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Appellate Practice and Procedure in North Dakota

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Part I

HISTORY AND JURISDICTION OF THE SUPREME COURT

This paper deals with the history and jurisdiction of the North Dakota Supreme Court, and contains sidelights on some of the men who have served on it. The original Act of Congress passed in 1861 provided for the appointment by the President of three supreme court judges. These were also judges of the United States District Court for the territory and acted as trial judges within the various judicial districts; hence there was the anomolous situation of the judges sitting in review of their own decisions. There being no requirement that judges be residents or citizens of the territory, most judges came from other parts of the country. Whereas the original court consisted of the Chief Justice and two Associate Justices, additional appointments swelled the court to a total membership of nine by virtue of an enactment of August 9, 1888. The same Act prohibited a judge from sitting as a member of the appellate court in a matter wherein he had an interest or had presided as trial judge. Consequently, situations such as arose in *People v. Wintermute*[1] no longer could arise. In this case Chief Justice Shannon dissented to a decision which reversed his trial decision, and Associate Justice Barnes wrote a separate opinion attacking the dissent of Chief Justice Shannon.

The territorial court reports are contained in six volumes, the first opinion, argued in December, 1867, being undated. Usually some one of the Judges of the court acted as reporter of court decisions. The briefs and arguments of both sides are set forth at great length in these reports. Many of the opinions are well written and are excellent examples of judicial literature. The cases decided in these six volumes covered almost the entire field of law.

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[1] 1 Dak. 60 (46 N.W. 649) (1875).

To meet the situations arising as a result of the transition from territory to statehood, Section 6 of the Schedule to the Constitution of North Dakota provided that when any two of the judges of the Supreme Court of the State of North Dakota elected under the provisions of the constitution shall have qualified, the causes then pending in the Supreme Court of the Territory on appeal or writ of error from the district courts shall pass into the jurisdiction of the Supreme Court of the State of North Dakota, and a like provision shifted matters pending in territorial district courts into the new state district courts.

The organization of the court got under way as a result of the election of August 29, 1889, in which Judge Alfred C. Wallin was elected for the seven year term, J. M. Bartholomew for the five year term, and Guy C. H. Corliss for the three year term. As the constitution provided that the judge receiving the shortest term should serve as Chief Justice, the position automatically fell to Judge Corliss. Although these three were learned men, none of them was a law school graduate.

The first clerk of the newly organized court was R. D. Hoskins and the first reporter was E. W. Camp. J. H. Newton, who became deputy to Mr. Hoskins in April, 1913, and replaced him in March, 1917, has served in that capacity to the present.

The first term of our court was held in Fargo on January 24, 1890. The constitution provided for court to be held at Fargo, Bismarck, and Grand Forks unless otherwise provided by law. Hence, the court was "on wheels" until 1909 when a law was passed providing that all general terms should be at the seat of government. The first case argued was a case inherited from the territorial court, and the first case decided was *Ohlquist v. Swan.*[2]

Appellate Jurisdiction

It is interesting to observe the actual workings of the supreme court in connection with an appealed case before it for decision. When a record with appellant's briefs is received from one of the district courts, it is first checked to ascertain if the juris-

[2] 1 N.D. 30, 44 N.W. 1003 (1890).

dictional papers (the notice of appeal and undertaking on appeal) are with the record and have been served on opposing counsel. Any case filed fifteen days prior to the first Tuesday of a given month is entitled to be heard at that month's term. A notice is immediately sent to counsel informing them of the term at which the case is heard, and advising the respondent that his brief should be served and filed within fifteen days. Oral arguments are usually heard, pursuant to court rule, beginning the first Tuesday of the month and continuing until all cases for argument are disposed of. Ten days prior to the opening of the term the clerk prepares a calendar and notifies counsel of the date set for argument. Usually three cases are set for each day. The appellant is entitled to one hour for argument and respondent to forty-five minutes. The longer period of time is given the appellant because he has the additional duty of making the statement of facts. We have an automatic system of assignments so that each member of the court is assigned the same number of cases. Each member gets every fifth case. The calendar placed before the members of the court contains these assignments, so each judge knows before the argument the cases in which he is to prepare the opinion. The members of the court rarely examine the record and briefs prior to the argument, so until they hear the arguments they are not informed of the nature of the case or the issues involved.

After the opinion is filed and announced the defeated party has fifteen days within which to prepare and file a petition for rehearing. During this time and until the disposition of the petition for rehearing the remittitur to the district court is withheld. If the petition is to be denied a formal order is entered denying the same and the remittitur is then transmitted to the lower court. If a rehearing is granted, it may be either general, or on specified questions enumerated by the court. The record is held in the supreme court and the matter is usually set for reargument at the next regular term.

ORIGINAL JURISDICTION

The jurisdiction of the Supreme Court in matters of prerogative writs was first considered by the Supreme Court in *State v. Nelson County*,[3] involving constitutionality of a law

[3] 1 N.D. 5, 44 N.W. 492 (1890).

enacted to authorize the issuance of bonds to purchase seed grain for needy farmers. The action was one to procure an injunction to restrain the defendant from issuing such seed grain bonds. The court held the statute valid, and refused to issue the writ.

The court held in this case that it was the intention of the framers of the constitution that the jurisdiction of the supreme court to issue writs of mandamus, quo warranto, certiorari and injunction in the exercise of its original jurisdiction would be confined to cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives and the liberties of its people. In the exercise of such jurisdiction the court will judge for itself whether the wrong complained of is one which demands the interposition of the supreme court in the exercise of its prerogative jurisdiction. In that particular case it was held that the issues involved concerned only the interests of Nelson County and its taxpayers and, therefore, did not fall within the class of cases where the supreme court would assume original jurisdiction. The principles of the *Nelson County* case have been consistently applied in subsequent decisions.[4]

Supervisory Jurisdiction

Section 86 of the North Dakota Constitution provides *inter alia* that the supreme court shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. An early decision[5] asserted that this grant of general superintending control enabled the supreme court in a proper case to control the course of ordinary litigation in inferior courts, much in the same manner as the English Court of King's Bench exercises its supervisory control. Thus this superintending jurisdiction enables the supreme court to control a lower court which, though within its jurisdiction, is by mistake of law or wilful disregard of it, doing a gross injustice, and there is no adequate remedy by appeal.

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[4] 1 N.D. 88, 45 N.W. 33 (1890).
[5] State *ex rel.* Lemke v District Court, 49 N.D. 27, 186 N.W. 381 (1921),

Several cases in which our supreme court has discussed this superintending control are cited in the footnote.[6]

Generally this control is exercised sparingly, but in a proper case the court has not hesitated to exercise it to control the lower court. Its exercise, as with prerogative writs, is a matter of discretion of the court.

SUMMARY

In applying for an extraordinary or prerogative writ or a writ in the exercise of the superintending control, the attorney should prepare an application for such writ in much the same manner as any other application is made to the supreme court. It should be prepared on the regular brief paper, enclosed in a proper cover and duly verified, either by a verified petition—the preferable method—or by an affidavit setting forth the facts and the ground for the exercise of the court's jurisdiction and ending with a prayer for the desired relief. This should, in accordance with the court rules, be accompanied by a brief on the law, both on jurisdictional matters and on the merits of the case.

In recent years there has grown up the practice of including in the prayer for the writ the particular form of writ desired or "an appropriate" writ. In these matters it is very seldom that the court issues an alternative writ in the first instance. Instead, an order to show cause as to why such writ should not issue is usually given and the matter argued on such order to show cause. In some cases the question is actually argued out fully on the petition itself. As a matter of actual practice even when the court awards a writ either under its extraordinary or supervisory jurisdiction the writ itself is rarely issued, the parties concerned following the directions of the court without the necessity of the issuance of a formal writ.

One other matter which merits discussion, involving the original jurisdiction of the supreme court, is the application for writs of habeas corpus. While the court or the individual judges thereof are clothed with authority to issue such writs, in most instances it is required that an application be first

[6] *See* e.g., State v. Archibald, 5 N.D. 359, 66 N.W. 234 (1896); State *ex rel.* Steel v. Fabrick, 17 N.D. 532, 117 N.W. 860 (1908); State *ex rel.* Miller v. Norton, 20 N.D. 180, 127 N.W. 717 (1910).

made to the district court. If the writ has been denied by a district court, the full record of that proceeding must be attached to the application in the supreme court. No fee may be charged in a habeas corpus proceeding. The application is presented to the court and they then either order the issuance of a writ directing the petitioner to produce the body of the prisoner; or, and this is the prevailing practice in the greater number of instances, they issue an order to show cause why such writ should not issue and the matter is argued out on the order to show cause and return.

In the civil habeas corpus matters, cases involving the right to custody of children, etc., where application has been made to the district court and a writ denied, such order of denial has been held appealable and action in the supreme court must be on appeal from such order.

Part II

APPELLATE PROCEDURE

This paper is devoted mainly to the actual taking of the appeal; it involves the preparation of briefs and arguments; it discusses procedure in the supreme court and the making of the record for that court. One must always remember that no matter how meritorious the points you make on appeal, unless the proper foundation is laid in the lower court, such points will not be passed upon in the appellate court.

In recent years many cases have come before the supreme court in which assigned errors were not entitled to review because of failure to make appropriate motions during trial of the case below. This is probably attributable to the fact that there is far less trial work than there was twenty years ago, with a corresponding lack of opportunity for younger lawyers to watch the older lawyers at work. Largely responsible for this reduction of trial work are passage of the Workmen's Compensation Act, Employers' Liability Act, and the carrying of liability insurance to cover most conceivable injuries. Hence, the novice has lost his opportunity of "learning the law by ear."

An appeal may always be taken from a judgment and from certain enumerated orders, such as those granting or denying

a new trial, sustaining a demurrer, or vacating or refusing to vacate default judgments. There are, however, many instances in which it is not easy to determine whether the right of appeal exists. Generally in cases of doubt, the party maintaining the right to review on appeal will rely on N.D. Rev. Code 29-2702 (1) (1943) which says an appeal may be had from an order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or subd. 5, granting an appeal from an order which involves the merits of an action or some part thereof.

The Supreme Court of North Dakota has held the following, among many others, not appealable within the purview of these subdivisions:

1. An order denying a motion to vacate service of summons on the ground that the person upon which service was made was not an agent of a foreign corporation doing business within the state.
2. An order denying a motion to vacate an order advancing the cause on the calendar, and an order denying a motion to advance.
3. An order overruling a special appearance and objection to jurisdiction.
4. An order denying a motion for dismissal and abatement of the action.
5. An order denying a motion for a continuance.
6. An order refusing to require a party to give security for costs.
7. An order allowing an amendment to a complaint.
8. An order denying a motion to reverse a judgment of justice court in favor of the plaintiff on the ground that damages involved were for injury to real property and the judge had no jurisdiction for the reason that the pleadings were not in writing and verified.
9. An order denying plaintiff's motion for judgment on pleadings.
10. An order for dismissal.

In numerous instances the court has held that an appeal will not lie from an order for judgment. Judgment on such order

must be first entered and the appeal taken from the judgment.[7]

The court generally in denying the right to appeal from the orders such as above enumerated has held them to be mere interlocutory orders not involving the merits or affecting a substantial right. The court does not hesitate to deny an appeal which it feels to be purely dilatory.

The following are a number of instances where orders have been held appealable:

1. An appeal from an order vacating an order dismissing the action with prejudice.
2. An appeal from an order affecting a substantial right.
3. An order changing venue.
4. An order striking an amended complaint from the files.
5. An order setting aside a stipulation for dismissal of the action.
6. An order setting aside and modifying a previous order entered on stipulation for dismissal of certain actions.

Generally these situations involved the merits of the action and were thus appealable.

It must be remembered that all judgments and decisions of the lower courts come to the appellate court with a presumption of correctness. It has often been held that it is the correctness of the decision and not the reasons assigned by the lower court which governs, and that even if the reason assigned is erroneous, but the ruling is correct, the decision of the lower court will be sustained. The supreme court will not on appeal pass upon a matter not presented to the lower court, either by proper motion during the progress of the trial, or antecedent thereto; or on motion for new trial or judgment n.o.v. The court has held time and again that it is a condition precedent either to a motion for new trial, based upon the insufficiency of the evidence; or a motion for judgment n.o.v., that there shall have been a challenge to such deficiency by a motion for a directed verdict. While it is true that under our statute the

[7] State *ex rel.* Shafer v. District Court, 49 N.D. 1127, 194 N.W. 745 (1923) (denying the writ); State *ex rel.* Red River Valley Brick Co. v. District Court, 24 N.D. 28, 138 N.W. 988 (1912) (denying the writ); State *ex rel.* Enderlin State Bank v. Rose, 4 N.D. 319, 58 N.W. 514 (1894) (granting the writ).

trial court has no right to grant a motion for directed verdict if there is objection from opposing counsel, nevertheless the rule still prevails that the motion must be made before the court will consider an appeal on the question of the insufficiency of the evidence.

The same rule as to bringing matters complained of to the attention of the trial court also prevails in the matter of the court's instructions to the jury. If the charge as given generally represents a correct statement of the law, in the absence of requests for more specific instructions, appellant will not be heard on appeal to question its sufficiency. Also, where written instructions are given and submitted to counsel for the filing of exceptions he shall thereafter be entitled to complain only as to those portions of the charge to which objections were made.

To predicate error on remarks of opposing counsel in his argument to the jury, or off the record during trial, or in examination of witnesses, objection to such remarks must be made at the time and the court requested to admonish counsel or declare a mistrial. A record must be preserved for the appellate court. Case illustrating these points are *Morton v. Stensby*[8] and *Braun v. Martin*.[9] Where insurance may be involved, or the opposition makes inflammatory arguments to the jury, the attorney should ask the reporter to take the argument so as to preserve a proper record in case of an unfavorable verdict.

The motion for a directed verdict paves the way for motion for judgment n.o.v. or for new trial. In making such motions all points deemed erroneous must be raised if they are to be later considered by the supreme court.

The court has consistently held that an appeal does not lie from an order denying motion for judgment n.o.v., nor is a motion for judgment notwithstanding the disagreement of a jury appealable. The denial, however, may be raised on appeal from the judgment. Should the motion be made in the alternative, that is, a motion for new trial or motion for judgment

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[8] See Ellingson v. N.W. Jobbers Credit Bureau, 58 N.D. 754, 227 N.W. 360 (1929).

[9] 59 N.D. 784, 232 N.W. 6 (1930).

n.o.v., on appeal from the whole order the ruling on the motion for judgment n.o.v. may be reviewed. *Welch Mfg. Co. v. Herbst Department Store;*[10] *Stormon v. District Court.*[11] Motion for new trial must be noticed within the six months period within which an appeal may be taken if it is to be entitled to be heard or taken advantage of on appeal. It may be heard after the six months period under certain circumstances, but should be made timely.

The Taking of the Appeal

Jurisdiction on appeal is acquired by the supreme court by the taking, serving and filing of the notice of appeal within the prescribed time, and perfected by the giving, serving and filing of the required undertaking. In a civil case, an appeal from a judgment must be taken within six months from the date of written notices of entry of judgment. An appeal from an order, such as an order granting or denying a motion for new trial, or sustaining a demurrer to complaint or answer, must be taken within sixty days from the service of such order. No court has authority to extend this time. Contrary to a somewhat prevalent misconception, extending the time within which certain things in connection with the prosecution of the appeal are done does not constitute an extension of time for the taking of the appeal itself. The statutory period cannot be extended by the district court, or by stipulation of counsel. The filing of notice on appeal is also essential and jurisdictional.

The furnishing of an undertaking for costs is necessary in all cases, unless waived or unless the State is the appellant or the appeal is by a state officer, board or bureau appealing in its official capacity. In case a defective undertaking is given, either the trial court or the supreme court may authorize the serving and filing of an amended undertaking, and this even after the time for appeal has expired. The taking of appeal and furnishing of undertaking for costs does not automatically stay the proceedings or the execution of the judgment. In order to secure a stay of proceedings it is necessary that application be made to the trial court for an order fixing the amount of

[10] 70 N.D. 216, 293 N.W. 317 (1940).
[11] 53 N.D. 42, 204 N.W. 849 (1925).

undertaking required. This applies to appeals from various orders as well as appeals from judgments. An appeal is no longer allowed from an order overruling a demurrer. Usually an appeal should be taken from the whole judgment.

When judgment has gone against one in a jury case and he intends to move for new trial or judgment n.o.v. and appeal later, if necessary, the first step is to obtain a transcript of testimony from the court reporter, who furnishes four copies of the transcript. One copy must be served upon opposing counsel by delivering to him a copy with a notice to apply to the court, at a certain time fixed by statute, for a certificate settling the statement of the case and identifying the exhibits, if any. If there is no objection, the trial court usually settles the transcript as presented, and if there are objections or corrections the court determines those questions and settles the case with the corrections noted. The trial judge is authorized to settle from memory any defects, omissions or matters which the reporter may not have taken down.

The trial courts are vested with wide discretion in settlement of the statement of the case. Extensions of time may be made, Ex parte *Bucholz v. Harthun*;[12] or the trial court may settle the statement even though it has not been kept alive by extensions of time, without interference by the appellate court. No conditions may be imposed upon the settlement of a statement in a case.[13] Following these preliminary matters, a certificate should be executed by the trial judge finally settling the statement and it is then ready for use either on the motion for a new trial or on appeal.

In cases tried to the court, where objection has been made to settled statements, the statute requires that the statement of the case must contain a demand for trial de novo. Sometimes the following language is used: "Appellant demands a trial de novo in the supreme court"; or, "Appellant demands a trial anew in the supreme court and requests that the court review all questions of fact or law." Either is sufficient. Where it is desired that only particular facts be reviewed, they should be set out in the transcript. Recently in a divorce action where the demand was not made for a trial de novo, the

[12] 38 N.W.2d 785 (N.D. 1949).
[13] 61 N.D. 547, 239 N.W. 161 (1931).

court refused to review the testimony and affirmed the judgment of the district court denying a divorce.[14]

The statute requires that specifications of error be attached to and served with the notice of appeal. The court has held that the mere statement that the court erred, without setting forth the ground of error with more particularity was not a compliance with the statute and did not entitle appellant to a review on these grounds. Specifications of error on the admission of testimony must likewise point out wherein the admission was erroneous and prejudicial, and in specifications of insufficiency the mere statement that the evidence was insufficient is not enough; the inadequacy must be pointed out with particularity. It may be said generally that the court will refuse to review where the specification places a burden upon the court to explore the record in an effort to ascertain the claimed error.

Part III

PREPARATION OF THE APPELLATE BRIEF

The North Dakota Supreme Court has adopted rules on five different occasions since statehood. The present rules of court, found in 41 North Dakota, Rule 8, Subdivision B, set forth what should be contained in the briefs, as follows:

1. The pleadings necessary to understand the nature of the case.
2. The issues.
3. The nature of the appeal.
4. The specifications of error.
5. A concise statement of the facts pointing out specifically the page and line of the settled case in verification of each statement so made.
6. The ultimate facts, set forth separately.

Sufficient of the pleadings should be set forth that the picture of the case will appear before one reading the brief, without recourse to the judgment roll. The summons, if there is no question regarding it, may be omitted with the statement simply that it is in the statutory form. Then should come the com-

[14] Williams v. Hutchinson, 69 N.D. 476. 288 N.W. 210 (1939).
[15] Retterath v. Retterath, 38 N.W.2d 409 (N.D. 1949).

plaint (with the verification in most cases omitted), the answer, and reply, if any. Then, in a jury case, follows the instructions, if any questions are raised on the same, the verdict, order for judgment, judgment, notice of motion for new trial, or reference to the same, the motion itself with specifications of error, order of court on such motion, followed by notice of appeal and undertaking on appeal. The memorandum decision of the trial court should always be included in the appellant's brief. As a practical matter exhibits are generally not set forth in the brief, although such procedure may be wise where a particular exhibit is of prime importance to the case.

The matter of outlining the brief is presented with the appellant's brief in mind. The brief for the respondent will usually follow the same general plan, and respondent is at liberty to present his own statement of facts, supported by reference to the transcript by page and line. Any material pleading omitted by the appellant may be presented by the respondent. Also, the contents of some important exhibit may be reproduced.

All claimed errors must be supported by argument. Unless so supported, they are deemed waived. Argument should be supported by citation of authority. Not all specifications must be argued orally, but if contained in the brief they are entitled to be considered. When a North Dakota case is cited, it should precede the Northwestern citation. The page number of a quotation should be indicated, both in the official reports and in the Reporter system. The full title of the case should also be given when first cited.

When other jurisdictions are being cited, and the state reports are unavailable, the name of the state court should be indicated by enclosing the name of the state in parentheses immediately prior to the reporter citation. It is also wise, and a material aid to the supreme court to append a separate index listing the cases cited in the brief, giving citations, and indicating where they are to be found in the brief.

At a session of the Bar Association, then Chief Justice Burr presented a paper dealing incidentally with the preparation of a brief, in which he said in part:

> "A brief is what the term implies. It is a terse, brief statement of the issues involved, showing where the error is . . . . the members of the Court are not mind readers . . . . Why do you appeal? What error did the trial court make? Wherein was that important? At the end of the lawsuit . . . very few of the abjections raised are material . . . . There will be but one or two real vital issues. State these clearly and logically and show their relationship to each other. Let the court know . . . the issue . . . at the opening of the trial and what the real issue was at the close of the trial. The brief should be well indexed . . . . The cases should be to the point . . . . The appellant is required to show reversible error."

Of course, the argument contained in a brief should be of a dignified, lawyer-like character. A brief is no place wherein to heap abuse or ridicule upon either party or counsel.

As to argument before the court, in any matter appealed to the supreme court with the exception of cases where the amount involved is less than $300, or cases involving only practice questions or questions of costs, the parties are entitled to be heard orally as a matter of right. In the excepted cases, upon proper application to the court before the calendar for a given term is made up, the court may grant the right to present oral argument.

Appellant is entitled to one hour for argument and respondent to forty-five minutes. In opening, the appellant should state what the case is about, the court in which and the judge before whom it was tried, the decision of the court below, whether a motion for new trial or judgment n.o.v. was made, or whether the appeal is from the judgment only; or, in case the appeal is from an order, the nature of the order appealed from. This should be followed by a statement of the facts and then an argument on such law and facts.

Undoubtedly there will be questions from the bench during the course of your argument. These should be answered in a truthful, straightforward manner, even though you may think at the time the answer may hurt your case. If you are not certain say so. Do not make a positive statement if you are not sure of your facts and then suffer the humiliation of having your misstatements brought to the attention of the court.

Only rarely is more than the allotted time required for argument. Should the case be involved or the record lengthy, application for extension of time for argument should be made before the case is set. These requests are usually granted. The time allowed may be divided as the attorney sees fit; since his time is limited, he must not rehash points.

When the lawsuit has finally been decided, the question as to a petition for rehearing arises for the losing side. Such petition must distinctly point out the error complained of in the decision rendered, and the statutory provisions of law, or controlling principles of law overlooked or not called to the attention of the court upon the argument or in the briefs.

Typewritten briefs were accepted in 1920 by rule. Our court rule provides that the paper used in a typewritten brief shall be of good, white or yellow unglazed paper, eleven inches in length by eight and one-half inches in width, with marginal lines thereon. These marginal lines should leave a writing space of about five and one-half inches between them.

Whereas argument covering the various specifications and assignments should be double spaced, it is permissible to single space copy of pleadings, findings, memorandum opinion, and quotations from cited cases. Quotations should be indented or centered.

Court rules provide that the briefs shall contain a good and sufficient cover upon which is indicated the title of the case, nature of the appeal, from what court, and judge, and the names of respective counsel. The brief should be bound either with wire staples, brass rivets or tied with tape. The ordinary spreading type of brass paper fasteners should not be used. A light colored cover will take a filing stamp more satisfactorily.

When presenting an application to the supreme court in the exercise of its original jurisdiction, the same general plan should be followed as for the brief. Use the same type of brief paper, suitable covers, and file seven copies with the clerk. What has been said with reference to preparation of material for the supreme court applies with equal force to district court practice. All pleadings should be neatly and legibly typed and all copies clearly legible. In any situation, a well-prepared document reflects credit upon the lawyer.