Copy for Mr. Alexander Holtzoff, Secretary.

Thursday, September 11, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S .

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ADVISORY COMMITTEE ON RULES

OF CRIMINAL PROCEDURE,

UNITED STATES SUPREME COURT

THURSDAY, September 11, 1941.

The Committee met pursuant to adjournment, at 10 a.m., Mr. Arthur T. Vanderbilt, Chairman, presiding.

PRESENT:

Same as previously noted, except-

ABSENT:

George James Burke

Sheldon Glueck

J. O. Seth

George H. Dession

John J. Burns

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P R O C E E D I N G S

The Chairman. Gentlemen.

What rule are we on?

Mr. Robinson. 59. I think we had finished with 58.

The Chairman. In connection with Rule 58 I have just received a letter from Mr. Richard A. Chapel, chief of probations, with some valuable suggestions. It fits right in with the remarks made yesterday by Mr. Glueck, and Mr. Wechsler. We are turning it over to the Reporter so that if possible he can incorporate those ideas.

If there is nothing further on 58 we will turn to 59.

Mr. Robinson. This too will be connected with our considerations with regard to the relation of the rules to appeals. I do not believe I have any comment on 59.

Mr. Medalie. I would like to know about this provision, beginning at line 6 and on to line 7:

"the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law

Mr. Holtzoff. That would have to be changed I think in the light of a change we made yesterday striking out the rule as to findings of fact.

Mr. Medalie. Yes, but now, why "additional testimony"? I suppose the judge could take it if he were the sole trier of the fact.

Mr. Robinson. That is what it says in line 6, "tried without a jury".

Mr. Medalie. Oh, that is right. Excuse me.

Mr. Robinson. Pardon?

Mr. Medalie. That is the answer. Pardon my interposition.

The Chairman. You want the part in line 8, "amend findings of fact", out, though, do you not?

Mr. Holtzoff. Yes.

Mr. Youngquist. That would make it, then.

Mr. Robinson. Yes, that is right.

The Chairman. "and make new findings and conclusions."

Mr. Robinson. Yes.

Mr. Youngquist. He does not make findings and conclusions, under the practice we agreed on yesterday.

The Chairman. That is right.

Mr. Robinson. Yes.

The Chairman. Lines 8 and 9 are out.

Mr. Robinson. "and direct the entry of a new judgment."

The Chairman. That is in, I suppose.

Mr. Robinson. Yes.

Mr. Youngquist. On line 3, the new trial may be granted "on all or part of the issues in a criminal proceeding." Would there ever be a new trial on part of the issues in a criminal proceeding?

The Chairman. No.

Mr. Holtzoff. No.

Mr. Robinson. That goes out with some other material we put out here yesterday and the day before.

Mr. Youngquist. Yes.

Mr. Longsdorf. That is all?

Mr. Youngquist. "On all or part."

Mr. Holtzoff. Well, if that is so, I do not think you need anything beginning with the word "and" on line 3.

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Mr. Youngquist. You do not.

Mr. Holtzoff. And ending with the word "proceeding".

Mr. Youngquist. That is what I had in mine.

Mr. Orfield. Lines 4-6 state the grounds of new trial. I wonder if that states the grounds broadly enough. Ought there not to be some additional grounds for new trial? I wonder if we could not incorporate some of the provisions of the Model Code of Civil Procedure, paragraph 65.

The Chairman. How does that read?

Mr. Orfield. (reading)

"The court shall also grant a new trial for any other cause not due to his own fault, if the defendant has not received a fair and impartial trial."

Mr. Holtzoff. I think that is agreeable. There is no harm in adding it, but that is implied in the statement that is in the rule now, because that is the present law. The judge's power to grant a new trial is unlimited under the federal procedure.

Mr. Orfield. I am not prepared to say that -- giving all sorts of reasons, but I do not know if the cases have come right out and said that.

Mr. Holtzoff. Your statutes say that.

Mr. Longsdorf. I think you will find cases which have decided that for any error amounting to a miscarriage of justice or substantial prejudice to the defendant the judge can grant a new trial. Isn't that according to the usage of courts of law?

Mr. Holtzoff. I know that in the federal courts they will grant--I know a case where it was done--a new trial for

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no particular error of law but because the judge feels that an unjust result has been reached.

Mr. Longsdorf. In his discretion?

The Chairman. Is there any harm in incorporating that language that has just been read?

Mr. Holtzoff. No.

Mr. Medalie. I think if we incorporated certain language there are implied exclusions of other things, and I think it is good to let the courts continue to expand or contract according to experience.

The Chairman. But have you not a very practical difficulty in some States? Granting the new trial in the State courts is very much hedged about; unless there is some express authorization, taking a broad point of view, there is always a tendency of a new district judge to take his state law with him, and I think a little sentence like that if it doesn't hurt anybody might be very helpful to many defendants.

Mr. Longsdorf. That may be, Mr. Chairman, but when the Civil Rules were being considered I very well remember that it was with the purpose of getting away from the implications that arose out of those two specific statutes, that it was worded in this language.

We have a statute in California which lays down the grounds upon which a new trial may be granted, and the very explicitness and specification that the statute contained made it troublesome, because it gave rise to a whole flock of implications. They did not know whether those were exclusive or not, and finally we amended the statute and put in an additional subdivision giving him power to do it in his

discretion, when he thought it ought to be done.

Well, what was the result? We cut them out, all the rest.

The Chairman. You have the suggestion before you.

Mr. Dean. I would like to move that at the end of the word "United States", the 6th line, we add that general language which Mr. Orfield suggests in the A.L.I. Code.

Mr. Longsdorf. I have no objection to it.

The Chairman. I haven't any conviction for it.

Mr. Longsdorf. Would you read that again?

Mr. Orfield. (reading)

"The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."

Mr. Crane. Why do you put it, "not due to his own fault"? That is where most of the trouble comes.

Mr. Dean. I would strike those words.

Mr. Crane. Why shouldn't it be when he has been clearly in error according to the law?

Mr. Longsdorf. He means the defendant's fault.

Mr. Crane. Oh, the defendant's fault?

The Chairman. Yes.

Mr. Crane. I do not see why that should not be eliminated.

Mr. Medalie. The real object of granting a motion for a new trial is in the interest of justice, isn't it?

The Chairman. Absolutely.

Mr. Medalie. Well, wouldn't it be enough if we said just that, and let the courts develop it whichever way they can--as they should?

Mr. Dean. I meant we would have that particular language,

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but I think there ought to be a general over-all one, if the present cases restrict the motion rigidly.

Mr. Holtzoff. No, but they do not. The present cases do not restrict it, I am quite sure. I think not only the decisions but the actual practice of the federal judges is to be rather plenary in their use of the power to grant new trials.

Mr. Dean. Would there be any objection to adding this one just to cover any eventuality?

Mr. Crane. He has it--

"criminal proceedings, for any of the reasons for which new trials have heretofore been granted in criminal proceedings in the courts of the United States."

The Chairman. That is taken from the Civil Rules, Judge.

Mr. Crane. Yes.

The Chairman. But I think we can do better than that.

Mr. Crane. I think if you had this, here, it would be sufficient, wouldn't it?

The Chairman. Or even the general language Mr. Medalie suggested.

Mr. Medalie. I suggest:

"by reason of error, insufficiency of testimony, or in the interests of justice"

Mr. Holtzoff. "Or for any other reason, in the interests of justice".

Mr. Medalie. Yes.

Mr. Holtzoff. Because they are all in the interests of justice.

Mr. Medalie. That is right.

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Mr. Holtzoff. I think that is better wording.

The Chairman. That is what you said first?

Mr. Medalie. That is the first.

Mr. Holtzoff. I am afraid of the partial enumeration.

Mr. Dean. I am, too.

Mr. Crane. I think the general statement that they can grant a new trial where for any reason in the estimation of the judge it has been unfair or erroneous. I do not mean you have to recite that, but the American Institute has a good phrase, there, if you take the general one instead of specifications.

Mr. Longsdorf. Mr. Chairman, I think you will find some pretty good language in your federal statute, which is superseded by the Civil Rule. I think the Civil Rule departed from that language a little bit, and I do not think it was bettered thereby. I will try to get that, or Mr. Strine maybe can find that old New Trial section of the judiciary title.

Mr. Medalie. Well, the Judicial Code says:

"In cases where there has been a trial by jury, any reasons for which new trials have usually been granted in courts of law.

Mr. Longsdorf. Well, now, I think that is better a little bit than this, because it does not confine it at all.

Mr. Youngquist. Why not say:

"A new trial may be granted whenever required in the interests of justice."

Mr. Crane. That covers the whole thing.

The Chairman. Is that satisfactory?

Mr. Dean. That is all right.

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The Chairman. The motion then, made by somebody, is to strike from the beginning of line 4, or from the word "defendant" on line 3, to the end of the sentence, and substitute:

"whenever required in the interests of justice"

Mr. Orfield. Yes, sir.

The Chairman. Any remarks on the motion?

(The motion was agreed to.)

The Chairman. Is there anything further on (a)?

(b)?

Mr. Holtzoff. I would like to make a suggestion as to (b). I had a rather harrowing experience with a death case here several years ago which led me to the conviction that there ought not to be any time limit on a motion for a new trial on the ground of newly discovered evidence.

What I have in mind is this. In this particular case the defendant had been sentenced to death. We discovered additional evidence, sent for the defense counsel with a view to having him make a motion for a new trial, and ther after going into the matter we noticed that the time had gone by under the rules. There wasn't any remedy for this man, and all we could do was to arrange for a commutation of sentence, which we did.

Now, this sort of thing can occur not only in a death case, it can occur in a case where a person might have been sentenced to a long term of imprisonment, and after the term expires newly discovered evidence turns up. Now, of course these cases are very rare of motions for new trials on the ground of newly discovered evidence--fortunately, very rare--but in the unusual case where it arises it is very very necessary to achieve justice and there ought not to be any time

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limit.

Mr. Dean. It caused a great deal of trouble in the Mooney case, if you recall. The California statute provided that you could not make a motion for a new trial on the ground of newly discovered evidence after one year.

Mr. Holtzoff. The case I refer to, you probably recall - it was the ~~Richard Deshart~~ Lyman v. Shoppe case.

Mr. Dean. Yes, I do.

Mr. Holtzoff. And we had to ask the President to grant a commutation of sentence because the courts had lost jurisdiction to grant a new trial in the case, and the man had been sentenced to death.

The Chairman. Must there not on the other hand be some time limit as to when counsel in a particular kind of case may excite the public mind and keep on bringing in successive applications?

Mr Holtzoff. I think of course you could trust to the good judgment and discretion of the courts not to entertain frivolous applications, and we ought to have a provision that there must be due diligence.

Mr. Seasongood. That is in here.

Mr. Medalie. The California statute is doubtless like the New York statute. There is a 1-year time limit, plus the requirement of due diligence. In other words, if you could have found it out in a month, and you move at the end of six months, the court could deny your application, on the ground there was lack of diligence.

Mr. Crane. And the probability that the newly discovered evidence would affect the result.

Mr. Dean. That is right.

Mr. Medalie. And the probability that the newly discovered evidence would affect the result. That would be implicit in it anyway, because there are many items of newly discovered evidence that would make no difference or are not likely to make a difference.

Now the cases in which any injustice is possible because of that time limit are so few and far between that if you weigh any possible injustice in those very occasional and rare cases against the danger of frivolous motions being made to the annoyance of the court I think we are safer in that one case that comes up in 10 years, either in some state court or in the federal courts, to leave that to the pardoning power and avoid the annoyance to the courts. Now, a year is a long time.

Mr. Holtzoff. Well, I will suggest this, that the pardoning power after all is a matter of grace. I think the courts ought to have inherent power to remedy a palpable injustice no matter when that comes to their attention, and I think the judges can protect themselves against frivolous motions.

Mr. Orfield. May I say that in England, in the Court of Criminal Appeals, they allow an appeal at any time. There is no time limit or limit as to the grounds, and the appeal would correspond I would say to our new trial.

Mr. Youngquist. If 10 years after the conviction new evidence should be discovered, would you in that case authorize the court to entertain a motion for new trial?

Mr. Holtzoff. I would if a man were say serving a 20-year sentence in prison and were still in.

Mr. White. I have heard a criminal lawyer of great repute say that if he were allowed a new trial on newly discovered

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evidence at any time after the verdict and judgment, he could guarantee, give him money enough, to get every single man out of the penitentiary before the expiration of his sentence.

Mr. Medalie. Well, that is quite safe of him to say that, because of the impossibility of anybody meeting his offer. I do not think it is so.

Mr. Waite. If you are going to require a new trial, your "state's evidence" is gone 99 times out of 100. After three or four years they expire--you never in the world would get a conviction that late.

Mr. Orfield. Therefore I would leave it in the discretion of the court. I would not give the defendant an absolute right.

Mr. Waite. That throws a terrible burden upon the court.

Mr. Youngquist. Yes.

Mr. Holtzoff. I think the general tendency of the courts anyway is to deny motions for new trials on newly discovered evidence. It is in the exceptional case that those motions are granted, and if you have an exceptional case I think there ought to be no time limit.

It may be that I feel unduly stirred up about this point because of the rather harrowing experience we had with this death case, where the Department of Justice was helpless to get this man a new trial although we wanted to do so, and we had to resort to the pardoning power, which did not seem right.

Mr. Waite. It seems to me that is exactly what the pardoning power is for.

Mr. Holtzoff. Well, let me tell you another thing about that case. We were not willing to see the man let out to go

scot-free. We were willing for him to have a new trial. The man had been sentenced to death, and so we compromised by commuting his sentence to life imprisonment.

Mr. Medalie. Well, why didn't you want him to go scot-free? Was he implicated in the murder?

Mr. Holtzoff. No--because we were not quite sure of the new evidence. It was a question of identity, whether he was the person that had committed the hold-up. It was murder committed in the course of a hold-up. The newly discovered evidence threw a great deal of doubt upon the identification. It was evidence that had been suppressed--well, that had been in the possession of the local police, but they had not used it.

Now, some of us felt sure that if that evidence had been introduced at the trial there would have been an acquittal or at least a disagreement. We were not willing to pardon him on the ground of innocence, because we were not convinced of his innocence, but we were convinced he had not had a fair trial, because that evidence had not been before the jury, and yet there was nothing we could do about it except to commute that sentence to life imprisonment.

Mr. Waite. Now, unless it was an extremely unusual case, if there had been a new trial, by that time your 'state's evidence" would have weakened so definitely that you could not have gotten a conviction anyhow.

Mr. Holtzoff. I doubt it.

Mr. Waite. I say, unless it was an extremely unusual case.

Mr. Holtzoff. This was within a year after the trial. It was after affirmance by the court of appeals, between the time

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of affirmance and the date set for execution; but it does seem to me that the courts ought to have inherent power to grant a new trial on newly discovered evidence, at any time.

Mr. Medalie. Now what is the experience of the various States? Isn't that 1-year limitation fairly universal?

Mr. Dean. I think it is quite common.

Mr. Medalie. And do we know of any substantial number of instances, say more than 2 or 3 in 10 years, where there is any annoyance about this thing?

Mr. Holtzoff. Of course instances of this kind are isolated, but when the isolated instance occurs one does get a horrible sense of an injustice having been done and a sense of helplessness and frustration if you cannot grant a new trial merely because a certain time limit has gone by, so I think that there ought not to be any time limit on a motion for a new trial on newly discovered evidence.

Mr. Waite. I think that would be all right if there weren't any possible remedy, but inasmuch as the injustice can be prevented it seems to me to be better to let it be prevented by that means rather than raise all the difficulties and the injustices to society which you are going to get by new trials a long time after the evidence is gone.

Mr. Medalie. Mr. Chairman, to bring it to a head, I would like to move that subdivision (b) be re-written to conform to the New York and California statutes--that is, the 1-year limitation, with due diligence.

Mr. Holtzoff. I move to amend that so as to provide no time limit for motions for new trial on newly discovered evidence and to preserve the limitation on motions for new trial for any

other ground, as there provided.

Mr. Medalie. The only amendment I made was with respect to new trials with respect to newly discovered evidence.

Mr. Dean. That is all the California statute covers, is one year on that ground.

Mr. Seasongood. May I call attention to the existing rule on that? Now, the existing rule in criminal cases--that is, that I mentioned yesterday--is:

> "except in capital cases a motion for new trial solely on the ground of newly discovered evidence may be made within 60 days after final judgment without regard to the expiration of the term at which the judgment was rendered, unless an appeal has been taken, and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases the motion may be made at any time before execution of the judgment."

Mr. Medalie. I would accept the amendment as to capital cases, the one that was just read, and I think that is the New York rule.

Mr. Holtzoff. This last sentence that Mr. Seasongood read was inserted in the rule at the suggestion of the Department as a result of that murder case that I was speaking to you about.

Mr. Seasongood. Well, then it is taken care of.

Mr. Holtzoff. I know, but then similar situations may occur in cases of imprisonment.

Mr. Medalie. Then, Mr. Chairman, my motion is "one year, plus diligence, and in capital cases, any time before it is too

late."

Mr. Seasongood. It seems to me that this rule now was as carefully considered as our own, and here, in 1934, the court promulgates this rule. Also you have got this question of an appeal. You would have to take that in, that if the case is appealed you cannot reconsider it, just as you would have to provide, just as they have done here.

I would think that the rule as it is here should stand.

The Chairman. Perhaps this rule that you are reading from might be enlarged to go to a period of appeal which might be more than 60 days, might it not?

Mr. Holtzoff. Five days in criminal cases, 60 days in civil cases.

Mr. Longsdorf. I think there is a good deal of reason to believe--

Mr. Seasongood. An appeal is within 5 days after entry of judgment.

The Chairman. We have first Mr. Medalie's motion.

Mr. Youngquist. Just a moment. I think he re-stated it.

Mr. Medalie. Well, in effect, it is one year, plus due diligence, and in capital cases no limit.

Mr. Wechsler. What is the situation with respect to motions not based upon the ground of newly discovered evidence?

Mr. Medalie. Well, we take that up separately. I did not want to confuse the two.

Mr. Wechsler. I see.

Mr. Seasongood. Well, why should you want a change? I do not want to protract the discussion, but here you have a rule of the Supreme Court. What is there in the nature of things

which makes you change it, and especially a rule which takes care of the fact that you have taken an appeal where your case doesn't say anything about it, any of your amendments? Suppose the case has been appealed; it has to be appealed within 5 days. Can a person come along and make a motion any time within a year for a new trial?

Mr. Medalie. Well, there is this experience that I can point to. While an appeal is pending a motion is made for new trial on the ground of newly discovered evidence, and in the event of the denial, that part of the case is added to the record, where courts are willing to pass upon it, and where courts do not consider such a motion properly before them for appeal on the ground that it is a matter that they do not pass on they just reject it from the record.

Mr. Youngquist. I suppose that it is intended in view of the fact that we are now extending the time of the motion to a time after an appeal has been taken that proper provision will be made in the statute for the mechanics of getting it back to the district court or whatever else may be necessary?

Mr. Medalie. Well, if the district court has power to entertain a motion for a new trial on the ground of newly discovered evidence while the case is pending on appeal, I do not think we need that provision.

Mr. Seasongood. It hasn't, though. The appeal lifts the case out to the appellate court.

Mr. Youngquist. By this rule, though, we are retaining jurisdiction of the district court for this particular purpose. However, provision ought to be made so that for instance the two courts will not be working at cross purposes.

Mr. Seasongood. That is why I say the present rule is better. It says you can only do that on a remand from the court of appeals. Why, if you have got to appeal within 5 days, and appeals are automatically advanced, the case, like as not, will be submitted. I have a case right now where it is up in practically no time. It was filed in June, and it is going to be heard in October, because they are automatically advanced for hearing in the court of appeals.

Mr. Youngquist. Haven't you one more problem, that this motion may be made after it has been affirmed in the court of appeals?

Mr. Seasongood. Yes. Well then it would be remanded, and maybe the problem would be less acute, if it had been affirmed.

Mr. Medalie. Two things arise in connection with your suggestion of following the Criminal Appeals Rule, "solely upon the ground of newly discovered evidence within 60 days after final judgment." I think we ought to make that one year instead of 60 days.

Now, the other provision, "unless an appeal has been taken, and in that event the trial court may entertain the motion only on a remand of the case by the appellate court for that purpose."

The Chairman. Aren't you really now re-stating the present appeal rule that is on page 2, on the left?

Mr. Medalie. That is what I am reading from.

Mr. Seasongood. Yes.

The Chairman. Plus changing to 1 year instead of 60 days?

Mr. Youngquist. I think that is what we are trying to do.

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Mr. Crane. Are you still on the 1-year proposition. I thought if I got out you could settle it all very easily.

The Chairman. The question, Judge, seems to be on a comparison of our (b) with the recent United States Supreme Court Criminal Appeals Rule cited on page 2 on the left under 3, "Motions, 3."

Mr. Medalie. Here is the trouble I find with subdivision 3 of Rule 2 of the Criminal Appeals Rules: "The trial court may entertain the motion only on remand of the case by the appellate court for that purpose." "For that purpose" means for the purpose of considering a motion for a new trial on the ground of newly discovered evidence.

Mr. Seasongood. Yes, sir.

Mr. Medalie. Now, how does the appellate court know anything about that?

Mr. Wechsler. You make the motion in the appellate court to remand for that purpose.

Mr. Seasongood. That is the court that has jurisdiction and that is where you have to do it.

The Chairman. Or the court of appeals kept such jurisdiction.

Mr. Seasongood. Yes.

Mr. Medalie. I can go along on that. I can see that clearly. You still have your 1-year limitation.

The Chairman. Are these motions abandoned?

Mr. Medalie. If in that one year the case is in the appellate court you go to the appellate court and get a remand for that purpose.

Mr. Seasongood. That is right.

Mr. Medalie. Which they won't give you if they think you are frivolous?

Mr. Seasongood. That is right.

Mr. Medalie. I will accept that as part of the motion. The only extension then is the 1-year period.

The Chairman. Now, may we have the motion rephrased as it is and brought up to date.

Mr. Medalie. Without committing the Committee to language, instead of the 60-day period in subdivision 3 of rule 2 of the Criminal Appeals Rules, the time limitation be one year in non-capital cases.

Mr. Holtzoff. I would like to offer a substitute.

Mr. Youngquist. Put no limit in capital cases?

Mr. Medalie. No limit in capital cases.

Mr. Holtzoff. I would like to offer a substitute for that motion, that we adopt the language of the Criminal Appeals Rules in place of Rule 50-B, but that there be no time limitations on motions for new trials on newly discovered evidence.

Mr. Wechsler. I second that, if it is in order.

Mr. Longsdorf. Will you re-state that motion, please?

Mr. Holtzoff. My motion or substitute in effect is that there be no time limit on motions for a new trial on newly discovered evidence.

The Chairman. As I see the situation it is this--we are abandoning our (b) and considering now Criminal Appeals Rule 2, paragraph 3; that Mr. Medalie makes one change, which is to substitute for the 60-day provision there a 1-year provision. Mr. Holtzoff's motion is to make it without time limit.

Mr. Crane. Let me say that I myself personally ought to be

in this matter influenced a good deal by the opinion of the Attorney General,and his experience in office on matters must count with me. It is not like the ordinary practice, and if he feels that this right for a defendant should be as wide as this I feel much like one of my associates in the Court of Appeals. He said that when a certain judge, whom you all know personally by name, voted to sustain a conviction, he never read the evidence, he "went right along." He was the other way. And so here when Mr. Holtzoff thinks that it can be opened as wide as this without any injustice to the Government, I am going along.

The Chairman. We are troubled, some of us, by the thought that if that period is left too long it makes it possible for the court to be troubled with frivolous applications after the state's evidence has been dissipated.

Mr. Crane. Now, you have got your remedy right here, and that is, in one week you can change the rule.

Mr. Orfield. You can resort to habeas corpus or coram nobis or some other form.

Mr. Holtzoff. No because on a writ of habeas corpus in the federal court you cannot consider evidence. There is a question as to the writ coram nobis, as to whether it does or does not still persist in the federal courts. In other words, there is no remedy now.

Mr. Crane. I think you will change the rule but perhaps not so readily as I thought. You have to get an act of Congress to change it, do you not?

The Chairman. That is one of the moot questions as to whether they have to agree to subsequent amendments. They

have to adopt these.

Mr. Crane. Can the Supreme Court change them without an act of Congress?

The Chairman. That is one of the questions.

Mr. Holtzoff. I am strongly of the belief that we are not going to be troubled with frivolous motions for new trials, because one or two attempts of this kind would discourage the bar, even if such a tendency began to develop.

Mr. Medalie. No, the bar gets discouraged. I once suggested on account of the activities of an association of credit men in New York 15 years ago bringing up prosecutions for fraudulent bankruptcies, that would put an end fo fraudulent bankruptcies in a large measure, and experienced bankruptcy lawyers said, "No, there is always some young man who may advise a business man that he has found a new method. It is usually one of the old ones."

Mr. Holtzoff. Even so, the judges could give such motions very short shrift.

The Chairman. I think we have got the question fully canvassed.

Mr. Longsdorf. Before we can proceed with this motion, Mr. Chairman, I think we ought to consider that phrase in the pending rules of the present Criminal Appeals Rules, "except in capital cases." Now, does that mean cases wherein sentence of death has been imposed, or merely cases punishable capitally? and therefore possibly include life imprisonment cases.

The Chairman. I think clearly it means cases where the sentence is death.

Mr. Longsdorf. Then why not say so?

Mr. Medalie. I am not sure of that.

The Chairman. It is indicated by the last sentence:

"In capital cases the motion may be made at any time before execution of the judgment."

I mean, the clear inference is it means death cases.

Mr. Crane. It means he could not get a new trial, on earth at least, after he is executed.

Mr. Wechsler. Mr. Chairman, may I underline one point which I think Mr. Woltzoff made which proved to be very real in one instance, in my own experience, and that is the difficulty which you face when there is an application for clemency based on newly discovered evidence which is very strong, coming at a time when they can no longer be considered by a court because of the time limitation, when you feel that justice requires some relief for the petitioner, but you are exceedingly reluctant to hold that a second jury ought not to pass on all the evidence.

I think it is really a gruesome situation which is likely to result in a denial of justice, whichever way you rule on it. This proposal to avoid a time limit means that the executive in that situation can remand it to a court which has the additional power to grant a new trial, and the executive cannot do that. It is to meet that situation that I would support Mr. Woltzoff's proposal.

Mr. Medalie. Answering Mr. Longsdorf's doubt, the New York statute met it by using this language:

"except in the case of a sentence of death"

Mr. Longsdorf. That is what I was just talking about.

Mr. Medalie. Yes. I think you were right.

Mr. Longsdorf. Sentence of life imprisonment is not executed until a man dies in jail or is discharged.

Mr. Medalie. I would use the language, and I would include that in my motion, "except in the case of a sentence of death," so there would be no doubt.

Mr. Orfield. In Nebraska the period for filing motions on newly discovered evidence was increased from "during the term" to three years because of a bad case. The legislature passed an act on the subject, changing it to three years.

Mr. Robinson. In Indiana they reduced it from a year back to 60 days, just the reverse of the action here. That was based on a state experience that was terrible.

Even changing the 60 days to one year would mean that the finality of judgment, which after all is the first characteristic of judgments, as a practical matter, would be to that extent weakened and every criminal case would be open really for a year, at least in the minds of a good many lawyers.

Mr. Crane. I do not want to take up time, but in my experience most of them turn on men going back on their confessions or their testimony. That is the run of the cases. Now, there is not much attention paid to them. As a very matter of principle you cannot. I have only known a very few instances where the matter has been re-opened on newly discovered evidence, and it has been done when some man turns up in prison and confesses that he committed the crime, and the man has been wrongly committed.

Mr. Holtzoff. In those cases, no matter how much time has gone by, the courts ought to be allowed to do justice.

Mr. Crane. I do not think any harm is going to come from

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it.

The Chairman. We have three alternatives successively before us; one, Mr. Holtzoff's, which eliminates any time limit; one, Mr. Medalie's, which fixes one year; and I take it Mr. Seasongood is going to propose--if he doesn't, someone else will--

Mr. Seasongood: Yes, I will.

The Chairman (continuing). --the present rule, there. So let us vote on them successively.

All those in favor of the substitute motion of Mr. Holtzoff fixing no time limit show the hands.

(The substitute motion is LOST.)

The Chairman. Now the next will be on Mr. Medalie's motion to extend the period of 30 days mentioned in subdivision 3 to one year. All those in favor--

Mr. Seasongood (interposing). May I just say as to what Mr. Robinson said, that I think the object of this is to get certainty, and there is some maxim which I will not quote in Latin that there should be an end to litigation. Now, here you are going to have a situation where your appeal will have been heard and the conviction sustained, and as Judge Crane has said, most of this newly discovered evidence is just frivolous, there is nothing to it, but you are always going to have it in, you are going to have it in the papers, and you are going to have the general people believing that notwithstanding there was a trial and a conviction, that person was wrongly accused, and the proper way of handling that, if it is substantial, is by clemency; so we have adopted this rule.

The capital case that Mr. Holtzoff spoke of has been

taken care of in the rule, and I think that the evils of extending the time are much worse than the very occasional good that you may have from some newly discovered evidence being really substantial instead of just a pretext for stirring up matters.

Mr. Orfield. The Institute code gives one year on newly discovered evidence in section 762.

The Chairman. Are you ready for the vote on Mr. Medalie's motion? Better have a show of hands.

Mr. Buchsler. I vote for this, too.

Mr. Holtzoff. Yes, I vote for that rather than 60 days.

Mr. Crane. If we are going to write out the other one, I am going to No. 3.

Mr. Medalie. You just voted against it.

Mr. Crane. I say, if we are going to write out the other one, I am going to No. 3.

The Chairman. That seems to have been carried.

(The motion is agreed to.)

Mr. Gregsbood. We are going to record these votes, aren't we; somebody said, when it is close we had better be very careful.

The Chairman. I am also wondering if we are trifling with the rule of the Supreme Court adopted 2 years ago.

Mr. Gregsbood. That is how I feel.

Mr. Longsdorf. I want to say that, too.

Mr. Crane. I think I would be all right, for this reason, if you want to reconsider it. These things are coming up all the time, not on newly discovered evidence. Three men were convicted and got life imprisonment. One appealed, and the

other two did not. Now, by the time they got to the Court of [illegible] we reversed the one who appealed. What became of the two who did not appeal? They had no remedy, under the law, at all, except I [illegible] that of course an appl[illegible] cation to the [illegible] would apply to the two who did not appeal.

Mr. [illegible]. Was that about 1900 or 1901?

Mr. Crane. Yes.

Mr. [illegible]. After the [illegible] got the [illegible] acquittal, and then the Governor promptly pardoned the other two, as you suggest, on your suggestion.

Mr. Crane. He dismissed it, said there wasn't [illegible], or something.

Mr. [illegible]. [illegible] the [illegible], on one of the committees with which I have worked we evolved a process whereby, if there was strong dissent from any particular proposition and several of the [illegible] felt [illegible] strongly about it, we would submit to the [illegible] [illegible] where the majority [illegible] with a statement to the effect that there was some strong minority [illegible]. I [illegible] [illegible] [illegible] [illegible] speaking for myself [illegible] this [illegible] [illegible] [illegible] [illegible] [illegible], I wonder [illegible] would be anything undesirable [illegible] [illegible] [illegible] to the Supreme [illegible] this [illegible], for example a statement that [illegible] of the committee feel that the [illegible] is more desirable.

The Chairman. [illegible] we [illegible] want to [illegible] that [illegible], and I think we are now going [illegible] the general understanding that where there is a substantial minority their views will be given consideration again. I gathered from what Judge Crane

said that he is not wedded to the 1-year proposition.

Mr. Crane. I did not vote for the 1-year proposition.

The Chairman. Oh, pardon me. I thought you did.

Mr. Crane. I said if you are not going to adopt the Attorney General's suggestion, I am going to vote to keep this that is already the rule by the United States.

The Chairman. It may be well when we come back to the meeting of the entire Committee--we are now short four or five members--to give further consideration, whichmay result differently.

Mr. Longsdorf. Mr. Chairman, my memory is not very good, and sometimes it does not work as rapidly as it ought to, but we have got a recent federal statute which provides for compensation of persons unjustly convicted. Now, do not wag your head, Mr. Robinson, I am not going to drag in any irrelevancies, but I think we ought to remember that there is such a statute, and that it is not going to be changed by any rules that we can make, and we do not want to do anything that will frustrate that. I do not know. Mr. Holtzoff will no about that and explain it. I cannot.

Mr. Holtzoff. That is a statute which permits a civil action for damages.

Mr. Longsdorf. Yes.

Mr. Holtzoff. In the Court of Claims.

Mr. Longsdorf. Yes.

Mr. Holtzoff. For anyone who is found innocent, after he has been convicted and has served at least a part of his sentence. But that would not interfere with anything that we are doing here.

Mr. Longsdorf. I know, but what prompted me to think of that was Judge Crane's description of that case wherein three co-indictees were convicted, one appealed, and the others did not.

Mr. Robinson. You refer to my wagging my head--I was wagging my head in agreement, because I thought Mr. Holtzoff mentioned a man who had been in prison 10 years on his 20-year sentence. I began to think about this federal statute for compensation for unjust imprisonment.

Mr. Longsdorf. I see. I do not know what would happen.

Mr. Robinson. It is a factor.

Mr. Holtzoff. I do not think the $5,000 is very much compensation.

The Chairman. We have remedied (b).

Mr. Crane. It is coming up again, isn't it?

The Chairman. Yes. All of these are, Judge.

Is there anything under section (c)?

Mr. Medalie. How about line 12?

Mr. Youngquist. How about (b)?

Mr. Robinson. (b) went out.

Mr. Youngquist. We have discussed one phase of it, and not the rest. I wanted to raise the question of the making of the motion "not later than 3 days after the entry of the judgment". The Civil Rules provide for 10. It seems to me the 3 days is pretty short.

Mr. Holtzoff. Three days is the present provision of the Criminal Appeals rules.

Mr. Youngquist. Yes. Well, I would not suggest a change.

Mr. Medalie. Just about a month ago some lawyers came in

to see me about a conviction, and they had forgotten all about the time limit and appealed 10 days or 11 days after the conviction. There was no use, there was nothing pending.

Well, the United States attorney wanted an appeal in that case, so he could establish the law that he had gotten from the district judge, and he went back to the judge and they modified the sentence by some nominal reduction, which I do not think was effective, by the way.

Mr. Orfield. Does not line 12 change the existing criminal appeal rule providing 3 days after verdict, not after judgment?

Mr. Seasongood. Yes.

Mr. Orfield. The judgment might come considerably later.

Mr. Youngquist. That is right.

Mr. Holtzoff. Yes. This is more liberal to the defendant. I did not notice that.

The Chairman. Yes, I think it is.

Mr. Medalie. There is not much trouble about a motion for a new trial on the ground of error or insufficiency. As a matter of fact normally those motions are made by mumbling the appropriate formulas and giving your grounds immediately after the verdict. I think that is the general practice almost everywhere, unless there is some other rule that prevents it or the court says, "I will hear you some other day."

The Chairman. Your motion, Mr. Orfield, is to change, in line 12, the word "judgment" to "verdict"?

Mr. Orfield. Yes, to follow rule 2, section 2, of the Criminal Appeals Rules:

"after verdict or finding of guilt"

instead of "judgment".

Mr. Youngquist. In rule 50 we have provided that within 10 days after the verdict the court may grant or deny a motion for correction of judgment.

Mr. Crane. May I ask: If we have no power to deal with appeals, how can we put in our rules here anything inconsistent with it, if those are adopted? If those appeal rules stand, and we provide any rule here which is inconsistent with them, how can our rule be effective?

Mr. Orfield. The court can take them over. The '34 act still exists, that entitles them to change at any time.

The Chairman. Yes. The court, you see, in 1934 was granted the power to make rules in criminal cases after verdict. Now, the act under which we are operating gives them the same power, up to and including the verdict, and the two acts together give the Supreme Court complete power over criminal procedure.

Mr. Crane. Yes.

The Chairman. Now the court may ask and may authorize us at some early date to weave the two into one complete set of rules.

Mr. Crane. But they have not done so yet?

The Chairman. They have not done so yet.

Mr. Crane. Now, until they give us that power, should we adopt any rules inconsistent with that which they may think should stand?

The Chairman. Well, the suggestion was made at the outset that we might proceed tentatively along the line that we might be given such authority, because they do dovetail in,

and it makes it pretty hard to separate; but if the Court says "No, you have got all the authority we are going to give you," we have to stop right at the verdict.

Mr. Seasongood. That is why we should deviate as little as possible from rules they have adopted, and adopted very recently. I think it is a little preposterous.to do anything else.

Mr. Longsdorf. I feel strongly that way.

Mr. Seasongood. And I think that we are going too far when we take the rules as they have them and stick in "one year" instead of 60 days.

Mr. Longsdorf. It looks rather fresh on our part.

Mr. Youngquist. I do not feel that way about it.

Mr. Crane. You are a younger man.

Mr. Youngquist. Not so much as you might think. If we are going to make suggestions with respect to the appeal rules, I should think the Court would welcome the new ideas now that may develop on or off from the rules that are now in existence and in force; otherwise the Court is going to lose the benefit of what we think about those rules; and if we are going to do anything about it at all, certainly we ought to give the Court full benefit of what we do think, at the same time being reasonably conservative in our departures by reason of the fact that the court no doubt has itself carefully considered the rules now in force.

Mr. Longsdorf. What is going to happen if on the hypothesis that these changes or extensions into appellate rules are made, we frame our other rules, and then the Supreme Court rejects any rules that go into the matter of appellate procedure,

and therefore throws into disarray what we have done on the other part of the rules?

Mr. Seasongood. We would do it all over again.

The Chairman. We are not going to proceed to draft and submit to them any rules on the appellate procedure, unless we have a specific order from them in advance to do it.

Mr. Longsdorf. They are not to be included and submitted in the report of this Committee?

The Chairman. Not without authorization.

Mr. Seasongood. Does the Chairman or Mr. Holtzoff know, when they adopted these criminal rules of '34, whether they had a committee like this?

The Chairman. No.

Mr. Holtzoff. No they did not.

Mr. Wechsler. The Department submitted proposals which were adopted very largely.

Mr. Holtzoff. I suppose the reason they did not have a committee was because the scope of the work was much narrower.

Mr. Seasongood. I was just thinking that if there was a committee we should check it up.

The Chairman. No.

Mr. Wechsler. Mr. Chairman, may I offer as a substitute for Mr. Orfield's motion that instead of the present subsection (b), present Rule 2 in its entirety be substituted and constitute the working model, subject to the one change which the Committee has heretofore voted. That would meet the particular point that Mr. Orfield made, which is sound, with reference to "verdict" rather than "judgment".

It would also retain existing phraseology which is the

same in substance, unless there is some reason to deviate in substance from the existing language.

The Chairman. Do you accept that, Mr. Orfield?

Mr. Orfield. I think not.

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

Mr. Medalie. Pardon me, will you re-state that?

The Chairman. It is subject to the change made in Criminal Appeals Rules, too, by your motion that that rule as it stands be regarded as a substitute for our (b) under Rule 59.

Mr. Youngquist. Second the motion.

(The motion was agreed to.)

The Chairman. That brings us to item (c).

Mr. Holtzoff. Well, is (c) necessary, in view of the substitution that we have just now made? (c) merely is a matter of detail.

The Chairman. There is nothing under the present Rule 2 about--

Mr. Holtzoff (interposing). Well, there is nothing in the present Rule 2 about affidavits, but do you need a provision as to how to serve affidavits? In most cases you won't have affidavits in the motion for a new trial, except on newly discovered evidence.

Mr. Longsdorf. You might have something about occurrences--

Mr. Wechsler. Moreover, this would work an automatic delay of 10 days under the second sentence, which would probably be uncalled for in most cases.

Mr. Holtzoff. I move we strike out (c).

Mr. Seasongood. Second.

The Chairman. Any debate?

(The motion was agreed to.)

The Chairman. (d).

Mr. Holtzoff. I think (d) is surplusage in view of the way we modified (a), because we made (a) so broad that (d) becomes surplusage, I venture to suggest.

The Chairman. Mr. Reporter?

Mr. Robinson. I am not sure yet. I am checking. I would like to hear further discussion on it. What do you think about it, George?

Mr. Medalie. I do not think that you need that.

Mr. Holtzoff. I do not, either.

Mr. Seasongood. That limitation of 3 days--there is no point in that any way.

Mr. Holtzoff. No.

Mr. Robinson. I guess it can go out.

The Chairman. Well, by consent,--

Mr. Orfield. Gentlemen, we want to retain the power of the court to act on its own initiative, there.

Mr. Youngquist. That is what I was thinking of.

Mr. Holtzoff. I think you have it. Here we say under (a)

"A new trial may be granted to all or any of the defendants whenever required in the interests of justice."

The Chairman. That would clearly carry it with it.

Mr. Youngquist. I should doubt it then. We go right on and speak of motions, and again we speak of motions. The implication to me there is that it must be on motion.

Mr. Robinson. I do not think we are safe in assuming there that the court will take the initiative under a general

power or grant of that sort.

Mr. Youngquist. No.

Mr. Robinson. --as readily as it would where you expressly recognize that it may take certain action.

Mr. Holtzoff. Of course, there, the court does not take the initiative in those matters.

The Chairman. If there is any doubt--

Mr. Medalie. Where there is no limit at all the court may grant a motion for new trial, once the defendant has made the motion for new trial.

Mr. Robinson. It may.

Mr. Medalie. That means there is no limitation on the court's granting a new trial of its own motion.

Mr. Robinson. If you are sure we have given this enough consideration--I should think there that in civil matters there would be some guidance for us in criminal matters. Are we sure we have considered the same reasons that must have been before the Civil Rules Committee, in striking it out so readily?

Mr. Longsdorf. Suppose a defendant has been convicted on a minor degree, can the court on his own motion grant a new trial and give the district attorney a chance to convict the prisoner?

Mr. Holtzoff. Oh, no. The former jeopardy would be the plea there.

Mr. Youngquist. I think it ought to stay in conformance with the Civil Rules, if we can.

Mr. Medalie. The Civil Rule says "not later than 10 days after entry of judgment."

Mr. Youngquist. Yes. Ours has 3 days after finding or verdict.

Mr. Medalie. What we had in mind was the time at which the motion was made by the defendant.

Mr. Youngquist. And if the motion is not made the court ought to have the power on his own initiative.

Mr. Robinson. This relates to the suggestion made a few minutes ago to the effect that this would further delay.

Mr. Medalie. Giving the court power would not be very serious.

Mr. Wechsler. I move to strike the words prior to "the court" on line 25 so that there be no time limit. I do not think there is a danger that the court on its own initiative is going to do this out of time.

The Chairman. Giving to the court the right to do it at any time?

Mr. Wechsler. "The court of its own initiative may order a new trial,"and so forth.

The Chairman. The motion is to strike line 24 and the first two words of line 25.

(The motion was agreed to.)

Mr. Waite. Would that give the court power to grant a new trial more than one year afterwards? I am a little suspicious of that.

Mr. Wechsler. It says:

"for any reason for which it might have granted a new trial on motion of a defendant."

Mr. Youngquist. The court cannot grant the new trial after it has lost jurisdiction by appeal.

Mr. Seasongood. That means 5 days.

Mr. Longsdorf. It might if it was added.

Mr. Seasongood. I thought Mr. Wechsler did not put in any period. Did you? You simply said "the court may of its own initiative grant a new trial"?

Mr. Wechsler. Yes, but I did not specifically move to strike the words "for any reason for which it might have granted a new trial on motion of a defendant." And the point of the present remark is that perhaps that applies in the time limited on motions by the defendant.

Mr. Longsdorf. I certainly do not think it does.

Mr. Waite. I do not see the reason why, if it might grant on its own motion, that brings in the time limit.

Mr. Youngquist. No. Now, I would like to know one thing before we pass that.

Mr. Wechsler. Do you want the time limit in?

Mr. Crane. Aren't you going to make a great deal of confusion if you are changing the times and the rules, when you have got rules now that are operated in every court, and you are going to change the times for operations in other courts. You are going to get a hodgepodge.

Mr. Seasongood. Has not the court inherent power to set aside? It certainly has inherent power over its judgment. Couldn't it set aside a verdict without any motion?

Mr. Crane. The state court cannot do it after the term has expired. That is, a month.

Mr. Wechsler. If the court can do it on its own initiative after the period prescribed for the making of the motion, then I should think the court could invite a motion

any time, and the rule, in time, would cease to be a jurisdictional rule. I know that the cases under the present rule have treated the time limit as a jurisdictional limitation, and have not felt free to initiate motions outside of the time.

I think perhaps there is a real point in bringing in through the back door what we have just ejected through the front door.

Mr. Youngquist. If we provide that the court may do this at any time before the time for an appeal has expired, or appeal has been taken, that would take care of what I have in mind.

Mr. Holtzoff. That really means 5 days.

Mr. Seasongood. Five days after judgment.

Mr. Youngquist. Wait a minute. I suppose we will change this to "entry of verdict" as we did on the other rule, and the time for appeal does not begin until the entry of judgment, does it?

Mr. Holtzoff. No.

Mr. Youngquist. So that that would not mean the 5 days after verdict that we are talking about here.

Mr. Seasongood. Have we settled that, that the judgment does not go on after that?

Mr. Medalie. We are assuming that there is an appeal in all these cases. There might be no appeal.

Mr. Youngquist. I say, up to the time an appeal is taken, or up until the time for taking the appeal has run?

Mr. Holtzoff. No, not after it has run, because if no appeal is taken the district court would not have lost juris-

diction to re-open the judgment.

Mr. Youngquist. Well, I want to limit it to that.

Mr. Holtzoff. Oh, I see.

Mr. Youngquist. And I suggest that as an amendment.

The Chairman. What is your amendment, Mr. Youngquist?

Mr. Youngquist. I guess we have already voted on Mr. Wechsler's motion, so I move to reconsider it.

Mr. Wechsler. If I still had jurisdiction over the motion I think I would withdraw it at this point.

The Chairman. All right, let us consider the motion withdrawn.

Mr. Waite. May I suggest to Mr. Wechsler an amendment to his motion, to make it read this way:

"The court of its own initiative may order a new trial at any time and for any reason for which it might have granted a new trial on motion of defendant."

Mr. Seasongood. That would limit the time.

Mr. Waite. To one year. Yes, that is what I meant.

Mr. Wechsler. If it is still in order I would accept that amendment.

The Chairman. Well, you have heard Mr. Waite's motion, accepted by Mr. Wechsler. Any discussion?

Mr. Crane. What is the time? I have forgotten, we have had so many different times, here.

The Chairman. One year.

Mr. Crane. One year?

Mr. Longsdorf. We have renewed the Supreme Court's 60 days.

The Chairman. On newly discovered evidence.

Mr. Crane. On this it is 60 days. We have got so much time here I do not know what it is.

Mr. Seasongood. You cannot do that if an appeal has been taken. He cannot grant a motion for new trial if an appeal has been taken, yet an appeal might have been taken within this time within which he could file a motion on the ground of newly discovered evidence.

Mr. Medalie. I do not think any judge would ever think of granting a motion for a new trial of his own initiative, unless it got into the judges hand right after the trial, or even during the trial something has been troubling him.

Mr. Seasongood. That is right.

Mr. Medalie. Now, if that is so, I think we can safely follow the civil rule of a 10-day limitation after entry of judgment, subject of course to the case being taken away from him by its going to the appellate court.

Mr. Dean. In that situation he could as a practical matter suggest to counsel that this thing does trouble him, and suggest that he make the motion.

Mr. Medalie. Yes.

Mr. Holtzoff. I recall one case in Cleveland in the last two or three years where the judge was very much troubled by what he thought was the insufficiency of the evidence, and he of his own motion without talking to counsel filed an order setting aside the verdict and granting a new trial, after the 10th day.

Mr. Medalie. You could put the 10-day limit here, all right.

Mr. Holtzoff. I think the 10-day limitation is all right.

Mr. Medalie. I so move.

The Chairman. Now, is there a motion pending? I have sort of lost track.

Mr. Medalie. I think by common consent they have all been withdrawn.

Mr. Holtzoff. Mr. Waite had a motion.

Mr. Waite. There was Mr. Wechsler's motion.

The Chairman. He has withdrawn it.

Mr. Waite. Then he renewed it, as I remember it, at my suggestion.

Mr. Wechsler. I assigned it to you.

Mr. Waite. I do not know what Mr. Medalie's motion is. If he is asking Mr. Wechsler's motion I might be perfectly willing to accept Mr. Medalie's.

Mr. Medalie. Mymotion is that in conformity to the civil rule an order for a new trial may be made by a judge of his own initiative within 10 days after the entry of the judgment.

Mr. Robinson. Or in other words that leaves (d) just as it is, does it not?

Mr. Waite. No.

The Chairman. It changes (d) from 3 days.

Mr. Robinson. That is all.

Mr. Seasongood. I do not want to be persnickity but the rules provide an appeal has to be taken in 5 days.

Mr. Medalie. Yes, but it may not be taken.

Mr. Seasongood. But suppose it is taken?

Mr. Medalie. Subject to that.

Mr. Seasongood. Suppose it is taken? It has to be taken in 5 days, and you are granting 10 days to the judge to

grant a new trial, which cannot be.

Mr. Medalie. You are suggesting we make some provision to meet it?

Mr. Seasongood. You must.

Mr. Medalie. That would kill the appeal, wouldn't it?

The Chairman. I would like this to be referred back to the Reporter for further study.

Mr. Crane. I think so.

Mr. Seasongood. Second the motion.

Mr. Wechsler. Can an appeal be taken in 5 days if there is a motion for new trial?

Mr. Medalie. No. There is no motion.

(The motion was AGREED TO.)

The Chairman. The motion to refer this back to the Reporter has been passed.

Mr. Robinson. We are on Rule 60.

The Chairman. I think we have got to work out our time table a little more carefully.

Mr. Dean. Mr. Chairman, in that connection I have got a suggestion. If we are going to go through all the Criminal Appeals matters, shouldn't there be some explanation, since these rules were adopted such a short time ago, as to the necessity for changing these rules at this time, or any portion of them, rather than taking it chronologically and treating it as though we were the committee on criminal appeals rules?

Mr. Holtzoff. There is only one feature in the criminal appeals rules that is vitally different from the Civil Rules. The others ~~is a~~ are matters of detail. That is the presence of the

bill of exceptions, which the Criminal Appeals Rules require, and which the Civil Appeals Rules which came four years subsequently abolished. It might be wise to abolish the bill of exceptions in criminal cases.

The Chairman. I would like to make this suggestion, if it is agreeable--that we take up Rules 60 and 61 and then because some of our members have to leave this afternoon, that we go from there to Rules 77 and following, which deal specifically with matters within our reference, and then come back and go into this other general situation and let Mr. Robinson and Mr. Holtzoff outline the one or two vital changes we want to have made, if the Court will agree.

Now, may we have Rule 60.

Mr. Robinson: "Rule 60. Relief from Judgment or Order."

Under the present federal law clerical mistakes in judgments, orders, records, and the record generally may be corrected by order nunc pro tunc. This rule is a little more explicit and adds that section (b). In fact both are based on the civil rule as you see on the left. Section (b) of course will require some re-wording if you wish to accept it at all.

As you know, mistake, inadvertence, surprise, or excusable neglect generally are used for grounds of the motions to relieve from judgment in civil cases, but I do not know of any state statute in which those grounds are enumerated in criminal cases. For example the New York statute, section 542--well, that will come up in the next rule. I do not know of any state statute which would be comparable to 60-B.

I believe that is all I have to say.

The Chairman. Is there any question on (a)? If not,

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we will consider that as passed and go to the discussion of (b).

Isn't (b) dangerous?

Mr. Longsdorf. I think so. It was dangerous in civil cases in California, it was very dangerous, and it produced an immense amount of litigation.

Mr. Waite. Would the Reporter mind giving me an illustration of where (b) might apply? I cannot think of one.

Mr. Robinson. No, I have no illustration in mind. I think (b) can go out.

Mr. Holtzoff. I can give you an illustration--a forfeiture of a bail bond. This might apply.

Mr. Youngquist. That would be a forfeiture against the sureties?

Mr. Holtzoff. Yes, but that is part of the criminal proceeding.

The Chairman. The surety may not be in court when the defendant is called.

Mr. Orfield. He might not be personally in court.

In respect to line 12, isn't 10 days too short a time? I believe the civil rule says six months.

Mr. Longsdorf. It was 6 months in California, and that enlarged its mischievous capacity.

Owens
11:15

bl
Owens
fls
Pend.
1115am
9-11-41
S.Ct.Ad.
Com.

The Chairman. All right. We will pass that. We will refer that back to the reporter.

Mr. Seasongood. Well, I do not want to be obnoxious.

The Chairman. You have not been obnoxious at all.

Mr. Seasongood. You let everything be corrected but you do not want process to be corrected.

The Chairman. That does not refer to this.

Mr. Seasongood. No, that was a ways back. I was somewhat vehement about not allowing process to be amended, and instead you struck it out.

Mr. Wechsler. I think that at that time we agreed there would be a general saving equivalent.

Mr. Robinson. We did permit amendment of process.

Mr. Holtzoff. The general statute of jeofails.

Mr. Seasongood. That was what I thought you should have, a general jeofails.

Mr. Robinson. Line 13 and 14 state that "A motion under this subdivision does not affect the finality of a judgment or suspend its operation.

Mr. Holtzoff. I think it may stay because suppose the surety is paid and the executor asks for relief?

Mr. Medalie. How about fines levied against the estate? Are they paid?

Mr. Holtzoff. They die with the person.

Mr. Medalie. I know that they are never collected.

Mr. Seasongood. I think it is all right to leave in "legal representative," because you have some provision for taxing the lawyer costs in certain cases.

The Chairman. Rule 61.

b2

Mr. Robinson. That is the harmless error rule. There are two federal statutes under the accompanying civil rule, as you see on the left: Title 28, Section 391 of the Judicial Code deals with the harmless error where they grant new trials. Title 18, Section 556 refers to harmless error in indictments and presentments, and where there are defects of form.

The present federal law is:

"On the hearing of any appeal, certiorari, or motion for a new trial, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

That is Title 28, Section 391 of the U. S. Code.

Title 18, Section 556, states:

"No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding be deemed insufficient by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."

A comparable state statute is Section 542 of the New York Code of Criminal Proceedings, which provides that the court must give judgment without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

Mr. Crane. And it is a very important and very useful section because so many cases are affirmed by citing that section.

Mr. Youngquist. Does this cover technical defects in the

b3

written accusation, too?

Mr. Dean. Apparently not.

Mr. Youngquist. I doubt that it does.

Mr. Robinson. If the court sustains or if the court overrules a demurrer, or whatever his motion is, to attack the sufficiency of a written accusation, it would seem that this section would not be subject to reversal, but that would not help on your question.

Mr. Youngquist. No.

Mr. Robinson. You think that should be out, Mr.Yonngquist?

Mr. Youngquist. Yes, I do.

The Chairman. Is that generally agreed?

Mr. Robinson. I might say that Rule 61 or, as described here, the harmless error rule, will incorporate the provisions of the two federal statutes and the New York statute.

The Chairman. Any further suggestions on Rule 61?

(There was no response.)

The Chairman. May we turn now to Rule 77, leaving these intervening rules dealing with appeals alone, until we dispose of what is clearly within our jurisdiction.

RULE 77

Mr. Robinson. Of course, in subsection (b) there you have also the question that in all criminal proceedings the accused shall be entitled to the right of public trial. That has to be kept in mind always. That is set out at the bottom of the page to the left of Rule 77.

In (c) you observe that Rule 77 is substantially the

b4

same if not precisely the same as Civil Rule 77 because it is difficult for us to see that there is any distinction between civil and criminal cases so far as the district courts and clerks are concerned. That is that under (a) the courts are kept always open; under (b), hearings in chambers, with the caveat mentioned in regard to the exception.

Then clerk's office and orders by the clerk under (c), and notice of orders or judgmentsunder (d).

Mr. Holtzoff. I would like to say a word about (d).

Mr. Medalie. Before you get to (d), I would like to say something about (c).

Mr. Seasongood. Well, before you get to (c), I want to say something about (b). Why say "so far as convenient in a regular courtroom"? Trials should be public and should be in a courtroom. Otherwise that would be contrary to the Constitution.

Mr. Holtzoff. No. Under our juvenile delinquency act we hold hearings in chambers, and that is preferable when carrying out these juvenile delinquency cases.

Mr. Youngquist. That is correct.

Mr. Holtzoff. Yes, that is correct.

Mr. Medalie. That is not subject to these rules?

Mr. Holtzoff. They will be, I presume.

Mr. Medalie. They should not be. Doesn't that act make special provisions for these things?

Mr. Holtzoff. It does, but I think this is one of the subjects that we have not covered here as yet. Perhaps it would have to be one of the matters that will be covered later.

b5

Mr. Medalie. That act provides for hearings in chambers, does it not?

Mr. Holtzoff. Yes, it does.

Mr. Medalie. Then we could say nothing in these rules that affects the juvenile delinquency act.

Mr. Seasongood. According to this, they may not be in the courtroom?

Mr. Youngquist. The courthouse may burn down. That is possible.

Mr. Seasongood. This refers to a matter of convenience.

The Chairman. I am reminded of the Hall-Mills trial where they brought the pig woman down into court and put her on a stretcher. She was on the stretcher and testified for two or three days. However, they were not sure that they could get her there, and they contemplated holding trial and taking her testimony in the hospital.

Isn't that proper under this constitutional provision?

Mr. Youngquist. If the jury is present.

The Chairman. With the jury and the judge.

Mr. Youngquist. I think it is proper.

Mr. Wechsler. Wouldn't that be made by the deposition provision?

Mr. Holtzoff. In a certain town in Connecticut they hold court in the town hall, in the common council room. That is not a regular courtroom.

Mr. Medalie. I just reminded Judge Crane of a case in 1938 in Albany where the court, the jury, and the attorneys went to the hotel to get the testimony of a man who was in bed who said he had pneumonia, which he did not have.

b6

TheChairman. I think you have to have that exception clause.

Mr. Seasongood. I don't think "so far as convenient" is the way to express it.

Mr. Dean. Do we need any provision that it be in the regular court? Wouldn't it be enough to say that it shall be conducted in open court?

Mr. Crane. That is much better.

Mr. Wechsler. Why should this be limited to trials? Do not pleas, arraignments, and hearings and the other things that happen in criminal cases have to be conducted in open court?

Mr. Medalie. No. Suppose you come in at 4 o'clock in the afternoon with your defendant and arrange for the pleading: couldn't you arraign him before the judge in his chambers and then immediately walk out? Why should the judge have to take the elevator and go down to the courtroom and have the janitor open up the courtroom and just waste a lot of time? What is the need of doing all that?

Mr. Wechsler. I should assume that in that situation it is done at the defendant's initiative, but there could be situations where that is not the case.

Mr. Medalie. Suppose the judge is in one part of the district and the court is not in session and the defendant has been arrested? Then the district attorney wants the arraignment and the defendant would not have any objection to being arraigned where he finds the judge. He should be arraigned wherever the judge is found. Why should everything be held up until the judge takes a trip to the courthouse?

Mr. Wechsler. Suppose a defendant is in custody and the

b7

prosecutor wants to avoid publicity with respect to arraignment? They bring the defendant to the judge's house and arraign him there. Then he goes back to a place of detention and there is no witness to the incident. Is that a practice that should be encouraged?

Mr. Medalie. Well, the abuse of it should not be, but I think you should trust the judges to take care of that.

The Chairman. Aren't there quite a certain number of cases often on the equity side where you have to get the judge at his home occasionally? Aren't there corresponding matters in criminal cases?

Mr. Medalie. Yes, fixing bail.

Mr. Longsdorf. And habeas corpus.

Mr. Holtzoff. And frequently argument on motions.

Mr. Dean. That is often done.

The Chairman. Have we dispensed with (b)?

Mr. Seasongood. This says that all these other acts may be done within or without the district. Are there any other acts which shouldbe done out of the district?

Mr. Medalie. This is what often happens: A judge comes from one district and sits in another. He has had his trial and gone home; then there are motions. It is easier for the lawyers to go and see the judge than for the judge to come in and see the lawyers.

Mr. Youngquist. Or send it to the judge.

Mr. Seasongood. Or send a bill of exceptions to him.

Mr. Medalie. The judge having tried a case in June has gone off on his vacation from New York to Vermont or Yellowstone

b8

Park. In that case it should be possible.

Mr. Holtzoff. Then you have the situation of one judge in a district.

Mr. Seasongood. I agree that it isdesirable that there should be a lot of things that he could do, but I am just raising some of the questions because it says here "all other acts or proceedings."

Mr. Wechsler. How about sentences?

Mr. Holtzoff. That is part of the trial.

Mr. Wechsler. No, I do not think it is; it is the pronouncement of judgment.

The Chairman. Then again you may have the situation where a man may be designated as judge in two districts. You have to give him this power unless you get him going back and forth a lot.

Mr. Seasongood. There is no question about the power, but to say so broadly that all other acts or proceedings may be done outside the district is something I question.

The Chairman. How about sentences?

Mr. Seasongood. They should be had in the district.

The Chairman. They should be had in the district.

Mr. Crane. Yes. They should be had in the courthouse. I cannot imagine a judge sentencing a man except in a public courtroom.

Mr. Robinson. How about inserting the clause "all proceedings which require the attendance of the defendant shall be conducted" and so on?

Mr. Holtzoff. I think it is a good solution.

b9

Mr. Longsdorf. It sounds good.

Mr. Crane. How does that read, Mr. Chairman?

The Chairman. "All trials upon the merits and all proceedings which require the attendance of the defendant."

Mr. Wechsler. We do not need "trials upon the merits."

Mr. Robinson. Maybe not, but don't you think it is a good idea to state that?

Mr. Holtzoff. How are you changing this?

The Chairman. "All trials upon the merits and all other proceedings which require the attendance of the defendant."

Mr. Robinson. "Shall be conducted."

The Chairman. "Shall be conducted in open court."

Anything further on (b)?

Mr. Robinson. I think 11, 12, and 13 are safe. We have not been able to find any objection to that.

Mr. Holtzoff. I do not think any objection has been made to this amendment which you have just adopted.

Mr. Orfield. What do you mean by the rule "on the merits"?

Mr. Holtzoff. I do not think you need that at all.

The Chairman. Isn't that meant to eliminate motions?

Mr. Seasongood. What about a trial?

Mr. Holtzoff. Or former jeopardy.

Mr. Crane. It says "all trials."

Mr. Wechsler. I think it was intended to mean defaults in the case of the civil rules.

Mr. Medalie. I think you are safe there.

The Chairman. Anything on (c)?

Mr. Robinson. Line 18 sounds a little strange in criminal

b10

proceedings. If you have suggestions for modifying it I would be glad to have them.

Mr. Holtzoff. Line 12 should be changed. There is no final process to enforce and execute judgments.

Mr. Medalie. What about commitments?

Mr. Holtzoff. We use judgment and commitment.

Mr. Medalie. You mean that is a matter of just routine?

Mr. Holtzoff. Yes.

Mr. Dean. They may not use it next year. That is possible.

Mr. Holtzoff. I suppose it is all right, then.

The Chairman. We come to (d).

Mr. Holtzoff. I have a question on (d). I do not think it is applicable to criminal cases. We do not now serve judgments, and I hope that we will not change the practice.

Mr. Medalie. They do not serve orders, either.

Mr. Holtzoff. I move to strike out (d).

Mr. Medalie. Yes. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus ofayes.)

The Chairman. No.

(There was no response.)

3 The Chairman. It is carried.

Mr. Robinson. It is possible to draw an alternate draft.

The Chairman. We are not heartless on the reporter, because, as you remember, he expressed the idea in advance at the opening of the hearings that he put in there many things to bring them to our attention.

b11

Mr. Longsdorf. If it is in order to entertain a motion at this time, or perhaps a suggestion is enough, that the reporter in the course of his studies in recasting any of these suggestions or sections feels that an alternative would be appropriate or desirable--and of course it will be passed on again--but it would be understood that he has the authority of the committee to do that. Even though it is specifically left out, he may submit an alternative.

The Chairman. Yes. We are violating pretty nearly every rule of parliamentary law, or will before the motion to adjourn is made.

Mr. Longsdorf. I think we have done so.

The Chairman. Rule 78.

RULE 78

Mr. Medalie. With reference to the last part, lines 10 and 11, why impose on the judge the need for having a written statement of the reasons in support and opposition unless he wants it?

Mr. Robinson. Yes.

Mr. Medalie. He knows whether he wants it.

Mr. Youngquist. I cannot quite hear you, Mr. Medalie.

Mr. Medalie. You see in lines 10 and 11 "order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." The judge may make provision upon brief written statements of the reasons in support and opposition. The judge may not need them.

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The Chairman. The practical reason for that is this, that in some districts in connection with the civil rules the lawyers feel that the judges are imposing on them in requiring them. This was put in the civil rules, as I recall it, to give the judge a little bit of support from the Supreme Court in saying to the lawyers, "You have to submit a memorandum."

Mr. Medalie. But suppose the judge does not want it?

The Chairman. He does not have to have it then, but it gives him a little backing.

Mr. Medalie. Some of the districts may want to have a special rule for a certain class of lawyers.

Mr. Youngquist. "May make provision by rule or order."

Mr. Medalie. As I understand this paragraph, the court may make provision by rule without oral hearing.

Mr. Youngquist. By rule or order. He does not have to make a rule.

Mr. Medalie. That is all right, but having done that, why do we say that the judge can do that only if there is a brief written statement of the reasons in support and opposition? He may not require it. You can say that he can make an order only if he has a brief written statement in support or opposition.

The Chairman. He can give an oral hearing.

Mr. Medalie. No. This says "without oral hearing." It says here "upon brief written statements in support and opposition." He may not require them.

Mr. Dean. He may want an oral hearing without a memorandum and he may want neither.

b13

Mr. Medalie. Why tell the judge he has to have an oral hearing?

Mr. Longsdorf. Then without a hearing.

Mr. Medalie. Why say anything about it?

The Chairman. We cannot dispense with both the oral argument and with the memorandum without deleting the rights of the defendant, can we? He has got to listen to oral argument or read a written memorandum.

Mr. Seasongood. I do not see why you want this rule. I think the judge is better off if you get up and make your oral argument. Some may take five days and then you take six days for your reply and then it sometimes runs on into many weeks instead of getting up and making your argument right there.

Mr. Crane. I think there is something in that. I do not think a judge should require by order that matters be submitted to him without a chance to see them and have them explain their points.

Some appellate courts throughout the country are dead set against hearing oral argument, and they always make a mistake by not doing it, because I think that the purpose of the court is to be seen as well as to be heard; to listen and hear the arguments.

Personally I do not like the idea myself that all a judge has to do is a lot of paper work and that he can do it all by himself. I think the tendency should be the other way around. This idea that you have not got the time is just so much bunk in many cases, although not in all, of course. I think that when lawyers want to present a matter orally they should have

b14

the right to do so.

Mr. Medalie. Then you draw away from the practice in civil cases, in New York County, for example.

Mr. Crane. That is just an abuse.

Mr. Medalie. The lawyers are satisfied with it.

Mr. Crane. No.

Mr. Medalie. They do not want to make oral argument.

Mr. Crane. They are scared to death of the judges.

Mr. Holtzoff. I am wondering whether we need Rule 78 at all.

Mr. Youngquist. That is right.

Mr. Holtzoff. I doubt whether we need it in criminal proceedings. In civil cases it is desirable to have motion days because your case may be pending over a period of six months or a year; but in criminal cases there are very few motions and you can dispose of them quickly.

Mr. Medalie. There may be few motions in each case, but there are always a number of motions in connection with a criminal calendar. You will probably have a large number of motions. If you have a criminal calendar say of 200 cases in the district and if the court is in session at least one day a week, you will have a long calendar of motions.

Mr. Holtzoff. But you have in mind the Southern District of New York. On the other hand you take the country court where indictments are found today and trials commence tomorrow. Then there is no opportunity for a motion day.

The Chairman. There is no problem there because your judge has to have his civil motions taken care of, and he can combine

b15

them with the criminal motions.

Mr. Holtzoff. There would not be the interval between the indictment and the trial in country places that there is in the large cities.

Mr. Medalie. Whatabout cases where there is such an interval, even in sparsely populated districts?

Mr. Holtzoff. Well, I do not see any harm in it.

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

Mr. Dean. I move we strike it out.

Mr. Medalie. I second the motion.

Mr. Longsdorf. Why doesn't Rule 83 cover it?

Mr. Holtzoff. I think it does.

Mr. Wechsler. 83 provides only for local rule.

The Chairman. The motion is that Rule 78 be eliminated. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Opposed.

(There was no response.)

The Chairman. The motion is carried.

Rule 79.

RULE 79

Mr. Robinson. I would like to ask the committee at this point to hear Mr. Tolman with regard to the assistance that the committee may have from the Administrative Office and some others who are keeping in touch with these matters. I think it would be of great advantage to the committee to hear from Mr. Tolman.

The Chairman. Yes.

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Mr. Tolman. I would like to have the permission of the committee to consult with perhaps some of the clerks of the court and with Mr. Chandler on the advisability of this rule dealing with the criminal docket and with the criminal order book.

We have had a great deal of trouble with this order book, as it is provided for in Civil Rule 79. There seems to be very little practical reason for keeping that book, because it is a very expensive thing. You have photostatic machines and make copies of the several orders, and they run into quite an expense with respect to the machines and the photostatic work. The orders are kept by the clerk and there is a tremendous amount of time taken up with it and it is quite expensive.

I think that the Administrative Office is hopeful that some time they can persuade the Supreme Court to take out 79(b), and I think it would be unfortunate to put in a similar provision for criminal cases without considering the matter very carefully.

In other words, we are asking that we be allowed to consult about it and consider the present rule and make some suggestions on the subject.

Mr. Youngquist. I make that motion.

Mr. Seasongood. I second it.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

Mr. Holtzoff. I would like to call attention to a minor point in line 479(a) and suggest that instead of providing for the Attorney General that it now should be the director of the

b17

Administrative Office, because the civil rules say the "Attorney General" because the civil rules were adopted before the director's office was established.

Mr. Medalie. It should not be the attorney for one party.

Mr. Holtzoff. That is one reason why the Administrative Office was established.

The Chairman. The words "Attorney General" come out and substitute "Director of the Administrative Office".

Mr. Holtzoff. I thinkthe last sentence on that page should come out in view of the action which was taken yesterday on the demands for a jury trial.

Mr. Medalie. May I ask whether there is any uniformity at all in the keeping of records in criminal courts in the various districts?

Mr. Tolman. I think not. I think there is no uniformity.

Mr. Medalie. I do not have any doubt from what I have seen in the Southern District that they have simply continued the system they started when there was no criminal business.

Mr. Tolman. That is correct. The dockets in our criminal

6 cases particularly are very difficult to understand. On visits of our representatives of the Administrative Office which they make to the courts they try to find out what the state of the court dockets is and examine the book entries. Our experience has been that they give you practically no information at all. You can find out very little from them.

Mr. Medalie. We keep it as it is and put it in the appeal book and let the Circuit Court of Appeals guess what it is.

b18

Mr. Youngquist. That last sentence that Mr. Holtzoff referred to should be changed to this effect: "that if the jury is waived" and so on.

Mr. Seasongood. I think that when any criminal procedure case is to be tried the clerk shall enter the word "jury" on it.

The Chairman. Isn't that excluding the normal whereas you might put it in the reverse? Say it where the jury is waived.

Mr. Seasongood. I think they like to have all the jury cases noted stating that it is a jury case.

Mr. Holtzoff. The nonjury case is the exception. It is assumed that they are all jury cases.

Mr. Seasongood. That is what I had in mind.

Mr. Medalie. May I ask whether or not anybody has developed expertness like an accountant in relation to the keeping of court records? It is my impression that the matter of court records is something that is important, and the method of keeping them is just archaic and something carried over from the time they started it around 1850, or whenever they did. They continue the same method without any attempt being made to develop a scientific system.

Mr. Tolman. I think that is so, until very recent years. The Administrative Office requested the Bureau of the Budget to call upon some representative clerk's offices. This was last year. As a result of that the representatives of the Bureau of the Budget have made a careful study of the filing systems and of the docket systems and the methods of reproducing

records and have made a careful report.

One of the suggestions was the use of microfilm instead of the great bulky files for keeping those records. The Administrative Office will give careful consideration to that. It is to be brought up also at the Judicial Conference and we will be able to do a great deal toward improving that particular thing.

However, you are correct: There has been no scientific study at all.

Mr. Medalie. Have any of these scientific societies like public accountants been consulted?

Mr. Tolman. No.

Mr. Medalie. I think that would be helpful. They have a better idea of how to organize matters of that sort than a great many other people, being experts in that line.

Mr. Tolman. That is a good idea.

Mr. Youngquist. I would suggest that we leave in these rules these matters just as wide open as we can, because in time the Administrative Office will have this nicely worked out.

Mr. Robinson. In that connection I would like to know whether the committee would extend the same invitation to authorizing the reporter to receive from Mr. Chandler and the Administrative Office his assistance with reference to probation and other matters coming under his particular office.

Mr. Youngquist. I so move.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Shall we leave this last sentence to be

b20

worked out by Mr. Robinson?

(There was no response.)

The Chairman. Rule 80.

RULE 80

The Chairman. I will ask Mr . Robinson to tell us the status of this, if he will.

Mr. Robinson. The rule as drafted follows the rule on the left-hand page in the civil rules.

Mr. Medalie. I would like to say something about this rule. There are no official stenographers in the federal courts. They have a system as in the Southern District of New York in which they make a contract with a company of public stenographers. The district attorney never orders the minutes. If the defendant orders them, the defendant pays a flat rate, but the district attorney gets a copy for nothing at my expense.

Mr. Youngquist. For nothing?

Mr. Medalie. For nothing. It is a contract, but I really pay for it. I hesitate to say it about a government agency, but I think it is a racket.

Mr. Youngquist. So do I.

Mr. Holtzoff. I think there is a good deal of error about Mr. Medalie's statement. For many years we have had a contract for official reporters in the Southern District. We get all copies of the transcript free. The reason why the group of official reporters was glad to make that particular arrangement with the Department of Justice is that they have the privilege of coming into the court and taking the testimony and selling

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copies to counsel. In accordance with that system the government gets its transcript free.

Mr. Youngquist. That sounds like bribing the government.

Mr. Medalie. I signed the contract as United States Attorney each year I was in office. I may say that they could not have done this, this business, on any other basis, in view of the government's extortion. I am not blaming them.

Mr. Holtzoff. In these days when we are talking about saving the taxpayers' money--

Mr. Youngquist. (Interposing) Who is?

Mr. Holtzoff. You cannot condemn the Department of Justice.

Mr. Medalie. It is not the Department's fault at all. You do not just get the appropriation. You should get an appropriation which would have some relationship to the dignity of modern courts representing the greatest country in the world.

Mr. Holtzoff. I agree with you that we should have salaried official reporters in our federal courts as we have in the state courts. However, that would take legislation to take care of that. My understanding is that it is receiving the attention of the Administrative Office.

Mr. Medalie. I suggest that you get an appropriation now while the spending is good.

Mr. Holtzoff. We have to get legislation to establish the office of official reporter.

Mr. Crane. What is this? You do not pay these reporters anything and they have the privilege to take hearings other than criminal? Is that the situation?

Mr. Holtzoff. No, the situation is this: There are no

official reporters in any of the federal courts. We make the parties get their own reporters. The result is that in most districts criminal trials are not reported at all except when you get a defendant who can hire a reporter.

So far as the government is concerned it makes a contract in every district with a reporter or a firm of reporters to report those cases which the government wants reported.

In the Southern District of New York, because of the volume of business, the form of contract is very advantageous to the government. They require the reporter to report every case whether anyone orders the transcript or not. Then the government can always get its transcript free. Counsel for the defendant when they order a copy have to pay for it.

Mr. Medalie. The government does not get anything that the defendant does not order or which the adverse party does not order?

The Chairman. There are no transcripts except on order by the defendant.

Mr. Medalie. With one exception that they make a transcript any time the judge wants it, but they do a lot of grumbling and feel that they are imposed upon, without paying for it.

The Chairman. In my district the parties pay the reporter a per diem in addition to paying for the transcript.

Mr. Medalie. You can bring anybody in you please in many districts.

Mr. Crane. You have these reporters in civil litigation?

Mr. Holtzoff. In civil litigation the parties will make arrangements with the reporter.

Mr. Crane. And he takes the testimony before the judge in

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the civil litigation?

Mr. Holtzoff. Well, this contract requires that these reporters take all criminal cases whether the party orders the transcript or not, but in most districts you do not have such contracts because the volume of business does not amount to very much.

Mr. Crane. I mean in civil cases. There are reporters to take civil cases?

Mr. Holtzoff. The parties have to pay the reporter and they make their own arrangements.

Mr. Crane. They do?

Mr. Holtzoff. Yes.

Mr. Crane. Good heavens!

Mr. Seasongood. Isn't it a question rather that there should be a stenographic reporter of all criminal proceedings and that a transcript should be made available to the defendant in some way by being taxed as part of the costs? I think it is most unfair to have this sort of thing. You get some poor fellow and the judge has complete liberty to say what is in his mind, and it is one of those things where the man has no remedy.

Mr. Crane. May I ask whether there is any money for this?

Mr. Youngquist. Well, he does not recover his costs.

Mr. Medalie. He does not.

Mr. Holtzoff. Here is what happens: for instance, ~~in~~ rulsidet the Southern District of New York there are a large number of trials which are not reported. The result is that there is no opportunity for appeal except on matters which appear of record. In

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many cases which are reported the defendant appeals in forma pauperis. He is not able to get the transcript.

We often get requests from defense counsel ~~to see if~~ but we cannot do anything about it. At times we used to order a transcript for the government and then furnish it to the defendant so that he could appeal. However, the Controler General has ruled that we cannot do it. So we are in a difficult position as to that. I think it is a subject that calls for legislation.

Mr. Crane. Yes. You should not let the thing go by without saying something about it.

Mr. Holtzoff. The subject requires legislation.

Mr. Seasongood. Why shouldn't it be reported by a stenographer designated by the court and taxed as part of the costs?

Mr. Medalie. You have a difficulty there.

Mr. Holtzoff. You cannot do that.

Mr. Medalie. In districts in large cities such as New York and Philadelphia before they start an important criminal trial there is a discussion in advance of the trial. The court asks counsel for the defendant, "Are you getting a reporter?"

Then you go out and get bids as cheaply as you can and bring in your own reporter.

8 Mr. Crane. My God! What a situation!

Mr. Seasongood. I do not think you should have a situation like that. Maybe they may bring in a defendant's reporter. The court should have the control over that situation as to who shall report the case.

Mr. Crane. I think he should be an official.

Mr. Holtzoff. Yes. That would take legislation.

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Mr. Seasongood. In our court the court designates a reporter to take all cases and charges $4 a day per diem for each person for attendance and a certain amount for transcript.

Mr. Holtzoff. I do not think that the Supreme Court would pass a rule requiring the government to hire official reporters. It takes legislation to do that.

Mr. Seasongood. The court designates someone to take all civil cases.

The Chairman. Isn't this a matter that we should submit to the reporter and ask him to confer with Mr. Chandler and others in connection with the other rules and then come back with a rule?

Mr. Seasongood. I am only suggesting to the committee whether it is desirable for all cases to be reported and by request to be transcribed and that the defendant be given a copy to be taxed as part of the cost. I think that would be helpful.

Mr. Dean. I think that would be helpful, but whether we can accomplish it or not, I don't know.

Mr. Medalie. As a matter of fact, if there were a rule on it prescribing official reporters the Controler General would have to change his rule. Under the present rule there is no obligation on the part of the government.

Mr. Youngquist. I would not say that all of the testimony should be taken down. Wouldn't it be enough in only those cases which were taken at the request of either party? In a good many cases it may not be necessary.

Mr. Seasongood. In a great many cases defendants do not

have any lawyers. What is the harm of having it taken down? The ccurt stenographer is there when the court is in session, and he can just as easily take it down. You do not have to write it up unless there is a request that it be written up.

The Chairman. Mr. Tolman tells me that it is on the agenda and will come up for discussion two weeks hence. Perhaps the reporter can get some light for us from that and confer with Mr. Chandler and come back with a rule.

Your motion is, Mr. Seasongood, that it be the sense of the committee that all criminal proceedings be reported by an official reporter?

Mr. Seasongood. A reporter named by the court and that the defendant on request be furnished a transcript to be paid for as a part of the cost.

Mr. Medalie. I oppose the last part.

Mr. Seasongood. Suppose you are a poor man who cannot afford to buy a transcript and yet not be in forma pauperis. Mr. Holtzoff says that if he is not in forma pauperis, he does not get a transcript. He cannot appeal without a transcript.

Mr. Medalie. There is a different question after a trial has been concluded. In many trials lawyers do not order a transcript of the testimony. As far as I am concerned I will not try a case unless the client is able to pay for a transcript of all the minutes, because I realize the handicap I am under in not having it every night to use.

The Chairman. You are referring to day copy.

Mr. Medalie. Yes. Your provision refers to the run of trials and furnishing that copy.

Mr. Seasongood. No. I mean that he takes it down every

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day and then if the defendant wants it for his appeal and presents the matter to the court he should have the right to have it written up and have it taxed as costs.

Mr. Holtzoff. ~~That~~ What is a part of the costs? That does not mean anything as far as the government is concerned, because costs are hardly ever collected from a defendant.

Mr. Seasongood. Can't we collect from the government?

Mr. Holtzoff. We cannot collect that from the defendant.

Mr. Youngquist. There is no provision for taxing costs against the government.

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Mr. Holtzoff. If you provide for that, it is going pretty far to provide that the defendant may demand copies of the minutes. I think that if he does not have enough money to pay for the minutes he should have them or make a showing and give a reason to the judge why he wants them.

Mr. Seasongood. That is enough.

Mr. Wechsler. If he wants to appeal, that is enough.

Mr. Holtzoff. Yes, if he is asking for an appeal, but I do not think he should be allowed to ask for the minutes as a momento.

Mr. Longsdorf. I do not think he should have it even if he wants to appeal, unless he pays for it, without showing the probability that he will be successful on appeal or that he has an exceedingly good chance of success.

Mr. Seasongood. I do not think you could show that to the judge.

Mr. Crane. I think you are getting toward a situation in the United States with our increase in litigation and getting so close together that we are really all one. I think we have

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got to get a system such as exists in New York of stenographers paid a salary, proportionate, of course, to the costs of living in the particular locality and the amount of work. Then anybody who wants the minutes pays for them.

In New York he pays for them except in murder cases where the penalty is death. In that case the government pays for everything by furnishing him with a copy of the minutes. That is only in murder cases in the first degree. They get the stenographer's minutes of all the testimony. As I say, that is only in murder in the first degree. In other cases the stenographer takes down everything and makes a complete record. Why shouldn't they have a complete record?

They can afford to pay the man at the top; then they can afford to pay the reporter. They can afford to pay the reporter as well as they can afford anything else, and sometimes the reporter is ten times more important than the man at the top.

I do not say that this has to come right away, but I think that we should recognize that something like this is necessary. You are going to get more and more of this, because centralization is bound to come and to get greater and greater, whether you like it or not.

The Chairman. Then I think it is the sense of the committee that we have reporters.

Mr. Seasongood. That it be the sense of the committee that all criminal proceedings shall be reported stenographically and further that there be a provision for furnishing transcript to the defendant.

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Mr. Longsdorf. Before we leave this rule, I should like to ask Mr. Holtzoff an embarrassing question. It is an embarrassing question because of the prime question.

Is an official reporter appointed under authority of the civil rules an official reporter in criminal cases?

Mr. Holtzoff. Well, in a good many districts, under the civil rules, there is appointed an official reporter. The court selects the reporter instead of the parties doing it. However, the parties pay for the transcript.

Mr. Longsdorf. The official character of the reporter as in civil cases as distinguished from criminal? He is the official reporter for the court?

Mr. Holtzoff. No, he is an official reporter to the judge in civil cases.

Mr. Longsdorf. Then you have an official reporter in each case?

The Chairman. No.

Mr. Holtzoff. No. It does not mean very much because the parties still pay for the reporter.

Mr. Youngquist. Does that mean that the court picks the man and he takes it down in civil cases in his court?

Mr. Seasongood. The court presumably will pick a competent reporter. The parties may pick somebody who is a friend of theirs.

Mr. Longsdorf. In the Evans case reported down in Kansas, the reporter having been appointed under the civil rules there was a question raised with respect to that reporter being in a criminal case whether or not he was an official reporter.

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Mr. Holtzoff. That happens as a matter of convenience that the official reporter in civil cases will also report criminal cases.

Mr. Longsdorf. But appointed under the authority of the civil rules.

Mr. Holtzoff. Yes.

The Chairman. Well, we know the sentiment of the committee. Rule 81, gentlemen.

RULE 81

Mr. Robinson. This rule is tentative.

Mr. Crane. Excuse me, Mr. Chairman. It is necessary that I leave now. I am very glad to have met all of you gentlemen.

The Chairman. What about this scire facias?

Mr. Robinson. In working in this Rule 81 it has applicability to the civil rules provision. We put it in just for that with the consideration of possibly striking it.

Mr. Holtzoff. Scire facias is used in criminal cases for the purpose of forfeiture of bail bonds.

Mr. Medalie. That is the only use.

Mr. Longsdorf. It is abolished in the civil rules.

Mr. Holtzoff. In some districts they enforce bail bonds in civil cases; in other districts it is regarded as a part of the criminal proceeding.

Mr. Orfield. There is a Supreme Court case calling it a criminal proceeding.

Mr. Wechsler. I would think that in a procedure to forfeit bond that such is a civil proceeding. I think that is one instance where I would be prepared to make a positive judgment

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and say that it is a civil one.

Mr. Holtzoff. There is one advantage in the writ of scire facias. It is a summary proceeding and you do not have to bring suit on the bond. It brings the bondsman in and if he does not come in you forfeit the bond summarily.

Mr. Medalie. You have got to have a section on bail.

Mr. Holtzoff. Yes.

Mr. Medalie. That would supersede it.

Mr. Seasongood. Did the Supreme Court say it was criminal?

Mr. Orfield. They called it such forty or fifty years ago.

Mr. Youngquist. Then I do not see why we should say it is civil.

Mr. Robinson. Do you want to delete mandamus?

Mr. Holtzoff. The civil rules delete mandamus.

Mr. Robinson. The civil rules do abolish it. Do we want mandamus in the criminal rules?

Mr. Medalie. The only mandamus I know of in connection with a criminal case is a mandamus from the circuit court of appeals to the district court to try a case or dispose of it. You cannot get a trial and you want to get the trial or the alternative, which in your case is a dismissal of the proceedings because the district attorney does not want to try the case.

Mr. Seasongood. Is that a mandamus?

Mr. Medalie. It orders the district court to try the case or dismiss it.

Mr. Youngquist. They did that in the Madison Oil case.

Mr. Seasongood. It is a civil proceeding.

Mr. Robinson. It is a question whether the abolition of the mandamus by the civil rules is a matter which we must consider

Mr. Waite. Why should we say anything about it at all? I think it is wise to strike it out.

Mr. Longsdorf. I second the motion.

Mr. Seasongood. Mandamus is a civil proceeding. There is no sense in abolishing it in the criminal rules. It exists or it does not exist.

Mr. Robinson. It was put in here for the committee's information. I am only inquiring for information, as Judge Crane said.

The Chairman. What about removed proceedings? Does anybody say that we should not say anything about that? Does anybody say mandamus is a criminal remedy?

Mr. Medalie. I ran across several removal cases. There was a case started in the state court and then removed to the federal court.

Mr. Youngquist. A criminal case?

Mr. Medalie. Yes. There were cases of prohibition agents shooting persons.

Mr. Waite. The use of mandamus plays a very important part in Michigan practice and I would hate to just abolish it. On the other hand, I do not think that we need to say that it still exists. I think our object should be to just let it alone.

Mr. Holtzoff. This would not abolish the procedure. It means that the relief heretofore obtained by the writ of mandamus can be obtained by motion or appropriate action under the practice prescribed in the rules. Wouldn't that meet your objection?

Mr. Waite. I have this sort of thing in mind. A judge of the Recorder's Court in Detroit dismissed a great number of prosecutions on the ground that the evidence had been secured

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by unreasonable search. Under our statutes the argument was made that the search was reasonable, but there was no way for the state to appeal. So what the state did was to go to the Supreme Court for a writ of mandamus ordering the trial judge to restore those cases to trial, and it worked.

Mr. Holtzoff. We mandamused a district judge some years ago to bring a case to trial.

Mr. Seasongood. But is it a criminal procedure? You order a particular criminal case to proceed just like an

11 injunction, but an injunction is a civil proceeding.

Mr. Longsdorf. Yes, it is a civil proceeding. I got the impression that has been positively decided by the federal court that when mandamus came out of the circuit court of appeals it is always more of an ancillary right necessary to the exercise of the jurisdiction of the circuit court of appeals. That jurisdiction would not be exercised until the case is brought and decided upon. If I am right about that then the use of mandamus pertains to the circuit court of appeals and we have nothing to say about it beyond the possible exception of appellate rules.

Mr. Medalie. What happens in a case like this: A defendant is awaiting trial for three or four years and wants a trial or wants a dismissal? Where does he go to direct the district court to try his case?

Mr. Holtzoff. He goes to the circuit court of appeals.

Mr. Medalie. Then you have got a provision for mandamus, haven't you?

Mr. Dession. Yes.

Mr. Holtzoff. These are rules for the district court. This abolition of the writ of mandamus would not affect the

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mandamus issued by the circuit court of appeals. That is the way the corresponding civil rule has been construed.

The Chairman. Do you know of amy other place where mandamus is used by a district judge in a criminal case?

Mr. Medalie. I do not believe anywhere.

Mr. Youngquist. You mean in the district court?

Mr. Longsdorf. No, they have no mandamus power except in the District of Columbia.

Mr. Dession. In order to bring the matter to a head I move that we strike out (b) and leave the question of scire facias for the bail bond rule.

Mr. Dean. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Opposed.

(There was no response.)

The Chairman. It is carried.

(c). Removed proceedings.

Mr. Longsdorf. I would like to make this observation about removed state criminal proceedings which can occur and have in some times. There are still state prosecutions and it seems to be obvious when that state criminal proceeding is brought into federal court by removed proceedings why the federal court is to apply the state criminal law. I think we should be very cautious about saying how this is done. I mean in the same way as if it were begun in the federal court for a federal crime.

Mr. Holtzoff. They follow federal procedure today.

Mr. Wechsler. It is quite a complex study and I think it should be studied in the light of the decision on removed

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criminal proceedings.

Mr. Orfield. In a removed case you apply the state substantive criminal law. It would not follow state procedure.

Mr. Longsdorf. I wonder if you have any statistics about the number of state criminal proceedings that were removed.

Mr. Holtzoff. Very few.

Mr. Medalie. Under the prohibition law there were some in which prohibition agents shot people.

Mr. Holtzoff. In prohibition days there were some but we get very few now.

Mr. Dean. You get them in murder cases where a federal agent is involved.

Mr. Medalie. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. The case of Marshal Nagle.

Mr. Holtzoff. No, that was habeas corpus.

Mr. Medalie. But it should have been done that way. They took the short cut by habeas corpus.

The Chairman. Let us get back to this.

Mr. Medalie. I understand that we want to find out whether federal or state practice applies. I take it that as suggested by Professor Orfield that the federal procedure would apply.

Mr. Orfield. There are cases in which they rule both ways. Some of them suggest you take state substantive law and then federal procedure.

Mr. Medalie. Can we without violating the Constitutional rights provide that federal procedure apply?

Mr. Holtzoff. Yes.

Mr. Medalie. I think so myself.

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Mr. Seasongood. We are only concerned with the procedure, not substantive rights.

Mr. Medalie. Why can't we make then a provision that we want to get?

Mr. Holtzoff. I think we could.

Mr. Longsdorf. I think we should be extremely careful.

Mr. Dean. You have a practical problem because the state prosecutor is a man who comes in and he is presumed to be familiar with the state procedure, and if we depart too much from it it may be difficult, to say the least.

Mr. Holtzoff. I think it would do the state prosecutor good to learn the federal procedure.

Mr. Youngquist. We are going to make it so simple that even the state prosecutor can learn it.

The Chairman. Make it so simple that perhaps he will want to stay in the federal court.

Mr. Medalie. The judge knows all the state law and the procedure.

Mr. Youngquist. I beg your pardon?

Mr. Medalie. The federal judge knows about the state law and the procedure. That is the law, isn't it?

Shouldn't we have a suggestion to leave it to the reporter to put in words "these rules apply so far as they may"?

Mr. Seasongood. I think you have to go further than that. That does not mean anything.

Mr. Dean. I would like to suggest this with reference to the removed cases. In two or three leading cases where this has occurred in the last four or five years, we may get some light from the district judge and the prosecutor. In a murder case in

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Memphis in 1935 it went on for several weeks, and it must have been quite a headache as to whether they were proceeding under federal or state procedure. I think that the district attorney and the court could throw some light on that.

The Chairman. This will be referred back to the reporter to get information on that.

Mr. Robinson. The general sentiment of the committee is that it does apply to removed cases?

The Chairman. The general sentiment of the committee is that federal practice should prevail.

Mr. Robinson. Is that correct?

Mr. Longsdorf. Yes.

The Chairman. The District of Columbia. Section (d).

Mr. Longsdorf. Do we want to include the insular courts as well?

Mr. Seasongood. All of those courts that are named, China, Alaska, and all the others.

Mr. Medalie. This may be unnecessary in view of the specification of the court to which the rules are to be applicable. I think it should come at the beginning.

Mr. Seasongood. That is what occurred to me, referring to the specifications in the first or second rule.

The Chairman. Why was this in the civil rules, Mr. Tolman?

Mr. Tolman. In the District of Columbia there is a difference in terminology. The judge in the district court is a justice. You have to make that distinction.

The name of the court of appeals is different. Instead of being a court of appeals for such and such a circuit, it is known as the United States Court of Appeals for the District

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of Columbia. It is really a technical distinction.

Mr. Holtzoff. I think it was put in at the request of the Bar Association of the District of Columbia.

Mr. Youngquist. I think the latter half of this should come out because this particular rule deals with district courts only, not with courts of appeals.

Mr. Holtzoff. We put in appellate rules.

Mr. Seasongood. Maybe we should bracket every instance where we have reference to the court of appeals so that we may know whether it goes in or out.

The Chairman. Yes.

Rule (e).

Mr. Wechsler. I suggest that you do not retain that unless there is some provision in the rule in which there is this incorporation by reference to the state law or until the state law is declared to be applicable.

The Chairman. What is the reason for this, Mr. Reporter?

Mr. Robinson. The same reason that you have in the civil rules. That is to the left. It is a question as to its applicability to criminal cases.

Mr. Holtzoff. In the civil rules this was necessary because the rule as to provisional remedies contain the statement that the law of the state shall be applicable in federal courts.

Mr. Youngquist. Has it any place in the criminal rules? I do not recall any occasion for it.

Mr. Robinson. What about it, Mr. Dean?

Mr. Dean. I am not sure.

Mr. Medalie. Suppose we pass that question until we see

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what is proposed by the reporter. I think we should reserve decision on that until we see what is in our rules.

The Chairman. Then if there is any reference in our rules to state law, this will be eliminated.

Mr. Wechsler. Yes.

The Chairman. Rule 82.

RULE 82

Mr. Youngquist. When the law of the state is referred to, does the law include the statutes of that state and the ordinances and local regulations?

The Chairman. No. They are subject to proof, aren't they?

Mr. Seasongood. The law includes the statutes. Whenever the law is referred to the word "law" includes the statutes of the case.

The Chairman. How about judicial decisions?

Mr. Youngquist. It should go to enactment.

Mr. Seasongood. Does that take in judicial notice?

The Chairman. What do you have, Mr. Reporter?

Mr. Robinson. Strike out "construe". That will serve the purpose.

Mr. Longsdorf. Is it statutes and decisions of the state?

Mr. Robinson. That is satisfactory.

Mr. Medalie. Is that a correct definition that the law of the state may not be covered by statutes or judicial decisions?

Mr. Longsdorf. You will never adjourn if you go into that.

Mr. Seasongood. If you make a statement that they never include municipal enactments and regulations having the force of law, then we will come back to, do we need to discuss them.

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The Chairman. Let us pass it and make a note of it.

We have Rule 82.

Mr. Medalie. What is the need for that rule?

Mr. Holtzoff. It is in the civil rules.

Mr. Medalie. What is the applicability for this?

The Chairman. You are going to find out that it comes up in the minds of members of Congress that something may be done to take a man away from home and try a case in which he is involved. It does not hurt us any and I think it is desirable to have it in.

Mr. Wechsler. I have this question. Are we satisfied that there is nothing in the immediate future in criminal procedure that should be touched by these rules within the limits that the Constitution may permit them to be with respect to venue?

Mr. Robinson. What do you have in mind?

Mr. Wechsler. I have this generalproblem in mind: I think it is an abiding problem in criminal cases that the law of venue is controlled by the substantive rule as to where the crime was committed. In criminal courts you are dealing with continuing crimes like conspiratorial crimes committed over a broad territory sometimes, and the consequences are that you have at least a general question as to the propriety of grouping defendants in many large-scale transactions.

I do not suggest that this is a problem that would yield itself by rule, but I do suggest that it may catalog an important problem in connection with criminal procedure in our federal courts, and I state that that problem is one of the most important. With respect to substantive law, in my judgment I think it is generally a long procedural problem that merits

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study as to what can be improved upon.

Mr. Robinson. I would be glad to have improvements or suggestions made.

Mr. Wechsler. It is a matter of reading the cases on venue.

The Chairman. Would you have curbed such things as the Wisconsin Oil case?

Mr. Wechsler. That is a problem.

The Chairman. That is a very real problem.

Mr. Longsdorf. I think that is a matter which is outside of our province.

Mr. Wechsler. No. The matter of procedure is within our province.

Mr. Longsdorf. Some features of it. You cannot alter venue as laid down in 28, 101.

14 Mr. Wechsler. Yes, you can by rule.

Mr. Longsdorf. I do not believe that.

Mr. Wechsler. Isn't that a procedural matter which would limit the existing rules?

Mr. Longsdorf. I do not believe it.

The Chairman. Venue in my state is governed by rule in court.

Mr. Wechsler. There is a constitutional protection to the defendant which we could not alter if we wanted to, which we do not, but this other aspect of the matter is something different that causes me concern.

Mr. Longsdorf. You could not move a civil case to a place where the property was not situated.

Mr. Wechsler. Not by rule.

Mr. Dean. This rule may be read not in its strict sense

but in a very broad sense that nothing in these rules extends or limits the territorial construction in civil proceedings. We may give in severalplaces the power to the district court to do certain things in any criminal proceeding out of his own district.

Mr. Longsdorf. Aren't we going to have some pretty serious questions when we take up the proceedings for removal from one district to another for trial? It may be a useful section.

Mr. Holtzoff. Mr. Dean, I think that that is answered by the fact that this is a case where in the civil rules it has not been construed to prevent a judge from doing things outside the district.

Mr. Dean. That does not mean much to me because I may think of a hundred problems in which it would extend the power of the district judge. I would like to canvass everything we do before we adopt this rule.

The Chairman. Leave it open and refer it back to the reporter.

Rule 83.

RULE 83

Mr. Seasongood. It says that these rules shall be furnished to the Supreme Court. I think that they should also be made available to the bar.

The Chairman. Aren't they promulgated in every district? I mean in printed form.

Mr. Seasongood. I think that is one of the things that should be taken care of. We have a multiplicity of rules and regulations.

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The Chairman. Well, Mr. Tolman says that the administrative office has been publishing local rules for the benefit of the court.

Mr. Seasongood. May we get them on request?

Mr. Tolman. I imagine so. We do not make up any large-scale distribution.

Mr. Seasongood. How many copies would you provide for my district?

Mr. Tolman. That depends on what the district court requests. I would rely on his judgment. Law libraries have copies of the rules.

Mr. Seasongood. But we do not want to chase up to the law library. We want it on our desk at the time.

Mr. Tolman. I may say that usually copies are available.

Mr. Seasongood. I will move for tentative consideration to request that after promulgation they be made available to the bar.

Mr. Robinson. We may leave that for the administrative office.

Mr. Seasongood. What is the method of distribution? How many can you distribute to the various districts? How many will you distribute to New York or to the clerk in our district?

Mr. Tolman. We usually have a certain number of copies.

Mr. Seasongood. All right.

The Chairman. This rule is the weak link in the whole system because in some districts the local rules are longer than the general rules.

Mr. Burke. Another thought occurs to me in that connection:

"By action of a majority of the judges thereof may

from time to time make and amend rules governing its practice not inconsistent with these rules."

In many instances in the adoption of the rules you have adopted the language of the statute "In the discretion of the court or with the consent of the court," with one general blanket rule in cases of that kind. Now it may be used as a basis for a general rule which would change many of the things that it seems to me you have sought to accomplish here.

Mr. Dean. It would encourage district courts to promulgate rules in criminal proceedings. Don't we do that by this rule?

Mr. Wechsler. I question their authority to promulgate rules; at least rules of criminal procedure. There is nothing in the statutes for that.

Mr. Medalie. Every court has inherent right to prescribe procedure, and there is a necessity for its having that right so that it can have an orderly procedure.

Mr. Longsdorf. So far as I know there is no restriction on that right and there should be nothing inconsistent with the statutes or rules pertaining to the statutes. Besides that, there is an act which gives them that authority, and which has not been repealed.

I think it is necessary for the district court to make rules. Those rules may refer to the date when certain things can be done, and the matter of notice, and so on.

Mr. Wechsler. We need say merely, "not inconsistent with the rules or any provision of law."

Mr. Medalie. I think they are able to make rules. I have no doubt of their authority to make them.

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The Chairman. What is your pleasure?

Mr. Longsdorf. I would like to ask a question. Upon furnishing to the Supreme Court of the United States copies of the local rules adopted by the district court, are those rules thereafter judicially noticed?

The Chairman. In the district? By the district court?

Mr. Longsdorf. By the Supreme Court of the United States?

Mr. Wechsler. Are they judicially noticed now, whether they are furnished or not?

Mr. Longsdorf. Mr. O'Connell out in San Francisco found that out.

The Chairman. I am not sure that I got Mr. Burke's point.

Mr. Burke. Maybe I was not quite clear. It seems to me, for instance, in connection with the rule we adopted permitting invitation, there was the equivalent of pretrial procedure. That authority was made to amend the rules governing this practice not inconsistent with these rules, but in extending local rules there may be an effect which was not contemplated.

The Chairman. The court may require pretrial procedure.

Mr. Burke. Yes. The judges may pass a general rule where I think you have in mind in some of the rules a procedure in a particular case.

The Chairman. We have in mind giving specific authority.

Mr. Burke. Is that to a single case?

The Chairman. No. Mr. Medalie has pointed out that there are various things which must be the subject of local rule.

Mr. Burke. That is correct. Otherwise there would be no orderly process, but do we eliminate the effect of some of the things you have sought to preserve in the way of the specific

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right of the defendant which may be included in the general rule which would provide what you have in mind. I do not know if I am clear.

Mr. Dean. I think we may eliminate this rule altogether. However, what Mr. Medalie says is true, that courts have the power to make rules, and they may relate to everything from the size of the paper to whatever else you want to mention. However, it seems to me that if this rule were adopted we encourage in every district for judges to get together and sit around a table and completely revise the criminal rule.

Mr. Holtzoff. I do not think we could afford to leave this out because the civil rules have such a provision. If we leave this paragraph out, the implication will be that local rules may be made for civil cases but not for criminal cases.

I think that it is true that one or two districts have gone pretty far in adopting too many local rules but that is not done in most districts. If you give such power in civil cases and then leave it out of criminal cases, the question is whether you are depriving the court by implication of the right to adopt any local rules.

The Chairman. The civil rules went into effect in September, 1938. I was made chairman of the local rules committee and went to work surrounded by four other technical lawyers. We have not yet agreed upon local rules, and last week the Court took the rules away from us and said, "I will fix the local rules."

Mr. Justice Roberts is coming to the Judicial Conference and they are ashamed not to be able to say that they have any local rules. Yet we have been able to carry along for three

years without a single effective local rule.

I think that it should be possible to have the reporter affix a note to the rule that we recommend that the district judges use this power very sparingly.

Mr. Dean. Could we not say with respect to Rule 83 that "in cases where the rules may be promulgated by the district court that they shall not be inconsistent with these rules," or something of that sort?

The Chairman. I have examined some of those and most of them need never have been adopted. They are just drivel, and I have looked at about eight or ten of these local sets.

Mr. Dean. Well, in that way we may get away from this drivel.

Mr. Tolman. Some of these local rules have been perfectly outrageous. I worked with a committee headed by Judge Knox which was studying local rules, and I think that probably 75 percent of the local rules were useless, and many of them were inconsistent with the federal rules of civil procedure, and some of them put in additional requirements that the federal rules for civil procedure never contemplated.

Mr. Holtzoff. Suppose we leave this rule to the reporter in accordance with the sentiment of the committee?

The Chairman. The question is that we leave this with the reporter, having in mind the thought just expressed by Mr. Dean.

Mr. Dean. That the reporter may adopt such rules as are necessary to carry this into effect.

The Chairman. We will pass on to rule 84.

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RULE 84

Mr. Robinson. That was referring to Rule 8 that suggested forms of written accusation be prepared. I think it was generally agreed that the forms attached to the civil rules have been useful.

The Chairman. Any objection to that?

Mr. Seasongood. I would say "brevity and sufficiency." I want to know whether that is the proper form.

The Chairman. Is that necessary?

Mr. Seasongood. All right. I withdraw it.

The Chairman. Rule 85.

RULE 85

The Chairman. I would put some initials like F. R. CR. P.

Mr. Holtzoff. I think you have got to have initials that will not conflict with the rules of civil procedure because the initials are the same.

The Chairman. How about CR?

Mr. Medalie. You have to say CRIM.

The Chairman. That is what I wanted to bring out: F. R. CRIM. P.

Mr. Dean. Shouldn't this be rule number 1?

Mr. Robinson. That is a question I wanted to take up.

The Chairman. Rule 86.

RULE 86

Mr. Holtzoff. I am wondering whether the first sentence

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should not conform to the first sentence in the civil rule, Mr. Reporter? I do not know but I am just asking for information.

The Chairman. The reason for the blank is that we do not know which Congress it will be taken to.

Mr. Medalie. I think it is unnecessary, as a matter of fact.

Mr. Holtzoff. Suppose a person has filed a demurrer and the demurrer has not been disposed of?

Mr. Medalie. All right. You have answered it. I just wanted to know what the answer would be if someone from New York asked me.

The Chairman. That will be all for now. We will take up the rest this afternoon.

(Thereupon, at 12:55 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

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9/11/41

AFTERNOON SESSION

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

The Chairman. Let us proceed, gentlemen.

Rather than take up the appeals rules one by one, I think it might be well, in the time that we have left, first to ask the reporter and then Mr. Holtzoff if they will state generally the matters that they think might be improved in the appeals rules and get the views of the committee on those points, and after we have disposed of that I would like to ask each member to suggest to the reporter the additional topics that he thinks should be covered by the rules.

If this program is agreeable to the members of the committee, I will ask Mr. Robinson now to comment generally onthe changes that are sought to be made by the appeals rules that have been drafted and submitted here.

Mr. Robinson. The only change of any importance between the rules of criminal appeals and the criminal rules on which we are working is the abolition of a bill of exceptions. Outside of that we have substantially incorporated in our rules the provisions of the rules of criminal appeals.

Is that right, Mr. Holtzoff?

Mr. Holtzoff. I think so.

The Chairman. Is there anything to be said in favor of the continuance of a bill of exceptions?

Mr. Seasongood. What do you mean? As I understand, the appellant makes up what he thinks should be included, and then the Government can ask for additional parts, and that constitutes the bill of exceptions. Isn't that the practice under these

rules? The court no longer has to fix the bill of exceptions.

Mr. Holtzoff. It does not under the present criminal appeals rules. Under the civil rules it does not. On this particular point, the purpose of this draft, and I think it is a very good one, is to assimilate the criminal practice to the civil practice and abolish the bill of exceptions.

Mr. Dean. What do you substitute for it?

Mr. Holtzoff. You substitute the transcript or so much thereof as either party wants to include. Therefore, you do not have to go to the trouble of settling bills of exceptions any more. That is the civil procedure. I think the reason the bill of exceptions is in the criminal appeals rules is that they were adopted in 1934. The improvements in the Federal practice did not come until later. Otherwise the criminal appeals rules could stand pretty much as they read now.

The Chairman. Is there any objection to considering that as a principle that we would like to see applied if we are assigned the task of drafting appeals rules?

Mr. Burke. Does it represent any substantial reduction of the right of defendants in the matter of appeals?

The Chairman. Oh, no. He has a right to say how much of the record he wants to go up.

Mr. Youngquist. It extends it, really.

The Chairman. It extends his right and relieves the court and counsel --

Mr. Holtzoff. And it is no longer necessary to transform the testimony into narrative form. You just file your stenographer's transcript or as much of it as you need.

Mr. Medalie. Practically, in our circuit it means this.

You put in the so-called clerk's minutes, which state what happened. You can leave a large part of it out, if you want. It takes more time and expense if you leave it out. Then you incorporate the stenographer's minutes, taking out unnecessary colloquy, and you include such prior proceedings as necessary.

The practical thing is to go ahead and print the whole business.

Mr. Holtzoff. In some districts they still follow the old practice of transforming the transcript to narrative form.

Mr. Medalie. That is an old vicious practice which goes back to the ancient days, when you were not sure of what happened at the trial and where you relied on your own notes and the judge's notes. That practice persisted in New York until about 25, 26, or 27 years ago.

The old practice was to take your stenographer's minutes and go to the terrible work of reducing it to a narrative. That was your proposed case. Your adversary then proposed what he called amendments, and then the appeal was halted. You then wished that on the trial judge, who settled the case and had to settle the disputes and bickerings of counsel as to what should go in and how it should be said, with the net result that it took a long time, even if you were in a hurry, even if both sides were in a hurry, for an appeal to come on.

A few years ago Learned Hand wished on our circuit, for some inadvertent remark he made somewhere, this business of reducing the record of the trial to a narrative form, so that the entire office will take three weeks off to prepare a mail fraud case for appeal.

Now that is no longer necessary. We are all agreed that

that is not necessary. You now get an appeal, in the case of a record of a thousand or two thousand pages, in a comparatively short time. The printer can do it for you if you turn the papers over to him. That we ought to keep. I do not think we need worry very much about the reduction of the stenographer's transcript --

The Chairman. But, answering Mr. Burke's question, there is no loss of any rights to the defendant?

Mr. Medalie. No. He can put everything in.

The Chairman. He gains, because he gets it in the form where, if the court wants to turn to a particular page of testimony, he can come far nearer reproducing what happens in court than he could the other way.

Mr. Medalie. You have another aspect, and that is the assignment of errors. The requirement still is for assignments of errors in criminal cases.

Now, a lawyer who has tried a case and prepared the record for appeal will not omit any possible assignment of error, particularly because there might be other counsel in the case, and he will not exercise his judgment in the way that will preclude the exercise of judgment by another lawyer.

Also, he is not sure of what he will put in his brief until he has exercised a reasoned judgment on it and spent time on it. Therefore, every exception that he finds in the record is put in the form of an assignment of error, which the court never reads, which his adversary ignores, and which is subjected to a tremendous amount of expense and labor.

You remember that at the Second Circuit conference I digressed and went to the point of denouncing the practice.

Mr. Robinson. Judge Learned Hand and others agreed with you. They said they did not read the assignments.

Mr. Medalie. Even in Judge Learned Hand's mind there existed this idea, which he stated some years ago, not officially but in conversations with lawyers, semi-public expressions of opinion, and which he repeats today, to this effect: He says that if you want to sustain a conviction it is a good thing to be able to fall back onthe failure of an appellant to make an assignment, which is, I think, unworthy of a great judge like Learned Hand.

Mr. Robinson. He laughed when he said it.

Mr. Wechsler. He always does it in his opinions.

Mr. Holtzoff. I think we ought to follow the civil rules.

Mr. Medalie. I do not think that anybody can point out that there is any useful purpose served by assignments of error, in view of the practice in modern times of printing briefs, which the other side has enough time to prepare answers to.

The Chairman. Are we all united on this?

Mr. Seasongood. On what?

The Chairman. The abolition of the assignments of error and the printing of the record in this modernized form, authorized by the civil rules.

Mr. Youngquist. Without a bill of exceptions.

Mr. Seasongood. I am not entirely clear, Mr. Chairman. I just put this forward. It says here in the rules as they are now that all of the proceedings relating to the record are in the appellate court after you file your notice of appeal. From the time of filing the notice of appeal -- that is Rule 4 -- the appellate court has supervision and control of the proceed-

ings on the appeal, and wouldn't that have to be so if you abolished the bill of exceptions? That is a good deal of a burden. You cannot always get an appellate judge, and they do not want to be bothered with it, anyway.

Mr. Holtzoff. This rule relates to the mode of transferring the transcript to narrative form.

Mr. Seasongood. In one case I had the appellant filed certain parts of the record, and the United States insisted on a great mass of stuff, which cost two or three hundred dollars to print. There is nothing to do really except to let that go in.

Mr. Medalie. Unless the court gives you relief. Now, that frequently happens in long and complicated cases that are largely tried on exhibits.

The printing of exhibits is not only a great expense and a great loss of labor, but it is of no value to the court in most instances. The normal procedure, as you know, is to try to agree with your adversary as to what may not be printed, and you get a stipulation to that effect, with the provision that either side may use any exhibit not printed for perusal by the court.

If you do not agree with your adversary, the practice in our circuit, which is almost always in session except during the summer, is to have the court determine that question on a motion.

The Chairman. If we could agree on these two points, I would like to bring up a third one, which would be the recommendation of the practice that originated in the Fourth Circuit and has now been carried to the Third and adopted here in the

Court of Appeals of the District, and it is this: that instead of printing the record, the record from the district court comes up in typewritten form, and each side is allowed to print, as an appendix to his brief, those parts of the record on which he desires to rely, with the original record being there before the court, so that the court can get all of it if it wants, and the original exhibits are there for the court to look at.

3 The result is that you have your 50-page brief, then you have an appendix, which may vary from 20 pages to 200 pages, and the ultimate cost of the printing of these appendices is determined by the outcome of a case in a civil procedure, except that if any side prints something which the court concludes should never have been printed, the printing bill for that portion is deleted.

That is the rule in the Third and Fourth Circuits, and, according to an article by Claude Dean, it saves counsel about three-quarters of the cost which is ordinarily involved in printing the record.

All of us know that in an ordinary case there are great masses of the record that the court will never look at, and your case gains strength from the fact that the court knows you are printing the part that is worth looking at from your point of view.

I wonder if that is not something that we might well give consideration to and, if this task is assigned to us, urge it on the court to be adopted as the universal rule in criminal cases?

Mr. Dean. Do you send up just the one copy?

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The Chairman. Just the one copy.

Mr. Medalie. Couldn't it be done by any circuit court adopting a rule to that effect?

Mr. Holtzoff. It is done now by circuit rules.

Mr. Medalie. Why do we need to add anything? Suppose the Second Circuit finally broke down --

The Chairman. It has worked for years in the Fourth Circuit, and it is working here in the District, which is a district in which you have the heaviest records, from all these appeals from administrative bodies.

Why shouldn't it be presented to the court?

Mr. Medalie. The reason I would suggest, so far as it applies to my circuit, is this. The Second Circuit has a tremendous amount of business, certainly more than any other circuit --

The Chairman. I doubt if it has any more than the Court of Appeals for the District of Columbia.

Mr. Holtzoff. I think the number of cases is larger in the Second Circuit. The number of pages is more here in the District.

Mr. Medalie. In other words, it is not found to be an inconvenience --

The Chairman. Judge Groner is most enthusiastically in favor of it.

Mr. Medalie. I think we ought to consider that, and I think we should see what conditional resistance there will be to it, and clarify it in our own minds and see what objection there would be to that.

The Chairman. Mr. Dean has written an article on it. I

will see if he won't send a copy of it to each member of the committee.

Mr. Holtzoff. The First Circuit is considering it, if it has not adopted it.

Mr. Longsdorf. We have used exactly the system that you describe in the state courts in California for the last twenty-five years, and in Oregon, somewhat different but practically the same, for a little longer. We can still make use of a bill of exceptions. It is legal, but it has fallen into almost complete disuse.

I think it has worked very successfully in the state courts in California. I won't say that the system is flawless, but it works, and the profession has accepted it practically to the exclusion of using a bill of exceptions, although the right to use it still remains.

The Chairman. As a matter of fact, in cases coming up from the circuits that have that rule to the United States Supreme Court the United States Supreme Court has been accepting original stenographer's records plus the printing of those portions of the testimony that counsel want to rely on, not without some grumbling, I understand, originally, but they finally acquiesce in it.

From the standpoint of an indigent defendant or a poor defendant, it is really a very desirable thing.

Mr. Medalie. What happens as to the time that the appellee has to prepare what he thinks ought to be appended to his brief?

The Chairman. That is fixed by the rules. He is allowed so many days after the transcript is available.

Mr. Medalie. Is he given adequate time?

The Chairman. Yes.

Mr. Medalie. The time now for the writing of the brief may not be as long as the time you need for the preparation of the brief and appendix.

Mr. Holtzoff. You have to amend the rule fixing the time.

Mr. Youngquist. Ten days is provided here.

Mr. Holtzoff. Of course, this rule does not embody the rule that Mr. Medalie mentioned.

Mr. Seasongood. Is there any difficulty with reference to the correct printing of it in the brief? There is no official supervision of the printing?

The Chairman. You do not have that in the Second Circuit. There is no official printer.

Mr. Longsdorf. Mr. Vanderbilt, how do you get sufficient copies of the reporter's transcript to supply counsel on both sides -- I am speaking of civil cases -- and all of the counsel, where there are numerous parties, with enough copies of the transcript to choose what portions they want to print as an appendix?

The Chairman. Well, ordinarily you have only two sets of parties, a defendant and a plaintiff.

Mr. Longsdorf. What do you do when you have two or three attorneys or firms associated on one side of the case, and each one of them wants a transcript to see what portion he desires to have printed as an appendix?

The Chairman. They order carbon copies for their use.

Mr. Longsdorf. I suppose so.

The Chairman. The saving is not on stenographer's bills.

The saving is on printer's bills and facilitating the work of the court.

Mr. Longsdorf. I have heard that criticism made. I guess there is no help for it.

Mr. Seasongood. I move we recommend it.

Mr. Dession. I second it.

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

(There was a chorus of ayes.)

The Chairman. Opposed,"no."

Mr. Medalie. I would like to reserve my views on that. I would like to consult with my judges in the circuit on that.

The Chairman. I think you will be convinced after you read this article.

Mr. Dession. I would like to cite one case which illustrates the need for this. There was a conspiracy trial in Connecticut for some labor officials. They were tried under an old statute, with a 15-year penalty, and there were real questions of law involved. They wanted to take an appeal, but were out of funds by that time.

They moved the Supreme Court of Errors for leave to go up on a typewritten transcript. Motion was denied, so there was no appeal.

That sort of thing can't happen, and that was only a few years ago.

The Chairman. That illustrates the stiff-necked attitudes of the court.

Mr. Dession. That record would have cost $15,000 to print.

Mr. Longsdorf. There is one other thing about that method

in a civil case. I cannot see any reason why you should not send the original filesup and then get them back.

Mr. Medalie. Well, the parties usually have the exhibits, not the court.

The Chairman. Are there any other suggestions with reference to appeals practice?

Mr. Holtzoff. There is just one point, Mr. Chairman, on the question of stays. I think perhaps we might want to preserve the criminal appeals rules on the question of stays rather than follow the civil rules.

The Chairman. Is that involved in the situation that has made so much trouble in the Fifth Circuit, where a man will go to see --

Mr. Dession. That is the amount of bail.

Mr. Wechsler. Perhaps I misunderstood what we are doing. I thought the principle of our action was this: that we would abide by the present criminal appeals rules except that we were going to make the changes you referred to, to-wit, to abolish the bill of exceptions and the assignment of errors and to substitute therefor provisions for this other type of practice.

The Chairman. I mean on this abbreviated record.

Mr. Wechsler. Yes, but now Mr. Holtzoff raises the question of stays, and of course, Rule 62 of the civil rules deals with that. I just want to understand correctly that we have not taken any action with reference to these other civil rules.

The Chairman. We are passing by, for the moment, the question of the detailed consideration of whatever appeals rules appear in our draft, but saying that there are three changes

that we would like to recommend to the court, if this ever falls within our jurisdiction.

Now, I wonder if we might go on to the next point, which is one of getting from the members of the committee a list of additional topics that, in your judgment, should be incorporated into our draft.

Probation was mentioned earlier. Juvenile delinquents.

Mr. Wechsler. Procedure on sentence.

The Chairman. Yes.

Mr. Youngquist. You have, of course, arrests and proceedings before the commissioner.

Mr. Longsdorf. Preliminary proceedings.

Mr. Burke. Proceedings on bail.

Mr. Wechsler. Arraignment.

Mr. Holtzoff. Removal proceedings.

Mr. Wechsler. Yes. That is very important.

Mr. Medalie. I think we might really make a contribution on that subject, because of the abuses that come up occasionally.

Mr. Longsdorf. There is an obscure little provision, very seldom resorted to, but it is in the statutes: Proceeding for security to keep the peace.

Mr. Holtzoff. That is never used in the Federal courts.

Mr. Medalie. I did not know that there was such a provision.

Mr. Holtzoff. Search and seizure. Habeas corpus.

Mr. Youngquist. Motions to suppress evidence.

Mr. Holtzoff. That is under search and seizure.

Mr. Longsdorf. Habeas corpus.

Mr. Holtzoff. That is a civil procedure.

Mr. Wechsler. I do not think we could handle that. We

might get an authorization to deal with it. It is not touched by the criminal rules.

Mr. Holtzoff. In the light of the decision that came up from the Ninth Circuit, there ought to be somewhere, either in the civil or criminal rules, a set of rules regulating habeas corpus. Although habeas corpus is a civil proceeding, it is really applicable to criminal cases.

Mr. Wechsler. You realize what the situation is now. The civil rules apply except to the extent that they are inconsistent with the old habeas corpus statute.

There are eight, nine, or ten provisions in the U.S.Code regulating habeas corpus. In the case that you have in mind the holding was that the rule authorizing reference was inapplicable to habeas corpus, because the habeas corpus statute provided for determination by the judge.

I think there is a case for re-examining habeas corpus generally, but the committee on civil rules decided to retain it and not to tamper with the habeas corpus statute, because the civil rule provision is that the rules apply except to the extent that they are inconsistent with the statute.

We ought to examine into the basis for their judgment, I think, before we go ahead.

Mr. Holtzoff. It may be that perhaps the Supreme Court will transfer habeas corpus jurisdiction to this committee, because even though habeas corpus is a civil proceeding technically, it is generally used in connection with criminal cases.

Mr. Youngquist. Don't you think we have enough now without adding that?

Mr. Holtzoff. Perhaps so.

Mr. Longsdorf. There are several kinds of habeas corpus.

The Chairman. Let us put a question mark after that.

Mr. Robinson. Just one more subject I have down here, and that is contempt, if you want any consideration on that.

The Chairman. If possible, we will cover it.

Mr. Medalie. Mr. Longsdorf has expressed to me his opinion again and again that wherever we are dealing with anything that has aspects that are both civil and criminal we ought not to be worried about the classification. We ought to deal with it if we are going to make a contribution to the subject. The only thing you would worry about is the number of the rule.

Mr. Holtzoff. Except that perhaps we might be encroaching on the duties of the civil rules committee.

Mr. Medalie. The court could tell us that.

Mr. Youngquist. We ought not to go into anything outside our duty as set forth without the Supreme Court asking us to.

Mr. Holtzoff. I would rather see habeas corpus in these rules than in the civil rules, because as a matter of substance they belong in the criminal procedure, even though it is a civil procedure.

Mr. Youngquist. Mr. Chairman, might I interrupt the discussion to ask what is the plan on procedure after the reporter has done the tremendous amount of work that he is assigned?

The Chairman. My thought was that after the reporter has made a redraft of the rules in line with the sense of the meeting the rules will then be distributed by mail to the members of the committee, and each man will be asked to reply

by memorandum with any suggestions or corrections.

That will soon develop whether or not we need another general meeting of the committee on the subject of the rules insofar as covered by this original draft.

We also have the next problem, which is the consideration of the rules which will be before him as the result of these topics now being thrown on the table. For the purposes of that discussion I think we clearly will have to have another meeting of the entire committee, to canvass them in just the same way as we have been going over the first draft.

Therefore, one way or another, we will have another full meeting of the committee as soon as the reporter is ready for us. Now, as to when that meeting will be, that is something that the reporter can say better than anyone else.

Mr. Medalie. What is the immediate outlook as to that? Will it be within the next two months?

The Chairman. I think it is too much to expect that it will be before Thanksgiving, but I hope it will be before Christmas.

Am I too ambitious in that, Mr. Reporter?

Mr. Robinson. Well, I have talked to Mr. Strine and Mr. Holtzoff. We think that two months for the work outlined for us would give us a very busy time. We recognize the pressure of time, of course. We would like to have at least two clear months, if possible.

The Chairman. Yes, but my thought is that with these new topics coming in we should seek to make financial arrangements with the court to augment the staff. I think we would clearly be asking too much of this relatively small staff -- very small

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in comparison with what is available on the civil rules committee -- to do the work in the time assigned.

I think we can get additional help from the Department and perhaps people from the outside to give us a lift on these special topics.

If that were done, would two months be too little to suggest?

Mr. Robinson. For the record, the answer was that two months would be too little unless we get additional help.

The Chairman. Mr. Wechsler?

Mr. Wechsler. I do not mean to suggest that the reporter is incapable of working twenty-four hours or that any of his assistants is incapable of working at that speed, but I have a general familiarity with some of the topics that have been suggested, and I must say that I just do not see how it is conceivable that Mr. Robinson could do that much work in two months and be satisfied that it was the real thing.

I earnestly suggest that this is the time, with the great start that has been made in so short a time, to begin to breathe a little more easily and be more concerned with covering the ground fully and without undue pressure than for speed in submitting this to the court.

I may be wrong about this, but I feel very confident that when these rules or proposals are submitted to the court, even at this preliminary stage, there will be from the court the most incredible demand for commentary to explain the principle and reason for any changes that are made or to delineate the difference between what we have got and what we had in the past. I do not see how this material could be in condition for that

kind of submission in anything like that time.

I am repeating the point that I have expressed privately to you.

The Chairman. Mr. Wechsler, haven't we got an additional step that must be gone through before this goes to the court, because after we have our next general meeting we will still have another process of revision, which will probably be just as arduous as the one now contemplated, before the draft will be ready to go to the court?

Mr. Wechsler. Well, I am addressing myself to the form in which the material could most helpfully be before we have that meeting, preliminary to submitting it to the court, and I do not see any advantage in expediting the meeting if there will be a delay after the meeting, during which the reporter has to get the material ready for the court.

It seems to me that that should come first, and then we could be of more use, if we are of any utility.

Mr. Waite. Mr. Chairman, is it possible to have only one meeting before it goes to the court? I would assume that another meeting would take up all the material that has not been taken up at all at this time.

The Chairman. That is correct.

Mr. Waite. And perhaps it would go over the revision of this material. Then I should think there would be another meeting to go over the second time that which was taken up for the first time at another meeting and put the matter in final form for submission to the court.

The Chairman. I suggested this. I thinkyou were out of the room for the second. I suggested that all of the material

that we have here discussed will be redrafted by the reporter and his assistants, and then that will go out to the members of the committee. We will be asked to return.

If there are rules that meet with consent, we won't need to discuss them at our next meeting. In other words, I think that as to the parts that we have been over the process of revision should be much easier than it was on this first draft.

Then in that meeting that we will come back to we will have to discuss new parts of the rules, topics that we have just suggested, in the same way as we have gone over these rules for the last four days.

Now, whether there will have to be a third meeting of the committee before the matter finally goes to the court will depend upon what degree of success we have at our second meeting.

Mr. Holtzoff. Mr. Chairman, after all, the draft is to be submitted to the court only to secure its permission for circulation in a tentative form, so that I do not suppose the court will study it at this particular junction.

The Chairman. Of course, I should think that the court, as in the case of the civil rules, would want something that would go out to the bench and bar and come back laden with criticism. As I understand it, there was hardly a section of the civil rules that did not have to be revised as the result of the suggestions made by judges or lawyers.

Mr. Wechsler. I do not remember. When the civil rules were first distributed to the bar were there commentaries with them or were they distributed alone?

Mr. Longsdorf. Yes, there were.

Mr. Wechsler. My recollection is that there were commentaries and that those commentaries pointed up the discussion of the bar. I think we ought to follow that practice here.

Mr. Longsdorf. Then there was a second tentative draft.

I would like to suggest that when the reporter completes the recasting of these rules and sends copies of them so recast to us, he determine on some sort of a form, the size of paper, and so on, that we should use in our making our comments, so thatwhen they come back they will work in with the plan of materials which he has on hand.

I know from experience that a lot of stuff coming in on different size paper is hard to handle. I think we would help him somewhat if we do that, and we would make our comments probably more pointed to him by doing it.

Mr. Youngquist. Mr. Chairman, I suppose somewhere in the course of the proceeding there will be appointed a committee on style. It occurs to me that if such a committee were appointed it could probably begin its work after the next meeting and prior to the submission to the Supreme Court, which might save a good deal of general committee work.

The Chairman. Didn't the committee on style act after submission to the Supreme Court?

Mr. Tollman. It worked immediately after the first draft was submitted to the court, but that was one year after the work was begun. For two years the committee on style worked, and they held, I should say, meetings about six times, and saved a large amount of work for the general committee.

The Chairman. Suppose, without trying to fix any dates, we see how things work out.

Mr. Longsdorf. Please do not tie the poor man down to a date. I have been through all that. It is awful.

The Chairman. Of course, you know there are some of us who have to get briefs ready by certain dates.

Mr. Longsdorf. I have done that, too, and that is awful.

Mr. Wechsler. I think, too, Mr. Chairman, we ought to have some reasonable time to study the work that the reporter has done before the meeting is called, and I think we ought to have at least the time that is ordinarily accorded to counsel after a brief on the outside has been filed.

Mr. Youngquist. As I understood it, we are to submit our commentaries after we get the next draft. The commentaries, of course, will be submitted before the meeting, and we need some time to prepare that. When they are in we ought to be all ready to go.

The Chairman. Well, I have had some experience with committees, and I think it is safe to say that no matter how much time is given, at least one-third of the members of the committee will read the material on the train from their home to the committee, and that at least another third of the committee will never have read it until they come to the meeting, and they will both start off about even.

Am I doing an injustice to my profession?

(There was a chorus of noes.)

Mr. Wechsler. May I ask one other question, Mr. Chairman? Is there any guiding principle on this question? There are a lot of provisions in the statutes which have appeared on the left-hand page as we have proceeded here. Many of them have been incorporated in proposed rules, either in substance, the

same, or with some change, but many of them also have been entirely neglected. Many of them deal with exceedingly minute detail, and I do not for the moment say that it is not right to neglect them, but is there any principle that the net product shall try to tap or reproduce or address itself to the statutory provisions that now exist?

I think in the case of the civil rules it is one of the great virtues of the result that you can pretty much forget about the statutes and confine yourself to the rules. Now, if we were to make that an ideal --

The Chairman. That is because some of the statutes were repealed immediately afterwards.

Mr. Wechsler. Precisely, but that is because the rules address themselves to all the problems to which the statutes were addressed.

The Chairman. Pardon me. I am in error. Mr. Holtzoff says they were not repealed. They were left standing.

Mr. Wechsler. But what is the provision in the rules? That they are ineffective to the extent that they are inconsistent with the rules.

Isn't it true that there is very little in the statutes in civil cases governing procedure that is presently significant? And that is because the rules address themselves pretty much to everything and were developed in part with an eye to what was in the statutes.

Now, I simply ask whether we have any principle with reference to that problem. I may add that I think it would be advantageous for the result if to the extent that we can we cover the ground that is covered by existing Federal statutes

of import, so that it won't be necessary for practitioners in the future to start with our rules and say, "I must go through the same old business of exhausting all the statutes to see if there is anything there that is touched by the rules."

We can examine the statutes, and if we reproduce them in the rules we are not enlarging the net bulk of the applicable law.

The Chairman. Well, the reporters had that in mind, as you will see from these forms which were prepared for discussion. If we had discussed these rules following this form, we would never have gotten through. This says:

"Present Federal Law. Why no change? Why change? How change? Where now law?"

and then a statement as to who endorses the proposed rule and who opposes it.

Mr. Wechsler. I know that, but I asked as a question whether it was an ideal, an objective, to cover everything in the law, or whether there was some principle of --

Mr. Robinson. The question is very general.

Mr. Wechsler. I will make it more specific.

Mr. Robinson. I will have to answer generally, too. I think your objective is one that we have distinctly before us. We feel that to the extent that these rules can be sufficient within themselves to govern Federal criminal procedure, that is a very highly desirable objective, and that is our objective, and I think we can incorporate a good many of our statutes.

Mr. Wechsler. I wondered if there were a lot of Federal statutes that were not included in the documents you gave us, because there was no comparable civil rule.

Mr. Robinson. No. It was because there was no comparable Federal statute. We have been surprised to find the extent to which Federal criminal procedure is not statutory. A great mass of it is not statutory. That is the reason for the great variation between the various districts.

Mr. Youngquist. Couldn't we do this? Put an appendix on the rules that specified sections of the statutes shall no longer be controlling?

Mr. Longsdorf. We did in the civil rules. There is a parallel table furnished with the civil rules and it was furnished with the tentative draft that they sent out to us. There is a parallel table showing the citations of the judiciary statutes and the rule in another column which touches that subject.

Mr. Youngquist. What I mean is this, Mr. Longsdorf: To make it a rule that these specified statutes shall no longer control in criminal proceedings. That would serve as a repeal of those particular statutes.

Mr. Longsdorf. I would be afraid of that. I would prefer the word "supersede" without repealing. It may result in the same thing.

The Chairman. Before Mr. Youngquist gets away, I would like to ask if the reporter can get the work done in two months or something comparable to that. What time would best suit the convenience of the committee for a next meeting?

Mr. Medalie. I could not answer that question.

Mr. Youngquist. As far as I am concerned, any time except Christmas week.

Mr. Seasongood. I think Mr. Youngquist's suggestion is a

good one, because a great many States have the provision that you cannot repeal the statute without specifically mentioning it.

Mr. Holtzoff. That is a Federal law,

Mr. Seasongood. It is a good thing to know it has been repealed, so you do not have a question of whether the statute is in conflict with the rule or whether it is not.

Mr. Dean. It is something that should appear in the commentary to the rule, it seems to me -- what statute are we superseding, what statute are we embodying in part, and what statute are we embodying in full?

Mr. Seasongood. Mr. Youngquist made another suggestion, and that is the order of the rules. He thought that the logical order was to start at the beginning, and it seemed to me that that was so. Start with the arrest and go right through.

The Chairman. I think we came to the conclusion that we would abandon all hope of paralleling it with the civil rules and resort to chronological order.

Mr. Dean. I was out of the room when you discussed the subjects to be covered by the reporter. Was arrest covered?

The Chairman. Yes. Have you any others?

Mr. Dean. Proceedings before United States Commissioners.

The Chairman. We have that.

Mr. Dean. Habeas corpus.

The Chairman. That has a question mark.

Mr. Dean. Bail.

Mr. Longsdorf. There is another thing in connection with preliminary proceedings, proceedings before United States Commissioners. The statute qualifies a state magistrate to act

as a committing magistrate. I think we ought to bear in mind whether or not rules could be drawn with uniformity, so that in case any state magistrate was called upon to act, he should proceed in the same manner as the United States Commissioner does.

Mr. Waite. At the risk of repetition, may I ask if there was a suggestion that there be something about the power of the court to exclude certain persons from the audience, as there is in the state courts, for instance, to excuse youthful persons?

Mr. Medalie. Isn't that inherent in a court's power, providing it does not violate the defendant's right?

The Chairman. I think it is an inherent right.

Mr. Waite. I think it is inherent. I would rather have that.

The Chairman. The reporter willmake a note of that.

Mr. Waite. Also the power to order separation of witnesses.

Mr. Medalie. The court exercises that power.

The Chairman. That is something that is not done in many jurisdictions.

Mr. Medalie. The Federal courts in our locality exercise that power, and no one ever questions it.

Mr. Waite. I suggest that you consider some provision covering a conviction by the jury of included offenses, offenses which are included inan indictment.

Mr. Longsdorf. That leads up to this. We have not said anything about forms of verdicts yet.

Mr. Wechsler. And the subject of variance is related to that.

Mr. Longsdorf. Before we get too far away from the statutes, there are, among the few Federal statutes that we have, some, and notably Section 591, which combine a diversity of subjects. I think those ought to be separated.

We have the preliminary proceedings in Section 591, and then the removal proceedings very imperfectly stated in the concluding part of Section 591. Let us separate that.

Mr. Seasongood. I have a note of the same thing Mr. Waite stated. I took it that that was inherent, but maybe we ought to know whether there is anything different in criminal cases.

Another thing is examination of the premises. Of course, I would take it that the defendant would be present.

Mr. Robinson. I would like to cite the case of Blackley, 70 Pacific (2nd) 799, a case from Washington, which I mentioned in connection with joinder. There was an expression of belief from Mr. Youngquist that the final decision there was against the joinder, but the true situation is that at the trial in court the indictment was quashed for error in joinder, and in the higher court that was held to be error, by a divided court. Two or three judges and the Chief Justice dissented. I just want that in the record.

That was the case of a stage coach driver parking on a highway, followed by a drunken driver, with the result that a third party was killed, and they joined the first two.

Mr. Waite. There is another matter that I suggest for your consideration, and that is the necessity for the actual presence of the defendant in the courtroom.

Mr. Robinson. That is right.

Mr. Dean. Well, I hope you do not write a rule that he

must be present.

Mr. Robinson. It has been stated that it is not necessary to have all the defendants present at all times, especiallyin these anti-trust cases.

Mr. Longsdorf. When you get one of those anti-trust cases where a lot of corporate officers are indicted jointly with the corporation, you drag them across the continent just so they appear personally for arraignment. Then they go home and they make another trip three or four months later when the case is tried. They are perfectly responsible people. They won't run away, and you just make them waste time.

Mr. Medalie. I understand that they do not attend the trials. Do they?

Mr. Longsdorf. Well, they should not have to be present at the trial. The suggestion was to do it by a summons, allow them to authorize an appearance for arraignment without appearing in person at the arraignment.

Mr. Dession. Why limit that to anti-trust cases?

Mr. Longsdorf. It should apply to all similar types of cases.

Mr. Medalie. You mean cases where the penalty is not very serious, like one-year cases?

Mr. Longsdorf. Well, they did not specify that kind of case. They simply said it was useless procedure to drag responsible people clear across the continent merely to arraign them in the district where the crime was committed.

Mr. Holtzoff. You mean to allow a person to give bail wherever he is and to return later to where the trial is being held?

Mr. Longsdorf. Yes, and make some arrangement for arraignment day without being present.

Mr. Dession. That would be a difficult rule to frame.

Mr. Medalie. If the Government would object, its objection should be final on that. Now, the Government is not quite as unreasonable as some people would like to have you think.

Mr. Dession. Some of your district judges are going to have a feeling that they are discriminating. This class would have to be defined in a way that meant a defendant in every kind of case that met the requirements.

I am very much for using the telephone instead of a warrant where it is feasible, but sometimes the court would be your obstacle.

Mr. Medalie. If the court is opposed to it, it should not be done, but if the court and Government agree it ought to be done and it is safe to do it, I think it ought to be all right.

Mr. Longsdorf. I am simply pointing out something that ought to be done, not how it shall be done.

Mr. Seasongood. I raise the question whether there is anything peculiar in affidavits of prejudice in criminal cases. Should that subject be explored?

Mr. Robinson. That question comes up with contempt.

Mr. Seasongood. In any criminal case is there anything special in that regard that requires different treatment from ordinary statutes?

Mr. Holtzoff. There is a statute applicable either to criminal or civil cases.

Mr. Wechsler. Was the subject of grand jury proceedings mentioned?

The Chairman. Yes.

Mr. Waite. Does the question of change of venue arise in the Federal courts?

Mr. Holtzoff. The Federal statutes do not provide for change of venue.

Mr. Wechsler. That is an aspect of the proposition that I propounded before, that venue is a subject that should be considered. I think a change of venue should be possible in the Federal courts.

Mr. Longsdorf. That would mean amending the Constitution.

Mr. Wechsler. If the defendant asks for the change, it won't.

Mr. Holtzoff. I suppose the defendant would waive his constitutional right.

Mr. Wechsler. Moreover, the change would be likely to be made where the Government has a choice of venue, anyhow.

Mr. Medalie. I think that is a substantial fact. It is not a matter of just local prejudice, as in some state statutes, but where the Government should have tried them in Boston and chose to try them in Duluth, he might have some reason on account of local conditions.

Mr. Wechsler. In a conspiracy case the Government can bring an action anywhere in the United States.

Mr. Waite. If he can find an overt act. Judge Roberts told me he did his best to get the Sinclair and Doheny affair out of the District of Columbia, but he could not find an overt act anywhere else.

(A discussion as to the next meeting took place, after which the following occurred:)

The Chairman. I think we will have to leave the date open for the present.

Are there any other matters?

Mr. Dean. Is it feasible to send these rules out rule by rule, rather than wait until they are all redrafted?

Mr. Robinson. I should think it would be desirable to send them by sections, at least.

The Chairman. If there is nothing further to come before us, we will adjourn subject to the call of the Chair. We thank everyone for the helpful cooperation they have given.

(Thereupon, at 2:55 o'clock p.m., an adjournment was taken subject to the call of the Chairman.)