May 1936

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38DR45

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The Procedure of Appeal in Criminal Cases

The Time Element

Few more frequent criticisms of criminal appeals are made than that of the delay that is almost invariably involved. This weakness perhaps, as much as any, has led to opposition to any appeal at all. It has been urged that punishment to deter must be swift, but that appeal makes this impossible.

Before considering the various stages in appellate proceedings at which delay may creep in, it seems necessary to call attention to two things. In the first place, it should be remembered that complaints of delay in judicial proceedings have existed since time immemorial. It was promised in Magna Charta that “justice shall no longer be sold, refused or delayed” by the king’s courts. Shakespeare has Hamlet say:

“For who would bear the whips and scorns of time,
The oppressor’s wrong, the proud man’s contumely,
The pangs of dispriz’d love, the law’s delays,
The insolence of office and the spurns
That patient merit of the unworthy takes,
When he himself might his quietus make
With a bare bodkin?”

Dickens’ Bleak House with its endless case of Jarndyce v. Jarndyce is familiar to the lover of literature. Crime commissions and judicial councils give emphasis to it. Bar associations are frequently reminded. One might well conclude that delay is a feature found in all legal systems in all ages.

It is also to be remembered that the operation of judicial machinery inevitably requires a certain amount of time. There cannot be a trial and appeal or even a trial alone as quickly as a lynching. A certain amount of deliberateness is essential in even the most efficient legal system. A hierarchy of courts cannot be made to work like a slot

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1 Raymond Moley lists it among four defects in criminal appeals most commonly pointed out. Moley, Our Criminal Courts (1930) 95. Mr. Chief Justice Hughes said in an address to the American Law Institute: “Probably there is no greater reproach to the administration of justice in this country than the delay in criminal appeals.” (1933) 19 A. B. A. J. 325, 326. See Mitchell, Reform in Criminal Procedure (1932) 18 A. B. A. J. 732, 734; Morton, Some Suggestions About First Instance Courts of General Jurisdiction (1924) 49 A. B. A. Rep. 595, 603; Eliot, The Popular Dissatisfaction With the Administration of Justice in the United States (1913) 45 Chicago Legal News 207, 208; Taft, The Delays of the Law (1908) 18 Yale L. J. 28, 32; 4 Works of Bentham (1843) 339.

2 1 Hume, History of England Ch XI.

3 Hamlet, Act III, Sc. 1.

machine. In the words of the National Commission on Law Observance and Enforcement:  

"It is impossible to carry on the work of criminal justice without a somewhat elaborate, refined, and even technical procedure. . . . A certain amount of prescribed procedure is called for to guarantee deliberation and fairness as well as to make the public conscious that what is done in the course of prosecution goes on deliberately, rationally, and fairly. It is important also as enabling the courts to dispatch a large volume of business with a minimum expenditure of time."

One factor making for delay in the disposition of appeals is the period after verdict which the law grants to the defendant to take an appeal. This period may range from a few days to a year or two. At common law there was no time limitation as to writs of error although of course sentence was not postponed because of such possibility. Under the American Law Institute Code of Criminal Procedure the defendant may appeal within sixty days after the judgment or sentence appealed from is entered. In England a defendant has only ten days after conviction. The English rule seems much preferable to that of the Code. No good purpose is served in giving the defendant two months to decide whether he wishes to appeal. To allow ten days seems ample, some American jurisdictions allowing even less. The rules for the federal courts adopted by the United States Supreme Court give but five days. The code rule is also subject to the objection that the period is not from the verdict but from the entering of the judgment or sentence. A considerable time may elapse after the verdict before judgment or sentence are entered as where the defendant is put on probation and sentenced two years later for violation of probation. Thus the Code gives the defendant a minimum of sixty days. Only when appeal is from the sentence instead of the conviction should the period run from the sentence rather than the conviction. Such is the English rule.

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8 Infra note 18, § 429. This is criticized by Brunyate, The American Draft Code of Criminal Procedure, 1930 (1933) 49 L. Q. Rev. 192, 204.
9 English Criminal Appeal Act (1907) § 7 (1); English Criminal Appeal Rules (1908) Rule 19.
10 It is advocated in Ralston's presidential address to the American Institute of Criminal Law and Criminology, (1915) 6 J. Crim. L. 490, 504. A number of states have recently reduced the time in which appeals may be taken. Miller, Activities of Bar Associations and Legislatures in Connection with Criminal Law Reforms (1927) 52 A. B. A. Rep. 461, 471; Curran & Sunderland, op. cit. supra note 6, at 51, 202.
12 English Criminal Appeal Rules (1908) Rule 19.
Some leeway should be given the defendant where for good reason he fails to take an appeal during the fixed interval permitted. In a number of American jurisdictions deserving defendants have had their appeals dismissed on the ground that no provision is made to allow review beyond a certain period. If the trial court has no jurisdiction to grant a new trial and also refuses to grant a writ of error coram nobis, and equity refuses an injunction, the defendant has no judicial remedy and can only hope for a pardon. This gap in the law is amply provided for in the English Criminal Appeal Act by allowing the Court to extend the time for taking an appeal at any time except in capital cases. The American Law Institute Code of Criminal Procedure allows an appeal with respect to the same trial, after the usual interval for appealing only after a motion for a new trial, based on the ground of newly discovered evidence, is made and denied. The appellate court can thus act only if the trial court has first acted and only on the ground of newly discovered evidence.

The next step at which there is frequently a long delay is the preparation of the record. The defendant may be given a considerable period after the period in which he could commence his appeal to prepare his bill of exceptions. If he is out on bail he may be indifferent about such preparation. Where a narrative record is required there may be a great deal of wrangling between the attorneys and it may take the court considerable time to settle the difficulties. Even when the question and answer form of record is used the court stenographer may have other work to do first.

The remedy seems to be to abolish the requirements of a narrative

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16 Williston, Does a Pardon Blot Out Guilt? (1915) 28 Harv. L. Rev. 647, 658; Borchard, Convicting the Innocent (1932) XXI.
17 Supra note 9, § 7 (I), par. 2.
18 Code of Criminal Procedure (Am. L. Inst. 1930) § 429. Under section 362 such motion for a new trial may be made within one year after the verdict or at a later time if the court for good reason permits.
19 Sir William Brunyate suggests that only the appellate court should have power to reopen after judgment and sentence have been passed and recorded. Brunyate, op. cit. supra note 8, at 192, 203.
20 Attorney General Mitchell pointed out to the 1932 Judicial Conference that federal appeals take from nine months to three years and that most of the delay is before the case reaches the appellate court. Report of the Judicial Conference (1932) 18 A.B.A. J. 824, 826.
record and to send up a verbatim record of the proceedings with such omissions as may be agreed upon. No time will thus be wasted in trying to agree what should go into the record. The original documents and exhibits and record of the proceedings in the trial court might well go up instead of copies. If the court stenographer is too busy to prepare the appeal papers at the moment the appeal is taken, provision should be made for temporarily increasing the stenographic force.

If the narrative form is retained or made optional the time to prepare it should be decreased. Ten days is perhaps enough and thirty days at the most in the ordinary case, whereas some jurisdictions permit as much as ninety days. The rules governing federal appeals adopted by the Supreme Court require the attorneys to appear before the trial judge immediately to fix by order the time for preparing the record. In many jurisdictions the trial judge also has a long time to authenticate the bill of exceptions. This, too, should be lessened.

In North Carolina a judge must settle a case on appeal within sixty days after the courts of the district have ended or be subject to a fine.

The appellate rules may also permit the defendant additional time in which to file a brief. In England no printed briefs are employed in criminal or civil appeals and the arguments are all presented at the hearing. Delay for this purpose is thus entirely avoided. The custom of using formal briefs is perhaps too deeply imbedded in our legal system to admit of removal. But appellate rules may be revised so as

In the year ending Sept. 1, 1924, of the eleven months elapsing between conviction and the rescript on appeal, six and two-thirds occurred between the conviction and the allowance of the bill of exceptions. Second Report of the Judicial Council of Mass. (1926) 77. A study of fifty cases taken in order from the United States Supreme Court docket showed the average time between sentence and filing in the Circuit Court of Appeals to be 188 days. Proposed Rules to govern procedure after verdict submitted by the Attorney General to Mr. Chief Justice Hughes. Commentaries, p. 11. In Missouri, 7 months and 19 days are taken to perfect an appeal. (1926) Missouri Crime Survey.


24 Report of the Crime Commission (N. Y. 1927) 46. Under the American Law Institute Code of Criminal Procedure § 445, the trial court is to direct the transcription of the proceedings upon the filing of notice of appeal, and under § 447, the appeal papers are to be transmitted to the appellate court within twenty days of such filing.


26 Rule VII. Supra note 11, at 664.

27 Clayton, loc. cit. supra note 25.

28 Sherrill, Criminal Procedure in North Carolina (1930) 140.


30 Pollock, English Law Reporting (1903) 19 L. Q. Rev. 451, 455.
to give but a short time in which to file a brief. And appellate courts may discourage the practice of applying for continuances as to the filing of the brief, or for other reasons. Under the new Michigan civil appeals practice the case is to go automatically on the appellate calendar after a prescribed time for filing briefs has elapsed.

A fourth stage at which there is much opportunity for delay is the submission of the case to the appellate court for hearing. All of the other steps may have been performed in record time but the appellate court may have other business requiring its attention. How secure a hearing in the face of such congestion?

Several modes of relief suggest themselves. One method is to give criminal appeals right of way even though there be a large number of civil appeals which have been docketed much earlier. This is the rule of the United States Supreme Court and several state appellate courts. It is laid down by the American Law Institute Code of Criminal Procedure. It is a simple way to obtain a speedy consideration when, as is usually the case, the number of criminal appeals is relatively small as compared with the civil. If provision is made for keeping the appellate court or a division of it in almost constant session all cases can rapidly be disposed of as soon as they are ready for submission to the court.

The real problem arises when the number of criminal appeals is

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31 In 1902 a New York law took effect requiring appeals in capital cases to be brought to a hearing within six months unless the time should be especially extended. This is said to have cut down the time taken on appeal from fifteen to eight months. Smyth, The Limitation of the Right of Appeal in Criminal Cases (1904) 17 HARV. L. REV. 317, 321. See REPORT OF THE CRIME COMMISSION, supra note 24.


33 Sunderland, Revision of Rules Concerning Appellate Practice (1929) 9 MICH. St. BAR J. 23, 25.

34 Supra note 21.


36 The rules governing federal criminal appeals adopted by the Supreme Court provide similarly as to the Circuit Court of Appeals, Rule X, supra note 11, at 665.

37 Op. cit. supra note 18, § 454. Capital cases are to be considered before other criminal cases.

38 Hearing not later than thirty days after the filing of the record on appeal, unless an affirmative proof is made to the court that justice requires a continuance is recommended in the REPORT OF THE COMMISSION OF THE REFORM OF CRIMINAL PROCEDURE OF CALIFORNIA (1925); Gemmill, loc. cit. supra note 23.

39 Section 1 (8) of the ENGLISH CRIMINAL APPEAL ACT provides for rules of court for vacation sittings, and Rule 50 is in furtherance of this section.
itself very large, so that there is then a congestion of criminal appeals. This may be true where both criminal and civil appeals are decided by the same appellate court, as in Indiana in recent years when appeals in liquor law cases flooded the appellate courts. And it may be true in such states as Texas where its Court of Criminal Appeals decides as many as eight hundred cases a year, and in Oklahoma where the Criminal Court of Appeals decides over six hundred cases a year.

It is submitted that there is something wrong with the administration of justice in such states as Texas and Oklahoma where the number of appeals is so great. Their proportionate populations do not warrant so large a number of appeals; it is to be doubted that they are warranted by the number of crimes committed in those states. It is submitted that there should never be any problem of congestion of criminal appeals. Congestion may be avoided by speedy handling of appeals all along the line, the discouraging of frivolous appeals, and reversing only for substantial reasons. Better trial judges, higher standards of the bar, and an intelligent public opinion are also needed.

The existence of both an intermediate and a final court of appeal increases the delay. To decrease this delay the rules governing federal criminal appeals adopted by the Supreme Court allow but thirty days after the judgment below to appeal for a writ of certiorari. The most direct mode of relief is to provide that criminal appeals shall go directly from the trial court to the Court of last resort. This is usually the rule as to capital cases and often as to other felonies. It might well be extended to misdemeanors.

Usually the last delay on appeal has to do with the delivery of the opinion of the appellate court. In England the Court of Criminal Appeals usually gives its opinion orally at the close of the hearing. The reporter takes down the opinion and after some editing it appears in the law books as the opinion of the court. Thus in England there is no delay at this point, and appeals are usually decided four or five

40 Criminal appeals in Indiana increased from 42 in 1919 to 205 in 1925. Of 397 cases pending in the Supreme Court in 1926, 251 were criminal. Note (1926) 1 Ia. L. J. 43. See the criticism in Cain, Congested Dockets and Measures for Relief (1934) 9 Notre Dame Law. 117, 167.

41 Bentham, op. cit. supra note 1, at 349. In New York, civil cases are prolonged from ten months to over a year by appeal to the Court of Appeals. Some Aspects of Appeals 5 (Published by New York Law Society, 1934).

42 Rule XI, supra note 11, at 665.

weeks after they were commenced. In the United States on the other hand, a large portion of the appellate court’s time is devoted to the writing of opinions. As much as two months will often elapse after the hearing before the opinion will be filed.

In occasional cases a further delay occurs when an appellant petitions for a rehearing. This delay may come in two stages: the petition for the rehearing, and if granted, the rehearing. In Illinois in recent years there have been petitions in one third of all cases, civil and criminal, appealed, and the court has allowed a rehearing in one third of such cases. A high number of applications is also made in Iowa and Oklahoma.

The rehearing evil, it is submitted, can be almost entirely eliminated. The best way to do this is to improve the working methods of the court. In most cases rehearings arise out of a failure of the court to master the record or the legal principles governing it. The United States Supreme Court almost never grants a rehearing. Helpful oral argument is essential to adequate consideration. All the members of the court should examine the record or any abstract thereof and the briefs and feel a joint responsibility for the opinion of the court. The contentious attitude of the bar must be improved. The time to apply for a rehearing, which ranges in the United States from ten to sixty days should be reduced to somewhere near the former figure. A certificate

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44 In the years 1898 to 1902 inclusive, fourteen months was the average time required to secure review by the Appellate Division; six and one-half more were required to go from the Appellate Division to the Court of Appeals. Smyth, loc. cit. supra note 31. In 1919 appeals in felony cases from the Court of Common Pleas of Cleveland to the Court of Appeals took seven months and ten days. Pound & Frankfurter, loc. cit. supra note 35. Six to seven months are taken in Michigan. Sunderland, op. cit. supra note 33, at 37. During 1926 to 1928 the average time was thirteen months in Washington. Note (1931) 15 J. AM. JUD. SOC. 13. It often takes a year in California. Reform of Criminal Procedure (1934) 9 CALIF. BAR J. 31.

45 In the year ending Sept. 1, 1924, the average time between argument and rescript in Massachusetts was one and one-half months. Second Report of the Jud. C. of Mass., loc. cit. supra note 21. In Michigan, two and one-fourth months are taken. Sunderland, op. cit. supra note 33, at 38. The New York Court of Appeals takes two to six weeks, the Pennsylvania court four weeks, the Connecticut court less than two months, and the United States Supreme Court about the same. Report of the Jud. Council of N. J. to the Senate and General Assembly (1932) 59. In Missouri one month and 27 days are taken. Mo. Crime Survey, supra note 21. In Mississippi from two to six weeks are taken. Butts, The Court System of Mississippi (1930) 3 Miss. L. J. 97, 105.


47 Frankfurter & Landis, op. cit. supra note 32, at 226, 237; Curran & Sunderland, op. cit. supra note 6, at 51, 244; (1926) 20 OKLA. BAR ASS'N. REP. 16.

48 Hughes, The Supreme Court of the United States (1928) 63.

49 Cook, loc. cit. supra note 46.

50 The Proposed Rules governing federal criminal appeals submitted to the Supreme Court gave but five days to move for rehearing in the Circuit Courts of Appeals. Rule XIII. The Supreme Court, however, left the matter to each circuit court of appeals to prescribe its own rules. Rule XII, supra note 11, at 666.
might be required of counsel that the petition is presented in good faith and not for delay though just how much the requirement of such certificates reduces the number of motions is not clear. The approval of one or more concurring members of the court might be required.

In some states a considerable time may elapse after the decision is finally arrived at before it gets to the trial court from the appellate court. This is a matter of administration which can easily be corrected.

Delay then is due to varying causes. The statutes give a long period in which to take an appeal. Lawyers and trial judges are slow in preparing the appeal papers. The appellate court is slow in taking up the case, and in arriving at a decision. The public which tolerates all this is to that extent to blame. It has been asserted that the real cause of delay is lack of public desire for law enforcement.

The Appeal Papers

Although at common law in the United States review was by writ of error, appeal or what was called appeal was provided for by statute in many jurisdictions. In some jurisdictions this was held to do away with review by writs of error; in others review by writ of error might still be employed, while in still others the law was not clear as to the effect of statutes providing for appeal. Thus in some states the defendant may be out of court because he resorts to the wrong mode of review. Congress has abolished writs of error and substituted appeals but the change is only in name. The new Supreme Court rules governing procedure after verdict to do away with petitions for allowance of appeals and citations. The American Law Institute Code of Criminal Procedure provides for review by appeal only.

The first essential step in taking an appeal is the transfer of jurisdiction to the appellate court. This should involve nothing more than a formal notice to the trial court of the transfer to the appellate court, or where appeal is by leave, a request for a transfer. The filing of such notice should by itself divest the trial court of jurisdiction and place it in the appellate court.

The second step is to notify the prosecution of the appeal. This might be done by serving the notice of appeal upon the prosecuting

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51 Pound & Frankfurter, op. cit. supra note 35, at 319.
53 Rule III, supra note 11.
55 Sunderland, Improving the Administration of Justice (1933) 167 Ann. Am. Acad. 60, 80; Sunderland, Observations on the Illinois Civil Practice Act (1934) 28 Ill. L. Rev. 861, 872; Ralston, President's Address, op. cit. supra note 10, at 504.
PROCEDURE OF APPEAL IN CRIMINAL CASES

attorney. Such notice might also be employed to designate the items to go into the appellate record.\textsuperscript{57} The American Law Institute Code of Criminal Procedure provides for the taking of an appeal by filing a notice with the clerk of the trial court and serving a copy of the notice on the prosecuting attorney.\textsuperscript{58} Under the rules adopted by the United States Supreme Court a notice in duplicate is to be filed with the clerk of the trial court and a duplicate notice is then to be forwarded by the clerk of the trial court to the clerk of the appellate court; a copy of the notice is also to be served on the United States Attorney.\textsuperscript{59}

Perhaps the major problem in connection with the appeal papers is with reference to the preparation and transmission of the record to the appellate court. Should the record be in narrative or in question and answer form? The narrative form involves a condensation of the record, while that by question and answer is a verbatim copy of what happened at the trial. The narrative form has the advantage of being briefer and less bulky.\textsuperscript{60} The printing of it does not cost as much. The appellate court has less material through which to wade.

On the other hand the question and answer form while bulkier may be much cheaper to prepare. The invention of stenography has revolutionized the old form of review. The preparation of a narrative record may consume many days of the time of the appellant's attorney and the prosecuting attorney. It took a year and a half to prepare the record in the \textit{Sacco-Vanzetti} case. The parties may be unable to agree as to what should go into the record, and the judge may then have to give considerable of his time. A question and answer record is ready at the close of the trial. Thus against the greater cost of stenographic services in the question and answer form must be set what may often be the much more valuable services of the lawyers and the court.\textsuperscript{61} As has been seen in connection with our study of delay on appeal the preparation of a narrative record is often the greatest cause of it. Not

\textsuperscript{57} Sunderland, \textit{The New Michigan Court Rules} (1931) 29 MICH. L. REV. 586, 595; Sunderland, \textit{loc. cit. supra} note 55. This is opposed in HARMS, \textit{APPELLATE COURTS AND APPELLATE PROCEDURE IN OHIO} (1933) 161, on the ground that it gives the appellant too little time and would result in assignments being more numerous and less specific.

\textsuperscript{58} \textit{Op. cit. supra} note 18, §§ 431, 432.

\textsuperscript{59} Rule III, \textit{supra} note 11.

\textsuperscript{60} This is said to be its only advantage by Dunham, \textit{Form and Expense of Appellate Record} (1933) 17 J. AM. JUD. SOC. 88.

only is it hard to agree on what should go into the record, but the
natural inertia of lawyers and the press of trial work together with
the appellant's frequent desire to delay the appeal result in putting off
the preparation of the record. For this reason Massachusetts has
recommended it for all criminal appeals and civil as well. Third Report of the
action. (1927) 13 Mass. L. Quart. No. 2, 10, 12, 35.}

Moreover the question and answer record gives a much more accurate
All that is lacking to give a perfect picture of what happened are seeing and hearing the witnesses.\footnote{In
1931 a resolution was offered at the Illinois Bar Association Convention
by Edward T. Lee recommending the use of scientific apparatus for recording the
pictures and testimony of witnesses in the trial of appealable criminal cases. (1931)
Ill. State Bar Ass'n. 283.}
In some cases even a question and answer record may be inadequate but
certainly it is far less so than a narrative record. If the narrative record
is to be continued it should be drafted only after a careful comparison
with the stenographic record when such is made.\footnote{Second and Final Report of the Jud. Comm. of Mass. (1921) 68.}

Another advantage of the question and answer form is that the
preparation of the record is taken out of the hands of the lawyers and
put into the hands of the judicial organization. Why should the appel-
lant have anything more to do with the preparation of the record than
with any other stage of a criminal prosecution? The preparation of
the record should be a regular part of the business of the trial court
through its stenographer.\footnote{Carter, The Texas Court of Criminal Appeals (1933) 11 Tex. L. Rev. 455,
471. Untermeyer, Evils and Remedies in the Administration of the Criminal Law
(1910) 36 Ann. Am. Acad. 145, 157.}
The notice of appeal should constitute an order to prepare and transmit the appeal papers to the appellate court.\footnote{Sunderland, op. cit. supra note 33, at 29.}
In England a transcript of the shorthand notes and the judge's notes
and report go up to the appellate court.\footnote{Garraud, Précis de Droit Criminel (14th ed. 1926) § 492; Wright, French
Criminal Procedure (1929) 45 L. Q. Rev. 92, 108.}
In France the record is prepared by government officials.\footnote{It is asserted in the Report of the Montana State Crime Commission
(1930) 25, that the clerk of court does not usually know how to prepare the papers
and that it takes him a long time, hence the appellant should be required to pre-
pare them.}
A stenographic report of criminal trials is not invariably made in all jurisdictions. The provision for such reports has been treated as merely directory in England. The defendant does not pay for such transcript except where he desires a copy, and even then he may be relieved of paying where financially unable. Dean Wigmore recommends that every defendant be supplied with a stenographic report free of charge. This would serve the double purpose of enabling the defendant to find out whether he got a fair trial and offer the only accurate means of checking the efficiency of trial courts. It would, however, be tremendously expensive to do this in every case. Moreover, it would be futile in the vast majority of cases since the proportion of appeals to trials is very small.

One of the most frequently asserted allegations against the question and answer record is that it will demand more work on the part of the appellate court. This allegation has been accepted as conclusive by some but with all due respect to appellate judges it is submitted that the test should be not how it will affect the appellate court but what is best for society. As Dean Ezra Thayer has stated it: "If a change is needed and this change would mean added work for the judges, it is work of which they should not be relieved because it properly belongs to them."

But the abolition of the narrative record does not necessarily mean more work for the appellate court even though the record is bulkier. Accompanying the transcript may be an abstract of the record shorter even than a narrative record. In many cases the court need examine only this abstract. A proper brief will help the court a great deal. It may be desirable and necessary now and then to examine the full record. The abstract can be drawn so as to make easy citation to the relevant parts of the record and the judges may turn from it to the record. Thus is combined the advantages of both narrative and question

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71 Such report in all cases is approved in Sherrill, op. cit. supra note 28, at 84; Salvesen, The Judiciary Appeal Court, Its Anomalies and Limitations (1905) 17 Jurid. Rev. 332, 334.


73 English Criminal Appeal Act § 16.

74 English Criminal Appeal Rules (1908) Rule 39 (c).

75 Note (1922) 16 Ill. L. Rev. 548.


77 Griswold & Mitchell, op. cit. supra note 61, at 509; Sunderland, loc. cit. supra note 57. It is argued that the use of such abstracts will help avoid one-man opinions. Thomas, President's Address (1915) Proc. Ky. Bar Ass'n. 15, 23.

78 Thayer, op. cit. supra note 76, at 59.
and answer method. Also helpful are a short statement of the questions, approximately a page in length, and an index.

The American Law Institute Code of Criminal Procedure provides for the use of the question and answer form of the record. The Proposed Rules governing federal criminal appeals submitted to the Supreme Court by the Attorney General permit the Circuit Courts of Appeal to adopt whichever form they choose since the Circuit Judges differed as to which form they preferred. The rules as adopted by the Supreme Court are silent on the subject.

In recent years there has been criticism of the bulkiness of records. Perhaps too many things go into them as presently made up. Many pages may be devoted to the examination of jurors on voir dire. A mass of useless testimony and unnecessary exhibits frequently go up. In England the judge's notes and a report by him are sent up, sometimes, but not necessarily, accompanied by a transcript of the evidence. Dean Clark has suggested with reference to civil appeals that the appellate court should be furnished with special copies of all documents and the trial court's notes of the evidence but rarely with a transcript of the evidence. Dean Thayer would use only so much of the evidence as is necessary to present the question fairly to the court.

No mean contributory factor to the bulkiness of the record is the rule in many jurisdictions that the record must affirmatively show a

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81 Rule XIX.

82 Lamm, op. cit. supra note 4, at 254.

83 "Perhaps the requirement of many volumes of printed records may be the next to give way to modern methods. Unnecessary printing makes appeals unduly expensive. It is an unjustified waste of money. We have recently indicated in a drastic opinion by Judge Hubbs . . . that it is not only unnecessary but illegal to include in the printed record the examination of jurors in a case of murder in the first degree. This examination sometimes fills an entire corpulent volume. Much more might be done to save the printing of huge volumes of evidence in large part irrelevant to the merits of the appeal." Pound, Address (1933) 56 Rep. of N. Y. Bar Ass'n. 437, 444.

84 Even there the transcript may be bulky. In Rex v. Adler (1923) 17 Cr. App. R. 105 there was a six hundred page transcript and the court thought that perhaps the rules should be amended to prevent this. In Rex v. Cotton (1921) 15 Cr. App. R. 142 the court criticized the waste of public funds involved in the preparation of a 264 page record for a frivolous appeal.


86 Thayer, op. cit. supra note 76, at 62. This is also recommended in Some Aspects of Appeals, op. cit, supra note 41, at 8.
fair trial. The United States Supreme Court in the Crain case reversed a conviction because the record failed to show arraignment and plea although defendant did not challenge the fact. The remedy is to allow the appellate court to communicate with the lower court and find out.

One of the remedies for bulkiness of records is the development of a better bar. Prolixity in examinations and cross examinations should be avoided. Abler lawyers will know how to make up a technically correct record without putting into it a mass of unrelated materials. The appellate court might well reprimand lawyers whose briefs and records are too cumbersome. A recent study states that "the lawyer's skill and diligence in preparing the record on appeal are of significance in determining the costs, as well as other factors, involved in the prosecution of an appeal." This same study indicated that the average length of the record in civil appeals of a certain character was 209.5 pages, the longest being 2750 and the shortest 27; the average number of pages of testimony was 161, the longest being 2696 and the shortest 6 pages. Where appeal is discretionary with the appellate court the court should not have to examine upon application for appeal a long and cumbersome record, except possibly where appeal is on the ground that the verdict is against the weight of the evidence. The appellant should promptly and concisely state his grounds of appeal and the errors relied upon. Printing of the record should not be required even though it be required on final hearing. As in England the approval of the full court should not be required for the allowance of the appeal. Oral argument if required is likely to take up too much of the time of the court.

Another problem in connection with the form of the record is whether or not it should be printed or typewritten. From the point of view of expediting the appeal, typing seems preferable as more time is required for printing. Printing is also more expensive, so expensive in fact that appeals not infrequently are more profitable for the printer.
than the attorney.\textsuperscript{95} In a recent decade $20,000,000 was spent in New York for printing of records.\textsuperscript{96} Where a typed record is used the original record may be sent up while a printed record involves an additional copying.\textsuperscript{97} The requirement of a printed record may prevent the man with little or no means from appealing.\textsuperscript{98} A recent New York study of civil appeals showed the average cost of printing appellant's brief to be $46.83 and of the record $231.90.\textsuperscript{99}

Perhaps some distinctions should be drawn as to when printing should be necessary and what should be printed. When a case is taken up to the United States Supreme Court there is more justification for a printed record than when it is taken to a state appellate court or to a federal circuit court of appeals. An appeal to an intermediate appellate court ought never to require a printed record. In England only when appeal is to the House of Lords is a printed record necessary. A typewritten record may be used both in the Court of Appeal and the Court of Criminal Appeal.\textsuperscript{100}

It may also be desirable if printing is to be required that only part of the appeal papers be printed. The brief on the law, especially where the legal issues are numerous and important, might well be printed.\textsuperscript{101} It would cost only a fraction of the cost of printing the record.\textsuperscript{102} On the other hand no good purpose is served by printing the detailed bulky testimony of witnesses, especially if the court is not expected to read any part of the record not referred to in the briefs. In Illinois there is a printed abstract of the record.\textsuperscript{103}

\begin{footnotes}
\footnotetext{95}{Ralston, op. cit. supra note 10, at 504. Even the printing of a narrative record is said to be too expensive by Thompson, \textit{Form and Substance of the Record} (1933) 17 J. Am. Jud. Soc. 87. Carter would allow typed or even penwritten briefs by indigent criminal appellants. Carter, \textit{Preparation and Presentation in Courts of Review} (1917) 12 Ill. L. Rev. 147, 148.}
\footnotetext{96}{Dunham, loc. cit. supra note 60. See \textit{Report of Commission on Administration of Justice} (N. Y. 1934).}
\footnotetext{97}{In some jurisdictions an appellant in addition to filing a printed record has been required to file a written or typewritten transcript of the record below in the appellate court. \textit{Report of Committee on Procedural Reform of American Bar Association} (1909) 34 A. B. A. Rep. 578, 579.}
\footnotetext{98}{Judge Joseph N. Ulman says that two big expenses of appeal are printed records and briefs. Ulman, \textit{A Judge Takes the Stand} (1933) 262.}
\footnotetext{99}{\textit{Some Aspects of Appeals}, op. cit supra note 41, at 8.}
\footnotetext{100}{Loreburn, \textit{The Operation of the Reformed Equity Procedure in England} (1912) 6 Am. L. Sch. Rev. 1, 2.}
\footnotetext{101}{In New York in certain civil cases the average brief costs $46.83 and the average record $231.90. \textit{Some Aspects of Appeals}, op. cit. supra note 41, at 8.}
\footnotetext{102}{This is recommended in the \textit{Fifth Report of the Jud. Council of Mass} (1929) 21.}
\footnotetext{103}{Thompson, \textit{op. cit. supra} note 95, at 87.}
\end{footnotes}
The form of the record may also depend on the size of the court. Where the appeal is heard by only three or four judges, carbon copies of the typewritten record would seem adequate. But where the court is larger a mimeographed record may be preferable.° Enough copies may be made so that the lawyers and each member of the court and a few leading libraries can all be supplied with copies.

The chief arguments asserted in favor of the printed record are that it is more convenient for the appellate court,° and that a greater number of copies for libraries and the bar are available.°° Admittedly a printed record is easier on the eye than a typewritten record. But it is believed that this consideration is outweighed by those already mentioned. The appellate court need not ordinarily read the whole record; and what needs most careful reading may perhaps be printed.

The objection that typed copies of the record are not easily available for other lawyers and for libraries does not seem convincing. In the first place such a demand seems wholly inconsistent with the frequent criticism that there are too many statutes and too many decisions. If lawyers cannot keep up with these how can they be expected to derive any value from briefs that are all too commonly verbose, illogical and inaccurate? In the second place if we concede that it is the business of criminal appellants to supply legal materials to others than the courts, the use of mimeographing may make available a sufficient supply of copies.

In jurisdictions which cling to the printed record the evil of expense may be mitigated somewhat by reducing the amount of fees going to the clerk.°°° There is no doubt but that in many jurisdictions such fees could be materially reduced.

Under the earlier method of review by writ of error the defendant's next steps were to draw up a separate assignment of errors. This assignment was viewed as commencing the appellate proceedings just as the complaint commences a civil proceeding in the trial court. It is said to have developed out of the early view that an appeal was taken against the judge rather than the judgment and that the judgment was

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°°° (1929) 9 MICH. ST. BAR J. 53, statement by George Donaldson, head of largest reporting firm in Detroit.
°° Bryan, op. cit. supra note 63, at 287; SECOND AND FINAL REPORT OF THE MASS. JUDICATURE COMMISSION (1921) 68; Prentis, The Amended Rules of the Supreme Court of Appeals (1930) 42 VA. STATE BAR ASS'N. 536, 549; Carter, op. cit. supra note 95.
°° The Attorney General in his comment on the proposed rules to govern federal criminal appeals submitted to the Supreme Court points this out, p. 23. Rule XIX permits the Circuit Courts of Appeal to prescribe the form of the record.
°°° Bryan, op. cit. supra note 63, at 292.
intended to inform him of the charges against him. Since this is no
longer the view it has been inferred that assignments by error no longer
serve any purpose. It is true that they are often taken purely in a
perfunctory manner, list many trivial and highly technical objections,
are often so broad and indefinite as to serve no purpose, and are re-
peated in the brief.

Formal assignments of error have been abolished by many juris-
dictions. But that something to take their place is necessary seems
clear. It is essential for the convenience of the appellate court that
it be enabled to know the defendant's objections so that it may focus
its attention at once without having to search minutely through the
whole record.

It is quite common today to provide that the defendant assign his
errors in his brief.\(^{108}\) That is the rule laid down by the American Law
Institute Code of Criminal Procedure.\(^{109}\) Under the new rules of civil
appellate procedure in Michigan the appellant is to specify the grounds
of his appeal in his notice of appeal.\(^{110}\) The Proposed Rules as to
federal criminal appeals submitted by the Attorney General to the
United States Supreme Court did the same.\(^{111}\) The rules as adopted
by the Supreme Court, however, provide for a separate assignment of
events.\(^{112}\)

**Bail Pending Appeal**

One of the weak spots in the administration of criminal justice is the
granting of bail pending appeal.\(^{113}\) The defendant is over protected
in most American jurisdictions. He has an absolute right to bail before
conviction not only as to petty crimes but also serious felonies and in a
number of jurisdictions he may have bail in homicide cases where the
proof is not strong. Granting bail before conviction has, however, the
justification that the defendant has not as yet been tried and found
guilty. But after conviction he can no longer claim any presumption
of innocence. He had previously failed to secure his discharge before
the committing magistrate. A grand jury may have thought him guilty.

\(^{108}\) This is the new Illinois practice. Sunderland, *op. cit. supra* note 55, at 861,
872. It is recommended in *Harris, loc. cit. supra* note 57. The Proposed Rules gov-
erning federal criminal appeals submitted in Ohio to the Supreme Court so provide.
Rule X.


\(^{110}\) Sunderland, *loc. cit. supra* note 33.

\(^{111}\) Rule VI.

\(^{112}\) Rule VIII, *supra* note 11, at 663.

\(^{113}\) "The spectacle of persons convicted of crime at large on bail pending un-
necessary delays on appeal brings the processes of the courts into public contempt."
Hughes, *Address to American Law Institute* (1934) Boston Evening Transcript,
May 10, 1934, p. 1.
But those proceedings were practically *ex parte*. At the trial he had presumably had every opportunity to present what defense he may have. It is obvious that his position is different from what it was before conviction.

Not only is there less hardship to require a convicted defendant to remain incarcerated, but the need for keeping him there is greater. There is stronger temptation to escape since it is not likely that the appellate court will reverse, and if it does reverse, a new trial is likely to be a part of the judgment. The number of appeals is small compared with the number of trials. A fairly substantial fraction of trials result in acquittal. On the other hand the proportion of reversals is insignificant as compared with the number of convictions, and sometimes not very large even as compared with the number of appeals taken. The law does not prevent a defendant from taking a purely frivolous appeal. It is thus possible, in fact altogether likely, that a defendant out on bail may escape the jurisdiction not only on appeals taken in good faith but also on appeals taken purely for delay or with the express object of becoming a fugitive. Appellants out on bail occasionally commit crimes as serious or even more serious than the crime for which they were convicted. 114 If bail is granted, the defendant should be in court when the decision is announced, and the decision should not be made public until control of the defendant is obtained.

Another objection to the granting of bail on appeal is that the combination of freedom after conviction with a considerable lapse of time between the conviction and the decision on appeal results in a loss of the deterrent effects of the law. Criminals and would-be criminals get the notion that the law has no teeth in it. 115 A long delayed prison term may be almost as bad as none at all. The very fact of being admitted to bail itself tends to slow up the proceedings. As one judge said: 116

"Too frequently after the defendant has been admitted to bail his interest apparently lags, the appeal drags, the bill of exceptions is not promptly settled, and the record does not reach the appellate court as promptly as it should. There are inexcusable delays in securing the printing of the transcript—more delays in printing and serving the briefs."

One remedy, suggested by Mr. Justice Butler, is that the order admit-

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114 "One notorious automobile thief participated in a most atrocious double murder and payroll robbery while his attorney was considering the advisability of filing a petition in error after conviction for auto-stealing." Pound & Frankfurter, *op. cit. supra* note 35, at 321.


ting to bail contain conditions against delay in bringing the proceedings to hearing.117

In spite of these manifest differences between bail before and bail after conviction many jurisdictions draw no very sharp line between the two. The Constitution or statutes of a state may give the defendant a right to bail after conviction.118 If they do a court can do nothing but follow them. But there is no good reason to bring about that result by interpretation where the language is not clear. A general constitutional guarantee of bail should be held applicable only to bail before conviction.119 The remedy in jurisdictions having express constitutional or statutory provisions is to secure their repeal. Bail after conviction in the federal courts is in the discretion of the judges. Discretion is also the prevailing rule in the state courts although there is a numerous minority.120

Even where there are no constitutional or statutory provisions giving a defendant a right to bail there are possibilities of abuse. Courts may be lax in granting bail. Perhaps the defendant may "shop around" among a large group of judges to secure bail. Perhaps it is granted perfunctorily. No other inferior court than the trial court should have the power to grant bail after conviction.121 Possibly the defendant should not be granted bail except on the filing of a certificate showing his good faith,122 though such procedure may become purely perfunctory. It should not be granted where review is sought on frivolous grounds merely for delay.123 The appellant should give notice to the prosecution that he is applying for bail.124 Receiving bail should be treated as more than a mere formality; and in case of default the bail should be forfeited.125

118 The constitutions or statutes of more than twenty states give a right to bail after conviction in various cases less than capital. Ibid. § 1232. Several states forbid it in capital cases. The Constitutions of ten states use the phrase "before conviction" or an equivalent term in defining the right to bail. Note (1920) 21 Col. L. Rev. 595.
119 Notes (1931) 41 Yale L. J. 293, 295; (1922) 19 A. L. R. 807; contra: State v. Williamson (1914) 135 La. 662, 65 So. 877.
120 Note (1931) 41 Yale L. J. 293, 295.
121 REPORT OF THE CRIME COMMISSION (N.Y. 1927) 44.
122 Op. cit. supra note 18, §§ 436, 438. See Rule IV of proposed rules governing the practice and procedure in criminal cases after verdict, prepared in the department of justice upon the request of the chief justice of the United States and transmitted to him by the attorney general of the United States on May 26, 1933.
123 Conference of Senior Circuit Judges (1925) 11 A. B. A. J. 453, (1927) 31 Law Notes 123; Rule VI, supra note 11, at 663.
125 Rex v. Stewart (1931) 23 Cr. App. R. 82.
The granting of bail should have some relation to the penalty involved. If the penalty is merely a fine bail might well be granted of right provided that the payment of the fine was secured. If the crime is a misdemeanor considerable liberality might be exercised in the discretion of the court. But where the crime is a felony, especially a violent one, bail should rarely be granted. Bail should not be granted to professional criminals. The previous good character of the appellant should be considered. The illness of the defendant is an element, as is the fact that a considerable time will elapse before the appellate court will be in session. A previous default on bail when not excused should bar bail.

Bail on appeal should in general be discretionary. Such is the rule in England, the federal courts and most state courts. The American Law Institute Code of Criminal Procedure makes bail discretionary except in two classes of cases. There may be no bail as to capital offenses except in cases of illness. Where the penalty is only a fine the defendant may be admitted to bail of right on filing a certificate of probable cause. Under both the English and the United States Supreme Court rules bail may be granted by either the trial or appellate judges.

To be considered with the problem of bail is that of stay of execution on appeal. What is to be done with a defendant who appeals? Is his appeal automatically to stay the execution of sentence? Or is he immediately to enter upon the serving of his term or the payment of his fine? Or is an intermediate plan to be adopted of allowing a stay provided that certain steps are taken?

Some few authorities would have the taking of an appeal automatically stay the execution of sentences. The Supreme Court rules provide that an appeal stays the execution of the judgment, unless the defendant pending his appeal elects to enter upon the serving of his sentence.

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129 Riddell, Bail (Criminal) in Canada (Mar.-Apr. 1933) 11, No. 2 The Panel 15-16; op. cit. supra note 18, §§ 66 (2), 73.
130 Riddell, loc. cit. supra note 129; Rex v. Gordon (1912) 7 Cr. App. R. 182.
131 But a mere allegation of illness is not enough. Rex v. Gott (1921) 16 Cr. App. R. 86.
132 Ibid. § 438 (2). The conditions of the undertaking are set out in § 83.
133 Ibid. § 66 (2), 73.
134 Ibid. § 438 (1).
135 Untermeyer, loc. cit. supra note 66. James M. Morton, Jr., asserts that there are grave practical objections to putting a sentence into execution while an appeal is pending. Morton, loc. cit. supra note 1.
sentence. In France there can be no execution of sentence during the period in which an appeal may be taken whether an appeal is taken or not. To allow the mere taking of an appeal to stay the sentence is, however, under present conditions to encourage delay and frivolous appeals. A defendant who has entered upon the serving of his sentence is not likely to appeal where if his appeal loses he receives no credit for the time spent in jail prior to the decision of his appeal. Where the processes of the law have gone so far as to result in the conviction of a defendant there seems no good reason why the mere taking of an appeal without more should prevent his immediate incarceration. A stay would offer strong incentives to escape.

Most of the proposals with respect to stay of execution provide for stays in the discretion of the court or if certain steps are taken. For instance the proposed rules to govern procedure after verdict in the federal courts provided for a stay on the filing with the notice of appeal of a supersedeas bond approved by the trial court together with a certificate of the trial court that in its opinion there is reasonable doubt whether the judgment should stand. The American Law Institute Code of Criminal Procedure provides for a stay in capital cases upon the taking of an appeal and a stay in other cases upon filing with the clerk of the trial court a certificate of probable cause by the trial judge or a justice of the appellate court. The certificate is to state the grounds on which it is granted. If execution is stayed but bail is not granted he remains in the custody of the official then having him in charge.

In England an appellant not admitted to bail is not treated like other prisoners. The Criminal Appeal Act directs that he be kept apart from other classes of prisoners. He is to wear a prison dress of a different color from that worn by other convicted prisoners. He is not to be required to sleep without a mattress except for misconduct. He is to be employed at work of an industrial or manufacturing nature.

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138 Rule V, op. cit. supra note 11, at 662.
137 GARRAUd, op. cit. supra note 68, § 491; Wright, loc. cit. supra note 68.
139 REPORT OF THE COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE, CALIFORNIA (1925) 25. Professor Chester G. Vernier proposed, and the California Bar Association approved that there be no stay of execution on appeal except in capital cases or unless ordered by the court to which an appeal is taken. (1926) CALIF. BAR ASS’N. PROC. 192, 248. See (1928) 19 J. CRIM. L. 425, 426.
140 Rule IV.
142 Ibid. § 437.
143 Ibid. § 443. Under § 444 if execution of sentence has already commenced, the granting of a stay suspends the further execution of sentence.
144 Supra note 9, § 14 (1).
If released on appeal he is to be paid a reasonable sum for his work. He may receive visits from his lawyer and others about his case. In the case of a conviction involving sentence of death or corporal punishment sentence is not to be executed until after ten days, the time in which an appeal may be taken, has elapsed. If an appeal is taken in such cases the sentence is not to be executed until the determination of the appeal. As to other defendants there is no stay even during the ten day period; nor any special treatment until active steps towards appealing are taken.

THE HEARING

At the present time when appeals are brought on for hearing the appellate court is usually wholly unfamiliar with the cases. In a great many cases most of the time is spent explaining the factual situation to the court. At the same time the appellant is doing this the appellate court is likely to be glancing at the printed record and briefs before it. After the appellant presents his case that for the state is heard. The lawyers on both sides present their argument in a formal fashion. Often there is no clean cut clash on issues in the argument. Furthermore the court itself may take no part in the discussion. The lawyers may frame their argument with an eye chiefly to using a certain amount of time. As a consequence the hearing as conducted in many jurisdictions is a heavy lumbering process which serves little or no purpose. The small value attached to it is evidenced by the common agitation to abolish it or to cut down its length. If it were serving a useful end it would seem that proposed changes would be in the other direction.

Great improvement may be made in the hearing of appeals. In the first place the appellate court should prepare itself for the hearing. Some time before the hearing it should examine the record and the briefs or have a report on them from its secretaries, so that it will have an intelligent understanding with which to begin rather than groping in the dark as it may do under the present system.

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145 Ibid. § 7 (2).
of the court should do this, thus avoiding “one-man” opinions. If a single judge is assigned to do this and that fact is known to the lawyers they are likely to concentrate on him and ignore the remainder of the court. If the case is decided immediately after hearing it is even more essential that every judge be familiar with the case.

In the case of tribunals with a tremendous amount of business it may be impossible for each judge to read the record prior to the hearing. In that case it may be necessary to assign the case for study to a single judge or possibly to two judges. Such judge might then report on the case at the hearing. In Soviet Russia a single judge who has studied the record reports the case. In France a report by a single judge is the first step at the hearing of appeals as to correctional cases, and also cases in the Court of Cassation.

The main improvement is needed in the conduct of the hearing itself. A proper hearing is the best assurance that the decision is that of the full court. Even without a prior examination of the record a properly conducted hearing may bring about very satisfactory results. The hearing should be conducted in an informal manner somewhat after the manner of a college seminar instead of like an ancient religious rite. The lawyers should not speak any prescribed length of time but should thresh out point after point. The court should feel free to participate. It should ask questions. It should direct attention to points on which it desires information. The whole proceeding should be in the nature of a colloquium, as can easily be seen upon an examination of English appeals. The court should decline to hear further argument where the case presents no issue worthy of extended oral argument. On the

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148 Yet it has been claimed that in all but four states the judges examine the records or abstracts of the record before voting. Baskin, _loc. cit. supra_ note 147; Note (1926) 20 OXLA. BAR Ass'n. Rev. 38.

149 _Carter, loc. cit. supra_ note 147; Note (1926) 20 OXLA. BAR Ass'n. Rev. 38.

150 Winn, _Courts of Last Resort_ (1912) KY. ST. BAR Ass'n. 77, 82; but Hobson, C. J., asserted that not even two judges would have time to read the record. (1912) KY. ST. BAR Ass'n. 91, 99.

151 ZELITCH, _SOVIET ADMINISTRATION OF CRIMINAL LAW_ (1931) 283.

152 GARAUD, _loc. cit. supra_ note 68.

153 Wright, _op. cit. supra_ note 68, at 112.

154 At the present time questions are often asked merely to relieve the tedium of a boresome session or to poke a little fun at the lawyer. Medina, _The Oral Argument on Appeal_ (1933) 20 A.B.A.J. 139. See Linn, _Appellate Court Argument_ (1931) 6 TEMP. L. Q. 3.

155 Dickinson, _How the Supreme Court of Tennessee Cleared Its Docket_ (1890) 24 Am. L. Rev. 283; Note (1906) 3 ILL. L. REV. 299.

156 In thirty out of 258 cases disposed of at October 1928 term, the United State Supreme Court cut short the argument. Frankfurter & Landis, _loc. cit. supra_ note 32.
PROCEDURE OF APPEAL IN CRIMINAL CASES

other hand existing time limits should be altered so as to give the necessary amount of time to each case.\textsuperscript{157}

It may be objected that this will mean lack of order in the hearing or that no good would be derived.\textsuperscript{158} The attorney may stand in such awe of the judges that questions or any disturbance of the regular procedure may upset them.\textsuperscript{159} It would seem, however, that a properly selected and organized appellate court should be able to conduct the hearings in an orderly way without requiring a dummy-like stiffness of procedure. The introduction of the system might embarrass lawyers at first, but when it came to be the practice they would doubtless adjust themselves. Furthermore it is extremely questionable whether lawyers who cannot adapt themselves to such a method should be permitted to practice in the appellate courts.\textsuperscript{160} The present system makes for the development of a mediocre appellate bar. Many lawyers regard the hearing as so unimportant that they send their junior partner rather than appear themselves.\textsuperscript{161} If more were expected of lawyers at the hearing a better type of appellate argument would be developed.\textsuperscript{162} The United States Supreme Court in recent years has done

\textsuperscript{157}Sunderland, \textit{Intermediate Appellate Courts} (1929) 6 \textit{Am. L. Sch. Rev.} 693, 697. In the case of State v. Molineaux (1931) the N. Y. Court of Appeals allowed three days for argument and then unanimously reversed the judgment. Battle, \textit{Three Notable Cases} (1932) 44 \textit{Va. St. Bar Ass'n.} 254. In Wisconsin two hours are allowed in felony cases and seventy-five minutes in other criminal cases. \textit{Wisconsin Supreme Court Rule 34}. One hour is allowed in the Oklahoma Criminal Court of Appeals, Rule XIII.

\textsuperscript{158}Carter, \textit{op. cit. supra} note 95, at 158; Hiscock, \textit{The Court of Appeals of New York: Some Features of Its Organization and Work} (1929) 14 \textit{Corn. L. Q.} 131, 139.

\textsuperscript{159}"Judge Hiscock thought the lawyer should be allowed to have his say out at least once and perhaps twice (Laughter) 'Do you want to kill that man?' he once said to me. 'He is frightened enough without trying to answer your questions.' (Laughter) Fair questioning is, however, not only a part of the lawyer's ordeal, but also a preventive of somnolence on the Bench." Pound, \textit{Address} (1935) 56 \textit{N. Y. St. Bar Ass'n.} 440.

\textsuperscript{160}"Secondly, there is need of good advocates before the courts in bank. Here is another highly specialized activity. It is seldom, today, that the great trial lawyer is also a great lawyer before the appellate court. The two functions call for different talents and different experiences. But the latter is quite as important from the standpoint of the public as the former. Bentham says that the law is not made by Judge, but by Judge and Company. The reports are full of illustrations of the extent to which good or bad results in judicial finding and declaring of the law depend upon the way in which questions were presented to busy courts by counsel. Slovenly arguments to appellate courts bear fruit in slovenly decisions and confusion and uncertainty in the traditional elements of the law." Pound, \textit{What Is a Good Legal Education?} (1933) 19 \textit{A.B.A. J.} 627, 628.


\textsuperscript{162}"Individuals whose performance at once indicated them as wholly unfit for handling the cases before the Court, were very properly made to perceive that
much to improve the quality of argument. A special appellate bar, if that were possible, would improve the quality of the hearing.

A third needed improvement is the immediate decision of the court as soon as the case has been argued. The court has the arguments freshly in mind. The very fact of the necessity of immediate decision would make the court more alert at the hearing. The court usually follows its view at the close of oral argument. Examination of the record before the hearing together with thorough informal consideration at the hearing should enable the court to decide most cases as soon as the last argument is heard. An occasional case involving important questions of public policy and therefore requiring more careful consideration may be laid over for a few days. The reporter may take down the opinions of the court as they are given orally and after some inevitable revision publish them for the bar. This is the practice of both the English Court of Criminal Appeal and the Court of Appeal. It was introduced or re-introduced by Lord Mansfield. It has been recently recommended by the Judicial Council of New Jersey. The result of the practice of the English Court of Criminal Appeals has been that it has successfully disposed of the cases before it, though it has not succeeded in developing the law. But development of the law by appellate courts at the present time is not so necessary.

The practice of the American appellate courts to decide cases a month or two after the hearing is so deeply rooted as perhaps hardly to admit of change. More time is said to be spent in writing opinions than in arriving at them. Something may be done within the limits of such a view, however. Written opinions may be confined to cases they had wasted the time of the court and done their client's cause no good. The frankness with which these intimations were communicated to counsel was exceedingly refreshing." Note (1908) 3 ILL. L. REV. 299.


164 Manton, The Presentation of Appeals (1928) 6 N.Y. L. REV. 421.

165 (1914) 39 A. B. A. REP. 963.

166 A judge of the New York Court of Appeals once told Chief Justice Hughes that in ninety per cent of the cases he voted as he felt after listening to argument. Hughes, op. cit. supra note 48, at 61.

167 In 1919 in the Court of Appeal the average time of delivering the judgment when opinion was reserved was fourteen days. (1920) 5 MASS. L. Q. 220, 235.


171 Carter, op. cit. supra note 147, at 244.
where they add to the development of the law. The work of the United States Supreme Court and the New York Court of Appeals illustrate this. In New York ninety affirmances by the Court of Appeals in capital cases were memorandum opinions. In the absence of an express constitutional requirement the court should not write opinions in all cases. In Mississippi a statute requires opinions in felony cases where the sentence is ten or more years in prison. Where opinions are written they can be made shorter with less citations and quotations.

To avoid "one-man" opinions, a case should be assigned for writing only after a previous thorough examination, conference, and vote of the entire court. It should be assigned in the discretion of the chief justice and not according to mechanical rotation in order that the court may develop specialization. The court should not waste time by reading the opinion in court when the opinion is written.

Lester B. Orfield.

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172 Warren, The Welter of Decisions (1916) 10 Ill. L. Rev. 472; Rosbrook, The Art of Judicial Reporting (1925) 10 Corn. L. Q. 103, 132. The number of opinions written per judge in 1929 in a number of states is set out in (1930) 8 N.C. L. Rev. 487; the number in 1912, in Winn, op. cit. supra note 150, at 78.

173 Taylor, Murder Cases and the Practice Relating Thereto in the Court of Appeals (1924) Lectures on Legal Topics, Ass'n. of Bar of City of New York 407.


176 Frankfurter, loc. cit. supra note 175; Frankfurter & Landis, op. cit. supra note 32, at VII. Contra: Hiscock, op. cit. supra note 158, at 138; Carter, op. cit. supra note 147, at 251; Kelly, op. cit. supra note 93, at 216.

177 Dickinson, loc. cit. supra note 155; Pollock, op. cit. supra note 168, at 455.