LEGISLATION

New Appellate Procedure in Ohio

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The new appellate procedure will become effective January 1, 1936. This new law is the culmination of four years of work on the part of the Judicial Council and the State Bar Association. A committee was originally set up by the Judicial Council which worked in conjunction with a committee of the State Bar Association. These committees presented to the bar association three years ago a proposed draft of a bill to revise appellate procedure in Ohio. This matter was considered at several regional meetings of the bar association and finally was put into shape for legislative action.

The main feature of the bill is to abolish the error proceeding as it now exists, and to permit the commencement of all appellate proceedings by notice of appeal. All appellate proceedings will be designated appeals and the title of the case will remain the same as in the court of origin.

The constitution provides for the trial of chancery cases and therefore the method of appellate hearing for chancery cases is beyond legislative control. The two different types of hearings are designated as appeals on questions of law and appeals on questions of law and fact or on questions of fact. If the appeal is upon questions of law the case is heard upon errors assigned, if the appeal is upon questions of law and fact the case is retried upon the facts.

A retrial upon the facts is permitted in cases as provided by law. There is no provision for hearing by appeal on the facts

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by the Supreme Court, and the only such provision involving the court of appeals is in the constitution relating to chancery cases. There are several provisions for appeal upon the facts in the common pleas court from various boards or tribunals and as these provisions are changed from time to time the changes will fit into the new system.

The notice of appeal is a simple statement of the intention to appeal which is filed in the common pleas court twenty days after judgment unless otherwise provided by law. It is only necessary to state the judgment appealed from and whether the appeal is upon question of law or upon questions of fact.

If a litigant asks for a hearing on the facts and he is not entitled to such a hearing, the appeal will not be dismissed but the case will be set down for a hearing on questions of law.

With the abandonment of the petition in error, the formality of an early assignment of errors is avoided. It is provided that errors may be assigned in the appellant's brief as that is the first time at which the lawyer knows for sure the points he will rely upon. The new rule will not materially affect the practice as at present the court only hears the errors assigned in the brief. However, the unnecessary bother of the assignment of errors by petition in error is avoided.

Another incident of the error proceeding is the summons in error. It hardly seems necessary to give new notice when the proceeding is a continuation of the original suit and the new step is taken only a few days after the judgment is entered. The new proceeding does not require service of the notice of appeal.

The transcript of record and papers are to be filed in the appellate court by the clerk rather than by the attorney. The attorney must file a praecipe and deposit the fee for the transcript but the remaining acts are to be performed by the clerk of the court. If the record is not filed in time it will be the duty of the court to see that the clerk gets the record completed.

If the party filing the notice of appeal does nothing about

ordering out a transcript, how can the appellee protect his rights? The courts may provide by rule that the appellant may dismiss the proceedings by filing a dismissal in the common pleas court of appeals. If the dismissal is not voluntary, the act provides that the appellee may apply to the court to have the case docketed. The court of appeals could then order a dismissal for want of prosecution and assess an attorney's fee, not to exceed $25.00.

The statutes concerning penalties heretofore have been dead letters. There has not been a penalty imposed for almost fifty years. One reason is that the penalty is in most cases a specific amount and too severe. The new act lessens the amount of the penalty and adds the power to assess a penalty upon dismissal for want of prosecution. A few small penalties may prevent the litigants from starting the appeal without serious intention of perfecting it.

The bond provisions on appeal are not materially changed. A litigant can appeal on questions of law without bond but one cannot appeal on the facts without filing bond with the notice of appeal. The appeal upon questions of law may stay the execution if a supersedeas bond is filed. This bond in law cases may be filed at any time and in the amount fixed by the trial or appellate court. Thus, the old provision that the bond be in double the amount of judgment is wiped out.

Provision is made for filing the supersedeas bond with the recorder if the surety is an individual and the bond will then become a lien upon the real estate of the surety in the county. That lien shall continue until discharged by satisfaction of judgment or by special order of the court.

Summary judgment may be entered against the sureties on the supersedeas bonds upon the affirmance of the judgment upon appeal. This will avoid unnecessary delay in the satisfaction of the appeal after the court has ruled thereon. This delay is sometimes due to a dispute between the judgment debtor and

the surety. The judgment creditor is not interested in that dispute and should not be made to suffer thereby. For this reason the court is given power to protect the judgment creditor by entering judgment immediately.

A substantial change in the practice is made by the abolishment of the exception. A ruling by a court can be challenged on appeal if the matter had been presented by motion or objection without the necessity of an exception. The exception at the present time can have no useful purpose. It originally was used to obtain a record of the particular ruling of the court. Otherwise no record would be made of the proceedings. When the exceptions was taken the trial stopped and the court made up the statement of the record. These bits of record were gathered together at the end of the trial and became the bill of exceptions. This procedure is no longer necessary when the proceedings are taken down by an official court reporter.

It is somewhat of an anachronism to speak of a bill of exceptions when exceptions are no longer taken. For some time now the term "bill of exceptions" has lost its original meaning and is used to refer to a complete transcript of the testimony. In some states the term "transcript of testimony" is introduced. But that seems only to add to the confusion, as the lawyers continue to use the term "bill of exceptions" with which they are familiar.

The bill of exceptions must still be filed within the forty days from the order overruling the motion for new trial except in two cases. (1) When the appellant appeals on questions of fact but the court decides that the litigant is not entitled to a hearing on the facts but sets the case down for a hearing on questions of law and the party has not prepared a bill of exceptions, then the court may allow additional time not exceeding thirty days to prepare the bill of exceptions. (2) When the Supreme Court allows a motion to certify in a case which has been tried on the facts in the court of appeals, the party shall

have twenty days from the allowance of the motion to certify to file the bill of exceptions.

The important changes in the new procedure which have been enumerated above can be itemized as follows:

1. Petition in error is abolished.

2. All appellate proceedings are called appeals.

3. Style of case is not changed.

4. Type of hearing on appeal shall be designated as "appeal on questions of law" or "appeal on questions of law and fact."

5. Appeal is instituted by filing notice of appeal which shall designate the order or judgment appealed from and whether the appeal is upon the law or the facts.

6. No step subsequent to the perfection of the appeal shall be jurisdictional.

7. The transcript of record shall be filed by the clerk instead of by the attorney.

8. Notice of appeal shall be filed within 20 days and the transcript within 10 days. The latter time is not jurisdictional.

9. The assignment of errors need not be made in the notice of appeal but need only appear in the appellant's brief.

10. Service of notice of appeal is not necessary.

11. Appeals on facts are allowed in the court of appeals only by the constitution. Appeals on the facts in the common pleas court from inferior courts or from administrative boards may be allowed by law. If not so expressly allowed, the appeal would be limited to questions of law.

12. Appeals on questions of law may be taken without bond, but appeals on questions of fact can be taken only if the judgment has been superseded by a bond filed with the notice of appeal.

13. Supersedeas bonds filed with individual sureties may be made liens upon property of the surety if the bond is filed with the recorder.

14. Summary judgment may be entered against the surety upon affirmance of the judgment.

15. Exceptions are abolished.

16. Time for filing bill of exceptions is extended in two cases.

17. Bill of exceptions not necessary when case is tried on agreed statement of facts.

18. The signature of the trial judge on the bill of exceptions may be dispensed with in some cases.

19. The act shall not apply to appeals on questions of fact from probate courts and from justice courts.

20. The new procedure will go into effect January 1, 1936, and apply to all proceedings where the order or judgment appealed from is rendered after that date.

These changes are more of form than of substance. But the objection to the present procedure is the over-emphasis upon merely formal requirements. The most substantial changes relate to the removal of many jurisdictional requirements. The appellate courts will therefore have more opportunity to pass upon the merits of the controversy rather than being obliged to terminate the cause on some procedural ground.