we ought to let it alone. If the judges decide that that oath has no validity and that a person is not guilty of contempt for refusing to take the oath, we would have no difficulty about it.

RULE 35

The Chairman. May we proceed to rule 35, which follows substantially, I think, the civil rule.

Mr. Robinson. That is right. The same question is involved here as before, whether or not we should have a rule to correspond with the civil rule.

Mr. Seasongood. I do not say I am a great constitutional lawyer, but I believe that provision would not be upheld.

The case to which I refer is Sibbeth against Wilson & Company, which will be recorded officialy in 312 Supreme Court, involved the rule in the civil procedure of requiring compulsory examination. Four justices dissented, so that I think that that is a change.

Mr. Medalie. Could you tell us what theMassachusetts situation is on that with respect to the examination of defendants concerning their psychiatric condition?

Mr. Glueck. I referred Mr. Robinson to the so-called Briggs law in Massachusetts, which provides for the examination, as a matter of course and as a matter of routine, of persons accused of felonies and of certain other defendants by psychiatrists on the staff of the State Department of Mental Diseases, a neutral agency, and the filing of a report by those psychiatrists,that the report be available to all parties concerned, including the judge, but not admissible in evidence.

Now, in practice the way it has worked out is that that report has been used a great deal by prosecutors in borderline cases of mental disorder, in which the accused was not able to meet the requirement of due responsibility because of insanity, because he did not know right from wrong, but in which, never-

theless, there was something wrong with him.

The prosecutor had something concrete and reliable on which to exercise his discretion in accepting a plea of guilty to manslaughter, with the understanding that no sooner was the man sent to the prison than he was transferred to a mental hospital.

I suggest that you consider that statute.

Mr. Robinson. We have been thinking, of course, that you were going to work especially on judgments and applications of mental examinations in that connection. Is that mental examination compulsory?

Mr. Glueck. Yes.

Mr. Crane. I suppose there is no objection to the court's ordering an examination of the defendant to find out whether he is sane enough and mentally capable of going on with his trial.

Mr. Seasongood. I should think so.

Mr. Crane. This would be broad enoughto cover that, and I suppose there would be no objection to that, because that is being done right along and that is for his protection more than anything else.

Mr. Seasongood. In line 3 it says mental or physical condition. It also says: "of a party."

Well, I suppose you do not examine the United States. It means just a defendant.

Then you have: "Subject to the rights and privileges secured to the party by the Constitution or laws of the United States."

If I am correct, it means that you may not do it.

Mr. Medalie. You mean that if he says no you cannot do it?

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Mr. Seasongood. That is, if the assumption is correct. I think it is, as four of the justices as previously constituted said it is an infraction of the right of privacy of a person, to which I myself do not agree, but there it is. They are certainly going to say it is a right of requirement to give evidence against himself.

Mr. Youngquist. Is this intended to apply only to the cases where the question is whether the defendant can be tried, whether his present mental condition is such that he can be tried, or his present physical condition?

Mr. Medalie. He claimed he was physically incapable of doing the act with which he is charged, or being mentally incapable of intending the result of his action. Mental examination means asking questions. Physical examination means looking at him.

11 Mr. Glueck. Well, it may, but it is not thorough. Your psychological examination may entail asking him questions.

Mr. Medalie. There is no examination of his mental health without talking to him. When you talk to him you are compelling him to testify.

If you look at him or take his fingerprints or take his height and weight, that is different; or if you compel him, as in a recent case in New York, to take a shave. That happened in a murder case. The defendant in one of these Murder, Inc. cases grew whiskers so that witnesses could not identify him. The court ordered him shaved. He was shaved.

The Chairman. Gentlemen, are there any motions addressed to this rule?

Mr. Medalie. It is too heavy for us to make up our minds

as to whether we are imposing something futile on the courts or whether we are doing something that is workable. Isn't that the way you feel about that?

Mr. Seasongood. Yes.

Mr. Robinson. Here are two questions I would like to ask. One is in regard to mental examinations in insanity cases where the defendant pleads insanity. Many States have statutes providing that the court may appoint expert witnesses to examine the defendant, and since he has pleaded insanity --

Mr. Glueck. He cannot object.

Mr. Robinson. He does not object. He wants to show how crazy he is, sometimes. At least, he wants to show how much he is entitled to have that plea sustained, and so he welcomes the doctors, and they may testify as the court's own experts.

Now, should something of that kind be in the rules? That is the first question.

The second is in connection with judgments. The whole problem of the Briggs law is with reference to that type of examination prior to trial and prior to sentence. The question has come up at two or three different times, and I am wondering whether in our rules we should try to consolidate the question all in one rule, or whether we had better sift it into two or three places in the proceedings as I have indicated, where it might be material -- one at the trial, one at the time of the arrest, one preceding judgment.

What do you think about that?

The Chairman. You mean three separate provisions for an examination?

Mr. Robinson. This is preferable to that, is it not, to

have it all arranged in one separate rule -- a provision for mental examination -- and in that rule specify the places --

Mr. Glueck. The stages in the procedure.

Mr. Robinson. Yes, at which such an examination would be required.

Mr. Crane. Where he pleads insanity he is going to plead insanity at the time of the act, of course. They may appoint doctors to examine him. Whether that applies to the time of the trial or to the time of the offense, I am not quite sure, because I know there has been quite a bit of heavy scandal over the appointment of doctors in cases where it was hardly necessary for the fee they have obtained. It has caused a comment in the papers about it, because instead of putting one on it they put two or three.

Of course, that has nothing to do with the merits of the measure. I think, if it can be done, people ought to be allowed to examine the defendant where he is making a plea of insanity, and he is given experts, and they are going to testify to his mental condition, so that the present time is indicative of what his mental condition was at the time of the offense. It would narrow any objection there might be of a general examination.

Mr. Robinson. If you permit courts to call experts on the insanity issue, should you permit the courts to call experts on any other issues?

Mr. Crane. I do not know of any case except in cases of insanity where it has been admitted.

Mr. Holtzoff. Why not do it on ballistics questions?

Mr. Crane. They get experts for such ridiculous things. A man was shot in the heart from a shotgun held about 10 feet

from him, and they brought experts and brought his clothes in to show that he had been wounded by a shotgun by reason of what the clothes showed.

Mr. Seasongood. If you are going to consider this rule further, as of course you are, I do not think it is sufficiently guarded in any event. You should have a provision that if he is examined he is entitled to have his own physician present at the examination. It says "any party."

The Chairman. Must it not be changed throughout to "the defendant"?

Mr. Seasongood. I think so, because you are only talking about the defendant.

Then you have a provision in here that he has to turn over any reports that the doctors have made to the prosecution, and if he does not do so you can exclude the testimony. Well, I do not think you can prevent the defendant from defending by requiring him to turn over his evidence to the prosecution, and if not to exclude the evidence.

Mr. Holtzoff. That is a civil rule.

Mr. Seasongood. I know it is a civil rule.

The Chairman. Gentlemen, we have passed our stipulated hour, and we will adjourn now until 10 o'clock tomorrow morning.

(Whereupon, at 10:20 o'clock p.m., an adjournment was taken until tomorrow, Wednesday, September 10, 1941, at 10 o'clock a.m.)