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COMMON MISTAKES IN APPELLATE PROCEDURE

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An ancient statement, with which all law students are familiar, is that, "A doctor buries his mistakes but a lawyer's mistakes are written in the books."

Doubtless many of you are of the opinion that the time of the Supreme and Appellate Courts of our state is spent entirely in dealing with the mistakes of the trial courts from which such appeals are taken. Such is not wholly true.

In about 13 per cent of our cases motions are filed to dismiss the appeal. These motions are usually predicated upon failure of the attorneys for the appellant to recognize and comply with the statutory requirements and rules of the court governing appellate procedure.

During the calender year ending June 30, 1939, our court passed upon 29 motions to dismiss appeals. During the calendar year ending June 30, 1940, our court passed upon 35 such motions. During the last year 8 appeals were dismissed under Rule 16 for failure of the appellant to file briefs within the time limit and 2 were transferred to the Supreme Court because the appellant had mistaken the jurisdiction of the Appellate Court in such matters.

In 1939 our court disposed of 186 cases. 31 cases, or 16⅔ per cent, of the number disposed of were not decided upon the correctness of the judgment appealed from. In 1940, 172 cases were disposed of. Of this number, 17 per cent were disposed of for reasons other than errors made by the trial court. If you add to these percentages the number of cases disposed of on motions to dismiss, it is apparent that more than one-fourth of the time of the court is occupied in dealing with mistakes made by lawyers who represent their clients on appeal. It follows therefore that the business of the courts could be expedited if many of the mistakes commonly made by the attorneys on the appeal of cases could be eliminated.

I desire, therefore, to call your attention to a few of

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the mistakes which most frequently appear in the records which come before us.

Rule 5 of the Revised Rules of the Supreme and Appellate Courts of Indiana, adopted June 21, 1937, and substantially embodied in Rule 2-6, 1940 Revision, provides that, "The appellant shall attach to the front of the Transcript following the index a specific assignment of the errors upon which he relies and he shall therein properly entitle the cause." Now it seems that there should be no difficulty in following this rule. Yet appeals come to our court wherein the assignment of errors is found at the back of the Transcript or in the center of the record. We sometimes find the assignment of errors filed under a separate cover and as a separate instrument, or even attached to the front of the record and outside the covers.

However, Judge Tremain, in a recent decision of the Supreme Court, in passing upon the question of compliance with this rule said:

> "Rule 5 of this court, adopted June 21, 1937, does require the assignment of errors to be attached to the 'front of the transcript, following the index.' This rule was made for the convenience of this court, to facilitate the consideration of cases. The record in this appeal is not voluminous, and we have not been seriously burdened by this technical failure to comply with the rule. The appeal will not be dismissed."[1]

It would seem, however, that even inexperienced lawyers should find no difficulty in the proper preparation and location in the record of the assignment of errors.

Another mistake commonly made has also to do with the preparation of the assignment of errors. Rule 7 of the Rules governing appeals provides that, "The assignment of errors shall contain the full names of all parties to the judgment, and process when necessary shall issue accordingly."[2] It seems that considerable difficulty is experienced by attorneys in determining who shall be made parties on appeal. It would seem an easy matter to name in the assignment of errors all the parties to the judgment below. The question frequently arises, however, as to the necessity of making parties those who were defaulted in the trial court.

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[1] Collins *et al.* v. Siegel *et. al.*, 214 Ind. 206, 212, 14 N.E. (2d) 582, 584 (1938).

[2] Rule 2-8, Ind. Sup. & App. Cts, 1940 Rev.

Our Supreme Court held in the case of the *Second National Bank of Robinson, Ill. v. Scudder,*[3] that those defendants who were personally served with process and made default are not necessary parties on appeal. This statement is criticized somewhat by the Supreme Court in a later decision in the case of *Johnson et al. v. Indianapolis Co.,*[4] wherein the court stated that, " . . . it must be conceded that the expressions in the opinions upon the question of whether or not defaulted defendants are necessary parties to an appeal, and whether it is necessary to serve them with notice, are most confusing." The rule is approved as announced in the Scudder case, however, on the basis that the Scudder case involved a term time appeal. In the Johnson case the court states that "notice to all co-parties of a vacation appeal is a minimum requirement." The Supreme Court further decided that parties before the court on constructive notice, and defaulted, were necessary parties to an appeal.[5]

From an analysis of these cases it would seem proper practice therefore to make all persons defaulted in the trial court parties on appeal, save and except those term-time appeals wherein the defaulted parties were personally served.

Some confusion has arisen as to the proper interpretation of the phrase "parties to the judgment." Our Supreme Court recently held that "persons may be made parties to an appeal when they were parties to the record and interested in maintaining the judgment even though they were not actually parties to the judgment."[6] In this case the action was begun against the Chicago & E. I. R. R. Company and afterwards one Thompson was appointed trustee for the company and he was made an additional party defendant. The trial court sustained a motion and entered an order staying the proceedings permanently as against Thompson, the trustee. Judgment was entered for the railroad company on the trial of the case, and on appeal Thompson was made a party. The Supreme Court held this proper even though he was not a party to the judgment. The court said, "He was still a party to the record when the judgment was entered against the appellant. In maintaining this judgment the

[3] 212 Ind. 283, N.E.(2d) 955 (1937).
[4] 19 N.E. (2d) 940 (Ind. 1939).
[5] Second National Bank v. Scudder, *supra* n. 3.
[6] Bartley v. Chicago & E.I.R.A. Co., 24 N.E.(2d) 405 (Ind. 1939).

trustee has such an interest as to justify making him a party appellee to this appeal."[7] In the light of this statement, it is apparent that parties other than those named in the judgment are in some instances proper parties on appeal. A rule sufficiently broad to include all cases does not seem to have been formulated.

Another mistake commonly made by attorneys has to do with the preparation of the record for perfecting a term-time appeal. The manner of perfecting a term-time appeal is provided by statute and it has been many times held that a failure to follow the steps as outlined operates to deprive the court of jurisdiction of the appeal. Our statute provides that the court at the time of overruling the motion for new trial shall fix the amount of the bond and the time in which the same shall be filed and if that time is beyond the term, shall designate and approve the surety on such bond. Sec. 2-3204, Burns Ind. Statutes, 1933 Rev. This is a matter that is vital in perfecting a term-time appeal and so our court has held in the recent case of *Reitzel v. Campbell*,[8] that failure to follow such procedure must result in dismissal. In that case our court said:

> "It is well settled that, in order for a party to perfect a term-time appeal, it is essential that the bond be approved by the court at the term at which the appeal is granted, or that the equivalent be accomplished by the court fixing the amount of the bond and naming and approving the sureties at such term, and by appellant filing the same in accordance with such order, within the time granted by the court and shown by the record."

Where the bond is not filed during the term, the penalty of the bond and the time for filing it must be fixed and the surety or sureties thereon must be approved by the court during that term. It has accordingly been held that where the bond is not filed in term-time, failure to fix the amount and penalty of the bond deprives the court of jurisdiction in term-time appeals.[9]

Another common error which occurs time after time in the records on appeal is embodied in the reasons given in support of a motion for new trial. The statute defines the causes for a new trial and the sixth statutory cause is

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[7] *Supra* n. 6, at 407.

[8] 103 Ind. App. 650, 5 N.E.(2d) 148 (1936).

[9] McClara v. Snow *et al.*, 22 N.E.(2d) 900 (Ind. App. 1939).

this: "That the verdict or decision is not sustained by sufficient evidence or is contrary to law."[10] It seems that this is sufficiently plain and understandable, but many times motions for new trial are filed which seek to embody causes other than those designated by statute. Attorneys will assign as causes for a new trial that the judgment of the court is not sustained by sufficient evidence. And so it is necessary for our court to say over and over again that "assigning as causes for a new trial that the judgment is not sustained by sufficient evidence or is contrary to law raises no question."[11]

Similarly, assigning as reason for a new trial that the judgment and decision of the court is not sustained by sufficient evidence, that the judgment is against the weight of the evidence, that the verdict of the jury is contrary to the evidence, that the judgment or decision is clearly against the weight of the evidence, and many others, have all been held to be improper and insufficient to present any question.

While on the subject of new trials, let me say further that in my opinion, generally speaking, motions for new trial are entirely too long. They assign too many reasons. I can hardly conceive of a case where it is necessary to assign 100 reasons in support of a motion for new trial, yet records come to us in which many more than that number are assigned in support of such motions.

In discussing Appellate practice, an article in the Indiana Law Journal of March, 1932, contains this statement:

"There are but few substantial questions in any appeal. Some attorneys, and this school is not a small one, believe in an omnibus attack, presenting everything trifling, or otherwise, in the hope as Justice Holmes once said, that something would be made to stick. Others concentrate on points which they can emphasize and, moreover, do not smother up as a few grains of wheat in many bushels of chaff. Moreover, arguments limited to 20 or 30 minutes on a side would be excellent lessons in concentration. It is well-known that the most efficient counsel appearing before the Supreme Court of the United States are usually very brief. One famous member of that court, a few years ago as a practitioner therein sucessfully presented a very important case in a printed brief of 6 pages, citing 2 cases. Few cases will not lend themselves to a policy on the part

[10] 1933 Burns' Ind. Stat. §2-2401.

[11] State *ex rel.* v. Boyd, 28 N.E.(2d) 256, 262 (Ind. 1940).

of counsel of constantly narrowing the issue; as a case progresses through the courts, they should gradually focus and not scatter."[12]

It would be a great time saver for both courts and lawyers if only the propositions which constitute reversible error were selected and discussed both in motions for new trial and on appeal.

Another mistake commonly made by attorneys in the appeal of cases involves the time for perfecting appeals. The rules of practice and procedure now in force[13] provide that all appeals must be taken within 90 days from the date of the judgment or the ruling on the motion for new trial. Accordingly, our Supreme Court said, in the case of *Roebuck, et al. v. Essex*,[14] "The purpose of Rule 1 was to reduce the maximum time for appeals. The rule must be treated as controlling all appeals except those governed by statute fixing a shorter time." It is apparent therefore, that the statutory provisions which formerly controlled and fixed the time for the perfecting of appeals no longer control. This is true in criminal cases where the statute provides that the transcript must be filed within 60 days after service of notice of the appeal.[15] So our Supreme Court said in the case of *Smith v. State*:

"In this case the record shows that notice of the appeal was acknowledged by the prosecuting attorney on December 3, 1937, and the transcript was filed with the clerk of the Supreme Court on February 26, 1938, 85 days after the service of notice. The 60-day provision of the old statute does not now control. So long as a notice has been given by the appellant and the transcript filed in the office of the clerk within 90 days from the date of judgment or the ruling on a motion for a new trial, it will be sufficient. The record in this case discloses that the motion for a new trial was overruled Dec. 1, 1937, 87 days before the record was filed in this court. This was sufficient. The motion to dismiss the appeal was heretofore properly denied."[16]

It is apparent from the cases above cited that the 90-day rule now governs all appeals and yet quite frequently attorneys fail to file their record within this allotted time.

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[12] Bomberger, Unnecessary Delays in Appellate Procedure, 7 Ind. L.J. 348 (1932).

[13] Rule 1, Ind. Sup. & App. Cts, 1937; Rule 2-2, Ind. Sup. & App. Ct, (1940 Rev.)

[14] 214 Ind. 637, 17 N.E.(2d) 460 (1938).

[15] 1933 Burns' Ind. Stat., §9-2308.

[16] 19 N.E.(2d) 549 (Ind. 1939).

Approximately one-fourth of the cases dismissed by our court are dismissed because of failure to file the transcript as directed in the Clerk's office within 90 days after the date of the judgment or the overruling of the motion for new trial.

Considerable difficulty is also experienced in the manner of the giving of notices required in vacation appeals. Our statute provides that after the close of the term at which the judgment is rendered an appeal may be taken by the service of a notice in writing on the adverse party or his attorney and also on the Clerk of the court in which the proceedings were had. When this is done the party may perfect his appeal by filing his transcript in the Clerk's office within the allotted time. This is commonly described as the unofficial notice. The statute further provides that if the unofficial notice is not given, such an appeal may be taken by filing the transcript in the office of the Clerk of the Supreme Court and upon such filing the Clerk of the Supreme Court shall issue notice of the appeal to the appellee. Sec. 2-3206, Burns Ind. Statutes, 1933 Rev. This is commonly known as the official notice. Lawyers sometimes apparently confuse this procedue and attempt to file their transcript in the office of the Clerk of the Supreme Court and then serve the adverse parties with notice of such appeal. This they cannot do. After the transcript is filed with the Clerk, only the Clerk may issue the notice. So in the case of *Gainey et al. v. Hasler*, 95 Ind. App. 209, in discussing such procedure, our court said, "Under our Appellate procedure appellant could not give an unofficial notice of an appeal to this court after he had filed the transcript with the clerk." Under the new rules effective September 1, 1940, proof of the giving of such unofficial notices must be filed in the office of the Clerk of the Supreme Court at the time the transcript of the record is filed.[17] This new rule will doubtless obviate some of the mistakes which have arisen with regard to the proper notices required in vacation appeals.

Further difficulty has been experienced by many attorneys in the preparation of the record dealing with the bill of exceptions. Bills of exceptions may be filed during term-time without an order of the court. However, when

[17] Rule 2-4, Ind. Sup. & App. Cts. (1940 Rev.)

a bill of exceptions is to be filed after term, leave therefore must be given by the court at the time of the ruling on the motion for new trial.[18] It frequently happens, however, that attorneys for some reason are unable to have the record so prepared. In a recent case the court overruled a motion for new trial near the last day of the term. No time was given by the court in which to file a bill of exceptions. This ruling was made on the 31st day of July, 1937. The attorney for the appellant was not present at the time this ruling was made and had no knowledge thereof. The term of court ended August 4. He accordingly, on the first day of the succeeding term, which was October 4th, asked and obtained time in which to file his bill of exceptions. This was accordingly done and an attempt to perfect an appeal was made. Our court was compelled to hold that the bill of exceptions was not properly within the record. *Crouse v. Crouse*, 106 Ind. App. 565.

From these experiences as above detailed, I have come to the conclusion that the common mistakes in Appellate procedure are occasioned because of the following conditions:

(1). The lawyers do not take the time to re-read and have fresh in their minds the rules of the court when preparing their case for appeal.

(2). Insufficient time and study is given to the preparation of the record for appeal after the date of the verdict or decision.

I also believe that fewer mistakes would be made if the attorneys were able and willing to select and present only such errors as are vital to the decision of the case on appeal.

If these conditions could be corrected the work of both the courts and the lawyers would be materially lessened.

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[18] Harker v. Eisenhut, 212 Ind. 67, N.E.(2d) 936 (1937).