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West Virginia Supreme Court of Appeals

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A GENERAL, BUT INCOMPLETE, RÉSUMÉ OF APPELLATE PROCEDURE IN WEST VIRGINIA*

JAMES B. RILEY**

In selecting the subject of this paper, I have designated it as a general, though incomplete, résumé of appellate procedure in West Virginia. Necessarily, the judges of this state are thoroughly familiar with the rules of practice promulgated by the supreme court through the course of years as to trial practice, as well as the rules governing practice before the supreme court. To restate these rules and detail the statutory provisions as to appellate procedure in this state would make this paper too long.

Generally, Section 3 of Article VIII of the Constitution of West Virginia prescribes the jurisdiction of the supreme court. As all lawyers in this state know, the supreme court has original jurisdiction only in cases of habeas corpus, mandamus and prohibition. It has appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value in amount than one hundred dollars; and in all controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee, curator, or concerning a mill, road, way, ferry or landing, or the right of a corporation or county to levy tolls or taxes. Likewise its appellate jurisdiction extends to cases in quo warranto, habeas corpus, mandamus, certiorari, and prohibition, and to “cases involving freedom or the constitutionality of a law.” In criminal cases its appellate jurisdiction extends to convictions for a felony, or misdemeanor in a circuit court, and where the conviction has been had in any court of limited jurisdiction and the conviction has been affirmed in the circuit court. In litigation relative to public revenue the right of appeal belongs to the state, as well as to the defendant, and this section of the Constitution provides that the supreme court shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.

In this jurisdiction no petition for a rehearing is allowed to any decision of the supreme court in original proceedings in mandamus, habeas corpus or prohibition.

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*Address delivered before the West Virginia Judicial Association, at Clarksburg, West Virginia, on October 5, 1951.
**Judge of the Supreme Court of Appeals of West Virginia.
Any original proceeding in mandamus, habeas corpus, or prohibition will not be heard piecemeal, where questions of fact are involved. If questions of fact are involved, they must be decided on depositions or affidavits with right to cross examine, or relator or petitioner may submit on pleadings and run the risk that the allegations of the answer raising the question of fact, if true, do not bar the right of relator or petitioner.

On the question whether the supreme court has jurisdiction to adjudicate the question in controversy, a clear distinction must be made between a case involving the constitutionality of a law and one involving the jurisdiction of the trial court. Where the question of the constitutionality of a statute is involved, it must be raised in the trial court.\(^1\) But, of course, if the proceeding before the supreme court necessarily raises the question of constitutionality by demurrer, plea, instruction or otherwise, that court has jurisdiction regardless of the amount involved. Where, however, the jurisdiction of a trial court, as distinguished from the constitutionality of a statute, is involved, the supreme court may take cognizance of the lack of jurisdiction, regardless of whether that question is raised in the trial court, for if the judgment of the trial court, from which the appeal or writ of error was allowed, was entered without jurisdiction, the supreme court is likewise without jurisdiction. The question of the jurisdiction of a court, whether it be a court of record or not, may be raised at any time where the court seeks wrongfully to assert its jurisdiction or exercises powers which it does not have.

In cases before the supreme court in some circumstances, the parties litigant are required to assume certain risks:

1. If the appellant or plaintiff in error causes the record to contain unnecessary matter, or, if on certiorari, praying for a diminution of the record, a party causes matters in addition to the original record to be brought up, which are unnecessary, the costs growing out of such inclusion of such unnecessary matter shall be required to be paid by the responsible party without regard to the outcome of the case;

2. If the entire record is not brought up, appellant or plaintiff

\(^1\) M.J., Appeal and Error § 83 (1948); Hulvey v. Roberts, 106 Va. 189, 55 S.E. 585 (1906).
in error may run the risk that there is sufficient of the record before the court to permit of a proper decision without regard to the matter omitted from the record; and

(3) Original proceedings in mandamus, prohibition or habeas corpus, as heretofore indicated, will not be heard piecemeal. Thus, if the record presents a question of fact on the pleadings, the relator, or petitioner, who always has the burden of proof, must proceed by depositions or affidavits with the right to cross examine, bearing on and for the purpose of solving the question of fact.

Except in chancery cases, under Code 58-5-1 (g), which permits an appeal to an interlocutory decree, which adjudicates the principles of the case, a writ of error or appeal does not lie to a judgment or decree of a circuit court which is not final.

A ruling of the state tax commissioner is addressed to the circuit court of Kanawha County, and then to the supreme court within eight months on writ of error.

There is a thirty-day period for appeal to the supreme court from a ruling of the workmen's compensation appeal board.

In Wilson v. Hix,2 decided June 12, 1951, the court read Sections 11, 17 and 22 of the Employment Security Act of 1949, in pari materia, and construed these sections, when so read, to mean that if no application for an appeal from a finding of the board of review is had to the circuit court of Kanawha County within thirty days after the decision of the board of review, the decision of said board shall become final, in which event a claimant, last employer, or other interested person has an additional twenty days under Section 22 within which to apply to the circuit court for a judicial review; and, further, if a claimant, last employer or other interested person elects under Section 17 to apply to the circuit court of Kanawha County for an appeal within the thirty-day period, such person has a right to a judicial review independent of the provisions of Section 22, in which case it is the duty of said circuit court to pass on all legal questions involved in the court's finding, and from the order of the circuit court a writ of error lies to the supreme court.

There are certain rules of practice and procedure in the supreme court not contained in any statute or in any formal rule.

2 65 S.E.2d 717 (W. Va. 1951).
of the court. Only two of these could I recall at the time this paper was prepared: (1) Upon application being filed in the supreme court for a writ of error or appeal, that court will not suspend the execution of a judgment or decree of the trial court before the appeal or writ of error is granted, for the case at that time is still before the trial court; and (2) where several applicants for an appeal or writ of error to the supreme court apply for a supersedeas and a joint bond is required, and thereafter one of the applicants does not desire to give bond, he has no other course than to move that the appeal or writ of error be dismissed without prejudice to himself, and thereafter make timely application for a writ of error or appeal, as the case may be, without asking for a supersedeas, which independent application for a writ of error or appeal will be entertained.

Under Code 53-5-5, a plaintiff who has been refused an injunction upon application made to a circuit court, or the judge thereof in vacation, may apply to the supreme court, or a judge thereof in vacation, upon presentation of the original papers, with the decree of refusal of the injunction, in which case, the court, or judge thereof in vacation, may award an injunction. Thus, a plaintiff in such case has a summary and expeditious remedy in the supreme court. If upon such application the supreme court should grant the injunction, and on the remand the trial chancellor should dissolve it, the plaintiff, under Code 58-5-1 (g), no longer has an expeditious remedy but must apply to the supreme court for an appeal.

On the other hand, a defendant, against whom an injunction has been awarded in a circuit court, or by a judge thereof in vacation, unlike the plaintiff, has no expeditious remedy, but must pursue the tortuous route of applying for an appeal. The unjust impact of these procedural rules on a defendant against whom an injunction has been awarded, as distinguished from a plaintiff who has been refused an injunction, seems apparent and should readily lend itself to legislative consideration.

Under Code 58-5-25, where a writ of error to or an appeal from a judgment or decree of a trial court is pending in the supreme court: “With leave of the court previously granted, and after reasonable notice to be prescribed by a rule of the court, a
motion to dismiss involving the merits, or to affirm or reverse, may be made at any time after the allowance of the appeal, writ of error or supersedeas; and, upon the hearing of such motion, the court may dismiss, affirm, modify or reverse with like effect as if the appeal, writ of error or other process had been regularly matured for final hearing."

Under Section 9, Rule 6 of the Rules of Practice of the Supreme Court of Appeals, briefs in cases on motions to dismiss, affirm, modify or reverse, may be typewritten, unless the printing of the records and briefs be directed by the court. Such motions are not heard by themselves, but are set down for hearing on the regular docket of the court to be heard at the same time that the arguments are heard on the writ of error or appeal.

The supreme court in the exercise of its original or appellate jurisdiction, and other courts of record having jurisdiction of mandamus, may direct that a board of canvassers reconvene and correct the results of a canvass and direct whether questioned ballots should be included or excluded from the results of an election, whether it be an election of candidates for office, or a levy, bond or constitutional amendment election.

In the exercise of its appellate jurisdiction, in a proceeding in mandamus, instituted in the circuit court of Jackson County, the supreme court held: "The votes in a special election, called by the board of education of a county, pursuant to Code, 11-8-16 and 17, should be canvassed by the members of the county court of that county, acting as a board of canvassers; and upon a recount being demanded by a citizen, voter or taxpayer of the county, though he be not a candidate for office, the members of the county court, as a board of canvassers, should conduct such recount."³

While it is true that a party interested, who is not a proper party litigant, may, with leave of court file a brief *amicus curiae*, that party, through his counsel, will not be permitted to argue the case, but if one or more of the parties litigant, through their attorneys of record, permits an attorney, who has filed a brief *amicus curiae*, to join in the brief of the parties litigant of record by mutual arrangement between the attorneys, the court will permit argument on that basis only.

³ Park v. Landfried, 68 S.E.2d 586 (W. Va. 1951), Syl. 1.
The power of the supreme court to review a judgment in a contempt case presents a complex question. Whether the contempt is in a suit in equity or an action at law, the proceeding in contempt should be prosecuted on the law side of the court, and from an adverse judgment the offender may obtain a writ of error.\(^4\) In this state at common law there was no review of judgments for contempt which did not involve punishments.\(^5\) In the case of criminal contempt the trial court must be convinced of the guilt of the offender or the accused beyond a reasonable doubt; but it seems that if there is reasonable evidence tending to show the guilt of the accused, the finding of fact by the trial court will not be reviewed by the supreme court on writ of error, and though an order imposing punishment for a criminal contempt should be entered on the law docket, in *Hallam v. Alpha Coal Corp.*,\(^6\) it was held that the entry of an order of contempt on the chancery docket does not constitute reversible error. But, if the court entering the order of contempt both fails to enter the proceeding separately from the proceeding in which the act of contempt was committed and entitle the contempt proceeding in the name of the state, the supreme court will reverse so much of the judgment of contempt, if improper on its merits, which orders the punishment.\(^7\)

On the question whether a writ of error to a judgment of contempt entered by a circuit court, or to a judgment of a circuit court refusing a writ of error to a judgment of a court of limited jurisdiction against which the act of contempt was committed will be entertained by the supreme court, a distinction must be drawn between a civil contempt and a criminal contempt. The distinction is not without difficulty, and the decisions of the court through the course of years have created some confusion. In the case of civil contempt a writ of error lies only when the court against which the act of contempt was had was initially without jurisdiction, or where a writ of error was improvidently awarded by a circuit court to a judgment of contempt of a court of limited jurisdiction against which the alleged act of contempt was had,—

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\(^4\) *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S.E. 413 (1887).


\(^6\) 122 W. Va. 454, 9 S.E.2d 818 (1940).

\(^7\) *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S.E. 413 (1887); *State ex rel. Mason v. Harper's Ferry Bridge Co.*, 16 W. Va. 864 (1879).
for instance, where an application for a writ of error was made to the circuit court after the four months' time provided by statute. In the case of criminal contempt, as in all criminal cases, a writ of error will be awarded by the supreme court if the record contains apparent error.

A civil contempt is one in which the contempt proceeding is instituted primarily to enforce the rights of private persons and to compel obedience to a lawful order or decree for that purpose, as in a case of arrears in the payment of alimony, in which the court in a bygone day said that the contemner by failing to comply with the decree of the court, because it is within his power to purge himself of the contempt, holds "the key to his own prison." A criminal contempt, on the other hand, is one in which the proceeding is primarily to preserve the dignity of the court, and to punish for violation of its order or decree, and in which the prime purpose is the punishment by the government of an effrontery to its court.

In this regard the supreme court in the leading case of State ex rel. Continental Coal Co. v. Bittner\(^8\) has invoked the West Virginia Constitution, Article VIII, Section 3, dealing with the scope of jurisdiction of the supreme court, which provides that that court shall have jurisdiction "in cases involving freedom or the constitutionality of a law." The rule stated by Judge Lively in the Bittner case\(^9\) reads:

"... The courts make a distinction between criminal and civil contempts. Where the proceeding is to preserve the power and dignity of the court, and to punish for violations of its order, it is criminal and punitive in its nature, and the government is vitally interested in the prosecution. Such contempts lessen respect for the courts, and weaken their power. The government can not continue unless the courts can function and compel obedience to their lawful orders. The legislature cannot take from the courts this inherent right. On the other hand, those proceedings instituted to enforce the rights of private persons and to compel obedience to lawful orders made for that purpose, are civil, remedial and coercive in their nature, and the chief interest therein is confined to the parties to the suit."

\(^8\) 102 W. Va. 677, 136 S.E. 202 (1926).
\(^9\) At 685, 136 S.E. at 205.
But, as suggested by the court in the *Bittner* case, the distinction between criminal and civil contempt is of little importance, as both are violations of the court's orders, and strike at the power, dignity and authority of the court. So perhaps the real basis for determining whether a contempt is civil or criminal is that in the latter the freedom of the contemner is involved, and the prime object of the proceeding is punishment.

Thus far I have spoken of acts of contempt by the violation of an order or decree of a court outside the presence of the court. Under Code, 61-5-26, misbehaviour in the presence of the court, or so near thereto as to interrupt the administration of justice, in which case the court, in which the alleged act of contempt was committed may, without a jury, summarily punish by a fine not exceeding fifty dollars, or—and not "and"—imprisonment for not more than ten days, to which order of punishment no writ of error lies.\(^{10}\)

The contempt cases of *United States v. United Mine Workers of America*,\(^{11}\) and the *International Union, United Mine Workers of America v. United States* (two cases),\(^{12}\) and *United States v. International Union, United Mine Workers of America*,\(^{13}\) seem to hold that in some cases a contempt may be both civil and criminal.

Under Code, 58-3-1, an appeal lies to the circuit court from a final order of the county court in certain specified cases, including cases of contempt, and under Code, 24-4-5, there is conferred upon the public service commission the same power to punish for contempt that "is now conferred on the circuit court, with the right of appeal in all cases to the supreme court", in which case the same procedure should be entertained as in all other cases on appeal to the supreme court from orders of the public service commission. But whether in the two last mentioned cases the distinction between criminal and civil contempt should be drawn is as yet undetermined in this jurisdiction.

Though there is confusion in the cases arising in other jurisdictions, it seems to be the general, if not the universal rule, that the vindication of the public interest in upholding the administra-

\(^{10}\) Hallam v. Alpha Coal Corp., 122 W. Va. 454, 9 S.E.2d 818 (1940).
\(^{11}\) 330 U.S. 258 (1947).
\(^{12}\) 177 F.2d 29 (D.C. App. 1949).
\(^{13}\) 190 F.2d 865 (D.C. App. 1951).
tion of laws by an administrative body, like the public interest in upholding the administration of justice by the courts, is had by the process of criminal contempt.\textsuperscript{14}

In the matter of appeal and error, aside from its rule-making power, which has been charily exercised, the supreme court has proceeded \textit{ex necessitate} by the process of trial and error. Thus Rule VI (e) of the Rules of Practice for Trial Courts provides that "Objections, if any, to each instruction shall be made when the same is offered; specific grounds of objection only will be considered." When upon application for a writ of error to the court in a criminal case, involving the life of an accused person, it appeared that, through inadvertence of counsel, a specific objection was not made to an instruction, which seemed to the court to be clearly erroneous and decidedly prejudicial, it became necessary not to change the rule but to abrogate it by applying it only to misdemeanors as distinguished from felonies.

Likewise on the question whether a certificate in lieu of a bill of exceptions under Code, 56-6-36, as distinguished from bills of exceptions under Code, 56-6-35, an order is required to make the evidence a part of the record, the court changed its position and held that in case of a certificate in lieu of a bill of exceptions an order is not required under said Section 56-6-36, but in case of a bill of exceptions under Code, 56-6-35, such order is required. Section 35 provides, in part: "If such bill of exceptions be signed by the judge in vacation, he shall certify the same to the clerk of the court, who shall enter the certification upon the order book of such court, and any such bill of exceptions so made in vacation shall be a part of the record and have the same effect as if made in term." Such provision as to the entry of an order of certification upon the order book is not contained in Section 36.

The procedure on review by the supreme court of final orders of the public service commission is provided for by Code, 24-5-1. Under this section of the Code, any party feeling aggrieved may present a petition in writing to the supreme court, or a judge thereof in vacation, within thirty days after the entry of the order complained of, praying for suspension of such final order. The applicant shall deliver a copy of the petition to the secretary of

\textsuperscript{14}See well annotated and reasoned Note, 99 Geo. L.J. 263 (1951).
the commission before presenting the same to the court, and the court, or judge, shall fix a time for a hearing on the application; but such hearing, unless by agreement of the parties, shall not be sooner than five days after its presentation, and notice of the time and place of such hearing shall be delivered to the secretary of the commission. If the court, or judge, after such preliminary hearing be of opinion that a suspension order should issue, bond may be required, and the case shall be heard upon all papers filed before and the evidence had at the hearing by the public service commission. Thereafter, if a suspension order is granted, the case is set on the regular docket of the court for final hearing.

Under the ruling of the supreme court in United Fuel Gas Co. v. Public Service Comm’n,¹⁵ the jurisdiction of that court, properly or improperly, has been exercised under its original, as distinguished from its appellate jurisdiction; but because the court may not under the constitutional separation of powers exercise administrative power, the court has no jurisdiction to review an order of the public service commission, unless it has exceeded its constitutional or statutory powers, or unless the action of the commission is based upon a mistake of law, or its factual finding is clearly wrong or against the clear preponderance of the evidence adduced before the commission.¹⁶

In the case of an appeal from a valuation of a public utility by the board of public works, an owner or operator claiming to be aggrieved by the decision of the board of public works may by petition in writing, duly verified, to the circuit court of the county wherein the property so assessed is situate, or, if said property be situated in more than one county, then in the county in which the largest assessment is made, such owner or operator may in the next succeeding year appeal from the assessment and valuation so made. If the court is satisfied the valuation so fixed by the board of public works is correct, the state or the owner or operator may appeal to the supreme court, if the valuation of the property be fifty thousand dollars or more.

The procedure governing certification to the supreme court,

¹⁵ 73 W. Va. 571, 80 S.E. 931 (1914).
¹⁶ See an excellent summary, bearing on the authority of the supreme court to review the proceedings of the public service commission, in 15 M.J., Public Service and State Corporation Commissions §§ 15, 16 (1951).
as to the sufficiency of a summons, return of service or pleading, is governed by Code, 58-5-2, and Rule II, Section 4 of the Rules of Practice in the Supreme Court of Appeals, as amended by revision effective November 19, 1946. The statute provides that: "Any question arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading, in any case within the appellate jurisdiction of the supreme court of appeals, may, in the discretion of the circuit court in which it arises, and shall on the joint application of the parties to the suit, in beneficial interest, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back." It has been held that final judgments, orders and decrees are not reviewable by certificate. And further it has been held that mere procedural matters cannot be certified. Section 4, Rule II, which provides that no question or questions shall be certified under the statute until after the decision thereof by the trial court and such decision shall be certified, with the question or questions, was revised so as to add thereto a provision that all motions to docket certified cases shall be filed in the clerk's office of the supreme court within sixty days after the date of the order of certification entered by the circuit court; and that no question once certified shall be included in any subsequent order of certification of the same case. In this revision of the rule, the court invited attention to its holdings in Sweeney v. Security Trust Co., and Hastings v. Finney, to the effect that a refusal to docket a case certified is not a final decision of the questions involved.

This revision was deemed necessary because Code, 58-5-2, provided no time within which motions to docket certified cases should be presented to the supreme court, and time and again for an indefinite period the court was confronted with applications to docket, thus giving to an applicant the power almost forever and a day to delay litigation in the circuit court simply on a preliminary question involving the sufficiency of a summons, return of service or a pleading.

17 Saffel v. Woodyard, 90 W. Va. 747, 111 S.E. 768 (1922).
18 Sutherland v. Guthrie, 82 W. Va. 419, 96 S.E. 61 (1918).
In at least one circuit in this state, a circuit judge, now deceased, did not favor resort to the statutory provisions and rules of the supreme court as to certification, and, of course, where a motion for a certification is not upon the joint application of interested parties litigant, the circuit court has the power either to certify or not to certify, and the position taken by the court in any of the circuits not to entertain motions for certification, at least in the absence of a joint motion by the interested parties, is entirely tenable.

In cases of appeals from justices of the peace, either to the circuit court or to a court of limited jurisdiction, having appellate jurisdiction, no appeal lies directly from the justice's court to the supreme court; but where the judgment of the justice in the first instance has been finally decided by the circuit court of a county, an aggrieved party has eight months from the time of the entry of the order of the circuit court to apply for a writ of error to the supreme court.

Likewise an aggrieved party has an eight months' time limitation for application to the supreme court in case of a judgment of a circuit court involving an "appeal" from a county court. Code, 58-3-4, which deals with "appeals" from county courts, provides for a time limitation of four months for application for an "appeal" to a circuit court from an order of a county court; but Code, 58-3-6, which provides for application to the supreme court when an "appeal" is refused by a circuit court, contains no limitation within which application should be made to the supreme court; and therefore, in the recent case of Boggs' Estate,21 the supreme court necessarily applied Code, 58-5-4, which provides for an eight months' time limitation for the filing of a petition to the supreme court for an appeal from or a writ of error or supersedeas to a decree or order of a circuit court.

The rule, however, is different where a petition to the supreme court comes from a judgment or decree of a circuit court based on a judgment or decree of a court of limited jurisdiction. Code, 58-4-4, provides that "No petition shall be presented to the circuit court or judge for an appeal from, or writ of error or supersedeas to, any judgment, decree or order rendered or made by

21 In re Boggs' Estate, 63 S.E.2d 497 (W. Va. 1951).
such court of limited jurisdiction, . . . which shall have been rendered or made more than four months before such petition is presented.” Under Code, 58-4-7, an aggrieved party has only four months to apply to the supreme court of appeals for a writ of error to a judgment of or an appeal from a decree of a circuit court in refusing a writ of error or appeal from a judgment or decree of a court of limited jurisdiction.

A clear distinction must be made between a case involving an issue out of chancery, as distinguished from a case of devisavit vel non. As held by the supreme court in the case of Ammons v. South Penn Oil Co.,22 an issue out of chancery is simply advisory, and its only object is “to enlighten the conscience of the Court”; and in Mullens v. Lilly,23 in point 7 of the syllabus, the court held that a bill of exceptions or a certificate in lieu thereof is not required. On an issue devisavit vel non, under Code, 41-5-11, which provides that any party coming within the provisions thereof is entitled to an issue devisavit vel non, the chancellor has no discretion either to direct or refuse to direct a trial by jury. The court in the case of Prichard v. Prichard,24 involving an issue of devisavit vel non, upon reversing the decretal judgment of the circuit court of Cabell County and setting aside the jury verdict, held that a new trial should be granted. In that case the court applied the rule in Koblegard v. Maxwell,25 not applicable to cases in which there has been a demurrer to the evidence, that “upon the reversal of a jury verdict in a law action, this Court is not at liberty to enter judgment here, but must award a new trial.” And in Grottendick v. Webber26 the court held: “On the trial of an issue of devisavit vel non, the evidence adduced on the trial of such issue is not a part of the record, unless made so by a bill of exceptions or certificate in lieu thereof in accordance with Code, 56-6-35 or Code, 56-6-36.”

Strange as it may seem, the supreme court has jurisdiction to interpret treaties between this country and foreign countries for the purpose of determining whether Code, 23-4-15 (a), which provides for the disqualification of beneficiaries of nonresident alien

22 47 W. Va. 610, 35 S.E. 1094 (1900).
23 123 W. Va. 182, 1 S.E.2d 694 (1941).
24 Prichard v. Prichard, 65 S.E.2d 65 (1951), Syl. 7.
26 81 S.E.2d 854 (1950), Syl. 2.
beneficiaries of a person injured in the course of and as result of his employment with an employer who is a subscriber to the workmen's compensation fund, applies to a class of nonresident alien beneficiaries under existent treaties. Section 15 (a) reads, in part: "Notwithstanding any other provisions of this chapter, no benefits under any such provisions and no commutation of periodical benefits under the provisions of section seventeen of this article shall be made to nonresident alien beneficiaries on account of any injury sustained after March eleventh, one thousand nine hundred thirty-nine." In such cases the second clause of Article VI of the Constitution of the United States is invoked as the basis for declaration that Section 15 (a) is unconstitutional as contravening an existent treaty. This clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In Micaz v. State Compensation Comm'r, the supreme court held that Section 15 (a) of Chapter 137, Acts of the West Virginia Legislature, 1939, denying compensation to nonresident alien beneficiaries, as applied to a case of death without negligence or fault, is not unconstitutional as violative of the Treaty of 1871 between the United States and Italy. In point 3 of the syllabus the court held: "A treaty with a country of which an alien is not a national, cannot have the effect of removing legal disability due to alienage, in the absence of a 'most-favored-nation' clause in a treaty between the government of the United States and the government of the country of which the alien is a national, dealing expressly with the subject matter of such disability."

Later in the case of Antosz v. State Compensation Comm'r, the court held, in point 2 of the syllabus: "Section 15 (a), Chapter 131, Acts of the West Virginia Legislature, 1945, denying workmen's compensation to nonresident alien beneficiaries as applied to death benefits under the workmen's compensation statute to the widow of a nonresident Polish national based on the death of her husband,

also a Polish national, killed in the course of and as the result of his employment with a subscriber to the workmen's compensation fund, is invalid as violative of the treaty between the United States of America and the Republic of Poland, ratified by the United States Senate on April 5, 1932, and proclaimed by the President of the United States on July 10, 1933."

A court in the first instance and the supreme court on appeal or writ of error have jurisdiction to decide patent license agreements, but in no instance has the state court the right to pass on the validity of the patent itself.30

Under Code, 58-5-31, a party who desires to present a petition to the Supreme Court of the United States "for an appeal from, or writ of error or supersedeas to, a final decree, judgment or order" of the court, the court during the term at which the judgment, order or decree is rendered, or a judge thereof, within sixty days after the end of the term at which such decree, judgment or order is made, may make an order suspending the execution of such judgment, order or decree, for ninety days after the end of the term at which it is rendered, when such person shall give bond before the clerk of the court or the clerk of the circuit court from which the case was taken to the supreme court, in such penalty as the supreme court, or a judge thereof, may require, with condition reciting such judgment, order or decree, and the intention of such party to present the petition. This suspending order for ninety days is allowed where the case has been finally decided by the supreme court on writ of error or appeal, and not otherwise. In this jurisdiction there is no statutory or other machinery for the supreme court of this state to grant an appeal directly to the Supreme Court of the United States. The application in the first instance must be addressed to the Supreme Court of the United States. In this regard the State of West Virginia stands alone among the various jurisdictions, though in one instance a president of the court, now deceased, inadvertently did grant such appeal. This question likewise lends itself to legislative consideration.

Notwithstanding Code, 58-5-31, provides for the suspension of the execution of a judgment, order or decree of the supreme court for ninety days after the end of the term at which it is rendered,

the Supreme Court of the United States recently has taken the position in a case which came to the supreme court of this state from Logan County that the application to the Supreme Court of the United States must be made within ninety days from the time the order was entered, though the orders of courts of this state do not become final until the rising of the court.

I deem it my duty to invite the attention of the trial judges of this state to the rule governing nunc pro tunc orders. A nunc pro tunc order may be entered by a trial court, not on the basis of that which the court intended to do, but upon the factual basis of what was actually done. In the absence of a memorandum, or other record, that the trial court actually made an order, but that it was inadvertently omitted from the order book, there is no basis for a nunc pro tunc order. The rule in this regard becomes most important where the question arises whether the trial court actually ordered that a bill of exceptions, which he has timely signed, be made a part of the record, and in particular where attorneys, who later seek to obtain a writ of error to the supreme court, and move for an additional period from the expiration of the original period of ninety days for an extension of time within which to prepare and have signed a bill of exceptions. In the case of Monongahela Ry. v. Wilson, the court held in point 2 of the syllabus that: “An order nunc pro tunc can only be entered where the intent to enter an order in the first instance is shown by some entry or memorandum upon the records or quasi records of the court”; and in State v. Wooldridge, et al., it was held that it was proper for a trial court to enter a nunc pro tunc order in the trial of a criminal case, in which the direction of the trial court, taken down in shorthand by the court reporter, was held to serve as the basis for the entry of a nunc pro tunc order. These cases present a reification of the rule governing nunc pro tunc orders in this state. It is suggested that in order to protect a trial court in the conduct of a law action, as well as attorneys and parties litigant, that when it becomes necessary, in order to base a writ of error to the supreme court on the entry of a final judgment, the trial court should, in open court with the clerk being present, direct the entry of the required order.

31 122 W. Va. 467, 10 S.E.2d 795 (1940).
32 129 W. Va. 448, 40 S.E.2d 899 (1946).
In a number of jurisdictions it has been held that a judge, acting in the absence of his clerk, does not constitute an open court. So it is suggested that every trial judge in this state should keep a memorandum as to every action that he has taken in directing the clerk to enter the required order, and in lieu thereof to have the proceedings, including the direction of the trial court to the clerk, who should be then and there present, taken down and transcribed by the court reporter.