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## Four Years of the Rules on Appeal

An examination of the California decisions dealing with the new California Rules on Appeal and the practice thereunder

*B. E. Witkin\**

### INTRODUCTION

#### *Scope of discussion*

This article seeks to review the experience of the first four years of operation of the new California Rules on Appeal, which became effective July 1, 1943.<sup>1</sup> All relevant decisions of the supreme court and district courts of appeal are discussed, with the object of furnishing, in brief and compact form, the authoritative interpretation of the rules, for the benefit of courts and attorneys. Only those cases dealing with the Rules on Appeal from the superior court are covered; decisions on municipal and inferior court appeals are not considered, and problems of appellate practice or review outside the scope of the rules are likewise omitted.

The treatment herein is often merely expository, and no attempt has been made to subject each case to detailed critical examination. The reasons for this, apart from obvious limitations of time and space, are two: first, many of the problems raised in the decisions have already been fully explored in a previous article by the writer,<sup>2</sup> to which reference will be made at all appropriate places; and, second, it is contemplated that members of the staff of the REVIEW will write individual notes on significant cases. Nevertheless, some important implications of the decisions will be pointed out in this article, and

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<sup>1</sup> The material was originally prepared in summary form for use at the discussion meeting of the Conference of California Judges, Supreme and Appellate Court Section, at the State Bar Convention in Santa Cruz, September 11, 1947.

<sup>2</sup> Witkin, *New California Rules on Appeal* (1944) 17 So. CALIF. L. REV. 79, 232.

some suggestions will be offered as to methods of increasing the usefulness of the rules and the efficiency of appellate practice.

### *Validity of rules and retroactive application*

Two problems, which caused some concern and gave rise to considerable debate among those engaged in framing the rules, have apparently been solved without difficulty.

The first was the problem of validity, involving the constitutionality and interpretation of the grant of power to the Judicial Council. The Council acted on the assumption that the grant was valid and, although a test case was proposed by the State Bar Committee on Administration of Justice,<sup>3</sup> none, it seems, was brought. In the large number of opinions filed since the rules became effective, no question of validity of the rules as a whole, or of any particular rule, has been raised. In view of this general acquiescence, and the additional fact of the repeal of superseded statutes in 1945,<sup>4</sup> it may safely be concluded that for practical purposes the validity of the rules is established.

The second problem was that of retroactivity of the rules in cases where the notice of appeal was filed before July 1, 1943. The solution embodied in Rule 53(b) was to keep the old law governing preparation of the record in force as to such pending appeals, but to make the new rules applicable to filing of briefs and to other steps taken in the reviewing court after filing of the record therein.<sup>5</sup> This scheme was easy to understand and follow, and seems to have given no trouble.<sup>6</sup>

## I. FILING APPEAL

### *Form of notice of appeal* [Rule 1(a)]

The former rule, established by the cases, that a notice of appeal must be signed by the attorney of record, was abrogated by Rule 1(a),

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<sup>3</sup> *Ibid.* at 299.

<sup>4</sup> Cal. Stats. 1945, p. 356. The following sections were repealed: CAL. CODE CIV. PROC. §§ 648, 649, 650, 651, 653, 939, 940, 950, 951, 952, 953, 953a, 953b, 953c, 954, 954a; CAL. PEN. CODE §§ 1241, 1249, 1264. Various other sections of the Code of Civil Procedure, Penal Code, and Probate Code were amended to eliminate matter in conflict with the rules and to make reference to the rules in appropriate places.

<sup>5</sup> Witkin, *op. cit. supra* note 2, at 296.

<sup>6</sup> See *Williams v. Davis* (1946) 27 Cal. (2d) 746, 750, 167 P. (2d) 189, 192; *Peak v. Nicholson* (1943) 61 Cal. App. (2d) 355, 143 P. (2d) 78; *Culver v. Culver* (1944) 65 Cal. App. (2d) 145, 150 P. (2d) 292; *Williams v. Davis* (1945) 69 Cal. App. (2d) 141, 158 P. (2d) 748.

which allows the notice to be signed either by the appellant himself or by "his attorney", who need not necessarily be attorney of record.<sup>7</sup> The change was overlooked, and the old law was followed, by the district court of appeal in *Jackson v. Jackson*,<sup>8</sup> where the notice of appeal was signed by an attorney who had not yet been effectively substituted for the former attorney of record; but this case was overruled in *Estate of Hultin*,<sup>9</sup> the supreme court holding that the words "his attorney" "mean the appellant's attorney, whether he appears as such of record or not".

*Time of filing: normal time* [Rule 2(a)]

The unfortunate tampering with a final judgment after its entry led to a late filing of the notice of appeal in *Kemper v. Mark Hopkins, Inc.*<sup>10</sup> Final judgment was entered for defendants, with costs of \$857.20. After plaintiffs obtained an order reducing the costs to \$257.20, the court made an *order amending and correcting the judgment previously entered*, copying it in full as modified. Plaintiffs appealed within 60 days from the entry of this modified judgment, but more than 60 days after the original entry of judgment. The court held that the appeal should be dismissed; the real judgment was the one on the merits, and the trial court had no power to disturb it in the course of changing the incidental award of costs.

*Time of filing: what constitutes entry; date of entry in the minutes* [Rule 2(b)(2)]

This important new rule was adopted to remove uncertainty as to the time to appeal where the court order is first entered in the minutes, and thereafter a formal order is signed and filed.<sup>11</sup> The background of the former law and the purpose and effect of the new rule are discussed, and the rule applied, in *Pessarra v. Pessarra*.<sup>12</sup> The trial court, by minute order, granted a motion to set aside interlocutory and final divorce decrees. The minute entry did not contain a direction that a written order be prepared and filed. Later, after submission of a proposed formal order by defendant, the trial court considered proposals of both parties and eventually signed a formal order, con-

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<sup>7</sup> Witkin, *op. cit. supra* note 2, at 83.

<sup>8</sup> (1945) 71 Cal. App. (2d) 837, 163 P. (2d) 780.

<sup>9</sup> (1947) 29 Cal. (2d) 825, 832, 178 P. (2d) 756, 760.

<sup>10</sup> (1947) 78 A. C. A. 975, 178 P. (2d) 767.

<sup>11</sup> Witkin, *op. cit. supra* note 2, at 85.

<sup>12</sup> (1947) 80 A. C. A. 1093, 183 P. (2d) 279.

taining findings, which went beyond the scope of the original minute order. Appeal was taken from the formal order. The appeal was dismissed, for the reason that the minute order started the time running, and the formal order was therefore a nullity. The court observed that the language of the new rule is "clear and certain", and that "There is no room for interpretation".

This last observation, unfortunately, cannot be considered entirely reliable. The rules of trial procedure governing the rendition and entry of judgments and orders must be taken into consideration in reading Rule 2(b)(2).<sup>13</sup> Thus, in *Trubowitch v. Riverbank Canning Co.*,<sup>14</sup> a petition to enforce an arbitration agreement under section 1282 of the Code of Civil Procedure was filed in the superior court; and, after a hearing, the court orally announced that it was denied and that defendant's motion for a dismissal was granted. Later the court ordered defendant to prepare findings, which were adopted and signed. It was held that the notice of appeal, filed within 60 days thereafter, was valid. Time did not commence to run from the minute entry of the original order because the action was, in substance, a suit in equity for specific performance, and findings were essential. There was therefore *no rendition of judgment* until findings were signed and filed, and the previous minute order was not appealable at all.

Thus it appears that there may be implied exceptions to the literal terms of Rule 2(b)(2) which are, nevertheless, thoroughly consistent with the purpose and general effect of the rule. The basic fact to remember is that this rule never comes into operation at all until there is an appealable judgment or order.<sup>15</sup> Whether an oral or written pronouncement by the judge is an order or a mere statement of intention to make an order may sometimes depend upon the statutory requisites of such an order; and, as the *Trubowitch* case shows, where findings are required, there is no effective, appealable judgment until they are signed and filed. It may be that further experience will bring to light additional situations in which the minute entry does not fulfill the statutory requisites of an effective judgment, order or decree, and therefore will not be deemed the entry for the purpose of computing time to appeal, even though it fails to recite that a formal order

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<sup>13</sup> Witkin, *op. cit. supra* note 2, at 86, 88.

<sup>14</sup> (1947) 30 A. C. 335, 346, 182 P. (2d) 182, 190.

<sup>15</sup> Guardianship of Leach (1946) 29 Cal. (2d) 535, 539, 540, 176 P. (2d) 369, 371; Witkin, *op. cit. supra* note 2, at 82.

is to follow. The disclosure of such situations might eventually justify a revision and enlargement of Rule 2(b).<sup>16</sup>

A peculiar set of facts involving Rule 2(b) was presented in *Estate of Lair*.<sup>17</sup> The court gave a decree settling the final account of the trustee of a testamentary trust after its termination and distributing the assets. The decree was signed and filed June 3, but, reversing the usual process, the signed decree directed that it be entered in the minutes. Entry in the minutes was made June 8. The notice of appeal, given August 5, was late if time ran from the filing of the decree, but not if time ran from the entry in the minutes. The court held that the notice was timely, because time runs from entry in the minutes where there is no express direction that a written order be filed, and here the minute entry contained no such direction (since a written order had already been prepared and filed). The court did not give consideration to what might appear to be a stronger reason why the appeal was in time: under Rule 2(b)(4), in the case of a *decree of distribution* in a probate proceeding (which this was), time does not begin to run until the date of "entry at length in the minutes".

*Extension of time where motion for new trial denied* [Rule 3(a)(1)]

This rule restates the statutory provision by incorporating the effect of the decisions interpreting it.<sup>18</sup> One of the important conditions laid down in the cases, and expressly declared in the new rule, is that, in order to have the effect of extending time, the notice of intention to move for a new trial must be "valid". This requirement was ignored by counsel in *Lynch v. Watson*.<sup>19</sup> Defendant's motion to dismiss the action was granted by a minute order directing counsel for defendant to prepare a formal judgment. The judgment was signed and filed. Thereafter plaintiff moved for a new trial, his motion was denied, and he appealed. The appeal was dismissed. Under Rule 2(b)(2), since the court had directed the preparation of a written judgment, the time ran from the filing of that judgment. The time was not extended under Rule 3(a) because the judgment of dismissal was

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<sup>16</sup> It is possible, however, that a study of the statutes and the varying practices of trial courts and clerks in different counties will show that the problem cannot be solved without a revision of those statutes and the superior court rules. Witkin, *op. cit. supra* note 2, at 86, 88.

<sup>17</sup> (1944) 65 Cal. App. (2d) 245, 150 P. (2d) 560.

<sup>18</sup> Witkin, *op. cit. supra* note 2, at 92.

<sup>19</sup> (1945) 69 Cal. App. (2d) 51, 158 P. (2d) 250.

given before any trial on the issues of fact, a motion for new trial was improper, and consequently there was no "valid" notice of intention.<sup>20</sup>

*Cross-appeal where motion for new trial granted* [Rule 3(a)(2)]

This rule was one of the most controversial and substantial changes,<sup>21</sup> but so far has not been discussed in any reported opinion. That it constitutes a pitfall for uninformed attorneys is demonstrated in an unreported case.<sup>22</sup> The trial court ordered that judgment be given for plaintiff but, prior to the signing of findings and conclusions (the actual rendition of judgment), defendants moved for a new trial. The motion was granted, the findings were set aside, and a new judgment for defendants was entered. Plaintiff appealed and had that judgment reversed on the ground that the new trial motion was premature.<sup>23</sup> Then, over 3 years after the original judgment for plaintiff, defendants filed notice of appeal from that judgment. *The appeal was dismissed.* Under settled law, the trial court's order granting a new trial did not extend time to appeal from the judgment,<sup>24</sup> and the protection afforded by the new Rules—a prompt cross-appeal from the judgment—was ignored by counsel for defendants.

A question as to the *form of the order* in cases involving a cross-appeal arose in the supreme court. Suppose plaintiff gets judgment; defendant moves for a new trial and the motion is granted; plaintiff appeals from the order granting a new trial and, at the same time, defendant cross-appeals from the judgment. Then, as usually happens, the trial court's order granting a new trial is affirmed, and defendant is satisfied. But the appellate court, having affirmed the order granting a new trial, still has before it, undecided, defendant's precautionary, and now useless, appeal from the judgment. As a matter of uniform procedure, should that appeal from the judgment be dismissed, or should the judgment itself be reversed? The old practice, by analogy, would suggest dismissal,<sup>25</sup> and this is logical, for the appellate court does not even consider the cross-appeal unless it first decides to reverse the order granting a new trial; and therefore, in the example

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<sup>20</sup> See also *Middle Fork Gold Min. Co. v. Green* (1947) 79 A. C. A. 390, 179 P. (2d) 363. Notice of intention was filed eleven days after receipt of notice of entry of judgment, one day late, and therefore did not serve to extend time for appeal.

<sup>21</sup> Witkin, *op. cit. supra* note 2, at 94.

<sup>22</sup> *Fong Chuck v. Chin Po Foon*, decided without opinion by Dist. Ct. of Appeal, 1st Dist., Div. 1, *hearing den.*

<sup>23</sup> *Fong Chuck v. Chin Po Foon* (1947) 29 Cal. (2d) 552, 176 P. (2d) 705.

<sup>24</sup> Witkin, *op. cit. supra* note 2, at 94.

<sup>25</sup> *Ibid.* at 95, n. 51.

stated above, it has not made any attempt to decide the cross-appeal on the merits. This being so, a reversal, which is a decision on the merits, seems incorrect; the proper action is to *dismiss the appeal*. This was done in *Brignoli v. Seaboard Transportation Co.*<sup>26</sup>

*Extension of time where motion to vacate denied* [Rule 3(b)(1)]

This rule attempts to give the same type of extension (and cross-appeal) where a motion to vacate is made, as where a motion for a new trial is made. The language of the rule is extremely broad, covering any type of motion to vacate,<sup>27</sup> and it differs in one important particular from Rule 3(a): to obtain the extension the *motion itself must be made within the prescribed time*; it is not enough that a notice of motion is given within the time. Thus in *Estate of Corcofingas*<sup>28</sup> judgment was entered July 29; a written "notice of motion to vacate judgment and enter a different judgment" was filed September 27, within 60 days after entry of judgment [Rule 3(b)], but the notice specified October 1 as the time when the motion would be made in court, and this was more than 60 days after entry of the judgment. It was held that the motion did not extend time to file the notice of appeal. The filing of notice of intention to move differs from the actual making of the motion in open court, and the deliberate choice of language in Rule 3(b) ("motion to vacate"), different from that used in Rule 3(a) ("notice of intention to move for a new trial"), indicates that a different meaning was intended.<sup>29</sup>

An attempt to misuse the provisions of Rule 3(b) was frustrated by the court in *Gillies v. Brent*.<sup>30</sup> Judgment was entered March 15, notice of entry was served March 16, a timely notice of intention to move for a new trial was served on March 22, and denied on April 9. Appellants failed to give notice of appeal within 30 days thereafter, and, accordingly, lost their right of appeal [Rule 3(a)(1)]. However, they advanced this novel argument: the "Notice of Intention to Move For a New Trial" stated that they "intend to move the court to vacate and set aside the judgment . . . and to grant a new trial . . ."; hence there were in fact two motions, one for a new trial, one to vacate; the

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<sup>26</sup> (1947) 29 Cal. (2d) 782, 792, 178 P. (2d) 445, 451 ("The order granting a new trial is affirmed, and the appeal from the judgment is dismissed.")

<sup>27</sup> *Estate of Corcofingas* (1944) 24 Cal. (2d) 517, 521, 150 P. (2d) 194, 196; Witkin, *op. cit. supra* note 2, at 97.

<sup>28</sup> *Supra* note 27.

<sup>29</sup> The decision in the *Corcofingas* case is followed in *Middle Fork Gold Min. Co. v. Green*, *supra* note 20.

<sup>30</sup> (1946) 73 Cal. App. (2d) 585, 166 P. (2d) 877.

trial judge denied the motion for a new trial, but failed to rule on the motion to vacate, and consequently appellants had 120 days from the entry of judgment to file notice of appeal [Rule 3(b)(1)]. The court rejected this obviously unwarranted interpretation of the notice, pointing out that it was in the usual form, and on the usual grounds, of a motion for a new trial, and was a single notice of a single motion. The holding is, therefore, that when Rule 3(a) applies, Rule 3(b) does not; and that an appellant who claims that an extension of time resulted from a motion to vacate must show that he made a genuine motion to vacate, on some recognized ground, and not merely a motion for a new trial.

*Late notice* [Rules 45(c), 53(b)]

(1) *Time jurisdictional: dismissal for late notice though adverse party or trial court at fault.* The rule that the time for appeal is jurisdictional, and that a late notice of appeal is ineffective, regardless of a showing of excusable mistake, or hardship, or even fraud of the opposite party, has long been settled in California, and was reaffirmed in a late case which arose just before the adoption of the new rules.<sup>31</sup> Although considerable attention was given to possible exceptions, the Judicial Council, supported by all State Bar Committees participating in the revision program, decided to retain the jurisdictional requirement.<sup>32</sup>

The only civil case on this point since the new rules which seems to require mention is *Kamper v. Mark Hopkins*.<sup>33</sup> The trial court improperly amended its final judgment, and counsel took the appeal from the void amended judgment, instead of from the original and true judgment. The appeal was dismissed, despite the fact that the trial court seems to have been, in part, responsible for counsel's mistaken notion of when to appeal.

The foregoing decision is probably not as drastic as that in *Lane v. Pellissier*,<sup>34</sup> where the appeal was dismissed as too late because counsel relied on the actual court record of the date of entry of judgment, which, as a result of an unauthorized act of the clerk, was not the true date.

(2) *Late notice excused in criminal case where state officials at*

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<sup>31</sup> Estate of Hanley (1943) 23 Cal. (2d) 120, 142 P. (2d) 423.

<sup>32</sup> See Rules 1(a), 45(c), 53(b); Witkin, *op. cit. supra* note 2, at 91.

<sup>33</sup> *Supra* note 10.

<sup>34</sup> (1929) 208 Cal. 590, 283 Pac. 810. See Witkin, *op. cit. supra* note 2, at 92.

*fault: theory of constructive filing.* The doctrine of the *Hanley* case,<sup>35</sup> which is also the rule in criminal cases, was recently relaxed in an exceptional situation. In *People v. Slobodion*,<sup>36</sup> defendant, convicted and sent to San Quentin, deposited his notice of appeal in the prison mail box, in a properly addressed envelope, well within the 10-day period [Rule 31]. Through negligence of the officials acting under prison regulations, his letter was not actually sent to the superior court clerk until the period had elapsed. It was held that the notice was *constructively filed in time* when it was deposited with the prison officials, since appellant was wholly dependent upon them and had no direct access to the court clerk. The court added that, unless this conclusion were reached, appellant would be denied equal protection of the laws under the decision in *Cochran v. Kansas*,<sup>37</sup> on the theory that the state, through its prison officials enforcing prison regulations, would deny him the practical right to perfect his appeal.

It should be noted that the *Slobodion* case declares a limited rule applicable (1) to criminal cases where the defendant is imprisoned and therefore is without the freedom of movement which is assumed to exist under the jurisdictional time rule; (2) where the defendant actually does everything in his power to procure the filing of the notice, and the failure is due to circumstances beyond his control. One point is perhaps still open: suppose the delay is due, not to the negligence of prison officials, but to circumstances beyond the control of both the appellant and the prison officials, *e.g.*, loss of the letter in the mail, or delay in delivery of the mail by postal authorities. Will this default be excused? Here there is no fault on the part of state officers, but, unlike the free appellant who can take the notice and personally deposit it with the clerk, and therefore mails it at his own risk, the incarcerated convict is forced to take the risk of the mail.

## II. RECORD ON APPEAL

*The transcript method: content of record; new provision for including opinion of trial court* [Rule 5(a)]

The new rule was designed to allow the bringing up of the trial court's opinion, for whatever purposes it could properly serve under the established law governing review on appeal. It was not intended as an enlargement of those purposes, and it cannot be used to create

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<sup>35</sup> *Supra* note 31.

<sup>36</sup> (1947) 30 A. C. 361, 181 P. (2d) 868.

<sup>37</sup> (1942) 316 U. S. 255.

uncertainties or contradictions in the lower court's decision as a foundation for a claim of reversible error.<sup>38</sup> This has been made clear in several decisions since the adoption of the rule.<sup>39</sup>

*Settled statement* [Rule 7]

(1) *Preliminary notice of election.* This requirement of a preliminary notice of election to proceed by the settled statement method is new,<sup>40</sup> but it has been said that the rule is desirable, its purpose being to enable counsel to prepare the condensed statement of the oral proceedings while the evidence is fresh in their minds.<sup>41</sup> Another case points out that the requirement, though mandatory, is not jurisdictional, *i.e.*, the appellant must comply with it, but the reviewing court may grant relief from the default.<sup>42</sup>

(2) *Contents of settled statement: necessity of transcript.* Attempts to use the settled statement procedure as a means of presenting a biased or unfair record<sup>43</sup> will not be countenanced, and the trial judge has power to meet such unfair practices by requiring the preparation of a transcript or the incorporation of additional testimony. Thus, in *Lande v. Southern Cal. Freight Lines*,<sup>44</sup> appellant, using only a partial transcription as a guide, prepared a condensed narrative statement of portions of the oral proceedings, though the points raised on his appeal dealt largely with insufficiency of the evidence and conflicts in the findings. The trial judge denied respondent's motion to strike the proposed statement, but ordered incorporation of the testimony of nineteen witnesses in narrative form, and that of several other witnesses in question-and-answer form. This was approved by the appellate court. Appellant's contention that this order would make necessary the preliminary preparation of a transcript in almost every appeal on a settled statement<sup>45</sup> was, in effect, conceded by the court.<sup>46</sup>

<sup>38</sup> Witkin, *op. cit. supra* note 2, at 109.

<sup>39</sup> *So. Cal. etc. Lines v. San Diego etc. Ry. Co.* (1944) 66 Cal. App. (2d) 672, 676, 152 P. (2d) 470, 472; *Redsted v. Weiss* (1946) 73 Cal. App. (2d) 889, 891, 167 P. (2d) 735, 736; *Williams v. Kinsey* (1946) 74 Cal. App. (2d) 583, 600, 169 P. (2d) 487, 498.

<sup>40</sup> Witkin, *op. cit. supra* note 2, at 117.

<sup>41</sup> *Brock v. Southern Pacific Co.* (1946) 74 Cal. App. (2d) 806, 809, 169 P. (2d) 402, 404.

<sup>42</sup> *Averill v. Lincoln* (1944) 24 Cal. (2d) 761, 764, 151 P. (2d) 119, 120.

<sup>43</sup> Witkin, *op. cit. supra* note 2, at 115.

<sup>44</sup> (1947) 78 A. C. A. 452, 177 P. (2d) 936.

<sup>45</sup> Witkin, *op. cit. supra* note 2, at 115.

<sup>46</sup> "A judge is not required to act upon his own recollection in such matters . . . . It appears clearly from the record that the trial judge was convinced of his inability to settle a satisfactory statement without the benefit of a transcript. Rule 7 . . . does not

(3) *Settlement and engrossment: amendments.* Another attempt to defeat the objects of the settled statement rule was criticised in *Williams v. Goldberg*.<sup>47</sup> Appellant prepared an argumentative statement of his theory of the evidence. Respondent proposed amendments which, though more factual, were also argumentative. The trial judge ordered all amendments allowed and the statement engrossed. Appellant's "Engrossed Statement on Appeal" contained his original statement and respondent's amendments, separately, just as proposed. The court declared that this was not the proper practice; the engrossed statement should have incorporated the amendments so as to make a single consistent statement and not two inconsistent statements.

(4) *No settlement by reviewing court: remedy where appellant is unable to obtain settlement by trial judge.* The most difficult practical problem encountered in the old bill of exceptions procedure is still present under the new rules: where the appellant is unable to convince the respondent or the trial judge that his narrative or other statement of the proceedings is correct, and the trial judge refuses to settle it, the appellant has no record and no prospect of getting any. What can he do?

The approved procedure today, and the only practical solution for the problem, is to apply to the reviewing court for relief from default (because the time to give notice for a transcript has long since run), and start in all over again to prepare the transcript form of record under Rules 4 and 5. This was the suggestion made in *Averill v. Lincoln*,<sup>48</sup> wherein it was indicated that relief will usually be granted.

Suppose, however, that a persistent appellant insists on his right to a settled statement despite the trial judge's refusal to settle, and, invoking "the obsolete and impractical procedure under section 652 of the Code of Civil Procedure",<sup>49</sup> asks the reviewing court to settle the statement. This procedure was carefully examined by the su-

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excuse an appellant from furnishing a transcript, either partial or complete, which the judge deems necessary in the settlement of the statement." *Lande v. Southern Cal. Freight Lines*, *supra* note 44, at 455, 177 P. (2d) at 938. See also, to the same effect, the observation in *Averill v. Lincoln*: "If the judge by reason of unfamiliarity with the trial proceedings is of the opinion, however, that he cannot fairly or properly pass upon the sufficiency or accuracy of the proposed statement or of any proposed amendments thereto, he may require appellants to furnish a transcript of the trial proceedings to assist in the settlement of the statement." *Supra* note 42, at 765, 151 P. (2d) at 121.

<sup>47</sup> (1944) 66 Cal. App. (2d) 40, 151 P. (2d) 853.

<sup>48</sup> *Supra* note 42, at 765, 151 P. (2d) at 121.

<sup>49</sup> *Witkin, op. cit. supra* note 2, at 123.

preme court and held improper in *Burns v. Brown*.<sup>50</sup> Appellants asked the reviewing court "to discover whether appellants' version of the statement is a fair condensation of the proceedings". Rejecting the request, the court observed that "The object of the settled statement procedure, the furnishing of a short record in order to conserve the time and effort of the reviewing court, would be frustrated by such a procedure".<sup>51</sup> It was further declared that section 652 "is not applicable to the preparation of a record under the new rules", and that it "cannot be invoked to harmonize the views of the trial judge and a party with respect to the correctness of the proposed statement".<sup>52</sup>

*Record where transcript wholly or partly unavailable* [Rule 4(e); CAL. CODE CIV. PROC., §953e]

Rule 4(e) provides for the preparation of a settled statement in lieu of a reporter's transcript when the transcript has for some reason become unobtainable.<sup>53</sup> The object of the rule is, of course, desirable, and it may be useful when the unobtainable transcript is relatively small in volume. But when the omission is substantial, it appears that, as a practical matter, the same reasons which make the transcript unobtainable also make a settled statement unobtainable, *i.e.*, a transcript is usually an essential guide to the preparation of a condensed statement.<sup>54</sup> This would seem to explain the absence of any cases dealing with Rule 4(e).

The alternative remedy of motion for new trial under section 953e of the Code of Civil Procedure therefore remains the usual procedure. This raises a question as to the nature of the right to a new trial in this situation, where without it no effective appeal is possible, as distinguished from the ordinary situation in which a new trial is sought as a method of attacking the judgment on the merits.

The most important decision involving this section, since the

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<sup>50</sup> (1946) 27 Cal. (2d) 631, 166 P. (2d) 1.

<sup>51</sup> *Ibid.* at 635, 166 P. (2d) at 3.

<sup>52</sup> *Ibid.* at 635, 166 P. (2d) at 3, 4. The court then repeated the suggestion previously made in *Averill v. Lincoln*, *supra* note 42: "When appellant cannot or does not want to avail himself of this method of preparing the record on appeal, either because a reporter was not present at the proceedings or for other reasons, and when he fails to convince the trial judge that his statement accurately reflects the proceedings in question, the action of the trial judge, who heard and tried the case, must be regarded as final." 27 Cal. (2d) at 636, 166 P. (2d) at 4.

<sup>53</sup> Witkin, *op. cit. supra* note 2, at 117.

<sup>54</sup> *Ibid.* at 119.

adoption of the rules, is *Weisbecker v. Weisbecker*.<sup>55</sup> Notice of appeal was given June 12, notice to prepare transcripts June 20, and the clerk's transcript was filed September 1. Both parties acquiesced in delays in furnishing the reporter's transcript, and the reporter died September 14, with nothing transcribed. Appellant's counsel discovered the death on October 30, and moved for a new trial on November 3. It was held that the trial judge abused his discretion in denying the motion. The delay was slight and usual and was consented to; the motion was made promptly; and there was no prejudice from the delay. Since the remedy under Rule 4(e) is expressly made alternative, "any failure to move for a settled statement should not be considered a penalizing circumstance in connection with appellant's motion for new trial."<sup>56</sup> "Furthermore, it is difficult to see how the appellant could prepare an adequate statement of the evidence, or indeed, under any appellate procedure, intelligently present her contention that the judgment was contrary to the evidence, without the aid of a transcript or some other equivalent data nonexistent in this case."<sup>57</sup>

The court in the *Weisbecker* case also made the following observation concerning the *scope of review* and the *function of the appellate court* in an appeal from the order denying this type of motion for new trial:

If trial courts become committed to the practice of summarily denying motions for new trial sought under the provisions of Code of Civil Procedure, section 953e, and if on appeal from such denial reviewing courts take the course of least resistance and affirm the order of denial because the matter is deemed one within the discretion of the trial court, the succor afforded by section 953e is as effectually denied the appellant as it would be if no such statute existed. Such cannot have been the intent of the legislators in enacting this provision.<sup>58</sup>

Two points of interest appear in *Williams v. Davis*,<sup>59</sup> one of several decisions involving an appellant's dispute with a reporter. Appellant moved for a new trial on the ground that the reporter by reason of his long battle with appellant in connection with the transcript, involving his jail sentence for contempt and flight from the state, had become mentally and physically ill, had prepared a tran-

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<sup>55</sup> (1945) 71 Cal. App. (2d) 41, 161 P. (2d) 990.

<sup>56</sup> *Ibid.* at 47, 161 P. (2d) at 994.

<sup>57</sup> *Ibid.* at 48, 161 P. (2d) at 995.

<sup>58</sup> *Ibid.* at 47, 161 P. (2d) at 994; cf. *Fickett v. Rauch* (1947) 78 A. C. A. 194, 177 P. (2d) 661, *hearing granted*, which takes a contrary position.

<sup>59</sup> (1944) 67 Cal. App. (2d) 274, 154 P. (2d) 22.

script containing some 5,000 errors, and was consequently under a "disability" within the meaning of section 953e. The motion was denied, and appellant appealed from the order of denial. It was held that a trial judge is "without jurisdiction" to grant a motion for a new trial under that section unless the reporter either dies or suffers a physical or mental disability which renders him incapable of preparing a transcript; and the reporter here was alive and did in fact prepare a transcript, regardless of its accuracy. The appeal was consequently without merit and hence "*should be dismissed*".

The theory of this holding may be questioned on two grounds. It would seem, first, that the question should not be considered one of jurisdiction. If, *e.g.*, a reporter, alive but physically ill or mentally unstable, prepared a "transcript" which was incoherent or so inaccurate as to be, in the opinion of the trial judge, an inadequate record on appeal, and the trial judge granted the motion for new trial, his order might well be upheld, and it certainly should not be deemed wholly void. Secondly, if the trial judge justifiably denied the motion for a new trial, and appellant appealed from the order, should not the proper decision have been an *affirmance of the order*? The usual disposition of an appeal lacking in merit is affirmance rather than dismissal.<sup>60</sup>

#### *Certification of record* [Rule 8]

Rule 8 abolishes the former general requirement of the trial judge's certification of the record, and, except in the case of a settled statement which the judge must settle, his participation in the preparation of the record is limited to determining requests for correction of disputed parts of the transcript.<sup>61</sup>

This fundamental change is occasionally overlooked, and the old law applied, as in *Engasser v. Engasser*.<sup>62</sup> The appeal involved the familiar situation of a motion decided after a hearing on both affidavits and oral evidence. The appellate court held that it could not treat the affidavits as properly in the record unless the trial judge certified that they had been considered by him in deciding the motion, and that the affidavits are not part of the judgment roll and cannot be authenticated by the clerk. *The appeal was dismissed.*

The older authorities, cited in the *Engasser* case, support the holding; but they are no longer applicable under the new procedure, as

<sup>60</sup> See *Jenks v. Lurie* (1925) 195 Cal. 582, 234 Pac. 370.

<sup>61</sup> *Witkin, op. cit. supra* note 2, at 121.

<sup>62</sup> (1946) 75 Cal. App. (2d) 80, 170 P. (2d) 116.

has been pointed out in two decisions. In *Redsted v. Weiss*,<sup>63</sup> a motion was made, a hearing was had on September 8, and the trial judge allowed respondents additional time to file an affidavit, which they did. Thereafter the order was made. On appeal appellants objected that it did not appear from the record that the affidavit was "used" on consideration of the motion. The court held the objection untenable; since the record contained no certificate of the trial judge it is presumed that no correction was requested and the certification by the clerk was sufficient, under Rule 8(a). Observing that "decisions prior to the enactment of the rules are not helpful", the court declared:

. . . since the Rules on Appeal provide a complete scheme for the preparation of the clerk's transcript, and since they dispense with the certificate of the trial judge unless objection is made under Rule 8, *we must assume here that, in its consideration of the motion, the trial court 'used' the entire record on file at the time of its decision.*<sup>64</sup> (Italics added.)

The point is made still more emphatically in *McMahon v. Superior Court*.<sup>65</sup> Petitioner appealed from a probate decree and made a timely request for clerk's and reporter's transcripts, which were prepared and deposited with the trial judge. He declined to certify the transcripts, one ground of his refusal being incompleteness. Mandamus was issued by the supreme court, directing the judge to determine a request for correction and to certify the transcripts as correct. Pointing out that the parties had been mistakenly proceeding under the former practice, the court said:

Under the new rules *the trial judge is not charged with the function of 'settling' or certifying all transcripts*; in the absence of a request for correction of an alleged mistake, the record is transmitted with the certification of the reporter . . . and of the clerk . . . . *The objection on the ground of lack of completeness is no longer tenable*, and the remedy of a respondent, if he desires a complete transcript, is to designate the balance thereof . . . . If, however, corrections have been requested by either party, it is the duty of the trial judge to hear and determine the request, and thereafter to certify the transcripts, with such corrections, if any, as he may allow.<sup>66</sup> (Italics added.)

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<sup>63</sup> (1945) 71 Cal. App. (2d) 660, 665, 163 P. (2d) 105, 109.

<sup>64</sup> *Ibid.* at 666, 163 P. (2d) at 109.

<sup>65</sup> (1946) 29 Cal. (2d) 515, 175 P. (2d) 817.

<sup>66</sup> *Ibid.* at 519, 175 P. (2d) at 819.

*Augmentation of the record* [Rule 12]

The improved, simple procedure of augmentation<sup>67</sup> seems to have worked out satisfactorily, but, since Rule 12 is usually applied by minute orders, very few matters of this type reach the stage of an opinion.

Augmentation is not a matter of right, but may be denied where the party has been guilty of inexcusable neglect; and Rule 12 cannot be used to allow a party, after deliberate choice of one form of record, to switch to another distinct type, thus circumventing the provisions of the rules regulating the preparation of each type. This was made clear in *Russi v. Bank of America*.<sup>68</sup> Appellant requested only a clerk's transcript for an appeal on the judgment roll and exhibits. After the briefs were on file and the case was placed on the calendar, appellant gave notice of motion for augmentation of the record to include all the oral testimony. The court, in denying the motion, said:

As has been pointed out, Rule 12 is merely a revised version of certain former statutes and rules dealing with 'diminution' of the record and its purpose was to carry on the former procedure with as little procedural difficulty as possible . . . . But neither the old nor the new rule was designed as a means by which the appellant could at any time during the progress of the appeal switch from one record to another . . . . But as has been correctly said: 'Even where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons. The new rule does not deal expressly with this aspect of the question and the discretion of the court to deny the application still remains. Hence the augmentation procedure is not to be regarded as a cure-all, nor as an assurance that negligent preparation of the record will entail no harmful results.' (See 17 So. Cal. L. Rev. 130.)<sup>69</sup>

The obvious point that the augmentation procedure does not permit the bringing up of material which would not be a proper part of the record in the first place was made in two recent cases.<sup>70</sup>

*Presumption where record not complete* [Rule 52]

Rule 52, intended to protect short records and thereby to encourage their use,<sup>71</sup> is one of the most important of the new rules, but

<sup>67</sup> Witkin, *op. cit. supra* note 2, at 130.

<sup>68</sup> (1945) 69 Cal. App. (2d) 100, 158 P. (2d) 252.

<sup>69</sup> *Ibid.* at 102, 158 P. (2d) at 253.

<sup>70</sup> Estate of Cazaurang (1945) 69 Cal. App. (2d) 1, 158 P. (2d) 48; Burns v. Brown (1946) 76 Cal. App. (2d) 639, 173 P. (2d) 716.

<sup>71</sup> Witkin, *op. cit. supra* note 2, at 123.

counsel have not always urged its applicability, and it has, in consequence, been overlooked occasionally. The cases may be roughly classified as follows:

First, cases in which Rule 52 was relevant, but was not considered.<sup>72</sup>

Second, cases in which Rule 52 was recognized as applicable to the situation involved, but inapplicable in the particular case because the appeal was taken before the effective date of the new rules.<sup>73</sup>

Third, cases in which Rule 52 was applied. Two decisions, one a criminal case and one a civil case, have applied the presumption. The criminal case is *People v. Hidalgo*,<sup>74</sup> in which the record contained a statement of the prosecuting attorney, in his argument to the jury, constituting misconduct. The court, quoting Rule 52, said:

. . . we must presume that had there been any statements made by defense counsel inviting the prejudicial reply, respondent would have had them included in the record. There can be no doubt that this rule applies to appeals in criminal cases. (17 So. Cal. L. Rev. 79, at p. 123, n. 128.)<sup>75</sup>

The opinion points out, however, that in criminal cases one qualification of Rule 52 is found in the specific provisions of Rule 33(b), to the effect that, in urging error as to instructions, the appellant must see that all the instructions are brought up.<sup>76</sup>

The civil case, which contains an exhaustive discussion of the nature, purpose, and scope of the rule, and holds it applicable to *an appeal on the judgment roll*, is *Alkus v. Johnson-Pacific Co.*<sup>77</sup> Judgment was given for defendant, pursuant to a finding in its favor, which finding constituted an erroneous interpretation of the terms of written leases incorporated in the findings. Plaintiff appealed on the judgment roll. The judgment was clearly without support in the findings unless the old presumption was indulged that parol evidence,

<sup>72</sup> *E.g.*, *Transportation Guar. Co. v. Jellins* (1946) 29 Cal. (2d) 242, 174 P. (2d) 625; *Engasser v. Engasser*, *supra* note 62.

<sup>73</sup> *E.g.*, *Cuthbert Burrell Co. v. Shirley* (1944) 64 Cal. App. (2d) 52, 53, 148 P. (2d) 85, 86 (appeal on clerk's transcript and exhibits); *Garside v. Garside* (1947) 80 A. C. A. 360, 362, 181 P. (2d) 665, 667 (Due to reporter's absence, transcript omitted one day's proceedings. The court observed that the old presumptions are probably still applicable "to appeals on incomplete records as distinguished from short records permitted by the rules".).

<sup>74</sup> (1947) 78 A. C. A. 1014, 179 P. (2d) 102.

<sup>75</sup> *Ibid.* at 1028, 179 P. (2d) at 110.

<sup>76</sup> *Ibid.* at 1022, 179 P. (2d) at 106. See *Witkin, op. cit. supra* note 2, at 277.

<sup>77</sup> (1947) 80 A. C. A. 1, 181 P. (2d) 72.

which established that the language of the leases was intended to have a different meaning, had been introduced below. Though offered an opportunity by the appellate court to bring up any such evidence at plaintiff-appellant's expense, defendant-respondent refused to do so and stood on the judgment roll and the old presumptions. It was held that Rule 52 applied, and the judgment was reversed.

In addition to its recital of the problems which arose in the preparation of the rules, and the considerations which led to the adoption of Rule 52, the opinion contains a detailed discussion of, and decision on, the following points:

(1) *The applicability of Rule 52 to a judgment roll appeal is shown by the express language of the rules.* Rule 5(f), providing for appeal on the judgment roll, describes it as one in which "the appellant has designated only the papers and records constituting the judgment roll", and declares that in such case "the judgment roll shall constitute the record on appeal". Rule 52 applies where "a record on appeal does not contain all of the papers, records and oral proceedings". Thus, the judgment roll is a "record on appeal" under both rules, and Rule 52 necessarily applies to a record brought up under Rule 5(f). "In other words, it makes no difference whether the record contains 50 per cent of the proceedings, or 1 per cent of the proceedings, or the 10 per cent or 20 per cent constituting the papers and records, and not the 90 per cent or 80 per cent containing the testimony—in all those cases there is something less than a complete record, i.e., the record does not contain 'all of the papers, records and oral proceedings.'"<sup>78</sup> Moreover, the provision of Rule 5(f), allowing the respondent to obtain augmentation of the record "to prevent a miscarriage of justice", would be useless if Rule 52 did not apply, for the respondent would be safe in relying on the old presumptions, and he would have no reason to augment.<sup>79</sup>

(2) *The applicability of Rule 52 to a judgment roll appeal is also indicated by the purpose of the rule,* which is to encourage avoidance of the useless burden and expense of a complete transcript when it would contribute nothing relevant. This purpose is emphasized by the provision in Rule 26(a), that penalties may be imposed for "the inclusion of any matter not reasonably material to the determination of the appeal". The court said:

Conceding that such a rule should be invoked rarely and with great caution (see draftsman's comment, 17 So. Cal. L. Rev. 102), never-

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<sup>78</sup> *Ibid.* at 12, 181 P. (2d) at 79.

<sup>79</sup> *Ibid.* at 16, 181 P. (2d) at 81.

theless it stands in the rules as a warning to counsel that the courts are tired of huge transcripts full of immaterial evidence, and that it is the duty of appellants to avail themselves of the methods established by the rules for cutting the record down to matters relevant to the points raised on appeal.<sup>80</sup>

(3) *Rule 5(f) provides ample protection for the respondent:*

. . . the fact that the reviewing court under Rule 5(f) requires an application to be made to it before a reporter's transcript can be prepared, is consistent with the declared purpose of the rule that, when the points involved can be raised on the judgment roll alone, the court retains such control as is necessary to see that the respondent does not convert it into an unnecessary full record appeal. It cannot be assumed that the court, where its attention is called by respondent to the fact that there are matters in the court below which should be considered on the appeal, would deny respondent the right to augment. Such a denial would be a clear abuse of discretion.<sup>81</sup>

(4) *The reviewing court can offer an additional protection to the respondent, as was done here, by calling attention to Rule 52 and offering the opportunity to augment under Rule 5(f) by bringing up relevant evidence at appellant's expense.*<sup>82</sup>

(5) *Rule 52 was within the rule-making power of the Judicial Council.* The old presumptions were "merely rules of convenience which the courts have established regulating the manner in which the record on appeal should be considered . . . . These presumptions are purely procedural, were made by the courts, and can be changed by the courts."<sup>83</sup> In this connection the court said:

" . . . Rule 52 does not encroach upon the appellate court's power of review . . . . It says nothing about the manner in which the court is to consider the evidence, or the weight it may give it, nor does it even hint that the court must decide the case on less than the entire record. By stating the presumption that the relevant matters have come up, the rule simply does away with presumptions as to omitted matters, and requires that the court rely upon the *actual record*. If the court is not satisfied with a short record, or desires further light on any point, it may invoke the augmentation rule on its own motion, ordering up as much additional record as it desires, and may then proceed to decide the case on the actual, augmented record."<sup>84</sup>

<sup>80</sup> *Ibid.* at 12, 181 P. (2d) at 79.

<sup>81</sup> *Ibid.* at 14, 181 P. (2d) at 80.

<sup>82</sup> *Ibid.* at 15, 16, 181 P. (2d) at 81.

<sup>83</sup> *Ibid.* at 17, 181 P. (2d) at 82.

<sup>84</sup> *Ibid.* at 18, 181 P. (2d) at 82. The court was quoting Witkin, *op. cit. supra* note 2.

## III. BRIEFS

The rules on content and form of briefs<sup>85</sup> would seem, from the absence of decisions, to be working out satisfactorily.

The questions which have arisen relate to default in filing the opening brief<sup>86</sup> and default in filing the respondent's brief. As to the latter, Rule 17(b) states the prior practice, under which the reviewing court may accept the appellant's statement of facts as correct if the respondent fails to file a brief. But the decisions show that the court, nevertheless, will often examine the record.<sup>87</sup>

## IV. HEARING AND DETERMINATION OF APPEAL

*Voluntary abandonment of appeal before record filed* [Rule 19(a)]

This rule, which allows the dismissal of an appeal by a written document filed in the superior court, restates the practice established under former section 954a of the Code of Civil Procedure.<sup>88</sup> It was applied in *Estate of Corcofingas*.<sup>89</sup>

*Additional evidence on appeal* [Rule 23(b)]

In *Baker v. Ferrell*<sup>90</sup> the condition of this rule was invoked, and the application rejected, where the evidence sought could have been presented at the trial, and no facts to excuse the failure to do so were shown.

*Finality of decision on appeal* [Rules 24(a), 25(a)]

The different kinds of finality of an appellate judgment, resulting from the relation of the district court of appeal to the supreme court, under the constitution, are stated in Rules 24(a) and 25(a).<sup>91</sup>

There is an additional and distinct type of finality which California lawyers must keep in mind: finality for purposes of review in the United States Supreme Court. *The time for review starts running when the opinion is filed*, regardless of the fact that, under our state

<sup>85</sup> See Witkin, *op. cit. supra* note 2, at 132 *et seq.*

<sup>86</sup> See Peak v. Nicholson, *supra* note 6; Peebler v. Olds (1945) 26 Cal. (2d) 656, 160 P. (2d) 545.

<sup>87</sup> See Greer v. Freitas (1944) 66 Cal. App. (2d) 335, 152 P. (2d) 15; Baldwin v. Baldwin (1944) 67 Cal. App. (2d) 175, 153 P. (2d) 567; *cf.* Postin v. Griggs (1944) 66 Cal. App. (2d) 147, 148, 151 P. (2d) 887, 888.

<sup>88</sup> Witkin, *op. cit. supra* note 2, at 233.

<sup>89</sup> *Supra* note 27.

<sup>90</sup> (1947) 78 A. C. A. 619, 621, 177 P. (2d) 973, 974.

<sup>91</sup> See Witkin, *op. cit. supra* note 2, at 248 *et seq.*

practice, the remittitur does not issue until the appellate judgment becomes final in accordance with our constitution and appellate rules. This is pointed out in a case coming up from the California supreme court, *Market St. Ry. Co. v. Railroad Commission*.<sup>92</sup>

### *Costs on appeal* [Rule 26]

On the discretion of the reviewing court to award costs as it deems proper,<sup>93</sup> an interesting case is *Paine v. Bank of Ceres*.<sup>94</sup> Plaintiff sued in the superior court, received judgment for \$849.02, and was denied trial court costs because the judgment could have been rendered by a justice's court of the county (CAL. CODE CIV. PROC. § 1032). Then defendant appealed, and the judgment was affirmed with costs to the plaintiff-respondent. This was held to be proper on the theory that the limitation of section 1032 does not apply to appeal costs and, under Rule 26(a), stating the previously recognized practice, the appellate court may award costs to either party.

An additional point of procedure is stated in the *Paine* case:

If the losing party wants to urge that the appellate court should exercise its inherent power and deny costs to the prevailing party in the interests of justice he should normally urge such point before the appellate court has lost jurisdiction by the issuance of the remittitur. He should not be permitted to wait and see if the court exercises such power on its own motion, and, if it does not, secure, in effect, a second hearing on a motion to recall the remittitur.<sup>95</sup>

## V. APPEALS IN CRIMINAL CASES

### *Notice of appeal* [Rule 31]

The abolition of the oral notice of appeal<sup>96</sup> is sometimes overlooked by counsel, as in *People v. Darcy*,<sup>97</sup> where the court held that a writ of *coram nobis* is not available as a remedy for the failure to give the proper written notice.

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<sup>92</sup> (1945) 324 U. S. 548.

<sup>93</sup> See Witkin, *op. cit. supra* note 2, at 257.

<sup>94</sup> (1943) 60 Cal. App. (2d) 621, 141 P. (2d) 219.

<sup>95</sup> *Ibid.* at 623, 141 P. (2d) at 219. See also *Estate of Nielsen* (1944) 65 Cal. App. (2d) 60, 149 P. (2d) 737, dealing with discretion to determine whether costs in a probate appeal should be paid by the estate, but not discussing Rule 26(a). On the items recoverable as costs, and particularly the \$100 limitation on the amount allowed for briefs [Rule 26(c)], see Witkin, *op. cit. supra* note 2, at 258, and *Lane v. Pacific Greyhound Lines* (1946) 77 A. C. A. 1, 174 P. (2d) 635, *hearing granted*.

<sup>96</sup> See Witkin, *op. cit. supra* note 2, at 269.

<sup>97</sup> (1947) 79 A. C. A. 825, 834, 180 P. (2d) 752, 758.

Where the late filing of the notice is due to negligence of prison officials, the appeal will be held timely.<sup>98</sup>

*Record on appeal and briefs* [Rule 33 *et seq.*]

Although special rules deal with the record in criminal appeals (Rules 33-36), they do not completely cover the subject. By express cross reference, the rules dealing with preparation of the record in civil appeals are made available in certain respects, *e.g.*, Rules 35(a) and 35(b) refer to Rule 9, and Rules 35(c) and 35(e) refer to Rule 10. In addition, Rule 30 contains a general incorporation of such civil appeals rules as are appropriate.<sup>99</sup>

The fact that a settled statement is permissible in criminal appeals only when the reporter's transcript is unobtainable [Rule 36(b)] is noted in *People v. Mitchell*,<sup>100</sup> where the court also makes this observation:

The widespread use of the reporter's transcript as the record on appeal and the modernization of the bill of exceptions into a narrative statement of the proceedings (see Rules on Appeal, Rule 7), have resulted in the practical disappearance of the formal exception in appellate procedure in this state.

That the requirement of timely filing of an opening brief applies to criminal cases in the same way that it applies to civil cases is shown in *People v. Dorsey*.<sup>101</sup> Appellant's application for a writ of *coram nobis* was denied by the superior court, and he appealed, but failed to file his brief on time. On receiving the clerk's 30-day notice [Rule 17(a)], he filed a "Motion to Review the Records *per se*", without briefs. The motion was denied. However, appellant was granted an additional 30 days to file a brief.

## VI. GENERAL PROVISIONS

### *Extension of time* [Rule 45]

(1) *Limited power of superior court.* One of the most important of the changes was that which limited the power of the superior court in the matter of time by three restrictions: (1) an extension can be granted only prior to the expiration of the time period or any valid

<sup>98</sup> *People v. Slobodion*, *supra* note 36.

<sup>99</sup> For a listing of the civil appeals rules probably applicable to criminal appeals, and of those probably not applicable, see Witkin, *op. cit.* *supra* note 2, at 268. And see *People v. Hidalgo*, *supra* note 74, holding Rule 52 applicable to criminal appeals.

<sup>100</sup> (1946) 27 Cal. (2d) 678, 686, 166 P. (2d) 10, 14.

<sup>101</sup> (1947) 78 A. C. A. 878, 178 P. (2d) 20.

extension thereof; (2) no single extension can exceed 30 days; (3) the total period of extensions to any party cannot exceed 90 days.<sup>102</sup> As to the effect of these changes, the court said in *Averill v. Lincoln*:<sup>103</sup>

The new rules constitute a fundamental departure from the old procedure in the following respects: (1) Fixed periods are specified for the performance of the various steps in preparing the record, and when the allotted time has elapsed the appellant is in default. (Rules 4-7.) (2) The trial court has authority to extend time for limited periods, and has no power to extend if the time has already expired. (Rule 45(b).) (3) The appellate court alone has power to grant additional extensions of time and to relieve from default. (Rules 45(c) and 53(b).)

Several other cases emphasize the fact that the trial court may extend time only before the expiration of the prescribed time and may not relieve from default.<sup>104</sup>

(2) *Mandatory extension to members of Legislature* [CAL. CODE CIV. PROC. §1054]. The provisions of section 1054 of the Code of Civil Procedure, providing for a mandatory extension of time where an attorney of record is a member of the Legislature or of a legislative committee, were considered in *Pacific States Sav. & L. Co. v. Mortimer*.<sup>105</sup> Appellant's counsel, a member of the Legislature, failed to give timely requests for transcripts. In opposition to the motion to dismiss the appeal, he relied on an extension ordered by the trial judge under section 1054. Respondent argued that section 1054 referred to an extension of time for an act to be done "as provided in this code", whereas the time involved was provided by the Rules on Appeal. The court characterized this as a narrow interpretation, since at the time section 1054 was enacted the procedural steps on appeal were covered by the code; but then the court concluded that it was not necessary to determine this issue because, in view of the assumption of the trial judge and appellant that the section did apply, the case was a proper one for relief from default under Rule 53(b).

Subsequent to this case, the 1947 Legislature made the mandatory extension applicable to procedure on appeal.<sup>106</sup> Apart from the

<sup>102</sup> Rule 45(b). See Witkin, *op. cit. supra* note 2, at 290.

<sup>103</sup> *Supra* note 42, at 763, 151 P. (2d) at 120.

<sup>104</sup> *Peebler v. Olds*, *supra* note 86, at 659, 160 P. (2d) at 546; *Jarkieh v. Badagliacco* (1945) 68 Cal. App. (2d) 426, 430, 156 P. (2d) 969, 970; *Brock v. Southern Pac. Co.*, *supra* note 41, at 808, 169 P. (2d) at 404 (Opinion states that an extension given by the trial judge in excess of the aggregate 90-day limit was "beyond the jurisdiction of the court").

<sup>105</sup> (1945) 70 Cal. App. (2d) 811, 814, 161 P. (2d) 684, 686.

<sup>106</sup> See CAL. CODE CIV. PROC. §§ 1054 (enacted twice) and 1054.1.

question whether such special legislation is intrinsically desirable, it is a departure from one of the basic objectives of the grant of rule-making power to the Judicial Council, namely, to bring all the appellate procedure and practice together in one place: the Rules on Appeal.<sup>107</sup>

*Dismissal of appeal for delay or default in preparing record or briefs, and relief from default* [Rules 10(a), 17(a), 53(b)]

(1) *Abolition of motion in trial court to terminate proceedings for a record.* Under the new rules, the chief control over time to prepare the record is placed in the reviewing court. The trial court's power to extend time is limited and, when it is exhausted, extensions or relief from default may be granted only by the reviewing court. A motion to dismiss an appeal for delay may be made whenever default occurs, and the former requirement of a motion to terminate proceedings for a record is abolished.<sup>108</sup>

(2) *Nature and purpose of Rule 53(b), on relief from default.* Where dismissal of the appeal is sought for delay or default in connection with the record or briefs, the appellant may make a showing of excuse, either by a motion for relief from default or by opposition to the motion to dismiss. Rule 53(b), dealing with relief from default, does not, it would seem, grant any new power to the reviewing court, but merely states the inherent power always exercised by such a court, either on motion or on its own motion.<sup>109</sup> In *Averill v. Lincoln*,<sup>110</sup> the first authoritative construction of Rule 53(b), the court emphasized two points: (1) The trial court may extend time, but may not grant relief from default; only the appellate court has this latter power. Under our former practice, of course, both the trial and appellate courts had this power. (2) "The relief provision of Rule 53(b) is comprehensive, and an appellate court in ruling on an application

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<sup>107</sup> Witkin, *op. cit. supra* note 2, at 81, 300.

<sup>108</sup> *Averill v. Lincoln*, *supra* note 42, at 764, 151 P. (2d) at 120 ("As a result of these changes, the motion to terminate proceedings for a record has disappeared from our procedure. If the specified time and allowable extensions have elapsed, the appeal will be dismissed under Rule 10(a) unless the appellate court grants relief."). See also Jarkich v. Badagliacco, *supra* note 104, to the same effect. Note the inadvertent discussion of an order terminating proceedings as if it were still proper in *Lande v. So. Calif. Freight Lines*, *supra* note 44, at 454, 177 P. (2d) at 937.

<sup>109</sup> See Witkin, *op. cit. supra* note 2, at 293.

<sup>110</sup> *Supra* note 42, at 765, 151 P. (2d) at 121.

for relief from default in the preparation of the record may consider all questions which an appellant may appropriately present in support of a claim that he was improperly deprived of an opportunity to bring up a record on appeal."<sup>111</sup>

It may be noted that there are other provisions in the rules under which a party may be relieved from the effect of particular defaults, e.g., failure to state the points to be raised in an appeal on a short record [Rules 4(b), 7(a)], failure to file a brief on time [Rule 17], and failure of the brief to conform to requirements of the rules [Rule 18].

(3) *Defaults in connection with record: relief granted.* It is impossible to state, with any assurance, a governing theory or test for the application of Rule 53(b). This is partly because in most instances relief is granted by a simple order without opinion, and partly because the opinions have not yet disclosed a definite policy in this connection. Hence the following cases are merely illustrative of situations in which relief may be granted because it has been granted. In *Averill v. Lincoln*,<sup>112</sup> appellant's default was a failure to serve the preliminary notice of election to proceed by settled statement within 10 days after notice of appeal [Rule 7]. The excuse was disregard of instructions by counsel's secretary, and the court pointed out that respondents offered no showing of injury from the delay. In *Estate of Hultin*,<sup>113</sup> relief was granted, without extended discussion, where transcripts were already prepared, and counsel had mistakenly thought that relief should be obtained from the trial court. In *Burns v. Brown*,<sup>114</sup> appellants elected to appeal on a settled statement in lieu of both reporter's and clerk's transcripts [Rule 7(b)], but their notice was technically defective in that it referred only to the "reporter's transcript". Respondents participated in the proceedings for settlement, and there was obviously no prejudice.

A more extended discussion of the policy involved and the grounds for relief appears in *Jarkieh v. Badagliacco*.<sup>115</sup> The reporter's notification of charges of \$1,000 was given on November 12, 1943, and payment was not tendered until March 13, 1944. It was held that the delay up to February 18, 1944, was excused by reason of negotiations for a settlement, and that the subsequent default, for less than

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<sup>111</sup> See also *Jarkieh v. Badagliacco*, *supra* note 104; *Peebler v. Olds*, *supra* note 86.

<sup>112</sup> *Supra* note 42.

<sup>113</sup> (1946) 28 Cal. (2d) 340, 170 P. (2d) 16.

<sup>114</sup> (1944) 66 Cal. App. (2d) 142, 151 P. (2d) 899.

<sup>115</sup> *Supra* note 104.

one month, should be relieved, particularly since the new rules had just become effective. The court declared that it reached its conclusion without regard to whether the attorneys had an actual understanding that the preparation of the record could be deferred pending the negotiations. A dissenting opinion argues that, in view of the trial judge's declaration that he would strictly enforce the rules, appellant's failure to seek an extension of time was inexcusable.

(4) *Defaults in connection with record: relief denied.* One of the difficult situations which occasionally confronts an appellate court is when a party, after commencing proceedings to bring up one type of record, seeks to be relieved from his default in order to try another method. In *Averill v. Lincoln*,<sup>116</sup> and in *Burns v. Brown*,<sup>117</sup> it was pointed out that if the appellant attempts to bring up a settled statement and, through inability to satisfy the judge that his statement is accurate, or for some other reason, is unable to obtain its settlement, he may properly apply to the reviewing court for relief from default, for the purpose of allowing him, belatedly, to proceed by the transcript method. The reason for this is clear. Appellant's failure to obtain a settlement may not be due to his own fault, and it is more expeditious to allow a change to the other form of record than to attempt to apportion the blame among counsel and the trial court.

*But this is not true in the converse situation*, where the appellant starts with a transcript appeal and then attempts, for no justifiable reason, to change to a settled statement. Thus, in *Brock v. Southern Pac. Co.*,<sup>118</sup> appellant, having been denied the privilege of proceeding on appeal *in forma pauperis*, gave his notice for a transcript and received the estimate of costs on October 29. He obtained extensions from the trial court, including an invalid one (over the 90-day aggregate), until March 15, when he gave a new notice of election to proceed by settled statement and received a new extension from the trial court. The appeal was dismissed. The last extensions were void; he was in default; and there was no justification for relief from default where, after five months, he chose, apparently for reasons of convenience, to commence proceedings for the other type of record. The court also declared that the 10-day notice required by Rule 7 was for the purpose of enabling the parties to prepare the condensed statement while the evidence was fresh in the memories of counsel, and

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<sup>116</sup> *Supra* note 42.

<sup>117</sup> *Supra* note 50, at 634, 166 P. (2d) at 2.

<sup>118</sup> *Supra* note 41.

that the purpose of the rule would be defeated by granting relief.<sup>119</sup>

Another difficult situation is where both the appellant and a court officer are at fault. Rule 10(a) was designed to follow the view of the more liberal prior decisions to the general effect that the appellant must investigate unwarranted delays and remind the proper officer of forgotten steps, but that he is not required to exert continual pressure, and that only connivance in or long indifference to the officer's neglect would constitute "fault of the appellant" sufficient to warrant dismissal.<sup>120</sup> However, in *Flint v. Board of Med. Examiners*,<sup>121</sup> appellant's notices of appeal and to prepare transcripts were filed in September and November of 1944, and this motion to dismiss was filed in 1946. Appellant's sole defense was that the clerk's certificate failed to show that the clerk ever gave appellant notification of the cost estimate. The appeal was dismissed, the court saying:

Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed.<sup>122</sup>

That military service does not, itself, justify failure to prosecute an appeal, is the holding in *Levin v. Levin*.<sup>123</sup>

(5) *Default in connection with briefs.* The new procedure [Rule 17(a)], under which, promptly upon expiration of the prescribed time, the clerk sends a 30-day notice to file the brief or show good cause for relief, was designed not only to speed up the filing of briefs but also to eliminate, as far as possible, the wasteful procedure of motions to dismiss.<sup>124</sup> A study of the minutes of the various reviewing courts discloses that the plan has been quite successful; hundreds of

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<sup>119</sup> The earlier case of *Russi v. Bank of America* is to the same effect. The court there suggests, by way of interpretation of Rule 53(b): "The relief is similar to that which may be granted under section 473 of the Code of Civil Procedure, and as in the code section, it is limited to cases where 'good cause' is shown for the default . . . It is plain . . . that appellant was not taken by surprise, that it has not shown any excusable neglect, and that the omission was made purposely and voluntarily." *Supra* note 68, at 101, 103, 158 P. (2d) 253, 254.

<sup>120</sup> *Witkin, op. cit. supra* note 2, at 128.

<sup>121</sup> (1946) 72 Cal. App. (2d) 844, 165 P. (2d) 694.

<sup>122</sup> *Ibid.* at 846, 165 P. (2d) at 695.

<sup>123</sup> (1944) 64 Cal. App. (2d) 298, 148 P. (2d) 714 (appeal dismissed because of six months inactivity, despite appellant's argument that she was financially unable, as a result of military service, to prosecute it).

<sup>124</sup> *Witkin, op. cit. supra* note 2, at 141.

appeals have been dismissed, without complaint, and, in other cases, briefs have been quickly forthcoming.

The only question of interpretation which has arisen is whether the 30-day notice by the clerk is a right of the appellant, thus enlarging, in effect, his time to file the opening brief. This theory finds no support in the language of the rule, nor was it the intention of the framers.<sup>125</sup> That was made clear in *Peak v. Nicholson*, where the court declared:<sup>126</sup>

We do not wish to be understood as suggesting, by anything said in this opinion, that under the new rules an appellant has an additional 30 days to file his brief, by virtue of the provisions of Rule 17(a), and therefore that respondent's motion to dismiss was premature. Rule 17(a) merely provides a speedy procedure of enforcement of the terms of Rule 16(a) and the notification and grace period of 30 days operates in much the same manner as the former order to show cause why the appeal should not be dismissed for failure to file the brief. Rule 17(a) expressly states that if the clerk does not mail the notification, the respondent may move to dismiss, and there is nothing in the section which prevents him from making that motion within a reasonable time after the brief is due.<sup>127</sup>

As to the grounds for relief from default, the same liberality has been shown as in the cases dealing with defaults in connection with the record, but, as usual, there are a number of minute orders and scarcely any opinions. The only discussion of policy appears in the dissenting opinion in *Peebler v. Olds*.<sup>128</sup> At the time of the motion to dismiss, appellants were in default for 11 days, and relief was granted on the ground that they had been confused by a dual motion (seeking to dismiss the appeal for delay in filing the brief and also to strike the reporter's transcript), and they could not intelligently prepare their brief until they knew what the record was to be. The dissenting opinion, however, points out that the appeal was first pending in the district court of appeal, the motion to dismiss was made there and granted, and thereafter a hearing in the supreme court was granted. The question, says the dissenting justice, was not whether the supreme court should exercise its discretion to grant relief from default, but rather *the extent to which it should undertake to regulate the exercise of such discretion by the district court of appeal*. He concludes:

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<sup>125</sup> *Ibid.* at 142.

<sup>126</sup> *Supra* note 6, at 359, 143 P. (2d) at 81.

<sup>127</sup> *Cf.* earlier case of *Wilson v. Smith* (1943) 60 Cal. App. (2d) 211, 213, 140 P. (2d) 144, containing an intimation to the contrary.

<sup>128</sup> *Supra* note 86.

The Supreme Court should not undertake to reexamine the various considerations that enter into the discretionary determination to grant or deny relief from default. The appellate courts cannot successfully carry out their duties if such determinations are subject to an independent review and reconsideration by the Supreme Court.<sup>129</sup>

#### GENERAL OBSERVATIONS

##### *Attitude of appellate courts toward the Rules*

The foregoing review of decisions furnishes an answer to some of the gloomy predictions made at the time the revision project was first proposed. In quite respectable quarters the view was expressed that, first, no new rules would be devised, but that the old rules would appear in slightly different dress; second, that, if any substantial changes were proposed, they would meet with such hostility from the bar that they would never be adopted; and, finally, that, if rules embodying substantial changes were adopted, indifference of the bar and laxity of the bench would allow them to remain ostensibly in effect, but actually unenforced and ineffective. Over four years ago the first and second predictions were disproved; with the cooperation of the State Bar, new rules, embodying substantial changes, were adopted. Today, the last fear has also been dispelled. The interpretation of the rules by the appellate courts has been wholly sympathetic toward the objectives of the revision, and a number of definitive opinions,<sup>130</sup> setting forth the background and purposes of important changes, have contributed greatly to an understanding of the new procedure. The rules are in friendly and informed hands, and this fact should furnish the necessary incentive for an inquiry into the results of the four-year period of their operation, with the object of discovering what can be done to make them operate more uniformly and efficiently.

##### *Cooperation of the trial courts*

It has already been demonstrated that the *revision* of appellate procedure cannot, with complete success, start at the appellate level; trial procedure is interrelated and must be reshaped, where necessary,

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<sup>129</sup> *Ibid.* at 663, 160 P. (2d) at 548.

<sup>130</sup> *E.g.*, Pessarra v. Pessarra, *supra* note 12 ; Brock v. Superior Court, *supra* note 41 ; Averill v. Lincoln, *supra* note 42 ; Burns v. Brown, *supra* note 50 ; Weisbecker v. Weisbecker, *supra* note 55 ; McMahon v. Superior Court, *supra* note 65 ; Russi v. Bank of America, *supra* note 68 ; Alkus v. Johnson-Pacific Co., *supra* note 77 ; Peebler v. Olds, *supra* note 86, Jarkieh v. Badagliacco, *supra* note 104.

to fit into the new system of appeal or other review.<sup>131</sup> It is equally impossible, experience has shown, to achieve an efficient and uniform administration of the new appellate procedure, if we look only to the operations of the appellate courts. Many of the rules apply to steps taken in the trial court and, when the trial judge or clerk fails to follow the new procedure, the appeal runs into difficulties before the appellate court enters the picture. Recent illustrations, in the cases discussed above, include the unauthorized modification of a final judgment or order, causing counsel mistakenly to believe that a new time for appeal commenced to run;<sup>132</sup> failure to understand the effect of Rule 2(b), specifying the methods of entry of orders for the purpose of determining the period within which to file notice of appeal, and particularly the importance of expressly indicating an intention to file a formal, written order;<sup>133</sup> overlooking the new approach to the problem of extension of time, with the result that void extensions, after expiration of the time period, or for more than the 90-day limit, are granted;<sup>134</sup> failure to take note of the fact that the entire procedure of motion to terminate proceedings for a record, with its right of intermediate appeal, has been abolished;<sup>135</sup> and lack of understanding of the abolition of the general certification requirement, and of the fact that the trial judge has no power to prevent the transmission of the reporter's transcript to the reviewing court by refusal to certify.<sup>136</sup>

Once it is fully appreciated that trial judges and clerks are an integral part of the appellate system, and that it is the trial court which has the first opportunity and duty to make the Rules on Appeal function effectively, more attention will be devoted to enlisting their interest and cooperation in this program, and to furnishing them with adequate information and assistance. Steps in this direction have already been taken under the joint auspices of the Conference of California Judges and the Judicial Council.<sup>137</sup>

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<sup>131</sup> Witkin, *op. cit. supra* note 2, at 88, 301.

<sup>132</sup> Kamper v. Mark Hopkins, *supra* note 10.

<sup>133</sup> Pessarra v. Pessarra, *supra* note 12.

<sup>134</sup> Brock v. Superior Court, *supra* note 41.

<sup>135</sup> Averill v. Lincoln, *supra* note 42.

<sup>136</sup> McMahan v. Superior Court, *supra* note 65.

<sup>137</sup> An outline or check list of those rules relating to the superior judge, superior court clerk, and superior court reporter, with annotations to the Draftsman's discussions and to all of the decisions construing those rules, is being prepared for distribution to all of the superior courts.

*Relief from default: role of attorneys and appellate courts*

The most important of the rules, in the sense that it involves great potentialities for harm, is Rule 53(b). This provision for relief from default was originally conceived as a temporary measure to cover the educational period during which the rules would become familiar to practicing attorneys. Thereafter its general language was logically viewed as a statement of the unlimited inherent power of the reviewing court to relieve from any nonjurisdictional procedural missteps.<sup>138</sup> There can be no quarrel with this interpretation, and it is difficult to level criticism at any of the reported decisions, in each of which there appears a reasonable, or at least a plausible, excuse for the default.<sup>139</sup> Indeed, a study might show that no real problem exists, *i.e.*, that the courts are, on the whole, not lax but reasonably strict in their enforcement of the rules. However, since the numerous minute orders through which the bulk of applications for relief are granted do not indicate the grounds therefor, it is at least possible that the same lack of uniformity in the grounds or conditions for granting and denying relief exists among the various appellate courts as formerly existed under the old procedure.

This is a danger which, if disregarded, will gravely jeopardize the successful operation of the system. The rules contain liberal time and extension provisions, ample for all purposes,<sup>140</sup> and defaults can often be traced to a confident reliance on the court's liberal attitude toward relief from default. When a reviewing court excuses a substantial, deliberate or negligent failure to comply with time provisions, it is being more than generous to the individual appellant—it is allowing itself to be used as an instrument to undermine the system. Every unmerited relief from default is an invitation to attorneys to indulge in dilatory practices which the new procedure was designed to eliminate; and, so long as appellate courts are willing to accept poor excuses, they will continue to create the conditions which call for this relief. Some attempt to formulate more definitely the policy and conditions of such relief would seem to be desirable, if the time provisions of the rules are not to become, like trial court time, largely directory.

*Amendments and further revision*

It was suggested by the writer in the earlier article on the rules that piecemeal amendments were to be avoided, as tending to create

<sup>138</sup> See Witkin, *op. cit. supra* note 2, at 293.

<sup>139</sup> *E.g.*, *Averill v. Lincoln*, *supra* note 42; *Jarkieh v. Badagliacco*, *supra* note 104.

<sup>140</sup> See Rule 45, and Witkin, *op. cit. supra* note 2, at 290.

continual uncertainty in the procedure, and that amendments should preferably be made "in the course of periodical and not too frequent reconsideration of all the rules in the light of experience".<sup>141</sup> The question arises as to whether the four-year period has furnished enough experience for a consideration of possible amendments, and it would seem, from an examination of the decisions, that the experience is adequate. Not every rule, but nearly every important change, has been construed and applied in reported cases; and judges, clerks, reporters, and attorneys have doubtless acquired considerable practical information as to the operation of the rules in proceedings which have not reached the appellate courts. Hence there would seem to be no objection to a study of the accumulated material and a general call for suggestions.

Much more important than amendment of the rules, however, is the long-neglected revision of those subjects of appellate procedure which were excluded from the rules mainly on the ground that they dealt with "substantive" matters, particularly the subject of appealable judgments and orders. This would complete the ambitious program originally undertaken, but curtailed for lack of power and time.<sup>142</sup>

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<sup>141</sup> *Ibid.* at 301.

<sup>142</sup> *Ibid.* at 82, 301.