LEGISLATION AND ADMINISTRATION

APPEAL UNDER THE AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE

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IN RECENT years every phase of criminal procedure from arrest to appeal has come under severe public scrutiny. The police, the prosecuting attorney, the criminal bar, the trial judge and the appellate court have each been assigned part of the blame for defects in the administration of the criminal law. Several methods of review have been possible with the result that there has been confusion and want of simplicity. Appellate courts have been criticized as deciding on technical grounds. Long delays in the disposition of appeals have occurred. Frivolous appeals have not been penalized. Appellate courts have regarded themselves as unable to review the facts and to hear new evidence. They have failed to dispose finally of cases which might well be disposed of in them. Bail pending appeal has been too freely granted. Appeal papers have been bulky and expensive. It has been asserted that only the rich can appeal. All these defects have frequently been pointed out but all too often no constructive nor comprehensive plan of reform has been proposed. In recent years, however, a number of excellent models have offered themselves. The English Criminal Appeal Act of 1907 laid down the present admirable rules governing criminal appeals in England.¹ The American Law Institute Code of Criminal Procedure, adopted in 1930, in its chapter twenty-five entitled Appeal, offers a plan based on the best American practice. The rules of practice and procedure after conviction in the federal courts promulgated by the Supreme Court of the United States on May 7, 1934, present the most recent model.²

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¹ 7 Edw. 7. c. 23 (1907). A recent discussion of the act appears in Archbold, Pleading, Evidence and Practice in Criminal Cases (28th ed. 1931), 313-351.

² Preliminary Print, 291 U.S. n. 3, p. I to X, Official Reports of the Supreme Court (1934). The problem of civil appeals is excellently dealt with by Curran and Sunderland, Organization and Operation of Courts of Review, 3d Report of Judicial Council of Michigan (1933), 59-246.

APPEAL AS MATTER OF RIGHT

The Code provides for appeal as a matter of right.³ This is in line with the prevalent practice in the United States. Less than half a dozen states make appeal discretionary. Michigan has recently provided for discretionary appeal.⁴ Virginia, going back for two years to appeal of right, returned to discretionary appeal.⁵ The Code recommends that in states where the decision of an intermediate appellate court may be reviewed by the court of last resort such review be had only with the permission of the court of last resort.

The broadest possible form of review is automatic appeal. The chief advantages of such review are that all defendants would be assured of review whether rich or poor and whether intelligent or ignorant, and that effective central supervision of all cases would be made possible. On the other hand there would be a great deal of wasted effort as obviously only a small number of cases require reversal. The additional work imposed upon the court might result in a less careful review of deserving cases. The appellate courts would be overwhelmed with cases. If existing methods of procedure were followed tremendous expense would be involved.

The best form of appeal then seems to demand a choice between appeal of right on the initiative of the defendant and discretionary appeal. In England appeal on issues of law is of right, while that on issues of fact or from the sentence is of leave.⁶ Appeal of right insures a full review of the case, irrespective of the frequently prejudiced view of the trial court or the uninformed view of the appellate court. Such appeal, however, results in the possibility of frivolous appeals since no ground of appeal can be said to be frivolous until the appellate court has reviewed it. If appeal of right were allowed as to the facts a tremendous number of cases might be taken up on appeal. The trial court is better able to pass on the facts. The appellate court can do so only with great inconvenience and expenditure of time. Hence appeal on the facts might well be discretionary. Discretionary appeal when the discretion lies in the appellate court is equivalent to a right to appeal but with a less detailed and formal consideration. The rule of the Code providing for appeal of right in all cases seems not undesirable particularly since the Code does not, like the English Criminal Appeal Act, provide for review of the facts in the sense of hearing new evidence or examining the witnesses in the appellate court. Abuse of such right to appeal even on frivolous grounds might be avoided by allowing the appellate court to increase the sentence, by allowing the appellate court to hear

³ § 426.

⁵ Va. Michie Code (1930), §§ 4935, 6348.

⁴ Mich. Compiled Laws (1930), § 17357.

⁶ Criminal Appeal Act, *supra* note 1, § 3.

the case summarily on the motion of the clerk of the appellate court, and by giving no credit for time served in prison before the decision of the appeal. The Code, however, fails to confer any such power.

The recommendation of the Code that where an intermediate appellate court may be reviewed by the court of last resort such review be discretionary seems not far-reaching enough. In jurisdictions where there are intermediate appellate courts criminal appeals ought to go directly to the court of last resort. In Indiana and Tennessee all criminal appeals go directly to the highest appellate court and in many jurisdictions capital cases and other felony cases go directly to the highest court. Two appeals result in additional delay and expense. A defendant ought not be entitled to more than a single appeal.

STAGE AT WHICH APPEAL LIES

At common law a writ of error lay only from a conviction. Review at any earlier stage in the trial was impossible. Under the Code the defendant may appeal only from a final judgment of conviction or from a sentence.⁷ This is still the English rule.⁸ However under a separate chapter of the Code entitled Certification of Case the trial court may, if the defendant consents, certify the case to the appellate court on any question of law arising upon a motion to quash an indictment or information which in the opinion of the trial court is so important as to require the decision of the appellate court.⁹ Thereupon all proceedings in the case are stayed up to the decision of the appellate court. The same may be done after verdict or finding of guilty but before sentence.

Review before conviction when an appeal is well founded might avoid the delay and expense of subsequent proceedings. On the other hand when the appeal is unfounded it delays the trial, causes additional expense to the state, and results in the greater possibility of several appeals. It is to the advantage of the appellate court to settle the whole case on one appeal rather than on several. It is to the advantage of the defendant and the trial court to settle the point at once. In some cases the defendant is sufficiently protected by writs of habeas corpus, mandamus or prohibition. The Code provision, it is to be noticed, does not confer an absolute right of review before conviction to the defendant. The trial court must first deem a question of law to be so important as to need the decision of the appellate court. Indeed such certification seems more intended for the benefit of the trial court than for that of the defendant. Furthermore such review

⁷ § 427.

⁸ Criminal Appeal Act, *supra* note 1, § 3.

⁹ C. 24, § 421.

is permitted only at two stages: upon a motion to quash an indictment or information and after verdict or finding of guilty but before sentence. The right of review before conviction is thus not as broad as the right conferred on the state. But this inequality as between the defendant and the state is more apparent than real. Where for instance the appeal is from an order sustaining a demurrer to an information because the statute under which it is brought is unconstitutional, the state is absolutely foreclosed from a consideration on the merits. On the other hand, though the defendant cannot appeal before conviction, nevertheless he obtains a trial on the merits and can then later appeal.

APPEAL BY THE STATE

In recent years one of the reforms in criminal appellate procedure most frequently urged has been the conferring upon the state of the right to appeal. This is done in the Code.¹⁰ The state may appeal from: (a) an order quashing an indictment or information, or any count thereof, (b) an order granting a new trial, (c) an order arresting judgment, (d) a ruling on a question of law adverse to the state where the defendant was convicted and appeals from the judgment, and (e) the sentence on the ground that it is illegal.¹¹

Such appeal may be taken within sixty days after the order or the sentence appealed from is entered.¹² An appeal is taken by filing with the clerk of the trial court a written notice stating what the state appeals from and by serving a copy of the notice of appeal on the defendant.¹³ The notice is to be served on the defendant if his place of residence is known or if he is imprisoned in the county; or, if not, on the counsel, if he had one, who appeared for him at the trial if he lived or practised in the county.¹⁴ If either of these is impossible, service is to be by publication.

When the state appeals after conviction, a judge of the trial court or a justice of the appellate court may in his discretion admit the defendant to bail if the offense is bailable.¹⁵ An appeal by the state does not stay the operation of an order in favor of the defendant except when the appeal is from an order granting a new trial.¹⁶

¹⁰ § 423. See Miller, Appeals by the State in Criminal Cases, 36 Yale L. J. 486 (1927).

¹¹ § 428.

¹² § 430. But if the state appeals where the defendant was convicted and appeals from the judgment, such appeal is to be taken within thirty days from the date when notice of appeal is filed by the defendant.

¹³ § 431.

¹⁴ § 433. Under § 434 the appellee may waive his right to a notice. ¹⁵ § 439. ¹⁶ § 441.

When notice of appeal is filed by the state the trial court is to direct the stenographic reporter to transcribe whatever parts of his notes that the prosecuting attorney directs.¹⁷ Further portions of the notes may be transcribed on the direction of the trial court upon the request of counsel for the defendant. Upon notice of appeal being filed by the state the clerk of the trial court is within twenty days, unless the trial court grants a longer time, to transmit to the appellate court the appeal papers which are to consist of certified copies of the notice of appeal, pleadings and entries of record made by the clerk specified by the prosecuting attorney or directed by the court upon application of the defendant, and such portions of the notes of the stenographic reporter as the prosecuting attorney shall specify or the court direct upon application of the defendant.¹⁸ A failure of the clerk to transmit all the appeal papers within the time limit is not to prejudice the rights of the parties; but the appellate court may on its own motion, or is on the motion of either party to direct the clerk to transmit such papers.¹⁹ Upon appeal from any order the appellate court may affirm or reverse such order.²⁰ Upon appeal from a sentence on the ground that it is illegal the court is either to approve such sentence or to correct to correspond to the verdict.

Appeal by the state finds almost no support in history. Appeal is a recent development, and by many regarded only as a necessary evil, even with respect to the defendant. The King may not appeal in England. Appeal by the state does not from a strictly logical standpoint violate the rule against double jeopardy since the defendant has been in no jeopardy until he has been legally tried. An appeal may be regarded as a continuation of the original proceeding. The double jeopardy doctrine grew up before appeals existed, hence has no necessary application to them. However, except in Connecticut, appeals after acquittal are regarded as violating double jeopardy provisions. As to other appeals, as for instance from an order quashing an indictment, there is no jeopardy even under existing rules. The view is usually taken, however, that the state may appeal only when expressly authorized by statute.

If appeal by the state is to be permitted the least objectionable form is that from orders of the court, such as an order quashing an indictment or sustaining a demurrer thereto, especially where the ground of such order is that the statute under which the indictment was drawn is unconstitutional. Where the ground of such order is unconstitutionality the state is foreclosed from any further prosecution for the crime. However, other

¹⁷ § 446.

¹⁸ § 449.

¹⁹ § 451.

²⁰ § 460.

trial judges would not have to follow such decision. Moreover, even such appeal, if it fails, causes hardship to the defendant. The ultimate disposition of the case is delayed. The defendant has to pay the expenses of defending an appeal. The proponents of state appeal may retort that the state may compensate him, but few things are harder to secure than an adequate system of appeal *forma pauperis*. It is unfair to require the defendant to suffer because of the mistakes of the trial court. The analogy of civil appeals, which are themselves but necessary evils, is not *à propos* since neither life nor liberty is at stake, the likelihood of indigence of the defendant is not so great, the defendant is not imprisoned or required to give bail on appeal, and there are less preliminary proceedings. The same hardship exists as to appeals from other orders of the court. New trials ought only be grantable by the appellate court. The trial court should not be asked to correct errors already considered by it. There is a duplication of effort when the appellate court again reviews such errors. The trial court is not a fair tribunal to pass on its own errors. On the other hand, because of corruption or false sentimentality it may grant new trials where none is called for. The Code, however, permits the trial court to grant new trials.²¹ An appeal where the defendant also appeals is a very limited appeal since the defendant must take the initiative. Appeal from sentence would be unnecessary except in rare cases if sentence were imposed by a disposition tribunal with appeal possible only for arbitrariness, corruption and lack of support in the evidence. The Code wisely makes no provision for appeal after acquittal to lay down the law. Such appeals really call on the court for advisory opinions. The defendant, not having his life or liberty at stake, is not likely to be represented at the hearing, so that the case is moot. The defendant is put in an anomalous position since while he is free the appellate court may decide that he ought not to be. There is no agreement as to what sort of questions should be taken up. There is rarely an incentive for a prosecuting attorney to take such an appeal.

Appeal after acquittal seems an undue harassing of the defendant. So strongly is this felt in England that even upon an appeal from a conviction the Court of Criminal Appeal may not order a new trial. The Code makes no provision for such appeal.²² It may be granted that the absence of any

²¹ § 361. This section is criticized by Sir William Brunyate. The American Draft Code of Criminal Procedure, 1930, 49 L. Quart. Rev. 192, 203 (1933).

²² But a new trial after an acquittal would be possible under the American Law Institute Administration of the Criminal Law (tent. draft n. 2 (1932), § 28: "When the defendant has been acquitted, and in the course of the trial a material error has been made to the prejudice of

state appeal results under the existing system in the occasional escape of guilty defendants. The remedy, however, does not consist in allowing the state to appeal. It consists rather in better prosecuting attorneys, better judges and judicial organization and improvement of the bar from which defense attorneys are drawn. Even where state appeal is permitted it is seldom resorted to. It must therefore be concluded that such appeal is both unnecessary and undesirable.

TIME AND MANNER OF TAKING APPEAL

Review is to be only by one method, appeal, except where a case is certified up to the appellate court by the trial court.²³ Writs of error and of *certiorari* may no longer be employed. In states where the state constitution guarantees the right to a writ of error, this will require a constitutional amendment. The use of a single method of appeal seems desirable since it makes for greater simplicity and less chances for falling into error.

The defendant may appeal within sixty days after the judgment or sentence appealed from is entered.²⁴ Where appeal is from both judgment and sentence it may be taken within sixty days after the entering of sentence. A later appeal from the same trial lies in only one case, namely, where a motion for a new trial based on the ground of newly discovered evidence is made and denied after the time for taking an appeal has expired.²⁵ The defendant may appeal within sixty days after the denial of such motion.

The Code lays down much too long a time in which to appeal.²⁶ Furthermore, such time is to run from the entry of judgment or sentence instead of from the verdict. In England an appeal must be taken within ten days after the verdict.²⁷ Under the rules governing procedure after verdict in the federal courts just adopted by the Supreme Court appeals must be taken within five days after entry of judgment of conviction.²⁸

the State, the State shall be entitled to a new trial." The American Law Institute, however, has not approved the proposal and the Reporter is to prepare a proposed final draft for presentation at a later meeting. 18 A.B.A.J. 156, 365 (1932).

²³ § 422.

²⁴ § 429.

²⁵ Under § 362 a motion for a new trial on the ground of newly discovered evidence may be made within one year after the rendition of the verdict or the finding of the court or at a later time if the court for good cause permits.

²⁶ This and a number of other criticisms is made by Sir William Brunyate, 49 L. Quart. Rev. 192, 204 (1933).

²⁷ Criminal Appeal Act, *supra* note 1, § 7 (1).

²⁸ Rule III, 291 U.S. n. 3, Official Reports of the Supreme Court, Preliminary Print, p. II.

The defendant takes his appeal by filing with the clerk of the trial court a written notice stating what he appeals from and by serving a copy of the notice of appeal on the prosecuting attorney.²⁹ The appellee may waive his right to a notice of appeal.³⁰ The Supreme Court rules provide that appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney.³¹ In England blank forms of notices of appeal or of application for leave to appeal are furnished all prisoners, and defendants not in prison may secure forms from the registrar of the Court of Criminal Appeals.³² When completed the forms are to be sent to the registrar of the Court, who then communicates with the clerk of the court where the conviction took place.³³

Upon the filing of the notice of appeal by the defendant the trial court is to direct the stenographic reporter to transcribe his notes of the proceedings.³⁴ The rules thus imply the existence of a stenographic reporter. The reporter is then to file his notes and the transcript thereof with the clerk of the trial court. If either party questions the correctness of the notes, the question is to be settled by the court.

Under the federal rules the clerk of the trial court is immediately to forward the duplicate notice of appeal to the clerk of the appellate court.³⁵ The appellate court is, subject to the rules, to have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal. The clerk of the trial court is immediately to notify the trial judge of the filing of the appeal and the trial judge is at once to direct the appellant and the United States Attorney to appear before him and is to give directions as to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.³⁶ There is no system of official reporting in the federal courts. In England it is the duty of the registrar of the Court of Criminal Appeals to perfect the appeal, prepare the entire record, and take the proper steps to bring it on for hearing.³⁷

²⁹ §§ 431 and 432. In states where the attorney general may represent the state, service is also to be on him.

³⁰ § 434.

³¹ Rule III, p. III.

³² Criminal Appeal Act, *supra* note 1, § 15 (4).

³³ Criminal Appeal Rules (1908), rule 20.

³⁴ § 445.

³⁶ Rule VII, p. IV.

³⁵ Rule IV, p. III.

³⁷ Criminal Appeal Act, *supra* note 1, § 15 (1).

Within twenty days after the filing of notice of appeal unless a longer time is granted by the trial court, the clerk of the trial court shall, without charge to the appellant, transmit to the clerk of the appellate court the appeal papers which are to consist of certified copies of the notice of appeal, the pleadings, entries required to be made by the clerk, a transcript of the stenographic reporter's notes and copies of documents offered or received in evidence, and a record of any proceedings upon a motion for a new trial or in arrest of judgment.³⁸ No provision is made as in England for sending up the judge's notes and report though these may be of the greatest value.³⁹ The parties may stipulate in writing for the omission of any of these papers. What appeal papers are to be transmitted and the time and manner of transmission on appeal from sentence are to be specified in a rule of court.⁴⁰

Under the federal rules when it appears that the appeal is to be upon the clerk's record of the proceedings, that is, upon the indictment and other pleadings and the orders, opinions, and judgment of the trial court, the trial judge is to direct the appellant to file with the clerk of the trial court, within the time stated, an assignment of errors, and is to direct the clerk to forward promptly, with his certificate, the clerk's record of proceedings and the assignment of errors, and the appellate court is at once to set the appeal for argument.⁴¹ In other cases the appellant is within thirty days after the taking of the appeal, or within such further time as is fixed by the trial judge during the running of such thirty days, to procure to be settled and file with the clerk of the trial court, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record of proceedings, and is to file within the same time an assignment of the errors of which he complains.⁴² Thereupon the clerk is to transmit the bill of exceptions and assignment of errors together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court.

The Code rules seem superior to the Supreme Court rules under which a narrative record with its possibilities of controversy may still be employed. A record in question and answer form is easier and cheaper to prepare. A more accurate picture of the proceeding below is obtained. If more work is demanded of the appellate court, it is work they ought to perform. But the use of abstracts and helpful briefs will eliminate any increase in the work of the court.

The requirement of an assignment of errors is abolished.⁴³ The appel-

³⁸ § 447.

⁴⁰ § 448.

⁴² Rule IX.

³⁹ Criminal Appeal Act, *supra* note 1, § 8.

⁴¹ Rule VIII.

⁴³ § 435.

lant is, however, required to state the grounds of his appeal in his brief, which is to be filed and a copy of it given to the appellee within a time fixed by rules of court. Other grounds of appeal may be presented on the argument of the appeal in the discretion of the appellate court provided that it can be done without prejudice to the appellee. Such a provision by itself is not enough, however. An improved bar should make the argument of additional grounds extremely infrequent.

The federal rules still retain separate assignments of errors.⁴⁴ In addition the appellant in his notice of appeal is to set out a succinct statement of the grounds of appeal.⁴⁵ In his assignment of errors he may amplify or add to the grounds stated in the notice of appeal. In England the appellant is also to set out his grounds in his notice of appeal.⁴⁶ This requirement of setting forth the grounds of appeal at the time the appeal is taken should decrease the number of frivolous appeals. The issues on appeal are crystallized at an early stage. On the other hand, the requirement for such prompt action may result in the defendant's setting forth numerous and general specifications, whereas, if he had more time, he would set forth only a few objections of a specific nature.

HEARING

Appeals are to be heard and decided by the appellate court at the earliest time possible with due regard to the rights of the parties.⁴⁷ Criminal appeals are to have precedence over other appeals and are to be placed first upon the calendar for hearing.⁴⁸ The federal rules also give priority to criminal appeals.⁴⁹ Appeals in cases where a death sentence has been imposed are to have precedence over all other appeals. The defendant need not be present during the hearing of the appeal.⁵⁰ But where appeal is on issues of fact his presence may expedite the disposition of the appeal. He may be and is frequently present in such cases in England.⁵¹ The court is not to reverse without argument by the appellant, either oral or upon written brief.⁵² This may work hardship on poor appellants in the absence

⁴⁴ Rules VIII and IX, p. IV.

⁴⁵ Rule III, p. III.

⁴⁶ Form XXXIV, set out in Archbold, Pleading, Evidence and Practice in Criminal Cases (28th ed. 1931), 350.

⁴⁷ § 453.

⁴⁸ § 454.

⁴⁹ Rule X, p. V.

⁵⁰ § 455.

⁵¹ Criminal Appeal Act, *supra* note 1, § 11.

⁵² § 456. In England, the appellant may set out his case and argument fully in his notice of appeal. See Form XXXIV, Archbold, Pleading, Evidence and Practice in Criminal Cases (28th ed. 1931), 350, 351.

of an adequate system of appeal *forma pauperis*. The court may order the rehearing of an appeal.⁵³ A properly organized court will rarely exercise such power.

RULES

Rules for regulating the practice and procedure in appeals consistent with the provisions of the Code may be made by the appellate court.⁵⁴ This is entirely sound since there is no phase of procedure which can be better regulated by rules of court than appellate procedure. The legislature is wholly unsuited to deal with the subject. The Court of Criminal Appeal may also lay down rules,⁵⁵ as may the federal circuit courts of appeals under the Supreme Court rules.⁵⁶

DISMISSAL

The appellate court may dismiss the appeal if the appellant does not prosecute it as required by rules of court.⁵⁷ When an appeal is dismissed the clerk of the appellate court is to file with the clerk of the trial court a certificate that the appeal has been dismissed. If a defendant who is at large on bail pending the appeal breaks the condition of the undertaking that he will duly prosecute his appeal, the appellate court in addition to declaring the undertaking forfeited, may dismiss the appeal and may remand the case to the trial court for such further proceedings as are proper.⁵⁸ Under the federal rules the circuit court of appeals may at any time, upon five days' notice, entertain a motion to dismiss the appeal.⁵⁹ However, the court also has the authority on five days' notice to entertain a motion for the correction, amplification, or reduction of the record filed with the appellate court, and may issue such directions to the trial court in relation thereto as may be appropriate.⁶⁰ A too strict adherence to formalities may result in unjust dismissals. The English Criminal Appeal Rules wisely provide that non-wilful non-compliance with the rules may be waived and permit the appellant to correct his error and go on with his appeal if the court thinks proper.⁶¹

⁵³ § 469.

⁵⁴ § 470.

⁵⁵ Criminal Appeal Act, *supra* note 1, § 18.

⁵⁶ Volume 291 U.S. n. 3, Official Reports of the Supreme Court, Preliminary Print, Rule XII, p. VI. Rules of the Court of Appeals for the District of Columbia, adopted Oct. 27, 1934, are set out in 73 F. (2d) X (1934).

⁵⁷ § 452.

⁵⁸ § 442.

⁵⁹ Rule IV, p. III.

⁶⁰ Rule IX, p. V.

⁶¹ Criminal Appeal Rules (1908), rule 45.

STAY OF EXECUTION

Execution of a sentence of death is stayed upon the taking of an appeal.⁶² Execution of any sentence other than death is stayed upon filing with the clerk of the trial court a certificate of the trial judge or a justice of the appellate court that there is probable cause for reversing the judgment or modifying the sentence. The application for a certificate of probable cause is to contain a statement of the grounds upon which it is based.⁶³ A copy of the application is to be given to the prosecuting attorney. If the certificate is granted, it is to contain a statement of the grounds upon which it was granted. If execution of a sentence of imprisonment has begun before a stay is granted, the granting of such stay is to suspend the further execution of the sentence.⁶⁴ If a stay is granted, but the defendant is not at large on bail, he is to remain in the custody of the official in whose custody he then is.⁶⁵

Under the federal rules an appeal from a judgment of conviction stays the execution of the judgment, unless the defendant, pending his appeal, elects to enter upon the serving of his sentence.⁶⁶ 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.⁶⁷ He is to wear a prison dress of a different color from that worn by other convicted prisoners. He is to be employed at work of an industrial or manufacturing nature. If released on appeal he is to be paid a reasonable sum for his work.

BAIL PENDING APPEAL

Where the penalty is a fine only, a defendant upon filing a certificate of probable cause is entitled to bail pending appeal as a matter of right from any official having authority to admit to bail.⁶⁸ Where any other sentence than a fine is imposed, bail lies as to bailable offenses in the discretion of the trial court or a justice of the appellate court.⁶⁹ When a defendant thus released on bail has made default he shall be again admitted to bail only upon showing a proper excuse for default.⁷⁰ The condition of the undertaking when the defendant is admitted to bail shall be that he will duly prosecute his appeal and that he will surrender himself in case of affirmance, dismissal, or reversal and remanding for a new trial, and that he will not depart without leave.⁷¹

Under the federal rules bail may be granted by the trial judge or by the

⁶² § 436.

⁶⁶ Rule V, p. III.

⁶³ § 437.

⁶⁷ § 14 (1).

⁶⁴ § 444.

⁶⁸ § 438 (1).

⁷⁰ § 440.

⁶⁵ § 443.

⁶⁹ § 438 (2).

⁷¹ § 83.

circuit court of appeals, or, where the circuit court is not in session, by any judge of the court or by the circuit justice.⁷² It must appear, however, that the appeal involves a substantial question which should be determined by the circuit court. The circuit court may at any time upon five days' notice entertain a motion to vacate or modify any order for the granting of bail.⁷³ In England the Court of Criminal Appeal or a judge thereof may admit to bail.⁷⁴ Bail is rarely granted.⁷⁵

APPEAL FORMA PAUPERIS

The Code nowhere expressly makes provision for indigent defendants. It does, however, provide rather strangely for the payment by the state of certain appeal items in all cases whether the appellant is rich or poor. The appeal papers including a transcript of the stenographic reporter's notes are to be transmitted by the clerk of the trial court to the clerk of the appellate court without charge to the appellant.⁷⁶ Upon application therefor the clerk of the trial court is to deliver to the defendant or his attorney a copy of the appeal papers.⁷⁷ In the other direction is a provision that judgment may not be reversed without argument by the appellant, either oral or upon written brief.⁷⁸

The Code lays down a very generous rule in providing for payment by the state for the appeal papers and for furnishing a copy of such appeal papers to the appellant, irrespective of the financial status of the appellant. In England an appellant able to pay must pay for a copy furnished him but not for the papers transmitted to the Court of Criminal Appeal.⁷⁹ If the appeal is well grounded it may be that the state should pay such expenses, though it is highly debatable whether there are not other claims upon the state more deserving of consideration. The defendant has to pay his own expenses in the trial court. If the appeal is without merit it is even more absurd to require that the state pay when the defendant is perfectly able to do so.

As to indigent defendants with meritorious cases there can be no objection to payment for the appeal papers by the state. In fact in such

⁷² Rule VI, p. III.

⁷³ Rule IV, p. III.

⁷⁴ Criminal Appeal Act, *supra* note 1, § 14 (2).

⁷⁵ Archbold, Pleading, Evidence and Practice in Criminal Cases (28th ed. 1931), 321.

⁷⁶ § 447.

⁷⁷ § 450.

⁷⁸ § 456.

⁷⁹ Criminal Appeal Act, *supra* note 1, § 16. However, shorthand notes of the trial are not taken in all cases. Archbold, Pleading, Evidence and Practice in Criminal Cases (28th ed. 1931), 327.

cases the state ought to furnish legal assistance as is done in England.⁸⁰ But where the appeal is not worthy of review there seems no good reason for furnishing legal aid or paying for the appeal papers. All that can be said for doing so is that a person who can afford to can take frivolous appeals. But the way to reduce such frivolous appeals and thus to secure equality between rich and poor is to authorize the appellate court to penalize frivolous appeals.

SCOPE OF REVIEW

The appellate court is to review all rulings and orders appearing in the appeal papers to the extent that it is necessary to do so in order to pass upon the grounds of appeal, whether any exception was taken in the trial court or not.⁸¹ The court is also to review all instructions to which an objection was made and which are alleged as a ground of appeal. The court in its discretion may also, if it deems that the interests of justice so require, review any other thing said or done in the case appearing in the appeal papers, including instructions to the jury. Where the insufficiency of the evidence to support the judgment is a ground of appeal the court is to review the evidence.⁸² It may review the evidence whether its insufficiency is a ground of appeal or not. Where the appeal is by a defendant sentenced to death the appellate court is to review the evidence whether its insufficiency is a ground of appeal or not.

Thus the Code, like the federal rules, does not provide for review of the facts in the English sense, that is to say the hearing of witnesses and new evidence in the appellate court.⁸³ It does, however, provide for a review of the facts appearing in the record and transcript. In this sense, the sense in which it is so often used in the United States, review of the facts is permitted. The possibility of review of the facts at least in this sense, and better in the English sense, seems wholly desirable. It permits an appeal on the merits. Errors of fact do occur, as is well brought out in Professor Borchard's *Convicting the Innocent*. When they do occur their effects are likely to be far more serious than errors of law. Errors of law are often hard to distinguish from errors of fact.

Though the appellate court should have the power to review errors of fact it should not often be called upon to do so. The appellate court is further separated both as to time and place than is the trial court. The trial judge sees and hears the witnesses. Appellate courts are already overburdened with examination of legal issues. Review of the facts would

⁸⁰ Criminal Appeal Act, *supra* note 1, § 10.

⁸¹ § 457 (1).

⁸² § 457 (2).

⁸³ Criminal Appeal Act, *supra* note 1, § 9.

be tiresome and time-consuming. It does not develop trial standards nor the law. To avoid abuse of the right, possibly the English rule of allowing such appeals only in the discretion of the trial and appellate courts should be adopted though it is hard to see how an appellate court could act on such an application without as detailed a record of the case as would be involved in appeal of right. However, a single judge might examine the record, and no oral argument be allowed, nor any presentation of the other side. The power to penalize appeals without merit might sufficiently discourage frivolous appeals.

The Code provision making review discretionary as to matters not objected to below seems sound. If the question had been raised below the error might have been corrected immediately. Defendants might purposely hold back points in order to raise them on appeal. The usual conception of the function of an appellate court is that it exists to correct errors made below. To avoid hardship on the defendant the Code permits the appellate court to review matters not raised below nor preserved in the appellate court. This remedy is not far-reaching enough, however. The real remedy is to elevate the standards of the bar so that lawyers will almost invariably raise the question below.

REVIEW OF SENTENCE

The appellate court may review the sentence when there is an appeal from the sentence.⁸⁴ If an illegal sentence has been imposed upon a lawful verdict or finding of guilty by the trial court, the appellate court is to correct the sentence to correspond to the verdict or finding, upon an appeal by the defendant from sentence or even from a judgment of conviction.⁸⁵ In England an appeal from the sentence even as to legality is only by leave of the Court of Criminal Appeal.⁸⁶

The appellate court may review not only the legality but also the fairness of the sentence upon an appeal from the judgment or from the sentence on the ground that it is excessive.⁸⁷ It may reduce the extent or duration of the penalty if in its opinion the conviction is proper but the punishment imposed is greater than, under the circumstances, of the case it ought to be.

If the appellate court is to have the power to review the sentence it seems a mistake not to permit it to increase as well as to decrease the sen-

⁸⁴ § 457 (1).

⁸⁵ § 459 (1).

⁸⁶ Criminal Appeal Act, *supra* note 1, § 3 (c).

⁸⁷ § 459 (2).

tence.⁸⁸ Frivolous appeals would then be discouraged. In England the Court of Criminal Appeal may increase the sentence when the appeal is from the sentence.⁸⁹ In Scotland the appellate court may increase the sentence whether appeal is from the sentence or conviction thus making it possible to discourage any kind of frivolous appeal.

As an original proposition, however, it seems questionable whether appellate courts should have power to review the fairness of sentences except for corruption, arbitrariness and want of support in the evidence. Appellate judges rarely know anything of criminology, social case work, psychology and psychiatry. They are, therefore, not the best fitted persons to determine what the proper sentence should be for individual offenders. They often fail to follow their own previously stated standards of fairness. The sentencing function should be separated from that of guilt finding and placed in the hands of a group of experts to be known as a disposition tribunal. The decision of this tribunal should then be final except for corruption, arbitrariness and want of support in the evidence.

TECHNICAL REVERSALS

The appellate court is not to reverse or modify any judgment unless after an examination of all the appeal papers it is of the opinion that error was committed which injuriously affected the substantial rights of the appellant.⁹⁰ There is to be no presumption that an error has affected the substantial rights of the appellant.

One of the most frequent criticisms of appellate courts has been that they reverse for purely technical reasons. It should be remembered, however, that comparatively few cases are appealed. But the fewness of appeals is not a wholly satisfactory answer. A single erroneous decision may affect hundreds or thousands of trials. Such decisions may encourage the taking of frivolous appeals with the hope of further technical reversals. The maintenance of trial court standards demands that the appellate court consider not only the guilt of the defendant but also whether or not

⁸⁸ An effort to allow the court to increase the sentence was defeated at the meeting of the Institute. 8 Proc. Amer. L. Inst. 267 (1930).

⁸⁹ Criminal Appeal Act, *supra* note 1, § 4 (3).

⁹⁰ § 461. This section is objected to by Sir William Brunyate, The American Draft Code of Criminal Procedure, 1930, 49 L. Quart. Rev. 192, 204 (1933). He preferred the English mode of stating the rule, which according to him is that before condoning an irregularity of procedure, the court should be able to satisfy itself affirmatively that no substantial miscarriage of justice has resulted therefrom. If this is the English rule, it would seem to put too great a burden on the prosecution. Likely, however, the mode of stating the rule is of far less importance than the attitude of the court. Very probably the English Court of Criminal Appeal arrives at less technical decisions than American appellate courts in jurisdictions where the Code rule exists.

he got a fair trial. Insistence on certainty in the law carries in its wake the drawing of sharp lines. Lack of the power to review a case fully or to dispose of it finally may result in technical decisions.

Only the most uncritical optimist could hope, however, that the mere passage of a statute forbidding reversals except for substantial error would do away with technicalities. The attitude of the appellate court must be changed. The addition of occasional trial duties may help. A unified court system would be an advance. Criminal procedure should be simplified and laid down by rules of court. Appellate judges should be appointed. They should write fewer and shorter opinions. Trial judges should be appointed and given the power to control the trial of the case. They should be subject to supervision. More frequent waivers of trial by jury would eliminate or reduce reversals for misdirection and erroneous rulings on the admission or exclusion of evidence. Prosecuting attorneys should be appointed for long terms and subject to central supervision. The criminal bar must be improved. Law schools must engage in research in criminal law and procedure. Judicial councils and ministries of justice should be created and fostered.

POWER OF APPELLATE COURT ON APPEAL FROM CONVICTION

The appellate court is given the power to reverse, affirm or modify the judgment upon appeal from a judgment of conviction.⁹¹ When the judgment is reversed it is either to order the discharge of the defendant or, if it thinks proper, to grant a new trial.⁹² When the appellate court orders a new trial it is to direct that such trial be had in the court from which the appeal was taken, unless the defendant applied in such court for reversal and the appellate court thinks that the trial court should have granted such application, in which case the appellate court is to direct in what court the new trial shall be had.⁹³ The new trial is to proceed in all respects as if no former trial had been had.⁹⁴ The former verdict or finding is not to be used or referred to in evidence or argument on the new trial.

The power to order a new trial on reversal is in line with usual American practice. The Court of Criminal Appeal in England has no such power, however. The trial court cannot grant a new trial there either. In many cases where there is a reversal and remand for a second trial the defendant is never brought to trial. The power to order such a new trial seems necessary, however, to avoid the discharge of guilty defendants who were tried unfairly. But the whole administration of the criminal law ought to be

⁹¹ § 458.

⁹³ § 465.

⁹² § 463.

⁹⁴ § 466.

improved so that not more than one trial is necessary. There is much to be said for the English view that to allow a second trial is to harass the defendant.

The Code does not, as does the English Criminal Appeal Act,⁹⁵ authorize the appellate court to change a verdict to guilty of some other count or part alleged in the indictment or to some other degree of an offense charged in the indictment. To allow this would increase the power of appellate courts finally to dispose of cases.

ENTERING OF JUDGMENT

All judgments and orders of the appellate court are to be entered on the minutes.⁹⁶ It is suggested that if in any state it is thought proper that the court shall file written opinions in all cases this section should be amended to require such practice. A certified copy of the entry of judgment is to be transmitted to the clerk of the trial court and filed by him.⁹⁷

The suggestion as to the writing of opinions seems unwise. Opinions are not needed in all cases. Where a case is affirmed on well established principles no opinion should be required. The writing of opinions takes much of the time of the court, indeed in many cases more than any other stage of the appellate process, such as the hearing and the conferences. The need of written opinions often delays the decision of the appeal a month or two or more after the hearing. The English practice of immediate decision right after the hearing, delivered orally by the court, except in cases of unusual difficulty and grave importance, seems preferable.

SUMMARY

The American Law Institute Code of Criminal Procedure sets out a system of appeal and appellate procedure containing a number of defects but for the most part one representing real improvement over existing American systems.

Several defects in the Code appear. The Code does not go far enough in recommending discretionary appeal to the court of last resort when decisions of the intermediate court may be reviewed by the court of last resort. Where there are intermediate appellate courts, criminal appeals should be taken up directly to the court of last resort. The Code also permits the state to appeal. This results in delay and expense to the defendant. No provision is made for assisting an indigent defendant to defend such appeal, or to compensate him if the appeal is unsuccessful. The Code gives the defendant too long a time to appeal and does not make such time run

⁹⁵ § 5 (1) and (2).

⁹⁶ § 467.

⁹⁷ § 468.

from the date of conviction. No provision is made for setting out the grounds of appeal in the notice of appeal. The prohibition of reversal without argument by the appellant either oral or upon written brief may result in hardship to indigent appellants. The Code makes no provision for legal assistance at the hearing of the appeal. On the other hand provision is made for the transmission of all the appeal papers including a transcript of the stenographic reporter's notes to the appellate court and for furnishing a copy of the appeal papers to the appellant without charge irrespective of his financial status or the meritoriousness of his appeal. No provision is made to furnish legal assistance at any stage. Provisions for penalizing frivolous appeals by increasing the sentence or bringing the appeal on for summary hearing are not made. No provision is made for the hearing of witnesses or new evidence in the appellate court.

The appellate court is authorized to review the fairness of the sentence but can only decrease it. Provision for appellate review of fairness is sound in the absence of a disposition tribunal. The setting up of a disposition tribunal would dispense with the necessity of appellate review of fairness except for corruption, arbitrariness, and lack of support in the evidence.

No provision is made in the Code to allow the appellate court to change a verdict to guilty of some other count or part alleged in the indictment or to some other degree of an offense charged in the indictment. The suggestion that written opinions in all cases be required seems unsound since it results in delay and congestion.

But the advantages of the Code outweigh its disadvantages. Only one method of review, appeal, is to be allowed. Writs of error and of *certiorari* are abolished. Appeal is to be by notice of appeal filed in the trial court and served on the appellee. The trial court is to direct the stenographic reporter to transcribe his notes of the proceedings immediately upon the filing of the notice of appeal. Thus the narrative form of the record is not employed and the appeal papers are quickly and cheaply prepared. Preparation is taken out of the hands of the parties and placed under the direction of the judicial organization. Bulkiness of the record is avoided by allowing the parties to stipulate for the omission of part of the appeal papers. No separate assignment of errors is required and the appellant is required to state the grounds of his appeal in his brief. Other grounds are permitted at the hearing of the appeal in the discretion of the appellate court where this does not prejudice the appellee. Criminal appeals are to be heard early and given precedence over civil appeals, and appeals where the sentence is death are given the earliest hearing of any. The appellate

court is permitted to make rules of practice and procedure upon appeal not inconsistent with the Code rules. The lax granting of bail is checked. No right to bail is granted except in cases where the penalty is a fine. In other cases of bailable offenses it is to lie in the discretion of the trial court or a justice of the appellate court. The appellate court is required to review the evidence, where the insufficiency of the evidence is a ground of appeal, authorized to review it whether made a ground of appeal or not and required to review it in death cases whether made a ground or not. Allowing the court to review matters not objected to seems sound as otherwise hardship may result though the basic remedy is to improve the bar so that such slips will not be made. The appellate court is authorized to correct legal mistakes made in sentencing. It is not to reverse any judgment for errors that are not prejudicial. Such a provision, however, expresses merely a pious hope unless it is accompanied by a change in judicial attitude.

The Code does not attempt to deal with such matters as the organization or personnel of the appellate court. Yet proper organization may be as essential or more essential than the rules of procedure which govern appeals. But the highest importance must be assigned to personnel. Judges of character and ability can accomplish much in spite of antiquated procedure and organization. Finally it must be remembered that appellate courts do not exist *in vacuo*. Reforms in appellate procedure, organization and personnel must be accompanied by improvements in the work of prosecuting attorneys, trial courts, and the bar. An enlightened public opinion possible only in a favorable intellectual climate must create a demand for improvement.