

# Tulsa Law Review

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Volume 18 | Issue 4

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Summer 1983

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### Recommended Citation

Marian P. Opala, & Emily Duensing, *The Immortal Remnants of the Common-Law Record Concept in Oklahoma: What a Common Oklahoma Lawyer Needs to Know*, 18 Tulsa L. J. 541 (2013).

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# TULSA LAW JOURNAL

Volume 18

1983

Number 4

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## THE IMMORTAL REMNANTS OF THE COMMON-LAW RECORD CONCEPT IN OKLAHOMA: WHAT A COMMON OKLAHOMA LAWYER NEEDS TO KNOW

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An Oklahoma lawyer today needs three eyes and synchronic vision when viewing the prospect of an appeal in the state court system. Preparing a trial record for review—or for protection from a delayed attack—virtually demands these attributes: one eye for the past, looking to the common law; a second for the present, focused on title 12 of the Oklahoma Statutes, where current procedure is found; a third for the future, attentive to a record's potential defects that could be fatal on appeal or upon delayed attack in years hence; and finally, all eyes working together to perceive points on which to rescue the case from a judgment lost. Unfortunately, the modern lawyer's vision tends to be too narrow, failing to see the persistent remnants of the common-law record, sprinkled throughout today's appellate practice, which can be invaluable assets in any lawyer's "bag of tricks."

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Admittedly, appellate procedure has undergone many changes since the days of thirteenth century England, wherein lie the roots of Oklahoma practice. Oklahoma has recognized five different methods of bringing an appeal from its inferior tribunals to the supreme court since Oklahoma Territory was denominated in 1889.<sup>1</sup> Yet the basic principle of appellate review has remained constant throughout the centuries: the scope of an appellate court's review of the proceedings, judgments, or decrees of another court is limited to the "record," presented to the appellate court, of matters occurring in that proceeding.<sup>2</sup> In addition, the appellate record is—and always has been—comprised of other records made in the course of the proceeding for which review is sought. What have changed are many of the connotations associated with the term "record" and the various means which have been employed to incorporate materials reflecting the proceedings into the all-important appellate record.

The genealogy of these changes is available, in large part, in Oklahoma statutory and case law—potentially invaluable resources for any lawyer throughout the course of litigation. But the "true" meaning of references in those sources to the components of a "record," and the mechanics of creating one, might easily be lost on one untrained in the early common-law assumptions on which those references are based. One who is so trained, though, should be able to discover the means to leave the "paper trail" so vital to creating a record capable of withstanding virtually any attack. This Article will attempt to alert the "untrained common lawyer" to some of those early common-law assumptions and meanings and to show how they remain viable today, particularly concerning the interpretation of a judgment years after its rendition, a motion for new trial, and the modern usage of the term "record."

#### I. HISTORICAL PERSPECTIVE: THE "RECORD PROPER" AND THE PROCEEDINGS AT TRIAL—AN AGE-OLD DICHOTOMY

The origins of all appellate records can be traced to two arenas: the court clerk's office, where all papers pertaining to a proceeding are filed, and the trial proceeding itself. Recognition of the early common-

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1. These methods of preparing an appellate record are the transcript of record appeal, the casemade appeal, the original record appeal, the appeal in simplified form, and the appeal by designation of record. The latter is the current mode of appeal in Oklahoma, although each of the other modes has contributed to the procedure governing the current method.

2. 4 AM. JUR. 2d *Appeal and Error* §§ 397-398 (1962).

law distinction between these two arenas is essential to understanding the development of Oklahoma appellate procedure.

Until late in the thirteenth century, the common-law practice of trying all questions of fact to a jury and questions of law to the court<sup>3</sup> provided no means of attacking the jury's verdict or the judge's decision, in and of themselves.<sup>4</sup> Instead, a review of evidence occurred only via the attain, a procedure which, though similar to a new trial, was really a new action attacking the jury.<sup>5</sup> Attacks on a judgment also took the form of a new action attacking the judge, rather than an attack on the incorrectness of the judge's decision as to questions of law raised by the pleadings.<sup>6</sup> However, a procedure eventually developed whereby the judgments handed down in the royal courts and its satellites could be reviewed for error without attacking the judge himself.<sup>7</sup> This procedure—the writ of error—provided only a very narrow scope of review and left review of errors occurring at trial untouched. The record presented by a writ of error was "of a very limited nature; it consisted of little, if any, more than the required writings, such as the pleadings, any rulings of the Court thereon, the process, the verdict and the judgment in the case."<sup>8</sup> This record, known as the "judgment roll" because it originally was transcribed or enrolled on a parchment plea roll, did not provide a means for review of such matters as motions during the trial, evidence presented to the jury, or any other in-trial process.

The mere spoken words of the Court, whether in charging the jury, in admitting or rejecting evidence, or otherwise, were not recorded, and could compose no part of its record, or of the record sent to the reviewing court on writ of error. . . . Nor could the testimony of witnesses compose a part of the record sent up in obedience to the direction of that writ. . . . The strict record was all that could be sent to the upper court, and there was no redress by writ of error for an erroneous decision that did not appear in the lower court record.<sup>9</sup>

Thus, only the judge's decisions on issues of law raised by the

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3. At common law, questions of law were tried before a four-judge panel.

4. Wilson, *Assignments of Error in Appellate Practice*, 9 U. KAN. L. REV. 165, 166-69 (1960).

5. *Id.* at 167.

6. *Id.* at 167-68.

7. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 652 (1943).

8. *Empire Box Corp. v. Jefferson Island Salt Mining Co.*, 42 Del. 258, —, 31 A.2d 240, 242 (1943).

9. *Id.* (citations omitted). For an extensive discussion of the "judgment roll," its history,

pleadings<sup>10</sup> were reviewable by the appellate court, because the sole record available to the upper court was the judgment roll, which contained only the original writ or process<sup>11</sup> signed by the attorneys and decisions, orders, or judgments signed by the judge, who was limited in his decision-making powers.

Although issues of fact<sup>12</sup> were also raised by the pleadings, these issues, which might be more readily described today as “matters occurring at trial,”<sup>13</sup> were not reviewable by an appellate court. Technically, these matters were not “matters of record” but were “*en pais*”<sup>14</sup> and thus beyond an appellate court’s scope of review. Even if a scrivener had attempted to write down every word spoken and motion made during a trial, the writings would not be matters of record because they had been neither settled by a judge nor approved by the attorneys as

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and its elements, see 1 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS §§ 175-193 (5th ed. 1925).

10. Unfortunately, many court clerk’s offices, and hence lawyers, use the term “pleadings” to describe any paper which is filed in a particular case and which goes into the case file. Oklahoma law defines pleadings, however, as the plaintiff’s petition, the answer or demurrer by the defendant, the demurrer or reply by the plaintiff, and the demurrer by the defendant to the reply of the plaintiff. OKLA. STAT. tit. 12, § 263 (1981). A motion for judgment on the pleadings is considered equivalent to a demurrer, and thus is also a pleading within the meaning of the law. See *Burdett v. Burdett*, 26 Okla. 416, 420-23, 109 P. 922, 923-25 (1910), *appeal dismissed*, 220 U.S. 627 (1911).

Oklahoma has adopted the common-law definition of “issues of law.” “An issue of law arises upon a demurrer to the petition, answer or reply, or to some part thereof.” OKLA. STAT. tit. 12, § 553 (1981). *Id.* § 552 describes how issues which are to be examined at a trial arise: “Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. There are two kinds. First, of law. Second, of fact.” These definitions, along with the “issue of fact” provision, *infra* note 12, describe issues going to the merits of a complaint or defense, rather than to collateral issues raised by motion during the pre-trial, trial, or post-judgment stages (except for a motion for judgment on the pleadings, which goes to the merits). The dichotomy between issues of law and issues of fact remains viable in Oklahoma today, particularly in reference to new trial motions. This aspect is discussed at *infra* notes 94-120 and accompanying text.

11. *But see* 1 A. FREEMAN, *supra* note 9, § 178, at 351 (noting conflicting authority as to whether the writ or process was part of the early common law’s judgment roll).

12. “An issue of fact arises: First, Upon a material allegation in the petition, controverted by the answer; or, second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading.” OKLA. STAT. tit. 12, § 554 (1981). This also follows the common-law definition of issue of fact.

13. See *Poafpybitty v. Skelly Oil Co.*, 394 P.2d 515, 518-20 (Okla. 1964) (explaining difference between issues of law and issues of fact). Although some “matters of law” do arise at trial, for example upon a demurrer to the evidence, these are technically not common-law issues of law and thus are not automatically “matters of record” as are issues of law arising on the face of the pleadings.

14. A matter *en pais* is one which is not properly a part of the appellate record. See BLACK’S LAW DICTIONARY 882-83 (5th ed. 1979). *En pais* is the same as *in pais*. BALLENTINE’S LAW DICTIONARY 404 (3d ed. 1969).

being an accurate record of events occurring at trial. As a result, issues of fact remained unreviewable.

In 1285, this defect in English practice was rectified by the Statute of Westminster II,<sup>15</sup> which allowed parties aggrieved by an action or ruling of the court at trial to bring a bill of exceptions. By taking exception to incorrect rulings at trial, writing those rulings and exceptions down, and having the judge settle or approve, sign, and seal the writing, parties were able to incorporate the in-trial rulings and relevant evidence into the record to be reviewed by the appellate court.<sup>16</sup> Once settled and signed by the judge, the bill of exceptions became part of the judgment roll to be examined in a proceeding-in-error. The bill provided the means for transforming matter otherwise "not of record," or *en pais*, into reviewable "matter of record."<sup>17</sup>

This method of appellate procedure, which endured for centuries, was incorporated, with only minor changes, into the first collection of statutes for Oklahoma Territory in 1890<sup>18</sup> as an appeal by "transcript of the record."<sup>19</sup> "Transcript" in this sense meant a copy of the judgment roll, as opposed to the term's use today to refer to a "transcript of the evidence" or a "transcript of trial proceedings" prepared by a court reporter.<sup>20</sup>

Though the 1890 statutory provisions are somewhat vague,<sup>21</sup> the appeal by transcript of the record embraced two possible means of creating an appellate record: by transcript certified by the clerk alone, which included signed papers properly a part of the judgment roll, or "record proper"<sup>22</sup> as this record was known prior to 1285; and by transcript that also incorporated evidentiary matters into the judgment roll

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15. Wilson, *supra* note 4, at 170.

16. *Id.*

17. See I A. FREEMAN, *supra* note 9, § 179, at 351.

18. OKLA. STAT. ch. 70, art. 24, §§ 1-32 (1890). Statutes providing for an appeal by transcript of the record were repealed in 1968. Act of May 3, 1968, ch. 290, § 4, 1968 Okla. Sess. Laws 469, 470 (effective Jan. 13, 1969), *repealing* OKLA. STAT. tit. 12, §§ 954-967 (1961) and conflicting laws.

19. OKLA. STAT. ch. 70, art. 24, § 24 (1890).

20. See *infra* notes 116-17 and accompanying text.

21. This is perhaps because of the haste with which the statutes were compiled. The preface to the Oklahoma Statutes of 1890 provides an account of the first session of the Legislative Assembly of Oklahoma Territory, which convened Aug. 27, 1890. According to this account, assemblymen accomplished in 30 days what should have taken 10 months, so that the statutes could be in printed form by January 1891. "[T]he session's closing days witnessed an avalanche of legislation, precluding consideration in detail. . . . Technical accuracy vanished. Legal sense was often lost. Construction was thrown in medley. Punctuation ran riot." Little, Pitman & Barker, *Preface* to OKLA. STAT. (1890).

22. The terms "judgment roll" and "record proper" are synonymous. *Short v. Hale*, 400 P.2d 816, 819 (Okla. 1965); *Peerson v. Mitchell*, 205 Okla. 530, 531, 239 P.2d 1028, 1030 (1950).

via a bill of exceptions which had been settled and signed by the judge.<sup>23</sup> The 1890 provisions also included a vague description of matters to be made, automatically, "of record," stating that only "proper entries made by the clerk, and all papers pertaining to a cause, and filed therein . . . are to be deemed parts of the record."<sup>24</sup> The reference here to entries is important, and the use and meaning of that term will be discussed in greater depth in section IV of this Article.<sup>25</sup> The term refers to the clerk's formal act of "entering" matters of record upon the trial court's own official journal record. For many years in Oklahoma, a formal "record entry" of any judgment or order in the trial court was a strict prerequisite for review of that judgment or order on appeal.

Oklahoma Territory's 1893 statutes clarified what material was automatically a part of the "record proper," establishing the definition that still is used today.

The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account, or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded.<sup>26</sup>

This definition is now embodied, just as it appeared in the 1893 Code, in section 32.1 of title 12.<sup>27</sup> The Oklahoma Supreme Court has stated in numerous opinions that the provision is but a modern verbal garb for the common-law "judgment roll" or record proper.<sup>28</sup>

The 1893 Code also differed from the 1890 Code in that the major

23. See OKLA. STAT. ch. 70, art. 24, §§ 1-5, 24-25 (1890). The 1890 Code defined an exception as "an objection taken to a decision of the court upon a matter of law." *Id.* § 1. This same definition appears in the current version of the Oklahoma Statutes. OKLA. STAT. tit. 12, § 631 (1981).

24. OKLA. STAT. ch. 70, art. 24, § 25 (1890).

25. See *infra* notes 128-55 and accompanying text.

26. OKLA. STAT. ch. 66, § 430 (1893).

27. OKLA. STAT. tit. 12, § 32.1 (1981) ("material for record").

28. *E.g.*, *Short v. Hale*, 400 P.2d 816, 819 (Okla. 1965); *State ex rel. Comm'rs of Land Office v. Whitfield*, 200 Okla. 300, 301, 193 P.2d 306, 307-08 (1948); *Sabin v. Lavorsen*, 193 Okla. 320, 322, 145 P.2d 402, 405, *cert. denied*, 320 U.S. 792 (1943). Each of these cases defined judgment roll in the same language as statutory provisions. See also *Dime Savings & Trust Co. v. Able*, 185 Okla. 461, 461, 94 P.2d 834, 834 (1939) (syllabus by the court) ("word 'record' as used in [statute] is synonymous with or equivalent to 'judgment roll' at common law"); *Excise Bd. v. Chicago, R.I. & P. Ry.*, 152 Okla. 120, 122, 3 P.2d 1037, 1038 (1931) (defining judgment roll as being same as statute concerning material for record); *Pettis v. Johnston*, 78 Okla. 277, 296, 190 P. 681, 700 (1920) (also defining judgment roll as being same as statute concerning material for record).

provisions on exceptions to trial court rulings were separate from the provisions on proceedings-in-error. While the 1890 Code's article entitled "Appeal" was comprised largely of provisions applicable to the taking and preparation of exceptions,<sup>29</sup> these provisions were moved in the 1893 Code to the article entitled "Trial."<sup>30</sup> These changes indicated a legislative attempt to draw attention to the necessity of exceptions where they were vital—at trial<sup>31</sup>—and emphasized the still-existing distinction between "matters occurring at trial" not of record, and matters apparent on the face of the record. The provisions concerning exceptions in the 1893 Code, like the provisions for the record proper, remained virtually unchanged in subsequent statutory codifications until 1951, when the necessity of taking formal exceptions was abolished. Formal exceptions were replaced by a provision which allows that an objection to in-trial court rulings on points of law is sufficient to preserve the matter for appeal.<sup>32</sup> Oklahoma law remains unsettled, however, as to whether a bill of exceptions, if one were filed, would be recognized as a valid expansion of the record proper as described in section 32.1 of title 12.<sup>33</sup> The continued validity of the bill of excep-

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29. See OKLA. STAT. ch. 70, art. 24 (1890).

30. See *id.* ch. 66, §§ 311-317 (1893). The 1893 Code provisions concerning the process for appeal were set forth in the article entitled "Error in Civil Cases." *Id.* §§ 556-598.

31. The provisions on exceptions required the observance of strict formalities when disagreeing with an in-trial court ruling. Exceptions could be taken only to a decision on a matter of law at the time the ruling was made, although any exception later had to be reduced to writing and, with the evidence necessary to explain it, presented to the trial judge for settlement, or approval, and signature. However, if a decision was such that it belonged in the record proper, an exception could be embodied in the decision, as long as sufficient grounds for the exception also were included. After settlement and signature by the judge, the bill of exceptions was then filed with the court clerk who filed the bill "with the pleadings as a part of the record." *Id.* §§ 311-317.

32. Act of Apr. 9, 1951, tit. 12, ch. 11, §§ 1-2, 1951 Okla. Sess. Laws 25, 25-26 (providing that formal exceptions to rulings or orders of the court are no longer required and repealing all conflicting laws).

33. So far, the issue has never been addressed by the Oklahoma Supreme Court. However, some Oklahoma statutes suggest the continued existence of the bill of exceptions, even though a formal bill is no longer necessary to preserve errors occurring during the trial for review. See OKLA. STAT. tit. 12, §§ 578, 611, 616, 637 (1981).

Oklahoma case law prior to 1951 followed the common law in holding that the bill of exceptions became a part of the judgment roll, or record proper, for purposes of a transcript of the record appeal. See, e.g., *Industrial Bldg. & Loan Ass'n v. Cunningham*, 183 Okla. 125, 125, 80 P.2d 228, 228 (1938) (syllabus by the court) ("A motion for new trial and an order made thereon are no part of the record of the trial court which can be brought to this court by transcript unless incorporated therein by bill of exceptions."); *Godfrey v. F.D. Bearley Lumber Co.*, 171 Okla. 425, 425, 43 P.2d 478, 479 (1935) (syllabus by the court) ("[I]f [the appealing party] desires to bring to this court any part of the record other than the pleadings, the process, the return, reports, verdict, orders, and judgments . . . he must incorporate the same into the record by a bill of exceptions."); *Williamson v. Adams*, 34 Okla. 317, 319, 125 P. 486, 487 (1912) ("The record proper in a civil action consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment; and incorporating motions, affidavits, or other papers into a transcript will not constitute them a



tions could provide an invaluable asset, or hazard, to an attorney wishing to preserve all important aspects of a proceeding.<sup>34</sup>

Although it retained the strict formalities of old English practice in some respects, the 1893 Code also broke new ground. First, it officially abolished the writ of error,<sup>35</sup> providing instead that appellate proceedings were to be initiated by a "petition in error" listing all assignments of error occurring either at trial or on the face of the judgment roll.<sup>36</sup> In addition, a "summons in error" had to be served on the adverse party to the appeal.<sup>37</sup> The petition in error, containing all assignments of error, continues to be used today.<sup>38</sup> The summons in error, described in case law as a means by which the appellate court gained personal jurisdiction over an appellee,<sup>39</sup> was later replaced by the requirement that the appealing party give notice of his intent to appeal.<sup>40</sup> This notice is no longer required.<sup>41</sup>

The second major break from the common law in the 1893 statutes was the provision for a completely new, alternative method of appeal: the "casemade."<sup>42</sup> The casemade, which became the dominant method of creating an appellate record, provided a more modern means of cre-

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part of the record, unless made so by a bill of exceptions." Each case also further illustrates and reiterates the basic common-law doctrine that only the record proper, or judgment roll, was reviewable, regardless of whether it included a bill of exceptions.

34. See *infra* notes 83-93 and accompanying text; see also Morgan, *Delayed Attacks on Final Judgments*, 33 OKLA. L. REV. 45, 54-72 (1980) (attack may be made on the validity of a final judgment at any time, either directly or collaterally, if it appears from the face of the judgment roll that the rendering court lacked subject matter jurisdiction).

35. OKLA. STAT. ch. 66, § 582 (1893).

36. *Id.* § 561.

37. *Id.*

38. OKLA. STAT. tit. 12, § 990 (1981).

39. See *Hill v. Hill*, 49 Okla. 424, 427-29, 152 P. 1122, 1123 (1915). The idea that the appellate court needed to obtain personal jurisdiction over an appellee resulted from the common-law concept of review that an appeal was a brand new proceeding. See *Sunderland*, *supra* note 7, at 660. Under the modern approach, however, an appeal is considered a continuation of the trial court action. *Mabee Oil & Gas Co. v. Price*, 198 Okla. 510, 512, 179 P.2d 916, 918 (1947).

40. OKLA. REV. LAWS ANN. §§ 5238-5239 (1910), which dealt with the summons in error, were repealed by Act of Mar. 23, 1917, ch. 219, §§ 1-2, 1917 Okla. Sess. Laws 403, 403-04. The session law also replaced the summons in error with the requirement that the appealing party give notice of his intent to appeal. *Id.* § 1, 1917 Okla. Sess. Laws at 403-04. The notice of intent to appeal has been described as a means to obtain personal jurisdiction. *Callender v. Hopkins*, 97 Okla. 41, 42, 222 P. 672, 673 (1924) ("The notice provided in the amendment is for the purpose of obtaining jurisdiction of the person in the proceedings in error.").

41. See OKLA. R. CIV. APP. P. 1.14(b) ("The mailing of a copy of the petition in error shall constitute notice of appeal, and no further notice is required.").

42. OKLA. STAT. ch. 66, §§ 563-568 (1893). Statutes providing for the casemade appeal were repealed in 1968. Act of May 3, 1968, ch. 290, § 4, 1968 Okla. Sess. Laws 469, 470 (effective Jan. 13, 1969). However, the casemade may still be viable. Should the parties to an appeal dispute the contents of the court reporter's transcript of trial proceedings, "settlement" of the transcript—and the dispute—by the trial judge would be required.

ating the record on appeal, requiring neither the formal and narrow judgment roll nor the bill of exceptions.<sup>43</sup> The casemade was but a term for a court reporter's copy of essential papers on file in the case, together with his account, in question and answer form, of the trial proceedings. It thus provided an improved method for preserving errors which occurred at trial, and hence were "not of record."

The wording of the casemade statutory provision was simple.

A party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court.<sup>44</sup>

After making the case within certain time limits,<sup>45</sup> the appellant was then required to serve the casemade on the adverse party or parties, who could make amendments in writing.<sup>46</sup> The amended casemade was then to be given to the trial judge, who would settle the statement, sign it, and "cause it to be attested by the clerk, [with] the seal of the court . . . thereto attached."<sup>47</sup> Disputes over the casemade's contents were handled at a hearing preceding the judge's settlement of the casemade.<sup>48</sup> Exceptions stated in the casemade had the same effect as if they had been reduced to writing and signed by the judge.<sup>49</sup> Despite the fact that additional statutes were created over the years to deal with specific problems arising from the procedure,<sup>50</sup> the basic method

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43. See OKLA. STAT. ch. 66, §§ 563-568 (1893).

44. *Id.* § 565.

45. *Id.* § 566. The appellant was allowed three days to serve the casemade on the adverse party, although the judge could extend the time. *Id.* § 567. In later years, statutes permitted longer time periods for first service and the trial judge still was permitted to grant an extension. See OKLA. REV. LAWS ANN. § 5242 (1910) (allowing 15 days for first service). The trial judge could not extend the time beyond the statutory deadline for perfecting an appeal, however. See *Reed v. Wolcott*, 40 Okla. 451, 453, 139 P. 318, 319 (1914).

46. OKLA. STAT. ch. 66, § 566 (1893).

47. *Id.*

48. See *Charles v. Hillman*, 48 Okla. 549, 550-51, 150 P. 461, 461 (1915) (appeal dismissed because casemade failed to show that appellees were given notice of time and place for settlement of casemade, and did not show waiver of such notice).

49. OKLA. STAT. ch. 66, § 566 (1893).

50. Such problems included correction of the casemade, OKLA. REV. LAWS ANN. § 5243 (1910); extension of time to make and serve a casemade after a previous extension order expired, *id.* § 5246; the evidentiary effect of the trial judge's certification of the casemade, *id.* § 5248; the trial judge's refusal to include certain matters in the casemade (parties could "prove" the contents in a special hearing before another judge), *id.* § 5249; creation of casemade by stipulation of the parties, OKLA. STAT. tit. 12, § 966 (1941); and other procedural matters, for example, COMP. OKLA. STAT. ANN. § 785 (1921), providing for casemade service on non-residents.

In reference to the necessary steps in perfecting an appeal by casemade, see *Barrows v. Cas-*

of making a case, set out in the Code of 1893, was retained.<sup>51</sup>

In 1968, statutes providing for the transcript of record and casemade appeals were abolished,<sup>52</sup> as were provisions for two other methods of appeal, the original record appeal and the appeal in simplified form, which had been created during the 1950's and 1960's.<sup>53</sup> To-

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sidy, 113 Okla. 114, 115, 239 P. 581, 582 (1925) (appeal dismissed in part because appellant failed to serve casemade on all appellees); Pettigrew v. Harmon, 62 Okla. 245, 246, 162 P. 458, 459 (1917) (appeal dismissed because appellant failed to serve casemade on opponent within time set out in record entry of judgment, even though court reporter's notes showed judge allowed a longer period); Barger-Adams Co. v. Walker Bros., 55 Okla. 637, 637, 155 P. 587, 587 (1916) (appeal dismissed because casemade served one day late, rendering it a nullity); Board of Comm'rs v. Vann, 60 Okla. 86, 86, 159 P. 297, 298 (1916) (appeal dismissed in part because casemade failed to show that certificate of trial judge settling casemade was attested by court clerk and by seal of court); Ledgerwood v. Neal, 60 Okla. 133, 134, 159 P. 292, 292 (1916) (appeal dismissed because casemade not filed in same court in which case was tried).

51. See OKLA. STAT. tit. 12, §§ 956-960 (1961) (repealed 1968).

52. Act of May 13, 1968, ch. 290, § 4, 1968 Okla. Sess. Laws 469, 470.

53. See generally Act of June 1, 1955, tit. 12, ch. 15b, §§ 1-12, 1955 Okla. Sess. Laws 136, 136-38 (appeal on the original record); Act of July 12, 1965, ch. 464, § 1, 1965 Okla. Sess. Laws 906, 906 (repealed 1968) (appeal in simplified form); Okla. Sup. Ct. R. for Simplified App. 1-20, OKLA. STAT. tit. 12 (Supp. 1965) (repealed 1968) (appeal in simplified form). These methods lessened the appellant's burden in perfecting an appeal. Perfecting an appeal under the casemade and transcript-of-record methods required many procedural steps, a great number of which were considered jurisdictional and thus resulted in automatic dismissal of an appeal or summary affirmance. However, the original record appeal was perfected merely by filing a petition in error within 90 days after judgment was rendered, regardless of whether the appellate record was ready for transmission to the supreme court, and the giving of notice of intention of appeal. *Marshall v. Marshall*, 408 P.2d 794, 797 (Okla. 1965) (construing OKLA. STAT. tit. 12, §§ 954, 956.2 (1961), sections which deal with proper notice and timely filing, respectively). On the other hand, appeals by transcript of record or casemade required that the petition in error be accompanied by the transcript or casemade when the petition was filed. See generally *Taylor v. Sites*, 296 P.2d 152, 154 (Okla. 1956) ("[A]n appeal has not been filed in time, even though petition in error is timely filed, unless the casemade is attached thereto and filed also within said time."); *Banta v. Banta*, 203 Okla. 580, 581, 224 P.2d 592, 593 (1950) (appeal dismissed because "where the petition in error is not accompanied by a case-made duly served and filed or by a transcript of the record duly certified, there is nothing for this court to review").

The original record appeal's contents and form also differed from the appeal by casemade or transcript of record. The "original record" contained the originals of all papers filed in the lower court, gathered, indexed, bound, and certified by the court clerk, and so much of the court reporter's transcript of the proceedings as was designated by the parties. No settlement procedure before the trial judge was necessary unless the parties disputed the contents. Additionally, unlike the casemade method where the appellant was required to include all evidence if an assigned error depended on considering any evidence, the original record appeal merely required that the appellant include only so much of the evidence as was necessary to support his or her allegation of error. Compare decisions dealing with appellant's burden under the casemade method, e.g., *Ledgerwood v. Neal*, 60 Okla. 133, 159 P. 292 (1916); *School Dist. No. 51 v. Trotter*, 10 Okla. 625, 64 P. 9 (1901), with those determining burden under original record method, e.g., *Massey v. Love*, 478 P.2d 948, 950 (Okla. 1971) (trial court judgment reversed because appellant's designated evidence went unchallenged by a counter-designation from appellee); *Marshall v. Marshall*, 408 P.2d 794, 797 (Okla. 1965) (court's willingness to consider appeal as an original record saved an appeal that was fatally defective as casemade or transcript).

The appeal in simplified form was even more like the present "designation of record" method. Three steps were necessary to perfect an appeal in simplified form: proper notice of intent to appeal, a petition in error filed within 30 days after rendition of judgment, and a \$25

day's "designation of the record" appellate procedure was then established, breaking down the common-law strictures of form even further.

Yet the common-law forms and distinctions—and the Oklahoma cases pertaining to them—remain viable today. The judgment roll or record proper, for example, plays a vital role in preserving a judgment against attacks on it as void on its face and is instrumental in making a delayed attack on a judgment in the court where the judgment was rendered.<sup>54</sup> The issue of fact/issue of law dichotomy remains alive in conjunction with the motion for new trial and there is a plethora of older, but relevant, cases concerning the type and form of court or trial records which may be considered by an appellate court.<sup>55</sup> The court still does not consider some records in the court clerk's office acceptable for review.<sup>56</sup> Moreover, the connotative meanings of terms pertaining to records, such as "journal entry" and "record entry," have changed so substantially that a modern lawyer who lacks knowledge of the common-law underpinnings of early Oklahoma decisions could find it virtually impossible to understand the concepts embodied in them and their implications for today's appellate record.

## II. APPLICATIONS: THE JUDGMENT ROLL IN OKLAHOMA CASE LAW AND ITS IMPLICATIONS TODAY<sup>57</sup>

Obviously, the term "appellate record" has undergone a variety of

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deposit with the court clerk. Time extensions were prohibited. The appellate record was to be comprised of papers and evidence designated by the appellant and appellee. After the designations were made, the clerk was to index and bind the originals of all designated records, or certified copies, upon order by the trial judge and then file the designated record in the case. Correction or supplementation was available by trial court order prior to transmission to the supreme court. Okla. Sup. Ct. R. for Simplified App. 1-20, OKLA. STAT. tit. 12 (Supp. 1965) (repealed 1968).

54. *See Pettis v. Johnston*, 78 Okla. 277, 296, 190 P. 681, 700 (1920); *see also Morgan, supra* note 34, at 54-72 (discussing necessity of error appearing on face of judgment roll in delayed attack on final judgment).

55. *E.g.*, *Marshall v. Marshall*, 408 P.2d 794, 796-97 (Okla. 1965) (describing forms required for various modes of appeal); *Long v. McMahan*, 205 Okla. 696, 697, 241 P.2d 185, 185 (1952); *Apple v. American Nat'l Bank*, 104 Okla. 69, 70, 231 P. 79, 80-81 (1924) (record entry of judgment required on appeal).

56. *See State ex rel. Dep't of Highways v. Lehman*, 462 P.2d 649, 650 (Okla. 1969) (court refused to consider an unsigned letter, attached to appellant's brief, which purportedly was from trial judge and supported appellant's contention that the journal entry filed in the action was not the journal entry that should have been filed); *Render v. Henry Schafer, Inc.*, 198 Okla. 95, 95, 175 P.2d 330, 331 (1946); *Little v. Employer's Casualty Co.*, 180 Okla. 628, 629, 71 P.2d 687, 688 (1937) (clerk's unsigned minutes and minute entries on appearance docket cannot be considered by appeals court).

57. The use here of the term "judgment roll" as synonymous with "matters automatically of

transformations in meaning over the years. The meaning of the term "transcript" has similarly changed. Today, the word is used in reference to a court reporter's "transcript of trial proceedings," meaning the stenographically reported proceedings or evidence from a trial or hearing.<sup>58</sup> The term's use in Oklahoma case law prior to 1968, however, was most often in reference to a "transcript of the record," a type of appellate record that included only the common-law record proper, or judgment roll.<sup>59</sup>

When a transcript of record appeal was taken, presentation of the entire judgment roll was mandatory.<sup>60</sup> As a result, knowledge of what papers on file in the court clerk's office properly belonged on the judgment roll was vital. Although "material for the record," meaning the judgment roll, or record proper, has been defined by statute since before statehood and the bill of exceptions was available to expand the record proper's contents to include matters occurring at trial and not of record, problems naturally arose as trial proceedings became more complex. Written motions and rulings, exhibits, agreed statements of facts, minutes, jury instructions, and a variety of other papers on file in the court clerk's office complicated the delineation between matter automatically "of record" and matter requiring a bill of exceptions. Despite the statutory definition, the multitude of Oklahoma Supreme Court opinions addressing the issue<sup>61</sup> illustrates that the delineation was far from clear. An extensive case history of the court's treatment of

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record" does not mean that an attorney today has no responsibility for designating such matters for inclusion in the appellate record. Rule 1.20(a) of the supreme court's rules of appellate procedure in civil cases mandates that an appellant "file in the trial court . . . a designation of any pertinent instruments filed in the case and of proceedings and evidence adduced which are sought to be included in the record on appeal." OKLA. R. CIV. APP. P. 1.20(a). In addition, it has been held that the attorneys to an appeal, not the court clerk, are responsible for "what is contained in the record transmitted for appellate review," regardless of the nature of the matter omitted. *S & C Transp. Co. v. McAlister*, 528 P.2d 1140, 1144 (Okla. Ct. App. 1974) (released for publication by the Okla. Ct. App.). The Oklahoma Supreme Court has held that, after a timely petition in error is filed, "Unexcused failure . . . to timely designate the record on appeal . . . constitutes an abandonment of the appeal and the appeal becomes subject to dismissal." *Haynes v. Barnett*, 483 P.2d 1140, 1141 (Okla. 1971).

58. This is the meaning given "transcript" in the current supreme court rules governing appellate procedure in civil cases. OKLA. R. CIV. APP. P. 1.20(a), (b), 1.21.

59. *See supra* notes 19-28 and accompanying text.

60. *See, e.g., Local Union Textile Workers No. 1840 ex rel. Bradfield v. Commander Mills, Inc.*, 182 Okla. 315, 316, 77 P.2d 705, 706 (1938) (appeal dismissed because transcript of record failed to contain complete copy of all materials belonging in record proper filed in the case); *Schabel v. Wright*, 179 Okla. 73, 73, 64 P.2d 855, 855 (1937).

61. *E.g., Industrial Bldg. & Loan Ass'n v. Cunningham*, 183 Okla. 125, 125, 80 P.2d 228, 228-29 (1938); *Grady County v. Schrock*, 53 Okla. 144, 146, 155 P. 882, 882 (1916); *Putnam v. Western Bank Supply Co.*, 38 Okla. 152, 152, 132 P. 483, 483 (1913); *Kingman v. Pixley*, 7 Okla. 351, 352, 54 P. 494, 495 (1898).

the judgment roll is not warranted here, however. The primary purpose of this section is threefold—to reemphasize that the judgment roll most often parades in Oklahoma case law as a transcript of record appeal; to alert the practitioner to further definition of the judgment roll in case law; and to show the continuing importance of the judgment roll to a court attempting to construe a prior ambiguous judgment after the time of appeal from that judgment has expired.

A. *The Judgment Roll in Case Law*

The boundaries of the judgment roll were delineated by the Oklahoma Supreme Court in the 1939 case of *Dime Savings & Trust Co. v. Able*.<sup>62</sup> The appeal, brought by transcript of record, was dismissed because the appellant mistakenly thought his motion for revivor of a dormant judgment and the trial court's denial of it were part of the judgment roll and thus reviewable by the transcript mode of appeal. The court ignored the argument that the motion was a "pleading" within the statutory definition of "material for the record" or judgment roll,<sup>63</sup> concentrating instead on the fact that the motion was brought after the entry of judgment in the case.

A record, in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer for the purpose of perpetuating the exact state of facts. . . . The record ends with the judgment of the court. . . .

It has many times been held that a motion for a new trial and order overruling the same are not a part of the record which may be brought up by transcript. . . .

It has been held in numerous cases that a motion to vacate and set aside a judgment and order of the court thereon are not a part of the record unless brought into the same by bill of exceptions. . . .

. . . Errors which appear on the face of the record, which is defined as "the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court", *prior to the entry of final judgment*, are reviewable by transcript of the rec-

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62. 185 Okla. 461, 94 P.2d 834 (1939).

63. *Id.* at 461-62, 94 P.2d at 835. Material for the record is now listed in OKLA. STAT. tit. 12, § 32.1 (1981). This definition for the judgment roll has remained the same in Oklahoma for 90 years.

ord duly certified to this court.<sup>64</sup>

Thus, the judgment roll, or record proper, begins with the plaintiff's petition, or amended petition, and ends with record entry<sup>65</sup> of the final judgment or order of the court in the original action. Post-judgment motions and rulings thereon are not part of the judgment roll, and require formalities in the nature of a bill of exceptions to include them in the record proper of a proceeding. *Dime Savings* further suggests that any post-judgment action taken in regard to the judgment would be excluded from the judgment roll, because of the court's statement that executions "or other writs issued by the clerk to carry the judgment into effect"<sup>66</sup> were matters of fact, or *en pais*, and thus not part of the judgment roll. Presumably then, post judgment entries on the county or court clerk's judgment docket, necessary to create a judgment lien,<sup>67</sup> are also excluded.

Although it did not do so, the court might also have found a basis for dismissal in the appellant's argument that the motion for revivor was a pleading. Section 263 of title 12 of the Oklahoma Statutes enumerates "pleadings" as the plaintiff's petition, the defendant's answer or demurrer, the plaintiff's demurrer or reply, and the defendant's demurrer to the plaintiff's reply. Only these papers come within the judgment roll as pleadings and a motion for revivor clearly is not included.

Papers which are included as part of a pleading, such as exhibits,<sup>68</sup> may become part of the judgment roll, although affidavits are excluded.<sup>69</sup> Other matters which the court has held to be embraced within the judgment roll include a referee's report and bill of excep-

64. 185 Okla. at 461-62, 94 P.2d at 835 (emphasis added; citations omitted).

65. Record entry is vital here, and does not refer to a mere minute notation by the court clerk on the appearance docket of a particular case. Neither the court clerk's minutes nor minute entries on the docket are acceptable for civil appellate review. See *supra* note 56; *infra* notes 80-81 & 155 and accompanying text.

66. 185 Okla. at 462, 94 P.2d at 835. It should be noted that a new proceeding, filed in the court where the original judgment was rendered, attacking the original judgment, such as a delayed attack permitted under OKLA. STAT. tit. 12, §§ 1031, 1033, 1038 (1981), would initiate an entirely new judgment roll as well.

67. See OKLA. STAT. tit. 12, § 706 (1981).

68. See *Sabin v. Levorsen*, 193 Okla. 320, 322, 145 P.2d 402, 405, *cert. denied*, 320 U.S. 792 (1943); see also *Gamble v. Emery*, 94 Okla. 167, 168, 221 P. 514, 515 (1923) (quiet title ruling by Indian Territory Land Commissioner, incorporated into petition as exhibit, reviewable as part of judgment roll); *Gourley v. Williams*, 46 Okla. 629, 630-32, 149 P. 229, 229-30 (1915) (copy of promissory notes and mortgage, attached to petition as exhibit, accepted and reviewed on appeal by transcript of record). *But see* *Turner v. Sooner Oil & Gas Co.*, 206 Okla. 344, 345-46, 243 P.2d 701, 704-05 (1952) (construction of prior judgment being challenged, incorporated by reference into plaintiff's petition, not reviewable on appeal without inclusion of exhibit of which trial court took judicial notice).

69. *City of Kingfisher v. Pratt*, 4 Okla. 284, 285, 43 P. 1068, 1069 (1896).

tions taken from the hearing before the referee,<sup>70</sup> an agreed statement of facts,<sup>71</sup> and jury instructions.<sup>72</sup> In addition, a motion for judgment on the pleadings has been considered by case law as equivalent to a demurrer, and is thus a pleading within the statutory definition.<sup>73</sup>

Other matters raised by motion during the pre-trial and trial stage, however, are not considered automatically "of record" via the judgment roll. Motions to quash service of process or for change of venue are not included;<sup>74</sup> neither are motions going to the admissibility of evidence<sup>75</sup> nor demurrers to the evidence.<sup>76</sup> In short, all papers requiring the introduction of evidence for their proper disposition and interpretation are excluded from the record proper. Evidence itself is expressly excluded by statute.<sup>77</sup>

Finally, case law appears to have largely ignored the various dockets in the court clerk's office, as well as the entries on them, as related to the record proper.<sup>78</sup> Although the *Dime Savings* opinion by implication excluded the execution and judgment dockets,<sup>79</sup> the appearance and trial dockets have received almost no treatment by the court in this regard.<sup>80</sup> However, the clerk's minutes, and minute entries on the ap-

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70. See *Tribal Dev. Co. v. White*, 28 Okla. 525, 528-29, 114 P. 736, 737-38 (1911).

71. *Patterson v. Carter*, 83 Okla. 70, 71, 200 P. 855, 856 (1921). *Contra* *Bank of Va. v. Bank of Chillicothe*, 16 Ohio 170, 172-73 (1847).

72. *Peerson v. Mitchell*, 205 Okla. 530, 239 P. 2d 1028 (1950); see OKLA. STAT. tit. 12, § 578 (1981) ("A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions . . .").

73. See *Lockett v. Ely-Walker Dry Goods Co.*, 60 Okla. 131, 132, 159 P. 324, 324 (1916); *Burdett v. Burdett*, 26 Okla. 416, 421-22, 109 P. 922, 924 (1910), *appeal dismissed*, 220 U.S. 627 (1911).

74. *Bowman v. Oklahoma Natural Gas Co.*, 385 P.2d 440, 443 (Okla. 1963) (motion to quash not reviewable on transcript of record appeal unless included in bill of exceptions or casemade); *Kelleam v. Kelleam*, 198 Okla. 380, 383, 178 P.2d 604, 607 (1946); *Fancher v. State*, 61 Okla. Crim. 447, 449, 69 P.2d 409, 410 (1937) (motion to change venue not part of record proper).

75. See *McDonald v. Strawn*, 78 Okla. 271, 274, 190 P. 558, 560 (1920).

76. *Id.*

77. OKLA. STAT. tit. 12, § 32.1 (1981).

78. However, docket entries may definitely be used as evidence of record material in a court proceeding to prove a record's existence for nunc pro tunc entry or to reconstruct a record. See, e.g., *McCullough v. Safeway Stores, Inc.*, 626 P.2d 1332, 1334 (Okla. 1981); *Woodmansee v. Woodmansee*, 137 Okla. 112, 114-15, 278 P. 278, 280 (1929).

79. 185 Okla. at 461, 94 P.2d at 835.

80. *But see* *Little v. Employer's Casualty Co.*, 180 Okla. 628, 71 P.2d 687 (1937). In *Little*, the court expressly held that notice of intention to appeal, required by statute to be entered on the trial court's trial docket, became a part of the judgment roll when so entered on the trial docket or on the appearance docket. *Id.* at 629, 71 P.2d at 687. The fact that the notice was a jurisdictional prerequisite to appeal may have influenced the court in its decision, as well as the fact that no particular form or substance was required for the notice, other than that it be given in open court after rendition of judgment or in writing within 10 days after rendition. OKLA. STAT. tit. 12, § 954 (1961) (repealed 1968). The notice of intent to appeal is no longer required, leaving the status of



pearance docket, have received a fair amount of attention and the message has been consistently clear: not only are the minutes and minute entries excluded from the judgment roll, but they also are inappropriate for the appellate record as a whole. Unlike written motions and rulings thereon, which today may be reviewed upon designation for inclusion in the appellate record, the unsigned minutes or minute entries, even if designated and included in the appellate record, present nothing for review in a civil appeal.<sup>81</sup>

### B. *The Judgment Roll's Significance Today*

Though it has become obsolete in some respects, the judgment roll retains vital significance today as the only means available to preserve, forever, the rights gained or lost by a party in a trial court proceeding. Once the time to appeal from a judgment has expired,<sup>82</sup> any later attempt to construe the meaning of that judgment is limited to the face of the judgment roll itself.<sup>83</sup> The relevance of this restriction, particularly as to judgments which will be relied upon forever, such as a quiet title decree, is obvious. Lawyers must ensure that all papers belonging on the judgment roll of an action are properly saved and recorded so that should an ambiguity arise at some future time, a judge will be able to construe—from the four corners of the judgment roll alone—what rights were granted or restrictions imposed.

In *Peerson v. Mitchell*,<sup>84</sup> a 1950 opinion in which the Oklahoma Supreme Court upheld and applied this restriction, the court discussed

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the *Little* holding, as applicable to other docket entries, in doubt. In reference to minute entries on the appearance docket, see *infra* note 81.

81. See *Render v. Henry Schafer, Inc.*, 198 Okla. 95, 95, 175 P.2d 330, 331 (1946); *Little v. Employer's Casualty Co.*, 180 Okla. 628, 629, 71 P.2d 687, 688 (1937); *Kenney v. Neumeyer*, 171 Okla. 1, 1, 41 P.2d 869, 870 (1935).

82. See OKLA. STAT. tit. 12, § 990 (1981); OKLA. R. CIV. APP. P. 1.15; see also *id.* 1.11 (computation of time for appeals); *id.* 1.12 (when motion for new trial will extend appeal time).

83. See *Peerson v. Mitchell*, 205 Okla. 530, 532-33, 239 P.2d 1028, 1030-31 (1950); *Russell v. Freeman*, 202 Okla. 417, 419, 214 P.2d 439, 441-42 (1949); *Reaves v. Turner*, 20 Okla. 492, 495-96, 94 P. 543, 544 (1908). Later courts are also limited to the face of the judgment roll when a judgment is attacked as void on its face. See, e.g., *Sabin v. Levorsen*, 193 Okla. 320, 320, 145 P.2d 402, 403, *cert. denied*, 320 U.S. 792 (1943) (syllabus by the court).

A judgment will not be held void on its face unless it affirmatively appears from an inspection of the judgment roll that one or more of the following jurisdictional elements are absent: (1) jurisdiction of the person; (2) jurisdiction of the subject matter; (3) judicial power to render the particular judgment.

*Id.* In *Sabin*, the court also stated and applied the rule that when a judgment is subject to collateral attack, the court will presume that the trial court rendering the judgment required proper evidence before rendition, even if the introduction of such evidence does not appear on the judgment roll. *Id.* at 323, 145 P.2d at 405.

84. 205 Okla. 530, 239 P.2d 1028 (1950).

at length the rule's long-standing use in Oklahoma case law.<sup>85</sup> In *Peerson*, the court faced an appeal from a trial court denial of a motion by the defendant Peerson to release of record a 1935 judgment against him which he claimed had been discharged by his 1938 bankruptcy.<sup>86</sup> The trial court, looking only to the face of the judgment roll<sup>87</sup> in the 1935 action, found that the judgment constituted a debt for "wilful and malicious injury," and that under the Bankruptcy Act, "one may not be discharged from obligations arising out of wilful and malicious acts."<sup>88</sup> Peerson claimed that evidence introduced in the original trial of the case should be used to construe the judgment and would show that the true grounds for the jury verdict and judgment were in negligence, thus creating a dischargeable debt. He had neglected, however, to assure that the negligence theory was included in any of the papers on file in the case which were "of record" and the supreme court refused to look further.

As disclosed by the discussion of the pleadings and instructions of the court this cause of action was predicated entirely upon the harboring of a vicious dog and submitted to the jury on that theory only. By the plain terms of the Bankruptcy Act . . . a judgment based upon wilful and malicious injury cannot be discharged.

Where the record proper . . . which is synonymous with the judgment roll at common law . . . shows the judgment is based upon knowingly harboring a vicious dog, wilful and malicious conduct inheres or is implicit in said judgment and resort to the evidence may not be had to establish that the judgment was based on negligence.<sup>89</sup>

Attorneys themselves are not immune from the rule, as shown by the recent case of *Sooner Federal Savings & Loan Association v. Mobley*.<sup>90</sup> In *Sooner*, attorneys in a prior divorce proceeding were barred from filing claims against their judgment debtor's homestead in a mortgage foreclosure action because the attorneys had failed to have

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85. *Id.* at 532-34, 239 P.2d at 1030-32.

86. *Id.* at 530-31, 239 P.2d at 1028-29.

87. In *Peerson*, the judgment roll in the 1935 case consisted of the plaintiff's petition alleging Peerson had knowingly allowed his "ill-tempered, mean, vicious, dangerous" dog to run at large; the defendant's general demurrer; the jury instructions, which went to the question of liability for knowingly harboring a vicious dog; the verdict against Peerson; and the judgment entered on the verdict without reservation. *Id.* at 531-32, 239 P.2d at 1029-30.

88. *Id.* at 531, 239 P.2d at 1029.

89. *Id.* at 532, 239 P.2d at 1030 (citations omitted).

90. 645 P.2d 1000 (Okla. 1981), *modified on rehearing*, 645 P.2d 1000, 1003-05 (Okla. 1982).

the judge include, in the divorce decree awarding attorney fees, a provision that a statutory attorney's lien also was being placed on the homestead until the debt was discharged.<sup>91</sup> Thus, the decree was construed as awarding only an ordinary money judgment, which could not be enforced against the homestead property.<sup>92</sup> Though the court did not specifically address the "four corners of the judgment roll" issue, the restriction obviously was applied in construing the prior decree.<sup>93</sup>

### III. APPLICATIONS: THE VESTIGIAL EFFECTS OF THE COMMON LAW'S ISSUE OF LAW/ISSUE OF FACT DICHOTOMY ON NEW TRIAL MOTIONS IN OKLAHOMA TODAY

The new trial, which is defined in part as "a reexamination in the same court of an issue of fact, or of law, either or both,"<sup>94</sup> is inextricably bound to the common-law definitions of "issue of law" and "issue of fact" which Oklahoma has adopted. An "issue of law" arises only upon "a demurrer to the petition, answer or reply, or to some part thereof."<sup>95</sup> An "issue of fact" arises in one of three situations, all related to the pleadings: (1) on a "material allegation in the petition, controverted by the answer"; (2) on "new matter in the answer, controverted by the [plaintiff's] reply"; and (3) on "new matter in the reply," presumed controverted without further pleading.<sup>96</sup>

The issue of law/issue of fact distinction is derived from the strict line drawn by the common law between "matters of record" and "matters not of record."<sup>97</sup> Only trial court decisions on issues of law, which arose from the face of "matter of record" or the judgment roll, were reviewable in a proceeding in error. Issues of fact, on the other hand,

91. *Id.* at 1002-03.

92. *Id.* On rehearing, the court's holding was modified as to one of the attorneys, who alleged he had proof of a judgment, issued after the decree, imposing a statutory attorney's lien on the property. The attorney did not make the judgment a part of the record proper of either the divorce decree or mortgage foreclosure, however, and the court refused to review the judgment as presented (attached to the brief on petition for rehearing). Instead, the court remanded the case to the trial court, with instructions to review the judgment award's validity and to render judgment for the attorney if the lien was determined valid. *Id.* at 1004-05.

93. The court looked only to the divorce decree itself in construing its meaning in light of OKLA. STAT. tit. 31, §§ 1(A)(1), 5(1981), which set forth property protected by homestead exemption and debts to which the homestead exemption does not apply respectively.

94. OKLA. STAT. tit. 12, § 651 (1981). The full statutory definition provides that a new trial reexamines an issue of law or fact "after a verdict by a jury, the approval of the report of a referee, or a decision by the court." *Id.*

95. *Id.* § 553.

96. *Id.* § 554.

97. See *supra* notes 10-14 and accompanying text.

were not "matters of record" because their resolution occurred at the trial proceeding. The bill of exceptions enabled review of some issues of fact. Ironically, "questions of law" arising during the proceeding could be reviewed upon proper exception.<sup>98</sup> Thus, only "questions of fact," which were a type of issue of fact, remained unreviewable on appeal after the bill of exceptions was introduced.<sup>99</sup>

At one time in Oklahoma, the issue of law/issue of fact distinction was vital to an appeal. New trials were allowed only on issues of fact<sup>100</sup> and a new trial motion was a mandatory prerequisite to appellate review of matters occurring during the trial.<sup>101</sup> As shown by the definition of "new trial,"<sup>102</sup> new trials today can reexamine both issues of law and fact; and, in any case, a new trial motion is not a prerequisite to appellate review.<sup>103</sup> Yet the common-law definitions of issue of law and issue of fact retain viability because they affect the extension of appeal time, and the issue of law/issue of fact dichotomy remains an invaluable aid in determining whether a court reporter's transcript of trial proceedings is necessary on appeal.

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98. Sunderland, *supra* note 7, at 653. This is true in Oklahoma law, which defines an exception as "an objection taken to a decision of the court or judge upon a *matter of law*." OKLA. STAT. tit. 12, § 631 (1981) (emphasis added).

99. Sunderland, *supra* note 7, at 653.

The very essence of a proceeding in error involved the conception of wrong judicial conduct on the part of the judge. He had no control over the conclusions which the jury might draw from the evidence, and if they went wrong it was sufficient to say that it was no fault of his. Therefore no error could be assigned upon any matter of fact.

Summarizing the scope of this common law system of review, it may be said that it dealt best with the least important class of questions, namely, controlling errors of law which appeared upon the judgment roll, that it dealt clumsily, by means of new trials, with those incidental errors of law which affected the course of the trial and influenced the conduct of the jury; and that it dealt not at all with pure errors of fact.

*Id.*

100. This was the case until 1963. See OKLA. STAT. tit. 12, § 651 (1961), amended by Act of June 13, 1963, ch. 239, § 1, 1963 Okla. Sess. Laws 326, 326-27 (current version at OKLA. STAT. tit. 12, § 651 (1981)).

101. See *Poafpybitty v. Skelly Oil Co.*, 394 P.2d 515, 518 (Okla. 1964). *Poafpybitty* construed the addition of reexamination of issues of law to the new trial provision as requiring a new trial motion prior to appellate review of any judgment. This holding has since been overturned by statute. OKLA. STAT. tit. 12, § 991(a) (1981). The case remains viable, however, in this context for its delineation of the issue of law/issue of fact dichotomy in relation to new trial motions—and for the confusion which reliance on the dichotomy has caused.

The mischief sought to be corrected by the amendment to Sec. 651 [i.e., allowing reexamination in the trial court of issues of law] was the uncertainty and doubt which existed in many instances as to the necessity for a motion for a new trial. The situation contributed to a dismissal of a large number of appeals, and in borderline cases caused a cautious practitioner to perfect both an appeal from the judgment and one from the order overruling motion for new trial.

394 P.2d at 519.

102. See *supra* text accompanying note 94.

103. OKLA. STAT. tit. 12, § 991(a) (1981); OKLA. R. CIV. APP. P. 1.12(a).

### A. *New Trial Motions Extending Time to File an Appeal*<sup>104</sup>

Although several types of trial court orders are appealable, a new trial motion will extend the time to appeal only if it is filed after the trial court has rendered a final order or judgment.<sup>105</sup> Determining whether a new trial motion is authorized to extend appeal time thus requires simultaneous examination of several statutory provisions concerning judgments, final orders, issues, and the new trial provision itself. An improvidently filed new trial motion could be fatal to a later appeal from the judgment.<sup>106</sup>

The common-law definitions of issues are incorporated by reference into the Oklahoma Supreme Court's definition of a final judgment as "the trial court's determination of *all* issues in controversy."<sup>107</sup> The court's definition encompasses issues arising on the merits of a claim or defense,<sup>108</sup> as opposed to collateral issues. Thus, an attorney planning to direct a new trial motion at what he thinks is a judgment must ensure that all issues on the merits are finally disposed of by the trial court before the motion is filed<sup>109</sup> and must file the motion within ten

104. "If a motion for new trial or a postjudgment motion for judgment notwithstanding the verdict is filed in time, no party shall appeal from the decision and appeal time shall not begin to run until the motion shall have been disposed of." OKLA. R. CIV. APP. P. 1.12(b).

105. The Oklahoma Supreme Court has promulgated rules for civil appeals which define "decisions" of the district court to which a new trial may be directed as including both final judgment and final order. *Id.* 1.10(a), 1.12(a). Rule 1.12(c) enumerates the exceptions where a new trial motion will not extend appeal time including a motion addressed to the grant or denial of a motion for judgment notwithstanding the verdict, *id.* 1.12(c)(IV), to the denial of a new trial, or to modification or refusal to vacate a final judgment on any ground specified in OKLA. STAT. tit. 12, §§ 651, 655 (1981), OKLA. R. CIV. APP. P. 1.12(c)(I). Rule 1.40(d) provides that filing a motion or petition for new trial will not extend appeal time from an appealable interlocutory order.

106. An appeal must be commenced within 30 days from the rendition of the final order or judgment, unless a new trial motion authorized to extend appeal time is filed. OKLA. STAT. tit. 12, § 990 (1981); OKLA. R. CIV. APP. P. 1.15(a); *see also* *Timeplan Corp. v. O'Connor*, 461 P.2d 935, 935 (Okla. 1969) (new trial motion filed more than 10 days after rendition of judgment, as provided by OKLA. STAT. tit. 12, § 653 (1981), is ineffective to extend appeal time and results in dismissal unless appellate proceedings have been initiated within 30 days following rendition of judgment). *See* OKLA. R. CIV. APP. P. 1.12(c) for examples of motions which will extend appeal time.

107. OKLA. R. CIV. APP. P. 1.10(a)(13) (emphasis added). *See* OKLA. STAT. tit. 12, § 681 (1981) for a definition of "judgment." The statutory definition of issues in general is found in *id.* § 552.

108. *See* OKLA. STAT. tit. 12, § 681 (1981) where the legislature used the term "rights of the parties to an action" rather than the term "issues" in its definition of judgment.

109. In *Barrows v. Cassidy*, 113 Okla. 114, 239 P. 581 (1925), for example, the appellant had filed a new trial motion in the trial court before rendition of final judgment. The supreme court dismissed the appeal, stating that a "prematurely filed [new trial motion] is as much out of time as when filed too late." *Id.* at 115, 239 P. at 582. The appellants had not refiled the motion following rendition of judgment and, at that time, a new trial motion was a prerequisite to appellate review of errors occurring at trial, meaning issues of fact.

days after rendition of final judgment.<sup>110</sup>

In addition, the statutory definition of new trial includes a reexamination only of issues of law and fact arising on the merits. This suggests that the new trial motion must seek reexamination of issues arising on the merits, on one or more of the nine grounds enumerated in section 651 of title 12.<sup>111</sup> Despite this suggestion, the Oklahoma Supreme Court, by rule, which has the force of statute, has defined "decision" as including all final orders as well as judgments.<sup>112</sup> Orders granting or denying a motion for judgment notwithstanding the verdict, orders denying a new trial, or orders modifying or refusing to vacate a final judgment on any ground specified in sections 561 and 655 of title 12 are not final orders.<sup>113</sup>

Thus, a new trial motion will not extend appeal time if it goes solely to a trial court decision on a matter collateral to the merits that did not result in a final order. One example is a new trial motion going solely to the denial or grant of a temporary injunction. A timely filed new trial motion will extend appeal time, however, from any final judgment or final order, even if the order went to a collateral issue of law or fact.

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110. OKLA. STAT. tit. 12, § 653 (1981). However, if the grounds for new trial are newly discovered evidence or impossibility of procuring a transcript of the evidence, the movant may file a petition for new trial within one year from rendition of judgment. *Id.* §§ 653, 655.

The movant also should be aware that acceptance of a jury's verdict by a trial court without reservation constitutes rendition of judgment. However, "[i]f judgment on jury verdict is reserved or if the case is tried to the court," judgment is not rendered until its terms are "completely pronounced by the judge and clearly resolve all the issues in controversy." OKLA. R. CIV. APP. P. 1.11(b); *see* Arkansas La. Gas Co. v. McBroom, 526 P.2d 509, 512 (Okla. 1974).

111. OKLA. STAT. tit. 12, § 651 (1981). Nor can the new trial motion merely parrot the statutory grounds for new trial. The motion must "adequately inform the trial court of the errors sought to be alleged." *Federal Corp. v. Independent School Dist. No. 13*, 606 P.2d 1141, 1144 (Okla. Ct. App. 1978) (approved for publication by Okla. Sup. Ct., Feb. 14, 1980) (prospective in effect from Feb. 8, 1980).

112. OKLA. R. CIV. APP. P. 1.10(a).

The following are considered final orders: (1) the denial of a timely and proper new trial motion; (2) grant of a postjudgment motion for judgment notwithstanding the verdict, or denial of same; (3) modification or refusal to vacate or modify a final judgment; (4) any order defined under § 953 of title 12; and (5) any other order precluding a party from proceeding further in the case. *See* OKLA. R. CIV. APP. P. 1.11(b). Section 953, referred to in rule 1.11, provides:

An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified, or reversed . . . .

OKLA. STAT. tit. 12, § 953 (1981).

113. OKLA. STAT. tit. 12, § 651 (1981) (listing grounds on which new trial is warranted); *id.* § 655 (providing for petition for new trial when grounds are newly discovered evidence or impossibility of procuring transcript of evidence or proceedings).

B. *The Issue of Law/Issue of Fact Dichotomy's Effect on Necessity of a Transcript of Proceedings and Evidence*

At common law, and in Oklahoma's earliest territorial days, errors of the court as to issues of fact, such as erroneous rulings at the trial, which were not "matters of record" could be brought to the appeals court by a bill of exceptions.<sup>114</sup> After the turn of the century, however, the casemade<sup>115</sup> became the dominant means in Oklahoma of bringing issues of fact up on appeal. Today, this role of both the bill of exceptions and casemade has been taken over largely by the court reporter's transcript of proceedings or evidence.<sup>116</sup>

Appellate review does not always require a court reporter's transcript of the proceedings, however, and the issue of law/issue of fact dichotomy can assist in determining one circumstance where such a transcript would be entirely superfluous. When the only issue presented for review is the trial court's decision on an issue of law, there is no need for a device to bring up issues of fact. If the alleged error appears on the face of the record proper or judgment roll, a transcript of trial proceedings is unnecessary.<sup>117</sup> Any time an issue of fact is presented, however, a court reporter's transcript is necessary.

Technically, a motion for new trial could present a problem in the issue of law situation, because a new trial motion is not itself a part of the record proper.<sup>118</sup> However, the requirement that assignments of error specified in the new trial motion match the assignments in the petition in error,<sup>119</sup> the ability to designate the written motion for inclu-

114. *See supra* notes 10-16 and accompanying text.

115. *See supra* notes 42-52 and accompanying text.

116. *See* OKLA. R. CIV. APP. P. 1.20(a), 1.25(c); *see also id.* 1.22 (allowing preparation of narrative statement by the attorneys in certain circumstances in lieu of court reporter's transcript).

117. This is implied by a statement of the court in *In re Rich*, 604 P.2d 1248 (Okla. 1979). "Where the record does not contain evidence presented at trial and no errors appearing on the face of the judgment roll are assigned, there is nothing for us to review and the trial court's judgment may not be disturbed." *Id.* at 1253. The appellant's failure to include the transcript of proceedings caused affirmance of the trial court's judgment. *Id.*

118. *See supra* notes 64-65 and accompanying text. This problem was not present at common law or in Oklahoma until 1963, since new trials were limited to reexamination of issues of fact alone. The trial judge was without jurisdiction to reexamine his own decision on issues of law and thus a new trial motion going to such issues was not authorized. *See supra* notes 100-01 and accompanying text. Many supreme court opinions which address only issues of law are rendered in cases where review was sought by transcript of record appeal. *E.g.*, *Bowman v. Oklahoma Natural Gas Co.*, 385 P.2d 440 (Okla. 1963); *Grissom v. Beidleman*, 35 Okla. 343, 129 P. 853 (1912).

119. *See* OKLA. STAT. tit. 12, § 991(b) (1981). *But see* *Benson v. Blair*, 515 P.2d 1363 (Okla. 1973). The court held that the trial court's failure to perform a "ministerial duty" as directed by state statute was reviewable even though no assignment of error on that point appeared in the motion for new trial or the petition in error. The court noted, however, that this ground had not

sion in the appellate record, and the necessary written evidence of the judge's order, including the judge's signature, on the motion,<sup>120</sup> eliminate the need for a special device to bring the motion's allegations before the appeals court for review. Other motions and issues arising on anything other than demurrers to the pleadings, however, require the preparation of a court reporter's transcript for inclusion in the appellate record.

#### IV. MODERN USAGE

The strict meaning of the common-law record is no longer adhered to in judicial and litigative parlance. As a result, the subject matter seems confusing, particularly in light of the greater number, type, and form of records which an appellate court may review. No longer is there assurance, as there was at common law, that when reference is made to the "record" in an appellate opinion or brief, the reference is to some "matter of record," the "record proper," or the "judgment roll."<sup>121</sup> Easing this confusion requires greater specificity of reference,<sup>122</sup> which in turn requires greater understanding of the items included in the appellate record.

As at common law, today's appellate record may be comprised of two distinct sections:<sup>123</sup> the designated instruments on file in the court clerk's case file<sup>124</sup> and the trial record, or court reporter's transcript of proceedings or evidence,<sup>125</sup> by which errors occurring at trial are preserved for review. Unlike at common law, however, the papers included in the case file, where all papers filed in the case are kept, are not restricted to only those properly a part of the judgment roll. Any

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arisen until after the new trial motion was filed and thus was not available to the appellant at that time. *Id.* at 1364-66.

120. *See* *Boxberger v. Martin*, 552 P.2d 370, 371-72 (Okla. 1976) (court permitted the appellate record to be amended nunc pro tunc so that the signed orders on motions for new trial and judgment notwithstanding the verdict, filed after timely petition in error was filed, could be added to the appellate record).

121. *See, e.g., State ex rel. Dep't of Highways v. Lehman*, 462 P.2d 649, 650 (Okla. 1969) (matter "that is dehors the record" refers to matter not on appellate record).

122. In the modern appeal, for example, if reference is made in the brief to a paper in the designated record that came from the clerk's file, the reference should specify the instrument itself and note that it is found within the assembled paperwork from the clerk's file. If an item was filed as a trial exhibit, reference should be to the "trial exhibit found at page \_\_\_ of the transcript of the evidence," or "trial record."

123. At common law, these segments were found in the judgment roll, which might include a bill of exceptions containing errors occurring at trial. *See supra* notes 7-13.

124. *See* OKLA. R. CIV. APP. P. 1.20, 1.26.

125. *Id.*



instrument on file may be designated for inclusion in the appellate record.<sup>126</sup> Thus, the case file, rather than the judgment roll, has in many ways become the keystone of today's appellate record.

Nevertheless, perfecting a record for civil appeal involves more than merely designating existing instruments and specifying them in the appellate brief. An attorney also must assure that all necessary items,<sup>127</sup> in their proper form, are included so that the reviewing court can perform its function. Even today, the common-law requirements of form inhere as to certain papers; only the methods of achieving that form have changed.

Though the term is rarely used today,<sup>128</sup> "record entry" of an appealable order has always been a prerequisite to review of that order.<sup>129</sup> "Record entry" has had an extremely garbled history in Oklahoma case law, stemming primarily from the failure, by courts and attorneys alike, to discern the difference between "journal entry" and "record entry." The trial court's journal is equivalent to a common-law court's official record of a proceeding, the parchment plea roll onto which the parties' pleadings and the process were transcribed. After final judgment was entered of record on the roll, it became the judgment roll.<sup>130</sup> Upon completion, the roll was deposited in the court's registry for eter-

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126. *Id.* 1.20(a), (b).

127. It is estimated that more than half of the completed, designated portions of the appellate records on file in the Tulsa County Court Clerk's Office need to be re-opened—and reorganized—for additional material after notice of completion of the designated portion has been sent to the parties. Interview with Don Perram, head of Tulsa County Court Clerk's Civil Division (Oct. 15, 1982). A review of designations filed in the office revealed a variety of listings, ranging from a cursory designation of "All Pleadings, Motions and Orders" and "The Complete Record" to lengthy lists of specifically named papers. Perram suggested that attorneys, when preparing a designation of record, use the case's appearance docket as a reference guide and as a reminder of what papers may still need to be filed. *Id.*

128. *But see* McCullough v. Safeway Stores, 626 P.2d 1332, 1335 n.8 (Okla. 1981) (record entry distinguished from minute entry).

129. *See* Willitt v. ASG Indus., Inc., 572 P.2d 1296, 1297 (Okla. 1978); Long v. McMahan, 205 Okla. 696, 696, 241 P.2d 185, 185 (1952) (syllabus by the court); City of Tulsa v. Kay, 124 Okla. 243, 244, 255 P. 684, 685 (1927); Board of Comm'rs v. Vann, 60 Okla. 86, 86, 159 P. 297, 297 (1916).

Record entry is not essential to the validity of a judgment as between the parties, however. McCullough v. Safeway Stores, 626 P.2d 1332, 1335 n.8 (Okla. 1981). Nor has record entry always been considered a jurisdictional prerequisite to appellate review. As noted in the *Willitt* case, "defective records [will] not defeat jurisdiction if a proper petition in error is timely filed." 572 P.2d at 1297. Whether the *Willitt* statement is true today, however, is questionable in light of the legislature's 1981 amendment to OKLA. STAT. tit. 12, § 32.2 (1981), requiring that a recorded written instrument, signed by the judge and specifying the relief sought, is a jurisdictional prerequisite to appellate review. Act of Apr. 13, 1981, ch. 66, § 1, 1981 Okla. Sess. Laws 103, 103.

130. *See supra* notes 10-16 and accompanying text.

nal preservation<sup>131</sup> and was the only "record" available for appellate review.

In order to accommodate the common-law mode, Oklahoma statutes from the earliest days provided for the following: (1) A court "journal," containing the proceedings of the court each day;<sup>132</sup> (2) "journal entries," providing that "[a]ll judgments and orders must be entered on the journal of the court and specify clearly the relief granted or order made in [the] action";<sup>133</sup> (3) a formal "record," compiled by the clerk on order of the trial court, for each "cause as soon as it is finally determined,"<sup>134</sup> with the record containing "[m]aterial for [the] record,"<sup>135</sup> which has been held by many Oklahoma courts to be equivalent to the judgment roll at common law<sup>136</sup> (the trial judge was required to sign this "record");<sup>137</sup> and (4) a duty, imposed on each court, to assure that its "judicial acts [and] proceedings" were recorded, examined, and if found correct, signed.<sup>138</sup>

These provisions prompted two basic lines of interpretation in case law. The first, and majority, viewpoint held that entry on the court's journal was a jurisdictional prerequisite for appellate review. "Entry on the court journal" and "record entry" were equivalent terms, and entries reflected on the journal of the court were the best—and only—evidence of the trial court's true judgment acceptable on appeal.<sup>139</sup>

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131. *Pettis v. Johnston*, 78 Okla. 277, 296, 190 P. 681, 700 (1920).

132. OKLA. STAT. ch. 66, § 733 (1893) (current version as amended at OKLA. STAT. tit. 12, § 24 (1981)).

133. OKLA. STAT. ch. 66, § 427 (1893) (codified from 1941-1971 at OKLA. STAT. tit. 12, § 701) (repealed 1971).

134. OKLA. STAT. ch. 66, § 428 (1893) (codified from 1941-1972 at OKLA. STAT. tit. 12, § 702) (repealed 1972).

135. OKLA. STAT. tit. 12, § 32.1 (1982) (original version at OKLA. STAT. ch. 66, § 430 (1893)).

136. *See supra* note 28.

137. OKLA. STAT. ch. 66, § 429 (1893) (codified from 1941-1972 at OKLA. STAT. tit. 12, § 703) (repealed 1972).

138. OKLA. STAT. ch. 66, § 431 (1893) (current version at OKLA. STAT. tit. 12, § 32.2 (1981)).

139. *See, e.g., City of Tulsa v. Kay*, 124 Okla. 243, 244, 255 P. 684, 685 (1929) (appeal dismissed because casemade failed to show final order denying new trial had been entered on court journal: "The court here speaks through its journal, and, when the journal is silent as to any act upon which jurisdiction on appeal depends, the appeal must be dismissed."); *Apple v. American Nat'l Bank*, 104 Okla. 69, 70, 231 P. 79, 80-81 (1924) (trial court decision affirmed; appellant failed to file and have entered on trial court journal court's order overruling demurrer to plaintiff's supplemental petition); *Hilligoss v. Webb*, 60 Okla. 89, 89, 159 P. 291, 292 (1916) (dismissed in part because appellate "record fails to show that the judgment of the trial court . . . was entered of record [on the court journal] in the trial court"); *Hirsh v. Twyford*, 40 Okla. 220, 224-26, 139 P. 314, 314-15 (1913) (court clerk's refusal to enter "of record" a signed, filed "journal entry" quieting title in appellant endangered appellant's title to property); *Cockrell v. Schmitt*, 20 Okla. 207, 214-15, 94 P. 521, 523 (1908) (overruled by *Cumby v. State ex rel. Vinzant*, 468 P.2d 490 (Okla. 1970)) (judge-signed "journal entry"—i.e., instrument setting out terms of judgment—deemed in-

The appellate court was able to tell that a certain judgment had been entered on the court journal if the copy of the judgment contained a book and page number showing where it had been recorded.<sup>140</sup> From these cases the notion developed that a "matter of record" was that which had been, or was required to be, recorded in the trial court's journal.<sup>141</sup>

The second line of cases held that the "court journal" and "journal entry" requirements were ministerial in nature and directory to the court clerk.<sup>142</sup> In this second line of cases, "record entry" of a judg-

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sufficient evidence of prior judgment without proof of its "entry" on trial court journal); *Ex parte Stevenson*, 20 Okla. 549, 551-52, 94 P. 1071, 1071-72 (1908) (overruled by *Cumby v. State ex rel. Vinzant*, 468 P.2d 490 (Okla. 1970)) (record entry of trial court order or judgment on court journal is indispensable to prove the judgment in later action).

In *Cockrell*, the court stated,

All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in (the) action.

. . . .  
[R]ecord entry of a judgment is indispensable to furnish the evidence of it when it is made the basis of a claim or defense in another court.

. . . The minutes from which the judgment is made up, and even a judgment in paper, signed by the master, are not proper evidence of the record.  
20 Okla. at 214-15, 94 P. at 523-24 (emphasis added; citation omitted).

The "record entry" requirement also extended to judgments rendered on jury verdicts. In *Long v. McMahan*, 205 Okla. 696, 241 P.2d 185 (1952), the court, on its own motion, dismissed an appeal for lack of jurisdiction because the appellant's casemade did not affirmatively show that judgment on the verdict had been "entered of record" in the trial court. *Id.* at 696-97, 241 P.2d at 186-87. This occurred even though the casemade contained what the court called a "journal entry" showing denial of a new trial motion and despite the court's recognition of the jury's verdict. *Id.* at 696, 241 P.2d at 186.

140. *See Board of Comm'rs v. Vann*, 60 Okla. 86, 86, 159 P. 297, 297-98 (1916) (appeal dismissed because trial court decree included in casemade, though it contained a statement that it had been filed in the court clerk's office, failed to show affirmatively *where* on the court's journal it had been recorded).

141. *See Oklahoma Turnpike Auth. v. Kitchen*, 337 P.2d 1081, 1083-85 (Okla. 1959) (case-made allowed to be withdrawn so that order on new trial motion, which appeared in transcript of evidence, could be reduced to writing, signed by judge, and entered "of record" in the case). "Record," as used in such cases, does not refer to the "judgment roll," which tends to confuse the subject matter even more. Here, "record" is used in reference to the trial court journal, and the necessity of entering a new trial denial order thereon. The new trial motion and rulings thereon are not properly part of the judgment roll, or record proper, unless made so by a bill of exceptions. *See supra* notes 64-66 and accompanying text. To heighten the confusion even more, compare *State ex rel. Dep't of Highways v. Lehman*, 462 P.2d 649, 650 (Okla. 1969) (evidence "dehors the record" refers to matter not included in appellate record at all) with *Pettis v. Johnston*, 78 Okla. 277, 284, 190 P. 681, 688 (1920) (evidence "dehors the record" refers to matter not properly a part of the judgment roll).

142. *See, e.g., Illinois Bankers' Life Ass'n v. Davaney*, 102 Okla. 302, 302-03, 226 P. 101, 101-03 (1924) ("journal entry," (written instrument) signed by attorneys and included in casemade (appellate record) signed by judge, but not showing recordation on court journal, accepted as sufficient evidence of judgment on which to base appeal because journal recordation requirements held ministerial, not jurisdictional); *St. Louis & S.F.R.R. v. Taliaferro*, 58 Okla. 585, 587, 160 P. 610, 611 (1916) (court accepted written instrument showing extension of time to make and serve casemade, included in casemade, even though order did not show it had been entered on court

ment appeared to be achieved when written evidence of a judgment, signed by the judge and both attorneys, was filed with the court clerk and then included on a proper appellate record.<sup>143</sup>

As if these conflicting lines of interpretation are not enough to blur the concept, opinions favoring either interpretation frequently used the term "journal entry" to refer to the written instrument containing the terms of a judgment, which was filed with the court clerk, for inclusion in the case file and recordation on the court journal, after rendition of judgment.<sup>144</sup> And, more recently, a dissenting opinion has suggested that a judgment entered *in absentia* be considered entered as of the date of the judge's decision shown by a minute entry on the appearance docket, even though actual rendition of the judgment occurred much later.<sup>145</sup> Add one more record-garbling usage—the careless substitution of the word "entered" for "rendered" when referring to a court's pronouncement of judgment to all parties to the action<sup>146</sup>—and the hazy shadow of case-by-case law on the once-definite meaning of common-law "record entry" becomes even darker.

In 1968, the jurisdictional barrier constructed by the first line of cases appeared to be destroyed by statute. Section 990 of title 12 was amended to provide that "except for the filing of a petition in error as provided herein, all steps in perfecting an appeal are not jurisdictional."<sup>147</sup> In 1970, the "best evidence" rationale of those cases was also removed. In the case of *Cumby v. State ex rel. Vinzant*,<sup>148</sup> the

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journal; "[N]owhere in [statutes providing for casemade] is there any requirement that the case shall show the condition of the record or the performance by the clerk of any ministerial duties imposed upon him by other provisions of the statute.").

143. In *Taliaferro*, the court intimated, however, that the result in the case might not have been acceptable on an appeal by transcript of record, which brought up only the judgment roll, or record proper, for review. 58 Okla. at 587, 160 P. at 611.

144. *E.g.*, *Illinois Banker's Life Ass'n v. Davaney*, 102 Okla. 302, 303, 226 P. 101, 103 (1924); *Cockrell v. Schmitt*, 20 Okla. 207, 213-14, 94 P. 521, 523 (1908).

145. *See McCullough v. Safeway Stores, Inc.*, 626 P.2d 1332, 1335 (Okla. 1981) (Simms, J., concurring specially in part, dissenting in part; Barnes, V.C.J., and Doolin, J., concurring with Justice Simms) (5-3 decision). *McCullough* involved an *in absentia* grant of summary judgment, the letter ruling of which was not mailed to the parties until nearly two months after minute notation was made on the appearance docket of the trial judge's decision. The majority of the court held that rendition of the judgment could not be considered to have occurred until notice of the decision had been sent to the parties, and thus appeal time did not begin to run until such notice was sent. *Id.* at 1334-35. In a footnote, the court explained that "record entry" of judgment generally occurred via a "written memorial—most often made nunc pro tunc—which is filed in the case and entered on the court's journal." *Id.* at 1335 n.8 (emphasis in original).

146. Such usage generally occurs when the subject at hand is not dealing directly with the question of the form of entry. *See, e.g.*, *Sooner Federal Savings & Loan Ass'n v. Mobley*, 645 P.2d 1000, 1004 (Okla. 1982) (supplemental opinion on rehearing).

147. Act of May 3, 1968, ch. 290, § 2, 1968 Okla. Sess. Laws 469, 469-70.

148. 468 P.2d 490 (Okla. 1970).

supreme court agreed with the reasoning of the second line of cases that the statutory "journal" requirements were ministerial in nature, and relied on statutes pertaining to evidence to hold that written evidence of a judgment or order, signed by the judge and appearing in the trial court's case file, was acceptable to prove the judgment. Entry on the court journal would be presumed.<sup>149</sup> In 1971, the statutory provision for "journal entries" was repealed<sup>150</sup> and in 1972, the statutes pertaining to the court journal, record proper, and proper form of judgment were revamped and renumbered to provide for: (1) A "journal record," on which the clerk mandatorily was to keep copies of items of process and "[a]ll instruments filed in the case that bear the signature of the judge and specify clearly the relief sought";<sup>151</sup> (2) repeal of the duty to compile a formal record and retention of the common-law definition of "material for record";<sup>152</sup> and (3) clear imposition of a duty on the court, or on counsel if directed by the court, to write out orders, judgments, and decrees for the judge's signature and recordation in the case record.<sup>153</sup>

Thus by the obvious use of the term "record" in conjunction with "journal" and "case" in the above provisions, the legislature has incorporated the common-law definition of record which has been codified at section 32.1 of title 12. "Record entry" means entry on the journal record and occurs after a written instrument signed by the judge, which specifies clearly the relief granted, is filed in the trial court. The term "journal entry" continues to be used in reference to the written instrument signed by the judge and, generally, both attorneys. However, a journal entry does not become a "record entry" until it is placed on the journal record.<sup>154</sup> An unsigned minute or minute entry on the appearance docket can never become a record entry for purposes of a civil appeal.<sup>155</sup> The legislature's provisions also make clear that notation of

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149. *Id.* at 492-93.

150. Act of June 16, 1971, ch. 245, § 3, 1971 Okla. Sess. Laws 584, 584.

151. OKLA. STAT. tit. 12, § 24 (1981).

152. *Id.* § 32.1.

153. *Id.* § 32.2.

154. *See* *Cumby v. State ex rel. Vinzant*, 468 P.2d 490, 493 (Okla. 1970).

155. A "minute" is a synopsis of each transaction concerning a particular case, and can contain information ranging from a few, cursory words as to the final judgment to extensive and in-depth listings of appearances, names of attorneys, witnesses, experts, and the court reporter, the type of hearing or trial, the rulings occurring during the trial, and the finding of the court, if any, or other action taken in regard to the case. Minutes may be taken by the judge or by the judge's minute clerk, and are generally used as a quick-reference guide by the judge, attorneys, or parties to the suit. Minutes are "entered" on the appearance docket of a case. In Tulsa County, "minute sheets," containing all minutes issuing daily from each judge, are bound together in a "minute

a judgment on various other "court records" in general, such as the judgment docket, trial docket, or execution docket, does not constitute "record entry." These, like the appearance docket, are primarily used for housekeeping purposes within the court clerk's office or judge's chambers<sup>156</sup> or for public notice.<sup>157</sup> None require entry of the full terms of the judgment, as do the journal record and case record provisions.<sup>158</sup>

In 1981, section 32.2 of title 12 was amended so that a "recorded written order, judgment or decree signed by the court is a *jurisdictional* prerequisite to appellate review."<sup>159</sup> This provision has not yet been construed in conjunction with section 990.<sup>160</sup>

A restrictive construction of the 1981 amendment would require the appealing party, within the thirty days allowed for *filing a petition in error*,<sup>161</sup> to (1) have the journal entry settled and (2) have the court clerk formally place the journal entry "of record" (record entry). This construction thus would require an affirmative showing of settlement and recordation on the face of the journal entry, and the absence of such showing would cause the appeal to fail for lack of appellate jurisdiction. A more lax construction would require that, within the time required for the *completion of an appellate record*,<sup>162</sup> the appealing

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book" kept by the court clerk's office. Interview with Sally Howe-Smith, Second Deputy to Tulsa County Court Clerk Don Austin (Sept. 2, 1982). In some counties, such as Cleveland County, minutes may not only be prepared by the judge, but they may also be signed by the judge and in such form become "memorials" of a judgment. Interview with Norma Nichols, Court Clerk of Cleveland County (Sept. 22, 1982). In this form, the memorialized minute *may* be acceptable for appellate review. However, such memorials are often quite cryptic, and should never be relied upon regularly by attorneys wishing to preserve a judgment indefinitely.

Oklahoma case law has consistently held that unsigned minutes or minute entries cannot be considered on appeal. *See supra* note 74. However, an appellate record may be withdrawn to reduce a judgment to a written, signed instrument if evidence of the judgment, for example in minute form, appears in the record. *Willitt v. ASG Indus., Inc.*, 572 P.2d 1296, 1297 (Okla. 1978).

156. *See supra* note 155 for primary use of clerk's minutes.

157. For example, a judgment which is not "alphabetically entered in the judgment docket," as required by statute, under the names of *all* judgment debtors resulting from a judgment, does not become a lien on the property of unlisted debtors to the detriment of subsequent good faith purchasers of the debtor's property. *Wilson v. First Nat'l Bank*, 184 Okla. 518, 518, 88 P.2d 628, 629 (1939) (syllabus by the court).

158. *See OKLA. STAT.* tit. 12, §§ 23, 25-26, 663 (1981) (providing for appearance docket, judgment docket, execution docket, and trial docket, respectively); *see also* *Smith v. Citizens Nat'l Bank*, 204 Okla. 586, 589-90, 232 P.2d 618, 621-22 (1951) (while entry on court's journal is necessary to prove a judgment itself, entry of judgment debtor's name on judgment docket prior to purchase by a third person is necessary to defeat good faith purchase from debtor).

159. Act of Apr. 13, 1981, ch. 66, § 1, 1981 Okla. Sess. Laws 103, 103 (emphasis added).

160. OKLA. STAT. tit. 12, § 990 (1981) provides that "except for the filing of a petition in error as provided herein, all steps in perfecting an appeal are not jurisdictional."

161. OKLA. R. CIV. APP. P. 1.15(a).

162. *See id.* 1.26.

party must have a written memorial, signed by the trial judge, of the disposition from which appeal is being made, included in the appellate record. Adoption of the strict construction would deprive trial judges of their common-law power to enter their own judgments *nunc pro tunc*, a power which is recognized in section 32.2 as it stood prior to the 1981 amendment.<sup>163</sup>

Regardless of its construction, the amendment highlights the problems that can occur when too much distance is put between the common-law record and current procedures under the system of appeals in Oklahoma today. The parchment roll itself may be gone, but as long as the English-based system of appeals is maintained, the remnants of the record inscribed on that roll will carry on.

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163. Prior to its amendment, § 32.2 consisted only of the first paragraph of the current section which reads:

It is the duty of the court to write out, sign and record its orders, judgments and decrees within a reasonable time after their rendition. To aid in the performance of this duty, the court may direct counsel or the court clerk to prepare the written memorialization for its signature and, after it is signed, to file it in the case record.

OKLA. STAT. tit. 12, § 32.2 (1981).