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Getting into the Higher Court

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Huntington Circuit Court

GETTING INTO THE HIGHER COURT

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A knowledge of the law relative to appellate practice is essential to every practicing lawyer. There is no joy sweeter to the general practitioner than that borne by a notice from the higher court that he has prevailed on appeal, as it means the vindication of his theory of the case and his manner of conducting the trial. Success to the lawyer in the higher court is an encouragement to greater effort and a builder of self-confidence.

The term *appeal* has been variously defined, and, as used at different times, has different meanings. But in the sense in which it is used when we speak of an appeal to the Supreme or Appellate Court of Indiana, it means the removal of a suit in equity or of an action at law from an inferior court to a superior court, for the purpose of reviewing a judicial determination of the inferior court.

It is important to remember in this connection that causes are appealed in the sense above stated, solely for the purpose of reviewing what has already been done and not for the purpose of deciding the questions originally in controversy.

An appeal differs in many particulars from a trial. A trial is a judicial investigation of the truth of certain matters affirmed by one party and denied by the other. In conducting this investigation, information is sought from various sources. In the pleadings filed, the facts relied on by each party are stated in general terms and the allegations of the pleadings are supported by evidence which may not be disclosed until it is presented at the trial. The fullest opportunity is given to each party to establish the truth of his allegations, as there are few kinds of evidence, either spoken or written, that will be rejected. But the pleadings in an appeal are usually confined to allegations that the trial court did or did not commit an error, and the only source of information on that subject is the record.

An appellant cannot raise any question in an appellate court or there urge any grounds of objections or exceptions which were not presented to the trial court in the proper manner, except objections to the jurisdiction of the court over the subject matter of the action or that the judgment is wholly void for

* See p. 280 for biographical note.

some other reason. The objection that the complaint does not state facts sufficient to constitute a cause of action, or that the affidavit or indictment does not charge a public offense, is no longer available as ground for a reversal on appeal, unless the question was first presented to the trial court. The rights of a litigation appeal are ordinarily measured by his rights in the court below.

A complaint to review a judgment has many of the characteristics of an appeal, but it can only be had in the lower court, and cannot be secured by an appeal.

As an appeal is based upon the record, the preparation of the record is the most important duty of the appellant. The record is the foundation of your appeal, and, without a true and complete record, your appeal will crumble.

The record as embodied in a properly prepared and duly authenticated transcript, imparts absolute verity. No extrinsic evidence, whether in the form of affidavits, or of the original papers in the case, or of a statement by the clerk of the trial court, will be received to aid, vary or contradict the record as certified by the clerk. If the transcript is erroneous, the only remedy is to make a proper application to have the same corrected. The corrected portion of the transcript, as certified by the clerk under the seal of the trial court, will take the place of the part of the first transcript and will, in turn, "impart absolute verity."

In a recent Appellate Court decision, the Judge said, "Since the Appellate Court has no control of the records of the trial court, it cannot, in the first instance and before correction of the record of the trial court, grant an application for a writ of certiorari to the trial court, but the record should first be corrected in the trial court, and then application made in the Appellate Court for a writ of certiorari to bring up such corrected record."[1]

The statute provides that "no pleadings shall be required in the Supreme Court upon an appeal, but a specific assignment of all errors relied upon to be entered on the transcript in matters of law only." Under this provision, it has been repeatedly declared by the Supreme Court that errors can not be assigned of matters of fact. There is a statute providing that errors may be assigned "upon matters of fact and law" in an appeal

[1] *Wabash-Portland Cement Co. v. Evarts*, 79 App. 371.

from the judgment in a will contest, but the Supreme Court has held that so much of that statute as authorizes the presentation of questions of fact for decision has been repealed. There is also a statute authorizing the presentation of questions of fact for consideration on appeal under some circumstances in equity cases. On construing this section, the Supreme Court has said, "This suit would have been of exclusively equitable jurisdiction under the law of this state prior to June 18, 1852, and belongs to that class of cases in which this Court may review both the law and the facts. The evidence in this case being all written, we can judge of its probative force and effect as well as the trial court could, and are able to ascertain and declare the justice of the case. It is competent for this court, under such circumstances, both by virtue of its inherent power and by the statute, to render such a decree in the premises as the justice of the case requires."[2]

It seems well settled that except within the strict limits of the statute, in equity cases where the evidence is documentary, the higher court will never set aside a decision of the court or jury on the ground that the weight of the evidence is opposed to it.

The terse language "this Court will not weigh the evidence" has been the ending of many ambitious appeals and this fact should be kept in mind by attorneys who anticipate an appeal.

Reserving an exception may properly be said to be the first step in taking an appeal. The statute requires that an exception shall be taken at the time the decision objected to is made, both in civil and criminal cases, and the record must show the fact that an exception was so reserved or the ruling cannot be successfully attacked on appeal, however erroneous it may be.

As before stated, the only objections which may be made available on appeal, although not presented to the trial court, are objections to the jurisdiction of the trial court over the subject of the action.

Where the court makes special findings of fact and conclusions of law, the party wishing to appeal and question the conclusions of law should have an exception entered by the court directly after the entering of the conclusions of law in the order book. Some attorneys follow the practice of noting their exceptions on the conclusions of law themselves and allowing them to be copied into the record when the special findings and conclusions

[2] *State, ex rel., v. Board, etc.*, 165 Ind. 262.

of law are copied, but the better practice would seem to be to have an order book entry made showing the exception at the time of the entry, and by making the proper assignment of error on appeal.

It is also essential that the record show that a judgment or order from which an appeal will lie has been made by the lower court, and that counsel satisfy himself that the proceeding is one from which an appeal is allowed. Unless such a judgment or order is shown, the appeal will be dismissed without consideration.

An examination of the reports will disclose that many attorneys have made the mistake of attempting to appeal from the action of a trial court after a ruling upon a demurrer without a rendition of judgment. The statute provides that if a party fail to plead after his demurrer is overruled, "Judgment shall be rendered against him as upon a default," and in case the demurrer is sustained, the record should show the action of the court and the failure to plead further and the rendition of judgment against plaintiff for costs, and the same rule applies to the action of the trial court upon a motion to quash the indictment or affidavit.

Filing an appeal bond is an essential preliminary step in taking some kinds of appeals, and is the only means by which a stay of execution can be secured pending appeals of several other kinds. The only appeals in which an appeal bond is indispensable are appeals from decisions in favor of decedents' estates in matters growing out of the settlement thereof, and appeals from interlocutory orders of certain kinds. Executors, administrators and guardians are excused from the necessity of filing appeal bonds and the right of the state or a city to prosecute suits without giving bonds probably extends to prosecuting appeals.

Appeals are of two kinds—term appeals or vacation appeals. Filing an appeal bond is an essential step in perfecting a term appeal. Filing an appeal bond is not a necessary part of taking a vacation appeal, and a great many appeals have been entertained and decided in which no such bond was filed. Such an appeal may be perfected by merely filing a transcript of the record, with proper assignments of error in the clerk's office of the Supreme Court and giving the proper notices. But an appeal not taken in term does not stay execution or other proceed-

ings in the court below, unless a supersedeas is granted by the Supreme Court or some judge thereof, and such an order can only be obtained by filing an appeal bond. If the appellant does not fear an execution because he has nothing from which the amount of the judgment can be collected, or if he appeals from a judgment in his own favor, because it does not grant him all the relief to which he believes himself entitled, or is willing to pay the judgment rather than file a bond, he may take a vacation appeal without filing one.

However, after a party has failed to perfect a term appeal, he may file his transcript and perfect a vacation appeal by giving notice.

Where the filing of an appeal bond is required as a preliminary step in perfecting an appeal, the bond must be filed within the time limited by the statute or prescribed by an order of court, with such penalty and sureties as the court will approve.

It is now provided by statute that every pleading, motion in writing, report, deposition or other paper filed or offered to be filed, in any cause or proceeding, whether received by the Court, refused or stricken out, should be a part of the record from the time of such filing or offer to file, and any order or action of the court in respect to any such pleading, motion in writing, deposition or other paper, and every exception thereto taken by any party shall be entered by the clerk on the minutes or record of the court, and the same when so entered shall be a part of the record without any bill of exceptions. It is by this authority that the pleadings and all motions relative thereto and other motions become part of the record for appeal, which record is also known as the transcript.

The civil code further provides that when the record does not otherwise show the decision or grounds of objections thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions and procure it to be duly signed and filed.

Oral testimony can only be saved by a bill of exceptions and it is necessary that the longhand manuscript of the evidence, as copied, shall be actually embraced in and certified by such a bill, and it is by this method that the evidence becomes part of the record for consideration of the higher court.

Care should be exercised by the attorney in preparing the certificate to the bills of exceptions, after the transcript of the

evidence is prepared by the court reporter, the attorney conducting the case should prepare the certificate to the bill. This is not a part of the duty of the trial judge nor of the court reporter, and its importance is such that it needs the careful consideration of the one preparing the record for appeal. The signature and certificate of the judge to the corrections of a bill of exceptions are essential parts of it. The statute requires that his certificate shall recite the date of presentation to the trial judge, the date when the judge signed the bill of exceptions must also be stated, for it is necessary that the record should affirmatively show that it was filed after signing by the judge.

If the certificate is one for a bill containing the evidence, it should also show that the bill contains all the evidence given in the cause. In a recent case, the court, in affirming the case, said, "We cannot consider the sufficiency of the evidence to sustain the verdict, because there is no affirmative showing that the bill of exceptions contains all the evidence given in the case."[3] Our Supreme Court has also held that "testimony" is not synonymous with "evidence" and that a certificate that the bill of exceptions contains all the testimony in the case is not equivalent to saying that it contains all the evidence in the case,[4] neither is it sufficient that the court reporter certifies that the bill contains all the evidence. This must be contained in the court's certificate.

Under the practice in this state, there are three methods of saving exceptions to the giving or refusal of instructions in a civil case. (1) By noting the exception on the margin of each instruction according to the requirements of the civil case of 1881, (2) by noting the exception at the close of the instructions, or orally and having same noted on the record or minutes of the Court according to the requirements of the Acts of 1903, as amended in 1907, and (3) by a bill of exceptions. No one of the methods for saving exceptions to instructions is exclusive of the others.

The manner now most in use by attorneys is that provided for by the Acts of 1907 (Section 586, B. R. S. 1926) and as the statute has now been frequently construed, it can be followed safely in preparing the record for appeal. The following sug-

[3] *Sunderman v. State*, 197 Ind. 705.

[4] *Kleyla, ex rel., v. State*, 112 Ind. 146; *Breckley v. Weghorn*, 71 Ind. 497.

gestions should be kept in mind by the practitioner: (a) In order to reverse the action of the trial court in refusing to give instructions, the record must not only show the filing of a written request that they be given, but it must also show that the request was made before the commencement of the argument to the jury. The court will not look to statements in the request to determine when it was made, especially when the record fails to show that it was filed. (b) The memorandum of exceptions to instructions must be dated and signed by the party excepting or his counsel. (c) The memorandum at the close of the instructions must be signed by the trial judge, and must show which instructions are to be given and which refused, and must be made before the jury is instructed. (d) Instructions given by the court of its own motion must be signed by the trial judge in order to make them a part of the record under Acts of 1907 (e) The court should follow the statute in modifying instructions. (f) The record should show that all instructions requested, whether given or refused, and all given by the court on its own motion were filed at the close of the instructions to the jury.[5]

Regardless of whether exceptions to instructions are saved by either of the statutory methods mentioned, an exception to the action of the court in giving or refusing to give instructions may be taken orally and exception saved by bill of exceptions in the same manner as an exception is taken to any other action of the court, and there is nothing to prevent the use of the statutory method and also using the bill of exceptions method.[6]

In preparing the record for appeal, the statute relative to practice must be carefully followed and all proper questions must be raised in the motion for a new trial, so that the action of the trial court upon the motion for a new trial may be carried forward and assigned as error in the higher court. At the time of the action of the lower court upon the motion for a new trial, time should be taken in which to file all bills of exceptions

[5] *Folsom v. Buttolph,* (App.) 143 N. E. 258; *Duckwall v. Davis,* (Sup.) 142 N. E. 113; *Inland Steel Co. v. Smith,* 168 Ind. 245; *Stewart v. Manship,* 193 Ind. 694; *Fowler v. Ft. Wayne Trac. Co.,* 45 App. 445; *Morgan Construction Co. v. Dulin,* 184 Ind. 652; *Retsek v. Harbart,* 176 Ind. 441; *Glasser v. Jones,* 68 App. 192; *Illinois Surety Co. v. Frankfort Heating Co.,* 178 Ind. 208; *Souer v. Zeigler,* 73 App. 87; *Elrod v. Purlee,* 165 Ind. 239; *Neff v. Masters,* 173 Ind. 196.

[6] *Ohio & Mississippi R. Co. v. Dunn,* 138 Ind. 18; *Zollman v. B. & O. R. R. Co.,* (App.) 12 N. E. 135.

and an appeal taken to either the Supreme or Appellate Court as shall by statute have jurisdiction of that particular kind of action, and at this time the appeal bond should be fixed and the time granted for filing as may be necessary if a term time appeal is contemplated.

After a cause has been prepared for an appeal by reserving proper exceptions to the rulings which are believed to be erroneous and causing the record properly to state the action of the court and exceptions reserved, and a judgment or decision has been rendered from which an appeal is taken, the next step is to procure a written transcript of the record for presentation to the appellate tribunal. This record is procured from the clerk of the lower court by filing a written request called a praecipe. If a transcript of the entire record is desired, it shall be sufficient to so state in the praecipe; but if a complete transcript is not desired, then the praecipe shall indicate the parts of the record desired. Such praecipe shall constitute a part of the record and be copied in the transcript immediately before the certificate of the clerk, which shall refer thereto and certify that the transcript contains correct copies, or the originals, of all papers and entries in the cause required by such praecipe.

After the transcript is completed, it should be neatly and securely bound. It should then be carefully examined by the attorney and all papers and entries checked so that any corrections may be made prior to the filing above. It is much easier to correct the transcript prior to filing than after, and avoids costs. Before filing, the transcript should be numbered as to pages, and marginal notes should be made on each page indicating what is copied thereon as required by the court rules.

After the appeal has been perfected, the procedure is largely prescribed and controlled by the rules of court. These rules may be obtained from the Clerk of the Supreme Court and are intended to promote the administration of justice and not to impede or defeat it, and the court gives them a liberal construction to that end, exacting compliance with such rules, but holding that substantial compliance in a good faith effort to obey them is sufficient.

No pleadings are required in the Supreme or Appellate Courts on an appeal except a specific assignment of errors relied on. This assignment is the appellant's complaint in the appellate tribunal and its preparation and filing are essential steps in

completing an appeal. The assignment of errors must be written on the transcript or on a paper so attached to the transcript as to become part of it, or the appeal will be dismissed. It is required to contain the title of the cause, and the full names of all the parties and must be signed by the appellants or their attorney. The following form set out shows the manner of assigning error and covers the questions raised in the majority of appeals:

"State of Indiana,
In the Supreme (or Appellate) Court,
James Smith, Appellant,
v.
George Jones, Appellee.

The appellant says there is manifest error in the judgment and proceedings prejudicial to appellant, in this cause in this:

1. The court erred in overruling appellant's demurrer to appellee's complaint.
2. The court erred in overruling appellant's demurrer to the first paragraph of appellee's reply.
3. The court erred in striking out the third paragraph of appellant's answer.
4. The court erred in overruling appellant's demurrer to the amended second paragraph of appellee's reply.
5. The court erred in overruling the appellant's motion for judgment on the answer to interrogatories.
6. The court erred in overruling appellant's motion for a venire de novo.
7. The court erred in overruling appellant's motion for a new trial.
8. The court erred in overruling appellant's motion in arrest of judgment.
9. The court erred in overruling appellant's motion to modify the judgment.

(Signed) George Robinson,
Atty. for Appellant."

Most of the arguments made in the Supreme and Appellate Courts are presented in the form of written or printed briefs. A rule of court requires the appellant to file a brief within sixty days after his appeal is submitted on penalty of having it dismissed by the clerk without consideration by the court. It has

long been an unwritten rule of court that a failure by appellant to present in his brief any reason or authority in support of a point covered by his assignment of errors amounted to a waiver of such point, notwithstanding it was saved by a proper exception in the court below.

Appellee is allowed ninety days after submission for filing his brief, and oral argument may be had on application in writing made before the time for filing brief has expired.

In the preparation of briefs on appeal, the rules of the court should be carefully followed; literally hundreds of cases, and points in cases, have not been considered by the higher court on account of failure to properly raise the question in the brief.

If a person wishes to practice in the higher courts, he must follow the rules. The legislature in 1917 attempted to simplify brief writing and provided that before objections to an improper brief could be raised, that a certain written objection should be filed, pointing out such objections or else they were waived, and giving the appellant the right to amend his brief as a matter of right.

This act was promptly declared invalid by the Supreme Court, which said: "So far as this act refers to the rules of this court and what shall be deemed a sufficient brief, and when defects in such brief shall be pointed out, the same is void. This court has power to make its own rules as to briefs, and as to the conduct of business before the court. It is not a legislative function to make rules for the court, or to say what the court shall consider a sufficient brief. This court will have to be the judge of how it can best expedite business, and how questions can best be presented by briefs so that each member of the court may have an opportunity, if necessary, to consider, particularly, each case. So far as briefing is concerned, it will be well for litigants to proceed as they have heretofore under the rules made by this court."[7]

The rules of court provide that the brief of appellant shall contain a short and clear statement disclosing—

First. The nature of the action.

Second. What the issues were.

Third. How the issues were decided and what the judgment was.

Fourth. The errors relied upon for a reversal.

[7] *Solimeti v. State*, 188 Ind. 170.

Fifth. A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. If the insufficiency of the evidence to sustain the verdict or finding in fact or law is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient unless the opposite party in his brief shall make necessary corrections or additions.

Following this statement, the brief shall contain under a separate heading of each error relied on, separately numbered propositions or points, state concisely and without argument or elaboration, together with the authorities relied on in support of them; and it further provides that no alleged error or point, not contained in the statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for a rehearing.

The rules further provide for the brief of appellee and follows with the statement that the brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom and shall be bound with the same.

Besides the rules of court, the Supreme and Appellate Courts issue calendars at the beginning of the November and May terms listing all pending cases and these calendars contain valuable suggestions to attorneys relative to appellate practice.

Our books are full of decisions relative to the purpose and meaning of the rules. It is the desire of the higher court that the members may be informed as to each error relied upon for a reversal without having to examine the record.

Justice Black in an early decision on the rules said: "Not only should the court not be expected to practice law in a case before it, but it should carefully abstain therefrom. There will necessarily be great diversity in the presentation of matters on appeal by different attorneys, and we are not disposed to require the strictest observance of technicalities, though greater labor be imposed upon by inadequacy of presentation, but the rules of the court constitute part of the law and cannot be wholly waived or ignored in the court by which they have been adopted and published."[8]

[8] *Franklin Ins. Co. v. Wolf*, 30 App. 534.

There seems to be a growing practice among attorneys doing an extensive appellate court work to abbreviate the argument, and many do not include any argument of any kind in the brief, the practice being to make the points and authorities so full and complete that the court may grasp the appellant's position without any elaboration in argument.

In closing this brief and incomplete review of the high spots in appellate practice, I want to impress upon the young lawyer doing his first appealing the value of examination and study of briefs and records in completed appeals prepared by experienced lawyers, a visit to the office of the clerk of the Supreme Court, where a study of such records can easily be had, will prove of intense value, and save much book examination, and this with an examination of the statutes and the excellent works of Judges Elliott and Ewbank should safely guide them through the troubled waters of appellate practice.

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