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It is now only a little over two months since the spirit of life was breathed into the new Federal Rules of Criminal Procedure and they became effective. They are constructed on the solid foundation of our conventional practice and our fundamental concepts. The comparatively few innovations are in the nature of simplification, and are consistent with the basic principles governing our mode of administering criminal law.

In discussing the new procedure, it seems best to refer only to those Rules which have changed or modified prior practice. The Rules are intended to contain, insofar as possible, a complete Code of criminal procedure. It necessarily follows that many of them are merely a restatement of preexisting law.

The first change of any significance is the provision found in Rule 4 (c) (2), that a warrant is effective throughout the United States, instead of, as heretofore, only in the district in which it was issued. This modification does not affect the defendant's rights a particle. It is of some importance, however, to law enforcement officers, United States attorneys, and United States commissioners. Previously, if the defendant was found in a district other than that in which the prosecution was instituted, the original warrant issued in the district in which the case was pending was returned *non est inventus*. All of the papers were then forwarded to the district where the defendant was located, and on the basis of these documents a fugitive warrant was issued by a commissioner in that jurisdiction. This circumlocution is now avoided. The original warrant may be sent to and served in the district where the defendant is apprehended.

It seems pertinent to consider in this connection the new Rule on removal (Rule 40), which contains one of the few important and drastic innovations introduced by the new procedure. Removal proceedings are eliminated in case the defendant is arrested in a district located within the State in which the prosecution was brought, or in case he is apprehended at a point less than 100 miles distant from the place of trial. In that event, the committing magistrate may bind the defendant over directly for the district court before which the case

is pending. The preliminary hearing is no different than that which would be had if the accused had been arrested in the district where the prosecution was instituted. For example, if a person who is wanted in Alexandria, Virginia, in the Eastern District of Virginia, is arrested in the District of Columbia, he will be brought before the United States commissioner in Washington, who, in turn, would bind him over for appearance in the United States District Court for the Eastern District of Virginia, at Alexandria. The nature of the hearing would be no different than if the prosecution were pending in the district in which the arrest was made. This change will, no doubt, result in the reduction of useless technicalities, unnecessary delays, and dilatory tactics. In our own district, a case was presented a couple of years ago involving a draft evader wanted in Alexandria, Virginia. He was arrested in Washington. Removal proceedings and *habeas corpus* proceedings, lasting over several weeks, were necessary in order to authorize the transportation of the defendant across the Potomac River. This outmoded relic is now a thing of the past.

Removal proceedings are, however, retained for cases involving transportation over a distance of 100 miles or more between points in different States. It was realized that defendants should be protected against improvident removal to distant points for trial. If, however, the removal is requested on the basis of an indictment, as distinguished from a complaint or an information, the production of a certified copy of the indictment is conclusive proof of probable cause, and the only issue remaining is that of identity. There have been instances in the past in which defendants have endeavored practically to try in a removal proceeding, the entire merits of the case. It seems incongruous that a judge of a distant district should have authority not reposed in the judge of the district where the case originated, namely, the right to review preliminarily and before trial, the question whether the defendant should have been indicted. In such a case a grand jury has already passed upon the issue of probable cause. If, however, the prosecution is based on an information or complaint, the Government has to adduce proof of reasonable cause to believe the defendant guilty, in order to justify the issuance of a warrant of removal.

The Rule governing the convening of grand juries is liberalized (Rule 6a). It confers discretion on the court to summon as many grand juries as the court deems necessary. The maximum period of service of a grand jury is 18 months unless sooner discharged by the court (Rule 6 (g)). Previously, the jury served for the term for which it was summoned, but the period of service might be extended by the court up to a maxi-

mum of 18 months, with a limitation, however, that during the extended time only those investigations might be undertaken which had been commenced during the original term. The occasional controversies which this restriction engendered have been rendered impossible by its elimination. The result is that each district court may itself fix the period of service of a grand jury, subject to the limitation that the time may not exceed a maximum of 18 months.

The rule as to secrecy of grand jury proceedings has been made both definite and uniform. Heretofore, it varied as between districts. The new Rule (Rule 6 (c)) imposes the seal of secrecy on members of the grand jury, government counsel, interpreters and stenographers. It expressly provides that no such obligation may be imposed on any other person, thereby abolishing the practice existing in some districts of sealing the lips of witnesses testifying before the grand jury.

With respect to indictments and cognate matters, the new Rules make a conspicuous departure from traditional procedure. They expressly permit the defendant to waive indictment and to consent to prosecution by information, the only exception being in capital cases (Rule 7 (b)). I am inclined to believe that, from a practical standpoint, this provision makes perhaps the greatest advance in the administration of criminal justice to be found in the new procedure. I am informed that waiver of indictment is already being widely used. For example, in the District of Wyoming all of the 15 or 20 defendants confined in jail waived indictment immediately when the Rules became effective, and the cases were promptly disposed of on informations. This course made it unnecessary to summon a grand jury previously scheduled. In the District of Columbia, with which I am familiar, the waiver procedure has been used to advantage. In one case that came before me, the defendant had a hearing before a commissioner at ten o'clock in the morning. Shortly after two o'clock on the afternoon of the same day, he was brought before me. His counsel and the Assistant United States Attorney appeared at the same time. The defense counsel submitted a waiver of indictment and the Assistant United States Attorney presented an information, which he had drawn that day. The defendant was forthwith arraigned and pleaded guilty. The matter was immediately referred to the Probation Officer for a presentence investigation, who, because of peculiar circumstances of the case, was able to make his report within an hour. At half-past three the same afternoon, sentence was imposed. In other words, less than a full day elapsed between the commissioner's hearing and the imposition of sentence, as a result of the use of waiver of indictment. This case is, of course, extreme, but it illus-

trates the potentialities of the Rule. I envisage the possibility that it will be used so widely that a large percentage of criminal cases in the Federal courts may in the future be prosecuted on waiver of indictment. This eventuality seems all the more likely when we bear in mind the fact that between 85 and 90 percent of all criminal cases in the Federal courts are disposed of on pleas of guilty. The waiver procedure is a boon for a defendant who is too poor to give bail and who would otherwise have to languish in jail until he is indicted.

The arraignment rule (Rule 10) requires a copy of the indictment or information to be furnished to the defendant before he is called upon to plead. This provision was not contained in the final draft prepared by the Advisory Committee, but was later inserted by the Supreme Court on its own initiative. It is, therefore, necessary for every district court to organize suitable administrative machinery for complying with this direction. In the District of Columbia, we have made the following arrangements. Simultaneously with the return of the indictment, the United States Attorney furnishes the necessary number of carbon copies to the clerk of the court. If a defendant is in custody, the clerk sends his copy to the jail. One of the officers of the jail delivers the copy to the defendant and fills out a printed certificate to that effect, returning the certificate to the clerk of the court, who files it with the papers in the case. If a defendant is on bail, his copy is mailed to him by the clerk of the court, directed to the address given by the defendant on his bond. All officials taking bail bonds have been instructed to require defendants to note their addresses on bonds. The clerk of the court files with the papers of the case a certificate that he mailed a copy of the indictment.

The Rules offer a simple form of indictment, in the hope that the weeds and the underbrush that have grown up around the traditional form may be swept away, and the indictment will really apprise the defendant in simple, modern, and concise phraseology of the charge against him, instead of mystifying him with long, intricate clauses composed of ponderous, archaic terms (Rule 7 (c)). In order to encourage United States Attorneys to use the simple form of indictment, a few samples are attached in the Appendix of Forms. For example, the new form of indictment for murder in the first degree consists of five lines, and the indictment for mail fraud of only one page. The extent to which the simplification of indictments will be actually attained will depend in large part on the cooperation of United States attorneys and other Government counsel. Perhaps it is not Utopian to venture the hope that in the future indictments will be so drawn that on first reading one will be able to understand a conspiracy or a mail fraud

indictment, or even an indictment in an antitrust case.

Probably the most far-reaching departure from ancient moorings is the abolition of pleas in abatement, demurrers, motions to quash, and special pleas in bar. Any point heretofore interposed in any of these modes may be raised only by a simple motion to dismiss. All objections have to be joined in a single motion, except, of course, lack of jurisdiction, and failure of the indictment or information to charge an offense. These fundamental objections may be raised at any time. Rule 12 of the Criminal Rules, which covers this subject, is patterned in many respects on Rule 12 of the Civil Rules, which substitutes a simple motion to dismiss for pleas in abatement and demurrers in civil cases.

The Rules contain provisions for the taking of depositions (Rule 15). These provisions are a restatement of existing law. The prosecution is not permitted to take depositions. The defense is allowed to do so under the customary restrictions and well-known limitations, only if a prospective witness may be unable to attend at the trial and the taking of his deposition is necessary in order to prevent a failure of justice. This Rule does not change the law previously prevailing in most circuits, although perhaps not in the Fourth Circuit. I refer to it, however, merely because a United States attorney in one of the other circuits has objected to the rule as though it introduced a new procedure, apparently not realizing that in most circuits, on a proper showing, it has always been permissible for a defendant to take depositions by permission of the court. Naturally, resort to depositions in criminal cases is had but rarely, and, perhaps for that reason, the procedure was unfamiliar to this critic and, therefore, seemed a novelty. It is natural for most human beings to regard anything as an innovation which is outside of the orbit of their own experience.

There is a slight change in the provision governing the issuance of subpoenas to witnesses in behalf of an indigent defendant at Government expense (Rule 17 (b)). Heretofore such a subpoena might be issued only if the witness was to be found within 250 miles of the place of trial. This limitation as to distance has been eliminated, as it was deemed unfair in cases of real necessity. It was further felt that the court in the exercise of discretion would be able to prevent any abuse of the privilege.

A far-reaching innovation is found in the Rules in connection with change of venue. There are several provisions relating to this subject. In case a defendant is apprehended outside of the district in which the prosecution is pending and desires to plead guilty, he may consent to disposition of the case in the district where he was arrested, thereby making it

unnecessary to remove him to the originating district. If both United States attorneys concerned give their consent, the case is disposed of in the district in which the defendant was apprehended (Rule 20). It is conceivable that many cases will be handled in this manner, thereby relieving the Government of the expense, and the defendant of the hardship of removal.

I have a case now pending before me in which the defendant was arrested in the District of Columbia to answer to an indictment found in the Eastern District of Louisiana, on a charge of interstate transportation of counterfeit obligations. After a hearing, I directed the defendant's removal to the Eastern District of Louisiana. He then asked the privilege of pleading guilty before me, in order that sentence might be imposed in our court, and removal to New Orleans, where the case was pending, would be avoided. The United States Attorney for the District of Columbia consented and is now communicating with the United States Attorney for the Eastern District of Louisiana to ascertain whether the latter will concur in this disposition of the matter.

Another rule permits a change of venue to be made on the defendant's motion, if the court is satisfied of the existence of such a prejudice against the defendant that he cannot obtain a fair and impartial trial in the District or division where the case is pending (Rule 21 (a)). Still another provision relates to cases in which it appears that the offense was committed in more than one district or division. In that event, on the defendant's motion, the case may be transferred to another district or division, in which it is charged that the offense was committed, if the court finds that it is in the interest of justice to do so (Rule 21 (b)). This provision is applicable to such cases as those involving mail frauds, violations of the Sherman law, and violations of the conspiracy statute. It creates a certain degree of equality between the prosecution and defense in the choice of the place of trial.

We may now turn to the Rules governing the trial. While preserving the existing number of peremptory challenges, as well as the principle that multiple defendants shall be treated as a single defendant for the purpose of peremptory challenges, an element of flexibility is introduced. If there are multiple defendants, the court in its discretion may allow additional challenges and permit them to be exercised either separately or jointly. This is a desirable amelioration of the rigor of the rule previously existing. It is peculiarly desirable in cases in which there is a large number of defendants (Rule 24 (b)).

There is a short and comprehensive provision on the subject of evidence (Rule 26). It will be recalled that the corresponding civil rule provides that all evidence shall be admissible

which is admissible either under the previously existing Federal law, or under the law of the State where the Federal court is sitting. In other words, the rule which favored the admission of the evidence was to be preferred to that which would exclude it. This ingenious provision, desirable though it was, precluded uniformity. Since, however, in civil cases the applicable substantive law is frequently the law of the State, uniformity on the subject of evidence is not important. On the other hand, since Federal criminal law is uniform throughout the country, it seems desirable, in fact essential, that there be uniformity on the subject of evidence, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another. In order to achieve uniformity and at the same time to permit necessary growth and development, the new Criminal Rules provide that the admissibility of evidence and the competency and privileges of witnesses, shall be governed by the principles of the common law as they may be construed by the courts of the United States in the light of reason and experience. It is contemplated that in the course of years, a body of Federal law of evidence for criminal cases may be evolved by judicial decisions.

The court is now authorized to appoint its own expert witnesses (Rule 28). While theoretically this provision is sound, I have considerable doubt whether it will be extensively used in practice.

A motion for a directed verdict is now known as a motion for a judgment of acquittal, in order to correspond with realities (Rule 29 (a)). This is only a change in nomenclature, since the motion is to be granted or denied on the same basis as a motion for a directed verdict. It eliminates, however, the formality of taking a directed verdict, which is at times misunderstood by the jury. A provision for judgments *n.o.v.* is introduced (Rule 29 (b)). It parallels a corresponding provision in the civil rules. The right to render a judgment *n.o.v.* in a criminal case has been recognized by some Federal courts and has been actually exercised. This rule sanctions the practice and eliminates all doubts on this subject. The procedure is highly desirable. If a judge on reconsideration determines that he should have granted a motion for a judgment of acquittal, instead of submitting the case to the jury, he should be in a position to exert a remedy.

The rule as to instructions to the jury expressly provides that the court shall instruct the jury after arguments of counsel are completed (Rule 30). This is the generally prevailing practice. A similar provision is found in the civil rules.

Several changes are made in procedure after trial, or after a

plea of guilty. The old provision that an application for leave to withdraw a plea of guilty may be entertained only within ten days after pleading, has been abolished. The entire matter is left to the discretion of the trial judge (Rule 32 (d)).

The time for making a motion for a new trial or in arrest of judgment, is increased from three days to five days. A motion for a new trial on the ground of newly discovered evidence may be made within two years after final judgment (Rules 33 and 34).

The Rule heretofore existing that the court might reduce a sentence only within the term at which it was imposed, is changed by substituting a definite period of time within which such action can be taken. The period now prescribed is sixty days (Rule 25). Terms of court were uncertain and variable. If, for example, sentence was imposed near the end of the term, the power of the court to change it lapsed shortly after passing of sentence. Moreover, the duration of terms of court varied as between districts. These considerations led to the change. The Rule also permits a reduction of sentence to be made within sixty days after the termination of appellate proceedings. Previously, while the court could place the defendant on probation under these circumstances, it could not otherwise shorten the sentence. The Rule makes it clear that an illegal sentence may be corrected at any time. This is merely a clarification and restatement of previously existing law.

The time for taking an appeal is increased from five days to ten days (Rule 27 (b)). A provision is inserted to protect the rights of a defendant who was not represented by counsel at the trial. In such event, the Rule requires that the defendant be advised of his right to appeal and if he so requests, the clerk is to prepare and file a notice of appeal in his behalf. It is interesting to observe that this provision was inserted in the Rules by the Advisory Committee at the express suggestion and on the initiative of the late Chief Justice Stone. Naturally, it does not apply to a case in which the defendant pleads guilty but is limited to a situation of a defendant who stands trial, but has waived counsel and represents himself.

There is a slight change in the Rule relating to stay of sentence of imprisonment pending appeal (Rule 38 (a) (2)). Heretofore a notice of appeal stayed the sentence, unless the defendant affirmatively elected to enter upon the service of his sentence. The new rule shifts the burden of election and provides that a sentence of imprisonment shall be stayed if an appeal is taken, only if the defendant affirmatively elects not to commence service of the sentence, or is admitted to bail. The change was deemed advisable, because under the old procedure at times a defendant who took an appeal and was not admitted

to bail, assumed that the period of incarceration during the pendency of the appeal, would be credited against his sentence, not being aware of the fact that he had to make an affirmative election in order to secure this credit.

The appellate procedure is simplified by being made identical with the appellate practice in civil cases. Bills of exceptions are abolished and the record on appeal is to be prepared in the same manner as a record on appeal in a civil case (Rule 39).

The rule governing *nolle prosequi* is changed (Rule 48a). In accordance with the general policy of supplanting Latin terminology by English words, a *nolle prosequi* is now known as a dismissal. The prosecution may dismiss a case only by leave of court. This limitation on the right of the prosecuting attorney was not included in the final draft submitted to the Supreme Court by the Advisory Committee. It was inserted by the Supreme Court on its own initiative. To what extent the courts will exercise the control granted to them, no doubt, depends upon the individual judge. My own conception is that ordinarily leave should be granted readily and more or less *pro forma,* because the court is generally not in possession of all the surrounding facts and circumstances, and must necessarily rely on the judgment of the United States attorney, who is a public official appointed by the President and confirmed by the Senate. I contemplate this provision as vesting in the court a residual control to be invoked in an exceptional case in which the judge deems a trial necessary and a dismissal improvident. This is my own personal view and whether it will be generally accepted remains to be seen.

Most of the Rules are quite general, because the Advisory Committee realized that they had to be adjusted to varying conditions existing in different districts and that considerable room had to be left for these variations. A rule that would meet the needs of a metropolitan center might be entirely unsuitable in a district composed largely of rural areas, and *vice versa.* Moreover, the Advisory Committee felt that considerable leeway should be given to trial judges and much should be left to their discretion. Minutiae should not be governed by rules of general application. It is expressly indicated in Rule 57 that details may be filled in by local rules.

Time alone will determine whether the new rules are a substantial improvement and a significant advance in the progress of the law. Their framers nurture the hope that this may prove to be the case.