FEDERAL CIVIL PROCEDURE: SECOND CIRCUIT REJECTS "100 MILE RULE" IN FAVOR OF DISCRETIONARY TAXATION OF WITNESSES' TRAVEL EXPENSES

SINCE taxable costs in American litigation include only a portion of the expenses of an action, generally the prevailing party is not made whole.[1] One restriction on taxable costs in the federal courts is the "100 mile rule,"[2] which limits the mileage allowable for a witness from outside the district to a distance of one hundred miles from the place of trial.[3] In *Farmer v. Arabian Am. Oil Co.*,[4] the

[1] See generally, 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 1195-201 (Wright ed. 1958); CHADBOURN & LEVIN, CASES ON CIVIL PROCEDURE 427-63 (1961); MCCORMICK, DAMAGES §§ 60-71 (1935); 6 MOORE, FEDERAL PRACTICE ¶¶ 54.70-.77 (2d ed. 1953); Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Peck, *Taxation of Costs in U.S. District Courts*, 42 NEB. L. REV. 788 (1963); Comment, 44 ILL. L. REV. 507 (1949); Comment, 49 YALE L.J. 699 (1940); Note, 53 COLUM. L. REV. 78 (1953).

[2] Prior to *Farmer*, the "100 mile rule" had been accepted in the courts of appeal in six circuits. Ludvigsen v. Commercial Stevedoring Co., 228 F.2d 707 (2d Cir.) (dictum), *cert. denied*, 350 U.S. 1014 (1956); Vincennes Steel Corp. v. Miller, 94 F.2d 347 (5th Cir. 1938); Kenyon v. Automatic Instrument Co., 10 F.R.D. 248 (W.D. Mich. 1950), *aff'd*, 186 F.2d 752 (6th Cir.), *cert. denied*, 342 U.S. 820 (1951); Friedman v. Washburn Co., 155 F.2d 959 (7th Cir. 1946); Spiritwood Grain Co. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1950) (dictum); Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897 (9th Cir. 1956).

In addition, district courts within all other circuits had accepted the rule. Commerce Oil Ref. Corp. v. Miner, 198 F. Supp. 895 (D.R.I. 1961) (1st Cir.); Perlman v. Feldmann, 116 F. Supp. 102 (D. Conn. 1953), *rev'd on other grounds*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); Consolidated Fisheries Co. v. Fairbanks, Morse & Co., 106 F. Supp. 714 (E.D. Pa. 1952) (3d Cir.); Barnhart v. Jones, 9 F.R.D. 423 (S.D.W. Va. 1949) (4th Cir.); United States v. Green, 196 Fed. 255 (D.N.M. 1912) (10th Cir.).

Three cases have intimated that there might be exceptions to the rule in certain circumstances. Pinson v. Atchison, T. & S.F.R.R., 54 Fed. 464 (C.C.W.D. Mo. 1893) (imperative necessity of presence of witness); Smith v. Chicago & N.W. Ry., 38 Fed. 321 (C.C.S.D. Iowa 1889) (where one party amends pleadings or changes issues on eve of trial); The Vernon, 36 Fed. 113 (E.D. Mich. 1888) (necessity of presence of witness when deposition is unsatisfactory). *But see* Gallagher v. Union Pac. R.R., 7 F.R.D. 208 (S.D.N.Y. 1947).

Two early Massachusetts cases, United States v. Sanborn, 28 Fed. 299 (C.C.D. Mass. 1886), *rev'd on other grounds*, 135 U.S. 271 (1890) and Prouty v. Draper, 20 Fed. Cas. 13 (No. 11,447) (C.C.D. Mass. 1842), rejected the rule, but this position was criticized in The Governor Ames, 187 Fed. 40 (1st Cir. 1910). See also Commerce Oil Ref. Corp. v. Miner, *supra*.

Recent cases rejecting the rule are: Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D.N.Y. 1959); Maresco v. Flota Mercante Grancolumbiana, S.A., 167 F. Supp. 845 (E.D.N.Y. 1958); Bank of America v. Loew's Int'l Corp., 163 F. Supp. 924 (S.D.N.Y. 1958); Knox v. Anderson, 163 F. Supp. 822 (D. Hawaii 1958).

[3] "[I]n the case of a witness from without the district, mileage allowable should be that which was traveled *within* the district, *or* actual mileage traveled in and out

Second Circuit Court of Appeals rejected the 100 mile rule and allowed the taxation of *actual* mileage of witnesses at the trial court's discretion.

At the first trial in an action for damages for breach of an employment contract, the court directed a verdict for defendant[5] and taxed plaintiff with mileage from Saudi Arabia to New York for three of defendant's witnesses.[6] On appeal, the judgment was reversed on the merits and remanded.[7] At the second jury trial, after a verdict for defendant, the court found the mileage allowed by the first trial court to be excessive and limited allowable mileage to one hundred miles.[8] However, it did so as a matter of discretion and expressly declined to consider the "100 mile rule." On appeal, the Second Circuit Court of Appeals rejected altogether the 100 mile rule, upheld the second trial court's exercise of discretion, but reinstated the costs assessed by the first trial court as being within that court's discretion.[9]

The Court of Appeals rejected the 100 mile rule on two grounds. First, the rule has no valid statutory basis. Neither the statute authorizing the taxation of witnesses' expenses[10] nor the statute estab-

---

of the district up to 100 miles, whichever is the greater . . . . The mileage of a witness from within the district would still be the actual mileage traveled." Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897, 904 (9th Cir. 1956). (Emphasis in original.)

[4] 324 F.2d 359 (2d Cir. 1963).

[5] Farmer v. Arabian Am. Oil Co., 176 F. Supp. 45 (S.D.N.Y. 1959). The judge granted defendant's motion for a directed verdict after the trial had terminated in a jury disagreement.

[6] See Farmer v. Arabian Am. Oil Co., 285 F.2d 720, 722 (2d Cir. 1960). Total costs assessed were $6,601.08, including $3,995.50 for mileage from Saudi Arabia.

[7] Farmer v. Arabian Am. Oil Co., 277 F.2d 46 (2d Cir.), *cert. denied,* 364 U.S. 824 (1960). On remand, the action was dismissed for plaintiff's refusal to post bond to secure costs. Farmer v. Arabian Am. Oil Co., Civil No. 111-103, S.D.N.Y., Nov. 22, 1960. Again there was an appeal, and the dismissal was reversed on the ground that plaintiff was denied his day in court by the imposition of excessive bond. Farmer v. Arabian Am. Oil Co., *supra* note 6. Thereupon the second jury trial took place.

[8] Farmer v. Arabian Am. Oil Co., 31 F.R.D. 191 (S.D.N.Y. 1962). The Clerk of Court at the second trial taxed costs at $11,900.12, including the total costs of the first trial ($6,601.08) and $3,595.50 for transportation of witnesses from Saudi Arabia to the second trial. The judge reduced this amount to $831.60 by reducing the mileage allowance for witnesses to one hundred miles to and from the courthouse for each trial and by disallowing expenses for transcripts, stenographer's fees at pretrial hearings and other items. 31 F.R.D. at 194-97; 324 F.2d at 361-62.

[9] 324 F.2d at 359. However, the court disallowed $2,064.00, the costs taxed at the first trial for two witnesses who came from Saudi Arabia in otherwise unoccupied seats on a regularly scheduled flight in a company plane.

[10] 28 U.S.C. § 1920(3) (1958). See note 32 *infra.*

lishing allowable mileage rates[11] contains such a limitation. The rule was derived purely by implication[12] from the one hundred mile limitation on the subpoena power of federal courts outside their respective districts.[13] Moreover, the 1949 amendment to the mileage statute authorizes the allowance of *actual* mileage in lieu of the usual statutory rates for witnesses traveling to and from the continental United States.[14] Second, the court concluded that the rule has no valid basis in reason. It has been justified as adhering to two axioms of American jurisprudence: that expenses of a lawsuit should

[11] 28 U.S.C. § 1821 (1958). "A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. . . . Witnesses . . . who attend at points so far removed from their respective residence[s] as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed . . . ."

[12] For judicial analysis of the derivation of the rule see, *e.g.,* Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897 (9th Cir. 1956); Vincennes Steel Corp. v. Miller, 94 F.2d 347 (5th Cir. 1938); Barnhart v. Jones, 9 F.R.D. 423 (S.D.W. Va. 1949).

The rule has been codified only in Admiralty Rule 47, promulgated by the Supreme Court. This enforcement of the limitation by the Court was one reason for Judge Smith's reluctance to discard it in *Farmer.* 324 F.2d at 367 (dissenting opinion). However, rule 47 has been abrogated by the Advisory Committee on Admiralty Rules in its recent revision of the rules. See Amendments to Effect Unification of Civil and Admiralty Procedure, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I (March 1964).

[13] FED. R. CIV. P. 45 (e). This rule replaced the code provision for subpoena limits, 28 U.S.C. § 654 (1940) (formerly Act of March 2, 1793, ch. 22, § 6, 1 Stat. 335).

[14] Act of May 10, 1949, ch. 96, 63 Stat. 65. This amendment, among other changes, added the proviso dealing with foreign witnesses. See note 11 *supra.* The majority in *Farmer* interpreted this proviso as abrogating the 100 mile rule to the extent that it applied to foreign witnesses; *i.e.,* that all witnesses covered by the proviso were entitled to full compensation for travel expenses from origin to destination and that these expenses were to be taxed as costs without limitation. The dissent, on the other hand, concluded that the proviso merely substituted *actual per mile* rates for the statutory rates and that the actual rates were taxable as costs, but only to the extent of one hundred miles. Since the 100 mile rule was in effect at the time of the amendment and since there is no specific mention of the rule either in the amendment or in its legislative history, the analysis of the dissent seems to be sound. See S. REP. NO. 187, 81st Cong. 1st Sess. (1949), reprinted in 1949 U.S. CODE CONG. SERV. 1231-33. Moreover, there is authority to the effect that the 1949 amendment dealt only with allowances to witnesses and not with taxable costs. See, *e.g.,* Ludvigsen v. Commercial Stevedoring Co., 228 F.2d 707 (2d Cir.), *cert. denied,* 350 U.S. 1014 (1956).

However, as this note points out, there are valid reasons for rejecting the rule which are not dependent on statutory interpretation.

be borne by the incurring party;[15] and that all persons, particularly impecunious persons, should be assured access to the courts.[16] However, the normal practice of imposing attorney's fees on the incurring party is sufficient compliance with the first axiom and therefore the 100 mile rule merely adds an unnecessary burden to the prevailing party.[17] Furthermore, the second axiom would be more effectively served by a discretionary rule, whereby the court might consider such factors as "the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith."[18]

The rule of discretion adopted in *Farmer* is consistent with well established practice. In Engalnd, costs representing substantially all of the expenses of an action are awarded, at the court's discretion, to the prevailing party.[19] Similarly, in American federal courts, before the appearance of the Federal Rules of civil procedure, costs were allowed to the prevailing party at the court's discretion in equity, but as a matter of course at law.[20] Under the Federal Rules, however, costs in all actions are allowed at the court's discretion, unless prohibited by statute or the rules.[21] Although the American

[15] 324 F.2d at 363, 367-68.

[16] 324 F.2d at 363, 365.

[17] "Fees for legal services are *usually* the largest single expense of litigation. *In most cases,* the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further. Certainly there is no reason to extend it by the curious means of limiting the recovery of travel expenses to 100 miles . . . ." 324 F.2d at 363. (Emphasis added.)

Since the 100 mile rule itself and federal statutes, *supra* notes 10 and 11, reduce to some degree the burden of costs borne by the prevailing party, this axiom may be of questionable validity. Certainly the court accepts it to a limited extent only.

[18] 324 F.2d at 363. This statement forms one basis for defendant's cross petition to the Supreme Court for a writ of certiorari, on the ground that it advocates a deep pocket theory of justice. Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, pp. 5, 10-11. While it is true that defendant was denied certain costs in *Farmer,* substantial costs were imposed on the financially weaker of the two parties, indicating that the court, at least, did not consider the ability to pay to be controlling. However, the denial of costs is usually based on the presence of bad faith, and if the court did consider the relative financial resources of the parties, this would be a novel element of discretionary power in American courts. For discussions of the use of substantial costs to control parties in cases of bad faith, see, *e.g.,* Goodhart, *supra* note 1, at 877-78; Comment, 44 ILL. L. REV. 507 (1949); Comment, 49 YALE L.J. 699 (1940); Note, 53 COLUM. L. REV. 78 (1953); 74 HARV. L. REV. 1464 (1961).

[19] See Goodhart, *supra* note 1, at 854.

[20] BARRON & HOLTZOFF, *op. cit. supra* note 1, § 1195, at 43.

[21] FED. R. CIV. P. 54(d) provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."

rule is basically similar to the English rule, the practice in American courts is to deny the taxation of certain major items of expense,[22] particularly attorney's fees.[23] Such allocation is still a matter of discretion, however, and courts have frequently asserted the power to allow any costs where there are compelling equitable considerations.[24]

The one hundred mile limitation on the court's discretionary power to tax expenses of witnesses will not withstand close analysis. In the first place, even as a means of allocating costs under the prevailing American rule, the limitation is arbitrary and outdated. The one hundred mile subpoena limit from which it was implied was first codified in 1793.[25] While the extension of the subpoena limit to taxable travel expenses may have had some validity then, it seems unrealistic today in light of modern transportation. If an arbitrary limit is essential, a more meaningful figure, perhaps five hundred miles, should be adopted. In addition, it is evident that the 100 mile rule is inconsistently applied. For example, subsistence allowances for witnesses from outside subpoena limits are not arbitrarily

[22] The specific costs allowable are prescribed by statutes, court rules, and local practices. See, *e.g.*, *Ex parte* Peterson, 253 U.S. 300, 316-17 (1920); Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897, 899 (9th Cir. 1956); McWilliams Dredging Co. v. Department of Highways, 187 F.2d 61, 62 (5th Cir. 1951); Williams v. Sawyer Bros., 51 F.2d 1004, 1005 (2d Cir. 1931).

[23] MOORE, *op. cit. supra* note 1, ¶ 54.70, at 1301-02. Expert witness fees and pretrial expenses are also generally disallowed; however, attorney's fees represent the largest single item of expense of a lawsuit. *Id.*

The disallowance of attorney's fees as costs in the United States stems from the general antipathy toward lawyers in the colonies and from the idea that the expense of a lawsuit is an accepted risk of society. See generally, POUND, THE SPIRIT OF THE COMMON LAW 112-38 (1921); Goodhart, *supra* note 1, at 873.

Statutes in some jurisdictions allow token amounts to be taxed as attorney's fees, but these amounts usually represent a minimal portion of actual fees. See, *e.g.*, Distler, *The Course of Costs of Course*, 46 CORNELL L.Q. 76 (1960); Goodhart, *supra* note 1, at 873-74. However, there are several federal statutes which allow full recovery of attorney's fees as an element of damages in certain actions. For a comprehensive list of such statutes, see MOORE, *op. cit. supra* note 1, ¶ 54.71[2], at 1318-22. See also note 24 *infra* and accompanying text.

[24] See, *e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466, (6th Cir.), *cert. denied*, 326 U.S. 775 (1945); Swan Carburetor Co. v. Chrysler Corp., 149 F.2d 476 (6th Cir. 1945); American Auto Ass'n v. Spiegel, 128 F. Supp. 794 (E.D.N.Y. 1955); Coca-Cola Co. v. Dixi-Cola Labs., Inc., 57 F. Supp. 911, 913 (D. Md. 1944), *aff'd in part and rev'd in part*, 155 F.2d 59 (4th Cir.), *cert. denied*, 329 U.S. 773 (1946). *But see* United States v. Kolesar, 313 F.2d 835, 838 (5th Cir. 1963); Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 51 F. Supp. 36, 40 (S.D.N.Y. 1943), *rev'd*, 145 F.2d 215 (2d Cir. 1944) *rev'd*, 325 U.S. 797 (1945).

[25] Act of March 2, 1793, ch. 22, § 6, 1 Stat. 335.

limited.[26] Moreover, subpoena limits are irrelevant in determining whether a witness is to be paid. The relevant factors considered by the courts are the materiality of the testimony[27] and the necessity for attendance,[28] even in the case of voluntary witnesses from outside subpoena limits.[29]

Secondly, the 100 mile rule is not an effective device for protecting the interests of poor litigants. A party with a just claim may be equally deterred by the prospect of paying the mileage of his own witnesses in excess of one hundred miles as by the prospect of bearing the full travel expenses of his adversary's witnesses.[30] The rule benefits the indigent loser, but hurts the indigent victor. The *Farmer* rule, on the other hand, while permitting general obeisance to the American rule of costs and preventing inequities through the exercise of judicial discretion, would also allow full recovery in appropriate cases.[31]

Finally, absent the implication from subpoena limits, there seems to be no valid reason for treating witnesses' mileage differently from other specific statutory items.[32] One reason often advanced is that unlimited travel expenses would be unreasonably large and

[26] See, *e.g.*, Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897 (9th Cir. 1956); Banana Distribs., Inc. v. United Fruit Co., 19 F.R.D. 532 (S.D.N.Y. 1956); Gallagher v. Union Pac. R.R., 7 F.R.D. 208 (S.D.N.Y. 1947). See also note 11 *supra*.

[27] See, *e.g.*, Spiritwood Grain Co. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1950).

[28] See, *e.g.*, Peck, *supra* note 1, at 795.

[29] See, *e.g.*, Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897 (9th Cir. 1956); Gallagher v. Union Pac. R.R., 7 F.R.D. 208 (S.D.N.Y. 1947).

[30] For example, if the *plaintiff* in *Farmer* had transported the witnesses from Saudi Arabia and had *lost* the suit, he would have paid $7,591.00 in mileage expenses ($3,995.50 for the first trial and $3,595.50 for the second trial). See notes 6 and 8 *supra*. On the other hand, if he had *won* the suit, his expenses would still have been $7,399.00 ($7,591.00 less $192.00 taxable under the 100 mile rule). Clearly the deterrent effect in either case would be substantial.

[31] The liberalization and increased use of actions *in forma pauperis* under 28 U.S.C. § 1915 (1958) would provide additional protection for the impecunious litigant. See, *e.g.*, SMITH, JUSTICE AND THE POOR 20-30 (3d ed. 1924); WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 574-75 (1929); Goodhart, *supra* note 1, at 875; Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

[32] 28 U.S.C. § 1920 (1958) provides for taxation of: "(1) Fees of the clerk and marshall; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees . . . ."

Similarly, there are compelling reasons not to treat ordinary witnesses' expenses in the same manner as attorney's fees. First, there are no express statutory limitations on witnesses' expenses, whereas attorney's fees are allowed by statute only in special cases or in limited amounts. Second, witnesses' expenses do not have the same historical background as attorney's fees. See notes 14 and 23 *supra*.

that the taxation of such sums would impose an excessive burden on the losing party.[33] However, other taxable costs also involve large sums[34] which are often allowed under the discretionary power of the courts.[35] If the discretionary rule is effective in controlling other sizeable items, it should be equally effective in controlling witnesses' expenses. It is also urged that depositions afford an effective and less expensive substitute for the calling of witnesses.[36] Although this may be true in some cases, it must be remembered that deposition expenses are also taxable as costs and have themselves been criticized as being burdensome in some instances.[37] Moreover, as *Farmer* indicates, the physical presence of witnesses at the trial is often critical.[38] Therefore, it would seem that the availability of depositions should not preclude the allowance of actual mileage for witnesses, but should merely weigh in the court's exercise of discretion.

The instant decision, in rejecting the 100 mile rule as being arbitrary and anachronistic, is sound. There are compelling reasons for the adoption of a rule of discretion which will allow the court to consider the equities of each situation and to treat witnesses' expenses in the same manner as other statutory costs. In light of the safeguards of appellate review[39] and the store of judicial experience

[33] See, *e.g.*, Lee v. Pennsylvania R.R., 93 F. Supp. 309, 310 (E.D. Pa. 1950); Barnhart v. Jones, 9 F.R.D. 423, 425 (S.D.W. Va. 1949); Buffalo Ins. Co. v. Providence & Stonington S.S. Co., 29 Fed. 237 (C.C.S.D.N.Y. 1886). It is interesting to note that both the trial judge who formulated the *Farmer* rule and one dissenting appellate judge in *Farmer* expressed the same fear of extravagant lawsuits. *Compare* 31 F.R.D. at 193, *with* 324 F.2d at 369.

[34] It is not difficult to imagine cases where even extensive mileage allowances would be less than other allowable costs. For example, in the instant case, if three of defendant's witnesses had flown from California to New York for one trial, the actual mileage under the statute would be $1,440.00 (three witnesses x 6,000 miles x eight cents per mile), which is less than the allowance for the single item of stenographic fees ($1,812.30).

[35] See, *e.g.*, Farmer v. Arabian Am. Oil Co., 324 F.2d 359 (2d Cir. 1963) (stenographic fees, $1,812.30); Swan Carburetor Co. v. Chrysler Corp., 149 F.2d 476 (6th Cir. 1945) (charts and drawings, $3,179.80); Commerce Oil Ref. Corp. v. Miner, 198 F. Supp. 895 (D.R.I. 1961) (stenographic fees, $1,767.90). See also notes 15 and 16 *supra* and accompanying text.

[36] See, *e.g.*, cases cited note 33 *supra*.

[37] See, *e.g.*, Bank of America v. Loew's Int'l Corp., 163 F. Supp. 924, 929-30 (S.D.N.Y. 1958). See generally CHADBOURN & LEVIN, *op. cit. supra* note 1, at 427-63. Deposition expenses are usually taxable as costs if the deposition was necessary or if it seemed necessary at the time of taking, even though never used at the trial. These expenses include fees for the presiding officer, stenographer, and sometimes a statutory allowance for attorney's fees. See BARRON & HOLTZOFF, *op. cit. supra* note 1, § 1197, at 55-62.

[38] 324 F.2d at 364.

[39] The issue of the appealability of a judgment solely for costs was faced by the

with comparable discretionary matters,[40] the *Farmer* rule should be readily acceptable to the courts.[41]

---

court in *Farmer,* which held that a judgment is appealable where the question involves an abuse of discretion by the trial court. This would seem to be in line with recent cases. See, *e.g.,* Kemart Corp. v. Printing Arts Research Labs., Inc., 232 F.2d 897 (9th Cir. 1956); Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 207 F.2d 67 (2d Cir. 1953), *cert. denied,* 347 U.S. 904 (1954); Prudence-Bonds Corp. v. Prudence Realization Corp., 174 F.2d 288 (2d Cir. 1949); Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949), *cert. denied,* 338 U.S. 948 (1950). *But see* Newton v. Consolidated Gas Co., 265 U.S. 78 (1924); Walker v. Lee, 71 F.2d 622 (9th Cir. 1934); The James McWilliams, 49 F.2d 1026 (2d Cir. 1931). See also Goodhart, *supra* note 1, at 877. Moreover, the issue appealed from involved more than the allowance of certain items or the amount to be taxed; there was also the complicating matter of the review of a decision of one trial court by another trial court. 324 F.2d at 364.

[40] See, *e.g.,* Goodhart, *supra* note 1, at 877; Comment, 44 ILL. L. REV. 507, 515-20 (1949); Comment, 49 YALE L.J. 699, 710-12 (1940).

[41] The Supreme Court granted certiorari to both parties in *Farmer* on the questions of (1) consideration of the relative financial resources of the parties; (2) appealability of a judgment solely for costs; (3) interpretation of the 1949 amendment to 28 U.S.C. § 1821 so as to reject the 100 mile rule. 84 Sup. Ct. 799 (1964). See notes 14, 18, and 38 *supra.*