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THE MISSOURI RULES OF CRIMINAL PROCEDURE

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The request of the editor of the Missouri Law Review that I comment on the proposed Missouri rules of criminal procedure was one which I felt that I could not reject in view of my interest in improvement of criminal procedure both state and federal. Since the Federal Rules of Criminal Procedure offer a model for state criminal procedure¹ my discussion will proceed by first setting forth the Federal rule and then comparing it with the Missouri rule. Since New Jersey has had a complete new set of rules of court governing criminal procedure since September 15, 1948, I shall also incidentally make reference to them.² It should be noted that eight other states have given their appellate courts the power to lay down rules of criminal procedure: Arizona, Idaho, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin.³ There can be little question that the courts

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1. Assistant Solicitor General Harold Judson has stated: "I suggest that State officials, acting through their representative organization, the Council of State Governments, develop recommendations for uniform state rules which would embody the best features of the Federal Rules." *Improvement in Criminal Procedure from the Viewpoint of the Department of Justice*, 5 F. R. D. 39, 43-44 (1945). For an example of the activity of the Council of State Governments see note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COL. L. REV. 1190 (1948).

2. See *RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY* (1948), particularly Part II, and to some extent Part I. They are discussed by Duane E. Minard, Jr., *The Rules of Criminal Practice in the Superior Court and County Courts*, 2 RUTGERS UNIV. L. REV. 138 (1948).

For a comparison of the Wisconsin law see Brooke Tibbs, *Criminal Procedure Under Proposed Federal Rules Compared with Wisconsin Statutes*, 28 MARQ. L. REV. 75 (1944).

3. During the past year the Indiana State Penal and Correctional Survey Commission prepared a new code for adoption by the state legislature. See *CODE OF CRIMINAL PROCEDURE, TENTATIVE DRAFT* (1948); and *Report of the State Penal and Correctional Survey Commission*, 24 IND. L. J. 1 (1948). The Pennsylvania

are better fitted to prescribe rules of procedure than are the legislatures, and the State of Missouri is to be congratulated on having adopted that system.⁴

Article V, Section 5 of the Missouri Constitution of 1945 empowers the Supreme Court to lay down rules of criminal procedure.⁵ This provision does not specifically refer to criminal procedure, but rather to "rules of practice and procedure for all courts." The rules need not, as in the case of most of the federal rules, be submitted for legislative approval by inaction of the legislature.

On May 12, 1945 the Supreme Court of Missouri appointed a committee of twenty-seven lawyers and judges, including the Attorney General, under the chairmanship of Richard K. Phelps of Kansas City to assist the court in drafting rules of criminal procedure. The court designated nine of the committee as a drafting committee to consolidate the material submitted by the sub-committee of the full committee, and to draft therefrom a complete code. The drafting committee met in November, 1947 and January and February, 1948 to complete their draft of rules. An editing committee composed of three members of the drafting committee, Chairman Phelps, Judge Henry J. Westhues of the Supreme Court and Franklin Miller of St. Louis then edited the proposed code, and provided a table of contents and an appendix containing citations to the Missouri Statutes, the Federal Rules of Criminal Procedure, and other sources of the rules. The editing committee met for four days in June, 1948. The Supreme Court ordered the last draft to be printed and submitted to the members of the Bar for comments and criticisms before adoption and promulgation. On October

Joint State Government Commission Committee on Penal Laws and Criminal Procedure prepared a new code, beginning work in April 1948, and it will be considered by the 1949 legislative session. In 1942 Louisiana adopted a new code. See references cited in DESSON, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER*, 393-394 (1948) on codification in the United States.

4. See George G. Potts, *Reform of Criminal Procedure—A Judicial or A Legislative Problem?* 1 *TEXAS LAW AND LEGISLATION*, 6, 20 (1947).

There is a strong movement in Texas to confer criminal rule making power on the state supreme court, 72 *NEW JERSEY LAW J.* p. 22 (Jan. 20, 1949). See also *The President's Address*, Proceedings of State Bar of Texas, 26 *TEX. BAR REV.* 3, 5-7 (1947); C. S. Potts, *Speeding Criminal Appeals: A Book Review*, 18 *TEX. L. REV.* 249 (1940). C. S. Potts, *Criminal Procedure From Arrest to Appeal: A Book Review*, 26 *TEX. L. REV.* 607 (1948).

5. "The Supreme Court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to that purpose."

16, 1948 the Clerk of the Supreme Court mailed copies to the Bar with an accompanying letter inviting comments, criticisms and requests for hearings up to December 16, 1948.

The editing committee stated that the main thought and aim of the committee was to preserve the statutory provisions in Chapter 30, Revised Statutes of 1939, as amended to 1948, which have been found sound and workable. The arrangement of the rules is like that of the statutes, with some changes to conform to the arrangement of the Federal Rules of Criminal Procedure. Some necessary amendments have been added, and some new matter deemed necessary to bring the Code into line with the best current practice in other jurisdictions. As to statutory sections carried over into the new rules, prior judicial constructions when applicable are also carried over.

THE FEDERAL RULES FOLLOWED IN THE MISSOURI RULES

Rule 1. *Scope.* Missouri Rule 21.01 follows the general principle of scope laid down in Federal Rule 1, except that Federal Rule 1 refers to exceptions stated in Rule 54. The Missouri rules "govern the procedure in all criminal proceedings in all courts of the State of Missouri having jurisdiction of criminal proceedings." Thus the Missouri coverage is without any exceptions.⁶

Rule 2. *Purpose and Construction.* Federal Rule 2 provides that the federal rules "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Missouri Rule 21.02 is to the same effect.⁷

Rule 5(c). *Preliminary Examination.* Under this rule the defendant following preliminary examination may be held to answer if it appears to the court that there is probable cause to believe that an offense has been committed and that the defendant has committed it. Thus a defendant

6. Rule 2:1-1 of the Rules Governing the Courts of the State of New Jersey (1948) provides:

"These rules govern the practice and procedure in the Superior Court and County Courts in all criminal proceedings and in so far as they are applicable, the practice and procedure on indictable offenses in all other courts except the Juvenile and Domestic Relations Courts."

Section 102 of the proposed Indiana Code is as sweeping as the Missouri rule.

7. Likewise, Rule 2:1-2 of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 102 of the proposed Indiana Code.

may be held to answer for an offense other than that stated in the complaint or warrant of arrest.⁸ Missouri Rule 24.54 seems to arrive at the same result.

Rule 12. *Pleadings and Motions Before Trial; Defenses and Objections.* Rule 12(a) provides:

"Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. 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."⁹

Missouri Rule 26.02(a) makes no reference to the plea of *nolo contendere*.¹⁰ This seems proper as the state courts face no such problem as the federal courts in dealing with anti-trust prosecutions. The federal rule abolished all other pleas, and demurrers and motions to quash. The Missouri rules, unfortunately fail to do this, thus failing to make use of one of the most important federal developments.¹¹ Under the federal rule, a simple motion to dismiss raises any point that formerly might be raised by the pleas and motions abolished. It is helpful to a defendant who demurs when he should plead in abatement, or moves to quash when he should demur. At the same time, it expedites the administration of justice to require objections to be raised in a single motion. Under the former practice the defendant might raise certain objections by pleas in abatement; when they were overruled he might raise other objections by demurrer; and after overruling of the demurrer, he might still move to quash.

8. Likewise, Rule 2:3-3(c) of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 89-90 (1947).

The proposed Indiana Code, Sec. 625, provides that a new complaint be filed but that the defendant is not to be released in the meantime.

9. To substantially similar effect see Rule 2:5-3(a) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 1133 of the proposed Indiana Code. Rule 12 is discussed in ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 282-288 (1947).

10. That the plea of *nolo contendere* may have value in state practice is asserted in George Rossman, J., *A Study of Rules 10, 11, 12, 13, 14, 15, 16, and 17 of the Federal Rules of Criminal Procedure With Particular Respect to Their Suitability for Adoption into State Criminal Procedure*, 25 ORE. L. REV. 21, 24-29 (1945). See also ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 292-293 (1947).

11. The reasons favoring the federal rules are well stated by Rossman, J., *supra*, 25 ORE. L. REV. 21, 29-31. Missouri Rule 24.35 retains the demurrer and motion to quash; Rules 25.05 and 25.11 retain the plea in abatement. Rule 25.11 refers to the motion to dismiss. See also ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 282-288 (1947).

Missouri Rule 26.03 is substantially the same as Federal Rule 12(b) (1-4).¹²

Rule 14. *Relief From Prejudicial Joinder.* Under this rule if it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. Missouri Rule 25.09 is modeled on the federal rule but more narrowly phrased.¹³ The federal rule is not cited.

Rule 17(c). *Subpoena For Production of Documentary Evidence and of Objects.* This rule provides that a subpoena may command the person to whom it is directed to produce the objects designated therein. The court may quash or modify the subpoena if compliance would be oppressive. The court may direct that the objects be produced before the court at a time prior to the trial and may upon the production permit the objects to be inspected by the parties and their attorneys. Missouri Rule 25.24 is to similar effect.¹⁴

Rule 23. *Trial by Jury or by the Court.* Federal Rule 23(a) provides for waiver in writing of jury trial in any criminal case with the approval of the court and the consent of the government.¹⁵ Missouri Rule 26.01(b) is to similar effect. Federal Rule 23(b) provides that the parties may stipulate for a jury of less than twelve at any time up to verdict. The Missouri rule is silent, but arguably since waiver of jury is provided for, waiver of part of a jury would be valid also.^{15a}

Rule 24(c). *Alternate Jurors.* This rule permits up to four alternate jurors. Alternate jurors not replacing regular jurors are to be discharged after the jury retires to consider its verdict. Missouri Rule 26.09 is modeled

12. Rule 2:5-3(b) of the Rules Governing the Courts of the State of New Jersey (1948) follows Federal Rule 12 (b) more closely.

13. Rule 2:5-5 of the Rules Governing the Courts of the State of New Jersey (1948) is a complete following of the federal rule.

See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 316-320 (1947).

14. Likewise, Rule 2:5-8(c) of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 13, 334-336; note, *Subpoenaed Documents in Federal Criminal Cases*, 51 *YALE L. J.* 687 (1942).

15. In accord see Sec. 1705 of the proposed Indiana Code.

Rule 2:7-1(a) of the Rules Governing the Courts of the State of New Jersey (1948) is to the same effect, except in murder cases.

See ORFIELD, *supra* n. 13, 390-396.

15a. See Comment, 14 *Mo. L. Rev.* 185 (1949).

along the same lines.¹⁶ It fixes no limit on the number of alternate jurors. The federal rule is not cited.

Rule 29. *Motion for Acquittal.* Rule 29 abolishes the motion for directed verdict and substitutes the motion for judgment of acquittal. The court is to enter judgment of acquittal at any time after the evidence on either side is closed, if the evidence is not sufficient to warrant a conviction. A defendant, whose motion at the close of the evidence offered by the government is not granted, may, even though he did not reserve the right to do so, offer evidence as if the motion had not been made. Missouri Rule 26.21 is to the same effect.¹⁷

Rule 31. *Verdict.* Under Rule 31(a) the verdict is to be unanimous, and to be returned in open court. Under Rule 31(b) if there are two or more defendants, the jury may return at any time a verdict with respect to a defendant as to whom it has agreed. Under Rule 31(c) a defendant may be convicted of an included offense. Under Rule 31(d) when a verdict is returned the jury may be polled. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. Missouri Rule 26.22 is to the same effect, though the federal rule is not cited.¹⁸

Rule 32(d). *Withdrawal of Plea of Guilty.* Normally, a motion to withdraw a plea of guilty may be made before sentence or suspension of imposition of sentence. But "to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." This greatly expands Criminal Appeals Rule 2(4) allowing only ten days after entry of plea. Section 230 of the American Law Institute Code of Criminal Procedure is to the same effect.¹⁹ Unfortunately the Missouri rule does not go equally far in protecting the defendant. Missouri Rule 27.23, following Criminal Appeals Rule 2(4), permits the

16. Rule 2:7-2(d) of the Rules Governing the Courts of the State of New Jersey (1948) provides for alternate jurors up to two in number. Sec. 1401 of the Indiana Code calls for one or two alternate jurors.

See ORFIELD, *supra* n. 13, 398-399.

17. Likewise, Rule 2:7-7 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 13, 434-435.

18. Likewise, Rule 2:7-9 of the Rules Governing the Courts of The State of New Jersey (1948).

See ORFIELD, *supra* n. 13, 477-483.

19. Likewise, Rule 2:7-10(e) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 1141 of the proposed Indiana Code.

See ORFIELD, *supra* n. 13, 300-303.

defendant to apply within ten days after entry of the plea and sentence imposed. Additional leeway is, however, provided by the provision in the Missouri rule permitting the court to act on its own motion within the term.

Rule 38(a). *Stay of Execution*. Under 38(a)(1) a sentence of death shall be stayed if an appeal is taken. Missouri Rule 28.07(a) is to similar effect.²⁰ Under 38(a)(2) a prison sentence shall be stayed if an appeal is taken *and* the defendant elects not to commence service of the sentence or is admitted to bail. Thus, a stay is not automatic; the defendant must take an affirmative step if he desires a stay.²¹ Missouri Rule 28.07(b) provides that a prison sentence shall be stayed if an appeal is taken and the defendant is admitted to bail; nothing is said as to the situation where the defendant elects not to commence service of the sentence. Federal Rule 38(a)(3) provides that a sentence to pay a fine may be stayed if an appeal is taken upon terms deemed proper to the court. The court may require the defendant to deposit the fine and costs in the registry of the court, or to give bond for the payment thereof.²² Missouri Rule 28.07(c) provides that a sentence to pay a fine *shall* be stayed if an appeal is taken and the defendant gives a bond for the payment of the fine and costs. Federal Rule 38(a)(4) provides that an order placing the defendant on probation shall be stayed if an appeal is taken. There is no similar Missouri rule.²³

Rule 39. *Supervision of Appeal*. Under Rule 39(a) the appellate court is to have supervision and control of the proceedings on appeal from the time of the filing with its clerk of the notice of appeal. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the trial court, or to modify or vacate any order made by the trial court

20. The Appendix to the Missouri Rules at p. 110 erroneously cites Federal Rule 40 instead of 38. Evidently the person so citing was looking at the Report of the Advisory Committee rather than the rules as promulgated by the United States Supreme Court, which omitted two of the proposed rules.

21. Compare Rule 1:2-16(b) of the Rules Governing the Courts of the State of New Jersey (1948); and Section 2019 of the proposed Indiana Code.

See ORFIELD, *CRIMINAL APPEALS IN AMERICA*, 171-173 (1939).

22. Likewise, Rule 1:2-16(c) of the Rules Governing the Courts of the State of New Jersey (1948).

23. Compare Rule 1:2-16(d) of the Rules Governing the Courts of the State of New Jersey (1948).

in relation to the prosecution of the appeal, including any order fixing or denying trial.²⁴ Missouri Rule 28.13 is to similar effect.²⁵

Under Federal Rule 39(d) unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than thirty days after the filing in that court of the record and as soon after the expiration of that period as the state of the calendar will permit. Preference is to be given to criminal over civil appeals.²⁶ Missouri Rule 28.17 is to similar effect.²⁷

Rule 41. *Search and Seizure.* Under Rule 41(b) covering grounds for issuance of search warrants, a warrant may be issued to search for and seize any property stolen or embezzled in violation of statute or designed or intended for use or which is or has been used as the means of committing a criminal offense. Missouri Rule 29.67 is to similar effect.

Under Federal Rule 41(d) a search warrant may be executed and returned only within ten days after its date. The officer taking property is to give a copy of the warrant and a receipt for the property taken. The return is to be made promptly and is to be accompanied by a written inventory. The inventory is to be made in the presence of the applicant for the warrant and the owner, if they are present. The judge is upon request to deliver a copy of the inventory to the owner and to the applicant for the warrant. Missouri Rule 26.69 is to similar effect, though the federal rule is not cited.

Under Federal Rule 41(e) a person aggrieved by an unlawful search may move for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant; (2) the warrant is insufficient on its face; (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The motion to suppress must be made before trial or hearing unless opportunity

24. Likewise, Rule 1:2-9 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *CRIMINAL APPEALS IN AMERICA*, 254-255 (1939).

25. The Appendix to the Missouri Rules erroneously cites Federal Rule 41 instead of 39.

26. To similar effect see Rule 1:4-2(b) of the Rules Governing the Courts of the State of New Jersey (1948); See ORFIELD, *supra* n. 24, 256.

27. The Appendix to the Missouri Rules erroneously cites Federal Rule 41 (d) instead of 39 (d).

therefor did not exist or the defendant was not aware of the grounds for the motion. Missouri Rule 29.70 is to similar effect, though the federal rule is not cited. Sections 801-814 of the proposed Indiana code are modeled very largely on Federal Rule 41. The New Jersey Rules do not cover search and seizure.

Rule 45. *Time* Under Rule 45(a) in computing any period of time the day of the event after which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or holiday. When a period of time is less than seven days, intermediate Sundays and holidays shall be excluded. A half holiday shall not be considered as a holiday. Missouri Rule 29.34 is to similar effect,²⁸ though the federal rule is not cited.

Under Rule 45(b) when an act is required or allowed to be done at or within a specified time, the court may (1) order the period enlarged if application is made before the expiration of the period originally prescribed or (2) upon motion may permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect. Missouri Rule 29.35 is to similar effect,²⁹ though the federal rule is not cited.

Under Rule 45(c) the period of time is not affected or limited by the expiration of a term of court. Missouri Rule 29.36 is to similar effect. It may be noted that Federal Civil Rule 6(c) was amended in 1948 so as to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in the rules.³⁰

Under Rule 45(d) a written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing. When a motion is supported by affidavit, the affidavit is to be served with the motion. Missouri Rule 29.37 is to similar effect,³¹ though the federal rule is not cited.

Rule 49. *Service and Filing of Papers.* Under Rule 49(a) written motions and similar papers are to be served on the adverse parties. Under

28. Likewise, Rule 1:7-8 of the Rules Governing the Courts of the State of New Jersey (1948).

29. Likewise, Rule 2:12-2(a) of the Rules Governing the Courts of the State of New Jersey (1948).

30. See Advisory Committee Notes (1946) 5 F. R. D. 437, 439.

31. Likewise, Rule 2:12-2(b) of the Rules Governing the Courts of the State of New Jersey (1948).

Rule 49(b) service is to be upon the attorney unless service upon the party himself is ordered by the court. Missouri Rule 29.41 is substantially similar,³² though the federal rule is not cited.

Rule 55. *Records.* This rule requires the clerk of the district court and each United States commissioner to keep such records as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe.³³ Missouri Rule 29.57 provides in part: "Every court of record of this State having criminal jurisdiction shall keep just, full and faithful records, rolls, dockets and indexes of its proceedings, orders and judgments as may be required by law." The federal rule is not cited.

Rule 56. *Courts and Clerks.* Under this rule the court of appeals and the district court are to be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office is to be open during business hours on all days except Sundays and legal holidays. Missouri Rule 29.38 is substantially to similar effect,³⁴ though the federal rule is not cited.

Rule 57. *Rules of Court.* Under Rule 57(a) rules made by the United States district courts and courts of appeals are not to be inconsistent with the Federal Rules. Copies of all such rules are to be furnished to the Administrative Office of the United States Courts. Such rules must be published promptly and made available to the public. Under Rule 57(b) if no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with the Federal Rules or with any applicable statute. Missouri Rule 21.03 is based on the same general principles.³⁵

32. Rule 2:12-5 of the Rules Governing the Courts of the State of New Jersey (1948) is to similar effect and also incorporates Federal Rule 49 (c) and (d).

33. For the analogous New Jersey Rule see Rule 2:12-9 of the Rules Governing the Courts of the State of New Jersey (1948). It is to be noted that New Jersey provides for an administrative director of the Supreme Court.

34. Likewise, Rule 2:12-10 of the Rules Governing the Courts of the State of New Jersey (1948).

35. Likewise, Rule 2:12-11 of the Rules Governing the Courts of the State of New Jersey (1948).

The Explanatory Foreword of the Editing Committee of the Missouri Rules states:

"Where the subject matter of any section of Chapter 30 of the Revised Statutes is not covered by or converted into a Rule by this Code, it will be in no wise affected, as by a repeal or otherwise, by the adoption and promulgation of these Rules."

MISSOURI RULES BASED ON RECOMMENDATIONS OF UNITED
STATES SUPREME COURT ADVISORY COMMITTEE

Right to Copy of Accusation. Rule 10 of the Report of the United States Supreme Court Advisory Committee provided that the defendant "shall be advised that he is entitled to a copy of the indictment and if he requests it a copy shall be given to him before he is called upon to plead." The United States Supreme Court rejected this proposal and provided instead that the defendant shall be given a copy of the indictment or information before he is called upon to plead. Missouri Rule 25.02 is modeled on the Advisory Committee proposal. The New Jersey rule is modeled on the the present federal rule.³⁶

Pre-Trial Procedure. Rule 15 of the Report of the United States Supreme Court Advisory Committee provide that at any time after the filing of the accusation the court might invite the attorneys to appear before it for a conference, at which the defendant should have the right to be present, to consider (1) the simplification of the issues; (2) the possibility of obtaining admissions of fact which will avoid unnecessary proof; (3) the number of witnesses who are to give testimony of a cumulative nature; (4) and such other matters as may aid in the disposition of the proceeding. The rule is not to be invoked as to defendants not represented by counsel. The United States Supreme Court rejected the proposed rule. Missouri Rule 25.13 entitled "Pre-Trial Conferences" is largely modeled on the proposed federal rule. On September 15, 1948 a similar rule became effective in New Jersey.³⁷

Notice of Alibi; Specifications of Time and Place. Rule 16 of the Report of the United States Supreme Court Advisory Committee laid down a rule on the subject of alibis, which was, however, rejected by the Supreme Court. Missouri Rule 26.04 is largely modeled on this proposed rule.³⁸ On Septem-

36. Rule 2:5-1 of the Rules Governing the Courts of the State of New Jersey (1948); and likewise Sec. 1138 of the proposed Indiana Code. This is the majority state rule. George Rossman, *A Study of Rules 10, 11, 12, 13, 14, 15, 16, and 17 of the Federal Rules of Criminal Procedure With Particular Respect to Their Suitability for Adoption into State Criminal Procedure*, 25 ORE. L. REV. 21, 23-24 (1945). See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 277 (1947).

37. Rule 2:10-1 of the Rules Governing the Courts of the State of New Jersey (1948).

See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 323-324 (1947); *Book Reviews*, 32 MINN. L. REV. 314 (1948); 62 HARV. L. REV. 335, 337 n.8 (1949).

38. The Appendix to the Missouri Rules cites as its source Code of Iowa, 1946, Vol. II, Sec. 777.18 (p. 2115).

ber 15, 1948 an alibi rule was adopted in New Jersey though not based on the proposed federal rule.³⁹

Depositions at Instance of the Government. Rule 17(e) of the Report of the United States Supreme Court Advisory Committee permitted the prosecution to take depositions. The Supreme Court rejected the proposed rule. Missouri Rule 25.18 permits the prosecution to take depositions. The New Jersey Rules contain no provision for depositions at the instance of the prosecution.⁴⁰

Service of Subpoena. Under Federal Rule 17(d) when a subpoena is issued on behalf of the prosecution or an indigent defendant fees and mileage must be tendered. Rule 19(d) of the Report of the United States Supreme Court Advisory Committee had expressly made such tender unnecessary, but the United States Supreme Court rejected the proposal. Missouri Rule 25.26 makes the tender unnecessary.⁴¹

Trial Without a Jury. Federal Rule 23(c) provides that in cases tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. The United States Supreme Court rejected the proposal of its Advisory Committee that the judge "may in addition find the facts especially." Missouri Rule 26.01(c) followed the view of the Advisory Committee in its Rule 25(c) in providing: "In a cause tried without a jury the Court shall make a general finding and may in addition in his discretion, find the facts especially." On September 15, 1948 a rule following the United States Supreme Court rule rather than the advisory committee rule went into effect in New Jersey.⁴²

THE FEDERAL RULES NOT FOLLOWED IN THE MISSOURI RULES

Rule 4. *Warrant or Summons on Complaint.* Rule 4(a) provides that upon the request of the prosecution a summons instead of a warrant shall

39. Rule 2:5-7 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 308-315.

40. See Rule 2:5-6 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 325-328.

41. Likewise, Rule 2:5-8(d) of the Rules Governing the Courts of the State of New Jersey (1948) providing that "if the person is a state's witness or the witness of an indigent defendant he shall receive his fee from the sheriff before leaving court at the conclusion of the trial."

42. Rule 2:7-1(c) of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 395-396.

issue. There is no similar Missouri provision.⁴³ Furthermore, more than one warrant or summons may issue on the same complaint.⁴⁴ There is no similar Missouri provision. Rule 4(c)(3) provides that the officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible.⁴⁵ There is no similar Missouri provision.

Rule 5(c). *Preliminary Examination.* This rule provides that the defendant shall not be called upon to plead.⁴⁶ At the early stage of preliminary examination the defendant may not have had the benefit of advice of counsel. There is no similar Missouri or New Jersey provision. Possibly the same result is reached by Missouri Rule 25.03: "The defendant in an indictment or information in a court of record, shall not be required to plead thereto until he shall have had a reasonable time in which to examine the same and to prepare his pleading."

Rule 6. *The Grand Jury.* Rule 6(a) provides for a grand jury with a maximum of twenty-three and a minimum of sixteen. Missouri Rule 24.01 provides for a grand jury of twelve members. A majority of states favor the smaller grand jury, and for the sake of economy and efficiency they should not be asked to increase the number to conform to the federal rule.⁴⁷ The federal rule permits the court to summon more than one grand jury at the same time. This may be desirable in large urban centers. The Missouri rule is silent as to this subject.⁴⁸ Missouri Rule 24.12 provides for a second grand jury after discharge of a prior grand jury.

Rule 6(b)(1), like many state rules, permits the prosecution as well as

43. Nor is there a New Jersey provision. But Sec. 304 of the proposed Indiana Code provides for the use of the summons. See ORFIELD, *supra* n. 37, 31-33.

44. Likewise, Rule 2:3-2(a) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 301 of the proposed Indiana Code. See ORFIELD *supra* n. 37, 14.

45. Likewise, Rule 2:3-2(c) (3) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 306 of the proposed Indiana Code. See ORFIELD, *supra* n. 37, 13-14. Minnesota passed such a statute in 1947. Note, 33 MINN. L. REV. 27, 39 (1948).

46. See ORFIELD, *supra* n. 37, 81 (1947).

47. Glenn R. Winters, *A Study of Rules 6, 7, 8, and 9 of the Federal Rules of Criminal Procedure with Particular Respect to their Suitability for Adoption into State Criminal Procedure*, 25 ORE. L. REV. 10, 11 (1945).

Sec. 201 of the proposed Indiana Code provides for six. Rule 2:4-1 of the Rules Governing the Courts of the State of New Jersey (1948) provides a maximum of twenty-three. See ORFIELD, *supra* n. 37, 147.

48. Rule 2:4-1 of the Rules Governing the Courts of the State of New Jersey (1948) provides: "There shall be at least one grand jury serving in each county at all times." See ORFIELD, *supra* n. 37, 147.

a defendant who has been held to answer to challenge the grand jury. Missouri Rule 24.02 permits only a person held to answer to challenge. There seems no good reason for this discrimination against the government.⁴⁹ The federal rule permits challenges both to the array and to individual jurors, as in sixteen states. The Missouri rule speaks of challenges only to individual jurors.⁵⁰ Earlier Missouri law had expressly forbidden challenges to the array. The federal rule seems superior.⁵¹ The federal rule sets out more adequate grounds for challenge than does the Missouri rule.⁵²

Under Federal Rule 6(e) no obligation of secrecy is imposed on grand jury witnesses.⁵³ Under Missouri Rule 24.04 witnesses take an oath of secrecy.

Federal Rule 6(d) provides that government attorneys, witnesses under examination, and stenographers and interpreters as needed may be present while the grand jury is in session but that nobody may be present while it is deliberating or voting.⁵⁴ The Missouri rules are silent on the subject, except for the provisions in Rules 24.08 and 24.25.

Federal Rule 6(f) provides that twelve or a bare majority of the maximum grand jury may find an indictment. On the same majority basis seven jurors should be able to find an indictment in Missouri.⁵⁵ Missouri Rule 24.17 calls for the concurrence of at least nine grand jurors.

Rule 7. *The Indictment and Information.* Rule 7(c) provides in part: "The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."⁵⁶ There is no similar provision in the Missouri rules. Rule 7(c) also provides that

49. Rule 2:4-2 of the Rules Governing the Courts of the State of New Jersey (1948) follows the federal rule; so does Sec. 205 of the proposed Indiana Code.

50. Rule 2:4-2 of the Rules Governing the Courts of the State of New Jersey (1948) and Sec. 206 of the proposed Indiana Code follow the federal rule.

See ORFIELD, *supra* n. 37, 152-153.

51. See Winters, *supra*, 25 ORE. L. REV. 12.

52. These grounds are followed in Rule 2:4-2 of the Rules Governing the Courts of the State of New Jersey (1948).

53. Likewise Rule 2:4-6 of the Rules Governing the Courts of the State of New Jersey (1948) and Sec. 213 of the proposed Indiana Code.

See also ORFIELD, *supra* n. 37, 172-173.

54. Likewise, Rule 2:4-5(a) of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 173-175; Note, 32 MINN. L. REV. 504 (1948).

55. Winters, *supra*, 25 ORE. L. REV. 15. A bare majority is enough under Rule 2:4-7 of the Rules Governing the Courts of the State of New Jersey (1948). Under Sec. 216 of the proposed Indiana Code five of the six grand jurors must concur.

56. Rule 2:4-11 of the Rules Governing the Courts of the State of New Jersey is to the same general effect. See Winters, *supra*, 25 ORE. L. REV. 17-19 as to the importance of following Federal Rule 7 (c); also, ORFIELD, *supra* n. 37, 245-246.

the accusation need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. There is no similar Missouri rule. Rule 7(c) also provides that allegations in one count may be incorporated by reference in another count; also that the means by which the act was done may be alleged to be unknown.⁵⁷ There is no similar Missouri rule. An important innovation provided in Rule 7(c) is that a citation to the law alleged to have been violated must be included. But error or omission of the citation is not ground for dismissal unless it misled the defendant to his prejudice.⁵⁸ Missouri Rule 24.38 provides to the opposite effect: No accusation is to be deemed invalid or in any manner affected "by omitting to charge any offense to have been contrary to a statute or statutes, notwithstanding such offense may have been created or the punishment declared by a statute."

Under Federal Rule 7(f) the court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time as may be prescribed by rule or order.⁵⁹ There is no Missouri rule dealing with bills of particulars.

Rule 8. *Joinder of Offenses and of Defendants.* This was one of the most important and carefully worked out federal rules.⁶⁰ It provides that different offenses, if associated together, may be charged in the same indictment, and that multiple defendants may be charged in one indictment for the same or related offenses. All the defendants need not be charged in each count. Missouri Rules 24.29 and 24.30 are considerably narrower in scope.

Rule 9. *Warrant or Summons Upon Indictment or Information.* Under Rule 9(c) the warrant following indictment or information is to be issued by the court. Under the rule as prepared in the Report of the United States Supreme Court Advisory Committee the *clerk* was to issue the warrant. The Supreme Court rejected the proposal. Under Missouri 24.41(a) the

57. Rule 2:4-11 of the Rules Governing the Courts of the State of New Jersey (1948) is to the same effect.

58. Likewise, Rule 2:4-11 of the Rules Governing the Courts of the State of New Jersey (1948). See ORFIELD, *supra* n. 37, 245-246.

59. Substantially like the federal rule is Rule 2:4-14 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 238-247.

60. See Winters, *supra*, 25 ORE. L. REV. 19. Rules 2:4-15 and 2:4-16 of the Rules Governing the Courts of the State of New Jersey (1948) are substantially to the same effect.

See ORFIELD, *supra* n. 37, 258-264.

clerk may issue the warrant.⁶¹ The federal rule provides for the issuance of a warrant upon the request of the government or by direction of the court. Missouri Rule 24.41 does not expressly mention summons, but does speak of the issuance of a warrant "or other process."⁶² Under Federal Rule 9(b)(1) the amount of bail may be fixed by the court and endorsed on the warrant at the time of its issuance.⁶³ Missouri Rules 29.43 and 29.44 are substantially to the same effect.

Rule 13. *Trial Together of Indictments or Informations.* This rule authorizes the court to order the trial of two or more accusations together if the offenses and the defendants could have been joined in a single accusation.⁶⁴ There is no similar Missouri rule.

Rule 16. *Discovery and Inspection.* Under this rule upon motion of the defendant after the filing of the accusation, the court may order the prosecution to permit the defendant to inspect and copy or photograph designated objects obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.⁶⁵ There is no similar Missouri rule.

Rule 20. *Transfer from the District for Plea and Sentence.* Under this rule a defendant may plead guilty in the district of arrest as well as in the district of the commission of the crime. Many states have decisions holding that venue may be waived.⁶⁶ It would seem desirable to have statutes expressly permitting waiver of venue at least as to guilty pleas. There is no similar Missouri⁶⁷ or New Jersey rule.

61. Under Rule 2:4-18(a) of the Rules Governing the Courts of the State of New Jersey (1948) the county clerk shall issue the warrant.

See ORFIELD, *supra* n. 37, 264-265.

62. Under New Jersey Rule 2:4-17 a summons is to be issued upon request of the prosecuting attorney. Sec. 304 of the proposed Indiana Code leaves the matter in the discretion of the court.

63. Likewise, New Jersey Rule 2:4-18(a).

64. Likewise, Rule 2:5-4 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 37, 320.

65. This rule is advocated for the states by Rossman, J., *supra*, 25 ORE. L. REV. 21, 33-34. There is no similar New Jersey rule.

See also ORFIELD, *supra* n. 37, 328-334. (1947).

Compare the broad rule laid down in the Federal Rules of Civil Procedure. See Ridge, J., *Amendments to the Federal Rules of Civil Procedure*, 7 Mo. B. J. 131, 150 (1948).

66. Lester B. Orfield, *The Constitutionality of Federal Criminal Rule 20*, 34 CORN. L. Q. 129, 139-141 (1948).

67. Compare Missouri Rule 29.14, and Section 1710 of the proposed Indiana Code.

Rule 25. *Judge; Disability.* Under this rule if by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed after a verdict of guilt, another judge may perform these duties. But if such judge is satisfied that he cannot perform these duties, he may in his discretion grant a new trial.⁶⁸ Missouri Rules 29.29 through 29.33 do not seem to touch this situation.

Rule 28. *Expert Witnesses.* Under this rule the court may order the defendant or the prosecution to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations.⁶⁹ The court may appoint witnesses agreed upon by the parties. It may also appoint witnesses of its own selection. The court shall not appoint a witness unless he consents to act. A witness so appointed shall be informed of his duties at a conference in which the parties shall have opportunity to participate. Such witness shall advise the parties of his findings, and may later be called to testify by the court or by any party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection. There is no similar Missouri or New Jersey rule. Section 1507 of the proposed Indiana code follows the federal rule.

Rule 29(b). *Judgment Notwithstanding the Verdict.* A substantial innovation in criminal procedure is the provision for reservation of decision on motion.⁷⁰ In net effect a defendant against whom a verdict has been returned is permitted to renew a motion which he previously may have made for a directed verdict. There is no similar Missouri or New Jersey rule, though the tentative New Jersey draft provided for it.

Rule 30. *Instructions.* Under this rule at the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests are to be furnished the adverse party at the same time. Prior to argument to the jury the court is to inform counsel of its proposed action upon the requests. The court is to instruct

68. Likewise, Rule 2:7-4(b) of the Rules Governing the Courts of the State of New Jersey (1948). As to disability before verdict see New Jersey Rule 2:7-4 (a).

See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 378-380 (1947).

69. See ORFIELD, *supra* n. 68, 430-433.

70. See ORFIELD, *supra* n. 68, 436-438.

after the completion of argument. Objection to the charge is to be made before the jury retires to consider its verdict.⁷¹

The Missouri rule does not follow the federal rule. Under Rules 26.12 (6) and 26.18 the instruction must be in writing. It would seem that oral instructions are more effective. Furthermore, under the Missouri Rule instruction is to precede the argument. It would seem preferable that the last words heard by the jury should come from a neutral court rather than from interested and impassioned counsel.⁷²

Rule 32(c). *Presentence Investigation*. A significant criminological development making presentence investigation the normal procedure is accomplished by a provision that before sentence or probation, "unless the court otherwise directs," the probation service shall make a presentence investigation and report to the court.⁷³ There is no similar Missouri provision.

Rule 33. *New Trial*. Under this rule the federal trial court may grant a new trial to the defendant "if required in the interest of justice." Missouri Rule 27.17 enumerates five grounds, these being narrower in scope. The federal rule permits a motion for new trial on the ground of newly discovered evidence within two years after final judgment. Rule 35 of the Report of the United States Supreme Court Advisory Committee, rejected by the United States Supreme Court would have permitted an unlimited time as to this ground and also as to deprivation of a constitutional right. Missouri Rule 27.18 allows only ten days with a possible extension of thirty days in every type of case, thus being unduly narrow in scope. The New Jersey rule is modeled on Federal Rule 33 in all respects.⁷⁴

Rule 34. *Arrest of Judgment*. The court is to arrest the judgment if the accusation does not charge an offense or if the court was without jurisdiction of the offense charged. The time is to be the same as with respect

71. Rule 2:7-8 of the Rules Governing the Courts of the State of New Jersey (1948) is similar though more brief.

See ORFIELD, *supra* n. 68, 448-456.

72. Compare the order of trial recommended in 1939 by the Commission on Administration of Justice in New York State. ORFIELD, *supra* n. 68, 429. Under Sec. 1707 of the proposed Indiana rules argument will precede instructions; and the instructions must be in writing.

73. Likewise, Rule 2:7-10(d) of the Rules Governing the Courts of the State of New Jersey (1948). See also Sec. 1915 of the proposed Indiana Code.

See ORFIELD, *supra* n. 68, 543-547. (1947).

74. Rule 2:7-11 of the Rules Governing the Courts of the State of New Jersey (1948). Section 1804 of the proposed Indiana Code allows only five days.

See ORFIELD, *supra* n. 68, 499-507.

to motion for new trial, namely five days after determination of guilt.⁷⁵ Missouri Rule 27.19 abolishes the *motion* in arrest of judgment, but Rule 27.20 permits the court to arrest judgment of its own motion. Motion for new trial is to take the place of motion in arrest of judgment. No provision is made in the proposed Indiana code for arrest of judgment.⁷⁶

Rule 35. *Correction or Reduction of Sentence.* The federal court may correct an illegal sentence at any time. It may also reduce a sentence within sixty days after it was imposed.⁷⁷ There is no similar Missouri provision.

Rule 36. *Clerical Mistakes.* Under this rule clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.⁷⁸ There is a somewhat similar Missouri provision in Missouri Rule 24.40. Civil Rule 60(a) similar to Federal Rule 36 was amended in 1948 to add: "During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

Rule 37(a)(2). *Time for Taking Appeal.* Under this federal rule a defendant may take an appeal within ten days after entry of the judgment or order appealed from. Thus a very limited time is fixed in which an appeal may be taken. Section 429 of the American Law Institute Code of Criminal Procedure allowed sixty days. The New Jersey Rule fixes a period of six months.⁷⁹ Missouri Rule 28.04 permits an entire year as to writ of error. Missouri Rule 28.01 allows an appeal during the term of court at which judgment is rendered. Under the federal rule when a court after trial im-

75. Likewise, Rule 2:7-12 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 68, 516-521.

76. See note to Sec. 1135 of the proposed Indiana code. Sec. 1125 provides that lack of jurisdiction or the failure of the accusation to charge an offense shall be noticed by the court at any time during the pending of the proceeding.

77. Likewise, Rule 2:7-13 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 68, 569-571.

78. Likewise, Rule 2:7-14 of the Rules Governing the Courts of the State of New Jersey (1948) and Sec. 2108 of the proposed Indiana Code.

See ORFIELD, *supra* n. 68, 571.

79. Rule 1:2-5(f) of the Rules Governing the Courts of the State of New Jersey (1948).

For my argument favoring a short time in which to appeal see ORFIELD, CRIMINAL APPEALS IN AMERICA 124-126 (1939).

poses 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 a notice of appeal on behalf of the defendant.⁸⁰ There is no similar Missouri or New Jersey rule.

Rule 39(b). *The Record on Appeal*. The rules governing the preparation and form of the record on appeal in civil actions are to apply to the record on appeal in all criminal proceedings except as the Criminal Rules otherwise provide. Thus the old fashioned method of bill of exceptions is abolished.⁸¹ Missouri Rule 28.16 retains the bill of exceptions.

Rule 39(c). *Docketing of Appeal and Record on Appeal*. The record on appeal is to be filed with the appellate court and the proceeding there docketed within forty days from the date the notice of appeal is filed in the district court; such time may be extended. There is no similar Missouri or New Jersey rule. Under Missouri Rule 28.02 the defendant must perfect his appeal within six months from the time the appeal is granted; a ninety day extension may be granted.⁸²

Rule 44. *Assignment of Counsel*. Under this rule in all cases including misdemeanors if the defendant appears in court without counsel, the court is to advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding, unless he elects to proceed without counsel or is able to obtain counsel.⁸³ Missouri Rule 29.01 provides for assignment of counsel only in felony cases.

Rule 48. *Dismissal*. The Attorney General or the United States Attorney may be leave of court file a nolle prosequi of an indictment, information or complaint and the prosecution shall thereupon terminate.⁸⁴ There

80. See Orfield, *Improving Procedure on Judgment and Appeal in Federal Criminal Cases*, 27 MINN. L. REV. 169, 178-179 (1943).

81. Likewise, Rule 1:2-8 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *CRIMINAL APPEALS IN AMERICA* 140-157 (1939); Orfield, *Improving Procedure on Judgment and Appeal in Federal Criminal Cases*, 27 MINN. L. REV. 169, 180-183 (1943).

82. For my argument against delay at this stage see ORFIELD, *CRIMINAL APPEALS IN AMERICA* 127-129 (1939).

Sec. 2009 of the proposed Indiana Code allows twenty days unless extended by the trial court for transmission of the appeal papers.

83. Likewise, Rule 2:12-1(a) of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 417-428 (1947).

84. Substantially similar is Rule 2:14-4(a) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 1136 of the proposed Indiana Code. See ORFIELD, *supra* n. 83, 337-343.

is no corresponding Missouri rule. Under Federal Rule 48(b) unnecessary delay in filing the accusation or in bringing the defendant to trial justifies the court in dismissing the indictment, information or complaint. Missouri Rule 26.20 is couched in less flexible terms.

Rule 50. *Calendars*. Under this rule the trial courts may provide for placing criminal proceedings upon appropriate calendars.⁸⁵ There is no similar Missouri rule.

Rule 51. *Exceptions Unnecessary*. This rule makes exceptions to rulings or orders of the court unnecessary.⁸⁶ Missouri Rule 26.19 provides that exceptions may be taken as in civil cases.

Rule 52. *Harmless Error and Plain Error*. Under Rule 52(a) any error which does not affect substantial rights shall be disregarded.⁸⁷ Missouri Rule 24.38 is a very lengthy one, and possibly not as broad in scope. Under Federal Rule 52(b) plain errors affecting substantial rights may be noticed although they were not brought to the attention of the court.⁸⁸ There is no similar Missouri provision.

Rule 53. *Regulation of Conduct in the Court Room*. This rule provides that the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.⁸⁹ There is no such provision in Missouri Rule 29.59.

Rule 58. *Forms*. This rule provides that the forms contained in the Appendix of Forms are illustrative and not mandatory. Twenty-seven forms are set out in the appendix. There is no appendix of forms in either the Missouri or New Jersey rules. Missouri Rule 23.06 sets out a form of

85. Likewise, Rule 2:12-6 of the Rules Governing the Courts of the State of New Jersey (1948).

See ORFIELD, *supra* n. 83, 383-384; note 48 COL. L. REV. 613 (1948).

86. Likewise, Rule 2:12-7 of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 2002 of the proposed Indiana Code.

See ORFIELD, CRIMINAL APPEALS IN AMERICA 94-95, 100, 274 (1939).

87. Likewise, Rule 1:2-19(b) of the Rules Governing the Courts of the State of New Jersey (1948); and Sec. 2020 of the proposed Indiana Code.

See ORFIELD, CRIMINAL APPEALS IN AMERICA 190, 195-197 (1939); note 47 COL. L. REV. 450 (1947).

88. Rule 1:2-19(a) of the Rules Governing the Courts of the State of New Jersey (1948) is possibly not so broad in scope. See also Sec. 2010 of the proposed Indiana Code.

The adoption of Rule 52 in Missouri is recommended by Commissioner Paul W. Barrett, *Allocution*, 9 MO. L. REV. 232, 253 (1944).

89. For a substantially similar rule see Rule 2:12-8 of the Rules Governing the Courts of the State of New Jersey (1948). It was applied in *Bisignano v. Municipal Court of Des Moines*, 23 N. W. 2d 523, 532 (Iowa 1946).

See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 490-492 (1947).

recognizance when a continuance is granted; and Rule 23.09 sets out a form for the oath of grand jurors; and 24.04 for the oath of witnesses before the grand jury; and 24.07 for the oath of the court reporter. Rule 24.42 sets out a form for information and 24.43 as to indictments.

GENERAL OBSERVATIONS ON THE MISSOURI RULES

Repetition of Rules. To a very slight extent there is a repetition of the rules. Rule 25.04 provides in part that "no judgment rendered in any criminal case shall be reversed, set aside or for naught held for the reason that the record does not show that the defendant was arraigned and a plea of not guilty entered, where a trial was had in all respects as though the defendant had been arraigned and had formally tendered the general issue under a plea of not guilty." This is substantially repeated in Rule 29.05. Rule 25.19 on subpoenas for the prosecution is identical except as to its title with Rule 29.115. Rule 25.20 on subpoenas for the defendant is identical except as to its title with Rule 29.117.

Subjects covered in the Rules. There are a number of subjects covered in the Missouri rules not always covered in rules of court or codes of criminal procedure: identification of criminals; pardons, remissions and suspensions by governor; judicial parole of prisoners; relief of confined insolvents; and costs. As is normally the case, habeas corpus procedure is not covered, nor is evidence. Nothing is said as to the writ of error coram nobis, hence I assume that it continues in full force.⁹⁰

Extent to Which Federal Rules Followed. The Missouri Rules seem to follow about nineteen of the Federal Rules, namely, Federal Rules 1, 2, 5(c), 12, 14, 17(c), 23, 24(c), 29, 31, 32(d), 38, 39, 41, 45, 49, 55, 56 and 57. The appendix to the Missouri Rules lists nine rules as being followed, namely: 12, 17, 23, 29, 32, 38, 39, 41 and 57. The New Jersey Rules have followed the Federal Rules much more extensively and literally; about forty-eight of the sixty Federal Rules have been followed.

The proposed Indiana code follows approximately fifteen of the rules, thus resembling the Missouri rules.

The American Law Institute Code of Criminal Procedure. The Missouri rules apparently have made little or no use of the provisions of the American Law Institute *Code of Criminal Procedure*. The same is true of the New

90. See the Missouri cases cited in my note 10 NEB. L. BULL. 314, 324, n. 51 (1932). See also ORFIELD, *supra* n. 89, 522-525 (1947).

Jersey rules. On the other hand the proposed Indiana Code has made very extensive use of the Institute Code.⁹¹ The only Missouri rule based on the experience of other states is Rule 26.04 on notice of alibi which is based on an Iowa Statute. On April 1, 1940 the Arizona rules of criminal procedure prescribed by the State Supreme Court, modeled closely on 24 of the 25 chapters of the Institute Code went into effect.⁹² They were the first complete set of court rules of criminal procedure adopted in the United States.⁹³

Venue as to Accessories. Under Missouri Rule 29.13 accessories are to be prosecuted in the county of the acts of accessoryship rather than in the county where the principal offense was committed. It seems to me that Section 241 of the American Law Institute *Code of Criminal Procedure* is better in providing that the prosecution may be in either county. This is also the New Jersey rule.⁹⁴

Comment on Evidence. Missouri Rule 26.18 expressly provides that the "court shall not in the trial of the issue in any criminal cause orally sum up or comment upon the evidence or charge the jury as to any matter of fact." The federal courts have always had the power to comment on the facts. New Jersey is one of the ten states following the common law rule permitting comment. Section 325 of the American Law Institute *Code of Criminal Procedure* is to the same effect.⁹⁵

Comment on Failure of Defendant to Testify. Under Missouri Rule 26.17 there may be no comment on the failure of the defendant to testify. This is line with the federal approach. Both the United States Supreme Court and its Advisory Committee rejected a proposal to permit comment.⁹⁶ The New Jersey rules are silent on the matter, though prior decisions permitted comment.

Determination of Penalty by Jury. Under Missouri Rule 26.23 the jury is vested with broad powers in giving the penalty. There is no similar federal or New Jersey rule. It would seem that the experience of the judge

91. Back in 1930 I suggested that Nebraska adopt many of the Institute Code provisions. Orfield, *Should Nebraska Adopt the Model Code of Criminal Procedure?* 9 NEB. L. BULL. 146 (1930).

92. John B. Waite, *Arizona's Code of Criminal Procedure*, 23 J. AM. JUD. SOC. 175 (1940).

93. *Arizona Takes lead in Rule-Making*, 23 J. AM. JUD. SOC. 174 (1940).

94. Rule 2:6-1(h) of the Rules Governing the Courts of the State of New Jersey (1948); Sec. 125 of the proposed Indiana Code is to the same effect.

95. See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 457-459 (1947).

96. *Id.*, 459-466 (1947); note 57 YALE L. J. 145 (1947).

would place him in a better position to fix a sentence based on fairness and scientific principles than an ordinary jury.⁹⁷

CONCLUSION

The Missouri Rules of Criminal Procedure represent a notable accomplishment by the Supreme Court of Missouri and its advisory committee. Missouri now has an up-to-date system of criminal procedure to be found in a single set of rules and prescribed by court rather than by legislative action. The other states in which criminal procedure is prescribed by rule of court will do well to look to the Missouri rules, as will state legislatures, crime commissions, and students of criminal procedure.

97. ORFIELD, *supra* n. 95, 537. Sec. 1920 of the proposed Indiana Code provides:

"In all criminal actions if the jury returns a verdict of guilty or the court makes a finding of guilty the sentence and fine, if any, shall be fixed by the court."