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FEDERAL PRACTICE AND PROCEDURE

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The phenomenal expansion of our industries, the enormous growth of interstate commerce, the rapid development of corporate business, carried on by corporations, many of which operate throughout the Union, the unprecedented increase in the insurance business, nation-wide in its operations, the extension and consolidation of railroad systems, each system in many instances traversing a number of States, and the manifold ramifications of the great industries throughout the Union, have created for the Federal Courts litigation of a variety and magnitude not dreamed of a few years ago.

As most of the big business in this State, other than banking, textile and furniture, is carried on by so-called foreign corporations (that is to say, corporations organized under the laws of some other State), it follows that a large per cent of the important cases find their way into the Federal Courts, for (a) any foreign corporation or citizen of another State, when sued in the State court by a resident of this State, may remove the case to the Federal Court, if the amount involved exceeds $3,000.00, exclusive of interest and costs, or (b) the foreign corporation or citizen, in the first instance, may sue a corporation or citizen of this State, in the Federal Court under similar conditions. In many instances, the Federal Courts have jurisdiction, irrespective of the amount involved; and where a Federal question is involved, irrespective of diversity of citizenship.

The present discussion will be confined to practice and procedure in the Federal Courts in civil causes.

JURISDICTION

Generally speaking, the District Courts of the United States are given original jurisdiction of any suit of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the constitution or laws of the United States or treaties made under their authority or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects.

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But the provision requiring $3,000.00 in value, does not apply to causes of admiralty or maritime jurisdiction, or to cases arising under postal laws, or under any law regulating commerce, or to matters in bankruptcy, or to suits arising under any law to protect trade and commerce against restraints and monopolies, or to certain other cases mentioned in the statute.[1]

A District Court of the United States has no jurisdiction over a suit by an assignee of a promissory note or other chose in action (except a foreign bill of exchange or a promissory note payable to bearer and executed by a corporation) unless the suit could have been maintained before the assignment. In other words, the necessary diversity of citizenship to confer jurisdiction cannot be created by the assignment of a note or other chose in action, except in suits on foreign bills of exchange or on promissory notes payable to bearer and executed by a corporation.[2] A foreign bill of exchange is one drawn in one State upon a person in another State and payable in the latter State.[3]

As the jurisdiction of the Federal Courts is limited, the bill of complaint must affirmatively show that the court has jurisdiction, whether it rests upon a federal question or diversity of citizenship or otherwise. Actions can be instituted only in the district in which the defendant resides or is found, unless he voluntarily appears, except as to actions of a local nature, and attachment cannot take the place of personal service.[4]

Removal of Causes to Federal Court

The Act of Congress provides that any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States or treaties made under their authority, of which the District Courts of the United States are given original jurisdiction, which may be brought in any State Court, may be removed by the defendant or defendants therein, to the District Court of the United States for the proper district. Any other suit of a civil nature at law or in equity, of which the District Court of the United States has jurisdiction brought in any State Court, may be removed into the District

[1] 28 U. S. C. A. §41.
[2] 28 U. S. C. A. §41, n. 811.
[3] Buckner v. Finley, 2 Pet. 586, 7 L. ed. 528 (1829).
[4] Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913); Missouri v. Taylor, 266 U. S. 200, 45 Sup. Ct. 47, 69 L. ed. 247 (1924).

Court of the United States by the defendant or defendants therein, being non-residents of that State.[5]

The first ground of removal rests upon a Federal question and the second ground upon diversity of citizenship, but in either case, the cause cannot be removed unless the amount in controversy exceeds $3,000.00, exclusive of interest and costs. The amount was increased from $2,000.00 to $3,000.00 by the Judicial Code, which went into effect January 1, 1912.

The matter in dispute must be capable of estimation in money, and the Court is governed by the amount set forth in the complaint, unless it was falsely made to obtain jurisdiction. The action will be dismissed if the evidence shows a fraudulent statement of the amount in dispute to give jurisdiction.[6]

In removing a case from the State Court to the United States District Court, the defendant is first required to give written notice to the plaintiff that he will file in the State Court a petition and bond for removal. The Federal Statute merely provides that written notice to the plaintiff must be given prior to the filing of the petition and bond. The 1925 Legislature of North Carolina passed a statute[7] providing that the Clerk of the Superior Court can not hear a motion to remove until ten days notice has been given to the opposing party. This is an ill-advised statute and the courts are not required to observe it, as no order of removal is required to be made in the State Court, but the case is deemed removed as soon as the petition and bond in due form are filed in a removable cause. It is customary to have the Clerk of the Superior Court enter a formal order of removal.[8]

The petition must be filed before the time for answering as fixed by the State statute, or rule of the court, expires, unless the removal is asked on the ground of prejudice and local influence, in which case the petition may be filed at any time before trial. The petition must be verified and accompanied by a bond with surety in the sum of $500.00.

If the removal is on the ground of diversity of citizenship, all of the defendants must be citizens of States different from the plaintiff

[5] 28 U. S. C. A. §71.

[6] Schunk v. Moline M. & S. Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. ed. 255 (1893).

[7] N. C. Code (Michie 1927) §913 (b).

[8] Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354 (1881); Huntley v. Express Co., 191 N. C. 696, 132 S. E. 786 (1926).

or plaintiffs, unless it is what is known as a separable controversy, in which case the diversity of citizenship must apply only to the plaintiff and the petitioning defendant. All the defendants must join in the petition to remove, unless it is a separable controversy.[9] The petition should set forth, among other things, the facts showing that the diversity of citizenship existed at the time of the institution of the suit and that the amount involved exceeds $3,000.00, exclusive of interest and costs.

When an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of State power, and the States are without authority to penalize or punish one who has sought to avail himself of the Federal right of removal.[10] A number of States have enacted laws providing that if a foreign corporation, licensed to do business in the State, should undertake to remove to the Federal Court an action brought against it in the State Court, its license to do business in the State would be revoked and it would be penalized for thereafter doing business in the State. Such statutes have been declared unconstitutional in so far as they affect corporations doing both intrastate and interstate business.[11] A North Carolina statute[12] provides that every foreign corporation before being permitted to do business in this State, shall become "domesticated," but the fact that it domesticates does not change its status as a foreign corporation, and it may resort to the Federal Courts just as it could have done, if not domesticated.[13]

A case arising under the Federal Employers Liability Act brought in the State Court cannot be removed to the Federal Court.[14] The defendant waives his right to remove the cause by not giving notice as required by the statute, or by not filing his petition and bond before the time for answering expires or by agreeing to an extension

[9] Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. ed. 1055 (1900).

[10] Harrison v. St. L. & S. F. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. ed. 621 (1914); Herndon v. Chicago R. I. & P. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970 (1910).

[11] Harrison v. St. L. & S. F. R. Co., *supra* note 10; Donald v. Phila. & R. Coal & I. Co., 241 U. S. 329, 36 Sup. Ct. 563, 60 L. ed. 1027 (1916).

[12] N. C. Cons. Stat. Ann. (1919) §1181.

[13] Southern Ry. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. ed. 1078 (1903).

[14] 45 U. S. C. A. §56.

of time to file pleadings and he may waive his right to remove in other ways.[15] If the case is removed, the plaintiff may move in the Federal Court to remand the case to the State Court, if he conceives it has been improperly removed.[16]

Notwithstanding the refusal of the State Court to remove the case, the party desiring the removal may file a transcript of the record in the District Court of the United States, and if the case is a removable one, it is immaterial that the State Court has denied the petition for removal and the District Court may protect its jurisdiction by injunction against further proceedings in the State Court.

While the petitioning defendant, in the event of an adverse decision in the State Court, may remain in that Court, and after a final judgment therein, bring the case to the Supreme Court of the United States for review, he is not obliged to do so. He may file the record in the District Court of the United States, while the case is going on in the State Court. The Federal Statute then gives to the United States District Court the jurisdiction to determine the question of removability, and it has the power to protect its jurisdiction by an injunction against further proceedings in the State Court. "In order to prevent unseemly conflict of jurisdiction, it would seem," says the Supreme Court, "that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the Circuit Court (district court) of the United States is reviewed in this Court (U. S. Supreme Court). . . . Conceding that except for the principle of comity, the State Court may decide the question of jurisdiction for itself, in the absence of an injunction from the Federal Court in aid of its own jurisdiction, or a writ of *certiorari* requiring the State Court to surrender the record under the Act of 1875, is the State Court obliged to give effect to the judgment of the United States Circuit Court from which no writ of error is taken, and rendered in the Federal Court after it (State Court) has sustained its own jurisdiction."[17]

The petitioning defendant is required to file in the District Court of the United States within thirty days from the date of filing his petition for removal, a certified copy of the record in such suit, and

[15] Burton v. Smith, 191 N. C. 599, 132 S. E. 605 (1926); So. Pac. Co. v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. ed. 345 (1917).

[16] 28 U. S. C. A. §80, n. 191.

[17] Chesapeake & Ohio R. R. Co. v. McCabe, 213 U. S. 207, 219, 29 Sup. Ct. 430, 53 L. ed. 765 (1909).

he shall within thirty days thereafter plead, answer or demur to the complaint.[18]

A corporation sued in the courts of a State of which neither it nor the plaintiff is a resident may remove the case into the Federal District Court of that State, provided diversity of citizenship exists between the plaintiff and the defendant.[19]

In an action by a plaintiff as executor or administrator, jurisdiction of a Federal Court on the ground of diversity of citizenship is determined by the citizenship of the personal representative, not by that of the decedent.[20] The same rule applies to receivers[21] and general guardians,[22] but not to guardians *ad litem* or next friends.[23]

Separable Controversy.

The Federal Statute provides that "when there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper District."[24] This makes what is called "a separable controversy." What constitutes a separable controversy is often a difficult question to determine. To contain a separable controversy, the case must be capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined between them without the presence of any of the other parties to the suit as it has been begun.[25] The fact, however, that the several defendants may set up separate defenses against the one cause of action or single controversy, does not constitute or create separate controversies that must exist as a basis to divide the case.[26]

[18] 28 U. S. C. A. §72.
[19] Lee v. C. & O. R. R. Co., 260 U. S. 653, 43 Sup. Ct. 230, 67 L. ed. 443 (1923), overruling Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 264 (1906).
[20] Amory v. Amory, 95 U. S. 186, 24 L. ed. 428 (1877); Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380 (1886).
[21] Pepper v. Rogers, 128 Fed. 987 (C. C. Mass. 1904).
[22] Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47, L. ed. 245 (1903).
[23] Blumenthal v. Craig, 81 Fed. 320 (C. C. A. 3rd, 1897).
[24] 28 U. S. C. A. §71.
[25] Fraser v. Jennison, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. ed. 131 (1882); Note (1907) 5 L. R. A. (N. S.)58.
[26] Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. ed. 693 (1884); 28 U. S. C. A., §71, n. 391.

Fraudulent Joinder.

An action is joint or several as the pleader may choose to make it, unless the defendants were sued jointly as a device and with a fraudulent purpose of defeating the right of removal, when in fact no cause of action existed against the resident defendant, and the assertion of his liability to the plaintiff is a mere sham or pretense. But this must be alleged and proved by the defendant in his petition for the removal of the cause.[27]

"So, when in such a case a resident defendant is joined with the non-resident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fradulent' to the joinder, will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith."[28]

Issues of fact arising upon a petition for removal are to be determined in the Federal Court, and the State Court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition.[29] If the petition for removal is insufficient, the State Court may deny it. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud, that the State Court is required to surrender its jurisdiction.[30]

Distinction Between Law and Equity Suits

The Constitution of North Carolina[31] abolished the distinctions between actions at law and suits in equity and the forms of all such actions and suits and provided for one form of action, denominated a civil action, though the principles of law and equity still obtain.[32] The Federal Courts, however, have preserved the distinction between

[27] Hough v. So. R. R. Co., 144 N. C. 692, 57 S. E. 469 (1907).
[28] C. & O. R. Co. v. Cockrell, 232 U. S. 146, 152, 34 Sup. Ct. 278, 58 L. ed. 544 (1914). *Accord,* Chicago, R. I. Ry. v. Whiteaker, 239 U. S. 421, 36 Sup. Ct. 152, 60 L. ed. 360 (1915); Fenner v. Cedar Works, 191 N. C. 207, 131 S. E. 625 (1926).
[29] C. & O. R. Co. v. Cockrell, *supra* note 28.
[30] So. Ry. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. ed. 402 (1916); 28 U. S. C. A. §72, n. 192, §7, n. 366.
[31] N. C. Const. (1868) Art. IV, §1.
[32] Furst v. Merrits, 190 N. C. 397, 130 S. E. 40 (1925).

suits in equity and actions at law, and if one proposes to sue in the Federal Court, the first question to be determined is whether the case must be brought on the law side of the docket or on the equity side.

Under the former practice, if the suit was brought on the wrong side of the docket, it was dismissed, but in 1915, Congress passed an act providing that "In case any United States Court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the Court shall order any amendments to the pleading which may be necessary to conform them to the proper practice.. . . The cause shall proceed upon such amended pleadings."[33] And Equity Rule 22, provides "if at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the docket, it shall forthwith be transferred to the law side, and be there proceeded with, with only such alterations in the pleadings as shall be essential."

In 1915 Congress passed an Act providing that "In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the Court."[34] Prior to the enactment of the section, equitable defenses could not be interposed in Federal Courts in common law actions. Equity Rule 23 provides that if in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit, according to the principles applicable, without sending the case or question to the law side of the docket. But legal and equitable actions seeking affirmative relief cannot be joined in the same suit in the Federal Courts, regardless of State practice.[35]

Suits in Equity.

Congress conferred on the Supreme Court of the United States the power to enact rules of procedure in equity and admiralty cases, and pursuant thereto, the Supreme Court on November 4, 1912, promulgated Equity Rules which became effective February 1, 1913, and which have had the effect of greatly simplifying the practice and procedure on the equity side of the docket.[36]

If the suit to be instituted is in equity, the procedure is as follows:

[33] 28 U. S. C. A. §397.
[34] 28 U. S. C. A. §398.
[35] Morris v. Texas Working Barrel Mfg. Co., 13 F. (2d) 977 (C. C. A. 5th, 1926).
[36] 28 U. S. C. A. §723.

The bill of complaint must first be prepared and filed with the clerk, with a prayer that a subpoena issue thereon, summoning the defendant to appear at a day named, not exceeding twenty days from the day of service and answer the bill of complaint. The bill of complaint must be signed by the attorney individually, and is served by copy, as is the subpoena.[37]

There is no general requirement in the Equity Rules that a bill be verified and as a general rule a bill will not be objectionable because it is not verified.[38]

But under Equity Rule 25, it is provided that "if special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff or someone having knowledge of the facts upon which such relief is asked." The waiver of answer under oath seems wholly unnecessary under the present rules, because the rules apparently do not require any answer to be made under oath.[39]

Equity Rule 29 abolishes demurrers and pleas, and the defendant is required to answer in the time fixed, unless the time is enlarged by the Judge. In the answer the defendant may move to dismiss for want of jurisdiction or want of equity and for other reasons.

Under Equity Rule 31, if the answer includes a set-off or counterclaim, a reply must be filed in ten days.

Verification of an answer in equity as distinguished from the answers to interrogatories is not required.

If the defendant conceives that the service of summons is invalid or defective, he should enter a special appearance before answering, and move to strike out the service of summons.

Equity Rule 16 provides in case the defendant is in default in failing to file answer or defense, the plaintiff may take an order as of course that the bill be taken *pro confesso,* and when the order *pro confesso* is entered, the defendant cannot appear in any way or adduce any evidence or be heard at the final hearing.[40] Under Rule 17, the Court may proceed to a final decree any time after the expiration of thirty days after the entry of the order *pro confesso.*

In equity suits all matters are decided by the Judge without a jury. This is in marked contrast to the practice in the courts of this State wherein all issues of fact whether arising in actions at law

[37] Equity Rule 24.
[38] Fichtel v. Barthel, 173 Fed. 489 (C. C. S. D. N. Y. 1909).
[39] Pgh. Water Heater Co. v. Beler Water Heater Co., 222 Fed. 950 (D. C. W. D. Pa. 1915).
[40] Clifton v. Tomb, 21 F. (2d) 893 (C. C. A. 4th, 1927).

or suits in equity, are tried by a jury, unless a jury trial is waived by the parties in the manner provided by law. The original Judiciary Act of 1789 provided that suits in equity shall not be sustained in the districts courts of the United States in any case where a plain, adequate and complete remedy may be had at law.[41] This statute must be construed in connection with the 7th Amendment to the Constitution of the United States, which guarantees a trial by jury in suits at common law. The amendment is practically contemporaneous with the statute as the amendment was proposed five days after the passage of the Judiciary Act. Soon after the enactment of this provision, it was construed by the U. S. Supreme Court which held "that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy."[42] And the same construction was placed upon this act many years later.[43] This act does not, therefore, restrict the ancient jurisdiction of courts of equity as exercised by the Chancery Courts of England.

Whenever a court of law affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[44] Under the old equity practice, the custom had grown up of sending practically all equity causes to a master who heard the witnesses and made his report to the Judge, but under the Equity Rules adopted in 1912, a marked change for the better in this respect was made. Under the present practice the Judge hears the witnesses and he cannot refer a suit to a master (save in matters of accounts) except upon a showing that some exceptional condition requires it.[45] In suits in equity, the Judge may submit issues of fact to a jury, but the finding of the jury is not binding, only advisory, which the Judge may accept or not, at his pleasure.[46]

Actions at Law.

If the action to be instituted is an action at law, the procedure is different from the equity procedure. The Federal Statute passed in 1872, known as "The Conformity Act," was intended to bring

[41] 28 U. S. C. A. §384, Judicial Code, §267.
[42] Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655 (1830).
[43] Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167 (1894).
[44] Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 698, 28 L. ed. 246 (1884); Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. ed. 358 (1891).
[45] Equity Rule 59.
[46] Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. ed. 113 (1896).

about uniformity in State and Federal procedure in common law causes. The statute provides that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts shall conform as near as may be to the practice, pleadings, forms and modes of proceeding in like causes in the courts of record of the states within which the district courts are held." The Supreme Court held that the words "as near as may be" do not mean as near as may be possible or practicable, but as near as may be necessary in the judgment of the court to advance the ends of justice or prevent delay.[47]

In the Eastern District of North Carolina, the Court has adopted the North Carolina practice act[47a] as to the issuance and return of summons and filing of pleadings, so that the summons is made returnable before the Clerk and commands the Marshall to summon the defendant to appear and answer the complaint within thirty days after its service, and the complaint must be filed in the Clerk's office at or before the time of the issuance of the summons and a copy thereof delivered to the defendant at the time of the service of summons and the defendant must appear and answer or demur within thirty days after the service of summons upon him.

Under the North Carolina practice, legal and equitable matters may be joined in the same suit, but this is not permissible under the Federal practice.[48] For instance, under the State practice, a suit may be brought upon a note and in the same suit, a cause of action may be joined to set aside a conveyance of property made by the debtor on the ground that it was in fraud of creditors, but under the Federal practice this cannot be done. Under the Federal Equity practice a suit to set aside a conveyance of property in fraud of creditors cannot be maintained until the claim has first been reduced to judgment in an action at law and thereafter as a general rule, execution has been issued thereon, and returned unsatisfied. In other words, all legal remedies must have been exhausted before resorting

[47] Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. ed. 602 (1898).

[47a] N. C. Pub. Laws (1927) c. 66; N. C. Code (Michie, 1927) §476, discussed in *Recent Statutory Changes in North Carolina,* (1927) 6 N. C. L. Rev. 170, at p. 182. 28 U. S. C. A. §731 provides that "the several district courts may . . . make rules and orders directing the returning of writs and processes, the filing of pleadings . . . and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

[48] Morris v. Texas Working Barrel Mfg. Co., *supra* note 35.

to the equitable powers of the Court.[49] This is one of the most frequent mistakes made by those unfamiliar with the Federal practice.

SERVICE OF SUMMONS ON NON-RESIDENTS

Under the North Carolina statute, a non-resident who has property in this State may be brought into court by attachment of his property insofar as to enable the court to obtain a judgment in *rem*, but, under the Federal statute, jurisdiction of a non-resident cannot be acquired by attachment, except in an action local in its nature, for the reason that the Federal Courts can acquire no jurisdiction over a defendant or his property unless personal service can be had upon him in the district or upon his agent for process.[50] Where an action has been commenced in the Federal Court and personal jurisdiction over the defendant obtained, the issuance of a writ of attachment in conformance with the State law is authorized.[51]

In suits "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where the suit is brought," non-resident defendants may be served wherever found by order of the Court or where personal service upon the absent defendants is not practicable, service may be obtained by publication for not less than once a week for six consecutive weeks.[52] This procedure is confined to local actions touching the status of property within the district, in cases depending for federal jurisdiction, upon diversity of citizenship.

The Supreme Court of the United States held valid a statute of Massachusetts which provided for service upon non-residents by service upon the State Registrar in actions growing out of any accident or collision in which the non-resident may be involved while operating a motor vehicle on the public highway, provided notice of such service and a copy of the process are sent by registered mail by plaintiff to defendant, and defendant's return receipt and plaintiff's affidavit of compliance with the statute are offered to the Court.[53] Chapter 75 of North Carolina Public Laws of 1929[54] is

[49] Scott v. Neely, *supra* note 44.
[50] Big Vein Coal Co. v. Read, *supra* note 4.
[51] 28 U. S. C. A. §71, page 46.
[52] 28 U. S. C. A. §118.
[53] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).
[54] See *A Survey of Statutory Changes in North Carolina in 1929* (1929) 7 N. C. L. REV. 363, 368-70.

a substantial copy of the Massachusetts Statute held valid in *Hess v. Pawloski.*[55] Unless the law contains a provision making it reasonably probable that the notice will be communicated to the person sued, it is invalid under the fourteenth amendment.[56]

The question frequently arises as to whether a foreign corporation can be brought into the Federal Court by service upon an officer or agent residing in the State. An action was instituted in the Superior Court of North Carolina against a Virginia corporation which was not engaged in business in this State and had no property in this State, and the summons was served upon a director who lived in this State. The Supreme Court of North Carolina held the service was valid,[57] but this was reversed by the United States Supreme Court.[58]

Where a foreign corporation or a citizen of another State, is sued in the State Court by a resident of this State for more than $3,000.00 and it is contended that the service of summons is not valid and it is desired to take the proper steps to have the service vacated and it is also desired to remove the case to the Federal Court, is it necessary to file the motion in the State Court to vacate the service of summons and have it acted upon before a petition to remove is filed? In other words, does the filing of a petition to remove amount to a general appearance, and cure any defect in the service? The law is settled that the filing of a petition to remove is not a general appearance, and does not prevent the defendant from moving to strike out the service of summons, or otherwise pleading to the jurisdiction after the case is removed into the Federal Court. After removal to the Federal Court, the case stands in that court just as if originally brought there.[59]

TRIAL

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved." Suits at common law embrace all suits which are not of equity or

[55] *Supra* note 53.
[56] Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 447 (1928).
[57] Menefee v. Riverside and Dan River Cotton Mills, 161 N. C. 164, 76 S. E. 741 (1912).
[58] Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. ed. 910 (1915).
[59] General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261, 43 Sup. Ct. 106, 67 L. ed. 244, 252, 260 (1922).

admiralty jurisdiction.[60] This right to trial by jury may be waived. The trial of issues of fact in the District Courts of the United States shall be by jury except in cases of equity, admiralty and maritime jurisdiction, and except as otherwise provided in bankruptcy proceedings.[60a] "Trial by jury" means a trial by a jury of twelve men as known to the common law.[61]

Three peremptory challenges are allowed without reference to the number of plaintiffs or defendants. Challenges for cause or favor are tried by the court.[62] Where both parties request peremptory instructions and do nothing more, it is equivalent to a request to the court to find the facts, and a direction by the court to find for one or the other party is a finding for the party in whose favor the instruction is given and both are concluded by the finding, unless there is no evidence to support the finding.[63] But a party may request a peremptory instruction and upon the refusal of the court to give it, may insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent.[64] The District Court is not bound by the State law requiring a special verdict on any issue.[65]

In 1906, Congress passed an Act providing that "the competency of a witness to testify in any civil action, suit or proceeding in the Courts of the United States shall be determined by the laws of the State in which the Court is held."[66] This statute applies to civil cases only and in the administration of the criminal law, the United States Courts are governed by the rules of the common law and the competency of a witness is determined by the law of the state in which the court is held, as it existed when the courts of the United States were established by the Judiciary Act of 1789.[67] The ordinary rules of the common law govern the examination of witnesses and the cross-examination must be confined to the subjects brought

[60] Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493 (1873).
[60a] 28 U. S. C. A. §770.
[61] Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873 (1899).
[62] 28 U. S. C. A. §424.
[63] Beutell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. ed. 654 (1895).
[64] Empire State Cattle Co. v. Atchison, T. and S. F. Ry. Co., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. ed. 931 (1908).
[65] U. S. Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. ed. 60 (1889).
[66] 28 U. S. C. A. §631.
[67] 28 U. S. C. A. §729 and notes.

out on the direct examination.[68] If it is desired to examine the witness as to new matter not brought out in the direct examination, the party must make the witness his own witness when he presents his own case. This is in striking contrast to the North Carolina practice.[69] In order to review objections to the admission or rejection of evidence or to the charge or objections made during the trial, exceptions to the rulings of the court must be taken at the time and presented for review by a bill of exceptions. The exception should be taken and recorded at the time the objection is made. When an exception to the charge is taken after the jury retires, it will not be considered.[70]

The Federal Courts are not bound by the State practice in charging the jury. The charge may be oral or written, and the Judge may comment on the evidence and express his opinion as to the facts, but the jury must determine the facts and they are not bound by the view of the Court.[71] The form and effect of the verdict are controlled by the practice in the State Courts.[72] Under the Conformity Statute, the plaintiff in an action at law in the Federal Court, has the same right to take a voluntary non-suit as exists under the State statute.[73] It is the right of a plaintiff to dismiss a bill in equity before final hearing without prejudice on payment of costs, except in certain cases. The exception is where the dismissal would prejudice the defendant in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.[74]

APPELLATE PROCEDURE

Appeals to Circuit Courts of Appeals

Formerly there were two methods by which cases were reviewed in the Federal Appellate Courts. In an action at law the judgment

[68] Ferry-Hallock Co. v. Orange Hat Box Co., 185 Fed. 816 (C. C. D. N. J. 1910).

[69] Cross-examination may be extended to any matter relevant to the inquiry. State v. Allen, 107 N. C. 805, 11 S. E. 1016 (1890); State v. Gouge, 157 N. C. 602, 72 S. E. 994 (1911).

[70] Maleng v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. ed. 163 (1899).

[71] California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. ed. 730 (1890); Dobie, Federal Procedure (1928) 612.

[72] Glenn v. Sumner, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. ed. 301 (1889).

[73] Barrett v. Virginia R. Co., 250 U. S. 473, 39 Sup. Ct. 540, 63 L. ed. 1092 (1919). This case arose in the Fourth Circuit and reversed the practice obtaining in this circuit.

[74] Matter of Skinner and Eddy Corp., 265 U. S. 86, 44 Sup. Ct. 446, 68 L. ed. 912 (1924).

of the District Court was reviewed by writ of error, and in a suit in equity, the decree was reviewed by appeal.

On January 31, 1928, Congress passed an act abolishing the writ of error and substituting an appeal. This act provides as follows: "The writ of error in cases civil and criminal is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."[75] This act, as amended by the Act of April 26, 1928 (which is now the law), further provides as follows: "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate shall be applicable to the appeal which the preceding section substitutes for a writ of error."[76]

The Circuit Courts of Appeals have jurisdiction as follows: (a) to review by appeal final decisions: in the District Courts in all cases save where a direct review may be had in the Supreme Court under Section 345 or 28 U. S. C. A.; (b) to review by appeal final decisions in the District Courts for Hawaii, Porto Rico, Virgin Islands and Canal Zone, and in the United States Court for China; (c) to review certain interlocutory orders and decrees of the District Courts, including the District Courts of Alaska, Hawaii, Virgin Islands and Canal Zone; (d) appellate and supervisory jurisdiction in bankruptcy proceedings; (e) jurisdiction over the Federal Trade Commission, Interstate Commerce Commission and Federal Reserve Board;[77] (f) jurisdiction to review decisions of the Board of Tax Appeals.[78]

Time of Appeal.

No appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review, shall be allowed unless application therefor be duly made within *three months* after the entry of such judgment or decree.[79] The statute limiting the time for taking appeal is mandatory and jurisdictional and the time fixed by the statute cannot be extended by waiver, agreement of the parties or

[75] 28 U. S. C. A. §861-a.
[76] 28 U. S. C. A. §861-b.
[77] 28 U. S. C. A. §225.
[78] 26 U. S. C. A. §1226.
[79] 28 U. S. C. A. §230. The foregoing is the Act of February 13, 1925, amending the Act of March 3, 1891, which allowed six months. Prior to the Act of March 3, 1891, the time was limited to one year.

order of the Court.[80] An appeal is not taken until the petition and order for appeal and appeal bond are filed in the trial court.[81]

Appeals in Bankruptcy.

Appeals in bankruptcy proceedings are regulated by Section 24 and Section 25 of the Bankruptcy Act as amended by Act of May 27, 1926.[82] Section 24 of the Bankruptcy Act as amended by the Act of May 27, 1926, provides:

(a) The Circuit Courts of Appeals are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy.

(b) The Circuit Courts of Appeals have jurisdiction in equity to superintend and revise in matters of law (and in matters of law and fact, the matters specified in Section 48), the proceedings of the courts of bankruptcy. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 48, to be allowed in the discretion of the appellate court.

(c) All appeals under this Section shall be taken within thirty days after the judgment or order has been rendered or entered.[83]

It is necessary to determine whether the question at issue is a "controversy arising in bankruptcy proceedings" or "a proceeding in bankruptcy" for the reason that if it is the former, the appeal must be allowed by the District Court, whereas if it is the latter (except the three classes of cases mentioned in Section 25) the petition for appeal must be presented to the Circuit Court of Appeals, which court may in its discretion allow the appeal, and the allowance of the appeal by the District Court is ineffectual.[84]

"Controversies arising in bankruptcy proceedings" include those matters arising in the course of a bankruptcy proceeding, which are

[80] Sprague v. Chicago B. & O. R. R. Co., 17 F. (2d) 768 (C. C. A. 8th, 1927); Old Nick Williams Co. v. U. S., 215 U. S. 541, 30 Sup. Ct. 221, 54 L. ed. 318 (1910).

[81] Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. ed. 246 (1890); Fowler v. Hamill, 139 U. S. 549, 11 Sup. Ct. 663, 35 L. ed. 266 (1891); Credit Co. v. Arkansas Credit Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L.ed. 448 (1888). As to what are and are not final decisions which may be reviewed by appeal, see 25 C. J. 966, notes 86 and 87, and 3 C. J. 432-465.

[82] 11 U. S. C. A. §§47 and 48.

[83] 11 U. S. C. A. §47.

[84] White v. Barnard, 29 F. (2d) 510 (C. C. A. 4th, 1928); Gunn v. Gardner, 28 F. (2d) 270 (C. C. A. 8th, 1928); Reich v. Olson, 25 F. (2d) 865 (C. C. A. 8th, 1928).

not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate.

"Proceedings in bankruptcy" are those matters of an administrative character including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate.[85]

Section 25 of the Bankruptcy Act as amended by the Act of May 27, 1926, provides that: Appeals, as in equity cases, may be taken in bankruptcy proceedings from the Courts of Bankruptcy to the Circuit Court of Appeals in three cases: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a claim of $500.00 or over, and such appeal shall be taken within thirty days after the judgment has been rendered.[86]

Steps in Perfecting an Appeal.

The following are the essential steps in perfecting an appeal:

First, prepare and get the bill of exceptions signed by the trial judge. Next, present the petition for the appeal and get the trial judge to sign an order allowing the appeal, and at the same time get the judge to fix the amount of the appeal bond and have him approve the bond, and also have him fix the amount of the supersedeas bond, if one is necessary. With the petition for appeal, an assignment of errors must be filed.

After the petition for appeal is allowed, have the judge sign a citation to the appellee and then have the citation served upon the appellee or his counsel, and file the same with the Clerk.

Each one of these matters will now be considered.

(a) Bill of Exceptions.

While no act of Congress in express terms authorizes the Judges to sign bills of exceptions, yet Congress recognizes the use of such bills by providing how they are to be authenticated by the Judges.[87] A bill of exceptions is a written statement of the exceptions duly

[85] Taylor v. Voss, 271 U. S. 176, 46 Sup. Ct. 461, 70 L. ed. 889 (1926).
[86] 11 U. S. C. A. §48.
[87] 28 U. S. C. A. §776; Buessel v. U. S., 258 Fed. 811, 816 (C. C. A. 2nd 1919).

taken at the trial to the decisions and instructions of the Judge, and properly certified by the Judge. The object of a bill of exceptions is to spread upon the record and preserve the facts of the case that the party excepting may have them, and the Court's action upon them, reviewed.[88] It is only through a bill of exceptions that the rulings of the Judge made at the trial become a part of the record to be reviewed; and the evidence, rulings and instructions upon which reliance is placed for reversal, must be embodied in a bill of exceptions before the appellate court can consider them.[89]

A bill of exceptions must be presented to the Judge during the term at which the judgment is rendered or within a further time allowed by order entered at that term or by standing rule of court, or by consent of parties given during the term or during a valid extension thereof.[90] A mere objection to the admission of evidence, without a statement of any grounds of objection, is not sufficient. Exceptions to the charge must be taken before the jury retires.[91] A bill of exceptions is essential in an appeal in an action at law, for without a bill of exceptions the record is limited to the pleadings, process, verdict and judgment,[92] but bills of exceptions are unknown in the equity practice in the Federal Courts.[93]

(b) Petition for Appeal and Bond.

The petition for appeal sets forth the desire of the petitioner to appeal and asks the Judge of the lower Court to allow the appeal. With this petition, the petitioner must present his assignment of errors and he should at the same time present a bond with surety that he will prosecute his appeal with effect, or if he fails therein, will answer for all costs. The bond should be approved at the time

[88] 28 U. S. C. A. §776, p. 45.

[89] 28 U. S. C. A. §776, notes 91 to 95. And the bill of exceptions should be settled and signed before the petition for appeal and assignment of errors are presented, as no assignment of errors as to rulings of law occurring in the course of the trial, can be considered by the appellate court unless incorporated into the record by the bill of exceptions. Ana Mairia Sugar Co. v. Quinones, 254 U. S. 245, 41 Sup. Ct. 110, 65 L. ed. 246 (1920).

[90] Exporters of Mfg. Products v. Butterworth-Judson Co., 258 U. S. 365, 42 Sup. Ct. 331, 66 L. ed. 663 (1922).

[91] 28 U. S. C. A. §776, notes 43 and 66. Rule 10 of 4th Circuit, 288 Fed. VII (1923).

[92] Reilly v. Beekman, 24 F. (2d) 791 (C. C. A. 2nd, 1928); Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. ed. 269 (1895).

[93] 28 U. S. C. A. §776, p. 46. The common law bill of exceptions is not the proper way to present the evidence in an equity appeal. The practice is regulated by the equity rules. Struett v. Hill, 269 Fed. 247 (C. C. A. 9th, 1920).

the appeal is allowed. The trial judge fixes the amount of the cost bond.

(c) Assignment of Errors.

The assignment of errors must be presented and filed at the time the petition for appeal is presented. The assignment of errors tells the trial judge to whom the petition for the appeal is presented, what the errors are upon which the petitioner relies, and gives notice to opposing counsel and the appellate court of the questions to be presented on appeal.

The Rules of the Supreme Court[94] and of the Circuit Courts of Appeal[95] provide that an appeal shall not be allowed unless an assignment of errors is filed.

Each error intended to be urged on appeal should set out separately and particularly. When the error alleged is directed to the exclusion or admission of evidence, the assignment must set forth the evidence excluded or admitted. When there is exception to the charge, the assignment must set out that part of the charged excepted to.

The assignment of errors must be included in the transcript of the record and printed with it.[96]

(d) Citation, Briefs, and Argument.

The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted and that he may appear and be heard.[97] The citation must be signed by the Judge and should be signed at the time the appeal is allowed. The Clerk cannot sign the citation. It must be served upon the defendant in error or his counsel of record, or service accepted by him. Mailing the citation to the defendant or his counsel is not sufficient.[98] It is not necessary to obtain a citation when both the appeal is allowed and the bond is given in open court during the term at which the judgment appealed from is entered.[99] Under Rule 14 of the Fourth Circuit,[100] the

[94] Revised Rules of the Supreme Court of the U. S., Rule 9, 275 U. S. 595, 600 (1928).
[95] 150 Fed. XXV, XXVII (1906) Rule 11.
[96] Rule 11 of the 4th C. C. A., 288 Fed. VII (1923).
[97] 28 U. S. C. A. §868.
[98] Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 12 Sup. Ct. 655, 36 L. ed. 371 (1892).
[99] Hewitt v. Filbert, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. ed. 581 (1885).
[100] 288 Fed. IX (1923).

citation is returnable not exceeding forty days from the day of signing the citation. The supersedeas bond is regulated by Rule 13.[101]

Under Rule 25 of the Fourth Circuit, each side has one and one-half hours for oral argument, unless special leave is granted before argument.[102]

Under Rule 24 of the Fourth Circuit the appellant's brief must be filed fifteen days before the term and the appellee's brief five days before the term.[103]

Under Rule 14[104] of the Fourth Circuit, except in cases where counsel agree, the trial judge upon application after notice to opposing counsel, determines what portion of the records and proofs shall be printed in the transcript of the record.

Equity Rule 75B,[105] requires the essential parts of the testimony to be stated in narrative form by the appellant and to be lodged in the Clerk's office for the examination of the appellee, and the appellant is required to notify the appellee of such lodgment and name a time and place when he will ask the judge to approve the same.

Appeals to Supreme Court

Time of Appeal.

No appeal or writ of *certiorari* intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of the judgment or decree. For good cause shown the time for applying for a writ of *certiorari* may be extended not exceeding sixty days by a Justice of the Supreme Court.[106]

The Supreme Court of the United States has jurisdiction to review three classes of judgments:

(1) Direct review of judgments of the District Courts in certain cases.

(2) Judgments of Circuit Courts of Appeals.

(3) Judgments of highest courts of the States.

[101] 288 Fed. VIII (1923).
[102] 288 Fed. XVI (1923).
[103] 288 Fed. XV (1923).
[104] 288 Fed. IX (1923).
[105] 198 Fed. XL (1912).
[106] 28 U. S. C. A. §350. This is the Act of February 13, 1925, which repealed the Act of March 3, 1891, which gave one year. Before the Act of 1891, the time was two years.

Direct Appeal from District Court to Supreme Court.

A direct appeal to the Supreme Court from an interlocutory or final judgment of the District Court, may be had in the five following instances enumerated in the statute and not otherwise—to-wit:

(1) Suits against monopolies where the United States is complainant.

(2) Appeal by United States in criminal cases where a demurrer to an indictment is sustained or judgment arrested, when the decision is based on invalidity or construction of the statute upon which the indictment is founded; or from a judgment sustaining a special plea in bar where the defendant has not been put in jeopardy.

(3) From an order granting or denying an interlocutory injunction upon alleged repugnancy of a State statute to the Federal Constitution.

(4) From an order granting or denying an interlocutory injunction as to orders of the Interstate Commerce Commission.

(5) From an order granting or refusing an interlocutory injunction under the Packers and Stockyards Act.[107]

Review of Judgments of Circuit Courts of Appeal.

(a) In any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court upon petition of any party thereto, to require by *certiorari* either before or after a judgment by such lower Court, that the cause be certified to the Supreme Court for determination by it.

(b) Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on appeal; but in that event a review on *certiorari* shall not be allowed at the instance of such party.

(c) No judgment or decree of a Circuit Court of Appeals shall be subject to review by the Supreme Court otherwise than as provided in this section.[108]

Review of Decrees of State Courts.

Jurisdiction of Supreme Court to review on writ of error (now

[107] 28 U. S. C. A. §345.
[108] 28 U. S. C. A. §347.

appeal) judgments of State Courts of last resort extends to two classes of cases:

(1) Where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) Where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity.

This is 28 U. S. C. A., Section 344 (a), and is the Act of February 13, 1925, amending Section 237 of the Judicial Code.[109] But the Act of January 31, 1928, which is Section 861 (a) of 28 U. S. C. A., abolished the writ of error and "provides that all relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of January 31, 1928, contained a proviso "that the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts," but this was stricken out by the Act of April 26, 1928, and in lieu thereof the following was substituted (which is section 861 (b) of 28 U. S. C. A.): "The statutes regulating the right to a writ of error shall be applicable to the appeal which the preceding section substitutes for a writ of error."

In consequence of the Act of April 26, 1928, the Supreme Court of the United States on June 5, 1928, promulgated Rule 46 which provides that under the Act of January 31, 1928, as amended by the Act of April 26, 1928, the review which theretofore could be had in this court on writ of error, may now be obtained on appeal.[110]

The Federal Statute further provides for a review by *certiorari* of decrees of State Courts of last resort in the following cases:

(1) Where is drawn in question the validity of a treaty or statute of the United States, or

(2) Where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or

[109] See King Mfg. Co. v. Augusta, 277 U. S. 100, 48 Sup. Ct. 489, 72 L. ed. 801 (1928).

[110] 275 U. S. 595, 630, 72 L. ed. 1042, 1059. The new revised rules of the Supreme Court adopted June 5, 1928, effective July 1, 1928, are printed as an Appendix in Vol. 275 of the U. S. Reports and Vol. 72 of the Lawyers Edition.

(3) Where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review in these instances "may be exercised as well where the *Federal claim is sustained as where it is denied.*"[111]

It will be noted that the jurisdiction to review by writ of error (now appeal), under paragraph (b) of Section 344, is limited to cases in which the decision is against the validity of a treaty or statute of the United States; or is in favor of the validity of a statute of a State, while the power to review by *certiorari,* under paragraph (b) may be exercised whether the federal claim is sustained or denied.

The federal statute further provides that "if a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for *certiorari,* this alone shall not be a ground for dismissal."[112] Under the present statute, the full power of the Supreme Court to review the decisions of State Courts of last resort is available by *certiorari.*

The right of review is not dependent upon the amount in controversy but on the character of the right in dispute and the judgment which the State Court has pronounced on it.[113] An appeal does not lie on the ground that the parties are citizens of different states.[114] Whether a federal question is properly raised in the trial court of the State is a question of state practice.[115] The jurisdiction extends only to final judgments or decrees of state courts.[116] And it must be a judgment of the "highest Court" in which a decision in the suit could be had.[117]

Rule 38[118] provides that a petition for review on writ of *certiorari* of a decision of a State Court shall be accompanied by a certified transcript of the record in the case, including the proceedings in the

[111] 28 U. S. C. A. §344 (b).
[112] 28 U. S. C. A. §344 (c).
[113] Wilson v. Charleston, 2 Pet. 449, 7 L. ed. 481 (1829).
[114] Barrington v. Missouri, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. ed. 890 (1907).
[115] N. C. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591 (1914).
[116] Louisiana Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, 33 Sup. Ct. 78, 57 L. ed. 138 (1912).
[117] Fisher v. Perkins, 122 U. S. 522, 7 Sup. Ct. 1227, 30 L. ed. 1192 (1887).
[118] Revised Rules of the Supreme Court of the United States, 275 U. S. 595, 72 L. ed. 1042 (1928).

court to which the writ is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for allowance of the writ. A supporting brief may be included in the petition.

Where an appeal is taken to the Supreme Court from a State Court, a District Court or a Circuit Court of Appeals, the appellant shall file with the Clerk of the Court below with the petition for appeal, an assignment of errors.[119] When an appeal is allowed, a citation to the appellee shall be signed by the judge allowing the appeal, returnable in not exceeding thirty days and it must be served before the return day. The appellant shall also file with the Clerk of the lower Court, together with proof of service of a copy on the appellee, a praecipe indicating the portions of the record to be incorporated in the transcript.[120] The appellant must docket the case and file the record with the Clerk of the Supreme Court by or before the return day unless an order of enlargement is made and filed in the Supreme Court.[121]

Within thirty days after docketing the case the appellant shall file forty copies of a printed statement, disclosing the basis on which it is contended the Supreme Court has jurisdiction to review the decree below and he shall serve a copy of his printed statement on the appellee, and the appellee shall have twenty days in which to file forty printed copies of a statement disclosing any ground making against the jurisdiction asserted by the appellant.[122]

In cases where an appeal may be had from a State Court, the same may be allowed in term or in vacation by the Chief Justice or presiding Judge of the State Court, or by a Justice of the Supreme Court of the United States.[123]

[119] *Supra* note 110, Rule 9.
[120] *Supra* note 110, Rule 10.
[121] *Supra* note 110, Rule 11.
[122] *Supra* note 110, Rule 12.
[123] *Supra* note 110, Rule 36.