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FEDERAL CRIMINAL APPEALS

LESTER B. ORFIELD†

IT is surprising that the criminal appellate work of the federal courts has hitherto escaped treatment as a separate subject in the exhaustive literature dealing with problems of federal jurisdiction. The work of the federal courts in the field of criminal law has been increasingly conspicuous in recent years. The most important single phase in this development has been the spectacular effort of the Supreme Court in several recent cases to ensure a fair trial in the state courts, especially to Negroes, by a vigorous and orthodox application of the due process clause of the Fourteenth Amendment.¹ The number of criminal cases in the federal courts, and consequently the number of criminal appeals, moreover, increased considerably with the enactment of the Volstead Act, and more recent federal criminal legislation.² In any event, a survey to restate the present nature of criminal appellate practice is timely for the special reason that the Supreme Court has promulgated a set of rules for procedure in criminal cases.³

The development of criminal appeals in the federal courts has not differed widely from the growth of federal appellate practice in other cases. There has been the tendency to grant a review as of right by an intermediate federal court of appeal in criminal cases originating in the federal courts, but to limit sharply the cases which can be appealed as of right to the Supreme Court. Three methods of obtaining review of criminal cases have been developed: by appeal as of right, discretionary appeal, and by petition for habeas corpus. Appeal as of right in criminal cases was formerly by "writ of error."⁴ But in the Act of January 31, 1928 review by writ of error was "abolished" and the term "appeal" substituted to designate all appeals as of right.⁵

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1. E.g. *Patterson v. Alabama* 294 U. S. 600 (1935); *Powell v. Alabama*, 287 U. S. 45 (1932) (*The Scottsboro Cases*); *Brown v. Mississippi*, 56 Sup. Ct. 461 (1936); *Moore v. Dempsey*, 261 U. S. 86 (1923).

2. Twenty statutes in the field of criminal law and procedure were enacted in the 73d Congress. See REP. ATT'Y GEN. FOR 1934, p. 61. Of course, with the repeal of the Eighteenth Amendment, there was a decrease in the number of criminal cases in the federal courts (*id.* at p. 3). Nevertheless in 1934, 34,152 criminal cases were commenced (*id.* at p. 2) as compared with 12,495 in 1895, REP. ATT'Y GEN. FOR 1895, p. 3, which in turn had shown a considerable increase over preceding years. See also table evidencing increase in criminal cases in Manton, *Administration of Criminal Law in the Federal Courts*, (1925) 50 A. B. A. REP. 752, 762.

3. *Rules of Practice and Procedure in Criminal Cases*, promulgated by the Supreme Court, 1934, 292 U. S. 660 (1934).

4. See DOBIE, *FEDERAL PROCEDURE* (1928) 902 et seq.

5. 45 STAT. 54, 28 U. S. C. A. §§ 861a, 861b (1928). Some confusion was caused by the fact that this statute was silent as to stays, security, scope of review and form of

It seems strange that in the federal judiciary system as set up by the Act of 1789, there was no provision for any appellate review in criminal cases,⁶ either in the circuit courts or in the Supreme Court. A small measure of review was first provided in 1802 when it became possible for the circuit court, upon division of opinion, to certify questions to the Supreme Court.⁷ And subsequently by the Act of 1879 provision was made for appeal as of right by writ of error to the circuit courts from the district courts, in all criminal cases where "the sentence is imprisonment, or fine and imprisonment, or where if a fine only, the fine shall exceed . . . three hundred dollars."⁸ But there was as yet no right to review by the Supreme Court^{8a} and this situation often resulted in injustice. For, it became the practice for a single judge to hold circuit alone, and since two-thirds of the circuit work was left to district judges, a single district judge was the ultimate appellate tribunal for all crimes from the most trivial to capital offenses.⁹ This situation existed until the eighties when the movement for general social reform in the administration of justice brought about the Act of 1889, which granted the right of appeal by writ of error to any federal court in capital crimes.¹⁰ But the reformers were not satisfied, and proposals were soon made to extend further the right to have decisions of the lower federal courts reviewed by the Supreme Court.¹¹ These culminated in the Judiciary

record to be used on those "appeals" which were formerly by "writ of error." This was settled by the Act of April 26, 1928, 45 STAT. 466, 28 U. S. C. A. § 861b (1928) amending the earlier statute so as to restore the provisions of the "statutes regulating the right to a writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate . . ." See Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 27; (1928) 41 HARV. L. REV. 673; (1932) 32 COL. L. REV. 860.

6. 1 STAT. 73 (1789). § 11 provided that the circuit courts were to have appellate jurisdiction in cases from the district courts, but § 22 limited it to civil cases. § 11 also gave the circuit courts original jurisdiction in criminal cases that was concurrent with the district courts in all crimes cognizable by them and exclusive in certain cases.

7. 2 STAT. 59 (1802).

8. 20 STAT. 354 (1879).

8a. *United States v. More*, 3 Cranch. 159 (U. S. 1805); *Ex Parte Kearney*, 7 Wheat. 38 (U. S. 1822). See sketch of history of federal criminal procedure in *United States v. Sanges*, 144 U. S. 310, 319 (1892), and in Manton, *Criminal Law in the Federal Courts*, (1925) 50 A. B. A. REP. 752.

9. FRANKFURTER AND LANDIS, *BUSINESS OF THE SUPREME COURT* (1927) 109. Moreover, where the court was held by a single judge there was not even the possibility of obtaining the opinion of the Supreme Court through certification of division of opinion. See McCrary, *Needs of the Federal Judiciary* (1881) 13 CENT. L. J. 167, 168. It is significant that state courts during this period were willing to issue habeas corpus for prisoners convicted in federal courts. See 2 WARREN, *SUPREME COURT IN UNITED STATES HISTORY* (2nd ed. 1926) 332.

10. 25 STAT. 655 (1889).

11. The proposals made, and their sponsors, are listed in FRANKFURTER AND LANDIS, *supra* note 9, at 109 et seq.

Act of 1891 which granted an appeal directly from the district court to the Supreme Court in all cases of "infamous crimes."¹² Although the drafters of the Act believed that this phrase included only crimes for which the penalty was something more burdensome than short periods of incarceration, the Supreme Court had previously given it a broader interpretation, which it applied to the Act of 1891, construing it to cover all offenses for which the defendant might be sentenced to a penitentiary, even though in fact only a fine was imposed.¹³

It was soon realized that the "reform" had been carried too far. The Supreme Court was overburdened with petty and unimportant criminal cases.¹⁴ Moreover, the Act of 1891 had provided an adequate appellate review as of right in the newly established circuit courts of appeal.¹⁵ Limitation upon appeal to the Supreme Court could therefore no longer be unjust and in 1897, the right to have decisions of the inferior courts reviewed by the Supreme Court was limited to cases involving capital crimes.¹⁶ But the right of appeal directly to the Supreme Court even as thus restricted was unnecessary, and in 1911 it was accordingly abolished in the Judicial Code.¹⁷ Hence in criminal cases originating in the federal courts, there is at present no appeal as of right to the Supreme Court available to the defendant unless the decision of the circuit court of appeals is one that comes within Section 240 (b) of the Judicial Code, namely when the affirmance of the conviction in the circuit court of appeals is based upon holding a state statute unconstitutional.¹⁸

But although a defendant thus has practically no right to review by the Supreme Court of the decision of an inferior federal court, the prosecution may even today in certain cases appeal to the Supreme Court directly from the trial court. This privilege, first afforded by the Criminal Appeals Act of 1907,¹⁹ has survived the general tendency to abolish appeal as of right to the Supreme Court since in its absence inferior federal judges would be able virtually to nullify federal criminal legislation.²⁰ Moreover, making the appeal directly to the Supreme Court

12. 26 STAT. 827 (1891), 28 U. S. C. A. § 346 (1926).

13. *In re Claasen*, 140 U. S. 200 (1891).

14. See statements by Chief Justice Fuller, and Attorney-General Harmon in 23 CONG. REC. 3285 (1892); SEN. REP. No. 265, 54th Cong., 1st Sess., Ser. No. 3362 (1895). See also REP. ATT'Y GEN. FOR 1893, xxv; *id.* FOR 1894 xxix.

15. 26 STAT. 826 (1891).

16. 29 STAT. 492 (1897).

17. 36 STAT. 1157 (1911).

18. 43 STAT. 938 (1925), 28 U. S. C. A. § 347b (1926).

19. 34 STAT. 1246 (1907), 18 U. S. C. A. § 682 (1926). See (1907) 20 HARV. L. REV. 219. Appeal of course does not lie after a verdict of not guilty, not even for the purpose of ascertaining the law for future cases. *United States v. Evans*, 213 U. S. 297 (1909).

20. The inability of the government to take an appeal in the absence of statute was first made definite in *United States v. Sanges*, 144 U. S. 310 (1892). For the results of this decision, see FRANKFURTER AND LANDIS, *supra* note 9, at 114.

expedites the construction of new criminal statutes so as to inform those in charge of enforcement what their final construction will be.²¹

The right to have decisions of inferior federal courts reviewed, however, is only one aspect of the problem of appeal as of right to the Supreme Court. The latter tribunal may also review on appeal criminal cases arising in the state courts. Until 1925, defendants could take an appeal as of right to the Supreme Court from the decisions of the highest state courts in a considerable number of cases,²² although there was no appeal as of right from the federal courts during most of that time, and the tendency to restrict appeal to the Supreme Court from the state tribunals is generally more severe, for reasons of federalism, than in the case of appeals from the federal courts. Since the Judiciary Act of 1925, however, appeal as of right lies only in the two classes of cases: when the validity of a state statute under the federal constitution is challenged and sustained, or when a federal statute or treaty is involved and its validity denied.²³

Review in a criminal case by the Supreme Court of decisions of inferior federal courts or of state courts may also be had within the discretion of the Supreme Court or a circuit court of appeals. A form of discretionary appeal has always been present. Even when there was no appeal as of right from the lower federal courts, the old circuit court could certify questions to the Supreme Court;⁸ and this practice has been continued for the circuit courts of appeal.²⁴ In the Judiciary Act of 1891, review of certain cases by the Supreme Court was for the first time made dependent upon its own discretion.²⁵ The Supreme Court could now issue a writ of certiorari to a circuit court of appeals or to the highest court of a state, an adequate federal question being present and properly preserved.²⁶ Like most of its other business, criminal appeals are now principally heard by the Supreme Court on certiorari.²⁷

21. Taft, *Jurisdiction of the Supreme Court Under the Act of February 13, 1925* (1925) 35 YALE L. J. 1, 6.

22. See § 25 of the Judiciary Act of 1789, 1 STAT. 85, as interpreted in *United States v. More*, 3 Cranch 159 (U. S. 1805); *Fox v. Ohio*, 5 How. 434 (U. S. 1847); *Twitchell v. Commonwealth*, 7 Wall. 321 (U. S. 1868). See also Taft, *supra* note 21, at 8.

23. 43 STAT. 937 (1925), 28 U. S. C. A. § 344 (1926).

24. 26 STAT. 828 (1891), 28 U. S. C. A. § 346 (1926).

25. Taft, *supra* note 21, at 1.

26. The occasions on which certiorari will lie and the manner in which the federal question must be preserved are the same as in civil cases. See 43 STAT. 937, 938 (1925), 28 U. S. C. A. §§ 344, 347 (1926).

27. Statistics are not available as to what percentage of the criminal cases heard by the Supreme Court are on certiorari. But during the 1931, 1932 and 1933 terms all of the criminal cases coming from the federal courts were heard on certiorari. See REP. OF ATT'Y GEN. FOR 1931, p. 13; FOR 1932 p. 7; FOR 1933, p. 7. It is also of interest as demonstrating

The third method of obtaining review of a criminal case in the federal courts is by petition for habeas corpus. Originally, the writ lay only when the petitioner was detained under the authority of the United States,²⁸ but in 1867 it was made applicable wherever the detention violated the Constitution, laws or treaties of the United States.²⁹ Thus, habeas corpus was extended so as to provide an additional means for review by the federal courts of decisions by state courts and the writ has been most widely used in this connection. Of course, as is often said, habeas corpus cannot serve the function of a writ of error; as a method of collateral attack it is, at least nominally, to be confined to cases where the judgment of the court is said to be void.³⁰ But the federal court may go outside of the record on writ of habeas corpus.³¹ This attitude taken by the Supreme Court in its treatment of habeas corpus cases, coupled with the development of the principle that circumstances attendant upon the trial may be so repugnant to constitutional ideals of due process in procedure as to void the judgment of the court,³² has made habeas corpus an effective means for obtaining review of state criminal cases in the federal courts. Habeas corpus, moreover, has the advantage over appeal as of right or on certiorari to the state court, in that the appellant avoids the necessity of showing that he has raised the federal question in time.

Petitions for habeas corpus may be made in the district court and in the Supreme Court,³³ and to any federal judge or justice.³⁴ However,

the difficulty of obtaining a hearing in the Supreme Court in a criminal case, that in the tables given in the series of articles on the business of the Supreme Court, under the heading of "Crimes and Forfeitures," only two petitions for certiorari were granted during the 1931 term as compared with thirty denied; one granted and twenty-eight denied during the 1932 term; four granted and forty-nine denied during the 1933 term and four granted and fifty-three denied during the 1934 term. See articles by Frankfurter and Landis, (1932) 46 HARV. L. REV. 226, 252 and by Frankfurter and Hart, (1933) 4 HARV. L. REV. 245, 261; (1934) 48 HARV. L. REV. 238, 245; (1935) 49 HARV. L. REV. 68, 81.

28. 1 STAT. 82 (1789).

29. 14 STAT. 385 (1867), 28 U. S. C. A. § 453 (1926).

30. *Ashe v. United States*, 270 U. S. 424 (1926); *Frank v. Mangum*, 237 U. S. 309 (1915) noted (1915) 28 HARV. L. REV. 793.

31. *Frank v. Mangum*, 237 U. S. 309 (1915); *Moore v. Dempsey*, 261 U. S. 86 (1923) noted (1923) 37 HARV. L. REV. 247; (1923) 9 VA. L. REV. 556; (1923) 33 YALE L. J. 82; cf. *Mooney v. Holohan*, 294 U. S. 103 (1935). See Nutting, *The Supreme Court, The Fourteenth Amendment and State Criminal Cases* (1936) 3 U. OF CHI. L. REV. 244, 258; Schofield, *Federal Courts and Mob Domination of State Courts: Leo Frank's Case* (1916) 10 ILL. L. REV. 479.

32. First indicated in *Ex Parte Lange*, 18 Wall. 163 (U. S. 1873), and since then, especially apparent in *Moore v. Dempsey*, 261 U. S. 86 (1923). See Comment (1935) 35 COL. L. REV. 404, 412. See also Waterman and Overton, *Federal Habeas Corpus Statutes and Moore v. Dempsey* (1933) 1 U. OF CHI. L. REV. 307.

33. R. S. § 751, 28 U. S. C. A. § 451 (1926).

34. 43 STAT. 940 (1925), 28 U. S. C. A. § 452 (1926). If the writ is refused the

original petitions for habeas corpus are rarely made in the Supreme Court, prior petition to the inferior courts being regarded as a prerequisite to action by the Supreme Court.³⁵ In this procedure it may thus happen that district courts act as appellate tribunals for the purpose of reviewing state court decisions. Nor is the decision of the district court on the petition subject to review even by the circuit court of appeals unless the district judge or a judge of the circuit court of appeals certifies the presence of probable cause for the appeal.³⁶ It is therefore natural that the power of the federal courts to constitute themselves appellate tribunals for reviewing decisions of state courts should be widely criticized and that the Supreme Court should seek to place restraints upon its exercise.³⁷ The writ is regarded as a final and extraordinary remedy, and it is said that the petitioner must show that he has exhausted all available remedies,³⁸ and that the state has failed to provide adequate corrective judicial process.³⁹ Accordingly, in the recent *Mooney* case, the petition was dismissed although the merit of the petitioner's claim was recognized, because he had not sought his remedy by state habeas corpus.⁴⁰ Although this decision and the rule of "exhaustion" which it represents will promote delay in the execution of justice, it is probably an inevitable concomitant of federalism, consistent with the political

custody of the prisoner is not to be disturbed pending the appeal, if allowed; but if the lower court renders a final decision discharging the prisoner, he may be released within the discretion of the trial judge. R. S. § 765, 28 U. S. C. A. § 464 (1926); Supreme Court Rule 45, 275 U. S. 629 (1928). However, any proceedings against the prisoner before habeas corpus proceedings are finally adjudicated and the appeals had, are null and void. 43 STAT. 940 (1925), 28 U. S. C. A. § 465 (1926).

The prisoner may make successive applications for the writ to other federal judges on the same grounds if his petition is denied by the district court, rulings on habeas corpus not being *res judicata*, but merely "persuasive" on subsequent petition. *Salinger v. Loisel*, 265 U. S. 224 (1924); *Wong Doo v. United States*, 265 U. S. 239 (1924); Comment (1935) 35 COL. L. REV. 415.

35. An original Supreme Court writ will issue only in cases of "special urgency" which is construed as confined to cases of detention under federal or foreign authority. In *re Neagle*, 135 U. S. 1 (1890) (granted); *Minnesota v. Brundage*, 180 U. S. 499 (1901) (denied); see *Ex Parte Royall*, 117 U. S. 241, 251-252 (1886) (denied).

36. 43 STAT. 940, 942 (1925), 28 U. S. C. A. § 466 (1926). Provision for appeal of the final decision on habeas corpus is made in 43 STAT. 940 (1925), R. S. § 765, 28 U. S. C. A. §§ 463, 464 (1926).

37. See *Markuson v. Boucher*, 175 U. S. 184, 187 (1899); *Baker v. Grice*, 169 U. S. 284, 290 (1898); *United States v. Tyler*, 269 U. S. 13, 17 (1925); DOBIE, *FEDERAL PROCEDURE* (1928) 308 et seq.; Dobie, *Habeas Corpus in the Federal Courts* (1927) 13 VA. L. REV. 443; Williams, *Federal Habeas Corpus* (1924) 9 Sr. LOUIS L. REV. 250.

38. *Ex Parte Royall*, 117 U. S. 241 (1886); *Cooke v. Hart*, 146 U. S. 183 (1892); *Reid v. Louis*, 187 U. S. 153 (1902); *Goto v. Lane*, 265 U. S. 393 (1924). See also (1936) 45 YALE L. J. 543, 544.

39. *Frank v. Mangum*, 237 U. S. 309 (1915); *Mooney v. Holohan*, 294 U. S. 103 (1935). See Comment (1935) 35 COL. L. REV. 404, 415.

40. 294 U. S. 103 (1935), noted (1935) 35 COL. L. REV. 282.

theory of dual sovereignty, and equitable in result, in that the supreme court of the state in question is given an opportunity to pass upon the issues which the petitioner claims to have deprived him of his right to a fair trial, before the federal judiciary interferes in state administration of justice.

The methods provided in the federal courts for review of criminal cases are fair and practical. It is desirable for administrative reasons that the occasions for appeal to the Supreme Court be sharply limited. That tribunal cannot act as a court of review in ordinary criminal cases.⁴¹ Limitations on the right to review by the Supreme Court may result in injustice.⁴² But criminal cases originating in the federal courts are subjected to review by at least one appellate tribunal, a circuit court of appeals; in most cases there is no occasion for a second appeal. As regards appeal of criminal cases from state courts, even stronger reasons are present to justify limitations upon review by the Supreme Court. A free right of appeal from the decision of the state court or from that of an inferior federal court on petition for habeas corpus would result in intolerable delays in the execution of criminal sentences. The defendant has in all probability already enjoyed one appeal in the state courts. To provide additional opportunities for review is to encourage the taking of appeals merely for the purpose of delay.⁴³ But an anxiety to avoid this abuse of federal criminal jurisdiction may result in the anomaly of having the federal district court become the ultimate court of review for the state supreme court, on a petition for habeas corpus from which there is no right to appeal. This paradoxical result is comparatively rare, but it could easily be avoided by granting the state an appeal as of right to the circuit court of appeals where the decision on habeas corpus is adverse to it, and then review by the Supreme Court could be sought in the usual manner by certiorari. The solution proposed is, however, open to the possible objection of effecting an increase in the number of petitions to the Supreme Court for certiorari and further delaying a final adjudication of the case.

But the ultimate problem of the writ of habeas corpus, and of other devices for the review of state criminal cases by the federal courts, is the political one of dividing power between state and nation. The Supreme Court must be sensitive to the pride of local things in guiding the interference of the federal judicial system into the administration of justice in the state courts. The due process clause of the Fourteenth Amendment

41. See REP. ATT'Y GEN. FOR 1893, p. xxv; FOR 1895, p. 12; FRANKFURTER AND LANDIS, *supra* note 9, at 109 et seq.

42. See Nutting, *supra* note 31, at 260.

43. See *Judicial Procedure of the Courts of the United States* (1910) 35 A. B. A. REP. 624, 631; (1917) 3 A. B. A. J. 507, 509.

has been a powerful, if erratic, weapon for the control of criminal procedure in the state courts. But it has been used sparingly, in deference to the prestige of the federal principle.⁴⁴ Ideas of comity explain, if they cannot altogether justify, the harsh dismissal on a technicality of the appeal in the *Herndon* case;⁴⁵ they dominate the treatment of the habeas corpus in the *Mooney* case, and find vigorous fruition in *Brown v. Mississippi*,⁴⁶ where the Supreme Court took advantage of what it regarded to be a technically appropriate occasion to illustrate the potentialities of the Fourteenth Amendment as an instrument of justice.

But the provision of opportunities for review, however adequate, depends in a large measure for its effectiveness upon the manner in which the review is obtained. And the appellate practice involved in obtaining a review of a criminal case tried in the federal courts has long been in need of reform. There is no federal code of criminal procedure, but merely a number of separate statutes. The conformity act is not applicable and before the Supreme Court Rules, in the absence of a controlling federal statute the parties had been compelled to follow the common law criminal procedure as it existed in the jurisdiction where the court was sitting at the time when the state was admitted into the Union.⁴⁷ A confused and dilatory appellate practice had been developed.⁴⁸ The first step towards systematizing and clarifying federal appellate practice was taken by the Act of February 24, 1933,⁴⁹ as amended on March 8, 1934,⁵⁰ giving the Supreme Court the power to

44. Best indicated in the opinion of Justice Holmes when refusing habeas corpus in the *Sacco-Vanzetti* case. See (1927) 12 MASS. BAR. Q. No. 7, p. 27.

45. *Herndon v. Georgia*, 295 U. S. 441 (1935), noted (1935) 35 COL. L. REV. 1145. Appeal on certiorari by a Communist Negro from the Supreme Court of Georgia was dismissed because the federal question was not raised in time. The case raised some doubts that the Supreme Court would continue in the path marked out by the *Scottsboro* cases as the protector of the southern negro. These doubts have, however, been settled by the more recent *Brown v. Mississippi*, 56 Sup. Ct. 461 (1936). There the appellant was a negro but questions of radicalism were not involved.

46. 56 Sup. Ct. 461 (1936). The opinion in this case by Chief Justice Hughes is extremely emphatic in its assertions of determination not to permit "the State (to hurry) the accused . . . to conviction under mob domination."

47. See *Reid v. United States*, 12 How. 361, 365 (U. S. 1851); *Re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 553 (1888); *Rothman v. United States*, 270 Fed. 31, 35 (C. C. A. 2d, 1920); *Blisse v. United States*, 263 Fed. 961, 962 (C. C. A. 2d, 1920); cf. *Rosen v. United States*, 245 U. S. 467 (1918). See also Hough, *The Review of Criminal Causes in the Courts of the United States* (1926) 3 LECTURES ON LEGAL TOPICS 51, 58; Matthews, *Federal Criminal Practice* (1921) 2 LECTURES ON LEGAL TOPICS 421.

48. See Hough, *supra* note 47, at 50 et seq. A similarly confused situation exists at present with respect to federal rules of evidence. See Ferguson and Callahan, *Evidence and New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 622.

49. 47 STAT. 904, 28 U. S. C. A. § 723a (1933).

50. 48 STAT. 399, 28 U. S. C. A. § 723a (1934). The Supreme Court's power to promulgate rules was extended by the Act of June 19, 1934, 48 STAT. 1064, 28 U. S. C. A. §§ 732b, 723c (1934), to cover civil cases.

frame rules of procedure in criminal cases after a verdict or finding of guilt by the court if a jury has been waived, or after a plea of guilty. The court was authorized to make these rules applicable to all federal courts including the Supreme Court and to prescribe the "times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed."

On May 26, 1933, Attorney-General Mitchell transmitted to Chief Justice Hughes a set of rules prepared in the Department of Justice under the direction of Solicitor General Thacher. Approximately one year later the Supreme Court adopted the rules now in effect, differing in a few respects from those proposed by the Attorney-General. The rules were made applicable to all criminal cases in the federal courts of the United States, but were not to govern appeals by the prosecution. In many respects, they effected desirable and needed reforms.⁵¹

The major defect in federal criminal appellate practice had been the long intermission between the sentence and the final disposition of the case. The defendant, generally out on bail, had every incentive to delay the course of the appeal. The United States attorneys, engaged with the trial of other cases, did not always insist upon prompt action. Sentences often came long after verdicts. And the appellate practice then existing made possible and fostered dilatory tactics. The defendant was allowed under statute a maximum of three months in which to take an appeal and thirty day citation thereafter before argument.⁵² In addition, extensions of time in which to file a bill of exceptions were granted almost as of course. The failure of the circuit courts of appeal to dispose promptly of motions for rehearing served further to halt the adjudication of the case, since certiorari does not lie until the motion is settled. It is significant that the average time in fifty sample cases between entry of judgment in the trial court and argument in the circuit court of appeals was 343 days, and in some cases three years elapsed before final adjudication.⁵³

The constitutional power of the Supreme Court to frame such rules is not here treated but will be discussed in an article by Dean Charles E. Clark to appear in the *HARVARD LAW REVIEW* for June, 1936.

51. *Rules of Practice and Procedure in Criminal Cases*, promulgated May 7, 1934, 292 U. S. 660 (1934). The Court has not, however, exercised its power to make rules as to criminal cases in the courts of Alaska, Hawaii, Puerto Rico, Canal Zone, Virgin Islands and the United States Court for China, because of the absence of sufficient data.

52. REV. STAT. § 999, 43 STAT. 940 (1925), 28 U. S. C. A. §§ 230, 350, 868 (1926). When the appeal was to the Supreme Court under the Criminal Appeals Act only 30 days were allowed. 34 STAT. 1246 (1907), 18 U. S. C. A. § 862 (1926).

53. Mitchell, *Reform in Federal Criminal Procedure* (1932) 18 A. B. A. J. 732, 734; *Report of the Judicial Conference* (1932) 18 A. B. A. J. 824, 826; *Address of Chief Justice Hughes to the American Law Institute* (1933) 19 A. B. A. J. 325, 326. See also PROPOSED RULES GOVERNING PRACTICE AND PROCEDURE IN CRIMINAL CASES PREPARED IN THE DEPARTMENT OF JUSTICE AND TRANSMITTED TO THE CHIEF JUSTICE, May 26, 1933, at p. 11.

The rules of practice as promulgated by the Supreme Court accordingly attempt to hasten the course of the appeal.⁵⁴ Rule I requires that sentence be imposed immediately after conviction, unless a motion either for withdrawal of plea of guilty, in arrest of judgment, or for a new trial is pending. Motions after conviction are, moreover, to be made and determined promptly. A motion in arrest of judgment or for a new trial must be made within three days after conviction. But if the motion for a new trial is based solely upon the ground of newly discovered evidence, it may be offered within sixty days after final judgment irrespective of the expiration of the term at which the judgment was rendered. Similarly, motions to withdraw pleas of guilty must be made within ten days after the entry of the plea and before sentence is imposed.⁵⁵ Since the motions after sentence are thus hastened, Rule III, limiting the time for filing the notice of appeal, can be effective. It provides that appeal may be taken only within five days after entry of judgment of conviction, but with the exception that where a motion for a new trial has been made, appeal may lie within five days after the entry of the order denying the motion.

The rules prescribing the manner in which the appeal is to be taken demonstrate that the court is attempting not only to hasten the course of the appeal but to clarify and simplify federal appellate practice in criminal cases. Thus petitions for allowance of appeal and citations are abolished together with the dilatory and technical practice which surrounded their use. Under the new rules, a notice of appeal is to be filed in duplicate with the clerk of the trial court and a copy of the notice is to be served upon the United State attorney. The notice should set forth the title of the case, the names and addresses of the appellant and his attorney, a general statement of the nature of the offense charged, the date of the judgment from which the appeal is being taken, the sentence imposed, and, if the appellant is in custody, the prison where he is confined. The fact that the defendant is taking an appeal as well as the grounds therefor are to be succinctly stated.⁵⁶ The clerk of the trial court is to forward one copy of the notice of appeal to the clerk of the circuit court of appeals,⁵⁷ and also inform the trial judge of the appeal. The latter thereupon is at once to direct the appellant or his attorney to appear before him, together with the prosecutor, for the purpose of giving directions for preparing the record on appeal.⁵⁸

54. The rules are set forth in 292 U. S. 660 (1934).

55. Rule II.

56. Rule III. The forms to be used for notice of appeal are appended to the rules.

57. Rule IV. After the notice has been filed in the appellate court, the latter tribunal is in full charge of the case. Under Rule IV, the clerk of the trial court is also to forward a statement of docket entries in the forms which are provided.

58. Rule VII.

The rules recognize two methods of taking an appeal and give the appellant the option of including a bill of exceptions in the record on appeal. When the appeal is prosecuted upon the clerk's record of proceedings without a bill of exceptions, the appellant should promptly file with the clerk of the trial court an assignment of errors.⁵⁹ If the review is to be upon bill of exceptions, he is to file the bills of exceptions with the trial court clerk in addition to the assignment of errors within the time allotted by the trial judge, which cannot exceed thirty days. It is specifically provided that the trial judge is to settle the bill of exceptions as promptly as possible and to grant an extension of the time within which the bill can be filed only in unusual cases.⁶⁰

The assignment of error and the bill of exceptions, if used, are immediately forwarded by the clerk of the trial court to the clerk of the court in which the appeal is to be heard, generally of course the circuit court of appeals.⁶¹ The rules provide that preference on the appellate calendar is to be given to criminal appeals and that the appeal is to be argued as soon as the state of the calendar permits, but not before thirty days after the filing of the papers in the appellate court.⁶² The petition to the Supreme Court for certiorari must be made within thirty days after the entry of judgment in the court to which the certiorari is to be directed.⁶³ The form used is that prescribed in Rules 38 and 39 of the Supreme Court Rules and the petition is attended by the usual incidents of petition for certiorari.⁶⁴

Discretion in the regulation of certain matters is left to the various circuit courts of appeal by the Supreme Court Rule XII. It provides that "appellate courts"⁶⁵ shall have the power to prescribe rules not inconsistent with those of the Supreme Court, with respect to "cost bonds, procedure on the hearing of appeals, the issue of mandates, and the time in which petitions for rehearing may be presented." Some circuit courts have in addition set out the form which an assignment of errors must follow.⁶⁶ Likewise the number of copies of the record on appeal to be printed, and the distribution thereof, have been prescribed by all circuit

59. Rule VIII. The clerk's record of proceedings is composed of "the indictment and other pleadings and the orders, opinions, and judgment of the trial court."

60. Rule IX. Bills of exceptions must conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States, 275 U. S. 622 (1928).

61. Rules VIII and IX. The appellate court may at any time hear a motion by either party for "correction, amplification or reduction of the record filed with the Appellate Court."

62. Rule X.

63. Rule XI.

64. See 275 U. S. 622 (1928).

65. Rule XIII defines "appellate court" as the "United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia."

66. See e.g. Rule 10 of the Rules of the Second Circuit.

courts of appeal.⁶⁷ Local rules regarding bail and supersedeas are common in most circuits, although in the Supreme Court's Rules there are express provisions dealing with both bail and supersedeas. Rule V provides that the notice of appeal from a conviction operates as a stay of the execution unless the defendant pending his appeal chooses to begin serving his sentence. Bail is expressly not to be allowed pending appeal unless it appears that a substantial question is involved which should be determined by the appellate court. It is provided that bail may be granted by the trial judge or by the appellate court, or where it is not in session, by any district judge or circuit judge.⁶⁸ The circuit courts of appeal in defining further the right to bail, have typically provided that the appellant may apply for bail to the trial judge, and after refusal, may on four days' notice repeat the application to the circuit court of appeal or to any justice or circuit judge.⁶⁹ Bail, if granted, may, however, be revoked on five days' notice by action of the circuit court of appeals.⁷⁰ Although this practice as to bail is an improvement over the earlier system, when bail was granted after conviction almost as a matter of course, it is objectionable in that a defendant can obtain bail from a judge who has not heard the evidence and who is not furnished with the record, notwithstanding the trial judge's belief that his case has no merit.

The new rules incorporate criminal appeals into the general system of federal appellate jurisdiction. In the main they adequately remedy the defects of the pre-existing federal appellate practice in criminal cases and provide a system ostensibly well suited to meet the demands made upon it. Defects may in time become apparent but so long as the court is possessed of the power to frame rules, sufficient flexibility is assured to permit the Supreme Court to meet difficulties as they arise. Moreover, in adopting the expedient of permitting the circuit courts of appeal to promulgate rules in certain matters, the Supreme Court has demonstrated that it will not err in attempting arbitrarily to unify a field of law in which so many of the problems vary locally.

67. See e.g. Rule 21 of the Rules of the Second Circuit. Other matters are also regulated for which reference should be made to the rules of the local circuit.

68. Rule VI.

69. E.g. Rule 32 of the Rules for the Second Circuit. The power, however, of the circuit courts of appeal to frame such rules is questionable since the Supreme Court has ruled upon the specific subject.

70. Rule IV.