Indiana Law Journal

Volume 17 | Issue 5 Article 3

6-1942

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COMMENTS ON THE REPORT OF THE COMMITTEE ON JURISPRUDENCE AND LAW REFORM.

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In embarking upon a study of the report of the Committee on Jurisprudence and Law Reform, one must be willing to abandon some of the conventionalities to which we have been accustomed for generations. That, after all, is the spirit of the new Federal rules and is one that certainly commends itself to the litigant whose interests are at stake.

In the main the Committee's recommendations follow the Federal rules. There are some departures, but a study of these variances will lead to a conviction, it is believed, that they tend somewhat to simplification.

Appellate Procedure begins with a fair presentation of the question in the trial court. The machinery set up for obtaining a review of an adverse decision should be simple and efficacious. While it should be cast in a well defined pattern, it should be free, if possible, from technicalities and procedural pitfalls.

The first recommendation of the Committee is that bills of exception be retained. This is maintaining some of the formality that has been abandoned in the Federal rules under which the evidence is not incorporated into a bill of exceptions, but the reporter's transcript is filed and sent up by the clerk to the Circuit Court of Appeals, in most cases without having it brought to the attention of the trial judge. There is one feature of the Federal rule 75 (h), however, which might well be incorporated into the Indiana practice. It is entirely possible for errors or omissions to creep into a bill of exceptions even after the most careful scrutiny by the reporter and counsel. Serious complications or even fatality may result from such error or omission, and therefore it seems only reasonable that the trial court should be vested with authority to make corrections "on a proper suggestion or of its own initiative" and cause the corrected record to be transmitted to the court of appeal. Occasions to apply this rule will be comparatively rare but probably extremely

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critical. It can hardly be assumed that lawyers will be less diligent, relying upon the protection of this rule, in endeavoring to have their bills of exception correct in the first instance.

The second recommendation is to abolish assignments of errors, and the third, to abolish the motion for new trial. These may be discussed together. The Committee objects to carrying on the traditional burden of naming everybody to the record in a paper called Assignment of Errors. This instrument is archaic as it is used in Indiana. Long ago some judge on appeal conceived the idea of treating the cause in the court of appeal as a new case, and, reasoning from that, that the assignment of errors is the complaint. Of course, if this principle is sound this conclusion is fair enough, but no modern authority treats an appeal as a separate lawsuit. It is nothing more or less than an additional step in the original case. There is no more occasion for naming all the parties in some paper in the Appellate Court than there would be for re-naming them all over again when filing an answer or any other pleading except the complaint or amendments thereto.

Roscoe Pound, in his very late work entitled "Appellate Procedure in Civil Cases," states the whole case in this language: "A case goes up on appeal and the parties go with it." Assignments of error have been abolished in the Federal courts except insofar as the instrument is used merely to indicate that less than the whole record will be taken up. In appeals to the Circuit Court of Appeals it is designated as Statement of Points. Rule 75(d).

It is the Statement of Points provided for in Rule 75(d) that can take the place of the motion for new trial and the assignment of errors. In fact, it does so in the Federal practice. A motion for new trial is not in the chain of procedure to take an appeal. About all it amounts to is to delay proceedings while it is pending and undisposed of in the district court. There can be no substantial objection to having one paper take the place of two.

The proposal of the Committee is that within twenty days after verdict or decision a statement of *all* errors alleged to have occurred at any time from the inception of the case shall be filed in the trial court. At the threshold let us note that this will at once eliminate the perplexing prob-

lem that lawyers frequently confront in attempting to determine whether a certain error is to be presented by the motion for new trial, or must be treated as an independent error and made the basis of an assignment of error on appeal. Cases are constantly coming down from reviewing courts in which lawyers have been mistaken on this particular point. It will no longer be a matter of concern and it should not be. There is no good reason why the reviewing court should be concerned with the manner of presenting the matter to the lower court. In fact, under the proposed rule all alleged errors will be grouped into one instrument. This is to be filed and called to the attention of the trial court. It may be very informal in form. In fact, it would be sufficient to say that "the following errors are alleged to have occurred in the proceedings in this cause and will be presented for review on appeal if an appeal is taken." They can then be enumerated and will include rulings on pleadings, introduction of evidence, the charge to the jury, and everything else that the aggrieved party thinks should be presented to a reviewing court. The present requirements as to the presentation of questions in the motion for new trial can readily be continued as to the statement of errors. The trial judge may consider this instrument as equivalent to a motion for new trial. If he is convinced that there are reversible errors in the statement of errors lodged in his court, he may grant a new trial, but he must do so within thirty days.

Here another departure from the traditional procedure is introduced. Instead of allowing the trial judge to hold up a motion indefinitely, as it is sometimes done very grievously to the parties, it is automatically out of the trial court at the end of thirty days unless a new trial is granted in the interim. It is strongly urged that this departure alone will be a great boon to the people whose interests are tied up in the courts. They have a right to minimize the delay, and one of the worst offenses of trial judges is in this respect. There seems to be no limit upon the time that may be taken to pass upon a motion for new trial, and the records show that motions have been held up for several years in this state.

Of course, it goes without saying that no question which has not been embodied in the statement of errors filed in the trial court will be considered on appeal. The traditional right of a trial judge, as we sometimes hear it said, to

review his rulings, is strictly preserved by the method here outlined. In that respect the proposals of the Committee depart slightly from the Federal rules. In the United States District Court the judge gets one opportunity, and only one, to decide a question, if the losing party chooses his option to appeal without filing a motion for new trial.

At this point it is appropriate to consider the 6th recommendation of the Committee, which is that the substance of Rules 73, 74, 75 and 76 of the rules of procedure for United States District Courts be adopted. These rules are much simpler than a cursory reading might indicate.

Let it be assumed that the case has now reached the point where the trial court has not acted upon the statement of errors filed after the trial, and at the end of thirty days the losing party is confronted with the alternative of abiding by the judgment or taking his appeal. It is at this point that the proposed Federal rules come in. Rule 73 requires simply a Notice of Appeal filed in the district court. It is not required in this notice to name all the parties on the record but simply the parties taking the appeal and that part of the judgment appealed from and the name of the court to which it is taken. The clerk then has the responsibility of getting this notice to the parties. This is entirely informal. 73(b).

Moreover, it is not jurisdictional and does not prejudice the appealing party. In fact, after the filing of the Notice of Appeal failure of the appellant to take further steps to secure review of the judgment does not affect the validity of the appeal. 73(a).

Instead of having the trial court fix an appeal bond, the rule fixes the bond at $250.00. 75(c) However, if proceedings are to be stayed, the appellant may be required to present a supersedeas bond which is to be approved by the judge. There are many cases, therefore, in which there will be no supersedeas bond and the appeal bond of $250.00 is ample.

Rule 73(f) injects a salutary provision by which the surety on the appeal or supersedeas bond subjects himself to the jurisdiction of the court and appoints the clerk as his agent for service of any papers affecting his liability on the bond, and that liability may be enforced without an independent action. Under the present practice in Indiana one may be compelled to maintain two lawsuits, one to establish his

rights, and the other to collect the money from a surety.

Rule 73(g) requires the docketing of the appeal within forty days from the date of the Notice of Appeal. This may be enlarged not to exceed ninety days. This is practically the present rule in Indiana, except that it enlarges the preliminary time from thirty to forty days.

Having filed his Notice of Appeal and his appeal bond, the next step required on the appeal is to designate the parts of the record which it is desired to use. That is, under the Indiana practice one must now file a praecipe, but under the Federal rules there is no serious risk taken as to how to formulate a praecipe or that something important might be omitted. This is another rock upon which numerous meritorious appeals have been wrecked in Indiana. It is highly technical and nothing more or less in the last analysis than a procedural pitfall. Certain parts of the record are automatically to be included whether called for in the praecipe or not. Rule 75(g).

This clause of Rule 75 is another instance of taking drudgery off the appealing attorney. He knows that practically everything he wants is to be in the transcript whether he calls for it or not. He can be giving his attention to the merits of the case, where his attention belongs.

Rule 75(d) calls for a Statement of Points or Assignment of Errors where less than the full record is required. This point is already in the Statement of Errors, used instead of a motion for new trial and assignment of errors in the reviewing court.

Rule 75(e) is worthy of attention because it calls for an abbreviation of the record; it forbids repetition. It ought to be sufficient to incorporate a document once and say at the other places where it would appear that it is the same document as appears at record so and so. The court can very well adopt a rule or policy of treating this reference as verity regardless of whether it is made by the trial judge in the bill of exceptions or the clerk certifying the record. There is authority for saying that the Supreme Court would so hold,[1] but the ultra-cautious lawyer may decline to take the risk.[2]

It will be noted that not only does the rule forbid a duplication of the instruments but it calls for an abridgment

[1] Henry v. Thomas, Exec. 118 Ind. 23.
[2] Sanders v. Farrell, 83 Ind. 28.

as well. Where the appellant prepares a bill of exceptions with an abridged lengthy instrument, using only such parts as he deems pertinent, the appellee may call for such parts as he feels are improperly omitted. Rule (75a).

It is firmly believed that the recommendations of the Committee, if adopted, will very materially simplify the manner of taking an appeal. The question of the merits of the appeal is another matter. There can be no machinery which will assure an intelligent presentation of a case by an incompetent or careless lawyer. But the difficulty today is that the machinery gets in the way of the capable lawyer and prevents his concentration upon the questions involved by too much emphasis upon the manner in which he shall present them. The issues on appeal are much more important than the procedural practice by which they are to be carried up.

It is possible, as we know it is done in England, to hear and dispose of appeals successfully and satisfactorily without any formality, even without a brief. English litigants get their cases heard without undue delay and with a minimum of procedural problems. There is no reason except tradition which compels us to use more expensive and cumbersome methods. As to attaching exhibits to the transcript, it will be noted that under the Federal practice, instead of being put into a bill of exceptions, they are assembled by the clerk below and transmitted with the record. When the oral argument comes on, or at any other time, the judges having the case under consideration may call for the exhibits and examine them. They then go into the custody of the clerk of the Appellate Court. Nobody suffers from this informality, and it should be adopted and encouraged in Indiana. Rule 75(i).

There remains for consideration one further recommendation of the Committee. That involves an admonition to Indiana lawyers to observe the spirit of the rule requiring a summary of the record in appellant's brief. The Committee says: "We believe the purpose and spirit of the rule is to have just enough of the record included in the brief to present the question and not necessarily to include the testimony of all witnesses or print all exhibits." Here again most lawyers are fearful of doing too little. So they commit the opposite error of doing too much. Appellant should fairly

be allowed to include in his summary of the abstract of the record just what is necessary to present his question. This will call, of course, for intelligent and skillful preparation. If he is remiss in this task, or the appellee feels that to defend the judgment he must bring forward other parts of the record not summarized by the appellant, he may do so. It should not subject the appellant to the ultimate disaster of dismissal or affirmance of his appeal because his judgment differs from the appellee's in this respect.

The fourth recommendation is that the Supreme Court adopt a rule to the effect that where an appellee files a motion to dismiss an appeal, the time for filing his brief shall, upon petition, be extended to a date thirty days beyond the date of overruling the motion. As the rule now stands one may be compelled to write a brief on the merits while his motion to dismiss is pending. It has been suggested that this proposed rule would encourage appellees to file motions to dismiss not in good faith. A few disciplinary examples, such as taxing costs or other rebuke to the appellee, would probably eradicate this evil or hold it to a minimum. The court can very well hold in such cases that in its judgment the motion to dismiss is frivolous. It may be that the rule should be amended by this qualification, that if the motion is found to be frivolous the appellee may be ordered to file his brief within five days of the overruling of the motion. If one presented such a motion in bad faith he would probably know it as well as the court and have the brief in readiness. So that after all he would gain little, if any, time by the subterfuge.

The lawyer who wishes to use procedure for the purpose of entrapment or ambush will take little comfort from the report. But certainly, the profession must take the broad view and should subscribe to the creed which we have heard before, which I conceive to be this:

A litigant has the right to have his cause presented by a thoroughly trained lawer of integrity and ability, to an impartial judge, capable of analysis and discrimination, and prompt in his decisions, and an early review of the decision by a court equally capable, unhampered by unnecessary procedural technicalities. The method and manner of presenting

a cause must be completely subordinated to the ultimate objective. While the orderly processes of practice must be observed, yet an appeal must not be paralyzed by a praecipe, nor should a lawyer agonize over an assignment of errors.

The approval of this report at the Annual meeting will be a forward step and encourage the Supreme Court to make further improvements in the practice. Thus will be further enhanced the high esteem which the Court has already attained among students of procedure by reason of its courageous use of its rule-making power.