

## BOOK REVIEWS

FEDERAL RULES OF CRIMINAL PROCEDURE. Preliminary Draft, With Notes and Forms. Prepared by the Advisory Committee on Rules of Criminal Procedure, Appointed by the Supreme Court of the United States. United States Government Printing Office, Washington, 1943. Pp. xxiv, 292.

This important uncopyrighted work has been widely circulated among members of the legal profession. In its Foreword, the Advisory Committee emphasizes the tentative nature of the draft, which was submitted to the Supreme Court in May, 1943, not as a report to be considered on its merits but merely for the purpose of securing authority to print copies and distribute them in the hope of obtaining "the views of the bench and bar as to definite proposals to form a part of the Federal Rules of Criminal Procedure."<sup>1</sup> The pamphlet contains not only the proposed Rules of Criminal Procedure, 56 in number, as formulated by the Advisory Committee, but also the five separate acts of Congress which specifically authorize the Supreme Court to prescribe Rules of Criminal Procedure, even in derogation of earlier law, and the five orders of the Supreme Court to this Advisory Committee.

Following each one of the 56 Rules is a Note, which by adequate citations to federal statute and case law, indicates the extent to which the particular Rule is in accord or at variance with existing law. The Notes do much more than this. They reveal a thorough and comprehensive study of recent Anglo-American legal literature in the field of criminal procedure, and the twentieth-century efforts to improve and modernize the administration of criminal justice. There are references not only to standard text-books, digests and law review articles, but to many publications, some of them important but not widely known, based upon institutional research subsidized by public funds or private endowments. Among these publications of institutional origin, evidently treated with respect by the Advisory Committee, may be mentioned: *Criminal Justice in Cleveland* (1922); *Missouri Crime Survey* (1926); *Report of the California Crime Commission* (1929); *Illinois Crime Survey* (1929); *Report of the Royal Commission on Police Powers and Procedure* (1929); *American Law Institute Code of Criminal Procedure and Commentaries* (1931);<sup>2</sup> *Annual Report of the Attorney General of the United States* (1931); *National Commission on Law Observance and Enforcement, Report on Criminal Procedure* (1931); *Proceedings of the Attorney General's Conference on Crime* (1934); *Handbook of the National Conference of Commissioners on Uniform State Law* (1937); *Report of the Commission on the Administration of Justice in New York State* (1939); *Report of Massachusetts Judicial Council* (1940); *Report of the Judicial Conference of Senior Circuit Judges* (1940); *Id.* (1941); *Id.* (1942).

Of course the main purpose of the Notes is to explain and justify the proposed Rules. Whether intended or not, the Notes accomplish two other results. Extremely rich in references to existing federal statutes and judicial decisions, and arranged systematically, the Notes constitute a

---

1. Page xiv.

2. The Notes contain at least 31 separate references to this work.

valuable exposition of existing law on federal criminal procedure. Without many citations of state statutes or state decisions, but with abundant and discriminating references to standard works of commentators in the general field of American criminal procedure, the collection of Notes is a valuable introduction to a critical study of criminal procedure in most American states, especially in those states which are as yet untouched by the current trend toward simplification and reform.

The Rules are arranged in conventional code style, following in general the chronological order of the various incidents of a criminal prosecution, beginning with the complaint and arrest, and continuing to judgment and appeal, with a final division of 19 Rules of a miscellaneous nature entitled "General Provisions." Since the 56 Rules cover all boundaries of normal criminal procedure, the relatively small bulk of the totality of text material is worthy of comment. No doubt this feature is partly due to a conscious effort to be concise. Another and more significant reason is that federal criminal procedure is one existing system, and the Rules are designed only to codify and amend the general principles controlling that one system. Much of federal procedure is left untouched, even at the sacrifice of uniformity. Rule 3 describes "the complaint,"<sup>3</sup> which is a prerequisite for the "warrant" or "summons"<sup>4</sup> described in Rule 4. According to existing law, a federal complaint must follow the "usual mode of process" of the state in which the proceedings are held.<sup>5</sup> In some but not all parts of the country, the complaint by local law must be in writing. In some parts of the country the supporting oath must be on personal knowledge and in other parts of the country, an oath on information and belief is sufficient. The proposed Rule requires a "written" complaint "made upon oath."<sup>6</sup> If the Rule is adopted there will have to be a written complaint in all parts of the country, but there will continue to be diversity as to the form of oath. The Note to Rule 3 makes it plain that as to the form of oath the Advisory Committee deliberately decided "not to deal with the matter by Rule."<sup>7</sup>

In the history of American jurisprudence our own generation, immediately following World War I, will always be known as a generation of procedural reform, both civil and criminal. Much has been recommended and much actually accomplished in some jurisdictions. Many of the current reforms are to a great extent standardized. Some of the standardized reforms appear in the proposed Rules, and it would be surprising if this were not true. Rule 8 provides for a simple and non-technical indictment or information. The significance of exceptions will be abolished if Rule 47 is approved, but the true nature and proper function of stated objections will be maintained, as in federal civil cases. Under Rules 35 and 37 bills of exceptions would cease to exist, but records on appeal and other features of appellate procedure would prevail, very much as in civil cases. The proposal which is most destructive of ancient technicalities is Rule 13, which abolishes demurrers, motions to quash, pleas in abatement and special pleas in bar. However, "defenses and objections" can be raised by "motion to dismiss or to grant appropriate relief, as provided in these rules."<sup>8</sup> The admirable Note to this Rule is a

---

3. Page 5.

4. Page 6.

5. 18 U. S. C. A. § 591 (1927).

6. Page 5.

7. Page 6.

8. Page 49.

treatise in miniature.<sup>9</sup> It contains about 8000 words and is analytically arranged to fit the old leading cases and the old terminology into the common sense of the new Rules. The busy practicing lawyer will find this Rule 13 the most revolutionary of all the 56, and the Note to the Rule the most helpful of all the Notes.

The twentieth-century advocates of criminal procedural reform tend to divide themselves into two groups. The first group, generally thinking about professional criminals, emphasizes the importance of speeding up prosecution and making it somewhat rougher than it formerly was on defendants. The second group, concerned mostly with casual criminals or innocent persons, is earnest in seeking to preserve and to strengthen traditional civil liberties. It is evident that the Advisory Committee tried to steer a middle course. However, there was more inclination to agree with the second group than with the first group. By Rule 4 the warrant for arrest or summons may be executed in the "state" where issued or within 100 miles of the "place" where issued.<sup>10</sup> Those lawyers who favor "hard-boiled" prosecution would like to have warrants run in any district. Rule 5 prescribes that every arrested person shall be taken "without unnecessary delay" before the "nearest available commissioner," and also excludes as evidence statements to an agent of the Government made by a defendant "held in custody in violation of this Rule."<sup>11</sup> Rule 13 (b) (2) gives defendant the right to rely upon want of jurisdiction over the person, at any time, as well as upon the factual defects of an indictment or information.<sup>12</sup> Rule 32 regulating the removal of an arrested person to a distant place for trial, specifically requires a showing of probable cause when the charge is not based upon an indictment and a hearing is not waived. Rule 34 relating to criminal contempt and punishment therefor, is based upon recent and liberal holdings of the Supreme Court at variance with earlier holdings of that and other federal courts. If adopted this Rule also will have the effect of converting a canon of judicial propriety into this definite formulation of law: "When the alleged contempt consists of disrespect to or criticism of a judge, that judge shall be disqualified from presiding at the trial or hearing, except with the defendant's consent."<sup>13</sup> Rule 39 recognizes and regulates the constitutional right of a defendant to have professional counsel "at every stage of the proceeding," even if the defendant is unable to obtain counsel of his own choosing.<sup>14</sup> The Note to this Rule invites attention to repeated utterances of Attorneys General and federal judges, in favor of a federal public defender statute.<sup>15</sup> Rule 48 codifies the concept of "plain error" affecting "substantial rights," and authorizes a reviewing court to consider such error even if not brought to the attention of the trial court.<sup>16</sup>

The volume under review contains a Supplement which indicates that at least one member of the Advisory Committee favors a slight relaxation of the normal American principle that an examining magistrate cannot interrogate an accused person regarding his connection with the alleged crime, even if properly warned of his constitutional right against self-

---

9. Pages 51-75.

10. Page 7.

11. Page 11.

12. See Note to Rule 13, page 69.

13. Page 147.

14. Page 170.

15. Page 171.

16. Page 197.

incrimination.<sup>17</sup> The same member of the Advisory Committee also favors a provision authorizing the trial judge and attorneys on both sides to comment upon a defendant's failure to testify at his trial, if he does not take the witness stand.<sup>18</sup> The rejection of these proposals by the majority of the Advisory Committee is further evidence of sympathy for traditional civil liberties.

Lawyers favoring vigorous prosecution will be pleased with Rule 18 authorizing depositions in behalf of the Government, and with Rule 17 which requires prior notice when alibi is to be a defense at the trial.

In addition to the constitutional right to counsel, referred to above, two other constitutional features of federal procedure have been carefully treated in the proposed Rules. Amendment V of the Constitution requires a grand jury to make the final accusation for an "infamous" crime. Following prevailing judicial opinion, the Advisory Committee in formulating Rule 8 regards the constitutional language as describing a personal privilege and not a jurisdictional prerequisite. Provision is made for the written waiver of an indictment and for the substitution of an information when the offense is "infamous" but not capital, and when the accused is represented by counsel.<sup>19</sup> Of course this Rule, if adopted, would have the effect of making it possible for many persons accused of crime and unable to furnish bail, to plead guilty shortly after arrest and commitment, even if the grand jury is not in session. The effect of waiver of a right described in the Constitution, without regard to earlier misconceptions as to jurisdiction, is also obvious in Rule 21. A jury trial can be waived by the defendant in writing "with the approval of the court and consent of the government."<sup>20</sup> By written stipulation of the parties, and with the approval of the court, there may be a jury of fewer members than 12.<sup>21</sup>

From the viewpoint of legal history the most interesting Rule is No. 24 which is as follows: "In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules. 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 interpreted by the courts of the United States."<sup>22</sup> As formulated the Rule seems to recognize the existence of federal common law, at least in the field of evidence. The Rule also assumes that the quasi legislative power as to "practice and procedure" conferred upon the Supreme Court by Congress includes the power to ordain modifications in the law of evidence.<sup>23</sup> However, there is no present effort to induce the Supreme Court to exercise that power. Instead, there is a solemn expression of abiding faith in the ability of federal courts, by adjusting principles of decision in the ordinary course of litigation, to keep the law of evidence in accord with common sense. The Note to this Rule makes it plain that the case of *Funk v. United States*<sup>24</sup> was the guiding

17. Page 249.

18. Pages 251-252.

19. Pages 27-28.

20. Page 110.

21. Page 110.

22. Page 115.

23. Page v.

24. 290 U. S. 371, 54 Sup. Ct. 212, 78 L. Ed. 369 (1933). *Held*: that the wife of a defendant on trial for a criminal offense is a competent witness in his behalf. The ground of decision was the inclusion in common law of the principle that when the reason for a particular law ceases to exist, the law itself ceases to exist.

star of the Advisory Committee in formulating the Rule. If the *Funk* case had been decided, and decided the same way, 30 years earlier, it is not likely that President Woodrow Wilson would have spoken as he did when officially welcoming the American Bar Association to Washington in 1914.<sup>25</sup> In his short and rather hostile address, the President criticized the judges of his generation for judicial timidity, for putting a higher valuation on "citations" than on "principies," for ignoring "changes of social circumstances," and for forcing law always to grow from the outside through legislation rather than through "the life that is in it."

Tyrrell Williams.†

OUR SERVICEMEN AND ECONOMIC SECURITY. Edited by Robert H. Skilton. The American Academy of Political and Social Science, Philadelphia, 1943. Pp. vii, 213. Price: paper, \$2.00, cloth, \$2.50.

It must require something of the heroic for one to undertake the editing of a symposium by 17 writers upon 18 different aspects of a subject, but Mr. Robert H. Skilton has ventured to do it in *Our Servicemen and Economic Security* in *The Annals* for May, 1943. The result, though uneven in quality and lacking in continuity in places, is a useful compilation of information on such matters as dependents, allowances, civil liabilities of service men, insurance, readjustment upon termination of service, and women in the service. For the most part the contributors confine themselves to an analysis of existing laws and their administration, and comparisons with our experiences during and after the last war as well as British experiences past and present. The volume deals, therefore, with a considerable amount of ephemeral matter the substance of which will inevitably vary with changes in legislative and administrative policy.

The portion of the study dealing with allowances for dependents, the civil liability of service men, and insurance is too much concerned with existing policies and too little with the inadequacies of the pittances and other minor forms of relief provided for service men and their dependents by an otherwise profligate government. Some evidence of the inadequacies of the immunities granted service men for debts is to be found in practices of some creditors cited by some of the writers which go considerably beyond the requirements of the law. Practices of some employers in continuing salary payments to employees for a period after induction indicate that some groups at least are more aware of the hardships of service men and their families than is the government of the United States. In view of the deficiencies of the whole governmental program in these respects it is somewhat irritating to encounter enthusiastic descriptions of National Service Life Insurance by Brigadier General Frank T. Hines of the Veterans Administration.

The portion dealing with readjustment of service men upon termination of service has to do with the most important aspects of economic security as it is related to the returning war veteran. Here the difficulties to be encountered and the inadequacies of existing policies are clearly presented. The problem of what must be done for the returning service man is properly regarded as one which will continue long after the end of the war and involves not only the problem of the politics of preferment,

25. (1914) 39 A. B. A. REP. 6-9.

† Professor of Law, Washington University School of Law.

but also serious social and economic problems related to rehabilitation and readjustment. The contributors to the section dealing with readjustment have raised questions that government, students of economics and politics, and planners cannot ignore. Thoughtful persons would do well to ponder the pages of this section; for in the best of conditions there is serious danger that the politics of privilege will take precedence over the dictates of prudence in the solution of this major problem.

*Robert J. Harris.†*

THE BURDEN OF BRITISH TAXATION. By G. Findlay Shirras and L. Rostas. Cambridge University Press; Macmillan Company, New York, 1943. Pp. xiii, 240. Price: \$3.00.

This is a very timely and instructive study, directed by the Dean of the Faculty of Economics and Commerce, University College, Exeter. It gives every indication of being a careful scholarly treatment and the presentation is unusually good, easily understood at most points by laymen, as well as by tax experts and statisticians. Part I gives the main definitions and assumptions and summarizes the findings. The summary itself is neatly summarized in three pages; excellent graphs and tables at the end of Part I show the detailed results. Part II discusses the individual taxes and shows the methods of calculation in much detail. Two cautions are mentioned at the outset (in italics):

"The first is that the estimates relate solely to the burden placed on the citizen by the finances of the State; they take no notice of the advantage he derives. Before any judgments in equity are entered, both sides must be considered.

"Although the results are printed with an air of precision, it must be very clearly understood that all of them are approximate. They are not exact figures, but more or less close indications of the orders of magnitude involved."

The value of the report is much enhanced by the comparisons of 1941-1942 (wartime) British tax burdens with those of 1913-1914 (pre-World War I); 1925-1926 (Colwyn Committee's famous *Report*); and 1937-1938 (pre-World World II). The main conclusions are as follows:

- i. There have been large increases in taxes in recent decades.

#### PER CAPITA TAX PAYMENTS

Fiscal Year	Taxes Paid into the Exchequer			Taxes and Compulsory Contributions*		
	£	s.	\$	£	s.	\$
1913-14	3	12	(18.)**	5	19	(30.)
1925-26	15	2	(75.)**	20	8	(102.)
1937-38	17	16	(89.)**	24	16	(124.)
1941-42	40	17	(163.)***	51	14	(207.)

† Professor of Government, Louisiana State University.

\* Such as social service contributions and rates (taxes for local purposes).

\*\* Conversion by reviewer, assuming £1 = \$5.

\*\*\* Assuming £1 = \$4.

2. The distribution of the tax burden in 1937-38 was not greatly different from the distribution following the last war, that is, it was quite progressive from £1000 upward, regressive on lower incomes (below £300) and relatively light on the middle incomes (£300 to £1000).

3. Wartime taxes are "noticeably progressive" on all incomes above £250 and slightly more regressive on incomes below £250 than before the war.

4. In 1937-38 direct taxation was mainly a burden on higher incomes (those above £1000) but indirect taxation was the greater burden on middle and lower incomes. In 1941-42 direct taxes were larger, "but still not heavy", on low incomes, an "important item" on middle incomes, and "very heavy" on higher incomes. At the lower end, single persons with 42s. (\$8.40) per week are subject to income tax; at the upper end, the income and surtaxes lead to "an actual ceiling of possible spendable income of about £7,000 (\$28,000), which requires a gross income of £150,000 (\$600,000). The increase in income taxation "is nothing short of revolutionary." "With the current system of taxation it is impossible to maintain capital intact, over successive generations, above a certain level."

5. Indirect taxes on sugar and tea are heavy burdens on incomes below £150, especially in cases of large families. The duties on tobacco and alcoholic drinks are heavy burdens on incomes below £1000. Taxes on private motoring are more burdensome on motorists than taxes on alcoholic beverages or tobacco.

The following is a condensation of one of the seventy-eight illuminating tables.

*A. Estimated Total Burden of Taxation*

1937-38 and 1941-42

(Husband, wife and two dependent children)

Income £	Fully earned incomes <sup>1</sup> Percentage of Income Taken in Taxation		Fully investment incomes <sup>2</sup> Percentage of Income Taken in Taxation	
	1937-38	1941-42	1937-38	1941-42
	100	18	28	16-16
300	12	21	14-15	25-26
500	14	31	20-22	37-40
1000	19	40	28-31	47-53
5000	33	59	39-52	64-75
50000	58	91	63-70	92-94

1. The following items are included: income tax and surtax, social insurance contributions, tea, sugar, small indirect taxes, tobacco, alcohol, entertainments, private motoring, P. O. net revenue, buses and taxis. The series also includes a conjectural burden on account of taxes on production in general, protective duties and the purchase tax. Excluded items: death duties, taxes on business profits and rates on dwelling houses.

2. These figures include death duties (and exclude employees' social insurance contributions). The difference between the two figures represents the difference between the minimum and maximum estimate of the burden of death duties. (From Table 12, p. 56.)

*B. Estimated Net Income after Deduction of All Taxes*

	£	£	£	£
100	82	72	84-84	75-75
300	264	237	258-255	225-222
500	430	345	400-390	315-300
1000	810	600	720-690	530-470
5000	3350	2050	3050-2400	1800-1250
50000	21000	4500	18500-15000	4000-3000

American readers who have not yet become sufficiently impressed with the United States war taxes to call them to mind quickly for the sake of comparison may be interested in the following figures released by Secretary Morgenthau, though they relate only to federal income and "victory" taxes and are not strictly comparable with the above figures which include "total" taxes, except specified levies. Such brief and unexplained comparison is likely to be misleading unless one considers all of the major qualifications and differences between the taxes of the countries compared.

*Income Tax for Married Person With No Dependents<sup>3</sup>*

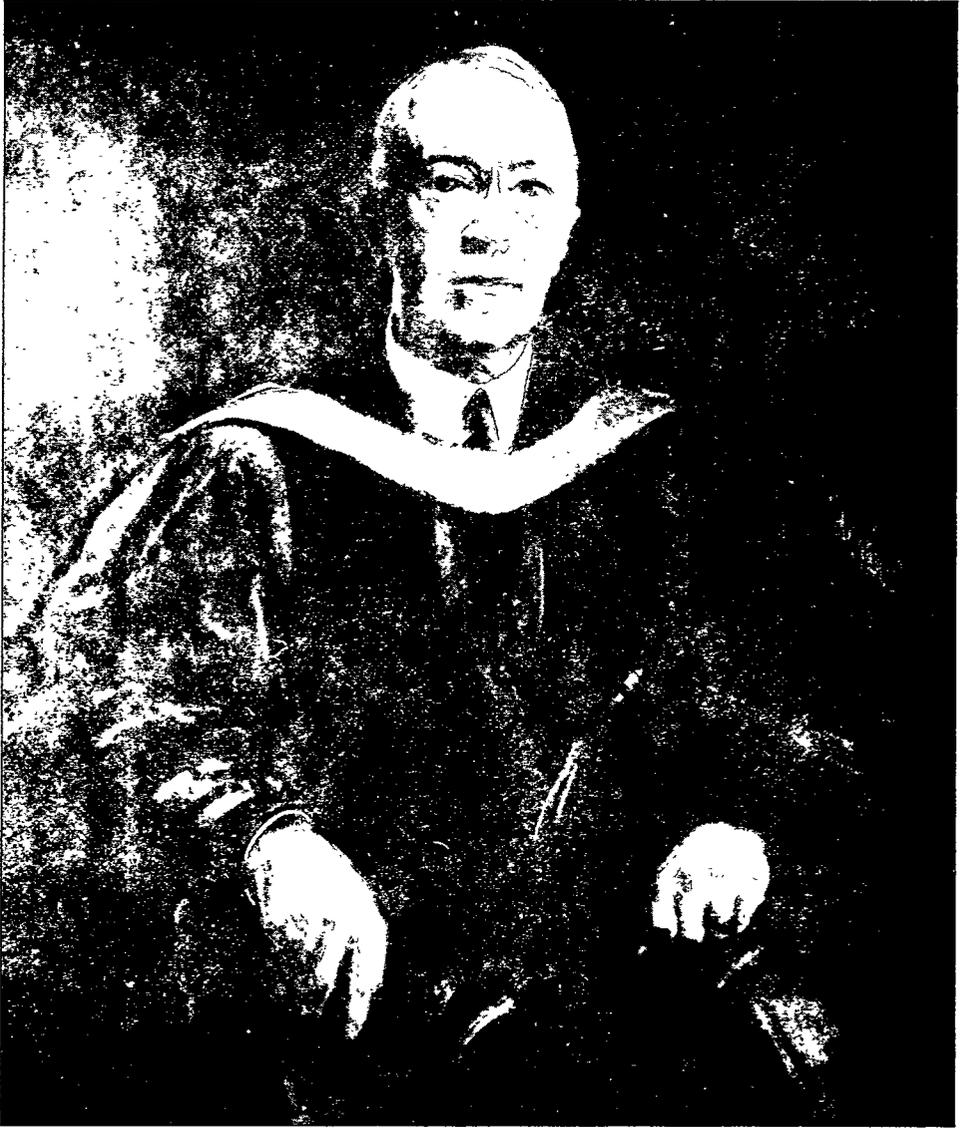
	Net Income	
	\$2,000	\$5,500
United States	\$188	\$894
Canada	231	1378
United Kingdom	378	1628

*Roy G. Blakey.†*

3. War Finance Bulletin, U. S. Treasury Department, September 15, 1943.

† Professor of Economics, University of Minnesota.





*Portrait by Alice Kent Stoddard*

WILLIAM EPHRAIM MIKELL