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MISSOURI APPELLATE PRACTICE AND PROCEDURE†

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It is recognized at the outset that it is an absolute impossibility to discuss all or in any great detail the many phases of Missouri Appellate Practice and Procedure within the reasonable length of a single law review article. With this in mind, the present article is limited to a presentation of the mechanics of an appellate court review; dealing, first, with the respective jurisdictions of our upper courts—this to get a proper foundation for further discussion; second, tracing the steps necessary for upper court review; third, pointing out the main essentials of a proper abstract of record, including discussion of its various parts; and finally, dealing with the subject of briefs in upper courts, their essential and component parts. Particular emphasis will be made with respect to the inconsistencies and deficiencies of our upper court practice which entrap the unwary practitioner and which justify a demand for revision of our code of civil procedure and our upper court rules. It is thought that these are the highlights of our appellate practice that are of special interest to the bench and bar.

No detailed discussion of the scope and proper procedures with respect to original writs or extraordinary legal remedies in Missouri is included, as this subject has been ably considered in a prior law review article.¹

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1. Burke, *Jurisdiction of Appellate Courts in Issuance of Extraordinary Legal Writs* (1933) 2 KANSAS CITY L. REV. 3.

I

As is well known, the Missouri upper court system consists of the Supreme Court of Missouri, with territorial jurisdiction co-extensive with the state, and three appellate courts, with the territorial jurisdiction of the state divided between these courts.

Under the Constitution of Missouri, the supreme court has original jurisdiction in *habeas corpus*, *mandamus*, *quo warranto*, prohibition, *certiorari*, and with respect to other original remedial writs.² These writs do not include the writ of injunction, which, while remedial, is not an original writ in the constitutional sense.³ Through the issuance of the original writs recognized at common law, the supreme court has a general superintending control of all inferior courts⁴ and by express constitutional provision has a superintending control over the courts of appeal by *mandamus*, prohibition and *certiorari*.⁵ The original jurisdiction of the supreme court is exclusive as to causes within its appellate jurisdiction, and is concurrent with the courts of appeal in cases within their appellate jurisdiction.⁶ Except as above noted, the jurisdiction of the supreme court is appellate only, under restrictions and limitations provided in or authorized by the constitution.⁷ The appellate jurisdiction of the supreme court includes all cases where the amount in dispute, exclusive of costs, exceeds the sum of \$7500.00;⁸ cases involving state and federal constitutional questions, the validity of a treaty or statute of the United States or an authority exercise thereunder; cases involving the construction of the revenue laws of the state or the title to any office under the state; cases involving title to real estate; and cases where a county or other political subdivision of the state or any state officer is a party; as well as in all cases of felony.⁹

The three appellate courts, within their respective territorial jurisdictions, have original jurisdiction in *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and with respect to other original remedial writs. These appellate courts also have a superintending control of all inferior courts

2. MO. CONST. art VI, § 3.

3. *Wait v. Atchison, T. & S. F. Ry.*, 204 Mo. 491, 103 S. W. 60 (1907).

4. MO. CONST. art. VI, § 3.

5. MO. CONST. AMEND. of 1884, art. VI, § 8.

6. *State ex rel. Duraflor Products Co. v. Percy*, 325 Mo. 335, 29 S. W. (2d) 83 (1930):

7. MO. CONST. art. VI, § 2.

8. MO. CONST. art. VI, § 12, as amended by AMEND. of 1884, art. VI, §§ 3 and 5; MO. REV. STAT. (1929) § 1914.

9. MO. CONST. art. VI, § 12; AMEND. OF 1884, art. VI, § 5.

of record within their respective territorial jurisdictions.¹⁰ They have appellate jurisdiction (either by appeal or writ of error) within their respective territorial jurisdictions, in all cases where the amount in dispute, exclusive of costs, does not exceed the sum of \$7500.00.¹¹ Both the original and appellate jurisdiction of the courts of appeal is confined to those cases, the subject matter of which is not within the appellate jurisdiction of the supreme court.¹² All laws relating to practice in the supreme court are by the constitution and statute applicable to the three appellate courts.¹³

The supreme court and the respective appellate courts have power to make suitable rules and regulations governing procedure in their own court, including what is or is not necessary to be contained in the record for the determination of any particular question, but such courts may not require a bond for costs or that any part of the record proper be printed. Included in said power to make rules is the power "to require parties to print abstracts of . . . record and briefs of points and argument."¹⁴ Such courts, of course, cannot make rules or regulations contrary to statutory or constitutional provisions.

There are three methods of invoking the appellate jurisdiction of our upper courts, namely: by appeals from the trial or circuit court direct to the court having appellate jurisdiction;¹⁵ by writs of error from the court having appellate jurisdiction to the trial or circuit court;¹⁶ and likewise by appeal from the court having appellate jurisdiction to the circuit court upon the inspection of a copy of the record by a judge of the appellate court.¹⁷

Under the first method the appeal must be taken during the term at which the judgment or decision appealed from is rendered.¹⁸ Writs of error are required to be brought within one year after the rendering of the final judgment or decision to be reviewed with the exception that persons within the age of twenty-one years shall be allowed to bring their writs of error in civil cases within three years after reaching such age.¹⁹

10. MO. CONST. art. VI, § 12; AMEND. OF 1884, art. VI, §§ 2 and 3.

11. MO. CONST. AMEND. OF 1884, art. VI, § 3; MO. REV. STAT. (1929) § 1914.

12. State *ex rel.* Sale v. Nortoni, 201 Mo. 1, 98 S. W. 554 (1906); State *ex rel.* Blakemore v. Rombauer, 101 Mo. 499, 14 S. W. 726 (1890).

13. MO. CONST. art. VI, § 15; MO. REV. STAT. (1929) § 1906.

14. MO. REV. STAT. (1929) §§ 1029-1031.

15. MO. CONST. AMEND. OF 1884, art. VI, § 5; MO. REV. STAT. (1929) § 1018.

16. MO. CONST. AMEND. OF 1884, art. VI, § 5; MO. REV. STAT. (1929) § 1034.

17. MO. REV. STAT. (1929) § 1023.

18. *Id.* § 1020.

19. *Id.* § 1036.

Appeals from the reviewing court to the trial court may be granted by special order at any time within one year next after the rendition of the final judgment or decision appealed from.²⁰

A judgment becomes a final judgment when a motion for new trial, having a proper legal function to perform, is passed upon. If a motion for new trial is passed upon at a term subsequent to the term at which the judgment is rendered, the term of court at which the motion for new trial is passed upon is the court term at which the judgment becomes final and during which an appeal must be taken. If, however, a motion for new trial is filed which does not have a proper legal function to perform,²¹ as for example where a motion for new trial is filed attacking a circuit court decree reviewing a workmen's compensation award, the appeal must be taken at the same court term at which the circuit court renders its decree and not at a subsequent term at which the unnecessary motion for new trial is ruled on.

Appeals under the first method above mentioned—from the trial court to the reviewing court—lie from an order granting a motion for a new trial or in arrest of judgment, from an order refusing to revoke, modify or change an interlocutory order appointing a receiver or dissolving an injunction, from any interlocutory judgment in partition determining the rights of the parties, or from any final judgment or special order after final judgment in the cause. Failure to appeal from an interlocutory order does not prejudice the right of the party to have the action of the trial court reviewed on an appeal taken from the final judgment in the case.²² A writ of error or a special appeal lies only from a final judgment or decision.²³ Only the record proper is reviewed on a special appeal from the reviewing court to the circuit court unless the bill of exceptions has been filed in the trial court and made a part of the record at the time the special appeal is granted.²⁴ This results from the fact that the statute authorizing special appeals expressly provides that such appeal can only be granted "upon inspection of a copy of the record." The bill of exceptions, therefore, must be filed and made a part of the record at the time that a special appeal is granted for matters of exception to be reviewed.

20. *Id.* § 1023.

21. *O'Neal v. Milburn*, 112 S. W. (2d) 124 (Mo. App. 1938); *State ex rel. May Dept. Stores Co. v. Haid*, 327 Mo. 567, 38 S. W. (2d) 44 (1931).

22. *MO. REV. STAT.* (1929) § 1018.

23. *Id.* § 1034; *State ex rel. Iba v. Mosman*, 231 Mo. 474, 133 S. W. 38 (1910).

24. *MO. REV. STAT.* (1929) § 1023; *Buerck v. Mid-Nation Iron Prod. Co.*, 295 Mo. 263, 245 S. W. 45 (1922); *State v. Campbell*, 325 Mo. 561, 32 S. W. (2d) 69 (1930); *Brockmann v. United Railways Co.*, 271 Mo. 696, 197 S. W. 337 (1917).

A final judgment may be reviewed either by regular appeal, by writ of error, or by special appeal and if the bill of exceptions has been filed and made a part of the record at the time the special appeal is granted, the scope of review is the same regardless of the procedure adopted for review.²⁵ A party, however, cannot pursue more than one of these remedies at the same time, and when review has been had by one procedure the other methods of review are unauthorized.²⁶ Where review is sought by special appeal, notice in writing of such appeal must be given to the respondent at least twenty days before the commencement of the return term of the appellate court to which such appeal is to be sent.²⁷

If an appeal from a trial court is taken to a wrong court, that court may transfer the appeal to the proper reviewing court which does have jurisdiction to determine the case, and the court to which the case is transferred must proceed with the case as if it had gone there directly from the trial court.²⁸ This rule of transferring a case from one reviewing court to another does not apply to a special appeal granted by an upper court²⁹ but does apply to review by writ of error as well as by regular appeal.³⁰ The provisions as to transferring causes from one court of appeals to another, however, do not authorize a court of appeals to transfer cases arising in its own district to the court of appeals of another district in order to equalize the business of the courts.³¹

It is also provided that a court of appeals may certify a case before it goes to the supreme court when one of the judges of the court of appeals deems its decision contrary to a previous decision of one of the other courts of appeals or of the supreme court.³² A litigant however, may not move to have the case certified as a matter of right, this being a matter resting solely on the determination of one of the appellate judges.³³ When a case is certi-

25. *Lewis v. Kansas City*, 233 Mo. App. 341, 122 S. W. (2d) 852 (1938); *State v. Hardy*, 339 Mo. 897, 98 S. W. (2d) 593 (1936); *State ex rel. Hermann v. Green*, 230 Mo. App. 805, 76 S. W. (2d) 432 (1934); *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977 (1932); Mo. REV. STAT. (1929) § 1061; *Wilson v. Brownfield Const. Co.*, 228 Mo. App. 898, 74 S. W. (2d) 377 (1934).

26. *Harris v. Chitwood*, 210 Mo. 560, 109 S. W. 653 (1908); *Kehler & Cashman v. Walls*, 118 Mo. App. 384, 94 S. W. 760 (1906).

27. Mo. REV. STAT. (1929) § 1026.

28. Mo. CONST. AMEND. OF 1884, art. VI, § 3; Mo. REV. STAT. (1929) § 1915. *First Natl. Bank of Monett v. Kinser*, 104 S. W. (2d) 283 (Mo. App. 1937).

29. *State v. Hartman*, 282 Mo. 680, 222 S. W. 442 (1920); *Platies v. Theodorow Bakery Co.*, 334 Mo. 508, 66 S. W. (2d) 147 (1933).

30. Mo. REV. STAT. (1929) § 1915.

31. *State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336 (1910).

32. Mo. CONST. AMEND. OF 1884, art. VI, § 6.

33. *State ex rel. Barnes Amusement Co. v. Trimble*, 318 Mo. 274, 300 S. W. 1064 (1927).

fied to the supreme court, such court acquires full and complete jurisdiction as on a direct appeal³⁴ and is not limited, as on *certiorari*, to ascertaining whether there is conflict between the decisions of the supreme court and the decision under review.³⁵

So much for the respective jurisdictions of our upper courts.

II

Before an appellant or plaintiff in error can have a review of any matter of exception on the trial, he must not only make his objections and save his exceptions at the time error occurs, but he must also bring such errors to the the trial court's attention by motion for new trial. In case of failure so to do, the review will be limited to the record proper.³⁶ Errors appearing on the face of the record proper—which are not matters of exception—are reviewable without exceptions and without such matters being called to the attention of the trial court by motion for new trial or even by a motion in arrest of judgment.³⁷ Two well recognized examples of errors apparent on the face of the record and which can be presented for the first time in the reviewing court are (1) the failure of the petition to state a cause of action, and (2) the lack of jurisdiction of the trial court over the subject matter.³⁸

To review any matter of exception a motion for new trial is necessary.³⁹ Such motion must be filed in the trial court within four days after the verdict in a jury case and within four days after the judgment or decree in a non-jury case;⁴⁰ provided always that such motion must be filed at the same term of court, and this even though the court term does not continue for four days.⁴¹ The Missouri statutes⁴² also recognize and provide for the filing of a motion in arrest of judgment within the same time as required for filing motions for new trial. The statutes, however, do not state the functions of a motion in arrest of judgment, so resort must be had

34. MO. CONST. AMEND. OF 1884, art. VI, § 6.

35. *State ex rel. St. Louis-San Francisco Ry. v. Shain*, 134 S. W. (2d) 89 (Mo. 1939).

36. MO. REV. STAT. (1929) § 1061; *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977 (1932).

37. *St. Louis v. Senter Comm. Co.*, 340 Mo. 633, 102 S. W. (2d) 103 (1937); *Presley v. Central Terminal Co.*, 142 S. W. (2d) 799 (Mo. App. 1940).

38. MO. REV. STAT. (1929) §§ 770 and 774.

39. *Castorina v. Herrmann*, 340 Mo. 1026, 104 S. W. (2d) 297 (1937); *Wells v. Wells*, 115 S. W. (2d) 94 (Mo. App. 1938).

40. *Lee's Summit Building & Loan Ass'n v. Cross*, 134 S. W. (2d) 19 (Mo. 1939).

41. MO. REV. STAT. (1929) § 1005.

42. *Id.* §§ 1005 and 1018.

to the common law. It is the proper scope and function of such a motion to call attention to and review errors apparent on the face of the record proper. Until recently it was held in Missouri that a motion in arrest of judgment had a proper review function to perform and that the rulings of the trial court with respect to such motion should be preserved and reviewed on bill of exceptions; the motion not being a part of the record proper.⁴³ Recently, however, our supreme court has overruled many prior decisions and now holds that a motion in arrest of judgment performs no legal function and does not preserve any matter for appellate review.⁴⁴ This creates an anomalous situation in that the motion in arrest of judgment is expressly recognized by statute, and express provision is made for an appeal from an order arresting a judgment.⁴⁵

If, as is now held, a motion in arrest of judgment performs no legal function, it would seem to follow, in line with other Missouri decisions, that a motion in arrest of judgment filed at one term of court and passed on at a subsequent term would not keep the judgment from becoming final at the prior court term. The decisions, however, are in conflict on this matter. In one very recent case it was held that a motion in arrest of judgment prevents the judgment from becoming final until the motion is overruled.⁴⁶ In another very recent case, also decided by our supreme court, motions for new trial and in arrest of judgment had both been filed, the motion for new trial was subsequently overruled at one term of court and the motion in arrest of judgment was taken under advisement and finally overruled at a later court term. In this case⁴⁷ it was ruled that the judgment did not become final until the subsequent term of court at which the motion in arrest of judgment was overruled, and that the appeal was properly taken at that term of court. It is submitted that, as a matter of playing safe, if an attorney at this time files a motion in arrest of judgment along with a motion for new trial, he should see to it that both motions are passed upon at the same term of court lest his appeal be dismissed as not having been taken at the proper court term.

It should likewise be pointed out that when motions for new trial and

43. *Ferber v. Brueckl*, 210 Mo. App. 223, 243 S. W. 230 (1922).

44. *St. Louis v. Senter Comm. Co.*, 340 Mo. 633, 102 S. W. (2d) 103 (1937); *Melenson v. Howell*, 344 Mo. 1137, 130 S. W. (2d) 555 (1939); *Presley v. Central Terminal Co.*, 142 S. W. (2d) 799 (Mo. App. 1940).

45. MO. REV. STAT. (1929) §§ 1005 and 1018; *O'Neal v. Milburn*, 112 S. W. (2d) 124 (Mo. App. 1938); *State ex rel. May Dept. Stores Co. v. Haid*, 327 Mo. 567, 38 S. W. (2d) 44 (1931).

46. *Lee's Summit Building & Loan Ass'n v. Cross*, 134 S. W. (2d) 19 (Mo. 1939). But see, *Stid v. Mo. Pac. Ry.*, 211 Mo. 411, 109 S. W. 663 (1908).

47. *Williams v. Pemiscot County*, 133 S. W. (2d) 417 (Mo. 1939).

in arrest of judgment are both filed, and a new trial is granted, an appeal may be taken from the order granting the new trial even though the motion in arrest of judgment is undisposed of. When a motion for new trial is sustained, a motion in arrest of judgment has no purpose to perform.⁴⁸

When motions for new trial and in arrest of judgment are both to be filed, the motion for new trial should be filed prior to the motion in arrest of judgment.⁴⁹ Both having been filed, the motion for new trial should be passed upon prior to the motion in arrest of judgment. If both are passed upon at the same time, there is a presumption that the motion for new trial was passed upon first.⁵⁰ An appeal from an order either sustaining a motion for new trial or sustaining a motion in arrest of judgment is proper,⁵¹ but an appeal from an order overruling either a motion for new trial or motion in arrest of judgment is unauthorized.⁵² Where such motions are overruled, the appeal should be taken from the final judgment rather than from the orders overruling such motions.

If a motion for new trial is not filed, or if a motion for new trial is filed out of time, the upper court review is limited to the record proper.⁵³ Only one motion for new trial need be filed and no additional motion for new trial need be filed after final judgment on *remittitur*.⁵⁴ The filing of a second motion for new trial, out of time, amounts only to a suggestion and does not authorize the trial court to do anything it could not do without it. Where a motion for new trial is sustained after a verdict for defendant, plaintiff has no right to dismiss the lawsuit during the same term of court and thus prevent the defendant from taking an appeal.⁵⁵

Motions for new trial, within their proper scope, should call the trial court's attention, either generally or specifically as required by the authorities, to the errors complained of. In civil cases many errors, such as errors with respect to the admission of evidence or the giving of instructions, may be assigned generally in motions for new trial, but other errors, par-

48. *Jackson v. Security Benefit Ass'n*, 139 S. W. (2d) 1014 (Mo. App. 1940); *Garner v. K. C. Bridge Co.*, 194 S. W. 82 (Mo. App. 1917).

49. *Gill v. Farmers' & M. Bank*, 195 S. W. 538 (Mo. App. 1917).

50. *St. Louis v. Maryland Cas. Co.*, 122 S. W. (2d) 20 (Mo. App. 1938).

51. *Mo. REV. STAT.* (1929) § 1018; *Williams v. Pemiscot County*, 133 S. W. (2d) 417 (Mo. 1939).

52. *Williams v. Pemiscot County*, 133 S. W. (2d) 417 (Mo. 1939); *Bueker v. Aufderheide*, 111 S. W. (2d) 131 (Mo. 1937); *Mo. REV. STAT.* (1929) § 1018.

53. *State ex rel. Bragg v. McJimsey*, 128 S. W. (2d) 271 (Mo. App. 1939); *Lee's Summit Building & Loan Ass'n v. Cross*, 134 S. W. (2d) 19 (Mo. 1939).

54. *Melenson v. Howell*, 344 Mo. 1137, 130 S. W. (2d) 555 (1939).

55. *State ex rel. Hahn Bakery Co. v. Anderson*, 269 Mo. 381, 190 S. W. 857 (1916).

ticularly with regard to the disqualification and misconduct of jurors and improper argument of counsel, must be assigned specifically. Our civil practice in this respect is not as strict as our criminal practice, where the motion for new trial must set forth the specific grounds or causes of error "in detail and with particularity in separate numbered paragraphs."⁵⁶

In recognition of this strict requirement of our criminal law, provision is made for an accused in a criminal trial to apply for a court order extending the time for filing motion for new trial for a period of thirty days additional to the four day period, and this irrespective of court term.

As hereinbefore stated, a general appeal must be taken during the court term at which a judgment becomes final or an appealable, interlocutory or other order is made. The application for a regular appeal must be supported by an affidavit to the effect that the appeal is not made for vexation or delay but because affiant believes the appellant is aggrieved by the judgment, and must be further supported by the payment of a \$10.00 docket fee.⁵⁷

A special appeal from the reviewing court to the trial court must be taken "within one year next after the rendition of the final judgment or decision in the cause," and this with written notice to respondent at least twenty days before the commencement of the return term of the appellate court to which such appeal is to be sent.⁵⁸ Writs of error from any final judgment or decision of the trial court may be brought within one year after the rendering of the judgment or decision, saving to minors a period of three years after becoming of age to sue out a writ of error.⁵⁹

When a writ of error is sued out, the party obtaining it must cause notice in writing to be served on the adverse party or his attorney of record at least twenty days before return day of such writ; the notice specifically stating the return date of the writ. If such notice be not served, the writ will be dismissed unless good cause for such failure is shown.⁶⁰ The return and the notice, with acceptance, waiver or return of service endorsed thereon, should be filed with the clerk of the reviewing court.⁶¹

56. Mo. REV. STAT. (1929) § 3735, as amended 1939; Mo. Laws 1939, p. 359.

57. Mo. REV. STAT. (1929) §§ 1020-1021.

58. *Id.* §§ 1023 and 1026.

59. *Id.* §§ 1034 and 1036.

60. *Id.* § 1051; State *ex rel.* Schuhart v. Rose, 296 Mo. 156, 246 S. W. 196 (1922).

61. State *ex rel.* Schuhart v. Rose, 296 Mo. 156, 246 S. W. 196 (1922); Rule 7, Kansas City Ct. of App.; Rule 7, St. Louis Ct. of App.; Rule 7, Springfield Ct. of App.

It was formerly held in Missouri that the appealing party, on a general appeal, had to obtain a court order fixing and extending the time to file bill of exceptions. This, however, is no longer necessary. At the present time it is only necessary on a regular appeal, as well as on writ of error, that the bill of exceptions be filed before the appellant, or plaintiff in error, is required to serve his abstract of record in the reviewing court.⁶² It is, however, necessary on special appeals that the bill of exceptions be filed and approved at the time the special appeal is requested, in order that the bill of exceptions be a part of the record inspected by the upper court judge granting the special appeal.

Term bills of exceptions are no longer necessary, but if filed will be considered.⁶³ While it is necessary for the bill of exceptions to set forth the objections and exceptions made during the course of a trial, two recent decisions have announced that it is no longer necessary to show in the bill of exceptions that an exception was taken to the action of the trial court in overruling a motion for new trial.⁶⁴

All appeals (both general and special) taken at least sixty days before the first day of the next term of the reviewing court are returnable to such next term of court, and all appeals taken less than sixty days before the first day of the next term are returnable to the second term of the reviewing court.⁶⁵ On writs of error, the return term is fixed by the court granting the writ of error, but such return term must commence more than twenty days after the issuance of the writ of error in order that the party obtaining the writ may give the statutory twenty days notice to the adverse party or his attorneys of record.⁶⁶

On appeal, the appellant is required to file in the reviewing court at least fifteen days before the first day of the return term of such court, and on writ of error, the plaintiff in error is required to file in the reviewing court on or before the first day of the return term of said court, a perfect transcript of the record and proceedings in the case, or in lieu of such transcript, a certified copy of the record entry of the judgment, order,

62. *State ex inf. Conkling v. Sweaney*, 270 Mo. 685, 195 S. W. 714 (1917); *Moberly v. Watson*, 340 Mo. 820, 102 S. W. (2d) 886 (1937).

63. *Smith v. Ohio Millers Mutual Fire Ins. Co.*, 320 Mo. 146, 6 S. W. (2d) 920 (1928); *State v. Wolzenski*, 340 Mo. 1181, 105 S. W. (2d) 905 (1937).

64. *State v. Batson*, 339 Mo. 298, 96 S. W. (2d) 384 (1936); *State v. Wolzenski*, 340 Mo. 1181, 105 S. W. (2d) 905 (1937); *Guaranty Savings & Loan Ass'n v. Springfield*, 113 S. W. (2d) 147 (Mo. App. 1938).

65. Mo. REV. STAT. (1929) § 1027; Rule 28, Mo. Supreme Ct.; Rule 25, Kansas City Ct. of App.

66. Mo. REV. STAT. (1929) § 1051. See also *State ex rel. Schuhart v. Rose*, 296 Mo. 156, 246 S. W. 196 (1922).

or decree appealed from, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal;—that is, he must file either a complete or a short form transcript.⁶⁷ Where cross appeals or cross writs of error are taken, the transcript (as well as the abstract of record) filed in the reviewing court by appellant or plaintiff in error may be used on both appeals or writs of error.⁶⁸

It is the duty of the appellant or plaintiff in error to see that a proper transcript—either complete or in short form—duly certified by the clerk of the trial court,⁶⁹ is filed in proper time,⁷⁰ and if he fails to do so, the appeal or writ of error will be dismissed.⁷¹ Where an appeal is dismissed because the transcript was filed out of time, the bringing of a writ of error is unauthorized.⁷² If the appellant fails to file a transcript, the respondent may file a short form transcript and have the judgment of the trial court affirmed.⁷³ If it is impossible to complete and file a transcript because the record or a portion thereof has been destroyed by fire, a new trial will be granted.⁷⁴

III

It should be noticed that by statute⁷⁵ it is the duty of the appellant or plaintiff in error to file a “*printed abstract(s) of the entire record*” in the upper court. The same statute provides that if a respondent or defendant in error is dissatisfied with the abstract filed by his adversary, an additional abstract may be filed. Another statute⁷⁶ provides that our upper courts have no authority “to require any part of the *record proper to be printed*” but shall have power “to require parties to *print abstracts*

67. MO. REV. STAT. (1929) § 1028, as amended by Mo. Laws 1939, p. 276.

68. MO. REV. STAT. (1929) § 1032.

69. *Stogsdill v. St. Louis-San Francisco Ry.*, 337 Mo. 126, 85 S. W. (2d) 447 (1935); *State ex rel. Anderson Motor Service Co. v. Public Service Comm.*, 134 S. W. (2d) 1069 (Mo. App. 1939); *State v. Nidiffer*, 337 Mo. 1020, 87 S. W. (2d) 636 (1935); MO. REV. STAT. (1929) § 1028.

70. *State ex rel. Gilman v. Robertson*, 264 Mo. 661, 175 S. W. 610 (1915).

71. *Ritchie v. Fairbanks*, 131 S. W. (2d) 145 (Mo. App. 1939).

72. *Mahopaulos v. C. R. I. & P. Ry.*, 256 Mo. 249, 165 S. W. 310 (1914). See also note 26, *supra*.

73. *McCarthy Bros. Construction Co. v. Green*, 109 S. W. (2d) 907 (Mo. App. 1937).

74. *Boyd v. Treasure*, 84 S. W. (2d) 688 (Mo. App. 1935) (instructions last).

75. MO. REV. STAT. (1929) § 1028 as amended; Mo. Laws 1939, p. 276 (italics supplied).

76. MO. REV. STAT. (1929) § 1031.

of such record.” Other statutes⁷⁷ authorize our upper courts to promulgate suitable rules with regard to abstracts of record.

Under its rule-making authority, our supreme court has provided that if a printed and indexed transcript of the entire record be filed instead of a manuscript record, and copies thereof be filed and served as required for abstracts, such printed transcripts shall dispense with the necessity of filing any abstract.⁷⁸ The rules of the Springfield Court of Appeals provide that a printed and indexed transcript may be filed instead of a manuscript record,⁷⁹ and the rules of the St. Louis Court of Appeals provide that a printed and indexed transcript may be filed instead of a manuscript record, the rule adding that if six of such printed transcripts of the entire record are filed and served within time prescribed by the rules for serving abstracts they “shall be deemed a full compliance with this rule and *dispense with the necessity of any former transcript.*”⁸⁰ The Kansas City Court of Appeals has no similar rule. It is only in the supreme court that the filing of a printed and indexed transcript of the entire record dispenses with the filing of an *abstract* of record.

The situation with respect to abstracts of record is further complicated by the fact that in the Missouri Supreme Court, the St. Louis Court of Appeals, and the Springfield Court of Appeals, different procedures are required with respect to abstracts of record depending upon whether a typewritten or printed complete transcript is filed or a mere short form transcript.⁸¹ Only the rules of the Kansas City Court of Appeals provide (and properly so) for a single procedure concerning abstracts of record.⁸²

In the supreme court, where a complete transcript (other than a complete printed transcript with index) is filed, the appellant must serve an abstract of record on the respondent at least thirty days before the day on which the cause is set for hearing, and file ten copies with the clerk of the court not later than the day preceeding the one on which the cause is set for hearing.⁸³ If, however, a short form transcript is filed, the appellant “shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing,” and in a like time file ten

77. *Id.* §§ 1029 and 1030 (italics supplied).

78. Rule 14, Mo. Supreme Ct.

79. Rule 13, Springfield Ct. of App.

80. Rule 13, St. Louis Ct. of App. (italics supplied).

81. Rules 11 and 12, Mo. Supreme Ct; Rules 12 and 14, St. Louis Ct. of App.; Rules 12 and 14, Springfield Ct. of App.

82. Rule 15, Kansas City Ct. of App.

83. Rule 12, Mo. Supreme Ct.

copies thereof with the clerk.⁸⁴ In the one case, the abstract of record is only required to be filed the day preceding the date of hearing, while in the other case the abstract of record must be filed at least thirty days before hearing. The rules apply to plaintiffs in error on writ of error as well as to appellants on appeal.⁸⁵

In the Springfield Court of Appeals, the abstract of record of the appellant or plaintiff in error must be served and filed within the same time as required by the supreme court, the time of filing differing by reason of the form of transcript filed.⁸⁶

In the St. Louis Court of Appeals, the abstract of record must be served at least thirty days before the hearing date, and nine copies must be filed with the clerk not later than the day preceding the date of hearing,⁸⁷ but if the abstract be attacked, the appellant must immediately file at least one copy of his abstract with the clerk.⁸⁸

In the Kansas City Court of Appeals, irrespective of the form of transcript filed, the appellant or plaintiff in error must serve his printed abstract of record "at least twenty days before" the hearing date and must file the abstract of record on or before the day next preceding the date of hearing.⁸⁹

The supreme court rules also provide that if a short form transcript is filed, the respondent must serve any additional abstract at least fifteen days before the hearing date, but if a complete transcript is filed, the additional abstract may be served five days before the hearing date.⁹⁰ Similar provision is made by the St. Louis Court of Appeals, but the Springfield Court of Appeals requires the respondent's additional abstract of record to be filed fifteen days ahead of hearing date irrespective of form of the transcript of record. In the Kansas City Court of Appeals any additional abstract by the respondent must be served on his adversary at least eight days before the hearing date and filed on or before the day next preceding the date of hearing.⁹¹

So much for the service and filing of abstracts of record. Now let us consider the contents and the proper parts of such abstracts.

84. Rule 11, Mo. Supreme Ct.

85. Rule 10, Mo. Supreme Ct.

86. Rules 12 and 14, Springfield Ct. of App.

87. Rules 12 and 14, St. Louis Ct. of App.

88. Rule 33, St. Louis Ct. of App.

89. Rule 15, Kansas City Ct. of App.

90. Rules 11 and 12, Mo. Supreme Ct.

91. Rule 15, Kansas City Ct. of App.

An abstract of record consists of three parts: (1) the abstract of the record proper; (2) the bill of exceptions; and (3) the index.

Until very recently it was a fatal error for an attorney to include as a part of the record proper any matter that should be included as a part of the bill of exceptions, or *vice versa*, and the attorney had to use great care not to fall into such an error. The present rules of our reviewing courts, however, have done away with these technicalities by providing that where such mistake occurs "such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections in writing and serve same upon the opposing party or his counsel." The other party is then given ten days within which to correct his abstract so as to obviate such objections.⁹² Notwithstanding the above rules, however, the practicing attorney in preparing his abstract of record should use all care to distinguish between the parts in the record that are a part of the record proper and those that form a part of the bill of exceptions.

In one rather recent case, the Kansas City Court of Appeals dismissed the appeal because matters forming a part of the record proper and the bill of exceptions were commingled, and in another case, where the same situation prevailed, the same court limited the review to the record proper.⁹³

It is better practice to set forth the record proper first and follow with the record that constitutes the bill of exceptions.⁹⁴

The record proper should set forth either by recital or in *haec verba* so much of the record as is necessary to be consulted in the disposition of the assigned errors. Abandoned pleadings should not be included, and only the substance of the pleadings upon which the case is tried need be set forth by recital unless some question is presented which requires the pleadings to be set forth in full.⁹⁵ This statement is also applicable to other parts of the record proper.⁹⁶ The record entries setting forth the steps taken in the trial court to perfect the appeal need not be abstracted, and it is sufficient if the abstract states that the appeal was duly taken.

92. Rule 13, Mo. Supreme Ct.; Rule 15, Kansas City Ct. of App.; Rule 15, Springfield Ct. of App. See also Rules 33 and 34, St. Louis Ct. of App.

93. *LeClair v. LeClair*, 77 S. W. (2d) 862 (Mo. App. 1934); *Bailey v. Nichols*, 70 S. W. (2d) 1103 (Mo. App. 1934).

94. *King v. Rolla*, 130 S. W. (2d) 697 (Mo. App. 1939).

95. Rules 9 and 13, Mo. Supreme Ct.; Rules 12 and 15, Kansas City Ct. of App.; Rules 10 and 15, St. Louis Ct. of App.; Rules 10 and 15, Springfield Ct. of App.

96. MO. REV. STAT. (1929) § 1031.

Absent a record by respondent showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.⁹⁷

The judgment of the trial court should be included, by recital at least, in the record proper. It has recently been held by our supreme court that if the judgment is omitted, the abstract of record is insufficient.⁹⁸ So the Springfield Court of Appeals has recently dismissed a case for the reason that the abstract of record failed to show the judgment of the trial court.⁹⁹ However, the Kansas City Court of Appeals not long ago announced a more liberal rule in holding that where the judgment is omitted from the abstract of record, the transcript may be looked to to supply the omission and is controlling.¹⁰⁰

Most of the trouble with respect to the abstract of record concerns the bill of exceptions. The review in many upper court cases is limited to a review of the record proper because of some omission in not having the bill of exceptions properly incorporated into the record and properly before the upper court.¹⁰¹ In order to make the bill of exceptions a proper part of the record, the abstract of the record proper should show that the bill of exceptions was presented to, and allowed by, the trial court and ordered made a part of the record.¹⁰² In addition, the abstract of record proper should show the filing of and the ruling on the motion for new trial, the filing of application, and the allowance of, an appeal, and should show also that the motion for new trial was filed in due time at the proper court term and that the appeal was properly taken at the term of court from which appeal could be taken. The motion for new trial itself should be shown in the bill of exceptions.¹⁰³

The big and disturbing question with respect to the sufficiency of the bill of exceptions part of the abstract of record concerns the question of evidence—the amount of evidence that should be included and how the

97. Rule 31, Mo. Supreme Ct.; Rule 26, Kansas City Ct. of App.; Rule 34, St. Louis Ct. of App.; Rule 32, Springfield Ct. of App.

98. *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939).

99. *Boyd v. Spickard*, 136 S. W. (2d) 448 (Mo. App. 1940).

100. *Galvin v. Kansas City*, 233 Mo. App. 531, 122 S. W. (2d) 379 (1938). See also *Matthews v. Jones*, 199 S. W. 578 (Mo. App. 1917). See also *Concrete Engineering Co. v. Grande Building Co.*, 230 Mo. App. 443, 86 S. W. (2d) 595 (1936).

101. *State v. Bank of Southeast Mo.*, 107 S. W. (2d) 1 (Mo. 1937); *Bakersfield News v. Ozark County*, 338 Mo. 519, 92 S. W. (2d) 603 (1936).

102. *Bakersfield News v. Ozark County*, 338 Mo. 519, 92 S. W. (2d) 603 (1936); *Lewis v. Kansas City*, 233 Mo. App. 341, 122 S. W. (2d) 852 (1938).

103. *Warner v. Howard*, 339 Mo. 923, 98 S. W. (2d) 613 (1936); *Merchants Exchange Bank v. Bankers Life Co.*, 231 Mo. App. 674, 104 S. W. (2d) 744 (1937); *Wittmeyer v. Storms*, 203 S. W. 237 (Mo. App. 1918); *Pennewell v. Pennewell*, 204 S. W. 183 (Mo. 1918).

evidence that is included should be set forth, whether by question and answer or in narrative form.

With respect to the question as to how much evidence should be included, it can be answered generally that so much of the evidence should be included as is necessary to enable the upper court properly to review the questions presented.¹⁰⁴ In an equity case all of the evidence should be included.¹⁰⁵ Even where an action at law is tried as an equity case, the entire record, including all of the evidence, is necessary for review.¹⁰⁶

Again, where the propriety of the ruling on a demurrer to the evidence is presented for review, all of the evidence, including exhibits, should be before the upper court,¹⁰⁷ and this notwithstanding the parties have stipulated that the bill of exceptions contains all of the evidence.¹⁰⁸ The same rule governs where the question is presented that the judgment is not supported by the evidence.¹⁰⁹ If all of the evidence is not included the presumption exists that the omitted evidence is sufficient to support the trial court's judgment.¹¹⁰

Where a question is presented as to the propriety of the admission of evidence, the evidence objected to must be either stated or the substance set forth.¹¹¹ Where it is submitted that evidence is improperly excluded, the abstract of the bill of exceptions must show the offer of proof made.¹¹²

Another very interesting question arises with respect to whether the entire evidence, a portion thereof, or any evidence is required to be included in the bill of exceptions and abstract of record for an upper court to review instructions. If the practicing lawyer is not very careful the

104. *Orlann v. Laederich*, 338 Mo. 783, 92 S. W. (2d) 190 (1936); *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939); *Emory v. St. Louis Cooperage Co.*, 137 S. W. (2d) 663 (Mo. App. 1940).

105. *Short v. Kidd*, 197 S. W. 64 (Mo. 1917); *Robinson v. Burton*, 139 S. W. (2d) 942 (Mo. 1940). There is a recent supreme court case to the contrary holding that even though all of the evidence is not included in an equity case, the appeal will not be dismissed where the court can properly determine the case. See *Dreyer v. Videmschek*, 123 S. W. (2d) 63 (Mo. 1938).

106. *Gale v. Nolan*, 137 S. W. (2d) 974 (Mo. App. 1940).

107. *Weintraub v. Abraham Lincoln Life Ins. Co.*, 99 S. W. (2d) 160 (Mo. App. 1936); *Ross v. Speed-o Corp. of America*, 130 S. W. (2d) 180 (Mo. App. 1939), but see *Poague v. Kurn*, 140 S. W. (2d) 13 (Mo. 1940), where the original exhibits are before the court. *Bueker v. Aufderheide*, 136 S. W. (2d) 281 (Mo. 1940).

108. *Stalcup v. Bolt*, 139 S. W. (2d) 544 (Mo. App. 1940); see also *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939).

109. *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939).

110. *Galvin v. State Social Security Comm.*, 129 S. W. (2d) 1051 (Mo. App. 1939); *Walsh v. Monett*, 200 S. W. 97 (Mo. App. 1918).

111. *Wheeler v. Cantwell*, 140 S. W. (2d) 744 (Mo. App. 1940); *Newkirk v. Tipton*, 136 S. W. (2d) 147 (Mo. App. 1939). See also Rule 11, Kansas City Ct. of App.

112. *Lowry v. Columbia Cemetery Ass'n*, 189 S. W. 1162 (Mo. 1916).

rules of our upper courts with regard to this question are liable to entrap him.

The supreme court rule¹¹³ provides that in reviewing the action of the trial court in giving or refusing instructions "it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts." The rule further provides: "If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter."

The rules of the St. Louis and Springfield Courts of Appeal¹¹⁴ are identical with the supreme court rule with the exception that the rules of the appellate courts state that if the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of witnesses "may" be stated in narrative form rather than, as provided in the supreme court rule, "the testimony of the witnesses shall be stated in narrative form."

The Kansas City Court of Appeals rules with respect to reviewing instructions and how the evidence must be stated with reference thereto, are dissimilar to the rules of the other upper courts just mentioned.

The Kansas City Court of Appeals rules provide:

"In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, . . . in giving or refusing instructions, that the whole of the testimony given or excluded . . . should be embodied in the *bill of exceptions*: but it shall be sufficient . . . that the bill of exceptions should state that 'evidence tending to prove' a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it."¹¹⁵

"If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a *bill of exceptions*, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue."¹¹⁶

"If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof

113. Rule 6, Mo. Supreme Ct.

114. Rule 8, St. Louis Ct. of App.; Rule 8, Springfield Ct. of App.

115. Rule 8, Kansas City Ct. of App.

116. Rule 9, Kansas City Ct. of App.

of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried."¹¹⁷ (Italics supplied)

Under the rules of the Kansas City Court of Appeals just quoted, that court until very recently held that instructions would be reviewed where the evidence was not set forth in the *bill of exceptions* so long as there was a general statement in the bill of exceptions that the evidence tended to support the allegations of the pleadings of the respective parties,¹¹⁸ but even then we find the court warning attorneys that a judgment would be affirmed where it was impossible because of appellant's "failure to set forth the evidence or the particular facts . . . to say whether the instructions were correct or otherwise."

In its earlier cases the supreme court likewise permitted a review of instructions under general statements with respect to the evidence, but pointed out that under its rule that if the parties disagree as to what facts the evidence tends to prove, it is necessary, if the rule be followed, to at least set forth the evidence in narrative form.¹¹⁹ Later, however, the supreme court practically nullified not only its own rule but also the rules of the three appellate courts by pointing out that under the statutory law there could be only one bill of exceptions in a case and that the evidence must be set forth in the bill of exceptions; that the upper courts by rules cannot alter these statutory requirements.¹²⁰ Following these controlling supreme court decisions, the Kansas City Court of Appeals has held that a general statement in a bill of exceptions as to what the evidence disclosed is insufficient for a review of instructions.¹²¹ The St. Louis Court of Appeals has ruled to the same effect.¹²²

Where, however, the parties, as provided by court rules,¹²³ enter into an agreed statement of the cause of action or the evidence, the upper court may review instructions, to the extent possible, on such agreed statement.¹²⁴

117. Rule 10, Kansas City Ct. of App.

118. *Norris v. Brady*, 132 S. W. (2d) 1059 (Mo. App. 1939) (in my opinion, an erroneous decision in view of prior controlling decisions of supreme court); *Mott v. C. R. I. & P. Ry.*, 79 S. W. (2d) 1057 (Mo. App. 1935); *Good Roads Co. v. K. C. Rys.*, 217 S. W. 858 (Mo. App. 1920).

119. *Odell v. Met. Street Ry.*, 212 S. W. 849 (Mo. 1919).

120. *Klene v. St. Louis-San Francisco Ry.*, 321 Mo. 162, 9 S. W. (2d) 950 (1928); *State ex rel. C. R. I. & P. Ry. v. Shain*, 338 Mo. 217, 89 S. W. (2d) 654 (1936).

121. *Lay v. Pollock Milling & Elev. Co.*, 138 S. W. (2d) 754 (Mo. App. 1940).

122. *Breck v. Koeneman*, 108 S. W. (2d) 992 (Mo. App. 1937).

123. Rule 6, Mo. Supreme Ct.; Rule 10, Kansas City Ct. of App.; Rule 22, St. Louis Ct. of App.; Rule 22, Springfield Ct. of App.

124. See *Bedsaul v. Feedback*, 341 Mo. 50, 106 S. W. (2d) 431 (1937), where a bill of exceptions was agreed to and treated in effect as an agreed statement.

Instructions may also be reviewed, without any evidence being included in the abstract of record, in the limited number of cases where, irrespective of any evidence, the instructions are clearly erroneous under the pleadings.¹²⁵

It is submitted that attorneys are treading upon very dangerous ground, notwithstanding the upper court rules, in seeking a review of instructions without presenting the evidence to the upper court.

Having considered how much evidence should be included in the abstract of record, let us now turn our attention to the rules concerning the manner in which evidence should be set forth—whether by question and answer or in narrative form.

The rules of the supreme court¹²⁶ provide that in equity cases “parol evidence *shall* be reduced to a narrative form where this can be done and its full force and effect be preserved,” and further provide that “the evidence of witnesses *may* be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony.” The rules of the St. Louis and Springfield Courts of Appeal provide that in equity cases “parol evidence . . . *may* be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence” and further provide generally that “the evidence of witnesses *shall* be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence.”¹²⁷ The Kansas City Court of Appeals by rule provides that in equity cases “the *whole* of the evidence *shall be embodied* in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.”¹²⁸ Other than just stated, the Kansas City Court of Appeals does not limit the evidence in the abstract of record either to narrative or question and answer form.

Under the foregoing rules of the Springfield Court of Appeals, except in equity cases where the evidence may be set forth either by question and answer or in narrative form,¹²⁹ the evidence must be set forth in narrative. If this is not done, the appeal or writ of error is either dismissed or the assignments of error which involve a review of the evidence or part thereof will not be passed upon.¹³⁰ Even where the attorney tries to conform to

125. *Field v. National City Bank of St. Louis*, 343 Mo. 419, 121 S. W. (2d) 769 (1938).

126. Rules 7 and 13, Mo. Supreme Ct. (italics supplied).

127. Rules 9 and 15, St. Louis Ct. of App. and Springfield Ct. of App. (italics supplied).

128. Rule 14, Kansas City Ct. of App. (italics supplied).

129. *Deverell v. Eagle-Picher Lead Co.*, 137 S. W. (2d) 473 (Mo. App. 1939).

130. *Brown Shoe Co. v. Bess*, 110 S. W. (2d) 1139 (Mo. App. 1937); *White v.*

the rule of the Springfield Court of Appeals and narrates the testimony of witnesses, he is still in danger of having his case dismissed if the court should conclude that the narrative is that of counsel preparing the abstract rather than a narrative of the testimony of witnesses.¹³¹ If the abstract states that a witness "testified in effect as follows" this is held to be a mere conclusion of counsel and not a narrative of the witness' testimony. If the court determines that the narrative is that of counsel rather than that of the witnesses, the abstract is disregarded. In other words, the attorney is between the devil and the deep blue sea, and it is little help to him for the court to advise that he should take great care to prepare the testimony in narrative form *exactly* as it appears in the questions and answers and that his conclusion should not be stated.¹³²

In the Kansas City Court of Appeals the evidence in equity cases (unless the parties agree on an abbreviated statement) must be set out in question and answer form including exhibits and objections made to the testimony.¹³³ In other cases the testimony of witnesses may be set forth either by questions and answers (*haec verba*) or by the "narrative of witnesses," but in my opinion an attorney would be very foolish to set forth the testimony of witnesses in narrative form before the Kansas City Court of Appeals. That court, in a goodly number of cases, has construed the narration to consist of the mere conclusions of counsel rather than a narrative of the testimony of witnesses, holding that the narration violated their rule. In some cases assignments of error necessitating a consideration of the testimony in question were not reviewed.¹³⁴

The Missouri Supreme Court also rules that the oral evidence and

National Lead Co., 99 S. W. (2d) 535 (Mo. App. 1936); Marshfield v. Brown, 99 S. W. (2d) 485 (Mo. App. 1936). First National Bank of Jasper v. Wilson, 94 S. W. (2d) 914 (Mo. App. 1936); Marx v. Marx, 230 Mo. App. 68, 88 S. W. (2d) 1018 (1935); Thompson v. Clark, 107 S. W. (2d) 973 (Mo. App. 1937); Ozark Savings Bank v. Moberly, 107 S. W. (2d) 974 (Mo. App. 1937).

131. Cory v. Interstate Securities Co., 99 S. W. (2d) 861 (Mo. App. 1936); Parker v. Mass. Bonding & Ins. Co., 123 S. W. (2d) 570 (Mo. App. 1938); Colorado Milling & Elev. Co. v. Rolla Wholesale Grocery Co., 102 S. W. (2d) 681 (Mo. App. 1937).

132. King v. Rolla, 130 S. W. (2d) 697 (Mo. App. 1939).

133. Auxvasse Quarry Co. v. Harrison, 233 Mo. App. 62, 117 S. W. (2d) 384 (1938).

134. Stratman v. Norge Co., 233 Mo. App. 590, 124 S. W. (2d) 572 (1939); National Refg. Co. v. Chandler, 71 S. W. (2d) 482 (Mo. App. 1934); Tackett v. Linnenbrink, 112 S. W. (2d) 160 (Mo. App. 1938); Euler v. State Highway Comm., 227 Mo. App. 755, 55 S. W. (2d) 719 (1933); Dickson v. Dickson, 231 Mo. App. 515, 101 S. W. (2d) 774 (1937); Kelly v. K. C. Building & Loan Ass'n, 86 S. W. (2d) 975 (Mo. App. 1935). See also Craven v. Midland Milling Co., 228 S. W. 513 (Mo. App. 1921) (*haec verba* necessary when demurrer to evidence is passed upon). Beall v. North Missouri Farmers' Mut. Ins. Co., 89 S. W. (2d) 585 (Mo. App. 1935).

testimony of witnesses may be included in the abstract of record either in question and answer form or narrative form,¹³⁵ but here again it is dangerous to use the narrative form as our supreme court has held that if the narration merely consists of the conclusions of the attorney rather than a narrative of the testimony of witnesses, the appeal will be dismissed or review denied.¹³⁶

I have not found any recent decisions of the St. Louis Court of Appeals with respect to this matter, and I conclude that either that court is interpreting its rules liberally or the attorneys practicing before it are well trained.

Enough has been said on this particular matter to show the miscarriage of justice and damage to litigants by the rules authorizing or requiring the testimony of witnesses to be narrated in the abstract of record. It is submitted that an upper court cannot properly determine questions involving the evidence where the evidence is not set forth in question and answer form.

It should be stated, briefly, that the duty is upon the appellant to supply a sufficient abstract of record for the court to pass upon the assignments of error presented.¹³⁷ The abstract of record must affirmatively show the jurisdiction of the trial court as well as that of the reviewing court.¹³⁸ Unless the abstract of record discloses the contrary, there is a presumption that it is complete and that nothing is omitted.¹³⁹ It is also presumed as a matter of fact that the abstract of record contains all of the evidence applicable to any particular ruling to which an exception is saved.¹⁴⁰ If, however, the abstract of record of the appellant or plaintiff in error is so incomplete as to be insufficient for the court to pass upon the various questions presented, the respondent or defendant in error may follow one of three courses: (a) if the abstract of record shows on its

135. *Bakersfield News v. Ozark County*, 338 Mo. 519, 92 S. W. (2d) 603 (1936); *Orlann v. Laedrich*, 338 Mo. 783, 92 S. W. (2d) 190 (1936).

136. *Redler v. Travelers' Ins. Co.*, 342 Mo. 677, 117 S. W. (2d) 241 (1938); *Polk v. M. K. T. R. R.*, 341 Mo. 1213, 111 S. W. (2d) 138 (1937); *Moberly v. Watson*, 340 Mo. 820, 102 S. W. (2d) 886 (1937).

137. *State ex rel. Hartman v. Thomas*, 245 Mo. 65, 149 S. W. 318 (1912); *Manthey v. Kellerman Contracting Co.*, 311 Mo. 147, 277 S. W. 927 (1925); *Lester v. Tyler*, 69 S. W. (2d) 633 (Mo. 1934); *St. John v. McCormick*, 109 S. W. (2d) 874 (Mo. App. 1937).

138. *Lawyers Cooperative Pub. Co. v. Piatt*, 128 S. W. (2d) 1072 (Mo. App. 1939); *Martone v. Bryan*, 233 Mo. App. 1249, 130 S. W. (2d) 962 (1939); *Ray v. Missouri Christian College*, 84 S. W. (2d) 614 (Mo. 1935).

139. *Lawyers Cooperative Pub. Co. v. Piatt*, 128 S. W. (2d) 1072 (Mo. App. 1939).

140. Rule 8, Mo. Supreme Ct.; Rule 13, Kansas City Ct. of App.; Rule 11, St. Louis Ct. of App.; Rule 11, Springfield Ct. of App.

face that it is incomplete, he can defend on this ground without filing any additional abstract of record; if the abstract of record appears on its face to be complete, but is in fact incomplete, the respondent or defendant in error may either (b) file an additional incomplete abstract of record which will affirmatively show that the original abstract, and as supplemented by the additional abstract, still constitutes an incomplete abstract of the record and defend against any review of the questions presented on this ground, or (c) he may file a supplemental abstract making the original abstract complete and thus waive any points as to insufficiency of the abstract of record.¹⁴¹ The respondent or defendant in error, however, is not duty bound to correct the mistakes of his adversary.¹⁴² After respondent calls attention to the insufficiency of the appellant's abstract of record, the appellant cannot file a supplemental abstract to correct his original abstract either out of time or without leave of court.¹⁴³

It is improper to emphasize in the abstract of record by a blacker type or by italics.¹⁴⁴ The Kansas City Court of Appeals rules expressly provide that the parties are forbidden to italicize any part of the abstract of record except where the record from which the abstract is taken is in italics, but that italics may be used to show wherein an instruction is modified. The court in its rules states that if italics are desired, "they must be used in the statement, brief, and written argument."¹⁴⁵

The third part of an abstract of record, namely, the index, needs no lengthy discussion. The rules¹⁴⁶ of our four upper courts expressly provide for a complete index which shall specifically identify exhibits. Where

141. *Weintraub v. Abraham Lincoln Life Ins. Co.*, 99 S. W. (2d) 160 (Mo. App. 1936); *Rishel v. Kansas City Pub. Service Co.*, 129 S. W. (2d) 851 (Mo. 1939); *Deverell v. Eagle-Picher Lead Co.*, 137 S. W. (2d) 473 (Mo. App. 1939); *Ross v. Speed-o Corp. of America*, 130 S. W. (2d) 180 (Mo. App. 1939); *Boyd v. Spickard*, 136 S. W. (2d) 448 (Mo. App. 1940); *Brown v. Eagle-Picher Lead Co.*, 136 S. W. (2d) 708 (Mo. App. 1939); *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939); *Colorado Milling & Elev. Co. v. Rolla Wholesale Grocery Co.*, 102 S. W. (2d) 681 (Mo. App. 1937); *Beal v. North Missouri Farmers' Mut. Ins. Co.*, 89 S. W. (2d) 585 (Mo. App. 1935).

142. *Feeherty v. Sullivan*, 129 S. W. (2d) 926 (Mo. App. 1939); *Monsour v. Excelsior Tobacco Co.*, 115 S. W. (2d) 219 (Mo. App. 1938); *Robison v. C. G. W. Ry.*, 66 S. W. (2d) 180 (Mo. App. 1933).

143. *Wright v. Metropolitan Life Ins. Co.*, 122 S. W. (2d) 375 (Mo. App. 1938); *Hopkins v. A. & L. Dunn Merc. & L. Co.*, 85 S. W. (2d) 907 (Mo. App. 1935); *LeClair v. LeClair*, 77 S. W. (2d) 862 (Mo. App. 1934) (after motion to dismiss appeal); *Rishel v. Kansas City Pub. Service Co.*, 129 S. W. (2d) 851 (Mo. 1939).

144. *State ex rel. Eggers v. Brown*, 134 S. W. (2d) 28 (Mo. 1939).

145. Rules 28 and 29, Kansas City Ct. of App.

146. Rule 13, Mo. Supreme Ct.; Rule 30, Kansas City Ct. of App.; Rule 15, St. Louis Ct. of App.; Rule 15, Springfield Ct. of App.; *Pruett v. Milgram Food Stores, Inc.*, 232 Mo. App. 781, 112 S. W. (2d) 371 (1938).

the index is not complete as required by rule and the labors of the court are thereby increased, the appeal will be dismissed even though the abstract is not voluminous.¹⁴⁷

The various rules applicable to the sufficiency of the abstract of record on appeal apply with equal force to the abstract of record on writs of error.¹⁴⁸

IV

The supreme court rule¹⁴⁹ requires the appellant to deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing. The respondent is required to deliver his brief to the appellant at least five days before the hearing date. The appellant is required to deliver a copy of his reply brief to respondent not later than the day preceding the date of hearing. Ten copies of these various briefs are required to be filed with the court clerk on or before the day preceding the hearing date. The St. Louis Court of Appeals rule¹⁵⁰ is to the same effect, excepting only that nine copies of each brief are required to be filed. The Springfield Court of Appeals rule¹⁵¹ requires the appellant's brief to be served thirty days before hearing, the respondent's brief ten days before hearing, and the appellant's reply brief the day preceding hearing. Eight copies of each brief are required to be filed on or before the day preceding the hearing date. The Kansas City Court of Appeals by rule¹⁵² requires the appellant to deliver a copy of his brief to respondent at least twenty days before the date of hearing, requires respondent to serve appellant with respondent's brief at least eight days before hearing, and requires the appellant to serve on respondent a reply brief within five days after service of respondent's brief. All of such briefs are required to be filed with the court on or before the day next preceding the date of hearing.

By statute¹⁵³ the upper courts are given power to require parties to print "briefs of points and argument." Also by statute¹⁵⁴ the parties on appeal and writ of error are required "on or before the day next preced-

147. *Bank of Kennett v. Tatum*, 340 Mo. 198, 100 S. W. (2d) 475 (1936); *Ozark Savings Bank v. Moberly*, 107 S. W. (2d) 974 (Mo. App. 1937); *Payne v. Payne*, 338 Mo. 224, 89 S. W. (2d) 665 (1936). But see *Weller v. Searcy*, 343 Mo. 768, 123 S. W. (2d) 73 (1938).

148. *Woods v. Dowd*, 137 S. W. (2d) 426 (Mo. 1939).

149. Rule 15, Mo. Supreme Ct.

150. Rule 18, St. Louis Ct. of App.

151. Rule 18, Springfield Ct. of App.

152. Rule 15, Kansas City Ct. of App.

153. Mo. REV. STAT. (1929) § 1031.

154. *Id.* § 1060.

ing" the hearing date to make out and furnish the court "with a clear and concise statement of the case, and the points intended to be insisted on in argument."

The supreme court by rule¹⁵⁵ requires all briefs to be printed and requires the brief of appellant (a) to distinctly allege errors committed by the trial court, and to contain (b) a concise statement of the grounds on which the jurisdiction of the court is involved, (c) "a fair and concise statement of the facts of the case without reiteration, statements of law, or argument," (d) a statement in numerical order of the points relied on and citations of authorities thereunder, and (e) a printed argument "if desired." The respondent in his brief may adopt the statement of appellant, or if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent follows the order of that required of appellant. Any brief or statement which violates the above rule will not be considered by the court.

The Kansas City Court of Appeals rules¹⁵⁶ require the appellant's brief to contain (a) "a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses," (b) a distinct and separate statement of errors alleged to have been committed by the trial court, (c) "in numerical order, the points of legal propositions relied on, with citation" of authorities, and (d) an argument. The respondent in his statement may adopt that of the appellant or file a corrected statement.

The court states that its rules are to enable the court to be informed of the material facts of the case from the statement, without being compelled to glean them from the abstract of record. Similar requirements are contained in the rules of the St. Louis and Springfield Courts of Appeal.¹⁵⁷

Under the above statutes and rules, therefore, the original brief of appellant or plaintiff in error consists of five parts, namely, (1) the jurisdictional statement, (2) the plain and concise statement of the facts, (3) the assignments of error, (4) the points and authorities, and (5) the argument. Each of these in turn will be touched upon or discussed.

1. *The Jurisdictional Statement.* The supreme court rule has recently been amended to require a concise statement of the grounds on which the jurisdiction of the court is involved. Apparently this jurisdictional

155. Rule 15, Mo. Supreme Ct.

156. Rules 15, 16 and 17, Kansas City Ct. of App.

157. Rules 18 and 19, St. Louis Ct. of App.; Rules 18 and 19, Springfield Ct. of App.

statement should be separate and apart from the plain and concise statement of the facts and should precede same. Until this amendment of the rule becomes better known the supreme court undoubtedly will, and has, construed it liberally.¹⁵⁸

In our appellate courts, even absent the above requirement of the supreme court rule, the appellant should make a clear-cut statement in his brief of the jurisdictional grounds supporting a review by the court, and this should be included in his plain and concise statement.

2. *The Plain and Concise Statement.* In considering the statement of the case that must be contained in an appellant's brief, we must keep in mind that by statute the only requirement is that there be "a clear and concise statement of the case."¹⁵⁹ This statutory requirement, without any modification or amplification by court rule, constitutes the statement requirement of both the St. Louis and Springfield Courts of Appeal. In the supreme court, however, the statutory requirement is restricted by court rule requiring "a fair and concise statement of the facts of the case without reiteration, statements of law, or argument."¹⁶⁰ The Kansas City Court of Appeals rule goes even further in restricting the statutory requirement by requiring that the statement of the case "shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses."¹⁶¹ It is thus seen that the rule of the Kansas City Court of Appeals is most strict. It is under this rule that the Kansas City Court of Appeals has dismissed many cases and has denied to litigants a review on the merits. The Kansas City Court of Appeals has interpreted its rule rather strictly and an attorney preparing a brief for presentation in that court must be very careful to see that his statement of the case cannot be construed as a violation of that court's rule. The other upper courts have construed their rules more liberally and wherever possible have passed on the merits of the case rather than dismissing same on a mere procedural deficiency; a desirable condition toward which there seems to be a tendency on the part of the Kansas City Court of Appeals in its more recent decisions.

Let us now turn our attention to the decided cases to ascertain what

158. *Lee v. Ullery*, 140 S. W. (2d) 5 (Mo. 1940); *Stephens v. Anth*, 142 S. W. (2d) 1008 (Mo. 1940).

159. MO. REV. STAT. (1929) § 1060.

160. Rule 15, Mo. Supreme Ct.

161. Rule 16, Kansas City Ct. of App.

our upper courts deem essential in the statement of the case in an appellant's brief.

The rule is mandatory that the statement be clear and concise but the rule is to be liberally interpreted.¹⁶² The statement cannot be dispensed with either by waiver or stipulation of the parties,¹⁶³ and cannot be aided by the transcript of record.¹⁶⁴ If the brief does not contain a statement of the case, through inadvertence or otherwise, the appeal will be dismissed,¹⁶⁵ unless the case is not complicated,¹⁶⁶ or perhaps, where a question on demurrer to the evidence is involved and the court is thus required in any event to search the entire record.¹⁶⁷ In one very recent case where the statement was omitted through inadvertence the appeal was dismissed, notwithstanding application to the court to file a statement.¹⁶⁸

The statement of the case is required for both the benefit of the court and the litigants.¹⁶⁹ One purpose of the statement is to enable the court to be informed of the material facts without having to glean them from the abstract of the record.¹⁷⁰

The statement should affirmatively show the jurisdictional facts.¹⁷¹ It should show also the trial history of the case, including a recital of the title of the case, the verdict and judgment (the amount, date, and court term when rendered), a reference to the motion for new trial (the date and term when filed and passed upon), and the application and allowance of appeal (the date and term at which such application was made and appeal allowed).¹⁷² The statement, likewise, must clearly and concisely outline or state the material ultimate facts which are necessary for the

162. *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939).

163. *Wilkerson v. National Council of Knights & Ladies of Security*, 218 S. W. 976 (Mo. App. 1920); *Dean v. State Social Security Comm.*, 123 S. W. (2d) 573 (Mo. App. 1939).

164. *Evans v. Hilliard*, 232 Mo. App. 817, 112 S. W. (2d) 886 (1938).

165. *Glaze v. Mutual Benefit Health & Accident Ass'n*, 74 S. W. (2d) 96 (Mo. App. 1934); *Pegram v. Lee & Co.*, 236 S. W. 1056 (Mo. App. 1922); *Hyer v. Baker*, 121 S. W. (2d) 278 (Mo. App. 1938).

166. *Menke v. Farmers Produce Exchange Co-op. Ass'n*, 101 S. W. (2d) 508 (Mo. App. 1937).

167. *Christianson v. Metropolitan Life Ins. Co.*, 102 S. W. (2d) 682 (Mo. App. 1937).

168. *Hyer v. Baker*, 121 S. W. (2d) 278 (Mo. App. 1938).

169. *Emory v. St. Louis Cooperage Co.*, 137 S. W. (2d) 663 (Mo. App. 1940).

170. *Bramhall v. McGhee*, 87 S. W. (2d) 453 (Mo. App. 1935).

171. *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935). But see *Stoll v. First Natl. Bank*, 132 S. W. (2d) 676 (Mo. App. 1939) (where respondent does not assert lack of jurisdiction).

172. *Brady v. Rapedo*, 139 S. W. (2d) 540 (Mo. App. 1940); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935); *Stoll v. First Natl. Bank*, 132 S. W. (2d) 676 (Mo. App. 1939); *Swinney v. Modern Woodmen of America*, 231 Mo. App. 83, 95 S. W. (2d) 655 (1936).

court to understand the errors assigned and the questions of law presented—must set forth a birds-eye view of the situation presented.¹⁷³ In addition, the statement should include references to the record pages so that the court will be directed to the particular record supporting the statements made.¹⁷⁴

The statement should not include: (a) statements or issues of law,¹⁷⁵ (b) argument or argumentative matter,¹⁷⁶ or (c) quotations either from the pleadings,¹⁷⁷ evidence,¹⁷⁸ or instructions.¹⁷⁹ The statement should not be one-sided, distorted, favoring appellant only, and should not ignore the testimony favorable to the respondent.¹⁸⁰ The courts are quick to dismiss an appeal for this reason where the defect is glaring or willful. Again, the statement to be concise should not be any longer than required by the record presented or the points submitted.¹⁸¹ The supreme court has held a statement of 3000 words to be a violation of the rule,¹⁸² and the St. Louis and Kansas City Courts of Appeal, respectively, have held that statements twenty-four and fourteen pages long, required dismissal.¹⁸³ If

173. *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935); *Flint v. Loew's St. Louis Realty & Amusement Corp.*, 344 Mo. 310, 126 S. W. (2d) 193 (1939); *Gerber v. Kansas City*, 311 Mo. 49, 277 S. W. 562 (1925); *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939); *Evans v. Hilliard*, 232 Mo. App. 817, 112 S. W. (2d) 886 (1938).

174. *Pruitt v. St. Johns Levee & Drainage District*, 341 Mo. 120, 106 S. W. (2d) 467 (1937); *Glaze v. Mutual Benefit Health & Accident Ass'n*, 74 S. W. (2d) 96 (Mo. App. 1934).

175. *Nelson v. Massman Constr. Co.*, 120 S. W. (2d) 77 (Mo. App. 1938); *Farmers' Bank v. Ogden*, 192 Mo. App. 243, 188 S. W. 201 (1915).

176. *Shaw v. Fulkerson*, 339 Mo. 310, 96 S. W. (2d) 495 (1936); *Nelson v. Massman Constr. Co.*, 120 S. W. (2d) 77 (Mo. App. 1938); *Emory v. St. Louis Cooperage Co.*, 137 S. W. (2d) 663 (Mo. App. 1940); *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935); *Hartweg v. Kansas City Rys.*, 231 S. W. 269 (Mo. App. 1921); *State ex rel. Eggers v. Brown*, 134 S. W. (2d) 28 (Mo. 1939).

177. *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939); *Bramhall v. McGhee*, 87 S. W. (2d) 453 (Mo. App. 1935); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935). But see, *Stoll v. First Natl. Bank*, 132 S. W. (2d) 676 (Mo. App. 1939).

178. *Globe American Corp. v. Miller*, 131 S. W. (2d) 340 (Mo. App. 1939); *Sims v. Hydraulic Press Brick Co.*, 323 Mo. 447, 19 S. W. (2d) 294 (1929); *Marks v. Acme Phonograph Co.*, 236 S. W. 900 (Mo. App. 1922); *Wilkerson v. National Council of Knights & Ladies of Security*, 218 S. W. 976 (Mo. App. 1920).

179. *Stoll v. First Natl. Bank*, 132 S. W. (2d) 676 (Mo. App. 1939).

180. *Coolidge v. Strother*, 137 S. W. (2d) 467 (Mo. 1939); *Brown v. Citizens' State Bank*, 134 S. W. (2d) 116 (Mo. 1939); *National Refining Co. v. Chandler*, 71 S. W. (2d) 482 (Mo. App. 1934); *Flint v. Loew's St. Louis Realty & Amusement Co.*, 344 Mo. 310, 126 S. W. (2d) 193 (1939); *Sudduth v. Kansas City Gas Co.*, 123 S. W. (2d) 589 (Mo. App. 1938).

181. *Wolf v. Wuelling*, 130 S. W. (2d) 671 (Mo. App. 1939).

182. *State ex rel. State Highway Comm. v. Shain*, 333 Mo. 235, 62 S. W. (2d) 711 (1933).

183. *Emory v. St. Louis Cooperage Co.*, 137 S. W. (2d) 663 (Mo. App. 1940); *Peck v. Great American Ins. Co.*, 230 Mo. App. 325, 90 S. W. (2d) 415 (1936).

mere surplusage is contained in the statement, such surplusage can be disregarded by the court and this does not require dismissal.¹⁸⁴

The Kansas City Court of Appeals criticizes subheads dividing the statement of the case. Subheads that have been criticized are: "Pleading," "Evidence," "Plaintiff's Evidence," and "Defendant's Evidence."¹⁸⁵

If the statement does not constitute a clear and concise statement within the meaning of the above decisions, an appeal or writ of error will be dismissed.¹⁸⁶ But the case will not be dismissed, even though the statement is defective, where the defect (a) does not work an injustice to the appellee,¹⁸⁷ (b) does not impede or unnecessarily increase the appellate court's burden, time and work,¹⁸⁸ or (c) where the defect is rather limited, technical, or results merely from the fact that the statement is inartistically drawn.¹⁸⁹ Where the upper court, notwithstanding the defects in the statement, can grasp the substantial facts without difficulty, and can obtain from the statement a sufficient knowledge of the questions to be reviewed, the court will grant a review in the interest of justice. Drastic action will not be taken which deprives a litigant of a review for infractions presenting no real difficulty either to opposing counsel or to the court.¹⁹⁰

A rather interesting question has arisen in this state as to whether the statement of the case contained in an appellant's brief is required to or may contain a condensed narrative statement of testimony by the respective witnesses, and the effect if such a statement is or is not included.

The supreme court rule requires the statement to be "without reiteration." Under this rule our supreme court has held both ways on the question.

In the case of *Crockett v. Kansas City Railways*,¹⁹¹ after pointing out

184. *Soderstrom v. Missouri Pacific R. R.*, 141 S. W. (2d) 73 (Mo. App. 1940); *Wolf v. Wuelling*, 130 S. W. (2d) 671 (Mo. App. 1939).

185. *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939); *Yarde v. Hines*, 209 Mo. App. 547, 238 S. W. 151 (1922); *Wilkerson v. National Council of Knights & Ladies of Security*, 218 S. W. 976 (Mo. App. 1920).

186. *State ex rel. State Highway Comm. v. Griffith*, 112 S. W. (2d) 78 (Mo. App. 1938); *Williams v. Jenkins*, 107 S. W. (2d) 938 (Mo. App. 1937); *Dameron v. Hamilton*, 225 S. W. 110 (Mo. App. 1920); *Robinson v. Slater*, 209 S. W. 557 (Mo. App. 1919).

187. *Clark v. Meriwether*, 123 S. W. (2d) 603 (Mo. App. 1939).

188. *School District of Independence ex rel. Whalen v. Wilcox*, 58 S. W. (2d) 1009 (Mo. App. 1933).

189. *Cannon v. S. S. Kresge Co.*, 233 Mo. App. 173, 116 S. W. (2d) 559 (1938); *Globe American Corp. v. Miller*, 131 S. W. (2d) 340 (Mo. App. 1939); *Jacobson v. Graham Ship-by-Truck Co.*, 61 S. W. (2d) 401 (Mo. App. 1933); *Stoll v. First Natl. Bank*, 132 S. W. (2d) 676 (Mo. App. 1939).

190. *Wright v. Stickler*, 96 S. W. (2d) 932 (Mo. App. 1933); *Prudential Ins. Co. v. Kelley*, 233 Mo. App. 362, 120 S. W. (2d) 65 (1938); *Evans v. General Explosives Co.*, 293 Mo. 364, 239 S. W. 487 (1922); *Flint v. Loew's St. Louis Realty & Amusement Corp.*, 344 Mo. 310, 126 S. W. (2d) 193 (1939).

191. 243 S. W. 902, 905 (Mo. 1922).

that the statement contains "a concise recital of the substance of the testimony of each witness," the supreme court states the rule:

"We conceive that the rule requires a statement of the *ultimate facts* which the testimony tends to prove and not a statement of the testimony which tends to *establish such facts*. The purpose of the rule is to aid the court in quickly obtaining a comprehensive grasp of the issues of fact presented by the testimony. A clearing away of the underbrush by a concise recital of uncontradicted facts, followed by a clear statement of the facts which the testimony of the respondent tends to prove and of the facts the testimony of the appellant tends to prove, very materially lightens the labors of the appellate court." (Italics by court)

The supreme court, however, in the case of *Longan v. Kansas City Railways*,¹⁹² in 1923 and less than one year after the decision in the *Crockett* case was rendered, ignoring such case, criticized the statement in the appellant's brief because it did not set forth the testimony of six witnesses to the material facts in the case. The court severely criticizes counsel for appellant by stating:

"They have neither mentioned the names of any of defendant's witnesses, nor have they set out, or even referred to, the testimony of any of said witnesses, as disclosed by the record. We would be fully justified in dismissing the appeal in this cause on account of the flagrant disregard of our statute and Rule 15 supra, under the previous rulings of this court. . . ."

The *Longan* case was followed by the case of *Kirby v. Balke*,¹⁹³ where the supreme court criticized the statement of appellant by stating:

"The statement of appellant does not give an adequate idea of the facts of the case. It states the nature of the case in a general and indefinite manner, and fails to set forth the facts which constitute this case. There is no reference to the facts as to the fraud charged, nor are the terms of the contract, nor are the subsequent acts of the parties thereto set out, so as to show the real nature of the case."

In the *Kirby* case, the *Longan* case was cited as authority but the *Crockett* case was not mentioned.

In the very recent case of *Flint v. Loew's St. Louis Realty & Amusement Corporation*,¹⁹⁴ a somewhat middle ground is taken by the supreme court in that it is held that the testimony of witnesses should be set forth in cases where the probative value of the entire evidence is being considered as on demurrer to the evidence, but that in other cases it is sufficient to set forth the material ultimate facts rather than a statement of the testimony tending to establish such facts.

192. 299 Mo. 561, 567, 253 S. W. 758, 760 (1923).

193. 306 Mo. 109, 117, 266 S. W. 704, 706 (1924).

194. 344 Mo. 310, 126 S. W. (2d) 193 (1939).

It is submitted that, while it is not always necessary, it is better practice in the supreme court, after stating the material ultimate facts very briefly, to set forth the testimony by witnesses.

With respect to the practice in the Kansas City Court of Appeals, it must not be overlooked that that court's rule concerning the statement of the case expressly provides that it shall be "without . . . repetition of testimony of witnesses."¹⁹⁵

The Kansas City Court of Appeals, following the express provisions of its rule and citing the *Crockett* case in the supreme court as authority (apparently without having had the *Longan* case in the supreme court called to its attention), has consistently ruled that the statement of the case only requires "a statement of the ultimate facts which the testimony tends to prove and not a statement of the testimony which tends to establish such facts."¹⁹⁶ That court is inclined to dismiss cases where the statement of the case only condenses and narrates the testimony of witnesses without making a condensed statement of the material ultimate facts.¹⁹⁷ Where, however, the first part of a statement is a clear and concise statement of the material ultimate facts, and this is followed by a separate condensed narrative statement of the testimony by witnesses, the Kansas City Court of Appeals will look only to the first part of the statement, ignoring the second part, and will not dismiss the appeal or writ of error.¹⁹⁸ It is this form of statement that the writer of this paper favors in writing his brief in the Kansas City Court of Appeals (as well as in the supreme court) for the reason (a) such form is protected by the decisions just referred to, (b) it requires the attorney to prepare carefully and become more familiar with his case, and (c) if the case be either certified or transferred to the supreme court such form of statement will fully comply with the supreme court rule.

An appellant or plaintiff in error cannot file either an additional or supplemental brief to correct a defective statement of facts without leave of court, and generally the upper court will not grant leave to file such

195. Rule 16, Kansas City Ct. of App.

196. *Fuenfgeld v. Holt*, 70 S. W. (2d) 143 (Mo. App. 1934); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935) (both of which cases rely on the *Crockett* case in the supreme court); *Malone v. Kansas City Rys.*, 232 S. W. 782 (Mo. App. 1921).

197. *Evans v. Hilliard*, 232 Mo. App. 817, 112 S. W. (2d) 886 (1938); see also *Nelson v. Massman Constr. Co.*, 120 S. W. (2d) 77 (Mo. App. 1938); *Beck v. Security Benefit Ass'n*, 129 S. W. (2d) 1073 (Mo. App. 1939).

198. *Hartweg v. Kansas City Rys.*, 231 S. W. 269 (Mo. App. 1921); *Robinson v. Chicago Great Western Ry.*, 66 S. W. (2d) 180 (Mo. App. 1933).

additional brief after the respondent's brief has been served.¹⁹⁹ If, however, respondent in his answering brief, being dissatisfied with the statement of facts contained in appellant's brief, sets forth a sufficient statement of facts in said answering brief, the defect in appellant's brief is cured and grounds for dismissal no longer exist.²⁰⁰

3. *Assignments of Error.* The rules of our upper courts expressly provide that the brief on behalf of the appellant or plaintiff in error shall allege the errors committed by the trial court distinctly and separately.²⁰¹ These rules have been construed to require the assignments of error to be specific rather than general, definite rather than argumentative. In addition, the assignments of error must state the objections and exceptions made in the trial court, point out the particular error made, the reasons why the court erred, and refer to the record pages where the error is disclosed.

It is not necessary that the assignment of error be in any particular or formal language, as for example, "the court erred." The matter complained of as error need not be so denominated if it otherwise appears that it was clearly so intended.²⁰² The assignment of error, however, must be more than the statement of a mere conclusion or an abstract principle of law.²⁰³ Assignments of error are insufficient if they are argumentative,²⁰⁴ or where they consist of general, undeveloped statements without specifically pointing out the error.²⁰⁵ Assignments of error are also insufficient where the reasons are not given showing that error exists.²⁰⁶ The particular record pages in the abstract of record showing where error exists must be expressly

199. *Fuenfgeld v. Holt*, 70 S. W. (2d) 143 (Mo. App. 1934); *Morris v. Washington Natl. Ins. Co.*, 90 S. W. (2d) 138 (Mo. App. 1936).

200. *Globe American Corp. v. Miller*, 131 S. W. (2d) 340 (Mo. App. 1939); *Hyde v. Henman*, 256 S. W. 1088 (Mo. App. 1923). See Rule 15, Mo. Supreme Ct.; Rule 16, Kansas City Ct. of App.

201. Rule 15, Mo. Supreme Ct.; Rule 17, Kansas City Ct. of App.; Rule 18, St. Louis Ct. of App.; Rule 18, Springfield Ct. of App.; *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 342 Mo. 991, 119 S. W. (2d) 274 (1938) (burden on appellant to affirmatively disclose error).

202. *Bente v. Finley*, 83 S. W. (2d) 155 (Mo. App. 1935); *Kirkland v. Bixby*, 282 Mo. 462, 222 S. W. 462 (1920).

203. *Butler v. Equity Life Ins. Soc.*, 233 Mo. App. 94, 93 S. W. (2d) 1019 (1936); *Wyatt v. Kansas City Art Institute*, 229 Mo. App. 1166, 88 S. W. (2d) 210 (1935).

204. *Nelson v. Massman Constr. Co.*, 120 S. W. (2d) 77 (Mo. App. 1938); *Beall v. North Missouri Farmers Mut. Ins. Co.*, 99 S. W. (2d) 492 (Mo. App. 1936).

205. *Johnston v. St. Louis*, 138 S. W. (2d) 666 (Mo. App. 1940); *Nelson v. Massman Constr. Co.*, 120 S. W. (2d) 77 (Mo. App. 1938); *Rathke v. Rathke*, 233 Mo. App. 74, 118 S. W. (2d) 77 (1938); *Metropolitan Properties Co. v. Rideout*, 142 S. W. (2d) 1055 (Mo. 1940).

206. *University Bank v. Major*, 229 Mo. App. 963, 83 S. W. (2d) 924 (1935); *Schell v. Ransom Coal & Grain Co.*, 79 S. W. (2d) 543 (Mo. App. 1935).

pointed out.²⁰⁷ The court will not search the record in an attempt to find error.²⁰⁸

Among the general assignments of error that have been held insufficient may be mentioned the following: constitutional question raised but no section of the constitution cited;²⁰⁹ verdict against the weight of evidence, against law and the evidence; verdict for wrong party;²¹⁰ excessive judgment under the pleadings, evidence and law;²¹¹ error of the trial court in overruling motions for new trial and in arrest of judgment.²¹²

Among the various assignments of error that have been held too general or insufficient with respect to the admission or exclusion of evidence, may be mentioned the following: incompetent, irrelevant and immaterial evidence was improperly admitted, and competent, material evidence was improperly excluded;²¹³ the court erred in rejecting evidence, without designating the particular evidence;²¹⁴ the objection made to the introduction of evidence was not pointed out;²¹⁵ the assignment did not point out the names of the witnesses and the substance of the testimony;²¹⁶ no attempt was made to show how appellant was prejudiced.²¹⁷

With regard to assignments of error held too general or insufficient with regard to the giving or refusal of instructions, the following situations may be stated as examples: instructions not sufficiently designated to point them out;²¹⁸ not pointed out wherein instruction is erroneous;²¹⁹ instruction broader than pleading and evidence without pointing out wherein instruc-

207. *Johnston v. St. Louis*, 138 S. W. (2d) 666 (Mo. App. 1940); *Magee v. Hayden*, 111 S. W. (2d) 239 (Mo. App. 1937); *University Bank v. Major*, 229 Mo. App. 963, 83 S. W. (2d) 924 (1935); *Wheeler v. Cantwell*, 140 S. W. (2d) 744 (Mo. App. 1940); *Cholet v. Phillips Pet. Co.*, 71 S. W. (2d) 799 (Mo. App. 1934).

208. *Martin v. Connor*, 128 S. W. (2d) 309 (Mo. App. 1939); *Weaver v. Stephens*, 78 S. W. (2d) 903 (Mo. App. 1935).

209. *Nodaway County v. Tilson*, 129 S. W. (2d) 915 (Mo. 1939).

210. *Hooper v. Wineland*, 131 S. W. (2d) 232 (Mo. App. 1939).

211. *Miller v. Mutual Benefit Health & Acc. Ass'n*, 80 S. W. (2d) 201 (Mo. App. 1935).

212. *Bennett v. Royal Union Mutual Life Ins. Co.*, 232 Mo. App. 1027, 112 S. W. (2d) 134 (1938).

213. *Roark v. Dawson*, 122 S. W. (2d) 376 (Mo. App. 1938).

214. *University Bank v. Major*, 229 Mo. App. 963, 83 S. W. (2d) 924 (1935); *State v. Gregory*, 344 Mo. 525, 127 S. W. (2d) 408 (1939).

215. *Stratman v. Norge Co.*, 233 Mo. App. 590, 124 S. W. (2d) 572 (1939); *McGee v. St. Joseph Belt Ry.*, 233 Mo. App. 111, 93 S. W. (2d) 1111 (1936). See also Mo. Rev. Stat. (1929) § 1061.

216. *Martin v. Connor*, 233 Mo. App. 1024, 128 S. W. (2d) 309 (1939); *McGee v. St. Joseph Belt Ry.*, 233 Mo. App. 111, 93 S. W. (2d) 1111 (1936).

217. *Richards v. Earls*, 133 S. W. (2d) 381 (Mo. 1939). See also Mo. Rev. Stat. (1929) § 1062 (error must affect merits).

218. *University Bank v. Major*, 229 Mo. App. 963, 83 S. W. (2d) 924 (1935); *Spangler-Bowers v. Benton*, 229 Mo. App. 919, 83 S. W. (2d) 170 (1935); *Willard v. Robertson*, 129 S. W. (2d) 911 (Mo. 1939) ("certain instructions"); *Sheridan v. St. Joseph*, 232 Mo. App. 615, 110 S. W. (2d) 371 (1937).

219. *Langston v. Howell County*, 108 S. W. (2d) 19 (Mo. 1937); *Diamant v. Stein & Green*, 232 Mo. App. 1174, 116 S. W. (2d) 273 (1938); *Wright v. Stickler*, 96 S. W. (2d) 932 (Mo. App. 1936).

tion broader than pleading or the evidence;²²⁰ instruction comments on the evidence, without pointing out wherein comment exists;²²¹ instruction assumes facts not in evidence, without pointing out facts alleged to be so assumed;²²² instructions conflicting, without pointing out the conflict.²²³

It is held that the assignments of error need not be alleged separate and apart from the points and authorities,²²⁴ but the better practice appears to be to the contrary.²²⁵ If assignments of error are contained in the brief separate and apart from the points and authorities, and such assignments of error are defective, they may be aided by the points and authorities.²²⁶ Where, however, the appellant's brief contains no assignments of error, either as such or under points and authorities, the appeal will be dismissed.²²⁷

Assignments of error which are not mentioned under the points and authorities or discussed in the argument are abandoned and waived.²²⁸ Assignments of error are also treated as abandoned and waived where no authorities are cited in support thereof.²²⁹

An appellant or plaintiff in error cannot make and file additional assignments of error out of time in an additional or supplemental brief over the objection of appellee or defendant in error.²³⁰ Neither can he supplement his assignments of error in his reply brief.²³¹ Such supplemental assignments of error will not be considered when not made in answer to the brief of the respondent or defendant in error.

4. *Points and Authorities.* Under our upper court rules the briefs of appellant or plaintiff in error must contain a "statement, in numerical order, of the points relied on, together with a citation of authorities, ap-

220. *Young v. Sinclair Refining Co.*, 92 S. W. (2d) 995 (Mo. App. 1936); *Green v. Baum*, 132 S. W. (2d) 665 (Mo. App. 1939).

221. *Donnell v. England*, 137 S. W. (2d) 471 (Mo. 1939).

222. *Butler v. Equitable Life Ins. Soc.*, 233 Mo. App. 94, 93 S. W. (2d) 1019 (1936).

223. *Wells v. City of Jefferson*, 132 S. W. (2d) 1006 (Mo. 1939); *Adams v. Kansas City So. Ry.*, 83 S. W. (2d) 913 (Mo. App. 1935).

224. *Wright v. Hammond Packing Co.*, 199 S. W. 754 (Mo. App. 1917); *Reinert Bros. Constr. Co. v. Whitmer*, 206 S. W. 387 (Mo. App. 1918).

225. *Clark v. Reising*, 341 Mo. 232, 107 S. W. (2d) 33 (1937).

226. *Schell v. Ransom Coal & Grain Co.*, 79 S. W. (2d) 543 (Mo. App. 1935); *Friedman v. Maryland Cas. Co.*, 228 Mo. App. 680, 71 S. W. (2d) 491 (1934).

227. *Brown v. Dawes*, 76 S. W. (2d) 714 (Mo. App. 1934).

228. *Meintz v. Morgan Trucking Co.*, 132 S. W. (2d) 1010 (Mo. 1939); *State v. Davit*, 343 Mo. 1151, 125 S. W. (2d) 47 (1939); *Belsky v. Met. Life Ins. Co.*, 124 S. W. (2d) 508 (Mo. App. 1939); *Hyman v. Caledonian Ins. Co.*, 117 S. W. (2d) 617 (Mo. App. 1938).

229. *Beall v. North Missouri Farmers Mut. Ins. Co.*, 99 S. W. (2d) 492 (Mo. App. 1936); *Lach v. Buckner*, 229 Mo. App. 1066, 86 S. W. (2d) 954 (1935). See also note 237, *infra*.

230. *Powell v. Brosnahan*, 232 Mo. App. 1161, 115 S. W. (2d) 140 (1938).

231. *Spangler-Bowers v. Benton*, 229 Mo. App. 919, 83 S. W. (2d) 170 (1935).

propriate under each point." In citing authorities it is necessary to give the names of the parties in the case cited together with the volume number and page where the case can be found. When reference is made to any elementary work or treatise, the number of the edition, the volume, section and page, shall be set forth.²³²

Under the foregoing rules, the points and authorities must not contain mere general abstract propositions of law with no application made to the facts of the particular case,²³³ but must be specific, pointing out the particular errors and defects and applying the law to the facts of the particular case.²³⁴ Points and authorities that do not distinctly allege the errors committed in the particular case but consist merely of abstract propositions, bald assertions, or ambiguous statements hidden in generalities, are insufficient.²³⁵

The rules require the citation of authorities appropriate under each point. If no authorities are cited, or if cited, have no relation to the point of error, or if the authorities cited are lumped together without segregating same to the particular points, the brief is improper and, in the more glaring instances, the case will be dismissed.²³⁶

Points and authorities cannot be dispensed with by stipulation of parties.²³⁷ If there are no points and authorities, the assignments of error are treated as abandoned and the case will be dismissed.²³⁸ If a particular assignment of error is unsupported by points and authorities, it is treated as abandoned.²³⁹

It has already been pointed out when discussing assignments of error,

232. Rule 15, Mo. Supreme Ct.; Rule 16, Kansas City Ct. of App.; Rules 18 and 19, St. Louis Ct. of App.; Rules 18 and 19, Springfield Ct. of App.

233. *Brown v. Citizens' State Bank*, 134 S. W. (2d) 116 (Mo. 1939); *Lampson v. New Cole County Building & Loan Ass'n*, 341 Mo. 168, 106 S. W. (2d) 911 (1937); *Clay v. Owen*, 338 Mo. 1061, 93 S. W. (2d) 914 (1936); *LeClair v. LeClair*, 77 S. W. (2d) 862 (Mo. App. 1934).

234. *Willard v. Robertson*, 129 S. W. (2d) 911 (Mo. 1939); *Jeck v. O'Meara*, 122 S. W. (2d) 897 (Mo. 1938); *Marks v. Acme Phonograph Co.*, 236 S. W. 900 (Mo. App. 1922); *Metropolitan Properties Co. v. Rideout*, 142 S. W. (2d) 1055 (Mo. 1940).

235. *White v. McCoy Land Co.*, 87 S. W. (2d) 672 (Mo. App. 1935); *State ex rel. Karbe v. Bader*, 336 Mo. 259, 78 S. W. (2d) 835 (1934); *Concrete Engineering Co. v. Grande Building Co.*, 230 Mo. App. 443, 86 S. W. (2d) 596 (1936).

236. *Hartkopf v. Elliott*, 339 Mo. 1009, 99 S. W. (2d) 25 (1936); *State ex rel. Johnson v. Regan*, 229 Mo. App. 237, 76 S. W. (2d) 736 (1934); *Williams v. Jenkins*, 107 S. W. (2d) 938 (Mo. App. 1937); *Killam v. Travelers Protective Ass'n*, 127 S. W. (2d) 772 (Mo. App. 1939). See also note 230, *supra*.

237. *Dean v. State Social Security Comm.*, 123 S. W. (2d) 573 (Mo. App. 1939).

238. *Gorman v. Mercantile-Commerce Bank & Trust Co.*, 137 S. W. (2d) 571 (Mo. 1940).

239. *Metals Refg. Co. v. St. Louis-San Francisco Co.*, 137 S. W. (2d) 977 (Mo. App. 1940).

that such assignments are aided by the points and authorities. In like manner, the points and authorities may be aided by the assignments of error.²⁴⁰ An assignment of error that is not included in the points and authorities, or referred to therein, is treated as abandoned and waived.²⁴¹

While the points and authorities can also be treated as assignments of error, when they are sufficient as such, this practice is not approved.²⁴²

5. *Argument.* The supreme court rule with reference to the brief of appellant with respect to argument provides that the brief shall contain "a printed argument, *if desired.*"²⁴³ The other upper court rules make no express requirements concerning the argument part of a brief.

The rules, therefore, convey the impression that an argument is not necessary in appellant's or plaintiff-in-error's upper court brief. If the attorney were to follow such misimpression, he would be entrapped and his client would be the loser. Our upper court decisions very clearly rule that any assignment of error²⁴⁴ not referred to or mentioned in the argument, and all points and authorities not developed and briefed in the argument,²⁴⁵ are to be treated as waived and abandoned and will not be considered. This is far from holding, and is in fact directly contrary to the supreme court rule that the appellant or plaintiff in error can include an argument in his brief "if desired."

The argument, then, should discuss every assignment of error and every point and authority upon which the appellant or plaintiff in error is relying to obtain a reversal in the upper court. The argument, however, should not include the discussion of any proposition not covered by the assignments of error and points and authorities. Any proposition raised for the first time in the argument will not be considered.²⁴⁶

Many upper court judges prefer the attorney to limit his argument by setting forth his reasoning and citing the authorities without quotation

240. See *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Crabtree v. Aetna Life Ins. Co.*, 341 Mo. 1173, 111 S. W. (2d) 103 (1937).

241. *Doll v. Purple Shoppe*, 230 Mo. App. 256, 90 S. W. (2d) 181 (1936); *Robinson v. Burton*, 139 S. W. (2d) 942 (Mo. 1940); *Martin v. Bulgin*, 111 S. W. (2d) 963 (Mo. App. 1937).

242. *Clark v. Reising*, 341 Mo. 282, 107 S. W. (2d) 33 (1937).

243. Rule 14, Mo. Supreme Ct. See also Mo. REV. STAT. (1929) § 1031 (courts have power to require parties to print briefs of points and argument).

244. *Robinson v. Burton*, 139 S. W. (2d) 942 (Mo. 1940); *State ex rel. St. Louis v. Public Service Comm.*, 341 Mo. 920, 110 S. W. (2d) 749 (1937); *McAdoo v. Metropolitan Life Ins. Co.*, 233 Mo. App. 900, 110 S. W. (2d) 845 (1937).

245. *Wisman v. Hazel Dell Farmers Mutual Fire & Lightning Ins. Co.*, 230 Mo. App. 489, 94 S. W. (2d) 908 (1936).

246. *Massey-Harris Co. v. Rich*, 233 Mo. App. 509, 122 S. W. (2d) 858 (1938); *Powell v. Brosnahan*, 232 Mo. App. 1161, 115 S. W. (2d) 140 (1938).

therefrom. Other judges prefer to have the attorneys set forth quotations from the decisions in support of their argument. The first method has the advantage of shortening the brief. The second method is advantageous in that it enables the judge to consider the pertinent authorities along with the argument without the interruption and inconvenience of going to the reported cases while reading the brief.

If an appellant or plaintiff in error files no brief in the upper court his appeal or writ of error is dismissed.²⁴⁷ Our upper court rules²⁴⁸ also make provision for the filing of printed briefs by the respondent or the defendant in error. The supreme court rule²⁴⁹ provides:

“The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant.”

A somewhat similar rule governs in the Kansas City Court of Appeals.²⁵⁰

If the respondent files a brief, it should conform with the above rule requirements.²⁵¹ However, a respondent is not required to file a brief of any kind as he may rely upon the presumption that the judgment below is correct.²⁵²

With regard to reply briefs it should be emphasized that where a point is raised for the first time in a reply brief, the point will not be considered.²⁵³ Likewise, if the reply brief varies from the original brief filed and contradicts same, the proposition advanced in the original brief will be treated as abandoned.²⁵⁴

With regard to briefs in general, it should be pointed out that statements in briefs supplementing and adding to the record, even though supported by affidavit, cannot be considered by the court.²⁵⁵ Admissions

247. *Citizens Bank of Sparta v. Aetna Cas. & Surety Co.*, 115 S. W. (2d) 3 (Mo. App. 1938); *Hogan v. Hogan*, 109 S. W. (2d) 871 (Mo. App. 1937); *St. John v. McCormick*, 109 S. W. (2d) 874 (Mo. App. 1937). (The same rule applies where the appellant fails to file an abstract of record).

248. Rule 15, Mo. Supreme Ct.; Rules 15 and 16, Kansas City Ct. of App.; Rule 18, St. Louis Ct. of App.; Rule 18, Springfield Ct. of App.

249. Rule 15, Mo. Supreme Ct.

250. Rule 16, Kansas City Ct. of App.

251. *Pennington v. Davis*, 202 S. W. 424 (Mo. App. 1918).

252. *Fidelity Loan Sec. Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (1919); *Marks v. Acme Phonograph Co.*, 236 S. W. 900 (Mo. App. 1922).

253. *State ex rel. Fisher Body v. Shain*, 137 S. W. (2d) 546 (Mo. 1940); *Fitzgerald v. Fisher Body*, 130 S. W. (2d) 975 (Mo. App. 1939); *Arnold v. Brotherhood of Locomotive Firemen & Enginemen*, 232 Mo. App. 325, 106 S. W. (2d) 32 (1937); *Evans v. Sears, Roebuck & Co.*, 104 S. W. (2d) 1035 (Mo. App. 1937); *Morris v. Washington Natl. Ins. Co.*, 90 S. W. (2d) 138 (Mo. App. 1936).

254. *Wells v. Wells*, 115 S. W. (2d) 94 (Mo. App. 1938).

255. *Stubenhaver v. Kansas City Rys.*, 213 S. W. 144 (Mo. App. 1919).

against interest contained in briefs, however, will be considered in connection with the record.²⁵⁶

In this connection there is another situation which deserves the attention of the bar and which should be corrected by our upper courts. By statute²⁵⁷ the trial court is expressly advised that "every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted." The trial judges have the habit of intentionally ignoring and violating the provisions of this statute with the result that the attorney for the appellant or plaintiff in error has an additional burden cast upon him in the upper court to brief all of the assignments of error contained in his adversary's motion for new trial and to show that the trial court committed error in granting a new trial on such assignments of error.²⁵⁸ This also unnecessarily increases the labors of the upper court and the expense on litigants. Our upper courts should devise some means of requiring trial judges to recognize and follow the statute requiring the specific ground for granting a new trial to be stated of record.

Finally, with regard to abstracts of record and briefs, our upper court rules provide that if any appellant or plaintiff in error fails to comply with the requirements of the rules hereinbefore discussed, the appeal or writ of error will be dismissed or, at the option of the respondent, the case will be continued at the cost of the party in default.²⁵⁹ The rules also provide that no brief which violates the rules of the court will be considered.²⁶⁰

CONCLUSION

It must be realized that there are many pitfalls in our Missouri appellate practice—pitfalls in not preserving or properly assigning error in the trial court, pitfalls in not properly perfecting the appeal or writ of error, pitfalls in not properly preparing and filing the transcript, abstracts of record and briefs in the reviewing court.

Judge Paul Barnett, of the Kansas City Bar, while a Commissioner of the Kansas City Court of Appeals, wrote an article, published in the *Missouri Bar Journal* of February, 1930, under the title, *Pitfalls in Appel-*

256. *Harvey v. Peoples Bank*, 136 S. W. (2d) 273 (Mo. 1939).

257. Mo. REV. STAT. (1929) § 1003.

258. *Philibert v. Ansehl Co.*, 342 Mo. 1239, 119 S. W. (2d) 797 (1938); *Spitzengel v. Greenlease Motor Car Co.*, 136 S. W. (2d) 100 (Mo. App. 1940); *Pollock v. Missouri State Life Ins. Co.*, 123 S. W. (2d) 212 (Mo. App. 1938); *Reid v. Swift & Co.*, 117 S. W. (2d) 636 (Mo. App. 1938).

259. Rule 16, Mo. Supreme Ct.; Rule 18, Kansas City Ct. of App.; Rule 21, St. Louis Ct. of App.; Rule 21, Springfield Ct. of App.

260. Rule 14, Mo. Supreme Ct.; Rule 18, St. Louis Ct. of App.; Rule 18, Springfield Ct. of App.

late Practice. Judge Barnett mentions some of the pitfalls of appellate practice that I have pointed out. The Judge wrote in a jocular vein, analyzing the subject from the viewpoint of an appellate judge. He points out, somewhat humorously, that the upper court judge searches the record with a critical eye and with the avowed purpose of finding record defects so that he can save himself and the court extra labor in passing on the merits, by either dismissing the case or limiting the review. As a summation, the Judge states in his article:

“The lawyers of this state have no doubt been imbued with admiration for the ingenuity and resourcefulness of appellate courts in devising ways and means for affirming judgments and dismissing appeals.”

While Judge Barnett's article is written in a humorous vein, and he warns the reader not to take seriously anything that he says, there is a serious side to the entire question when litigants are deprived of their right of review by confusing and inefficient rules and procedure.

The question for consideration is: What are we—members of the courts and members of the bar—going to do to correct our procedural deficiencies?

Action has already commenced.

By resolution, the last session of the Missouri Legislature invited the Missouri Supreme Court to submit to the next General Assembly for its consideration, suggestions for a Revised Code and Rules of Civil Procedure. The supreme court, pursuant to said legislative suggestion, has appointed a Commission of fifty-four lawyers, resident throughout the state, to make suggestions to the court of needed changes. This Commission, in turn, has requested all lawyers in the state to participate by offering suggestions as to changes that should be made. The Supreme Court Commission, with full co-operation by the Missouri and local bar associations in the state, and with the co-operation of many lawyers throughout the state, is now actively functioning to the end that needed changes in our revised code and rules of civil procedure will be presented to the next legislature.

The work of the Missouri Supreme Court Commission covers the entire range of both trial and upper court civil procedure. Suggestion has been made that we abolish our entire Code of Civil Procedure and substitute, as an entirety, the new Federal Rules of Civil Procedure. Personally, I am opposed to casting aside the provisions of our code—the good sections as well as the bad—and substitute therefor, in toto, the new federal rules. It is my thought that we should retain in our practice the proper functioning sections of our code with their settled judicial construction, and that

we should only amend and cast aside those sections, which, based upon experience, do not properly function.

The lawyers of Missouri have been expressly requested by the Supreme Court Commission to make specific suggestions as to needed changes and amendments in our procedural law and rules. In line with such request I make the following suggestions for changes affecting our upper court practice and procedure, namely:—

1. *Our upper court rules should be simplified and made uniform for all four of our upper courts.* It is suggested that a complete, printed transcript of the record or a printed abstract of the record, with reference to the bill of exceptions at least, should not be authorized or required. All requirements that the evidence contained in the bill of exceptions be narrated in the abstract of record should be discarded. Provision should be made authorizing the filing of the original bill of exceptions in the reviewing court and thus dispense with the necessity, as well as the additional expense and trouble, of printing and filing an abstract of record of said bill of exceptions or of filing a complete transcript including said bill of exceptions in printed form. Technical requirements as to briefs should also be eliminated. It is suggested that the upper court rules should authorize the statement of the case in the brief to include a condensed, narrative statement of the testimony by witnesses, and litigants should not be penalized for oversights of their attorneys in this respect. By permitting the attorneys to include in their statement of the case a condensed narrative of the testimony by witnesses with page references to the original bill of exception filed in the upper court, there will be no need of a printed abstract of record covering the bill of exceptions. This change will also result in the attorneys being more familiar with their cases in the upper court.

2. *The present requirements that the bill of exception be included in a printed abstract of the record or in a printed complete transcript should be abolished.* By filing the original bill of exceptions in the upper court (filing a copy in the trial court) the attorneys in their briefs can refer to the pages of the original bill of exceptions on file rather than to the pages of the abstract of record, and a printed abstract of record will no longer be necessary, at least to the extent of the bill of exceptions. This suggested plan is feasible, less expensive, and should be adopted. In the very recent case of *Poague v. Kurn*,²⁶¹ and in the case of *Field v. National City*

261. 140 S. W. (2d) 13 (Mo. 1940).

Bank,²⁶² the supreme court granted permission to file the original bill of exception and the decisions were based, in whole or in part, on said original bills of exception filed in that court.

3. *There should only be one method of review. Special appeals under Sec. 1023, Missouri Revised Statutes 1929, and writs of error should be abolished.* Review should be by regular appeal from the trial to the reviewing court. One year after the rendition of the final judgment is too long a time in which to permit review and to have controversies remain unsettled.

4. *The motion in arrest of judgment should be expressly abolished by statute with reference to civil procedure the same as has been done in our criminal procedure.*²⁶³ If the motion in arrest of judgment has any legal function to perform at this time,²⁶⁴ the motion for new trial can be used as a substitute motion. The authority and right to file a separate motion in arrest of judgment as now recognized by statute, causes confusion and injects technical procedural questions into the case. All statutes referring to motions in arrest of judgment should be amended to eliminate any reference to such motions, and motions in arrest of judgment should be expressly abolished by statute.

It is my opinion that if the above changes are made in our Missouri procedural law there will be more upper court cases decided on the merits and fewer cases dismissed, or with review limited, due to procedural technicalities and deficiencies.

Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, speaking at the 1938 annual meeting of the American Law Institute, pointed out the need of "a vigilant bar." Today the united efforts of a vigilant bar (in full co-operation with the courts) are needed to see that steps are taken (a) to expedite trials and upper court reviews, (b) to simplify legal procedure, and (c) to lessen litigation expense. The elimination of delays, the avoidance of decisions on procedural law rather than on the merits, and the decrease of the expense of litigation will relieve both our courts and the legal profession of a rather pronounced and, in part at least, well founded criticism, and will enable both our courts and our legal profession to carry on efficiently and in the public interest.

262. 343 Mo. 419, 121 S. W. (2d) 769 (1938).

263. Mo. Rev. Stat. (1929) § 3736; see also § 3737.

264. See *Midwest Natl. Bank & Trust Co. v. Parker Corn Co.*, 211 Mo. App. 413, 245 S. W. 217 (1922); *Stid v. Mo. Pac. Ry.*, 211 Mo. 411, 109 S. W. 663 (1908); *Gosnell v. Camden Fire Ins. Ass'n*, 109 S. W. (2d) 59 (Mo. App. 1937). See also statutes and cases cited under notes 42, 43, 44 and 45, *supra*.