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Depositions in Federal Criminal Procedure

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DEPOSITIONS IN FEDERAL CRIMINAL PROCEDURE

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Rule 15, entitled "Depositions," of the Federal Rules of Criminal Procedure provides as follows:

> (a) *When Taken.* If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.
>
> (b) *Notice of Taking.* The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.
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> (c) *Defendant's Counsel and Payment of Expenses.* If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

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(d) *How Taken.* A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) *Use.* At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) *Objections to Admissibility.* Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

I. HISTORY OF DRAFTING OF RULE 15

Rules 26 through 32 of the First Draft of the Federal Rules of Criminal Procedure dated September 8, 1941, were modeled on Rules 26 through 32 of the Federal Rules of Civil Procedure. The Advisory Committee had before it a number of suggestions. On May 1, 1941, the Committee for the District of Kansas suggested that the defendant be permitted to take depositions on notice to the United States Attorney "in the same manner as provided in the rules of civil procedure;" that the United States be also permitted to take depositions in the same manner, provided that the United States "shall furnish transportation and the necessary expenses to the indigent defendants so that they may appear at the taking of the deposition;" that depositions be taken before officers with the power to punish for contempt, witnesses who fail or refuse to answer questions; that the rules provide that depositions may not be taken by the government within any federal

institution except by order of the court where the case is pending; and that the rules provide that failure of the defendant to attend the examination "except for good cause shown to the court prior to the taking of the deposition" is a waiver of his right to object to the use of the deposition at the trial on the ground of his non-presence.

On June 26, 1941, the Judicial Conference of the Second Circuit raised the question whether depositions taken by the government would be constitutional. On June 30, 1941, Nathan April of New York stated that provision for depositions should be made but only when the defendant specifically and explicitly waives his right of confrontation for each witness. On July 15, 1941, the Committee for the Cincinnati Bar Association suggested that the defendant by his counsel should be permitted to take depositions in his own behalf provided he first makes affidavit as to what he expects the testimony to be. On July 21, 1941, Frederick F. Faville of the Committee for the Northern District of Iowa stated that both sides should be allowed to take depositions but that discovery should go no further than would be provided for in pre-trial conference. Tobias E. Diamond, United States Attorney for the Northern District of Iowa, suggested that the defendant be permitted to take depositions of witnesses residing too far away for a subpoena, at the expense of the United States if the defendant shows his financial condition to be such that he cannot subpoena the witnesses at his own expense and that they are material and necessary. On August 8, 1941, the Committee for the District of Colorado suggested that both the defendant and the government be permitted to use depositions where it is either difficult or impossible or too expensive to secure attendance of witnesses at the trial. The defendant should be permitted to be present and to be represented by counsel. On August 15, 1941 the Committee for the District of New Jersey suggested that the rights of the prosecution and the defense should be made equal regarding the introduction of testimony taken by deposition of sick or absent witnesses. Constitutional obstacles may be overcome by affording opportunity to the defendant to be present to cross-examine the witness.

The Second Draft, dated January 12, 1942, contained but a single rule dealing with depositions, namely Rule 57 entitled "Depositions." The mechanical details of the rule were taken

very largely from Civil Rules 26, 28, 29, 30, 31, and 32. But Civil Rule 27 was not used because it relates to depositions to perpetuate testimony taken before the institution of an action and therefore is not germane to criminal procedure. The rule differed materially from Civil Rule 26. The Civil Rules encourage depositions and permit them to be used as examinations before the trial for purposes of discovery, as well as for the purpose of securing testimony. But in criminal cases depositions are not to be used frequently and should not be encouraged. Hence, there may be no proceeding by notice as in Civil Rule 26. Instead a deposition may be taken only by order of the court on a showing that such course is desirable. In part the phraseology of the Rule is based on the then 28 U. S. C. sec. 644. Both the defendant and the government may take depositions. To protect the defendant's constitutional right to confrontation of witnesses it is provided that the defendant is to be present at the taking of the deposition. Confrontation is construed as not requiring confrontation in the presence of the trial jury, but rather an opportunity to cross-examine the witness. The court may direct that a deposition be taken after the filing of an accusation in order to prevent a failure or delay of justice. A witness committed for failure to give bail may move for a deposition and then be discharged. Notice is to be given to the opposite party. Depositions might be taken on written interrogatories. Objections to receiving in evidence a deposition or part thereof may be made "for any reason which would require the exclusion of the evidence if the witness were then present and testified, unless the ground of the objection is one which might have been obviated, removed, or cured if presented at the taking of the deposition."

Rule 55 of the Third Draft, dated March 4, 1942, was essentially the same as Rule 57 of the Second Draft. However, a witness unable to give bail yet allowed to give his testimony by deposition "may" be discharged from custody rather than "shall" be discharged. Furthermore, if a defendant is not represented by counsel the court is to apprize him of his right to counsel for the purpose of confronting him at the taking of the deposition. If it is shown to the court that the defendant is indigent and financially unable to bear the expense of taking a deposition, the court may direct that reasonable expenses of the defendant and his counsel for that pur-

pose be defrayed by the government. In such event, the United States Marshal upon order of the court shall make the payments provided by the order to the defendant and his counsel.

Rule 20 of the Fourth Draft, dated May 18, 1942, made a number of changes. The words "indictment or information" were substituted for "accusation." The government would pay the reasonable expenses for taking a deposition if "it appears that a defendant desiring to take a deposition cannot bear the expense thereof." The language as to indigence was deleted. A provision that examination and cross-examination of witnesses "shall proceed in accordance with the practice prevailing at the trial" was deleted. A new provision was inserted that at the trial a deposition may be used if it appears "that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition." There was also a new provision allowing use of the deposition "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." Furthermore, it was provided that "a deposition shall be taken in the manner provided in civil cases," that objections "to receiving in evidence any deposition or part thereof may be made as provided in civil cases," and that depositions on written interrogatories were to be taken as in civil cases. Subsections on provisions before whom depositions may be taken, stipulations regarding the taking of depositions, record of examination, submission to witness, and certification and filing by officer were deleted. Thus, the rule came close to its final form except that it allowed the government to take depositions.

Rule 20 of the Fifth Draft, dated June, 1942, made some changes. The provision as to use of depositions now provided that a deposition may be used if it appears "that the witness is out of the United States." The language "at a greater distance than 100 miles from the place of trial or hearing" was deleted. Also deleted was the language about "exceptional circumstances." The phraseology "civil actions" was substituted for "civil cases." This draft was submitted to the Supreme Court for comment. The Court offered several com-

ments. The rule seemed to say that the court must appoint counsel to represent the defendant at the taking of a deposition even though defendant can well afford to pay for counsel. Was there need of this, and in any case, should not the rule be drafted so as to be in harmony with the separate rule on right to counsel? As to the subsection on use of deposition, at the end of the first sentence allowing use of the deposition in certain special situations, should there not be added qualifying words allowing the court in its discretion to preclude the use of the deposition? As to the subsection providing that depositions shall be taken in the manner provided in civil actions, it was pointed out by the Supreme Court that neither this rule nor the Civil Rules, 26- to- 32, not specifically referred to in this rule, deal with the problem of a witness who claims privilege and refuses to answer. The only reference to it in the Civil Rules is Rule 26(b). The Supreme Court asked whether the proposed rule intends to authorize, as it appears to do, the taking of depositions out of the country, and if so what authority is there for holding the defendant, who claims his privilege of being present at the taking of the deposition, after he passes outside the territorial limits of the United States. There are also questions of policy which should be dealt with in the annotation. May the deposition system not be more costly to the government than its worth? And may it not be used unfairly to a defendant because of the likelihood that the government would most frequently have resort to it? The rule was questionable so far as Government depositions were concerned.

Rule 18 of the Sixth Draft, dated Winter 1942-1943, made a number of changes. Provision was now made for ordering papers and objects to be produced with the witness. The term "bail" was substituted for "recognizance" for the sake of uniformity. In order to secure uniformity with the separate rule on right to counsel the following language was now used: "If the defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless he elects to proceed without counsel or is able to obtain counsel of his choice." As to the subsection on use of depositions the following language was added at the end of the first sentence: "but the court may in its discretion exclude part or all of the deposition." It was the intention of the Advisory Committee that the use, as well as the taking of the deposition should

be kept in the strict control of the court. It had been proposed also that the use of the deposition be further restricted to matters not controverted, thereby making avoidable any needless expense and other hardship to the parties and to witnesses, but the Advisory Committee so far has left such consideration to the trial court.

Rule 18 of the First Preliminary Draft, dated May, 1943 (the seventh committee draft) made some changes. Subsection (a) now bore the title "When Taken" instead of "When Depositions May Be Taken." In the case of a witness committed for failure to give bail, the court "may direct" that his deposition be taken instead of the former "shall direct." Thus, not only the discharge of the witness but the taking of the deposition is left in the discretion of the court. A part of the former subsection (a) was now placed into a new subsection (b) entitled "How Taken." As to the subsection on use of depositions, the phraseology "sickness or infirmity" was substituted for "age, sickness, or infirmity." The language permitting the court to exclude a deposition in its discretion was deleted. A former separate subsection on "Manner of Taking Depositions" was placed in the subsection "How Taken."

Rule 17 of the Second Preliminary Draft, dated February, 1944 (the eighth committee draft) made some slight changes. The new subsection (a) provided in part: "If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on the application of the witness may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness." This was a shortening of the former language: "If a witness has been ordered to give bail to appear to testify at the trial and has been committed for failure to give bail, the court on the application of the witness may direct that his testimony be taken by deposition. After the deposition has been taken and subscribed, the court may discharge the witness from custody." In the subsection on "How Taken" the language "able to obtain counsel" was substituted for "able to obtain counsel of his choice."

Rule 17 of the Report of the Advisory Committee, dated June, 1944 (ninth draft) made some changes and was very close to the final version of the rule. A new requirement was laid down on the application for depositions. It must appear

that the testimony of the prospective witness "is material and that it is necessary to take his deposition in order to prevent a failure of justice." Furthermore a witness committed for failure to give bail if he wishes to give a deposition must make a written motion and give notice to the parties. Notice of taking a deposition was now covered in a separate subsection. "The notice shall state the name and address of each person to be examined." The rule deleted the old language at the end of this sentence "if known, or if the name is not known a description sufficient to identify him." A new subsection (c) was created entitled "Defendant's Counsel and Payment of Expenses." The new language provided that the "court may direct that the expenses of travel and subsistence of the defendant's attorney at the examination shall be paid by the government." The old language had referred to the "reasonable expenses of the defendant and his attorney in taking the deposition." The subsection "How Taken" now became subsection (d). To this subsection was transferred the content of the old subsection (f) "Upon Written Interrogatories." Subsection (e) was entitled "At instance of the government or of a witness." It provided:

> The following additional requirements shall apply if the deposition is taken at the instance of the government or of a witness. The officer having custody of a defendant shall be notified of the time and place set for examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay in advance to the defendant's attorney and a defendant not in custody expenses of travel and subsistence for attendance at the examination.

The Supreme Court rejected this proposed subsection in its entirety with the result that only the defendant may take depositions. Accordingly it changed subsection (d) "How Taken" to provide: "The court at the request of the defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions." The old language had been: "If the deposition is taken at the instance of a defendant, the court may at his request direct that it be taken on written interrogatories in the manner provided in

civil actions." Because two prior proposed rules were rejected by the Supreme Court the rule became Rule 15.

Many comments were made to the Advisory Committee on this rule. It was discussed at the Judicial Conference for the Eighth Circuit held at Minneapolis, Minnesota June 24, 1943. As to the First Preliminary Draft Judge John C. Collet of the Western District of Missouri (later of the Court of Appeals) favored the rule.[1] The trial judge could easily prevent abuse of the rule. If the defendant asked to take a deposition from a person upon the assertion that the witness will testify to a given set of facts, it would not be expensive or burdensome for the authorities of the place of incarceration of the person to interview the witness and communicate with the judge in writing what the responses to the questions were, what his attitude was, and what his record was. If he stated what he was expected to testify, the court would take that into consideration. On the other hand if he stated that he did not know about the matter, this too would be taken into account in exercising discretion not to direct a deposition. If depositions may not be used, innocent defendants may sometimes be convicted. Possibly there should be additional safeguards against abuse. Harvey M. Johnsen of the Court of Appeals favored giving the rule a trial. Judge John E. Miller of the Western District of Arkansas was opposed. Congress had considered and rejected a similar statute in 1936 and 1939. It would not be practical to present depositions by either side. Fishing expeditions would be encouraged. Great expense would be involved. On the other hand Judge T. C. Trimble of the Eastern District of Arkansas thought the rule would be useful.[2] Judge A. Lee Wyman of the District of South Dakota opposed the rule. It would result in confusion, expense, and waste of time. Miscarriage of justice is not likely to occur simply because depositions cannot be used. Defendants will find it easy to obtain a trip at government expense to some distant place. The defendant might escape on the trip. The deposition might be used to aid perjured testimony offered at the trial. Where the defendant is in custody the expenses of the marshal will also have to be paid. The rule adds nothing to the existing authority of the court.

1. Comments, Recommendations and suggestions received concerning the proposed federal rules of criminal procedure, Vol. I, p. 119.
2. *Id.* at 120.

Wendell Berge, Assistant Attorney General in charge of the Criminal Division of the Justice Department, thought that the rule would be useful where a government witness will not be available at the trial.[3] The government would not very often make use of depositions. George Philip of the Committee for the District of South Dakota favored strongly that part of the rule allowing a witness unable to give bail to offer his deposition. Other parts of the rule might result in abuses through unnecessary trips to take depositions from members of the gang. Tobias Diamond, United States Attorney for the Northern District of Iowa, also objected to the rule on similar grounds.[4] Defendant might apply for numerous trips and continuances, and then if denied, allege error on appeal. Harry C. Blanton, United States Attorney for the Eastern District of Missouri, thought fishing expeditions would be encouraged. The holding of the trial would be delayed. In effect the government will have to disclose its evidence while the defendant will not. Neither side has been hurt in the past through inability to use depositions. Joseph T. Votava, United States Attorney for the District of Nebraska, favored that part of the rule allowing depositions to witnesses unable to give bail.[5] He pointed out that the defendant already has the right to take depositions. The rule would be very little used. Austin M. Cowan of Wichita, Kansas, stated that the rule should make provision for the use of documentary evidence for the purpose of impeachment where the matter is subsequent to the taking of the deposition. There might be considerable time elapsing from the date of the deposition to the date of the trial. Notice should be given to the other side. A concrete example would be conviction of the deponent of a crime after the taking of the deposition. William Scott Stewart of Chicago, Illinois, opposed the rule.

John T. Metcalf, United States Attorney for the Eastern District of Kentucky, pointed out that Judge H. C. Ford had suggested that the rule require that it "be made to appear to the satisfaction of the court that the prospective witness is able to give testimony material and competent in the case and that it is not merely cumulative."[6] Horace Frierson, United States Attorney for the Middle District of Tennessee, opposed

3. *Id.* at 121.
4. *Id.* at 122.
5. *Id.* at 123.
6. *Id.* at 125.

the subsection permitting the government to take depositions.[7] This would violate the Sixth Amendment guaranteeing the right of confrontation of witnesses. Such confrontation must be in open court. Judge Calvin Chesnut of the District of Maryland felt, however, that the rule conformed to the constitutional requirement.

Chief Justice James P. Alexander of the Supreme Court of Texas would add the language "if it is otherwise admissible" to the sentence: "If only a part of a deposition is offered in evidence by a party . . . any party may introduce other parts."[8] Irrelevant matter should not be made admissible simply because the other party had introduced the relevant part of the deposition. Robert M. Hitchcock of Dunkirk, New York, would omit from this sentence the words that an adverse party "may require him to introduce all of it which is relevant to the part introduced, and any party . . . ." In other words the adverse party would be confined to introducing other parts only where a part of a deposition is offered in evidence. As to the language "unless it appears that the absence of the witness was procured by the party offering the deposition", Judge Mac Swinford would insert after the word "deposition" the words "for the purpose of preventing his appearing as a witness." Otherwise the rule might be invoked against the government by showing that the government had caused the failure of the appearance of the witness by inducting him into the service or by sending him on some military mission.

Judge Walter C. Lindley of the Eastern District of Illinois favored the rule and stated that in his past experience he would have many times felt happier if he had had the power to let the defendant take depositions.[9] The federal judges of Michigan objected to the rule because all material testimony should be taken in open court in the presence of the defendant. John E. Metcalf, United States Attorney for the Eastern District of Kentucky thought that the rule should specify the kind of a showing that is to be made by the applicant, what is reasonable notice, and what is required before the government assumes the expense. The rule should make more specific what constitutes reasonable expenses of the defendant and his attorney. Victor E. Anderson, United States Attorney

7. *Id.* at 126.
8. *Id.* at 127
9. Vol. II, p. 417.

for the District of Minnesota, did not approve the taking of depositions in criminal cases.[10] Speedy trials would be impaired. The rule follows Civil Rules 26 and 30; criminal procedure should not be enlarged to that extent. Stupid defense counsel may try to take depositions from every contemplated government witness. Witnesses may insist that their depositions be taken as they do not intend to be available at trial. Permitting a witness unable to give bail to give a deposition and be discharged may work badly in white slave prosecutions; it will be difficult to secure convictions if the female witness does not testify at the trial. Harry C. Blanton, District Attorney for the Eastern District of Missouri, pointed out that the prosecutor will have to travel around the country or solicit the aid of the local United States Attorney who knows nothing about the case. The jury should have the benefit of the presence of the witness. It will be expensive to have the defendant and his counsel and the guards traveling about the country. The staff of the United States Attorney will have to be increased. Clyde O. Eastus, United States Attorney for the Northern District of Texas, opposed the rule. The defendant would use it to seek discovery of the prosecutor's case.[11]

Hugh A. Fisher, First Assistant of the Criminal Division of the Department of Justice, feared there would be undue delay and expense. Where there are a number of defendants, a defendant not seeking a deposition would be handicapped on examining the witness as he could not visualize to what extent he might be implicated by the activities of his co-defendants. Joseph F. Deeb, United States Attorney for the Western District of Michigan, favored presence of the witness at the trial even though the Constitution may not require it. The same view was taken by Judge Pierson M. Hall of the Southern District of California. As to witnesses unable to give bail the rule is not necessary as the Judge need not commit the witness to custody or make him put up bail.[12] Judge Leon R. Yankwich of the Southern District of California favored the rule. But the Ninth Circuit Conference adopted a resolution by a vote of sixteen to five disapproving the rule.

Robert S. Rubin, Special Counsel of the Securities and Exchange Commission, pointed out that the first subsection

10. *Id.* at 418.
11. *Id.* at 419.
12. *Id.* at 420.

of the rule did not permit the taking of a deposition in cases where the witness will not be available for a reason other than inability to appear and testify, as where the witness is a non-resident temporarily in the United States.[13] Requiring bail of such a witness would not be appropriate in all cases. Hence the rule should be amended to include the situations where there is reason to believe that attendance will not be procurable by a subpoena. Provision should also be made for depositions to be used in hearings before commissioners. Stuart H. Steinbrink of New York would make the rule clear that the court will not grant an *ex parte* order for the taking of a deposition. The opposing party should have an opportunity to appear and object to the taking of a deposition by controverting the grounds asserted by the applicant. James E. Ruffin of the Criminal Division of the Department of Justice would enforce a duty on the court to see that the expenses of the defendant and his attorney not taking depositions should be paid in cases where the depositions are taken at the instance of other defendants, just as when they are taken at the instance of the Government.[14] Joseph W. Burns of the Criminal Division of the Department of Justice objected to having the government pay the expenses of an indigent defendant taking a deposition. The government does not pay other investigating expenses. Expenses should be paid only when the Government takes the deposition. James E. Ruffin thought that the clause in the subsection on "Use" requiring the adverse party objecting to the offering of only part of a deposition to introduce "all of it which is relevant to the part introduced" objectionable because it enforced on one party the other party's ideas about relevance.[15] The best rule is to require the offering party to offer the entire deposition, or to let him offer only such parts as he desires. This is the rule usually followed, and one most likely to be enforced.

Many comments were also offered to the Advisory Committee on the rule as it appeared in the Second Preliminary Draft. Judge John Biggs of the Third Circuit favored the rule.[16] It would have proved very helpful in the *Mantle Club Case* in Delaware where about 300 depositions were taken in different parts of the United States prior to the trial and no

13. *Id.* at 421.
14. *Id.* at 422.
15. *Id.* at 424.
16. Vol. III, p. 62, (1944).

actual rule covered it. Judge Leahy worked out a solution like the proposed rule. He did not receive the depositions of the government. Judge Robert C. Baltzell of the Southern District of Indiana thought the rule too broad; confusion and undue expense would ensue. Judge Allen Cox of the Northern District of Mississippi thought the rule would be cumbersome, expensive, and productive of delay. The witnesses should testify at the trial. The same view was taken by Judge John McDuffie of the Southern District of Alabama.[17] Judge Fred L. Wham thought the rule would open up an undesirable field of possible defense by indigent defendants. Judge J. Foster Symes of the District of Colorado opposed the rule. It will be almost impossible for the court to determine whether a witness is unable or prevented from attending trial. Since the government pays, unnecessary depositions will be sought. Perjury is more likely at a deposition hearing than at a trial. But if the rule is adopted, all depositions should be taken on written interrogatories prepared by the defendant and settled by the court upon hearing. The applicant should be required to make an offer of proof as to what the witness will testify. The government should have an opportunity to object, or to avoid the taking of a deposition by admitting in whole or in part the facts to which the witness will testify.

Judge Matthew F. McGuire of the District of Columbia thought it important that the witness testify at the trial and objected to depositions taken by the government.[18] As to depositions taken by the defendant the trial court should exercise firm control to prevent abuse. Even as to depositions from witnesses unable to give bail, the court should exercise the power wisely and sparingly. The Hudson County Bar Association of New Jersey opposed the rule. The New York County Lawyers Association Committee on Federal Courts and Criminal Courts stated that the rule should be clarified so that the application is on notice to the opposite party and not *ex parte*.[19] The Judicial Conference of the Second Circuit adopted a motion proposed by Judge A. N. Hand that depositions be limited to depositions taken within the continental United States except as to depositions taken by written interrogatories. Judge Swan had proposed the latter exception. Ralph F. Lesemann of the Bar Committee of the Seventh Cir-

17. *Id.* at 63.
18. *Id.* at 62 (a).
19. *Id.* at 65.

cuit thought that before a deposition is permitted there should be a showing of materiality and necessity and notice to the other side.[20] If the applicant knows what the testimony will be he should state what it is. Lloyd P. Stryker would require that when there is to be a deposition by a witness unable to give bail there should be notice to the defendant and the government.[21] L. S. Brassfield of the North Carolina Bar would fix the notice period at ten days rather than "reasonable written notice.[22] If the defendant is ill and therefore cannot attend the taking of the deposition, the deposition should not be taken. The Judicial Conference of the Second Circuit would allow payment of expenses to a defendant taking a deposition only after the judge has determined that the testimony is material and that the defendant cannot safely go to trial without taking such a deposition. This idea was taken from the subpoena rule as to indigent defendants. Stuart H. Steinbrink of New York thought the language if "a defendant is without counsel, the court shall advise him of his right . . . " too indefinite.[23] What right: the right to counsel, or the right to take depositions, or the right to object to their taking? If the government serves notice of taking a deposition on a defendant without counsel, how or when will the defendant be before the court so that the court may advise him "of his right." Judge William J. Campbell of the Northern District of Illinois would amend the rule as to depositions taken by the government to permit the defendant to waive his right to be taken to the place of examination when it appears that the deponent will not identify the defendant.[24] A concrete example is certification of corporate books and records. This will save expense of transporting the witness to the place of trial and prevent inconvenience to the defendant. The Committee on Criminal Law and Procedure of the Chicago Bar Association would allow reasonable attorneys' fees to attorneys for the defendant when a trip is taken for a government deposition and not simply expenses of travel and subsistence. A committee of the Seattle Bar Association objected to government depositions as the defendant should have the right to have the witness testify at the trial. The witness is more apt to be truthful at the trial. Moreover the defendant might

20. *Id.* at 66.
21. *Id.* at 66 (a).
22. *Id.* at 67.
23. *Id.* at 68.
24. *Id.* at 69.

in effect be deprived of the right to counsel as few attorneys could afford to travel very long for only subsistence and travel expenses. A report to the Board of Governors of the Oregon State Bar objected to government depositions on somewhat similar grounds.[25] The defendant still has to pay the attorney for his time as the government furnishes only subsistence and travel expenses. The defendant is put to the inconvenience of having to leave his place of residence and business. On the other hand the government has tremendous resources to secure the attendance of necessary witnesses. Depositions based on stipulation should be allowed. Aside from this the government should not be permitted to take depositions. Nathan April of New York opposed government depositions as presence of the witness at the trial gives the only full protection to the defendant.

As to the use of a part of a deposition the New York County Lawyers' Association Committee on Federal Courts and Criminal Courts suggested the following substitute. "If only a part of a deposition is offered in evidence by a party, an adverse party may at the same time, or later during the presentation of his own case, introduce any other parts of the deposition relevant to the issues or the part offered."[26] The use by one party of a part should not license the other to introduce other parts which are irrelevant. The Advisory Committee language is awkward even though it is based on Civil Rule 26 (c) (4). Philip F. Herrick, United States Attorney for the District of Puerto Rico, favored the use of depositions except in the most serious offenses based simply on the long distance away of the prospective witness. This would be useful in Puerto Rico where the witness is in New York or in Chicago or Hawaii. Suppose the case of a soldier-witness transferred to continental United States between the dates of indictment and trial. Under the rule apparently his deposition would not be admissible unless he were subpoenaed and unless the Army refused to permit him to return to Puerto Rico to testify. The exacting rule as to inability to procure attendance by a subpoena would apply only when the witness has disappeared and where the Army or Navy refused to release him. The rule as to a witness being out of the United States would work a paradoxical result in Puerto Rico as the term "United

25. *Id.* at 70.
26. *Id.* at 71.

States" does not include Puerto Rico.[27] There a witness who was in Puerto Rico would be "out of the United States" and could give a deposition simply on that ground. This should be clarified in the rule covering application of terms. James B. McNally, United States Attorney for the Southern District of New York, objected to depositions on written interrogatories.[28] Though Civil Rule 31 provides for interrogatories, this is not desirable in criminal cases, as interrogatories are not as adequate as oral examination at a trial or at an oral deposition examination. The Conference of United States Attorneys opposed the entire rule as hampering enforcement of the law.[29] The Philadelphia Chapter of the Federal Bar Association opposed the rule as unfair to the defendant. The Special Committee of the Los Angeles Bar Association opposed that part of the rule permitting the government to take depositions.[30] The Committee of the State Bar of California took the same position. With one exception, the Committee of the Bar Association of the District of Columbia took the same position. Allowing the government to take depositions would give the government discovery in criminal cases. In 1935 Congress rejected a bill permitting the government to take depositions. A witness giving a deposition will not regard his testimony as seriously as he would testimony at a trial. Civil cases require only a preponderance of evidence while a criminal defendant must be proved guilty beyond a reasonable doubt.

II. Confrontation and Depositions

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him." The purpose of this provision is to prevent secret and inquisitorial methods of trial, and to secure to the defendant the privilege of sifting and testing the evidence against him by cross-examination of witnesses.[31] The provision is violated by the introduction of evidence given by witnesses whom the defendant has had no opportunity to cross-examine. A statute making the record

27. *Id.* at 72; See Downes v. Bidwell, 182 U. S. 244, 287 (1901).
28. *Id.* at 73.
29. Vol. IV, p. 39.
30. *Id.* at 40.
31. McCormick, Handbook of the Law of Evidence, § 482, p. 483 (1954); Rottschaefer, Handbook of American Constitutional Law, 795 (1939). See Fotie v. United States, 137 F. 2d 831, 839 (8th Cir. 1943). For a valuable state court study see note, 28 N. C. L. Rev. 205 (1950).

of the conviction of one person of stealing given property conclusive evidence of the fact that the property had been stolen in the prosecution of the receiver thereof violates the provision.[32] The admission of dying declarations is an exception to the rule based on historical considerations and necessity.[33]

Suppose the defendant has had an opportunity to cross-examine. Does it follow that there is no constitutional violation? Not necessarily. The provision is violated by admitting in evidence the statement of an absent witness taken at the preliminary examination of the defendant, at which he had an opportunity to cross-examine the witness, where the absence of the witness was not by the procurement, connivance or suggestion of the defendant but due to the negligence of the government.[34] On the other hand, when the absence of the witness is due to the wrongful procurement of the defendant, his rights are not violated by admitting proof of what such witness had stated on a former trial of the defendant for the same offense although under a different indictment.[35] The same result is reached where the former witnesses are dead at the time of the subsequent trial.[36] On principle the same rule should apply where the absence of witnesses appearing at the former trial is due to other causes beyond the control of the government.[37]

An exception to the rule on confrontation and to the hearsay rule is the case of official statements.[38] The right of the defendant is that of being confronted with the witnesses against him, not of being confronted by officials of the trial court.[39] Another exception is for reputation. For example, in a prosecution for fraud in the mails, accounts and letters

32. Kirby v. United States, 174 U. S. 47 (1899).
33. *Ibid*; See also United States v. Greene, 146 Fed. 796, 801 (D. C. S. D. Ga. 1906).
34. Motes v. United States, 178 U. S. 458 (1900).
35. Reynolds v. United States, 98 U. S. 145 (1878).
36. Mattox v. United States, 156 U. S. 237 (1895); See in accord, United States v. Macomb, 26 Fed. Cas. 1132, No. 15, 702 (C. C. D. Ill. 1851), allowing use of testimony given at the preliminary examination.
37. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW, 796 (1939). Absence from the jurisdiction shall be a ground. See United States v. Sterland, 27 Fed. Cas. 1307, No. 16,387 (W. D. Va. 1858). Temporary illness is not a ground, and defendant waives any right by going to trial instead of seeking a continuance. Smith v. United States, 106 F. 2d 726, 728 (4th Cir. 1939).
38. 5 WIGMORE, EVIDENCE § 1398 (1940); Heike v. United States, 192 Fed. 83, 94 (2d Cir. 1911).
39. Dowdell v. United States, 221 U. S. 325, 330 (1911).

were received as admissions.[40] A view of the scene of the alleged murder by the trial judge does not deprive the defendant of his right to confrontation when the view is conducted in the presence and with the consent of the defendant's counsel, and no testimony is taken, and no improper remarks are addressed to the judge.[41] As Justice Cardozo has stated, the exceptions to the confrontation rule "are not even static, but may be enlarged from time to time if there is no departure from the reason of the general rule."[42]

The constitutional provision on confrontation applies only to "criminal prosecutions." It does not apply to actions to recover penalties for violation of the revenue laws,[43] nor to contempt proceedings,[44] nor to international extradition proceedings.[45] It has been held that the use by the government of depositions taken by it in a court-martial proceeding does not violate the right to confrontation.[46] This was held even though the defendant could not be present at the taking of the deposition, as he had the right to propose cross-interrogatories. There is no right of confrontation in habeas corpus proceedings as technically they are civil proceedings.[47] The NATO Status of Forces Agreement protects the right to confrontation of witnesses.[48] It is a rule of international law

40. Salinger v. United States, 272 U. S. 542, 547 (1926). Another exception is regular entries in the course of business. United States v. Leathers, 135 F. 2d 507, 511 (2d Cir. 1943).

41. Valdez v. United States, 244 U. S. 432, (1917). Two justices dissented. To similar effect see Snyder v. Massachusetts, 291 U. S. 97 (1934).

42. Snyder v. Massachusetts, 291 U. S. 97, 107, (1934). But in Salinger v. United States, 27 U. S. 542, (1926) the court states: "The purpose of that provision, this court has often said, is to continue and preserve that right, and not to broaden or disturb the exceptions." The "present trend here as in the civil cases is towards the acceptance of any genuine showing of unavailability whatever the cause." MCCORMICK, EVIDENCE, p. 485 (1954).

43. United States v. Zucker, 161 U. S. 475, (1896). Here the government offered a deposition which it had taken in France. The deposition was authenticated and certified under letters rogatory.

44. Merchants' Stock and Grain Co. v. Board, 201 Fed. 20, 28 (8th Cir. 1912).

45. Ex parte La Mantia, 206 Fed. 330, 332 (D. C. S. D. N. Y. 1913). Extradition to Italy was involved.

46. United States v. Sutton, 3 U. S. C. M. A. 220, 11 C. M. R. 220 (1953); noted 22 Geo. Wash. L. Rev. 502 (1954). The deposition was taken in Korea. See in general on depositions in Military cases FIELD, COURT-MARTIAL PRACTICE: SOME PHASES OF PRETRIAL PROCEDURE, 23 Brooklyn L. Rev. 25, 30-36 (1957).

47. Burgess v. King, 130 F. 2d 761 (8th Cir. 1942).

48. ORFIELD, JURISDICTION OF FOREIGN COURTS OVER CRIMES COMMITTED ABROAD BY AMERICAN MILITARY PERSONNEL, 8 S. C. L. Q. 346, 349 (1956).

that when an alien is prosecuted for a crime he is entitled to confront the witnesses against him.[49]

Even in a criminal proceeding the right to confrontation does not apply to all stages of the proceeding. It does not apply to the stage after conviction when the court is determining the amount of punishment to be imposed or whether probation is to be granted.[50] The court may hear, and make use of, reports and investigations based on information obtained from persons not called into the court room.

It has been suggested that if the phrase "criminal prosecutions" has the same meaning as it has in defining the cases in which the Sixth Amendment requires trial by jury, the right to confrontation does not exist in the trial of misdemeanors and petty offenses.[51] Possibly the due process clause of the Fifth Amendment should be construed as applying to those cases, but there are no decisions to that effect.

The defendant may waive his right to confrontation.[52] The defendant waived when he offered the testimony taken at the preliminary investigation.[53] The testimony was in by his act and with his consent. "It was not offered by the government, but by the accused, and was offered without qualification or restriction." The court cited favorably several state court cases allowing the use of depositions and waiver of confrontation.[54] In a military case it has been held that even in a capital case a defendant by voluntary absence may waive his right to confrontation under the Sixth Amendment.[55] A

49. ORFIELD, WHAT CONSTITUTES FAIR CRIMINAL PROCEDURE UNDER MUNICIPAL AND INTERNATIONAL LAW, 12 U. Pitts. L. Rev. 35, 42 (1950).

50. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW, 194 n. 47 (1953). See Williams v. New York, 337 U. S. 241 (1949), but see ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 543-547 (1947).

51. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW, 797 (1939).

52. 5 WIGMORE, EVIDENCE, § 1399, p. 142 (3rd ed. 1940); Note, 23 So. Calif. L. Rev. 266 (1950); Note, 28 N. C. L. Rev. 205, 212 (1950).

53. Diaz v. United States, 223 U. S. 442, 449 (1912). Thus, the waiver may be implied, as well as express.

54. *Id.* at 451. The court also referred to Reynolds v. United States, 98 U. S. 145, 158 (1878) as a case of waiver. 223 U. S. 452. For a later case upholding waiver see Valdez v. United States, 244 U. S. 432, 445 (1917).

55. United States v. Houghtaling, Ct. Mil. App. No. 573, February 26, 1953, noted 66 Harv. L. Rev. 1538 (1953). The defendant escaped during the trial. See also United States v. Barracota, 45 F. Supp. 38 (S. D. N. Y. 1942); United States v. Loughery, 26 F. Cas. 998, 1000 No. 15, 631 (C. C. E. D. N. Y. 1876); United States v. Noble, 294 Fed. 689, 692 (D. Mont. 1923); United States v. Vassalo, 52 F. 2d 699 (E. D. Mich. 1931); Ah Fook Chang v. United States, 91 F. 2d 805, 809 (9th Cir. 1937).

defendant can admit and be bound by the admission that a witness not present would testify to certain facts. This is a form of allowable waiver.[56] The right to confrontation may be waived by a failure to assert it in apt time.[57]

Normally the witness should give his testimony in court so that the jury may observe his demeanor.[58] But "considerations of public policy and the necessities of the case"[59] create exceptions such as death of the witness,[60] and absence of the witness due to the procurement of the defendant.[61] In 1904 the Supreme Court stated:

> At common law, the right existed to read a deposition upon the trial of a defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was at the time of the trial dead, insane, too ill even to be expected to attend the trial, or kept away by the connivance of the defendant.[62]

In one situation the Supreme Court has laid down a rule that is scarcely fair to the defendant. A witness for the government in a murder case died after the first trial, and his testimony was read at the second trial. The defendant offered evidence that after the first trial the witness said that his testimony was secured by duress and was untrue. It was held, with three justices dissenting, that such evidence was properly excluded for want of foundation.[63] Impeachment by inconsistent statements is excluded unless the impeacher at the

56. Schick v. United States, 195 U. S. 65, 71-72 (1904). This was followed in Mullan v. United States, 212 U. S. 516, 519-520 (1909).

57. Gonzalez v. People of Virgin Islands, 109 F. 2d 215, 217 (3rd Cir. 1940); Burgess v. King, 130 F. 2d 761, 763 (8th Cir. 1942).

58. But the confrontation provision does not explicitly require confrontation *at the final trial.* MCCORMICK, EVIDENCE, p. 484, n. 22 (1954).

59. Mattox v. United States, 156 U. S. 237, 242, 243 (1895). The court made express reference to depositions and to ex parte affidavits. Language in the decisions seeming to object to depositions probably has reference to depositions taken in the absence of the defendant. MCCORMICK, EVIDENCE, p. 484 (1954).

60. *Ibid.*

61. Reynolds v. United States, 98 U. S. 145, 158, 159 (1878).

62. West v. Louisiana, 194 U. S. 258, 262 (1904). The court concluded that it was only a slight extension of the common law to permit the use of depositions upon proof merely of non-residence and permanent absence, 194 U. S. 263. The court also pointed out that no case had treated this as unconstitutional in federal criminal proceedings. 194 U. S. 266.

63. Mattox v. United States, 156 U. S. 237, 244 (1895). The holding was recognized as correct in Carver v. United States, 164 U. S. 694, 698 (1897). The latter case held that the requirement did not apply so as to prevent impeachment of a dying declaration.

former hearing asked the preliminary question. This is said to be the view of most American decisions, but an unsound approach.[64] The case "exhibits more interest in protecting the honor of a deceased witness than in giving a live defendant a fair trial."[65]

It has been proposed that in civil cases the requirement of unavailability of the witness should be abandoned.[66] "In criminal cases, however, the present requirement of unavailability is embodied in the constitutional guaranty of confrontation, and a change in the constitutional provisions or their interpretation could hardly be expected unless and until favorable experience in civil cases should convince the profession that the change could fairly be applied in the trial of crimes."[67]

Clause (a) of Rule 63 (3) of the Uniform Rules of Evidence does not require that a deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition is taken. In criminal cases this would seem to violate the constitutional right of the defendant to confrontation of witnesses.[68] Rule 511 of the Model Code of Evidence entitled "Prior Testimony or Deposition" provides: "Evidence of a hearsay statement which consists of testimony given by the declarant as a witness in an action or a deposition taken according to law for use in an action is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given or for use in which the deposition was taken, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence."

Allowing the prosecution to take depositions would not violate the confrontation clause when the defendant and his counsel are permitted to be present at the taking.[69] This is not very different from the existing rule permitting the prosecution to use testimony at a preliminary hearing or at a prior

64. McCORMICK, EVIDENCE, § 37, pp. 68-69 (1954); 3 WIGMORE, EVIDENCE, § 1031-1032, (3rd ed. 1940); Note, 20 So. Calif. L. Rev. 102 (1946).
65. Note, 28 N. C. L. Rev. 205, 206 n. 12 (1950).
66. McCORMICK, EVIDENCE, p. 500 (1954).
67. *Id.* at 501.
68. DONNELLY, THE HEARSAY RULE AND ITS EXCEPTIONS, 40 Minn. L. Rev. 455, 461-462 (1956). See also McCORMICK, HEARSAY, 10 Rutgers L. Rev. 622 (1956); *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. Rev. 481, 494 (1954).
69. McCORMICK, EVIDENCE, p. 485 (1954); 5 WIGMORE, EVIDENCE, § 1398, p. 136 (3rd ed. 1940).

trial. The Advisory Committee of the Supreme Court recommended such a rule pointing out that seventeen states have conferred the right by statute. But as Professor McCormick points out: "The court, without statement of reasons, denied the recommendation and limited the taking of depositions to the defendant."[70] As the late Professor George H. Dession has pointed out: "The Court's action in eliminating depositions on behalf of the government may have been prompted by a feeling that the government could better afford to lose a few cases than make even a gesture which might be interpreted as favoring trial on a paper record."[71]

The Sixth Amendment does not apply to state court proceedings. No specific provision in the Constitution requires confrontation in the state courts.[72] Hence, a deposition taken at the preliminary hearing may be used at the trial when the witness is permanently absent from the state. There is no violation of the due process clause of the Fourteenth Amendment. The holding is not a strong or necessary holding because, as the court pointed out, no case had held that this would violate the rule as to confrontation in federal cases.[73] In a later decision Justice Cardozo stated that for "present purposes we assume" that the privilege of confrontation "is reinforced by the Fourteenth Amendment though this has not been squarely held."[74] In 1953 the Supreme Court seems to have held that the privilege of confrontation is not secured by the Fourteenth Amendment.[75] On the facts such a ruling was unnecessary, hence may not say the final word.[76]

III. Depositions Before the Adoption of Rule 15

The first reported case on depositions ruled that the federal courts have no power to issue commissions for the taking of depositions when the witness is within the jurisdiction of the court.[77] The jurisdiction of a federal trial court is co-exten-

70. McCormick, Evidence, p. 486 (1954).
71. Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L. J. 197, 218 (1947).
72. West v. Louisiana, 194 U. S. 258, 261 (1904).
73. *Id.* at 266.
74. Snyder v. Massachusetts, 291 U. S. 97, 106 (1934). See comment on this case in 28 N. C. L. Rev. 205, 214 (1950).
75. Stein v. New York, 346 U. S. 156, 195 (1953). This case construes the Snyder case as holding that even if a state defendant had a federal right to confrontation, his exclusion from a view would not offend it, and that he had no federal right to confrontation.
76. Note, 67 Harv. L. Rev. 91, 121 (1953).
77. United States v. Thomas, 28 Fed. Cas. 79, No. 16, 476 (C. C. D. C. 1847). The prosecution was by way of indictment for libel.

sive with the Union, hence the federal trial court in the District of Columbia has jurisdiction of a witness in Missouri. The court did not deny that depositions might be taken if the witness was in a foreign country.[78] The government had argued that no depositions can be taken "unless by consent." The court did, however, postpone the date for trial. Later the prosecution presented to the court a formal consent signed by the victim of the crime and the United States Attorney to the taking of a deposition by commission before two justices of the peace at St. Louis, Missouri, within fifty days on three days notice to named attorneys of St. Louis. The case was terminated by the entry of a *nolle prosequi.*

The first reported lower court federal case to allow a defendant to take depositions was decided in 1882.[79] The defendant was charged in an information with smuggling. He submitted a petition and affidavit showing that he had witnesses residing abroad who were material to his defense. He asked a *dedimus potestatem* to take the depositions under section 866 of the Revised Statutes.[80] The United States Attorney resisted the application on the ground that it was unprecedented and without authority and on the ground that the deposition would not be admissible at the trial. The trial court granted the application for deposition by commission even though it was probably unprecedented in federal criminal cases. He pointed out that it was permitted in the state courts of Georgia, and allowed by statute in other states. The government would not be prejudiced as the taking would be at the expense of the defendant, and its admissibility would be determined on the trial. If it was rejected at the trial, the judge would, nevertheless, take account of it in imposing sentence. The order of the court provided that service be made on the United States Attorney of interrogatories to be propounded to the witnesses; and the United States Attorney was then to have three days to file cross-interrogatories. The commission was to be returned ten days before the next term of court.

A similar view was taken the next year by the Circuit Court of the Eastern District of Missouri.[81] The court referred to the language of the statute in effect since 1874 providing that

78. This is pointed out in United States v. Hofmann, 24 F. Supp. 847, 849 (S. D. N. Y. 1938).
79. United States v. Wilder, 14 Fed. 393 (C. C. S. D. Ga. 1882).
80. This statute was 28 U. S. C. 644, at the date the Federal Criminal Rules went into effect in 1946.
81. United States v. Cameron, 15 Fed. 794 (C. C. E. D. Mo. 1883).

"in any case where it is necessary, in order to prevent a failure of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." This statute, in using the words "in any case," applied to criminal as well as to civil cases. The court pointed out that the statutory provision was originally enacted as a proviso to section 30 of the Judiciary Act of 1789 as follows: "Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice which power they shall severally possess." Possibly the act of 1789 did not cover criminal cases, but there is strong argument that it did. The 1874 act definitely covered criminal cases. The 1874 provision appeared in a chapter entitled "Evidence" which covered both civil and criminal cases. The words "common usage" in the 1874 act refer to the usage of the courts of the state in which the federal court sits, and not to the common law because when the statute was enacted it was common usage to take depositions under statutes. The 1789 act should be construed similarly. Missouri law had allowed such depositions for half a century. The defendant had shown necessity as the witness resided several hundred miles away and the defendant was unable to pay the cost of bringing him to the place of trial and the government could not pay such cost and the witness need not. The court stated that it does "not say that all these facts must necessarily appear."[82] Allowing depositions would prevent delay and continuances and a failure of justice. One need not fear perjury at the taking of the deposition as the government may cross-examine and later at the trial show the reputation for truth and veracity of the witness. If the witness commits perjury at the taking of the deposition he may be prosecuted for perjury as the court has authority of law to take testimony by deposition.

Almost fifty years later the Court of Appeals of the Tenth Circuit stated of this latter decision: "We may assume that decision is sound without committing the court definitely on the subject."[83] The trial court was warranted in denying the taking of the deposition as the defendant had not complied with the District Court Rule or the Colorado state law relat-

82. *Id.* at 797.
83. Clymer v. United States, 38 F. 2d 581, 582 (8th Cir. 1930).

ing to notice and the filing of interrogatories. The federal statutes did not prohibit the district courts from adopting rules to prevent the abuse of depositions. The defendant was not entitled to a continuance and postponement of trial as his motion for continuance did not show diligence in preparation for trial. In the same year the Court of Appeals for the Fourth Circuit upheld the refusal of the trial court to allow the taking of a deposition as to witnesses residing outside of the state.[84] The court stated: "Congress has made provision for service and attendance of witnesses in criminal cases. It was early determined that no power existed in the federal courts to order the taking of depositions in criminal cases . . . They were unknown and unauthorized at common law."[85] *Ex parte* affidavits are not admissible in criminal cases, and may not be offered to impeach a government witness.[86]

In 1938 a court granted an order for taking a deposition of a witness in Germany.[87] The due process clause of the Fifth Amendment and the compulsory process provision of the Sixth Amendment point to the right of a court to assist a defendant to secure evidence in other countries. There are no cases permitting letters rogatory on behalf of a criminal defendant, but several federal decisions have upheld the use of depositions under 28 U. S. C. section 644.[88] But the defendant must show the necessity to prevent a failure or delay of justice and that the testimony to be given is material. The defendant must file with the consular representative before whom the witness is to appear a consent executed and acknowledged by the witness, a German citizen, expressing his willingness to appear voluntarily and testify under oath. A mere cable and letter from the witness would not be sufficient. Materiality as to witnesses was shown when the affidavit stated that they are the persons to whom and for whom the defendant illegally carried messages. The attorney for the defendant later went to Germany to interview the proposed witnesses. There must first be negotiations between the United

84. Luxenburg v. United States, 45 F. 2d 497 (4th Cir. 1930) cert. denied 283 U. S. 820 (1931) under the state law of West Virginia depositions could be taken.

85. *Id.* at 498. The court cited United States v. Thomas, 28 Fed. Cas. 79, No. 16, 476 (C. C. D. C. 1847).

86. Vendetti v. United States, 45 F. 2d 543 (9th Cir. 1930).

87. United States v. Hofmann, 24 F. Supp. 847 (S. D. N. Y. 1938). The prosecution was for conspiring to transmit certain information to a foreign government, and for unlawfully delivering such information.

88. This statute was said to be essentially the same as the statute in the earlier cases. *Id.* at 849.

States and Germany concerning the right of an American Consul in Germany to take the deposition. And the passports issued to the United States Attorney or his representatives must be first properly visaed. If it were shown that the defendant was inpecunious she need not bear the expense although the moving papers were silent on that subject. The admissibility of the evidence was left to the trial court.

The Court of Appeals of the Ninth Circuit also upheld the right to grant orders for depositions.[89] It was a matter of discretion for the trial court as the word "may" is used in the statute. The court should grant a deposition only when necessary to prevent a failure or delay of justice. The trial was in Hawaii and the two witnesses apparently in China. The court conceded that if the testimony of the two witnesses was conclusive a failure of justice would have to be prevented. But the jury might choose to disbelieve the witnesses. Hence the trial court properly denied the application as necessity was not shown.

In one of the last decisions before the adoption of the Federal Criminal Rules it was asserted that a federal trial court has inherent power to order depositions abroad if not contrary to the law of the country in which the testimony is sought or in violation of any treaty between the United States and such country.[90] Here, interrogatories were sought of a corporal in the United States Army stationed in Africa. However, no deposition was ordered as the defendant was guilty of gross laches and the testimony sought was merely collateral. The testimony would not support the defendant's defense but would merely show that a government witness had violated the law. A year later the same judge relied on the statute as authority instead of on inherent power.[91] In a prosecution for disseminating a false seeds advertisement depositions were sought from two persons resident in Buenos Aires, Argentina, to show that the seeds were in fact as represented in the defendant's advertisement. The court rejected the application on the ground that there were other experts in the United States available to establish such defense. The government had offered an affidavit of a government official

89. Wong Yim v. United States, 118 F. 2d 667 (9th Cir. 1941) cert. denied 313 U. S. 589 (1941). Indictment was for violations of the narcotics law.
90. United States v. Dockery, 50 F. Supp. 410 (E. D. N. Y. 1943). Indictment was for sale of tax unpaid distilled spirits.
91. United States v. Dunn, 55 F. Supp. 535 (S. D. N. Y. 1944).

familiar with this type of problem listing persons available in the United States. The court, therefore, concluded that to grant the application would unduly postpone the trial. Shortly after the adoption of the criminal rules Judge Charles E. Clark pointed out that it had been the majority view that the statutes permitted depositions in criminal cases.[92]

IV. RULE 15 AS INTERPRETED IN THE DECISIONS

When a criminal proceeding is involved, a defendant seeking a deposition may not do so under Civil Rule 26 but instead must proceed under Criminal Rule 15.[93] It should be noted, however, that Rule 15 to a considerable degree adopts the Federal Civil Rules, and to that extent reference to them is necessary.[94]

The rule as adopted by the Supreme Court makes no provision for the taking of depositions by the government. The trial court "may upon motion of a defendant" order the taking of a deposition. But a witness committed for failure to give bail may also apply for the taking of a deposition, that is to say, his own deposition.[95] The government may not apply for even this kind of a deposition, nor may the defendant. However, at the trial the government as well as the defendant may use this deposition provided the witness is not available.

The burden of proof as to the necessity of taking a deposition of a prospective witness is on the moving party, that is to say, the defendant.[96] Depositions are to be taken "only in exceptional situations."[97]

The affidavit in support of defendant's motion to take a deposition must show that the testimony of the witness is

92. Mosseller v. United States, 158 F. 2d 380, 382 (2d Cir. 1946).

93. Application of Russo, 19 F. R. D. 278, 281 (E. D. N. Y. 1956). See also United States v. Schluter, 19 F. R. D. 415 (S. D. N. Y. 1956). For a proposal to amend the Federal Criminal Rules so as to adopt the more liberal procedure of the Federal Civil Rules see Note, 60 Yale L. J. 626, 642-644 (1951).

94. For reference to the specific civil rules adopted and discussion of such rules see WHITMAN, FEDERAL CRIMINAL PROCEDURE, 116-127 (1950); 4 BARRON, FEDERAL PRACTICE AND PROCEDURE, 117-123 (1951).

95. NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE PROCEEDINGS, Vol. VI, pp. 194-196 (1946). No fixed time is provided as to when the witness shall make his motion, nor is any specific showing of necessity or hardship required.

96. United States v. Ausmeier, 5 F. R. D. 395, 396 (E. D. N. Y. 1946). In support of this view the court cited Wong Yim v. United States, 119 F. 2d 667 (9th Cir.) cert. denied 313 U. S. 589 (1941); United States v. Cameron, 15 Fed. 794 (C. C. D. Mo. 1883). For a subsequent case see United States v. Glessing, 11 F. R. D. 501, 502 (D. Minn. 1951).

97. United States v. Glessing, 11 F. R. D. 501, 502 (D. Minn. 1951). In accord see Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955).

material and necessary to prevent a failure of justice.[98] Subsection (a), Rule 15, sets forth these prerequisites. A motion by several defendants for an order to take depositions, at the expense of the government, of witnesses alleged to be in Germany, was denied where it was not shown to what the witnesses would testify, or that the witnesses were available, or that if available witnesses would voluntarily present themselves to give the depositions, or before whom depositions could be taken in Germany, or any authority in Germany to force the witnesses to present themselves to give testimony, or that the defendants were unable to bear the expense.[99]

Where a defendant sought an oral deposition from members of a Presidential Appeal Board, a deposition was denied because the defendant failed to show the required necessity as he did not make a sufficient showing that any material testimony would be adduced from such examination.[100] The court pointed out that the board was quasi judicial in character, that the mental processes of the board could not be delved into, and that the board was very busy. A mere statement by defendant's counsel in his affidavit that the testimony was material is a sheer conclusion and insufficient to justify granting leave. The defendant is not entitled to take a deposition under Rule 15 when there is no proof or even indication that the defendant's accountant is a prospective witness in the criminal prosecution and it is not established that it is necessary to prevent a failure of justice.[101]

The defendant must show that it is practicable to obtain the deposition sought.[102] He must show that the deposition could probably be obtained within a reasonable time.[103] Otherwise a continuance need not be granted. And the continuance may be denied when the prosecution admits judicially that the prospective witness would testify as the defendant claimed. Nevertheless, the prosecution could disprove such judicially admitted facts by reputable testimony, but could

98. United States v. Ausmeier, 5 F. R. D. 395, 396 (E. D. N. Y. 1946). The affidavit was made by the attorney for the defendants. The court was skeptical of the "bare statement of an attorney for a defendant."

99. *Id.* at 396, 397.

100. United States v. Glessing, 11 F. R. D. 501, 502 (D. Minn. 1951). The affidavit was made by defendant's counsel.

101. Application of Russo, 19 F. R. D. 278, 281 (E. D. N. Y. 1956).

102. United States v. Ausmeier, 5 F. R. D. 395. 396 (E. D. N. Y. 1946); Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955).

103. Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955). Here the prospective witness was under sentence of death in the Florida penitentiary. The federal criminal proceeding was in Alabama.

not impeach such witness by proof of contradictory statements.

A Court of Appeals has held that a refusal to permit the taking of a deposition is in the discretion of the trial court.[104] A similar rule has been laid down as to discovery and inspection before trial under Criminal Rule 16,[105] and as to subpoena *duces tecum* for inspection before trial under Criminal Rule 17 (c).[106]

The court may order the taking of a deposition "at any time after the filing of an indictment or information" upon motion of the defendant and notice to the parties. When the indictment or information has been filed, the motion "should be made promptly."[107] A trial judge was justified in denying a motion filed only five days prior to the trial and renewed on the date of the trial where no explanation was offered for the delay.[108] Fifteen days had elapsed between the appointment of counsel and the filing of the motion. It is too late to allege illness of the defendant during such interval when appeal is taken. No fixed time is provided as to when a witness committed for failure to give bail shall apply for the taking of his depositions.

Rule 15 (c) provides that if "a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel." Thus, the duty to advise is placed upon the court and not on investigating officers.[109]

Rule 15 (c) provides for payment of expenses of taking a deposition where the defendant cannot bear the expense there-

104. Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955).

105. United States v. Schiller, 187 F. 2d 572, 575 (2d Cir. 1951).

106. Remer v. United States, 205 F. 2d 277, 284 (9th Cir. 1953).

107. United States v. Foster, 81 F. Supp. 281, 284 (S. D. N. Y. 1948). Here there had been numerous preliminary motions and hearings and defendants asked for a continuance of not less than ninety days. The date of indictment was July 20, 1948. The motion for continuance under consideration in the instant case was made on November 8, 1948. The date of decision of this case was November 22, 1948. The trial date was set for January 17, 1949. Thus application for a deposition was to be made promptly after November 22, 1948.

108. Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955). The United States Attorney was engaged in trying cases and was unable to go to Florida to take part in the taking of the deposition.

109. United States v. Skeeters, 122 F. Supp. 52, 56 n. 3 (S. D. Calif. 1954).

of. The defendant must show that he suffers such inability.[110] Where such failure is accompanied by very great expense involved, unlikelihood of ever actually being able to take the depositions, and a failure to show materiality, the court *a fortiori* will not order payment of expenses by the government.

Under Rule 15 (d) a deposition may "be taken on written interrogatories in the manner provided in civil actions."[111] This has reference to the deposition of a prospective witness. It does not have reference to interrogatories to the opposing party, that is to say the government. There is no criminal rule corresponding to Civil Rule 33 "Interrogatories to Parties."[112]

Suppose a deposition is to be taken in a foreign country. Under Rule 15 (d) a deposition is to be taken in the manner provided in civil actions. Under Civil Rule 28 (b) depositions "in a foreign state or country shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory."[113]

In a recent case involving the prosecution of William and Samuel Powell, their attorney, Mr. Wirin, counsel for the American Civil Liberties Union, brought a court action seeking clearance to go to Communist China to obtain depositions in their behalf.[114] The attorney wished to interview Chou En-lai and others. The Powells were charged with having interfered with the American military effort during the Korean War. The attorney stated that he had a passport, but that the State Department had refused to validate it for travel to China. He asked that the court order validation of the passport for his proposed travel or rule that he could go to Hong Kong on his passport and from there travel to China without

110. United States v. Ausmeier, 5 F. R. D. 395, 396-397 (E. D. N. Y. 1946). Thus payment is not limited to cases in which counsel is appointed by the court. WHITMAN, FEDERAL CRIMINAL PROCEDURE, 122 (1950).

111. Presumably when Civil Rule 28 (a) was amended in 1948, Criminal Rule 15 (d) became based on the amended rule. ORFIELD, AMENDING THE FEDERAL RULES OF CRIMINAL PROCEDURE, 24 Notre Dame Law 315, 323 (1949).

112. United States v. Schluter, 19 F. R. D. 415, 416 (S. D. N. Y. 1956).

113. United States v. Ausmeier, 5 F. R. D. 395, 396 (E. D. N. Y. 1946). Here the prospective witnesses were in Germany.

114. New York Times, January 3, 1957.

a passport and without being subject to American prosecution. The attorney won an order on January 9, 1957, from Federal District Judge Goodman to make the trip as an "officer of the Court."[115] But the Judge ruled that he lacked authority to instruct the State Department to validate the passport. The Communist spokesman had sent word after the order as to making the trip as "an officer of the court" that the attorney would be representing the United States as he was a federal court officer. Therefore, the attorney's passport would have to be validated by the United States before he could be admitted into Communist China or North Korea. Judge Goodman then deferred action, and asked affidavits to clarify the communications situation between the United States and Communist China.[116] The attorney then postponed his trip which was to have commenced on January 26, 1957. An Assistant United States Attorney called this a subterfuge by the Communists to force recognition of Communist China by the United States Government. Mr. Wirin sought a compromise solution; no specific validation of the passport, hence no request of State Department action, but simply an order of the court stating that the passport restriction forbidding travel in Communist China and North Korea was stricken in the case of Mr. Wirin. Trial had been set for April 15, 1957.

Under Rule 15 (e) a deposition may be used at the trial if it appears "that the witness is unable to attend or testify because of sickness or infirmity." Thus, a deposition may be used as to a co-defendant where a physicians' report indicates that he should not be subject to excitement attendant upon trial.[117]

Suppose at the trial the deponent effectively claims a privilege not to testify. May his deposition be used? Rule 15 (e) is silent on this as a ground of unavailability. Yet this has been held a ground as to the use of former testimony in state

115. New York Times, January 18, 1957, p. 15. The order provided that the government pay the travel expenses of the attorney as the defendant had no funds.

116. New York Times, January 26, 1957, p. 3. It seems fantastic to conclude that the steps taken in a criminal proceeding may be treated as recognition of Communist China. Recognition is for the political department. But in Russian Government v. Lehigh Valley R. Co., 293 Fed. 133, 135 (S. D. N. Y. 1919) the court speaks about recognition through naturalization proceedings.

117. United States v. Foster, 81 F. Supp. 281, 283, 284 (S. D. N. Y. 1948).

court decisions.[118] There is even authority that a witness is unavailable if he claims the privilege of self-incrimination when he is not entitled to assert the privilege, as when he has been granted immunity.[119] But this is incorrect as technically he is available, even though a delay in the trial may ensue.[120]

Suppose several defendants are jointly tried and a deposition is taken on the application of one defendant. May the other defendants object to the use of the deposition at the trial? Rule 15 is silent on this subject, and there have been no decisions.[121] Perhaps the matter is in the discretion of the trial court as the trial court in its discretion may refuse to permit the taking of a deposition. Certainly all the defendants should have notice and a right to be present at the taking of the deposition.[122] Or possibly they might be granted a severance for trial under Rule 14. Or the deposition might be used in evidence only against the defendant who applied for it. However, this might confuse the jury even though they were instructed on the subject. George Z. Medalie thought the rule adequate without any provision on the subject. The trial court when faced with the problem would simply have to determine whether the right to confrontation was violated.[123]

Suppose the criminal defendant has taken a deposition but has not chosen to put it in as evidence. May the government put it in as evidence? There seem to be no federal precedents. But Wigmore has argued that the government should be able to do so.[124]

Suppose the trial court is proceeding improperly to grant a deposition. May the government apply to the Court of Ap-

118. McCoy v. State, 221 Ala. 446, 129 So. 21 (1930); Note, 79 A. L. R. 1401 (1932); MCCORMICK, EVIDENCE, § 231, p. 485 (1954); 5 WIGMORE, EVIDENCE, § 1409, pp. 163-164 (3rd ed. 1940).

119. People v. Pickett, 339 Mich. 294, 63 N. W. 2d 681 (1954). It should be noted that a defendant does not waive his privilege against self-incrimination by a disclosure at a part of the proceeding before trial; his waiver is only as to that proceeding. MCCORMICK, EVIDENCE, § 130, p. 274 (1954).

120. FALKNOR, EVIDENCE, 30 N. Y. U. L. Rev. 927, 932 (1955).

121. The problem is discussed in NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE PROCEEDINGS, Vol. VI, pp. 191-194 (1946).

122. Rule 15 (b) provides for notice "to every other party." Normally the other party would be the government. But in a case of several defendants jointly tried it would also be the defendants not applying for the deposition. Thus it is not true that the language "every other party" is an "unnecessary generalization" as claimed in WHITMAN, FEDERAL CRIMINAL PROCEDURE, 121 (1950).

123. *Id.* at 194.

124. 5 WIGMORE, EVIDENCE, § 1389 and § 1416, p. 196 (3rd ed. 1940); see Note, 8 Col. L. Rev. 663 (1908). There are some contrary cases such as State v. McCall, 158 Kan. 652, 149 P. 2d 580 (1944).

peals for a writ of prohibition? Probably not. Mandamus was denied as to a subpoena *duces tecum* under Rule 17 (c).[125] The Supreme Court has suggested that with respect to an application to suppress a deposition the order on it is interlocutory.[126]

A refusal to grant the taking of a deposition may be considered on an appeal from a conviction. Reversal is not likely as the refusal has been said to be in the discretion of the trial judge.[127] Could the defendant have relief immediately after denial of his application and before conviction? There are no cases in which mandamus or appeal has been permitted.[128] The order of denial is probably an interlocutory order and therefore not appealable.[129]

There are several important differences between depositions in federal criminal cases and those in federal civil cases.[130] The Civil Rules authorize examination of witnesses before trial as a normal routine. Criminal Rule 15 authorizes examination of witnesses who "may be unable to attend or prevented from attending a trial or hearing," or who have been committed because unable to give bail. Depositions in criminal cases may be taken only in the court's discretion.[131] The theory is that depositions will not often be needed, as the witness subpoena runs throughout the United States, whereas in civil cases it runs within the district of issue or within 100 miles from the place of trial.[132] Only the criminal defendant may take depositions, whereas in civil cases both parties may take them. In civil cases the depositions are taken at the expense of the parties. In criminal cases of defendants "who cannot bear the expense," counsel is to be assigned and the court may direct that the expenses of travel and subsistence of his attorney be paid by the government. The Civil

125. United States v. Bondy, 171 F. 2d 642, 643 (2d Cir. 1948).
126. Cogen v. United States, 278 U. S. 221, 223-224 (1929).
127. Heflin v. United States, 223 F. 2d 371, 375 (5th Cir. 1955).
128. Compare Moder v. United States, 62 F. 2d 462, 464 (D. C. Cir. 1932). But the government obtained mandamus to force the trial court to issue subpoenas under Criminal Rule 17 (c) in United States v. United States District Court, 238 F. 2d 713 (4th Cir. 1956).
129. Cogen v. United States, 278 U. S. 221 (1929).
130. See ORFIELD, THE FEDERAL RULES OF CRIMINAL PROCEDURE, 26 Neb. L. Rev. 570, 586-587 (1947).
131. Compare Civil Rules 26 (a) and 30. In civil cases the proceeding is by notice. In criminal cases an order of the court must be obtained.
132. Criminal Rule 17 (e) (1). Compare Civil Rule 45 (e) (1). Criminal Rule 15 (e) permits use of a deposition because of absence of a witness only when the witness is outside of the United States instead of 100 miles from the place of trial as provided in the Civil Rules.

Rules encourage depositions and permit them to be used as examinations before trial for purposes of discovery as well as for the purpose of securing testimony. In criminal cases the purpose seems to be only to secure testimony.

V. DEPOSITIONS IN ENGLISH CRIMINAL PROCEDURE

It is somewhat confusing to attempt to compare the English procedure on the use of depositions by the defendant with Federal Criminal Rule 15. Much of the writing on English procedure is concerned with the depositions of witnesses at the preliminary examination of the defendant.[133] Obviously such depositions are not taken on the application of the defendant but are simply normal and usual parts of the preliminary examination. The Indictable Offenses Act of 1867 authorizes any justice of the peace to take the deposition out of court of any person who is able to give material information relating to an indictable offense, but who is dangerously ill.[134] Such a deposition may be taken even though no person is yet charged with the offense to which it relates and in the absence of the person against whom it is to be used if he has received notice of the intention to take it, and does not choose to attend. At the trial the deposition may be read in evidence if the deponent is dead or unable to travel, if it is shown that reasonable notice in writing of the intention to take such deposition was served upon the person whether prosecutor or defendant against whom it is proposed to be read in evidence, and if it is shown that such person, or his counsel had or might have had, if he had chosen to be present, full opportunity to cross-examine.

The Children and Young Persons Act of 1933 provides for the use of depositions of children or young persons who are the alleged victims of certain offenses where attendance at the trial would be dangerous to the life or health of such per-

133. SHAW, EVIDENCE IN CRIMINAL CASES, 233-239 (3rd ed. Michael Lee 1947); KENNY, OUTLINES OF CRIMINAL LAW, § 608, p. 424, § 709-711, pp. 482, 483 (1952); ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES, 436-450 (3rd ed. 1949); ROSCOE, CRIMINAL EVIDENCE, 57-74 (16th ed. 1952); 5 WIGMORE, EVIDENCE, § 1374, 1375, 1380 (3rd ed. 1940). Depositions originated with the statute of Philip and Mary (1554). STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND, 219, 221, 237 (1883).

134. SHAW, EVIDENCE IN CRIMINAL CASES, 239-241 (3rd ed. Michael Lee 1947); ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES, 442-444 (32d ed. 1949); ROSCOE, CRIMINAL EVIDENCE, 59, 231-232 (16th ed. 1952).

son.[135] Notice must be served on the defendant of intention to take such deposition and there must be an opportunity for cross-examination.

In general, testimony of witnesses who are out of England may not be taken by deposition.[136] But in some exceptional instances statutes have made such depositions possible. The Merchant Shipping Act of 1894 provides for cases in which the defendant is himself in the foreign country where the witness is.[137] It permits any deposition on oath made outside the United Kingdom before a proper official, that is to say, a magistrate if in a British possession, or a British consular officer if in a foreign country, in the presence of the defendant, to be offered in evidence if the witness is not in the United Kingdom. In extradition proceedings the Extradition Act of 1870 allows depositions taken abroad to be offered in evidence.[138]

As to depositions taken at the preliminary examination, they may be used at the trial if the witness is dead, insane, too ill to travel, or is kept away by the defendant.[139] The common law rule was similar as to the use of evidence given in a former proceeding.[140]

VI. DEPOSITIONS UNDER THE UNIFORM RULES OF CRIMINAL PROCEDURE

Rule 27 of the Uniform Rules of Criminal Procedure adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1952 is modeled very largely on Federal Rule 15, but allows the prosecution to take depositions as the United States

135. SHAW, EVIDENCE IN CRIMINAL CASES, 241-243 (3rd ed. Michael Lee 1947). ARCHBOLD, EVIDENCE, PLEADING & PRACTICE IN CRIMINAL CASES, 446 (32d ed. 1949); ROSCOE, CRIMINAL EVIDENCE, 451-452 (16th ed. 1952).

136. KENNY, OUTLINES OF CRIMINAL LAW, § 637, pp. 440-441 (1952); ARCHBOLD, PLEADINGS, EVIDENCE & PRACTICE IN CRIMINAL CASES, 446-448 (32d ed. 1949); ROSCOE, CRIMINAL EVIDENCE, 59, 60 (16th ed. 1952).

137. 57 and 58 Vict. c. 60, § 691.

138. 33 and 34 Vict. c. 52. Compare ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES, 447 (32d ed. 1949).

139. KENNY, OUTLINES OF CRIMINAL LAW, § 608, p. 424 (1952). But if the witness has gone abroad it cannot be used except perhaps in misdemeanor cases, and then only by consent of the opposite party.

140. SHAW, EVIDENCE IN CRIMINAL CASES, 244-245 (3rd ed. Michael Lee 1947).

Supreme Court Advisory Committee had recommended.[141] As to depositions of witnesses committed for failure to give bail the Uniform Rule 27 (a) (2) provides that the taking of the deposition shall be "at the expense of the state." The federal rule is silent on this point. Uniform Rule 27 (c) provides in brackets for the taking of depositions on the application of the prosecution much as in Rule 17 (c) of the Second Preliminary Draft of the Rules of Federal Criminal Procedure. Uniform Rule 27 (d) on use provides that a deposition may be used if it appears that the witness is out of the state [and is in a state which has not adopted the act entitled "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings"].[142] Uniform Rule 27 (f) entitled "Joint Defendants" is new. It provides: "Where persons are jointly tried, the court for good cause shown may refuse to permit the use of a deposition taken at the instance of a defendant over the objection of any other defendant."[143]

VII. Evaluation of Rule 15

It would seem that Rule 15 is working reasonably well in practice. In contrast to Rule 16 on Discovery and Inspection and Rule 17 (c) on subpoena *duces tecum* for inspection before trial, Rule 15 has not been the subject of much judicial discussion and controversy. It is being used only to secure testimony and not for the purpose of discovery. Defendants are finding it a considerable burden to show the necessity and materiality of the testimony sought. Depositions of witnesses in foreign countries are quite frequently sought.

Should the Rule be amended so as to permit the government to take depositions? The confrontation provision of the Sixth Amendment does not stand in the way. The Advisory Committee had recommended such a rule in the First and Second Preliminary Drafts circulated throughout the nation. But the provision drew much criticism. And the Supreme Court in its comments to the Advisory Committee indicated much skepticism and doubt. It does not seem reasonable to antici-

141. The annotation pointed out that statutes in seventeen states permit the prosecution to take depositions as did Missouri Rule 25.18; that the Supreme Court Advisory Committee favored such a rule, and referred to the criticism of George H. Dession, The New Federal Rules of Criminal Procedure, II, 56 Yale L. J. 197, 217 (1947).

142. This was based on New Jersey Rule 2: 5-6 (c).

143. This was based on Maryland Rule 4 (f). See the discussion as to this in Federal Rules of Criminal Procedure: Notes and Institute Proceedings 191-194 (1946).

pate that the Court would adopt such an amendment even though the subsequently drafted Uniform Rules of Criminal Procedure permit the prosecution to take depositions, and though the law of seventeen states permits such depositions.

Do Rules 15 and 46 (b) give adequate protection as to witnesses unable to give bail? Arguably they do not. As Judge Emerich B. Freed of the Northern District of Ohio has stated: "The rule in my personal judgment should be extended to provide for a hearing in court when the government requests that bail be fixed for a material witness. If upon a hearing it should appear to the court that an injustice may result to a witness by incarceration upon failure to furnish bail, the court may order that the witness' deposition be taken and the witness be discharged."[144]

What about amending the rule so as to protect defendants jointly tried against depositions taken by individual defendants? Possibly this should be done although no adjudicated federal cases either before or after the adoption of the Federal Criminal Rules has involved this issue. The Uniform Rules of Criminal Procedure contain a provision protecting joint defendants.

What about amending the Rule so as to adapt the wider scope of the Federal Rules of Civil Procedure? Much can be said for such a proposal.[145] As Judge Emerich B. Freed has stated: "Unless some reason should appear for denying discovery, it should be the policy of the law to permit as broad a scope of inspection and deposition in criminal cases as apply in civil trials. I cannot believe that any one will be deprived of a right by the promulgation of a rule which seeks to provide a means for unearthing the facts, whether those facts are pertinent in a criminal prosecution or a civil action."[146] At the same time there are possibilities of delay and great expense to the government if the defendant could take depositions without a court order.

144. FREED, THE RULES OF CRIMINAL PROCEDURE: AN APPRAISAL BASED ON A YEAR'S EXPERIENCE, 33 A. B. A. J. 1010, 1012 (1947). Perhaps Rule 15 should provide as does Rule 27 (a) (2) of the Uniform Rules of Criminal Procedure, that such deposition shall be taken at the expense of the government.

145. Note, 60 Yale L. J. 626, 642-644 (1950); ORFIELD, AMENDING THE FEDERAL RULES OF CRIMINAL PROCEDURE, 24 Notre Dame Law, 315, 336-337 (1949).

146. FREED, THE RULES OF CRIMINAL PROCEDURE: AN APPRAISAL BASED ON A YEAR'S EXPERIENCE, 33 A. B. A. J. 1010, 1068 (1947).

Finally, there may be some provisions of the English law which might be introduced into the Federal Rule. Under the Federal Rule no depositions may be taken prior to the filing of the indictment or information. In the interim prior to such filing a material witness might die. Under the English statute of 1867 a deposition may be taken of any person who is able to give material testimony relating to an indictable offense and who is dangerously ill. The deposition may be taken upon notice prior to the charging of any person with the offense. An English statute of 1933 provides for the use of depositions of young persons who are victims of various crimes where attendance at the trial would be dangerous to the life or health of such person. But none of these English provisions are very important, particularly the latter provision. The more important possibilities for amendment of Rule 15 have been canvassed in the preceding paragraphs.