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IN February 1941, the Supreme Court appointed an advisory committee to prepare a draft of Federal Rules of Criminal Procedure. That committee has made its report to the Court and has presented a final draft of the rules.[1] The adoption of these rules would be a landmark in criminal law administration. The importance of the draft does not lie in the fact that it projects matters that are novel or new, but rather in that it presents in successive provisions, stated in simple language, the best practices in criminal law procedure that have been evolved through experience. Of equal, or perhaps even greater, significance is the promise that these rules would tend to establish order and uniformity in federal practice where now there is uncertainty and confusion.

The main authority for the draft was an act of Congress of June 29, 1940.[2] Actually, full authority for it, including the rules dealing with petty offenses, was derived from five acts of Congress[3] and three orders of the Supreme Court. It is noteworthy that with the passage of these acts by the Congress, the Court has been given full rule-making power touching all phases of federal practice and procedure.

PURPOSE AND SCOPE OF THE RULES

The draft has ten chapters, the successive headings of which are: Scope, Purpose and Construction; Preliminary Proceedings; Indictment and Information; Arraignment, and Preparation for Trial; Venue; Trial; Judgment; Appeal; Supplementary and Special Proceedings; and General Provisions. These are followed by an appendix which sets out twenty-two illustrative forms. The rules are conceived to "govern the procedure in the courts of the United States and before

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[1] Federal Rules of Criminal Procedure, Final Report (1943). Page references are to the Final Report unless otherwise indicated. This Report was preceded by a Preliminary Draft (1943) which was widely distributed for criticism among the bench and the bar.

[2] 54 Stat. L. 688 (1940), 18 U.S.C.A. § 687 (Supp. 1943).

[3] 18 U.S.C.A. § 688 (Supp. 1943); 54 Stat. L. 1058-1059 (1940), 18 U.S.C.A. §§576-576d (Supp. 1943); 55 Stat. L. 779 (1941), 18 U.S.C.A. § 689 (Supp. 1943); 56 Stat. L. 271 (1942), 18 U.S.C.A. § 682 (Supp. 1943).

United States commissioners in all criminal proceedings."[4] They would not be applicable to proceedings involving petty offenses on federal reservations, the collection of fines and penalties, extradition and rendition of fugitives, forfeiture of property for the violation of a statute, nor to proceedings under the Federal Juvenile Delinquency Act in so far as the rules are inconsistent with the act.[5] Justices of the peace and other state magistrates would continue to follow state procedure when conducting preliminary examinations of federal offenders. The rules state that their purpose is "to provide for the just determination of every criminal proceeding," and that they "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."[6]

IN DESCRIPTION OF THE RULES

The draft encompasses a comprehensive set of regulations conceived to govern all phases of criminal procedure. No effort will be made in these comments to describe each of the rules. The discussion will be confined to provisions that are distinctive or new in federal practice.

The rules provide that a summons may be issued in place of a warrant. When the proceeding is upon a complaint, a summons would be issued on request of the attorney for the government.[7] Upon indictment or information it would be issued on direction of the court or on the request of the attorney for the government.[8] To expedite the making of arrests, the rules would eliminate several steps in the present practice by providing that "a warrant or a summons may be executed or served anywhere within the jurisdiction of the United States."[9]

The prescription in the Fifth Amendment relating to presentment or indictment by a grand jury has raised various obstacles to criminal procedure reform. The proposed rule provides for waiver of indictment. An offense which involves punishment by death would still have to be prosecuted by indictment, but when the death penalty is not involved, proceeding by information would be permissible "if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."[10] On the content of the indictment (or information), the rules propose that it need not contain a formal commencement or conclusion, or any other matter not necessary to charging the offense. A plain, concise and definite

[4] Rule 1, p. 4.
[5] Rule 57, pp. 268-271.
[6] Rule 2, p. 5.
[7] Rule 4(a), p. 10.
[8] Rule 9(a), p. 51.
[9] Rule 4(c) (2), p. 11.
[10] Rule 7(b), p. 30.

statement of the essential facts constituting the offense charged would be required.[11] The illustrative Table of Forms in the appendix gives further evidence of the intent of the committee. The following charge in an indictment for sabotage would be sufficient:

"The grand jury charges:

"On or about the _____ day of _____, 19__, within the _____ District of _____, while the United States was at war, John Doe, with intent to injure, interfere with or obstruct the United States in carrying on the war, wilfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill."[12]

One of the most sweeping changes proposed by the new rules is that relating to defenses and motions.[13] The pleadings designated for all criminal proceedings are the indictment and the information, and the pleas are guilty, not guilty, and *nolo contendere.* Under present practice in the federal courts, defendants raise defenses and objections much as they did in Blackstone's time. The proposed rules would abolish demurrers, motions to quash, pleas in abatement, and pleas in bar, and substitute for them a motion to dismiss.[14] All dilatory pleas would be waived if not raised before trial. Lack of jurisdiction, however, and failure of the indictment or information to charge an offense might be presented at any time.[15] To encourage determination before trial of some issues which now are raised during trial, the rules provide, "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."[16]

[11] Rule 7(c), p. 30.

[12] P. 299.

[13] Rule 12, p. 60.

[14] Rule 12(a) reads, in part, as follows: "All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules."

The American Law Institute Code of Criminal Procedure, Official Draft, (June 15, 1930) has a similar provision. It, however, designates the motion to quash as the single substitute motion. See § 209 of the Code.

[15] Under present practice lack of jurisdiction over the person is waived if the objection is not presented before any plea to the indictment or information. The new rules would conform to present practice with respect to the failure of the indictment to charge any offense. See note to Rule 13, p. 69, Preliminary Draft, and authorities there cited.

[16] Rule 12(b) (4), p. 61.

Provision is made for pre-trial procedure.[17] The rules would inject another new procedure into federal practice that would deal with the alibi defense.[18] Several states now have statutes on that subject. Rule 16 of the draft provides that if a defendant intends to offer evidence that at the time the offense is alleged to have been committed he was at another place, he may make a motion calling on the government to serve and file before trial a specification stating with particularity the time and place of the alleged offense. If the court grants the motion, it would fix the time the specification is to be served. If the defendant intends to offer evidence of alibi, he would on service of the government's specification be required to serve and file a specification of the place where he was at the time the offense is alleged to have been committed. Should the defendant fail to make the motion or the specification, and at the trial offer evidence of alibi, "the court may exclude the evidence unless it finds that the failure was excusable or that the admission of the evidence would be in the interest of justice."[19]

The rules would authorize taking a witness' deposition.[20] The obstacle to the taking of depositions in criminal cases has been the constitutional provision on confrontation. Under the proposed rule, either the defendant or the government may request a deposition. If the government makes the request, the officer who has the defendant in charge, if he is in custody, would be required to produce him at the examination. If the defendant is not in custody, he would be given notice that he has the privilege of being present at the examination and the government would pay in advance to him and his attorney their travel and subsistence expenses in attending the examination.

A departure from accepted practice is proposed under which a defendant might consent, under circumstances specified, to a disposition of his case by a court in a district other than the one in which the crime was committed. The language of the Sixth Amendment to the Constitution is that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The rules provide that, "All proceedings shall be had in a district and division in which the offense was committed, except as otherwise provided in these rules."[21] The departure in the draft occurs when the defendant is arrested in a district other than the one in which an indictment or information is pending against

[17] Rule 15, p. 102.
[18] Rule 16, p. 105.
[19] Ibid.
[20] Rule 17, pp. 113-115.
[21] Rule 20, p. 128.

him. Then he "may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested." [22]

In accordance with the decision in *Patton v. United States*,[23] the defendant would be permitted to waive jury trial or consent to being tried by a jury of less than twelve, provided he expresses the waiver or consent in writing, and this action has the approval of both the court and the government.[24] As provided in the Federal Rules on Civil Procedure [25] the court would be empowered to direct the calling of alternate jurors in criminal cases.[26]

The draft is conceived to clarify an ambiguous situation with respect to rules that control the competency of witnesses and the admission of testimony in criminal cases. In *United States v. Reid*,[27] Chief Justice Taney held that the law by which the "admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789." [28] That case was decided in 1851. In recent years two cases, *Funk v. United States* [29] and *Wolfle v. United States*,[30] have given expression to a new formula. According to these decisions, the competency of witnesses and the admissibility of testimony are governed, in the absence of an expression by the Congress, not by the law of the state, but by the principles of the common law as interpreted by the federal courts "in the light of reason and experience." In accordance with the *Funk* and *Wolfle* cases, the new rules propose that the "admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [31]

Although the practice has been recognized that the court has the power to call and examine expert witnesses, this procedure is sufficiently clouded that an express provision on it is desirable. The rules

[22] Rule 22, p. 135.
[23] 281 U.S. 276, 50 S. Ct. 253 (1930).
[24] Rule 25, p. 142.
[25] Rule 47(b).
[26] Rule 26(c), p. 145.
[27] 12 How. (53 U.S.) 361 (1851).
[28] Id. at 363.
[29] 290 U.S. 371, 54 S. Ct. 212 (1933).
[30] 291 U.S. 7, 54 S. Ct. 279 (1934).
[31] Rule 28, p. 150.

would give the court that power.[32] Rule 30 specifies that, "The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection." A witness appointed by the court "shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party," and "he shall be subject to cross-examination by each party." This provision is based on the Uniform Expert Testimony Act drafted in 1937 by the National Conference of Commissioners on Uniform State Laws.

The draft outlines in simple but adequate terms procedures for sentence and judgment,[33] and provides for pre-sentence investigation.[34] This investigation would be made as a matter of course unless the court directs otherwise. The report of the investigation would contain a statement on any prior criminal record of the defendant, and such information about his traits and characteristics, his financial condition, and circumstances affecting his behavior as may be of aid in imposing sentence, in granting probation, or in correctional treatment.

The provisions on appellate procedure would tend to simplify it.[35] The aim is to prescribe a uniform procedure for the taking of appeals. Petitions for the allowance of appeal, citations and assignments of error are abolished. To preserve the interests of a defendant not represented by counsel, the rules provide that, "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith on behalf of the defendant a notice of appeal."[36]

CRITICAL EXAMINATION

There remain for consideration a few provisions of the proposed draft on which opinions may differ. The rules make no provision for notice by the defendant that he intends to present evidence that he was insane at the time he is charged with having committed the offense. They do cover notice of alibi.[37] The defenses of insanity and alibi are equally difficult for the prosecution when raised, without previous notice, in the course of a trial.[38]

The Advisory Committee rejected a proposal that would make

[32] Rule 30, p. 159.
[33] Rule 34(a) and 34(b), p. 172.
[34] Rule 34(c), p. 172.
[35] Rules 39-41, pp. 187-200.
[36] Rule 39(a) (2), p. 188.
[37] Rule 16, p. 105.
[38] The American Law Institute Code of Criminal Procedure, Official Draft, § 235 (June 15, 1930) requires notice of purpose to show evidence of insanity. It does not cover notice with respect of alibi.

permissible comment to the jury by the court and the attorney for the government on the defendant's failure to testify. One of its members[39] brought this question to an issue by submitting the following statement for its approval:

> "If a defendant does not testify in his own behalf, it is permissible for the jury to consider that fact and for the trial judge and the attorneys for the prosecution and the defense to comment upon it; provided, however, that if the accused does take the witness stand he may not be interrogated except by his own attorney concerning any previous alleged criminality."[40]

This proposal, or its substance, has often been advanced and it has had wide endorsement by judges and professional bodies.[41] In rejecting it the majority of the committee stated that it "felt that the time honored privilege of the defendant against comment either by the court or the prosecuting attorney on the defendant's failure to take the stand, is important and should not be disturbed."[42] This response is not convincing. We must recognize that there is a sharp difference of opinion on this subject, and this fact alone may have been sufficient ground for rejecting the proposal. But that was not the reason advanced by the majority of the committee.

The proposed rule bearing on the presence of the defendant at various proceedings is not clearly stated. It provides:

> "The defendant has the right to be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. In cases not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In cases punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant that counsel shall act for him, may permit arraignment to be had and a plea of not guilty to be entered or the trial to be conducted in the absence of the defendant."[43]

There would seem to be no quarrel with the objectives of the rule. The difficulty lies in its negative language, and in its leaving too much

[39] Professor John B. Waite, University of Michigan Law School.
[40] Preliminary Draft, pp. 251-252, (1943).
[41] See Professor Waite's comment, Preliminary Draft, p. 252 (1943).
[42] Preliminary Draft, p. 255 (1943).
[43] Rule 45, p. 224.

to inference. The first sentence states in broad language that the defendant has the right to be present at the proceedings specified. If this sentence is intended to guarantee a *right* in the defendant, it is a solemn pronouncement on a matter that is not controverted. The word *right* can, however, in this context, be taken to imply a privilege, and being a privilege, to imply that the defendant may waive it. This probably was not intended by the committee. The second sentence would seem to imply that the defendant must, in cases involving punishment by death, be present at all the proceedings mentioned in the first sentence.[44] But if that is what the committee intended, it should have stated that the defendant *shall* be present on those occasions. The second sentence would also seem to imply that in *all* cases other than those in which the death penalty is involved, the defendant may be absent voluntarily during all the proceedings named in the first sentence, except that he must be present at the arraignment and sentence. But the last sentence implies that in misdemeanor cases, under specified conditions, he may be absent from *all* the proceedings except the sentence.[45]

The proposed rules represent a laudable project that is well done. They are sustained by experience and, to their credit, by the best experience; and they are sound. One might wish that the committee had shown more daring and imagination in projecting improvements in the machinery of the law, but if it had done that, it would have risked contention, criticism, and possibly the rejection of its proposals. In drafting the report, the committee had the assistance of an expert staff, and it also had the friendly but critical aid of a wide array of talent from the bench and bar, and especially from the federal judges. When it submitted its preliminary draft for criticism to the bench and bar, the committee did, indeed, subject its proposals to an ordeal by fire, and a number of important modifications and improvements followed from that procedure. The final product is excellent.

[44] The language of the proposed rule reads, "In cases not punishable by death." Cases are never punished by death; but we must not become meticulous.

[45] Cf. the provisions on this subject in the American Law Institute Code of Criminal Procedure, Official Draft, §§ 287-291 (June 15, 1930).