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THE FEDERAL CRIMINAL APPEALS RULES AS INTERPRETED IN THE DECISIONS

LESTER B. ORFIELD*

On February 24, 1933, an act of Congress was approved which authorized the Supreme Court to prescribe rules of practice and procedure with respect to proceedings after verdict in criminal cases.¹ On March 8, 1934, an amendatory act was approved so as to include in Section 1 proceedings after "finding of guilt by the court if a jury has been waived, or plea of guilty."² The amendatory act also included proceedings in the Supreme Court of the United States, and added a proviso "that nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for a withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed." Section 2 of the original act was amended so as to authorize rule making with respect to applications for writ of certiorari. The Supreme Court has pointed out that the legislative history of the 1934 amendment shows that it was made because it would not be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from that in which there is a finding of guilt by the court on the waiver of a jury.³

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¹ 47 STAT. 904 (Feb. 24, 1933).

² 48 STAT. 399 (March 8, 1934). "... the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided*, That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which super-seedeas or bail may be allowed.

"Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

³ *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941).

Several cases have referred to the rules as the "Criminal Appeals Rules."⁴ In order to aid the Court a draft of proposed rules was submitted on May 26, 1933, by the Attorney General of the United States.⁵ The Supreme Court promulgated the rules by what has been referred to by Chief Justice Hughes as the "promulgating order."⁶

The rules "have the force and effect of federal statutes";⁷ but it does not follow that "every act or proceeding taken by the trial court which may not be in strict conformity with these rules is necessarily void as done or performed without jurisdiction."⁸ For instance, even though there were improper delay in imposition of sentence, the sentence would still be valid.

The rules make no mention of motions to vacate judgment or of appealable orders. "Hence the appealability must be determined by Federal law."⁹ An order denying defendant's motion to set aside a judgment of conviction and permit defendant to withdraw his plea of guilty made in the same term in which the challenged judgment was entered is not appealable.

An allegation that Rule II(4) is unconstitutional, as depriving the defendant of the right of trial by jury in allowing him only ten days to withdraw his plea of guilty, will not be considered, where it does not appear that the defendant at any time sought to withdraw his plea.¹⁰

The rules "cannot destroy or restrict the right of appeal but may prescribe the time for taking the appeal."¹¹

A defendant may take his appeal in his own person by filing his

⁴ *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938); *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937); *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937); *Evans v. United States*, 90 F. (2d) 851, 852 (C. C. A. 5th, 1937); *Long v. United States*, 90 F. (2d) 482, 483 (C. C. A. 9th, 1937) ("Criminal Appeals Rule"); *Young v. United States*, 88 F. (2d) 305 (C. C. A. 10th, 1937) ("appellate criminal rules"); *United States v. Adamowicz et al.*, 82 F. (2d) 288 (C. C. A. 2d, 1936) ("appellate criminal rules of the Supreme Court"); *White et al. v. United States*, 80 F. (2d) 515, 516 (C. C. A. 4th, 1935). The late Federal Circuit Judge Rufus E. Foster gave an address to the Judicial Conference of the Fifth Circuit entitled "Criminal Appeals Rules," published in 1 Fed. Rules Dec. 261-263 (1939).

⁵ *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938). The rules are set out in 292 U. S. 660, 78 L. ed. 1512 (1934). They are also set out as amended with notes to the decisions in 18 U. S. C. A. §688 (Supp. 1942).

⁶ *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938); and see the majority opinion of Douglas, J., in *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941).

⁷ *Gallagher v. United States*, 82 F. (2d) 721 (C. C. A. 8th, 1936). The court cited as in accord: *Fewox v. United States*, 77 F. (2d) 699 (C. C. A. 5th, 1935). See also *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938); *Wainer v. United States*, 87 F. (2d) 77, 79 (C. C. A. 7th, 1937); *Wolpa v. United States*, 84 F. (2d) 829, 830 (C. C. A. 8th, 1936).

⁸ *Berkowitz v. United States*, 90 F. (2d) 881, 884 (C. C. A. 8th, 1937).

⁹ *Bensen v. United States*, 93 F. (2d) 749, 750 (C. C. A. 9th, 1937).

¹⁰ *Williams v. Sanford*, 110 F. (2d) 526, 527 (C. C. A. 5th, 1940).

¹¹ *Meyers v. United States*, 116 F. (2d) 601, 603 (C. C. A. 5th, 1941). See also *Fewox v. United States*, 77 F. (2d) 699, 700 (C. C. A. 5th, 1935).

notice of appeal, and may also proceed in his own person with the perfection and presentation of his record on appeal.¹²

The purpose of the rules is to force speedy termination of criminal proceedings and to expedite appeals.¹³ The rules were not made for the benefit of the litigant who invokes them, but to serve the general good by simplifying and expediting trials. Unless the violation of a rule of procedure by the court is fundamental, the litigant should not be allowed to complain.

PROMULGATING ORDER

Order, paragraphs 1 and 2. Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict" (Act of February 24, 1933, c. 119, U. S. C., Title 28, Sec. 723(a)).

It is ordered on this seventh day of May, 1934, that the following rules be adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

The rules do not apply to appeals from the police court of the District of Columbia but only to those from the District Court for the District of Columbia.¹⁴ An Act of Congress of June 7, 1934, changed the name of the Court of Appeals of the District of Columbia to the United States Court of Appeals for the District of Columbia.¹⁵ An Act of June 25, 1936, changed the name of the Supreme Court of the District of Columbia to District Court of the United States for the District of Columbia.¹⁶

A circuit court of appeals held that the rules applied to criminal cases in the United States District Court for the Territory of Hawaii.¹⁷

¹² *Boykin v. Huff*, 121 F. (2d) 865, 873-874 (U. S. Ct. of App. D. C. 1941), noted (1941) 27 IOWA L. REV. 133, (1941) 14 ROCKY MT. L. REV. 69, (1942) 27 WASH. U. L. Q. 272.

¹³ *Ex parte United States*, 101 F. (2d) 870, 876 (C. C. A. 7th, 1939), note 18, *aff'd* by a four to four vote without an opinion, *United States v. Stone*, 308 U. S. 519, 60 S. Ct. 177, 84 L. ed. 441 (1940).

¹⁴ *Clawans v. District of Columbia*, 89 F. (2d) 802, 804 (U. S. Ct. of App. D. C. 1937), *cert. denied*, 301 U. S. 692, 57 S. Ct. 794, 81 L. ed. 1348 (1937). This was held as to Rule IX, paragraph 4.

¹⁵ 45 STAT. 926 (June 7, 1934).

¹⁶ 49 STAT. 1921 (June 25, 1936).

¹⁷ *Mookini v. United States*, 92 F. (2d) 126, 127 (C. C. A. 9th, 1937).

This was because it had the jurisdiction of a district court of the United States, was by law required to proceed in the same manner as a district court, and appeals from that court to the circuit court were required to be taken in the same manner as appeals from the regular district courts. The Supreme Court reversed and held the rules inapplicable to the Territory of Hawaii.¹⁸ The Attorney General, in submitting a draft of proposed rules on May 26, 1933, to the Court at the request of the Court, had stated that there were not sufficient data at hand upon which to predicate proposals as to Hawaii and other Territories and possessions. It lay in the power of the Court under the rule-making statute to limit the application of the rules to the regular district courts and the District of Columbia. The term "District Courts of the United States" as used in the rules without an addition expressing a wider connotation describes the constitutional courts created under Article 3 of the Constitution. Territorial courts on the other hand are legislative courts and not district courts of the United States. Vesting a territorial court with jurisdiction similar to that vested in the district courts of the United States does not make it a "District Court of the United States." "Not only did the promulgating order use the term District Courts of the United States in its historic and proper sense, but the omission of provision for the application of the rules to the territorial courts and other courts mentioned in the authorizing act clearly shows the limitation that was intended."

The Criminal Appeals Rules do not as originally drawn apply to the Canal Zone.¹⁹

On March 17, 1941, the Supreme Court issued an order effective July 1, 1941, extending the operation of the rules to cases arising in the district courts of Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands, though not to the United States Court for China.²⁰ The order read as follows:

"It IS ORDERED, that the Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, promulgated by order of May 7, 1934 (292 U. S. 661), and amended by orders of May 24, 1937 (301 U. S. 717), May 31, 1938 (304 U. S. 592), and October 21, 1940 (311 U. S. 731), 18 U. S. C. A. following section 688, be and they hereby are made

¹⁸ *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938) (certiorari). The Act of February 13, 1925, 28 U. S. C. A. §§225, 230, allowing three months was therefore held to apply.

¹⁹ *Schackow et al. v. Government of the Canal Zone*, 104 F. (2d) 681, 682 (C. C. A. 5th, 1939). The court cited *Mookini v. United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. ed. 748 (1938).

²⁰ See 312 U. S. 721, 61 S. Ct. CLIII, 85 L. ed. 1560 (1941); 18 U. S. C. A. §688, p. 128 (Supp. 1941), for the order.

applicable to all proceedings after plea of guilty, verdict or finding of guilt by the trial court where a jury is waived, in criminal cases in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone and Virgin Islands, and in all subsequent proceedings in the United States Circuit Court of Appeals and in the Supreme Court of the United States.

"IT IS FURTHER ORDERED, that these rules shall be applicable to proceedings in all cases in such courts in which a plea of guilty shall be entered or a verdict or finding shall be rendered on or after the first day of July, 1941."

The Ninth Circuit Court of Appeals held in December 1937 that the Criminal Appeals Rules, particularly Rule III, apply to criminal contempts since, while there is no right to jury trial in all contempt cases, there may nevertheless be a plea of guilty in a criminal contempt.^{21*} Moreover, since there may be a jury trial in some criminal contempt cases, a contrary interpretation would result in two different methods of appeal in criminal contempt cases.

Where, however, in a criminal contempt case there was no plea of guilty, no verdict of guilt by a jury, and no finding of guilt by the court after waiver of jury, the Criminal Appeals Rules did not apply.²² The qualifying language of the rules, contrary to the argument by the government, does not designate merely the stage of the proceedings in criminal cases when the rules become applicable, but the rules describe the kind of cases to which they should be applied. The court reasoned as follows: The Act of March 8, 1934, amended the Act of February 24, 1933, which gave the Supreme Court rule-making power "with respect to any or all proceedings after verdict in criminal cases." The legislative history shows that the amendment in 1934 was made because it would not be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the court on the waiver of a jury. The original act covered only cases tried by a jury. "In light of this history and the language of the order promulgating the rules we conclude that the categories of cases em-

^{21*} *Wilson v. Byron*, 93 F. (2d) 577, 579 (C. C. A. 9th, 1937), noted (1938) 16 N. C. L. REV. 389. The court also relied on Section 2 of the act authorizing criminal appellate rules. 48 STAT. 399, §2 (1934), 28 U. S. C. A. §723(a) (1941). The statute provides that the right of appeal shall continue in those cases in which appeals are authorized by law, but that the rules promulgated by the Supreme Court with reference to the manner of taking appeals shall control. In accord that an appeal in a criminal contempt case is governed by the Criminal Appeals Rules see *McCrone v. United States*, 100 F. (2d) 322, 323 (C. C. A. 9th, 1938).

²² *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941). Followed as to an appeal from a judgment by the trial court convicting defendant of criminal contempt committed in the presence of the court. *United States v. Bollenbach*, 125 F. (2d) 458, 460 (C. C. A. 2d, 1942).

braced in the rules cannot be expanded by interpretation to include this type of case."²³

The Supreme Court does not deny that as to appeals from civil contempts, where the action is pending September 16, 1938, or later, appeal will be under the Federal Rules of Civil Procedure.²⁴

At any rate an Act of Congress of November 21, 1941, expressly extended the rule-making power of the Supreme Court to "proceedings to punish for criminal contempt of court."²⁵

Order, paragraph 3. It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, on or after the first day of September, 1934.

The rules do not apply to a judgment rendered March 30, 1934, since the rules had not yet become effective.²⁶ Hence a motion to remand a case to the district court for hearing a motion for a new trial on the ground of newly discovered evidence, first presented to the circuit court of appeals, would be denied.

RULE I. Sentence

Rule I, paragraph 1. After a plea of guilty, or a verdict of guilt by a jury or a finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 STAT. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

On May 24, 1937, the Supreme Court by order amended Rule I, paragraph 1, adding this sentence: "The judgment setting forth the

²³ *Nye v. United States*, 313 U. S. 33, 44, 61 S. Ct. 810, 813, 85 L. ed. 1172, 1178 (1941).

²⁴ *McCrone v. United States*, 307 U. S. 61, 59 S. Ct. 685, 83 L. ed. 1108 (1939). However, the case arose before September 16, 1938, and was therefore held governed by statutory rules of civil appeals. For the case below see *McCrone v. United States*, 100 F. (2d) 322 (C. C. A. 9th, 1938). See also *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941); Note, *Contempt of Court, Civil and Criminal, Review of Contempt Orders in the Federal Courts* (1938) 16 N. C. L. Rev. 389.

²⁵ 55 STAT. 779 (1941), 18 U. S. C. A. §689 (Supp. 1942).

²⁶ *Needham v. United States*, 73 F. (2d) 1, at 3 (C. C. A. 7th, 1934). Nor did the rules apply to a conviction on June 14, 1934. *Tinkoff v. United States*, 86 F. (2) 868, 880 (C. C. A. 7th, 1937) (as to supersedeas).

sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk."²⁷

Even though a sentence is imposed after great and inexcusable delay, habeas corpus would not lie, nor would a writ of prohibition lie to restrain the judge from imposing sentence on the ground that he had lost jurisdiction of the case.^{28*} Possibly the United States District Attorney could prosecute mandamus proceedings to require the judge to impose sentence. Where there is a postponement of sentence without cause it may be error, but the court still has jurisdiction. Although imposing a sentence to begin in the future is not a practice to be recommended, if a court had no jurisdiction to do so it could not impose consecutive sentences. This would be an undesirable restriction of power. A case may be continued to a subsequent term for sentencing. This was applied to a plea of guilty made on March 17, 1937, where sentence was imposed on May 26, 1938.

Rule I does not change, nor was it intended to change, the substantive law relative to jurisdiction.²⁹ There is no penalty attached to the rule. The rule was adopted for the purpose of expediting criminal cases after verdict. The rule requiring sentence without delay is not for the benefit of the defendant, who cannot complain if the government does not vigorously insist on a rule promulgated for its benefit. Neither can the surety on the bail complain of a violation of the rule. However, a suggestion in one case³⁰ that the rule is not for the benefit of a defendant, but for the benefit of the government, was rejected. It is equally important that the defendant have the benefit of the rule, and that upon his request, unless good cause to the contrary appears, the court should accommodate him by imposing sentence without delay. The Supreme Court in promulgating the rule had in mind the interest of the prisoner as well as of society. But the substantive law relative to jurisdiction remains unchanged. Hence a delay in imposing sentence does not strip the trial court of jurisdiction.

A study of certain cases decided before and after the adoption of the rules has shown the following intervals between verdict and sentence: in the First Circuit 5 days before and 13 days after, in the Sec-

²⁷ 301 U. S. 717, 57 S. Ct. LXII, 81 L. ed. 1373 (1937).

^{28*} *Berkowitz v. United States*, 90 F. (2d) 881, 884 (C. C. A. 8th, 1937). It is pointed out in a note (1939) 52 HARV. L. REV. 983, that the language, "sentence shall be imposed without delay" in Rule I, like the language, "motions shall be determined promptly" in Rule II(1), and bills of exceptions "shall be settled as promptly as possible" in Rule IX, is designed merely to urge despatch upon the trial courts, and that this is weakened by the possible absence of sanctions, though possibly mandamus will lie.

²⁹ *Pratt v. United States*, 102 F. (2d) 275, 278 (U. S. Ct. of App. D. C. 1939). The trial court granted a motion in arrest of judgment because of the delay and then later vacated it. The appellate court found no jeopardy.

³⁰ *Berkowitz v. United States*, 90 F. (2d) 881, 884 (C. C. A. 8th, 1937).

ond 7 days before and 28 after, in the Third 64 before and 32 after, in the Fourth 10 before and 2 after, in the Fifth 1 before and 5 after, in the Sixth 1 before and 8 after, in the Seventh 19 before and 10 after, in the Eighth 5 before and 5 after, in the Ninth 18 before and 11 after, and in the Tenth 13 before and 19 after.³¹ The language of Rule I that after verdict the "sentence shall be imposed without delay" was thus not particularly effective in such cases.

Rule I, paragraph 2. Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

Where a judgment pronouncing sentence provided that the sentence should not begin for thirty days the sentence is still pending within the rule authorizing the court to continue or increase the amount of bail pending sentence.³² The court had control of its judgment and the potential sentence during that time, and could have modified or set aside the judgment. The judgment fixing the time for commencing sentence is at most irregular, and not void. A surety voluntarily executing a new bond is estopped to question the regularity of the proceeding.

RULE II. *Motions*

Rules I and II do not bar nor affect a judgment *non obstante veredicto* pursuant to a reserved ruling on a pre-verdict motion. They govern criminal procedure after verdict of guilt and refer specifically to post-trial motions. Even if Rules I and II were applicable they would not limit the procedural power of trial courts. The purpose of these rules is to force speedy termination of criminal proceedings and to expedite appeals. They are not made for the benefit of the litigant who invokes them, but are made to serve the general good by simplifying and expediting trials. Unless the violation of a Rule of Procedure by the court is fundamental, the litigant should not be allowed to complain.³³

Rule II (1). Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

Though Rule II (1) provides that "motions shall be determined promptly" it is not clear that this result has been obtained. Certain

³¹ Note (1939) 52 HARV. L. REV. 983, 988-992, Tables II-V.

³² Berkowitz v. United States, 90 F. (2d) 881, 884 (C. C. A. 8th, 1937) (action by the United States against surety on a forfeited bail bond).

³³ *Ex parte* United States, 101 F. (2d) 870, 876, n. 18 (C. C. A. 7th, 1939). For the same case in the trial court see United States v. Standard Oil Co., 24 F. Supp. 575, 579 (W. D. Wis. 1938), taking the same view. Certiorari was granted. United States v. Stone, 307 U. S. 620, 59 S. Ct. 1044, 83 L. ed. 1499 (1939), and there was an affirmance by a four to four vote, 308 U. S. 519, 60 S. Ct. 177, 84 L. ed. 441 (1940), motion granted, 60 S. Ct. 583 (1940).

cases sampled have shown that the time intervals before and after adoption of the rule in the First Circuit Court were 5 days before and 13 days after, in the Second Circuit 0 days before and 5 after, in the Third 24 before and 36 after, in the Fourth 8 before and 2 after, in the Fifth 16 before and 6 after, in the Sixth 42 before and 4 after, in the Seventh 9 before and 6 after, in the Eighth 11 before and 5 after, in the Ninth 8 before and 8 after, and in the Tenth 10 before and 15 after.³⁴

Rule II (2). Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

A motion for new trial filed more than five months after verdict is made too late.³⁵ A motion made two days after the expiration of the three-day period is too late, and will not extend the time for taking an appeal.³⁶ The fact that the defendant is prevented from filing his motion for new trial within the time allowed by the rules because of his incarceration under conviction will not support a petition for writ of habeas corpus.³⁷

In one case the circuit court stated that Rule II (2) raised a serious question as to the power of the court to entertain a motion to vacate and set aside a judgment after the three-day period had elapsed.³⁸ But the government had not raised that issue, and, since the appeal was not taken on time, the court felt precluded from considering the point.

A petition for a writ of habeas corpus "for time to secure counsel to make motion for new trial" must show that such motion was made within the three-day period. Due process does not require that the trial court see to it that the defendant's attorney move for a new trial. The attorney may have been of the opinion that the motion would be useless.³⁹

Where a defendant's counsel continued to represent him for more than three days after verdict was returned, and he filed no motion for a new trial, in the absence of a showing that any basis existed for such a motion, the circuit court must assume that defendant's counsel had concluded that a motion for new trial would be unavailing.⁴⁰

³⁴ See note (1939) 52 HARV. L. REV. 983, 989-992, Tables II-V.

³⁵ *Miceli v. United States*, 87 F. (2d) 472, 473 (C. C. A. 7th, 1936). No mention of Rule II(2) was made in a case involving motion for new trial and in arrest of judgment made nearly three months after trial, but the motions were refused. *United States v. Peterson et al.*, 24 F. Supp. 470 (E. D. Pa. 1938).

³⁶ *O'Gwin v. United States*, 90 F. (2d) 494, 495 (C. C. A. 9th, 1937); *accord*, *Decker v. United States*, 97 F. (2d) 473, 474 (C. C. A. 5th, 1938), where motions in arrest of judgment and for new trial were three days late.

³⁷ *Vermillion v. Zerbst*, 97 F. (2d) 347, 348 (C. C. A. 5th, 1938).

³⁸ *United States v. Tousey*, 101 F. (2d) 892 (C. C. A. 7th, 1939).

³⁹ *De Maurez v. Swope*, 104 F. (2d) 758, 759 (C. C. A. 9th, 1939).

⁴⁰ *Errington v. Hudspeth*, 110 F. (2d) 384, 386, 127 A. L. R. 1467 (C. C. A.

The rule requiring motions for new trial, and in arrest of judgment, within three days after verdict has resulted in some reduction in delay. A study has shown as to certain cases sampled that the time interval between verdict and motion in the Second Circuit was 1 day before adoption of the rule and 2 days after, in the Third 7 days before and 3 after, in the Fourth 4 before and 1 after, in the Fifth 7 before and 4 after, in the Sixth 78 before and 1 after, in the Seventh 11 before and 4 after, in the Eighth 8 before and 3 after, in the Ninth 8 before and 8 after, and in the Tenth 7 before and 5 after.⁴¹

Rule II (3). A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

On May 31, 1938, the Supreme Court by order amended Rule II (3), so as to add at the beginning of the paragraph the words "Except in capital cases," and to add at the end of the paragraph the sentence: "In capital cases the motion may be made at any time before execution of the judgment."⁴²

A motion to remand a case to the district court for hearing a motion for new trial on the ground of newly-discovered evidence could not be made with respect to a judgment rendered March 30, 1934, since that was before September 1, 1934, the date made determinative in the promulgation of the Rules.⁴³

In one case an appeal had been taken and final judgment entered affirming the decision of the lower court. The case was sent back to the trial court for final disposition. No application for a remand had been made in the circuit court. It was held that the district court then had no jurisdiction to entertain a motion for new trial on the ground of newly-discovered evidence because the case had not been remanded to permit the defendant to make such a motion.^{44*}

10th, 1940), *cert. denied*, 310 U. S. 638, 60 S. Ct. 1087, 84 L. ed. 1407 (1940) (appeal from a denial of writ of habeas corpus).

⁴¹ Note (1939) 52 HARV. L. REV. 983, 989-992, Tables II-V. In the First Circuit it was 1 day before and 13 after.

⁴² 304 U. S. 592, 58 S. Ct. CXXXVIII, 82 L. ed. 1561 (1938).

⁴³ *Needham v. United States*, 73 F. (2d) 1, at 3 (C. C. A. 7th, 1934).

^{44*} *Flowers v. United States*, 86 F. (2d) 79, 81 (C. C. A. 8th, 1936). In a case going to the Supreme Court it was held that after an appeal from a conviction the district court was without jurisdiction pending the appeal to modify its judgment by resentencing the defendant. *Berman v. United States*, 302 U. S. 211, 58 S. Ct. 164, 82 L. ed. 204 (1937).

Though a defendant was convicted on April 19, 1934, thus not coming within the operation of the Criminal Appeals Rules, which covered only convictions on or after September 1, 1934, the court stated that it was settled that a district court is without jurisdiction to entertain a motion for new trial on the ground of newly-discovered evidence after the expiration of the term at which the judgment of conviction was entered.⁴⁵ The court made no reference to the Criminal Appeals Rules.

However, under the rules the motion, if made in the district court, is made too late when the sixty-day period has expired.⁴⁶ A motion made in the circuit court before the case is argued and submitted, to remand the case to the district court for determination of a motion for new trial based on newly-discovered evidence, is timely, even though made more than sixty days after verdict, since the sixty-day limit does not apply to motions made in the appellate court.⁴⁷ The appellate court may remand at any time before final judgment.

The circuit court is without power to entertain a motion for new trial, but may in its discretion remand the case to the trial court for its consideration of such motion.⁴⁸ A case will be so remanded only if showing is made to the appellate court that the lower court would be justified in granting the new trial.⁴⁹

An affidavit by an attorney, not shown to have been unavailable as a witness at the trial, that defendant was insane and the exculpatory affidavit of a co-defendant will not warrant remand of the case to the district court for consideration of appellant's motion for new trial on the ground of his insanity, issue as to which had been raised by his motion in arrest of judgment.⁵⁰

The *ex parte* affidavit of a defendant who was a fugitive when co-defendants were tried, exonerating co-defendants and assuming blame, is not sufficient to warrant remand of the case on appeal so that the trial court might consider the co-defendant's application for new trial based on newly-discovered evidence.⁵¹ The court pointed out that delay at this stage was undesirable, and that evidence of this kind was very weak.

The motion should indicate that it is made on the ground of newly-

⁴⁵ Buie v. United States, 84 F. (2d) 564 (C. C. A. 5th, 1936).

⁴⁶ Miceli v. United States, 87 F. (2d) 472, 473 (C. C. A. 7th, 1936).

⁴⁷ Hawkins v. United States, 90 F. (2d) 551, 555, *cert. denied*, 302 U. S. 733, 58 S. Ct. 118, 82 L. ed. 567 (1937).

⁴⁸ Wagner v. United States, 118 F. (2d) 801, 802 (C. C. A. 9th, 1941); Evans v. United States, 122 F. (2d) 461, 468 (C. C. A. 10th, 1941).

⁴⁹ Evans v. United States, 122 F. (2d) 461, 469 (C. C. A. 10th, 1941). The court cited *Isgrig v. United States*, 109 F. (2d) 131, 134 (C. C. A. 4th, 1940), which was a proceeding for remission of forfeiture of an appearance bond in a criminal case, but that court cited Civil Rule 59(b).

⁵⁰ Lee v. United States, 91 F. (2d) 326, 331 (C. C. A. 5th, 1937).

⁵¹ La Belle *et al.* v. United States, 86 F. (2d) 911, 912 (C. C. A. 5th, 1936).

discovered evidence. An application for new trial for newly-discovered evidence must show diligence, the evidence must be material, not merely cumulative nor impeaching, and such that it will probably produce an acquittal.⁵² Hence, where the affidavits supporting the motion consisted largely of hearsay testimony and impeachment of testimony received in the trial, the circuit court would not in its discretion remand the case to the trial court for its consideration of the motion.

Since the rule does not mention appeal, an appeal may be taken only within five days after entry of judgment of conviction.⁵³

Rule II (4). A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

Section 1 of the act authorizing the promulgation of the Rules expressly saved the right to apply for a withdrawal of a plea of guilty when made within ten days after entry and before sentence.⁵⁴

A motion for leave to withdraw a plea of guilty not made before imposition of sentence will be denied.⁵⁵ In a case where plea of guilty was entered on January 6, 1939, and motion for leave to withdraw was noticed for February 6, 1939, but actually heard eleven days later, it was held too late.⁵⁶ Since the defendant appeared to be trifling with the court, the court thought it unnecessary to consider "whether the Rules intended to deprive the court of all power to entertain such a motion after the lapse of ten days, where the interests of justice might so require." However, in another case District Judge Yankwich stated concerning withdrawal of the plea of guilty and the ten-day period permitted: "After that period, the District Court cannot allow a change of plea, and the government acquires the right to have a judgment follow the plea. The object of this rule was to do away with the rule previously obtaining which permitted a change of plea 'if for any reason the granting of the privilege seems fair and just,' *Kercheval v. United States*, (1927) 274 U. S. 220, 225, 47 S. Ct. 582, 583, 71 L. ed. 1009, and which, no doubt, at times, worked for delay."⁵⁷

⁵² *Wagner v. United States*, 118 F. (2d) 801, 802 (C. C. A. 9th, 1941). The court cited *Johnson v. United States*, 32 F. (2d) 127, 130 (C. C. A. 8th, 1929). See also *Evans v. United States*, 122 F. (2d) 461, 468 (C. C. A. 10th, 1941).

⁵³ *Fewox v. United States*, 77 F. (2d) 699, 700 (C. C. A. 5th, 1935).

⁵⁴ 48 STAT. 399 (1934), 28 U. S. C. A. §723(a) (1941).

⁵⁵ *United States v. Schor et al.*, 13 F. Supp. 399 (E. D. N. Y. 1936), *aff'd*, *United States v. Balkan*, 85 F. (2d) 1020 (C. C. A. 2d, 1936). Plea of guilty was made on December 23, 1935, sentence followed, and on December 31, 1935, defendants moved for leave to withdraw their plea of guilty.

⁵⁶ *United States v. Gotta*, 26 F. (2d) 427 (E. D. N. Y. 1939).

⁵⁷ *Cooke v. Swope*, 28 F. Supp. 492, 494 (W. D. Wash. 1939), *aff'd*, 109 F. (2d) 955 (C. C. A. 9th, 1940).

A plea of *nolo contendere* is a "plea of guilty" under Rule II (4).⁵⁸ The rule gives no absolute right to withdraw pleas of guilty or of *nolo contendere*. The rule simply regulates the limit of time within which the application to withdraw may be filed. The principles on which withdrawal may be granted or denied remain unchanged.

When the question concerning whether the defendant had consented to judgment of conviction by allegedly failing to withdraw a plea of guilty within the ten days permitted by the rule had not been raised either in the district court or the circuit court, and was based solely upon dates of entries in the criminal docket without any supporting proof, the question would not be considered by the Supreme Court.⁵⁹ The government had argued that the provision of the rule was mandatory and that therefore the judgment, as one upon consent, should be affirmed without consideration of the merits. The defendant answered that the government by going to trial was estopped to raise the question; and that a plea of guilty did not prevent the defendant from challenging the sufficiency of the indictment.

In one case the circuit court stated that Rule II (4) raised a serious question as to the power of the court to entertain a motion to vacate and set aside a judgment after the ten-day period to withdraw a plea of guilty had elapsed. But the government had not raised the issue, and, since the appeal was not taken on time, the court felt precluded from considering the problem.⁶⁰

A contention that the rule is unconstitutional in limiting the time within which a plea of guilty may be withdrawn as denying the right of trial by jury need not be decided when it does not appear that the defendant at any time sought to withdraw his plea.⁶¹

A motion was made to vacate judgment and sentence and to withdraw a plea of guilty on the grounds that the defendant was insane and under duress and misrepresentation when he pleaded guilty, was denied assistance of counsel, and was not advised of his right to withdraw his plea of guilty, and that the court erred in imposing sentence within less than ten days after the plea. It was held that this motion went to the jurisdiction of the court and could therefore be raised collaterally on habeas corpus in any federal court where the defendant was detained, including the court rendering the judgment.⁶² The motion to set aside was

⁵⁸ *Farnsworth v. Zerst*, 98 F. (2d) 541, 543 (C. C. A. 5th, 1938). The same is true as to Section 1 of the Act authorizing the Supreme Court to lay down rules of procedure. 28 U. S. C. A. §723(a) (1941).

⁵⁹ *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468, 82 L. ed. 607 (1938). Apparently the withdrawal was permitted eleven days after the entry of the plea.

⁶⁰ *United States v. Tousey*, 101 F. (2d) 892 (C. C. A. 7th, 1939).

⁶¹ *Williams v. Sanford*, 110 F. (2d) 526, 527 (C. C. A. 5th, 1940), *cert. denied*, 310 U. S. 643, 60 S. Ct. 1096, 84 L. ed. 1411 (1940).

⁶² *Robinson v. Johnston*, 118 F. (2d) 998, 1000 (C. C. A. 9th, 1941) (appeal

in the nature of the writ of error *coram nobis*, superseded in the federal courts by a motion addressed to the trial court. Such motion may be made after the expiration of the time fixed for similar motions by rule of court.

RULE III. *Appeals*

Rule III, paragraph 1. An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

The appeal provided under the rules must be taken within five days after entry of judgment of conviction. Hence if an appeal is taken within five days after the overruling of a motion for new trial made solely on the ground of newly-discovered evidence, it is barred if not also taken within five days after the entry of judgment of conviction.⁶³ The time limit for appeal cannot be extended by moving for new trial on the ground of newly-discovered evidence. A main purpose of the rules is to force early termination of criminal cases. A motion frivolously made might otherwise allow the defendant sixty-five days in which to appeal.

The time limit fixed by rule is jurisdictional.⁶⁴ The fact that defendant's incarceration prevents him from taking his appeal in the allotted time is not a basis for a writ of habeas corpus.⁶⁵ Where it is too late for the defendant to appeal on the ground of newly-discovered evidence, the defendant's remedy, if he is innocent, is to apply to the President for a pardon.⁶⁶

from denial of writ of habeas corpus). See Note (1941) 39 MICH. L. REV. 963, 966.

⁶³ *Fewox v. United States*, 77 F. (2d) 699, 700 (C. C. A. 5th, 1935). Where judgment was entered on June 29, 1935, the time for appeal expired on July 6, 1935. *Mookini v. United States*, 92 F. (2d) 126, 128 (C. C. A. 9th, 1937). See in accord: *Burr v. United States*, 86 F. (2d) 502 (C. C. A. 7th, 1936). Sundays and holidays are excluded from the five-day period. *Scott v. United States*, 115 F. (2d) 137, 138 (C. C. A. 10th, 1940), *cert. denied*, 312 U. S. 678, 61 S. Ct. 449, 85 L. ed. 1117 (1941).

⁶⁴ The court goes on to say, however: "But, since section 2 of the statute above referred to preserves the right of appeal as formerly authorized, the overruling of the extraordinary motion may still in a proper case be itself reviewed." *Fewox v. United States*, 77 F. (2d) 699, 700 (C. C. A. 5th, 1935).

In *Decker v. United States*, 97 F. (2d) 473, 474 (C. C. A. 5th, 1938), the court stated that "the delay in taking the appeal raises a question of jurisdiction which may not be waived." See also *Meyers v. United States*, 116 F. (2d) 601, 603 (C. C. A. 5th, 1941); *Boykin v. Huff*, 121 F. (2d) 865, 873 (U. S. Ct. of App. D. C. 1941).

⁶⁵ *Vermillion v. Zerbst*, 97 F. (2d) 347 (C. C. A. 5th, 1938).

⁶⁶ *In re Crum*, 94 F. (2d) 746, 747 (C. C. A. 9th, 1938).

The five-day rule as to appeal may not be circumvented by taking an appeal from an order denying a motion to vacate a portion of a judgment of conviction and sentence, where the motion was presented more than a year after entry of judgment, after expiration of term, and no appeal was taken from the judgment.⁶⁷ The only appeal permissible was from the original judgment within five days after its entry. The applicant's remedy, if any, was by habeas corpus upon termination of the valid portion of the sentence.

If a motion for new trial is filed after the expiration of the three-day period, this will not extend the time for taking an appeal as would a motion filed within the three-day period.⁶⁸

The five-day limit was held in 1937 to apply to criminal contempt proceedings.^{69*} It was considered immaterial that the defendant was not entitled to a jury trial, inasmuch as there might have been a plea of guilty which clearly would have brought the proceeding within the scope of the Criminal Appeals Rules.

A petition for a writ of habeas corpus "for time to secure counsel to make motion for new trial or to take an appeal" must show that such motion was made within the five-day period. Due process does not require that the trial court see to it that the defendant's attorney perfect an appeal. The attorney may have been of the opinion that the appeal would be useless.^{70*}

Where defendants were sentenced March 14, 1939, no motion for new trial was filed, and leave to appeal in *forma pauperis* was granted April 5, 1939, appeal taken by filing notice of appeal April 5th was not taken within five days after judgment of conviction, was ineffective, and motion to dismiss was granted.⁷¹

Where judgment of conviction was entered four years before judgment denying motion for resentence, the period for taking the appeal measured by five days from the entry of judgment of conviction as

⁶⁷ *Dembrowsky v. United States*, 86 F. (2d) 677 (C. C. A. 1st, 1936). See also *United States v. Tousey*, 101 F. (2d) 892 (C. C. A. 7th, 1939); *Audette v. United States*, 99 F. (2d) 113, 114 (C. C. A. 9th, 1938) (rule not mentioned); *Bensen v. United States*, 93 F. (2d) 749, 750 (C. C. A. 9th, 1937); Note (1939) 52 HARV. L. REV. 983, 984.

⁶⁸ *O'Gwin v. United States*, 90 F. (2d) 494, 495 (C. C. A. 9th, 1937); *accord*, *Decker v. United States*, 97 F. (2d) 473, 474 (C. C. A. 5th, 1938).

^{69*} *Wilson et al. v. Byron Jackson Co.*, 93 F. (2d) 577, 578 (C. C. A. 9th, 1937). The court stated that an inspection of the record in *Russell v. United States*, 86 F. (2d) 389 (C. C. A. 8th, 1936) showed that the appeal had been taken in accordance with the Criminal Appeals Rules. Prior to the rules three months were allowed.

^{70*} *De Maurez v. Swope*, 104 F. (2d) 758, 759 (C. C. A. 9th, 1939). But it is pointed out in the case of *In re Edwards*, 106 F. (2d) 537, 538 (C. C. A. 8th, 1939), that an appeal in a habeas corpus proceeding is not an appeal in a criminal case.

⁷¹ *Miller v. United States*, 104 F. (2d) 343 (C. C. A. 5th, 1939).

stated in Rule III, paragraph 1, is inapplicable.⁷² An appeal taken two days after judgment denying the motion, and one week after defendant was notified in prison of the decision, was timely. The court stated by Judge Sibley: "We are of opinion that the time for taking this appeal is not limited by any provision of Rule III, and that the time limit applicable before the rule was made still obtains. Under it the appeal is in time. The promptness in executing the criminal law sought by the rule is of no importance here, because the appellant is already imprisoned. The motion to dismiss is denied."

This doctrine was followed by Federal Circuit Judge Bratton in a case where the sentence was in 1936, defendant's motion to vacate the judgment was denied on August 4, 1941, and the notice of appeal was filed fifteen days later.⁷³ The court referred to the first two sections of the act authorizing the Supreme Court to lay down rules of criminal appellate procedure and to Rule III. It was held that Rule III applies to the taking of an appeal from a judgment of conviction, but not to an appeal from an order denying a motion to vacate the judgment of conviction. On May 25, 1942, the Supreme Court held that the failure to make provision in the Criminal Appeals Rules for appealing an order dismissing a petition to correct a sentence was "*casus omissus*." This left in full force the provision of the Judiciary Act requiring application for allowance of appeals to the circuit court to be made within three months after entry of the order appealed from.⁷⁴

A letter written by an indigent defendant within the time allowed for appeal, informing the trial court of the desire to appeal and of uncertainty regarding intentions of assigned and volunteer counsel, could be regarded as sufficient to constitute taking an appeal, though it also expressed hope that counsel would take appeal formally, and though it did not contain all details specified in applicable rules.⁷⁵ The letter was a safeguard against the anticipated failure of counsel to appeal. It set forth the essential things, namely, the identity of the cause and of the appellant and the intention to appeal. Neither the government nor the court could have been misled or prejudiced by any of the omissions.

The rule requiring appeals to be taken within five days after conviction has resulted in considerable reduction in delay. A study has shown as to certain cases sampled that the time interval between sen-

⁷² *Meyers v. United States*, 116 F. (2d) 601, 603 (C. C. A. 5th, 1941).

⁷³ *Gilmore v. United States*, 124 F. (2d) 537, 539 (C. C. A. 10th, 1942). The court relied on *Meyers v. United States*, 116 F. (2d) 601, 603 (C. C. A. 5th, 1941).

⁷⁴ *United States ex rel. Coy v. United States et al.*, — U. S. —, 62 S. Ct. 1137, 86 L. ed. (Adv. Ops.) 1052 (1942). For same case in the district court see, 38 F. Supp. 610 (W. D. Ky. 1941); and in the circuit court, 124 F. (2d) 1019 (C. C. A. 6th, 1942).

⁷⁵ *Boykin v. Huff*, 121 F. (2d) 865, 873 (U. S. Ct. of App. D. C. 1941).

tence and appeal was in the First Circuit 47 days before the rule and 3 days after adoption of the rule, in the Second 21 days before adoption and 3 after, in the Third 3 days before and 5 after, in the Fourth 4 before and 2 after, in the Fifth 30 before and 7 after, in the Sixth 38 before and 4 after, in the Seventh 31 before and 5 after, in the Eighth 19 before and 4 after, in the Ninth 5 before and 2 after, and in the Tenth 18 before and 3 after.⁷⁶

Rule III, paragraph 3. 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. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

According to Chief Justice Hughes, the "fundamental policy of the Criminal Appeals Rules is that as speedily as possible, upon the taking of the appeal, the Circuit Court of Appeals shall be vested with the jurisdiction to see that the appeal is properly expedited and to supervise and control all proceedings on the appeal."⁷⁷ For this purpose the rules provide that the notice of appeal shall be filed in duplicate with the clerk of the trial court and a copy of the notice served upon the United States Attorney. And, by Rule IV, paragraph 1, it becomes the duty of the clerk of the trial court immediately to forward the duplicate notice of appeal to the clerk of the appellate court.

Where an objection was not called to the attention of the trial court, either in the notice of appeal containing a statement of the grounds of appeal as provided in Rule III, paragraph 3, nor in the assignment of errors, the circuit court will generally decline to examine the question.⁷⁸

Where the record failed to indicate that a copy of the notice was served upon the United States Attorney, as required by Rule III, paragraph 3, the court refused to explore the effect of such omission in the absence of a motion to dismiss the appeal.⁷⁹

A letter by an indigent defendant informing the trial court of a

⁷⁶ Note (1939) 52 HARV. L. REV. 983, 989-992, Tables II-V.

⁷⁷ Ray v. United States, 301 U. S. 158, 163, 57 S. Ct. 700, 703, 81 L. ed. 976, 981 (1937).

⁷⁸ United Cigar Whelan Stores Corp. v. United States, 113 F. (2d) 340, 346 (C. C. A. 9th, 1940).

⁷⁹ Scott v. United States, 115 F. (2d) 137, 138 (C. C. A. 10th, 1940).

desire to appeal is not ineffective under the circumstances because the letter was filed with the judge rather than the clerk, since the latter is merely an arm of the court. There was a substantial compliance with the rule.⁸⁰ The filing of the letter was not ineffective because the defendant did not tender the five-dollar filing fee required by statute and rules. Upon the receipt of the letter the court should have informed the defendant that, if he wished to appeal in his own person, this fee should be paid to the clerk, but instead the court made no reply until the time allowed for taking appeal had expired. It made no difference that the court apparently regarded the letter as an application for leave to appeal in *forma pauperis*.

RULE IV. *Control by Appellate Court*

Rule IV, paragraph 1. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

Chief Justice Hughes states concerning Rule IV, paragraph 1: "By rule 4 it becomes the duty of the clerk of the trial court immediately to forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form annexed to the Rules. This is a ministerial duty which the clerk of the trial court must perform."⁸¹

Rule IV, paragraph 2. From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appeal is perfected and complete control of the case is vested in the circuit court when the duplicate notice of appeal and the statement of the essential docket entries are forwarded by the clerk of the trial court to the circuit court.⁸²

The Supreme Court interpreted Rules IV and IX as giving the circuit court wide powers of control over criminal appeals in the leading case of *Ray v. United States*.⁸³ While the powers of the trial judge

⁸⁰ *Boykin v. Huff*, 121 F. (2d) 865, 873 (U. S. Ct. of App. D. C. 1941), noted (1941) 27 IOWA L. REV. 133, (1941) 14 ROCKY MT. L. REV. 69, (1942) 27 WASH. U. L. Q. 272.

⁸¹ *Ray v. United States*, 301 U. S. 158, 163, 57 S. Ct. 700, 703, 81 L. ed. 976, 981 (1937). The case came up on certiorari.

⁸² *Simmons v. United States*, 89 F. (2d) 591, 595 (C. C. A. 10th, 1937).

⁸³ 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937). See also *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937); *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468, 82 L. ed. 607 (1938). In the last case the Supreme

are strictly limited under Rule IX, the circuit court is given full authority to set aside or modify his orders when there has been an abuse of discretion, or the interests of justice require it, and therefore can extend the time granted by the trial judge. The circuit court under Rule IX, paragraph 4, may send back a bill of exceptions to the trial judge for correction under its direction into condensed and narrative form. Supervision and control of the circuit court over the preparation of the bill calls for the exercise of sound judicial discretion and its action will not be reviewed unless it appears that this discretion has been abused. In the case actually before the court, the defendant, convicted of violation of the mail fraud and conspiracy statute, was granted four months within which to file his bill of exceptions, and after unsuccessful efforts to obtain agreement for condensation of the evidence, or an extension of time, procured the trial judge to settle the stenographer's minutes as a bill of exceptions. The circuit court refused to grant further time or to return the bill of exceptions to the trial judge for correction. This was held to be no abuse of discretion.

It was also held in *Ray v. United States* that the clause in Rule IV, paragraph 2, providing that the appellate court's supervision and control shall be "subject to these rules" refers to the rules governing the action of the appellate court, and not those governing the trial court. To make effective this supervision and control, any matter requiring correction may be brought before the appellate court upon the short notice of five days, as provided in Rule IV, paragraph 3. There may be not only a motion to dismiss the appeal, but "for directions to the trial court" and "to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal." This includes orders fixing the time for settlement and filing of the bill of exceptions. The government may show the appellate court that the time fixed is too long; and the defendant may claim that the time fixed is too short.⁸⁴

That appellant's failure to have a bill of exceptions settled and filed on time was not brought to the circuit court's attention until it had heard argument and reached a decision will not preclude it from thereafter exercising its supervisory powers in regard to such settlement and filing.⁸⁵ The court may in its sound discretion refuse to strike the bill

Court vacated the judgment and remanded the cause in order that the circuit court could exercise its discretion because the circuit court might have proceeded upon the assumption that it had no power to act.

For a statement of the law prior to the rules see *Walker v. United States*, 113 F. (2d) 314, 317 (C. C. A. 9th, 1940).

⁸⁴ *Accord*, *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937).

⁸⁵ *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937).

of exceptions and may approve the previous filing and settlement thereof. It would be a mere idle form to extend the time and return the bill of exceptions for settlement accordingly.

Without referring to any specific rule, it has been held that the circuit court may allow the amendment of the bill of exceptions to include the motion for a directed verdict, ruling of the trial court thereon, and exceptions, where they had not been incorporated in the bill.⁸⁶

Also without referring to any specific rule, the court held that assuming that "it is a doubtful question whether or not a second order extending the time for settling the bill of exceptions may be made within 30 days after the appeal is taken in a criminal case, we would be inclined to exercise our supervisory authority over the settlement of the bill."⁸⁷

It is not necessary that the circuit court, when in recess, convene to grant extension of time in which to settle the bill of exceptions.⁸⁸ Extension may be properly granted by a single judge though the term "appellate court" is used.

The discretionary power of the appellate court to extend the time for settling and filing the bill of exceptions will not be exercised where the bill contains 23 pages, all but one of which are occupied with instructions given to the jury and the exceptions thereto, and there was a delay of about eight months between the sentence and the proposal of the bill of exceptions.⁸⁹

After the thirty-day period allowed in Rule IX has elapsed without an extension having been timely granted by the district court or by the appellate court under Rule IV, the district court is without power to settle and sign the bill of exceptions.^{90*}

When no motion to extend the time for filing has been made in the circuit court, the court said in one case that "on the record presented we are not inclined to act *sua sponte*."⁹¹

While the bill of exceptions should show on its face that it was settled within the time fixed by law and such fact may be shown in the

⁸⁶ *Reiner v. United States*, 92 F. (2d) 321 (C. C. A. 9th, 1937). The court said that the amending might be done by stipulation of the parties. If they could not agree, the trial judge was then authorized and directed to amend. The court cited *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

⁸⁷ *Noland v. United States*, 92 F. (2d) 820, 821 (C. C. A. 9th, 1937).

⁸⁸ *United States v. Freundlich*, 95 F. (2d) 376, 380 (C. C. A. 2d, 1938).

⁸⁹ *Long v. United States*, 90 F. (2d) 482, 484 (C. C. A. 9th, 1937), rehearing denied. But the court stated that the examination of the record presented by the appellant satisfied it that there had been no miscarriage of justice. The court cited *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 777, 81 L. ed. 976 (1937).

^{90*} *Evans v. United States*, 90 F. (2d) 851, 852 (C. C. A. 5th, 1937). This was held true though the attention of the district judge was not called to the petition for extension forwarded to him within the thirty-day period until after the expiration of the period, and though the district judge signed a *nunc pro tunc* order extending the time to present the bill.

⁹¹ *Holt v. United States*, 94 F. (2d) 90, 94 (C. C. A. 10th, 1937).

certificate of the trial judge approving and settling the bill, the appellate court need not accept such assertion of jurisdiction when contrary to fact, particularly in view of the fact that the appellate court has supervisory control over the settlement of the bill of exceptions and the preparation of the record in criminal appeals.⁹² Hence the appellate court might call upon the clerk of the district court to certify the orders of extension. It could order the trial court to include the orders granting extension of time in the bill of exceptions.⁹³

Judge Learned Hand states that he understands *Ray v. United States*⁹⁴ to hold that after an appeal is taken, the circuit court "has always power to control the time of settling the bill."⁹⁵ Therefore, in a case where the defendant was sentenced on July 2nd, and time for settling the bill was extended on July 19th by consent to October 1st (though not by the judge who tried the case, who was possibly absent), and on September 17th a further extension to November was granted by a judge of the circuit court over opposition of the district attorney, and on October 19th there was a still further extension to December 1st by a judge of the circuit court by consent, and the bill was not finally settled until December 7th, Judge Hand held that the defendant had not been guilty of any conduct or inaction which forfeited his rights and that the circuit court would consider the bill. The circuit court stated that even though the defendant had done nothing at all to settle the bill, "as mere matter of power we should be able to let him settle at any time."

The lodging of a proposed bill of exceptions with the clerk on the final day of an extended period for settling and filing does not constitute compliance with Rule IX, where the bill was not finally settled and filed until more than two months later. Yet the reviewing court may extend the time for filing the bill to embrace the period during which it appears to have been filed, in order to determine whether there has been a miscarriage of justice, particularly where the district attorney does not ask the reviewing court to strike the bill.⁹⁶

Where counsel for defendants neglect their clients' case and leave them uninformed, if not actually misled, with respect to the status of the appeal which was not perfected, i.e., filed and settled within the time

⁹² *Long v. United States*, 90 F. (2d) 482, 484 (C. C. A. 9th, 1937), rehearing denied.

⁹³ The court cited *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

⁹⁴ 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

⁹⁵ *United States v. Freundlich*, 95 F. (2d) 376, 380 (C. C. A. 2d, 1938). The court referred to both Rules IV and IX.

⁹⁶ *Sanford v. United States*, 98 F. (2d) 325, 326 (App. D. C. 1938). The court cited *Forte v. United States*, 302 U. S. 220, 223, 58 S. Ct. 180, 182, 82 L. ed. 209, 212 (1937).

limited therefor, the circuit court would in its discretion permit the defendant to file assignments of error and a bill of exceptions at a later date.⁹⁷ The court stated that every case stands on its own facts.

A circuit court in one case denied a motion to strike a bill of exceptions allegedly settled one day after the expiration of the extended time for settling the bill.⁹⁸ The court stated that it acted in the exercise of its discretion in order to prevent injustice.

Where notice of appeal was given on December 8, 1937, and the district court attempted to enlarge the time for filing the bill of exceptions by orders dated February 9 and March 8, 1938, the latter order extending the time for sixty days, and yet the bill was not filed until May 23, 1938, the circuit court dismissed an appeal.⁹⁹ Five months had elapsed and no compelling reasons in favor of the defendant existed.

Where defendant wrote a letter informing the trial court of a desire to appeal, and under the circumstances the failure of the trial court to inform the defendant of his right to appeal in *propria persona* in effect prevented the defendant from taking steps to perfect the record and properly present the appeal, the circuit court is authorized on application by the defendant to order that the record be prepared and presented for consideration.¹⁰⁰

Under Rule IV, paragraph 2, in conjunction with Rules IX and XII, a circuit court may lay down rules relating to the assignment of errors.¹⁰¹

Rule IV, paragraph 3. The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

Where there is no apparent effort to prepare the record, and it is not in fact timely filed, the court may apply the provision of Rule IV that "The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal."¹⁰² Where, in its order on

⁹⁷ Hannon v. United States, 99 F. (2d) 933, 934 (C. C. A. 3rd, 1938). The court referred also to rules VI and IX.

⁹⁸ Mackreth v. United States, 103 F. (2d) 495, 496 (C. C. A. 5th, 1939). The court found it unnecessary to decide whether the time for settling had actually expired. The court cited Kay v. United States, 303 U. S. 1, 58 S. Ct. 468, 82 L. ed. 607 (1938).

⁹⁹ Miller v. United States, 104 F. (2d) 97, 98 (C. C. A. 3rd, 1939). (The court also cited Rule IX.)

¹⁰⁰ Boykin v. Huff, 121 F. (2d) 865, 873 (App. D. C. 1941). The court cited Forte v. United States, 302 U. S. 220, 223, 59 S. Ct. 180, 182, 82 L. ed. 209, 212 (1937).

¹⁰¹ Walker v. United States, 116 F. (2d) 458, 463 (C. C. A. 9th, 1940).

¹⁰² Weber v. United States, 104 F. (2d) 300, 301 (C. C. A. 5th, 1939).

the docket of the circuit court, the criminal case was called on April 11, and there was no record filed, time for filing having expired April 5th, and there was no application for relief, no brief, and no counsel present, dismissal for want of prosecution was justified.

RULE V. *Supersedeas*

An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence.

On October 21, 1940, the Supreme Court by order amended Rule V to read: "An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence. The trial court or the Circuit Court of Appeals may stay the execution of any sentence to pay a fine or fine and costs upon such terms as it may deem proper. It may require the defendant pending the appeal to pay to the clerk in escrow the whole or any part of such fine and costs, to submit to an examination as to his assets, or to give a supersedeas bond, and it may likewise make any appropriate order to restrain the defendant from dissipating his assets and thereby preventing the collection of such fine."¹⁰³

An appeal operates as a supersedeas unless the defendant elects to begin serving his sentence.^{104*} Commitment of the defendant to the penitentiary in execution of sentence pending appeal is error since the defendant is entitled to go at large on bail until final judgment, and on failure to furnish bond he could only be deprived of liberty until such final judgment, usually by detention in jail.¹⁰⁵ The defendant cannot without his consent be put in a penitentiary in execution of his sentence until that time.

Where the defendant, upon entry of an order directing commitment to the penitentiary obtained permission to remain in the county jail at the place where the order was entered in order that he might render assistance to counsel in preparation of an appeal from a denial of the writ of habeas corpus, the defendant was not entitled to have the time spent in jail, prior to incarceration in the penitentiary after adverse decision on appeal, applied as a credit on his sentence. The court stated

¹⁰³ 311 U. S. 731, 61 S. Ct. CLII, 85 L. ed. 90 (1940).

^{104*} *Simmons v. United States*, 89 F. (2d) 591, 594 (C. C. A. 10th, 1937) (rehearing denied). The law prior to this rule is stated in *Tinkoff v. United States*, 86 F. (2d) 591, 594 (C. C. A. 7th, 1937). Under such prior rule, a supersedeas could be obtained by serving the writ within the time prescribed without giving security, provided that the judge who signed the citation directed that the writ should operate as a supersedeas. Supersedeas was thus discretionary.

¹⁰⁵ *Tinkoff v. Zerbst*, 80 F. (2d) 464 (C. C. A. 10th, 1936) (prisoner was given release on bail bond for forty days to endeavor to obtain correction of alleged errors in the trial court).

that this conclusion found support "in the spirit of Rule 5."^{106*} The defendant's request amounted to an election not to enter upon the service of the sentence.

The late Federal Circuit Judge Rufus E. Foster in an address to the Judicial Conference of the Fifth Circuit pointed out that an appellant not on bail has the right, unless he waives it, to remain in the local jail in custody of the marshal.¹⁰⁷

RULE VI. *Bail*

The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.

Rule VI has the force and effect of a statute and was promulgated "for the purpose of expediting the disposition of appeals in criminal cases."¹⁰⁸

As a preliminary to application for bail in the circuit court, a defendant must first apply to the trial judge unless good cause is shown for not doing so. In a case before Judges Learned Hand, Chase, and Charles E. Clark the court in a per curiam opinion stated:

"While we cannot find that any court has construed these words, we think their meaning is clear. Verbally, it is true, the defendant may apply in the first instance either to the trial judge or to the circuit court of appeals if it is in session; and it might even be held that having applied to one, he must be content. We do not so understand the rule; rather we think it means that he may apply to both. That being so, it is obviously desirable that he shall first apply to the trial judge, who necessarily knows more of the case than the circuit court of appeals can learn, certainly while the record remains in the district court, as it almost always does. His ruling will help us greatly; particularly if he states why he does not think the appeal raises any 'substantial question which should be reviewed.' In that event, the defendant will have to satisfy us that the judge's reasoned conclusion should not prevail, and

^{106*} *DeMarois v. Hudspeth*, 99 F. (2d) 274, 275 (C. C. A. 10th, 1938), *cert. denied*, 305 U. S. 656, 59 S. Ct. 360, 83 L. ed. 425 (1939). Note that an appeal in a habeas corpus case is thus treated like an appeal in a criminal case.

¹⁰⁷ Foster, *Criminal Appeals Rules*, (1939) 1 Fed. Rules Dec. 261, 262.

¹⁰⁸ *Berkowitz v. United States*, 90 F. (2d) 881, 884 (C. C. A. 8th, 1937) (action by United States against surety on a forfeited bail bond).

we shall not be left in a welter of assertion and counter-assertion in affidavits from which we have no adequate means of emerging."¹⁰⁹

Rule VI confers jurisdiction on the circuit court once an appeal has been taken.¹¹⁰ Rule VI does not confer power to dispose of the appeal. Regardless of what was done under Rule VI the defendant would be compelled to go on with the preparation of his bill of exceptions. Hence where the defendant had been without money or counsel, had appealed, and, being unable to procure bail, had been in custody since sentence, and no bill of exceptions had been prepared, a writ of habeas corpus was necessary to complete exercise of appellate jurisdiction of the circuit court, and such court would entertain the writ to review questions of the district court's jurisdiction.

RULE VII. *Directions for preparation of record on appeal*

The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this Rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

The initiative in many matters, especially in those relating to the preparation of the record, is placed upon the trial judge or the clerk of the trial court.¹¹¹ Under Rule VII it is made the duty of the trial judge to "at once direct the appellant or his attorney, and the United States attorney, to appear before him," and to "give such directions as may be appropriate with respect to the preparation of the record on appeal."

In one case where there was a motion for giving directions as required by Rule VII, the court stated: "In regard to giving directions as required by Rule VII, the attorney for defendant may present a statement, or index, of his proposed record on appeal and I will give the necessary directions."¹¹²

¹⁰⁹ *United States v. Hansell*, 107 F. (2d) 613 (C. C. A. 8th, 1937).

¹¹⁰ *United States ex rel. McMann v. Adams*, 126 F. (2d) 274 (C. C. A. 2d, 1942), *cert. granted* April 30, 1942, — U. S. —, 62 S. Ct. 1048, 86 L. ed. (Adv. Ops.) 937. (Habeas corpus proceedings were brought in the circuit court.)

¹¹¹ *Boykin v. Huff*, 121 F. (2d) 865, 873 (App. D. C. 1941).

¹¹² *United States v. Stewal*, 28 F. Supp. 87, 88 (S. D. N. Y. 1937).

RULE VIII. *Record on appeal without bill of exceptions*

When it appears that the appeal is to be prosecuted upon the clerk's record of proceedings, that is, upon the indictment and other pleadings and the orders, opinions, and judgment of the trial court, without a bill of exceptions, the trial judge shall direct the appellant to file with the clerk of the trial court, within a time stated, an assignment of the errors of which he complains (which may amplify or add to the grounds stated in the notice of appeal), and shall direct the clerk to forward promptly, with his certificate, to the appellate court the above-mentioned record and assignment of errors, and upon receipt thereof the appellate court shall at once set the appeal for argument as provided in these rules.

The circuit court has said that it can hear an appeal upon the indictment, pleadings, orders, opinions, and judgment of the trial court, notwithstanding that there is no bill of exceptions.¹¹³ The court stated that perhaps the word "orders" opened to its review an order made before trial denying a motion to suppress certain documents seized from the possession of two of the defendants by what they asserted to be an unlawful search. But it added that without the bill of exceptions it had no means of knowing how important the papers were, whether any of them were used at the trial, or whether they could have affected the result. Hence the court could not reverse the convictions.

When the appeal is under Rule VIII the circuit court is limited in its consideration to the "sufficiency of the indictment and the judgment of the court below."¹¹⁴ The record will contain no bill of exceptions.¹¹⁵

The "clerk's record" described in Rule VIII consists of the indictment and other pleadings, and the trial court's orders, opinions, and judgment.¹¹⁶ Where the trial court denied a plea of former acquittal, and the purported indictment, order, and verdict in the prior prosecution were neither included in the clerk's record nor incorporated in a bill of exceptions, but were certified by the clerk and forwarded to the circuit court, they could not be considered by the circuit court.

Rule VIII, like Rule IX, expressly requires an assignment of errors.¹¹⁷ Noncompliance with such requirement warrants a dismissal.

¹¹³ *United States v. Adamowicz*, 82 F. (2d) 288, 289 (C. C. A. 2d, 1936).

¹¹⁴ *United States v. Kay*, 89 F. (2d) 19, 21 (C. C. A. 2d, 1937).

¹¹⁵ *Fleisher v. United States*, 91 F. (2d) 404, 406 (C. C. A. 6th, 1937).

¹¹⁶ *Ross v. United States*, 102 F. (2d) 113, 114 (C. C. A. 9th, 1939). Without referring to any rule the court stated in *Lewis v. United States*, 92 F. (2d) 952, 953 (C. C. A. 10th, 1937): "The record proper in a criminal case consists of the pleadings, process, verdict, and judgment. It does not embrace interlocutory motions and rulings thereon, especially where the motion is supported by affidavits or evidence." It has been pointed out that Rule VIII omits mention of the verdict as a part of the formal record. Note (1939) 52 HARV. L. REV. 983, 985, note 20.

¹¹⁷ *Dreher v. United States*, 92 F. (2d) 859, 860 (C. C. A. 9th, 1937). The

RULE IX. *Bill of exceptions*

Rule IX, paragraph 1. In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, 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 as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Rule IX governs the settlement of the bill of exceptions.¹¹⁸ A court may not settle in violation of the rule. Where the bill of exceptions is not settled within the time prescribed by the rules, the circuit court cannot consider what took place at the trial even though the appellee consents.¹¹⁹ But, Rule IX does not affect the power of the appellate court, if plain error vital to the defendant has been committed, to notice and correct such error on appeal, notwithstanding the absence of objection and exception.¹²⁰

Federal Circuit Judge Woodrough has stated: "The rule does not descend to particulars as to the time within which the appellant must prepare the bill of exceptions, or the time to be allowed the District Attorney to examine and make objections, or for presentation and rulings on objections, or for the making of amendments and resubmission to the District Attorney and the court. It deals broadly with the fixing (within 30 days from taking appeal) of a time within which everything

court stated that this was a continuation of an old requirement, citing 28 U. S. C. A. 861a, 861b, 862, and 880.

¹¹⁸ Pinkussohn v. United States, 88 F. (2d) 70, 71 (C. C. A. 7th, 1937).

¹¹⁹ United States v. Adamowicz, 82 F. (2d) 288 (C. C. A. 2d, 1936), *cert. denied*, 298 U. S. 664, 56 S. Ct. 748, 80 L. ed. 1388 (1935). The court left undecided the question whether under Rule IX the trial judge had power to grant more than one extension. The court implied that "settling" the bill is not the same as "filing and serving" it. The appellants had gotten a series of orders from a judge of the circuit court *ex parte* extending the time to "file and serve" their bill of exceptions. In accord as to consent of parties see Wainer v. United States, 87 F. (2d) 77, 80 (C. C. A. 7th, 1937), *cert. denied*, 300 U. S. 669, 57 S. Ct. 511 (1936); United States v. Kay, 89 F. (2d) 19, 21 (C. C. A. 2d, 1937).

¹²⁰ Meadow v. United States, 82 F. (2d) 881, 884 (App. D. C. 1936). But see the view of Robb, J., dissenting, 82 F. (2d) 881, 885, at 886. It is stated in Walker v. United States, 116 F. (2d) 458, 463 (C. C. A. 9th, 1940), that assignments of errors under Rule IX must be filed in certain types of cases.

shall be done in order that the bill shall be settled and filed with the clerk of court."¹²¹*

Where a motion was made to strike a bill of exceptions "on the ground that it was not signed within the period first fixed for that purpose, and that no extension of that period was permissible after the expiration of the thirty days allowed by Rule IX of the Criminal Appeals Rules of the Supreme Court," the court stated that it need not pass on such motion in that case, but that it "would seem to be well grounded."¹²²*

A year later it was held that assignments of errors and bill of exceptions not filed with the clerk of the trial court within thirty days after the taking of an appeal, nor within a further time fixed within such period of thirty days, should be stricken.¹²³* A second order of extension must be entered within the thirty days after the appeal was taken.

An order by the trial judge made fifty days after the appeal was taken, extending the time for filing the bill of exceptions for a thirty-day period, is not permitted by the rule.¹²⁴ There is a second lapse or hiatus when the bill is not filed within the thirty-day period given by the order extending the time for filing. Not only must the order extending time be made within the thirty-day period, but such order must fix the time within which the bill should be settled and filed.¹²⁵* The

¹²¹* *Wolpa v. United States*, 84 F. (2d) 829, 831, 832 (C. C. A. 8th, 1936) (dissenting opinion). For a discussion of the law prior to the Rule, see the opinion of Federal Circuit Judge Foster in *In re Lee*, 87 F. (2d) 142, 143 (C. C. A. 5th, 1936). The trial judge could extend during the term, or within the extended period, if additional time was granted, and in extraordinary cases delay beyond the time granted might be excused. The court cited *In re Bills of Exceptions*, 37 F. (2d) 849 (C. C. A. 6th, 1930).

¹²²* *White et al. v. United States*, 80 F. (2d) 515, 516 (C. C. A. 4th, 1935). The court stated that it need not pass on the motion since it was satisfied from the matter appearing in the bill of exceptions that the judgment appealed from should be affirmed. For the law prior to the Rule see cases cited in Note (1939) 52 HARV. L. REV. 983, 985, note 19.

¹²³* *Yep v. United States*, 81 F. (2d) 637, 638 (C. C. A. 10th, 1936). The court, nevertheless, examined the bill of exceptions, but found no prejudicial error. Later, on rehearing, the judgment was reversed, and it was held that the bill of exceptions would be considered where the order of the trial court certified to the circuit court showed that the bill had been filed within the extended time granted by the circuit court. *Yep v. United States*, 83 F. (2d) 41, 42 (C. C. A. 10th, 1936).

¹²⁴* *Gallagher v. United States*, 82 F. (2d) 721, 722 (C. C. A. 8th, 1936) (appeal taken on April 4, 1935; bill of exceptions was filed on October 3, 1935). The court stated that as an act of grace it had carefully read and examined the record in the case, and was fully satisfied that the evidence was sufficient to warrant the finding of the jury.

¹²⁵* *Wolpa v. United States*, 84 F. (2d) 829, 831 (C. C. A. 8th, 1936) (Woodrough, J., dissenting). This is true, though the defendant tendered a proper form of order to the trial judge and the judge then proceeded to change such order and hand down an improper one. The defendant should have excepted to the court's order and petitioned for a writ of mandamus. The trial court used the word "present" instead of "settle." The defendants alleged the court's use of

court cannot reserve jurisdiction to make another order after the thirty days have expired fixing the time of filing and settling. Neither several orders nor merely one may be made after the thirty-day period.

Where additional extensions are granted they must be granted within the extended time and not after such extended time has ended.¹²⁶ But other cases seem clearly to hold that the second or subsequent extensions must be made within thirty days after the appeal was taken.¹²⁷ The trial court may not correct its order entered within the proper time to fix a longer period than was first fixed, if no such period

"present" was confusing. The motion to strike the bill of objections was sustained. The court cited, in addition to paragraph 1 of Rule IX, paragraph 3 of the same rule.

For other cases of improper delay in settling and filing bills of exceptions see *Clark v. United States*, 108 F. (2d) 969 (C. C. A. 3rd, 1940) *cert. denied*, 309 U. S. 668, 60 S. Ct. 609, 84 L. ed. 1015 (1940); *Miller v. United States*, 104 F. (2d) 97, 98 (C. C. A. 3rd, 1939); *Holt v. United States*, 106 F. (2d) 684, 685 (C. C. A. 10th, 1939); *Holt v. United States*, 94 F. (2d) 90, 94 (C. C. A. 10th, 1937) (addendum to transcript); *Drecker v. United States*, 94 F. (2d) 859, 860 (C. C. A. 9th, 1937) (one day default); *Evans v. United States*, 90 F. (2d) 851, 852 (C. C. A. 5th, 1937); *Long v. United States*, 90 F. (2d) 482, 483 (C. C. A. 9th, 1937), *cert. denied*, 302 U. S. 730, 58 S. Ct. 55, 82 L. ed. 564 (1937); *United States v. Kay*, 89 F. (2d) 19, 21 (C. C. A. 2d, 1937), *remanded in Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468, 82 L. ed. 748 (1937); *Hightower v. United States*, 88 F. (2d) 302 (C. C. A. 9th, 1937); *Wainer v. United States*, 87 F. (2d) 77, 79 (C. C. A. 7th, 1936), *cert. denied*, 300 U. S. 669, 57 S. Ct. 511, 81 L. ed. 876 (1936); *Cusamano v. United States*, 85 F. (2d) 132 (C. C. A. 8th, 1936); *Spero v. United States*, 85 F. (2d) 134 (C. C. A. 8th, 1936), *cert. denied*, 299 U. S. 601, 57 S. Ct. 193, 81 L. ed. 876 (1936); *Slade v. United States*, 85 F. (2d) 786 (C. C. A. 10th, 1936); *Cary v. United States*, 85 F. (2d) 461, 462 (C. C. A. 9th, 1936), *cert. denied*, 300 U. S. 659, 57 S. Ct. 435, 81 L. ed. 868 (1936); *St. Charles v. United States*, 86 F. (2d) 463, 464 (C. C. A. 9th, 1936); *Goddard v. United States*, 86 F. (2d) 884, 885 (C. C. A. 10th, 1936); *United States v. Ray*, 86 F. (2d) 942, 944 (C. C. A. 2d, 1936); *Miceli v. United States*, 87 F. (2d) 472, 473 (C. C. A. 7th, 1936); *Fitzpatrick v. United States*, 87 F. (2d) 471, 472 (C. C. A. 7th, 1936); *Young v. United States*, 88 F. (2d) 305 (C. C. A. 10th, 1936).

¹²⁶ *Fierman v. United States*, 84 F. (2d) 968 (C. C. A. 3rd, 1936), *affirming United States v. Fierman et al.*, 13 F. Supp. 774, 775 (M. D. Pa., 1936). The court seems to hold that it is immaterial that extensions are made after the thirty days following the taking of the appeal. On December 30, 1935, which was within the thirty-day limit, the time for filing was extended to January 25, 1936. On January 25, 1936, the time was again extended to February 10, 1936. On February 10, 1936, the time was extended to February 20, 1936. On February 27, 1936, the time was extended to March 15, 1936. The case is cited as contrary to a long list of cases in *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 702, note 1, 81 L. ed. 976 (1937).

¹²⁷ *Slade v. United States*, 85 F. (2d) 786, 787 (C. C. A. 10th, 1936). The defendant took an appeal on December 10, 1935. On January 4, 1936, the trial court extended the time for filing and settling to February 1, 1936. On that date the trial court extended to March 1, 1936. The second order was held ineffectual. See also *Cary v. United States*, 86 F. (2d) 461, 462 (C. C. A. 9th, 1936) in which the court states that dicta in *Fierman v. United States*, 84 F. (2d) 968 (C. C. A. 3rd, 1936), "suggests a contrary holding, but is not an adjudication to that effect"; *St. Charles v. United States*, 86 F. (2d) 463, 464 (C. C. A. 9th, 1936); *Clark v. United States*, 108 F. (2d) 969 (C. C. A. 3rd, 1940), *cert. denied*, 309 U. S. 668, 60 S. Ct. 409, 84 L. ed. 1015 (1940). The question was raised but not decided in *Noland v. United States*, 92 F. (2d) 820, 821 (C. C. A. 9th, 1937).

was then actually fixed due to the omission or error of counsel.¹²⁸ The extension of the term of court will not change the result so as to help the defendant.^{129*}

The Supreme Court in an opinion by Chief Justice Hughes finally held that Rule IX limited the power of the trial judge to grant extensions.¹³⁰ The purpose of the rule is to expedite appeals and therefore to end long delays due to extensions of time to prepare bills of exceptions. The rule presupposes that the trial judge is in a position to estimate the time needed to prepare and file the bill, and he is given thirty days after the taking of the appeal to fix that time. That is the limit of his authority, save as he may act under the direction of the circuit court.

In a case coming up to the Supreme Court on certificate from the Court of Appeals for the District of Columbia, the following question was certified: "When, in a criminal case, a bill of exceptions has, within thirty days after the taking of an appeal, been prepared, agreed to by counsel for the United States, and 'submitted' by filing with the clerk of the District Court, but when the trial judge does not settle and file the bill within said thirty days, but does settle and sign the same thereafter, is the bill of exceptions properly settled and signed?" The answer of the Supreme Court was "No."¹³¹

The mere preparation of a proposed bill of exceptions and the lodging of it with the clerk before the expiration of the thirty-day or extended period is not a compliance with Rule IX, where the bill was not settled and filed until more than two months later.¹³²

An addendum to a transcript of the record signed by the judge after the time for filing has expired cannot be considered, as the trial court had lost jurisdiction to settle the addendum.¹³³

The "trial judge" referred to in Rule IX means the judge who tried the case, or, in case of his absence from the district, or disability or death, any other judge assigned to hold, or holding, the court in which the case was tried.¹³⁴ Where the judge who tried the case is not absent

¹²⁸ *Slade v. United States*, 85 F. (2d) 786, 787 (C. C. A. 10th, 1936); *Goddard v. United States*, 86 F. (2d) 884, 885 (C. C. A. 10th, 1936).

^{129*} *St. Charles v. United States*, 86 F. (2d) 463, 464 (C. C. A. 9th, 1936). Even though the term has ended, that by itself does not cut off the rights of the defendant. *Schackow, et al. v. Government of the Canal Zone*, 104 F. (2d) 681, 682 (C. C. A. 5th, 1939) (applying Rule IX by way of an analogy to appeal from Canal Zone).

¹³⁰ *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

¹³¹ *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937).

¹³² *Sanford v. United States*, 98 F. (2d) 325, 326 (App. D. C. 1938). The court cited *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937); *Young v. United States*, 88 F. (2d) 305 (C. C. A. 10th, 1937); *Miller v. United States*, 88 F. (2d) 102 (C. C. A. 9th, 1937).

¹³³ *Holt v. United States*, 94 F. (2d) 90, 94 (C. C. A. 10th, 1937).

¹³⁴ *United States v. Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d, 1937). The

or disabled, only he has the power to extend the time for settling the bill of exceptions. That the trial judge was absent from the district would not excuse failure to have the bill of exceptions settled and signed within thirty days after the taking of the appeal since the rule does provide for settlement by another judge.¹³⁵

However, the filing of a bill of exceptions with the clerk within the period of extension allowed by the judge for settlement of a bill of exceptions is timely, notwithstanding the absence of the trial judge from the district and resultant delay in the settlement of the bill beyond the time granted, where filing with the clerk was permitted by local rule.^{136*} The bill is then constructively in the hands of the judge and appellant has done all that he could to procure the bill to be settled.

Rule IX, paragraph 1, provides that the "bill of exceptions shall be settled by the trial judge as promptly as possible." This result has not always been achieved but there has been some reduction in delay. A study has shown as to certain cases sampled that the time interval between sentence and approval of the bill of exceptions before the rule in the First Circuit was 73 days before and 75 days after the rule, in the Second 131 days before and 85 after, in the Third 83 before and 46 after, in the Fourth 50 before and 39 after, in the Fifth 84 before and 52 after, in the Sixth 126 before and 109 after, in the Seventh 98 before and 65 after, in the Eighth 95 before and 77 after, in the Ninth 151 before and 61 after, and in the Tenth 117 before and 76 after.¹³⁷

The circuit court will not review a ruling on a motion to quash a search warrant and suppress evidence, where no exception was taken to the ruling at the time and where neither bill of exceptions nor assignment of errors were filed on time and were not therefore properly before the court.¹³⁸

court cited the definition of a trial judge laid down in Rule XIII. In *United States v. Freundlich*, 95 F. (2d) 376, 380 (C. C. A. 2d, 1938), the extension was not made by the judge who tried the case. The court stated that possibly the trial judge was absent, but the fact does not appear. In *Walker v. United States*, 113 F. (2d) 314, 316 (C. C. A. 9th, 1940), illness was held a ground for settling by another judge, without any reference being made to any rule.

¹³⁵ *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937) (certificate from App. D. C.), *overruling*, *In re Lee*, 87 F. (2d) 142 (C. C. A. 5th, 1936).

^{136*} *In re Lee*, 87 F. (2d) 142, 143 (C. C. A. 5th, 1936). The court held that mandamus would not lie to compel the trial judge to settle and sign a particular bill of exceptions submitted, since the judge has discretion to examine objections and determine whether the bill correctly discloses the course of the trial. *Cf. Wolpa v. United States*, 84 F. (2d) 829, 831 (C. C. A. 8th, 1936), where, with one judge dissenting, the possibility of mandamus is suggested.

As to the point of the sufficiency of filing a proposed bill with the clerk of the court when the judge is absent from the district, this case is overruled by *Forte v. United States*, 302 U. S. 220, 58 S. Ct. 180, 82 L. ed. 209 (1937).

¹³⁷ Note (1939) 52 HARV. L. REV. 983, 989-992. Tables II-V.

¹³⁸ *Cusamano v. United States*, 85 F. (2d) 132, 133 (C. C. A. 8th, 1936); *accord*, *Hannon v. United States*, 99 F. (2d) 933, 934 (C. C. A. 3rd, 1938).

The time for filing the assignment of errors is the same as that for settling the bill of exceptions.¹³⁹ The time allowed under Rule IX for filing a bill of exceptions and assignment of errors is under Rule XIII not to include holidays and Sundays.¹⁴⁰

Rule IX, paragraph 2. Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of records as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The bill of exceptions must be settled in accordance with Supreme Court Rule 8 requiring evidence to be in narrative form.¹⁴¹ Where the bill is not in condensed and narrative form, the circuit court may return it to the trial judge and require appropriate correction, and the trial judge could make such correction under the direction of the circuit court.¹⁴²

Under the Revised Rules, adopted by the Supreme Court February 13, 1939, effective February 27, 1939, Rule 8 has been liberalized to allow the evidence to be set out in full as well as in narrative form.¹⁴³ Rule 8 now provides: "The judges of the district courts in allowing bills of exception shall give effect to the following rules:

"2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which the exceptions are reserved, and such evidence as is embraced therein may be set forth in full or in condensed and narrative form.

"See Rules of Civil Procedure 46, 51, 75, 76, and 81."

In one situation the trial judge had died before approval and settling of the bill of exceptions. A designated judge ordered inclusion of certain evidence, and neither side was satisfied with the bill of exceptions as approved. As the decision turned on the evidence, and a properly certified transcript of all the evidence was before the review-

¹³⁹ Long v. United States, 90 F. (2d) 482, 484 (C. C. A. 9th, 1937) (rehearing denied).

¹⁴⁰ Young v. United States, 88 F. (2d) 305 (C. C. A. 10th, 1937); Yep v. United States, 83 F. (2d) 41, 42 (C. C. A. 10th, 1936).

¹⁴¹ United States v. Ray, 86 F. (2d) 942, 944 (C. C. A. 2d, 1936).

¹⁴² Ray v. United States, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

¹⁴³ 43 STAT. 1028 (1925), 28 U. S. C. A. p. 75 (Supp. 1942). Hence the late Judge Rufus E. Foster concludes that on the analogy of Civil Rule 73(g) ninety days should be enough in which to prepare the record. Foster, *Criminal Appeals Rules* (1939) 1 Fed. Rules Dec. 261.

ing court, the court granted a motion by the district attorney to include a transcript of all the evidence as part of the bill of exceptions.¹⁴⁴

The record certified to the circuit court is the record on which the appeal is to be heard.¹⁴⁵

Rule IX, paragraph 4. The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

Where the bill of exceptions is not in condensed and narrative form, the circuit court, under Rule IX, paragraph 4, as well as paragraph 2, may return it to the trial judge and require appropriate correction, and the trial judge can make such correction under the direction of the circuit court.¹⁴⁶ The authority of the circuit court extends to the "correction, amplification, or reduction" of the record on appeal of which the bill of exceptions is a part. The appellate court is authorized to require a proper bill of exceptions and to give any directions to the trial court or trial judge that may be necessary to attain that end.

Such was the decision of the Supreme Court, and, also, it had been held in the case below that the circuit court could not under the fourth paragraph of Rule IX extend the time for settling and filing the bill of exceptions after the expiration of the thirty-day period. Settling the bill, it had been held, was for the trial judge alone.¹⁴⁷ The circuit court might correct the record so as properly to reflect proceedings in the district court by adding papers not certified by the clerk or striking out unnecessary papers, and might correct its own record if it is not stated properly.

Where the state of the record was such that the circuit court could not consider the defendant's contention that the trial court had erred in denying his plea of former acquittal, the circuit court would order that time for presentation to and allowance by the trial court of the bill of exceptions be extended and that all evidence introduced on hearing of the plea of former acquittal be included.¹⁴⁸

¹⁴⁴ *Moore v. United States*, 123 F. (2d) 207, 208 (C. C. A. 5th, 1941). The court stated that its decision to include the evidence in the bill was limited to the facts of the case and was not to be considered as authority for amending bills of exceptions by this court. Cf. *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 85 L. ed. 976 (1937).

¹⁴⁵ *Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 669, 85 L. ed. 957 (1941).

¹⁴⁶ *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937). For a statement of the law prior to the rules, see *Walker v. United States*, 113 F. (2d) 314, 317 (C. C. A. 9th, 1940).

¹⁴⁷ *United States v. Ray*, 86 F. (2d) 942, 944 (C. C. A. 2d, 1936). The court cited *United States v. Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d, 1936).

¹⁴⁸ *Ross v. United States*, 102 F. (2d) 113, 114 (C. C. A. 9th, 1939).

Where counsel for defendant did all he could properly do to have the bill approved by the trial judge within the time fixed by the court order, but failed as a result of the court reporter's delay in returning the transcript to the clerk after rewriting a portion thereof because of rechecking by the assistant district attorney and the wish of the judge to recheck it, a motion to dismiss would be overruled.¹⁴⁹ Such a motion should be treated as a motion to strike the bill of exceptions, as defendant has a right of review for errors in the record proper.

Neither the requirement that the bill of exceptions be settled and filed within thirty days after the taking of appeal or such further time as within the period may be fixed by the court, nor any other requirement subsequent to taking of appeal, can be regarded as jurisdictional.¹⁵⁰ Where the indigent defendant within the time for appeal wrote a letter informing the trial judge of a desire to appeal and uncertainty regarding intentions of volunteer and assigned counsel, and the trial judge, in reply after the time for appeal had expired, improperly failed to inform the defendant that he might appeal in *propria persona*, and in effect prevented the defendant from taking steps to perfect his appeal, the appeal will be considered as taken in time, despite failure of the defendant to perfect the record and present the appeal.

A petition by the defendant for writ of certiorari to be directed to a trial court instructing the court to forward to the circuit court a stenographic report of testimony of certain witnesses and the proposed bill of exceptions of the defendant and his objections to the amendments of the government, and a request that the circuit court direct the trial court to send up the government's amendments to the proposed bill, would be denied because the circuit court would not assume the burden of writing the bill of exceptions for the defendant.¹⁵¹

Rule IX, paragraph 4, applies to appeals from the District Court for the District of Columbia but not to appeals from the police court.¹⁵²

RULE X. *Setting the appeal for argument*

Save where good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than thirty (30) days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar of the appellate court will permit.

¹⁴⁹ Hall *et al.* v. United States, 106 F. (2d) 684, 686 (C. C. A. 10th, 1939). The circuit court on September 18, 1939, by a *nunc pro tunc* order directed an extension of time from June 15 to July 1, 1939.

¹⁵⁰ Boykin v. Huff, 121 F. (2d) 865, 873 (App. D. C. 1941).

¹⁵¹ Walker *et al.* v. United States, 113 F. (2d) 314, 320 (C. C. A. 9th, 1940). This case raises a number of questions as to the action of the circuit court in allowing alterations made in the bill of exceptions sent up.

¹⁵² Clawans v. District of Columbia, 89 F. (2d) 802, 804 (App. D. C. 1937).

Preference shall be given to criminal appeals over appeals in civil cases.

Rule X is emphatic that criminal appeals should be brought to a speedy hearing. It expressly commands a prompt hearing and that preference should be given to criminal appeals over appeals in civil cases. "Appeals in criminal cases are thus properly to be heard wherever the Court is sitting, without special order, and on no other notice than is customarily given of the setting of cases for argument."¹⁵³ Rule X applies where the record is timely filed. But where there is no apparent effort to prepare the record and it is not in fact timely filed, the appellate court may dismiss under Rule IV, paragraph 3. The court may set the matter on its docket for hearing and where there is no appearance and no motion for continuance or other relief, may dismiss the appeal. The defendant cannot postpone disposition of the appeal by delaying beyond the time allowed for the preparation and filing of the record.

A sampling of cases before and after adoption of the Rule has shown the following intervals between the filing of the last paper in the circuit court and the judgment of that court: in the Second Circuit 46 days before and 38 days after, in the Third 125 days before and 182 after, in the Fourth 64 before and 28 after, in the Fifth 28 before and 48 after, in the Sixth 133 before and 73 after, in the Seventh 115 before and 62 after, in the Eighth 72 before and 75 after, in the Ninth 99 before and 107 after, and in the Tenth 118 before and 95 after.¹⁵⁴

RULE XI. *Writs of certiorari*

Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within thirty (30) days after the entry of the judgment of that court. Such petition shall be made as prescribed in Rules 38 and 39 of the Rules of the Supreme Court of the United States.

A judgment of the circuit court affirming the district court's order dismissing a petition for correction of sentence is a judgment in a criminal proceeding after verdict and judgment of conviction, and petition for certiorari to review the judgment was a "subsequent proceeding" in such a case to which Rule XI requiring petition to be made within thirty days after entry of judgment applied.¹⁵⁵ It is immaterial

¹⁵³ *Weber v. United States*, 104 F. (2d) 300, 301 (C. C. A. 5th, 1939), *cert. denied*, 308 U. S. 590, 60 S. Ct. 119, 84 L. ed. 494 (1940), *rehearing denied*, 308 U. S. 637, 60 S. Ct. 178, 84 L. ed. 529 (1940).

¹⁵⁴ Note (1939) 52 HARV. L. REV. 983, 989-992, Tables II-V.

¹⁵⁵ *United States ex rel. Coy v. United States et al.*, — U. S. —, 62 S. Ct. 1137, 86 L. ed. (Adv. Ops.) 1052 (1942). For the same case in the district court,

that Rule III omitted to provide for an appeal from the order of the district court in such cases.

RULE XII. *Local rules*

Each appellate court may prescribe rules, not inconsistent with the foregoing rules, with respect to cost bonds, the procedure on the hearing of appeals, the issue of mandates, and the time and manner in which petitions for rehearing may be presented.

Pursuant to Rule XII the Circuit Court of Appeals of the Ninth Circuit adopted a rule relating to the assignment of errors.¹⁵⁶ Under the rule the defendant is required to "set out separately and particularly each error asserted and intended to be urged." When the "error alleged is as to the admission or rejection of evidence, the assignment of errors shall quote the grounds urged at the trial for the objection and the exception taken and the full substance of the evidence admitted or rejected"; and "errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." The court stated that the Rule was adopted "after forty years of experience to promote the efficiency and convenience of the court, and in order that assigned errors would not be misunderstood."

RULE XIII

Rule XIII, paragraph 1. In the foregoing rules, the phrase "trial court" shall be deemed to refer to the District Courts of the United States and the Supreme Court of the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia.

An order of the Supreme Court effective July 1, 1941, extended the operation of the rules to the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands.¹⁵⁷ An act of June 1,

see 38 F. Supp. 610 (W. D. Ky. 1941); and in the circuit court, 124 F. (2d) 1019 (C. C. A. 6th, 1942).

¹⁵⁶ Walker v. United States, 116 F. (2d) 458, 463 (C. C. A. 9th, 1940). The court also relied on Rules IV and IX. The circuit court refused, therefore, to consider assignments of error relating to the admission of evidence flagrantly violating its rules.

¹⁵⁷ 312 U. S. 721, 61 S. Ct. CLIII, 85 L. ed. 731 (1941).

1934,¹⁵⁸ changed the name of the Court of Appeals of the District of Columbia to United States Court of Appeals for the District of Columbia. An act of June 25, 1936,¹⁵⁹ changed the name of the Supreme Court of the District of Columbia to the District Court of the United States for the District of Columbia.

The phrase "trial judge," used in Rule IX and defined in Rule XIII means the judge who tried the case, or in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried.¹⁶⁰

Rule XIII, paragraph 2. For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Where judgment was entered on June 4, 1940, and notice of appeal was filed with the clerk on June 10th, since one of the intervening days was a Sunday, the notice was seasonably filed.¹⁶¹ Under this Rule, an order of May 21, 1935, allowing thirty additional days to file a bill of exceptions and assignment of errors would give the defendant until July 31, 1935, to act since the Rule excludes Sundays and holidays.¹⁶²

Where the last day of an extended period for settling and filing fell on a Sunday, settlement on the following day is sufficient.¹⁶³ Where there is a plea of guilty and judgment of conviction on Saturday, September 19, 1936, and a motion for new trial is filed on Friday, September 25, 1936, it is made two days after the expiration of the three-day period allowed.¹⁶⁴

In one case the government argued that the Rule refers to a "computation," as where the extension is for a certain term or period, and

¹⁵⁸ Act of June 1, 1934, 48 STAT. 926, c. 46.

¹⁵⁹ Act of June 25, 1936, 49 STAT. 1921, c. 804.

¹⁶⁰ *United States v. Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d, 1936), *cert. denied*, 298 U. S. 664, 56 S. Ct. 748, 80 L. ed. 1388 (1935). No reference to the rule was made in *Walker v. United States*, 113 F. (2d) 314, 316 (C. C. A. 9th, 1940), but simply to 31 STAT. 270 (1900), 28 U. S. C. A. 776 (1928).

¹⁶¹ *Scott v. United States*, 115 F. (2d) 137, 138 (C. C. A. 10th, 1940), *cert. denied*, 312 U. S. 678, 61 S. Ct. 449, 85 L. ed. 1117 (1940).

¹⁶² *Yep v. United States*, 83 F. (2d) 41, 42 (C. C. A. 10th, 1936). The court applied Rule IX. *Accord*, *Young v. United States*, 88 F. (2d) 305 (C. C. A. 10th, 1937); *Evans v. United States*, 90 F. (2d) 851, 852 (C. C. A. 5th, 1937); *Dreher v. United States*, 92 F. (2d) 859, 860 (C. C. A. 9th, 1937). Rule XIII was applied to Rule II(2) in *Decker v. United States*, 97 F. (2d) 473, 474 (C. C. A. 5th, 1938).

¹⁶³ *United States v. Ray*, 86 F. (2d) 942, 944 (C. C. A. 2d, 1936), *affirmed*, *Ray v. United States*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).

¹⁶⁴ *Ogwin v. United States*, 90 F. (2d) 494, 495 (C. C. A. 9th, 1937).

not to a case where a specific date is fixed. But the Supreme Court regarded such a construction as too narrow. Chief Justice Hughes stated: "The phrase 'For the purpose of computing time' was plainly intended to be of general application and 'computing' naturally embraces whatever reckoning is necessary to fix the time allowed."¹⁶⁵ Thus where the time for settling and filing a bill of exceptions is extended to November 1, 1936, and that day is Sunday, settling and filing on Monday is proper.

¹⁶⁵ Ray v. United States, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976 (1937).