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ORIGIN AND DEVELOPMENT OF MISSOURI APPELLATE PROCEDURE

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This article is only intended to be a survey of some of the principal features of our system of appellate procedure, applicable to civil cases, and the manner in which they were developed. Statutory procedural rules for appellate practice in Missouri are much older than our code of pleading, practice and procedure, adopted for trial courts in 1848 following the New York model. The adoption of this code had very little effect on appellate procedure, which was then already established in substantially its present form. The first published statutes of this state¹ contain most of the basic rules of appellate procedure followed today. These were stated in most part in the present wording and arrangement in the 1835 Revision.² It will, therefore, be apparent that in appellate practice we are still following common law rules. To discover their origin, we must go back not merely to 1825 but to 1285, when six and a half centuries ago Edward I ruled England. The Statute of Westminster II,³ then enacted, created the bill of exceptions as a means for preservation for appellate review of rulings made during trial. Ever since that time, there has been a method to obtain review of all prejudicial errors of the trial court, although it took a long time to develop its present scope. Writs of error were already in use in the time of Edward I, and no one knows how ancient they are, but prior to 1285 the only possible review was on the record proper.⁴

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1. 2 Mo. REV. STAT. (1825) 631-636.

2. Mo. REV. STAT. (1835) 450, 518.

3. 13 EDW. I (1285).

4. *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977 (1932).

The *record proper* and the *bill of exceptions* have always since been and still are in this state the twin pillars which support the superstructure of appellate procedure. Although appeal is provided by statute,⁵ such appeal from any final judgment in a law case is still substantially a common law writ of error proceeding, both in its scope and in the rules applicable to preservation for review of errors committed during the trial which are matters of exception. In equity cases, an appeal under the same statute is a trial *de novo*, with the appellate court weighing the evidence heard below, whether admitted or not (if competent and preserved in the bill of exceptions) and with the incompetent evidence admitted below eliminated from consideration.⁶ Such review is granted not by reason of any present statutory provision for it, but because that was the rule of the English Chancery courts. The same thing is true of the more restricted review on appeal in law cases; namely, such review was the English common law review on writ of error. Thus the scope of review in each is governed more by history than by statute. Of course, this history has been made the basis of and has been transformed into firmly established principles by hundreds of judicial precedents.⁷

5. Mo. Rev. Stat. (1929) § 1018.

6. *Rinkel v. Lubke*, 246 Mo. 377, 152 S. W. 81 (1912); *Lowe v. Montgomery*, 321 Mo. 330, 11 S. W. (2d) 41 (1928); *Blackiston v. Russell*, 328 Mo. 1164, 44 S. W. (2d) 22 (1931); *Farmers & Merchants Bank v. Funk*, 92 S. W. (2d) 587 (Mo. Sup. 1936).

7. The first Constitution of Missouri established a judicial department following the federal model. Section 13, art. 5, provided: "The Governor shall nominate, and by and with the consent of the Senate appoint the Judges of the Supreme Court, the Judges of the Circuit Courts, and the Chancellor, each of whom shall hold his office during good behavior." (Separate Chancery courts were abolished by an amendment adopted in 1822.) It is interesting to note that section 14, art. 5, provided: "No person shall be appointed a judge of the supreme court, nor of a circuit court, nor chancellor, before he shall have attained the age of thirty years; nor shall any person continue to exercise the duties of any of said offices after he shall attained to the age of sixty-five years." [Only one man was ever thus disqualified, Judge George Tompkins, who served 1824 to 1845; see Krauthoff, *The Missouri Supreme Court*, 3 GREEN BAG 157 (1891).] This age restriction was not carried into the Constitutions of 1865 and 1875. It might throw some light on present controversies to know why it was abandoned. Authority was given to the Governor to remove any judge from office "on the address of two-thirds of each house of the General Assembly", the cause for which was to be stated, but was not to be a cause for which he might be impeached. CONST. (1820) art. 5, § 16.

Instead of following this method for removal, both in 1822 and 1834 constitutional amendments were adopted to put the judges out of office by ending their terms. However, the method of selection by appointment to serve during good behavior was not then changed. In 1848, an amendment was adopted which fixed the terms of judges of the supreme court at twelve years and the terms of circuit judges at eight years. The power of appointment was left with the Governor, and all judges, within the age limits originally fixed, were eligible for reappoint-

The first General Assembly of Missouri, by an act approved December 12, 1820, provided for regulating proceedings in the Supreme Court.⁸ This act limited the Court's jurisdiction (not specifically provided for by the Constitution) to appeals, writs of error or supersedeas in law or chancery cases where the matter in controversy was of the value of one hundred dollars or involved real estate titles, and in chancery cases involving lands, slaves, or other specific property. It provided for appeals to be allowed from decrees of the court of chancery or judgments of circuit courts, and for supersedeas to be granted by the Supreme Court or any judge thereof in vacation. Oath of the applicant, that he did not request the same for the sole purpose of delay, was required. It was also required, before granting an appeal or supersedeas, that there be a recognizance with sufficient security in double the amount of the judgment, or double the value of the subject of the decree. This act further provided that a clear and concise statement of the case of each party in an appeal, writ of error or supersedeas, with the points intended to be insisted upon should be delivered to the judges in advance, but authorized the court to hear the case "if this be neglected." A provision of this act, which has ever since been continued in our statutes, and construed to mean that all matters of exception shall be presented for the trial court's ruling in a motion for new trial in order to preserve them for appellate review, stated that on appeal or writ of error the Supreme Court should "take no exception to the proceedings in the court of chancery or circuit courts, but such as have been there expressly decided on."⁹ This was intended to be an added requirement, to other common law procedural steps, necessary to

ment. (Under the original Constitution, art. 12, amendments could be made by two-thirds of each house of the General Assembly, if proposed prior to an election of members, without submission to the people.) However, before this system could be tried out, another amendment was adopted, in 1850, requiring all judges to be elected at a general election and reducing all terms to six years. Not until 1870 were terms of supreme court judges increased to ten years. The bitter feeling over the slavery question no doubt was the principal cause of these changes in the judicial department before the Civil War. Four times before, and twice during the War, the terms of the judges were ended by constitutional amendments or ousting ordinances. It is significant that as the independence of the judiciary was overcome by such measures, the authority of the courts to control the methods of conducting proceedings before them was gradually whittled away by detailed rules of procedure established in the meantime by statute-appellate procedure in 1825, criminal procedure in 1835, and the Civil Code in 1848.

8. Mo. Laws 1820, 72-76.

9. Mo. REV. STAT. (1929) § 1061; *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977, 980 (1932), and cases cited.

preserve matters of exception for appellate review. An unusual feature of this original act was that it required unanimous opinions for a reversal, by its provision that "whenever the supreme court shall be divided in opinion on the hearing of any writ of error or appeal, the judgment or decree shall be affirmed."^{9a} Our later Constitutions made such a situation impossible by providing for a decision in every case, even though the judges should be equally divided, by a provision for appointment of a special judge to sit for the decision of such a case.¹⁰

The original act of 1820 left all other matters of practice to the Supreme Court, by providing that the judges thereof "have full power and authority, and they are hereby directed to make and establish such rules regulating the practice of the supreme court, the court of chancery and circuit courts, and expediting the determination of suits as they in their discretion shall judge necessary."¹¹ This authority was not long left to the court. It began to get directions from the Legislature, in the form of procedural statutes, very soon. It would be interesting but perhaps impossible to learn now whether this was due to the failure and unwillingness of the court to act, or whether it was because of a deliberate decision of the Legislature to remove the regulation of procedure from the court. Whatever the reason may have been, between 1820 and the first published revision of the statutes in 1825, many rules governing appellate practice were enacted by the Legislature.¹²

A practice act approved February 12, 1825, contained most of our present statutes concerning bills of exceptions, motions for new trial and in arrest, making appeals, and survival of proceedings after death of parties, substantially as they now are.¹³ Prior to 1835, most of the present statutory provisions regulating writs of error were adopted.¹⁴ These were mainly a codification of common law rules with definite requirements concerning matters that were formerly discretionary. In 1848, when our code of civil procedure was adopted, few changes were made as to appellate practice.¹⁵ These changes only went to matters of detail and added another, but little used, method of granting appeals by special order of appellate judges.¹⁶

9a. Mo. Laws 1820, 74.

10. Mo. CONST. (1865) art. VI, § 10; *ibid.* (1875) art. VI, § 11.

11. Mo. Laws 1820, 74.

12. 2 MO. REV. STAT. (1825) 620-648.

13. *Ibid.* §§ 39-53, pp. 631-638.

14. MO. REV. STAT. (1835) 518.

15. Mo. Laws 1848-49, 93-95.

16. MO. REV. STAT. (1929) §§ 1019, 1023, 1024, 1025, 1026, 1033.

These additions did not change the essential features of appellate procedure. One new section¹⁷ provided that "the supreme court . . . shall not reverse the judgment of any court, unless it shall believe that error was committed . . . materially affecting the merits of the action." Then existing statutory provisions concerning appellate procedure, with these additions, were made a part of one entire code of pleading, trial practice, and appellate practice in the Revision of 1855, so that, since that time, our whole statutory code has existed substantially as it is today. Certainly the lawyer who knew the appellate practice of a century ago would have very little to learn to follow our present procedure.

The twin pillars of our appellate procedural system now are sections 1061 and 1063 of the Revised Statutes of 1929, which carry on the distinctions between review on the *record proper* and on *bills of exceptions*. As noted, section 1061 was originally enacted in 1820, and eliminates from appellate review all *matters of exception* not covered by the grounds stated in the motion for new trial timely filed in the trial court. The purpose of this requirement is to notify the trial court of alleged errors so that, if they be good grounds for reversal, they may be remedied in the trial court without the delay and expense of appellate review. Thus a motion for new trial under our practice performs a dual function. One is to obtain relief in the trial court; the other is to preserve matters of exception for appellate review. This first purpose is attained by the trial court sustaining the motion; the latter by the trial court overruling it.¹⁸

The steps, which now and ever since the 1820 appellate practice act have been necessary to preserve for appellate review errors *which do not appear from the record proper*, are as follows:

"(1) Properly objecting, at the time, if necessary to obtain a ruling.

"(2) Properly excepting to an adverse ruling, at the time. (Instructions are rulings.)

"(3) Presenting all exceptions saved, to the trial court to be there decided, by stating such matters in a motion for a new trial as grounds therefor.

"(4) Making all exceptions saved part of the record, after the trial court has decided them adversely by overruling the motion for new trial,

17. *Ibid.* § 1062.

18. *Castorina v. Herrman*, 104 S. W. (2nd) 297 (Mo. Sup. 1937).

by writing and presenting them in a bill of exceptions and obtaining its allowance.

“(5) Presenting them to the appellate court as assignments of error, and properly briefing them in accordance with its rules.”¹⁹

Section 1063 of the Revised Statutes of 1929 is found in the practice act of 1825.²⁰ It provides that the appellate court “shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given. . . .” This means the *record proper*.²¹ The tendency to overlook the distinction between the *record proper* and a *bill of exceptions* is shown by the fact that the Legislature has, by amendments,²² added provisions to section 1063 concerning requirements as to bills of exceptions, which properly should have been made a part of either section 1061 or 1008 relating to bills of exceptions. These distinctions are still vital in our appellate practice, and failure to understand and observe them may preclude any review on the merits.

Anything that is a part of the record proper preserves itself, and no exception, motion, or other preservative process whatever is necessary to preserve any error disclosed by the record proper. This matter has very recently been finally settled by the decision of the Supreme Court en banc in *City of St. Louis v. Senter Commission Company*,²³ which definitely holds that a motion in arrest has no function as a step in appellate procedure, and that its only purpose is to obtain relief in the trial court as to errors appearing on the face of the record proper.²⁴ All cases indicating otherwise (many of them are discussed in the *City of St. Louis* opinion) were overruled.

It would seem that there was a good practical reason, as well as an historical basis for the distinction between matters of record and matters of exception, namely: The whole record proper is composed of written orders, records and documents, which are at all times before the trial court. Therefore, the court could and should know of errors appearing therein, which the *City of St. Louis* case points out must be really substantial and actually prejudicial to authorize reversal.²⁵ Matters of exception relate in whole or in

19. *Young v. Wheelock*, 333 Mo. 992, 64 S. W. (2d) 950, 956 (1933).

20. 2 MO. REV. STAT. (1825) 635.

21. *City of St. Louis v. Senter Commission Co.*, 102 S. W. (2d) 103 (Mo. Sup. 1937).

22. Mo. Laws 1885, 219; 1903, 105.

23. 102 S. W. (2d) 103 (Mo. Sup. 1937).

24. As to what relief can be obtained thereby, see *Stephens v. Oberman Mfg. Co.*, 334 Mo. 1078, 70 S. W. (2d) 899 (1934).

25. See, also, MO. REV. STAT. (1929) § 1062.

part to oral evidence, statements or rulings which are only put in written form, after the motion for new trial is ruled on, when the bill of exceptions is prepared. Since the trial court does not have such matters before it in written form, they must be called to its attention in some manner, and a motion for new trial is the means provided for doing so. It may now be definitely stated that the only motion that can be filed after verdict in the trial court, which serves any preservative function to save any matter for appellate review, is a motion for new trial timely filed therein.²⁶

The record proper consists of written documents comprising the judgment roll. Whatever proceedings the law or practice of the court requires to be enrolled are a part of it; but what is not necessary to enroll does not form a part of it unless made so by order of the court.²⁷ Documents included are the petition, original writ of summons and return,²⁸ demurrer, answer, reply, verdict, and judgment.²⁹ Pleadings denominated motions, which perform the office of a demurrer and dispose of the case, may be treated as a demurrer and therefore part of the record proper.³⁰ Otherwise, motions and rulings thereon are not part of the record proper.³¹ Neither is an abandoned petition or other pleading part of the record proper, and these can only get before the appellate court by being offered in evidence and coming in as a part of the bill of exceptions.³² Minutes of the circuit clerk showing oral announcements or rulings which are not part of any record,

26. For effect of motions not timely filed, see *State ex rel. Union Electric Light & Power Co. v. Sevier*, 98 S. W. (2d) 980 (Mo. Sup. 1936).

27. *State ex rel. May Dept. Store Co. v. Haid*, 327 Mo. 567, 38 S. W. (2d) 44 (1931); *Capitain v. Mississippi Valley Trust Co.*, 177 S. W. 628 (Mo. Sup. 1915).

28. *Madison Co. Bank v. Suman's Admr.*, 79 Mo. 527 (1883); *Reed Bros. v. Nicholson*, 93 Mo. App. 29 (1902); *Kelso v. Ross Construction Co.*, 337 Mo. 202, 85 S. W. (2d) 527 (1935).

29. *Smith v. Moseley*, 234 Mo. 486, 495, 137 S. W. 971 (1911); *South St. Joseph Land Co. v. Bretz*, 125 Mo. 418, 28 S. W. 656 (1894); *Bateson v. Clark*, 37 Mo. 31 (1865); *Roden v. Helm*, 192 Mo. 71 (1905). See, also, MO. REV. STAT. (1929) §§ 1833-1836.

30. *Ruggles v. International Ass'n*, 331 Mo. 20, 52 S. W. (2d) 860 (1932); *Home Ins. Co. v. Mo. Power & Light Co.*, 327 Mo. 1201, 39 S. W. (2d) 1039 (1931); *Mayes v. United Garment Workers*, 320 Mo. 10, 6 S. W. (2d) 333 (1928); *Dickey v. Webster Co.*, 318 Mo. 821, 300 S. W. 1086 (1927); *Sebastian Co. Coal & Min. Co. v. Fidelity Fuel Co.*, 317 Mo. 610, 296 S. W. 154 (1927); *Shohoney v. Q., O. & K. C. R. R.*, 231 Mo. 131, 132 S. W. 1059 (1910); *Garber v. Mo. Pac. Ry.*, 210 S. W. 377 (Mo. Sup. 1919).

31. *Electrolytic Chlorine Co. v. Wallace & Tiernan Co.*, 328 Mo. 782, 41 S. W. (2d) 1049 (1931).

32. *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977 (1932).

order or judgment are no part of the record proper.³³ Many appeals are still decided upon the record proper only. The most usual appeals, decided on the record proper, no doubt are appeals from judgments reached solely on determination of the sufficiency of pleadings, as where the appellate court is asked to review the correctness of the trial court's ruling on a demurrer.³⁴

Substantial changes, in the scheme set up by early appellate procedural statutes, made since the adoption of the code in 1848, have been: (1) those tending to make the practice less technical as to time for filing and the method of preparing, and settling bills of exceptions; (2) those making provisions for allowing appeals from orders other than a final judgment; and (3) those tending to further restrict and more minutely regulate the rule making power, and to control the actual methods of operation of appellate courts. These developments will be discussed in this order.

FIRST: BILLS OF EXCEPTIONS

The most important change as to bills of exceptions was made in 1911,³⁵ authorizing the allowance and filing of bills of exceptions at any time (either during term or in vacation) before an appellant is required by the rules of the appellate court to serve his abstract of the record, without obtaining an order from the trial court extending the time.³⁶ Prior to that time many appeals were dismissed because of failure to comply with requirements, due to a restricted view of the trial court's authority to complete its records, which had become unnecessary and out of date because of the use of court reporters.

At first, because the matter depended upon the memory of the lawyers and the trial judge, all exceptions had to be written out and allowed during the trial, but it came to be required only that the bill of exceptions be filed at the trial term. The Revised Statutes of 1825³⁷ stated: "That if during the progress of any trial in any civil cause, either party allege an exception,

33. *Wallace v. Woods*, 102 S. W. (2d) 91 (Mo. Sup. 1936).

34. *Clark v. Grand Lodge*, 328 Mo. 1084, 43 S. W. (2d) 404 (1932).

Recent cases showing situations in which appeals, considered on the record proper may be successful are: *Fields v. Luck*, 100 S. W. (2d) 471 (Mo. Sup. 1936); *Ruehling v. Pickwick-Greyhound Lines*, 337 Mo. 196, 85 S. W. (2d) 602 (1935); *Clark Real Estate Co. v. Old Trails Inv. Co.*, 335 Mo. 1237, 76 S. W. (2d) 388 (1934); and *Newman v. Weinstein*, 75 S. W. (2d) 871 (Mo. App. 1934).

35. Mo. Laws 1911, 139.

36. *Carter v. Burns*, 332 Mo. 1128, 61 S. W. (2d) 933 (1933); *Brockmann v. United Rys. Co.* 271 Mo. 696, 197 S. W. 337 (1917); *State ex. inf. Conkling v. Sweaney*, 270 Mo. 685, 195 S. W. 714 (1917).

37. Vol. 2, § 29, p. 631.

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and he that allegeth the exception doth write the same, and prays the Judge or Judges to allow it, and sign and seal the same for a testimony, the Judge or a majority present shall do so.” This is almost the exact language of 13 Edw. I.³⁸ Section 1008 of the Revised Statutes of 1929 now says the same thing in different words.³⁹ Later the bill was permitted to be filed within the time fixed by an order of the court made at that term.⁴⁰ This was subsequently changed so that filing and allowance could be made within the time then stipulated between the parties, or extended by the court at a subsequent term.⁴¹ These changes were made because, by use of court reporters, all oral testimony, statements or rulings were taken down and no longer depended upon the memory of anyone. As a result, we have a statute authorizing the bill to be signed by a judge who did not hear the trial.⁴² Is there any reason to continue provisions for bystanders bills of exceptions?⁴³

Improved reporting methods have made it possible to speed up the examination of witnesses and otherwise expedite trials. Nevertheless, section 1008 of the Revised Statutes of 1929 still contains the original language requiring the writing of exceptions “in the progress of any trial.” In spite of this, a court rule has been upheld, which provides that all exceptions to adverse rulings are considered saved, without any action “in the progress of any trial,” but permits them to be written into court reporter’s transcript when he transcribes the testimony from his shorthand notes.⁴⁴ Although recognizing that such a rule does conflict with the literal meaning and strict interpretation of the statutory language, the Supreme Court en banc held in *State ex rel. Brockman Mfg. Co. v. Miller*⁴⁵ that “courts have an inherent power to prescribe rules of practice to regulate their proceedings in the administration of justice;” that the wording of the statute was “due largely to the statute retaining the phraseology of the law as enacted in 1825, which was evidently framed upon an English statute;” and that “a necessity . . . arose for the adoption of a rule supplementing without violating the meaning and purpose of the statute,” because of “convenience . . . in the transaction of the business of the courts.” Certainly to literally apply the medieval

38. (1285) § 2; TIDD’S PRACTICE, 852.

39. *Carter v. Burns*, 332 Mo. 1128, 61 S. W. (2d) 933 (1933), and cases cited.

40. Mo. Laws 1885, 214.

41. Mo. Laws 1889, 189.

42. MO REV. STAT. (1929) § 1012; Mo. Laws 1889, 190.

43. MO. REV. STAT. (1929) §§ 1011, 1013-1017.

44. *State ex rel. Brockman Mfg. Co. v. Miller*, 241 S. W. 920 (Mo. Sup. 1922).

45. *Ibid.*

1285 method so as to stop a trial to write out an exception (or even to dictate it to the reporter) after every ruling of the court in a twentieth century trial, when the reporter has already taken down the evidence, objection and ruling, would be useless delay which would interfere with prompt transaction of judicial business. It would seem that the court actually allowed this statute to be amended by a circuit court rule which really changed instead of supplemented it. But who will say that litigants' rights should be lost unless their lawyers continue to go through useless motions that would slow down, impede, and confuse the administration of justice, merely because an ancient method (unsuited to the present trial practice) was prescribed by a statute which had escaped legislative revision for more than 100 years? Why should not courts have the right to change *mere procedural rules* when their requirements no longer fit into universally used methods of conducting trials, hinder the work of the courts and actually obstruct, rather than aid, the administration of justice?

Even with such automatic exception saving machinery as this rule provides, every exception must nevertheless be actually written in the bill before it is allowed by the trial court and filed. Failure to write in an exception before allowance, in the proper place after each ruling shown in the bill, is fatal, because without it that particular ruling can never by any subsequent action be resurrected for appellate review.⁴⁶ Except as to matters shown by the record proper, appellate courts will not consider anything that does not appear in a bill of exceptions duly allowed and ordered made a part of the record by the trial court.⁴⁷ Even the official reporter's transcript of the evidence or a statement of facts agreed upon by the attorneys will not be considered unless it has been first made a part of a duly allowed bill of exceptions.⁴⁸ The integrity of all matters, not a part of the record proper depends upon the bill of exceptions, which is the only official record of what has occurred. When it settles and allows a bill of exceptions, the trial court merely completes its own records to show what happened in the trial by which its judgment was reached.⁴⁹ The appellate court's function

46. *Stokes v. Godefroy Mfg. Co.*, 85 S. W. (2d) 434 (Mo. Sup. 1935); *Osby v. Tarlton*, 336 Mo. 1240, 85 S. W. (2d) 27 (1935); *Sakowski v. Baird*, 334 Mo. 951, 69 S. W. (2d) 649 (1934); *Klaber v. Lahar*, 63 S. W. (2d) 103 (Mo. Sup. 1933); *Bradley v. Becker*, 296 Mo. 548, 246 S. W. 561 (1922); *Ross v. Grand Pants Co.*, 241 Mo. 296, 145 S. W. 410 (1912).

47. *Wallace v. Woods*, 102 S. W. (2d) 91 (Mo. Sup. 1936).

48. *Bakersfield News v. Ozark Co.*, 92 S. W. (2d) 603 (Mo. Sup. 1936).

49. *Carter v. Burns*, 332 Mo. 1128, 61 S. W. (2d) 933 (1933).

is to determine whether or not there was error in the trial prejudicial to the rights of the losing party. It must decide that question upon the matters that were before the trial court, and the only information about them that will be considered is the contents of the bill of exceptions approved, allowed and ordered made a part of the record by the trial court. No doubt modern reporting methods make possible a simpler and less complicated procedure than that now in use, which the Supreme Court might adopt if it made its own rules of procedure.⁵⁰

SECOND: APPEALABLE ORDERS AND JUDGMENTS.

Orders and judgments from which appeal may be made are specified in section 1018 of the Revised Statutes of 1929. The practice act of 1825 provided for allowance of appeals from "any final decision or judgment of any circuit court" applied for "during the term in which such judgment or decision is given."⁵¹ The affidavit required by section 1020 of the Revised Statutes of 1929 was also required in the 1825 act, and substantially the provisions of section 1022 of the Revised Statutes of 1929 for supersedeas were also stated therein.⁵² It was not until 1895 that appeal was provided from any order except the final judgment in the case.⁵³ By the 1895 amendment, appeal was allowed from "any order granting a new trial, or in arrest of judgment, or order refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties," and also "from any special order after final judgment in the cause." It was also provided that "a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case." Before this amendment, when the trial court set aside a verdict and granted a new trial, "the only redress afforded to the injured party is to abide a new trial or the further action of the court resulting in a final judgment and then appealing from the whole case."⁵⁴ This was, of course, an inadequate remedy to a party who lost a favorable verdict by arbitrary or erroneous action in

50. See an article by the writer, *From Common Law Rules to Rules of Court* (1937) 22 WASH. U. LAW Q. 187.

51. 2 MO. REV. STAT. (1825) 632.

52. *Ibid.* at 633.

53. Mo. Laws 1895, 91.

54. *In re Zartman's Adoption*, 65 S. W. (2d) 951 (Mo. Sup. 1933).

setting it aside. Certainly making these orders appealable was in the interest of substantial justice. It should be noted, however, that an appeal is not authorized from an order overruling a motion for new trial,⁵⁵ or from an order refusing to set aside an involuntary nonsuit,⁵⁶ or from any other order or judgment (other than those specified in the statute) which does not dispose of all parties and all issues in the case.⁵⁷ Appeals from such orders are unnecessary because a final judgment, which can be appealed, is the next step and appeal therefrom affords complete review before further action can be taken.

Making orders before final judgment appealable was a step in the direction of English appellate practice under which appeals lie from "the whole or any part of any judgment or order . . . whether final or interlocutory."⁵⁸ However, in England, trial judges cannot grant new trials, and appeals from interlocutory orders are quickly decided on summary hearing. Unreasonable appeals for purposes of delay are penalized by assessment of costs.⁵⁹ Our system has been deemed to require a formal hearing with the same procedure on all appeals whether from a final judgment or from appealable interlocutory orders, and to require a decision thereof by a written opinion. While, unquestionably, proper consideration for the rights of litigants required these provisions for appeals from interlocutory orders, it is apparent that they greatly increased the work of the appellate courts, and were one of the causes of their congested dockets. This could have been avoided to some extent by permitting appellate courts to work out a method of hearing them summarily (like applications for original writs, for example) instead of as appeals from final judgments. If this could be done, it would be practicable to provide for appellate review prior to final judgment of other interlocutory orders, and to dispose of them without more work and effort than is now required by the present system. That should result in fewer second trials (as is true of the English courts) by making the first trial more likely to reach a judgment without error.

55. State ex rel. Kansas City Stock Yards Co. v. Trimble, 333 Mo. 51, 62 S. W. (2d) 473 (1933).

56. Boyd v. Logan Jones Dry Goods Co., 335 Mo. 947, 74 S. W. (2d) 598 (1934).

57. Magee v. Mercantile-Commerce Bank & Trust Co., 98 S. W. (2d) 614 (Mo. Sup. 1936).

58. 7 Statutory Rules and Orders Revised 142, Order 58.

59. Hyde, *supra* note 50, at 200.

THIRD: RESTRICTIVE AND REGULATIVE STATUTES

(a) *Preferential Appeals.* As a result of the congestion, due in part to our rigid and detailed procedural system, the Legislature during the last 45 years has enacted statutes requiring that appeals in certain civil cases be given preference over others. The earliest of these, section 1059 of the Revised Statutes of 1929,⁶⁰ provides that any case, which in any appellate court, "has been or shall be reversed and remanded, and said case shall again come before any of said courts for further trial, it shall be the duty of said clerk to docket such case for trial among the first cases for trial at the next term of the court." Section 1018⁶¹ provides as to "appeals from orders refusing to revoke, modify or change an interlocutory order appointing a receiver" the appellate court "shall on motion advance the same on its docket." Section 5237, enacted as a part of the Public Service Commission Act of 1913, provides that any appeals to the Supreme Court (in an action to review an order or decision of the Public Service Commission) shall "be immediately placed on the docket of the then pending term" and "shall have precedence over all civil causes of a different nature pending in said court." Section 6637, authorizing mandamus suits by police boards in cities of the first class against the mayor and council for use of buildings and equipment, and section 7549, authorizing such suits in cities having over 500,000 inhabitants, each provide that an appeal therein "shall be heard immediately by the supreme court, if then in session, and if not in session, at the next term;" and that "the case shall be taken up and tried in preference to all others." Section 10376 provides that, as to any appeal in an election contest, "it shall be the duty of the supreme court to advance it for immediate hearing and determination." Section 10488 provides that actions by the attorney general or a prosecuting attorney to oust an elective officer for violation of the corrupt practice act (with reference to elections) "shall have a preference on the docket of any court . . . over all other civil actions." Section 10894 only requires, in cases involving validity of Sanitary Drainage District bonds, that "the appeal shall be heard and determined as a privileged case by the supreme court." Likewise, section 11208 is not as drastic as some of the others but only requires, in proceedings for removal of certain public officers, that the "cause shall have precedence" on appeal and that the "Supreme Court shall hear such appeal as soon as possible." However,

60. Also, Amended Laws 1893, 116.

61. Also, Amended Laws 1895, 91.

the latest preferential appeal enactment, section 3342, provides that, in cases under the Workmen's Compensation Act, appeals "shall have precedence over all other cases except election contests."

Thus some of these sections when read together literally provide that the class of cases, separately mentioned in each, *shall each have preference over each other*. This creates a situation somewhat like the hypothetical meeting of the irresistible force and the immovable object. If this tendency continues, all classes of appeals might separately be made preferential and thus all would be on the same preferential basis and all get back to the starting place. There could be unjust results from these provisions. Take, for example, a case of the employee of a corporation negligently driving a truck on the wrong side of a highway and striking the automobile of an individual, engaged in an independent occupation or profession. If both were killed in the collision, the widow of the employee (whose fault was the cause of the catastrophe) could obtain an award for his death (his negligence being immaterial under the compensation act) and an appeal in her case would be advanced and determined at the next term of the appellate court; whereas the widow of the man, who was killed as a result of such employee's negligence, after obtaining a judgment against his employer, would have to wait a year or more longer for the appeal in her case (crowded off the docket by the preferential appeals) to be heard and determined. In the meantime (as has happened), both the employer and the surety on his appeal bond might become insolvent and, if so, by reason of delay due to statutory preferences the most meritorious right would be completely lost. Does it not seem reasonable to believe legal business could be more expeditiously transacted by allowing the court to determine when and in what order appeals should be heard rather than to attempt to regulate them by fixed statutory directions?

(b) *Perfection of Appeals*. The matter of briefs, abstracts, and details of procedure to perfect an appeal was left mainly with the court up to and even after 1848. The only provision concerning these matters (carried on in part in section 1060, Revised Statutes of 1929) provided for making assignments of errors, and for "a clear and concise statement of the case, and the points intended to be insisted on in the argument" to be furnished by the appellant before the day the cause was docketed, and for joinders in error to be filed thereafter within four days.⁶² Section 39 of chapter 128

62. 2 MO. REV. STAT. (1855) c. 128, §§ 23, 24, 32.

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of the Revised Statutes of 1855 gave the Supreme Court the duty "to frame and promulgate, and, from time to time, as may be needful, change rules, prescribing what parts or portions of depositions, papers, records, entries, returns, process and other proceedings, belonging to a cause, as may not be necessary to the proper adjudication of any question arising upon appeal or writ of error, may be omitted from the record." This was carried on in section 1920 of the Revised Statutes of 1929.

In 1885, what is now section 1028 of the Revised Statutes of 1929, was passed providing for printed abstracts and briefs.⁶³ Previously in 1872, the Supreme Court was expressly prohibited "to make or enforce any rule for printing of the record, transcript, statement or brief in any cause" or to require any party "to file a bond for costs."⁶⁴ By amendments, this was changed to authorize rules for printing briefs and abstracts but the provision concerning bond for costs remains.⁶⁵ Section 1027 of the Revised Statutes of 1929, in its original form⁶⁶ required perfection of appeals by filing a transcript of the record (record proper) within a specified time. This has been changed⁶⁷ by making provision for the so-called short form transcript alternative method authorized by section 1028 of the Revised Statutes of 1929. Section 1029⁶⁸ authorizes making of rules concerning the enforcement of the requirements of Section 1027 and 1028 for perfection of appeals. The rigid requirements of these two sections, especially when it is necessary to construe them with section 1059, (hereinafter discussed), make for unnecessary delay, congestion of the appellate court's docket and waste of judicial time. It should be possible to require prompt action for perfection of appeals (such as ordering transcript for bill of exceptions, allowance thereof, and filing abstracts) before the case is docketed for hearing, and as a condition for being docketed. These sections together with section 1059 cause cases to be docketed before any bill of exceptions is allowed and even when there is no intention to ever perfect an appeal.⁶⁹ Section 1060 (carrying on the provisions of the 1855 statutes above mentioned but originating in the 1820 act),⁷⁰ is out of harmony with the rest of the scheme of appellate procedure.

63. Mo. Laws 1885, 217.

64. Mo. Laws 1872, 30.

65. Mo. Laws 1883, 123; 1889, 210; Mo. REV. STAT. (1929) § 1031.

66. 2 Mo. REV. STAT. (1825) 633.

67. Mo. Laws 1891, 29.

68. Mo. Laws 1889, 201; Amended Laws 1909, 344.

69. See recommendations of Missouri Bar Association Committee on Expediting Trials and Appeals, 8 Mo. BAR JNL. 28 (1937).

70. Mo. Laws 1820, 73.

It is literally complied with by allowing until "the day next preceding the day on which the cause is docketed for hearing," for filing briefs and abstracts.⁷¹ Nevertheless orderly preparation of briefs in advance of the argument is required by other provisions of these rules for their delivery before that time to parties. Otherwise the delay which this statute would cause in getting cases ready for hearing would be intolerable. Section 1032 providing for joint abstracts on cross appeals, was enacted in 1895;⁷² and section 1021 requiring deposit of a docket fee, was enacted in 1907.⁷³ These were helpful additions. While the right of appeal depends upon statute, and jurisdictional steps are properly fixed thereby, it would seem that details of procedure for perfection thereof and for orderly preparation of the case for hearing might better be regulated by leaving all procedural steps to the court. The Congress of the United States has recently given this responsibility to the Supreme Court not only as to appellate procedure but for trial practice as well.⁷⁴

(c) *Other Restrictions and Directions.* There has been a statute ever since 1845 concerning the arrangement of the docket of the Supreme Court. Section 22 of chapter 139 of the Revised Statutes of 1845 provided for docketing "all causes from the same judicial circuit in succession," and limited the docket to "not more than five causes for each day." Of course, in those days, a trip to Jefferson City from remote parts of the state was a matter of considerable moment, not to be undertaken lightly or frequently. This statute also required a copy of the docket to be "printed in some newspaper at least ten days before the commencement of the term." By amendment in 1889,⁷⁵ the provision for publication was changed to require a copy to be "printed in the county wherein such Supreme Court or courts of appeals shall be held." There was considerable controversy as to whether the court had to print its docket in the local newspapers.⁷⁶ The whole matter was finally settled by amendment eliminating this provision of the statute in

71. Supreme Court Rules 12 and 15.

72. Mo. Laws 1895, 92.

73. Mo. Laws 1907, 121.

74. 28 U. S. C. A., §§ 723b and 723c (1934); Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 13 U. OF MO. BULL. L. SER. 3. But see Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 HARV. L. REV. 1303; also Preliminary Draft of Rules of Civil Procedure for the District Courts of the U. S. (1926) p. xi.

75. Mo. Laws 1889, 208.

76. In the Matter of Publishing the Docket, 266 Mo. 48, 187 S. W. 1174 (1915); In re Publication of Docket, 232 S. W. 454 (1921).

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1921.⁷⁷ At that time, inherent power of the court over its docket was not even discussed. Could not the provision for "due public notice" in Article 3 of Constitutional Amendment of 1890 properly have been construed as leaving the matter to the court to determine what was necessary for compliance? Another somewhat similar statute, which the court did hold to be beyond the constitutional powers of the Legislature, required the court to prepare and furnish free of charge, to both appellant and respondent, copies of every opinion adopted by the court.⁷⁸

As the statute now stands, it requires the judges of all appellate courts "at the end of each term . . . to direct the number of cases to be docketed . . . For the next succeeding term," and the docketing of "all cases from the same judicial circuit in succession, in the order of the circuit, setting not more than ten cases for each day." It is easy to see why following the method required by this statute of setting the docket for each term at the close of the prior term (before it is known whether appeals set for hearing will be perfected) causes the courts to have more cases set for hearing on some days than can be heard while on others there are only one or two cases, or sometimes none, for argument. It is likewise not difficult to understand that a waste of judicial time will result from cluttering the docket with cases that will never be heard. Dead cases are required to be put on the docket, and thus live ones which would be ready for hearing are delayed.

Another provision of this same section is that "cases not reached for hearing at the first term at which they are docketed" must be placed "first upon the docket of the succeeding term." Literally following this provision and the preceding one requiring all cases from the same judicial circuit in succession at the rate of not more than ten per day could produce startling results. This is demonstrated by an actual incident of a few years ago when about 200 appeals of the City of St. Louis, in condemnation cases under its ten year improvement plan, were filed on the same day. Considering the fact that the court annually has less than 60 days for hearings (in each division for civil cases from the whole state) it is easy to see what this could have done to subsequent appeals from the City of St. Louis Circuit for a year or two. In that instance, a reasonable solution could be reached (without raising the issue of disregarding the statute) by agreements for certain controlling cases to go on the docket and for continuance of the rest.

77. Mo. Laws 1921, First Ex. Session, 49.

78. *State v. Parker Distilling Co.*, 237 Mo. 103, 139 S. W. 453 (1911).

The Constitution provides that opinions of appellate courts or divisions of the Supreme Court shall be in writing, to be filed in and become part of the record of cases in which they are made.⁷⁹ This does not specifically require a complete discussion of facts and legal principles by a written opinion on every decision the court makes.⁸⁰ However, the Legislature has required a written opinion "in each case" by section 1067 of the Revised Statutes of 1929, and has also gone further, to provide that the opinion "shall show which of the judges delivered the same." It would seem that this would prohibit *per curiam* opinions. Section 1068 goes still further to say how they shall be written, by the requirement that "the opinion shall always contain a sufficient statement of the case, so that it may be understood without reference to the record and proceedings in the same."⁸¹ Does it serve any useful purpose to write an opinion, with a complete statement of facts, in a case where the trial court's action is *affirmed* and where the statement of legal principles upon which the ruling is based could only be a restatement of legal principles already settled and stated over and over again in the reported cases? Of course, if a judgment is reversed or if a new trial is required on any issue, there should be a complete statement and discussion. But is there any good reason why an appellate court should not determine which cases require a complete discussion of facts and principles and which might properly be affirmed on memorandum *per curiam* opinion?

CONCLUSIONS

The following conclusions seem clear. Our appellate procedure is substantially the appellate procedure of the common law courts. Review on appeal in law cases is practically the same as was common law review on writ of error. Appellate review in an equity case follows largely the precedent of English Chancery review before the 1873 and 1875 Judicature Acts. The common law distinctions between record proper and bill of exceptions are strictly observed, and the scope of review either at law or in equity depends upon observance of requirements based upon these distinctions. While in some respects the strictness of common law rules have been amelior-

79. CONST., art. 6, § 15; Amendment of 1890, § 3.

80. Section 1, Amendment of 1890, seems to recognize that some matters might be disposed of by "orders, judgments and decrees."

81. These sections were enacted in 1871 (Mo. Laws 1871, 50); for discussion of them see *Turner v. Anderson*, 236 Mo. 523, 139 S. W. 180 (1911); *Smarr v. Smarr*, 319 Mo. 1153, 6 S. W. (2d) 860 (1928); *State ex rel. Kansas City v. Trimble*, 322 Mo. 360, 20 S. W. (2d) 17 (1929).

ated (as in preparation and allowance of bills of exceptions), in other ways the system has been made even more rigid, more technical, and more complicated by statutes prescribing details of procedure to perfect appeals, restricting the rule making power of appellate courts, and prescribing the methods it must follow in transacting business before it. Unquestionably, there has been an advance by reason of an increasing tendency of appellate courts to give a liberal rather than technical construction to procedural statutes so that cases may be determined on the merits and not on technicalities. It is not necessary to abolish the entire present code and substitute an entirely new system so that lawyers would have to learn appellate procedure all over again. A very few changes could make a harmonious flexible system suited to prompt dispatch of increasing judicial business. Changes made by legislation often add new technicalities as obstructive as those replaced and continue to compel the courts to operate in the straight-jacket of rigid procedural rules.

England, the nation from which we got this common law procedure, found it to be unsuitable in its rigid and technical application for the prompt dispatch of judicial business under the conditions of modern commercial and industrial urban civilization; and over sixty years ago the English judicial department was reorganized for modern methods and had placed upon it the responsibility for devising and maintaining a system of procedure that would work without delay. England found this to be a practical solution. We have now reached the point where modern methods of transportation and communication tend to make our whole state one urban community to an even greater degree in many ways than was true of England half a century ago. In part at least, our solution of many of the new problems, arising from these changed conditions and relations, has been to take them completely away from the courts and have them considered and settled by boards, bureaus, and commissions in which laymen predominate over lawyers. How far this will continue we cannot know. Men properly trained for the legal profession should be able to render such service better than any others. It is respectfully submitted at the Bar of Public Opinion that increased litigation, due to many new problems arising from changed relationships brought about by our modern industrial urban civilization, could be better considered and more promptly handled by lawyers and courts, if the judicial department should be permitted to devise its own methods of procedure for transaction of judicial business.