

REVISED RULES

of the

UNITED STATES DISTRICT COURT

for the

Southern District of West Virginia

1942

REVISED RULES OF PRACTICE
of the
UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT of WEST VIRGINIA
including
BANKRUPTCY RULES

Civil Rules effective June 15, 1942.
Bankruptcy Rules effective October 1, 1942.

JUDGES

HON. HARRY E. WATKINS - - - - - Fairmont, W. Va.
HON. BEN MOORE - - - - - Charleston, W. Va.

CLERK

EARL R. CAVENDER - - - - - Charleston, W. Va.

TERMS

Charleston—Second Tuesday in April and third Tuesday in November.

Huntington—Second Tuesday in May and third Tuesday in October.

Bluefield—Third Tuesday in January and third Tuesday in June.

Lewisburg—First Tuesday in March and first Tuesday in September.

Beckley—Third Monday in July.

REFEREES IN BANKRUPTCY

H. L. Snyder, Jr. - - - - - Charleston, W. Va.
John E. Jenkins - - - - - Huntington, W. Va.
Sidney J. Kwass - - - - - Bluefield, W. Va.
Cyrus B. Van Bibber - - - - - Huntington, W. Va.

UNITED STATES COMMISSIONERS

Thomas C. Whited - - - - - Logan, W. Va.
A. D. Preston - - - - - Beckley, W. Va.
Edward E. McComas - - - - - Madison, W. Va.
Thomas H. Scott - - - - - Bluefield, W. Va.
Eugene Chase Bare - - - - - Alderson, W. Va.
Will Davis - - - - - Sutton, W. Va.
Ramon A. Woodall - - - - - Hamlin, W. Va.
Sampson N. Miller - - - - - Webster Springs, W. Va.
Mason C. Brackman - - - - - Lewisburg, W. Va.
Arville A. Browning - - - - - Pineville, W. Va.
Chlide Nelms - - - - - Williamson, W. Va.
Wm. Herbert Belcher - - - - - Charleston, W. Va.
Frederick W. Sawyer - - - - - Hinton, W. Va.
Robert J. Thrift, Jr. - - - - - Fayetteville, W. Va.
J. Randolph Tucker - - - - - Welch, W. Va.
Dana Herold - - - - - Summersville, W. Va.
Joseph W. Fitchett - - - - - Huntington, W. Va.

RULES OF PRACTICE IN CIVIL ACTIONS

RULE 1. Attorneys:

(a) Any resident of the State of West Virginia who is a member in good standing of the bar of that State is eligible for admission as a permanent member of the bar of this Court, and may be admitted to practice therein upon motion by a permanent member of the bar of this Court who shall vouch for the applicant and sign the register of attorneys along with the person admitted.

(b) Any non-resident of the State of West Virginia who is an attorney in good standing at the bar of any other state, territory, or the District of Columbia, or who has been admitted as a permanent member of the bar of any other Federal District Court, who desires to appear in any litigation in this Court may, upon motion, be admitted *pro hac vice*, but shall not be eligible to become a permanent member of the bar of this Court.

(c) No attorney, not admitted as a permanent member of the bar of this Court may appear or file a pleading or notice therein, except by special permission of the Court, unless there be associated with him a permanent member of the bar of this Court.

(d) Each local attorney appearing in litigation in this Court shall file his post office address in the Clerk's office, and shall advise the Clerk of any change therein in the course of such litigation, and any notice or other paper, the service of which by mail is permitted, shall be deemed sufficiently served if mailed to said address, and shall be sufficient service upon the party represented by such attorney to the extent provided by the Rules of Civil Procedure. The said address shall be treated as properly filed if it appear by endorsement or notation upon any pleading or other paper filed in the litigation.

(e) The final disbarment of any permanent member of the bar of this Court, by a court of the State of West Virginia having jurisdiction, evidenced by a duly certified copy of the order of such disbarment, shall automatically revoke the admission to practice in this Court of the attorney affected.

RULE 2. Deposit for Costs:

The plaintiff in a civil action, upon filing a complaint, shall deposit with the Clerk on account of costs the sum of \$20.00, and the defendant or any intervening party, upon making a first appearance by filing a pleading or otherwise, shall make a deposit of \$10.00, unless it be otherwise directed by the Court or Judge. The Clerk, unless otherwise directed by the Court or Judge, may require further deposits as occasion may require.

RULE 3. Security for Costs:

(a) A bond for security for costs may be required of a non-resident plaintiff, other than one suing in *forma pauperis*, upon seasonable suggestion to the Court of the fact of such non-residency.

(b) The Court, upon motion, or of its own initiative, may order any party to file a bond for costs or additional security for costs in such an amount and so conditioned as the Court by its order may designate.

(c) At the time application is made, under the Acts of Congress providing for suits by poor persons, for leave to commence any civil action without being required to prepay fees and costs or give security for them, the applicant shall file a written consent that the recovery, if any, in the action, to such amount as the Court may direct, shall be paid to the Clerk who shall pay therefrom all unpaid fees and costs taxed against the plaintiff and shall pay to his attorney the amount which the Court allows or approves as compensation for the attorney's services, the Court to have control of the amount of any allowance of fees, regardless of any previous contract between the parties.

RULE 4. Service:

No service by mail or otherwise shall be required upon an attorney non-resident of the State of West Virginia (except where such non-resident attorney appears without local associate by special permission of the Court under Rule 1, Section (c)), service upon the local associate of such attorney being sufficient.

Waiver or acceptance of service by an attorney of record shall be equivalent to service of any notice, process, pleading

or other papers upon said attorney and upon the party represented by him.

RULE 5. Pre-Trial Conferences:

Pre-trial conferences may be held in any civil action at any time by the Judge, without formal calendar, on reasonable notice to the attorneys of the parties affected, or upon waiver of such notice by such attorneys. Participation by an attorney in such pre-trial conference without objection shall be deemed a waiver of any notice thereof.

RULE 6. Special Trial Docket:

(a) At least twenty (20) days before each regular term of Court, counsel for any party desiring trial of any civil action upon the docket shall give notice to opposing parties or their counsel. After such notice shall have been given, no action shall be moved for continuance unless notice to that effect be given by the prospective movant to the other parties, or their counsel, at least ten (10) days before the first day of said term of Court, except for causes thereafter arising, or except by special leave of the Court under circumstances which would, in the judgment of the Court, work a hardship if such motion were not entertained. The actions in which such notices for trial shall have been given and other actions that shall be set for trial by the Court under the provisions of subdivision (b) of this Rule, shall constitute the Special Trial Docket of such term, and all cases not upon the Special Trial Docket shall stand continued, unless they be subject to dismissal for lack of prosecution under Rule 8.

(b) On such day before, or during, each regular term of the Court, as from time to time shall be designated by the Court, at each place of holding Court, a docket shall be called of all civil actions then and there pending, and the Court shall set upon the Special Trial Docket for such term, in addition to those actions as to which notice for trial shall have been given, such actions as the Court may deem proper to be tried, it being the intention and policy of the Court that all civil actions be tried as speedily as is consistent with the due administration of justice.

RULE 7. Uncontested Actions:

The provisions of Rule 6 and the requirements thereof

as to notice and setting of an action upon the Special Trial Docket shall not apply to any civil action in which a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and such fact is made to appear by affidavit or otherwise. In such action, judgment by default may be taken as provided by Rule 55 of the Rules of Civil Procedure.

RULE 8. Dismissal for Want of Prosecution:

(a) At least ten (10) days before the first day of the first term of Court in each calendar year at each place of holding court, the Clerk shall notify, in writing, all parties, or their attorneys, in any civil action as to which trial notice for said term has not been given, and in which no substantial action has been taken for more than one year, that such action is liable to be dismissed for lack of prosecution as hereinafter set forth.

(b) On the calling of the docket, as provided in Rule 6, Section (b), if it appear, at the first term of Court in any calendar year, as to any civil action not upon the Special Trial Docket for said term, that more than one (1) year has elapsed since the docketing of said action, in which no substantial action therein has been taken, notice having been given by the Clerk as hereinbefore provided, such civil action, in the discretion of the Court, may be dismissed for lack of prosecution. Any action so dismissed for lack of prosecution may be reinstated within six (6) months by order of the Court, upon motion by any party affected, upon at least ten (10) days' notice to the opposite parties, and upon a showing of good cause. Upon any dismissal for lack of prosecution under this Rule, the Clerk shall immediately notify, by mail, all parties, or their attorneys of the fact and date of such dismissal.

RULE 9. Orders, Findings and Judgments:

(a) All orders (except as otherwise specifically provided by the Rules of Civil Procedure) shall be entered and transcribed in full in the Civil Order Book.

(b) Within a reasonable time after announcement of decisions, the prevailing attorney shall prepare and submit to the Judge a suggested form of order, after submitting a copy thereof to the opposing local attorneys having sub-

stantial interests, unless the number of such opposing attorneys exceeds five, in which case notice shall be given to all of the local attorneys representing substantial interests of the time and place when the order shall be presented to the Judge. If the attorneys are unable to agree on the form of order, the Judge, either in informal hearing at which the attorneys are present, or after reasonable notice, shall settle and determine such form. A non-resident attorney who has appeared without local associate by special permission of the Court under Rule 1, Section (c) shall be considered and treated under this Rule as though he were a local attorney.

(c) Either before or after the announcement of a decision the Judge may, in his discretion, require the respective attorneys to submit proposed findings of fact and conclusions of law.

RULE 10. Release of Judgment:

A release of any judgment may be entered of record by order of the Court, upon proper showing to the Court. In the absence of such order, such release shall be in writing, executed by the person, or persons, in whose favor said judgment shall have been entered, or their duly proven personal representatives, successors, or assignees, in a form recordable under the statutes of the State of West Virginia then in effect which release shall be presented in the Clerk's office and noted in the Civil Docket and a certified copy of such release filed in the papers in the action.

RULE 11. Constitutional Question:

Whenever the constitutionality of an Act of Congress affecting the public interest is drawn in question in any civil action to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the attorneys, respectively, for each of the parties shall be required to advise the Judge, in writing, either jointly or separately, that such constitutionality is so drawn in question, at such time prior to the first trial or hearing of such action as will permit the Judge to comply with Rule 24 (c) of the Civil Rules of Procedure, and with the Act of August 24, 1937, Ch. 754, Sec. 1, requiring such

questions to be certified by the Court to the Attorney General of the United States.

RULE 12. Attachments and Garnishments:

The laws of the State of West Virginia relative to attachments and garnishments currently in effect shall govern for the conduct of similar proceedings in this Court, so far as it be not otherwise provided by Act of Congress or the Rules of Civil Procedure. Writs of attachment and garnishment shall be directed to the Marshal, who shall perform all of the duties, and exercise all of the powers, of sheriffs under the laws of West Virginia. Whenever a bond is required to be given by a plaintiff, defendant, intervenor, or any claimant of property subject to attachment or garnishment, it shall be made payable to the defendant or plaintiff, as the case may be, as obligee, and shall be conditioned as required in like cases by the laws of the State of West Virginia. Where, under the laws of said State, copies of writs or other papers are required to be posted at a court house door or elsewhere, the same shall be posted at the front door of the building, where this Court is held and where the proceedings are pending or returnable.

RULE 13. Abatement of Action:

If a summons and complaint in any civil action shall not be served on a defendant within three calendar months after the issuance of the summons, and if such defendant in such action has not appeared therein, then such action shall abate as to such defendant not served, provided, however, that a plaintiff, whose time to effect such service has not expired, may, from time to time, for good cause shown, procure an order extending the time to serve the summons and complaint for such further period as the Court may direct.

RULE 14. Executions:

Writs of execution may issue at any time after ten (10) days following entry of judgment. Every officer to whom any writ of execution is delivered shall make return to the Clerk's office at the place of holding Court, from which such execution issued, unless the Court by order otherwise direct. Where a sale is made under any execution, and no particular

time for return is prescribed by order of Court or by provisions of law, the return shall be made within thirty (30) days after said sale. If no particular time be prescribed by order or law, and no sale be made under such execution, then return shall be made immediately after such execution is executed, or, if not executed, within sixty (60) days after its date.

RULE 15. Bonds:

(a) Any surety upon any bond shall be a corporation authorized by the Secretary of the Treasury of the United States to act as surety on official bonds under the Act of August 13, 1894, (28 Stat. 279), as amended U.S.C., Title 6, Sec. 1-13, or an individual resident in this District who owns unencumbered real, or personal property within the District, sufficient to justify the full amount of suretyship.

(b) In lieu of a surety, any party may deposit with the Clerk, or to order of the Court, an amount of cash, or securities of the United States of a present par value, equal to the penalty of the bond, which cash or securities and the application thereof shall be under the control and direction of the Court.

(c) Unless otherwise specially provided by law, or ordered by the Court, the Clerk is authorized to approve all bonds and the sureties thereon.

(d) No Clerk, Deputy Clerk, Marshal, Deputy Marshal, member of the bar, or other officer of the Court will be accepted as surety on any bond or undertaking in any action or proceeding in this Court.

RULE 16. Withdrawal of Papers from Clerk's Office:

Papers may be withdrawn from the Clerk's office on permission of the Clerk by permanent members of the bar of this Court, upon leaving a receipt therefor, which receipt, if such papers are to be held longer than two days, shall list such papers.

BANKRUPTCY RULES

I. BANKRUPTCY PETITIONS

1. All petitions in bankruptcy shall be filed with the clerk at a point of holding court convenient to the bankrupt or the petitioning creditors.

2. The petitions, schedules and Statement of Affairs must be typewritten or printed, and must be filled out and filed in triplicate.

3. Each item in the schedules and Statement of Affairs not otherwise filled out shall be carried out with the entry "None." The use of ditto marks is forbidden.

4. The address of creditors residing in large towns or cities shall be given by street and number, if known, or if unknown, that fact to be stated, as well as the place of residence.

5. The oath of affirmation to the petition and schedules shall not be taken by the attorney for the petitioner.

6. Every petition shall state the first name, middle name, and last name, of the petitioner.

7. When petitions are filed by partners, praying that the firm and individual members thereof be adjudged bankrupts, there shall be separate orders of adjudication and reference for each individual and the partnership firm; each shall constitute a separate estate in bankruptcy, and the Clerk shall collect a separate filing fee of \$30.00 for each such estate, and the Referee's costs shall be paid for each estate to be administered.

II. ADJUDICATION AND REFERENCE

Reference shall be made to the referee whose territorial division includes the county wherein the bankrupt has resided or has done business: PROVIDED, That for good cause reference may be made to any referee.

III. TRUSTEES IN BANKRUPTCY

The Attorney for the bankrupt in voluntary cases, the attorney for the petitioning creditors in involuntary cases, or any attorney or other person holding claims against an estate of a bankrupt, or the partner of such attorney or person, shall not be elected or appointed Trustee.

IV. EXEMPTIONS

Property claimed to be exempt by a bankrupt shall be listed in his schedules by separate items and values and proved by the bankrupt, and set apart by the Trustee in the manner prescribed by the statutes of the State of West Virginia.

V. INDEMNITY FOR COSTS

(A) Before incurring any expense the referee may in any matter require the person in whose behalf the duty is to be performed to deposit, from time to time in accordance with the following rules, sufficient funds to cover all necessary expenses of the referee in such matter. Monies so advanced may be taxed as costs against the parties or may be repaid out of the estate as part of the costs of administration, as the court may direct.

(B) There shall be deposited with the referee as indemnity for actual and necessary expenses incurred by him in each estate in ordinary bankruptcy an original deposit not in excess of the sum of \$20.00. The original deposit in proceedings under Chapters X, XI, and XII, shall be \$50.00, and in proceedings under Chapter XIII, \$15.00. Such indemnity deposits shall be deposited in the referee's official account and accounted for by him in his semi-annual report.

The original deposit in general bankruptcy proceedings of \$20.00 shall cover the following items:

1. Cost of publication of notice of first meeting of creditors, not in excess of \$4.00.

2. For all clerical aid in preparing notices to creditors of first meeting not exceeding thirty, mailing the same, making proof thereof, keeping register, files and records, preparing typewritten memoranda of proceeding prior to first meeting of creditors, including stationery, envelopes, printing, letters, messages and all petty expenses, and for clerical aid in taking and keeping notes and records of the first session of the first meeting of creditors, not in excess of \$7.00. The phrase "Clerical aid through first meeting," may be employed to cover all the foregoing items.

3. For similar clerical aid and other expenses as above stated, subsequent to the first session of the first meeting of creditors, including notices to creditors not exceeding

thirty, in proceedings for discharge, not in excess of \$7.00. The phrase "Clerical aid subsequent to first meeting," may be employed to cover the items of this paragraph.

4. For clerical aid in closing estate and preparing record of proceedings, not exceeding 10 folios of 100 words each, not in excess of \$2.00.

(C) Additional charges not in excess of the following may be made by the referee as additional deposits for indemnity for actual and necessary expenses incurred by him:

1. For rent \$3.00, where offices are not provided by the United States Government for the referee.

2. For each published notice other than the notice of the first meeting of creditors, the actual expense of the publication.

3. For all notices of first meeting of creditors and of discharge proceedings, in excess of thirty notices, 10c each.

4. For all other notices, 10c each.

5. For each specification of objection filed to a discharge or confirmation of an arrangement, or plan, \$10.00, provided that no such charge shall be made for filing specifications of objections to discharge by the United States Attorney or the trustee.

6. For office accommodation and clerical aid in taking and keeping notes and records of all meetings other than the first session of the first meeting of creditors and of hearings arising in the general administration of the estate within the ordinary duties of the referee at which any business is transacted, including reclamation and discharge hearings, for each meeting or hearing, \$2.50.

7. For travel expenses, the amount actually incurred in the discharge of the referee's duties. The charge for subsistence shall not exceed \$6.00 per day, divided by quarter days, regardless of the number of hours. The charge for transportation by private automobile shall not exceed 5c per mile.

8. The actual cost of reporting and transcribing testimony.

9. For clerical aid in closing estate and preparing record of proceedings in excess of ten folios, 20c per folio of one hundred words.

10. For clerical aid on all claims filed in excess of ten, for filing, recording, computing and distributing dividend, 20c each.

11. For a copy of any record, entry or other paper and the comparison thereof, 15c for each folio of 100 words. For comparing any copy of record or other paper, not made by the referee, with the original thereof, 5c for each folio of 100 words. For a certificate, 50c.

12. For certifying questions for review with necessary records, 50c per folio page, minimum charge \$10.

Each referee shall establish, and may from time to time revise, a schedule of charges within the foregoing maximums of additional charges which will maintain his official account in an amount sufficient but not more than is reasonably necessary to defray the actual expenses of his office. All deposits of indemnity shall be in accordance with such schedules, but within the maximum. Each referee may make such refunds or adjustments of the charges in individual cases as in his judgment may be necessary or advisable.

(D) Whenever practicable, all notices or orders shall be combined and mailed under one cover, one charge only to be taxed by the referee for mailing each such combined notice.

(E) All receipts of monies as indemnity or charges for expenses shall be entered in a cash book substantially in the form and manner required by General Order 26, and all monies so received shall be deposited forthwith to the credit of the referee in his official account in a designated depository and shall be disbursed only by checks signed by the referee in his official capacity.

The monies received under this Rule as indemnity shall constitute a revolving fund for the payment of the necessary and actual expenses of the referee. To these monies the referee shall have no claim of ownership of any kind as compensation for his services as referee. This fund shall at all times be under the jurisdiction and control of this Court.

(F) Referees whose offices are exclusively devoted to the conduct of the business of the court are authorized to make disbursements from their official account to pay the actual and necessary costs and expenses of maintaining their offices,

expenses necessarily incurred in the performance of their duties under the Act, and the actual and necessary costs and expenses incidental to the prosecuting of proceedings and the administration of estates pending before them. Necessary furniture, equipment, law books and similar property paid for out of the official account shall belong to the United States for the use of and shall be under the control of the Court.

(G) Referees who devote part time to their duties as referees are authorized to make disbursements from their official account for the actual and necessary expenses incurred in the performance of their duties under the Act and incidental to the prosecution of proceedings in estates pending before them, and also for such actual and necessary expenses of maintaining their offices as are reasonably and fairly apportioned to the administration of estates in bankruptcy pending before them.

(H) With his final report closing an estate, a referee shall file an account showing the amount received for indemnity and the amounts in detail charged against the same in accordance with this Rule. The Clerk shall examine such account and report to the Judge at the time in charge of bankruptcy proceedings any mistakes or irregularities appearing therein.

(I) In any case in which the bankrupt or debtor fails to pay the deposit of indemnity for expenses as required by the Referee within ten days after mailing of notice or letter by the Referee to the bankrupt or debtor and his attorney for such payment or any extension thereof which may be allowed by the Referee, the Referee may dismiss the petition.

(J) A party who files objections to a bankrupt's discharge, may be required by the Referee to deposit with him such sum as the Referee may determine, under the foregoing schedule of charges, is necessary to pay his indemnity and the expenses of stenographer in reporting testimony. In that event the Referee shall give notice to the attorney for the objecting party of the amount of the deposit required and that unless such deposit is made within ten days thereafter, the objections will be dismissed. If such deposit is not made within

said period of ten days or such further time as the Referee may allow, the Referee shall dismiss the objections and grant the discharge.

VI. REFEREE'S DOCKET

A loose-leaf record book or docket shall be kept in each case and shall contain a memorandum of each step in such case, a list of claims filed, and an itemized statement of the referee's receipts and disbursements. Such record, properly endorsed and certified by the referee, shall be transmitted to the Clerk along with the other papers in the case as the referee's complete record.

VII. DEPOSITORIES FOR MONEY IN BANKRUPTCY

1. This Court will from time to time designate, by order, banking institutions as depositories for the money of bankrupt estates.

2. Each Trustee and Receiver shall deposit in one of the depository banks so designated all monies coming into his hands belonging to the bankrupt's estate, and, in the event any persons shall be acting as Trustee or Receiver of more than one bankrupt estate, the account for each estate shall be kept separately. Said accounts shall be so designated as to disclose the particular bankrupt's estate to which the monies so deposited belongs.

3. All checks signed by Trustees and Receivers, and countersigned by the Referee, shall contain the number of the case and the name of the bankrupt estate from which the disbursement is made.

4. All paid official checks, drawn by Trustees or Receivers and paid by the depository bank, shall be retained by the depository bank until withdrawn by the Referee on his order, and such checks, when so withdrawn by the Referee, shall be by him transmitted to the Clerk's office to be filed with the record of the case.

VIII. ATTORNEY'S FEES IN BANKRUPTCY

All applications for allowances to attorneys shall be made in the first instance to the referee in charge of the case, and shall be heard on notice sent by mail to the creditors and the applicants. Petitions for such allowances shall show

in detail the character of the services performed, state the sum petitioner deems reasonable for such services, shall be verified, and otherwise comply with Section 62 "D" of the Bankruptcy Act.

IX. BANKRUPTCY PETITIONS IN FORMA PAUPERIS

No petition in forma pauperis shall be filed unless accompanied by affidavit of petitioner that he does not have and cannot obtain the money necessary to pay such fees, together with an affidavit by his attorney, if any, that he has not and will not accept any compensation for his services as such attorney until said fees and Referee's expenses are paid in full.

After adjudication and reference under a voluntary petition in bankruptcy filed in forma pauperis without prepayment of the statutory filing fees, if the referee, after due examination and investigation, shall determine that the bankrupt is able to pay his filing fees, he may order the bankrupt to pay such filing fees within a specified time. If such filing fees be not paid within such specified time, the referee may dismiss the bankrupt's petition in accordance with Section 59 (g) of the Bankruptcy Act.

X. DISMISSALS BY REFEREE

The referee before whom any case is pending may, for proper cause, dismiss the same as provided in Section 59 (g) of the Bankruptcy Act.

XI. REFEREES' DIVISIONS

Until otherwise ordered by the Court, the counties of this judicial district shall be divided into the following divisions for bankruptcy purposes, to-wit:

Division No. 1 shall consist of Kanawha, Boone, Braxton, Clay, Fayette, Greenbrier, Jackson, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers and Webster Counties.

Division No. 2 shall consist of Mercer, McDowell and Wyoming Counties.

Division No. 3 shall consist of Cabell, Wayne, Mingo, Lincoln, Mason and Logan Counties.