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THE COURSE OF AN APPEAL TO THE UNITED STATES CIRCUIT COURTS OF APPEALS

OR

PROBLEMS AND QUESTIONS ARISING IN THE COURSE OF AN APPEAL TO THE U. S. CIRCUIT COURTS OF APPEALS*

EVAN A. EVANS†

The problem confronting the attorney who desires to appeal to the U. S. Circuit Court of Appeals should not be a difficult one. For over a century appellate courts, state and federal, have been endeavoring to simplify appeals. The various circuit courts of appeals have from their origin joined in this effort.

Notwithstanding this constant effort, it is exasperating and difficult to explain, the entanglements with rules which the profession experience in their efforts to perfect an appeal. The number of motions to dismiss appeals is inconceivably large and grows no less with the passing years. For example, in the last year, in the Circuit Court of Appeals for the Seventh Circuit, there were 25 motions to dismiss appeals, usually because one or more rules were not complied with. In a single late volume of the Federal Reporter, 2nd Series, were found 21 cases where a motion to dismiss was considered by the court in its opinion.

*This article constitutes a chapter in a projected volume on the work of the United States Court of Appeals. The author wishes to acknowledge his indebtedness to his law clerks, who gathered much of the material used in this article; to Professor Henry Hart of the Harvard Law School, whose class in Federal Jurisdiction prepared term papers on the various topics embraced in the proposed book and which were made available to me; and to Professor Orrin B. Evans of the Law School of the University of Missouri, who read and edited the entire manuscript.

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In the Supreme Court, in the case of *Commissioner v. Estate of Bedford*, decided May 19, 1945, half of the opinion was devoted to a consideration of a motion to dismiss the writ of *certiorari* because not applied for within 90 days. Determination turned on the rules of the Second Circuit. The specific question was,—When did the 90 days within which petitioner could file its petition for a writ of *certiorari*, begin to run? Justice Frankfurter, speaking for the Supreme Court, said:

“But now that the existing practice has revealed abstract disharmonies, if not difficulties, the Circuit Court of Appeals will doubtless establish a more tidy system for meeting the technical requirements for review here. . . . The uncertainties inherent in litigation should not be needlessly prolonged. The entry of the ‘Order for Mandate,’ which in the Second Circuit begins the running of the period for appeal, is apparently variable and vagrant. . . . Uniformity in the entry of judgment among the eleven circuits forming the single federal judicature ought to be capable of achievement without loss to the geographic flexibility of the system.”

An examination of the cases wherein the dismiss motions were made convinces the writer that the fault does not lie solely in the weakness or insufficiency of the rules, nor in their complexity, nor in the inability of counsel to understand them. Partial explanation is to be found in the manner in which dilatory practices are resorted to by counsel in their effort to delay or postpone final decision. These delay efforts, however, do not account for all the motions to dismiss. There are a large number of legitimate motions to dismiss due to disputes over the rules and statutes governing appeal. This fact supplies added reason for this article, which it is hoped will some day become Chapter 3 of *THE WORK OF THE U. S. CIRCUIT COURT OF APPEALS*.

It is true that the procedural law of the federal courts generally was for many years so complicated and of such uncertain philosophy that it was described by one writer as “understood by none and practiced by a few experts.”¹ Unlike the situation as to the substantive law to be applied,² there could be no doubt of Congressional power to provide rules of practice quite independent of and uncorrelated with the procedure followed in the courts of the several states where the federal courts would sit. From 1789

1. Shelton, *Congested Federal Dockets* (1922) 94 CENT. L. J. 127.

2. See the rationale of Mr. Justice Brandeis' opinion in *Erie R. R. v. Tompkins*, 304 U. S. 64, 114 A.L.R. 1487 (1938).

to 1934 Congress ordained that the practice in actions at law in the federal trial courts should conform as nearly as might be to the practice of the state in which the federal court was held. The statute undoubtedly reflected a jealousy of an independent federal judiciary as well as a meritorious desire to simplify the problems of a local lawyer who might have occasion to practice in both the federal and state courts in his community. It was in the nature of things, however, that rules of procedure in the federal courts could not conform precisely to those prepared for and administered in a court organization of quite different jurisdiction, and in the differences which developed—as well as in the differences which were instigated by particular federal statutes—lay the danger to the inexpert. Of great significance was the circumstance that “conformity” was not enjoined in equitable actions, with the result that the federal courts followed the rules of the English High Court of Chancery at the time of the separation of this country from England, modified by Rules promulgated by the Supreme Court in 1822 and revised thereafter. Thus there was not only a different procedure in a whole field of law, but the separate treatment of law and equity so enjoined made impossible adoption in law cases of procedure used in the states which by code had merged law and equity into a single cause of action.

All of these matters have been fully discussed in the voluminous writings on the Rules of Civil Procedure for the United States District Courts, drafted by a committee appointed by the Supreme Court and promulgated by the court in 1938, pursuant to statute of 1934³ authorizing a uniform and independent code for the federal courts. Actually, conformity with state practice was never attempted in the Supreme Court (there was obviously no particular state to whose practice obeisance should be made) and when the Circuit Courts of Appeals were created, Congress provided that the procedure before them should follow, as far as possible, that in the Supreme Court.⁴ But an appeal begins in the trial court, and it is necessary to understand the background and source of the rules of practice there to gain a clear picture of the course of an appeal to the Circuit Court of Appeals.

A complete list of the sources of law governing practice in the Circuit Courts of Appeals would be more confusing than helpful. On the one hand

3. Act of June 19, 1934, c. 651; 48 STAT. 1064; 28 U.S.C. §§ 723b, 723c.

4. This has been the uniform interpretation of the Act of Mar. 3, 1891, § 11, 26 STAT. 829, by which the Circuit Courts of Appeals were created. See 28 U.S.C.A. § 228 and cases collected in the annotation thereto.

there are the Federal Rules of Civil Procedure for the District Courts. On the other are the Rules of Court of the United States Supreme Court, issued by the court on its own prerogative and governing practice before it, which practice was declared by statute to be the model for the several Circuit Courts of Appeals, as stated before, and which has been specifically adopted by the Circuit Courts of Appeals through their own rules of court. In criminal cases, appellate procedure is largely regulated by the "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in criminal cases in the District Courts of the United States" promulgated by the Supreme Court in 1934 pursuant to Act of Congress,⁵ which are, of course, directed squarely toward the appellate courts. These rules are subject to considerable change from the effect of the proposed Federal Rules of Criminal Procedure, now before Congress.⁶ There are, in addition, isolated statutes affecting the procedure in certain types of cases, some of which, though still on the books, have been superseded by one or more of the rules referred to. Finally, in adapting the controlling rules⁷ and statutes to the routine of the court's business, the several Circuit Courts of Appeals have issued their own rules of court.⁸

5. These rules were promulgated May 7, 1934, pursuant to the enabling Act of February 24, 1933, 47 STAT. 904; as amended March 8, 1934, 48 STAT. 399, and June 7, 1934, 48 STAT. 926; 18 U.S.C. § 688.

6. Drafted by a special committee appointed by the Supreme Court, pursuant to Congressional Acts; 54 STAT. 688, 18 U.S.C. § 687; 54 STAT. 1058, 18 U.S.C. §§ 576d, 55 STAT. 779, 18 U.S.C. Supp. III, § 689; 56 STAT. 271, 18 U.S.C. Supp. III, § 682.

7. The rules of all the circuits were extensively revised following the promulgation of the Rules of Civil Procedure and the Rules governing Criminal Appeals. However, by Rule 12 of the latter, much authority in rule making was expressly delegated to the Circuit Courts of Appeals.

8. By Act of Mar. 3, 1891, c. 517 § 2, 26 STAT. 826; 28 U.S.C. § 219, each Circuit Court of Appeals is specifically authorized to prescribe the forms of writs and other processes conformable to the exercise of its jurisdiction, and to establish all necessary rules and regulations for the conduct of the business before it. This has been broadly construed to authorize the issuance of all writs agreeable to the usages and principles of the law necessary for the exercise of its jurisdiction, though the writs were not otherwise specifically provided for. *Hudson v. Parker*, 156 U.S. 277 (1895). A rule of court which does not conflict with an Act of Congress has the force and effect of law. *In re Hargrove*, 96 F. (2d) 168 (C.C.A. 5th, 1938).

The power to make rules of court, at least of limited scope, is probably inherent in the judicial power, and to the extent exercised by the several circuit courts of appeals, may have existed in them without express statutory authorization.

The Rules of Court of the several circuit courts of appeals are collected in Vol. 11, with supplements, of the Digest to the Lawyers Co-operative Edition of the United States Supreme Court Reports. They may also be found in Vol. 8 of the Federal Code Annotated.

CIVIL CASES

In an earlier article the jurisdiction of the Circuit Courts of Appeals has been outlined.⁹ Not every final judgment, certainly not all interlocutory orders or decrees, may be appealed. But if the case is one in which their jurisdiction properly may be invoked, if error was clearly committed,¹⁰ and if the proper foundation for an appeal has been laid,¹¹ it is still necessary that the appeal from a final judgment be taken within three months from its entry;¹² from an interlocutory order or decree, within thirty days of its entry,¹³ from orders in bankruptcy, within thirty days after written notice of the judgment or decree to the complaining party, and in all events within

9. Evans, *Fifty Years of the United States Circuit Court of Appeals* (1944) 9 Mo. L. REV. 189.

10. The great field of substantive law with which the district courts must deal, and the procedure in the district courts, is obviously outside the scope of this article. However, it is proper to point out that too many unjustified appeals are taken. During the six years from 1935 to 1940, inclusive, the ten circuit courts of appeals and the Court of Appeals of the District of Columbia disposed of 20,182 appeals. In only 4,699 cases, or less than one out of four, were the district courts reversed in whole or in part. The ratio is remarkably uniform throughout the country. The record shows that of the such 20,182 appeals, almost one-fourth are dismissed without hearing.

It is true that because of the jurisdictional limitations on the federal district courts, the cases tried there generally involve large sums of money. Nevertheless, the expense of an appeal is sufficient to make a conscientious counsel hesitate to impose this burden on his client unless he has a strong case. Filing fees average about \$40. A hundred page record can be printed in the 7th circuit for \$134. (Printing costs will vary in different parts of the country, of course, and over the years.) In many cases the record runs to thousands of pages. These costs will normally be borne by the losing party, but the record shows that has been most often the appellant. A fifty page brief costs approximately \$75 to print. Counsel fees may be the largest item of all.

11. It is no longer necessary to take an "exception" to an adverse ruling of the trial court, in order to preserve an objection for review (FED. RULES CIV. PROC. 46), but unless there was no opportunity at the time of the ruling (FED. RULES CIV. PROC. 52b), a timely objection to the ruling must have clearly focused the trial court's attention upon the issue. And if error is alleged in the giving or refusing of instructions, an objection must have been entered before the jury retired (FED. RULES CIV. PROC. 51). However, findings of fact made by the court without the aid of a jury may be attacked for lack of sufficient evidence to support them although the appellant had made no objection to such findings, motion to amend them, nor motion for judgment notwithstanding them.

Appeal now lies directly from the judgment. It may be proper to move for a new trial—in fact, if no error of law has been committed it may be the only practical possibility for saving the cause—but it is not necessary as a foundation for appeal.

12. 28 U.S.C. §§ 230, 226; 26 U.S.C. § 1142. An exception is an appeal from a decision of the District Court reviewing an award under the Railway Labor Act, which must be taken within ten days. 45 U.S.C. § 159.

13. 28 U.S.C. §§ 225b, 227, 227a; 7 U.S.C. § 194. Only 15 days are permitted for appeal from an interlocutory decree in admiralty.

forty days from its entry.¹⁴ Prior to 1938 the running of the statutory time for appeal was tolled, or suspended, pending the disposition of a motion for new trial or petition for rehearing. The Rules of Civil Procedure are silent on the subject and it may be presumed the old practice will be continued, but the matter is not conclusively settled.

The appeal¹⁵ is taken by filing with the District Court of whose order or judgment a review is sought a notice of appeal within the time allowed.¹⁶ Filing of the notice is the only essential jurisdictional step. At the same time¹⁷ a bond in the sum of \$250¹⁸ must be filed to insure the costs of the appeal, normally payable by the unsuccessful party in the court above unless the appellant is the United States or acts under its direction.¹⁹ If the appel-

14. 11 U.S.C. § 48a. Because the Bankruptcy Act contained a considerable number of procedural provisions for its administration, the draftsmen of the Rules of Civil Procedure totally excepted bankruptcy proceedings from the scope of their operations. Rule 81 (a) (1). However, the General Orders and Forms in Bankruptcy, which are promulgated by the Supreme Court pursuant to authorization contained in the original Bankruptcy Act (30 STAT. 554, 11 U.S.C. § 53), were amended in 1939 to require the application of the Rules of Civil Procedure except as otherwise specifically provided in the Chandler Act (the recent revision of the Bankruptcy Act, 52 STAT. 840).

15. As recorded in the chapter on the history of the Circuit Courts of Appeals, decisions and rulings of the district courts since 1928 (see 28 U.S.C. §§ 861a, 861b) have been reviewed only by appeal. However, though "writs of error" were then abolished, much of the substance of the distinction was retained, not only by the constitutional limitation on the power of the appellate court to reconsider the findings of a jury, but also by the procedural requirement of a "Bill of Exceptions" to bring to the attention of the reviewing court the alleged errors committed at the trial of a "law" case. In appeal of an equity case, a "Statement of the Evidence" was employed. The Seventh Amendment is, of course, still with us, limiting the scope of the review, but FED. RULES CIV. PROC. 75 has unified the practice in perfecting "appeals" of all types. This is more fully developed *infra*.

16. FED. RULES CIV. PROC. 73a and 73b. An appropriate form is supplied in Form 27, prepared by the draftsmen of the Rules pursuant to Rule 84. Under the Rules of Court of the 7th Circuit (Rule 15 (5)), the parties are designated as they appeared in the District Court, if possible: *i.e.* John Smith, Plaintiff-appellee v. William Jones, Defendant-appellant.

17. If the bond is not filed with the notice of appeal, or if it is insufficient, the district court may fix a later date for filing the bond, provided the appeal has not been docketed with the appellate court; after such docketing only the circuit court of appeals may allow the belated filing of the bond.

18. FED. RULES CIV. PROC. 73c. The court may fix a different amount, but the burden is on the appellee to raise the question of amount of bond or adequacy of the surety. Only when the issue is thus raised is court approval of the bond necessary. By 6 U.S.C. § 6, surety companies may file accounts with the Secretary of the Treasury and from him receive a certificate which entitles them, as single bond, to satisfy the requirement of surety.

19. FED. RULES CIV. PROC. 73c directs the filing of the bond "whenever a bond for costs on appeal is required by law." By 28 U.S.C. § 869 bond is required in all cases except those "brought up by the United States or by direction of

lant desires to stay the enforcement of the judgment or order appealed from, he must present a *supersedeas* bond, sufficient for the satisfaction of the judgment with costs, interests, and damages for delay, to the District Court for approval.²⁰ Filing of a *supersedeas* bond dispenses with the necessity of an appeal bond.²¹ In general, *supersedeas* is available to the appellant at any time, though not sought when the appeal was first taken. However, in appeals from judgments granting or denying injunctions, receiverships, or, in actions for patent infringements, or accounting, *supersedeas* can be obtained only by court order.²²

The Federal Rules provide that parties interested jointly, severally, or otherwise may appeal jointly or severally without a special proceeding for severance of their interests from those not joining in the appeal.²³ In harmony with the philosophy of the Federal Rule governing the institution of actions in the District Court, notice of the appeal is given to the Clerk of the District Court,²⁴ who mails copies of the notice of appeal to the other parties.²⁵

The appeal must then be perfected. In order to describe the procedure more simply, the practice of the 7th Circuit is presented. Those steps for which a rule of that court is cited as authority may vary in some details in the several circuits. It must be obvious that, once the machinery has been set in motion to give notice to the opposing party, the substance of appellate procedure consists of getting a proper record of the trial, and of

any department of the government." By 28 U.S.C. § 832 appeal by parties in "*forma pauperis*" without bond is permitted.

20. FED. RULES CIV. PROC. 73d.

21. *Ibid.* 73c.

22. *Ibid.* 62a.

23. *Ibid.* 74. Prior to the federal rules, if a judgment were rendered against A and B, and A only wished to appeal, A had to summon B before the district court and obtain an order of severance. It was a procedural snare, for although the order was always granted, if it were overlooked, the appeal which was not in the name of all defendants would be dismissed.

24. It will be observed that the modern practice generally increases the duties of the clerk and relieves the judge from the performance of tasks which had become purely mechanical. In general, it is no longer necessary to petition the court to allow an appeal (the right of review was absolute, anyway), and to obtain an order of allowance, an approval of the cost bond, and a citation to the opposing party, notifying him of the appeal. However, in proceedings not governed by the Rules of Civil Procedure (special proceedings and those practices in bankruptcy specifically regulated by the Bankruptcy Act), these generalizations do not apply. And if for any reason the cost bond must exceed \$250, it is the rather clear negative implication of the rules that judicial approval of the bond is necessary.

25. FED. RULES CIV. PROC. 73b.

the errors alleged to have been committed in it, before the reviewing court. Therefore, the appellant must promptly²⁶ serve upon the appellee and file with the clerk of the District Court a "designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal."²⁷ These items consist of papers or exhibits already in the clerk's file. It is the appellant's duty to obtain, at his own expense, a certified transcript of such part of the stenographically reported testimony or proceedings as he desires to put in the record from the court stenographer²⁸ and file the same with the clerk along with the designation. If the appellee wishes additional testimony in the record, appellant must obtain and file it for him. Normally this is done by informal agreement but the appellee may obtain a court order directing appellant to supply the additional transcript. Although Rule 75b would appear to require two copies of the transcripts to be filed with the district clerk, one for the printer and for the use of appellee, this rule is not free from doubt as to its proper construction. As a matter of practice—one more frequently than two copies are filed.

The appellee then has ten days in which to designate in the same manner additional matter he wishes to have included.

These formalities may be reduced by the parties filing a written stipulation designating the portions of the record, proceedings and evidence to be included in the record on appeal.²⁹ Under either procedure, if the "designation" or "*praecipe*" does not call for the entire record—and in some circuits, even if it does³⁰—the appellant must file a "Statement of Points"

26. There is no specific time limit for the service of this "*praecipe*." However, as the perfected appeal must be docketed in the circuit court of appeals within 40 days of the filing of the notice of appeal, unless an extension to 90 days has been granted by the district court upon petition filed prior to the expiration of the regular period, (FED. RULES CIV. PROC. 73g), and as appellee has 10 days after the filing of the designation in which to designate additional material, it behooves the appellant to waste no time. If he foresees the necessity for some delay, he can gain a few days by postponing the filing of his notice of appeal until the end of the period allowed for it. Moreover, the time limit is directory rather than mandatory, and while unjustified delay will result in dismissal of the appeal, a reasonable excuse may be accepted. *Mutual Benefit Society v. Snyder*, 109 F. (2d) 469 (C.C.A. 6th, 1940).

27. FED. RULES CIV. PROC. 75a.

28. Discussion of the duties of the court reporter is outside the scope of this paper. It is pertinent to note that the federal courts have not had publicly paid official court reporters. However the Rules of Civil Procedure made provision conferring semi-official status on private reporters under the rail, and by Act of Jan. 20, 1944, 28 U. S. C. § 9a, official court reporters on an annual salary have been authorized.

29. FED. RULES CIV. PROC. 75f.

30. *E.g.* Rule of Court, Seventh Circuit, 9.

on which he intends to rely on his appeal.³¹ It seems clear that there must be a correlation between the "Statement of Points" and the designation of the incomplete record, so that the latter will show the error alleged to have been committed and the foundation of the appeal in regard to it. And under either procedure, there is the independent duty on the clerk of the district court to include in the record, whether designated or not, (1) the material pleadings, (2) the verdict or findings of fact and conclusions of law, (3) the Master's report, if any, (4) the opinion of the court, (5) the judgment or part thereof appealed from, (6) the notice of appeal with the date of filing, (7) the designations or stipulations of the parties as to the matter to be included in the record, and (8) any statement by the appellant of the points on which he intends to rely.³² The record must also show any order extending the time for docketing the record in the Circuit Court of Appeals.³³ No court approval of a record so prepared is necessary unless one or both parties believes it factually erroneous and desires a correction.

An alternative method of formulating the record on appeal is for the parties to prepare and sign an "agreed statement" of the case, which must set forth the essential facts, the judgment appealed from, a copy of the notice of appeal with its date of filing, and a concise statement of the points relied upon by the appellant. This statement is not to be confused with the stipulated designation of the portions of the transcript to be included in the record, mentioned above. The "agreed statement" is a complete substituted record. It is subject to approval by the district judge, after which it is certified to the appellate court as the record on appeal.³⁴

The Rules of Civil Procedure specifically permit the transcript of the evidence to be in either question and answer form or condensed narrative

31. FED. RULES OF CIV. PROC. 75d. This might seem to reinstate the old "Assignment of Error" otherwise omitted from the Rules. However, the purpose here is to give appellee notice of the line appellant's argument will take, so that appellee may designate additional portions of the transcript he may think pertinent to the issues to be debated. The Circuit Court of Appeals may, for its convenience, also require an "assignment of error" to be set out in the brief of appellant.

32. FED. RULES CIV. PROC. 75g. Although not required by the rule, the record also customarily includes (a) the summons with return of service, (b) proof of service of the notice of appeal, and (c) the certificate of the clerk of the district court.

33. Rule of Court, 7th Circuit, 11 (1).

34. FED. RULES CIV. PROC. 76. Where the parties substitute their own version of what has transpired for the conventional record made up of pleadings and stenographic transcript, the desirability of court approval is obvious.

form.³⁵ The same rule requires the elimination of non-essential matter and duplication of documents, and the abridgment of documents by omitting all irrelevant and formal portions, and forbids the unnecessary substitution of a transcript in question and answer form for a fair narrative statement proposed by another party, upon pain of imposition or withholding of costs. The object is to reduce the expense of an appeal and to relieve the appellate court of the burden of reading an unnecessarily extended record. The decision calls for the good sense of the litigants' attorneys and decision depends on the importance of a literal presentation of the testimony. The names of all the parties, and the name and address of appellant's attorney are, of course, a matter of record in any appeal. Each appellee is also required to file with the clerk of the district court the name and address of his attorney of record before the transcript is docketed in the circuit court of appeals.³⁶

This constitutes the record on appeal.³⁷ Ordinarily only one copy is certified to the appellate court, although the particular court rules may require an additional copy for the use of the printer.³⁸ The parties may stipulate, or the district judge may order, that the original papers or exhibits, rather than copies, be certified to the appellate court. From here on,³⁹ the

35. *Ibid.* 75c. Previous to the Federal Rules of Civil Procedure, the narrative form was customarily required. It was the consensus of opinion that preparation of a fair narrative took more time than it was worth. But see the remarks of Huxman, J., appended to Rules of Court of 10th Circuit, 11 L. ed. Dig., 1944 Supp. 20.

36. Rule of Court of Seventh Circuit 10 (3). Counsel for appellant is required to file his appearance on the same day that the appeal is docketed. *Ibid.* 11 (6). Counsel for appellee must file his appearance before the filing of his brief. If the appeal is not docketed within the time allowed, the appellee may have the appeal docketed and dismissed by the circuit court of appeals. *Ibid.* 11 (2).

37. If, prior to the docketing of the complete record, a party desires to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the appeal or *supersedeas* bond, or any other intermediate order, the clerk of the district court will certify to the appellate court a copy of such portion of the record or proceedings as is needed for the purpose. FED. RULES CIV. PROC. 75j.

38. FED. RULES CIV. PROC. 75g. Two copies of the transcript are regularly filed so that one may be sent to the printer without letting the original from the court files. This is not essential, however.

39. The trial court may order a material omission from the record to be certified at a later date, at the request of either party. The circuit court of appeals may also order additional parts of the record sent up.

Also, if an appeal which has been taken is not being perfected with the necessary diligence, in order to settle it conclusively the district court may certify the "short" record to the circuit court of appeals, where the case can be put on the court docket and ultimately dismissed on appellee's motion. FED. RULES CIV. PROC.

activities of the litigants are in the circuit court of appeals and he deals with the clerk of that court.

First, the appellant (unless it is the United States, an officer or agent of the U. S.), must deposit a docketing fee with the clerk, the amount varying from thirty to fifty dollars in the various circuits.⁴⁰ It would be better if this were uniform, in the writer's opinion. If the United States, or any officer or agency thereof, is the appellant, the appellee must deposit a lesser amount, twenty to twenty-five dollars.⁴¹ Then, unless the appellant proposes to print the record himself, the clerk causes an estimate to be made of the cost of printing the record, and of his fees for preparing it for the printer, and notifies the attorney for the appellant of the amount, which must be paid within fifteen days.⁴² These expenses are part of the costs of the appeal, normally taxable against the losing party but subject to the court's direction.⁴³

If appellant elects to print the record himself, he must notify the clerk of that fact, withdraw the transcript from the file and return it with the required number of copies of the printed record within forty days of the docketing of the record in the circuit court of appeals.⁴⁴ If appellant desires the clerk to supervise the printing, which is done by contract with private printers, he must notify him promptly. Fifty copies of the transcript must be filed, of which three copies are furnished to each party.⁴⁵ The rules of the several circuits determine what must be printed (as distinct from type-written) and the mechanics of getting it printed, but the size, paper, and typography, of all printed matter must conform to the rules of the Supreme Court.⁴⁶

40. *E.g.* In the 7th circuit, the fee is \$40. Rule of Court 11 (3). In the 6th circuit it is \$45. Rule of Court 19 (2).

41. See rules of court of the several circuits. In the 7th circuit, it is \$20. Rule of Court 11 (4).

42. Rule of Court of Seventh Circuit 14. If the actual cost of printing varies from the estimate, the excess is refunded or the insufficiency must be supplied.

43. *Ibid.*

44. *Ibid.*

45. *Ibid.* Any party may arrange for additional copies at his own expense.

46. *FED. RULES CIV. PROC.* 75 (1). It was thought that if further review were sought in the Supreme Court, the same records could then be used. The applicable Supreme Court rule is 26, and in substance requires the use of type not less than small pica or 11 point, an opaque and unglazed paper, cut to 9¼x6½ pages on which the print is limited to 7-1/6x4-1/6 inches. In patent cases, a size sufficient to accommodate unfolded patent documents is permitted. See Rule of Court, 7th Circuit, 15.

Examination of the rules of court of the various circuits reveals a growing tendency to dispense with a separate printed transcript. Excerpts from the rules of the third circuit will illustrate this practice. Rule 26 (7) provides, "Unless specially ordered by this court it shall not be necessary to print the record on appeal or on a petition for review or enforcement of a decision or order. If the record is ordered by the court to be printed it shall be done under the supervision of the clerk." By section 2 of the same rule, it is required that the brief of the appellant shall contain "An appendix (which may be separately bound) which shall contain the relevant docket entries below arranged chronologically in a single column, any relevant charge or opinion of the court, agency, board or commission below, the judgment, decree, order or decision appealed from or sought to be reviewed or enforced and such other parts of the record material to the questions presented as the appellant or petitioner desires the judges of the court to read. Those portions of the record printed in the appendix shall be arranged in chronological order following the docket entries. Asterisks or other appropriate means shall be used to indicate omissions in the testimony of witnesses, reference to the pages of the typewritten transcript of the record where the testimony appears shall be made, and the names of the witnesses shall be included in the description of the contents of the appendix which shall form a part of the table of contents of the brief. A table of contents of the appendix shall also appear at the beginning of the appendix if it is separately bound." The appellant must, within 10 days of the filing of the transcript with the clerk, notify the appellee of the parts of the transcript he proposes to include in the appendix to his brief. The appellee may add an appendix, in similar form, to his brief if he wishes to bring additional parts of the record to the attention of the court. An appendix to appellant's reply brief is also permissible.

In the third circuit the actual expense of printing the briefs, including the appendix, is taxable as costs. Where the older practice of a separate printed transcript is followed, it is customary to tax the expense of printing the record as costs, but each party bears the expense of his own brief.

Very considerable savings in the cost of an appeal are claimed for this procedure.⁴⁷ The writer expects to see the practice grow until universally adopted. Although it would seem that many of the same advantages could be obtained under either system if counsel designated only those portions

47. See Dean, *Transcript of Record* (1943) 2 F.R.D. 27.

of the transcript really pertinent to his case for inclusion in the record by the clerk of the district court (so much of the record must be printed in any event, whether as a separate transcript or in an appendix to the brief), it is probably true that cautious counsel might be willing to print, as an appendix to his brief, only part of the record if he knows the full transcript has been docketed in the circuit court of appeals for reference if required, whereas he would be hesitant to omit the same material if omission meant that it did not go up at all.

Preparation of his brief and the printing of it is the responsibility of the attorney for each litigant. In all but one circuit it must be printed. Where printing is required the format must conform to the rules of the Supreme Court.⁴⁸ Within twenty days after delivery of the printed record, appellant must file thirty copies of his printed brief, three of which are delivered by the clerk to opposing counsel.⁴⁹ Within twenty days thereafter, appellee must file thirty copies of his brief.⁵⁰ Reply briefs, confined to new matter raised in the opponent's brief, may be filed if a copy is served on counsel within ten days from the date of receipt of his brief and at least five days before the day fixed for argument.⁵¹

These rules are not jurisdictional and the court has discretion to waive an infraction. However, it has been held that appellant's failure to comply with a rule of court requiring a separate and complete statement of each point relied upon, and when a ruling of the trial court on the admissibility of evidence has been objected to, requiring the statement to quote the evi-

48. Rule of Court, 7th Circuit, 15. In the Seventh Circuit, no brief may exceed 75 pages in length (90 pages in patent cases) without special court permission. Appellant's briefs are required to have light yellow covers, appellee's light blue. Upon the cover must be printed (a) the title of the court, (b) the number of the case in the court, (c) the title of the case, (d) the title of the trial court, (e) the name and title of the trial judge and (f) the names and addresses of counsel filing the brief. Rule of Court 15, 16.

The initial pages of the brief should contain an index giving page references to the subject matter covered by the brief, a summary of argument with page references, and a list of authorities cited, arranged alphabetically with page references to the places where each authority cited appears in the brief. Thereafter comes in the order here stated and under the respective titles: "A Statement of the Facts," "The Contested Issues," "Propositions of Law Relied on." Appellee's brief need not contain a statement of facts and contested issues unless that presented by appellant is controverted, but should discuss the issues, so far as practical, in the order in which they appear in appellant's brief, with page references to appellant's brief where the proposition is discussed. Rule of Court 16.

49. Rule of Court, Seventh Circuit, 16 (1).

50. *Ibid.*

51. *Ibid.*

jurisdiction of the court does not relieve the appellant of complying with a rule requiring a clear statement showing jurisdiction.⁵²

After the record and briefs have been filed, the case is placed on the calendar and the clerk in due time notifies the attorneys of the day of argument. Oral argument is the general rule, submission on briefs the exception permitted only by special order of the court on written motion.⁵³ Argument is limited to forty-five minutes a side, the appellant opening and closing the argument.⁵⁴ Unless special permission is obtained, only one counsel may argue for each side. He must make an independent argument and cannot read extensively from briefs, authorities or manuscripts.⁵⁵ However, motions and petitions which must be made in writing, are ordinarily disposed of on the briefs and affidavits filed in their support, although the court may order an oral argument.⁵⁶

As previously stated, the costs of the appeal are usually assessed against the unsuccessful party.⁵⁷ This is almost always true where the appeal is dismissed for failure of the party to observe the requirements of procedure. If the appeal is prosecuted merely for delay, punitive damages up to 10% may be added to the amount of the judgment.⁵⁸ An affirmed money judgment bears interest at the legal rate of the state in which it was rendered, from the date of the original judgment until paid, unless the Circuit Court of Appeals specially orders otherwise.⁵⁹

The Circuit Court of Appeals may affirm, reverse, or modify the decision of the trial court. If the judgment is reversed, it is perhaps most common to remand the case to the district court for re-trial, and this is almost necessarily true when the error requiring the reversal occurred in the course of a previous jury trial. However, when the trial court has reserved its ruling on a motion to dismiss or a motion to direct a verdict, the Circuit Court of

dence with page reference to the record, warrants dismissal of the appeal or affirmance of the judgment below. And that neither party questions the

52. *Credit Bureau v. Petrasich*, 97 F. (2d) 65 (C.C.A. 9th, 1938).

53. This is the practice in the Seventh Circuit. It is estimated only about one case each term is submitted on the briefs.

54. Rule of Court, Seventh Circuit, 18.

55. *Ibid.*

56. Rule of Court, Seventh Circuit, 19.

57. Rule of Court, Seventh Circuit, 24. Power to award costs is recognized in FED. RULES CIV. PROC. 75e.

58. Rule of Court, Seventh Circuit, 23 (2).

59. *Ibid.* 23 (1).

Appeals may order the entry of a proper judgment without a new trial.⁶⁰ This is also possible where only questions of law were involved in the controversy below. If it is apparent that the case was tried on the wrong theory, or the record does not permit a satisfactory disposition of the case on appeal, the court may remand the case for further proceedings in the trial court. Conversely, the Circuit Court of Appeals may issue its writ of *certiorari* to bring up portions of the record not included by the litigants, if the court deems it necessary to a just determination of the issues.⁶¹

The opinions are released by the court and filed by the clerk the same day, and the judgment of the court is entered on that day.⁶² The disappointed party then has fifteen days in which to file a petition for rehearing.⁶³ If no petition has been filed, the mandate issues to the district court as of course. Filing a petition delays the issuance of the mandate until five days after either denial of the petition or, if rehearing is granted, the final disposition of the case.⁶⁴ In the seventh circuit, in recent years the average time elapsed between the filing of notice of appeal and the issuance of the mandate to the district court has been about five months. Individual cases may vary considerably from the norm, not only because of the difference in the difficulty of decision and of the working habits of the judge to whom it may be assigned for opinion, but also because of the expedition of counsel (the promptness with which the record is designated and prepared and the briefs prepared and filed, the thorough and orderly treatment of the case in the briefs, and the genuine desire of counsel on both sides to obtain a prompt decision on the case) and because the particular case may or may not be appealed at a favorable date on the court calendar (the court does not sit in the summer, so that a case filed in the late spring may not be heard until fall. Whether the briefs are filed more than seven days before the beginning of a court session may determine whether the case can be argued that session.) It can fairly be said that few appellate courts have ever maintained a better record for prompt disposition of the litigation before them

60. See FED. RULES CIV. PROC. 50b.

61. This use of the writ of *certiorari* as an auxiliary writ in aid of the court's jurisdiction on "appeal" must not be confused with the use of "*certiorari*" as a method of acquiring jurisdiction. The latter function of "*certiorari*" is well illustrated in the practice of the United States Supreme Court, but is forbidden to the Circuit Courts of Appeal.

62. Rule of Court, Seventh Circuit, 20.

63. *Ibid.* 22.

64. *Ibid.* 25 (1). The rule is otherwise in the Fourth Circuit.

than the circuit courts of appeals since their establishment, a record which in recent years has been the more consistent because of the various judicial conferences and the work of the Administrative Office of the United States Courts.

Petitions for rehearing are "last straw" measurers, seldom successful. They will not be granted unless a majority of the court, including at least one judge who concurred in the judgment, desires it. Even then the chance of a reversal is small. Petitions for rehearing are filed in about 70% of the cases heard in the seventh circuit; in other words, from 125 to 150 petitions a year. Of this number, rarely are more than one or two granted. Of course, there are cases in which such petitions are proper, particularly where, for one reason or another, precedents of great force have not been considered by the court.⁶⁵ A petition for rehearing is not justified simply because counsel feels the court was not as impressed by the weight of his argument as it should have been. Petition for rehearing is not prerequisite to application for *certiorari* from the Supreme Court, as is sometimes supposed, and the fact that the filing fee is small is not a sufficient reason for taking up the time of the court and delaying the final settlement of the cause.

Enforcement of the judgment entered pursuant to the mandate is a matter for the district court. It should be promptly entered.

CRIMINAL CASES

At the moment of writing the proposed Federal Rules of Criminal Procedure are before Congress. Drafted by a special committee appointed by the Supreme Court, pursuant to Act of June 29, 1940,⁶⁶ and ordered by the court presented to the Congress by the Attorney General, by the terms of the Act they do not become effective until the close of the present session of Congress. Under the authority of an earlier statute,⁶⁷ the Supreme Court had promulgated the rules of criminal appellate practice under which we now proceed. The new rules, though directed primarily toward the trial practice,

65. I do not mean by this cases in which the court's opinion does not discuss all cited precedents. Occasionally counsel fails to discover all the pertinent authority prior to his argument and there is reason to suppose the court was not aware of its existence. More important, controlling opinions of the Supreme Court are sometimes handed down after argument.

66. 54 STAT. 688; 18 U. S. C. § 687.

67. 47 STAT. 904, amended 48 STAT. 399, 48 STAT. 926, 49 STAT. 1921; 18 U. S. C. § 688.

embrace appellate procedure to an even greater extent than do the Rules of Civil Procedure and will virtually supersede the present Criminal Appeals Rules. There seems little likelihood the rules will be rejected, or altered to any appreciable extent, by Congress, so that any presentation of this phase of appellate procedure must recognize the changes which are imminent.⁶⁸

Before detailing the steps of appeal, let us consider the immediate fate of the prisoner at the bar.

In general it may be said that under the present practice the appeal automatically stays the execution of the judgment of conviction, unless the defendant, pending his appeal, elects to enter upon the service of his sentence. He may, however, be refused bail and committed to the local jail to await the disposition of his appeal, except that where the government appeals from an adverse judgment or ruling, the defendant must be admitted to bail on his own recognizance.⁶⁹ Although the Circuit Justice, or any Circuit Judge, acting within the circuit, has power to admit the accused on bail in such amounts and upon such conditions as he may deem fair and reasonable, such applications must first be made in the District Court where the case was heard. Upon good cause shown, the application for bail may be made to the appellate court on written petition and due notice to the opposing party.⁷⁰

In a *habeas corpus* case,⁷¹ the unsuccessful petitioner must remain in

68. Once effective, the new rules will repeal any inconsistent rules or articles. 54 STAT. 688; 18 U. S. C. § 687. By order of the Supreme Court, 314 U. S. 719 (1941) the committee was authorized to include the subject of practice in criminal cases after verdict or plea of guilty. By statute (Act of May 9, 1942) and court order (317 U. S. 715 (1942)) the rules also cover the procedure in cases where the United States is appellant.

Literally read, the first order only authorized recommendations "respecting amendments to" the Criminal Appeals Rules. So far as they are not directly contradicted by the new Rules of Criminal Procedure, it may be argued they are still in force. In fact, however, the subject has been so completely dealt with in the new rules that the older ones may well be withdrawn.

69. 34 STAT. 1246, amended 56 STAT. 271; 18 U. S. C., Supp. II, § 682.

70. Criminal Appeals Rules 5 (*supersedeas*), 6 (bail). The practice controlling applications for bail in the Circuit Court of Appeals is set forth in Rule 32 of the Rules of Court of the Seventh Circuit. *Ibid.*, 32 (14) (2) provides: "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, and the enlargement of the accused on bail pending the disposition of the appeal will not be likely to result in violation of the law by the accused, and unless it appears to the satisfaction of the Judge or Judges that pending said appeal the accused is not likely to abscond, disappear or flee the jurisdiction of the Court wherein he was tried, pending said appeal."

71. A petition for writ of *habeas corpus* is not strictly a criminal case, and the procedure is distinctive, but the factor of imprisonment is so closely related that it seems appropriate to consider the *habeas corpus* case at this point.

custody pending a review of the decision denying the writ. If the writ has been granted and the prisoner ordered discharged, he will be "enlarged on recognizance," with or without surety as the trial judge shall order.⁷²

Under the proposed rules, a sentence of death will be automatically stayed if an appeal is taken. A sentence of imprisonment will be stayed if the defendant (1) elects not to commence service of the sentence or (2) is admitted to bail. That is, an affirmative step must be taken by the defendant. A sentence to pay a fine may be stayed by either the district court or circuit court of appeals upon such terms as the court deems proper. It may require deposit of all or part of the fine, bond, examination of assets, or restraint against dissipation of assets. An order placing defendant on probation is automatically stayed.⁷³

The provisions relating to bail⁷⁴ in the proposed rules substantially restate the present practice. They do require that where application is made to the circuit court of appeals or a circuit judge, the application shall be upon notice and shall show either that application to the trial judge is impractical, or has been made and denied, with the reasons given for the denial.

An appeal in a criminal case must now be taken within five days after entry of judgment of conviction, or after entry of an order denying a motion for a new trial duly made.⁷⁵ The appeal is taken by filing a notice of appeal,⁷⁶ in duplicate, with the Clerk of the District Court and by serving a copy of the notice upon the United States Attorney. The duplicate notice of appeal is forwarded immediately by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals, together with a statement from the docket entries.⁷⁷ Unlike the practice in civil appeals, the appellate court thereafter has control of the proceedings on the appeal, including the proceedings relating to the preparation of the record.⁷⁸

72. Rule of Court, 7th Circuit, 26.

73. Proposed Rule of Criminal Procedure 40a.

74. *Ibid.*, 48 (a) (2), 40 (c).

75. Criminal Appeals Rule 3. If a motion for new trial is to be heard, it must be made within three days after the verdict or finding of guilty. The motion tolls the period allowed for taking an appeal until the motion is acted upon. If it is denied, defendant then has five days in which to file his appeal. Criminal Appeals Rule 2 (2).

76. A form of notice, somewhat more elaborate than that required in civil cases, is set out in the forms appended to the Criminal Appeals Rules. Form 1.

77. Criminal Appeals Rule 4. A form for this statement is also appended to the Criminal Appeals Rules. Form 3.

78. Criminal Appeals Rule 4. So far as the mechanics of appeal are concerned, the difference seems more in theory than in substance. The clerk of the

Under the proposed rules, defendant may take his appeal within ten days of the entry of the judgment or order appealed from, or from denial of a motion for new trial made within the ten day period. If defendant is not represented by counsel, the court must advise him of his right to appeal, and upon his request, the clerk must prepare and file the notice of appeal. In a case in which the government may take an appeal, it has thirty days in which to do so.⁷⁹

The provisions of the proposed rules for notice of appeal⁸⁰ are substantially the same as the present practice, the only significant difference being that they do not require service of a copy of the notice upon the opposing party. That duty is cast upon the clerk. Under these rules, the notice may be signed by the appellant's attorney or clerk. Proceedings upon appeal will still be under the control of the appellate court.⁸¹

Under the Criminal Appeals Rules now in force, the clerk must notify the trial judge that the notice of appeal has been filed. The judge calls the appellant, or his attorney, and the United States Attorney before him and instructs them in the preparation of the record on appeal. The appeal may be taken with or without a Bill of Exceptions.⁸² In any case the appellant must file an assignment of error with the clerk of the District Court. If no Bill of Exceptions is to be used, the assignment of errors must be filed within due time as directed by the trial judge.⁸³ If a bill of exceptions is used, it, as well as the assignments of error, must be filed within 30 days after the notice of appeal, unless within that 30 days the trial judge grants an extension of time.⁸⁴ The bill of exceptions must conform to Rule 8 of the Supreme Court Rules. The bill of exceptions (if used), the assignment of errors, the indictment and other pleadings, and the orders, opinion and judgment of the district court constitute the record on appeal.

district court necessarily must prepare the transcript of the record in either case (see *Crim. App. Rule 7*). However, the appellate court thus is expressly granted supervisory jurisdiction over all the steps of the appeal.

79. Proposed Rule of Criminal Procedure 39 (a) (2).

80. *Ibid.*, Rule 39a. See Forms 26, 27.

81. *Ibid.*, Rule 41a.

82. Criminal Appeals Rules 8, 9. Whether a bill of exceptions is used depends, of course, upon the ground upon which appeal is taken. No bill is necessary if the alleged error appears in the clerk's record.

83. *Ibid.*, Rule 8.

84. *Ibid.*, Rule 9. See MARKER, FEDERAL APPELLATE JURISDICTION AND PROCEDURE (1925), Supp. (1940) §§ 106, 160.

The proposed rules would sweep most of this away. They provide, "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."⁸⁵ With the procedure so incorporated the readers of this article are already familiar. The record must be filed and docketed in the circuit court of appeals within forty days after the notice of appeal is filed in the district court, unless an extension of time is obtained from a judge of either court.⁸⁶ The Circuit Courts of Appeals are expressly permitted to dispense with a printed record and review the proceedings on a typewritten record if they see fit. This practice is growing.

Under either practice, the record is transmitted by the clerk of the district court to the clerk of the circuit court of appeals and the case set for argument within 30 days after the record is received. Preference is given to criminal appeals over civil appeals.⁸⁷ Federal statute expressly dispenses with bond for costs on appeal from conviction where the penalty provided by law is death.⁸⁸ Neither Criminal Appeals Rules nor proposed Federal Rules of Criminal Procedure contain any express regulations for costs bond, briefs, argument, mandate, or petitions for rehearing. These matters are now governed by the rules of court of the several circuits.⁸⁹ If the proposed rules become law, it remains to be determined whether special rules of court relating to criminal appeals will be permitted, or whether review must in all respects be governed by the rules of court now applicable to civil appeals.

At the date of writing, the practice in the seventh circuit is as follows:
No cost bond is required. (This is the general rule in other circuits.)

Within fifteen days after delivery of the printed transcript of the record on appeal to the appellant by the Clerk (the record is prepared and the printing supervised by the Clerk), appellant must file thirty copies of his

85. Proposed Rules of Criminal Procedure 41b (1).

86. *Ibid.*, 41c.

87. Criminal Appeals Rule 10; Proposed Rule of Criminal Procedure 41d.

88. 18 U. S. C. § 681.

89. Criminal Appeals Rule 12 expressly authorizes the several circuit courts of appeals to deal with these matters by rule of court not inconsistent with the other Criminal Appeals Rules. The only reference to local rules of court contained in the proposed Federal Rules of Criminal Procedure is the restrictive provision of Rule 60a that local rules shall not contravene the Rules of Criminal Procedure. However, Rule 60b reads, "If no procedure is specifically prescribed by rule (*i.e.* presumably, rule of Criminal Procedure), the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

printed brief, three of which are delivered by the Clerk to opposing counsel. Appellee has fifteen days after the delivery of appellant's brief to him in which to file thirty copies of his own brief. Reply briefs, confined to new matters raised in the adversary's brief, may be filed, provided a copy is served upon opposing counsel, within five days after delivery to him of opposing counsel's brief and at least before the day fixed for the hearing of the argument.⁹⁰

If it is necessary to include in the record a transcript of part of the testimony taken on the trial, counsel for appellant must file with the Clerk of the Circuit Court of Appeals, within ten days after notice of appeal has been filed, an acknowledgment of the court reporter that an order to transcribe the testimony has been placed with him and the estimated length of time required for typing the testimony.

The rules governing argument are the same as in civil cases. Ten days after the rendition of the opinion by the appellate court, the mandate is issued as of course. If a petition for rehearing has been filed, the mandate will issue three days after the denial thereof; if a rehearing is granted, the mandate will not issue until after the final disposition of the case. A petition for rehearing must be printed and thirty copies filed within ten days after the entry of judgment, and a copy served forthwith upon the opposing party, who, within five days after such service, may file thirty copies of his printed answer, and the petition shall be determined without oral argument unless otherwise ordered. Section 21 of Rule 32 of Rules of Court of the Seventh Circuit provides that all matters not covered in that rule are governed by its rules for civil appeals, *i.e.*, rules 1-30, inclusive, so far as applicable.

Section 10 of Rule 32 provides:

"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."

90. It may be observed that both Criminal Appeals Rules and the proposed Federal Rules of Criminal Procedure do contain an inferential limitation on the time for filing briefs. Appellant's brief must be filed in time to give appellee opportunity to prepare and file his brief within 30 days after the docketing of the record on appeal in which the case must be heard.

The scope of a judgment of the Circuit Court of Appeals in a criminal case is, of course, much more limited than in a civil case. The Constitution prohibits the re-trial of a defendant who has been once placed in jeopardy, so that the appellate court can only (1) affirm a conviction or (2) reverse a conviction, in whole or in part, on the merits, or (3) reverse a conviction with direction to dismiss for lack of jurisdiction, except in the limited situations in which the government is appellant. The Act of March 2, 1907, as amended by Act of May 9, 1942, gives the circuit courts of appeals jurisdiction over appeals by the government "From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any court thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act" and "From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court" is provided.⁹¹ In the first group of cases, Circuit Court of Appeals may affirm the decision or judgment, or reverse it and send the case back for trial, but it will be observed that it is not a re-trial and the defendant has never been placed in jeopardy. In the second group, the reviewing court may affirm or reverse the decision arresting judgment of conviction, but in the latter event, the judgment of conviction already rendered, is simply re-instated.

BANKRUPTCY AND ADMIRALTY

The sources of the law by which bankruptcy practice is regulated are somewhat confusing. The Federal Rules of Civil Procedure expressly exempt bankruptcy proceedings from their scope unless made applicable by Supreme Court rule.⁹² By General Order in Bankruptcy 36, as amended January 16, 1939,⁹³ the Supreme Court declared, "Appeals shall be regulated, except as otherwise provided in the Act [*i.e.*, the Bankruptcy Act], by the rules governing appeals in civil actions in courts of the United States, including the Rules of Civil Procedure." This would seem to leave the situation like any other civil action, except as the Bankruptcy Act makes different procedure necessary. The latest version of that Act, popularly known as the

91. 34 STAT. 1246, amended 56 STAT. 271; 18 U. S. C., Supp. II, § 682.

92. FED. RULES OF CIV. PROC. 81a.

93. 11 U. S. C. A. following § 53.

94. Bankruptcy Act of June 22, 1938; 52 STAT. 854 (1938); 11 U. S. C. 47 (1940).

Chandler Act,⁹⁴ stipulates that appellate jurisdiction shall be exercised by appeal and in the form and manner of appeal,⁹⁵ but that "allowance of appeal" is necessary when any order involves less than \$500. As petition for appeal, allowance of appeal, and so forth, are eliminated under the Rules of Civil Procedure, the implication is strong that in this situation the procedure there provided is inapplicable.

The prevailing view, then, is that in bankruptcy proceedings, an appeal from an order or judgment involving \$500 or more follows exactly the same procedure as any other civil case,⁹⁶ with the exception that appeal from final or interlocutory orders (as distinguished from judgment entered on a jury verdict determining the issue of insolvency or the commission of an act of bankruptcy, where the time for appeal is three months⁹⁷) must be taken within 30 days.⁹⁸ The very difficult question of when an order is appealable has been discussed in an earlier article.⁹⁹

Where the amount involved is less than \$500 it may be said the appeal is discretionary with circuit court of appeals. Review is always by way of appeal, not writ of error, but in some respects what might be called "old procedure"—*i.e.*, the procedure generally followed in all civil cases prior to 1937—is used. The "old procedure" also controls appeals in admiralty.¹⁰⁰

The "old procedure" might be briefly summarized as follows:

The first step¹⁰¹ is one of notification to all parties in the same position

95. 52 STAT. 855 (1938); 11 U. S. C. 47 (1940).

96. *Coursey v. International Harvester Co.*, 109 F. (2) 774 (C.C.A. 10, 1940).

97. Act of Feb. 13, 1925, § 128c, 43 STAT. 936; 28 U. S. C. § 230.

98. 11 U. S. C. §§ 47, 48, as modified by Act of June 22, 1938. It would be more precise to say that appeal must be taken within 30 days after the aggrieved party has received written notice of the entry of order complained of, proof of which notice has been filed within five days of service thereof. If notice is not served and proof filed, the aggrieved party has 40 days from the entry of the order in which to take his appeal. *Siegel v. Margiotta*, 102 F. (2d) 525 (C.C.A. 2nd, 1939).

99. Evans, *Fifty Years of the United States Circuit Court of Appeals* (1944) 9 Mo. L. REV. 189, 217.

100. FED. RULES CIV. PROC. 81. Admiralty Rules promulgated by the Supreme Court have but limited application to appellate procedure. Rule 45 provides for further proof being taken on appeal and Rule 49 in some detail sets forth what shall be included and what omitted from the record on appeal. Rule of Civil Procedure 81 also exempts copyright cases, but by Supreme Court Rule as to Copyrights 1, the new procedure was made applicable to those cases.

101. Assuming the litigation is of a type not covered by the Rules of Civil Procedure, it will have been necessary for the appellant to have laid the proper foundation for his appeal by preserving his objections or exceptions in proper form. This is a matter of trial practice beyond the scope of this paper.

as the prospective appellant of intention to appeal, with a request for information as to whether they propose to join in the appeal or not. If not, it is necessary to obtain an order of severance from the district judge. No particular form of notice, either by appellant or by the parties to which it is addressed of their intention, is required. Of course, this step is not necessary where there is but one party aggrieved by the decision of the court.

The prospective appellant then gives notice of his appeal to the court and to his opponent. This can be done in open court, in which case the judge should sign the statement of notice for the record, or by written notice to the opponent, which should be acknowledged by him or his attorney.

The appeal is taken by filing a petition for appeal. This is commonly in a very general form, simply alleging that error has been committed and that petitioner seeks correction thereof. It may include a request for an order fixing bond, with or without an order of *supersedeas*, and that citation issue and transcript be sent to the circuit court of appeals.¹⁰² The appeal

102. Forms of Petitions and of the other steps of appeal may be found in texts on federal practice. *Inter alia*, 14 HUGHES, FEDERAL PRACTICE.

In the 7th circuit, petition for leave to appeal in bankruptcy cases, by far the most numerous of the cases in which petition for appeal is still necessary, must conform to a special rule of court. Rule 31 reads:

1. Petitions for leave to appeal, in cases where the appeal is discretionary with this court, shall be docketed when the petitioner, within the statutory period of time allowed, makes the required deposit for costs and files an original and three copies of the petition, a statement of points, and a brief in support of petition, together with proof of service on respondent of copy of each.

2. Respondent may file an answer, with brief if any, within five days after such service, together with proof of service of a copy on petitioner.

3. The matter shall then be submitted to the court by the clerk, but no oral argument by counsel shall be heard, unless requested by the court. And, if the appeal is allowed, it shall be the duty of the petitioner to file a certified transcript of the record on appeal with the clerk of this court within 25 days from the date of allowance of appeal, unless the time shall be enlarged by this court or a judge thereof.

4. Briefs in support of, or in opposition to, the petition for leave to appeal shall be printed or typewritten. Unless otherwise ordered, only those who were parties in the district court may file briefs in this court. If the briefs are typewritten, petitioner shall file an original and three copies thereof, and respondent shall file an original and three copies thereof. If the briefs are printed, petitioner and respondent shall each file at least four copies.

5. The petition for leave to appeal shall set forth under oath the facts, which shall contain a brief history of the proceedings in the district court; all important dates; the amount of indebtedness; the estimated value of the assets; the amount and status of the claims of the creditors who are petitioning for permission to appeal; a statement showing when such creditors acquired their claims, whether before or after bankruptcy proceedings were instituted; a copy of any order or memorandum of views announced by the district judge.

may be allowed by any judge of either the district court or the circuit court of appeals.¹⁰³ He fixes the amount of the bond and enters the order of *supersedeas*, if that is sought, at the same time and issues the requisite citation.

It is absolutely essential that an assignment of error (or statement of points) be filed with the petition for appeal.¹⁰⁴

Citation is simply notice from the court to the appellee that the appeal has been allowed, advising him to appear in the circuit court of appeals to contest the appeal if he desires. It is not a summons. Failure of appellee to appear, file a brief and argue his case does not mean that the appeal goes for appellant by default. Appellee merely loses whatever advantage comes from a presentation of his side of the case. Appellant must serve the citation upon appellee and file proof of service with the clerk of the district court.

The allowance of the appeal is presented to the clerk of the court, who issues the appeal. This, with the bond previously set by the court, must be approved by the judge, and the approval and bond filed with the clerk of the district court.

The allowance of the appeal is presented to the clerk of the court, who issues the appeal. This, with the bond previously set by the court, must be approved by the judge, and the approval and bond filed with the clerk.

Finally, the preceding papers—the petition for appeal, the assignment

The petition shall be supported by a brief which shall set forth the statute and decisions, as well as other reasons why the petition should be allowed.

6. Respondent's answer, if any, must be under oath, and must set forth any pertinent facts which bear upon the exercise of a wise discretion on the part of the court. It may also contain facts, if supported by the record, bearing on petitioner's right to the relief sought.

7. The general rules under Title 1, except as otherwise provided in this Title, shall regulate appeals which are discretionary with this court.

Virtually all circuits have special rules governing discretionary appeals in bankruptcy, though not all are designed so to anticipate controversy over allowing the appeal. Preservation of this procedure in Bankruptcy appeals involving less than \$500 was intended to make allowance of the appeal truly discretionary. Prior to 1937, in the great majority of other types of cases the right to appeal was absolute, hence the petition for allowance was a matter of form (properly discarded by the Rules of Civil Procedure), and special rules of contesting the allowance were unnecessary.

103. Supreme Court Rule 36 (1).

104. Supreme Court Rules 9, 46 (2). The errors assigned must be set out specifically. Only errors of record can be assigned, so a bill of exceptions may be necessary to incorporate into the record proceedings which would not otherwise be included.

of errors and prayer for reversal, the appeal, the approved bond, the citation and proof of service— being filed with the clerk of the district court, are incorporated into the transcript which he certifies as a true, full and complete record and transmits to the clerk of the circuit court of appeals.¹⁰⁵ It is appellant's responsibility to see that the record is transferred and the case docketed in the circuit court of appeals.

The rules for printing the record, the preparation of briefs, and oral arguments are the same as in other civil cases in which the appeal is taken under the Rules of Civil Procedure.

How much of the "old procedure" described above, is now applicable to "discretionary appeals" in bankruptcy? It has been suggested that the Rules of Civil Procedure are not applicable at all, but this contention hardly seems consonant with the General Order in Bankruptcy set out above. The Rules of Civil Procedure apply unless clearly inappropriate. The rules of the several circuit courts of appeals relating to discretionary appeals in bankruptcy usually deal only with the allowance of appeal; they do not attempt to provide or regulate a complete and independent appellate procedure.

Petition for allowance, accompanied by assignment of error, is clearly necessary. Because of the language of the bankruptcy act, the petition must be addressed to the circuit court of appeals. (The appeal cannot be allowed by the district judge.) Filing of such petition is a "taking" of the appeal with the period allowed for appeal. If the appeal is allowed, citation should issue to the appellee, advising him of the appeal and that it will be heard on a certain day, although notice may be given by the clerk as in other civil actions. Unless the rules of court provide otherwise, the return date of the citation sets the time before which the case should be docketed and the record filed in the circuit court of appeals. There appears to be no reason why the Rules of Civil Procedure may not, and hence under the General Order of Bankruptcy they must, apply to the making up of the record, giving of bond for costs and *supersedeas*, filing the record and docketing the case. Neither should "notice and severance" be required.

105. Admiralty Rule of the Supreme Court 49 sets out in detail what the record on appeal in an admiralty case must contain. Trial practice in admiralty cases is *sui generis* and the record inevitably reflects the procedure of the trial.

REVIEW OF ADMINISTRATIVE AGENCIES

A unique feature of the jurisdiction of the circuit courts of appeals is the review of orders and decisions of a member of special courts and administrative tribunals. It has been suggested that in these cases the court is exercising original jurisdiction, as it is the first representative of the judicial branch of the government to entertain the case, but it is essentially appellate work that the court does and the procedure is that appropriate to the exercise of such appellate function. The Acts which created the administrative boards and special courts and provided for review of their decisions and orders contain surprisingly little guidance in the matter of the procedure by which the review may be accomplished, although they must be consulted in each case. The Rules of Civil Procedure are designed primarily for trials in the district courts and are not fully applicable to appeals from administrative tribunals.¹⁰⁶ Consequently, each circuit court of appeals can regulate the matter much as it pleases. Even the broad general requirement that practice in the several circuit courts of appeal must conform to that in the Supreme Court has little significance, the anomalous character of this jurisdiction defying close analogy to any action before the Supreme Court. It is therefore impossible to give a detailed description of procedure in force throughout the United States. The reader must consult the Rules of Court of his circuit. For illustrative purposes, the procedures adopted in the Seventh Circuit are here set forth.

(a) *U. S. Tax Court*

Appeal from a decision of the Tax Court must be taken within three months from the time the decision is rendered.¹⁰⁷ Appeal lies to that circuit court of appeals in whose circuit is located the collector's office to which the return of the disputed tax was made, or if no return was filed, then to the court of appeals for the District of Columbia. However, by written stipulation between the Commissioner of Internal Revenue and the taxpayer, the decision may be reviewed in any other circuit court of appeals.¹⁰⁸ The appellant takes his appeal by filing with the clerk of the Tax Court a petition for review and a statement of points relied upon, together with two con-

106. Observe the language of FED. RULES CIV. PROC. 1, 73.

107. 44 STAT. 109, amended 47 STAT. 286, 48 STAT. 926; 26 U. S. C. § 1142.

108. 44 STAT. 110, amended 48 STAT. 760, 48 STAT. 926; 26 U. S. C. § 1141 (b).

formed copies of each.¹⁰⁹ The petition must (1) name the court in which review is sought, (2) allege the facts necessary to establish venue, (3) set forth the party or parties seeking the review, (4) state the taxable period or periods involved, and (5) be signed by the petitioner or his attorney of record. The statement of points is similar to that employed in the appeal of a civil case. The clerk of the Tax Court must serve the petition and statement on the other parties, in the same manner in which the clerk of a district court serves the "notice of appeal" in a case¹¹⁰ governed by the federal rules of civil procedure. The "petition" for appeal is granted as of course if in proper form.¹¹¹ In other respects, the appeal is governed by the same rules and follows the same course as a civil case under the Federal Rules of Civil Procedure.¹¹² This is true as to the preparation and filing of the record and briefs as well as the argument and disposition of the case in the circuit court of appeals. The court may ". . . affirm, or if the decision of the Tax Court is not in accordance with law, . . . modify or . . . reverse the decision of the court with or without remanding the case for rehearing, as justice may require."¹¹³ Damages may be imposed if the appeal was sought only for delay.

(b) *Processing Tax Board of Review*

In all but two of the circuits special provision for review of the decisions of the Processing Tax Board of Review is made by rule of court.¹¹⁴ In the Seventh Circuit the procedure is almost identical with that employed in an appeal from the U. S. Tax Court, which of course is largely that in civil cases generally. In this instance the petition for review, with statement of points, is filed with the circuit court of appeals, which grants the review, *not* with the board whose decision is to be reviewed. At the same time, a copy of the

109. Rule of Court, 7th Circuit, 33. The court is specifically authorized to make rules of procedure for reviewing decisions of the Board of Tax Appeals (44 STAT. 109, 26 U. S. C. § 1141 c (2)) but the review must be sought by petition. 26 U. S. C. § 1142. It seems an inept method of instituting a review which is given as of right.

110. Rule of Court, 7th Circuit, 33.

111. As the Statute gives no standard by which the court shall determine whether the petition shall be granted or denied, the review is virtually of right. The statutory language is, "The decision . . . may be reviewed . . . if a petition for such review is filed . . ." 26 U. S. C. § 1142.

112. Rule of Court, 7th Circuit, 33.

113. 44 STAT. 110, 26 U. S. C. § 1141 (c) (1).

114. The statute controlling review of decisions of the Processing Board of Tax Appeals specifically authorizes such rules of court. 49 STAT. 1748; 7 U. S. C. § 648g.

petition must be served by the *petitioner himself* upon the opposing party, and another copy filed with the board.¹¹⁵ Within ten days thereafter, the record must be filed in the circuit court of appeals.

Review must be sought within three months of the mailing to the parties of a copy of the board's findings and decision, in the circuit court of appeals in which the claimant resides or has his principal place of business, or to the Court of Appeal of the District of Columbia, or to such circuit court of appeal stipulated by the parties in writings. Only objections made before the board will be reviewed.

By Act of Oct. 21, 1942^{115a} the Processing Tax Board of Review was abolished and its functions transferred to the United States Tax Court, which by the same Act was made to succeed the former Board of Tax Appeals. It would appear that the statutory provisions for review of decisions of the Tax Court, as well as rules of court of the several circuits regulating the procedure for review of decisions of the Tax Court, should now be applicable to any proceeding to review a decision of the Tax Court relating to the refund of a processing tax. Not all the Circuit Courts of Appeals have changed their rules of court to conform to the new court organization at this time, however.

(c) *Other Administrative Officers, Boards and Commissions*

In all the circuits there are rules of court governing the procedure of review of decision of administrative agencies, to the extent the judges believe the Rules of Civil Procedure are inadequate for this peculiar jurisdiction. In perhaps most circuits a single rule covers review of all administrative agencies except the two just described, which are distinguished by the judicial character of their proceedings. A peculiar feature of many applications to the circuit courts of appeals subsequent to administrative proceedings is that an aggrieved party is not seeking relief from a decision against him. The agency itself, having ruled against a party who does not comply with its decision, may seek an order of enforcement from the appellate court.

Examination of the latest rules of court of the several circuits discloses that the rules of the 6th, 7th, and 10th circuits on this subject are all but identical. The rules of the 3rd and 8th circuits are very similar to each

115. *Ibid.* And see Rule of Court, 7th Circuit, 34.

115a. 56 STAT. 967, 26 U. S. C. following § 1100 (Supp. III, 1944).

other and, where they cover the same points, virtually identical with those of the circuits first mentioned. In the 1st and 4th circuits, the same rules for filing petitions or applications apply, but the rules are more abbreviated. The situation in the 2nd, 5th and 9th circuits differ so greatly that comparison is not profitable.

A table of the jurisdiction of the circuit courts of appeals over administrative agencies appears in the footnotes.¹¹⁶ It is imperative to examine the statutes regulating the substantive rights of the parties and the appellate jurisdiction of the circuit courts of appeals. Many contain distinctive and mandatory provisions relating to the method of review and to venue of review.

Proceedings of the type here under discussion are almost universally instituted in the circuit courts of appeals by a petition for review or application for enforcement, with a copy for each respondent, filed in that court

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116. Order of Commission under the Grain Futures Act. 7 U. S. C. §§ 8, 9.
Orders of Secretary of Agriculture under Packers and Stockyards Act. 7 U. S. C. § 194.
Enforcement of orders and review of orders of Interstate Commerce Commission, Federal Reserve Board, and Federal Trade Commission to cease and desist under Clayton Act. 15 U. S. C. § 21.
Orders of Federal Trade Commission as to unfair methods of competition. 15 U. S. C. § 45 (As amended).
Orders of Securities and Exchange Commission under the Securities Act of 1933. 15 U. S. C. § 77i (a).
Orders of Securities and Exchange Commission under the Securities Exchange Act of 1934. 15 U. S. C. § 78y (a).
Orders of Securities and Exchange Commission under Public Utility Holding Company Act of 1935. 15 U. S. C. § 79x (a).
Order of Bituminous Coal Commission. 15 U. S. C. § 836 (b, c, d).
Order of Federal Power Commission. 16 U. S. C. § 825 1(b).
From decision revoking grant for establishment of foreign trade zone. 19 U. S. C. § 81r.
Order of Secretary of Treasury suspending or revoking a license of a customhouse broker. 19 U. S. C. § 1641 (b).
Decisions of Board of Tax Appeals. 26 U. S. C. §§ 651, 642. Now U. S. Tax Court. Act of Oct. 21, 1942; 26 U. S. C. § 1100 (Supp. III, 1944).
Order of Federal Alcohol Administrator denying an application for, or suspending, revoking, or annulling a basic permit. 27 U. S. C. § 204 (h).
Order of National Labor Relations Board. 29 U. S. C. § 160 (e, f).
Order of Secretary of War issued under 33 U. S. C. § 504. 33 U. S. C. § 505.
Orders of Federal Power Commission under Natural Gas Act. 15 U. S. C. A. § 717r.
Orders of Authority under Civil Aeronautics Authority Act of 1938. 49 U. S. C. A. § 646.
Orders of Administrator of Fair Labor Standards Act of 1938. 29 U. S. C. A. § 210.

within the time prescribed in the statute regulating the activities of the particular administrative body. The petition or application must contain a concise statement of the nature of the proceedings, the facts and statute upon which venue is based, and the relief or order prayed. In addition, a petition for review seeking reversal or modification of the decision below must be accompanied by a statement of the points upon which the petitioner relies. Unless otherwise provided by statute, the copies of the petition or application are served upon respondents by the clerk of court in the manner prescribed in Rule of Civil Procedure 73b.

Where practicable, two or more persons may file a joint and several petition for review. And where two or more persons petition for review of the same order, whether or not on a joint and several petition, a single record on review shall be prepared containing all the matter designated by both parties without duplication. A person interested may move to intervene even though the applicable statute does not provide for intervention, by motion containing a concise statement of his interest in the proceedings and the grounds upon which intervention is sought.¹¹⁷

In the 1st, 3rd, and 8th circuits, the rules require the respondent, within 20 days after the filing of the petition or application, to file an answer, with a copy for the petitioner which is served by the clerk. If he fails to answer within the prescribed time, the court may, by reason of the default, enter a decree granting the relief or order prayed. In the other circuits, a formal answer does not seem to be required.

In the 6th, 7th and 10th circuits, the rules of court prescribe in some detail the procedure for making up the record. Aside from the times set forth for each step, the process is essentially the same as that described in the Rules of Civil Procedure.

Instead of serving and filing designations as therein provided, the parties may stipulate the portions of the transcript to be printed. Whichever method is followed, the printed record must contain: (1) the petition for review or the application for enforcement, as the case may be, (2) the order and certificate of the Agency, Board or Commission, (3) the designations or stipulations as to the contents of the record, (4) the pleadings, and, (5) the findings of fact, conclusions of law and opinion, unless the parties stipulate that only certain portions thereof, specified by them, are material to the

117. Rules of Court, 1st, 3rd, 4th, 6th, 7th, 8th, and 10th Circuits.

consideration of the questions presented. The printing of the record itself is handled as in other civil cases.

If no time is set by statute, the transcript must be filed within 40 days of the filing of the petition¹¹⁸ or of the last designation of the record to be printed.¹¹⁹ Rules of court commonly provide for supplying omissions or correcting misstatements in the record, the use of original papers and exhibits, and extensions of time.

In the 5th circuit, the procedure there employed for review of orders of the Tax Court is the model for review of all administrative agencies. In general, it can be said that except as specifically changed by rule of court, the procedure under the Rules of Civil Procedure is followed in all circuits. After the determination of the case, a copy of the opinion and judgment is certified to the particular Board, Agency or Commission in the usual course in lieu of mandate.

(1) National Labor Relations Board

As the business before each circuit shows considerable activity in certain types of litigation, the judges of that circuit are apt to find that special rules are necessary—tailor made, as it were, to the peculiarities of the particular litigation. Thus, in the Court of Appeals for the District of Columbia, there is a special procedure for reviewing decisions of the Federal Communications Commission. In the seventh and eighth circuits, special provision is made for reviewing orders of the National Labor Relations Board. This practice varies from that of the review of other administrative bodies in the seventh circuit in the following respects.

Within forty days after service of the petition for review upon the Board, the complete transcript of the record must be filed. If the case is docketed thirty days before the next session, it will be heard at that session; if docketed within the thirty day period it may still be heard at that session, at the foot of the calendar, provided consent of counsel in writing is filed, together with the briefs of both sides, with the Clerk, at least three days before the case is called.

Instead of a separate record, printed by the Clerk, as in other cases taken to the Circuit Court of Appeals, the record is printed by the parties

118. 8th Circuit.

119. 7th Circuit.

in an appendix or supplement to the briefs.¹²⁰ Within ten days after the transcript has been filed, petitioner or applicant, as the case may be, shall serve respondent with a statement of the parts of the record he proposes to print with his brief. He must print as part of his appendix the pleadings, findings of fact, conclusions of law, order and opinion of the Board and the material evidence he desires the court to read. Respondent, in his appendix or supplement to the brief, should print such parts of the record as he desires the court to read and as have not been printed in the brief of opposing counsel. A reply brief may be filed by the petitioner or applicant, setting forth in an appendix thereof additional portions of the record he desires the court to read in view of the parts printed by respondent. The practice of printing material parts of the record as an appendix to the brief was adopted hesitatingly. It has proved a success and has greatly reduced the cost of printing.

The content and form of the briefs, other than extended regulations for the inclusion of the transcript, as mentioned above, are governed by the same rules as in other appeals, except that the page limit does not apply to the appendices or supplements to the briefs, and the time for filing, for the petitioner or applicant, is twenty days before the session, and for the respondent five days before the session at which the case is docketed. A reply brief may be filed at least three days before the day fixed for the hearing of the argument. Thirty copies of all briefs must be filed with the Clerk, three of which are sent forthwith by him to the opposing counsel.

MISCELLANEOUS

The Rules of Civil Procedure are expressly made applicable to appeals to the circuit courts of appeals in several types of litigation although they have limited, or no, application to the same case in the district court.¹²¹ This is eminently reasonable. Appellate procedure is much less complicated than trial practice. Detailed rules of procedure may not fit every kind of litigation upon trial; it is much easier to prescribe a uniform procedure for the steps of appeal. Among the cases to which these observations apply are: Probate, adoption or lunacy proceedings, admission to citizenship, *habeas corpus*, *quo warranto*, forfeiture of property for violation of a statute of

120. A similar practice in all civil appeals in some circuits has been commented upon *supra*.

121. Rule 81.

the United States, proceedings relating to arbitration (43 Stat. 883; 9 U. S. C. A. §§ 1-4), proceedings relating to boards of arbitration of railway labor disputes (44 Stat. 585; 45 U. S. C. A. § 159), and proceedings for the condemnation of property under the power of eminent domain. Of these, only *habeas corpus* proceedings require special mention. In most of the circuits, special rules refer to the custody of the petitioner pending decision. A *habeas corpus* proceeding is definitely not a criminal case. Neither the Criminal Appeals Rules, nor the prospective Rules of Criminal Procedure, are applicable. However, the practice relating to bail, and the right of petitioner to freedom prior to issuance of the writ, have been discussed in connection with the procedure on appeal in a criminal case. In one sense, *habeas corpus* may partially serve the purpose of review of conviction in a criminal case.¹²² For example, the jurisdiction of the trial court, may be argued on direct appeal; the same question may be raised in a *habeas corpus* proceeding instituted long after the time for appeal has passed. Moreover, the petition for a writ of *habeas corpus* may be presented to a circuit judge in the first instance.¹²³ However, his order must be entered in the district court in the district where the restraint complained of is had,¹²⁴ and the hearing held before the judge granting the writ¹²⁵ (be he district or circuit judge) is an original proceeding¹²⁶ subject to review by the circuit court of appeals¹²⁷ under the procedure prescribed by the Rules of Civil Procedure.

122. See Holtzoff, *Collateral Review of Convictions in Federal Courts* (1945) 25 BOSTON U. L. REV. 26.

123. 43 STAT. 940, 28 U. S. C. § 452, amended 52 STAT. 1232, 28 U. S. C. § 463.

124. *Ibid.*

125. 14 STAT. 385, 28 U. S. C. § 485.

126. 14 STAT. 385, 28 U. S. C. § 461.

127. 43 STAT. 940, 28 U. S. C. § 463.