

There is an intimation that the examiner should have allowed objections to his proposed findings. Yet the Court repeats the language of the first *Morgan* Case to the effect that while this is good practice, it is not essential to the validity of the proceedings.⁸

The *Mackay* Case⁹ holds that no particular procedure is essential. It requires only that the opposing party know the claims of the government with opportunity to meet them. As long as the parties know the issues involved and have an opportunity to meet them, there is no error merely because the examiner has not prepared a list of proposed findings or because the complaint does not accurately state the government's claim.

In the second *Morgan* Case the Court intimates that a "full hearing" required by the statute includes no more than the fundamental requirements of fairness which are the essence of due process. The *Mackay* Case seems to be a decision on due process. The Court does not attempt to distinguish the cases, however; it simply suggests, in refusing the motion for a rehearing¹⁰ in the *Morgan* Case, that they be compared.¹¹ The *Morgan* Case stresses the complexity of the evidence and exhibits, while the *Mackay* Case calls attention to the fact that there was only a single issue, which was known to both parties. The *Morgan* Case as supplemented by the *Mackay* Case would seem to indicate that the Court will consider the opportunity to know the claims of the opposing parties and to meet them as to each case, without compelling the administrative agency to follow any set procedure.

R. M. R.

APPEAL AND ERROR—COURT RULES—BRIEFS—[Missouri].—Two recent Missouri cases involved the enforcement of court rules regulating *briefs*. The Kansas City Court of Appeals, under a strict construction of the rules, dismissed an appeal because the "statement" did not fully inform the court of all facts essential to an understanding of the case.¹ The St. Louis Court of Appeals, however, denied a motion to dismiss an appeal where there was a failure to present "points and authorities" separate from the "argument" inasmuch as the appellant had made separate and distinct assignments of

8. This is reasserted by the court in denying the petition for rehearing in the *Morgan* Case, (1938) 6 U. S. Law Week 15.

9. *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 58 S. Ct. 905.

10. (1938) 6 U. S. Law Week 15.

11. Nowhere in either the *Mackay* Case or on the motion for rehearing in the *Morgan* Case does the court profess to distinguish them on the ground that the *Morgan* Case arose under the statutory requirement for a "full hearing" and the *Mackay* Case under due process. Neither did it rely on the distinction that the *Morgan* Case was entirely heard by the trial examiner while the *Mackay* Case was removed to Washington and the oral arguments heard before the Board. These two possible distinctions between the cases are factually present, however.

1. *Evans v. Hilliard* (Kansas City Ct. of App. 1938) 112 S. W. (2d) 886.

error and had applied the points and authorities to them in the "argument" proper.²

Court rules provide for a "statement," an "assignment of errors," and "points and authorities."³ The application of these rules has at times been strictly mandatory.⁴ In other instances, and especially more recently, they have been regarded as discretionary to a certain degree.⁵

When the brief does not contain a "statement,"⁶ the appeal may be immediately dismissed either upon motion by the respondent⁷ or at the discretion of the court itself.⁸ Furthermore, if the statement is not clear, concise, and informative⁹ as to all material facts and issues of the case, a dismissal usually results.¹⁰ The court, following the general rule, will not

2. *McNicholas v. Continental Baking Co.* (St. Louis Ct. of App. 1938) 112 S. W. (2d) 849.

3. Sup. Ct. Rule 15, St. Louis Ct. of App. Rule 18, Kansas City Ct. of App. Rules 16 and 17, Springfield Ct. of App. Rule 18.

4. *Pfotenhauer v. Ridgway* (1925) 307 Mo. 529, 271 S. W. 50; *Terry v. Ingraham* (Kansas City Ct. of App. 1928) 12 S. W. (2d) 763.

5. *Cox v. Orr* (1929) 322 Mo. 207, 14 S. W. (2d) 440, 441; *Houck v. Bridwell* (St. Louis Ct. of App. 1888) 28 Mo. App. 644; *Oberdan v. Evans* and *Howard Fire Brick Co.* (St. Louis Ct. of App. 1927) 296 S. W. 161; *Paulo v. Forum Lunch Co.* (Kansas City Ct. of App. 1929) 225 Mo. App. 167, 171; 19 S. W. (2d) 510; *Foman v. Liberty Life Ins. Co.* (Kansas City Ct. of App. 1932) 227 Mo. App. 70, 51 S. W. (2d) 212.

6. Opposing counsel cannot waive the court rule as to the "statement." *Wade v. Bankers' Life Ass'n* (Kansas City Ct. of App. 1910) 145 Mo. App. 172, 129 S. W. 1004; *Euler v. State Highway Commission of Mo.* (Kansas City Ct. of App. 1932) 227 Mo. App. 655, 55 S. W. (2d) 719.

7. *Terry v. Ingraham* (Kansas City Ct. of App. 1928) 12 S. W. (2d) 763; *Bank of Meta v. Schnitzer* (Kansas City Ct. of App. 1934) 67 S. W. (2d) 106; *Williams v. Jenkins* (Springfield Ct. of App. 1937) 107 S. W. (2d) 938.

8. *Royal v. Kansas City Western Ry. Co.* (Mo. 1916) 190 S. W. 573; *Southwick v. Southwick* (St. Louis Ct. of App. 1903) 99 Mo. App. 156, 72 S. W. (2d) 477.

9. "Statement" should not include argument. *Wheeler v. Shull* (Kansas City Ct. of App. 1926) 282 S. W. 61, 62; *National Refining Co. v. Chandler* (Kansas City Ct. of App. 1934) 71 S. W. (2d) 482; St. Louis Ct. of App. Rule 18; Kansas City Ct. of App. Rule 16; Springfield Ct. of App. Rule 18. A "statement" setting forth the testimony in the light most favorable to the appellant and ignoring that favorable to the respondent has been held to violate the court rule. *National Refining Co. v. Chandler*, *supra*.

10. *Farm Mortgage and Loan Co. v. Schubert* (Mo. App. 1925) 271 S. W. 873 (no mention of trial of the case or judgment rendered; argument included); *Daniel v. Burns* (Mo. App. 1926) 283 S. W. 749 (no information as to how accident happened); *Loomis v. Phoenix Ins. Co.* (Mo. App. 1928) 10 S. W. (2d) 956; *Carter Motor Co. v. Miller's Garage and Contracting Co.* (1931) 226 Mo. App. 551, 45 S. W. (2d) 101; *Mason v. Warnke* (1932) 226 Mo. App. 1244, 49 S. W. (2d) 200; *Glaze v. Mutual Benefit Health and Accident Ass'n* (Mo. App. 1934) 74 S. W. (2d) 96; *LeClair v. LeClair* (Mo. App. 1934) 77 S. W. (2d) 863; *McDonnell v. Hawkeye Life Ins. Co.* (Kansas City Ct. of App. 1935) 84 S. W. (2d) 389; *Peck v. Great American Inc. Co.* (1936) 230 Mo. App. 325, 90 S. W. (2d) 415. *All of the above cases were decided by the Kansas City Court of Appeals.*

"spy out those things essential to a statement" in the transcript.¹¹ Resort has been had to the transcript or record where the time required was not great¹² and where the court wished to prevent substantial injustice.¹³ Counsel from another state has not been held to the ordinarily strict insistence on compliance with the rule.¹⁴ Missouri follows the common practice in holding that a "statement" in the respondent's brief which complies with court rules remedies any defects in the appellant's "statement."¹⁵ The questions of the clarity, conciseness, and sufficiency of the "statement" is dependent on the facts and issues raised by the particular circumstances of each appeal.¹⁶ It seems that the Kansas City Court of Appeals in applying these requirements has dismissed a far greater number of appeals for failure of "statement" than either the St. Louis or Springfield Courts of Appeals. The Kansas City Court of Appeals has intimated that a poor "statement" by the appellant would be inadequate even though cleared up by the remainder of his brief.¹⁷ Because of certain liberal decisions,¹⁸ it is submitted that the St. Louis Court of Appeals would not take that position.

In general there is less insistence on strict compliance with the court rules as to the form of the "assignments of error" and "points and authorities."¹⁹ Where the errors complained of were not distinctly and separately set out as required by rule,²⁰ or a defective assignment of error was cleared up by "points and authorities,"²¹ or assignment of error was not made separately but included under "points and authorities,"²² or no assignment of errors was made but the interpretation of an important statute was involved,²³ motions for dismissal of appeal have been denied.²⁴ Similarly,

11. *Flanagan Milling Co. v. City of St. Louis* (1910) 222 Mo. 306, 309, 121 S. W. 112, 13.

12. *Foman v. Liberty Life Ins. Co.* (Kansas City Ct. of App. 1932) 227 Mo. App. 70, 51 S. W. (2d) 212.

13. *Sprague v. Mathias* (St. Louis Ct. of App. 1910) 148 Mo. App. 169, 127 S. W. 668.

14. *Universal Credit Co. v. Vanansdal* (Springfield Ct. of App. 1937) 106 S. W. (2d) 539.

15. *Charlesworth v. I. & L. Typesetting Co.* (Kansas City Ct. of App. 1936) 90 S. W. (2d) 423, 424.

16. *LeClair v. LeClair* (Mo. App. 1934) 77 S. W. (2d) 863.

17. *McDonnell v. Hawkeye Insurance Co.* (Kansas City Ct. of App. 1935) 84 S. W. (2d) 387.

18. *Houck v. Bridwell, Oberdan v. Evens and Howard Fire Brick Co.* (St. Louis Ct. of App. 1888) 28 Mo. App. 644.

19. *Round Prairie Bank of Fillmore et al. v. Downey* (Kansas City Ct. of App. 1933) 64 S. W. (2d) 701.

20. *Central Fibre Products Co. v. Bacher et al.* (Kansas City Ct. of App. 1937) 112 S. W. (2d) 372.

21. *Cavanaugh v. Dyer* (St. Louis Ct. of App. 1919) 215 S. W. 481; *Endres v. Haderl* (St. Louis Ct. of App. 1920) 220 S. W. 1002; *Rees v. Metropolitan Life Ins. Co.* (St. Louis Ct. of App. 1923) 251 S. W. 395.

22. *Cox v. Orr* (1929) 322 Mo. 207, 14 S. W. (2d) 440, 441; *Collier v. Lead Co.* (1907) 208 Mo. 246, 259, 106 S. W. 971; *Aulgur v. Strodtman* (1932) 329 Mo. 738, 46 S. W. (2d) 172; *Galbreath v. Galbreath* (Kansas City Ct. of App. 1930) 24 S. W. (2d) 202; *Rathbone v. Rathbun* (Springfield Ct. of App. 1937) 35 S. W. (2d) 38.

23. *State v. Caldwell* (1925) 310 Mo. 397, 276 S. W. 631.

24. No assignment of errors can be made after attention has been called to their omission by the filing of a motion to dismiss the appeal. *Quigley*

where the points were not stated "in numerical order" as required by the rule, a motion to dismiss was denied as the court was able to understand the theory of the appeal.²⁵ The St. Louis Court of Appeals has considered an assignment of error where no mention of points or citation of authorities was made.²⁶

Both of the instant cases are in line with the weight of authority—the appellant being held strictly to the rule in the case of a defective statement while a deviation was permitted in the manner of presenting "points and authorities." It is recognized that the rules of court have been laid down to achieve an efficient and time-saving method of expediting appellate procedure.²⁷ However, it should be remembered that justice for the litigants is the desired end of court proceedings. Accordingly they should not be penalized for lack of skill of counsel unless reasonably necessary. It is submitted, therefore, that it might be well to permit amendments of the "statement" at the discretion of the court even after the respondent has filed a motion to dismiss.²⁸ This would be to the advantage of the court in permitting a strict enforcement of the rule for clear and concise statements without unfairly subjecting the appellant to dismissal or to continuance at the option of the respondent.

J. M. F.

CONSTITUTIONAL LAW—COURTS—THE DOCTRINE OF SWIFT V. TYSON—[Federal].—Tompkins, a citizen of Pennsylvania, brought suit in federal court against appellant for injuries received while walking beside appellant's tracks in Pennsylvania. Following the long-settled doctrine of *Swift v. Tyson*,¹ the circuit court of appeals² affirmed the district court's action in declining to inquire into the Pennsylvania decisions with regard to the duty owed by a railroad to licensees.³ Having granted certiorari, the Supreme Court, speaking through Mr. Justice Brandeis, disapproved the doctrine of *Swift v. Tyson*, holding it an unconstitutional assumption of power by the courts of the United States.⁴

Litho. Co. v. Linda Vista Golf and Country Club (Kansas City Ct. of App. 1928) 1 S. W. (2d) 851.

25. *Neff v. Sovereign Camp Woodmen of the World* (Kansas City Ct. of App. 1931) 226 Mo. App. 899, 48 S. W. (2d) 564.

26. *Grubb v. Curry* (St. Louis Ct. of App. 1934) 72 S. W. (2d) 863.

27. *Williams v. Jenkins* (Springfield Ct. of App. 1937) 107 S. W. (2d) 938.

28. A possible analogy might be drawn from cases in which the appellant was permitted to present a supplemental abstract after the respondent had filed a motion to dismiss. *Davis v. Camp* (Springfield Ct. of App. 1909) 139 Mo. App. 650, 123 S. W. 1009. Contra as to amending "statement": *Fuenfgeld v. Holt* (Kansas City Ct. of App. 1934) 70 S. W. (2d) 143.

1. (1842) 41 U. S. 7, 10 L. ed. 865.

2. *Erie Railroad Co. v. Tompkins* (C. C. A. 2, 1937) 90 F. (2d) 603.

3. The Erie Co. desired to show that Pennsylvania decisions held that railroads owed to those using longitudinal pathways alongside their tracks, as distinguished from a crossing, only the duty owed trespassers.

4. *Erie Railroad Co. v. Tompkins* (1938) 303 U. S. —, 58 S. Ct. 817, 82 L. ed. 787, Mr. Justice Butler and Mr. Justice McReynolds dissenting. Mr. Justice Reed concurred in part.