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the prior corporate receivership statute²³ which has no discharge provision. In the opinion of the writer the pertinent provision of the latter statute is sufficiently inconsistent with the receivership section of the Uniform Act to be mutually exclusive. Without the complicating federal factor, the Uniform Business Corporations Act should be held to repeal the antecedent receivership statute by implication.

The Federal Bankruptcy Act only suspends the operation of the state insolvency law where Congress has pre-empted the field; therefore any function of the state law outside the federal scope should not be affected. For example, the Bankruptcy Act does not cover amounts under \$1,000.²⁴ The receivership-discharge provisions of the Uniform Act, as do all statutes, have two functions: (1) the affirmative or substantive function, and (2) the negative or repealing action upon prior inconsistent statutes. The latter would be affected by the Bankruptcy Act no more than if it had been express. Only the affirmative function has been suspended and only as to amounts of \$1,000 or over. Thus the rational conclusion must be that: (1) the prior corporate receivership statute,²⁵ subsection 5, is repealed, and (2) that the receivership provisions of the Uniform Corporations Act²⁶ are suspended.

Caveat: The Washington court in the *Becker* case,²⁷ *supra*, held that a creditor's acts under the Assignment for the Benefit of Creditors Act²⁸ were "invalid" because of the discharge provision, even though the amount concerned was under \$500 and thus without the scope of the Bankruptcy Code. From that decision it is arguable that the Washington court feels that federal action in this field not only "suspends" but "invalidates" or "repeals" the offending state law, a position which, it is submitted, is erroneous.

THE ASSIGNMENT OF ERRORS IN APPELLATE BRIEFS

HARRY R. VENABLES AND JOHN VEBLEN

INTRODUCTION

Few subjects have troubled courts more and legal writers less than faulty assignments of error. Since the subject has received little atten-

²³ REM. REV. STAT. § 741(5) [P P C. § 91-3(5)].

²⁴ U. S. C., TITLE 11, c. 3, § 22.

²⁵ REM. REV. STAT. § 741(5) [P P C. § 91-3(5)].

²⁶ *Id.*, §§ 3803-48 to 3803-56 [§§ 446-1 to 446-17].

²⁷ 167 Wash. 245, 9 P.(2d) 63 (1932).

²⁸ REM. REV. STAT. §§ 1086 to 1103 [P P C. §§ 642-1 to 642-33].

tion outside the reports themselves, there has developed a mass of hitherto unassimilated case authority which, because of its size, is an obstacle rather than an aid to courts and attorneys. This article is the product of a survey of those cases. It will add little to the general store of information on the subject, but it is designed to do two things: (1) call the attention of the Bar to some of the clearer and better written discussions of the problem in the Washington cases, and (2) to segregate, throughout the footnotes, the particular decisions dealing with specific problems posed by the requirement that all briefs contain an assignment of the errors relied upon for reversal.

HISTORY OF THE REQUIREMENT

Rule XXI of the Rules of the Supreme Court provides that all briefs contain an assignment of the errors relied upon by the appellant for reversal. The rule is placed with those rules which prescribe the form of the brief rather than with the rules which the court treats as jurisdictional, and, as will be shown, strict compliance with it has never been required by the court.

It is submitted that the reason an assignment of errors has not been considered indispensably necessary to an appeal in Washington and the majority of the states is that a technical assignment of errors was not essential to the transfer of causes by appeal when that procedure was used only for equitable actions.¹ Historically, transfer by appeal was a procedure adopted from the civil law whereby a complaint was made to a higher court of an injustice or error committed by the inferior court.² An appellant brought to the superior court a transcript of the record, and the trial was merely continued there. The assignment of error, on the other hand, was used with a writ of error, another procedure developed in the English common law and used there for transferring actions at law to the next higher court.³ By this procedure the party would not bring the record to the superior court for review but would apply directly to that court for a writ directing the trial judge to send up the record in order that an examination could be made of the specific errors assigned.⁴ If the party did not allege errors.

¹ *Smith v. Wingard*, 3 Wash. Terr. 291, 13 Pac. 903 (1887), *Frazier v. Venen*, 3 Wash. Terr. 392, 17 Pac. 885 (1888).

² *Wiscart v. Dauchy*, 3 Dall. 321, (U.S. 1796), *U.S. v. Goodwin*, 7 Cranch 108 (U.S. 1812), *Cunningham v. Neagle*, 135 U.S. 1, (1889), *Buessel v. U.S.* 258 Fed. 811 (C.C.A. 2d, 1919).

³ *Buessel v. U.S.*, *supra*, note 2.

⁴ *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, 248 Fed. 226 (C.C.A. 2d, 1917), *Ward v. Williams*, 270 Ill. 547, 117 N.E. 821 (1915), *Board of County Com'rs. of Hartford County v. Jay*, 122 Md. 324, 89 Atl. 715 (1914).

the court had nothing upon which to act, and the petition was necessarily denied. This limited use of the assignment of errors in the transfer of actions at law was well understood by the judges, though apparently not by the attorneys, of the Washington Territorial courts as they dismissed more actions at law for want of an assignment of errors in a period of four years than have been dismissed in the fifty-eight years since Washington became a state.⁵

DISCUSSION OF THE CASES

Under the code adopted when Washington entered the Union, the technical writ of error was dropped as a device for the transfer of actions at law, but the assignment of error was retained and incorporated into the new appellate procedure. Its significance there was first explained in the case of *McReavy v. Eshelman*:⁶

Respondent moves to dismiss for want of an assignment of errors. Code Proc. sec. 1428 [substantially the same as the present Rule XXI] is the only place where an assignment of errors is mentioned in our statutes as they now exist. We think, inasmuch as the technical writ of error is now obsolete in our practice, so is the technical assignment of errors. All causes are removed to this court on appeal, and the section of the statute above cited merely recognized the necessity of some orderly statement of grievances by the appealing party for the consideration of this court. It is a regulation of practice which the court has emphasized by rules 7 and 12. Opposite parties and the court look to the appellant's brief for alleged errors, and upon finding none assigned the court would, of course, affirm the judgment, or dismiss. But in this case, while the brief is far from being a model in clearness and convenience of arrangement, we easily find the points of objection, and shall not grant the motion.

Classifying the rule requiring the assignment of errors as formal rather than jurisdictional resulted in some flagrant abuses.⁷ These cases are of interest to us now only to the extent that they show by implication that the courts were prepared to entertain any but the

⁵ *Brown v. Hazard*, 2 Wash. Terr. 464, 8 Pac. 494 (1885), *Savage v. Maresch*, 3 Wash. Terr. 259, 21 Pac. 386 (1887), *Territory of Wash. ex. rel. Newlin v. Langford*, 3 Wash. Terr. 276, 21 Pac. 386 (1887), *Frazier v. Venen*, 3 Wash. Terr. 392, 17 Pac. 885 (1888). A total of four cases was dismissed in a period of four years; since Washington became a state, only two appeals have been dismissed for want of an assignment of errors. *Haugh v. Tacoma*, 12 Wash. 386, 41 Pac. 173 (1895), *Doran v. Brown*, 16 Wash. 703, 48 Pac. 251 (1897). See also *Perkins v. Mitchell, Lewis & Staver Co.*, 15 Wash. 470, 46 Pac. 1039 (1896).

⁶ 4 Wash. 757, 31 Pac. 35 (1892).

⁷ *Haugh v. Tacoma*, 12 Wash. 386, 41 Pac. 173 (1895), *Doran v. Brown*, 16 Wash. 703, 48 Pac. 251 (1897), *Perkins v. Mitchell, Lewis & Staver Co.*, 15 Wash. 470, 46 Pac. 1039 (1896).

most completely unorganized and confusing briefs. Thus in *Haugh v. Tacoma*⁸ the appeal was dismissed because:

So far as appears from this brief, none of the propositions of law to which authorities are cited are involved in this litigation, or were ruled on below, and the brief does not render any assistance to the court in determining what points were here for review. No errors are assigned in the brief and it cannot be determined therefrom that any of the matters therein discussed were ever brought to the consideration of the trial court.

Petition for Rehearing

It cannot be told from a reading of the brief what course the proceedings took in the lower court, whether the cause was disposed of on demurrer, or, if an answer was filed, what was the nature of the defense interposed by it, nor can it be told from said brief whether counsel relies for a reversal upon errors committed by the lower court in ruling upon the pleadings, or in receiving or rejection of testimony, or in charging the jury

This decision points out the particular difficulties which the assignment of errors was supposed to eliminate when it was incorporated into the appeal procedure, and at the same time indicated the high degree of informality the court would tolerate. The only other two cases in which entire appeals were dismissed were cases of this same sort.⁹ In general, the court has been satisfied with any form of assignment identifying understandably and specifically the findings or rulings which an appellant wished to challenge. The statement is not required to be in a stilted form nor occupy a set place in the brief, as the following example of a satisfactory form would indicate:

The appellants, on page 19 of their brief, assign errors as follows. "We contend. (1) That there was no agreement of any kind, or at all, concluded or entered into between Ranahan and Gibbons on the 6th of August, 1898, or at any time before the location of the First Thought; (2) That whatever talk was had between them was merely negotiary and amounted only to an offer or proposition, not a contract; (3) That the talk and proposition related only to the Shea claims, and contained nothing whatever as to Ranahan having an interest in the future locations of Gibbons and Walker; and (4) That the proofs do not warrant the facts found by the court."¹⁰

⁸ 12 Wash. 386, 41 Pac. 173 (1895).

⁹ *Perkins v. Mitchell, Lewis & Staver Co.*, 15 Wash. 470, 46 Pac. 1039 (1896). In this case the court heard the motion to dismiss for want of an assignment of error before they heard the case on its merits and denied the motion. After the hearing on the merits of the case the court held. "it is utterly impossible to determine from the brief what the appellant relies upon for a reversal" and dismissed the case. *Doran v. Brown*, 16 Wash. 703, 48 Pac. 251 (1897).

¹⁰ *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773 (1900).

Thus a concise statement of the questions to be reviewed was all that was required by the court when it had a volume of business approximating five hundred cases per annum.¹¹ The most recent pronouncement of the majority of the court would indicate that it has no intention of becoming less tolerant under the pressure of the current volume of appeals:

The general rule upon the subject of assignment of error seems to be that, while mere arguments in an appellant's brief do not take the place of proper assignments of error, and while there must be a substantial compliance with the statutes or rules with reference thereto, nevertheless a clear statement of the questions presented for review, pointing out the errors for which a reversal is sought, may be treated as a sufficient assignment of error.¹²

The greater danger which counsel faces today is that one of his arguments will not be considered because it was not adequately covered by an assignment of error. While it is possible that in particular cases the refusal of the court to decide a particular contention because there was no assignment to cover it could be tantamount to a dismissal of the appeal, the two situations should not be confused. As we have seen, the question of whether the appellant is entitled to be heard at all will depend upon whether the brief was sufficiently well-organized and phrased to be intelligible. The question of whether a particular argument was covered by the errors assigned will be determined by the substantive law.¹³ Thus where counsel assigned as error the rendering of the verdict, the court refused to consider the contention that the verdict was excessive;¹⁴ where the appeal was prosecuted on the ground that the court erred in finding unfair competition, the court would not consider the contention that some of the evidence was erroneously admitted.¹⁵ There was no question in these cases of the intelligibility of the arguments advanced (otherwise the court would not have been able to distinguish them), rather the objection to these

¹¹ Haugh v. Tacoma, 12 Wash. 386, 41 Pac. 173 (1895).

¹² *In re Whittier's Estate*, 126 Wash. Dec. 786, 176 P.(2d) 281 (1947).

¹³ In all the cases herein cited the appellant had assigned several errors and then incorporated in his brief or oral argument additional arguments which the court rejected. It is submitted that the reason they were rejected was that they bore no relation to the questions of law or of fact raised by the assignments made. *Williams v. Spokane Falls & N.R.R.*, 39 Wash. 77, 80 Pac. 1100 (1905), *Olympia Brew. Co. v. Northwest Co.*, 178 Wash. 533, 35 P.(2d) 104 (1934), *Walker v. Copeland*, 193 Wash. 1, 74 P.(2d) 469 (1938), *Kennedy v. The City of Everett*, 2 Wn.(2d) 650, 99 P.(2d) 614 (1940), *Sears v. Internat'l Bro. of Teamsters*, 8 Wn.(2d) 447, 112 P.(2d) 850 (1941), *Hafer v. Marsh*, 16 Wn.(2d) 175, 132 P.(2d) 1024 (1943).

¹⁴ *Williams v. Spokane Falls & N.R.R.*, *supra*, note 13.

¹⁵ *Olympia Brew Co. v. Northwest Co.*, *supra*, note 13.

contentions was that they raised questions of law or fact not posed by the assignments made in the brief. For example, the only relation between the problem of whether the verdict was excessive and whether it was erroneous is one of subject matter; both concern the verdict, but the law involved is entirely different.

Since the reports are studded with cases where particular arguments were not considered, the Washington Supreme Court has apparently been more lenient in allowing informal organization of appellate briefs than in permitting improper grouping of arguments.¹⁶ Admitting that the distinction between these two situations is slight, it may be important. A brief that reads with the simplicity and clarity of a dime novel may be as ineffective as the novel and as irrelevant.¹⁷ An example of this is the case of *Brydges v. Millionair Club*.¹⁸ In that case *P* brought an action for unlawful detainer; *D* denied *P*'s ownership of the property and alleged that he was tenant in common with *P*. A demurrer to the affirmative defense for want of facts sufficient to show ownership was sustained, then, the court specifically found that *D* was a lessee and gave judgment for *P*. On appeal *D* cited as error only the order sustaining the demurrer, and under that assignment tried to argue that he was not a lessee but a co-owner. Since the assignment challenged only the *order* of the trial court, the Supreme Court accepted the findings of fact (i.e. that he was a lessee) and then, inevitably, affirmed the order sustaining the demurrer. While *D*'s initial

¹⁶ *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327 (1892), *Blumenthal v. Pacific Meat Co.* 12 Wash. 331, 41 Pac. 47 (1895), *Sengfelder v. Hill*, 21 Wash. 371, 47 Pac. 757 (1899), *State v. Jensen* 194 Wash. 515, 78 P.(2d) 600 (1938), *Blouen v. Quimper Canning Co.*, 139 Wash. 436, 247 Pac. 940 (1926), *Goebel v. Elliott*, 178 Wash. 444, 35 P.(2d) 44 (1937), *State v. Elwood*, 193 Wash. 514, 76 P.(2d) 985 (1939), *Klein v. Zeeve*, 199 Wash. 644, 92 P.(2d) 877 (1939), for additional cases see note 13.

¹⁷ There is an exception to the broad generalization when the appellant has relied on only one error of the lower court. The Supreme Court has consistently declined to dismiss such cases for the reason that a formal assignment of error would add nothing to the clarity of the brief. One Justice of the present court does not believe such an exception should exist. His views are set forth in dissenting opinions to *In re Whittier's Estate*, 126 Wash. Dec. 786, 176 P.(2d) 281 (1947) and *Dill v. Zielke*, 126 Wash. Dec. 233, 173 P.(2d) 977 (1946). The writers are of the opinion that agreeing with the propositions advanced in those dissents would necessitate ignoring the history of the development of the assignment of errors, its purpose in the appellate procedure, and the following precedents: *Goetzing v. Rosenfield*, 16 Wash. 392, 47 Pac. 882 (1897), *Rowe v. Northport Smelting Co.*, 35 Wash. 101, 76 Pac. 529 (1904), *Moore v. The City of Spokane*, 88 Wash. 203, 152 Pac. 999 (1915), *O'Leary v. Bennett*, 190 Wash. 115, 66 P.(2d) 875 (1937), *State v. Lowe*, 192 Wash. 631, 74 P.(2d) 458 (1937), *Walker v. Copeland*, 193 Wash. 1, 74 P.(2d) 469 (1937), *Bobst v. Hardisty*, 199 Wash. 304, 91 P.(2d) 567 (1939), *Ernst v. Guarantee Millwork, Inc.*, 200 Wash. 195, 93 P.(2d) 404 (1939), *State ex. rel. Rand v. Seattle*, 13 Wn.(2d) 107, 124 P.(2d) 207 (1942), *Dill v. Zielke*, *ibid.*, *In re Whittier's Estate*, *ibid.*

¹⁸ 15 Wn.(2d) 714, 132 P.(2d) 188 (1942).

error was in setting up as an affirmative defense matter which could properly have been raised under a general denial, the effect of grouping, for the purposes of assignment of error, the arguments against the court's finding with the arguments against the ruling of the court deprived him of what was probably his only defense.

There remain several special aspects of the requirement of an assignment of errors that should be noted. The rule was laid down in *Le Cocq Motors, Inc. v. Whatcom County*¹⁹ that an assignment of errors as to conclusions of law does not bring up for review the finding of facts upon which the conclusions are based. This rule may be particularly troublesome since the recent case of *Hansen v. Lindsell*²⁰ held that the absence of a specific assignment of error would preclude the courts from going behind an implied finding of fact as well.

Abandoned or unsupported assignments will be disregarded by the court. An assignment will be considered abandoned when the court finds that there is no argument in the brief to amplify it and will be rejected as unsupported when the record brought up does not cover entirely the matter assigned as error.²¹ These grounds for rejection are so obvious that they need no discussion.

Finally it is to be noted that an assignment is not necessary at all to challenge a jurisdictional error which is an error apparent on the face of the record,²² and the same is true of the objection that the special findings of fact by the trial court are insufficient to support the judgment, or that the findings are too conflicting or uncertain to support the judgment.²³ These exceptions are fundamental to our system of pleading and procedure and are the ones incorporated into Rule XXI by the proviso:

That the objection that the lower court had no jurisdiction of the cause or that the complaint does not state sufficient facts to constitute a cause of action, or that the Supreme Court has no jurisdiction of the appeal, may be taken at any time.²⁴

¹⁹ 4 Wn.(2d) 601, 104 P.(2d) 475 (1940).

²⁰ 14 Wn.(2d) 643, 129 P.(2d) 234 (1942).

²¹ *Moheny v. Davis*, 104 Wash. 209, 176 Pac. 31 (1918), *Weisfield v. Seattle*, 180 Wash. 288, 40 P.(2d) 149 (1935), *Bond v. Werley*, 175 Wash. 659, 28 P.(2d) 318. All these cases were fairly early; it is submitted that the court now ignores such assignments without mentioning them in the written decisions.

²² *Green v. Langnes*, 177 Wash. 536, 32 P.(2d) 565 (1934).

²³ *Hansen v. Lindell*, 14 Wn.(2d) 643, 129 P.(2d) 234 (1942).

²⁴ *Hansen v. Lindell*, *supra*, note 23.

CONCLUSIONS

Thus the requirement that all briefs contain an assignment of the errors relied on for reversal resolves itself into two distinct problems. The first is organizing and phrasing the entire brief in a clear and intelligible style. It is not a legal problem, but rather one of composition. The second relates to the phrasing of specific assignments so that they cover the particular arguments the appellant intends to make. The courts have formulated only two rules to guide attorneys in phrasing their assignments: (1) assignments as to conclusions of law do not bring up for review the finding of facts upon which the conclusions are based; (2) jurisdictional errors may be argued without prior assignment. Obviously these two rules do not cover all possible defects or inadequacies that could be found in different assignments, but it should be emphasized that it is only with regard to the requirement of clarity that the court has practiced the liberality it preaches. While the inadequacy of a particular assignment is rarely discussed by the court, the decided cases often contain the comment, "Arguments not covered by the assignments of error were not considered."

In practice the court hears appeals on their merits in spite of deficiencies in logical assignments of error, but limits the "merits" to those questions of law or fact which the appellant sufficiently understands to be able to identify and point out. It is submitted that this is an intelligent compromise between the interest of efficiency in a court with a crowded calendar and the right of every man with a just cause to be heard. It provides adequate protection for the respondent and the maximum insurance of justice in the decisions of the appellate courts.