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## Appellate Practice

Tyrrell Williams

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## APPELLATE PRACTICE

TYRRELL WILLIAMS\*

### APPELLATE JURISDICTION BY VIRTUE OF THE CONSTITUTION ALONE

The Constitution of Missouri, like the constitutions of many other American states, creates a judicial department with a hierarchy of courts, and confers upon those courts general common-law and equity jurisdiction.<sup>1</sup> In approaching the subject of appellate procedure<sup>2</sup> as lawyers trained in our American ways of thinking, we naturally ask this question: To what extent is there any Missouri appellate jurisdiction by virtue of the Constitution alone without regard to statutes? Our supreme court and the supreme courts of other American states have said that the writ of error is inherent in the common-law system as to civil suits.<sup>3</sup> This means that there must be in Missouri, independently of any statute, some method of reviewing for alleged errors of law the final judgment of a trial court in a civil proceeding in the nature of a common-law action.<sup>4</sup>

The writ always existed in the common-law system and was not of statutory origin. It normally issued from the King's Bench to the Court of Common Pleas. In ancient times it operated only on the record proper, that part of the trial court's record which was official and proved itself—the summons, the return, the pleadings, the verdict and the judgment. It did not bring up for review the interlocutory determinations of the lower court during the trial of a lawsuit, such as determinations relating to the qualifications

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1. Mo. CONST. art. VI, §§ 1 and 2.

2. The term "appellate procedure" is, of course, used here in a broad sense to include writs of error as well as appeals. See *Dorris Motor Car Co. v. Colburn*, 307 Mo. 137, 158, 270 S.W. 339, 346 (1925).

3. A certain legislative "act by adopting the common law, introduces into our jurisprudence the writ of error." Tomkins, J., in *Jim v. State*, 3 Mo. 147, 150 (1832). To the same effect, *Moore v. Harris*, 1 Tex. 36 (1846).

4. "If no mode in any case had been prescribed [by the legislature], this court would have been bound to exercise its power, under the Constitution, of controlling the proceedings of inferior courts in such mode and by such writs, as would be most convenient and proper; and it doth seem to this court, that the writ of error is the most convenient process that could be used." Wash, J., in *English v. Mullanphy*, 1 Mo. 780, 781 (1827). The action was covenant. If the action is purely statutory and designed to vindicate an alleged right admittedly of statutory origin, there is no implied or constitutional privilege of suing out a writ of error. See *Dorris Motor Car Co. v. Colburn*, 307 Mo. 137, 270 S.W. 339 (1925).

of jurors, the admissibility of evidence, the instructions to the jury, *etc.* This restrictive limitation proved to be a defect and so in the 13th century the bill of exceptions was invented and prescribed by an act of Parliament.<sup>5</sup> If a party litigant during the trial of a case felt himself aggrieved by the ruling of the trial court, he could state his objections and if the trial judge persisted in his view, the litigant could except and after losing the case could prepare a document known as the bill of exceptions, which, if factually accurate, would have to be certified and made a part of the official record and eventually could be brought up to the higher court for review by the writ of error.

In territorial days, before our first constitution was adopted, a statute of Missouri, still on the books, provided that all English statutes of a general nature, adopted before the settlement of Jamestown, Virginia, should be included in our Missouri common law.<sup>6</sup> Certainly by virtue of, and probably independently of, this Missouri statute, the English statute of Westminster of 1285 providing for the bill of exceptions is a part of the common law which our constitutional courts must administer, except as that common law is modified by Missouri statutes. And so the writ of error with the bill of exceptions as used in England and in this country during the period of the American Revolution would have to be recognized by our Missouri courts even if not expressly prescribed in Missouri statutes.

#### STATUTORY APPELLATE JURISDICTION

In addition to this constitutional appellate jurisdiction, our Missouri courts have much statutory appellate jurisdiction. Appeals in our modern law are always created by statute.<sup>7</sup> Originally the English use was in chancery.<sup>8</sup> The appeal in Missouri appellate practice has always been available in equity suits, and for common-law actions certainly since 1825.<sup>9</sup> The writ of error by statute is now available in equity suits.<sup>10</sup> Both the appeal and

5. Statute of Westminster II, 1285, 13 Edward I, St. 1, c. 31, quite similar to MO. REV. STAT. (1939) § 1174.

6. MO. REV. STAT. (1939) § 645.

7. "The right of appeal in civil actions was unknown to the common law and is wholly of statutory origin." *Arkansas and Okla. R. R. v. Powell*, 104 Mo. App. 362, 367, 80 S.W. 336, 337 (1904), cited in RAWLE'S BOUVIER (3rd rev., 1914) 210.

8. *Wingfield v. Neall*, 60 W. Va. 106, 54 S.E. 47 (1906).

9. 2 Mo. Laws 1825, p. 632, § 43, now included in MO. REV. STAT. (1939) § 1184.

10. MO. REV. STAT. (1939) § 1200. See also MO. REV. STAT. (1835) p. 518, § 1.

the writ of error are available in criminal cases when the defendant is convicted.<sup>11</sup> By statute in Missouri, the doctrine of exceptions applies to both common-law actions and equity suits<sup>12</sup> and also to criminal cases.<sup>13</sup> Originally in chancery practice exceptions were regarded as unnecessary because all appeals were looked upon as complete trials *de novo* upon written documents.<sup>14</sup> The Missouri Chancery Code of 1825 expressly authorized the examination of witnesses in open court and adopted the same rules of evidence that prevailed at law.<sup>15</sup> Apparently the bill of exceptions was not expressly authorized in Missouri chancery practice until 1835, when by statute a bill of exceptions was to be "made a part of the record, in the same manner and with the same effect, as at law."<sup>16</sup> It is quite probable that the bill of exceptions was used in Missouri chancery before 1835 without express statutory authority, as was done in some other states.<sup>17</sup>

There are many other statutory differentiations between existing Missouri law of appellate procedure and the pre-existing appellate procedure at common law and in chancery. For present purposes, it is not necessary to specify these minor differentiations. Since the attention of Missouri lawyers is now directed to proposed changes in civil, as distinguished from criminal procedure, it is inadvisable to make any further references to criminal procedure.

#### GENERAL COMMENTS ON APPELLATE PROCEDURE

Before any detailed criticism of our present Missouri appellate practice in civil cases is attempted, it may not be out of place to set forth five preliminary comments.

The first comment in effect has been made before by Judge Laurance M. Hyde in one of his several excellent essays on Missouri procedure.<sup>18</sup> Those

11. Mo. Rev. Stat. (1939) § 4130 (appeal); Mo. Rev. Stat. (1939) § 4131 (writ of error).

12. Mo. Rev. Stat. (1939) §§ 1174 to 1183.

13. Mo. Rev. Stat. (1939) § 4084.

14. "A bill of exceptions is altogether unknown in chancery practice." Taney, J., in *Ex parte Story*, 12 Pet. 339, 343 (U. S. 1838).

15. Mo. Laws 1825, p. 641, § 27.

16. Mo. Rev. Stat. (1835) p. 512, § 9.

17. "Bills of exceptions went over from the common-law practice to equity practice in some jurisdictions partly by courts taking up the common-law practice by analogy and partly by statutes." POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) p. 295.

18. Hyde, *Origin and Development of Missouri Appellate Procedure* (1937) 2 Mo. L. Rev. 281.

sections of our so-called code of civil procedure which relate to appellate practice are much more ancient than those sections relating to pleading and trial practice. The portion of our code relating to pleading and trial practice in the main goes back to 1849, when the David Dudley Field Code was borrowed and enacted at Jefferson City a few months after it was enacted at Albany, New York. The main feature of our statutes on appellate procedure, as above stated, were adopted by our Missouri legislature in 1825.

The second preliminary comment, also emphasized by Judge Hyde,<sup>19</sup> is this. Our code of appellate procedure is clearly based upon the common-law and equity practice of Blackstone's time, which corresponds in general to the period of our American Revolution. Our Missouri statutes on appellate procedure are to a great extent merely restatements of the common law and equity, with a few extensions of the old remedies, so that appeals may be used for common-law actions, and the writ of error can be used to review final decrees in equity. The entire doctrine of exceptions has been preserved and clearly extended to equitable proceedings as well as to proceedings at common law.

Third, our Missouri system of appellate procedure as prescribed by statute and expounded by our appellate courts during the last 117 years, is typical of most American states throughout the last half of the 19th century and the first third of the 20th century, not only the so-called code states but also the so-called common-law states.<sup>20</sup> Up to nine years ago, the system of pleading and trial practice in Illinois was very different from pleading and trial practice in Missouri, but the appellate procedure in Illinois was quite similar to the appellate procedure in Missouri.<sup>21</sup>

19. *Ibid.*

20. "It would have been possible to develop a much simpler, more expeditious and less technical appellate procedure if instead of review of the judgment of the Common Pleas in the King's Bench on writ of error we [Americans] had taken as our model review of a trial before one of the common-law courts *en banc* after a trial at circuit. But our organization of local trial courts as courts of general jurisdiction, analogous to the Common Pleas, and of the courts of review on the model of the King's Bench as a court of review seemed to preclude this." POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) pp. 262, 263.

21. Twenty-five years ago, Sir Frederick Smith, afterwards Lord Birkenhead, Chancellor of England, visited this country and was widely entertained by groups of lawyers. When introduced at a bar association dinner in Illinois, the president of the local association told him that in Illinois judicial court procedures were more closely in accord with the proceedings of the English courts in Blackstone's time than was true of any other jurisdiction in the world. The Illinois lawyers spoke somewhat boastfully. When Sir Frederick got up to reply, his first remark was: "If you gentlemen are proud of that, you are unmitigated fools."

Fourth, this appellate system of our American states, which, despite reforms in many jurisdictions, is still the typical American system, has been much criticized during the twentieth century. Since the first world war the criticism has been almost vociferous. Bar association reports and law journals have printed innumerable addresses and articles pointing out alleged defects and suggesting reforms.

The fifth preliminary comment is perhaps not important. The movement for reform of civil procedure in this country, both trial and appellate, just referred to, did not start in law schools and was not initiated by law teachers. It was started by practicing lawyers and judges. After the movement got its start, it was taken up by law teachers who then began to make studies along the lines of comparative jurisprudence. Generally at the request of practicing lawyers, law professors also began drafting statutes. But, as a matter of professional history, the movement for reform of civil procedure was started by such men as Thomas W. Shelton of Virginia, Everett P. Wheeler of New York, Frederick W. Lehmann of Missouri, William H. Taft of Ohio, and Alexander W. Stephens of Georgia. Law teachers like William Minor Lile of the University of Virginia, Roscoe Pound of Harvard, and John D. Lawson of the University of Missouri, joined the movement afterwards.<sup>22</sup>

#### TYPICAL DEFECTS IN APPELLATE PROCEDURE AND PROPOSED REFORMS

What are some of the criticisms of the 19th century system of appellate procedure in our American states, which, if ever valid anywhere, are valid now in Missouri? And what concrete reforms have been suggested and adopted in many jurisdictions?

The features of criticism now to be presented will be indicated by references to existing Missouri law—most of it statutory law. The concrete reforms which have been suggested and adopted in many jurisdictions will be indicated by references to the "Proposed General Code of Civil Procedure

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22. In this connection the present writer cannot refrain from expressing his admiration for the comprehensive ability and unusual industry recently manifested by Professor Thomas E. Atkinson while performing his duties as Technical Director in supervising the work undertaken by the Advisory Committee appointed by the Supreme Court of Missouri to submit suggestions for improvements in our system of civil procedure. The legal profession owes a debt of gratitude to the President and Curators of the State University for relieving Professor Atkinson from some of his routine duties at the University to the end that he might devote time and skill to this temporary but highly useful task.

for the State of Missouri." This draft of a new code as recommended by the Advisory Committee appointed by the supreme court on November 7, 1939, was published by the supreme court in 1941, and is generally designated in Missouri as Plan II, by way of differentiating it from the alternative Plan I, drafted by the same committee to be used if it should be deemed wise to limit the scope of reform to a dozen or so particular proposals.

The first criticism to be mentioned is based upon the fundamental and elaborate distinction now recognized between the record proper and the bill of exceptions.<sup>23</sup> And the proposal is simply to enact a statute that this distinction is abolished for purposes of appeal.<sup>24</sup> This has been done in England and in many American jurisdictions. Originally, and for five and a half centuries, the distinction was reasonable and in accord with common sense. Stenography had not been invented. Court reporters as we now know them did not exist. The record proper was something official and tangible. No lawsuit in the common-law system could exist without certain official documents. Matters of exception, having to do with the trial, were for the most part oral. After utterance, they existed only in memory. If judge and counsel took notes, these notes were purely personal. Adverse rulings of the trial court were objected to, so that the trial court might correct possible errors then and there. But if these errors were not corrected, the party aggrieved could announce his exception, and then afterwards prepare his bill of exceptions, listing these alleged errors, for final scrutiny by the appellate court. The art of stenography and the institution of official court reporters have done away with the basis of common sense in the old distinction. The oral proceedings are immediately and officially preserved.<sup>25</sup> But in the proposal for Missouri the need for clearly stating objections is recognized. And unless an alleged error in the oral proceedings is objected to on stated grounds, the matter is not to be considered on appeal.<sup>26</sup>

Another criticism has to do with the ancient requirement that the evidence set forth in the abstract must be in narrative form and not in the

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23. MO. REV. STAT. (1939) §§ 1174 and 1175. A recent case explaining the distinction and citing earlier cases is *Wallace v. Woods*, 105 S.W. (2d) 91 (Mo. 1936).

24. PROP. GEN. CODE (1941) p. 58, § 1(a).

25. The statement in the text is not always true of juvenile court hearings, where often there is no court reporter present. This unusual situation is provided for in PROP. GEN. CODE (1941) p. 62, § 10(e).

26. PROP. GEN. CODE (1941) p. 66, § 14(a).

form of questions and answers.<sup>27</sup> In the old days when an appellant had to prepare his own bill of exceptions from memory, it was reasonable and in accord with common sense that he should not be allowed to build up his case with a lot of questions and answers which could not possibly be verbatim. The substance, the drift of the testimony, pertinent to the ruling of the trial court, alone should be attempted. But here again the invention of shorthand and the preservation of the reporter's notes have changed all that. And so, if appellant or respondent chooses to do so, he should be permitted to insert in the transcript on appeal verbatim questions and answers, although he may use the narrative form if he chooses.<sup>28</sup> In commenting on the narrative form in abstracts, Dean Roscoe Pound has said: "The prevailing opinion is that the result does not justify the labor involved. The lessened expense of printing does not amount to much where the whole transcript of the evidence is not printed, and is balanced by the expense of translation from question and answer to narrative by an expert."<sup>29</sup>

Another criticism relates to the preservation of both the writ of error and the appeal as concurrent methods of review.<sup>30</sup> The names are not important but when they are so much alike, even if not identical, is it wise to preserve both? In Missouri it is now proposed to abolish the writ of error.<sup>31</sup> This has already been done in many jurisdictions. In addition to certain historical and theoretical differences between the writ of error and the appeal, there are two differences of real importance. The writ of error is a new proceeding, like *certiorari* in this respect. The appeal is always a continua-

27. The traditional mode is not required by statute in Missouri. Many lawyers act as if it were required by statute. Apparently the matter could be regulated by rule of court. Rule 13 of the supreme court contains the following: "The evidence of witnesses may be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony." Prior to 1924, the word "shall" was used instead of "may." Rule 15 of the St. Louis Court of Appeals contains the following: "The evidence of witnesses shall be stated in narrative form, except when the questions and answers are necessary to the complete understanding of the evidence." Rule 15 of the Springfield Court of Appeals contains a sentence exactly similar to the sentence just quoted. See *First Natl. Bank v. Wilson*, 94 S.W. (2d) (Springfield App.) 914 (Mo. 1936). Appeal dismissed merely for failure to comply with rule as to narrative form of evidence. The Kansas City Court of Appeals apparently has no similar rule. See also Rules 6, 7 and 8 of the Supreme Court; Rules 8 and 9 of St. Louis Court of Appeals; Rules 8 and 9 of Springfield Court of Appeals; Rules 8, 9 and 10 of Kansas City Court of Appeals.

28. PROP. GEN. CODE (1941) p. 62, § 10(d). Similar to first sentence of Federal Rule 75(c).

29. POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) p. 366.

30. MO. REV. STAT. (1939) § 1184 and § 1200.

31. PROP. GEN. CODE (1941) p. 58, § 2(a).



tion of the old suit. With reference to this feature the appeal is certainly to be preferred, and the abolishment of the writ of error will be in accord with common sense. Another difference is important. The appeal must be taken within a reasonably short time after entry of the order appealed from. The writ of error may be sued out at any time within a rather long period after the final judgment. Formerly in Missouri the period of limitation was three years. Now it is one year.<sup>32</sup> And unlike *certiorari*, it is not a discretionary writ. A writ of error within the statutory period will issue as a matter of course.<sup>33</sup>

From the viewpoint of practicing lawyers, perhaps the most important change proposed has to do with perfecting the appeal. It is generally believed that our present system in Missouri is productive of unnecessary delay and expense.<sup>34</sup> The proposed system would be very much like the federal system.<sup>35</sup> When an appeal is permitted by law, the appellant must file a notice of appeal with the clerk of the trial court within ten days after the order appealed from was rendered and must also pay the docket fee for the appellate court to the clerk of the trial court.<sup>36</sup> A failure to pay the docket fee is an irregularity but does not affect the jurisdiction of the appellate court.<sup>37</sup> A failure to file notice of appeal within the ten-day period is a jurisdictional defect which apparently cannot be remedied by either the trial or appellate court.<sup>38</sup> After the notice of appeal is filed by the appellant, it becomes the duty of the clerk of the trial court to mail copies thereof to the appropriate parties, but his failure to do this does not affect the jurisdiction of the appellate court.<sup>39</sup> This modernistic substitution of a notice for process is borrowed from the federal system and has been highly praised by eminent authority.<sup>40</sup> The appellant who has within the ten-day period filed his notice of appeal has another period of thirty days in which to start to bring into existence the transcript on appeal.<sup>41</sup> "Transcript on appeal" is a new technical term having substantially the same meaning as "record

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32. MO. REV. STAT. (1939) § 1202.

33. MO. REV. STAT. (1939) § 1200.

34. MO. REV. STAT. (1939) §§ 1186, 1193, 1194, 1199.

35. Federal Rules 73, 75 and 76.

36. PROP. GEN. CODE (1941) p. 59, § 5.

37. PROP. GEN. CODE (1941) p. 59, § 5.

38. PROP. GEN. CODE (1941) p. 9, § 10.

39. PROP. GEN. CODE (1941) p. 60, § 6.

40. POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) p. 329.

41. PROP. GEN. CODE (1941) p. 62, § 10(a).

on appeal" in the Federal Rules. The transcript on appeal, like the record on appeal in the federal system, is a combination of the old record proper, the old bill of exceptions, the old complete transcript, the old short-form abstract. Great latitude is allowed appellant as to what points shall be reviewed and what questions in the trial record shall be sent up for review by the clerk of the trial court, although it is clear that most of what we have heretofore called the record proper is destined always to be required in the ordinary transcript on appeal.<sup>42</sup> The right of respondent to insert additional matter in the transcript on appeal is fully preserved.<sup>43</sup> A transcript on appeal insufficient for complete appellate justice may be amplified or corrected by an order of the appellate court.<sup>44</sup> Such insufficiencies do not affect the jurisdiction of the appellate court,<sup>45</sup> if there has been a timely filing of a notice of appeal. Appellant's failure to perfect his appeal is ground for appropriate action by the appellate court and this may mean dismissal of the appeal.<sup>46</sup> As in the new federal system, definite encouragement is extended to litigants in the matter of stipulating transcripts on appeal as sufficient.<sup>47</sup> A separate section also expressly provides for an agreed statement of the issues to be decided on appeal.<sup>48</sup> The proposal contemplates 100 days as the normal maximum time to elapse from the entry of the order appealed from in the trial court to the filing of the transcript on appeal in the appellate court.<sup>49</sup>

In Missouri now and throughout the country generally during the 19th century, statutes providing for a *supersedeas* bond in appealed cases fixed the amount of the bond at double the amount of the money in dispute.<sup>50</sup> This was reasonable and in accord with common sense when all bondsmen were individuals, generally acting gratuitously, and it was customary to have two, or many more than two, sureties in addition to the principal on each bond. At the present time, since bonding companies have obtained the privilege of writing bonds, these archaic provisions operate as a dividend-

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42. PROP. GEN. CODE (1941) p. 63, § 10(g).

43. PROP. GEN. CODE (1941) p. 62, § 10(a).

44. PROP. GEN. CODE (1941) p. 63, § 10(h).

45. PROP. GEN. CODE (1941) p. 59, § 5.

46. PROP. GEN. CODE (1941) p. 59, § 5. See also PROP. GEN. CODE (1941) p. 9, § 10.

47. PROP. GEN. CODE (1941) p. 62, § 10(c).

48. PROP. GEN. CODE (1941) p. 64, § 11.

49. PROP. GEN. CODE (1941) p. 65, § 12. For cause shown the trial court will have power to extend the time for filing the transcript on appeal. See section just cited and also PROP. GEN. CODE (1941) p. 9, § 10.

50. MO. REV. STAT. (1939) § 1188.

producing device for such companies. This was clearly pointed out by a committee of the American Bar Association in 1938.<sup>51</sup> The Advisory Committee has recommended that when the appellant is not a public official or municipality, the amount of the bond shall be in an amount fixed by the trial court as security for the respondent.<sup>52</sup> Following the federal rules, the Advisory Committee also recommends a provision authorizing a summary judgment in the trial court against sureties when liability can be established, the execution of the bond being an entry of appearance by the sureties.<sup>53</sup>

#### LOCAL CHARACTERISTICS OF MISSOURI APPELLATE PROCEDURE

The alleged defects just referred to are defects in many American states. Attention is now invited to certain features of our Missouri statutes on appellate procedure which are more or less unique. Of these unique features some are praiseworthy, some are not. In the early days, by common law and also by Missouri statute, the final judgment was the only order that could be reviewed on appeal. Since 1895 several other orders can be appealed from—the most notable being the order to grant a new trial. These statutory provisions as to reviewable orders are generally approved and certainly the Advisory Committee has not suggested any substantial change as to them.<sup>54</sup>

However, the Advisory Committee does not have the same feeling about those statutes which in mandatory language prescribe the exact order in which appealed cases shall be docketed for hearing in the appellate courts. Some of these docketing provisions appear in the so-called code of civil procedure.<sup>55</sup> Many of them appear in other portions of the Revised Statutes, regarding workmen's compensation, public service commission, police boards, election contests, corrupt practices, drainage district assessments, removal of officers, etc.<sup>56</sup> A plausible argument could be made that these statutes

51. 63 A.B.A. Reports (1938) 602, 604.

52. PROP. GEN. CODE (1941) p. 60, § 7.

53. PROP. GEN. CODE (1941) p. 61, § 9.

54. See MO. REV. STAT. (1939) § 1184, and PROP. GEN. CODE (1941) p. 59, § 3. The limited rule-making power, recommended by the Advisory Committee and discussed *infra*, would enable the appellate courts to hasten the administration of justice by providing in appropriate cases for summary hearings on appeals from interlocutory orders.

55. MO. REV. STAT. (1939) § 1225.

56. MO. REV. STAT. (1939) §§ 3732, 5693, 6490, 7697, 11669, 11796, 12484, 12834.

are unconstitutional because they have the effect of frustrating and not facilitating or regulating the administration of justice. However, it is to be hoped that no question of legislative power will ever come before our supreme court in connection with these frustrating statutes. The Committee has merely suggested that the legislature create a new and narrow field in which the appellate courts shall have power to make rules which, when and if promulgated, will have the effect of modifying the pre-existing statutes as to docketing.<sup>57</sup> Within this narrow field the Advisory Committee also recommends that the supreme court shall have power to prescribe rules which, if so designed, will operate not only on its own docket but also on the dockets of the three courts of appeals.<sup>58</sup>

Within another narrow field the Committee recommends that appellate courts shall have rule-making power with reference to the time when transcripts on appeal and briefs shall be filed in the appellate courts and served on the opposite party, and also with reference to the number of copies to be disposed of.<sup>59</sup> The proposed statute expressly makes optional with litigants the matter of printing transcripts on appeal and briefs, or having them typewritten or multigraphed. If printed, the expense shall not be taxed as costs.<sup>60</sup> Under existing law, abstracts must be printed and the expense taxed as costs,<sup>61</sup> and briefs must or may be printed according to prescribed rules of the appellate courts.<sup>62</sup> The Sub-Committee on Suggestions and Plan suggested that the entire subject of printing or not printing both transcripts and briefs be lodged by the legislature within the judicial rule-making power.<sup>63</sup> This suggestion was not adopted by the Advisory Committee.

As to written opinions in Missouri, the Constitution imposes certain duties on the appellate courts as to filing a written opinion when a case is finally disposed of. The legislature has repeated these commands, and has added an extra-constitutional command to the effect that each opinion shall contain "a sufficient statement of the case."<sup>64</sup> This extra-constitutional com-

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57. PROP. GEN. CODE (1941) p. 65, § 13.

58. PROP. GEN. CODE (1941) p. 65, § 13. See Note 27, *supra*.

59. PROP. GEN. CODE (1941) p. 65, § 13.

60. PROP. GEN. CODE (1941) p. 65, § 13.

61. MO. REV. STAT. (1939) § 1194.

62. MO. REV. STAT. (1939) § 1197. Supreme Court Rule 15. St. Louis Court of Appeals Rule 18, Kansas City Court of Appeals Rule 15, Springfield Court of Appeals Rule 18.

63. Sub-Committee's Mimeographed Draft, Plan II, p. 51, § 14.

64. MO. REV. STAT. (1939) § 1234.

mand is probably invalid or at most merely directory.<sup>65</sup> Perhaps for this reason the Advisory Committee has impliedly recommended an abandonment of the legislative effort to guide judicial discretion.

#### SUGGESTIONS AT VARIANCE WITH RECOMMENDATIONS OF THE ADVISORY COMMITTEE

The present writer is heartily in agreement with the Advisory Committee as to the main features of the proposed new code. However, in a very few matters he is not in agreement, and now takes the liberty of making two suggestions at variance with the recommendations of the Advisory Committee.

The Constitution does not require the individual authorship of a judicial opinion to be revealed and recorded. The present statute does so require.<sup>66</sup> The new proposed statute also so requires.<sup>67</sup> This writer would prefer a modification of this language so that the mandatory requirement as to individual authorship would apply only to opinions filed when there is a dissent in the court, but not when the court is unanimous. The present language has the effect of preventing *per curiam* opinions. In the minds of many lawyers, *per curiam* opinions should be encouraged when the points of law raised are simple and settled.<sup>68</sup>

In Missouri at the present time we have three methods of appellate review, for ordinary litigation in the fields of common law and equity. These are the normal appeal,<sup>69</sup> the writ of error,<sup>70</sup> and the appeal by special order of the appellate court after the time for a normal appeal has expired, up to one year from final judgment.<sup>71</sup> The Advisory Committee has recommended the abolishment of the second and third of these methods, and also has recommended, as set forth above, a statutory jurisdictional limitation of ten days for taking a normal appeal. The appeal by special order exists in the new procedure of Illinois (where the writ of error has been abolished)

65. *Turner v. Anderson*, 236 Mo. 523, 139 S.W. 180 (1911).

66. MO. REV. STAT. (1939) § 1233.

67. PROP. GEN. CODE (1941) p. 67, § 15(a).

68. See *Report of an American Bar Association Committee* (Edson R. Sunderland, Chairman) *to the Section of Judicial Administration*, 63 A.B.A. Reports (1936) 602, 613.

69. MO. REV. STAT. (1939) § 1184.

70. MO. REV. STAT. (1939) § 1200.

71. MO. REV. STAT. (1939) § 1189.

and several other states.<sup>72</sup> In Missouri the issuance is discretionary and dependent upon a clear showing as to the merits of the claimant's position. In Illinois it was apparently believed that justice in unusual circumstances (possibly involving illness, insanity or death) might be served by this deferred appeal. Furthermore, it was feared that there might be a constitutional attack on a statute abolishing the writ of error if the legislature did not prescribe some other method of review of common-law judgments, in addition to the normal appeal which, even in Illinois, is fairly restrictive as to the factor of time,<sup>73</sup> although far less restrictive than in the proposed new code of Missouri. Under the proposed new code in Missouri an unsuccessful litigant in the trial court cannot possibly get a review of his case if he does not file notice of an appeal within a period of ten days. This writer favors the retention in the new code of the appeal by a special discretionary order of the appellate court with certain restrictive modifications.<sup>74</sup>

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72. Ill. Civil Pract. Act of 1933, § 76. In Illinois the right to a normal appeal lasts for ninety days. See section last cited. In the federal system the right to an appeal (the only method of review in a circuit court of appeals) lasts for three months. U.S.C.A. Title 28, § 230. This is not changed by the Federal Rules. Fed. Rule 73. The present writer has always thought and still thinks that the period for taking even the normal appeal in Missouri should last for a longer period than ten days.

73. For a brief discussion of the constitutional aspect of statutes abolishing the common-law writ of error, see ILL. BAR ASSOCIATION'S EDITION OF ILL. PRACTICE ACT, ANNOTATED (1933) pp. 210-219.

74. Apparently the appeal by special order will be retained if Plan I is adopted without change. The Sub-Committee recommended the retention, with modifications, of the appeal by special order. See Sub-Committee's Mimeographed Draft, Plan II, p. 46, § 6(a). For a brief treatment of deferred appeals, see POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) p. 326 and pp. 340-341.