A TREATISE

ON

BILLS OF EXCEPTIONS

AND

STATEMENTS OF FACTS

BASED UPON THE STATUTES OF THE STATE OF WASHINGTON AND THE DECISIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON, INCLUDING VOLUME 65

BY

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PREFACE.

This work, which has been the delightful companion of the author during his leisure hours, is now submitted to the careful consideration of a generous and candid profession, with the hope that it will prove to be an interesting and useful treatise. The subject of which it treats is perhaps the most complex and beautiful of all subjects relating to appellate practice and procedure; and if the reader shall derive from a careful perusal of the work a benefit which is reasonably proportionate to the pleasure derived from its composition, the author will indeed be gratified. A clear presentation of a difficult subject necessitates at times a critical analysis of the statutes and decisions; and whenever this has been found to be necessary, it has been made in the kindliest spirit, even though the true spirit may occasionally be shadowed by the form of presentation which a forceful solution of an intricate problem required.

To Mr. Justice Rudkin, formerly chief justice of the supreme court of the state of Washington, and now judge of the federal court for the eastern district of Washington, who has very kindly devoted his leisure time to a critical examination of the work, the author is indebted for several very valuable suggestions, and desires to take this opportunity of expressing his appreciation of the kindness conferred.

Continued reflection has convinced the author that the statutes of the state of Washington relating to appellate practice and procedure are, with the exception of a few trifling blemishes, models of perfection, which slight and transient reasons should not be permitted to repeal or materi-

ally alter, for the beautiful principles which they embody are gradually being applied by the court as at present constituted with more accuracy and precision than was formerly the case, and a most admirable system of appellate practice and procedure is consequently fast becoming firmly established.

Spokane, Washington, June, 1912.

WILLIAM HUDSON SMILEY.

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BILLS OF EXCEPTIONS

AND

STATEMENTS OF FACTS.

CHAPTER I.

DIVISIONS OF THE SUBJECT—STATUTORY PROVISIONS.

§ 1. Divisions of the Subject.
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§ 1. Divisions of the Subject.—Bills of exceptions and statements of facts will be considered, first, with reference to the statutory provisions relating thereto; 2. With reference to the rules of the supreme court relating thereto; 3. With reference to the distinction between them; 4. With reference to their preparation; 5. With reference to their proposal; 6. With reference to their settlement; 7. With reference to their authentication; 8. With reference to their legal effect.

§ 2. Exceptions — Definition of Exception.—The following are the statutory provisions which relate to the subject of bills of exceptions and statements of facts:

"An exception is a claim of error in a ruling or decision of a court, judge or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein."[1]

§ 3. When to be Taken.—"It shall not be necessary or proper to take or enter an exception to any

[1] Rem. & Bal. Code, § 381.

ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause. But this section shall not apply to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury."[2]

§ 4. Manner of Taking in Cases Tried by Court.—"Exceptions to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, may be taken by any party, either by stating to the judge, referee or commissioner when the report or decision is signed, that such party excepts to the same, specifying the part or parts excepted to (whereupon the judge, referee or commissioner, shall note the exceptions in the margin or at the foot of the report or decision); or by filing like written exceptions within five days after the filing of the report or decision, or, where the report or decision is signed subsequently to the hearing and in the absence of the party excepting, within five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof."[3]

§ 5. Manner of Taking in Jury Cases.—"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury shall have retired to consider of

[2] Rem. & Bal. Code, § 382.
[3] Rem. & Bal. Code, § 383.

their verdict, and, if practicable, before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note the exceptions in the minutes of the trial, or cause the stenographer (if one is in attendance) so to note the same."[4]

§ 6. How Entered in Minutes.—"Exceptions to any ruling upon an objection to the admission of evidence, offered in the course of a trial or hearing, need not be formally taken, but the question put or other offer of evidence, together with the objection thereto and the ruling thereon, shall be entered by the court, judge, referee or commissioner (or by the stenographer, if one is in attendance) in the minutes of the trial or hearing, and such entry shall import an exception by the party against whom the ruling was made."[5]

§ 7. Manner of Taking and Entry.—"Exceptions to any ruling or decision made in the course of a trial or hearing, or in the progress of a cause, except those to which it is provided in this chapter that no exception need be taken and those to which some other mode of exception is in this chapter prescribed, may be taken by any party by stating to the court, judge, referee or commissioner making the ruling or decision, when the same is made, that such party excepts to the same; whereupon such court, judge, referee or commissioner shall note the exception in the minutes of the trial, hearing or cause, or shall cause

[4] Rem. & Bal. Code, § 384. See, also, § 31, *infra*.
[5] Rem. & Bal. Code, § 385.

the stenographer (if one is in attendance) so to note the same."[6]

§ 8. **Review on Appeal.**—"Alleged error in any order, ruling or decision to which it is provided in this chapter that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this chapter, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made, or in which he has joined, from any other appealable order or from the final judgment in the cause, where such error, if found to exist, would materially affect the correctness of the judgment or order appealed from: Provided, the ruling or decision, the alleged error in which is sought to be so reviewed, together with the exception thereto, if any, was a matter of record in the cause in the first instance, or before the hearing of the appeal has been brought into the record in the manner prescribed in this chapter. And any such alleged error shall also be considered in the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. But no exception to any appealable order or to any final judgment shall be necessary or proper in order to secure a

[6] Rem. & Bal. Code, § 386.

review of such order or judgment upon direct appeal therefrom."[7]

§ 9. Bill of Exceptions—What Constitutes. Statement of Facts—What Constitutes.—"Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the record in the cause, by the certifying of a bill of exceptions as in this chapter provided. And any such party may, after the making of an appealable order or the final judgment in the cause, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record in the cause by the certifying of a statement of facts, as in this chapter provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause."[8]

[7] Rem. & Bal. Code, § 387.
[8] Rem. & Bal. Code, § 388.

§ 10. Amendments—Notice of Application to Settle and Certify.—"A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and accepted, the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments."[9]

§ 11. How Written Evidence Certified.—"Depositions and other written evidence on file shall be appro-

[9] Rem. & Bal. Code, § 389.

priately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof." [10]

§ 12. Certificate, What to Contain—How Signed.—"The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein. The certificate shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto." [11]

§ 13. How Certified upon Change or Death of Judge. "If the judge before whom the cause was pending or

[10] Rem. & Bal. Code, § 390.
[11] Rem. & Bal. Code, § 391.

tried shall from any cause have ceased to be such judge he shall, notwithstanding, settle and certify, as the late judge, any bill of exceptions or statement of facts that it would be proper for him to settle and certify if he were still such judge, and such acts on his part shall have the same effect as if he were still in office; and he may be compelled by mandate so to do, as if still in office. If such judge shall die or remove from the state while in office or afterward, within the time within which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office. But if the parties cannot agree, and if such judge, when removed from the state, does not attend within the state and settle and certify a bill of exceptions or statement of facts in case one has been duly proposed, his successor in office shall settle and certify such bill or statement in the manner in this chapter provided, and in so doing he shall be guided, so far as practicable, by the minutes taken by his predecessor in office, or by the stenographer, if one was in attendance on the court or judge, and may, in order to determine any disputed matter not sufficiently appearing upon such minutes, examine under oath the attorneys in the cause who were present at the trial or hearing, or any of them." [12]

§ 14. When to be Filed—Effect of Irregularity.—"A proposed bill of exceptions or statement of facts must be filed and served either before or within thirty

[12] Rem. & Bal. Code, § 392.

days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed: Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. And the certifying of a bill of exceptions or statement of facts provided for by this chapter, and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause, and no irregularity or failure to pursue the steps prescribed by this chapter on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts." [13]

§ 15. Return of Copy of Bill or Statement—Extension of Time for Brief.—"The copy of a proposed bill or statement which is served as in this chapter prescribed, shall be returned to the party serving the same upon the bill or statement being certified, if he has appealed to the supreme court, or upon his thereafter appealing, for his use in preparing his brief on the appeal, and the time limited by any law or rule of court for the service and filing of his brief shall be enlarged

[13] Rem. & Bal. Code, § 393.

by any delay in returning such copy as herein required to the extent of such delay; and when he serves his brief he shall return such copy to the party on whom it was originally served, and his brief shall not be deemed served till such copy is so returned by him.'' [14]

§ 16. What Shall be Part of Record.—''All reports of referees or commissioners, with the testimony and other evidence returned into court therewith, all findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him, all charges to a jury made wholly in writing, all instructions requested in writing to be given as part of a charge, all verdicts, general or special, and all rulings and decisions embodied in a written judgment, order or journal entry in the cause, together with all exceptions, if any, taken to any thereof, as well as all papers and matters hitherto deemed a part of the record, shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry, a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts.'' [15]

§ 17. How Certified When Cases Consolidated.—''When two or more causes shall have been consolidated it shall not be necessary, for any purposes of an appeal which concerns only one or more, and not all of the original causes, to embody in a bill of exceptions or statement of facts any fact, matter or proceeding that relates solely to an original cause with which the ap-

[14] Rem. & Bal. Code, § 394.
[15] Rem. & Bal. Code, § 395.

peal is not concerned; and the bill or statement shall be certified as in this act prescribed, notwithstanding the omission therefrom of such facts, matters and proceedings." [16]

§ 18. Construction of Chapter.—"This chapter shall apply to and govern all civil actions, and proceedings, both legal and equitable, and all criminal causes, in the superior courts, but shall not apply to courts of justices of the peace or other inferior courts or tribunals from which an appeal does not lie directly to the supreme court. This chapter shall govern proceedings had after it shall take effect, in actions then pending as well as those in actions thereafter begun; but it shall not affect any right acquired or proceeding had prior to the time when it shall take effect, nor restore any right or enlarge any time then already lost or expired. And except as above provided all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." [17]

§ 19. Judgment-roll—What Constitutes.—"Immediately after entering the judgment, the clerk shall attach the following papers in the case, which shall constitute the judgment-roll:

"1. If the complaint has not been answered by any defendant, and no pleading has been filed by an intervenor, he shall attach together, in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment;

"2. In all other cases he shall attach together in like manner the summons and proof of service, the

[16] Rem. & Bal. Code, § 396.

[17] Rem. & Bal. Code, § 397.

pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment." [18]

§ 20. Appeals to the Supreme Court—Time of Taking.—"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within ninety days after the entry of final judgment." [19]

§ 21. Record on Appeal—What Constitutes—Duties of Clerk.—"Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted *in forma pauperis*, and in such cases at the expense of the county), a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter

[18] Rem. & Bal. Code, § 442.
[19] Rem. & Bal. Code, § 1718.

provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the superior court shall, at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the supreme court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit

the same to the clerk of the supreme court and the same shall be transmitted accordingly, and shall be under the control of the supreme court." [20]

§ 22. Time for Filing and Serving Briefs on Appeal. "Within ninety days after an appeal shall have been taken by notice as provided in this title, the appellant shall serve on the respondent three copies and shall file with the clerk of the superior court fifteen copies, together with proof or written admission of service, as aforesaid, of a printed brief on the appeal upon his part, which brief shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects, and its form and size, as the supreme court by its rules may have prescribed. Within thirty days after the service of the appellant's brief, the respondent shall likewise serve and file with the clerk of the superior court, with like proof of service, the like number of copies of a printed brief on the appeal upon his part which shall likewise conform to the rules of the supreme court. Not less than ten days prior to the hearing the appellant may also serve and file either with the clerk of the superior court or in the supreme court like printed brief or briefs, strictly in reply to respondent's brief. The time for service and filing of briefs, as in this section prescribed, may be extended by order of the superior court for good cause shown, or by stipulation of the parties concerned; and if the time for filing any statement of facts shall be extended by order or stipulation, the time herein prescribed for serving and filing the appellant's opening brief shall thereby be correspondingly extended. Either party may after the filing of his briefs and not less than

[20] Rem. & Bal. Code, § 1729.

one day prior to the hearing of the appeal submit to the supreme court and to the adverse party a written or printed statement of any additional authorities, with suitable comment thereon strictly in support of the position taken in his brief hereinabove required to be filed. But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities, or on the hearing, any grounds for reversal not clearly pointed out in his original brief." [21]

§ 23. Jurisdiction—Effect of Appeal upon.—"Upon the taking of an appeal by notice as provided in this title, and the filing of a bond to render the appeal effectual, the supreme court shall acquire jurisdiction of the appeal for all necessary purposes, and shall have control of the superior court and of all inferior officers in all matters pertaining thereto, and may enforce such control by a mandate or otherwise, and, if necessary, by fine and imprisonment, which imprisonment may be continued until obedience shall be rendered to the mandate of the supreme court. But the superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying of bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal." [22]

§ 24. Calendar—How Prepared.—"All appeals in which the record shall have been filed in the supreme court at least ten days before the beginning of any stated session of the court, shall be placed on the

[21] Rem. & Bal. Code, § 1730.
[22] Rem. & Bal. Code, § 1731.

calendar of the court for hearing at such session; and the subsequent filing of a supplementary record shall not affect the position of the appeal on the calendar. But the hearing of an appeal may at any time be postponed by the court or continued for the session, of its own motion or for good cause shown, and on such terms as may be just.'' [23]

§ 25. **Motion to Dismiss Appeal.**—''Any respondent may move the supreme court, at such time and in such manner as the court by its rules may have prescribed, to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted, or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds hereinabove mentioned; and there may be combined with a motion to dismiss a motion to affirm the judgment or order appealed from, or a motion for damages on the ground that the appeal was taken merely for delay, or was manifestly unauthorized by law, or both such motions. A general appearance in the supreme court shall not be a waiver of the right to make any motion herein authorized.'' [24]

[23] Rem. & Bal. Code, § 1732.

[24] Rem. & Bal. Code, § 1733.

§ 26. Hearing and Disposition of Motion.—"If the supreme court on the hearing of any such motion or motions shall find the grounds or any thereof alleged, for the same, to be well taken and true in effect, the court may grant the same in whole or in part, but when any such motion does not go to the substance of the appeal, or to the right of appeal, and the court shall be of the opinion that the moving party can be compensated in costs, or by the imposition of other terms for any delay of the appellant which is made the ground of any such motion (except a failure to take the appeal within the time limited by law) the court, in its discretion, may deny the motion on such terms as may be just. The court shall upon like terms allow all amendments in matters of form, curative of defects in proceedings to the end that substantial justice be secured to the parties, and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal if the appellant shall forthwith, upon order of the supreme court, perfect the appeal." [25]

§ 27. What may be Reviewed.—"Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal;

[25] Rem. & Bal. Code, § 1734.

and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court *de novo*, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement."[26]

§ 28. **Costs on Appeal.**—"Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows:

"The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When

[26] Rem. & Bal. Code, § 1736.

in the opinion of the supreme court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same." [27]

§ 29. Rules and Regulations of the Supreme Court. "The supreme court is hereby authorized to make all needful rules and regulations not inconsistent with law concerning practice and procedure in cases appealed to the supreme court." [28]

§ 30. Statutory Method of Appealing Exclusive.— "The mode provided by this title for appealing cases to the supreme court, and for securing a revision of the same therein, shall be exclusive and shall supersede all other methods heretofore provided. But no rights acquired under statutes which are abrogated by this title shall be lost by reason of the passage of this title, and all appeals pending when this title takes effect may be prosecuted to their determination as if this title had not been passed." [29]

§ 31. Manner of Conducting Trials—Charging Jury.—"The court must reduce the charge to be given the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury. Either party may request such instructions as he deems material to the case, and the court may hear them upon the propriety of the requested instructions before finally settling the charge that he will give. If a stenographer shall be in attendance upon the trial

[27] Rem. & Bal. Code, § 1744.
[28] Rem. & Bal. Code, § 1753.
[29] Rem. & Bal. Code, § 1754.

of the cause, the court shall have the right to dictate the charge he desires to give to such stenographer, and to have the stenographer reduce the same to writing for him and a copy for each of the parties plaintiff and defendant. And the cost thereof shall be taxed as other costs in the action. When the charge shall have been given by the court, the plaintiff, or party having the burden of proof, may, by himself, or one counsel, address the court and jury upon the law and facts in the case, after which the adverse party may address the court and jury in like manner, by himself and one counsel or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of the plaintiff or defendant shall be allowed. After the argument shall have been concluded, the jury shall retire to consider their verdict, and shall take with them to the jury-room, among other matters proper to be taken to their jury-room for further consideration by them, the written charge given them by the court. Either party, at any time before the hearing of a motion for a new trial may except to the instructions given by the court, or any part thereof." [30]

§ 32. Powers of Judge in Other Counties of His District.—"Any judge of the superior court of the state of Washington shall have power, in any county within his district: (1) To sign all necessary orders and papers in probate matters pending in any other county in his district; (2) to issue restraining orders, and to sign the necessary orders of continuance in actions or proceedings pending in any other county in his district; (3) to decide and rule upon all motions,

[30] Rem. & Bal. Code, § 339, subd. (4); Sess. Laws 1909, p. 184, § 1, subd. (4). See, also, § 5, *supra.*

demurrers, issues of fact or other matters that may have been submitted to him in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: Provided, that nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties."[81]

§ 33. Decisions and Rulings Out of His Own District.—"Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing and shall be filed immediately with the clerk of the county where such cause is pending."[82]

[81] Rem. & Bal. Code, § 41.
[82] Rem. & Bal. Code, § 42.

CHAPTER II.

RULES OF THE SUPREME COURT.

§ 34. Transcripts.
§ 35. Contents and Style of Briefs.
§ 36. Errors Considered.
§ 37. Service of Papers.
§ 38. Service of Papers—Continued.
§ 39. Service—Residence Unknown. Service by Mail.

§ 34. Transcripts.—"Every transcript shall be plainly typewritten with a black record ribbon or printed, on paper of good quality of the size of legal cap, and be free from interlineations and erasures, and be duly paged, and prefixed with an alphabetical index to its contents specifying the page of each separate paper, order or proceeding and of the testimony of each witness, and have at least one blank fly-leaf. Every statement of facts and bill of exceptions must also be printed or typewritten, and when typewritten none other than a black ribbon copy shall be used.

"Every transcript consisting of more than fifty leaves shall be bound under the direction of the clerk of the supreme court."[1]

§ 35. Contents and Style of Briefs.—"(1) Briefs shall be printed throughout in plain, clear type not smaller in size than small pica, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification.

"(2) Each error relied on shall be clearly pointed out and separately discussed: Provided, that several

[1] Rule III of the Rules of the Supreme Court.

assignments presenting the same general questions may be discussed together.

"(3) In citing authorities, the title of the case and the name and number of the volume must be clearly set out in each place in the brief where the case is mentioned; and in citing text-books, the number of the edition must be specified.

"(4) Briefs must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The cover shall be gray in color, or some color that will readily show the print. The title of the case, the designation—'Brief of Appellant,' 'Brief of Respondent,' 'Appellant's Reply Brief,' as the case may be—and the names of the attorneys signing the brief, with their postoffice address, shall be printed on the front cover.

"(5) In all equity causes and actions at law tried by the court without a jury, the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal; and shall also print such findings as they requested the lower court to make and which were refused, with their exceptions to such refusal, in case any error or contention shall be based thereon.

"(6) Twenty-five copies of all printed briefs shall be filed with the clerk."[2]

§ 36. **Errors Considered.**—"No alleged error of the superior court will be considered by the supreme court unless the same be clearly pointed out in the appellant's brief: Provided, that the objection that the

[2] Rule VIII of the Rules of the Supreme Court.

supreme court has no jurisdiction of the appeal may be taken at any time."[3]

§ 37. **Service of Papers.**—"Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party."[4]

§ 38. **Service of Papers—Continued.**—"Service of papers may be made as follows:

"(1) If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid: Provided, that in capital cases a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.

"(2) If upon a party, by delivery to him personally, or at his residence by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening."[5]

§ 39. **Service—Residence Unknown. Service by Mail.**—"Where the residence of a party and that of his attorney of record, if he have one, are not known, the service may be made upon the clerk of the superior

[3] Rule XII of the Rules of the Supreme Court.

[4] Rule XVIII of the Rules of the Supreme Court, subd. (2).

[5] Rule XIX of the Rules of the Supreme Court.

court in which the cause was tried, for the party or attorney."[6]

"(1) Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places between which there is a regular communication by mail. Postage must in such cases be prepaid.

"(2) Time shall begin to run from the date of deposit in the postoffice."[7]

[6] Rule XX of the Rules of the Supreme Court.

[7] Rule XXI of the Rules of the Supreme Court.

CHAPTER III.

THE DISTINCTION BETWEEN A BILL OF EXCEPTIONS AND A STATEMENT OF FACTS.

§ 40. The Distinction Between Them.

§ 40. The Distinction Between Them.—In the whole range of the state reports there are only two cases wherein the distinction between a bill of exceptions and a statement of facts is considered. In one of them it was said that bills of exceptions were limited to actions at law and special proceedings, and that statements of facts applied only to actions for equitable relief.[1]

In the other case the court said: "There is now practically little or no difference between them, except in the manner of the settlement."[2]

As these decisions were rendered prior to the enactment of the existing statutes, there is, therefore, no judicial authority upon the subject at the present time.

By the express provisions of the statutes, bills of exceptions and statements of facts apply to *all actions and proceedings.*[3]

A statement of facts may be defined to be a properly prepared and regularly proposed statement in writing which is duly settled and certified, or authenticated, after the entry of an appealable order or the final judgment to which it relates, and embodying all rulings or decisions of the court, or a judge, referee or commissioner thereof, not already a part of the rec-

[1] Stenger v. Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211.

[2] Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

[3] Rem. & Bal. Code, § 388. See § 9, *supra.*

ord, and all evidence, papers, proceedings and exceptions in a cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, the legal effect of which is to make its contents a part of the record in the cause for all the purposes thereof, and of any appeal therein.[4]

A statement of facts thus secures a review of all alleged errors that do not already appear upon the face of the record and are material to an appeal. In other words, an appeal, unaided by a bill of exceptions or statement of facts, secures a review merely of such alleged errors as already appear upon the face of the record; and it is the office of a statement of facts to enlarge the scope of an appeal by embodying in the record not only all rulings or decisions of the court, or a judge, referee or commissioner thereof, not already a part of the record, but also all evidence, papers, proceedings and exceptions in a cause, or part of a cause, as the case may be, not already a part of the record and material to the appeal.

It is a complete supplement to the record, and secures a review not only of all alleged *errors of law*, not appearing upon the face of the record, but also secures a review of all alleged *errors of fact* of the court, or a judge, referee or commissioner thereof, not already appearing upon the face of the record. In fine, it may secure the review of a cause *de novo* by the supreme court when the cause itself is one which may be reviewed *de novo;* that is, when the cause is an action for equitable relief, or an action for legal relief which is tried without a jury, or a special pro-

[4] Rem. & Bal. Code, §§ 388, 391. Rule III of the Rules of the Supreme Court. See §§ 9, 12, 34, *supra.*

ceeding which is tried without the intervention of a jury.

Criminal actions, and actions for legal relief which are tried with a jury, and special proceedings which are tried with a jury, are not in their nature reviewable *de novo*, for the supreme court will not usurp the province of a jury. A statement of facts cannot, therefore, in such causes, secure a review *de novo* of matters of fact decided by a jury; but can only secure a review of rulings upon matters of law and rulings upon such matters of fact and other incidental matters as may fall within the peculiar province of the court, or a judge, referee or commissioner thereof, where the alleged errors do not already appear upon the face of the record. The evidence in a cause tried *with a jury* may, it is true, be reviewed by the supreme court; as, for instance, where an appeal has been taken from an order granting a new trial upon the ground that the evidence is insufficient to justify the verdict; but the supreme court in reviewing the evidence in such a case does not do so for the purpose of reviewing the cause *de novo*. It reviews the evidence in such a case for the purpose of passing upon an alleged erroneous ruling of the court, namely, the order granting the new trial. The statement which embodies the evidence in such a case is properly denominated a *statement of facts;* for the ruling, that is, the order granting the new trial, is already a part of the record.

A bill of exceptions may be defined to be a properly prepared and regularly proposed statement in writing which is duly settled and certified, or authenticated, either before or after the entry of an appealable order or the final judgment to which it relates, and embodying any rulings or decisions of the court, or a judge, referee or commissioner thereof, in a cause, together

with the necessary evidence, papers or proceedings connected therewith, or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, the legal effect of which is to make its contents a part of the record in the cause for all the purposes thereof, and of any appeal therein.[5]

Whenever it is desired to supplement the record merely to the extent of embodying therein such rulings or decisions as are not already a part of the record, together with the necessary evidence, papers or proceedings connected therewith, or on which the same were based, and the exceptions thereto, if any, not already a part of the record, such embodiment is properly effected by means of a bill of exceptions.

Thus, rulings on the admission or rejection of evidence, rulings made during a trial before a jury on the alleged misconduct of an attorney, oral instructions given to a jury, the giving of instructions wholly in writing, or the refusal to give instructions requested in writing, and comments of the court upon the facts of a cause in the presence and hearing of the jury, are a few of the many rulings that are not already a part of the record; and are, therefore, rulings to which a bill of exceptions appropriately applies.

A comment by the court upon the facts of a cause in the presence and hearing of the jury may not at first glance appear to be a ruling; but a comment in such a case is an opinion of the court, and is in the nature of a charge to the jury upon the whole or a portion of the facts. It may, of course, be disregarded by the jury because it is expressly forbidden by the

[5] Rem. & Bal. Code, §§ 388, 391. Rule III of the Rules of the Supreme Court. See §§ 9, 12, 34, *supra*.

constitution; but it is an oral ruling or charge, nevertheless.

Instructions made wholly in writing, and instructions requested in writing, are made a part of the record by statute.[6]

It might, therefore, seem illogical to say that the giving of instructions wholly in writing, or the refusal to give instructions requested in writing, are rulings which are not already a part of the record; but the *giving* of written instructions, or the *refusal to give* instructions requested in writing, is one thing, and the *evidence of what was given or refused* is quite another. The *actual reading* of the written instructions, or the *refusal to read* the requested instructions, is the ruling of the court. This ruling will not appear from the mere fact that written instructions, or instructions requested in writing, are on file, and copies thereof embodied in the transcript on appeal.

The *giving* of the instructions, or the *refusal* to give them, must be shown. This is the ruling of the court. When this is shown, the written instructions, or the instructions requested in writing and refused, as the case may be, become *evidence of what was read or refused.* They are at no time evidence of the actual reading or refusal to read. Neither the written instructions nor the instructions requested in writing and refused should be embodied in a bill of exceptions or statement of facts, for they are already a part of the record.

The ruling of the court, however,—that is, the fact that the court read the written instructions embodied in the transcript on appeal, or refused to read the requested instructions embodied therein,—may properly be incorporated in the record by means of a bill of ex-

[6] See § 46, subds. 5, 6, *infra.*

ceptions, for it is a ruling which is not already a part of the record.

There may be one or more bills of exceptions and a statement of facts relating to the same appealable order or final judgment.[7]

In this event the bill or bills of exceptions will, of course, embody merely oral rulings, together with such facts, matters and proceedings as are material thereto on appeal and not already a part of the record, while the statement of facts will embody all the remaining facts, matters and proceedings which are material to the appeal and not already a part of the record.

Upon becoming a part of the record, the bill or bills of exceptions and the statement of facts may thus *assist each other* in securing the review *de novo* of causes which are tried without a jury; and the statute accordingly provides that "in actions legal or equitable, tried by the court without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court *de novo*, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement."[8]

Since it is the office of a bill of exceptions merely to embody in the record oral rulings and such facts, matters and proceedings as are material thereto on appeal and not already a part of the record, it follows that a bill of exceptions alone will seldom secure the review *de novo* of a cause which is tried without a jury. But occasionally a bill of exceptions may secure the review

[7] Rem. & Bal. Code, § 388. See § 9, *supra*.

[8] Rem. & Bal. Code, § 1736. See § 27, *supra*.

de novo of a cause which is tried without a jury; as where, for instance, the alleged errors consist entirely of rulings admitting the evidence; that is, where it is contended that none of the evidence should have been admitted. The statement in a case of this kind is properly denominated a *bill of exceptions;* for the rulings admitting the evidence are not already a part of the record, and the statute expressly provides that "in actions legal or equitable, tried by the court without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court *de novo*, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement." [9]

It also happens occasionally that a cause which is tried without a jury cannot be reviewed *de novo;* as where, for instance, a mistrial has occurred in the court below, and a review of the evidence *de novo* becomes impossible by reason of errors of law in the *exclusion* of evidence, and the cause is remanded for a new trial. In such cases the statement is properly denominated a *bill of exceptions;* for the rulings and the facts, matters and proceedings material thereto on appeal are not already a part of the record. Such instances, however, are rare.[10]

A bill of exceptions at least requires an oral ruling which, of course, is not already a part of the record. The facts, matters and proceedings which are material thereto on appeal may, or may not be, already a part

[9] Rem. & Bal. Code, § 1736. See § 27, *supra.*

[10] See Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625.

of the record. If not already a part of the record, they should be embodied in the bill of exceptions along with the oral ruling.

A statement of facts at least requires facts, matters and proceedings which are not already a part of the record, and which directly relate to a ruling which *is* already a part of the record. In addition to this it may, and usually does, embody all that a bill of exceptions properly embodies.

The proper terminology should always be carefully employed; but it has been held in an early case that a palpable misnomer would be overlooked.[11]

[11] Miller v. Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600.

CHAPTER IV.

THE PREPARATION OF THE BILL OR STATEMENT.

§ 41. Division of the Subject.
§ 42. The Form of the Bill or Statement.
§ 43. By Whom the Bill or Statement may be Prepared.
§ 44. What must be Embodied in the Bill or Statement.
§ 45. The Method of Embodying Depositions and Other Written Evidence on File.
§ 46. What must not be Embodied in the Bill or Statement.
§ 47. Costs of the Preparation of the Bill or Statement.

§ 41. Division of the Subject.—The preparation of the bill or statement will be considered, (a) With reference to its form; (b) By whom the bill or statement may be prepared; (c) What must be embodied therein; (d) The method of embodying depositions and other written evidence on file; (e) What must not be embodied therein; (f) The costs of the preparation of the bill or statement. And first, as to

§ 42. (a) The Form of the Bill or Statement.—The bill or statement should be so framed as to affirmatively show that the material facts, matters and proceedings embodied therein *actually occurred* in the cause.[1]

It is sufficient, though it be in the form of a narrative.[2]

[1] Waite v. Stroud, 9 Wash. 333, 37 Pac. 324.

[2] McReavy v. Eshelman, 4 Wash. 757, 31 Pac. 35; Murray v. Shoudy, 13 Wash. 33, 42 Pac. 631; Herrman v. Great Northern Ry. Co., 27 Wash. 472, 57 L. R. A. 390, 68 Pac. 82; Delaski v. Northwestern Improvement Co., 61 Wash. 255, 112 Pac. 341.

The practice of presenting the material facts, matters and proceedings in the form of a narrative is thus commended by the court: "The practice of bringing a narrative statement of the testimony to this court is to be encouraged. The statement in the affidavit filed on behalf of the respondent, that more than one hundred pages of the record have been reduced to four pages, does not, to our minds, indicate that it does not contain all the material facts testified to by the witness. On the contrary, it might still be subject to a motion to strike for redundancy, for our experience has taught us that the usual and ofttimes necessary repetitions and reiterations of the trial are not always essential to give this court a proper understanding of the facts." [3]

The facts, matters and proceedings which are properly embodied in the bill or statement, excepting, of course, depositions and other written evidence on file, are usually, however, noted in shorthand by a stenographer as they occur, and are thereafter reduced by him to longhand typewritten notes; and as thus reduced, are proposed and settled and presented to the supreme court.

It has been held, however, that while either party has the right to have the testimony of all the witnesses as fully set out in the bill or statement as it was given in the court below, yet, in the absence of an objection after due notice, the bill or statement may be abridged by setting out the testimony of a certain witness in full, and then saying that the testimony of other witnesses was substantially the same.[4]

[3] State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

[4] Parker v. Esch, 5 Wash. 296, 31 Pac. 754.

When amendments are proposed, the material facts, matters and proceedings should be reduced to a single bill or statement.

The court thus emphasizes the importance of this rule: "These considerations dispose of the case. But it is deemed proper to direct attention to the slovenly record that has been placed before the court. The proposed statement of facts, consisting of three pages, was made and filed by the plaintiff, and amendments, consisting of three pages, were thereafter filed by defendant. There also appears another page of typewritten matter, which contains interlineations and erasures, and, as gathered from a note upon a substituted page, is not part of the statement, but seems to have been left in as a voluntary disturber in the examination of the facts contained in the statement. The statement of facts should be a clean paper, regularly paged and in continued form; and the practice cannot be tolerated of each party making up detached papers in the form of a proposed statement, with amendments thereto, fastening them together, with a certificate that certain amendments have been allowed and others rejected, and forwarding the whole mass here for this court to undertake the labor of extracting from such confused papers what are the facts." [5]

In the following case where a statement of facts was proposed by an appellant, and an amended statement purporting to cover the same facts, matters and proceedings was proposed by respondent, and *both* were certified by the lower court as together containing all the material facts, matters and proceedings occurring in the cause and not already a part of the record, the combined statements were treated by the court, how-

[5] Greely v. Newcomb, 21 Wash. 357, 58 Pac. 216.

ever, as a statement of facts sufficient in form *in the absence of an objection in the court below against both being made a part of the record.*[6]

In the preparation of the bill or statement the following rule of the supreme court should be carefully observed and followed:

"Every transcript shall be plainly typewritten with a black record ribbon or printed, on paper of good quality of the size of legal cap, and be free from interlineations and erasures, and be duly paged, and prefixed with an alphabetical index to its contents specifying the page of each separate paper, order or proceeding and of the testimony of each witness, and have at least one blank fly-leaf. Every statement of facts and bill of exceptions must also be printed or typewritten, and when typewritten none other than a black ribbon copy shall be used.

"Every transcript consisting of more than fifty leaves shall be bound under the direction of the clerk of the supreme court."[7]

Under this rule exhibits should be indexed and classified; and if not indexed and classified, they will not be reviewed, especially when they are numerous.[8]

The bill or statement should be indexed before it is presented to the supreme court; but it has been held to be sufficient if the index to the bill or statement has been prepared by the clerk of the supreme court, and attached at the request of an appellant's attorneys.[9]

[6] Herrman v. Great Northern Ry. Co., 27 Wash. 472, 57 L. R. A. 390, 68 Pac. 82.

[7] Rule III of the Rules of the Supreme Court. See § 34, *supra.*

[8] Schell v. Walla Walla, 44 Wash. 43, 86 Pac. 1114.

[9] See Smith v. Glenn, 40 Wash. 262, 82 Pac. 605. See, also, Bringgold v. Bringgold, 40 Wash. 121, 82 Pac. 179.

The object of this rule is to facilitate an examination of the bill or statement, and it should therefore be carefully observed and followed; for an abstract of evidence, exhibits, etc., is not allowed either by statute or rules of court.[10]

Under this rule, also, the bill or statement should not be interlined.[11]

The rule is one which will, no doubt, be enforced in the discretion of the court; and should, therefore, be strictly adhered to.

In framing the bill or statement one should, of course, in the first instance, honestly endeavor to make it complete; for though the statute prescribes that errors in the proposed bill or statement shall be corrected, and omissions therefrom supplied, by means of proposed amendments, it does not thereby intend to sanction the practice of so framing the proposed bill or statement as to endeavor to impose upon an adversary the duty of supplying any considerable portion of the facts, matters and proceedings which should have been embodied therein in the first instance. The statute contemplates that the bill or statement as originally proposed will be a *substantial* embodiment of all the material facts, matters and proceedings occurring in the cause, and which are not already a part of the record. If it is not a *substantial* bill or statement, that is, *prepared substantially* in the manner which the statute contemplates, it is not sufficient to

[10] See Tacoma v. Tacoma Light & Water Co., 16 Wash. 288, 47 Pac. 738.

[11] See Medcalf v. Bush, 4 Wash. 386, 30 Pac. 325. In this case there was a statement which was interlined, but the appellant also presented a perfect statement duly certified by the judge as of the date when the other was certified, and moved its substitution for the defective statement.

compel the adversary to resort to the statutory remedy of proposed amendments; and he may, instead, move that the proposed bill or statement be stricken *in the first instance* where it is manifest that the party proposing it has been guilty of bad faith or such gross carelessness as will amount to bad faith; and where bad faith is not manifest, but *it is manifest* that the proposed bill or statement is not *a substantial one*, he may move that the bill or statement be corrected by the party proposing it until it shall become *at least a substantial bill or statement*, and such as the statute contemplates; and the judge may accordingly order it to be corrected as many times as may be necessary to make it a *substantial bill or statement;* and if the order is disobeyed, may strike it from the cause or refuse to certify it.[12]

Nor will a writ of mandate issue to compel the certification until all reasonable demands of the court or judge shall have been complied with.[13]

In whatever form the bill or statement is proposed, the "burden is on the appellant to furnish a statement of the testimony sufficient to show the court the facts upon which the assignments of error are predicated, and to give the court a full understanding of the case. The burden cannot be shifted to the respondent by filing an incomplete narrative."[14]

[12] State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631. In this connection, see, also, the following early case: Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

[13] State ex rel. Hofstetter v. Sheeks, 65 Wash. 410, 118 Pac. 308.

[14] State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

This rule of the decisions does not in any manner conflict with or disregard the statutory remedy of proposed amendments; for where the bill or statement is stricken *in the first instance* because of bad faith in its preparation, it is for the reason that it is not a bill or statement at all, but simply a *counterfeit* which has no legitimate place in the cause. And when it is stricken for failure to comply with the order or orders for its correction, it is for the reason that it is not *in substance* such a bill or statement as the statute contemplates should be proposed in the first instance, though subject to correction owing to the absence of bad faith in its preparation, had the order for its correction been complied with.[15]

The motion against the proposed bill or statement must, however, *be made in good faith;* that is, the proposed bill or statement must be manifestly insufficient in order to justify the motion against it; for one will certainly not be permitted to evade the statutory limitation for filing and serving proposed amendments by resorting to a motion against a proposed bill or statement which is manifestly a *substantial one*, and therefore such as the statute contemplates, even though it may not be *absolutely* perfect.

A motion which goes no further than to move the striking of the bill or statement which is partly in the narrative form, and the substitution of the notes of the stenographer, is insufficient, and cannot be aided by an affidavit filed in the supreme court wherein it is asserted that the proposed bill or statement, in so

[15] State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631; State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859; State ex rel. Hofstetter v. Sheeks, 65 Wash. 410, 118 Pac. 308.

far as it is in the narrative form, is garbled and inaccurate, and contradictory of the testimony as actually given by the witnesses. The alleged errors should be pointed out.[16]

When the motion is, however, made *in good faith*, it would seem to follow that the beginning of the time within which proposed amendments must be filed and served may be postponed by an application for an order requiring that the proposed bill or statement be made substantial. The motion should, of course, be made before the expiration of the time limited by statute for the proposal of amendments. There are, however, no adjudications upon this subject.[17]

§ 43. (b) By Whom the Bill or Statement may be Prepared.—The statute provides that any party to any action or proceeding may propose a bill or statement, and cause the same to be certified.[18]

But the word "any" as used in this particular statute must be interpreted in connection with other statutes, and with particular decisions; and when thus interpreted, will be found to admit of two exceptions.

The first exception is that the state, *in a criminal action*, has not the right to a bill of exceptions or statement of facts.

The statute provides that "an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or

[16] State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

[17] See § 82, *infra*.

[18] Rem. & Bal. Code, § 388. See § 9, *supra*.

is some other material *error in law* not affecting the acquittal of a prisoner on the merits." [19]

The right of the state to invoke the appellate jurisdiction of the supreme court in a criminal action is thus so limited and confined by statute as to forbid it to present to the supreme court any question whose consideration will necessitate the preparation of a bill or statement.[20]

The second exception is that the state has not the right to invoke the appellate jurisdiction of the supreme court in a proceeding for divorce; and has not the right, therefore, to a bill of exceptions or statement of facts in a proceeding for divorce.

Marriage being a status, the state is *theoretically* considered as a party to the proceeding for divorce in the lower court when the complaint remains undefended; but it is not actually named as a party in the pleadings, and has no appealable interest, and therefore is not entitled to be heard in the supreme court.[21]

With these two exceptions any party to any action or proceeding which is within the appellate jurisdiction of the supreme court has the right to a bill of exceptions or statement of facts in a proper case.

But a bill of exceptions or statement of facts which has been settled at the request of a party who has not

[19] Rem. & Bal. Code, § 1716, subd. (7).

[20] See State v. Wright, 60 Wash. 277, 111 Pac. 18; State v. Hubbell, 18 Wash. 482, 51 Pac. 1039; State v. Johnson, 24 Wash. 75, 63 Pac. 1124; State v. Murrey, 30 Wash. 383, 70 Pac. 971; State v. Kemp, 5 Wash. 212, 31 Pac. 711; State v. Armstrong, 19 Wash. 706, 53 Pac. 351; State v. Heron, 19 Wash. 706, 53 Pac. 348; Territory v. Lee, 3 Wash. Ter. 396, 17 Pac. 884.

[21] Lee v. Lee, 19 Wash. 355, 53 Pac. 349.

appealed can serve no useful purpose in connection with an appeal *by another party*, and will, therefore, on motion, be stricken in so far as it concerns that particular appeal.[22]

A respondent has been permitted to substitute, *as proposed amendments*, a full and complete bill or statement of his own where the bill or statement as proposed by appellant was manifestly incomplete; but such a course is unnecessary.[23]

§ 44. (c) What Must be Embodied in the Bill or Statement.—The review of a cause by the supreme court must necessarily be confined to the record before it. It is therefore self-evident that if the decision of the question or questions raised on appeal necessitates a review of facts, matters and proceedings which are not, in the absence of a bill of exceptions or statement of facts, a part of the record of the cause, such facts, matters and proceedings must be embodied in a bill of exceptions or statement of facts in order that the supreme court may be enabled to review the question or questions raised.

Thus, the misconduct of a prosecuting attorney or his deputy cannot be considered on appeal unless the facts in relation thereto have been found by the lower court and made a part of the record by a bill of exceptions or statement of facts.[24]

Thus, also, where judgment is rendered on the pleadings and on the oral admissions of the parties made in open court, the judgment will be presumed to be correct when such oral admissions have not been

[22] Lauridsen v. Lewis, 47 Wash. 594, 92 Pac. 440.

[23] See Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

[24] State v. Greer, 11 Wash. 244, 39 Pac. 874.

made a part of the record on appeal by a bill of exceptions or statement of facts.[25]

Stipulations and other proceedings occurring in the court below, and not already a part of the record, and which have not been made a part of the record by a bill of exceptions or statement of facts, will not be considered.[26]

It has been held that purported copies of a motion and affidavit for continuance, also purported statements of the prosecuting attorney to the jury, and certain papers purporting to have been used upon a motion for a new trial, not made a part of the record by a bill of exceptions or statement of facts, will be stricken on motion from the cause.[27]

Oral instructions not made a part of the record on appeal by bill of exceptions or statement of facts cannot be considered.[28]

Alleged error on the part of the trial court in granting a new trial on the ground that the evidence was insufficient to justify the verdict will not be considered when the evidence has not been embodied in a bill of exceptions or statement of facts.[29]

An order granting a new trial because of the alleged incompetency of certain testimony admitted in evidence will not be reviewed on appeal when there is no bill of exceptions nor statement of facts embodying the material evidence.[30]

[25] Byers v. Rothschild, 11 Wash. 296, 39 Pac. 688.

[26] Winsor v. McLachlan, 12 Wash. 154, 40 Pac. 727.

[27] State v. Howard, 15 Wash. 425, 46 Pac. 650.

[28] State v. Nichols, 15 Wash. 1, 45 Pac. 647.

[29] Pincus v. Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930.

[30] Linder v. Newman, 18 Wash. 481, 51 Pac. 1039.

Alleged error relating to instructions will not be considered on appeal in the absence of a bill of exceptions or statement of facts embodying all the material evidence relating thereto.[31]

Alleged error in the admission of incompetent testimony on cross-examination cannot be considered when the record does not contain the direct testimony upon which the cross-examination was based.[32]

Assignment of error in the admission of evidence varying the terms of a written contract will not be considered when the evidence is not brought up by a bill of exceptions or statement of facts.[33]

Exceptions to instructions given, or to a refusal to give requested instructions, should be embodied in the bill or statement when the giving of the instructions or the refusal to give those requested is assigned as error.[34]

Either party, at any time before the hearing of a motion for a new trial, may except to the instructions given by the court, or any part thereof.[35]

It may be stated as a general rule that whenever the decision of questions raised on appeal necessitates a review of any evidence, such evidence, unless it is

[31] State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157; Thompson v. Territory, 1 Wash. Ter. 548; State v. Rourk, 44 Wash. 464, 87 Pac. 507; Morgan v. Bankers' Trust Co., 63 Wash. 476, 115 Pac. 1047; Morgan v. Bankers' Trust Co., *supra,* on rehearing, 24 Wash. Dec. 429, 119 Pac. 1116.

[32] Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117.

[33] Rehlow v. Schmitt, 63 Wash. 666, 116 Pac. 267.

[34] See State v. Rourk, 44 Wash. 464, 87 Pac. 507; Rem. & Bal. Code, § 384. See § 5, *supra.*

[35] Rem. & Bal. Code, § 339, subd. (4); Sess. Laws 1909, p. 184, § 1, subd. (4). See § 31, *supra.*

already a part of the record, must be embodied in a bill of exceptions or statement of facts.[36]

Affidavits which are used as evidence in the lower court, and which are not already a part of the record,

[36] Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; Ferry v. King County, 2 Wash. 337, 26 Pac. 537; Rathbun v. Thurston County, 2 Wash. 564, 27 Pac. 448; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Cadwell v. First Nat. Bank, 3 Wash. 188, 28 Pac. 365; Howard v. Ross, 3 Wash. 292, 28 Pac. 528; Harker v. Crosby, 3 Wash. 377, 28 Pac. 745; Stenger v. Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211; McNatt v. Harmon, 3 Wash. 432, 28 Pac. 748; Wheeler v. Lager, 3 Wash. 732, 29 Pac. 453; Francioli v. Brue, 4 Wash. 124, 29 Pac. 928; Coats v. West Coast Fire & Marine Ins. Co., 4 Wash. 375, 30 Pac. 404, 850; McKinnon v. Kingston Land & Improvement Co., 4 Wash. 535, 30 Pac. 642; McCarty v. Hayden, 4 Wash. 537, 30 Pac. 637; Tacoma Foundry & Machinery Co. v. Wolff, 4 Wash. 818, 30 Pac. 1053; Whittier v. Cadwell, 4 Wash. 819, 820, 30 Pac. 1097, 1098; Gilbranson v. Squier, 5 Wash. 99, 31 Pac. 423; Smith v. State, 5 Wash. 273, 31 Pac. 865; Link v. Bosse, 5 Wash. 491, 31 Pac. 599; Fife v. Olson, 5 Wash. 789, 32 Pac. 766; Bently v. Port Townsend Hotel & Improvement Co., 6 Wash. 296, 32 Pac. 1072; Kirby v. Collins, 6 Wash. 297, 32 Pac. 1060; Case v. Ham, 9 Wash. 54, 36 Pac. 1050; Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317; Gaffney v. Megrath, 11 Wash. 456, 39 Pac. 973; Winsor v. McLachlan, 12 Wash. 154, 40 Pac. 727; State v. Robinson, 12 Wash. 491, 41 Pac. 884; State ex rel. Van Name v. Board of Directors, 14 Wash. 222, 44 Pac. 270; Taylor v. City Council of Tacoma, 15 Wash. 92, 45 Pac. 641; State v. Zettler, 15 Wash. 625, 47 Pac. 35; Bernier v. Bernier, 17 Wash. 689, 50 Pac. 495; Pincus v. Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930; Linder v. Newman, 18 Wash. 481, 51 Pac. 1039; State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157; State v. Anderson, 20 Wash. 193, 55 Pac. 39; State v. Webb, 20 Wash. 500, 55 Pac. 935; State v. Morgan, 20 Wash. 708, 54 Pac. 936; Greely v. Newcomb, 21

must be embodied in a bill of exceptions or statement of facts whenever the question or questions raised on appeal will necessitate a review thereof.

Thus, affidavits used in support of a petition for the appointment of a receiver, and which are not already a part of the record, will not be considered

Wash. 357, 58 Pac. 216; Van Brocklin v. Queen City Printing Co., 21 Wash. 447, 58 Pac. 575; State v. Jasper, 21 Wash. 707, 57 Pac. 796; Schlotfeldt v. Bull, 22 Wash. 362, 60 Pac. 1126; In re Alfstad's Estate, 27 Wash. 175, 67 Pac. 593; Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190; Pierce v. Fawcett, 31 Wash. 271, 71 Pac. 1011; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362; Corbin v. McDermott, 33 Wash. 212, 74 Pac. 361; State v. Howard, 33 Wash. 250, 74 Pac. 382; Dibble v. Seattle Electric Co., 33 Wash. 596, 74 Pac. 807; Hoskins v. Barker, 33 Wash. 706, 74 Pac. 1135; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; State v. Ryan, 34 Wash. 597, 76 Pac. 90; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Swope v. Seattle, 36 Wash. 114, 78 Pac. 607; Barto v. Stanley, 36 Wash. 150, 78 Pac. 791; Spencer v. Commercial Company, 36 Wash. 374, 78 Pac. 914; State ex rel. Cook v. Reed, 36 Wash. 638, 79 Pac. 306; Osburn v. Pioneer Mutual Ins. Assn., 36 Wash. 695, 79 Pac. 286; Caughey v. Rien, 37 Wash. 296, 79 Pac. 925; Poor v. Cudihee, 37 Wash. 609, 79 Pac. 1105; In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294; McNeilly v. McNeilly, 38 Wash. 401, 80 Pac. 541; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845; Collier v. Great Northern Ry. Co., 40 Wash. 639, 82 Pac. 935; State v. Packenham, 40 Wash. 403, 82 Pac. 597; Dawson v. Dawson, 40 Wash. 656, 82 Pac. 937; Rice v. Pershall, 41 Wash. 73, 82 Pac. 1038; State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027; Wiltsie v. Young, 41 Wash. 570, 84 Pac. 602; The Hotel Co. v. Merchants' Ice & Fuel Co., 41 Wash. 620, 84 Pac. 402; Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661; Mahncke v. Mahncke, 43 Wash. 425, 86 Pac. 645; Cantwell v. Nunn, 45 Wash. 536, 88

unless embodied in a bill of exceptions or statement of facts.[37]

Affidavits used in support of a motion for a new trial.[38]

Pac. 1023; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278; Cunningham v. Lakin, 50 Wash. 394, 97 Pac. 447; Adams v. Columbia Canal Co., 51 Wash. 297, 98 Pac. 741; Loeper v. Loeper, 51 Wash. 682, 99 Pac. 1029, 100 Pac. 1135; Gould v. Austin, 52 Wash. 457, 100 Pac. 1029; Malfa v. Crisp, 52 Wash. 509, 100 Pac. 1012; Clambey v. Copland, 52 Wash. 580, 100 Pac. 1031; Pierce v. Pierce, 52 Wash. 679, 101 Pac. 358; Coughlin v. Holmes, 53 Wash. 692, 102 Pac. 772; Staats v. Pioneer Ins. Assn., 55 Wash. 51, 104 Pac. 185; Lohman v. Claussen, 55 Wash. 408, 104 Pac. 624; Pack v. Peabody, 58 Wash. 76, 107 Pac. 839. See State v. Newcomb, 58 Wash. 414, 109 Pac. 355, a capital case where the rule was relaxed. In further support of the rule, see Cameron v. Burke, 61 Wash. 203, 112 Pac. 252.

[37] Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141; Norfor v. Busby, 19 Wash. 450, 53 Pac. 715; Hannon v. Millichamp, 40 Wash. 118, 82 Pac. 168; Kennedy Drug Co. v. Keyes Drug Co., 58 Wash. 499, 109 Pac. 56.

[38] Fox v. Territory, 2 Wash. Ter. 297, 5 Pac. 603; State v. Humason, 5 Wash. 499, 32 Pac. 111; State v. Howard, 15 Wash. 425, 46 Pac. 650; State v. Anderson, 20 Wash. 193, 55 Pac. 39; Nelson v. Seattle Traction Co., 25 Wash. 602, 66 Pac. 61; Shuey v. Holmes, 27 Wash. 489, 67 Pac. 1096; Griggs v. MacLean, 33 Wash. 244, 74 Pac. 360; State v. Yandell, 34 Wash. 409, 75 Pac. 988; Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 Pac. 839; Carstens v. Alaska Steamship Co., 39 Wash. 229, 81 Pac. 691; Taylor v. Modern Woodmen of America, 42 Wash. 304, 7 Ann. Cas. 607, 84 Pac. 867; State v. Dalton, 43 Wash. 278, 86 Pac. 590; State v. Stapp, 65 Wash. 438, 118 Pac. 337.

Under early statutes affidavits used in support of a motion for a new trial were part of the record without a bill of exceptions or statement of facts.[39]

Affidavits used in support of a motion for a continuance.[40]

The rule has also been applied in the following cases:

Affidavits used in support of a petition for a writ of *habeas corpus*.[41]

Affidavits used in support of a motion to set aside a default and judgment.[42]

Affidavits used in support of a motion to quash a writ of garnishment.[43]

Affidavits used in support of a motion to dismiss.[44]

[39] Anderson v. State, 2 Wash. 183, 26 Pac. 267. In further support of the rule, see Haines & Spencer v. Kelley, 57 Wash. 219, 106 Pac. 776.

[40] State v. Howard, 15 Wash. 425, 46 Pac. 650; State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157; Soder v. Adams Hardware Co., 38 Wash. 607, 80 Pac. 775; Gray v. Granger, 48 Wash. 442, 93 Pac. 912; State v. Lee Wing Wah, 53 Wash. 294, 101 Pac. 873.

[41] Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510.

[42] Spokane Falls v. Curry, 2 Wash. 541, 27 Pac. 477; Whidby Land & Development Co. v. Nye, 5 Wash. 301, 31 Pac. 752; Chevalier & Co. v. Wilson, 30 Wash. 227, 70 Pac. 487; Whitney v. Knowlton, 33 Wash. 319, 74 Pac. 469; Sellers v. Pacific Wrecking & Salvage Co., 34 Wash. 111, 74 Pac. 1056; Spoar v. Spokane Turn-Verein, 64 Wash. 208, 116 Pac. 627.

[43] McDonald v. Downing, 52 Wash. 394, 100 Pac. 834.

[44] Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374; Rehmke v. Fogarty, 57 Wash. 412, 107 Pac. 184.

Affidavits used in support of a motion to discharge an attachment.[45]

Affidavits used in support of a motion for a writ of assistance.[46]

Affidavits introduced as evidence at the trial of a cause.[47]

Affidavits used in support of a motion to dissolve a temporary injunction.[48]

Affidavits used in support of an application for leave to sue a receiver.[49]

Affidavits used in support of an application for a change of venue.[50]

Affidavits used in support of an application for a temporary restraining order, and affidavits used in support of an application for a temporary injunction.[51]

Affidavits used in support of a motion to quash the service of a summons.[52]

Thus, also, the fact that demonstrations of approval at the close of the argument for the prosecution were

[45] Windt v. Banniza, 2 Wash. 147, 26 Pac. 189; McDonald v. Downing, 52 Wash. 394, 100 Pac. 834.

[46] Jacobson v. Lunn, 16 Wash. 487, 48 Pac. 237.

[47] State v. Wood, 33 Wash. 290, 74 Pac. 380.

[48] Anderson v. McGregor, 36 Wash. 124, 78 Pac. 776.

[49] Whitehouse v. Nelson Dry Goods Co., 40 Wash. 189, 82 Pac. 161.

[50] Allen v. Baxter, 42 Wash. 434, 85 Pac. 26.

[51] Shorno v. Doak, 45 Wash. 613, 88 Pac. 1113. See, also, Heffner v. Board of County Commissioners of Snohomish County, 16 Wash. 273, 47 Pac. 430, where the affidavits were properly brought up, and the general rule was recognized.

[52] McCart v. Racine Woolen Mills, 48 Wash. 314, 93 Pac. 517; Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795.

made by persons present cannot be considered when there is no showing by a bill of exceptions or statement of facts as to what the demonstrations were, and no showing that the court had been requested to take any action thereon.[53]

In the absence of a bill of exceptions or statement of facts showing the circumstances under which a judgment was rendered, the supreme court will not disturb the action of the trial court in entering judgment in excess of the verdict of a jury. Error will not be presumed.[54]

Improper argument of counsel cannot be considered on appeal when the record fails to show the impropriety.[55]

Such impropriety should be shown by a bill of exceptions or statement of facts.[56]

Records in other causes are not judicially noticed; and when necessary to secure a review of the question or questions raised on appeal, must be introduced in the lower court, and embodied in a bill of exceptions or statement of facts.[57]

[53] State v. Anderson, 20 Wash. 193, 55 Pac. 39.

[54] Carpenter v. Barry, 26 Wash. 255, 66 Pac. 393.

[55] Cogswell v. West Street & North End Electric Ry. Co., 5 Wash. 46, 31 Pac. 411; State v. Greer, 11 Wash. 244, 39 Pac. 874; State v. Young, 13 Wash. 584, 43 Pac. 881; State v. McGonigle, 14 Wash. 594, 45 Pac. 20; Shoemaker v. Bryant Lumber & Shingle Mill Co., 27 Wash. 637, 68 Pac. 380.

[56] State v. Snails, 63 Wash. 172, 115 Pac. 82. See, also, Cohen v. Drake, 13 Wash. 102, 42 Pac. 529.

[57] Bartelt v. Seehorn, 25 Wash. 261, 65 Pac. 185; Plumley v. Simpson, 31 Wash. 147, 71 Pac. 710; Sweeney v. Waterhouse & Co., 43 Wash. 613, 86 Pac. 946. See, also, Downs v. Seattle & Montana Ry. Co., 5 Wash. 778, 32 Pac. 745, 33 Pac. 973.

When the question raised on appeal relates to an opening statement of counsel, such opening statement must be embodied in a bill of exceptions or statement of facts.[58]

An appeal was dismissed in one case because of the absence of a bill of exceptions or statement of facts where the appellant sought the review only of a question of law on the pleadings as to whether the action appeared therefrom to have been commenced in time, and where the judgment of the court recited that the decision was based on other matters before the court as well as upon the application of the statute of limitations to the facts pleaded.[59]

The exclusion of record evidence cannot be considered on appeal when such evidence was not formally offered on the trial and is not brought up by a bill of exceptions or statement of facts.[60]

In a late case where the evidence which was formally offered on the trial and excluded was properly brought up it was held that, owing to the exclusion of the evidence, it was not in the cause, and could not be considered by the court; that respondent's right to meet it in any proper way should not be foreclosed; and that, therefore, there was a mistrial; and the cause was accordingly remanded for a new trial.[61]

It has been held that a party will be excused for failure to include in the bill or statement matters which are contained in public records which the lower

[58] Johnson v. City of Spokane, 29 Wash. 730, 70 Pac. 122. See, also, Ballard v. Mitchell, 38 Wash. 239, 80 Pac. 440; Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

[59] Pierce v. Fawcett, 31 Wash. 271, 71 Pac. 1011.

[60] Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

[61] See Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625.

court purported to admit, when the court thereafter allows them to be taken away, and refuses to allow them to remain in the files of the cause, upon the ground that they were not, under such circumstances, admitted.[62]

It seems to be intimated in the above case that a party would be excused in any event from including in the bill or statement matters which are contained in public records unless he was first given an opportunity of supplying the record.

It may with propriety be here observed that a party always has such an opportunity; and it is no doubt the proper practice to obtain permission of the court, at the time when the original records are admitted, to substitute certified copies in case of an appeal.

Rules of practice of the superior courts are not judicially noticed by the supreme court; and when such rules are necessary to a review of a cause on appeal, they must be made a part of the record by a bill of exceptions or statement of facts.[63]

In proceedings supplemental to execution, the issuance of an execution is a jurisdictional step necessary to sustain such proceedings and cannot be waived, as such proceedings are held to be *in rem;* and while the *lower court* will take judicial notice of the fact that an execution has been issued in his own court, the supreme court will not do so, as it acts solely upon the record before it. And it has been held that when the affidavit does not state that an execution has been is-

[62] Gehres v. Wallace, 38 Wash. 101, 80 Pac. 273.

[63] Waite v. Wingate, 4 Wash. 324, 30 Pac. 81. See the following very early case in which it was said that they are a part of the record of the lower court and should be certified as such: Walla Walla Printing & Publishing Co. v. Budd, 2 Wash. Ter. 336, 5 Pac. 602.

sued, the fact must be shown by a bill of exceptions or statement of facts.[64]

In an early case it was held that the refusal of the court to grant a motion for a default for failure to answer within the prescribed time will be presumed to have been based upon a showing of good and sufficient cause therefor in the absence of a bill of exceptions or statement of facts setting forth the fact that the ruling was made without any showing by the defendants in opposition thereto.[65]

It was also held in an early case that in the absence of any showing in a bill of exceptions or statement of facts that the appointment of a guardian *ad litem* for certain children was made without any application therefor on their part, it will be presumed that the appointment was regularly made.[66]

The overruling of a motion for a new trial for newly discovered evidence will not be disturbed when the showing made is not embodied in a bill of exceptions or statement of facts.[67]

In the absence of a bill of exceptions or statement of facts the supreme court cannot review the action of the lower court in denying an application by a mother for provision for the support of children, awarded to her upon an appeal to the supreme court, by which appeal the cause had been remanded with directions to the lower court to make such provision as it deemed necessary, with other discretionary powers.[68]

When an objection is raised to the absence of a defendant in a criminal case during the examination of

[64] Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004.
[65] Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.
[66] Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.
[67] Seattle Lumber Co. v. Sweeney, 43 Wash. 1, 85 Pac. 677.
[68] Kane v. Miller, 43 Wash. 354, 86 Pac. 568.

a portion of the jury, such absence should be shown by a bill of exceptions or statement of facts, if it does not otherwise appear of record, and cannot be shown by affidavits filed in the supreme court.[69]

When an objection is raised to a special venire of twelve jurors upon the ground that a thirteenth man was substituted by the sheriff for a juror who was excused, the substitution should be shown by a bill of exceptions or statement of facts when it does not otherwise appear of record.[70]

A challenge to a juror cannot be reviewed unless all nonrecord matters relating to the challenge are embodied in a bill of exceptions or statement of facts.[71]

An alleged error relating to the oath of a jury should be shown by embodying in a bill of exceptions or statement of facts all facts, matters and proceedings upon which the alleged error is based.[72]

The revocation of letters of administration will not be reviewed in the absence of a bill of exceptions or statement of facts showing all nonrecord matters which are material to a review of the alleged error.[73]

Upon appeal from an order appointing a receiver, the pleadings will be deemed amended in the absence of a bill of exceptions or statement of facts embodying the evidence.[74]

Judgment by default for not answering within the time prescribed by the rules of court after the overruling of a demurrer to the complaint will not be disturbed on appeal when there is nothing in the record

[69] State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.
[70] State v. Shuck, 38 Wash. 270, 80 Pac. 444.
[71] McAllister v. Territory, 1 Wash. Ter. 360.
[72] Hartigan v. Territory, 1 Wash. Ter. 447.
[73] Farnham's Estate, In re, 41 Wash. 570, 84 Pac. 602.
[74] Cole v. Price, 22 Wash. 18, 60 Pac. 153.

showing that the appellant was entitled to an extension of time for answering.[75]

In the absence of a bill of exceptions or statement of facts embodying the evidence, a judgment denying a writ of mandate will not be disturbed even though a complete defense may not have been interposed by answer or demurrer.[76]

An objection that oral instructions were given cannot be considered when the record fails to show that any were given orally.[77]

When the alleged error is a misjoinder of causes of action not appearing upon the face of the record, all material nonrecord matters showing the misjoinder should be embodied in a bill of exceptions or statement of facts.[78]

The separation of the jury when urged as error should be shown by a bill of exceptions or statement of facts when it does not otherwise appear of record.[79]

Alleged error of the lower court in admitting a letter in evidence cannot be considered when neither the letter nor its contents are embodied in a bill of exceptions or statement of facts.[80]

Exceptions to a cost bill cannot be reviewed where the evidence on the hearing is not brought up by a bill of exceptions or statement of facts, and counsel do not agree as to what matters were considered by the court.[81]

[75] Ferguson v. Hoshi, 25 Wash. 664, 66 Pac. 105.

[76] Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95.

[77] Hall v. Union Central Life Ins. Co., 23 Wash. 610, 83 Am. St. Rep. 844, 51 L. R. A. 288, 63 Pac. 505.

[78] Huggins v. Sutherland, 39 Wash. 552, 82 Pac. 112.

[79] Maling v. Crummey, 5 Wash. 222, 31 Pac. 600.

[80] Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935.

[81] Ames v. Farmers & Mechanics' Bank, 48 Wash. 328, 93 Pac. 530.

When no objection has been made to the sufficiency of a pleading in the lower court, and its sufficiency is challenged in the supreme court, the evidence should be brought to the appellate court by a bill of exceptions or statement of facts, when evidence has been introduced in the cause, and a judgment rendered, in order to show that the defect has not been cured. If the evidence is not so brought to the appellate court, the pleading will be construed with every intendment in its favor.[82]

The statute provides that "depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof."[83]

It is therefore the general rule that depositions and other written evidence on file are not a part of the record; and when necessary to the review of a cause, must be embodied in a bill of exceptions or statement of facts.[84]

When, therefore, depositions and other written evidence on file are not embodied in the original bill or statement, and amendments are not proposed thereto,

[82] State ex rel. Sander v. Jones, 20 Wash. 576, 56 Pac. 369.

[83] Rem. & Bal. Code, § 390. See § 11, *supra*.

[84] Chapin v. Bokee, 4 Wash. 1, 29 Pac. 936; Likens v. Cain, 4 Wash. 307, 30 Pac. 80; State ex rel. Van Name v. Board of Directors, 14 Wash. 222, 44 Pac. 270; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362; Hoskins v. Barker, 33 Wash. 706, 74 Pac. 1135; Shorno v. Doak, 45 Wash. 613, 88 Pac. 1113. See, in further support of the rule, the numerous cases relating to affidavits which have already been cited in this section; Crane v. Dexter Horton & Co., 5 Wash. 479, 32 Pac. 223.

and the bill or statement is duly settled and certified, they cannot be considered, even though embodied in the transcript; for it will not be presumed from the mere fact that they were filed in the lower court and embodied in the transcript on appeal that they were read and admitted in evidence, and are matters which occurred in the cause; and the certificate will be conclusive.

Respondent, if he deems them material to a proper consideration of the cause on appeal, should, by a proposed amendment, have them embodied in the original bill or statement; and if he does not do so, his objections to the bill or statement because of the omission will not be sustained.[85]

To this general rule, however, that depositions and other written evidence on file are not a part of the record, and when necessary to the review of a cause, must be embodied in a bill of exceptions or statement of facts, there are two exceptions. One of these is statutory; and the other has its existence by virtue of judicial decisions. And, first, with regard to the statutory exception.

The statute provides that all reports of referees or commissioners, with the testimony and other evidence returned into court therewith, shall, upon being filed in the cause, become a part of the record in the cause, for all the purposes thereof and of any appeal therein; and that it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts.[86]

Pursuant to this provision it is, therefore, held that all reports of referees or commissioners, with the testimony and other evidence returned into court therewith,

[85] Swift v. Swift, 39 Wash. 600, 81 Pac. 1052.

[86] Rem. & Bal. Code, § 395. See § 16, *supra*.

are, when filed, a part of the record, and need not be embodied in a bill of exceptions or statement of facts.[87]

The testimony and other evidence must, however, be returned into court with his report, *by the referee or commissioner.* If transcribed and filed by one of the parties it is not a part of the record, and in such a case must be embodied in a bill of exceptions or statement of facts.[88]

Secondly, with reference to the exception which exists by virtue of judicial decisions.

It is well settled that a motion is a part of the record, and that an affidavit which is clearly identified as a part of the motion to which it is attached thereby becomes a part of the record, and need not be embodied in a bill of exceptions or statement of facts.[89]

In an early case the question whether a motion is a part of the record was raised, but its determination was avoided.[90]

In a later case, however, it was held that a motion was not a part of the record, and should, therefore, when deemed necessary to the proper consideration

[87] See Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462; Healy v. Seward, 5 Wash. 319, 31 Pac. 874; Savings, Loan & Building Co. v. Jones, 9 Wash. 434, 37 Pac. 666.

[88] State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027.

[89] State v. Vance, 29 Wash. 435, 70 Pac. 34; Richardson v. Richardson, 43 Wash. 634, 86 Pac. 1069; Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229. See, also, the following cases where the rule was recognized: Chevalier & Co. v. Wilson, 30 Wash. 227, 70 Pac. 487; Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795.

[90] See Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449.

of the cause on appeal, be embodied in a bill of exceptions or statement of facts.[91]

§ 45. (d) The Method of Embodying Depositions and Other Written Evidence on File.—Depositions and other written evidence on file, except, of course, reports of referees or commissioners, with the testimony and other evidence returned into court therewith by the referees or commissioners and filed, and affidavits which have been made a part of the motions to which they are attached, which, as has just been shown, are already a part of the record, are appropriately referred to in the bill or statement by a simple statement therein that the exhibit or deposition, giving the mark of identification, was offered and received in evidence; and this is all that is necessary to make them a part of the bill or statement.[92]

Their attachment to the bill or statement, though proper, is not essential.[93]

The statute relating to the subject reads as follows: "Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies

[91] See State v. Howard, 15 Wash. 425, 46 Pac. 650.

[92] Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Thornely v. Andrews, 40 Wash. 580, 111 Am. St. Rep. 983, 1 L. R. A., N. S., 1036, 82 Pac. 899; Pennsylvania Mortgage & Investment Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246; Templeman v. Evans, 35 Wash. 302, 77 Pac. 381.

[93] Thornely v. Andrews, 40 Wash. 580, 111 Am. St. Rep. 983, 1 L. R. A., N. S., 1036, 82 Pac. 899; Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Pennsylvania Mortgage & Investment Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246; Templeman v. Evans, 35 Wash. 302, 77 Pac. 381. See, also, Jones v. Herrick, 33 Wash. 197, 74 Pac. 332.

thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof." [94]

At first glance it would seem that the rule is quite out of harmony with the statutory provision; and inasmuch as the decisions are silent upon the subject, a brief investigation regarding the reason for the rule will probably not be out of place.

Since the statute [95] provides that the first step in connection with the settlement of the bill or statement shall be the filing thereof and the service of a *copy thereof* on the adverse party; and since the statute above quoted provides for an appropriate reference to the exhibits or depositions in the bill or statement *as proposed*, that is, *as filed and served*, and for the attachment of the depositions or exhibits to the bill or statement *when it is certified*,—that is, not until the *last* step in connection with the settlement of the bill or statement is taken,—it is clear that the statute which provides for the filing of the original bill or statement and the service of a copy thereof on the adverse party does not contemplate that actual attachment is necessary either to the original bill or statement which is filed, or to the copy which is served; for if it did, the copy whose service is provided for would not be a copy, and the original which is provided for would not be complete when filed. It is therefore also clear that *in so far as the duties which are imposed by the statute upon the appellant are concerned*, the exhibits or depositions become a part of the bill or statement when they are appropriately referred to therein.

[94] Rem. & Bal. Code, § 390. See § 11, *supra*.

[95] Rem. & Bal. Code, § 389. See § 10, *supra*.

The attachment of the exhibits or depositions is a matter which is placed by the statute *under the supervision and control of the judge;* and the statute is not, therefore, to be construed as contemplating that an omission or neglect on the part of the judge regarding a matter which it is his duty to supervise and control will, in any manner, affect an embodiment which is already perfect so far as a compliance with the statute by an appellant can make it perfect.

The provision that "when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement" is, therefore, to be construed as a mere direction that *the judge may, if he wishes,* attach the exhibits or depositions to the bill or statement, or cause them to be attached thereto, at the time of the certification; and that a failure to do so cannot, in any event, affect an embodiment of the same which is already perfect.

In consonance with this view of the rule, it is held that an objection that the exhibits or depositions were not attached when the bill or statement was served, or that copies thereof were not attached when the bill or statement was served, is not tenable.[96]

The rule that the depositions or exhibits must be appropriately referred to implies that the *depositions or exhibits themselves* must be properly marked for identification so that an appropriate reference *can be made.*[97]

In an early case which was decided under former statutes it was held that in equitable causes the origi-

[96] Thornely v. Andrews, 40 Wash. 580, 111 Am. St. Rep. 983, 1 L. R. A., N. S., 1036, 82 Pac. 899; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Pennsylvania Mortgage & Investment Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246.

[97] Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287.

nal exhibits should be sent up on appeal, and not copies thereof.[98]

It is unquestionably the best practice not only to appropriately refer to the exhibits or depositions in the bill or statement, but also to request the judge to attach them, or cause them to be attached to the bill or statement at the time of the certification; for when they are not attached, they are liable to be misplaced, and it has been held that when they are not attached to the bill or statement, nor transmitted to the court, the bill or statement will, of necessity, be disregarded.[99]

They may be attached by counsel before the certification, or by the judge.[100]

They may also be attached by the clerk.[101]

In one case where exhibits were not attached, and were missing, the court voluntarily postponed its determination of a cause upon the merits, and took the pains to write a separate opinion for the express purpose of fixing a period within which the record might be supplied. But this is a solitary instance of extreme leniency, a repetition of which can hardly be expected in view of the voluminous business before the court; and especially in view of the fact that such a state of things can readily be avoided by the exercise of ordinary care in securely attaching the exhibits to the bill or statement at the time of its certification.[102]

Since it is not necessary to attach them to the bill or statement, and since their transmission to the su-

[98] State ex rel. Quade v. Allyn, 2 Wash. 470, 27 Pac. 233.

[99] State ex rel. Van Name v. Directors, 14 Wash. 222, 44 Pac. 270.

[100] Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186.

[101] Pennsylvania Mortgage & Investment Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246.

[102] See Morse v. Ely, 21 Wash. 708, 61 Pac. 1135.

preme court with the other papers in the case is all that is necessary, it seems to be held that their *attachment to* the transcript is not improper.[103]

But while they may be *attached to* the transcript, they cannot be *embodied in* the transcript.[104]

In the following case it would appear that they were *embodied in* the transcript, and that the court refused to strike them from the record for the reasons that they were accurately identified and that the bill or statement was duly certified.[105]

The reader's attention is also called to the following statement of the court in a later case: "The exhibits became a part of the record when they were introduced and received as evidence in the case."[106]

This statement is, of course, erroneous; for if it were true, it would not be necessary to make them a part of the bill or statement. Besides, it appears from the case itself that the exhibits were attached to the bill or statement.

The case of State v. Hyde, *supra*, is either a very lenient case, or the exhibits were *attached to* the transcript.

In any event, an occasional lenient decision, or an occasional slip of the pen, must not be understood as

[103] Templeman v. Evans, 35 Wash. 302, 77 Pac. 381. See, also, Jones v. Herrick, 33 Wash. 197, 74 Pac. 332, where such practice seems to be impliedly sustained.

[104] Swift v. Swift, 39 Wash. 600, 81 Pac. 1052; Shorno v. Doak, 45 Wash. 613, 88 Pac. 1113; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362; Hoskins v. Barker, 33 Wash. 706, 74 Pac. 1136. See, also, Likens v. Cain, 4 Wash. 307, 30 Pac. 80; Chapin v. Bokee, 4 Wash. 1, 29 Pac. 936.

[105] State v. Hyde, 22 Wash. 551, 61 Pac. 719.

[106] Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071.

affecting the true rule as shown by the decisions as a whole.

Depositions and other evidence on file may also be made a part of the bill or statement by the embodiment of copies thereof in the bill or statement; and an embodiment of copies is, in itself, a direction that copies may be substituted for the originals.[107]

§ 46. (e) What must not be Embodied in the Bill or Statement.—Since it is the office of a bill of exceptions or statement of facts to embody in the record all material facts, matters and proceedings which have occurred in the cause, and which are not already a part of the record, it is evident that the bill or statement cannot legitimately embody any part of the record, or any facts, matters and proceedings which are *not material* to a determination of the question or questions raised on appeal, even though they occurred in the cause.

A definite knowledge of what constitutes the record is, therefore, necessary to an intelligent preparation of the bill or statement.

The statutory provisions relating to this subject are set forth in full in previous sections of this work.[108]

From these statutory provisions, and from decisions of the court which have been considered in section 44 of this work, the record (independent, of course, of the bill or statement) may be defined to be all the files of the superior court in the particular cause, including reports of referees or commissioners, with the testimony and other evidence returned into court therewith by the referees or commissioners, and filed, and affidavits which have been made a part of the motions to

[107] O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692.

[108] See §§ 11, 16, 19, 21, *supra.*

which they are attached, but *excluding* all other depositions or written evidence on file.

These properly belong in the transcript of the record which is prepared and certified by the clerk.

The following, therefore, are the principal things which should not be embodied in the bill or statement:

1. The summons.

2. The pleadings, which consist of the complaint, answer, demurrers and reply.

Thus, upon appeal from a judgment in a cause tried upon complaint and demurrer, a bill of exceptions or statement of facts is unnecessary, as the complaint and demurrer constitute a portion of the record in the cause.[109]

When a cause has been determined on the pleadings, a bill of exceptions or statement of facts is unnecessary.[110]

When the error assigned is the judgment of dismissal of a complaint, which is substantially the sustaining of a demurrer thereto, a bill of exceptions or statement of facts is unnecessary.[111]

Or where the error assigned is the striking of an answer.[112]

The rule was relaxed in an early case.[113]

[109] See State ex rel. Tremblay v. McQuade, 12 Wash. 554, 41 Pac. 897.

[110] Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009.

[111] Long v. Billings, 7 Wash. 267, 34 Pac. 936.

[112] Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449. That it is not necessary to incorporate in a bill of exceptions or statement of facts matters which are already a part of the record, such as pleadings and other matters of record, see Seattle & Montana Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567.

[113] See Savings, Loan & Building Co. v. Jones, 9 Wash. 434, 37 Pac. 666.

The *ultimate facts* of a cause may, no doubt, by stipulation of the parties, be reduced to the form of agreed facts, and when filed, become a part of the record in the cause; for *ultimate facts* so set forth are plainly nothing more nor less than *admitted pleadings* reduced to a concrete form, and are therefore properly a part of the record.[114]

3. All reports of referees or commissioners, with the testimony and other evidence returned into court therewith.[115]

The testimony and other evidence must, however, be returned into court with his report, *by the referee or commissioner.* If transcribed and filed by one of the parties, it is not a part of the record, and in such a case must be embodied in a bill of exceptions or statement of facts.[116]

4. All findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him.[117]

Since findings of fact and conclusions of law made in writing by a judge, referee or commissioner, and signed by him, become, when filed, a part of the rec-

[114] In this connection see the following cases: Fife v. Olson, 5 Wash. 789, 32 Pac. 766; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133; Yakima Water, Light & Power Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471; Townsend Gas & Electric Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778; O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039.

[115] See Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462; Healy v. Seward, 5 Wash. 319, 31 Pac. 874; Savings, Loan & Building Co. v. Jones, 9 Wash. 434, 37 Pac. 666.

[116] See State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027.

[117] State ex rel. Buddress v. Rohde, 8 Wash. 362, 36 Pac. 276.

ord, it follows that a bill of exceptions or statement of facts is unnecessary *when the findings are full and complete*, and the question to be determined is whether or not the conclusions of law and decree are warranted by the findings of fact.[118]

The findings, however, *must be full and complete*, or this rule will not apply; for where the findings are *merely defective*, and the contention is that the decree is not supported by the findings, it will be presumed *in the absence of the evidence* that the decree is supported by the evidence, unless the contrary affirmatively appears.[119]

But want of full findings will be excused when modesty demands it; and those made will be given a liberal construction to support the decree.[120]

5. All charges to a jury made wholly in writing.

The statutes of 1893 provide that "all charges to a jury made wholly in writing" shall be a part of the record.[121]

[118] Howard v. Shaw, 10 Wash. 151, 38 Pac. 746; Watson v. Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; Hill v. Sawyer, 12 Wash. 658, 40 Pac. 414; State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 Pac. 346; Brown v. Kern, 21 Wash. 211, 57 Pac. 798; Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003; Seattle v. Smithers, 37 Wash. 119, 79 Pac. 615; First National Bank of Seattle v. Coles, 40 Wash. 528, 82 Pac. 892.

[119] Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Gould v. Austin, 52 Wash. 457, 100 Pac. 1029; Clambey v. Copland, 52 Wash. 580, 100 Pac. 1031; Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392; Nelson v. McPhee, 59 Wash. 103, 109 Pac. 305; Holden v. Romano, 61 Wash. 458, 112 Pac. 489.

[120] Bloom v. Bloom, 57 Wash. 23, 135 Am. St. Rep. 965, 106 Pac. 197.

[121] Laws 1893, p. 117, § 15; Rem. & Bal. Code, § 395. See § 16, *supra*.

These words, when taken in their usual and ordinary sense, are not of doubtful import, and plainly mean all charges which are first reduced to writing and thereafter read to a jury and filed in the cause; and it was accordingly held, prior to a subsequent statutory innovation, that a charge to a jury which was partly written and partly oral was not a charge in writing, notwithstanding the fact that a stenographer was present who took down the charge as given.[122]

But subsequently the following statutory innovation was made:

"When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; . . . . *Provided further, That whenever in the trial of any cause, a stenographic report of the evidence and the charge and instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section.*" [123]

The question then arose, What constitutes a charge or instruction in writing within the meaning of this section? And the court in response thereto held:

First, that a charge or instruction which is delivered orally and reduced to writing by two stenographers, one of whom is employed by plaintiff and the other by defendant, is *not* a charge or instruction in writing within the meaning of the section.[124]

[122] State v. Miles, 15 Wash. 534, 46 Pac. 1047.

[123] Laws 1903, p. 119, § 1, subd. (4).

[124] State v. Mayo, 42 Wash. 540, 7 Ann. Cas. 881, 85 Pac. 251.

Secondly, that a charge or instruction which is delivered orally and reduced to writing by a stenographer who is employed by *both parties is* a charge or instruction in writing within the meaning of the section.[125]

In a later case, however, where the charge or instruction was delivered orally and reduced to writing by a stenographer who was employed by *both parties*, the court failed to note the case of Collins v. Huffman, *supra*, and followed the early case of State v. Miles, *supra*, and cited the case of State v. Mayo, *supra*, in support of its holding, and ruled that a charge or instruction which is delivered orally and reduced to writing by a stenographer who is employed by *both parties, is not* a charge or instruction in writing within the meaning of the section.[126]

The court, however, later overruled the case last cited, and approved the rule which was announced in the case of Collins v. Huffman, *supra*.[127]

This statutory innovation was, however, later repealed, and the following provision substituted in its stead:

"The court must reduce the charge to be given the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury. Either party may request such instructions as he deems material to the case, and the court may hear them upon the propriety of the requested instructions before

[125] Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

[126] McIntosh v. Sawmill Phoenix, 49 Wash. 152, 94 Pac. 930.

[127] Sturgeon v. Tacoma Eastern R. R. Co., 51 Wash. 124, 98 Pac. 87. See, also, Schon v. Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25; State v. Erickson, 54 Wash. 472, 103 Pac. 796.

finally settling the charge that he will give. If a stenographer shall be in attendance upon the trial of the cause, the court shall have the right to dictate the charge he desires to give to such stenographer, and to have the stenographer reduce the same to writing for him and a copy for each of the parties plaintiff and defendant. And the cost thereof shall be taxed as other costs in the action." [128]

The plain intent of this present statutory provision is that a charge or instruction to a jury is in writing when it is reduced to writing and read to the jury and filed in the cause, whether it is reduced to writing by the judge, or by the stenographer who is present at the trial and who reduces it to writing at the dictation of the judge, or by a party when the proposed charge or instruction is approved by the judge.

The written instructions become a part of the record when filed in the cause, and it is neither necessary nor proper to embody them in the bill or statement.[128a]

Formerly instructions in writing were not a part of the record.[129]

6. All instructions requested in writing to be given as part of a charge.

These become a part of the record when filed in the cause. If, therefore, they are not filed in the cause

[128] Rem. & Bal. Code, § 339, subd. (4); Laws 1909, p. 184, § 1, subd. (4). See § 31, *supra.*

[128a] State v. Phillips, 59 Wash. 252, 109 Pac. 1047.

[129] Medcalf v. Bush, 4 Wash. 386, 30 Pac. 325; Thompson v. Washington Territory, 1 Wash. Ter. 548; Cunningham v. Seattle Electric Ry. & Power Co., 3 Wash. 471, 28 Pac. 745; Puget Sound Iron Co. v. Worthington, 2 Wash. Ter. 472, 7 Pac. 882, 886; Yelm Jim v. Territory, 1 Wash. Ter. 63; Brown v. Forest, 1 Wash. Ter. 201; Oregon R. R. & Nav. Co. v. Galliher, 2 Wash. Ter. 70, 3 Pac. 615.

and brought up as a part of the record, they cannot be considered.[130]

An instruction requested in writing and filed with the clerk is already a part of the record, and should not be embodied in a bill of exceptions or statement of facts.[131]

7. All verdicts, general or special.

8. All rulings and decisions embodied in a written judgment, order or journal entry in the cause, together with all exceptions, if any, taken to any thereof.[132]

Thus, the rulings of the court upon demurrers may be reviewed upon the transcript, without incorporating in the record any bill of exceptions or statement of facts, or the findings and conclusions of the lower court.[133]

Exceptions to rulings and decisions embodied in a written judgment, order or journal entry in a cause are, however, neither necessary nor proper.[134]

9. "When two or more causes shall have been consolidated it shall not be necessary, for any purposes of

[130] Lemman v. Spokane, 38 Wash. 98, 80 Pac. 280; Northern Pacific Ry. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

[131] Tergeson v. Robinson Mfg. Co., 48 Wash. 294, 93 Pac. 428; State v. Phillips, 59 Wash. 252, 109 Pac. 1047.

[132] Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449.

[133] Chase National Bank of New York v. Hastings, 20 Wash. 433, 55 Pac. 574.

[134] Rem. & Bal. Code, § 382. See § 3, *supra;* Taylor v. Spokane Falls & Northern Ry. Co., 32 Wash. 450, 73 Pac. 499; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107. See, also, Long v. Billings, 7 Wash. 267, 34 Pac. 936. In the following cases exceptions were unnecessarily embodied in the record entry: Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Gottstein v. Simmons, 59 Wash. 178, 109 Pac. 596. In the following case an exception was

an appeal which concerns only one or more, and not all of the original causes, to embody in a bill of exceptions or statement of facts any fact, matter or proceeding that relates solely to an original cause with which the appeal is not concerned." [135]

But one bill of exceptions or statement of facts is necessary when two or more causes are consolidated and but one judgment rendered.[136]

10. The statute also provides that "all papers and matters *hitherto deemed a part of the record*, shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry, a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts." [137]

This section evidently refers to an earlier statute which provides for the judgment-roll.

The provisions of the statute relating to the judgment-roll have already been noted in this section.[138]

11. The statutes provide that only the material facts, matters and proceedings which have occurred in a cause and are not already a part of the record, should be embodied in a bill of exceptions or statement of facts.

unnecessarily taken and embodied in what was intended to be a bill of exceptions: Waite v. Stroud, 9 Wash. 333, 37 Pac. 324.

[135] Rem. & Bal. Code, § 396. See § 17, *supra.*

[136] Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822.

[137] Rem. & Bal. Code, § 395. See § 16, *supra.*

[138] For the provisions themselves, see Rem. & Bal. Code, § 442. See § 19, *supra.*

It is therefore the rule that facts, matters and proceedings which are *not material* to a decision of the question or questions raised on appeal, even though they occurred in the cause and are not already a part of the record, should not be embodied in the bill or statement.[139]

The written opinion of the judge is not material, and cannot, therefore, be made a part of the record.[140]

12. Facts, matters and proceedings not occurring in a cause, but which have been injected into a bill of exceptions or statement of facts with the idea or hope of thus making them a part of the record, will not be considered. Such matters cannot be embodied in the bill or statement.[141]

Nor can they by any device be made a part of the *record* either for the purpose of supplying evidence,[142] or for the purpose of supplying a deficient record as, for example, a lost or missing judgment.[143]

13. Exceptions to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury,

[139] Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022; Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Seavey v. Seattle, 17 Wash. 361, 49 Pac. 517; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Smith v. Glenn, 40 Wash. 262, 82 Pac. 605.

[140] King County v. Hill, 1 Wash. 63, 23 Pac. 926.

[141] North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 63 Wash. 376, 115 Pac. 855. See, also, Brandenstein v. Way, 17 Wash. 293, 49 Pac. 511; Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911.

[142] Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533.

[143] Reichenbach v. Sage, 8 Wash. 250, 35 Pac. 1081.

which are duly noted in the margin or at the foot of the report or decision.

Since all reports of referees or commissioners, with the testimony and other evidence returned into court therewith by the referees or commissioners, and filed, and all findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him, are already a part of the record; and since the statute provides that the exceptions thereto may be preserved by noting them in the margin or at the foot of the report or decision, it plainly follows that such exceptions when duly noted are already a part of the record, and that they should not be embodied in a bill of exceptions or statement of facts. The decisions assume this to be the rule as a matter of course.[144]

14. Written exceptions to the report of a referee or commissioner or to the findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, when such exceptions are duly taken and filed.

These also are treated and considered as already a part of the record.[145]

15. All files which relate to appellate proceedings.[146]

[144] See Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332; Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421. See Rem. & Bal. Code, §§ 383, 395. See §§ 4 and 16, *supra.*

[145] See Fisher v. Kirschberg, 17 Wash. 290, 49 Pac. 488; Schlotfeldt v. Bull, 22 Wash. 362, 60 Pac. 1126; Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773; Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199. See, also, Rem. & Bal. Code, §§ 383, 395. See §§ 4, 16, *supra.*

[146] Rem. & Bal. Code, § 1729. See § 21, *supra.* See, also, Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

16. Written motions duly filed with the clerk of the superior court.

In an early case the question whether a motion is a part of the record was raised, but its determination was avoided.[147]

In a later case, however, it was held that a motion was not a part of the record, and should, therefore, when deemed necessary to the proper consideration of the cause on appeal, be embodied in a bill of exceptions or statement of facts.[148]

It is now well settled, however, that a written motion which is duly filed with the clerk of the superior court is a part of the record.[149]

17. Proofs of service of papers and documents when the same have been duly filed with the clerk of the superior court.

These are not considered as evidence *in a cause*, but rather as proof of procedure, and are, therefore, treated as a part of the record.[150]

[147] See Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449.

[148] State v. Howard, 15 Wash. 425, 46 Pac. 650.

[149] State v. Vance, 29 Wash. 435, 70 Pac. 34; Richardson v. Richardson, 43 Wash. 634, 86 Pac. 1069; Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229; Chevalier & Co. v. Wilson, 30 Wash. 227, 70 Pac. 487; Swanson v. Pacific Co., 60 Wash. 87, 110 Pac. 795. See, also, the following case where the court held that a bill of exceptions or statement of facts is not necessary when the only question to be reviewed is the power of the lower court to ingraft an order for the sale of an appellant's property upon the original judgment. The court says: "The record here consists of the original judgment, the motion and order of sale, the notice of appeal, the order fixing a *supersedeas* bond, and the bond. . . . . The *record* here presents this question": Exposition Amusement Co. v. Raeco Products Co., 55 Wash. 314, 104 Pac. 509.

[150] See Whitney v. Knowlton, 33 Wash. 319, 74 Pac. 469.

18. Written notices on file.

These are also a part of the record. Thus, a notice of motion is treated as a part of the record.[151]

19. Requested findings of fact and conclusions of law which have been duly filed and refused.

These are treated and considered as already a part of the record.[152]

20. Written exceptions to the refusal to make requested findings and conclusions which have been duly taken and filed.

These, as well as exceptions which are noted in the margin or at the foot of the refusal, are treated and considered as already a part of the record.[153]

21. Stipulations in writing.

These, when filed, become a part of the record.[154]

Stipulations will not, however, be allowed to perform the office of a bill of exceptions or statement of facts. The court in considering this subject has said: "Appellant claims that the testimony in this case, by reason of the stipulation of attorneys, was already a part of the record, but we do not think that the *testimony* would be a part of the record. The stipulation that such testimony might be considered by the court might be a part of the record, but not the testimony submitted under the stipulation; the testimony is always

[151] Waite v. Stroud, 9 Wash. 333, 37 Pac. 324.

[152] Remington v. Price, 13 Wash. 76, 42 Pac. 527; Slayton v. Felt, 40 Wash. 1, 82 Pac. 173.

[153] Pederson v. Ullrich, 50 Wash. 211, 96 Pac. 1044; Peterson v. Johnson, 20 Wash. 497, 55 Pac. 932; Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940.

[154] Jones & Co. v. Spokane Valley Land & Water Co., 44 Wash. 146, 87 Pac. 65; Spencer v. Alki Point Transp. Co., 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

brought up under a statement of facts, and only becomes a part of the record when it is made so by settlement." [155]

The statute provides that, *in one particular instance*, a stipulation in writing may, when duly filed, perform the office of a bill of exceptions or statement of facts. Thus, the statute provides: "If such judge shall die or remove from the state while in office or afterward, within the time within which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled *by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office.*" [156]

In so far as this section confers upon the parties under such circumstances the right to *settle* the bill or statement, it is, no doubt, unobjectionable, for the *settlement* of the bill or statement is a *ministerial* act; but in so far as it attempts to delegate to the parties the power of *certifying* the bill or statement, it is clearly unconstitutional, for the *certification* of the bill or statement is a *judicial function.*[157]

Oral stipulations will not be considered by the supreme court, unless, of course, like other matters which are not already a part of the record, they have been

[155] Howard v. Ross, 3 Wash. 292, 28 Pac. 526; Madigan v. West Coast Fire & Marine Ins. Co., 3 Wash. 454, 28 Pac. 1027. See, also, State v. Maines, 26 Wash. 160, 66 Pac. 431.

[156] Rem. & Bal. Code, § 392. See § 13, *supra.*

[157] See §§ 89, 109.

embodied in a bill of exceptions or statement of facts.[158]

The court will not allow its time to be taken up with controversies over oral agreements; and will not, therefore, consider affidavits relating to them. If the stipulation is not recorded in a bill of exceptions or statement of facts, it should be reduced to writing and signed by the parties and duly filed in the cause.[159]

22. Transcripts which are required to be certified to a superior court on the removal of a cause thereto from an inferior tribunal are treated and considered as already a part of the record.

These transcripts are, no doubt, already a part of the record in so far as their contents are composed of matters which are *by the express provisions of the statutes* already a part of the record.

Thus, it has been held that under Laws of 1895, page 562, section 82, providing that where an appeal is taken from the Board of State Land Commissioners to the superior court, the board "shall prepare and certify under the hand of its secretary and the seal of such board, a true copy of all the pleadings and papers and record entries connected with said contest, *except the evidence used in said contest before said board,* to the clerk of the superior court of the county to which said appeal has been taken," such record, *as well as affidavits filed with the board,* may properly, on appeal from the decision of the superior court, be sent to the supreme court as the transcript in the cause certified by the clerk of the superior court; and that it is not

[158] See Livesley v. Pier, 9 Wash. 658, 38 Pac. 156; State ex rel. Smith v. Parker, 9 Wash. 653, 38 Pac. 156; Costello v. Drainage District No. 1, King County, 44 Wash. 344, 87 Pac. 513.

[159] See Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

necessary to embody it in a bill of exceptions or statement of facts.[160]

The above decision is no doubt correct in so far as it treats as a part of the record the pleadings and record entries and such other papers as are, by the express provisions of the statutes, already a part of the record; but in so far as it treats the *affidavits* as parts of the record, it is clearly in error. These affidavits were evidently used as evidence in the trial of the cause on its merits; and the statute expressly excepts from the transcript "*the evidence used in said contest before said board.*"

The statute also expressly provides that "the hearing and trial of said appeal in said court shall take place *de novo* before the court without a jury, upon the *pleadings* so certified."

The general rule that affidavits are not already a part of the record, and that they must, when material to a review of the question or questions raised on appeal, be embodied in a bill of exceptions or statement of facts, is, therefore, not affected by this statute.

The court in its desire to fully pass upon the merits of the cause undertakes to distinguish the case from Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141, but it is very clear that the distinction does not exist.

23. Finally, all other files of the superior court in the particular cause which fall within the record as defined at the beginning of this section.

The notice of appeal and proof of service are parts of the record, and are, therefore, properly embodied in the transcript.[161]

[160] Oliver v. Dupee, 16 Wash. 634, 48 Pac. 351.

[161] Ward v. Springfield Fire & Marine Ins. Co., 12 Wash. 631, 42 Pac. 119.

An oral notice of appeal duly noted in the journal by the clerk should not be embodied in the bill or statement.[162]

§ 47. (f) The Costs of the Preparation of the Bill or Statement.—The costs of the preparation of the bill or statement are regulated in part *by statute*, and in part *by judicial determination;* and are allowable as follows:

1. In civil actions and proceedings, *by virtue of the statute*, to the prevailing party who is without fault.

2. In criminal actions, *by virtue of a judicial determination*, to the defendant when he is successful on appeal.

The following is the statutory provision which relates to the present subject:

"Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the *prevailing party* in the supreme court, on any appeal in any *civil* action or proceeding as follows: . . . . any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action." [163]

[162] Elma v. Carney, 4 Wash. 418, 30 Pac. 732.

[163] Rem. & Bal. Code, § 1744. See § 28, *supra.*

It thus appears that, *by virtue of the statute*, costs for the preparation of the bill or statement in civil actions or proceedings are allowed to the prevailing party; and that to this general rule there is one exception, namely, that when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action.

The prevailing party must, however, be without fault; for the word "prevailing" implies a blameless as well as a successful party.

Thus, it has been held that upon an order of affirmance based upon a correction of the certificate to a bill or statement, no costs will be allowed to respondent where amendments were not proposed, and he waited several months before moving for a correction of the certificate.[164]

Costs are not, of course, allowable to a stranger to an action or proceeding. Thus, it has been held that the court has not the power to charge a county with the expense of a stenographer's notes of the testimony upon the trial of a civil action between individuals, although the case may involve many parties and conflicting rights.[165]

The statute expressly confines the allowance of costs for the preparation of the bill or statement to *civil actions or proceedings;* but it is held that the costs of the preparation of the bill or statement in a criminal case, *where the appellant is successful*, are taxable against the state. The reason which is assigned for the rule is that while the statutory right is doubtful,

[164] In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294.

[165] State ex rel. Rochford v. Superior Court, 4 Wash. 30, 29 Pac. 764.

the uniform and long-continued practice of allowing them has been acquiesced in by the legislature.[166]

Whether the state can be compelled to furnish a bill of exceptions or statement of facts on appeal, in any case, or under any circumstances, has not as yet been judicially determined under the present statutes. Since the enactment of the present statutes this question has been presented to the court in one case, but the point was not decided.[167]

In an early case which was decided under former statutes it was held that county commissioners cannot be compelled, for the benefit of the accused in a criminal prosecution, to advance money for a copy of a stenographer's report to be used on appeal.[168]

But this rule was immediately relaxed in favor of an accused in a capital case.[169]

The statute provides for the preparation, certifying, filing and forwarding by the clerk of a transcript of the record in criminal appeals prosecuted *in forma pauperis*, at the expense of the county; but does not provide for the preparation of a bill of exceptions or statement of facts at the expense of the county or state in any case.[170]

In no case, however, can a peremptory judgment direct that the costs of an appeal to be prosecuted by an accused be entered against a county without an appearance by or notice given to the county.[171]

[166] See State v. Rutledge, 40 Wash. 9, 82 Pac. 126.

[167] See State v. White, 40 Wash. 428, 82 Pac. 743.

[168] Stowe v. State, 2 Wash. 124, 25 Pac. 1085.

[169] See State ex rel. Coella v. Fenimore, 2 Wash. 370, 26 Pac. 807.

[170] See Rem. & Bal. Code, § 1729. See § 21, *supra*.

[171] See State ex rel. Langhorne v. Superior Court, 32 Wash. 80, 72 Pac. 1027.

It is apparent from the foregoing statute and decisions that the state has not the right to recover from a defendant in a criminal action either the whole or any part of the costs of an appeal.

In taxing the costs for the preparation of the bill or statement on appeal, not more than ten cents a folio can be allowed as disbursements for stenographer's fees in making a transcript of the evidence.[172]

In the above case the court says: "The statute has two limitations: if the amount paid or incurred as stenographer's fees is less than ten cents per folio, only the amount so paid or incurred can be recovered as costs; but if the amount paid or incurred equals or exceeds ten cents per folio, the amount to be recovered is limited to ten cents per folio.

"It may be true, as the appellant contends, that this sum will not reimburse him for the amount of his actual outlay, but that is not a matter with which the court can concern itself. The regulation of court costs is for the legislature, and that body must be appealed to if the costs allowed by it are either burdensome or insufficient; the courts can do no more than follow its mandate, so long as it acts within its constitutional powers." [173]

The cost bill should show the number of folios *by actual count;* for where no actual count of the folios is made, the clerk's estimate, made by counting a number of pages, and taking an average of these as an average of the whole, will be preferred to a party's estimate made by claiming a specified number of folios per page as the average because he had found that such was the general average of similar work.[174]

[172] Nelson v. McLellan, 34 Wash. 181, 75 Pac. 635.
[173] Nelson v. McLellan, 34 Wash. 181, 75 Pac. 635.
[174] Nelson v. McLellan, 34 Wash. 181, 75 Pac. 635.

Further definite rules respecting the costs which will be allowed for the preparation of the bill or statement cannot be given; for the adjustment of the costs on appeal is, in other respects, *by express statutory provision*, a matter which is wholly within the discretion of the supreme court. The costs in other respects will, therefore, be adjusted in each particular case in accordance with the court's ideas of what is just and fair.

CHAPTER V.

THE PROPOSAL OF THE BILL OR STATEMENT.

§ 50. Divisions of the Subject.
§ 51. The Necessity of Filing and Serving the Proposed Bill or Statement.
§ 52. The Precedence Which must be Observed and Followed in the Filing and Service of the Bill or Statement.
§ 53. The Proof of the Filing.
§ 54. The Kinds of Service Which are Provided for by Statute.
§ 55. The Meaning of the Phrase "Adverse Party."
§ 56. The Meaning of the Clause "Any Other Party Who has Appeared in the Cause."
§ 57. The Various Methods of Serving the Proposed Bill or Statement.
§ 58. Upon Whom It is Necessary to Serve the Proposed Bill or Statement.
§ 59. Proof of Service of the Proposed Bill or Statement.
§ 60. When the Proposed Bill or Statement must be Filed and Served in the Absence of Any Extension of Time.
§ 61. The Methods of Extending the Time for Filing and Serving the Proposed Bill or Statement.
§ 62. The Time Within Which the Proposed Bill or Statement must be Filed and Served When an Extension has Been Granted.
§ 63. The Place Where the Application for an Extension of Time may be Heard.
§ 64. The Judge Who may Make the Order Extending the Time, and to Whom, Therefore, the Application may be Made.
§ 65. The Place Where the Order Extending the Time may be Made.

§ 66. When the Time Within Which the Proposed Bill or Statement must be Filed and Served Begins to Run.
§ 67. How the Beginning of Such Time may be Postponed.
§ 68. The Method of Computing the Time Within Which the Proposed Bill or Statement must be Filed and Served.

§ 50. Divisions of the Subject.—By the proposal of the bill or statement is meant its submission as originally prepared, together with the amendments, if any, for settlement and certification.

The subject will therefore be considered in a twofold view: 1. With reference to the submission of the bill or statement as originally prepared, which will be the subject of the present chapter; 2. With reference to the submission of the amendments, which will be the subject of the following chapter. And first, with reference to the proposal of the bill or statement as originally prepared; and this must be *regular*. The subject will be considered as follows:

(a) With reference to the necessity of filing and serving the proposed bill or statement.

(b) With reference to the precedence which must be observed and followed.

(c) With reference to the proof of filing.

(d) With reference to the kinds of service provided for by the statute.

(e) The meaning of the phrase "adverse party."

(f) The meaning of the clause "any other party who has appeared in the cause."

(g) With reference to the various methods of serving the proposed bill or statement.

(h) Upon whom it is necessary to serve the proposed bill or statement.

(i) With reference to the proof of the service.

(j) With reference to the time when the proposed bill or statement must be filed and served in the absence of any extension of time.

(k) With reference to the methods of extending the time.

(l) With reference to the time when the proposed bill or statement must be filed and served when an extension has been granted.

(m) With reference to the place where the application for an extension of time may be heard.

(n) With reference to the judge who may make the order extending the time, and to whom, therefore, the application may be made.

(o) With reference to the place where the order extending the time may be made.

(p) When the time within which the proposed bill or statement must be filed and served begins to run.

(q) How the beginning of such time may be postponed.

(r) With reference to the method of computing the time within which the proposed bill or statement must be filed and served.

And first, with reference to

§ 51. (a) The Necessity of Filing and Serving the Proposed Bill or Statement.—The provision of the statute which relates to the necessity of filing and serving the proposed bill or statement reads as follows:

"A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, *file* it in the cause and *serve* a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause." [1]

[1] Rem. & Bal. Code, § 389. See § 10, *supra.*

This provision of the statute requiring the filing and service is mandatory; and if the so-called bill or statement is neither filed nor served, but merely forwarded to the supreme court with the other papers in the case, it will, on motion, be stricken from the cause.[2]

§ 52. (b) The Precedence Which must be Observed and Followed in the Filing and Service of the Bill or Statement.—The bill or statement must be filed before it is served. If the service precedes the filing, the bill or statement will, on motion, be stricken from the cause or disregarded.[3]

§ 53. (c) The Proof of the Filing.—There are no statutory regulations or rules of the supreme court upon this subject; but it is a rule, established by a uniform and long-continued practice, that the filing is proved by the filing marks of the clerk of the superior court, and that the supreme court will take judicial notice of such filing marks.[4]

Where there is an error in the date of the filing as shown by the filing marks, the true date of the filing may be shown by the affidavit of the clerk of the su-

[2] Case v. Ham, 9 Wash. 54, 36 Pac. 1050.

[3] Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241; Boyle v. Great Northern Ry. Co., 13 Wash. 383, 43 Pac. 344; Barkley v. Barton, 15 Wash. 33, 45 Pac. 654; State v. Yandell, 34 Wash. 409, 75 Pac. 988; State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

[4] Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Turner v. Bailey, 12 Wash. 634, 42 Pac. 115; Boyle v. Great Northern Ry. Co., 13 Wash. 383, 43 Pac. 344. See, also, McBroom & Wilson Co. v. Gandy, 18 Wash. 79, 50 Pac. 572.

perior court attached to the bill or statement and forwarded therewith to the supreme court.[5]

This rule is applicable to the proof of filing of all other papers with which this subject is concerned; and will therefore render any further consideration of such proof unnecessary.

§ 54. (d) The Kinds of Service Which are Provided for by the Statute.—The statute in providing that "a party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and *serve a copy thereof* on the adverse party, and shall also *serve written notice of the filing thereof* on any other party who has appeared in the cause," plainly contemplates two kinds of service, namely:

1. *Actual service* by the service of a copy of the original bill or statement on the adverse party; and

2. *Constructive service* by the filing of the original bill or statement with the clerk of the superior court, and by the service of written notice of the filing thereof on *any other party who has appeared in the cause.*

§ 55. (e) The Meaning of the Phrase "Adverse Party."—The phrase "adverse party" has a settled and well-defined meaning, and is held to mean every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor.[6]

[5] See Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411.

[6] Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505. See, also, Bruhn v. Steffins, 24 Wash. Dec. 78, 119 Pac. 29.

§ 56. (f) The Meaning of the Clause "Any Other Party Who has Appeared in the Cause."—This clause may be defined to be any party who has appeared in the cause, has an appealable interest therein, *and who may join in an appeal by reason of the fact that he is similarly affected by the ruling of the lower court.*[7]

If *literally* taken, it might include a party who has appeared and been dismissed; but such a construction would require the service of the notice of the filing of the bill or statement to be made upon *a stranger* to the cause, and this the statute does not contemplate in any case.[8]

If *literally* taken, it might, upon an appeal by a plaintiff, include a garnishee who has appeared in response to the writ issued at the instance of the plaintiff, and admitted a stated indebtedness, and who has thereafter been discharged from liability upon judgment being rendered in favor of the defendant; *for if a garnishee can be said to be a party to the principal action between the plaintiff and defendant, he is not in such a case an adverse party* for the reason that he is not, *although it be assumed that he has appeared in the case,* a party who will be affected by the appeal;

[7] Sipes v. Puget Sound Electric Ry. Co., 50 Wash. 585, 97 Pac. 723; Wilson v. Puget Sound Electric Ry. Co., 50 Wash. 596, 97 Pac. 727; Harris v. Puget Sound Electric Ry. Co., 50 Wash. 704, 97 Pac. 728; Iverson v. Bradrick, 54 Wash. 633, 104 Pac. 180; Exposition Amusement Co. v. Raeco Products Co., 55 Wash. 314, 104 Pac. 509; Beckman v. Brommer, 57 Wash. 436, 107 Pac. 190; Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795. See, also, Robertson Mortgage Co. v. Thomas, 63 Wash. 316, 115 Pac. 312.

[8] See Woelflen v. Lewiston-Clarkston Co., 49 Wash. 405, 95 Pac. 493; Sheehan v. Bailey Building Co., 42 Wash. 535, 85 Pac. 44.

nor is he "any other party who has appeared in the cause" within the meaning of the statute, for he is not one who has an appealable interest and who may join in the appeal.[9]

But it is not entirely clear that a garnishee *is* a party to the principal action between the plaintiff and defendant. The court in a comparatively late case seems to take the view that he is not. Thus, the court says: "The respondent moves to dismiss the appeal for the reason that certain persons who were summoned as garnishees in the court below, and who filed answers to the garnishee process in that court, were not served with the notice of appeal. *But these persons were in no sense parties to the action, and no right of theirs can be affected, however the case may be decided on this appeal.* They have therefore no legal right to appear in this court, either to controvert or sustain the judgment appealed from, and consequently there was no necessity for serving them with the appeal notice." [10]

From this case it is quite clear that whether a garnishee is a party to the principal action or not, a service of *anything* upon him is unnecessary when he has no appealable interest nor an interest which will be affected by an appeal.

If it is not necessary to serve him with the *notice of appeal*, on appeal by the plaintiff from a judgment in favor of the defendant, it certainly will not be necessary to serve him with *anything else* connected with the appeal.

[9] See Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505.

[10] Sudden & Christenson v. Morse, 48 Wash. 101, 92 Pac. 901.

If *literally* taken, it might include a coparty who has *not been* dismissed; for a coparty who has appeared in the cause may be one who will not have an appealable interest nor an interest which will or may be affected by the appeal; but it is also quite clear that service *of any kind* is unnecessary on a coparty who has no appealable interest nor any interest which will or may be affected by an appeal.[11]

He should, however, be served when he has an appealable interest, and is similarly affected by the ruling of the lower court, or when he has an interest which will or may be affected by the appeal.[12]

A plain treatment of the subject requires a brief consideration of a portion of the statutes relating to appeals.

The statutes relating to appeals and those relating to bills of exceptions and statements of facts are *in pari materia;* and it is self-evident that the service of the notice of appeal and the service, actual and constructive, of the bill or statement must be coextensive.

The statutes relating to appeals accordingly provide as follows:

"All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court

[11] Sipes v. Puget Sound Electric Ry. Co., 50 Wash. 585, 97 Pac. 723.

[12] Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterward dismissed. All parties who so join in an appeal after the notice is given or served shall be liable for the expenses thereof, and for costs and damages to the same extent and upon the same conditions as if they had originally joined in the notice. When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, *upon all parties who have appeared in the action or proceeding.*" [13]

The statutes relating to appeals also provide as follows: "If the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section 1718, serve written notice on the *prevailing party* or his attorney that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice he shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereof, in the journal of the court." [14]

[13] Rem. & Bal. Code, § 1720.

[14] Rem. & Bal. Code, § 1719.

There is a plain distinction between a "prevailing party" and an "adverse party." To *prevail* means to *overcome.* The phrase therefore contemplates an adversary *upon the face of the record.* To *prevail* also involves the idea of success, *at least to some extent.* A "prevailing party" may therefore be defined to be an adversary *upon the face of the record* to whom a judgment or order is favorable *at least to some extent,* and with which he is or *must be* content.

This definition, it is believed, is an accurate definition of the phrase as it is employed by the statutes in contradistinction to an *adverse party;* for it includes a plaintiff who is entirely successful, and who therefore *must be content;* it includes also a defendant who has been entirely successful, and who therefore *must be content;* it also includes a plaintiff who has succeeded only *partially,* but who nevertheless *is content;* it also includes a defendant who has only *partially* succeeded in defeating the sought for recovery, but who nevertheless *is content;* and finally, it implies that an adversary *upon the face of the record* is *not content,* for *if he were content* there would be no appeal.

On the other hand, the word *adverse* means to be *turned against from any angle* of the compass, and therefore the phrase "adverse party" may be defined to be every party whose interests are *turned against,* that is, *liable to be affected by* the interests of an appellant *on appeal,* whether he is an adversary *upon the face of the record or not.*[15]

The phrase "adverse party" includes the "prevailing party," and also includes those *who do not prevail,* but whose interests may nevertheless be affected by the appeal.

[15] See § 55, *supra.*

The statutes accordingly provide that "the party appealing shall be known as the *appellant*, and the *adverse party* as the respondent." [16]

This distinction will be found to be of great importance in clarifying a consideration of some of the decisions which will shortly be noted.

This clause, "any other party who has appeared in the cause," is most frequently applied to coparties who have appealable interests, for these are, as a general rule, the only parties who are similarly affected by the ruling of the lower court, and who may therefore *join in* an appeal.

The contention that these parties will in no manner be affected by the appeal is of no consequence whatever.

The statute is not here concerned in the least with that fact. Parties who will or may be affected by an appeal are already fully protected. The chief concern of the statute is *that they may appeal*, and its object is to compel them to appeal *quickly;* and in order to accomplish this end, requires that they be brought within the special statutory limitation by means of the service of the notice when they have not already been brought within the limitation by notice *given* at the time when the judgment or order was rendered or made. Their appeals will necessarily be separate whether they appeal independently or join in the notice already given, for the simple reason that, however taken, their appeals will have no concern with the other appeal. If they do appeal, the cause will, therefore, *necessarily* be appealed by piecemeal. They do not become parties to the *particular appeal already taken* merely by joining in the *notice of appeal* to the

[16] Rem. & Bal. Code, § 1717.

effect that they also appeal on their own behalf, any more than they become parties by appealing independently. They merely join in the *notice.* Two or more appeals are taken by a single notice, and *in that sense only* do they join in the appeal.

The rule of this section, namely, that the clause "any other party who has appeared in the cause" means any party who has appeared in the cause, has an appealable interest therein, *and who may join in an appeal by reason of the fact that he is similarly affected by the ruling of the lower court,* is a very vital one, since it involves not only the proper service of the notice of appeal, but also the proper constructive service of the bill or statement; but while it is regularly enforced, it is nowhere accurately stated by the court.

Thus, in endeavoring to make the principle clear, the court says: "While it is true that section 6504 directs that service be made upon all parties who have appeared, it is apparent that the *sole purpose* of such notice to appearing parties, *other than the prevailing one mentioned in section 6503,* was that in the event of their *having an interest in the appeal, they might join therein,* if they so desired. In other words, the object of the statute was to *require all interested parties* to *jointly prosecute* their appeals and cross-appeals instead of bringing them to this court by piecemeal." [17]

We will now consider the first sentence ending with the word "desired."

Parties *other than the prevailing one,* and *having an interest in the appeal,* cannot possibly join in the

[17] Sipes v. Puget Sound Electric Ry. Co., 50 Wash. 585, 97 Pac. 723.

notice of appeal. *They are not similarly affected by the ruling of the lower court.* They are *adverse parties;* and it would therefore be impossible to frame a notice of appeal in which they logically *could* join. To require their joining in the notice of appeal would be to require the *novel* and *forbidden* proceeding of *prosecuting an appeal against themselves.*

The statute provides that "the party appealing shall be known as the appellant, and the *adverse party* as the *respondent*, and they shall be so designated in all papers in the cause after the notice of appeal shall have been given or served; but the title of the cause shall in other respects remain unchanged." [18]

Being *adverse parties*, they *must be named* in subsequent proceedings as *respondents* and *cannot* therefore be *appellants* in the same appeal. Since they cannot be appellants in the same appeal, it follows *that they cannot join in the same appeal.*

We are therefore unerringly led to the conclusion that this announcement in its consideration only of parties *other than the prevailing one*, and *having an interest in the appeal*, not only overlooks the fact that these very same parties cannot possibly join in the appeal; but also overlooks the parties whom this section is especially considering, namely, those parties who have appeared in the cause, *have appealable interests therein*, and who may join in an appeal *by reason of the fact that they are similarly affected by the ruling of the lower court;* and that in thus overlooking them, *it overlooks the only parties who can join in an appeal.*

The notice of appeal is not to be directed to or against this "any other party who has appeared in the cause"; and, with the exception of the title of the

[18] Rem. & Bal. Code, § 1717.

cause in which he is necessarily designated as one of the parties to the cause, he is not even to be mentioned in the notice of appeal unless he joins therein in the first instance; for he is not an *adverse party*, and he is not an *appellant* unless he joins in the appeal.

It is true that the statute requires that the notice of appeal shall be served upon the adverse parties, and also upon this "any other party who has appeared in the cause," but the notice is not to be directed to or against this latter party, nor is the notice to be understood as being impliedly directed to or against this party; for, if he should join in the notice, he would, upon such a theory, *be joining in a proceeding against himself*, and this has been shown to be impossible, for he cannot be a respondent since he is not an *adverse party*.

The statutes do not contemplate that a party shall be required at any time to take positions which are *even apparently* contradictory and antagonistic to each other; and therefore the *opposing* parties in the body of the notice of appeal are the same as the *opposing* parties in the subsequent proceedings.

In fact, the statutory provision above quoted so provides by *expressly naming* the "party appealing" and the "adverse party," and by merely postponing the change in their designations to "appellant" and "respondent" until subsequent proceedings are taken.

It has been said that the notice of appeal is sufficient if it be directed to the prevailing parties, and "that it would seem . . . . that when the notice is properly entitled as of the action in which the appeal is taken, and informs the parties to the action who the appellants are, and the judgment or part of the judgment appealed from, it complies with all the requisites of

a proper notice, and, consequently, with the directions of the statute." [19]

The statutes are plainly to the contrary. But assuming that this is the rule, the notice of appeal, even though it contains no express designations, is *impliedly* directed against the *adverse parties* who are subsequently named as *respondents;* and therefore to require parties *other than the prevailing one,* and *having an interest in the appeal,* to join in the notice of appeal is also to require the *novel* and *forbidden* proceeding of their joining in a notice *which is impliedly directed against themselves.*

The manifest object of the statute in requiring that the notice of appeal shall be served upon this "any other party who has appeared in the cause," when he does not join therein in the first instance, is that he may be brought within the special statutory limitation applicable to him. Incidentally, he is given the privilege of either joining in the appeal already taken *as appellant,* or of taking an independent appeal. If he joins, the joinder will be perfectly logical; for in that event he merely becomes *an appellant in his own behalf* because he has an appealable interest and is similarly affected by the ruling of the *lower court.* He will not become a *respondent* because he is not an *adverse party;* that is, he will not be affected by the appeal of his coappellant. If he does not join in the appeal he will be designated in the subsequent proceedings just as he was designated in the lower court; that is, if he was a defendant in the lower court, and does not join in the appeal, he will be designated in the title

[19] Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. See, also, Philadelphia Mortgage & Trust Co. v. Palmer, 32 Wash. 455, 73 Pac. 501.

of the cause on appeal *as a defendant*, for he will neither be a respondent nor an appellant.

The court has overlooked the distinction between a party "having an interest in the appeal" and a party *having an appealable interest, and who may join in an appeal.*

One may not have the slightest interest in an appeal, and still be a party who may join in the appeal, because he has *an appealable interest and is similarly affected by the ruling of the lower court*, and may be, therefore, one who must be served with the notice of appeal, and with the notice of the filing of the bill or statement.

Thus, on appeal by one or more defendants from a decree of foreclosure adjudging that the claims and interests of all the defendants are subsequent and subordinate to the interests of the plaintiff, and barring all the defendants from asserting any claim other than was specified in the decree, the nonappealing codefendants who were similarly affected by the ruling of the lower court, that is, those who were in the same position as the appealing codefendants, had not the slightest interest in the appeal of the appealing codefendants, because they could not be *affected* by it, though they might be *benefited* by it "from the necessity of the case" as the statute puts it. And yet it was necessary to serve them with the notice of appeal. Why? Because though *not "having an interest in the appeal,"* they had *appealable interests*, and were similarly affected by the ruling of the lower court; that is, *they might appeal*, and being similarly affected, they might join in the appeal, or appeal independently. An appealable interest is not an interest in any appeal which has been taken, but an interest which will enable one *to take an appeal.* These are the parties whom the clause "any other party who has appeared in the cause"

refers to, and with whom it is particularly concerned; for *they may appeal;* and, as was before observed, it is the object of the statute to compel them to appeal quickly by requiring that they be brought within the special ten day limitation by means of the service of the notice of appeal, when they have not already been brought within such special statutory limitation by notice *given* at the time when the judgment or order was rendered or made. The fact that they have no interest in the appeal is of no consequence whatever.[20]

This provision of the statute relating to these parties was plainly framed for the benefit of the court, and is intended to compel these parties to appeal quickly, so that the labors of the court will not be endlessly devoted to a single cause; and the idea that it was the object of the statute to discourage appeals by piecemeal is not tenable; for if these parties appeal, the cause must necessarily be brought to the supreme court by piecemeal.

The court in the second sentence quoted, in endeavoring to put this rule still clearer, says: "In other words, the object of the statute was to require all *interested parties* to *jointly prosecute* their appeals and cross-appeals instead of bringing them to this court by piecemeal."

But it is plain from the foregoing observations that the same error has been made here as was made in the preceding announcement.

In further endeavoring to make this matter clear the court says: "It was the object of the law to enforce notice of appeal on parties who could appeal or join in an appeal, *and whose rights would or might be*

[20] See Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

affected by some action which the appellate court might take.'' [21]

Parties *who can appeal*, that is, parties having *appealable interests* and who can *join in an appeal* because their interests are similarly affected by the ruling of the lower court, must be served with the notice of appeal *though their interests neither will nor may be affected by any action which the appellate court might take.*[22]

Thus it is seen that the court has once more inaccurately announced *the real holding.*

It may be contended that the court in this last announcement intended to state the *broad rule* governing *all parties* who must be served.

Assuming that this is the case, the *broad rule* is not correctly announced, for the relative ''whose'' unerringly refers to parties ''who *could* appeal or *join in* an appeal,'' and parties *who cannot* appeal, but whose interests will or may be affected by the appeal, are not considered.

If the demonstrative ''those'' were inserted before the relative ''whose'' and the words ''appeal or'' were omitted, the announcement would perhaps state the broad rule correctly, for it would then read as follows:

''It was the object of the law to enforce notice of appeal on parties who could join in an appeal, and on those whose rights would or might be affected by some action which the appellate court might take.''

It is very plain that it is not necessary to serve *everyone who could appeal* with the notice of appeal.

[21] Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

[22] Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

Thus, in the statement of a prominent holding, the court says: "This action was commenced by Henry Sipes against the Puget Sound Electric Railway Company, a corporation, and W. S. Dimmock, to recover damages for personal injuries. The defendants appeared by the same attorneys, but answered separately. On a jury trial a verdict was returned, upon which judgment was entered in favor of the plaintiff and against the Puget Sound Electric Railway Company, for $7,000 damages, and judgment was also entered in favor of the defendant W. S. Dimmock against the plaintiff, Henry Sipes. The defendant the Puget Sound Electric Railway Company has appealed."

Here the plaintiff, Henry Sipes, is the adverse party because he will or may be affected by the appeal.

Dimmock is not an adverse party because he cannot be affected by the appeal. Nor is he a party who may join in or take an independent appeal as he chooses, for he has no appealable interest, and, of course, is not similarly affected by the ruling of the lower court.

The appellant is not, therefore, required to serve anything upon Dimmock, his codefendant.

If, however, Sipes had appealed, Dimmock would have been the adverse party, because he would or might have been affected by the appeal. It would, therefore, in such a case, be necessary to serve him with the notice of appeal. The Puget Sound Electric Railway Company would not be affected by such an appeal, for the plaintiff was successful as against this defendant, and the appeal could only affect Dimmock. The Puget Sound Electric Railway Company would, however, have an appealable interest, because it might also appeal as against Sipes; but it could not join in the notice of appeal of Sipes because it would not be *similarly affected* by the ruling of the lower court.

Not being affected by the appeal of Sipes, and not being similarly affected by the ruling of the lower court, it would not be entitled to service of the notice of appeal. It was neither affected by the appeal nor could it join in the notice of appeal, although it had an appealable interest; that is, although *it could appeal.* If one will not be affected by an appeal, but nevertheless has *an appealable interest,* he must also have the right *to join in the notice of appeal* before he becomes entitled to service of the notice of appeal.

With perfect deference to the court the author suggests that the *broad rule* of the statutes governing *all parties* who must be served with the notice of appeal, and, actually and constructively, with the bill or statement, may be stated as follows:

It was the object of the law to enforce service, first, on all parties who will or may be affected by the appeal; and, secondly, on any other party who has appeared in the cause, has an appealable interest therein, *and who may join in an appeal by reason of the fact that he is similarly affected by the ruling of the lower court.*

This latter party is the "any other party who has appeared in the cause."

§ 57. (g) The Various Methods of Serving the Proposed Bill or Statement.—There are no statutory provisions which relate to or govern the service of the proposed bill or statement.

With the exception of the statutory provisions relating to and governing the service of the *notice of appeal,* which will be shortly noticed, the only *statutory* provisions relating to or governing the service of papers are parts of an act entitled, "An act to provide

for the manner of *commencing* civil actions in the superior courts, and *bringing the same to trial.*" [23]

The service of the *notice of appeal* is fully provided for by statute as follows:

"When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, *it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon all parties who have appeared in the action or proceeding:* provided, that where the record and files in the cause do not disclose the address of a party on whom notice should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made (of which fact a return by the sheriff that they cannot be so found shall be proof), the notice of appeal need not be served on such party, but the appeal may be taken by filing the notice and such sheriff's return with the clerk. Service on an attorney who was the attorney of record for a party in the cause at the time when the judgment or order appealed from was rendered or made, shall be deemed service on such party in all cases where service is required by this title." [24]

Thus it appears that the service of the notice of appeal is well provided for. This, however, is as far as the statutes attempt to make provision for the service of any papers in appellate proceedings.

[23] See National Bank of Commerce of Seattle v. Seattle Pickle & Vinegar Works, 15 Wash. 126, 45 Pac. 731; Galler v. McMahon, 51 Wash. 473, 99 Pac. 309.

[24] Rem. & Bal. Code, § 1720.

But, in the absence of statutory provisions, the supreme court may, no doubt, by its rules, provide for and regulate appellate practice and procedure.[25]

Pursuant to its undoubted authority, the supreme court has adopted the following rules which are applicable to the service of the proposed bill or statement:

"Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party." [26]

"Service of papers may be made as follows:

"(1) If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid: Provided, that in capital cases a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.

"(2) If upon a party, by delivery to him personally, or at his residence by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening." [27]

[25] See in this connection, Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158; Horr v. Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125.

[26] Rule XVIII of the Rules of the Supreme Court, subd. (2). See § 37, *supra.*

[27] Rule XIX of the Rules of the Supreme Court. See § 38, *supra.*

"Where the residence of a party and that of his attorney of record, if he have one, are not known, the service may be made upon the clerk of the superior court in which the cause was tried, for the party or attorney." [28]

"(1) Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places between which there is regular communication by mail. Postage must in such cases be prepaid.

"(2) Time shall begin to run from the date of deposit in the postoffice." [29]

These rules, it will be observed, are quite similar to the statutory provisions.[30]

The service of the proposed bill or statement is, therefore, governed by the above rules of the supreme court.

The notice of appeal may be served by mail.[31]

And by analogy the proposed bill or statement may also be served by mail.[32]

The service by mail is completed when the copy is deposited in the postoffice, properly addressed, and with postage prepaid.[33]

[28] Rule XX of the Rules of the Supreme Court. See § 39, *supra*.

[29] Rule XXI of the Rules of the Supreme Court. See § 39, *supra*.

[30] See Rem. & Bal. Code, §§ 244–248.

[31] See Horr v. Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 695. See, also, Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940.

[32] State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

[33] State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845. The court in

The service of the proposed bill or statement is not, of course, sufficient where both parties reside in the same place.[34]

Service of the notice of appeal may be made upon the clerk of the superior court where the record and files in the cause do not disclose the address of a party on whom notice should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made; but by special statutory provision the return of the sheriff that they cannot be so found is the only competent evidence of such fact.[35]

By analogy the proposed bill or statement may also be served upon the clerk of the superior court where the residence of a party, and that of his attorney of record, if he have one, are not known, and where the service as prescribed by the rules of court cannot otherwise be made; and while the rules of the court do not prescribe a return of the sheriff that neither such party nor his attorney can be found within the county

this last case seems to treat the statutes as applicable, though it recognizes their deficiency in not fixing a time when the service shall be deemed complete; whereas the rules of the supreme court exactly fit the case, contain what the statutes omit, and are in consonance with the decision of the court. The cases of National Bank of Commerce of Seattle v. Seattle Pickle & Vinegar Works, 15 Wash. 126, 45 Pac. 731, and Galler v. McMahon, 51 Wash. 473, 99 Pac. 309, *supra*, have again been overlooked.

[34] See the following case which holds that the notice of the settlement and certification served under such conditions was insufficient: Bowen v. Cain, 7 Wash. 469, 35 Pac. 369.

[35] Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654.

in which the judgment or order appealed from was rendered or made, still, such a return would, no doubt, be advisable, in addition to an affidavit showing the facts required by the rules of court.

The case of National Bank of Commerce of Seattle v. Seattle Pickle & Vinegar Works, 15 Wash. 126, 45 Pac. 731, *supra*, was, in one instance, overlooked by the court, and as a consequence a decision upon this subject was based upon a supposed applicability of the statutes; but the decision was supported also by the rules of the supreme court.

Thus, upon a supposed applicability of the statutes, it was held that the service of a proposed bill or statement on appeal, made upon a clerk, is insufficient when the attorney himself is present in the office.[36]

It is not necessary to the service that the copy of the proposed bill or statement which is served should have a copy of the file-marks placed upon the original which was filed with the clerk of the superior court.[37]

Nor is it necessary to serve upon the adverse party a notice of the filing of the original bill or statement with the clerk of the superior court.[38]

[36] Times Printing Co. v. Seattle, 25 Wash. 149, 64 Pac. 940.

[37] Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

[38] Bennett v. Supreme Tent of the Knights of Maccabees of the World, 40 Wash. 431, 2 L. R. A., N. S., 389, 82 Pac. 744. See the following earlier case where the court held that the failure to serve the adverse party with written notice of the filing of the proposed bill or statement is waived where the adverse party voluntarily appears and moves to strike the proposed bill or statement, and excepts to the ruling of the court overruling the motion: Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511.

The service of the proposed bill or statement by leaving it at the office of one of respondent's attorneys, with a man whom appellant's attorney supposed to be the clerk of said attorney, but who appeared not to have been such, has been held to be insufficient.[39]

§ 58. (h) Upon Whom It is Necessary to Serve the Proposed Bill or Statement.—The statute provides that "a party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and *serve a copy thereof* on the adverse party, and shall also *serve written notice of the filing thereof* on any other party who has appeared in the cause." Two kinds of service are thus provided for, namely:

1. *Actual service* by the service of a copy of the original bill or statement on the *adverse party;* and

2. *Constructive service* by the filing of the original bill or statement with the clerk of the superior court, and by the service of written notice of the filing thereof on *any other party who has appeared in the cause.*[40]

It has been shown in section 55 of this work that the phrase "adverse party" means every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant, or intervenor.[41]

[39] Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929.

[40] Rem. & Bal. Code, § 389. See § 10, *supra.*

[41] Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505. See, also, Bruhn v. Steffins, 24 Wash. Dec. 78, 119 Pac. 29.

It has also been shown in section 56 of this work that the clause "any other party who has appeared in the cause" means any party who has appeared in the cause, has an appealable interest therein, *and who may join in an appeal by reason of the fact that he is similarly affected by the ruling of the lower court.*

It follows, therefore: 1. That the copy of the original bill or statement must be served upon every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant, or intervenor.[42]

2. That the notice of the filing of the original bill or statement must be served on parties who have appeared in the cause, have an appealable interest therein, *and who may join in an appeal by reason of the fact that they are similarly affected by the ruling of the lower court.*

It was held in an early case that when the notice of the filing is not served pursuant to the requirements of the statute, the bill or statement will, on motion, be stricken from the cause.[43]

The motion should, no doubt, be made in the lower court.[44]

The notice need not be served upon the adverse party. In this connection the reader's attention is called to the following early and curious ruling to the effect that failure to serve the *adverse party* with writ-

[42] See Howard v. Shaw, 10 Wash. 151, 38 Pac. 746.

[43] See First National Bank of Aberdeen v. Andrews, 11 Wash. 409, 39 Pac. 672.

[44] See § 120, *infra.*

ten notice of the filing of the proposed bill or statement *is waived* where the adverse party voluntarily appears and moves to strike the proposed bill or statement, and excepts to the ruling of the court overruling the motion.[45]

Some illustrations of this service may, perhaps, with some profit be given; and the author will, therefore, select three prominent cases in which *it will be assumed, simply for the purposes of the illustrations,* that service, actual and constructive, of the bill or statement was necessary.

Thus, on appeal by one or more unsuccessful defendants, less than the whole, from a judgment and decree of foreclosure adjudging that the claims and interests of all the defendants are subsequent and subordinate to the interests of the plaintiff in whose favor the judgment and decree was rendered and barring all the defendants from asserting any claim as superior to that of the plaintiff, the plaintiff is the adverse party upon whom a copy of the bill or statement must be served, because he will or may be affected by the appeal. The nonappealing codefendants are the "any other parties who have appeared in the cause," and are the parties upon whom the notice of the filing of the bill or statement must be served, because they have appeared in the cause, *have no interest whatever in the appeal,* but have *appealable interests in the cause,* and may join in the appeal, or take independent appeals, by reason of the fact that they are similarly affected by the ruling of the lower court. By being *similarly affected* is meant *that they have all been similarly ruled against.* Whether they *join in the appeal,* or take independent appeals, they will still have no interest whatever in the appeal of the appealing codefendants. Each one

[45] Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511.

will still be compelled to fight out his own battle on his own grounds. The taking and effecting an appeal merely involves the giving or service of the notice of appeal and the filing of the bond on appeal.[46]

Thus, again, on appeal in the same case by the same codefendants from an order confirming the sale of the real property:

It appears in this case that there was a judgment and decree of foreclosure adjudging that the claims and interests of all the defendants are subsequent and subordinate to the interests of the plaintiff in whose favor the judgment and decree was rendered, and barring all the defendants from asserting any claim other than that which was specified in the decree, namely, an adjudication that a certain party, who was not made a party in the pleadings, is entitled to a deed to one of the lots involved as assignee of one of the defendants, and that the supreme court held that this one whose specified claim was established became a party by such adjudication, and that the notice of appeal should therefore be served upon him.

The court also held that the purchaser of a portion of the property at public sale became a party by virtue of the purchase, and that the notice of appeal should be served upon him because he would or might be affected by the appeal.

We have, therefore, in this case the following parties:

1. The appealing defendants, who, of course, are *appellants.*

2. The plaintiff, who becomes an adverse party because he will or may be affected by the appeal.

[46] This illustration merely assumes that service of the bill or statement was necessary in the following case: Robertson Mortgage Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

3. The purchaser, who becomes an adverse party because he will or may be affected by the appeal.

4. The assignee who, it was adjudged, is entitled to one of the lots involved.

5. The nonappealing codefendants.

The assignee and the nonappealing codefendants are the "any other parties who have appeared in the cause," for they occupy exactly the same position as the appealing codefendants. They may receive some benefit from the appeal of the appealing codefendants "from the necessity of the case," as the statute puts it, even though they do not appeal themselves; but they will not be *affected* by it, because *they will not be adversely ruled against.* The affirmance of the order appealed from would be a mere affirmance of a *former ruling* which is *already adverse.* They may join in the appeal, or take independent appeals, because they have appealable interests, and are similarly affected by the ruling of the *lower court.* But they will not be affected *by the appeal,* even though they may possibly be *benefited* by it. One cannot be *affected* unless he can be *adversely ruled against;* that is, unless the ruling of the supreme court will, or may be, more unfavorable than the ruling of the lower court.

The nonappealing codefendants and the assignee need, therefore, only be served with the notice of the filing of the bill or statement.[47]

Thus again, the court, in the statement of an admirable holding, says: "This action was commenced by Henry Sipes against the Puget Sound Electric Railway Company, a corporation, and W. S. Dimmock, to recover damages for personal injuries. The defend-

[47] This illustration *merely assumes* that service of the bill or statement was necessary in the following case: Robertson Mortgage Co. v. Thomas, 63 Wash. 316, 115 Pac. 312.

ants appeared by the same attorneys, but answered separately. On a jury trial a verdict was returned, upon which judgment was entered in favor of the plaintiff and against the Puget Sound Electric Railway Company, for $7,000 damages, and judgment was also entered in favor of the defendant W. S. Dimmock against the plaintiff, Henry Sipes. The defendant the Puget Sound Electric Railway Company has appealed."

Here the plaintiff, Henry Sipes, is the adverse party, because he will or may be affected by the appeal.

Dimmock is not an adverse party because he cannot be affected by the appeal. Nor is he a party who may join in or take an independent appeal as he chooses, for he has no appealable interest, and, of course, is not similarly affected by the ruling of the lower court.

The appellant is not, therefore, required to serve anything upon Dimmock, his codefendant.

If, however, Sipes had appealed, Dimmock would have been the adverse party because he would or might have been affected by the appeal. It would, therefore, in such a case, be necessary to serve him with a copy of the bill or statement. The Puget Sound Electric Railway Company would not be affected by such an appeal, for the plaintiff was successful as against this defendant, and the appeal could only affect Dimmock. The Puget Sound Electric Railway Company would, however, have an appealable interest, because it might also appeal as against Sipes; but it could not join in the appeal of Sipes because it would not be *similarly affected* by the ruling of the lower court.

Not being affected by the appeal of Sipes, it would not be entitled to service of a copy of the bill or statement; *and not being similarly affected by the ruling of the lower court*, it could not join in the appeal of

Sipes, and would not be entitled even to service of the notice of the filing of the bill or statement, *though it would have an appealable interest.* The appealable interest and the right to join in an appeal must coexist. The ten day statutory limitation would not, therefore, apply to it.[48]

And finally, it may be asked why it should be necessary to serve a notice of the filing of the bill or statement on one who will not be affected by an appeal; and with the answer to this the author will conclude his observations regarding the persons upon whom the bill or statement must be either actually or constructively served.

The answer is that just as it is the policy of the statutes to permit his joining in the *notice of appeal* with the others who are similarly affected by the ruling of the lower court, so it is the policy of the statutes to permit his joining in a single bill or statement with the others who are similarly affected by the ruling of the lower court, and discourage a resort to separate bills or statements which would unnecessarily encumber the record; and in order that he may have an opportunity of *enjoying* the privilege, the statutes require that he shall be served with a notice of the filing of the bill or statement with the express end in view that all matters which are material merely to his own particular appeal may, if he so desires, be embodied in the same bill or statement *by means of proposed amendments.* And that there may be no question as to this right, the statutes very carefully provide that "within ten days after such service *any other party* may file and serve on the proposing party *any amend-*

[48] This illustration *merely assumes* that service of the bill or statement was necessary in the following case: Sipes v. Puget Sound Electric Ry. Co., 50 Wash. 585, 97 Pac. 723.

ments which he may propose to the bill or statement." [49]

His proposed amendments may not, of course, at all times be material to the *particular appeal of the other party* who proposed the bill or statement; but this is merely an unanswerable *objection* to their embodiment in the bill or statement *as originally proposed;* but they will become material *upon his joining in the appeal,* a privilege which the statute expressly confers upon him. And, moreover, it will often happen that they will be material to the bill or statement as originally proposed, and may therefore also be embodied therein upon his joining in the appeal, for the same bill or statement may often serve both parties, in which event the proposed amendments will, of course, embody only such matters as are necessary to the correction of the bill or statement as originally proposed. But if his right of appeal has already been lost when the bill or statement is filed and served, he will not be entitled to any notice of the filing, for the statutes do not require a useless act.

In this event, therefore, *through his own neglect or fault,* he is no longer "any other party who has appeared in the cause," for two of the elements of the definition of such clause are now wanting, namely, his *appealable interest* which has been lost, and with it *his right to join in the appeal by reason of the fact that he is similarly affected by the ruling of the lower court,* and only one element of the definition remains, namely, the fact that he appeared in the cause, which, *of itself alone,* is not sufficient to entitle him to the service of anything.[50]

[49] Rem. & Bal. Code, § 389. See § 10, *supra.*

[50] See, also, § 56, *supra.*

And that this right to join in the same bill or statement by means of proposed amendments when he joins in the appeal may be made still more manifest, the statutes further very carefully provide that when the bill or statement has been duly certified "all matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of *any appeal* therein." [51]

Since he is not affected in the least by the appeal, it is not necessary to serve him with any notice of an application to extend the time for the filing and service of the proposed bill or statement. The statutes merely contemplate that when the bill or statement *has been filed*, he shall be notified of the fact in order that he may have embodied therein, *by means of proposed amendments*, that which is material merely to his own particular appeal, and thus avoid the necessity of resorting to separate bills or statements which would unnecessarily encumber the record. The statutes, therefore, with this same end in view, again very carefully provide that the time for the filing and service of the bill or statement may be enlarged "by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, *made on notice to the adverse party*" only.[52]

The statutes thus prove *by their own internal evidence* that he is not affected by the appeal; and not being affected by the appeal, *he is not a party to the appeal*, whether he joins in the notice of appeal, or

[51] Rem. & Bal. Code, § 391. See § 12, *supra*.

[52] Rem. & Bal. Code, § 393. See § 14, *supra*. See, also, § 61, *infra*.

takes an independent appeal; and is not, therefore, one of the "parties" who may join in the stipulation. He is not concerned in the least with any extension of time for the filing of the bill or statement; but is merely concerned with *the fact of the filing.*

But if he does not choose to accept the proffered privilege, he may propose separate bills or statements of his own; for the statutes also contemplate this condition, and accordingly provide that the "certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, *comprising other matters in the cause, at the instance of the same or another party.*" [53]

§ 59. (i) Proof of Service of the Proposed Bill or Statement.—The proof of service of the proposed bill or statement is not regulated by statute or by rules of the supreme court, and, like the proof of the filing of the proposed bill or statement, is governed by an established practice which is sanctioned by judicial decisions.

The service of the proposed bill or statement may be proved:

1. By the written admission of service of the attorney of the party.[54]

The written admission of service of the attorney need not show the place of service; and when the attorney admits "due service and receipt of a copy thereof," the proof of service is sufficient.[55]

[53] Rem. & Bal. Code, § 388. See § 9, *supra.*

[54] Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813.

[55] Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819.

The written admission of service may be indorsed by the attorney upon the original bill or statement; and an indorsement that a copy of the bill or statement was "received and service of same accepted" is sufficient.[56]

2. By the written admission of service of a *party* when he has appeared, and has been personally served pursuant to the rules of the supreme court; for the supreme court will, after appearance, take judicial notice of his signature.[57]

But the supreme court will not, however, judicially notice the signature of a party who has not appeared.[58]

3. Proof of service of the proposed bill or statement may also be made by an affidavit of service of the attorney for the party.[59]

An affidavit of service which merely recites that the paper served was served upon respondent "by delivering and leaving at the office of [his attorneys] a true and correct copy of [the paper served]" is insufficient.[60]

4. Proof of the service may, no doubt, also be made by an affidavit of an officer making the service, or by an affidavit of a disinterested person making the service when it is shown by the affidavit that he is of suffi-

[56] Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.

[57] See Tischner v. Rutledge, 35 Wash. 285, 77 Pac. 388.

[58] Downs v. Board of Directors, 4 Wash. 309, 30 Pac. 147. See, also, Hill v. Gardner, 35 Wash. 529, 77 Pac. 808.

[59] Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503. See, also, the following case where service of the notice of the application to settle and certify a statement of facts was proved by the affidavit of the attorney for the party: Bowen v. Cain, 7 Wash. 469, 35 Pac. 369.

[60] Fairfield v. Binnian, 13 Wash. 1, 42 Pac. 632.

cient age and intelligence to make the service and proof.

These rules are applicable to the proof of service of all other papers with which this subject is concerned; and they will, therefore, render any further consideration of such proof unnecessary.

§ 60. (j) When the Proposed Bill or Statement must be Filed and Served in the Absence of Any Extension of Time.—In the absence of any extension of time, the proposed bill or statement must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed; and if not filed and served within that time, it will be stricken from the cause or disregarded.[61]

[61] Baker v. Washington Iron Works Co., 11 Wash. 335, 39 Pac. 642; Tatum v. Boyd, 11 Wash. 712, 39 Pac. 639; State v. Landes, 26 Wash. 325, 67 Pac. 72; Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374; Lamona v. Cowley, 31 Wash. 297, 71 Pac. 1040; Jones v. Herrick, 33 Wash. 197, 74 Pac. 332; State v. Yandell, 34 Wash. 409, 75 Pac. 988; McQuillan v. Seattle, 7 Wash. 331, 35 Pac. 68; Barkley v. Barton, 15 Wash. 33, 45 Pac. 654; Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104; State v. Aschenbrenner, 45 Wash. 125, 87 Pac. 1118; Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Brown v. Kinney, 48 Wash. 448, 93 Pac. 909; Lindsay v. Scott, 56 Wash. 206, 105 Pac. 462; McDonald v. Van Houten, 59 Wash. 593, 110 Pac. 428; Russell v. Mitchell, 61 Wash. 178, 112 Pac. 250. In the following early case, which was a capital case, the court relaxed the rule: State v. Blanck, 10 Wash. 292, 38 Pac. 1012; Rem. & Bal. Code, § 393. See § 14, *supra*. In further support of the rule, see the following cases: Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; McQueston

§ 61. (k) The Methods of Extending the Time for Filing and Serving the Proposed Bill or Statement.— The time for filing and serving the proposed bill or statement may be extended by either of the two following methods:

1. By stipulation of the parties; or

2. By an order of the court or judge wherein or before whom the cause is pending or was tried, for good cause shown and on such terms as may be just, made on notice to the adverse party.[62]

Where the time has been extended by stipulation of the parties, an order of the court or judge is unnecessary.[63]

The stipulation should be a matter of record; for the supreme court will not allow its time to be taken up with controversies over oral agreements, or agreements to enter into written stipulations; nor will it consider affidavits relating to oral agreements.[64]

The stipulation may be evidenced by a writing, signed by the parties, and duly filed.[65]

And it may also be shown in the bill or statement itself.[66]

But in the absence of a stipulation of the parties, an order of the court or judge wherein or before whom the cause is pending or was tried is necessary; and

v. Morrill, 12 Wash. 335, 41 Pac. 56; Harpel v. Harpel, 31 Wash. 295, 71 Pac. 1010; Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

[62] Rem. & Bal. Code, § 393. See § 14, *supra*.

[63] Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

[64] Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

[65] Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

[66] See Kane v. Kane, 35 Wash. 517, 77 Pac. 842; State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

such an order cannot be made without notice to the adverse party.[67]

The notice should specify the time and place of the hearing of the application, and name the judge to whom the application will be made; and when the notice has been so drawn, if the matter is not heard at the time specified, owing to no fault of the appellant, no further notice need be given if the application is made at the first opportunity.[68]

There are no statutory provisions or rules of the supreme court prescribing the time which must elapse between the service of the notice and the hearing of the application; and it is therefore held that a notice which is served within a reasonable time before the time fixed by the notice for the hearing of the application is sufficient.

Thus, a notice that an application would be made to the court at the hour of 3 o'clock in the afternoon of a certain day for an order extending the time for filing and serving the proposed bill or statement has been held sufficient, though served in the forenoon of the same day.[69]

It is also required that a good cause for the order should be shown; but it is held that the granting of an extension of time is discretionary with the lower court or judge, and that its action in *granting* the extension will not be disturbed.[70]

[67] Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; McQueston v. Morrill, 12 Wash. 335, 41 Pac. 56; Harpel v. Harpel, 31 Wash. 295, 71 Pac. 1010.

[68] State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[69] Galler v. McMahon, 51 Wash. 473, 99 Pac. 309.

[70] Greely v. Newcomb, 21 Wash. 357, 58 Pac. 216.

But this rule only applies when the granting of the extension is based upon *discretionary matters;* and, therefore, if the ruling involves the application of rules of law, such as jurisdictional questions, the ruling will, of course, be reviewed.[71]

But the *refusal* to grant an extension may *at times* work a positive injustice, and therefore *is* a discretionary matter which will be reviewed and reversed when such discretion is abused; but unless the discretion of the court or judge in refusing the extension has been plainly abused, its action will not be disturbed.[72]

But this rule also only applies where the refusal to grant an extension is based upon *discretionary matters;* and therefore, if the ruling involves the application of rules of law, such as jurisdictional questions, the ruling will be reviewed as a matter of course.[73]

When, in the opinion of a party, an extension of time has been unjustly refused, *certiorari* would, no doubt, be a proper remedy, and *mandamus* also; for these proceedings are, by the express provisions of the statutes, deemed steps and proceedings *in the cause itself*, resting upon the jurisdiction originally acquired by the court in the cause, and an appeal would be clearly inadequate, as a general rule.[74]

That an appeal is inadequate is evident from the following case wherein it was necessarily held that

[71] Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938.

[72] Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. 117.

[73] State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[74] See the following case where *mandamus* was resorted to: State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217; Rem. & Bal. Code, § 393. See § 14, *supra.*

the ruling of the lower court or judge in refusing an extension of time will not be reviewed where it appears that the longest period allowed by the statute *in any event* for the filing and service of the proposed bill or statement has already expired, and that any consideration of the ruling would, therefore, be useless.[75]

The time for filing and serving the proposed bill or statement may be extended once or more; but the order extending the time must be entered either before or after the expiration of thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed, *but if entered after*, it must be entered before the expiration of ninety days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed; for the order cannot, in any event, extend the time for the filing and service of the proposed bill or statement beyond a period of ninety days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed.[76]

In the absence of a stipulation, the order is the only evidence of the extension; and as the statutory provisions are *mandatory*, they cannot be evaded even by a *nunc pro tunc* order, although the bill or statement

[75] Hotel Company v. Merchants' Ice & Fuel Co., 41 Wash. 620, 84 Pac. 402.

[76] Rem. & Bal. Code, § 393. See § 14, *supra*.

has been filed and served within the time allowed by the *nunc pro tunc* order and by the statutes.[77]

The application for the extension should also be filed within such ninety day period.[78]

When, therefore, the application is filed within such ninety day period, and the order extending the time for filing and serving the proposed bill or statement is entered within such ninety day period, and the proposed bill or statement is filed and served within the time allowed by the order and by the statutes, the extension is proper.[79]

Since the order extending the time for filing and serving the proposed bill or statement should be entered within such ninety day period, it logically follows that if the time is extended by stipulation of the parties, such stipulation should be reduced to writing and signed by the parties before the expiration of such ninety day period. The careful practitioner will also *file* the written stipulation before the expiration of the ninety day period, if possible; but it would seem that this is not *necessary*, and that the stipulation would be effective if filed in time to be made a part of the record on appeal.

And finally, the statute provides that the notice of the application for the extension shall be served only upon the *adverse party*. The phrase "adverse party" means every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of the

[77] Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

[78] Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

[79] O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; Delaski v. Northwestern Improvement Co., 61 Wash. 255, 112 Pac. 341. See, also, State v. Pearson, 37 Wash. 405, 79 Pac. 985.

question whether he appears upon the face of the record in the attitude of plaintiff or defendant, or intervenor.[80]

The notice of the application for the extension need not, therefore, be served upon "any other party who has appeared in the cause." This clause may be defined to be any party who has appeared in the cause, has an appealable interest therein, *and who may join in an appeal by reason of the fact that he is similarly affected by the ruling of the lower court.*[81]

In this connection the reader's attention is directed to sections 56 and 58 of this work.

The rules governing the methods of service and the proof of service of the proposed bill or statement are applicable to the methods of service and the proof of service of all papers mentioned in this section; and therefore a reference to the sections wherein the methods of service and the proof of service of the proposed bill or statement are considered will be sufficient.[82]

§ 62. (1) The Time Within Which the Proposed Bill or Statement must be Filed and Served When an Extension has Been Granted.—When the time for the filing and service has been extended, whether by stipulation or by order of the court or judge, the proposed bill or statement must, of course, be filed and served within the time limited by the stipulation or order.

The time for the filing and service of the proposed bill or statement cannot, however, *in any case*, be extended beyond the period of ninety days after the time

[80] See § 55, *supra.*

[81] See § 56, *supra.*

[82] See §§ 57, 59, *supra.*

begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed; and if so extended, and the proposed bill or statement is not filed and served within the time so limited by the statute, it will be stricken from the cause or disregarded.[83]

It therefore follows that the lower court or judge will not be compelled to extend the time beyond the statutory limit.[84]

It is accordingly held that where an appeal is taken from two or more appealable orders, and the time for filing and serving a proposed bill or statement is properly extended, the statutory provision relating to the time of the filing and service of the bill or statement is applied to the date of the entry of each of the orders; and if the proposed bill or statement is not filed in time, *when the statutory limit is applied to the date of entry of any particular order*, the lower court will not be compelled to certify to any matters *relating to such order*, for the very plain reason that the proposed bill or statement is not filed in time, in so far as the particular order and the matters relating thereto are concerned, and would, if it were not filed in time with reference to other orders, be stricken from the cause or disregarded.

The statutes must be followed with respect to each order appealed from even if separate bills or state-

[83] In the following cases the time was extended beyond the statutory limit *by order of the court:* Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012; State v. Seaton, 26 Wash. 305, 66 Pac. 397. In the following cases the time was extended beyond the statutory limit *by stipulation of the parties:* Thomas v. Lincoln County, 32 Wash. 317, 73 Pac. 367; Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

[84] State v. White, 40 Wash. 428, 82 Pac. 743.

ments are necessary in order to comply with the statutes. A bill or statement cannot cover matters relating to an appealable order when the time for filing and serving a bill or statement relating to such matters and such order has expired. The statutes must be observed and followed, whether there be but one proposed bill or statement, or several proposed bills or statements.[85]

§ 63. (m) The Place Where the Application for an Extension of Time may be Heard.—The application for the extension may, *with consent of the parties*, be heard in any county within the district of the judge before whom the cause is pending; but *without consent of the parties to the hearing elsewhere*, the application must be heard within the particular county wherein the cause or proceeding is pending.[86]

Thus, where the application for an extension was heard outside of the county wherein the cause or proceeding was pending *without consent of the parties*, it was held, in accordance with the statutory provisions, that the hearing was unauthorized, and that the order extending the time was, therefore, invalid.[87]

The consent may be evidenced either by the stipulation of the parties reduced to writing and duly filed; or such consent may, no doubt, be shown in the proposed bill or statement.

These rules are applicable to the place of all hearings in the superior courts.[88]

[85] State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court, 30 Wash. 43, 70 Pac. 102.

[86] Rem. & Bal. Code, §§ 41, 42. See §§ 32, 33, *supra*.

[87] Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929.

[88] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774; Shaw v. Spencer, 57 Wash. 587, 107 Pac.

But the application for the extension cannot be heard outside of the *judicial district wherein the cause is pending, even with the consent of the parties.* The statute very clearly limits the territory within which the hearing may be held, even with consent of the parties, to the judicial district wherein the cause is pending.[89]

§ 64. (n) The Judge Who may Make the Order Extending the Time, and to Whom, Therefore, the Application may be Made.—Any judge of the court wherein the cause is pending, or any nonresident judge, or judge *pro tempore*, before whom the cause was tried may make the order extending the time for the filing and service of the proposed bill or statement; and any such judge is, therefore, the judge to whom the application may be made.[90]

The statute provides that the order extending the time for filing and serving the proposed bill or statement may be made by "the court or judge wherein or before whom the cause is pending or was tried."

The constitution provides that "the judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the case."

383. See, also, State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

[89] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[90] Rem. & Bal. Code, § 393; Const., art. 4, § 7.

A cause is always pending in the court of the resident judge until it has been finally determined in his court, and until all steps necessary to the completion of the proposed bill or statement have been taken; for by express provision of the statutes all steps and proceedings relating to the proposed bill or statement are deemed steps and proceedings *in the cause itself*, resting upon the jurisdiction originally acquired by the court in the cause. It follows, therefore, that the resident judge may make the order extending the time for the filing and service of the proposed bill or statement, even though the cause was tried by a nonresident judge. In such a case the time may be extended either by the resident or nonresident judge.[91]

Where there are two or more judges for a particular county, each of the judges has the same powers, of course; and any one of the judges may extend the time for the filing and service of the proposed bill or statement in a cause pending in the court of such county, whether he actually tried the cause or not.[92]

There are no decisions of the supreme court supporting the author's statement that a judge *pro tempore* before whom a cause has been tried may extend the time for the filing and service of the proposed bill or statement; but it is clear enough that none are necessary. The legislature, it is true, cannot delegate judicial powers.[93]

But while the *legislature* cannot delegate judicial powers, the *constitution* can; and the judicial powers of a judge *pro tempore* are *constitutional.*[94]

[91] State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[92] Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938.

[93] Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

[94] Const., art. 4, § 7.

§ 65. (o) The Place Where the Order Extending the Time may be Made.—The order extending the time for the filing and service of the proposed bill or statement may be made, that is, formally signed, by the judge who heard the application for the extension, in any county within the judicial district wherein the cause is pending; and if the judge who heard the application is a *visiting* judge, the order extending the time may be made, that is, formally signed, by him in any county in the state. The order when made should be immediately filed with the clerk of the proper county.[95]

This rule relating to the place where the order extending the time for the filing and service of the proposed bill or statement may be made is applicable to the place where *all* orders relating to the proposed bill or statement may be made.

Thus, a visiting judge who has tried a cause may *certify* the proposed bill or statement while in his own county.[96]

The rule governing the place where the application for the extension *may be heard* is quite different from the rule governing the place where the order *may be made, that is, formally signed.*

An order which is perfectly valid in so far as the place where it may be made or signed is concerned, may still be wholly invalid by reason of the fact that the application for the extension was *heard in the wrong place.*

[95] Rem. & Bal. Code, §§ 41, 42. See §§ 32, 33, *supra.* See, also, Const., art. 4, § 7.

[96] Downs Farmers' Warehouse Assn. v. Pioneer Mutual Ins. Assn., 41 Wash. 372, 83 Pac. 423. See, also, Matheson v. Ward, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520.

With this difference between these rules in mind, the following cases which seem at first glance to be opposed to the rule here given, will be found to support it.[97]

But the resident judge has no authority to make the order outside of the judicial district wherein the cause is pending.[98]

§ 66. (p) When the Time Within Which the Proposed Bill or Statement must be Filed and Served Begins to Run.—This subject will be considered in a threefold view, namely:

First, with reference to the final judgment.

Second, with reference to an appealable order other than the final judgment.

Third, with reference to the time when the final judgment or an appealable order is deemed to be entered.

And first, with reference to the final judgment:

The beginning of the time within which an appeal *must* be taken from a final judgment and, therefore, the beginning of the time within which a proposed bill or statement *must* be filed and served on appeal from a final judgment, is fixed by the statutes at the date of the entry of the final judgment.[99]

[97] Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Downs Farmers' Warehouse Assn. v. Pioneer Mutual Ins. Assn., 41 Wash. 372, 83 Pac. 423; Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774. See, also, Matheson v. Ward, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520; State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

[98] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[99] See Rem. & Bal. Code, § 1718. See § 20, *supra;* Lindsay v. Scott, 56 Wash. 206, 105 Pac. 462; Wollin v. Smith, 27

Second, with reference to an appealable order other than the final judgment:

In criminal causes there are no appealable orders other than the final judgment; but in civil actions and proceedings the beginning of the time within which an appeal *must* be taken from an appealable order other than the final judgment, and, therefore, the beginning of the time within which a proposed bill or statement *must* be filed and served on appeal from an appealable order is fixed by the statutes at the date of the entry of the appealable order *if made at the time of the hearing*, and in all other cases at the time of the service of a copy of such order with written notice of the entry thereof upon the party appealing or his attorney.[100]

If made at the time of the hearing, the time begins to run at the date of the entry of the appealable order.[101]

If not made at the time of the hearing, the time does not begin to run until the service of a copy of such order with written notice of the entry thereof upon the party appealing or his attorney.[102]

One may, of course, under the statute, as has already been seen, file and serve the proposed bill or statement *before* the time begins to run in either of the above cases; but he is not required to do so.

Under former statutes, also, he had the right to wait until *after* the time began to run.[103]

Wash. 349, 67 Pac. 561; Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012.

[100] See Rem. & Bal. Code, § 1718. See § 20, *supra*.

[101] Braely v. Marks, 13 Wash. 224, 43 Pac. 27; Donison v. Spokane, 27 Wash. 317, 67 Pac. 561.

[102] Debenture Corporation v. Warren, 9 Wash. 312, 37 Pac. 451; Otis Brothers & Co. v. Nash, 26 Wash. 39, 66 Pac. 111.

[103] Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98.

Third, with reference to the time when the final judgment or an appealable order is deemed to be entered:

It has long been settled by the authorities that an appealable order or the final judgment in a cause is entered when it is *filed*.[104]

In an early case which was decided under former statutes it was held that in an action at law tried by the court no judgment can be rendered until findings of fact and conclusions of law had been filed; and that although the judgment had been filed before the findings and conclusions, it did not take effect until the findings and conclusions had been filed; and that, therefore, the time for the filing and service of the proposed bill or statement did not begin to run until the date of the filing of the findings and conclusions.[105]

As between a formal order and a clerk's entry, the formal order will control. Thus, where the clerk's brief entry on the minutes, entered on the day that the court orally announced its decision, is inconsistent with the formal order of the court signed and filed a few days later, the latter controls, and must be considered the evidence of the real and final act of the court on the subject.[106]

But a journal entry is held to be controlling over a later formal order when the avowed object of the

[104] Quareles v. Seattle, 26 Wash. 226, 66 Pac. 389; National Christian Assn. v. Simpson, 21 Wash. 16, 56 Pac. 844; State ex rel. Brown v. Brown, 31 Wash. 397, 62 L. R. A. 974, 72 Pac. 86; Warner v. Miner, 41 Wash. 98, 82 Pac. 1033; McGlauflin v. Merriam, 7 Wash. 111, 34 Pac. 561.

[105] Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

[106] State ex rel. Jensen v. Bell, 34 Wash. 185, 75 Pac. 641; Gould v. Austin, 52 Wash. 547, 100 Pac. 1029. See, also, McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 Pac. 327; Michel v. White, 64 Wash. 341, 116 Pac. 860.

later formal order is to correct *errors of law* in the former ruling. The court has no inherent power to correct errors of law in an order once entered of its own motion. Errors of law must be corrected on appeal.[107]

§ 67. (q) How the Beginning of Such Time may be Postponed.—The instances in which the beginning of the time within which the proposed bill or statement *must* be filed and served may be postponed are five in number, one of which is a *statutory* instance, while the remainder owe their existence to judicial decisions.

And first, *by virtue of a statutory provision*, the beginning of the time within which the proposed bill or statement *must* be filed and served may be postponed by the death of a party after the rendition of a final judgment. Thus, the statute provides:

"The death of a party after the rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal, but the proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court, and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof." [108]

[107] Coyle v. Seattle Electric Co., 31 Wash. 181, 71 Pac. 733.

[108] Rem. & Bal. Code, § 1743.

By virtue of a statutory provision enacted prior to the present general statutes governing the subject of appeals, the

Second, by an application seasonably made to set aside an order or the final judgment upon the ground that it has been irregularly entered.

The time for an appeal from an order or judgment which is claimed to have been irregularly entered will not begin to run pending the determination by the trial court of a motion for its vacation; and hence, the beginning of the period within which the proposed bill or statement *must* be filed and served will be post-

beginning of the time within which the proposed bill or statement *must* be filed and served may be postponed by a proceeding to establish and restore the record of a lost or destroyed judgment or order concerning which either party has a right to an appellate proceeding. This statutory provision reads as follows: "*Whenever a lost or destroyed judgment or order is one to which either party has a right to a proceeding in error or of appeal, the time intervening between the filing of the application mentioned in section 1272 and the final order of the court thereon shall be excluded in computing the time within which such proceeding or appeal may be taken as provided by law*": Rem. & Bal. Code, § 1274. See, also, Rem. & Bal. Code, §§ 1270–1273.

The present general statutes relating to appeals are, however, exclusive, and supersede all other methods heretofore provided, as is manifest from the following provision:

"The mode provided by this title for appealing cases to the supreme court, and for securing a revision of the same therein, shall be exclusive and shall supersede all other methods heretofore provided. But no rights acquired under statutes which are abrogated by this title shall be lost by reason of the passage of this title, and all appeals pending when this title takes effect may be prosecuted to their determination as if this title had not been passed": Rem. & Bal. Code, § 1754.

In view of the later statutes it is apprehended that this prior statutory provision has been repealed. The court, however, may view the matter differently; and therefore the reader's attention is directed to it.

poned until such motion shall have been disposed of; that is, until the entry of the order disposing of the motion or application.[111]

When, therefore, an appeal has been taken from only a portion of a judgment which is in respondent's favor, and the portion appealed from is not affected by respondent's motion to vacate for irregularity, the rule does not apply to the portion appealed from. It applies only to that portion of the judgment which is attacked by the motion and which is in appellant's favor.[112]

Third, by a motion for a new trial which has been seasonably made.

The time for taking an appeal begins to run from the date of the entry of an order disposing of a motion for a new trial, when the motion is seasonably made. The entry of the judgment becomes final on that date; and, therefore, the beginning of the period within which the proposed bill or statement *must* be filed and served will be postponed until such motion shall have been disposed of; that is, until the entry of the order disposing of the motion.[113]

[111] State ex rel. Hennessy v. Huston, 32 Wash. 154, 72 Pac. 1015; Hennessy v. Tacoma Smelting & Refining Co., 33 Wash. 423, 74 Pac. 584.

[112] See Lauridsen v. Lewis, 47 Wash. 594, 92 Pac. 440.

[113] State ex rel. Payson v. Chapman, 35 Wash. 64, 76 Pac. 525; Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 Pac. 839. See, also, Owen v. Casey, 48 Wash. 673, 94 Pac. 473. See, also, Prospectors' Development Co. v. Brook, 32 Wash. 315, 73 Pac. 376; Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147; Wittler-Corbin Machinery Co. v. Martin, 47 Wash. 123, 91 Pac. 629; Chilcott v. Globe Navigation Co., 49 Wash. 302, 95 Pac. 264; Jemo v. Tourist Hotel Co., 55 Wash. 595, 19 Ann. Cas. 1199, 104 Pac. 820; O'Brien v. American Casualty

Fourth, by the reversal of a favorable ruling which prevented an appeal from an *unfavorable* one.

Thus, where a motion to vacate a judgment was sustained as to one ground and overruled as to others, and the order vacating the judgment was reversed on appeal, the defendant will be allowed to appeal from the order in so far as it *overrules* his motion. A party in whose favor a ruling has been made has not, of course, any ground for appeal. The date of the entry of the order overruling the motion as to the remaining grounds, made pursuant to the reversal, is therefore the date when the *adverse* ruling first becomes effective and furnishes a ground for appeal.[114]

Fifth, by estoppel.

Thus, where the clerk of the court makes an informal journal entry of judgment upon a verdict, and a new trial is subsequently denied, the successful party by subsequently entering a formal judgment is estopped from asserting that the same is not the final judgment in the case; and an appeal therefrom will not be dismissed because not taken within ninety days from the date of the order denying the new trial. The judgment is deemed to be entered in such a case at the time of the filing of the formal judgment.[115]

With this the author will conclude his observations regarding the various instances in which the beginning

Co., 57 Wash. 598, 107 Pac. 519; Mercer v. Lloyd Transfer Co., 59 Wash. 560, 110 Pac. 389; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287; Wooddy v. Seattle Electric Co., 65 Wash. 539, 118 Pac. 633.

[114] See Gray v. Washington Water Power Co., 30 Wash. 154, 70 Pac. 255.

[115] Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287; Jemo v. Tourist Hotel Co., 55 Wash. 595, 19 Ann. Cas. 1199, 104 Pac. 820.

of the time within which the proposed bill or statement *must* be filed and served may be postponed; but before proceeding to the next subject will briefly note those cases in which attempts have been unsuccessfully made to add to the instances already given.

Thus, it has been held that the time of the entry cannot be postponed by moving for a correction of the judgment entry, and taking an appeal from the judgment as corrected.[116]

Nor can the time of the entry be postponed by consent of the parties.[117]

Nor can the time of the entry be postponed by an order of the court.[118]

Nor can the time of the entry be postponed by a *nunc pro tunc* judgment correcting the final one.[119]

Nor can the time of the entry be postponed by moving to vacate an appealable order, when the motion to vacate merely brings on for rehearing matters which have already been heard and passed upon.[120]

It is also held that where a motion to vacate a judgment is denied, the beginning of the time within which an appeal must be taken from the order cannot be postponed by the filing of a petition to reconsider the order of denial, and by taking an appeal from the order refusing to reconsider; and that if the appeal from the order denying the vacation of the judgment is not taken within the time prescribed by law, the appeal will be dismissed.[121]

[116] Agassiz v. Kelleher, 11 Wash. 88, 39 Pac. 228.

[117] Cogswell v. Hogan, 1 Wash. 4, 23 Pac. 835; Stark v. Jenkins, 1 Wash. Ter. 421.

[118] State v. White, 40 Wash. 428, 82 Pac. 743.

[119] Schulze v. Oregon Railroad & Navigation Co., 41 Wash. 614, 84 Pac. 587.

[120] Nicol v. Skagit Boom Co., 12 Wash. 230, 40 Pac. 984.

[121] Pedigo v. Fuller, 37 Wash. 529, 79 Pac. 1129.

Where judgment is entered upon a verdict by the clerk, and thereafter a motion for a new trial is denied, the date of the entry of the order overruling the motion is, as has been already shown, the beginning of the time within which an appeal *must* be taken; and this cannot be postponed by the *losing party* by subsequently entering another judgment.[122]

§ 68. (r) The Method of Computing the Time Within Which the Proposed Bill or Statement must be Filed and Served.—The time within which the proposed bill or statement must be filed and served is computed by excluding the first day and including the last, unless the last is a holiday or Sunday, and then it is also excluded.[123]

This rule governs the method of computing the time within which all acts relating to the proposed bill or statement must be done.[124]

[122] Chilcott v. Globe Navigation Co., 49 Wash. 302, 95 Pac. 264; Wooddy v. Seattle Electric Co., 65 Wash. 539, 118 Pac. 633.

[123] Rem. & Bal. Code, § 150; Martin v. Sunset Telephone & Telegraph Co., 18 Wash. 260, 51 Pac. 376; Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; Delaski v. Northwestern Improvement Co., 61 Wash. 255, 112 Pac. 341; State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217; Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411.

[124] See Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536. See, also, the following cases: Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381; Hewitt v. Root, 31 Wash. 312, 71 Pac. 1021; Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147; Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; Scott v. Patterson, 1 Wash. 487, 20 Pac. 593.

CHAPTER VI.

THE PROPOSAL OF AMENDMENTS.

§ 69. Divisions of the Subject.
§ 70. The Character of the Proposed Amendments.
§ 71. When the Proposed Amendments must be Filed and Served.
§ 72. The Legal Effect of a Failure to File and Serve the Proposed Amendments Within the Time Prescribed by Statute.
§ 73. The Precedence Which must be Observed and Followed in the Filing and Service of the Proposed Amendments.
§ 74. The Proof of Filing.
§ 75. The Kind of Service Provided for by Statute.
§ 76. By Whom the Proposed Amendments may be Filed and Served.
§ 77. The Various Methods of Serving the Proposed Amendments.
§ 78. Upon Whom It is Necessary to Serve the Proposed Amendments.
§ 79. The Proof of Service of the Proposed Amendments.
§ 80. Whether the Time Within Which the Proposed Amendments must be Filed and Served can be Extended.
§ 81. When the Time Within Which the Proposed Amendments must be Filed and Served Begins to Run.
§ 82. Whether the Beginning of Such Time may be Postponed.
§ 83. The Method of Computing the Time Within Which the Proposed Amendments must be Filed and Served.
§ 84. When the Proposed Amendments may be Accepted.
§ 85. The Methods of Accepting the Proposed Amendments.

§ 86. The Methods of Proving the Acceptance of the Proposed Amendments.
§ 87. The Legal Effect of the Acceptance of the Proposed Amendments.

§ 69. Divisions of the Subject.—By the proposal of amendments is meant the submission of amendments to the proposed bill or statement for settlement and certification; and this must be regular. The subject will be considered as follows:

(a) With reference to the character of the proposed amendments.

(b) With reference to the time when the proposed amendments must be filed and served.

(c) With reference to the legal effect of a failure to file and serve the proposed amendments within the time prescribed by statute.

(d) With reference to the precedence which must be observed and followed in the filing and service of the proposed amendments.

(e) With reference to the proof of filing.

(f) With reference to the kinds of service provided for by statute.

(g) By whom the proposed amendments may be filed and served.

(h) With reference to the various methods of serving the proposed amendments.

(i) Upon whom it is necessary to serve the proposed amendments.

(j) With reference to the proof of service.

(k) Whether the time within which the proposed amendments must be filed and served can be extended.

(l) When the time within which the proposed amendments must be filed and served begins to run.

(m) Whether the beginning of such time may be postponed.

(n) With reference to the method of computing the time within which the proposed amendments must be filed and served.

(o) When the proposed amendments may be accepted.

(p) The methods of accepting the proposed amendments.

(q) The methods of proving such acceptance.

(r) The legal effect of an acceptance of the proposed amendments.

And first, with reference to

§ 70. The Character of the Proposed Amendments. The proposed amendments must be substantial in their character, or they will be disregarded.[1]

Proposed amendments which go no further than to move the striking of the bill or statement which is partly in the narrative form and the substitution of the notes of the stenographer are not sufficient. They should point out wherein the bill or statement is erroneous.[2]

§ 71. When the Proposed Amendments must be Filed and Served.—The proposed amendments must be filed and served upon the party proposing the bill or statement within ten days after the service of the bill or statement; and if not filed and served within that time, the proposed bill or statement will be deemed

[1] Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940.

[2] State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

agreed to, and the correctness of its contents cannot thereafter be questioned.[3]

The ten days allowed by statute for filing and serving the proposed amendments may, however, be waived by consenting to the certification of the bill or statement before the expiration of the ten days.[4]

The lower court has not, therefore, any authority to allow the bill or statement to be withdrawn for the purpose of amendment and refiling after the time for proposing amendments has expired, even though the time limited by statute for the filing and service of the bill or statement itself *has not expired.*[5]

Is not this rule fairly debatable?[6]

Where, however, the time for proposing amendments has not expired, a bill or statement filed without service may, under an order of the court, be withdrawn and thereafter refiled and served at any time before the time within which the bill or statement must be filed and served has expired.[7]

§ 72. The Legal Effect of a Failure to File and Serve the Proposed Amendments Within the Time Prescribed by Statute.—The legal effect of a failure to file and serve the proposed amendments within the time prescribed by statute is a *settlement* of the proposed bill or statement by the implied agreement of the parties; in which event the proposed bill or statement shall not only be deemed agreed to, as shown in

[3] State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

[4] State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

[5] State ex rel. Royal v. Linn, 35 Wash. 116, 76 Pac. 513.

[6] See § 120, *infra.*

[7] Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822.

the preceding section, but shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed.[8]

There does not seem to be any authority bearing directly on the proposition that where proposed amendments have not been filed and served within the time prescribed by statute, the filing of proof of service of the bill or statement, and proof that no amendments have been proposed, are conditions precedent to appellant's right to a certification of the bill or statement without notice. In an early case the court said: "At any time after the expiration of the ten days' limitation *either* party to the action may have the statement certified, without notice to any other party, by applying to the court and making the *requisite proof;* and of this right he cannot be deprived, either directly or indirectly, by any order of the court."[9]

The *requisite proof* is, of course, the statutory proof of the filing and service of the proposed bill or statement, and that no amendments have been proposed.

The provision is, no doubt, intended solely for the benefit of the court or judge; and it is apprehended that where the judge certifies the bill or statement without requiring such proof, or overlooks its absence

[8] Rem. & Bal. Code, § 389. See § 10, *supra;* Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120; Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; Downs Farmers' Warehouse Assn. v. Pioneer Mutual Ins. Assn., 41 Wash. 372, 83 Pac. 423.

[9] Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

from the record, the complaining party must affirmatively show by the record that some substantial injury has resulted therefrom. He certainly could not successfully invoke the statute where he is himself the applicant for the certification; and therefore, where *he is not the applicant*, it is quite clear that, as the complaining party, he must at least affirmatively show by the record that he has sustained some substantial injury as a result of the failure to file such proof. This proof usually consists of the affidavit of the attorney.

In a case somewhat later than the one last cited, the court said: "It is also true that there is nothing whatever in the record showing that the respondent, within the time limited by law, or at any time, filed and served on the appellant any amendments or objections to the statement as filed, and we must therefore presume, as the law presumes, that the respondent agreed to the same. And that being so, there was nothing for the court to 'settle,' and it was perfectly legitimate for the judge to certify the statement in the absence of, and without notice to, the respondent or his attorneys." [10]

§ 73. The Precedence Which must be Observed and Followed in the Filing and Service of the Proposed Amendments.—The provision of the statute in this respect is identical with that which relates to the filing and service of the original bill or statement. Thus, the statute provides:

"Within ten days after such service any other party may *file and serve* on the proposing party, any amendments which he may propose to the bill or statement." [11]

[10] Maney v. Hart, 11 Wash. 67, 39 Pac. 268.

[11] Rem. & Bal. Code, § 389. See § 10, *supra.*

It is therefore also the rule that the proposed amendments must be filed before they are served; and that if the service precedes the filing, the proposed amendments will be stricken from the cause or disregarded.[12]

This rule is recognized in the following case where it was held that when the proposed amendments are filed and served upon the same day, and there is nothing in the record by which the precedence may be determined, it will be presumed, in the absence of an express showing to the contrary, that the proposed amendments were filed before they were served.[13]

§ 74. The Proof of Filing.—The rule which governs the proof of filing the original bill or statement is equally applicable to the proof of filing the proposed amendments.[14]

§ 75. The Kind of Service Provided for by Statute. Unlike the service of the original bill or statement which, as has been shown, may be both actual and constructive, the service of the proposed amendments is an actual service on the *proposing* party.[15]

In this connection the reader's attention is directed to sections 54, 55, 56 and 58 of this work.

§ 76. By Whom the Proposed Amendments may be Filed and Served.—The statutory provision is that "within ten days after such service *any other party* may file and serve on the *proposing* party, any amendments which he may propose to the bill or statement."

[12] See § 52, *supra*, and cases cited.

[13] Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813.

[14] See § 53, *supra*, and cases cited.

[15] Rem. & Bal. Code, § 389. See § 10, *supra*.

The clause "any other party" here means, first, any party who will or may be affected by the appeal; and, secondly, any other party who has appeared in the cause, has an appealable interest therein, and who may join in an appeal *by reason of the fact that he is similarly affected by the ruling of the lower court.*

In this connection the reader's attention is directed to sections 56 and 58 of this work.

§ 77. The Various Methods of Serving the Proposed Amendments.—The rules which govern the various methods of serving the original bill or statement are equally applicable to the service of the proposed amendments.[16]

§ 78. Upon Whom It is Necessary to Serve the Proposed Amendments.—The only party upon whom it is necessary to serve the proposed amendments is the *proposing party;* that is, the one who proposed the original bill or statement.[17]

§ 79. The Proof of Service of the Proposed Amendments.—The rules which govern the proof of service of the original bill or statement are equally applicable to the proof of service of the proposed amendments.[18]

§ 80. Whether the Time Within Which the Proposed Amendments must be Filed and Served can be Extended.—The time within which the proposed amendments must be filed and served cannot be extended. This rule is recognized in the following case wherein the court said: "The time within which

[16] See § 57, *supra,* and cases cited.

[17] Rem. & Bal. Code, § 389. See § 10, *supra.*

[18] See § 59, *supra,* and cases cited.

amendments may be filed and served is expressly limited to ten days after service of a copy of the proposed statement of facts on the adverse party, and the court has no power or authority to extend the statutory period."[19]

§ 81. When the Time Within Which the Proposed Amendments must be Filed and Served Begins to Run. The time within which the proposed amendments must be filed and served begins to run when the original bill or statement has been served.[20]

§ 82. Whether the Beginning of Such Time may be Postponed.—It is a settled rule that the bill or statement as originally proposed must be a *substantial* bill or statement; that is, it must *in the first instance* contain *substantially* all the *material* facts, matters and proceedings occurring in the cause, or part of the cause, as the case may be, not already a part of the record, and that if it does not, *it is not sufficient in substance* to compel an adversary to resort to the statutory remedy of proposed amendments. When, therefore, the bill or statement as originally proposed is manifestly not such as the statute contemplates should be proposed in the first instance, it will, on motion, be stricken from the cause in the first instance where it is apparent that the party proposing it is guilty of bad faith in its preparation, or guilty of such gross negligence as amounts to bad faith; and when bad faith is not manifest, but it *is manifest* that the proposed bill or statement is not a *substantial* embodiment of all the material facts, matters and proceedings occurring in the cause, or part of the cause, as the case may be, not

[19] Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

[20] Rem. & Bal. Code, § 389. See § 10, *supra.*

already a part of the record, the party proposing it will, on motion, be required to correct it until it shall have been made substantial and such as the statute contemplates should be proposed in the first instance, and if not corrected pursuant to the order or orders for its correction, the proposed bill or statement will be stricken from the cause.[21]

From this it logically follows that the beginning of the time within which proposed amendments must be filed and served may be postponed by an application for an order requiring that the proposed bill or statement be made substantial, when the application is made in good faith and before the expiration of the time limited by the statute for the proposal of amendments; for the statute plainly contemplates that either such an application will be made, or that proposed amendments will be filed and served within the time prescribed for the proposal of amendments to a *substantial* bill or statement, and that if neither remedy is resorted to, the proposed bill or statement will be deemed to be both substantial and correct.

Where the order is granted pursuant to the application, the beginning of the time will, no doubt, be postponed until the order requiring the proposed bill or statement to be made substantial shall have been complied with; that is, until the filing and service of a substantial bill or statement pursuant to the order or orders of the judge; for, after having been made *substantial*, it may still be subject to correction by the proposal of amendments, and not subject to attack by further motions, as motions are only intended to reach a proposed bill or statement which is *manifestly* not

[21] State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631. See, also, § 42, *supra*.

substantial and are not intended as remedies for minor defects.

But when the application has been *refused*, the beginning of the time will, no doubt, be postponed until the entry of the order, if made at the time of the hearing, and in other cases until the service of a copy of the order with written notice of the filing thereof upon the party appealing, or his attorney; for the order is deemed to be an order *in the cause itself*.[22]

And it is also clearly an order, other than the final judgment, which may be directly reviewed by the supreme court upon an application for a writ of mandate, *an appeal being inadequate*, for it clearly affects a substantial right.[23]

§ 83. The Method of Computing the Time Within Which the Proposed Amendments must be Filed and Served.—The time within which the proposed amendments must be filed and served is computed by excluding the first day and including the last, unless the last is a holiday or Sunday, and then it is also excluded.

This is the rule which governs the method of computing the time within which the proposed bill or statement must be filed and served, and it is equally applicable to the proposed amendments.[24]

§ 84. When the Proposed Amendments may be Accepted.—The statute prescribes no time within which the proposed amendments must be accepted. It

[22] Rem. & Bal. Code, §§ 393, 1731. See §§ 14, 23, *supra*.

[23] Rem. & Bal. Code, § 1718. See § 20, *supra;* State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631. See, also, § 42, *supra*.

[24] See § 68, *supra*.

simply provides that "if amendments be proposed and accepted, the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments." [25]

The rational rule would therefore appear to be that the proposed amendments may be accepted at any time before the conclusion of the hearing of the application to settle and certify the bill or statement, and, *with the consent of the judge*, at any time thereafter and before the certification.

§ 85. The Methods of Accepting the Proposed Amendments.—There are no statutory regulations or rules of the supreme court relating to or governing the method of accepting the proposed amendments; but there *is* a rule which is a safe guide in the absence of such rules and regulations, and that is the rule so often announced by the court, namely, that the supreme court acts only upon the record.

Any method, therefore, by which the acceptance of the proposed amendments may be made to appear in the record on appeal is, no doubt, proper. Thus, the proposed amendments may be accepted:

1. By a written acceptance indorsed upon the proposed amendments, just as the acceptance of the service of the proposed amendments is often made to appear.

2. By the filing of a formal written acceptance.

3. By a formal acceptance of the proposed amendments in open court when such acceptance is made a part of the record on appeal; as where, for instance, it is embodied in the bill or statement as certified.[26]

[25] Rem. & Bal. Code, § 389. See § 10, *supra*.

[26] See Kane v. Kane, 35 Wash. 517, 77 Pac. 842; State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

§ 86. The Methods of Proving the Acceptance of the Proposed Amendments.—The methods of *proving* the acceptance of the proposed amendments are, of course, the same as the methods of *accepting* them; for any method by which the acceptance of the proposed amendments may be made to appear in the record on appeal is, at the same time, a method by which such acceptance may be *proved.*

The acceptance of the proposed amendments may therefore be proved:

1. By a written acceptance indorsed upon the proposed amendments, just as the acceptance of the service of the proposed amendments is often made to appear.

2. By the filing of a formal written acceptance.

3. By a formal acceptance of the proposed amendments in open court when such acceptance is made a part of the record on appeal; as where, for instance, it is embodied in the bill or statement as certified.[27]

§ 87. The Legal Effect of the Acceptance of the Proposed Amendments.—The legal effect of an acceptance of the proposed amendments is a *settlement* of the proposed bill or statement as so amended by the *express* agreement of the parties; in which event the proposed bill or statement as so amended shall be certified by the judge at the instance of either party, at any time, without notice to any other party, on proof being filed of the service of the original bill or statement and the service and acceptance of the amendments.[28]

[27] Kane v. Kane, 35 Wash. 517, 77 Pac. 842; State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

[28] Rem. & Bal. Code, § 389. See § 10, *supra.*

There does not seem to be any authority bearing directly on the proposition that where proposed amendments have been accepted, the filing of such proof is a condition precedent to the right to a certification of the bill or statement as so amended without notice.

The provision of the statute requiring such proof to be filed is clearly intended for the benefit of the court or judge; and it is apprehended that where the judge certifies the bill or statement as so amended without requiring such proof, or overlooks its absence from the record, the complaining party must affirmatively show by the record that some substantial injury has resulted therefrom.[29]

[29] See § 72, *supra*, and cases cited; Maney v. Hart, 11 Wash. 67, 39 Pac. 268.

CHAPTER VII.

THE SETTLEMENT OF THE BILL OR STATEMENT.

§ 88. Divisions of the Subject.
§ 89. The Distinction Between the Settlement and the Certification of the Bill or Statement.
§ 90. The Propriety of Considering the *Settlement* of the Bill or Statement in Connection With the *Certification.*

§ 88. Divisions of the Subject.—We now approach an intricate title which will require some degree of attention, and which, for the sake of clearness, will be considered, first, with reference to the distinction between the *settlement* and the *certification* of the bill or statement; and secondly, with reference to the propriety of considering the settlement of the bill or statement in connection with its *certification*, which will be the title of the following chapter. And first, with reference to

§ 89. The Distinction Between the Settlement and the Certification of the Bill or Statement.—The *settlement* of the bill or statement may be defined to be the determination that the bill or statement as originally proposed, or as finally amended, as the case may be, is perfect *only in so far as its contents are concerned.*

This *settlement* or *determination* may be evidenced either by the *implied* agreement of the parties, as where amendments to the bill or statement have not been proposed; or by the *express* agreement of the parties, as where amendments to the bill or statement *have been* proposed within the time prescribed by statute and *accepted;* or finally, by the certification of

the judge when the proposed bill or statement has been settled by himself.

The *certification* of the bill or statement is, as the word itself signifies, the *making certain* that the proposed bill or statement *is, in all respects,* a *proper* bill or statement; that is, that the bill or statement is worthy of the consideration of the supreme court. The *certification* may, therefore, be defined to be the determination by the judge that the bill or statement as originally proposed or as finally amended, as the case may be, has been *duly settled;* that is, that all statutory regulations and rules of the supreme court relating to the subject of bills of exceptions and statements of facts have been observed and followed.

This is the plain distinction between the *settlement* of the bill or statement, and its *certification;* for otherwise the statutory requirement that the bill or statement shall be certified by the judge even when amendments have not been proposed, as well as when proposed amendments have been accepted (in both of which cases the correctness of the bill or statement, *in so far as its contents are concerned,* is agreed upon by the parties), would be a useless requirement, for the reason that *all* statutory regulations and the rules of the supreme court relating to the subject of bills of exceptions and statements of facts are, forsooth, *directory* and not *mandatory,* and therefore useless, and that the meaning of a "*proper*" bill or statement, as contemplated by the statutes, is confined to a bill or statement which is perfect *with respect to its contents only;* a combination of absurdities which the most ordinary reason must repudiate.

The statutes do not permit irregularities. They simply contemplate that a failure to comply with their provisions, or with the rules of the supreme court, does

not forbid subsequent attempts to comply therewith so long as the *right itself* to a *proper* bill or statement is not barred by lapse of time. In other words, the statutes simply mean that if there has been an irregularity, the party may correct it at any time before the statutory limitation has barred his right to a "*proper*" bill or statement.

The following observation of the court, though limited and confined to the particular matters before it, is sufficient to illustrate the statutory meaning of a *proper* bill or statement: "We think that a *proper* statement must be such a one as has been settled after all notices have been given to the parties, as prescribed by law." [1]

This distinction between the *settlement* and *certification* of the proposed bill or statement reveals the fact that the proposed bill or statement may be absolutely perfect in so far as its contents are concerned, and still be absolutely worthless and, therefore, not a *proper* bill or statement; as, for example, where the proposed bill or statement is settled by the express agreement of the parties when proposed amendments have been accepted, and it appears upon the presentation of the proposed bill or statement to the judge for certification that it has not been filed or served within the time limited by statute.

Here the proposed bill or statement, though perfect as to its contents, and settled by the express agreement of the parties, is not a bill of exceptions or statement of facts *at all*, for a mandatory requirement of the statute has been disregarded, namely, the requirement that the proposed bill or statement must be filed and served within the particular time prescribed by

[1] First National Bank of Aberdeen v. Andrews, 11 Wash. 409, 39 Pac. 672.

the statute. It is not a *proper* bill or statement, though perfect as to its contents, for it has no legal effect. Many other illustrations might be given, but the above is sufficient.

The judge could not, therefore, in such a case, be compelled to certify the proposed bill or statement, even though the statute provides that "if no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and accepted, the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments."[2]

For this provision of the statutes must be construed in connection with another section of the statutes which provides that "if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, *in a proper case*, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto."[3]

When so construed it at once becomes clear that this is not *a proper case* for *mandamus;* for *mandamus* will not lie to compel the certification of a bill or statement which has been served before filing.[4]

[2] Rem. & Bal. Code, § 389. See § 10, *supra.*

[3] Rem. & Bal. Code, § 391. See § 12, *supra.*

[4] State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

And by a parity of reasoning *mandamus* would not lie to compel the certification of a bill or statement which had not been filed and served within the time prescribed by statute.

It thus appears that the *settlement* of the proposed bill or statement is a mere *ministerial* act, something that does not require the exercise of any judicial function, since it may be effected by the *parties themselves.*

On the other hand, the *certification* is a *judicial* act, because it requires and involves the exercise of *judicial functions*, namely, the application to the proposed bill or statement of the statutory regulations and the rules of the supreme court which govern the subject of bills of exceptions and statements of facts.[5]

Since the *settlement* of the bill or statement is a mere *ministerial* act, it follows that the supreme court may, in a proper case, appoint a referee to decide and report upon what the bill or statement should contain; in which event it becomes the duty of the supreme court itself to apply the rules of law involved in the *certification*, because the application of the rules of law involved in the *certification* of the bill or statement is a *judicial* act which cannot be delegated to a referee.[6]

It is true that the statutes, *in one particular instance*, provide that the bill or statement may be *certified* by the parties *as well as settled.* The provision of the statute reads as follows:

"If such judge shall die or remove from the state while in office or afterward, within the time within which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chap-

[5] Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

[6] See Van Lehn v. Morse, 16 Wash. 219, 47 Pac. 435; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

ter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties *with the same effect as if duly settled and certified by such judge while still in office.*"[7]

In regard to this provision of the statute, it may be said that in view of the plain distinction which has just been shown to exist between the *settlement* of a bill or statement, and its *certification*, it is quite apparent that the provision is unconstitutional in so far as it attempts to give to the *settlement* of the bill or statement by stipulation of the parties the legal effect of a settlement and certification by the judge; for it thus attempts to confer upon the parties themselves the judicial function of the judge.

A preceding portion of this section of the statute has already been held to be unconstitutional, for the reason that it attempts to impose the power and duty of settling and certifying the proposed bill or statement upon one whose judicial powers have terminated.[8]

And it is plain that this provision also is unconstitutional in so far as it attempts to confer upon the *parties themselves* the judicial power of *certifying* the proposed bill or statement, by giving to their *settlement* the legal effect of a *settlement and certification by the judge;* for the *certification*, as has been already shown, involves the exercise of judicial functions.

In so far as the statute confers upon the parties the mere power of *settling* the bill or statement under such circumstances, leaving the *certification* to the judge, it is unobjectionable; and hence a *settlement* by the stipulation of the parties under such circumstances may be mentioned as another instance of a *settlement* of the

[7] Rem. & Bal. Code, § 392. See § 13, *supra.*

[8] See Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

proposed bill or statement by the *express* agreement of the parties.

It follows from what has been said that the statutory regulations and also the rules of the supreme court relating to the subject of bills of exceptions and statements of facts are *mandatory*, and not *directory*, though occasionally certain requirements, as will be hereinafter noted, may be waived by the acts of the parties.[9]

Finally, it appears that *mandamus*, whose usual office it is to compel the performance of merely ministerial duties, is the proper remedy to compel the performance of judicial functions also; and this may create in the minds of some a doubt as to the correctness of the ruling that the certification of the bill or statement *is* a judicial act. But as to the correctness of this ruling there can be but little doubt after mature consideration. And if it be objected that the nature of *mandamus* has thus been changed, the answer is that the *nature* of *mandamus* depends upon the particular provisions of the statutes to which it owes its creation or which provides for its use; and that *in this particular instance*, its scope has been so broadened that it may now be resorted to not only as an appropriate method of compelling the performance of ministerial duties, but also as a substitute for an appeal which is considered inadequate.[10]

[9] Of the numerous cases sustaining this view, see the following: State v. Seaton, 26 Wash. 305, 66 Pac. 397; Jones v. Herrick, 33 Wash. 197, 74 Pac. 332; State v. Aschenbrenner, 45 Wash. 125, 87 Pac. 1118; Schell v. Walla Walla, 44 Wash. 43, 86 Pac. 1114; Smith v. Glenn, 40 Wash. 262, 82 Pac. 605; Medcalf v. Bush, 4 Wash. 386, 30 Pac. 325.

[10] That the ordinary remedy of *mandamus* in this state is quite different in its nature from the original and usual conception of *mandamus*, see State ex rel. Brown v. McQuade, 36

To the foregoing observations regarding the distinction between the *settlement* and the *certification* of the proposed bill or statement, the following observations will be added for the purpose of showing that the *settlement* of the proposed bill or statement is most logically considered in connection with the *certification;* and while added for this particular purpose, they may *incidentally* further clarify this intricate subject.

§ 90. The Propriety of Considering the Settlement of the Bill or Statement in Connection With the Certification.—Since the *certification* is a *judicial* act involving the application of statutory regulations and the rules of the supreme court for the purpose of determining whether the proposed bill or statement is, *in all respects*, a "*proper*" bill or statement, and therefore worthy of the consideration of the supreme court, it follows that upon the presentation of the proposed bill or statement to the judge for *certification*, it becomes the duty of the judge to determine the following *questions of law:* 1. The *legal effect* of any settlement of the proposed bill or statement by the parties; that is, to determine whether the mere ministerial act of collecting and agreeing, expressly or impliedly, upon the correctness of the contents of the proposed bill or statement, shall have any effect *as a matter of law*, and therefore to determine whether, *as a matter of law*, there *has been* a settlement by the parties, *regardless of what ostensibly appears to be the case*, for the proposed bill or statement, though agreed upon by the parties as an accurate embodiment of all material facts, matters and proceedings occurring in the cause and not

Wash. 579, 79 Pac. 207; State ex rel. Plaisie v. Cole, 40 Wash. 474, 82 Pac. 749; State ex rel. Ide v. Coon, 40 Wash. 682, 82 Pac. 993.

already a part of the record, may not have been filed and served within the time prescribed by statute, or the service may have preceded the filing, or the appeal itself may not have been taken within the time prescribed by statute, or other *mandatory* requirements may have been disregarded, in any of which cases the proposed bill or statement would not have any legal effect. 2. If it is determined by the judge *as a matter of law* that there *has been* a settlement by the parties, it is next the duty of the judge to determine the *extent of the settlement*, that is, *what has*, as a matter of law, *been settled or agreed upon by the parties*, regardless of what ostensibly appears to be the case, for proposed amendments, for instance, may have no legal effect whatever, *even though accepted*, for the reason that they were not filed and served within the time prescribed by statute, in which event the settlement of the parties would be confined, *as a matter of law*, to the contents of the bill or statement as originally proposed, and would become a settlement *by implied agreement.* 3. But if it appears to the judge that there *has not been* a settlement by the parties, it becomes the duty of the judge to determine next *as a matter of law*, whether the proposed bill or statement may be settled by himself, and if so, *when;* for the bill or statement as proposed may have no legal effect, as where, for instance, the service precedes the filing, in which event the proposed bill or statement may neither be settled nor certified by the judge; or the judge may not have the right to *exercise* his jurisdiction in the matter of settlement and certification *until such jurisdiction shall have been properly invoked*, as where, for instance, the notice of settlement has not been given, or is legally insufficient, and the defect has not been waived; in which event the time of the settle-

ment and certification must be postponed, *as a matter of law*, until a proper notice shall have been given.

From all of which it clearly appears that though the *settlement itself* is a mere ministerial act, it is a matter of law for the judge to determine before certification whether the proposed bill or statement has been *duly settled.* When, therefore, the proposed bill or statement has been settled by agreement of the parties, express or implied, the form of the certificate prescribed by the statute is accordingly such as will show the fact. The agreement of the parties evidences the fact merely that the bill or statement is correct *only in so far as its contents are concerned.* The certificate of the judge is evidence of the fact that the bill or statement has been *duly settled;* that is, that the agreement of the parties, express or implied, has been *legally made;* in other words, that the proposed bill or statement has been *legally* settled. The evidence of a settlement by the parties is incomplete and insufficient *without* a certification.

The distinction between a settlement and a certification is well illustrated by an early case wherein it appears that a statement of facts had been agreed upon, and regularly signed by the attorneys of both parties to the action, and certified by the judge; and having been subsequently lost, a similar statement was, by order of the court, substituted for the lost statement.

The *settlement* of the statement, that is, the correctness of its contents, was evidenced by the attorneys, while the certificate of the judge evidenced the fact that the statement was, *in all other respects*, a proper statement.[11]

In one early case the lower court interfered with the settlement of the parties by inserting in the bill

[11] Squire v. Greer, 2 Wash. 209, 26 Pac. 222.

or statement, at the time of the certification, matters which had not been agreed upon; but the supreme court excused the action of the lower court, for the reason that the matters inserted were wholly irrelevant, and could not in any manner affect the rights of the complaining party.[12]

In another early case it was held that a settlement by the parties could only be evidenced by a written stipulation duly filed.[13]

But these are exceptional and isolated cases which are no longer recognized as authority, and are mentioned merely because they are related to the subject under discussion.

And finally, since the *settlement* of the proposed bill or statement by the judge, *as well as the fact that it has been duly settled and certified by him*, can only be known by his *certificate*, it follows that the *settlement* (which is, as must now clearly appear, the mere ministerial act of collecting the contents of the proposed bill or statement) is most logically considered in connection with the *certification*—to the consideration of which we will now proceed.

[12] See Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96.

[13] State ex rel. Smith v. Parker, 9 Wash. 653, 38 Pac. 156.

CHAPTER VIII.

THE CERTIFICATION OF THE BILL OR STATEMENT.

§ 91. Divisions of the Subject.
§ 92. When Notice of the Settlement and Certification is not Required.
§ 93. When Notice of the Settlement and Certification is Necessary.
§ 94. When the Notice may be Given.
§ 95. Who may Give the Notice.
§ 96. Upon Whom the Notice must be Served.
§ 97. The Methods of Serving the Notice.
§ 98. Proof of Service of the Notice.
§ 99. What the Notice must Contain.
§ 100. The Judge to Whom the Application may be Made, and, Therefore, the Judge Whom the Notice may Specify.
§ 101. What Notice must be Given of the Hearing of the Application to Settle and Certify the Bill or Statement.
§ 102. The Method of Computing the Time Which the Notice must Give.
§ 103. How the Time of the Hearing of the Application may be Postponed.
§ 104. The Place Where the Hearing may be Held, and, Therefore, the Place Which the Notice may Specify.
§ 105. How the Place of the Hearing may be Changed.
§ 106. When a New Notice must be Given.
§ 107. When the Certification may be Made.
§ 108. Where the Certification may be Made.
§ 109. By Whom the Certification may be Made.
§ 110. The Number of Bills of Exceptions and Statements of Facts Which may be Certified.
§ 111. The Meaning of the Phrase "Final Judgment in the Cause" When Employed With Reference to the

Number of Bills of Exceptions and Statements of Facts Which may be Certified.
§ 112. The Form of the Certificate.
§ 113. Whether the Prescribed Form of the Certificate may be Changed or Varied for Any Purpose Whatever.
§ 114. When the Judge may Correct or Supplement His Certificate.
§ 115. What is Meant by the Correction or Supplementing of the Certificate.
§ 116. Whether Supplemental Bills of Exceptions or Statements of Facts are Permitted.
§ 117. The Remedies to Which a Complaining Party may Resort.
§ 118. The Remedy of *Mandamus*.
§ 119. The Remedy of Prohibition.
§ 120. Motions Made to the Supreme Court in the First Instance, and Based upon Various Grounds, to Strike the Bill or Statement from the Cause.

§ 91. Divisions of the Subject.—The certification of the bill or statement may be defined to be a duly authenticated determination that the bill or statement has been properly prepared, regularly proposed and duly settled. The preparation and proposal of the bill or statement have already been considered; and it now remains to consider the settlement and certification. The subject will be treated as follows:

(a) When notice of the settlement and certification is not required.

(b) When notice of the settlement and certification is necessary.

(c) When the notice may be given.

(d) Who may give the notice.

(e) Upon whom the notice must be served.

(f) The methods of serving the notice.

(g) Proof of service of the notice.

(h) What the notice must contain.

(i) The judge to whom the application may be made; and, therefore, the judge whom the notice may specify.

(j) What notice must be given of the hearing of the application to settle and certify the bill or statement.

(k) The method of computing the time which the notice must give.

(l) How the time of the hearing of the application may be postponed.

(m) The place where the hearing may be held; and therefore, the place which the notice may specify.

(n) How the place of the hearing may be changed.

(o) When a new notice must be given.

(p) When the certification may be made.

(q) Where the certification may be made.

(r) By whom the certification may be made.

(s) The number of bills of exceptions and statements of facts which may be certified.

(t) The meaning of the phrase "final judgment in the cause" when employed with reference to the number of bills of exceptions and statements of facts which may be certified.

(u) The form of the certificate.

(v) Whether the prescribed form of the certificate may be changed or varied for any purpose whatever.

(w) When the judge may correct or supplement his certificate.

(x) What is meant by the correction or supplementing of the certificate.

(y) Whether supplemental bills of exceptions or statements of facts are permitted.

(z) The remedies to which a complaining party may resort.

§ 92. When Notice of the Settlement and Certification is not Required.—Notice of the settlement and certification of the bill or statement is not required when the settlement has been effected by the agreement, express or implied, of the parties.[1]

§ 93. When Notice of the Settlement and Certification is Necessary.—Notice of the application for the settlement and certification of the proposed bill or statement is necessary, unless waived, when a settlement has not been effected by the agreement, express or implied, of the parties. Thus, where proposed amendments have not been accepted, notice of the application for the settlement and certification of the proposed bill or statement is necessary; and, unless notice has been waived, a proposed bill or statement which has been settled and certified without notice is not *duly settled and certified*, and will therefore be stricken from the cause or disregarded.[2]

[1] Rem. & Bal. Code, § 389. See § 10, *supra;* Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120; Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030; Downs Farmers' Warehouse Assn. v. Pioneer Mutual Ins. Assn., 41 Wash. 372, 83 Pac. 423. See, also, §§ 72, 87, *supra;* Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Cogswell v. West Street & North End Electric Ry. Co., 5 Wash. 46, 31 Pac. 411. See, also, Stelter v. Fowler, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879.

[2] Cuschner v. Longbehn, 44 Wash. 546, 87 Pac. 817; Shorno v. Doak, 45 Wash. 613, 88 Pac. 1113; State v. Howard, 15 Wash. 425, 46 Pac. 650.

The rule was the same under former statutes.[3]

But notice of the application for the settlement and certification of the proposed bill or statement may be waived; as, for instance, where it appears that the parties were present at the hearing of the application.[4]

The notice of the application for the settlement and certification of the proposed bill or statement might have been likewise waived under former statutes.[5]

§ 94. When the Notice may be Given.—The statute fixes no time within which the notice of the application for the settlement and certification of the proposed bill or statement must be given, and therefore must be understood as contemplating that the notice may be given within a reasonable time after the proposal of the amendments which are not accepted. What *is* a reasonable time will, of course, depend upon the circumstances of each particular case; but where it plainly appears that the appeal has been diligently prosecuted, and that there is no intention of abandoning it, a notice given in time to enable the proposed bill or statement to be settled and certified and filed in the supreme court before or at the time of the hearing of the cause on appeal is not too late.[6]

[3] Penter v. Staight and Beavers, 1 Wash. 365, 25 Pac. 469; Mooney v. State, 2 Wash. 487, 28 Pac. 363; State v. Hinchey, 5 Wash. 326, 31 Pac. 870; Ward v. Tucker, 7 Wash. 399, 35 Pac. 126, 1086; and on rehearing, Emigh v. State Ins. Co., 3 Wash. 122, 27 Pac. 1063; Caton v. Switzler, 3 Wash. Ter. 242, 13 Pac. 712; United States v. Lone Fisherman, 3 Wash. Ter. 316, 13 Pac. 617.

[4] See Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

[5] Dittenhoefer v. Clothing Co., 4 Wash. 519, 30 Pac. 660.

[6] Rem. & Bal. Code, §§ 389, 1729. See §§ 10, 21, *supra;* Floding v. Denholm, 40 Wash. 463, 82 Pac. 738; Prospectors'

Under former statutes the rule was different, for the statutes fixed a time within which the notice of the settlement and certification must be given, and such time could not be extended.

If the notice was not given within the time prescribed by the statute, a bill or statement settled and certified in pursuance of such a notice was settled and certified out of time, and would be stricken from the cause or disregarded.[7]

Where the judgment was rendered at chambers, the time did not begin to run until service of notice of the rendition of the judgment.[8]

Under the former practice an objection to the bill or statement upon the ground that it was not properly settled might be waived by a failure on the part of the one objecting to file a motion to strike the bill or statement, as required by the rules of court.[9]

The practice of serving the notice at the time of the service of the original bill or statement is quite common; but it has no statutory sanction. The statute contemplates that the notice will not be given prior to the service of the proposed amendments, for it ex-

Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791. See, also, State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court, 30 Wash. 43, 70 Pac. 102.

[7] Snyder v. Kelso, 3 Wash. 181, 28 Pac. 335; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Cadwell v. First National Bank, 3 Wash. 188, 28 Pac. 365; State v. Hoyt, 4 Wash. 818, 30 Pac. 1060; State v. Picani, 5 Wash. 343, 31 Pac. 878; Bently v. Port Townsend Hotel & Improvement Co., 6 Wash. 296, 32 Pac. 1072; Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139; Kenyon v. Knipe, 3 Wash. Ter. 243, 13 Pac. 759.

[8] Kennedy v. Derrickson, 5 Wash. 289, 31 Pac. 766.

[9] Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458.

pressly provides that "either party may then [that is, after the filing and service of the proposed amendments] serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement." [10]

The statute therefore impliedly forbids the giving of the notice at the time of the service of the original bill or statement; for the notice must fix a time not less than three nor more than ten days after service of the notice, and this will necessarily fall within the period allowed for the proposal of amendments, which, of course, will not be allowed; for, in the absence of an agreement, the bill or statement cannot be certified within that period.[11]

If the notice fixes the time for the hearing at a date which is subsequent to the time limited by the statute for the proposal of amendments, it is not a proper notice, and is insufficient to authorize a settlement and certification of the bill or statement in the absence of a waiver of the defect. Former statutes, similar in this respect to the present statutes, were so construed; and no doubt the present statutes would be likewise construed.[12]

[10] Rem. & Bal. Code, § 389. See § 10, *supra*.

[11] See Costello v. Drainage District No. 1, King County, 44 Wash. 344, 87 Pac. 513. See, also, Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139.

[12] See Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

Such defective notices may, as shown by the cases cited, be waived by a voluntary appearance and participation in the settlement, or by agreement; but if not waived, they are clearly not sufficient.[13]

Since the statute provides that "a proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed," it follows that the notice of the application for the settlement and certification of the proposed bill or statement may be given prior to the entry of the judgment or order appealed from, even though the statement be a *statement of facts*, where the time designated in the notice is subsequent to the date of the entry of the judgment or order, and the statement is settled and certified after such entry.[14]

A bill of exceptions may, of course, be settled and certified either before or after the entry of the judgment or order appealed from.[15]

But a statement of facts can only be settled and certified *after* the entry of the judgment or order appealed from.[16]

[13] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981; Costello v. Drainage District No. 1, King County, 44 Wash. 344, 87 Pac. 513.

[14] Rem. & Bal. Code, § 393. See § 14, *supra;* Phillips v. Port Townsend Lodge, No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476.

[15] Rem. & Bal. Code, § 388. See § 9, *supra.*

[16] Rem. & Bal. Code, § 388. See § 9, *supra;* Bartlett v. Reichenecker, 6 Wash. 168, 32 Pac. 1062.

The notice of the application for the settlement and certification of the proposed bill or statement may also be given before the notice of appeal.[17]

§ 95. Who may Give the Notice.—The notice may be given by either party; and by the phrase "either party" is meant either the party proposing the original bill or statement, or the party by whom the amendments have been proposed.[18]

§ 96. Upon Whom the Notice must be Served.—The provision of the statute is that "either party may then serve upon the *other*"; and by the word "other" is clearly meant the party proposing the original bill or statement, when the notice is served by the party who proposed the amendments; and when the notice is served by the party by whom the original bill or statement was proposed, the word "other" means the party by whom the amendments were proposed.[19]

Service upon attorneys of record is sufficient in the absence of proof of substitution.[20]

§ 97. The Methods of Serving the Notice.—The rules which govern the various methods of serving the original bill or statement are equally applicable to the service of the notice of the application for the settlement and certification of the bill or statement.[21]

[17] King County v. Hill, 1 Wash. 63, 23 Pac. 926. The two cases last above cited were, it is true, decided under former statutes; but they are clearly authority under the present statutes.

[18] Rem. & Bal. Code, § 389. See § 10, *supra*.

[19] Rem. & Bal. Code, § 389. See § 10, *supra*.

[20] Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977.

[21] See § 57, *supra*, and cases cited.

§ 98. Proof of Service of the Notice.—The rules which govern the proof of service of the original bill or statement are equally applicable to the proof of service of the notice of the application for the settlement and certification of the bill or statement.[22]

Proof of service cannot be made by affidavits filed in the supreme court.[23]

§ 99. What the Notice must Contain.—The statute prescribes that the notice shall specify: 1. The judge of the court before whom the cause is pending or was tried; 2. The time of the hearing of the application for the settlement and certification; 3. The place of the hearing of the application for the settlement and certification. These requirements of the statute will be separately considered in subsequent sections of this work.[24]

§ 100. The Judge to Whom the Application may be Made, and, Therefore, the Judge Whom the Notice may Specify.—The statute provides that the notice must designate "the judge of the court before whom the cause is pending or was tried."[25]

The statute also provides that the order extending the time for filing and serving the proposed bill or statement may be made by "the court or judge wherein or before whom the cause is pending or was tried."[26]

Thus it is seen that the rule relating to the judge to whom the application for the settlement and certification of the proposed bill or statement may be

[22] See § 59, *supra,* and cases cited.
[23] State v. Hinchey, 5 Wash. 326, 31 Pac. 870.
[24] See §§ 102, 104, *infra.*
[25] Rem. & Bal. Code, § 389. See § 10, *supra.*
[26] Rem. & Bal. Code, § 393. See § 14, *supra.*

made is the same as the rule relating to the judge to whom the application for an order extending the time for the filing and service of the proposed bill or statement may be made.

It is therefore the rule that any judge of the court wherein the cause is pending, or any nonresident judge, or judge *pro tempore*, before whom the cause was *tried*, is the judge to whom the application may be made; and, therefore, the judge whom the notice may specify.

The constitution provides that "the judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the case." [27]

A cause is always pending in the court of the resident judge until it has been finally determined in his court, and until all steps necessary to the completion of the proposed bill or statement have been taken; for by express provision of the statutes all steps and proceedings relating to the proposed bill or statement are deemed steps and proceedings *in the cause itself*, resting upon the jurisdiction originally acquired by the court in the cause; and, notwithstanding an appeal, the superior court shall retain jurisdiction for the purpose of settlement and certifying of bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal.[28]

[27] Const., art. 4, § 7.

[28] Rem. & Bal. Code, §§ 393, 1731. See §§ 14, 23, *supra*.

It follows, therefore, that the notice may specify a resident judge, even though the cause was tried by a *nonresident judge.*[29]

Where there are two or more judges for a particular county, each of the judges has the same powers, and all causes in their court are pending before them equally; and any one of the judges may therefore be designated in the notice of the application for the settlement and certification of the proposed bill or statement in a cause pending in the court of such county, whether he actually tried the cause or not.[30]

There are no decisions of the supreme court supporting the author's statement that a notice of the application for the settlement and certification of the proposed bill or statement may properly designate a judge *pro tempore* before whom a cause has been tried; but it is clear enough that none are necessary. The legislature, it is true, cannot delegate judicial powers.[31]

But while the *legislature* cannot delegate judicial powers, the *constitution* can; and the judicial powers of a judge *pro tempore* are *constitutional.*[32]

In an early case, decided under former statutes, it was held that a notice of an application to settle and certify a statement of facts which failed to name any place where such statement would be presented for settlement, and named a judge *who did not try the case* as the person before whom such settlement would be had, was ineffectual for the purpose for which it was

[29] See State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[30] See Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938.

[31] Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

[32] Const., art. 4, § 7.

given, and the statement was, for that reason, stricken from the cause.[33]

But the statute in force at the time of this decision expressly provided that the notice should specify "the court or judge *who tried the cause or made the decision, order, or judgment complained of*," and also "a place to be named in said notice, to settle and certify said statement of facts."[34]

The decision is, therefore, no longer authority respecting the judge to whom an application for the settlement and certification of a proposed bill or statement may be made; and, therefore, the judge whom the notice may specify.

The notice should designate the judge as the judge before whom the cause is pending, or as the judge before whom the cause was tried, as the case may be; but such a defect is waived by a voluntary appearance and participation in the settlement, especially where it also appears in the certificate that the judge designated in the notice is the proper judge.[35]

The statement in the above case was sustained upon the theory that the proposed amendments were agreed to "*in substance and effect*"; but it would have been more properly sustained upon the ground that the defective notice had been waived by a voluntary appearance and participation in the settlement; for the proposed amendments were at no time accepted in *full*, and therefore *not accepted*, as the decision shows.

[33] Coats v. West Coast Fire & Marine Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

[34] 2 Hill's Annotated Codes and Statutes of Washington, § 1422.

[35] See Stelter v. Fowler, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 978.

And finally, the judge designated must be one who will be a judge at the time of the certification; for an ex-judge has not the judicial power to certify a bill or statement, even if he is the judge who tried the cause.[36]

Therefore, if a judge is one who will not be a judge at the time of the certification, the notice should designate a judge who will be, or else designate *generally* a judge of the court.[37]

§ 101. What Notice must be Given of the Hearing of the Application to Settle and Certify the Bill or Statement.—The statute provides that the notice of the application for the settlement and certification of the proposed bill or statement must designate a time which will not be less than three days nor more than ten days after service of the notice.[38]

A notice which gives less than the statutory time is insufficient; and if the defect is not waived, the bill or statement will be stricken or disregarded when objected to for that reason.[39]

The notice should give the hour of the day, but if fixed by stipulation, neither party can object that the time was not fixed.[40]

A notice served on July 26th that appellants would apply to the judge who tried the cause on the second day of August following to settle and certify the bill or statement is a sufficient notice.[41]

[36] See § 109, *supra*, and cases cited.

[37] See Watt v. O'Brien, 6 Wash. 415, 33 Pac. 969.

[38] Rem. & Bal. Code, § 389. See § 10, *supra*.

[39] See Taylor v. Osburn, 1 Wash. 189, 22 Pac. 858; Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139.

[40] Seattle v. Buzby, 2 Wash. Ter. 25, 3 Pac. 180.

[41] Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490.

But this defect may be waived by voluntary appearance and participation in the settlement.[42]

A notice which gives *more* time than is allowed by the statute is *also* insufficient; and if the defect is not waived, the bill or statement will be stricken or disregarded when objected to for that reason.[43]

But this defect may also be waived by voluntary appearance and participation in the settlement.[44]

The notice must not designate a nonjudicial day; for if it does, and the defect is not waived, the bill or statement will be stricken or disregarded when objected to for that reason. Thus, it has been held that a notice which designates a nonjudicial day is void, and that an order of the judge extending the time for the hearing upon the *ex parte* application of appellants, and without notice to, or appearance by, respondent, was powerless to render the void notice effectual for any purpose. The court said: "A notice citing a respondent to appear and participate in the doing of an act at a time at which the act could not be legally done, is manifestly without any mandatory or coercive force whatever, and may be wholly ignored."[45]

§ 102. The Method of Computing the Time Which the Notice must Give.—The time is computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded.[46]

[42] Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

[43] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

[44] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

[45] Cadwell v. First National Bank, 3 Wash. 188, 28 Pac. 365.

[46] Rem. & Bal. Code, § 150.

Thus, when the notice is given on the ninth day of a month, and the notice states that the application will be made on the twelfth day of the same month, it is sufficient; and an intervening Sunday will not be excluded from the time. A Sunday or a holiday is to be excluded by the party who draws the notice when, in computing the time, he finds that the last day will fall on a Sunday or holiday.[47]

Thus again, under former statutes which required at least ten days' notice, and the notice of settlement and certification was given on the twentieth day of May, and the notice stated that the application would be made on the thirty-first day of the same month for the settlement and certification of the bill or statement, the thirtieth day of the month being a legal holiday, the notice was held sufficient. In this case the statute which prescribes that one who draws a notice must exclude a holiday or Sunday when, in computing the time, he finds that the last day will fall thereon, was carefully observed and followed.[48]

The statute does not sanction the designation of a holiday or Sunday as a day on which any act may be done; and, so far as notices are concerned, is plainly not intended to be curative in its nature, but is intended to furnish a method of computation by which the designation of a holiday or Sunday may be avoided.[49]

[47] Martin v. Sunset Telephone & Telegraph Co., 18 Wash. 260, 51 Pac. 376.

[48] See Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536. See, also, Ledyard v. West Street & North End Electric Ry. Co., 5 Wash. 64, 31 Pac. 417.

[49] See Cadwell v. First National Bank, 3 Wash. 188, 28 Pac. 365. For further illustrations of the method of computing

§ 103. How the Time of the Hearing of the Application may be Postponed.—The time of the hearing of the application may be postponed either, first, by an order of the judge; or, secondly, by stipulation of the parties. When so postponed, further notice of the application is not necessary.[50]

The stipulation of the parties must be evidenced by a writing duly filed in the cause, unless it otherwise appears of record.[51]

It may, no doubt, be also shown by the bill or statement.[52]

It was held in an early case that the adjournment by order of the court or judge may be established, *prima facie* at least, by a recital in the certificate to the bill or statement that regular notice had been given of the settlement, and that such settlement had been by him adjourned from time to time until the day when it was finally settled.[53]

Under former statutes the time and place of the hearing could be changed by stipulation of the parties; and

time, see the following cases: Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; Delaski v. Northwestern Improvement Co., 61 Wash. 255, 112 Pac. 341; State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217; Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411; Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381; Hewitt v. Root, 31 Wash. 312, 71 Pac. 1021; Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147; Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; Scott v. Patterson, 1 Wash. 487, 20 Pac. 593.

[50] Rem. & Bal. Code, § 389. See § 10, *supra*.

[51] Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

[52] See Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

[53] See Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96.

where an attorney appears generally for all the defendants in an action, his stipulation that a statement of facts might be settled at another time and place than named in the notice therefor is binding on all the defendants, though the record also shows that some of them were represented especially by other attorneys.[54]

§ 104. The Place Where the Hearing may be Held, and, Therefore, the Place Which the Notice may Specify.—The application may, *with consent of the parties*, be heard in any county within the district of the judge before whom the cause is pending; but *without consent of the parties to the hearing elsewhere*, the application must be heard within the particular county wherein the cause or proceeding is pending.[55]

Thus, where the application for the settlement and certification of the bill or statement was heard outside of the county wherein the cause or proceeding was pending *without consent of the parties*, it was held, in accordance with the statutory provisions, that the hearing was unauthorized, and the bill or statement was allowed to be returned to the proper county for due settlement and certification.[56]

The consent may be evidenced either by the stipulation of the parties reduced to writing and duly filed, or such consent may, no doubt, be shown in the proposed bill or statement.[57]

[54] Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

[55] Rem. & Bal. Code, §§ 41, 42. See §§ 32, 33, *supra*.

[56] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[57] See Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104. See, also, Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

These rules are applicable to the place of all hearings in the superior courts.[58]

But the application cannot be heard outside of the *judicial district wherein the cause is pending, even with the consent of the parties.* The statute very clearly limits the territory within which the hearing may be held, even with consent of the parties, to the judicial district wherein the cause is pending.[59]

The statute provides that the notice of the application for the settlement and certification of the bill or statement must designate the place of the hearing.[60]

It is accordingly held that a notice which fails to give the place of the hearing is insufficient, and that the bill or statement will be stricken or disregarded if the defect is not waived.[61]

This defect may, however, be waived by voluntary appearance and participation in the settlement.[62]

The statement in the above case was sustained upon the theory that the proposed amendments were agreed to "*in substance and effect,*" but it would have been more properly sustained upon the ground that the defective notice had been waived by a voluntary appearance and participation in the settlement; for the pro-

[58] See Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383. See, also, State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

[59] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[60] Rem. & Bal. Code, § 389. See § 10, *supra.*

[61] American Asphalt Co. v. Gribble, 8 Wash. 255, 35 Pac. 1098; Merchants' National Bank of Seattle v. Ault, 14 Wash. 701, 44 Pac. 129; Kroenert v. Gustason, 19 Wash. 373, 53 Pac. 340; Coats v. West Coast Fire & Marine Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

[62] See Stelter v. Fowler, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879.

posed amendments were at no time accepted in full, as the decision shows.

In counties where there are more than one judge and more than one department, it is the usual practice, in addition to designating the courthouse and the location thereof, to designate the particular department; but a designation of the "courthouse" has been held to be a sufficient designation of the place of the hearing.[63]

§ 105. How the Place of the Hearing may be Changed.—The statute directly relating to the subject of bills of exceptions and statements of facts provides that "at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement."[64]

But a later statute also provides as follows:

"Section 1. Any judge of the superior court of the state of Washington shall have power, *in any county within his district:* (1) To sign all necessary orders and papers in probate matters pending in any other county in his district; (2) to issue restraining orders, and to sign the necessary orders of continuance in actions or proceedings pending in any other county in his district; (3) *to decide and rule upon* all motions, demurrers, issues of fact *or other matters* that may have been submitted to him in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: Provided, that nothing herein contained shall

[63] Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758.

[64] Rem. & Bal. Code, § 389. See § 10, *supra*.

authorize the judge to *hear* any matter outside of the county wherein the cause or proceeding is pending, *except by consent of the parties.*

"Section 2. Any judge of the superior court of the state of Washington who shall have *heard* any cause, either upon motion, demurrer, issue of fact, *or other matter, in any county out of his district*, may decide, rule upon, and determine the same *in any county in this state*, which decision, ruling and determination shall be in writing and shall be filed immediately with the clerk of the county where such cause is pending." [65]

The courthouse of the particular county wherein a cause is pending is, no doubt, the only legitimate place for hearings in the absence of a statute expressly permitting the court or judge to change the place; and it therefore follows that the place of the hearing can only be changed by consent of the parties.[66]

Under the former practice the place of the hearing could be changed by stipulation of the parties.[67]

But the place of the hearing cannot be changed to a place outside of the judicial district wherein the cause is pending, *even with the consent of the parties.* The statute very clearly limits the territory within which the hearing may be held, even with consent of the

[65] Rem. & Bal. Code, §§ 41, 42. See §§ 32, 33, *supra.*

[66] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774. See, also, the following cases: Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383; State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

[67] Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

parties, to the judicial district wherein the cause is pending.[68]

Under former statutes the rule was different.[69]

§ 106. When a New Notice must be Given.—The statute provides that "if the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served."[70]

The statute, in thus providing for a new notice when the judge is absent at the appointed time, contemplates that the original notice is not sufficient to authorize a settlement and certification of the bill or statement after the time fixed in the notice or by the adjournment (whether the adjournment be by order of the court or by stipulation of the parties); in other words, that the vitality of the notice ceases at the time appointed for the hearing. This must be so, or the statutory provision is useless. The word "may," therefore, means "must" in such a case, and a new notice is necessary.

The intention of the statute plainly is that the hearing may be postponed or adjourned in such a case by a stipulation of the parties, and that if it cannot be so postponed, a new notice may be resorted to; but that, in any event, the one method or the other is a necessity.[71]

But this is not the only instance where the necessity of a new notice is contemplated by the statute, even

[68] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 77 Pac. 774.

[69] King County v. Hill, 1 Wash. 63, 23 Pac. 926; Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96; State ex rel. Malouf v. McDonald, 21 Wash. 201, 57 Pac. 336; Marsh v. Wade, 3 Wash. Ter. 477, 17 Pac. 886.

[70] Rem. & Bal. Code, § 389. See § 10, *supra*.

[71] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

though it is the only instance which is *expressly* mentioned.

It has been seen that the time of the hearing of the application can only be postponed or adjourned by an order of the judge, or by stipulation of the parties.[72]

This being so, a new notice is necessary if the application is not heard at the appointed time, and there is no adjournment, even though the judge is *present* at the appointed time.[73]

A new notice is also clearly necessary where the hearing has been adjourned to a place outside of the judicial district wherein the cause or proceeding is pending, and the bill or statement has been there settled and certified.[74]

Or where the original notice fixes the time for the hearing of the application on a legal holiday or Sunday.[75]

Or where the original notice fixes the time for the hearing of the application within the period allowed by the statute for the proposal of amendments, and is for that reason void.[76]

Or where the original notice allows an insufficient time for the hearing of the application.[77]

Or where the original notice designates a time subsequent to the time limited by statute.[78]

[72] See § 103, *supra*. See, also, Rem. & Bal. Code, § 389. See § 10, *supra*.

[73] See Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

[74] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[75] See Cadwell v. First National Bank, 3 Wash. 188, 28 Pac. 365.

[76] See Costello v. Drainage District No. 1, King County, 44 Wash. 344, 87 Pac. 513.

[77] See Taylor v. Osburn, 1 Wash. 189, 22 Pac. 858.

[78] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

Or where the original notice designates a place which is outside of the judicial district in which the cause or proceeding is pending.[79]

Or where the original notice, without consent of the parties to the change, designates a place for the hearing which is not within the particular county wherein the cause is pending, though it is within the judicial district of the judge before whom the cause is pending.[80]

Or where the original notice designates the wrong judge.[81]

Or where the original notice is not, in other respects, such as the statute contemplates.

But a failure to give a new notice may, of course, be waived; as, for instance, where the application is heard and the bill or statement settled and certified at a time subsequent to the time fixed by the notice, and there is no adjournment nor new notice, and even though the judge was present at the time fixed by the notice for the hearing, when there is a voluntary appearance and participation in the settlement.[82]

Also where the judge is absent at the time fixed for the hearing, but subsequently, without notice and without adjournment by stipulation, settles and certifies the bill or statement, allowing the proposed amendments, when there is a voluntary appearance and participation in the settlement.[83]

[79] See Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774.

[80] See Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383. See, also, State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

[81] Coats v. West Coast Fire & Marine Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

[82] McGlauflin v. Merriam, 7 Wash. 111, 34 Pac. 561.

[83] State v. Payne, 6 Wash. 563, 34 Pac. 317.

Also, under former statutes, where the judge was absent at the time fixed by the notice for the hearing, and the bill or statement was subsequently settled and certified without adjournment and without further notice, it was held that the failure to give a new notice was waived by the failure of the objecting party to serve a written notice upon the opposite party, stating whether or not the correctness of the statement of facts was contested, and if contested, in what particular or particulars it was deficient, incorrect or incomplete, as required by statute.[84]

Notice of the mere *certification* of the bill or statement is not necessary, for the certification is a *judicial act.* This is evident from the rule heretofore announced that notice of the application for the certification of the bill or statement is not necessary when the bill or statement has been settled by the agreement, express or implied, of the parties.[85]

Notice is only necessary for the hearing of the application for the settlement, *the ministerial act.* Therefore, when the bill or statement is allowed to be returned for proper certification after having once been forwarded to the supreme court, notice of the recertification is not necessary.[86]

§ 107. When the Certification may be Made.— When the application for the settlement and certification of the bill or statement has been heard, and the contents of the bill or statement has been determined upon; or when the bill or statement has been settled by the agreement, express or implied, of the parties,

[84] Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

[85] See § 92, *supra,* and cases cited.

[86] Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758.

it next devolves upon the judge to examine the record with a view to the *certification*, which is the final act by which the bill or statement is judicially determined to be, *in all respects*, a *proper* bill or statement.

The statute prescribes no time within which this judicial act must be done, and therefore it must be understood as contemplating that the judge shall have at least a *reasonable time* for deliberation.[87]

Indeed, the bill or statement may not be certified *at all;* for upon examination of the record it may appear that it is not, *as a matter of law*, entitled to certification; as, for instance, where it appears that the notice of appeal was not served within the time prescribed by statute, in which event the judge cannot be compelled to certify it.[88]

Or it may appear upon investigation of the record by the judge that the cause itself is not within the appellate jurisdiction of the supreme court, or that the bill or statement was not filed and served within the time prescribed by statute, or that it was served before it was filed, or that the bond on appeal has not been given, or is insufficient, in any of which cases (and there are others which will readily occur to the reader) the judge, it is clear, would not be compelled to certify it.

But it is unquestionably the rule that a bill or statement which is certified and filed in the supreme court before or at the time of the hearing of the cause on appeal is not too late.[89]

[87] State ex rel. Miles v. Superior Court, 13 Wash. 514, 43 Pac. 636.

[88] Shipley v. McPherson, 46 Wash. 172, 89 Pac. 408.

[89] Rem. & Bal. Code, §§ 389, 1729. See §§ 10, 21, *supra;* Floding v. Denholm, 40 Wash. 463, 82 Pac. 738; Prospectors' Development Co. v. Brook, 31 Wash. 187, 71 Pac.

But a statement of facts cannot, as has been before observed, be certified before the entry of the judgment or order from which the appeal has been taken, or with a view to an appeal from which it has been proposed.[90]

A bill of exceptions, however, may be certified either before or after the entry of the judgment or order appealed from.[91]

But either the bill or statement may be certified before giving the notice of appeal.[92]

And participation in the settlement of the bill or statement does not estop a party from raising jurisdictional questions; as, for instance, that the notice of appeal was prematurely given.[93]

§ 108. Where the Certification may be Made.— The bill or statement may be certified in any county within the judicial district wherein the cause is pending; and if the judge who heard the application for the settlement and certification is a *visiting judge*, it may be certified by him in any county of the state.[94]

774; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791. See, also, Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758; State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137. See also, State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court, 30 Wash. 43, 70 Pac. 102.

[90] Bartlett v. Reichenecker, 6 Wash. 168, 32 Pac. 1062. See, also, Phillips v. Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476.

[91] Rem. & Bal. Code, § 388. See § 9, *supra.*

[92] Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758.

[93] Marsh v. Degeler, 3 Wash. 71, 27 Pac. 1073.

[94] Rem. & Bal. Code, §§ 41, 42. See §§ 32, 33, *supra;* Const., art. 4, § 7. See, also, § 65, *supra,* and cases cited.

§ 109. By Whom the Certification may be Made.— It is the general rule that the bill or statement must be certified, or, in other words, *authenticated;* and if not, it will not be considered.[95]

This being so, our next inquiry will be directed to the person or persons in whom the power of certification resides. The rule is that the certification may be made by any judge of the court wherein the cause is pending, or by any nonresident judge, or judge *pro tempore*, before whom the cause was tried.[96]

The statute provides that the notice of application for the settlement and certification of the bill or statement shall designate "the judge of the court before whom the cause is pending or was tried." [97]

The constitution provides that "the judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the case." [98]

[95] Hanson v. Tompkins, 2 Wash. 508, 27 Pac. 73; Howard v. Ross, 3 Wash. 292, 28 Pac. 526; Madigan v. West Coast Fire & Marine Ins. Co., 3 Wash. 454, 28 Pac. 1027; McCarty v. Hayden, 4 Wash. 537, 30 Pac. 637; Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287; Case v. Ham, 9 Wash. 54, 36 Pac. 1050; Sprague v. Meagher, 32 Wash. 62, 72 Pac. 108, 708; Adams v. Columbia Canal Co., 51 Wash. 297, 98 Pac. 741.

[96] Rem. & Bal. Code, § 389. See § 10, *supra;* Const., art. 4, § 7.

[97] Rem. & Bal. Code, § 389. See § 10, *supra.*

[98] Const., art. 4, § 7.

The rule is therefore the same as the rule which relates to the judge who may make the order extending the time for the filing and service of the proposed bill or statement.[99]

When there are two or more judges in whom the power of certification resides, and the bill or statement has been settled by the agreement, express or implied, of the parties, no particular preference need be shown in the choice of the judge; but where the bill or statement *has not* been settled by the agreement of the parties, the judge who tried the cause should, of course, be preferred and designated in the notice of application for the settlement and certification; but where a preference does not exist, owing to the death of the judge who tried the cause, or where a preference would be impracticable or of no avail, as where a visiting judge who tried the cause refuses to attend the hearing of the application for settlement and certification, and to settle and certify the bill or statement, it may be certified by any other judge in whom the power of certification resides.

This simple rule has been somewhat obscured by a subsequent section of the statutes, parts of which are clearly unconstitutional, and the remainder nothing more than a periphrasis of that which is already provided for by the simple clause "*the judge of the court before whom the cause is pending or was tried.*"

The section referred to reads as follows:

"If the judge before whom the cause was pending or tried shall from any cause have ceased to be such judge he shall, notwithstanding, settle and certify, as the late judge, any bill of exceptions or statement of facts that it would be proper for him to settle and

[99] See § 64, *supra,* and cases cited. See, also, § 100, *supra,* and cases cited.

certify if he were still such judge, and such acts on his part shall have the same effect as if he were still in office; and he may be compelled by mandate so to do, as if still in office. If such judge shall die or remove from the state while in office or afterward, within the time within which a bill of exceptions or statement of facts in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office. But if the parties cannot agree, and if such judge, when removed from the state, does not attend within the state and settle and certify a bill of exceptions or statement of facts in case one has been duly proposed, his successor in office shall settle and certify such bill or statement in the manner in this chapter provided, and in so doing he shall be guided, so far as practicable, by the minutes taken by his predecessor in office, or by the stenographer, if one was in attendance on the court or judge, and may, in order to determine any disputed matter not sufficiently appearing upon such minutes, examine under oath the attorneys in the cause who were present at the trial or hearing, or any of them." [100]

That portion of the above section which attempts to confer or impose the power of settlement and certification upon an ex-judge has already been held to be unconstitutional, for the reason that it attempts to delegate judicial powers to one in whom judicial powers no longer reside.[101]

[100] Rem. & Bal. Code, § 392. See § 13, *supra*.

[101] Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

Under former statutes it was held that an ex-judge had no power to settle and certify a bill of exceptions or statement of facts.

The decisions were rendered apparently on the theory that the statutes failed to confer such power.[102]

In this last case, however, a bill or statement which was settled and certified by an ex-judge was entertained because respondents did not move to strike the bill or statement; but moved, instead, to dismiss the appeal. Justices Dunbar and Anders dissented.

In an early case under the present statutes it was held that an ex-judge could not be *compelled* to settle and certify a bill of exceptions or statement of facts, for the reason that the statute does not purport to do more than to *authorize* ex-judges to settle and certify; and that it does not, and could not, *require* them to do anything.[103]

In another early case it was held that the present statutes authorizing ex-judges to settle and certify bills of exceptions and statements of facts do not authorize an ex-judge to transfer the matter of settlement and certification to his successor in office; and the bill or statement which was settled and certified by the successor of the ex-judge was, accordingly, stricken from the cause.[104]

[102] Faulconer v. Warner, 2 Wash. 525, 27 Pac. 274; Gunderson v. Cochrane, 3 Wash. 476, 28 Pac. 1105; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Gordon v. Nelson, 4 Wash. 817, 30 Pac. 647; Watt v. O'Brien, 6 Wash. 415, 33 Pac. 969; Northern Pacific & Puget Sound Shore R. R. Co. v. Coleman, 3 Wash. 228, 28 Pac. 514.

[103] State ex rel. Hinchey v. Allyn, 7 Wash. 285, 34 Pac. 914.

[104] Michigan Mfg. Co. v. Saunders, 7 Wash. 302, 34 Pac. 1102.

It is now, however, clearly settled that an ex-judge has not the power to settle and certify a bill of exceptions or statement of facts. If, however, an ex-judge *does* settle and certify a bill or statement, a subsequent settlement and certification by his successor in office cures the defect.[105]

The clerk of the lower court has not, of course, the judicial power to settle and certify a bill of exceptions or statement of facts.[106]

Nor can the parties by their agreement exercise the judicial power of certifying the bill or statement.[107]

Nor can the bill or statement be authenticated by the affidavit of a stenographer.[108]

As between two or more judges who have certified different bills or statements, the bill or statement which is certified by the judge who first and rightfully assumes jurisdiction will be preferred to the other or others.[109]

That portion of the above section of the statutes which provides for the certification of the bill or statement by agreement of the parties is clearly unconstitutional, for the reason that it also attempts to delegate the judicial functions of the judge to the parties themselves.

[105] Rauh v. Scholl, 19 Wash. 30, 52 Pac. 332; Anderson v. Provident Life & Trust Co., 26 Wash. 192, 66 Pac. 415.

[106] Howard v. Ross, 3 Wash. 292, 28 Pac. 526; McCarty v. Hayden, 4 Wash. 537, 30 Pac. 637.

[107] Madigan v. West Coast Fire & Marine Ins. Co., 3 Wash. 454, 28 Pac. 1027.

[108] Adams v. Columbia Canal Co., 51 Wash. 297, 98 Pac. 741.

[109] See Hill v. Young, 7 Wash. 33, 34 Pac. 144.

It has long been the rule that the parties themselves cannot exercise this judicial function.[110]

The remainder of the section above quoted provides for nothing more than the simple clause "the judge of the court before whom the cause is pending or was tried" provides for; except that it undertakes to confer upon the successor of a nonresident judge who tried the cause the judicial power of certifying the bill or statement *as such successor*. In this respect the section is again unconstitutional, for the constitution clearly limits the delegation of judicial power to the *particular judge selected.*

Therefore, when a nonresident judge who tried a cause dies, his successor in office has not the judicial power, *as such successor*, to settle and certify the bill or statement.

It has been held, it is true, that where a nonresident judge who tried the cause dies, the bill or statement may be settled and certified by his successor in office *when he has been requested by the resident judge to do so.*[111]

But in such a case the judicial power of the successor who settles and certifies the bill or statement does not exist by reason of the fact *that he is the successor of the deceased nonresident judge who tried the cause*, notwithstanding the statutory provision; but it exists by virtue of the fact *that upon request of the resident judge to attend and settle and certify the bill or statement, he becomes, upon compliance with such request, for the time being, "the judge of the court before whom the cause is pending."*

[110] See Madigan v. West Coast Fire & Marine Ins. Co., 3 Wash. 454, 28 Pac. 1027. See, also, § 89, *supra,* and cases cited.

[111] Gray's Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

The constitution confers upon him, when he complies with the request, the power "*to hold court,*" and the phrase "*to hold court*" palpably means the power to exercise the judicial functions of the resident court or judge.

In the above case, therefore, the judge who settled and certified the bill or statement derived his judicial power to do so from the *constitution, and not from the statute.*[112]

Thus it is seen that the above section serves merely the purpose of confusing a subject which is already sufficiently complex; and is therefore really not entitled to a place among the statutes.

The constitution confers upon a judge *pro tempore* the right to "*try the case.*" [113]

The right to "*try the case*" is a right to retain jurisdiction to the end for the purpose of disposing of the cause upon the merits.[114]

The certification of the bill or statement is a step and proceeding *in the cause itself,* resting upon the jurisdiction originally acquired by the court in the cause.[115]

A superior court also retains jurisdiction, notwithstanding an appeal, for the purpose of settling and certifying bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal.[116]

[112] See Const., art. 4, § 7. See the early case of King County v. Hill, 1 Wash. 63, 23 Pac. 926.

[113] Const., art. 4, § 7.

[114] See State ex rel. Cougill v. Sachs, 3 Wash. 691, 29 Pac. 446; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107.

[115] Rem. & Bal. Code, § 393. See § 14, *supra.*

[116] Rem. & Bal. Code, § 1731. See § 23, *supra.*

A judge *pro tempore* has, therefore, the judicial power of certifying bills of exceptions and statements of facts.

It has accordingly been held that a judge whose term of office had expired before he had finally disposed of the cause, and who had subsequently been appointed judge *pro tempore* in the cause, had the judicial power to certify a statement of facts.[117]

In a later case a judge *pro tempore* who tried the cause was thereafter elected judge, and as such judge settled and certified a statement of facts in the cause. It was urged that he should have certified the statement of facts *as judge pro tempore*. The court said: "While he could have certified to the statement as judge *pro tempore*, under the authority of the case of Nelson v. Seattle Traction Co., 25 Wash. 602, 66 Pac. 61, the fact that he used his official title can make no difference. The material requirement is that it be certified *by the judge qualified so to do*." [118]

The rule of the section must be understood as meaning that when the certification is made by a judge who did not try the cause, he must be one who is qualified to sit in the cause; for if he is not qualified to sit in the cause, he is clearly not qualified to exercise the judicial function of certifying the bill or statement; and therefore, strictly speaking, the cause cannot be said to be pending before him. Disqualification is, however, something which may be waived; and he may therefore, no doubt, be designated in the notice of the application for the settlement and certification of the bill or statement.

[117] Nelson v. Seattle Traction Co., 25 Wash. 602, 66 Pac. 61.

[118] Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879.

§ 110. The Number of Bills of Exceptions and Statements of Facts Which may be Certified.—The certifying of a bill of exceptions or statement of facts does not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause.[119]

This provision of the statute that "only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause" simply means that only one bill or statement which embodies material facts, matters and proceedings occurring in the cause prior to the rendition of the final judgment *can be proposed for settlement and certification* after the rendition of such final judgment.

The terminology of this portion of the section is, it must be confessed, confusing; for the language is that "only one bill of exceptions or statement of facts *can be settled or certified* after the rendition of the final judgment in the cause"; whereas the plain intention of the statutes as a whole is that as many bills or statements may be settled and certified after the rendition of the final judgment as have been duly proposed *prior thereto*, though only one bill or statement which embodies material facts, matters and proceedings occurring in the cause prior to the rendition of the final judgment can be proposed for settlement and certification *after* the rendition of such final judgment; while the number of bills or statements which relate to appealable orders made after the rendition of such final judgment is unaffected by any limitation.

[119] Rem. & Bal. Code, § 388. See § 9, *supra*.

A somewhat extended consideration of this subject may be of some value; for in one case it appears to have been assumed by counsel (and pardonably too) that but one bill or statement can be *certified* after the rendition of the final judgment, though the opinion of counsel was not shared in by the court.[120]

The phrase "final judgment in the cause" is here used in its ordinary sense, and means "the final determination of the rights of the parties in the action." [121]

The statutes relating to appeals and those relating to bills of exceptions and statements of facts are *in pari materia*, and should therefore be construed together.

Furthermore, any particular provision of the statutes relating to bills of exceptions and statements of facts should be so construed with the other provisions that the whole may, if possible, stand.

Thus, the general statute relating to appeals expressly provides for appeals from the final judgment and also from certain specified orders made before and after the rendition of the final judgment.[122]

The statutes relating to bills of exceptions and statements of facts also expressly provide for a statement of facts "after the making of an appealable order or the final judgment in the cause"; and for a bill of exceptions at any stage of an action or proceeding.[123]

It thus appears that the phrase "final judgment in the cause" is used advisedly by the statutes relating to bills of exceptions and statements of facts and in contradistinction to appealable orders.

[120] See State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[121] Rem. & Bal. Code, § 404.

[122] Rem. & Bal. Code, § 1716.

[123] Rem. & Bal. Code, § 388. See § 9, *supra*.

When all provisions which are *in pari materia* are construed together, it at once becomes apparent that bills of exceptions and statements of facts which relate to appealable orders made after the rendition of the final judgment are not intended to be affected by any limitation whatsoever; for if they were, the right of appeal therefrom which has been so carefully provided for would ofttimes be *destroyed* owing to the certification of some bill or statement after the rendition of the final judgment.

On the other hand, it also becomes apparent that bills of exceptions and statements of facts which have been duly proposed for settlement and certification prior to the rendition of the final judgment are not intended to be affected by any limitation whatsoever; for if they were, the right of appeal from appealable orders made prior to the rendition of the final judgment, *as well as the right of appeal from the final judgment itself*, would also be ofttimes *destroyed* owing to the certification of some bill or statement after the rendition of such final judgment.

Moreover, the limitation cannot be taken in its literal sense and be understood as meaning what it unquestionably says, namely, that "only one bill of exceptions or statement of facts can be *settled or certified* after the rendition of the final judgment in the cause"; for if it were so understood, it would not only *necessarily affect, but ofttimes destroy*, the right of appeal from appealable orders made after the rendition of the final judgment, as well as the right of appeal from appealable orders made prior to the rendition of the final judgment, and finally the right of appeal from the final judgment itself, owing to the certification of some bill or statement after the rendition of such final judgment.

The limitation must therefore be so construed with the other provisions relating to bills of exceptions and statements of facts that the whole may, if possible, stand; and this is not a difficult task after the foregoing eliminations, for there is nothing left now to which the limitation *can be applied* except bills of exceptions and statements of facts which embody material facts, matters and proceedings occurring in the cause prior to the rendition of the final judgment and which are *proposed for settlement and certification* after the rendition of such final judgment.

These are the objects of the limitation, for its application to them will limit their number to a single bill or statement, but will not destroy any right of appeal.

The meaning of this limitation having been thus determined, a few words regarding *the reason for its existence* will probably not be out of place.

The statutes recognize the fact that the right to *a considerable number* of bills of exceptions *especially* may accrue prior to the rendition of the final judgment; for the number of bills of exceptions which may be proposed prior to the rendition of the final judgment *may be* limited only by the number of oral rulings made; and the number of statements of facts which may be proposed prior to the rendition of the final judgment *may be* limited only by the number of appealable orders made prior thereto.

The statutes also recognize the impossibility of prescribing a limitation to the number of bills of exceptions or statements of facts which may be proposed *prior* to the rendition of the final judgment; but the statutes also further recognize the fact that whether this privilege of proposing bills or statements without limitation as to the number *prior* to the rendition of the final judgment is, or is not, exercised, there is no

sound reason for extending the privilege beyond the time of the rendition of such final judgment. Indeed, a further extension of the privilege would impede rather than aid the administration of justice; for it would unnecessarily burden the courts with the settlement and certification of bills of exceptions and statements of facts when a single bill or statement would answer every purpose.

It is thus the intention of the statutes to limit the right of a party, after the rendition of the final judgment in the cause, *to the proposal for settlement and certification* of but one bill of exceptions or statement of facts which embodies all material facts, matters and proceedings occurring in the cause prior to the rendition of the final judgment, and to leave all bills of exceptions or statements of facts which relate to appealable orders made after the rendition of the final judgment unaffected; and also to permit the settlement and certification of all bills or statements which have been duly proposed prior thereto, notwithstanding the unfortunate phraseology that but "one bill of exceptions or statement of facts can be *settled or certified* after the rendition of the final judgment in the cause."

§ 111. The Meaning of the Phrase "Final Judgment in the Cause" When Employed With Reference to the Number of Bills of Exceptions and Statements of Facts Which may be Certified.—The phrase "final judgment in the cause," when employed with reference to the number of bills of exceptions and statements of facts which may be certified, might possibly be understood as referring to the last order from which an appeal may be taken, upon the theory that if this is not its intended meaning, the statute, instead of

assisting, would be a means of defeating, appeals from appealable orders made after the final judgment, as such phrase is usually understood. But such an order cannot be determined beforehand, and the phrase "final judgment in the cause" is here used advisedly and in its ordinary sense, and means "the final determination of the rights of the parties in the action." [124]

§ 112. The Form of the Certificate.—This subject will be considered in a twofold view, namely: First, with reference to the form of the certificate when the bill or statement has been settled by the agreement, express or implied, of the parties; and secondly, with reference to the form of the certificate when the bill or statement is settled by the judge.

And first, with reference to the form of the certificate when the bill or statement has been settled by the agreement of the parties.

It is self-evident that if the judge has no power to *settle* the bill or statement when the facts, matters and proceedings have been agreed upon by the parties, but has merely the power in such a case to certify the bill or statement in accordance with such agreement, he cannot be expected, on the one hand, to certify to the completeness of the contents of the bill or statement from his own knowledge; nor should he be allowed, on the other hand, to certify the bill or statement in such a manner as to show that it is insufficient or incomplete. A certification of the bill or statement in accordance with the agreement of the parties is, therefore, all that could be reasonably required of the judge; and this is all that the statute requires. Indeed, it could not logically require more.

[124] See § 110, *supra;* Rem. & Bal. Code, § 404.

The form of the certificate in such a case is plainly provided for by statute as follows:

"The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed to be all that are material therein. The certificate shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein." [125]

When the facts, matters and proceedings have been agreed upon by the parties, the form of the certificate should be such as to require the judge merely to certify "that the matters and proceedings embodied in this bill (or statement) are matters and proceedings occurring in this cause, and that the same are hereby made a part of the record herein; and that this bill (or statement) contains such of the facts, matters and proceedings heretofore occurring in this cause, and not already a part of the record herein, as the parties have agreed to be all that are material herein."

This is the form which the statute plainly provides for, and which the decisions recognize.[126]

[125] Rem. & Bal. Code, § 391. See § 12, *supra.*

[126] Nickeus v. Lewis County, 23 Wash. 125, 62 Pac. 763; Kane v. Kane, 35 Wash. 517, 77 Pac. 842. See, also, the

Secondly, with reference to the form of the certificate when the bill or statement is settled by the judge.

The statute provides that when the bill or statement is settled by the judge, he shall certify "that the matters and proceedings embodied in this bill (or statement) are matters and proceedings occurring in this cause and that the same are hereby made a part of the record herein; and that this bill (or statement) contains all the material facts, matters and proceedings heretofore occurring in this cause and not already a part of the record herein."

When the bill or statement is settled by the judge, the certificate must be substantially in the form thus prescribed by the statute; and if it is not, the bill or statement will be stricken from the cause, or will be disregarded. This was the rule also under former statutes.[127]

following cases generally: State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; State ex rel. Royal v. Linn, 35 Wash. 116, 76 Pac. 513; In re Hill's Heirs, 7 Wash. 421, 35 Pac. 131; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; State ex rel. Smith v. Parker, 9 Wash. 653, 38 Pac. 156; State v. Maines, 26 Wash. 160, 66 Pac. 431; State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

[127] King County v. Hill, 1 Wash. 63, 23 Pac. 926; Kellogg v. Bradley, 3 Wash. 429, 28 Pac. 367; State v. Carey, 4 Wash. 424, 30 Pac. 729; Schlaechter v. Miller, 4 Wash. 463, 30 Pac. 745, 31 Pac. 595; Clark-Harris Co. v. Douthitt, 4 Wash. 465, 30 Pac. 744; Small v. Geddis, 4 Wash. 518, 30 Pac. 746; Kirby v. Collins, 6 Wash. 297, 32 Pac. 1060; Holm v. Gilchrist, 7 Wash. 615, 34 Pac. 1102; Taylor v. City Council of Tacoma, 15 Wash. 92, 45 Pac. 641; State v. Zettler, 15 Wash. 625, 47 Pac. 35; State v. Pittam, 32 Wash. 137, 72 Pac. 1042; Demaris v. Barker, 33 Wash. 200, 74 Pac.

The following certifications have been held sufficient:

On appeal from an order fixing the compensation of a receiver, a certificate which stated that the bill or statement contains all the material facts in the proceeding to determine the compensation of the receiver.[128]

A similar certification has been held to be sufficient under the present statutes.[129]

A certification that the statement of facts includes all of the material evidence "except that there is omitted from said statement of facts all evidence which refers solely to the kind, quality, physical condition, fertility, productivity, salability, and value of the lands and premises mentioned in the pleadings in this cause." [130]

The following certification has also been held to be sufficient:

362; Caughey v. Rien, 37 Wash. 296, 79 Pac. 925; State ex rel. Miller v. Seattle, 45 Wash. 691, 89 Pac. 152; Ness v. Bothell, 53 Wash. 27, 101 Pac. 702; Collins v. Seattle, 2 Wash. Ter. 354, 7 Pac. 857; Case v. Ham, 9 Wash. 54, 36 Pac. 1050; Zenkner v. Northern Pacific R. R. Co., 3 Wash. Ter. 60, 14 Pac. 596.

[128] Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

[129] Bruce v. Foley, 18 Wash. 96, 50 Pac. 935.

[130] Smith v. Glenn, 40 Wash. 262, 82 Pac. 605. The court in its opinion in the above case said: "The evidence thus excluded had to do with an issue of fact upon which the trial court found in favor of appellants. Said issue is in no manner involved in the case as it comes before us on appeal. Hence, it was not necessary to bring up said evidence. The practice of eliminating all evidence except such as is material to the issues triable in this court is to be commended. The motion to strike the statement is denied."

"I hereby certify that the above and foregoing has been this day settled by me as the proper statement of facts in the above-entitled cause, to wit, Miller et al. v. Reed et al., and I hereby certify that the same is the proper statement of facts in said cause, and the above statement contains all the evidence taken in said cause." [131]

It has also been held that a certificate is sufficient when it certifies that the bill or statement contains all the material facts, including all exhibits in the case; and that it is not necessary that the certificate should state that the bill or statement contains all the testimony on which the cause was tried, together will all objections or exceptions taken to the reception or rejection of testimony.[132]

A similar certification was held to be sufficient under the present statutes.[133]

§ 113. Whether the Prescribed Form of the Certificate may be Changed or Varied for Any Purpose Whatever.—Since the statute has prescribed the forms which must be used in the certification of the bill or statement, it follows that the certificate cannot be legitimately employed for the purpose of supplying defects in the record, or for the purpose of supplying matters which have been omitted from the body of the bill or statement, or for the purpose of evidencing any collateral matters whatever.

The statutes contemplate that all *material* facts, matters and proceedings occurring in the cause, and

[131] Miller v. Washington Savings Bank, 5 Wash. 200, 31 Pac. 712.

[132] Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96.

[133] Phillips v. Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476. See, also, Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411.

not already a part of the record, shall be inserted in the *body* of the bill or statement; and that the forms of the certificate shall be simply those which the statute has prescribed.

Thus, it has been held that the certificate cannot be used for the purpose of proving that notice of the settlement and certification of the bill or statement had been served, as the proof of service should be shown by the transcript, or at least in the body of the bill or statement.[134]

In the above case, however, a record showing service had been supplied, but had escaped observation owing to the fact that it was not bound with the rest of the transcript; and such appearing to be the case, the order striking the bill or statement for want of notice of the settlement and certification was revoked on hearing.

But in a later case where the certificate recited that the appellant served notice on respondents on a given date that an application would be made to the court at a specified time for an order extending the time for filing a proposed statement of facts on appeal, it was assumed that proof of the service of the notice was sufficiently shown.[135]

In the above case, however, the respondents admitted the service in their brief; and thus the recital in the certificate became unimportant.

Thus, also, a recital in a certificate "that the findings of fact and conclusions of law hereto attached were the ones proposed by defendants and rejected

[134] Ward v. Tucker, 7 Wash. 399, 35 Pac. 126, 1086, and on rehearing.

[135] Galler v. McMahon, 51 Wash. 473, 99 Pac. 309.

and refused by the court, and exception allowed thereto," is not evidence of the matters recited.[136]

In an early case it is also intimated that a certificate may evidence an objection to matters included in the bill or statement.[137]

Thus again, the court has held that the certificate cannot be used for the purpose of making a finding of fact.[138]

In another early case it was said that where the certificate of the judge to a statement of facts certifies that the regular notice had been given of the settlement at a certain time and place, and that such settlement had been adjourned to another day and place, the fact that settlement was adjourned by order of the court is *prima facie* established, although the order does not appear in the record.[139]

But this was clearly *dictum*, for the court later said: "Besides, there has been an additional transcript filed, which supplies the defect in said record as to the entry of said order."

In another early case it was held that the certificate might be used for the purpose of identifying the statement as belonging to a particular cause.[140]

It was also held in an early case that when the judge certifies that the statement was settled and certified "in the presence of the attorneys of the respective parties," such recital in the certificate is con-

[136] Pederson v. Ullrich, 50 Wash. 211, 96 Pac. 1044.

[137] See United States Savings etc. Co. v. Jones, 9 Wash. 434, 37 Pac. 666.

[138] Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264.

[139] Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96.

[140] Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

clusive of the fact that want of notice of the time and place of settling the statement was waived.[141]

It was also held in an early case that a certificate with a similar recital in it is conclusive of the fact that a defective notice of the time of settlement was waived.[142]

In a comparatively recent case it was said that where the certificate of the trial judge, attached to a statement of facts, recites that, at the time of the signing and certifying of the statement, the plaintiffs and respondents appeared by their attorneys, and consented to the certifying and signing of the same, that fact in itself constitutes a persuasive argument against the granting of a motion to strike the bill or statement upon the ground that notice of the filing and notice of the settlement of the bill or statement were not given.[143]

But in this case, also, it appears that a supplemental transcript was prepared and duly filed, and that such supplemental transcript showed the filing of the statement of facts and the service thereof on the respondents, as well as the proof of due service of the notices. What was said regarding the right of the judge to evidence a waiver by a recital in the certificate is, therefore, unimportant.

In a case where an affidavit of an appellant, alleging that certain remarks were made by counsel of the prosecuting witness in his closing address to the jury, was made a part of the bill or statement, it was said that the certificate should certify that the things alleged in

[141] Dittenhoefer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

[142] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

[143] Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

the affidavit occurred at the trial, and that since the certificate failed to so certify the affidavit would not be considered. The certificate in this case was evidently framed in full compliance with the statutory provisions; and the court no doubt meant that the *body* of the bill or statement should show, *over the certificate of the judge*, that the things alleged in the affidavit occurred at the trial. The matters alleged in the affidavit should, no doubt have been disregarded; not because the *certificate* was defective, but because the bill or statement *was not properly prepared.* It is not the province of the certificate to cure defects in the *body* of the bill or statement.[144]

In a later case the certificate was employed for the purpose of certifying that certain exhibits formed no part of the evidence introduced at the trial. If they formed no part of the evidence, they should have simply been entirely disregarded.[145]

The material facts, matters and proceedings occurring in the cause, and not already a part of the record, should be embodied in the *body* of the bill or statement, and not in the certificate. Thus, the fact that a party was present at the time when the findings were settled, and that he argued the same, is properly shown by a recital of the fact in the *body* of the bill or statement.[146]

§ 114. When the Judge may Correct or Supplement His Certificate.—The judge may correct or sup-

[144] See State v. McGonigle, 14 Wash. 594, 45 Pac. 20.

[145] See North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 63 Wash. 376, 115 Pac. 855.

[146] See Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799.

plement his certificate according to the fact at any time before an appeal is heard.[147]

But the certificate cannot be corrected or supplemented after the appeal has been heard.[148]

Thus, after the dismissal of an appeal one cannot have the cause reinstated for the purpose of obtaining a correction of the certificate, and especially when a petition for rehearing is pending. It is then too late.[149]

Nor will the supreme court permit the bill or statement to be withdrawn for the purpose of correcting the contents thereof, and of obtaining a recertification accordingly.[150]

In an early case the court granted a reasonable time within which to obtain the proper identification of the bill or statement by the clerk of the lower court, even when the objection was raised for the first time at the hearing of the appeal; and upon the same principle, no doubt, the court would permit the bill or statement to be withdrawn for the purpose of obtaining a proper certificate where the objection is raised for the first time at the hearing of the appeal, and where permission to withdraw it for the purpose of obtaining a proper certificate is promptly requested.[151]

[147] Rem. & Bal. Code, § 391. See § 12, *supra;* In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294; State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137; Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758; State ex rel. Hersner v. Arthur, 7 Wash. 358, 25 Pac. 120.

[148] Boyer v. Boyer, 4 Wash. 80, 29 Pac. 981.

[149] Clark-Harris Co. v. Douthitt, 5 Wash. 96, 31 Pac. 422.

[150] Eicholtz v. Holmes, 6 Wash. 297, 34 Pac. 151.

[151] See Puget Sound Iron Co. v. Worthington, 2 Wash. Ter. 472, 7 Pac. 882, 886.

§ 115. What is Meant by the Correction or Supplementing of the Certificate.—The correction or supplementing of the certificate may be defined to be the act of making an erroneously framed authentication agree with the form prescribed by the statutes.

The word "certificate" simply means *the authentication of the judge*, as contradistinguished from *the body or contents* of the bill or statement. This is manifest from the following statutory provision upon the subject which at all time, carefully preserves the distinction:

"The *certificate* shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the *bill of exceptions or statement of facts*, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement *his certificate* according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a *bill of exceptions or statement of facts*, or to correct or supplement *his certificate thereto*, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto." [152]

The infinitive "to correct" means *to make right or proper.*

The infinitive "to supplement" means to add to a thing until it shall have become complete. It implies an imperfection arising from omission.

The word "fact" means *a thing done; that which has been produced; the condition* of the certificate.

The word "fact" refers to the authentication of the judge, and not to the contents of the bill or statement.

[152] Rem. & Bal. Code, § 391. See § 12, *supra.*

The word employed is the singular "*fact*," and not the plural "*facts.*"

But admitting that the word "*fact*" should be understood as meaning "*facts*," and as referring to the body or contents of the bill or statement, still this plain rule of the statutes would not be affected in the least.

One of the principal objects of the statutes is to produce a bill or statement which will be perfect as to its contents, and one which will, therefore, conform to and agree with a perfect certificate; and in providing for the correction or supplementing of the *certificate*, they should be considered as having some useful end in view, and to that end should be understood as assuming that the contents of the bill or statement are perfect, and as conferring upon the judge the power to correct or supplement his certificate according to such *standard of perfection;* for a correction or supplementing implies a standard of perfection, and assumes a state of imperfection in that which is to be corrected or supplemented.

From either point of view the rule itself would be unaffected; for, the word "fact" being understood as referring to the *authentication of the judge*, it necessarily refers to its *imperfections;* for if imperfection does not exist, there can be no occasion for correcting or supplementing.

The prepositional phrase "*according to the fact*" therefore means *according to the condition of the certificate;* that is, *according as the certificate needs correcting or supplementing.*

And finally, the correction or supplementing of the certificate according to the fact means the act of making an erroneously framed certificate or authentication agree with the form prescribed by statute, either by correcting errors appearing upon the face of the cer-

tificate, or by adding that which has been omitted *according to the condition of the certificate.*

To correct or supplement the certificate cannot logically mean the act of changing a certificate which is perfect in its form to one which is *imperfect* in form, in order that it may thus be made to conform to what is conceived to be an imperfect bill or statement; for such an act is antagonistic to the statutory provision prescribing the *form* of the certificate, and the *so-called correction or supplementing* must necessarily result in rendering the certificate *incorrect*, and therefore ineffectual.

The utter futility of such a theory, and the consequent disastrous result of its application, is well illustrated in the case of In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294.

In the above case no amendments were proposed; and, after the time for proposing amendments had expired, the judge certified that the statement "contains all the *material* facts, matters and proceedings heretofore occurring in the cause," etc.

Thereafter the respondent succeeded in persuading the judge to change his certificate, and to certify that "the above and foregoing matters and things are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein."

The supreme court recognized the power of the lower court or judge to make the *so-called correction* by changing the certificate which was perfect in its form to one which was *imperfect* in form, in order that it might thus be made to conform to what was conceived to be an imperfect bill or statement; but it refused to consider the bill or statement, for the reason that the *correction* of the certificate necessarily resulted in

rendering the certificate *incorrect*, and therefore ineffectual.

A correction which renders that which has been corrected *incorrect* is an impossibility, and therefore not within the contemplation of the statutes.

The correction or supplementing of the certificate according to the fact means, therefore, the act of making an erroneously framed certificate or authentication agree with the form prescribed by statute, either by correcting errors appearing upon the face of the certificate, or by adding that which has been omitted, *according to the condition of the certificate.*

The decision would, no doubt, be rejected by the court as at present constituted; and the author is obliged to agree with the dissenting opinion of Justice Rudkin, which reads as follows:

"By failing to propose amendments to the statement of facts at the time and in the manner provided by law, the respondent waived all objections thereto, and should not thereafter be heard to complain that the statement does not contain all the material facts, either in this court or in the court below. To permit a respondent to withhold his objections or amendments at the proper time, and thereafter defeat the appeal by procuring a change in the certificate of the trial judge, *is a travesty on justice which I cannot sanction. I think the change in the certificate was in derogation of law and justice, and should be utterly ignored by this court.*"

The rule as announced by the court in the above case is, however, in accord with former ideas of the court upon the subject.[153]

[153] See State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; State ex rel. Smith v. Parker, 9 Wash. 653, 38 Pac. 158. See,

The statute unquestionably contemplates that the judge shall not have the right *in any case* to make an *imperfect* certificate. If, in any particular case, the judge should feel that he should not sign a perfect certificate, he should refuse to sign *any*. His right to refuse to sign a perfect certificate may then be tested by *mandamus;* for the judge may in many instances be justified in not signing a perfect certificate, as where, for example, the bill or statement has not been filed and served within the time prescribed by statute, and in many other instances which might be mentioned, but which will readily occur to the reader without any special mention. But of one thing, however, there can be no serious doubt, namely, that it is the duty of the judge either to sign a perfect certificate or to refuse to sign any.[154]

§ 116. Whether Supplemental Bills of Exceptions or Statements of Facts are Permitted.—The only supplementing which the statutes allow is the supplementing of the certificate—a subject which has been considered in the preceding section. A statement of facts is an *indivisible entity*, and so is a bill of exceptions. Each may relate to one or more orders, but a partition of the office of either is not provided for; and therefore a supplemental bill of exceptions or a supplemental statement of facts cannot, scientifically speaking, have any existence. Aside from this, however, the statutes provide against the necessity of supplemental bills of exceptions or statements of facts by allowing ample time, in the first instance, for the filing and service of the proposed bill or statement, and by permitting,

also, State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137.

[154] See Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

when occasion requires, an extension of sixty additional days, and finally an additional ten days for the proposal of amendments. This is all that could reasonably be expected for the preparation of a proper bill or statement, and is, in fact, a liberal allowance of time.

To allow, in addition to this, the filing and service of supplemental bills or statements would be to nullify the statutory provisions limiting the time within which bills of exceptions and statements of facts must be filed and served. They are not, therefore, contemplated by the statutes.[155]

But in a later case it was held that where essential matters have been omitted from the proposed bill or statement, it may be corrected by a supplemental bill or statement at any time before the hearing of the cause on appeal, and that the judge will be compelled by mandate to certify such supplemental bill or statement.[156]

In this case the court said: "It seems to us that this case falls squarely within the provisions of section 5060, Ballinger's Code, which specially provides that the judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard; and further provides that, if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme

[155] See In re Guardianship of Hill's Heirs, 7 Wash. 421, 35 Pac. 131. See, also, Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120.

[156] State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137.

court, either pending an appeal or prior thereto. It appears that, in some of the cases heretofore decided by this court, this provision of the statute has not been enforced, but it was because it was not called to the attention of the court in the determination of those causes. But the statute is certainly plain and explicit, and seems to have been enacted to meet just such a case as the one that is presented here. It is conceded that the statement on appeal is not the correct statement, and is not one upon which this court could properly review the action or discretion of the lower court in passing upon the motion for a new trial. The application is made before the appeal is heard, and, falling within the plain provisions of the statute, the motion must be sustained, and respondent will be awarded the relief asked for."

The respondent in the case had evidently failed to propose amendments within the time prescribed by statute; and was thus enabled to accomplish indirectly, by means of a supplemental bill or statement, what he could not accomplish by means of proposed amendments directly, namely, the amendment of the bill or statement after the time for proposing amendments had long expired.

This is merely allowing a supplemental bill or statement to be filed and served long after the expiration of the statutory period for the filing and service of the original bill or statement and proposed amendments thereto, on the authority of a statutory provision which merely allows a certificate to be corrected or supplemented.

Much is said in the decision about the supplementing of a *certificate*, but that which was actually involved and allowed in the cause was the filing and

service of a purported *supplemental statement.* The decision is clearly out of harmony with the statutory provision limiting the time for the filing and service of the original bill or statement and the proposed amendments thereto. It is also in direct conflict with the case first cited in this section.

§ 117. The Remedies to Which a Complaining Party may Resort.—The remedies to which a complaining party may resort may be divided into two classes, namely, first, those remedies which exist by virtue of the statutes; and, secondly, those remedies which owe their existence to the approval of the court. The statutory remedies are those of *mandamus* and prohibition, the former being *expressly* provided for, and the latter *by necessary implication.* The remedies which owe their existence to the approval of the court are motions made to the supreme court in the first instance, and based upon various grounds, to strike the bill or statement from the cause. These remedies will now be considered in their order; and first, with reference to

§ 118. The Remedy of Mandamus.—The statute provides that "the judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto." [157]

It is self-evident that "*a proper case*" for *mandamus* is a *proper bill or statement, a proper judge by whom*

[157] Rem. & Bal. Code, § 391. See § 12, *supra.*

it may be certified, and a refusal on the part of the judge to certify; and since it has been the object of the preceding pages to explain what constitutes a proper bill or statement, and to indicate the judge by whom it may be certified, a repetition of the rules there given could hardly be desired or expected. The author will therefore proceed to note those cases wherein those rules have been enforced, and thus illustrate the practical working of this statutory remedy.

Thus, a resident judge may extend the time for the filing and service of the bill or statement, even though the cause was tried by a nonresident judge; and when the bill or statement has been filed and served within the time allowed by the order of extension, the nonresident judge may be compelled to certify it where his only reasons for refusing to certify are that the resident judge had no authority to extend the time for the filing and service, that the time had not been extended by himself, and that the statutory period for the filing and service of the bill or statement has expired.[158]

The judge is not justified in refusing to certify the bill or statement because "the transcript is not before this court, and cannot be certified to by this court until the usual and customary course is pursued by the relator of paying (as he should have done in the first place) the proper fees of the stenographer, obtaining his report, and presenting it to this court for certification"; and when no other reason is assigned for his refusal, he will be compelled to certify the bill or statement by a writ of mandate.[159]

[158] State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217.

[159] State ex rel. Quade v. Allyn, 2 Wash. 470, 27 Pac. 233

While *mandamus* is the proper remedy to compel the judge to certify a proper bill or statement, he is entitled to a reasonable time, at least, for deliberation; and where there has been no unreasonable delay, a return of the judge stating that he had not acted for want of time to consider the bill or statement, and that he had not refused to certify, the writ will be denied, even though the bill or statement had been *settled* by the implied agreement of the parties.[160]

Reports of referees or commissioners, with the testimony and other evidence returned into court therewith, must be returned *by the referees or commissioners* in order to be made a part of the record by the filing thereof. If transcribed and filed by one of the parties, they do not thereby become a part of the record, and in such a case should be embodied in a bill of exceptions or statement of facts. When, therefore, the judge refuses to embody in the bill or statement such material matters which properly belong therein, he may be compelled to do so by a writ of mandate; and the contention that they are already a part of the record will not be sustained. Nor will the fact that the trial judge has already certified a bill or statement which does not embody such matters, be a defense to the application for the writ.[161]

Mandamus is the proper remedy to prevent the judge from inserting in the bill or statement matters which did not occur in the cause by requiring him to certify a bill or statement which does not embody the objectionable matters.[162]

[160] State ex rel. Miles v. Superior Court, 13 Wash. 514, 43 Pac. 636.

[161] State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027.

[162] In re Rosner, 5 Wash. 488, 32 Pac. 106. See, also, the following cases where the remedy was not invoked and where

Alleged error of the judge in amending the proposed bill or statement before settlement will not be considered unless the proper remedy of *mandamus* is invoked.[163]

The mere taking of exceptions to the act of the judge in excluding from the bill or statement matters which are considered to be material and to properly belong therein will be of no avail. The remedy of *mandamus* should be invoked in such a case.[164]

Where the statutory remedy of *mandamus* is not invoked, and the judge refuses to certify a bill or statement which has been agreed upon by the parties, but prepares and certifies one of his own, the supreme court can only consider the bill or statement which is certified.[165]

When amendments have not been proposed, and the bill or statement has been duly certified, the judge will not be compelled at the instance of respondent to embody in the bill or statement matters which should have been duly submitted by proposed amendments, and to thereafter amend his certificate to conform to the new bill or statement.[166]

It has been held in an early case that where the bill or statement has been settled by the implied agree-

mere objections to the insertion of additional matters were of no avail: Anderson v. Northern Pacific Ry. Co., 19 Wash. 340, 53 Pac. 345; Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96.

[163] Scott v. Bourn, 13 Wash. 471, 43 Pac. 372.

[164] See Howe v. Kenyon, 4 Wash. 677, 30 Pac. 1058. See, also, Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

[165] State v. Maines, 26 Wash. 160, 66 Pac. 431.

[166] State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120. See, also, Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140. See, however, State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137. See, also, In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294.

ment of the parties, *mandamus* will not lie to compel the judge to certify in accordance with the form prescribed by statute in such cases, and that a settlement by the parties must be evidenced by a written stipulation.

The authority of the case on this subject has, however, long since ceased, and the case is mentioned here simply because it is in the reports and relates to the subject under consideration.[167]

Mandamus will lie to compel the judge to vacate an order striking from the cause a bill or statement which has been proposed in good faith, even though it may not be a perfect bill or statement, and to proceed with the settlement and certification thereof in the manner prescribed by the statutes.[168]

It is the duty of the judge to certify a proper bill or statement, and it is his duty to know *whether it is proper or not;* and when he refuses to certify merely because a transcript of all the evidence, and all of the records and proceedings had upon the trial of the cause, are not embodied in the bill or statement in compliance with the requirements of an order previously made, *mandamus* will lie to compel him to vacate the order and to proceed with the settlement and certification in the manner prescribed by the statutes. The judge should, if in his judgment the bill or statement is not a substantial one, but is one which omits a considerable portion of the material facts, matters and proceedings occurring in the cause, and not already a part of the record, order the insertion thereof in the bill or statement, and continue so to order until he can properly

[167] See State ex rel. Smith v. Parker, 9 Wash. 653, 38 Pac. 156.

[168] State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609.

make his certificate in the language of the statute; and if the order or orders be not complied with, the bill or statement may then be stricken, or its certification refused.[169]

The judge cannot require the party proposing the bill or statement to procure a transcript of the stenographer's notes for the purpose of aiding him in his determination, but must, from his own memory, or other aids, determine when and wherein the bill or statement is deficient, and likewise when it is *sufficient;* and when he refuses to certify because of his inability to accurately determine wherein the proposed bill or statement is deficient, and demands or suggests an agreement of the attorneys as to what is material, or the production of a transcript of the stenographer's notes, *mandamus* will lie to compel him to require the bill or statement to be made substantial, and to point out the particular defects, and to strike the bill or statement or refuse to certify it only upon noncompliance with the order or orders.[170]

It therefore follows that when an order has been made pointing out the particular defects and requiring the bill or statement to be made substantial, a writ of mandate will not issue to compel the certification until all reasonable demands of the court or judge shall have been complied with.[171]

The time for an appeal from an order or judgment which is claimed to have been irregularly entered will

[169] State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631.

[170] State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859; State ex rel. Miles v. Superior Court, 13 Wash. 514, 43 Pac. 636.

[171] State ex rel. Hofstetter v. Sheeks, 65 Wash. 410, 118 Pac. 308.

not begin to run pending the determination by the trial court of a motion for its vacation; and hence, the beginning of the period within which the proposed bill or statement must be filed and served will be postponed until such motion shall have been disposed of; that is, until the entry of the order disposing of the motion or application.

When, therefore, the judge refuses to certify the bill or statement on the theory that such is not the rule, and that the bill or statement has not, as a consequence, been filed and served within the time prescribed by statute, he will be compelled to do so by a writ of mandate.[172]

The time for taking an appeal begins to run from the date of the entry of an order disposing of a motion for a new trial, when the motion is seasonably made. The entry of the judgment becomes final on that date; and, therefore, the beginning of the period within which the proposed bill or statement must be filed and served will be postponed until such motion shall have been disposed of; that is, until the entry of the order disposing of the motion.

When, therefore, the judge refuses to certify the bill or statement on the theory that such is not the rule, and that the bill or statement has not, as a consequence, been filed and served within the time prescribed by statute, he will be compelled to do so by a writ of mandate.[173]

The time for the filing and service of the proposed bill or statement cannot, *in any case*, be extended beyond

[172] State ex rel. Hennessy v. Huston, 32 Wash. 154, 72 Pac. 1015. See, also, Hennessy v. Tacoma Smelting & Refining Co., 33 Wash. 423, 74 Pac. 584.

[173] State ex rel. Payson v. Chapman, 35 Wash. 64, 76 Pac. 525.

the period of ninety days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed; and if so extended, and the proposed bill or statement is not filed and served within the time so limited by the statute, it will be stricken from the cause or disregarded.[174]

It therefore follows that the lower court or judge will not be compelled to extend the time beyond the statutory limit.[175]

It is accordingly held that where an appeal is taken from two or more appealable orders, and the time for filing and serving a proposed bill or statement is properly extended, the statutory provision relating to the time of the filing and service of the bill or statement is applied to the date of the entry of each of the orders; and if the proposed bill or statement is not filed in time, *when the statutory limit is applied to the date of the entry of any particular order*, the lower court or judge will not be compelled to certify to any matters *relating to such order*, for the reason that the proposed bill or statement is not filed in time, in so far as the particular order and the matters relating thereto are concerned; and would, if it were not filed in time with reference to other orders, be stricken from the cause or disregarded.

The statutes must be followed with respect to each order appealed from, even if separate bills or statements are necessary in order to comply with the stat-

[174] Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012; State v. Seaton, 26 Wash. 305, 66 Pac. 397; Thomas v. Lincoln County, 32 Wash. 317, 73 Pac. 367; Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

[175] State v. White, 40 Wash. 428, 82 Pac. 743.

utes. A bill or statement cannot cover matters relating to an appealable order when the time for filing and serving a bill or statement relating to such matters and such order has expired. The statutes must be observed and followed, whether there be but one proposed bill or statement, or several proposed bills or statements.[176]

Under former statutes a visiting judge who tried a cause was not required to return to the county where the trial was held in order to settle and certify a bill of exceptions or statement of facts, but might perform such duty in any other county; and, therefore, *mandamus* would not lie to compel him to return for that purpose.[177]

This is no longer the rule with reference to the place of the hearing of the application for the settlement and certification of the bill or statement.[178]

It has been held that the lower court or judge may be compelled, at any time before the hearing of a cause on appeal, to certify a supplemental bill or statement embodying matters omitted from the original bill or statement which had been duly certified and forwarded to the supreme court, even though amendments had not been proposed to the original bill or statement.[179]

This decision is contrary to the statutes and to a former holding of the court, and most likely would not be followed by the court as at present constituted.[180]

[176] State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court, 30 Wash. 43, 70 Pac. 102.

[177] See State ex rel. Malouf v. McDonald, 21 Wash. 201, 57 Pac. 336.

[178] See § 105, *supra,* and cases cited.

[179] See State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137.

[180] See In re Guardianship of Hill's Heirs, 7 Wash. 421, 35 Pac. 131. See, also, § 116, *supra,* and cases cited.

The act of the lower court or judge in changing a correct certificate into an incorrect one has been sustained.[181]

And the following case was cited as authority for the approval of the act: State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137. But while this was a case where the judge was compelled to certify a supplemental bill or statement, *it does not appear that he was compelled to make a wrong certificate.*

The court has not, therefore, thus far held that *mandamus* will lie for the purpose of compelling the lower court or judge to transform a correct certificate into an incorrect one.[182]

It is a well-established rule that the filing of the bill or statement must precede the service; and it is accordingly held that *mandamus* will not lie to compel the certification of the bill or statement when it appears that the service preceded the filing.[183]

§ 119. **The Remedy of Prohibition.**—The power to compel the certification of the bill or statement *in a proper case* necessarily implies the power to prevent the certification in an *improper* case. While *mandamus* is *expressly* provided for, prohibition is therefore also provided for *by necessary implication.* The one is the counterpart of the other, and both are proper remedies.

Thus, it is the rule that proposed amendments must be filed and served upon the party proposing the bill or statement within ten days after the service of the

[181] In re Holburte's Estate, 38 Wash. 199, 80 Pac. 294.

[182] See § 115, *supra,* and cases cited.

[183] State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

bill or statement; and if not filed and served within that time, the proposed bill or statement will be deemed agreed to, and the correctness of its contents cannot thereafter be questioned.[184]

The lower court has not, therefore, any authority to allow the bill or statement to be withdrawn for the purpose of amendment and refiling after the time for proposing amendments has expired, even though the statutory time within which a bill or statement must be filed and served has not expired; and when he threatens to do so, the threatened action will be prevented by a writ of prohibition.[185]

Where a party waives in open court the time allowed by the statutes for the proposal of amendments, and agrees that a bill or statement as proposed, that is, as filed and served, may be certified without further delay, and the same is accordingly certified by the judge, he will not thereafter be heard to say that the contents of the bill or statement are not correct, and will not, therefore, be entitled to an order vacating and setting aside the certificate to the bill or statement upon that ground; and if the lower court or judge threatens to vacate and set aside the certificate for that reason, he will be prevented from doing so by a writ of prohibition.[186]

Prohibition is also the proper remedy to prevent the lower court or judge from hearing the application for the settlement and certification of the bill or statement in the wrong place.[187]

[184] See § 71, *supra,* and cases cited.

[185] State ex rel. Royal v. Linn, 35 Wash. 116, 76 Pac. 513.

[186] State ex rel. Fetterley v. Griffin, 32 Wash. 67, 72 Pac. 1030.

[187] See State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31.

As to the place where the hearing of the application for the settlement and certification of the bill or statement may be held, see §§ 104, 105, *supra*, and cases cited.

The statutes do not attempt to make the above remedies exclusive, and there are therefore instances where *certiorari* also would clearly be a proper remedy; for an appeal from a ruling of the lower court or judge on any matter relating to the bill or statement is inadequate, and *certiorari* is a remedy which may be invoked in aid of the appellate jurisdiction of the supreme court as well as *mandamus* and *prohibition*.[188]

Thus, when there is a dispute as to whether the filing of the bill or statement preceded the service, the question should, no doubt, be submitted to the lower court for determination, and from the ruling an aggrieved party is clearly entitled to invoke the appellate jurisdiction of the supreme court; and if he should, it is equally clear that an appeal would be inadequate.

In an early case this subject was judicially considered, and the court said: "The respondents move to strike the statement of facts herein, on the ground that a copy of the same was served upon them before the original was filed with the clerk of the court, and in support of said motion one of the attorneys for the respondents makes an affidavit in this court to the effect that on the 24th day of May, 1895, at his office in the Hyde block in the city of Spokane, there was presented to him by the appellant the original statement of facts, with the request that he admit service of the same, and that he did so by indorsing such admission upon such original statement, and that at said time there was no filing mark on said statement

[188] See State ex rel. Schwabacher Brothers & Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927.

showing that the same had been filed with the clerk of the court, and that he was informed and believed that the same had not been filed, but it does not appear from whom this information was obtained.

"It seems to us that this showing is insufficient. In the first place, if we were to presume that the statement had not been filed with the clerk of the court when served, because there was no filing mark thereon at the time, it does not appear but that the same might have been filed practically at the same time service was admitted by the respondents. For aught we know, the clerk's office might have been in a room adjoining the one where the service was made, and if the respondents had admitted service of the statement one moment, and the next moment the same had been presented to the clerk of the court for filing, so that the filing was contemporaneous with the serving, that certainly would have been sufficient.

"But aside from this, we do not think that a question of this kind should be presented to us for determination upon affidavits filed in this court. If the respondents desired to attack the statement upon the ground specified, they should have raised the objection in the lower court and made proof of the facts upon which the attack was based, and the lower court might have taken proofs, or such steps as it should have deemed necessary, to determine the fact as to whether the statement was filed at or prior to the time of service. *Possibly an appeal to this court would lie from the decision of that court upon the question of fact, but we are not called upon to determine this question at this time. Motion denied.*" [189]

[189] State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

While the court was not called upon to decide whether an order determining the matter of precedence in the filing and service of the bill or statement is an order from which an appeal would lie, and therefore did not commit itself upon the proposition, it is evident that such an order is one which affects a substantial right, and is for that reason appealable, and that *certiorari* would be a proper remedy owing to the inadequacy of an appeal.

The court *did determine*, however, that matters of this kind *should first be presented to the lower court for determination*; and this logically leads to an inquiry into the propriety of the remedies which owe their existence to the approval of the court, namely, motions made to the supreme court in the first instance, and based upon various grounds, to strike the bill or statement from the cause.

§ 120. Motions Made to the Supreme Court in the First Instance, and Based upon Various Grounds, to Strike the Bill or Statement from the Cause.—The statute provides that "the certification of a bill of exceptions or statement of facts provided for by this chapter, and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, *shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause*, and no irregularity or failure to pursue the steps prescribed by this chapter on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts."[190]

[190] Rem. & Bal. Code, § 393. See § 14, *supra*.

The statute also provides that "upon the taking of an appeal by notice as provided in this title, and the filing of a bond to render the appeal effectual, the supreme court shall acquire jurisdiction of the appeal for all necessary purposes, and shall have control of the superior court and of all inferior officers in all matters pertaining thereto, and may enforce such control by a mandate or otherwise, and, if necessary, by fine and imprisonment, which imprisonment may be continued until obedience shall be rendered to the mandate of the supreme court. *But the superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying the bills of exceptions and statements of facts*, and for all purposes in so far as the cause is not affected by the appeal." [191]

The statutes thus expressly declare that all steps and proceedings relating to the bill or statement, from the filing and service to the certification, are steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause.

It thus appears that the jurisdiction of the lower court or judge over the bill or statement *does not depend upon a compliance with any of the rules prescribed for the preparation, proposal, settlement or certification of the bill or statement; but depends and rests solely upon the jurisdiction originally acquired by the court in the cause.*

The steps and proceedings relating to the bill or statement are as much parts of the cause itself as any other steps in the cause, from the service of the complaint and summons to the entry of the final judgment, or any order thereafter entered.

[191] Rem. & Bal. Code, § 1731. See § 23, *supra.*

If the steps and proceedings are not taken in the manner prescribed by statute, the certification of the bill or statement *is merely an erroneous exercise of the jurisdiction which was acquired when the court originally acquired jurisdiction of the cause itself.*

An erroneous exercise of jurisdiction once acquired is the law of the case unless reversed by a superior tribunal whose jurisdiction has been properly invoked.

All rulings relating to the preparation, proposal, settlement or certification of the bill or statement, are rulings concerning which the appellate jurisdiction of the supreme court may be invoked, for they clearly affect a substantial right; but inasmuch as an appeal is inadequate, the statute provides that the appellate jurisdiction may be invoked by *mandamus* and prohibition.[192]

But it is a fundamental rule of appellate practice and procedure that it must appear from the record that all matters relating to alleged errors were presented to and acted upon by the lower court or judge.

It therefore follows that all questions relating to the preparation, proposal, settlement or certification of the bill or statement should first be presented to the lower court or judge for determination; and that if they are presented to the supreme court *at all*, they should be presented by invoking its appellate jurisdiction from the ruling or rulings complained of by an application for a writ of mandate, or prohibition, or certiorari, no doubt, according to the writ which appears to be the most appropriate to the particular case.

Motions made to the supreme court in the first instance, and based upon various grounds, to strike the bill or statement from the cause, are, therefore, not

[192] See §§ 118, 119, *supra*, and cases cited.

warranted, when the certificate is in the form prescribed by statute, and is duly signed by a judge of the superior court of the state of Washington.

In making these steps a part of the cause itself the statutes contemplate that a bill or statement so certified shall be of absolute verity and conclusiveness when attacked in the supreme court in the first instance. Of this there can be no serious doubt long entertained. The intention clearly is that a bill or statement so certified shall have the same force and effect as any other appealable order which has not been appealed from in the manner prescribed by statute; that is, that a superior court shall be a court of last resort upon all questions decided by it, where its jurisdiction to make the decision, *however erroneous*, is complete, and there has been no appeal.

In the preceding section it was shown that the court has held that where there is a dispute in regard to the precedence in the filing and service of the bill or statement, all matters relating thereto should first be presented to the lower court or judge for determination where they cannot be determined from an inspection of the record; and refused to entertain a motion to strike the bill or statement upon the ground that it was served before it was filed. The correctness of the principle here maintained was thus early recognized by the court.[193]

The correctness of this principle is also recognized by later cases which approve the practice of first submitting to the lower court or judge for determination the question whether the bill or statement as proposed is a *substantial* bill or statement (that is, whether the bill or statement as proposed is *in substance* such a

[193] State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

bill or statement as the statute contemplates should be proposed in the first instance), and which recognize the right of the lower court or judge to strike the bill or statement from the cause when it is apparent that bad faith, or such gross carelessness as amounts to bad faith, has been exercised in the preparation of the bill or statement, or when the order or orders of the lower court or judge requiring the bill or statement to be made substantial have not been complied with.[194]

See, further, the following late case where the practice of moving the lower court to strike the bill or statement upon the ground that it was not filed before it was served was recognized as the proper practice, and where the appellate jurisdiction of the supreme court was invoked from the ruling by an application for a writ of mandate, an appeal being inadequate.[195]

When this work was finished the author had no authority for the principle herein contended for, or rather the volume containing this late case had not been published, and he was not familiar with it; and it is gratifying to be able at the last moment to insert in the work a case which so admirably illustrates his contention.

If it should be insisted that a motion made to the supreme court in the first instance to strike the bill or statement from the cause upon the ground, for example, that it was not filed and served within the

[194] State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631. See, also, the following case where the court refused to strike the bill or statement upon the ground that it was sham and false: Jefferson County v. Trumbull, 31 Wash. 217, 71 Pac. 787.

[195] State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

time prescribed by statute, is proper because it presents a jurisdictional question, the answer is that *it does not present a jurisdictional question;* for the statute expressly provides that the filing and service are merely steps in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause. The certifying of the bill or statement by the lower court or judge under such circumstances would clearly be an *erroneous exercise of jurisdiction already existing;* but the erroneous exercise of jurisdiction already existing is one thing, and the *want of jurisdiction* is quite another.

If the bill or statement has not been filed and served within the time prescribed by statute, it is merely subject to the application by the court or judge of the statute of limitations in that particular case prescribed; and whether the statutory limitation is applied or not, the action of the court or judge is intended to be final unless the appellate jurisdiction of the supreme court be invoked therefrom either by *mandamus* or prohibition, an appeal being inadequate.

Would the supreme court strike a complaint from the record in response to a motion made to it in the first instance simply because it appeared from the record that the action was barred by the statutes of limitation before it was commenced? Or would the court strike an answer from the record in response to a motion made to it in the first instance simply because it appeared from the record that the time for answering had expired? Certainly not. The determination of such matters by the lower court is final, unless the appellate jurisdiction of the supreme court is properly invoked from the ruling.

The filing of the bill or statement is, by the express provisions of the statute, as much a step or proceeding

in the cause as is the filing of a complaint; and therefore the conclusion that a motion made to the supreme court in the first instance to strike a bill or statement from the record upon the ground that it was not filed and served within the time prescribed by statute is an unwarranted practice cannot logically be resisted.

The timely filing and service of the bill or statement is judicially determined by the certification which is an appealable ruling in the cause itself, and final and conclusive unless reversed by the supreme court after its appellate jurisdiction has been properly invoked, regardless of any filing marks or dates which might appear upon the face of the record.

Again, if it be insisted that a motion made to the supreme court in the first instance to strike the bill or statement from the cause upon the ground, for example, that the service preceded the filing, is proper because it presents a *jurisdictional question*, the answer again is that *it does not present a jurisdictional question*, for the statute expressly provides that the filing and service are merely steps and proceedings in the cause itself, *resting upon the jurisdiction originally acquired by the court in the cause.* [196]

The certifying of the bill or statement by the lower court or judge under such circumstances would clearly be an *erroneous exercise of jurisdiction already existing;* but, as was before observed, the *erroneous exercise of jurisdiction already existing* is one thing, and the *want of jurisdiction* is quite another.

If the service precedes the filing, the bill or statement may, no doubt, upon motion made to the lower court or judge, be stricken from the cause upon that ground; and from this ruling the appellate jurisdiction of the supreme court may then be properly invoked by

[196] Rem. & Bal. Code, § 393. See § 14, *supra.*

mandamus, or prohibition, or by *certiorari* also, no doubt, according to the remedy which may appear to be the most appropriate; and what is said here applies to the preceding instance.

The regularity of the filing and service is judicially determined by the certification which is an appealable ruling in the cause itself, and final and conclusive unless reversed by the supreme court after its appellate jurisdiction has been properly invoked, regardless of any filing marks or dates which might appear upon the face of the record.

If the bill or statement be finally stricken from the cause upon this ground, it may, no doubt, be regularly filed and served if the time for the filing and service has not yet expired, for it is clearly an irregularity, and the statute expressly provides that "no irregularity or failure to pursue the steps prescribed by this chapter on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts." [197]

If a bill or statement may be filed and served after having been *involuntarily* stricken from the cause, when the time for the filing and service has not expired, may it not be *voluntarily withdrawn*, and filed and served anew, at any time before the expiration of the period prescribed by the statute for the filing and service of the bill or statement? And is not the correctness of the ruling of the following case, therefore, fairly debatable, since it holds that the lower court or judge has not the authority to allow the bill or statement to be withdrawn for the purpose of amendment and refiling after the time for proposing amendments has expired, even though the time within which the

[197] Rem. & Bal. Code, § 393. See § 14, *supra*.

bill or statement must be filed and served has not expired?[198]

To continue to illustrate the principle here maintained by the selection of additional examples would necessitate a repetition of substantially the same reasons, and this is neither necessary nor desirable. What has been said while illustrating the principle by means of the prominent examples selected will apply to any other instance which might be named. All the steps and proceedings relating to the preparation, proposal, settlement and certification of the bill or statement are steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause; and therefore all rulings relating thereto are as final and conclusive, until reversed on appeal, as is the final judgment in the cause.

This principle will not, of course, apply to motions to dismiss the appeal upon the ground that the notice of appeal was not given within the time prescribed by statute, or upon the ground that the bond on appeal was not filed within the time prescribed, or upon the ground that the controversy has ceased, or upon the ground that the cause is not within the appellate jurisdiction of the supreme court, or upon the ground that the bond on appeal is not sufficient in form and substance, or upon the various other grounds permitted by the statute.[199]

These are all matters which either involve the appellate jurisdiction of the supreme court, or involve its *right to exercise* such appellate jurisdiction, and are not in any sense matters and proceedings in the cause

[198] State ex rel. Royal v. Linn, 35 Wash. 116, 76 Pac. 513. See § 71, *supra.*

[199] See Rem. & Bal. Code, § 1733. See § 25, *supra.*

itself *resting upon the jurisdiction orginally acquired by the court in the cause.*

But the certification of a bill or statement is a *judicial determination* upon which a party has the right to rely until the ruling shall have been reversed on appeal, and should not be any more subject to a sudden and unexpected attack than is the final judgment in the cause; and the same should be true as to any other ruling which relates to the bill or statement.

Of course, if the bill or statement is not *duly certified*, it may be stricken from the record upon motion made to the supreme court in the first instance; for, unless a bill or statement has been *duly certified*, it does not become a part of the record, and, in fact, *is nothing* in contemplation of law, and therefore has not a legitimate place anywhere.

The author therefore concludes that motions made to the supreme court in the first instance, and based upon various grounds, to strike the bill or statement from the cause, are not warranted when the bill or statement has been duly certified.

CHAPTER IX.

THE LEGAL EFFECT OF THE BILL OR STATEMENT.

§ 121. Definitions—Divisions of the Subject.
§ 122. The Bill or Statement When Duly Certified Becomes an Inseparable Part of the Record.
§ 123. The Bill or Statement When Duly Certified Becomes an Absolute Verity.
§ 124. Those Rules Which Spring into Existence When the Bill or Statement Becomes a Part of the Record, the Nonobservance of Which will Enlarge the Time Prescribed by Statute for the Service and Filing of the Briefs on Appeal.

§ 121. Definitions—Divisions of the Subject.—The statutory provision which must govern an inquiry into the legal effect of the bill or statement reads as follows:

"The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed to be all that are material therein. The certificate shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, *shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein.*"[1]

[1] Rem. & Bal. Code, § 391. See § 12, *supra.*

It is self-evident that a duly certified bill or statement cannot "become and thenceforth remain a part of the record in the cause" *if it may be stricken from the record;* and it therefore follows that the bill or statement when duly certified *becomes an inseparable part of the record.*

It is also self-evident that a duly certified bill or statement cannot "become and thenceforth remain a part of the record in the cause *for all the purposes thereof and of any appeal therein*" *if its correctness or truthfulness may be questioned;* and it therefore *also* follows that the bill or statement when duly certified *becomes an absolute verity.*

An *effect* is a *result produced.* A *legal effect* is a result which *the law* creates or produces. The legal effect of a duly certified bill or statement may therefore be defined to be a result whereby the contents of the bill or statement become, *in contemplation of law,* an inseparable part of the record, and an absolute verity.

The subject will be considered in a threefold view, namely, first, with reference to the statutory rule that the bill or statement when duly certified becomes an inseparable part of the record; secondly, with reference to the statutory rule that the bill or statement when duly certified becomes an absolute verity; and thirdly, with reference to those rules which spring into existence when the bill or statement becomes a part of the record, the nonobservance of which will enlarge the time prescribed by statute for the service and filing of the briefs on appeal.

And first, with reference to the statutory rule that

§ 122. The Bill or Statement, When Duly Certified, Becomes an Inseparable Part of the Record.—The statutory rule that the bill or statement becomes, when

duly certified, an inseparable part of the record, has not been very carefully observed and followed; but this may be easily explained.

The nonobservance of certain rules which are peculiar to other subjects of appellate practice and procedure may ofttimes directly affect the bill or statement and render it *of no avail, even though it is an inseparable part of the record and an absolute verity.* In other words, the *legal effect* of such nonobservance is to render the *bill or statement* of no avail, notwithstanding the fact that it is an inseparable part of the record and an absolute verity. In such cases the bill or statement should simply be disregarded, *and not stricken.* But the difference between a *disregarding* and a *striking from the cause* is *theoretical only;* that is, the final determination of the cause will be the same whether the bill or statement be disregarded or stricken from the cause; and therefore the rule has not been very carefully followed.

Thus, it is held that when the alleged errors relate to the evidence, and exceptions have not been taken to the findings and conclusions of the lower court, the bill or statement will be stricken from the cause.[2]

Thus again, it is held that when the exceptions to the findings are *general,* the bill or statement will be stricken from the cause unless it appears that each and all of the findings are erroneous.[3]

[2] Stoddard v. Seattle National Bank, 12 Wash. 658, 40 Pac. 730; Montesano v. Blair, 12 Wash. 188, 40 Pac. 731; Hoeschler v. Bascom, 44 Wash. 673, 87 Pac. 943; Crowe & Co. v. Brandt, 50 Wash. 499, 97 Pac. 503.

[3] Peters v. Lewis, 33 Wash. 617, 74 Pac. 815; Horrell v. California etc. Homebuilders' Assn., 40 Wash. 531, 82 Pac. 889.

It is also held that when exceptions to the *refusal* to make findings are *general*, the bill or statement will be stricken from the cause.[4]

But while a general exception to all the findings of fact is insufficient unless it appears that each and all are erroneous, the rule that the bill or statement will be stricken does not apply, it is held, where error is assigned on the action of the trial court in excluding evidence that might have changed the character of the findings.[5]

A respondent may propose and have a bill or statement certified, though not necessary to an appellant's case; but if respondent has not appealed, and the appellant has not excepted to the findings of fact, it is held that since the bill or statement serves no useful purpose in such a case, it will be stricken from the cause *in so far as it concerns the particular appeal.* Would it not have been more correct to have simply held that the bill or statement would be *disregarded* in such a case?[6]

It is held that a bill or statement will not be stricken when exceptions to the findings of fact are filed within five days after notice of the signing, when signed in the absence of the appellant, thereby implying that the bill or statement *would be stricken* where exceptions

[4] Pederson v. Ullrich, 50 Wash. 211, 96 Pac. 1044; Crowe & Co. v. Brandt, 50 Wash. 499, 97 Pac. 503.

[5] Lilly v. Eklund, 37 Wash. 532, 79 Pac. 1107; Bringgold v. Bringgold, 40 Wash. 121, 82 Pac. 179; Schlotfeldt v. Bull, 17 Wash. 6, 48 Pac. 343; Smith v. Glenn, 40 Wash. 262, 82 Pac. 605; Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747.

[6] See Lauridsen v. Lewis, 47 Wash. 594, 92 Pac. 440.

are not taken within five days after the filing of the findings, when signed in the *presence* of the appellant.[7]

The statutory rule has, however, long been recognized by the court, as is manifest from the following excerpt:

"Respondents move this court to strike the statement of facts from the record on the grounds and for the reasons that appellants have not made or taken any proper or legal exceptions to any order, rule or judgment of the lower court, and have not made or taken any exception to any finding of fact or conclusion of law, in the manner provided by law, nor within the time required by statute. It has been the practice of this court to strike the statement of facts from the record only in cases where the same is not *properly certified*, or where it has been settled and certified without notice to all parties who are entitled to notice, under the provisions of the statute. As it is not shown, or claimed, that the statement in this case *is not properly certified*, or that the necessary notices were not given prior to its certification, it follows that the grounds stated are not sufficient to authorize us to strike out the statement of facts."[8]

A flagrant violation of the rules of the supreme court relating to the bill or statement will also, no doubt, render the bill or statement *of no avail;* in which event it should be disregarded rather than stricken, for the statutes are of greater authority than the rules.

Although the bill or statement becomes an inseparable part of the record when duly certified, it does not in any sense become a part of the *transcript* which

[7] See Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 Pac. 56.

[8] Hannegan v. Roth, 12 Wash. 65, 40 Pac. 636.

is merely a copy of the records certified by the clerk. It may therefore be filed separately; and the indorsement of the clerk of the date of the filing is sufficient proof of the date of the filing when the signature of the clerk is not disputed.[9]

Under former statutes it was also the rule that the bill or statement need not be attached to the transcript.[10]

Indeed, it was the rule under former statutes that the bill or statement should be separate. But it was held that the fact that they were mingled together would not be ground for striking any portion when the whole is certified by the judge and clerk, both as a statement and transcript.[11]

Under former statutes a copy of the bill or statement should be sent up instead of the original; but it was held that an appeal would not be dismissed because the original was sent up instead of a transcript thereof.[12] Or because the copy bore the actual signature of the judge.[13]

The bill or statement is usually forwarded to the supreme court along with the transcript; but it is a sufficient compliance with the statutes if the bill or statement is sent up at any time before the hearing of the cause on appeal.

Thus, it was held under former statutes that the omission of the clerk to send up the statement of facts

[9] Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

[10] Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

[11] See Dittenhoefer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

[12] Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733.

[13] Dittenhoefer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

with the transcript of the record is not ground for dismissal of the appeal, where the mistake is corrected as soon as discovered.[14]

A supplemental transcript may be filed at any time before the hearing of the cause on appeal.[15]

§ 123. The Bill or Statement, When Duly Certified, Becomes an Absolute Verity.—The statutory rule that the bill or statement, when duly certified, becomes an absolute verity has had, like Aeneas, various fortunes; but it now appears to be well established. A short review of the cases, however, will no doubt be of profit.

The court recognized the statutory rule in an early case by the use of the following language:

"In our opinion, it would not be proper practice to entertain a motion, in this court, to modify a certified statement of facts either by inserting new matter therein, or by disregarding or striking out any portion thereof. What the facts are, in any particular case, so far as this court is concerned, must be ascertained from the certificate of the trial court, *and the truthfulness of a statement properly certified to this court cannot, for obvious reasons, be here questioned on appeal.*" [16]

In a later case it was held that a bill or statement which is duly certified cannot be contradicted by the

[14] Fox v. Utter, 6 Wash. 299, 33 Pac. 354.

[15] Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503. With reference to the statutory provisions relating to the time when the record on appeal should be forwarded to the supreme court, and providing for the dismissal of an appeal upon the ground that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted, see Rem. & Bal. Code, §§ 1729, 1733, 1734. See §§ 21, 25, 26, *supra*.

[16] Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

minutes of the clerk of the superior court, nor by affidavits filed in the supreme court.[17]

In a still later case it was held that a certificate of the judge which recites that the bill or statement "contains all the material facts, matters, and proceedings heretofore occurring in the cause, and not already a part of the record, and such thereof as the parties have agreed to be all that are material," is conclusive as to the verity of the bill or statement.[18]

In the following case, however, it was held that a duly certified statement of facts is not sufficient on appeal when it refers to certain exhibits offered and received in evidence as included in the record, and when such exhibits are neither attached to the statement nor found among any of the papers transmitted to the supreme court.[19]

The above is certainly a hard and extreme case for a satisfactory application of the statutory rule. But should this be a sufficient justification for a nonobservance of the rule? And should not the bill or statement in the case have been considered as an absolute verity nevertheless, and credited for what it was really worth, according to its actual contents? It evidently bore the required insignia of genuineness, and should have been considered accordingly.

We now come to a case which recognizes the statutory rule, but which holds that it is not applicable where it is manifest that the bill or statement is not complete, unless the form of the certificate is a combination of the form prescribed when the bill or state-

[17] State v. Wroth, 15 Wash. 621, 47 Pac. 106.

[18] See Nickeus v. Lewis County, 23 Wash. 125, 62 Pac. 763.

[19] State ex rel. Van Name v. Directors, 14 Wash. 222, 44 Pac. 270.

ment has been settled by the judge, and of the form prescribed when the bill or statement has been settled by the agreement, express or implied, of the parties.[20]

In this case the court says: "But it is urged by respondent that, under the record, this court would not, in any event, be justified in disturbing these findings, for the reason that it is apparent from the record that all the evidence is not here. The certificate of the court first recites that it contains all the evidence, *whereas it is apparent that said recital is erroneous*, as the depositions of four persons are shown to have been read in evidence, and much time was consumed by objections to questions therein. The record discloses only the names of the several persons whose depositions were read, the numbers of the several interrogatories challenged by objections, the objections thereto, and the rulings thereon. The deposition evidence itself does not, however, appear in the record. The action is triable *de novo* here, and this court must have all the evidence before it which was before the court below, in order to so try it: Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Cadwell v. First Nat. Bank, 3 Wash. 188, 28 Pac. 365; Kirby v. Collins, 6 Wash. 297, 32 Pac. 1060; State ex rel. Van Name v. Directors, 14 Wash. 222, 44 Pac. 270.

"It is true, the judge's certificate makes the further recital that the statement contains all the material evidence, *but it being manifest that it does not contain all the evidence, it becomes necessary, under section 5060, Ballinger's Code, that it shall recite that it contains all the facts which the parties have agreed to be all that are material:* Nickeus v. Lewis County, 23 Wash. 125, 62

[20] Kane v. Kane, 35 Wash. 517, 77 Pac. 842. For the different forms prescribed by the statute, see § 112, *supra*.

Pac. 763. *The certificate is lacking in said particular.* It being manifest, therefore, that all the evidence which was before the trial court is not before us, we cannot, *in the absence of agreement between the parties*, try the case *de novo* with a view to making new findings. We have, however, read the evidence that is in the record, and we may say that, standing alone, we think it justifies the findings made by the court, both upon the divorce issue and upon the money and property features of the case. There is much evidence in the record that is here, but an analytical discussion of it would require much space, and we believe it would not serve any useful purpose, in view of its conflicting nature. If we were required to make findings in the case, we should be disposed, from the evidence before us, to adopt the findings of the trial court, who heard and saw all the witnesses testify."

The court seems to have laid down such a rule for the first time in the case of Nickeus v. Lewis County, 23 Wash. 125, 62 Pac. 763.

The court in this case said: "The respondent moves to strike the statement of facts from the record for the alleged reason that it shows on its face that it does not contain all the material evidence adduced at the trial, and especially plaintiff's exhibit A, and certain depositions which were read to the jury. Both the character and contents of the exhibit are affirmatively shown by the testimony of the county auditor, but the matter contained in the depositions does not appear in the statement. *It is the general rule, as stated in the brief of the learned counsel for the respondent, that 'the fact that the statement is certified by the judge as containing all the evidence cannot control when it appears on its face that exhibits or depositions have been offered which do not appear'*: State ex rel. Van Name v.

Directors, 14 Wash. 222, 44 Pac. 270; Elliott, Appellate Procedure, § 824; Farr v. Bach, 13 Ind. App. 125, 41 N. E. 393. And if it were true that the certificate attached to the statement of facts in question contained nothing more than the ordinary recital that the statement contains all the material facts, etc., not already a part of the record, we would feel constrained to grant the respondent's motion. *But the certificate of the trial judge recites that the foregoing statement of facts 'contains all the material facts, matters, and proceedings heretofore occurring in the cause, and not already a part of the record, and such thereof as the parties have agreed to be all that are material.'* It thus appears that this is virtually an agreed statement of facts, and the motion must therefore be denied."

It will be noticed that Elliott, Appellate Procedure, section 824, is cited as authority for the statement that "*It is the general rule, as stated in the brief of the learned counsel for the respondent, that 'the fact that the statement is certified by the judge as containing all the evidence, cannot control when it appears on its face that exhibits or depositions have been offered which do not appear.'* "

But whatever may be said of this rule *as a general rule*, it is not applicable to the statutes of this state which make the certification of the bill or statement a *judicial determination*, and not the mere ministerial act of a person whose errors may be corrected or disregarded upon a mere inspection of the bill or statement. The case impliedly recognizes this principle. But why require a *combination* of correct forms which the statute prescribes for different occasions, in order that the statutory rule may be rendered applicable to a bill or statement which appears to be incomplete notwithstanding a perfect certificate? Evidently for the rea-

son that the statutes are supposed to require such a combined certificate in such cases in order to render the statutory rule applicable. But the statutes make no provision for such a certificate. They merely prescribe two forms for the certificate, one of which is intended for use when the bill or statement has been settled by the agreement, express or implied, of the parties; and the other when the bill or statement has been settled by the judge; and immediately thereafter expressly provide that either form, when properly employed, shall be sufficient to make the bill or statement an inseparable part of the record and an absolute verity.[21]

It will appear from a later case which this section cites, namely, the case of Swift v. Swift, 39 Wash. 600, 81 Pac. 1052, which is very similar to the cases of Kane v. Kane and Nickeus v. Lewis County, *supra*, that the reasoning of these last two cases is evidently not approved, and that the case of Kane v. Kane, *supra*, is no longer authority.

In another case the court used the following language: "The appellants filed and served a proposed statement of facts. No amendments were proposed by the respondents. When an appellant makes and files a proposed statement of facts, and no proposed amendments are filed and served, the proposed statement of facts becomes for all purposes an agreed statement of facts: Section 5058, Ballinger's Code. When, under such circumstances, the trial judge certifies,—as in this case,—that the record contains all the material facts, the statement is conclusive on the parties on appeal." [22]

[21] See § 112, *supra*.

[22] Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

In a very early case which was decided under former statutes, the court expressed its views upon this subject as follows:

"As to the last point made, that the instructions are not all here, it appears that three instructions were given at the trial, and only two are contained in the record. There was no request or attempt by any of the parties to have the other one brought up. The instructions here are contained in the statement *which is duly certified by the judge to contain all the material facts in the cause.* It is not claimed by the appellees that the instruction omitted is material, nor do they ask to have it brought here, and as all the parties to the action and the judge who tried the cause seem to have regarded it as unimportant for a fair consideration of the cause in this court, it is held by us to be unnecessary." [23]

In another case the court said: "As to the other contention, the court has certified that the record contains so much of the 'facts, matters and proceedings heretofore occurring in the cause' as is material to an appeal from the final judgment. *This court must take this statement as true.* It must determine from the evidence transmitted here whether or not the error was prejudicial, and is precluded from indulging in presumptions relative thereto. The *evidence transmitted* shows a substantial conflict as to what the facts were on the matters embraced within the excepted part of the court's charge, and we cannot say that the verdict of the jury was the only verdict that could be legally rendered on the evidence before them.

"The judgment is reversed and remanded, with instructions to grant the appellant a new trial." [24]

[23] Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

[24] State v. Dunn, 22 Wash. 67, 60 Pac. 49.

And finally, it would seem from the following language that the statutory rule is now recognized by the court: "The respondent moves to dismiss the appeal on the ground that the statement of facts fails to contain all the evidence; and in support thereof, calls attention to the fact that certain depositions appear in the transcript, over the signature of the clerk, and not in the statement of facts. But it appears that a proposed statement of facts was served on the respondent, and that she neither filed any exception nor proposed any amendments thereto, and that this statement was subsequently certified by the court to contain all of the material facts occurring in the cause, and not already a part of the record. *This is sufficient to authorize this court to try the case de novo. It is from what appears in the statement, over the signature of the trial judge, that this court discovers the facts of the case*, and it will not presume that depositions, which do not appear in the statement, were admitted and read in evidence, merely because the clerk has forwarded them to this court. The motion to dismiss is denied." [25]

And it may, with perfect propriety, be added that the court should not presume that depositions which do not appear in the statement, although taken apparently for use in the case, *are material to an appeal merely because they were admitted and read in evidence when the statement is duly certified to contain all that is material.*

In the following case the court inferred from an inspection of the body of a duly certified statement of facts that material evidence had been omitted therefrom; and some of the language employed would indicate that under such circumstances a duly certified

[25] Swift v. Swift, 39 Wash. 600, 81 Pac. 1052.

bill or statement would not be treated as an absolute verity; but the court nevertheless gave to the statement the full credit to which it was legally entitled, for it reviewed all the matters contained therein, and decided the cause in accordance with what was actually before it. And there is no reason why it should not have done so, for the lower court had certified that the statement embodied all that was *material*, and this certification had never been questioned. The statement contained the following recital: "The defendant and cross-complainant Eckloff thereupon introduced evidence tending to support the findings of fact made by the court."

But notwithstanding this recital the statement still might have embodied *all that was really material*, and it evidently did, for the judge so certified. A bill or statement which is duly certified can really be of little value, and must always be *at least an uncertainty*, if its verity can be questioned upon a mere inspection of its contents. If the contents are satisfactory to the parties, the statute contemplates that they shall be satisfactory to the court. If this were not the rule, the statutes are but of little use. That the court really treated the statement as an absolute verity seems quite clear from the following excerpt *as a whole:*

"In view of these findings and the certified statement that evidence not before us was introduced tending to sustain them, we cannot enter upon a consideration of the issue as to what additional damages, if any, should be allowed appellant for respondent's alleged delay. Without entering upon a detailed discussion of evidence now before us, upon which appellant relies, *we will nevertheless state that, having examined the entire record, we could in no event reach the conclusion that it is sufficient to justify any larger*

award of damages to appellants than the trial judge has already made." [26]

It may therefore be said to be the rule of the decisions, as well as the rule of the statutes, that the bill or statement when duly certified becomes an absolute verity.[27]

When the bill or statement is stricken or disregarded, the legal effect, of course, is that the action of the supreme court will be limited and confined merely to those alleged errors, if any, appearing upon the remainder of the record which is properly before the court, and to the disposal of the cause according to the state or condition of such truncated record.

This principle is so fundamental, and the cases in support of it so numerous, that a citation of authorities is unnecessary.[28]

§ 124. Those Rules Which Spring into Existence When the Bill or Statement Becomes a Part of the Record, the Nonobservance of Which will Enlarge the Time Prescribed by Statute for the Service and Filing of the Briefs on Appeal.—These rules are purely statutory, and are provided for as follows:

"The copy of a proposed bill or statement which is served as in this chapter prescribed, shall be returned to the party serving the same upon the bill or statement being certified, if he has appealed to the supreme court, or upon his thereafter appealing, for his use in preparing his brief on the appeal, and the time limited by any law or rule of court for the service and

[26] Seattle Turning & Scroll Works v. Eckloff, 63 Wash. 82, 114 Pac. 893.

[27] McReavy v. Eshelman, 4 Wash. 757, 31 Pac. 35.

[28] Hadzla v. Northern Pacific Ry. Co., 65 Wash. 700, 118 Pac. 212.

filing of his brief shall be enlarged by any delay in returning such copy as herein required to the extent of such delay." [29]

In accordance with this plain statutory rule it is held that a failure on the part of a respondent to return to appellant the copy of the statement of facts, as required by the statute, will excuse the failure on the part of appellant to serve and file his brief in time.[30]

The statute also prescribes the following rule: "When he [the appellant] serves his brief he shall return such copy to the party on whom it was originally served, and his brief shall not be deemed served till such copy is so returned by him." [31]

It is therefore another rule of the statute that an appellant must, when he serves his brief, return the copy of the bill or statement to the one on whom it was originally served, and that in case of his failure so to do, the time limited by any law or rule of court for the service and filing of such party's brief will be enlarged by any delay in returning such copy to the extent of such delay.[32]

The steps and proceedings prescribed by these rules are not "steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause"; for they are steps and proceedings which are not required to be taken *until the time of and after the certification of the bill or statement.*[33]

[29] Rem. & Bal. Code, § 394. See § 15, *supra.*

[30] Jefferson County v. Trumbull, 31 Wash. 217, 71 Pac. 787; Bailey v. Seattle & Renton Ry. Co., 31 Wash. 685, 71 Pac. 1134.

[31] Rem. & Bal. Code, § 394. See § 15, *supra.*

[32] With reference to the time prescribed for the service and filing of the briefs on appeal, see Rem. & Bal. Code, § 1730. See § 22, *supra.*

[33] See Rem. & Bal. Code, § 393. See § 14, *supra.*

Their nonobservance may therefore properly be shown *in the first instance* by affidavits filed in the supreme court.[34]

[34] Jefferson County v. Trumbull, 31 Wash. 217, 71 Pac. 787; Bailey v. Seattle & Renton Ry. Co., 31 Wash. 685, 71 Pac. 1134.

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