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A Memorandum on Appellate Practice

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JUDICIAL power is inherent in the people, who being unable to exercise that power directly, have by the Constitution of the State of North Dakota vested it in the courts. Thus judicial power resides exclusively in the courts and may not be conferred upon ministerial officers, boards or commissions. The courts named in the Constitution are the Supreme Court, the district court, the county court, justice of the peace, and such other courts as the legislature may create for cities, incorporated towns, and villages. This discussion will deal only with the Supreme Court, and in a general way with the procedure by which its appellate jurisdiction may be invoked. When we use the word "jurisdiction" we mean the authority of the court to hear and determine a legal controversy. It is only where such a controversy exists that the court may render a judicial decision. The Constitution vests in the Supreme Court three broad powers—appellate jurisdiction, general superintending control over inferior courts under regulations and limitations prescribed by the legislature, and original jurisdiction to issue original and remedial writs. The legislature may not impose duties upon the Supreme Court or any of the judges thereof except such as are judicial. This is in accordance with the fundamental principle of free government requiring the separation of branches of government into the executive, legislative and judicial. We have in this state, however, infringed on that principle by section 76 of the North Dakota Constitution making the Chief Justice a member of the Board of Pardon and by article 54 of the Amendments which places the Chief Justice in a group of three persons whose duty is to choose by unanimous selection a list of three names from which the governor makes a nomination for membership on the State Board of Higher Education.

The Supreme Court is required by the Constitution to write an opinion setting forth the reasons for the decision in each case where a judgment or decree is reversed or confirmed. It is also made the duty of the Court to prepare a syllabus of points adjudicated. In many states the court is not required to prepare a syllabus, this being done by clerks or by law book publishers. That is why after the syllabus in each North Dakota case there appears the nota-

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tion, "Syllabus by the Court." This syllabus is perhaps the most important expression of our work for it is the ultimate declaration of the law of the case, carefully prepared and agreed to by all of the members signing the opinion.

The Supreme Court does not and cannot be required to give advisory opinions, that is, opinions which are not necessary to the determination of a controversy before the Court. It is not the duty of the Supreme Court to advise the officials of the other branches of government as to what the law is. The giving of such advice is the function of another constitutional officer, the Attorney General of the state.

The Supreme Court consists of five judges, a majority of whom are necessary to form a quorum or pronounce a decision. In one instance, however, the majority does not necessarily prevail. A legislative enactment may not be declared unconstitutional unless at least four of the judges so decide. We have had instances where the opinion of three judges, constituting a majority of the Court, did not prevail.[1]

The appellate jurisdiction of the Supreme Court is most frequently invoked. While the power of the Court derives from the Constitution, the right of appeal, the procedure for exercising it, and the scope of review are statutory. In determining whether a right of appeal exists, the courts construe appeal statutes liberally in furtherance of the right of appeal, but the right sought to be asserted must be such that it can be spelled out of the statute or it does not exist. Contrary to the rule with respect to general jurisdiction, appellate jurisdiction cannot be conferred by consent of the parties.[2]

At this point it might be worth our while to consider briefly a few main points in the procedure by which a civil case may be brought to the Supreme Court for review.

An appeal implies a review of some or all of the acts of the trial court for the purpose of correcting errors that have occurred in the court below. Thus there appears the rule we have often stated that an issue which is neither raised nor considered in the trial court cannot be raised for the first time in the Supreme Court.[3]

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1. See State *ex rel.* Sathre v. Board of University and School Lands, 65 N.D. 687, 262 N.W. 60 (1935); Wilson v. Fargo, 48 N.D. 447, 186 N.W. 263 (1921); Daly v. Beery, 45 N.D. 287, 178 N.W. 104 (1920).

2. Bryan v. Miller, 73 N.D. 487, 16 N.W.2d 275 (1944); Muhlhauser v. Becker, 74 N.D. 35, 20 N.W.2d 353 (1945).

3. McDonald v. Abraham, 75 N.D. 457, 28 N.W.2d 582 (1947).

The responsibility of trial lawyers in this respect has been pointedly stated by the Supreme Court of Arizona:

> "It is their business to be attentive on a trial, and, if they miss a point by neglect, they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out other objections and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court on the case as presented were correct or not." [4]

The scope of the review in the Supreme Court is governed by two things—first, the questions and issues which have been before the trial court; and, second, the procedure pursued by the appellant in taking and perfecting the appeal. We will now devote some time to the second point, for the failure of counsel to follow the proper appellate procedure frequently makes it difficult, and sometimes makes it impossible, for the Supreme Court to conduct a comprehensive review of the issues which the appellant wishes to present.

Just as all issues must first be presented in the trial court, so too the manner of their presentation in that court determines which of two avenues of procedure must be followed, should a disappointed party undertake an appeal. Civil trials generally fall into two categories. They are trials to the court without a jury, where the court determines both the law and the facts, and trials to a court and jury, where the court determines the law and the jury is trier of the facts. The initial, fundamental, and jurisdictional step in every appeal is the service of a notice of appeal in writing, signed by the appellant or his attorney, on the adverse party and the filing of this notice in the office of the clerk of court in which the judgment or order appealed from is entered.[5] This notice must be served and filed within six months after the entry of a judgment, if the appeal is from a judgment; and if the appeal is from an order, the notice must be served and filed within sixty days after written notice of the order is given to the party appealing.[6] These time limits are strictly statutory and may not be extended by the order of any court or by stipulation or agreement of the parties. Most judgments are appealable but only such orders may be appealed from as the statute prescribes.[7]

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4. Rush v. French, 1 Ariz. 99, 25 Pac. 816, 823 (1874).
5. N.D. Rev. Code §28-2705 (1943).
6. N.D. Rev. Code §28-2704 (1943).
7. N.D. Rev. Code §28-2702 (1943).

In all appeals, whether the case was tried before the court or before a jury, or whether the appeal is from an order or from a judgment, there must be brought to the Supreme Court the record upon which the trial court made the challenged decision. This record, enumerating and containing the matters considered by the court in rendering the decision from which the appeal is taken, is known as the statement of the case.[8]

The only time that a statement of the case is not a requisite of appeal from a judgment is when the error upon which review is sought appears upon the face of the record.[9] Our statutes do not specifically require a settlement of the statement of the case upon an appeal from an order, but the record upon which the order is based must be certified to by the trial court or described and identified in the order from which the appeal is taken.[10]

Let us now go to a consideration of the appeals in the two types of cases which we have designated as cases triable by the court and cases triable to the court and jury. It is not enough to serve and file a notice of appeal and to have the trial judge certify the records to the Supreme Court. The appellant has other and very important duties to perform. A statutory undertaking must be furnished in most cases. The appellant must point out to the Supreme Court just what he wants the Court to review. In cases tried to the court without a jury the appellant from a judgment must secure a settled statement of the case. If he desires a complete review of all questions of law and fact, he needs comply with but one simple requirement, which is to include in the statement of the case a demand for the review of the entire case. The Supreme Court will then retry the case as to the issues of fact and law which appear on the certified record. If the appellant does not wish the Supreme Court to retry on the record all the issues of fact, the appellant, instead of demanding a trial anew, "shall specify therein the question of fact that he desires the Supreme Court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court."[11] It is important to realize the scope and simplicity of the demand for trial anew of a case that has been tried to the court without a jury. Sometimes the appellant does not realize how easy it is and attempts instead to specify errors as though the case had been tried to a jury.

8. It is described in Chapter 28-18, North Dakota Revised Code of 1943.
9. N.D. Rev. Code §22-2728 (1943).
10. Thorp v. Thorp, 46 N.D. 113, 180 N.W. 26 (1920).
11. N.D. Rev. Code §28-2732 (1943).

It is important, too, to remember that the demand for trial anew must be filed and settled as a part of the statement of the case. To incorporate it in or attach it to the notice of appeal, which has frequently happened, is not enough. The method of appeal I have just outlined to you is of growing importance for in civil litigation the trend is toward a determination by a trial court of both law and facts without a jury, and along with that trend has come an increasing number of cases brought to the Supreme Court for trial anew.

We now turn to appeals for judgment rendered in cases tried to the court and jury. There a demand for a trial anew avails the appellant nothing. Again, he must settle a statement of the case unless the alleged error appears on the face of the judgment roll. At the very inception of an appeal from a judgment rendered in a case tried to a jury, the appellant must serve with the notice of appeal a concise statement of the errors of law, if any, of which he complains; and, if he claims that the evidence is insufficient to support the verdict of the jury or is of such a character that the verdict should be set aside as a matter of the court's discretion, he must so specify.[12] As an aid to clear presentation, specifications of error should be separately numbered and, usually, but one point or ruling should appear in a specification which should include reference to the exhibit, document, or line and page of the transcript where the alleged error appears.

If the appellant challenges the correctness of the verdict on the ground of insufficiency of the evidence, he must point out specifically wherein the evidence is insufficient. A general statement that the evidence is insufficient to warrant the verdict means nothing without further specifications. But here again we operate under the shadow of the rule already mentioned that the question or issue reviewed must have first been brought to the attention of the trial court. No matter how meticulously specifications of the insufficiency of the evidence may be drawn, they will present nothing for review unless the sufficiency of the evidence to sustain the verdict was first questioned in the trial court, either by a motion for a directed verdict or by a motion for a new trial, or both, and the ruling or rulings of the trial court assigned as error on the appeal.[13] Thus, if an appellant is to challenge the sufficiency of

12. N.D. Rev. Code §28-1809 (1943); *In re* Heiden's Estate, 57 N.W.2d 242 (N.D. 1953).

13. Westerso v. City of Williston, 77 N.D. 251, 42 N.W.2d 429 (1950).

the evidence on appeal, he must lay his foundation therefor in the trial court.

An appeal is not the only remedy afforded a disappointed litigant from an adverse verdict. He may seek a new trial, which is a re-examination of the issues in the same court. If the trial court makes an order denying the motion for a new trial, an appeal may be taken from that order to the Supreme Court and, frequently, an appeal from the judgment and an appeal from an order denying a new trial are prosecuted concurrently and argued together in the Supreme Court. The right to and the procedure for seeking a new trial are statutory and the statutes prescribing them must be substantially followed. Any attempt at a detailed discussion of the procedure involved in seeking a new trial would trespass upon time that I do not feel free to take, so I leave you to study the statutes and decisions construing them.

The rules of appellate procedure are not unduly technical or involved. They are designed to permit the litigant who believes that the court has erred against him to have his case reviewed and errors, if any, corrected. The observations which I have made are not intended to cover all of the rules or situations which might arise under the rules that have been discussed. It has been my purpose to present a few basic principles and thereby to challenge your interest in the procedure by which a case may be presented to the Supreme Court.

I would recommend that before you try a case which you may find necessary to appeal you study the statutes and decisions pertaining to appellate practice so that in the trial court you may lay a proper foundation for an appeal in event error contributes to an adverse decision, and that if you do appeal you may take the proper steps within the time prescribed by law which will bring to the Supreme Court a record from which may be determined the questions which you desire to present. You will find further help from the rules of practice that have been promulgated by the Supreme Court. An attorney contemplating an appeal should familiarize himself with these rules. They may be found at the beginning of Volume 76 of the North Dakota Reports.

As a final word of advice, may I suggest that appellant's counsel prepare appeal papers with care and timely do that which he intends to do. He will thereby not only advantage his client, but will save himself inconvenience and embarrassment. The Supreme Court prefers to decide cases upon the merits presented by records that are free from unnecessary and vexatious questions of practice.