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ILLINOIS CIVIL APPELLATE PROCEDURE—A PRIMER

RUSSELL GREENACRE

This article is intended for law students and those lawyers who, with little or no experience in the field, have only infrequent occasion to consider or handle appellate matters in civil litigation. It is strictly elementary. Any attempt to accomplish a comprehensive and exhaustive treatment of Illinois appellate procedure in civil litigation would be beyond the scope of a law review article. It has been written on the premise that nearly all those for whose use it is intended have a quite limited knowledge of the subject, and the further belief that an over-all view of what is involved in a simple appeal, from start to finish, is the best preparation for work upon more unusual problems.

The method employed will be to take a simple, hypothetical case on appeal1 from the Circuit Court of Cook County, to the Appellate Court of Illinois in and for the First District; to consider the legal questions as to appellate procedure for which the appellant and appellee would be most likely to need answers; to comment upon some closely related legal problems; and to make some suggestions as to methods not within the realm of “law book law.”

As simple a case as may arise would be one in which the plaintiff, P, commences an action by filing a complaint in the Circuit Court of Cook County, alleging what he claims to be a cause of action at law for damages; the defendant, D, appears and, pursuant to Section 45 of the Civil Practice Act, files a motion that the complaint be stricken because, as asserted in said motion, the complaint is substantially insufficient in law; the Circuit court sustains D’s motion and strikes the complaint; P elects to abide by his complaint; and the Circuit court

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1 Ill. Rev. Stat. (1955) c. 110, § 74 et seq., has abolished the writ of error and extended appeal as the exclusive method of appellate review in so many situations that appeal, by that name, is the method of appellate review in almost all Illinois civil litigation; Bradford v. Waite, 392 Ill. 318, 64 N.E. 2d 491 (1945).
enters judgment that D recover nothing by his action, that D go hence without day, and for costs in favor of D and against P. The judgment order of the Circuit court is a final appealable order. The problem of what is an appealable order will be discussed later in this article.

Upon the entry of the judgment order in favor of D and against P, P is confronted with the problems:

1. Whether to appeal?
2. If he decides to appeal, then to what court of review?
3. If he decides to appeal, then what must he do; what had he best do; and, when must he do whatever he decides to do?

The answer to the first problem, viz., "Whether to appeal?" will depend upon the importance of the case, the estimate of the outcome upon appeal, the possibility of settlement, and other matters extraneous to the scope of this article. Let us assume that a decision to appeal is reached. This decision having been made, to what court shall the appeal be taken? The pertinent provisions of the Illinois Constitution as to appellate jurisdiction of the Illinois Supreme Court, and of the Illinois Appellate courts, are Sections 2 and 11 of Article VI. They are, respectively:

The Supreme Court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus, and habeas corpus, and appellate jurisdiction in all other cases. . . .

After the year of our Lord one thousand eight hundred and seventy-four inferior Appellate Courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide, may be prosecuted from Circuit

A practical consideration not logically a part of the subject of this article, but so closely related to said subject as to call for comment, is the following: In a case in which a litigant has decided in advance of a trial court's determination, that he, said litigant, will abide by the determination even though it is adverse, there may be an advantage to the litigant in avoiding any disclosure of his decision not to appeal. No matter how honest they are, judges are human. It may be a substantial aid to a judge in preventing himself from being influenced by sympathy or other matter which lawfully should not influence him, for him, the judge, to believe that whatever he does may be reviewed elsewhere, and that his record as a competent judge may be hurt by his ruling, even though so slightly.

Because the scope of this article is limited, the author has not considered at length whether there can possibly be a case in which federal appellate review of a judgment of the Circuit Court of Cook County entered on the pleadings in an action at law for damages would be available without a prior effort to obtain a reversal, or at least to obtain a hearing with a view to obtaining a reversal, in an Illinois Appellate court or the Illinois Supreme Court, or in both. If such a case arose it would involve a very unusual factual situation.
and other courts, and from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases, and cases in which a franchise, or freehold, or the validity of a Statute is involved, and in such other cases as may be provided by law. Such Appellate Courts shall be held by such number of Judges of the Circuit Courts, and at such times and places, and in such manner, as may be provided by law; but no Judge shall sit in review upon cases decided by him; nor shall said Judges receive any additional compensation for such services.

Although the language of said Section 11 may seem to indicate a different meaning, it is settled that the legislature may, by statute, provide that appellate review of Circuit court judgments "in all . . . cases in which a franchise, or freehold, or the validity of a Statute is involved," shall be solely by the Supreme court, thus eliminating appellate review by the Appellate court of Circuit court judgments "in all . . . cases in which a franchise, or freehold, or the validity of a Statute is involved," and so eliminating what said language of Section 11 seems to require, namely, appellate review by the Supreme court of Appellate court judgments entered upon appellate review by the Appellate court of Circuit court judgments entered "in all" such cases.4

For the sake of clarity, and not because it will help decide whether P should appeal to the Supreme court or to the Appellate court for the First District, it should be mentioned that the language of the Constitution, Article VI, Section 11, discussed above, does have something upon which to operate even though the legislature has enacted statutory provisions such that there may be no appellate review by the Appellate court of a judgment of a Circuit court in a case "in which a franchise, or freehold, or the validity of a statute is involved." For example, a judgment of the Circuit court entered in an action at law not raising any question as to the validity of a statute might be reviewed by the Appellate court, and the judgment of the Appellate court might raise such a question for the first time in that court. In such a case a right to have the Supreme court review the Appellate

4 Perry v. Bozarth, 198 Ill. 328, 64 N.E. 1076 (1902). Apparently due to a failure of the profession to bear in mind the language quoted above from the Constitution, together with the Supreme court's interpretation of that language, and also due to a confusion in the statutes mentioned in the Perry case, there are many cases decided since the adoption of the Constitution in 1870, arising under the statutes as they have existed from time to time, and involving confusion as to what the legislature could do, constitutionally, and as to what it has done by way of dividing between the Supreme court and the Appellate courts, jurisdiction to review judgments of the Circuit courts. The historical development of the Supreme court and the Appellate courts down to 1929, is well explained in Dodd & Edmunds, Illinois Appellate Procedure §§ 2–9 (1929).
court judgment is constitutionally guaranteed by the aforesaid Section 11.\(^5\)

The principal statutory provisions bearing upon the division of appellate jurisdiction between the Appellate courts and the Supreme court, where a judgment of a Circuit court is to be reviewed, are Section 8 of the Appellate Court Act and Section 75(1) of the Civil Practice Act.

Section 8 of the Appellate Court Act, as amended, provides:

The said appellate courts created by this Act shall exercise appellate jurisdiction only, and have jurisdiction in all matters of appeal or writs of error from final judgments, orders or decrees of any of the circuit courts, ... in any suit or proceeding at law, or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute. ... Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit ... courts, ... directly to the Supreme Court, in all criminal cases and in cases involving a franchise or freehold or the validity of a statute.\(^6\)

Section 75(1) of the Civil Practice Act, as amended, provides:

Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.\(^7\)

There seems to be a contradiction between these two statutory provisions. Section 8 of the Appellate Court Act seems to command that the Appellate courts shall have jurisdiction in all appeals from final judgments, orders or decrees of any of the Circuit courts in any suit or proceeding at law other than a criminal case, not a misdemeanor, and other than a case involving a franchise or a freehold or the validity of a statute. Section 75(1) of the Civil Practice Act seems to command that any appeals which there are in certain enumerated cases shall be taken directly to the Supreme court; and the enumeration of “cases” includes not only those “final judgments, orders or decrees” appeals from which are excepted from Section 8 of the Appellate Court Act, but also “cases” which include “final judgments, orders or decrees,” appeals from which are, under Section 8 of the Appellate

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\(^7\) Ill. Rev. Stat. (1955) c. 110, § 75(1).
Court Act, within the jurisdiction of the Appellate courts. The inconsistency is probably to be disposed of upon the basis that the last amendment of Section 75(1) of the Civil Practice Act, enacted in 1955, is more recent than the last amendment of Section 8 of the Appellate Court Act, enacted in 1945, and that the provisions of said Section 75(1), are, to the extent of the inconsistency, an amendment of said Section 8. Before the most recent amendments to the two sections, an implied amendment of said Section 8, by an amendment of the Civil Practice Act, was recognized.\(^8\)

There are many special statutory provisions which, when applicable, control as to whether appellate review shall be by an Appellate court or by the Supreme court. In most situations these special provisions become applicable only in the special proceedings authorized by the respective statutes in which said provisions are contained. An example of such a statutory provision is Section 19(f)(2) of the Workmen's Compensation Act,\(^9\) which provides that any judgment or order of a Circuit or City court, entered upon review by it of a decision of the Industrial Commission "shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue."

It might seem that by reason of Section 86 of the Civil Practice Act,\(^10\) P need not be much concerned with the question whether the Appellate court or the Supreme court is the correct one to which to appeal. Said Section 86 provides:

If an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to that court, it shall be the duty of the court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the clerk of the proper court. On the receipt of the record the clerk shall at once file the same and the case shall then proceed as if it had been taken there in the first instance. Any bond executed in any case which may be transferred as aforesaid is binding on the parties thereto with the same force and effect as if given in a case taken directly to the court to which the case is transferred.

Notwithstanding this section of the Civil Practice Act, P may come to grief if he appeals to the wrong court. In Wright v. Risser,\(^11\) Wright, a trustee in bankruptcy, filed his complaint in the Circuit

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\(^11\) 379 Ill. 539, 41 N.E. 2d 754 (1942); 378 Ill. 72, 37 N.E. 2d 778 (1941).
Court of Kankakee County to set aside, as fraudulent, certain conveyances previously made by the bankrupt; a motion to dismiss Wright's third amended complaint was made and sustained; the suit was dismissed at Wright's costs; Wright appealed to the Appellate Court for the Second District; that court reversed and remanded the cause with directions to overrule the motion to dismiss; upon further proceedings in the Circuit court, a decree was entered setting aside certain of the conveyances; defendants thereupon appealed directly to the Supreme court; and that court reversed and remanded upon the ground that, because a freehold was involved, the judgment of the Appellate court reversing the first decree of the Circuit court was a judgment entered by a court which lacked jurisdiction and was, therefore, void. This left the Circuit court's original decree of dismissal in effect. After said judgment by the Supreme court, Wright moved the Appellate court to transfer to the Supreme court, the original appeal which he had taken, and the Appellate court granted the motion. Upon the transfer of the appeal to the Supreme court, defendants moved that court to dismiss the appeal, assigning various grounds; and the motion was sustained, the Supreme court holding that Wright's motion to the Appellate court for the transfer of the appeal to the Supreme court, being made more than five years after the original Circuit court decree which Wright sought to have reversed, came too late.

Finally, concerning the question whether P should appeal to the Appellate Court for the First District or to the Supreme court, the meanings of the controlling provisions of Civil Practice Act, Section 75 (1), cannot be readily determined from a mere consideration of the words and phrases used. Any prospective appellant is under the necessity of using the greatest care to make certain that the case authorities upon which he relies in deciding to which court he will appeal, are really the controlling cases. An illustration of this necessity is Wright v. Risser, in which the plaintiff relied primarily on four cases as sustaining the propriety of his appeal to the Appellate court. One of those cases, Hooper v. Wabash Auto. Corp., involved an appeal taken by the plaintiff directly to the Supreme court, from an order of the Circuit Court of Cook County vacating a judgment

12 378 Ill. 72, 37 N.E. 2d 778 (1941).
13 Hooper v. Wabash Automobile Corp., 365 Ill. 30, 5 N.E. 2d 462 (1936); Wainwright v. McDonough, 364 Ill. 626, 5 N.E. 2d 452 (1936); Carney v. Quinn, 358 Ill. 446, 193 N.E. 455 (1934); Schrader v. Schrader, 357 Ill. 623, 192 N.E. 648 (1934).
14 365 Ill. 30, 5 N.E. 2d 462 (1936).
previously entered in plaintiff's favor in an ejectment suit. The Supreme court transferred the appeal to the Appellate Court, First District, saying that the only question "presented on the appeal" was whether the motion to vacate sufficiently complied with Civil Practice Act, Section 72; that that was a question of procedure; that a freehold was not "necessarily" involved because the only effect of vacating the judgment was to leave the cause for trial "with the issues undetermined;" and that a freehold is involved "only where the necessary result of the judgment or decree is that one party gains and the other loses a freehold or where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue."

In another of the cases, *Carney v. Quinn*, the Probate Court of Cook County had admitted a will to probate; Carney appealed to the Circuit Court of Cook County, and it entered an order admitting the will to probate; Carney then moved the Circuit court to vacate its order admitting the will to probate, and the motion was denied; and finally, Carney took his appeal from the order denying his said motion, directly to the Supreme court. The Supreme court transferred the cause to the Appellate Court, First District, commenting that "even though a freehold may be involved under the provisions of the will," nevertheless a freehold is not involved so as to authorize a direct appeal to the Supreme court where "questions of practice, only, are raised" and no question of freehold is involved in the "point assigned for error."

In still another of the cases, *Wainwright v. McDonough*, a suit was filed to remove a cloud upon title to a city lot; the bill was dismissed for want of prosecution; the complainant filed a written motion to have the order of dismissal vacated; the Circuit court denied the motion; and the complainant took an appeal from the order denying the motion to vacate, directly to the Supreme court. That court transferred the appeal to the Appellate court commenting that the "question whether the court erred in denying the motion" did "not directly involve a freehold although a freehold was involved in the litigation before the chancellor;" and that in order for the Supreme court to have jurisdiction upon direct appeal from a trial court, "a freehold must be involved not only in the original proceeding, but also in the issues to be settled on review by" the Supreme court.

15 Ibid., at 31 and 462.  
16 358 Ill. 446, 193 N.E. 445 (1934).  
17 364 Ill. 626, 5 N.E. 2d 452 (1936).
The *Wright* decision\(^{18}\) distinguished these cases outlined above upon the ground that in order to reverse the decree of the Circuit court, the Appellate court had to pass upon "more than matters of procedure." Nevertheless, in the *Wright* case, just as in the *Hooper* case, the *Carney* case, and the *Wainwright* case, the decision to be made upon the appellate review sought by the appellant, was a decision affecting the question, only, whether there should be a trial, or another trial, and not, in reality, "necessarily" involving a freehold.

Obviously the determination of the question whether a freehold is involved in a contemplated appeal depends, if at all doubtful, upon the closest application to, and analysis of, the decided cases. The same thing is true as to the other bases for direct appeal to the Supreme court, specified in Civil Practice Act, Section 75(1). With the Supreme court having more than enough to do, the sense of the situation indicates that its members will not welcome any widespread practice of taking appeals directly to it without due effort to determine whether it is the correct court. On the other hand, what happened in the *Wright* case, above, the provisions of Civil Practice Act, Section 86, and the fact that on an appeal to the Supreme court any error in taking the appeal to that court is not likely to go undetected long enough for it to become too late for the error to be remedied by a transfer to the Appellate court, all these factors combine to indicate that the safest course, in case of real doubt, is an appeal to the Supreme court.

An additional reason for selecting the Supreme court, as opposed to an appeal to the Appellate court, is that if an appeal is taken to the Appellate court and the errors assigned include some of which that court has jurisdiction, then the party appealing is deemed to have waived all those errors on account of which the appeal could and should have been taken directly to the Supreme court.\(^ {19}\)

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\(^{18}\) *Wright* v. *Risser*, 378 Ill. 72, 37 N.E. 2d 778 (1941).

\(^{19}\) *People* v. *Casper*, 5 Ill. 2d 97, 125 N.E. 2d 60 (1955). This case involved review in an Appellate court, by writ of error, of a judgment of the Municipal Court of Chicago entered in a misdemeanor case, but the principle is applicable generally. The recent amendments to the Civil Practice Act have changed to some extent the grounds for direct appeal to the Supreme court, but the principle that grounds for reversal on account of which a direct appellate review by the Supreme court could have been obtained are waived by an appeal to an Appellate court, has governed since the inception of the Appellate courts. The principle does not preclude an appellant in an appeal from an Appellate court to the Supreme court, from seeking reversal on the ground of the Appellate court's error in ruling upon a question of law which first arose in the Appellate court, even though the question falls within such a class of questions that,
There are innumerable situations in which it is entirely clear that an appeal by P from such a judgment as is described above, against him and in favor of D, must be to the Appellate Court, First District. An appeal to that court will be considered.

The judgment was that P recover nothing by his action, that D go hence without day, and for costs in favor of D and against P. The judgment being upon D's motion in the nature of a demurrer, sustained, and P's election to abide by his complaint, the judgment for costs will be for a very small amount. If P wishes to eliminate the possibility that steps will be taken, pending the appeal, to enforce payment of the judgment against his, P's, assets, he may pay it without jeopardizing his right to a reversal. There is some authority that the payment of a money judgment voluntarily, or under such circumstances that there can be no recovery of the amount paid in case of a reversal, does not bar appellate review of the judgment, even though the judgment is not confined to costs.

If P is unwilling to pay the costs voluntarily, and possibly lose his right to recover them from D in case he prevails on his appeal, he may ignore the judgment until such time, if ever, as D enforces payment by process, then pay the judgment involuntarily, and thereby lay the foundation for recovering from D, after reversal of the judgment, the amount paid involuntarily under the compulsion of legal process.

For simplicity in developing the subject it will be considered at this point that P decides against taking any step to avoid, pending the appeal, the enforcement against him of the judgment for costs in favor of D.

In order to appeal as a matter of right, and without first obtaining

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22 First Nat. Bank v. Road Dist. No. 8, 389 Ill. 156, 58 N.E. 2d 884 (1945); Clays v. White, 83 Ill. 540 (1876).
23 It should not be thought that the practice of permitting a small unpaid judgment to “dangle,” with the possibility that collection may be enforced to the embarrassment of the judgment debtor, is a good one. Usually it is very bad practice. But there may be occasion for it, and for the purpose of explanation, it is the simplest procedure, and is discussed first.
leave from the Appellate court, P must file his notice of appeal in the Circuit Court of Cook County, within sixty days from the entry of the judgment that P recover nothing by his action, that D go hence without day, and for costs in favor of D and against P. Within ten days after the notice of appeal is so filed, P must serve a copy of the same upon D, or his attorney of record in the Circuit court. The manner of service of notice of appeal is usually governed by Supreme Court Rule 7, as to service of papers generally; but under certain special circumstances specified in Supreme Court Rule 34(2), the provisions of that rule govern. Under certain of said circumstances, the time for service of notice of appeal is enlarged. Within five days after service of the notice of appeal, P must file in the Circuit court, proof of said service.

What the notice of appeal must contain, and its form, are specified by Supreme Court Rule 33. It is required to “specify and describe the order, determination, decision, judgment or decree which is being appealed from, and if the appeal is from a part thereof only, it shall specify which part.” In addition, Rule 33 states, “no amendment to the notice of appeal specifying and describing orders, determinations, decisions, judgments, decrees or parts thereof not specified in the original notice of appeal shall be permitted after the expiration of 60 days from their entry.” The notice of appeal must “state what judgments, decrees, orders or proceedings are desired from the reviewing court by way of relief.” Amendments as to this item may be permitted “on written motion” even after the sixty-day period just mentioned. The two requirements, namely, that the notice of appeal shall “specify and describe” what “is being appealed from,” and that it shall “state what” is “desired from the reviewing court by way of relief,” should receive more than clerical attention in the preparation of the notice of appeal. The other requirements of Rule 33 should present no problems.

When the Circuit Court of Cook County sustained D’s motion to

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25 Ibid., at § 76(1).
26 Ibid., at 34(1). These rules were in part adopted pursuant to the Civil Practice Act, especially §§ 2, 3, 79, 90.
27 Ibid., at 34(2).
28 Ibid., at 34(3).
29 Ibid., at 33(2).
30 Ibid., at 33(5).
31 Ibid., at 33(3).
32 Ibid., at 33(5).
strike P's complaint, it did what P needs to establish as error. Upon
the appeal P must sustain the position that the complaint stated, and
stated sufficiently, a cause of action at law for damages. When the
Circuit court entered judgment that P recover nothing by his action,
that D go hence without day, and for costs in favor of D and against
P, P having elected to abide by his complaint, that Court did not in
any non-technical sense, commit any new error. It did only what
resulted from the error, if error there was, in its determination that
P's complaint was substantially insufficient in law, that error being
followed by P's election to abide by his complaint. It is, however,
the judgment disposing of the action, and disposing of it finally un-
less the judgment is reversed or in some way set aside, which is
appealable, and from which P must appeal. The Circuit court's ruling
with respect to the legal sufficiency of the complaint, and its order
entered upon that ruling, are, each of them, neither final nor appeal-
able. 33

The general rule, subject to strictly limited exceptions, that only
"final judgments, orders or decrees" may be appealed, as stated in
Section 77(1) of the Civil Practice Act, is carried into the present
Act from earlier statutes, which in turn adopted the rule of common
law and chancery. 34

The foregoing means that if the Circuit court's order sustaining
D's motion and striking P's complaint as substantially insufficient in
law, was entered at an earlier date than the judgment that P recover
nothing by his action, that D go hence without day, and for costs,
then it is the date of entry of the judgment order rather than the date
of entry of the other order to which the Civil Practice Act, Section
76(1), refers when it specifies that "[N]o appeal may be taken . . .
after the expiration of sixty days from the entry of the order, decree,
judgment or other determination complained of. . . ." 35

The foregoing also means that under Supreme Court Rule 33(2),
which requires, first, that the notice of appeal "shall specify and
describe the order, determination, decision, judgment or decree which
is being appealed from," and second, that "if the appeal is from a part

33 Ill. Rev. Stat. (1955) c. 110, § 77(1); Heiden v. Tambone, 6 Ill. App. 2d 325, 127
34 Olson v. Chicago Transic Authority, 1 Ill. 2d 83, 115 N.E. 2d 301 (1953); Reserve
Fund Life Ass. v. Smith, 169 Ill. 264, 48 N.E. 208 (1897); Hayes v. Caldwell, 10 Ill. 33
(1848); Hedges v. County of Madison, 6 Ill. 306 (1844).
35 Hedges v. County of Madison, 6 Ill. 306 (1844) (italics added).
thereof only, it," the notice of appeal "shall specify which part;" there is occasion to "specify and describe" the judgment order only, the earlier order being mentioned, if at all, merely as a part of the description of the judgment order. 88

Within ten days after P files his notice of appeal, he must file with the clerk of the Circuit court, a praecipe, with proof of service of a copy upon D, or D's attorney. In the praecipe, P must designate what parts of the "trial court record" are to be incorporated in the "record on appeal." 89 Not more than sixty days after P files his notice of appeal, the record on appeal must be filed in the Appellate Court of Illinois, First District. 90 Although the transmission of the record on appeal may be attended to by the Clerk of the Circuit Court, the responsibility for seeing that the record on appeal is filed, or of filing it himself, is clearly upon P. 90 Within five days after the record on appeal is filed in the Appellate court, P must serve written notice of the filing date upon D and at the same time mail a copy of the notice to the Clerk of the Appellate Court. 40 If the record on appeal is filed in the Appellate court at least thirty days before the first day of the next term of that court, P's appeal may, and quite probably will, be included on the term calendar for said term. 91 If there is to be oral argument, then the time of the oral argument may be at the term of the term calendar upon which the appeal is first placed. 92 If either party obtains an extension of the time for the filing of his brief in the Appellate court, it may result in the appeal being continued to the next term of the Appellate court. 43 Therefore, any effort by P to obtain an early oral argument by filing his notice of appeal in the Circuit court early in the sixty-day period allowed for its filing, and by filing or causing the filing in the Appellate court of the record

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39 Ibid., at 36(2) (d) and I(2) (d).

40 Ibid., at 36(2) (c) and I(2) (c).

41 Ibid., at 36(2) (f) and I(2) (f).

42 Ill. App. Court Rules (1st Dist.) 13 (1).

43 Ill. App. Court Rules (1st Dist.) 13 (2), 13 (3), 38. Also Ill. Supreme Court Rules 42, 43.

44 Ill. Supreme Court Rules 42, 43; Ill. App. Court Rules (1st Dist.) 13, 38. There are five terms of the Appellate Court, First District, for each year, one beginning with the first Tuesday in each of the months February, April, June, October and December. Ill. Rev. Stat. (1955) c. 37, § 26.
on appeal early in the following sixty days allowed for that purpose, may prove unsuccessful.

The notice of appeal to be filed by P might be in the following form (caption omitted):  

**Notice of Appeal**

To: John Counsel  
Attorney for D  
987 Long Road  
Chicago 301, Illinois

You are hereby notified that P, the plaintiff in the above-entitled action, hereby appeals to the Appellate Court in and for the First District of Illinois, from the judgment rendered and entered in the Circuit Court of Cook County, Illinois, on the 21st day of December, 1956, being a judgment that the plaintiff, P, recover nothing by his action, that D, the defendant, go hence without day, and for costs in favor of said D and against P. Said judgment was entered upon said date upon P's presenting to and filing with the Court in the above-entitled action, after due notice to D, his, said P's, Election in Writing to abide by his Complaint theretofore filed in said action, the Court having theretofore, on the 17th day of December, 1956, entered its order sustaining the motion of D, filed in said action on the 30th day of April, 1956, and, in accordance with said motion, striking said Complaint as substantially insufficient in law.

The plaintiff, P, desires, by way of relief from said judgment, that the aforesaid Appellate Court shall enter its judgment order reversing said judgment of December 21, 1956, and remanding the cause to the aforesaid Circuit Court for further proceedings on the basis of the sufficiency in law of the aforesaid complaint.

P

By Joseph Attorney, /s/  
Joseph Attorney,  
Attorney for Plaintiff  
789 Short Street  
Chicago 103, Illinois  
Phone AX9-9999

The proof of service of a copy of the notice of appeal, might be in the following form (caption omitted):  

**Notice**

To: John Counsel  
Attorney for D  
987 Long Road  
Chicago 301, Illinois

You are hereby notified that I did, on the 24th day of December, 1956, file in the Circuit Court of Cook County, Illinois, a certain

44 Ill. Supreme Court Rules 33.  
NOTICE OF APPEAL

A true copy of said notice of appeal is hereto attached and by this reference made a part of this notice. A true copy of this notice, including a true copy of said notice of appeal, is served upon you this 26th day of December, 1956.

By JOSEPH ATTORNEY /s/
Joseph Attorney
Attorney for Plaintiff
789 Short Street
Chicago 103, Illinois
Phone AX 9-9999

Receipt on this 26th day of December, 1956, of a true copy of the above and foregoing notice, including a true copy of the form of notice of appeal attached to and made a part of said notice, is hereby acknowledged.

By JOHN COUNSEL /s/ 
Attorney for D

Consistently with the facts as indicated in the foregoing forms, and with the applicable rules, the foregoing notice, with the receipt at its foot, and with an attached copy of the notice of appeal, should have been filed in the office of the Circuit Court Clerk not later than December 31, 1956.46

The praecipe, with proof of service of a copy, might be as follows (caption omitted):47

PRAECIPE

The Clerk of the Circuit Court of Cook County is hereby directed to make up a complete authenticated transcript of the record in the above-entitled action, so that it will contain the following documents and matters:

1. Copy of complaint filed on April 2, 1956, and clerk's certificate of said filing.
2. Copy of summons issued on April 2, 1956, filed on April 23, 1956, together with the return of service of said summons endorsed thereon by the Sheriff of Cook County, and clerk's certificate of said filing.
3. Copy of motion of Defendant under Supreme Court Rule 45, filed on April 30, 1956, together with Certificate of Counsel48 and with Receipt and Acceptance of Service, all at the foot of said Motion,49 and clerk's certificate of said filing.
4. Copy of Notice filed on November 26, 1956, together with Receipt and

46 Ill. Supreme Court Rules 34(3).
48 Under Rule 20 of the Circuit Court of Cook County a motion under Section 45 of the Civil Practice Act must be accompanied by a certificate of counsel that it is not interposed for delay and that in the opinion of said counsel the motion is well founded in point of law.
49 Ill. Supreme Court Rules 5(2), 7(1), 7(2) (a); Circuit Court Rule 19(a).
Acceptance of Service at the foot of said Notice, and clerk's certificate of said filing.

7. Copy of Notice filed on December 21, 1956, together with Receipt and Acceptance of Service at the foot of said Notice, and clerk's certificate of said filing.
8. Copy of Election in Writing filed on December 21, 1956, and clerk's certificate of said filing.
9. Copy of judgment entered December 31, 1956, that the plaintiff, P, recover nothing by his action, that D go hence without day, and for costs in favor of D and against P.
10. Copy of Notice of Appeal filed December 24, 1956, and clerk's certificate of said filing.
11. Copy of Notice, including Acknowledgment of Receipt of a copy of said notice at the foot thereof, and also including a copy of the form of Notice of Appeal attached to and made a part of said notice, which notice was filed on December 26, 1956, and clerk's certificate of said filing.
12. Copy of this praecipe, including the Acknowledgment of Receipt of a copy of the same at its foot, and clerk's certificate of filing of this praecipe.
13. A certificate that the foregoing is a complete transcript of the record of all the proceedings in the Circuit Court of Cook County in the above-entitled action.

By JOSEPH ATTORNEY /S/
Joseph Attorney
Attorney for Plaintiff
789 Short Street
Chicago 103, Illinois
Phone AX 9-9999

50 This notice would be the notice of counsel, probably counsel for P, that he would appear before the Circuit court at a particular time and move orally that the court set down for hearing the matter of D's motion under Section 45 of the Practice Act.
51 This order would be the order by which the Circuit court set down for hearing D's motion under Section 45.
52 This would be the order sustaining D's motion made under Section 45, and striking the complaint as substantially insufficient in law. It would, as a matter of course, allow P time within which to file an amended complaint. Section 46 of the Civil Practice Act.
53 P, the plaintiff, would normally have no desire for delay. He would, therefore, present to the court upon a call of motions, of course, his election to abide by the complaint, giving notice to counsel for D that he was doing so.
54 It is not contemplated that a separate complete certificate for each document should be made by the Clerk of the Circuit Court. Said clerk has terse stock forms, one of which he completes and inserts in the transcript before each copy of a document. These forms, together with a single certificate by the clerk, placed at the end of the transcript, operate to make the entire transcript, including each item in it, a single document certified by the clerk.
55 Ibid.
56 Supreme Court Rule 6(4) specifies, "The first paper filed in any cause or served upon the opposite party shall bear the business address and telephone number, if any,
Receipt this 31st day of December, 1956, of a copy of the foregoing Praecipe, including this receipt and acknowledgment at the foot thereof, is hereby acknowledged.

JOHN COUNSEL /S/
Attorney for D

Immediately after filing the praecipe, P, or his counsel, should communicate with the deputy clerk of the Circuit court who is in charge of preparing transcripts in appellate matters, and should learn from him how best he can minimize the work of that clerk. The practice as to many small details changes from time to time. If the clerk will accept and use copies of documents furnished by counsel, extra carbon copies from counsel's file, if sufficiently clear and legible, can reduce, materially, the amount of time required in preparing the transcript. If carbons cannot be used, and if the clerk will accept and use copies specially typewritten for the purpose, and prepared in counsel's office or on his behalf, then care should be taken to have the copies "page for page and line for line," the same as the originals.

If the notice of appeal was filed on December 24, 1956, as suggested in the forms outlined above, then the last day for filing the record on appeal with the Clerk of the Appellate Court, First District, would be February 22, 1957, except that said day is Washington's birthday. Because of that circumstance, the record on appeal would be due to be filed before 12:00 noon Saturday, February 23, 1957. If, however, P desired to have the appeal included on the term calendar of the Appellate Court for the February 1957 term of that court, the last day for the filing with said court of the record of the attorney filing the same, or of the party who appears in his own proper person."

The obvious policy of this Rule applies in many other situations. It should be made easy for the deputy clerk of the Circuit court who prepares the transcript to communicate with appellant's counsel if occasion arises.

57 Supreme Court Rule 34(3) provides that "an acknowledgment" is one of the ways by which "proof of service" of a copy of a notice of appeal may be made. The rules of the Supreme and Appellate courts are silent as to what shall be proof of service as to many other documents. It seems to be the consensus of the profession in Illinois that, absent some special requirement, proof of service upon an attorney may always be by his acknowledgment of receipt. 6 Nichols, Illinois Civil Practice § 6771 (1942). Circuit Court of Cook County, Rule 19, provides that, "Proof of service of any notice or other paper shall be effected: (a) In any case by written acceptance of service, (b) . . . ." The risk to an appellant because of an insufficient authentication of the record on appeal, is substantially minimized by Supreme Court Rule 36(a) and Appellate Court Rule 1 (4) which place a burden upon anyone claiming that the record is incorrect, of establishing that fact, and also of establishing that the error is injurious to that party. Said risk is also minimized by Section 92(1) (c) of the Civil Practice Act, giving the Supreme and Appellate courts power to order or permit the record to be amended.

on appeal would be January 6, 1957, except that said date is a Sunday. Under the statutory language applicable in the case of Washington's birthday, there are several possible grounds for distinguishing this situation from the one where the last permissible day for filing the record on appeal is to be determined. Apparently there is no authoritative interpretation. It seems that if P is clearly to have the right to have the appeal included on the February, 1957, term calendar, he must file the record on appeal not later than 12:00 noon, Saturday, January 5, 1957.

Within five days after the record on appeal is filed with the Appellate court, P must serve written notice of that fact upon D's attorney of record or if D has no attorney of record, then upon D; and P must, at the same time, mail a copy of the notice to the Clerk of the Appellate Court. Apparently no proof of the service upon D, or his attorney, is required. The record on appeal having been filed in the Appellate court, a new "timetable" for a new set of "steps" to be taken, becomes operative. The notice of said filing to be served by P, he at the same time mailing a copy of the notice to the Clerk of the Appellate Court, has already been mentioned. Within thirty days after the filing of the record on appeal, P must file in the office of the Clerk of the Appellate Court, nine copies of appellant's, P's, brief and nine copies of the abstract, together with proof that three copies of said brief and of said abstract have been served upon D's attorney, or upon D. Within twenty days after the due date of P's, or appellant's, brief, D, the appellee, must file with the Clerk of the Appellate Court, nine copies of the appellee's brief, together with proof that three copies of said brief have been served upon P's attorney, or upon P. Within ten days after the due date of D's, appellee's, brief, P may file nine copies of a reply brief, together with proof of service of three copies of said reply brief upon D's attorney, or upon D. D, the appellee, may file an additional abstract making any corrections of, or additions to, the abstract filed by P, which D deems necessary, and in such case D must serve three copies upon P's attorney, or upon P. The time

61 Ill. Supreme Court Rules 7, 36 (2) (f); Ill. App. Court Rules (1st Dist.) 1 (2) (f), 11.
62 Ibid., at 41 (1), 41 (5) and 9 (1), 9 (2).
63 Ibid.
64 Ibid.
65 Ibid., at 41 (1), 41 (5) and 6, 9 (1).
for the filing of an additional abstract by D is not specified by the rules, but obviously it should be on file by the time the Appellate court is asked to notice anything shown by it and not shown, or not shown correctly in the original abstract filed by P. Normally D’s, appellee’s, brief would refer to those matters not shown in the original abstract filed by P, or not shown in said abstract satisfactorily to D; and the additional abstract would need to be filed at or before the time of filing of said appellee’s brief.\(^6^8\)

The abstract, as its name implies, is a condensation or abridgement of the record on appeal. Rules 6 and 8 of the Appellate Court, First District, should be followed closely in its preparation.\(^6^7\) Its unexpressed but obvious purpose is to provide enough copies of what is essential in the record on appeal, and to provide said copies in a form more convenient to use than the record itself.

"The abstract will be taken to be accurate and sufficient unless the opposing party files an additional abstract, making necessary corrections or additions."\(^6^8\) The rule as to P’s, the appellant’s, brief requires that it contain four divisions, the first being a statement of the Nature of the Case, and the third being a Statement of Facts.\(^6^9\) As to the Statement of Facts, said rule provides:

The Statement of Facts shall contain the facts necessary to an understanding of the case, without argument or comment, and with appropriate references to the abstract, or to the record on appeal if the filing of an abstract has been excused.

Concerning the appellee’s brief (D’s brief), the same rule specifies:

Appellee’s Brief shall conform to the same rules as those governing appellant’s brief except that it need not contain a Nature of the Case or Statement of Facts unless those presented by appellant are controverted.

Obviously it is the intent of the rule that the members of the Appellate court shall not need to look beyond the briefs, even to the abstracts. If P and D obey the rule and in their briefs refer for the facts only to the abstract and any additional abstract, then there will be no occasion for the members of the court to consider anything more than the briefs, unless the briefs disclose a conflict as to what is shown by the abstract, or abstracts. Further, if said parties so obey the rule

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67 Ill. Supreme Court Rules 38, 40; Ill. App. Court Rules (1st Dist.) 6, 8.
69 Ibid., at 7.
there will be no occasion for the members of the court to look beyond the abstract or abstracts and to the record unless the abstracts show a conflict as to what is in the record.

The obvious design of the rule furnishes a reason in addition to the ethical and other considerations why P and D should each make certain that no inaccuracy in the abstract, or additional abstract, filed by him, makes it necessary for the court to look to the record to see where the truth lies as between his and his adversary’s abstract; and a similar reason why each of said parties should make certain that no inaccuracy in the Statement of Facts contained in his brief makes it necessary for the court to look to the abstract or abstracts or the record, or to some of them, to see where the truth lies as between his and his adversary’s Statement of Facts. The suggestion of this paragraph is appropriate most frequently in connection with what is done by some litigants in furnishing, as parts of their abstracts, statements of the evidence “condensed in narrative form.” The suggestion should have no application to the abstracts and briefs filed in an appeal from a judgment on the pleadings, but some lawyers can develop a controversy by their statements of the Nature of the Case. After the record on appeal has been filed P can arrange to withdraw the same for use in preparing the abstract.

So much has been written on the art or technique of practical advocacy, applicable both to oral and to written advocacy, that there can be but few suggestions appropriate here. One suggestion, however, is clearly in order. Every beginner will have questions as to the preparation not only of his brief but also of his abstract, and some of those questions will be ones for which no answer can be found in any statute, rule of court, case report, text book, or other usual source to which lawyers and law students customarily look for the solutions of their legal problems. Frequently the answer can be found in what other lawyers have done, with success, in other cases. Often the cases can be selected from recent advance sheets and bound volumes of the reports. Once a case has been disposed of, it usually is an easy matter to examine, at the Appellate court Clerk’s office, all briefs, abstracts and other documents filed in it. Any professional pride which prevents a lawyer, young or old, from using the available, unpatented, uncopyrighted, skill of other lawyers, is folly.

70 Ibid., at 6. 71 Ibid., at 7.
72 Ill. Supreme Court Rules 54(3); Ill. App. Court Rules (1st Dist.) 20.
Either P or D or both may argue their cases orally upon the regular call for that purpose, but at least one of them must request oral argument at the time of filing his first or only brief, or they will both lose the right to oral argument. A request is made by a party by printing a notice of the request upon the cover of his brief.\textsuperscript{73} An appearance must be made in the Appellate court, and the appearance fee of that court must be paid in order to protect the right to oral argument. The provision that the clerk will notify all “counsel of record” of the time set by the court for oral argument, means “counsel of record in the Appellate court.”\textsuperscript{74} D, or an appellee in a different situation, or counsel for D or such other appellee should notice that the provision as to oral argument by an appellant in reply to the oral argument of an appellee, which reads,

The appellant shall have an additional 10 minutes for reply, but if an appellant who has requested oral argument waives his opening argument on the call of the case, he shall not be permitted to reply,

does not operate to deny to an appellant the right to reply unless the appellant requested oral argument.\textsuperscript{75} Thus if P has not requested oral argument, but D has, and if P appears at the time the case is set and has paid his appearance fee, P may waive his opening argument without losing his right to reply.\textsuperscript{76}

Counsel about to make an oral argument should prepare for it on the assumption that he may be interrupted and asked questions by some members of the court. A question from the bench may be his only opportunity to discover, prior to reading an adverse opinion of the court, a misapprehension existing in the minds of all or some of the court’s members. A question from the bench may furnish him his only opportunity to point out some point of fact or law, so well known to him that he has assumed, erroneously, that everyone else, or everyone else who had read the briefs, knew the point. It may be a help in innumerable ways.

Some time after the abstracts and briefs are filed and the oral argument, if any, has been heard, the Appellate court will announce its disposition of the case. The announcement is made orally upon a call of cases ready for decision, and consists, for each case, of nothing more than a word or phrase such as “Affirmed,” “Reversed and

\textsuperscript{73} Ill. App. Court Rules (1st Dist.) 13 (2).
\textsuperscript{74} Ibid., at 13 (2), 13 (3).
\textsuperscript{75} Ibid., at 13 (3).
\textsuperscript{76} Ibid.
Judgment for Plaintiff,” “Reversed and Remanded for Further Pro-
ceedings,” “Reversed and Remanded with Instructions,” and the like. There usually is no occasion for a litigant or counsel to attend at this call. The decision of the Appellate court will be entered of record on the same day that it is announced, orally, in open court; and counsel for each party may then withdraw from the clerk’s office, a copy of the opinion.

P or D, whichever one is the loser, may, within fifteen days after the decision is entered of record, file a petition for rehearing by the Appellate court. If a rehearing is granted, then the party in whose favor the decision of the Appellate court was entered, may, within fifteen days from the granting of the rehearing, file an answer to the petition; and the petitioner is given ten days within which to file a reply. “When a rehearing is granted, the original briefs of the parties and the petition for rehearing, answer and reply, shall stand as briefs on the rehearing. Oral argument will be permitted only when ordered by the court of its own motion.”

If, in our supposed case, the Appellate court’s decision is in favor of P, its judgment will reverse the judgment of the Circuit court and remand the case to the Circuit court for further proceedings. Absent some special circumstance, the further proceedings will be an answer to P’s complaint, to be filed by D, and ultimately a trial on the merits. The mandate of the Appellate court to the Circuit court will not be issued until fifteen days after the entry of the Appellate court’s judgment, in case D files no petition for rehearing, nor until ten days after the petition is denied, in case D files such petition and it is denied.

Under the circumstances described in the preceding paragraph, viz., the Appellate court’s judgment is in favor of P, and either D files a petition for rehearing which is denied, or D lets the time for filing a petition for rehearing expire without filing any such petition, D might like to appeal to the Supreme court. Section 75(2) of the Civil Practice Act provides that the judgments or decrees of the Appellate courts shall be final in all cases in which their jurisdiction is invoked except in those cases in which appeals are specifically required by the Constitution of the State to be allowed from the Appellate courts to the Supreme court, and also except in three other situations. The third one of these three other situations could have no application to a case.

77 Ibid., at 14.
78 Ibid., at 16.
where there has been no trial in the Circuit court. The first and second situations are stated in the statute as follows:

(a) in case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (b) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court.70

It might seem that the Appellate court could, in its discretion allow D to appeal to the Supreme court from its, the Appellate court's, judgment; and that the Supreme court could, in its discretion, allow such an appeal. This is not the case. Although the judgment of the Appellate court is stated in Section 75(2) of the Civil Practice Act to be "final," and is final in such sense that there can be no appeal from it unless it is brought within one of the exceptions; nevertheless it is not final in the sense of Section 77(1) of the Civil Practice Act, nor of the general rule, subject to no exception applicable here, that only final judgments may be appealed, viz., only judgments which terminate the suit or action before the court may be appealed. The judgment of the Appellate court in favor of P, and reversing the Circuit court's judgment in favor of D, calls for remandment for further proceedings in the Circuit court, is, therefore, not final, and is not ready for appeal to the Supreme court.80

If the Appellate court decides in favor of D, rather than P, then P's right to seek a rehearing in the Appellate court, and the timetable for action by him if he decides to do so, is in all respects the same as it is for D under the assumption that the Appellate court's decision is in favor of P.81

Further, if the Appellate court decides in favor of D, then its judgment of affirmance of the Circuit court's final appealable judgment in favor of D, is itself a final appealable judgment. In the present over-

70 The final paragraph of Practice Act § 75(2) contains provisos as to the amount involved in the case of an appeal under (b) above. It also contains procedural requirements applicable to both (a) and (b), stated in the form of provisos.
81 Ill. App. Court Rules (1st Dist.) 14.
burdened condition of the Supreme court the almost invariable prac-
tice of the Appellate court is to "send" no cases to the Supreme court
under Section 75(2)(a) of the Civil Practice Act. On the other hand,
with the Appellate courts doing what they can to permit the Supreme
court to choose the cases which it will review, in addition to those in
which review by it is a matter of right, the Supreme court does, in
some cases, and pursuant to Civil Practice Act Section 75(2)(b),
grant leave to appeal.

If the foregoing is an effective explanation of an appeal to the
Appellate Court, First District, by P, and from a judgment entered
against him by the Circuit Court of Cook County, then an equally
detailed explanation of an appeal to Supreme court, by P, and from a
judgment of affirmance entered by the Appellate court will be un-
necessary.

We may change our hypothetical situation in the Circuit Court of
Cook County, to be as follows:

The plaintiff, P, commences an action by filing a complaint in the
Circuit Court of Cook County, alleging what he claims to be a cause
of action at law for damages; the defendant, D, appears and files a jury
demand and an answer denying every material allegation of the com-
plaint; there is a trial to the court and jury resulting in a verdict in
favor of P awarding substantial damages; the Circuit court enters
judgment on the verdict; D makes a post-trial motion for a judgment
notwithstanding the verdict and also for a new trial; and the Circuit
court denies said motion.

D's situation is much like P's, in the case where D obtained a
judgment on the pleadings, except that:

1. D will almost certainly want to have his appeal made a supersedeas
so as to avoid paying the judgment against him, and so as to avoid,
also, any effort by P, pending an appeal by D, to enforce pay-
ment of the judgment by final process.82

2. D will need to include a report of the proceedings at the trial in
his record on appeal.83

3. The date of ruling upon the post-trial motion, rather than the
actual date of entry of the judgment, controls as to when D must file
his notice of appeal.84

83 Ibid., at § 79; Ill. Supreme Court Rules 36(1)(c); Ill. App. Court Rules (1st Dist.)
1(1)(c).
Section 68.1(4) of the Civil Practice Act provides:

A post-trial motion filed in apt time stays execution on the judgment, and the time for appeal does not begin to run until the court rules upon the motion.

Section 68.1(3) of the Civil Practice Act provides that post-trial motions must be filed within thirty days after the entry of judgment.

Suppose the following occurrences:

1. Entry of judgment on verdict for amount of verdict plus costs, in favor of P and against D.
2. On the twenty-first day after occurrence "1," D files a post-trial motion.
3. On the fortieth day after occurrence "1" and the nineteenth day after occurrence "2," the Circuit court denies D's post-trial motion.

Section 68.1(4) of the Civil Practice Act enlarges the time within which D may file his notice of appeal. The word "appeal" in "time for appeal" clearly includes the filing of the notice of appeal so far as concerns the question whether an appeal has been perfected. But does said word "appeal" include the filing of the "report of proceedings at the trial"? Does it include the filing of the notice of appeal and the filing of the bond so far as concerns the question whether a supersedeas has been perfected? The consensus among the profession is, according to the author's estimate, that Section 68.1(4) substitutes the date of ruling on the post-trial motion for the date of entry of judgment, wherever the date of entry of judgment is made significant by statute or rule of court. The sense of the situation seems to require some such enlargement of the word "appeal" in Section 68.1(4).

CONCLUSION

This article is intended as an exposition of the "steps to be taken," and as an outline of the problems to be solved in an appeal involving only such steps and only such problems as are involved in almost every appeal. It is submitted in the belief that the possession of such a "bare minimum of knowledge" concerning appeals can be given by a law review article; and, when given, will furnish a "head start" in the solution of those more unique and often more complicated problems, a different one of which is involved in almost every appeal.

85 Ibid., at §76. Note §76(2) particularly.
86 Authority cited note 83 supra.