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A Comparison of Federal and Kentucky Procedure for Appeal in Civil Cases

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A COMPARISON OF FEDERAL AND KENTUCKY PROCEDURE FOR APPEAL IN CIVIL CASES

This note will outline briefly the existing rules under the Kentucky Civil Code governing appeals and also the Federal Rules on the subject, to the end that comparison may be made of the two sets of provisions and conclusions drawn to the merits of the proposed changes from the present Kentucky Code to provisions based largely upon the Federal Rules.

Title XVIII, Chap. I-III of the Code provides that the method of bringing the judgment of an inferior court before the Court of Appeals is by an appeal granted by the court rendering the judgment, during the term at which it is rendered, or by filing a copy of the judgment in the office of the clerk of the Court of Appeals.[1] Code section 734-a further provides as a precautionary measure that an appeal from an order or judgment overruling a motion to quash a summons or a return of service will not constitute an entry of appearance by the appellant.[2] Once the appeal is taken, the appellee must be summoned either actually or constructively, except where the appeal is granted by the inferior court, or where the appellee enters his appearance in the Court of Appeals.[3] It is further provided that in the case of an appellee who is constructively summoned, a warning order attorney shall be appointed to inform the appellee of the pendency of the appeal.[4]

As to the actual nature of the transcript of the record itself, the Code provides that the clerk of the court entering the judgment shall copy the entire record or the parts of the record directed by the judge or the parties to the appeal. In the case of appellees who are constructively summoned, however, the appellant is directed to order a transcript of the entire record.[5] When the appeal is granted the appellant has ninety days to file a schedule with the clerk of the inferior court, showing what part of the record he wishes copied and he may serve notice on the appellee of this filing. The appellee then has twenty days after the receipt of service, or one hundred twenty days after the granting of the appeal, if notice is not served. Whether service is received or not, at any time before completion of the transcript ordered by the appellant, the appellee may file a similar schedule.[6] For the purposes of this general outline, the procedure, when

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[1] KY. CODE CIV. PRAC. ANN. sec. 734 (Carroll's 1948).
Id. at sec. 734a.
[3] Id. at sec. 736.
[4] Ibid.
Id. at sec. 739.
[6] Id. at sec. 737.

the appeal is filed in the office of the clerk of the Court of Appeals,[7] instead of with the clerk of the inferior court, is not so dissimilar as to warrant attention here. It is to be noted, however, in either situation Civil Code Section 737(11) requires that cost be paid by the party requiring the clerk to copy unnecessary or immaterial parts of the record. The above mentioned notices, records, and schedules coupled with certification by the clerk, constitute the complete record for the purpose of appealing,[8] and must be filed with the clerk of the Court of Appeals at least twenty days before the first day of the second term of the court next after the granting of the appeal.[9] The appellant must file at this time, in addition to the transcript, a statement showing the names of the appellants and appellees and their designation as such, the date when the judgment appealed from was entered and where on the record it may be found, and whether or not a summons or warning order is desired, and if so, to whom and where.[10] The writ of certiorari may be used by the appellees in certain instances to bring up the record and is always available where the clerk of the inferior court has failed to copy the parts of the record which he was directed to copy.[11]

While all of this preparation for the perfection of the appeal is going on however, the appellant is required to provide a supersedeas bond if he wishes to stay the effect of the judgment appealed from. To obtain this bond the appellant must execute, before the clerk of the inferior court or the clerk of the Court of Appeals, sufficient sureties to insure collection of the judgment and to post bond that he will abide by the judgment of the Court of Appeals and pay to the appellee, in the event the judgment is affirmed, an amount equal to that which the appellee would have obtained in the form of rents or emoluments during the period in which the judgment was stayed.[12]

Provision is also made allowing the requirement of a new bond if at any time it appears that the old bond does not effectively secure the rights of the appellee and supersedeas bonds may be issued to stay proceedings on part, as well as the whole of the judgment.[13]

As to the actual hearing of the case on appeal, the Code provides that appeals shall stand for trial during the first term twenty days before which the transcript is filed in the clerk s office, or at a reason-

[7] Id. at sec. 737 (5).
[8] Id. at sec. 737 (13).
[9] Id. at sec. 738.
[10] Id. at sec. 739.
[11] Id. at sec. 743.
[12] Id. at sec. 748.
[13] Id. at sec. 751.

able time fixed by the court.[14] It is to be finally noted that provision is made allowing the appellee to move for dismissal if it appears from the record that the appeal was improperly granted or that the appellant's right to prosecute it further has ceased.[15]

No attempt has been made by the writer to make an all inclusive presentation of the Kentucky rules of procedure governing appeal, but it is felt that the foregoing presents an adequate background against which to contrast the Federal Rules covering this subject.

In examining the Federal Rules, it becomes apparent in the first place, that the proceedings on appeal are greatly simplified. The essential step is the filing by the appellant of a notice of appeal[16] with the clerk of the appellate court, within thirty days of the entry of the judgment appealed from. This notice of appeal must specify simply, the "parties taking the appeal the judgment or part thereof appealed from (and) the court to which the appeal is taken" [17] Failure of the appellant to take further steps does not affect the validity of the appeal, "but is ground only for such remedies as are specified in this rule" or for such action as the appellate court deems appropriate, which may include dismissal.[18]

Notice is given by having the clerk mail copies of the notice of appeal to all parties other than the appellants [19] In the absence of an exemption by law a bond for costs on appeal is filed with the notice of appeal.[20] Further, as in Kentucky, a supersedeas bond must be executed to stay proceedings on the judgment below [21] However, if either the appeal or supersedeas bond is not filed seasonably or is insufficient, the court may give leave to file a proper bond.[22] The surety on either an appeal or a supersedeas bond submits himself to the jurisdiction of the court and his liability may be enforced by motion without the trouble or expense of an independent action.[23] The appeal itself must be docketed within forty days from the date of the filing of the notice, unless the appellate court grants an extension of time.[24]

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[14] Id. at sec. 753.
[15] Id. at sec. 757.
[16] FED. R. CIV. P 73 (a) (1948).
[17] Id. at 73 (b).
[18] Id. at 73 (a).
[19] Id. at 73 (b). Compare this simple but adequate rule with the Kentucky provision, KY. CODE CIV. PRAC. ANN. sec. 736 (Carroll's 1948).
[20] Id. at 73 (c).
[21] Id. at 73 (d).
[22] Id. at 73 (e).
[23] Id. at 73 (f). The Kentucky Civil Code Committee s Report to the Annual District Bar Meetings, Kentucky State Bar Association (1951) at page 38 calls this a "time and money saving method"
[24] Id. at 73 (g). This extension must not allow appellant more than ninety days from the time the notice was filed.

As soon as the appeal is taken, the appellant is required to serve upon the appellee, and file with the court, a designation of that part of the entire record which he wishes to be included in the record of appeal.[25] Thereafter, every other party to the action has ten days in which to file a designation including additional portions of the rec ord.[26] If evidence or proceedings stenographically reported are to be included the appellant must file a copy of the reporter s transcript.[27] If the designation includes only a part of the reporter s transcript the appellant must, "file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added."[28] The form of the testimony designated for inclusion, may be either in narrative or question and answer form, but any party, if dissatisfied with the narrative form, may require the question and answer form to be substituted.[29] Under the Federal rule no assignment of errors is necessary but unless the appellant includes the entire record he must designate a "concise statement of the points on which he intends to rely"[30] Every effort is made to encourage the omission of extraneous and immaterial parts of the record and costs are imposed upon the party responsible for their inclusion.[31] Rather than make the designations above discussed, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record they wish included,[32] which when transmitted to the appellate court constitutes the record on appeal.[33]

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[25] Id. at 75 (a).

[26] Ibid. Compare this rule with the present Code provision, KY. CODE CIV. PRAC. ANN. sec. 737 (e), (Carroll's 1948) in which appellee may have as much as 120 days to file a schedule. It is submitted that the present rule allows an unnecessary length of time.

[27] Id. at 75 (b).

[28] Ibid. However, the appellate court may require the appellant to file a second copy of the transcript for the use of the court.

[29] Id. at 75 (c). This provision would seem to be a satisfactory answer to the critics of the narrative form. For a discussion of the narrative form see, Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals,* 42 HARV. L. REV. 483 (1929); Stone, *The Record on Appeal in Civil Cases,* 23 VA. L. REV. 766 (1937).

[30] Id. at 75 (d). Here it might also be pointed out parenthetically that under the Federal Rules it is not necessary to take exception to an adverse ruling by the district judge. Thus the bill of exceptions is under the Federal Rules also eliminated. See FED. R. CIV. P 46 (1948).

[31] Id. at 75 (e).

[32] Id. at 75 (f).

[33] Id. at 75 (g). It is to be noted that whatever matter is designated the record must include the following: (1) Material pleadings; (2) Verdict or findings of fact together with direction for entry of judgment thereon; (3) In non-jury cases, the master s report, if any· (4) Opinion; (5) Judgment or part thereof appealed from; (6) Notice of appeal with date of filing; (7) Designations or stipulations of the parties as to matter to be included in the record, and (8) any statement by the appellant of the points on which he intends to rely

The district court[34] is not required to approve the record on appeal, but, in the event of any disagreement as to the correctness of the record, the district court is empowered to settle the difference.[35] In the case of error or omission in the record, correction can be made by stipulation of the parties or by the district or appellate court on their own initiative.[36] Where, before the record on appeal is settled and certified a party wishes to make some motion or apply for some intermediate order,[37] the clerk of the district court is authorized to certify and transmit to appellate court a copy of that portion of the record necessary for the particular purpose in mind.[38] When more than one appeal to the same court stems from the same judgment a single record may be prepared.[39] The part of the record which must be printed and the manner of printing is left to the appellate court, but the type, paper, and dimensions of the printed matter must conform to the rules of the Supreme Court of the United States.[40]

Provision is made allowing appeals in *forma pauperis*,[41] and where no stenographic report of the evidence or proceedings was made.[42] The concluding rule on appeals, Rule 76, provides for the simplest record on appeal of all, directing that where the questions presented by the appeal can be decided without an examination of all the proceedings in the court below,

> "the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court."[43]

This statement must include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, a concise statement of the points to be relied on by the appellant and must be approved

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[34] The district court referred to in the Federal Rules, and in this note, is of course, what would be known in Kentucky as the circuit court.

[35] Id. at 75 (h). Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1939) at p. 309, esp. n. 225, calls this a "simple substitute for such ancient practices as certiorari for diminution of the record." This "ancient" practice is still followed in Kentucky, see KY. CODE CIV. PRAC. ANN., sec. 739 (Carroll's 1948).

[36] Id. at 75 (h).

[37] Id. at 75 (j). This would include (1) motion for dismissal, (2) for a stay pending appeal, (3) for additional security on the bond on appeal or the supersedeas bond.

[38] Ibid.

[39] Id. at 75 (k).

[40] Id. at 75 (l). For the Supreme Court Rule see, 36 Stat. 901 (1911), 28 U.S.C. sec. 865 (1934).

[41] Id. at 75 (m).

[42] Id. at 75 (n).

[43] Id. at 76. There can be little doubt that such a rule would save time and expense in Kentucky.

by the district court before it can be certified as the record on appeal.[44] The only remaining Federal rule to be considered allows those persons jointly or severally interested in a judgment to appeal separately or jointly.[45]

What conclusions can we reach after this examination of the Federal rules in the light of the present Kentucky Code provisions? The writer submits the following conclusions as being true:

(1) There is no radical, basic difference between the Federal Rules of Procedure governing appeal and the present Code provisions in Kentucky relating to that subject.
(2) Where differences between the Federal and Code rules do exist, the Federal Rules are more desirable, providing a method of appeal that is quicker, simpler, and less expensive.

On this basis the writer urges the adoption of the Federal Rules 72 through 76 governing procedure in cases of civil appeals.

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[44] Ibid. For a discussion of this rule see FEDERAL RULES OF PROCEDURE AND PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION INSTITUTE, pp. 367 368 (1938) as cited by Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 310, esp. n. 231 (1939).

[45] Id. at 74. Ilsen and Hone, *Federal Appellate Practice As Affected By The New Rules of Civil Procedure*, 24 MINN. L. REV. 1 (1939), is an excellent discussion of this as well as the entire subject of Federal Rules and Procedures.