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## A Modern Substitute for Bills of Exceptions

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## A MODERN SUBSTITUTE FOR BILLS OF EXCEPTIONS

By L. CARLIN\*

PRIOR to the reign of Edward I,<sup>1</sup> a litigant in a common-law action could have appellate relief in respect to judicial error only as to matters appearing on the face of the record as an intrinsic part of those proceedings which had come to be recognized as constituting the technical *record* of the case.<sup>2</sup> Consequently, in order to have a proper understanding of the method and extent of early appellate procedure and to appreciate fully the purpose and function of subsequent remedial statutes, it is necessary to know something about the nature and scope of the common-law record.

First of all, it should be remembered that in early common-law actions, out of which the record evolved, all the proceedings, from the initial pleading up to the final judgment, were had *ore tenus* in open court.<sup>3</sup> In the very beginning, there was no record of the proceedings at all, except in the memory of the trial judges. Indeed, it was only reluctantly that a written record of the case was finally permitted to prevail over the memory of the justices.<sup>4</sup> When a written record finally came to be recognized, it was based on an extended and connected minute of the oral proceedings, recorded on a roll of parchment by a court officer who performed the duties

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<sup>1</sup>1272-1307.

<sup>2</sup>Taliaferro v. Franklin, 1 Grat. 339 (Va. 1845); Dryden v. Swinburne, 20 W. Va. 89, 108 (1882); Roanoke Land and Improvement Co. v. Karn, 80 Va. 589, 592 (1885).

<sup>3</sup>ANDREWS' STEPHEN, PRINCIPLES OF PLEADING, 2 ed., 146-147. It is not certain when oral pleadings as a general practice were abandoned. *Ibid.*, 151. However, it seems that written pleadings were not well established until the reign of Elizabeth (1558-1603). WILLIAM SEARLE HOLDSWORTH, "The Development of Written and Oral Pleading," 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 633; 22 L. QUART. REV. 360-382. Even after it became the practice to write out the pleadings in the first instance, they were still transcribed to the record roll. ANDREWS' STEPHENS, *supra*, 150-151.

<sup>4</sup>2 POLLOCK AND MATTLAND, HIST. ENG. LAW, 2 ed., 669-670. The word "record" is derived from a Norman-French word meaning primarily to remember. "Recorder anciently signified to rectify or testify on recollection, as occasion might require, what had previously passed in court." In early Norman court proceedings, not only the judges, but bystanders, could testify as to the record and were called *recordeurs*. ANDREWS' STEPHEN, *supra*, Appendix, note 11. The earliest plea rolls date from the year 1194. 1 POLLOCK AND MATTLAND, *supra*, 169.

devolving upon the clerk or prothonotary of the court in modern procedure. In fact, this minute of the court officer, recording from time to time in chronological order, and generally at numerous sittings of the court, the appearance of the parties, the pleadings, continuances and other matters leading up to the issue, a brief recital of the mode of trial, the result of the trial (in early days the trial really followed the judgment), and the judgment of the court, was the very record itself, and was known as the record roll.<sup>5</sup> The record, as evidenced by the record roll, was the final and inexorable guide controlling the judgment and fixing the rights of the parties. Being a verity, it could not be impeached.<sup>6</sup> Consequently, for the very reason that it was the basis of authority, its *prima facie* purport bounded the entire field of appellate inquiry. The trial court could speak only by its record, and the voice of justice had no other medium for reaching the ear of appellate relief.

It is easy enough to understand why an appellate court, on its inquiry into matters of error, should be confined to some sort of a record of the proceedings in the lower court. From the very nature of appellate procedure on writs of error, nothing was, nor is, done or tried *de novo*.<sup>7</sup> The appellate court simply looks at what has already been done and says "right," or "wrong," as the case may be, sending the parties back for further relief, if any there be, to the trial court. The appellate court has no means of knowing what has been done or what has not been done, unless through the medium of something in the nature of a record, call it what you will. But all these facts, necessarily conceded, do not explain why the record itself, in the first instance, was not broader in scope. Professor Minor, speaking of the modern record, says:

"The record proper, indeed, exhibits nothing but the formal allegations or *pleadings* on either side, the papers of which *profert* is made, and *oyer* demanded, the *issue*, the *impanelling of the jury*, or *waiver of one*, a *demurrer to evidence*, the *verdict*, and the *judgment*. (*Mandeville v. Perry*, 6 Call, 83; *White v. Toneray*, 9 Leigh, 351),—the mere lifeless skeleton, as it were, of the cause. The occurrences in court during the

<sup>5</sup>ANDREWS' STEPHENS, *supra*, 148-149.

<sup>6</sup>"It was preserved as a perpetual, *intrinsic* and *exclusively admissible* testimony of all the judicial transactions which it comprised." *Ibid.*, p. 149. The record is no less a verity in modern times. *Braden v. Reitzenberger*, 18 W. Va. 286 (1881); *State v. Vest*, 21 W. Va. 796 (1883).

<sup>7</sup>*Fouse v. Vandervort*, 30 W. Va. 327, 331-333, 4 S. E. 298 (1887).

trial—all that impart life, animation, and interest to the proceedings—are unnoticed. No vestige remains of the examination of the witnesses, the instructions and opinions of the court, or the behavior of the jury.<sup>98</sup>

A comparison will show that the scope of the modern record differs little, if any, in extent from that of the ancient record.<sup>9</sup> In fact, by reason of statutes abolishing formal technical matters of procedure, such as those relating to continuances, which formerly cluttered the record with endless prolixity, the variety-content of the record has gradually diminished rather than expanded.<sup>10</sup> In the perspective of modern procedure, it may be rather difficult to understand why the trial incidents mentioned by Professor Minor were not made a part of the record in the very earliest of common-law trials. In fact, since the pleadings and all matters constituting the record, as well as pure trial matters (to the extent that there were any in court), were delivered orally in open court in those days, there would seem to have been less reason then for differentiating in theory between the two different classes of proceedings than there is now when practically all pleadings are presented in writing in the first instance, while trial matters are oral unless reduced to writing for purposes of exception. In other words, the analogy was closer then than it is now.

From the historical view-point, perhaps the most facile explanation, and one which may be asserted and maintained with little knowledge of the actual facts of early trial procedure, is that of necessity. For example, the parchment rolls upon which the records were entered were scarce and expensive, and in the absence of mechanical aids and the stenographic art, the making of record entries was necessarily slow and laborious. That

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<sup>84</sup> MINOR, *INSTITUTES*, 3 ed., 912. In *Roanoke Land and Imp. Co. v. Karn*, note 2, *supra*, the court says (p. 591): "The case must be heard and considered in this court upon the errors apparent upon the face of the record. In *White v. Toncray*, 9 Leigh 347, 351, Judge Tucker says: "The record is made up of the writ (for purposes of amending by if necessary); the whole pleadings between the parties; papers of which profert is made or oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in court, until the rendition of the judgment, constitute the record in common law suits, and no others." *Mandeville v. Perry*, 6 Call, 78, 83; cited and approved in *White v. Toncray*, 9 Leigh 347, 351."

<sup>9</sup>A good example of a modern record will be found in 4 MINOR, *INSTITUTES*, 3 ed., 1091 *et seq.* See PERRY, C. L. PL., Appendix, for interesting specimens of common-law records of the reign of Charles II.

<sup>10</sup>See citations in note 9.

there was expediency, if not necessity, in requiring the record rolls to be as brief as possible, cannot be denied; but what effect such expediency or necessity might have had in eliminating trial matters from the record is nothing more than conjecture, owing to the fact that another excluding cause operating from the beginning never gave necessity or expediency a chance to show their influence.

The early modes of trial, *e. g.*, by ordeal, by battle, or even by compurgation (wager of law), involved little or no procedure to go into the record. The process of the trial was not to discover a fact or a state of facts which had already occurred and to apply the finding to a determination of the issue, or to let the issue itself terminate in such finding, as in the modern jury verdict. Rather, the issue was decided upon the result or effect of causes set in motion by the trial process, upon a fact *in futuro* with reference to the issue and having no connection whatever with the pleadings. The ultimate fact of the trial was *acted out, manufactured, not established*. It had absolutely no logical connection with the pleadings and the issue in the nature of cause or effect, nor was it deducible from them. Its arbitrarily positive or negative result with respect to the issue, by means of which it decided the issue in a collateral way, was supposed to be controlled by divine and inscrutable guidance, and of course the result could not be impeached. The divine process could not be observed, even if any court had possessed the temerity to have questioned it. The record was concerned only with the result of the trial, and only the result finally, with the advent of trial by jury, went into the record. Even trial by compurgation, although a formal step toward trial witnesses as we know them, was nothing more than a solemn sanction. Instead of being a true process of inquiry, it was essentially an evasion of trial.<sup>11</sup>

<sup>11</sup>For general references, see REEVES, HISTORY OF ENGLISH LAW; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 598-674; HOLDSWORTH, "The Development of Oral and Written Pleading," 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 614-642; HOLDSWORTH, "The Year Books," 22 L. QUART. REV. 360-382; ANDREWS' STEPHEN, PLEADING, 2 ed., ch. 5; THAYER, PRELIMINARY TREATISE ON EVIDENCE, ch. 1, "The Older Modes of Trial"; 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 367-402; 1 WIGMORE, EVIDENCE, ch. 1, §8.

"Since the trial was a matter of form, and the judgment was a determination what form it should take, the judgment naturally came before the trial. It determined not only what the trial should be, but how it should be conducted and when, and what the consequence should be of this or that result.

"In these trials there are various conceptions: the notion of a magical test, like the effect of the angel's spear upon Milton's toad—

'Him thus intent, Ithuriel with his spear  
touched lightly;..... up he starts,  
Discovered and surprised;'

With the Norman Conquest, came the germ of the jury system,<sup>12</sup> at the same time with trial by battle. It was many years, however, before trial by jury was finally freed from the old Norman idea of an inquisition. At first the jurors were selected with reference to their own peculiar knowledge, or their opportunity for acquiring knowledge, of the facts to be tried. Their verdict was based upon their immediate knowledge, reinforced with knowledge acquired by non-judicial inquiry before the trial, rather than upon the testimony of witnesses in court. The jury came already prepared to render a verdict, having been informed beforehand of the issue to be tried. There was no process of judicial inquiry leading up to the verdict to form the basis of error.<sup>13</sup> Practically, there

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that of a call for the direct intervention of the divine justice (*judicium Dei, Gottesurtheil*); that of a convenient form or formula, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rigmorole in a game—good, at all events, for reaching a practical result; that of regulating the natural resort of mankind to a fight; that of simply abiding the appeal to chance. There was also, conspicuously and necessarily, the appeal to human testimony, given under an oath, and, perhaps, under the responsibility of fighting in support of it. But what we do not yet find, or find only in its faint germs, is anything such as we know by the name of a trial; any determination by a court which weighs this testimony or other evidence in the scale of reason, and decides a litigated question as it is decided now. That thing, so obvious and so necessary, as we are apt to think it, was only worked out after centuries." THAYER, PRELIM. TREAT., 9-10; 2 SELECT ESSAYS, 369-370.

"I use the word 'trial', because it is the word in common use during recent centuries. But as applied to the old law this word is an anachronism. The old phrases were *probatio*; *purgatio*; *defensio*; seldom, if ever, in the earlier period, *triatio*. In those days, people 'tried' their own issues; and even after the jury came, *e. g.*, in the early part of the thirteenth century, one is sometimes said to clear himself (*purgare se*) by a jury; just as a man used to be said in our colonies to 'clear himself' and 'acquit himself' by his own oath, as against some accusations and testimony of an Indian." *Ibid.*, 16, note 1; 2 SELECT ESSAYS, 375, note 2.

"The language of the law, even in Bracton's day, has no word equivalent to our *trial*. We have not to speak of trial; we have to speak of proof." 2 POLLOCK AND MATTLAND, *supra*, 2 ed., 598.

<sup>12</sup>*Ibid.*, 140 *et seq.*; THAYER, PRELIM. TREAT., 7; 2 SELECT ESSAYS, 367 *et seq.*

<sup>13</sup>The commonplace idea that the early jurors were selected from the vicinage solely in order to obtain men having original knowledge of the trial subject is erroneous. They were supposed to supplement any original knowledge that they might have by *inquiry* of the vicinage, the true function of the Norman inquisitors, and to come into court fully prepared for a decision of the issue. 2 POLLOCK AND MATTLAND, *supra*, 2 ed., 622-28. "As to the manner in which the jurors came to their verdict, we know that as a general rule they had ample notice of the question which was to be addressed to them. At the least a fortnight had been given them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants; indeed it was their duty to discover the truth. Then, when the day of trial had come, we take it that the parties to the cause had an opportunity of addressing the jurors collectively." *Ibid.*, 627-628. Also, see ANDREWS' STEPHEN, PLEADING, 2 ed., 261-262. Indeed, in those days, a witness who volunteered testimony was looked upon as an intermeddler and was punished as such for maintenance. Witnesses refused to testify except under the compulsion and protection of chancery courts. It

were no rules of evidence prior to the thirteenth century.<sup>14</sup> There being no rules of evidence, none could be violated. It was long after the beginning of the thirteenth century before the jury trial, depending chiefly upon witnesses and extrinsic testimony, approximated the modern procedure.<sup>15</sup> And it must not be forgotten that during all this time the ancient modes of trial, by battle, by ordeal and by compurgation,<sup>16</sup> were competitors of the more modern and rational method, inevitably coloring the procedure in its development.<sup>17</sup>

It follows from what has been said that the science of pleading in its advanced stages of development is much older than the

was not until 1563 that a statute was passed allowing process to compel the attendance of trial witnesses, who made their full advent with the adoption of written pleadings. HOLDSWORTH, "The Development of Oral and Written Pleading," 2 SELECT ESSAYS, 629-636; THAYER, PRELIM. TREAT., 125-129.

<sup>14</sup>"Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accompanied by a *judicium dei*, and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses; for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers." 1 WIGMORE, EV., §8, (1).

<sup>15</sup>*Ibid.*, §8, (1)-(3).

<sup>16</sup>By a decree of the fourth Lateran Council at Rome, 1215, churchmen were forbidden to assist in trial by ordeal. 2 POLLOCK AND MATTLAND, 2 ed., 599. "That this was recognized and accepted in about three years (1218-19) by the English crown is shown by the well-known writs of Henry III. to the judges, dealing with the puzzling question of what to do for a mode of trial, *cum prohibitum sit per Ecclesiam Romanam iudicium ignis et aquae*." THAYER, PRELIM. TREAT., 37; 2 SELECT ESSAYS, 394-395. Henry's predicament is a plain comment on the prevalence of the older modes of trial at that time. Trial by ordeal had been the poor man's trial, particularly the Saxon's. Trial by battle came with the Normans, and was fostered by the nobility. Abandonment of the ordeal gave a great impetus to the development of jury trial, which offered the poor man an admirable substitute for the older method. The other primitive modes of trial lived longer. "At last came the famous appeal of murder in 1819 [Ashford v. Thornton, 1 B. & Ald. 405] in which the learning of the subject was fully discussed by the King's Bench, and battle was adjudged to be still 'the constitutional mode of trial' in this sort of case. As in an Irish case in 1815, so here, to the amazement of mankind, the defendant escaped by means of this rusty weapon. And now, at last, in June, 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when all the rest of Christendom had abandoned it." THAYER, 45; 2 SELECT ESSAYS, 401. It is no less remarkable that trial by compurgation was not abolished until 1833. THAYER, 34; 2 SELECT ESSAYS, 391.

<sup>17</sup>"The jury became almost the only mode of proof at a time when these old ideas of a trial were still prevalent; and consequently the jury was regarded as settling the matter in the same final and inscrutable manner as compurgation, battle, or ordeal. Therefore just as in the older law all the legal interest in the case turned upon what we should now regard as preliminary matters, such as the rules of process for getting the parties before the court, and the rules which defined the modes in which they should state their case when they were before the court." HOLDSWORTH, "The Development of Written and Oral Pleading," 2 SELECT ESSAYS, 621; "The Year Books" II, 22 L. QUART. REV. 360-382. See 1 WIGMORE, EVIDENCE, §8, (2); THAYER, PRELIM. TREAT., ch. 1; 2 SELECT ESSAYS, 367-402.

science of evidence and trial procedure. The former had become firmly fixed on a more or less rational basis at a time when the latter were still enveloped in the mist of formalism and superstition. The science of pleading had already, by years of precedent, definitely defined and limited the scope of the record before trial procedure had produced anything really worthy of going into the record. In the early days, what little significance a common-law action had as a means of dealing out justice depended more upon the course and result of the pleadings than upon the trial of the issue.<sup>18</sup> The record served the purpose, at the least, of *res adjudicata*, and thus prevented the recurrence of a farce; while the trial itself was frequently a farce pure and simple.

By the end of the twelfth century, the jury had become firmly established as an institution in trial procedure.<sup>19</sup> Even during the period while the jurors were yet *ex officio* the witnesses (or more properly, inquisitors) in the case, such a method was vastly superior to the older methods of trial. In fact, such a method amounted to a trial (although one in which the evidence rushed headlong at the pleadings, instead of being guided by them); while the older methods, excluding any psychological influence that a consciousness of being upon the right side may have had upon an issue entirely dissociated from the issue in the pleadings, amounted to nothing more than the tossing of a coin. Naturally, in the course of the next three centuries<sup>20</sup> during which trial by jury,

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<sup>18</sup>"So far are we from the rule of later law that evidence must not be pleaded, that we might almost say that oral evidence was generally brought to the notice of the court by pleading it." HOLDSWORTH, *supra*, 2 SELECT ESSAYS, 627. "All the legal interest of the case was centered in the questions which led up to the award of proof." *Ibid.*, 620-21. "The evidence, which in modern times is given by such witnesses, was at this period supplied partly by the jury, which the law was careful to draw from the neighborhood of the occurrence, partly by the custom of pleading such evidence. For this reason questions turning upon the 'venue' of the jury are of much importance in the Year Books; and for the same reason counsel deem themselves to be in a manner responsible for the statements which they make to the Court. They examine their clients before they put forward a plea. They even decline to plead a fact as to the truth of which they have doubts. Sometimes, indeed, we see a distinction taken between the plea and the evidence for the plea when it is convenient to say that a statement is only evidence and not really a plea. But, as a general rule, it would be true to say that such distinct things as the pleadings, the statements of counsel, and the evidence for those statements are hardly distinguished in the year books." *Ibid.*, 629-630. In many instances, cases were decided wholly by examination of the *secta*, by profert and oyer of documents, and by other preliminary matters, which, while pure pleading adjuncts, were nevertheless essentially evidential in character—were evidence at the front rather than at the end of the issue. THAYER, PRELIM. TREAT., 10-16; 2 SELECT ESSAYS, 370-375.

<sup>19</sup>1 WIGMORE, EV., §8; THAYER, PRELIM. TREAT., ch. 2; 2 POLLOCK AND MATTLAND, 2 ed., 641.

<sup>20</sup>*Circ.* 1200-1500. 1 WIGMORE, EV., §8.



aided by rational and definite rules of evidence, was slowly emerging out of the old Norman institution of inquest and unfolding into its modern state of efficiency, the trial procedure in an action at law gradually became relatively more important in its judicial phases. And although, in accordance with the ancient idea of the functions of a trial, only the ultimate result, or culmination, of the trial, the verdict of the jury, was important to start with, people were bound to realize that trial proceedings leading up to and controlling the verdict were just as important as the pleadings and other parts of the record itself. A demand was sure to come for relief on writ of error against erroneous rulings of the court in the progress of the trial. If such a demand had come in the beginning of common-law procedure, trial matters, or some of them, might possibly have entered into the minutes of the record roll as an intrinsic part of the record; but when the demand came, the scope of the record had been definitely limited for so long a time it could not permit the intrusion of such exotic company. To have done so would have done violence to legal precedent, even if there had been no other obstacle in the way.<sup>21</sup>

Legislative action was the only resource, and necessarily any remedial statute must have been based on one of two opposite theories. Either the scope of the record proper had to be extended so as to include trial error, or some means had to be devised of directing appellate inquiry outside of the record. Whatever method might have been pursued, it was indispensable, at the least, to reduce the subject-matter of the exception to writing and properly authenticate it. Preservation of the precise facts as well as placing them before the appellate tribunal demanded this much. We could not expect to find such a statute making provision for authentication of any trial matters already reduced to writing *in haec verba*, because at that time there were no such matters. Written instructions, stenographic notes, and sworn court reporters deft in the stenographic art are all products of a later age. Up to this point, it may be assumed that the framers of the statute advanced without hesitation. But here, we may imagine them as having paused and considered whether the authenticated exceptions should be made a part of the technical record, or whether the appellate tribunal should be required to consider them

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<sup>21</sup>Owing to the paucity and cost of materials, the laboriousness and delay in making record entries, and the conditional importance of exceptions, necessity or expediency would likely have had much weight in deciding the matter.

as a mere adjunct or supplement to the record. Practically, since authentication would seem to have been the prime essential and the authenticated exceptions, *as such*, could have been preserved just as carefully as the record roll, it would seem to have made little difference which method had prevailed. But the stage of procedure, in its historical perspective, was set for the former alternative. It was easier, less startling, to reconcile judicial precedent to an expansion of the record than it was to bend the line of appellate vision. As a result, we have the statute of Westminster II, 13 Edw. I., c. 31 (1285), creating bills of exceptions, and, for the first time in the history of the common law, granting appellate relief for judicial error committed in the course of a trial.<sup>22</sup> To this day, in most common-law jurisdictions, the bill of exceptions is an essential intermediary between trial error and appellate review.<sup>23</sup>

It is assumed that the statute contemplated making bills of exceptions technically parts of the record, and such was the judicial construction placed upon it;<sup>24</sup> but such a construction is far from being based upon the explicit language of the statute. The prescribed formality whereby the trial justice was required to appear before the appellate tribunal and confess or deny his seal may have been intended merely as an additional means of authentication, and not as any *quasi*-nuptial ceremony whereby the bill of exceptions was united with the record.<sup>25</sup> Or, even if the Statute

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<sup>22</sup>"When one impleaded before any of the justices alleges an exception, praying that they will allow it, and if they will not, and he, that alleges the exception, writes the same, and requires the justices will put to their seals, the justices shall do so; and if one will not, another shall; and if upon complaint made of the justices the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed." *Dryden v. Swinburne*, 20 W. Va. 89, 108 (1882).

<sup>23</sup>*Bashar v. Railway Co.*, 73 W. Va. 39, 79 S. E. 1009 (1913).

<sup>24</sup>*Tallafarro v. Franklin*, and *Dryden v. Swinburne*, *supra*, note 2.

<sup>25</sup>"Under this statute the practice was, upon the return of the writ of error the judge was summoned by a writ to appear personally and to confess or deny his seal. If he confessed it, the proper entry was made, and it became then a part of the record. In *Money, Watson & Blackmore v. Dryden Leach*, 3 Burrows 1692, 1693, a minute account is given of the manner, in which this statute was carried out; and as it is a rather amusing exhibition of the formalities of that day, I give an extract from the report. After setting forth this writ at length the report proceeds: 'The Lord Chief Justice Pratt having now come into the court, pursuant to the command contained in said writ, delivered it to the Lord Chief Justice of this court. Mr. Owen at the same time delivering the original bill of exceptions into Lord Mansfield's hands. Whereupon Lord Mansfield, showing to the Lord Chief Justice-

of Westminster II contemplated that bills of exceptions should be part of the record proper, it may have been intended that they should become such *per se* through the process of authentication.<sup>26</sup> These questions, like many other legal questions discussed in isolation, may seem purely academic; but the fact that bills of exceptions have been identified with the record undoubtedly has had two important practical effects upon the course of modern procedure. First, bills of exceptions have partaken of the sanctity of the record and, being a verity, cannot be impeached;<sup>27</sup> and second, much technicality has attended the application of modern statutes requiring bills of exceptions to be identified in court orders making them a part of the record.<sup>28</sup>

The Statute of Westminster II, 13 Edw. I., c. 31, with some few changes in substance and phraseology, was incorporated into the Virginia Code.<sup>29</sup> The West Virginia statute is based upon the Virginia Code, and hence is a lineal descendant of the ancient Statute of Westminster II.<sup>30</sup> In addition to the fact that the formality of sealing the bill of exceptions is not required under the West Virginia statute,<sup>31</sup> the chief distinction between the two statutes is in the method of making the bill a part of the record. Under the ancient statute, as has been observed, this formality was accomplished by the trial justice's confessing his seal before the superior tribunal, and hence the bill did not become a part of the record until the hearing in the court of review.<sup>32</sup> Under the West

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Pratt the seal thereunto affixed asked him, whether that was his lordship's seal or not, to which question his lordship answering in the affirmative, Lord Mansfield redelivered the bill of exceptions to Mr. Owen, at the same time delivering the above mentioned writ with orders, that it should be filed. The Lord Chief Justice of the Common Pleas immediately retired without sitting down and the Lord Chief Justice of this court attended him, till he was got past the puisne judge but not quite to the door of the court." GREEN, J., in *Dryden v. Swinburne*, *supra*.

<sup>26</sup>Such has been the rule in Virginia, by virtue of statute. VA. CODE, 1904, §3385; BURKS, PL. and PR., 523-524.

<sup>27</sup>*Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742 (1890); *State v. Vest*, 21 W. Va. 796. Perhaps this is the only consistent rule, although without doubt contributing to the particular precision required in authenticating bills of exception and making them a part of the record. If the thing is to be immutable, all the more reason there is that it should be fashioned truly. Impeachment of the truth of a bill, however, would lead to a trial within a trial, contrary to the economy of the law, and might demand an anomalous inquiry in the appellate court outside of the record, amounting to a trial *de novo*.

<sup>28</sup>Observe numerous illustrative cases in succeeding foot-notes.

<sup>29</sup>*Tallaferro v. Franklin*, 1 Grat. 339 (Va. 1845).

<sup>30</sup>W. VA. CODE, c. 131, § 9. Note that our statute specifically requires the bill of exceptions expressly to be made a part of the record after authentication. *Dryden v. Swinburne*, 20 W. Va. 89, 109 (1882).

<sup>31</sup>*Carr v. Coal Co.*, 64 W. Va. 448, 63 S. E. 334 (1908).

<sup>32</sup>*Dryden v. Swinburne*, *supra*.

Virginia statute, the bill is made a part of the record in the trial court by a court order there entered of record.<sup>33</sup>

The Statute of Westminster II and its progeny are highly remedial in purpose and character. Nevertheless, in application they have been productive of no little technicality. In too many of our extant decisions, honest attempts to comply with the statute have resulted in obliteration rather than authentication.

A brief comparison will show that, in very many respects, a modern action at law is the direct antithesis of an action contemporaneous with the Statute of Westminster II. Our nearest approach to the record roll is a miscellaneous order book. The pleadings, now reduced to writing in the first instance, although they still constitute the gist of the technical record, are not copied into the order book at all, and exist solely in the files.<sup>34</sup> Ordinarily, they have no business in court until an issue for the court or jury to try has been made up in the clerk's office. Formerly, as has been observed, court sessions were taken up almost exclusively with hearing and regulating the pleadings, while the parties were left to try the issue themselves as an aftermath to the judicial part of the proceeding. Now, just the opposite is true. Parties are required to plead and arrive at an issue before they come into court, while the court's time is given almost exclusively to regulating the trial of the issue.<sup>35</sup> The great bulk of the record proper is made up outside of court. A sworn court officer,<sup>36</sup> as of old, records minutes of the proceedings in court; but now the evidence in the case (trial proceedings), and not the "mere lifeless skeleton" of which Professor Minor speaks, forms the substance of his notes. Instructions are now written out and authenticated by the signature of the judge in the form of his initials, instead of being delivered as a more or less extemporaneous oral charge by the court.<sup>37</sup> In fact, prior to the Statute of Westminster II, in that time when the record was being clothed with all its sanctity, the components of a modern law action would have been classified with a rather startling result. In accord with the then existing criterion, the evi-

<sup>33</sup>*Dryden v. Swinburne, supra*; *Duckworth v. Stalnaker*, 68 W. Va. 197, 201, 69 S. E. 850 (1909).

<sup>34</sup>Except, of course, formal pleadings, such as the general issue, *similiter, eto.*, which may be pleaded orally and evidenced only by a court order.

<sup>35</sup>Rule days were designed to this end. *McDermitt v. Newman*, 64 W. Va. 195, 199, 61 S. E. 300 (1908).

<sup>36</sup>The stenographer, or short-hand reporter. W. VA. CODE, c. 114B; *Cummings v. Armstrong*, 31 W. Va. 1, 11 S. E. 742 (1890).

<sup>37</sup>W. VA. CODE, c. 131, § 22.

dence would have been considered *per se* a part of the record, because recorded during the course of the proceeding by an officer of the court; but the pleadings would have constituted no part of the record, because not copied into the order book, the modern record roll!

The truth is that the Statute of Westminster II and its offspring have become hopelessly antiquated. And, although it cannot be denied that many of our decisions applying the statute turn on rather technical considerations, the basic fault does not lie with the courts. The anachronism is statutory, not judicial. Our statute, construed with the maximum of liberality, is but a clumsy expedient to overcome difficulties which do not exist.<sup>38</sup> The working of the statute has always been attended with too much complication. It is a machine with an overplus of levers. Identification and incorporation must follow upon identification and incorporation, from paper to paper,<sup>39</sup> from paper to bill,<sup>40</sup> and from bill to court order.<sup>41</sup> Much of this was useless to start with and more of it has become obsolete. So much of it has degenerated into mere formality that the real function of the statute has been lost in hopeless confusion.

Many are the instances wherein identification in the bill of extraneous writings or documents by reference has failed.<sup>42</sup> But the exceptor must go further. It has been said that not only must he identify the subject-matter of his exception by reference, but he must also purport to *incorporate* it by reference.<sup>43</sup> Use of the

<sup>38</sup>BARON BOWEN, "Progress in the Administration of Justice During the Victorian Period," 1 SELECT ESSAYS, 516, 522, speaks of "the difficult formalities of the rule as to bills of exceptions—an old-fashioned and often impracticable method of challenging the direction of a judge."

Formalism had its use in early days. Transactions were not then evidenced by writings. Overt acts, observed by witnesses, were a general means of preserving the status of legal rights. Formality connected with the transaction made a vivid impression upon the memory of witnesses. Dramatics made a substitute, though a poor one, for records. The best example, perhaps, is the ceremony of livery of seisin. The ancient requirement that sales of personalty be conducted in the presence of witnesses is another instance. But when the necessity for such a formality ceases, there is nothing left to guide the process. There must be unreasoning submission to the letter of the formal requirement or nothing at all. The formality becomes a functionless survival in the legal organism, clogging and breaking down the normal vital processes of justice.

<sup>39</sup>McKendree v. Shelton, 51 W. Va. 516, 41 S. E. 909 (1902).

<sup>40</sup>Woods v. King, 59 W. Va. 418, 53 S. E. 605 (1905).

<sup>41</sup>Winters v. Null, 31 W. Va. 450, 7 S. E. 443 (1888).

<sup>42</sup>The numerous cases will be found under the title "Bills of Exception," ENCYC. DIG. VA. & W. VA. REP.

<sup>43</sup>Tracy's Adm'x v. Carver Coal Co., 57 W. Va. 587, 50 S. E. 825 (1905). This case seems rather technical. It would seem that *express reference* ought to mean

"skeleton" bill of exceptions, although making this dangerous method of extraneous reference necessary, has been commended by the courts as a labor-saving device.<sup>44</sup> It happens to be a labor-saving expedient because many matters of exception in modern trial procedure, in fact the great bulk of them in the form of instructions and evidence, are reduced to writing independently of the bill of exceptions. Incorporation by reference saves the task of copying into the bill something which is already reduced to writing. At the time when the "skeleton" bill of exceptions is certified, the writing incorporated by reference must have been in existence and is supposed to have been inspected and approved before the bill is signed by the judge.<sup>45</sup> The formality attendant upon such a proceeding is an open invitation to error. Practically, the judge knows that the stenographer's notes are the best evidence of the testimony,<sup>46</sup> the very means by which he removes any doubts from his mind, and there is a temptation to sign the bill in advance of transcription of the evidence.<sup>47</sup> The psychology of the tendency is plain and illustrates well the general attitude assumed in respect to other requirements. Unconsciously the signing of a "skeleton" bill of exceptions is looked upon as an empty formality. In certifying the evidence by way of anticipation, the judge feels that it is already, or will be, sufficiently authenticated, and that he is signing the bill as a mere formality in order to bring it into the record. The same observation is true as to instructions, which must already have been authenticated by the judge's abbreviated signature. Search the field of error where you will, and you will always find formality going hand in hand with error. The remedy here, however, is simple; in fact, is so obvious that there is, as in the case above, an irresistible temptation to follow it, even in the face of the law. In any instance where there is a writing

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*implied incorporation*, where the reference could have been intended for no other purpose. Here, the clerk had appended the evidence to the skeleton bill of exceptions, instead of inserting it in the bill in the spaces indicated for insertion. It is believed that nowhere else than in a court proceeding would anybody have doubted that the evidence appended was the evidence referred to in the court order.

<sup>44</sup>*Ibid.* The inconsistency of finding it necessarily to commend an expedient so dangerous argues something wrong with our procedure.

<sup>45</sup>*Ibid.*, at 594.

<sup>46</sup>In fact, they are made so by statute. W. VA. CODE, c. 114B, § 3. See *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742 (1890), to the effect that the stenographer's notes were made official and the best evidence in order to relieve the judge from attention to details of evidence, and in order to supply a substitute for his memory.

<sup>47</sup>*Cummings v. Armstrong, supra; Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547 (1901).

which might be incorporated into a bill of exceptions by reference, *let the judge certify the writing itself*, merely noting thereon the fact of the exception, and let the formal bill of exceptions be cast aside.

However many the evils to be charged against the archaic statute, there is at least one instance wherein the courts, in pursuit of the full doctrine of "express incorporation by reference," seem to have gone to an extreme of technicality not warranted by the statute itself. Professor Minor refers to this instance as

"The extraordinary, and, as it would seem, anomalous, rule which prevails in our courts, forbidding, in general, reference from one bill of exceptions to another, unless such reference be specially made in the later bill, notwithstanding all the bills are *parts of one record*; although it is permitted to refer to a bill purporting to contain *all the facts in the case*, in connection with other bills filed in the same cause."<sup>48</sup>

The remedy in the latter instance is plain. Let the court look upon the record as a whole, and not as a collection of dissociated parts. Any one part of the record should be able to aid any other part, without the necessity of any express reference. This does not mean that the appellate court should be compelled to grope for error. There are several other expedients for pointing out error.<sup>49</sup> Our decisions amply prove that the bill of exceptions has plenty to do in the task of dragging unwilling elements into the record, without exhausting its vitality in assignments of error. Incidentally, it has in most instances in the past performed the double task, but there is no reason why it is bound to do so.

Another requirement, that of expressly making the bill of exceptions, after authentication, a part of the record by an order of court, would seem to be based upon absolutely no reason. Granting that it is necessary for the bill to become actually a part of the record, there could be no better practical means of making it such than to require it to be properly authenticated.<sup>50</sup> If it has not been sufficiently authenticated, it would be illogical to make

<sup>48</sup>4 MINOR, INST., 3 ed., 916, 1088.

<sup>49</sup>By specific assignments of error (1) on the motion for a new trial, (2) in the petition for a writ of error, or (3) in the brief of counsel. *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 35 S. E. 973 (1900); *Hinton Milling Co. v. New River Milling Co.*, 78 W. Va. 314, 88 S. E. 1079 (1916).

<sup>50</sup>It has already been observed that such is sufficient in Va. Note 26, *supra*. Such is the rule in Cal., Ga. Kan., Miss., Mo., Nev., and Ohio. See 4 STAND. PROC. 371, notes 63, 64.

it a part of the record by any means whatsoever; but if it has been sufficiently authenticated, the entry of the formal order required by the statute is nothing less than the quintessence of superfluity. The statute should, and it is believed does, provide a sufficient mode of authentication. In addition, it should expressly provide that *substantial compliance with such mode of authentication shall per se make the matter so authenticated a part of the record*. If inadvertent failure to comply with the statute were the only risk involved, such risk alone would be sufficient condemnation of a useless formality; but when our decisions show how difficult it has been for counsel adequately to comply with the requirements of the statute in this respect, even with all their conscious and skilled effort, the situation would seem to be intolerable. The court order serves absolutely no purpose of authentication. If the bill of exceptions were signed by some other functionary of the court, then the court order might serve the useful purpose of showing the judge's approval; but since the judge himself is required to sign all bills of exceptions, the court order, for any purposes of authentication, is a mere reiteration of what the court already has done. And, since the bill of exceptions is not copied into the order book as a part of the order,<sup>51</sup> entry of the order adds no safeguard whatsoever to its preservation. The tenuous line of reference between the order and the bill is meaningless in the absence of the bill; in fact, too often it has been found meaningless in the presence of the bill.<sup>52</sup>

It is believed that all members of the profession will concur in the advisability of a change in our procedure. The usual argument urged against change of long-established legal principles, the admonition against doing violence to legal precedent, can have no force in the present instance. This is a matter of procedure, not of the substantive law, and cannot interfere in the slightest degree with vested rights. It cannot be perceived that a change would even in any way react upon or disturb the equilibrium of decisions in associated phases of procedure. When the change is undertaken, it is believed that it should be approached with a determination to do away with all formality and to retain only essentials reduced to terms of their greatest simplicity. The watchword should be *authentication*, and authentication alone should bring the exception

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<sup>51</sup>Bank v. Wetzel, 58 W. Va. 1, 50 S. E. 886 (1905).

<sup>52</sup>For allusion to additional features of the procedure under the W. Va. statute, see notes 61 *et seq.* on the Virginia statute.



and its subject-matter into the record. Where the subject-matter of any exception is already reduced to writing, the uncertainties of reference should be eliminated by permitting the writing itself to be certified, with an informal notation of the exception.<sup>53</sup> Where the matter or thing excepted to is not in writing at the time of the exception and is not later reduced to writing for some other purpose, let the facts, words or circumstances be reduced to writing and certified informally, with a notation of the exception.<sup>54</sup> As to what should be sufficient authentication, certainly certification over the signature of the presiding judge ought to be sufficient in any instance. The West Virginia statute already requires the ruling of the court to be noted on the instructions over the judge's abbreviated signature. All that remains to be done is to require him to sign his full name under a notation of the exception. As to the evidence, although there can be no great complication or hardship in requiring it to be certified over the judge's signature, it is believed that certification by the stenographer and the clerk (or even by the stenographer alone, where the original papers are sent up) should be sufficient.<sup>55</sup> Any paper, whatever its nature, per-

<sup>53</sup>This observation has particular application to evidence and instructions. And there is no reason why the statute, W. VA. CODE, c. 114B, should not be amended so as to make the reporter's notes official and the best evidence, not only as to the evidence, but as to all trial utterances, *e. g.*, rulings of the court, remarks of the court, jury or counsel, motions, arguments of counsel before the jury, or any remarks pertinent to the case and capable of being literally reported. In *Mankin v. Jones*, 63 W. Va. 373, 380, 60 S. E. 248 (1907), BRANNON, J., says: "The report contains remarks of court, remarks of counsel, interlocution between court and attorneys, and pages of argument of law questions before the court. Why should they go into the stenographer's report?" The answer is that it may be expedient to have some of them go in for the same reason that the evidence goes in; because they may be the subject of a bill of exceptions. Of course, all the matters *in extenso* mentioned by Judge BRANNON should not go into the official report. A motion addressed to the court might be very pertinent, while argument addressed to the court out of the presence of the jury would seem never to be pertinent. The statute should be framed so as to leave some discretion to the reporter, with the provision that he should report any matter requested by the court or counsel. Apportioning the costs would be a means of keeping out totally irrelevant matter. Furthermore, it is perfectly feasible to make the stenographer's report official and the best evidence as to all trial proceedings, without undertaking to define the limit of the report. The Pennsylvania statute requires the reporter "to take down as part of his report of the judge's charge, every ruling, order, and remark of the judge relating to the case upon trial, made in the presence of the jury, in any state of the proceeding." *Cummings v. Armstrong*, 34 W. Va. 1, 11, 11 S. E. 742 (1890).

<sup>54</sup>Practically the old bill of exceptions, shorn of its formality; but seemingly the simplest expedient available.

<sup>55</sup>Such has been held sufficient in Pennsylvania under a statute similar to the W. Va. statute; and such, seemingly, has been held in W. Va. *Cummings v. Armstrong*, *supra*; *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 470-471, 35 S. E. 970 (1900). The rule in W. Va. is very clearly otherwise now. *Tracy's Adm'x v. Carver Coal Co.*, 57 W. Va. 587, 50 S. E. 825 (1905). There might be a statutory

taining to the case and filed, either at rules or in court, by the regular method for filing papers in a cause, should without anything more be considered a part of the record.<sup>56</sup> Where any matter of exception is already sufficiently shown in a court order so as to enable the appellate court to determine from the order itself or from any other part of the record in connection with the order the propriety or impropriety of the trial court's ruling, nothing more should be required.<sup>57</sup> All the various elements of the record should be read together as a whole, on the full principle of implied reference. Mere pointing out of error, as a conscious end to be sought, should be left to the petition of the plaintiff in error or to the brief of counsel.

It is believed that practically all the features of reform sug-

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middle ground. The judge's signature might be required only if demanded by either party. This, however, might complicate the procedure too greatly, where the effort should be to simplify as much as possible. In some states, statutes provide that a bill of exceptions may be settled by bystanders where the trial judge refuses or neglects to settle it. See citations to statutes and decisions in 4 STAND. PROC. 348-349, note 82. In one case, *McDonald v. Faulkner*, 2 Ark. 472, bystanders actually certified the bill. It is interesting to note the analogy between this procedure and the ancient Norman custom of "making the record" from memory by bystanders, *recordeurs*. See note 4, *supra*. In fact, the two things are identical. And may it not be argued that, just as the written record supplanted the *recordeurs*, so the reporter's notes should decide the truth of the evidence, rather than the judge, who is only a degree more than a *recordeur*?

<sup>56</sup>It is believed that such is already the law. *Cummings v. Armstrong*, *supra*; *State v. Vest*, 21 W. Va. 796 (1883). Judge Burks says: "Of course, no bill of exceptions is necessary to introduce a matter already a part of the record. If the record sufficiently shows a fact, for instance, that a motion was made to require a bill of particulars, either of the plaintiff's claim or the defendant's grounds of defence, and was overruled, no bill of exception is necessary, as the order showing the ruling of the court is in the nature of a judgment, and is *per se* a part of the record." BURKS, PL. AND PR. 514, citing *Driver v. So. R. Co.*, 103 Va. 650, 49 S. E. 1000 (1905); *Blue Ridge L. & P. Co. v. Tutwiler*, 106 Va. 54, 55 S. E. 539 (1906). In the above instance, the pleadings, which are already a part of the record, would measure the propriety of the court's ruling. Would the rule hold good in all instances where the subject-matter of the motion does not appear of record, or where it is brought into the record by a bill of exceptions not connected by reference with the order? If there is any doubt, it should be removed by statute. The borderland between such matters already a part of the record by court order and matters needing the mediation of a bill of exceptions has been dim. Particularly, is this true in regard to rejected pleas, as the following series of decisions will show: *Perry v. Horn*, 22 W. Va. 381 (1883); *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004 (1891); *Quesberry v. People's Ass'n*, 44 W. Va. 512, 30 S. E. 73 (1898); *Bank v. Houston*, 66 W. Va. 337, 66 S. E. 465 (1909). It is pertinent to note here that our law still requires the foolish formality of craving oyer in order to make process a part of the record, except in cases of default judgments, and here no defendant has appeared to act out the formality. *Netter-Opppenheimer Co. v. Elfant*, 63 W. Va. 99, 102, 59 S. E. 892 (1907).

<sup>57</sup>It is believed that such is already the law, as judicially determined; but if there is any doubt in any instance, it should be removed by statute. See authorities in note 56, *supra*. Also, W. VA. CODE, c. 131, § 9; *Congrove v. Burdette*, 28 W. Va. 220 (1886); *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223 (1897).

gested above have been embodied in a recent act of the Virginia Assembly abolishing bills of exceptions.<sup>58</sup> It is furthermore believed that this statute could be adopted in West Virginia, with very slight changes. However this may be, the statute contains so many admirable features that it is considered worth while to publish it *in extenso*, for the benefit of those who are interested in legal reform. (See Appendix). Even among those who may not agree with the views of the writer or with the spirit of the Virginia statute, it will serve as a basis of discussion and add some element by way of suggestion. As a fitting preface to the statute, it will be interesting to know, in the words of the author of the statute, the motives which prompted him in framing its provisions.

“The object of the bill as prepared by me, which after slight amendment of its seventh section, was duly adopted, is apparent to every practitioner who, like the writer, has, no doubt, often wondered that the artificial form of the common law bill of exceptions should have been so long suffered to endure to vex the busy lawyer and to encumber the record with its solemn and prolix phraseology. How finical the courts have been with respect to the statutory punctilios respecting the scope and authentication of these episodic features of a cause, and how often a meritorious cause may have been lost on appeal by a technical ‘fluke,’ due to misprison or inadvertence of court or counsel in the completion of the record by the necessary bill, is abundantly established in the Virginia reports.

“To save time, to enlarge the powers of courts of review, to eliminate as much of the rubbish of formula as possible, consistently with clearness, and to mitigate costs of appeal, constituted the object which the draftsman had in view.”<sup>60</sup>

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#### APPENDIX<sup>58</sup>

An Act to abolish the bill of exception and to prescribe the means whereby in the trial court the record of the cause in any judicial proceeding at common law, or in any kindred proceeding in a suit in chancery, shall be ascertained and authenticated; to prescribe certain duties of the trial judge and of the clerk of the trial court, in respect to such record; and to prescribe in certain respects how such record shall be certified

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<sup>58</sup>VA. CODE, SUPPL. 1916, pp. 1194-1197, ACTS OF VA., 1916, c. 406.

<sup>59</sup>The Statute of Westminster II is so ancient as to be looked upon as common law.

<sup>60</sup>Excerpt from a letter written by Mr. Marshall R. Peterson, author of the statute, published in 2 VA. LAW REG. (N. S.) 292.

upon a writ of error, or supersedeas, to a final judgment, or upon an appeal from a final decree, in the cause and to make the provisions of this act apply to all cases now pending in any court of this State and to any case in which bill of exception has been filed within the time required by law with the trial judge, but not signed by him for any cause, and extending the time within which said bill of exception or certificate may be signed.

Approved March 21, 1916. In effect June 17, 1916.

#### EXCEPTIONS IN TRIALS AT LAW.

1. Be it enacted by the general assembly of Virginia, That in the trial of any cause at common law, or in any part, or at any stage of any judicial proceeding in which the procedure<sup>61</sup> is that which obtains at common law, any party may except to any action, ruling, order or judgment of the court.

#### BILL OF EXCEPTIONS ABOLISHED; HOW EXCEPTIONS SAVED.

2. That the bill of exception as heretofore employed in any judicial proceeding as means of preserving an exception to any action, ruling, order or judgment of any trial court by any party be, and the same is hereby abolished, and that in lieu of such bill of exception it shall be sufficient that, by a note thereto appended or thereon endorsed, in case of the denial by the trial court of any instruction to the jury, the trial judge shall certify that such instruction was requested by any party and denied by the court, and that the party requesting the same excepted; in case of any instruction granted by the court, that any party excepted thereto; in case of any question propounded to a witness, that said question was allowed or disallowed, according to the fact, and that any party excepted; and shall further certify briefly, where such question is disallowed, the answer which such question would have elicited, if at the time that objection was made to the question by a party excepting thereto, the tenor of the answer was ascertained by the court, the name of the witness to whom the question was propounded, the party by whom such witness was introduced, and at what stage of the examination, whether upon direct, cross, re-direct examination, et cetera, as the case may be, the question was propounded;<sup>62</sup> in case of the granting or over-ruling of a motion

<sup>61</sup>Issues out of chancery, etc.

<sup>62</sup>Merely declaratory of the rule already prevailing in W. Va. as to hypothetical answers. *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981 (1906); approved and followed in the following cases: *Hanley, Adm'r v. W. Va. & P. Ry. Co.*, 59 W. Va. 419, 53 S. E. 625 (1906); *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 708, 59 S. E. 634 (1907); *White v. Sohn*, 63 W. Va. 80, 84, 59 S. E. 890 (1907); *Smith v. White*,

for a new trial, that any party excepted; in case of an exception by any party to any other action, ruling, order or judgment, of any trial court, or of any other matter arising in the course of the trial or hearing of a cause, it shall be sufficient, instead of a bill of exception as heretofore obtaining, that the trial judge shall certify that any party excepted to such action, ruling, order, judgment or matter.<sup>63</sup>

**EFFECT WHEN EVIDENCE CERTIFIED BY TRIAL JUDGE; WHEN JUDGE MAY CERTIFY THE FACTS.**

3. That it shall be sufficient for all the purposes of a review by any appellate court of any action, ruling, order, judgment, or matter, arising in the course of the trial or hearing of a cause, that the trial judge shall certify the evidence introduced at the trial or hearing of such cause when a consideration of the evidence may be necessary, in order to a decision upon an appeal of any question involved in such review;<sup>64</sup> but nothing in this act contained shall be construed to preclude the trial judge from certifying, in lieu of the evidence, the facts proved on the trial or hearing of the cause,<sup>65</sup> as now provided by law.<sup>66</sup>

**FORMS OF CERTIFICATES OF EXCEPTION.**

4. That the forms of the respective certificates hereinabove provided for shall be substantially as follows:

“The foregoing instruction was granted at the request of the plaintiff (or defendant) and the defendant (or plaintiff) excepted. Teste: by consent<sup>67</sup> (if such be the fact) this..... day of

63 W. Va. 472, 476, 60 S. E. 404 (1908); *State v. Carr*, 65 W. Va. 81, 63 S. E. 766 (1908); *State v. Gebhart*, 70 W. Va. 232, 244, 73 S. E. 964 (1912).

<sup>64</sup>The general effect of this section is to permit informal certification of original papers or documents. Of course it does not, and could not, abolish the necessity of reducing to writing for purposes of certification trial matters which are not already reduced to writing regardless of the exception. But even as to these, it abolishes all formality.

<sup>65</sup>The W. Va. statute already requires certification of all the evidence touching upon the question of any exception. W. VA. CODE, c. 131, § 9.

<sup>66</sup>It has been held that the W. Va. statute, *supra*, is directory, not mandatory, and that a certification of the facts may still be considered on writ of error in lieu of the evidence. *King v. Jordan*, 46 W. Va. 106, 110, 32 S. E. 1022 (1899). However, it is believed that it is almost the universal custom to certify the evidence.

<sup>67</sup>The latter two sections certainly would not affect the rule established in W. Va. to the effect that objections and exceptions in the reporter's transcript may be noticed under a general bill of exceptions, if otherwise pointed out to the court, as held in *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 35 S. E. 973 (1900), and *Hinton Milling Co. v. New River Milling Co.*, 78 W. Va. 314, 88 S. E. 1079 (1916). *Quaere*: Is the W. Va. rule enacted in the Va. statute, § 6, *infra*? If not, would it not be advisable to have an express provision to such effect?

<sup>68</sup>For meaning of “consent”, see § 7, of the Virginia statute, *infra*.

....., 19...., .....  
 Judge.”

“The foregoing instruction requested by the plaintiff (or defendant) was denied, and the plaintiff (or defendant) excepted. Teste: by consent (if such be the fact) this..... day of ..... 19...., .....  
 Judge.”

“To the foregoing question propounded to....., witness for the plaintiff (or defendant) upon direct, cross, re-direct examination, et cetera, by the plaintiff (or defendant), and notwithstanding the defendant’s (or plaintiff’s) objection, allowed by the court, the defendant (or plaintiff) excepted. Teste: by consent (if such be the fact) this..... day of ..... 19...., .....  
 Judge.”

“The foregoing question propounded to....., witness for the plaintiff (or defendant), upon direct, cross, re-direct examination, et cetera, by the plaintiff (or defendant), upon objection by the defendant (or plaintiff), was disallowed by the court, and the plaintiff (or defendant) excepted; the answer to the question excepted by the plaintiff (or defendant) was .....  
 Teste: by consent (if such be the fact) this ..... day of ..... 19...., .....  
 Judge.”

“The following evidence on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, is all the evidence that was introduced on the trial of this cause (here insert evidence). Teste: by consent (if such be the fact) this ..... day of ..... 19...., .....  
 Judge.”<sup>68</sup>

“The following instructions granted at the request of the plaintiff and of the defendant, respectively, as hereinafter denoted, are all the instructions that were granted on the trial of this case (here insert instructions). Teste: by consent (if such be the fact) this ..... day of ..... 19...., .....  
 Judge.”<sup>69</sup>

<sup>68</sup>The court reporter, in transcribing his notes, would soon become accustomed to inserting this certificate at the beginning of the transcript, and the teste, with the blanks, at the end. How different from the uncertainties of the old incorporation by reference!

<sup>69</sup>All the instructions given must be certified as a condition to assigning error for refusal of an instruction. *Bartlett v. Bank of Mannington*, 87 S. E. 444, 449 (W.

HOW EXCEPTIONS PRESERVED OF RECORD; POWERS AND DUTIES OF APPELLATE COURT UPON APPEAL OR WRIT OF ERROR OR SUPERSEDEAS; HOW RECORD MADE UP BY CLERK OF TRIAL COURT.

5. That in all cases, to preserve of record to all the intents and purposes any exception to any action, ruling, order or judgment of the trial court, or any matter arising in the course of the trial or hearing of a cause; it shall be sufficient that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with the provisions of this act.<sup>70</sup>

[6.] That the appellate court in reviewing upon a writ of error, or supersedeas, to a final judgment, or upon an appeal from a final decree, of an inferior court in a cause any question arising upon the record in such cause shall in every instance, wherever necessary to a decision of such question, consider any exception, the evidence introduced on the trial or hearing of the cause, or any other matter, preserved of record in such cause by the certificate of the trial judge as provided by this act;<sup>71</sup> nor in the determination of any such question shall it be necessary to enable the appellate court to consider any other exception, or the evidence introduced at the trial or hearing of the cause, or any other matter preserved of record in the cause, by the certificate of the trial judge as provided by this act, that there shall be any express reference in the certificate of the exception under which such question may arise to the certificate of any other exception, of the evidence introduced at the trial or hearing, or of any other matter, preserved of record in the cause, as herein provided;<sup>72</sup> no certificate by the trial judge under the provisions of this act shall embody the name of the court or style of the cause, or be otherwise than as herein substantially provided; nor shall the clerk of any trial court in making up a

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Va. 1916). All the instructions will be certified under the first form of certificate in the statute. Next, those given will be separated from those refused, bound together, and certified under the general form of certificate at the end of § 4 of the statute.

<sup>70</sup>Authentication by certification alone makes the matter certified a part of the record.

<sup>71</sup>Does this provision enact the rule followed in *Kay v. Glade Creek & R. R. Co. and Hinton Milling Co. v. New River Milling Co.*, as suggested in note 66, *supra*?

<sup>72</sup>An abolishment of the requirement of "express reference", the requirement so deprecated by Professor MINOR, note 48 *supra*, and still in force in *W. Va. Hall v. Hall*, 12 W. Va. 1 (1877); *Campbell v. Hughes*, 12 W. Va. 183, 208 (1877); *Corder v. Talbot*, 14 W. Va. 277, 286 (1878); *Taylor v. Baltimore & O. R. Co.*, 33 W. Va. 39, 42, 10 S. E. 29; *Klinkler v. Wheeling S. & I. Co.*, 43 W. Va. 219, 27 S. E. 237 (1897); *Chapman v. Beltz & Sons Co.*, 48 W. Va. 1, 18-19, 35 S. E. 1013 (1900).

transcript of the record in the cause for any party for the purpose of praying a writ of error, supersedeas or an appeal, after having once identified the cause by its proper style in the trial court, in the caption of such transcript, thereafter in such transcript, reproduce or repeat the style of such cause, except where the style of such cause appears as a part of the matter preserved by a certificate of the trial judge, made under the provisions of this act.

WHEN JUDGE MAY SIGN CERTIFICATES; PROCEDURE WHEN JUDGE REFUSES TO SIGN SAME. HOW CONSENT OF PARTIES INDICATED.

7. That any certificate to the intents and purposes of this act may be signed by the trial judge either during the term of the court at which a final judgment in the cause is rendered, or within thirty days after the end of such term,<sup>73</sup> either in term time or in vacation, whether another term of such court shall have intervened or not,<sup>74</sup> or within such period in excess of the period of thirty days after the end of such term, as the parties by consent entered of record at any time either in term time or vacation may agree upon;<sup>75</sup> or if any bill of exception now required under any statute or rule of law or which may hereafter be required by certificate under this act shall have been presented to the court or judge in vacation for the signature of the judge, within said thirty days, or such time as has been agreed upon, and said judge has not signed said certificate or bill of exception on account of same not fairly stating the evidence or the case, or for any other cause, said judge to whom such bill of exception or certificate has been presented, shall summons the attorneys for the parties before him at such time and place as he shall see cause, within a reasonable time after having been so requested by the attorneys of the party filing the exception or certificate, and amend such bill of exception or certificate in such manner as shall in his opinion fairly state the case, and then sign said amended bill of exception or certificate, and when so signed shall have the same effect as if it had been signed within said thirty days or the time agreed; and this pro-

<sup>73</sup>Same as W. Va. Statute.

<sup>74</sup>Accord, *Layne v. Railway Co.*, 66 W. Va. 607, 67 S. E. 1103 (1909).

<sup>75</sup>In W. Va., the thirty-day limitation is construed to be jurisdictional, and hence cannot be extended by consent. *Jordan v. Jordan*, 48 W. Va. 600, 37 S. E. 558 (1900). There would seem to be no objection to extending the time, at least by agreement, except that memory as to the facts to be certified may become less certain. Other considerations would seem to outweigh this objection. At any rate, the objection does not exist as to the instructions and evidence, which are preserved in writing.



vision shall apply to all cases now pending in any court of this Commonwealth and all cases where bills of exception have been filed with any judge in time but not signed for any cause, provided the right of appeal has not been barred by the one year limitation, from the date of the final entry of the final order;<sup>76</sup> and whenever any cause is heard in vacation any certificate to the intents and purposes of this act may be signed by the trial judge within thirty days after the entry in vacation of such final judgment, or within such period in excess of the period of thirty days after the entry of such judgment, as the parties, by consent entered of record, may agree upon.

It shall be sufficient evidence that the certificate of the trial judge made under the provisions of this act was signed by him by such consent of the parties (if such be the fact), on any day specified, that such judge shall substantially in accordance with the forms of certificate prescribed by this act, so indicate by the insertion of the words "by consent" simply in such certificate.

#### WHEN SUITS IN CHANCERY NOT AFFECTED.

8. That all statutes or parts of statutes in derogation of, or in conflict with, the provisions of this act be, and the same are hereby repealed.

But nothing in this act contained shall be construed to alter or affect the practice or procedure now obtaining by law with respect to appeals in suits in chancery, except with respect to such proceedings where such occur, in any suit in chancery, as are according to law, conformed with the practice and procedure at common law.<sup>77</sup>

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<sup>76</sup>It would seem that this provision should have been made broader, so as to permit amendment of the matter certified, even after certification, at least as to inadvertent omissions of parts of the subject-matter from the certification and as to clerical errors in general. Such would be in accord with the practice of suggesting diminution of the record. But under our present law it seems that a bill of exceptions can not be amended after the expiration of the statutory period. *Tracy's Adm'x v. Carver Coal Co.*, note 43 *supra*; *Woods v. King*, note 40, *supra*. Such a rule places a bill of exceptions on a higher plane than a judgment or decree, which, although final, may be impeached in chancery for fraud or mistake.

<sup>77</sup>The following editorial commentary on the statute appears in 2 VA. LAW REG. (N. S.) 217: "The \* \* \* Act it will be seen is one in which the legislative body has attempted to make the question as to preparation of bills of exception no longer one to which there cannot be a ready answer. It seems to us that this Act is a most excellent one, and whilst we have no doubt that when put to the test of practice amendments may be necessary, yet as far as we can see at the present there is very little to be done by the practicing lawyer except to follow this Act to the letter. We therefore have only unqualified praise to give it."