

The preliminary draft goes far beyond the existing California law on the subject of extensions of time to appeal. In line with modern authority,¹⁴⁶ the pendency of other motions—namely, motions to vacate the judgment under sections 473 or 663 of the Code of Civil Procedure, or on any other ground—is put on a par with motions for new trial. While motions under section 663 seek to correct erroneous judgments, and the extension of time by the pendency of such motions will encourage the party to correct judgments in the trial court, motions under section 473 merely seek relief against mistake, inadvertence, surprise or excusable neglect, and the extension of time by the pendency of such proceedings more difficult to justify. The proposed rules also provide for a discretionary extension of time by the appellate court for good cause. This provision marks a change in the entire concept of the nature of the limitations placed on the time to appeal; time is no longer jurisdictional. While the right of the parties to extend the time by stipulation and waiver is not secured, the power of the court to relieve against hardship is established.

The suggested revision, by correcting the inadequacies of the existing procedure and by codifying the decisions which have supplemented the express wording of the code, is designed to attain a statutory method of appeal so comprehensive that the need to inquire beyond the statute will be at a minimum.

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APPEAL AND ERROR:

THE NARRATIVE STATEMENT AND THE REPORTER'S TRANSCRIPT COMPARED AS METHODS OF BRINGING UP EVIDENCE ON APPEAL

After a cause has been tried and decided by a court, our system of law generally allows an appeal to a higher court by the party who is aggrieved by the decision and who considers himself ill-used by the lower court. For the purpose of review on appeal the appellant must by some method tell the appellate court what happened during the trial below. He must place before the reviewing court a record of the trial which includes the issues which were involved, the proceedings which occurred, the evidence, if any, which was introduced, the decisions which were made by the lower court during the trial, and the judgment from which he is appealing.

¹⁴⁶ See note 135, *supra*.

There has been a traditional distinction drawn by the courts between the "record proper" or "judgment roll" and the evidence introduced to support or prove the allegations in the pleadings. The judgment roll, which may in an appropriate case be used alone as the record on appeal,¹ ordinarily consists of the process, pleadings, findings, verdict and judgments, orders or decrees filed in the lower court.²

I

A. At common law a writ of error lay for an error apparent on the face of the judgment roll, or for an error in fact where either party died before judgment. It did not lie for an error in law not appearing in the roll. Not until the passage of the statute of Westminster in 1285³ were the parties to a lawsuit able to obtain review of errors of law occurring during the trial. The statute authorized the allegation by the parties of exceptions to decisions which they thought erroneous, and required the justices to allow and put their seals to such exceptions, whereupon they became a part of the roll. The bill of exceptions was the means of preserving the exceptions together with narrative renditions of the evidence necessary to explain them.⁴

In California under the Practice Act bills of exceptions were used as records of the trial only on appeals from final judgments.⁵ The Act required the bill to be settled at the trial. That is, the point of the exception, including the pertinent facts, was particularly stated in writing and delivered to the judge for signature.⁶ When signed, the bill became a part of the judgment roll.⁷ The plan seems to have been that the bill was to be settled at the time the ruling was made and excepted to, and consequently that each ruling should have a bill to

¹ It is sometimes said that there are, in California, three types of record on appeal: (1) the judgment roll, (2) the whole record and (3) the bill of exceptions. Note (1942) 15 So. CALIF. L. REV. 348, 349. Whether the judgment is a separate type of record, at least since the 1915 amendment to section 953a of the Code of Civil Procedure, may well be doubted. In *Benson v. Gardner* (1939) 14 Cal. (2d) 526, 95 P. (2d) 136, it was held, on the basis of earlier cases, that in taking an appeal on the judgment roll the appellant may avail himself of the method prescribed by section 953a. See the discussion in section I, B, of the text of this article.

² CAL. CODE CIV. PROC. §670. Note that if the case is decided by the trial court on facts stipulated to by the parties, the stipulation of facts "takes the place of and has the force and effect of an unattacked finding of facts made by the court", and so becomes a part of the judgment roll. *Robinson v. El Centro Grain Co.* (1933) 133 Cal. App. 567, 572, 24 P. (2d) 554, 556.

³ 13 EDW. I (1285) c. 31.

⁴ POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 44 *et seq.*

⁵ Cal. Stats. 1851, p. 80; *ibid.* 1861, p. 589.

⁶ Cal. Stats. 1851, p. 80, §§189, 190; *ibid.* 1861, p. 589, §4.

⁷ *Packard v. Bird* (1870) 40 Cal. 378.

itself.⁸ The requirement that the bill be settled at the trial was based upon the theory that both sides were represented before the court at the moment of the ruling and therefore had immediate opportunity to participate in the settlement.⁹

Under the Practice Act the record on appeal from appealable orders was the so-called statement on appeal.¹⁰ The statement could also be used instead of a bill of exceptions in appealing from the final judgment.¹¹ It was prepared in narrative form by the appellant after the trial, and contained the grounds relied upon in appealing and ". . . so much of the evidence as may be necessary to explain the grounds, and no more . . ." ¹² The respondent was allowed to submit amendments and the whole was then settled by the judge who had heard the case and it became a part of the judgment roll.¹³ Like the bill of exceptions, the statement was for the purpose of bringing into the roll the questions of law which otherwise would not appear there. Both types of record were in narrative form, and both gave opposing counsel opportunity to propose amendments before settlement by the trial judge.

The Code of Civil Procedure retained the bill of exceptions settled at the trial¹⁴ and, instead of the statement on appeal,¹⁵ added a provision for a bill to be settled after the trial.¹⁶ The latter ". . . must contain all the exceptions and proceedings taken upon which the party relies . . .", ¹⁷ excluding from the stated exceptions, of course, the matters deemed excepted to under section 647 of the Code of Civil Procedure.¹⁸ In practice the bill rarely contains any exception

⁸ 2 HAYNE, NEW TRIAL AND APPEAL (Rev. ed. 1912) 1422. In this view there could be as many bills of exceptions as there were rulings. *Ibid.*; 2 SPELLING, NEW TRIAL AND APPELLATE PRACTICE (1903) 1296.

⁹ See *Wetherbee v. Carroll* (1867) 33 Cal. 549, 553.

¹⁰ Cal. Stats. 1851, p. 105, §338, as amended, Cal. Stats. 1863, p. 644. This statement is not intended to include the record on appeal from an order granting or refusing a new trial. For the old form of such record see 1 HAYNE, *op. cit. supra* note 8, §168; 2 *ibid.* §251.

¹¹ Cal. Stats. 1851, p. 105, §338, as amended, Cal. Stats. 1863, p. 644.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ CAL. CODE CIV. PROC. §649.

¹⁵ The Code of Civil Procedure as first enacted in 1872 did not provide for the statement on appeal. The amendments of 1874 added section 950, which allowed statements on motion for new trial (see authorities cited in note 10, *supra*) to be used upon appeal from a final judgment as well as upon appeal from an order granting or refusing a new trial. The 1915 code amendments abolished all provision for a statement of the case on appeal and on motion for new trial. Today the statement has no existence. The provision in section 653 of the Code of Civil Procedure dealing with the settlement of statements is an anachronism evidently overlooked by the legislature in its 1915 reforms.

¹⁶ CAL. CODE CIV. PROC. §650.

¹⁷ *Ibid.*

¹⁸ "The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or over-

since most of the rulings the court may make are included in that section. Specifications or assignments of error are not necessary.¹⁹ However, when the exception is to the verdict or decision on the ground that the evidence is insufficient to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient.²⁰ The opposing party may submit amendments. The bill, under the code, is no longer a part of the judgment roll²¹ and may be used on appeals from appealable orders²² as well as from final judgments.²³

B. In English equity practice evidence was taken by written questions and answers, and all depositions read at the original hearing were re-read on appeal. That is, in contrast to the narrative statement of the evidence embodied in a bill of exceptions used in an appeal at law, a verbatim report of the evidence in the form in which it was originally offered was used to bring up that part of the record in an equity appeal.²⁴ During the larger part of the history of our federal courts, the question and answer form has been the rule in equity appeals for both oral and written evidence.²⁵ However, the narrative statement was adopted as the sole form in 1913²⁶ and continued as such until the adoption of the new Federal Rules which give appellant his choice between the two methods.²⁷

The advent of the official court stenographer or reporter made

ruling a demurrer, allowing or refusing to allow an amendment to a pleading or a portion thereof, refusing a continuance, an order made upon *ex parte* application, giving an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony, a ruling sustaining or overruling an objection to evidence, and any misstatement of the court in commenting upon or in summarizing the evidence, are deemed to have been excepted to." See *Hanna v. De Garino* (1903) 140 Cal. 172, 73 Pac. 830; 2 HAYNE, *op. cit. supra* note 8, at 1455 *et seq.*

¹⁹ *Martin v. Southern Pac. Co.* (1906) 150 Cal. 124, 88 Pac. 701.

²⁰ CAL. CODE CIV. PROC. §648: "No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made."

²¹ See note 2, *supra*.

²² CAL. CODE CIV. PROC. §§951, 952; 2 CAL. JUR. 486.

²³ CAL. CODE CIV. PROC. §950.

²⁴ 3 DANIELL, CHANCERY PRACTICE (1841) 123, 146.

²⁵ Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929)

42 HARV. L. REV. 483.

²⁶ EQUITY RULE 75(b) (1912) 226 U. S. 671.

²⁷ FED. RULES CIV. PROC. Rules 75(c), 76.

possible the use of the question and answer method on all appeals, despite the oral form of the evidence offered during trial. In California this method was adopted in 1907 as an alternative for the bill of exceptions.²⁸ At the appellant's option the record may be brought up either in the form of a bill of exceptions or in the form of a transcript of the reporter's phonographic report of the trial.

If this alternative method is chosen, the trial judge must settle the transcript and certify to its truth and correctness.²⁹ The code requires that the briefs of the parties to the appeal contain such portions of the record as they desire to call to the attention of the appellate court.³⁰ Since 1928, however, section 3 of Rule VIII of the Rules of the California Supreme Court makes it a sufficient compliance with this requirement to state the substance of those portions of the record, with references to the line and page of the typewritten transcript for verification.³¹ As a result, the practice of appending large, or indeed any portions of the transcript to the brief, seems to have been abandoned.³²

The narrative statement is still the required form in at least seven states.³³ In at least six other states the lawyer is limited to the question and answer method.³⁴ In at least thirteen he is permitted the use of either the question and answer method or a narrative statement, at his option.³⁵ California, of course, is in the latter group.³⁶ The new

²⁸ CAL. CODE CIV. PROC. §953a.

²⁹ *Ibid.*

³⁰ CAL. CODE CIV. PROC. §953c.

³¹ (1931) 213 Cal. xlvii.

³² An examination of many briefs filed before and after 1928 indicates that this result has followed the amendment of section 3 of Rule VIII.

³³ ALA. CODE (Michie, 1928) p. 1939; GA. CODE (1933) §6-801; IOWA CODE (1939) §12845; IOWA CODE (1939) p. 2053, Rule 18; MICH. CT. RULES (1930) 287 Mich. xlvii, Rule 66, §9; 4 NEV. COMP. LAWS (Hillyer, 1929) §8890; N. C. CODE (Michie, 1935) p. 2668; UTAH REV. STAT. (1933) §104-39-4.

³⁴ COLO. RULES CIV. PROC. (1941) Rule 112(a) (Rule 112(e) provides, however, for an optional agreed statement of the case "When the questions presented by a writ of error can be determined without an examination of all the pleadings, evidence, and proceedings in the court below . . ."); 1 IND. STAT. (Burns, 1926) §688 (This section applies where the decision of the court, or the verdict of the jury, shall be called in question as being contrary to law or not sustained by sufficient evidence); 7 MASS. LAWS (Michie, 1933) c. 214, §24; MONT. RULES SUP. CT. (1941) 111 Mont. xxi, Rule VIII, §5; PA. STAT. (Purdon, Compact ed. 1936) tit. 12, §1199; WYO. REV. STAT. (1931) §89-4905.

³⁵ CAL. CODE CIV. PROC. §§650, 953a; ARIZ. CODE (1939) §21-1821; ARK. SUP. CT. RULES, Rules XV, XIX; FLA. SUP. CT. RULES (1942) Rule 11(4); IDAHO CODE (1932) §§7-509, 11-212; ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §§259.36 (1) (c), (d); MINN. RULES SUP. CT. Rule 8(2), 2 MINN. STAT. (Mason, 1927) p. 2118, *semble*; 1 MO. REV. STAT. (1939) §1194; N. Y. CIV. PRAC. ACT (1926) §576; OHIO CODE (Throckmorton, 1940) §11562, 12223-8; ORE. COMP. LAWS (1940) §5-703 (applies to appeals at law); TEX. RULES CIV. PROC. (1941) Rule 377; 4 WASH. REV. STAT. (Remington, 1932) §1729.

³⁶ CAL. CODE CIV. PROC. §§650, 953a.

Federal Rules and the rules of the United States Supreme Court also allow this option.³⁷ The Federal Rules also provide for an agreed statement of the case,³⁸ in common with the rules of several of the states.³⁹ Such a statement appears to add nothing to the bill of exceptions method other than the burden of procuring an opponent's consent before the agreed statement may be used.⁴⁰

II

In the California legislature of 1941, at the instance of the Chief Justice and with the cooperation of the State Bar, bills were introduced to delegate to the Judicial Council of California the authority to make rules governing appeal, superseding existing statutes and rules. The result was the enactment of section 961 of the Code of Civil Procedure⁴¹ and section 1247k of the Penal Code.⁴² To carry out the purpose of these statutes, the Judicial Council has appointed a draftsman of the new rules⁴³ and two research assistants.⁴⁴ A pre-

³⁷ U. S. SUP. CT. RULES (1939) 306 U. S. 691, Rule 10(2); FED. RULES CIV. PROC. Rule 75(c).

Rule 75(a) of the Federal Rules provides that "Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included."

Rule 75(b): "If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation . . ."

Rule 75(c): "Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof."

³⁸ FED. RULES CIV. PROC. Rule 76.

³⁹ COLO. RULES CIV. PROC. (1941) 107 Colo. 129, Rule 112(c).

⁴⁰ See Note (1942) 15 So. CALIF. L. REV. 348.

⁴¹ "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State.

"The Judicial Council shall report the rules prescribed by it to the Legislature within 10 days after the Legislature convenes for its Fifty-fifth Regular Session.

"The rules reported as aforesaid shall take effect on the ninetieth day after the day on which the Legislature convenes for its Fifty-fifth Regular Session, and thereafter all laws in conflict therewith shall be of no further force or effect."

⁴² "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State . . ."

⁴³ B. E. Witkin, the present Reporter of Decisions of the Supreme Court and District Courts of Appeal.

⁴⁴ Edward L. Barrett, Jr. and Walter B. Chaffee.

liminary draft of the proposed rules has already been prepared.

In the drafting of new rules for the form and content of the record on appeal, the draftsman has recognized that one of the chief questions is the abolition or retention of the bill of exceptions method of preparing the record. If the method is to be retained, possible changes in it must also be considered.

By the "bill of exceptions method" is meant the narrative statement method—the use of a settled narrative statement of the case to bring up the evidence rather than the original questions and answers in the form of a reporter's transcript. It has been pointed out that the bill of exceptions was first used before the day of the court reporter when there was no other means of getting the evidence into the record. Today, of course, that justification for a narrative statement of the evidence is gone. The question posed can best be answered through a critical comparison of the two forms of record. Is the narrative statement so inadequate compared to the question and answer form that it should be abolished? Or has it merit enough to warrant its retention in its present position in California as an alternative means of bringing up the evidence on appeal?

In any comparative evaluation of the merits and demerits of the two methods, the chief considerations are the following: (1) the presentation to the appellate court of a true picture of the trial below, (2) the preferences of the appealing lawyers and of the appellate courts in terms of the time and trouble involved and (3) the expense involved.

To the first problem, that of presenting a true picture of the trial, there seems to be but one possible answer—the question and answer method. It is obvious that no other form can give the appellate court as close an approximation of the trial below as that which sets forth the lawyers' questions and the witnesses' answers exactly as they were spoken.⁴⁵ The very nature of a narrative statement results in some changes in the wording of the witness's testimony. Therefore, it appears inevitable that a part of the original flavor of that testimony will be lost in the process of change. It is even possible that a wholly erroneous impression will be conveyed to the appellate court. It is common practice in rendering the evidence into narrative form to put the language of the lawyer's question into the mouth of the witness along with his own answer. The result is often misleading. The concessions sometimes made by lawyers in order to reach an agreement are another factor in the production of an inaccurate narrative transcript.

⁴⁵ See Griswold and Mitchell, *op. cit. supra* note 25, at 504, n. 94; Severn, *Practical Results of Federal Equity Rule 75(B) as to Restatement of Testimony in Narrative Form* (1936) 34 MICH. L. REV. 1093, 1102.

It is for these reasons that the argument that a lawyer need agree to nothing which may injure his client is not convincing. These facts are also an answer to any argument based upon the efficacy of court supervision in the settling of a narrative statement. Though it is, of course, quite possible to compose a narrative statement which will give a very fair picture of the trial, no rendition of the evidence can be as truthful or as accurate as that contained in a phonographic record of the testimony.

It has been said that the appellate court usually needs no more of a picture than that presented in a statement drawn by a capable lawyer. The facts of the case are within the province of the trial court; the appellate court ordinarily need concern itself only with questions of law. This assertion seems to ignore the requirements for review where the ground of appeal is insufficiency of the evidence to sustain the verdict or error in the giving or refusing of an instruction. Review on either of these grounds should involve a careful scrutiny of all the evidence offered during trial.⁴⁶ In such cases the danger attached to a misleading narrative statement becomes even greater. This much must be said, however, for the narrative statement as a method of presenting an accurate picture of the trial: Where the record is very long, it is seldom that each judge on the appellate court can read all of it. A carefully composed narrative statement may be a very good means of giving the entire court, including the judge writing the opinion, a clear picture of what happened below.

The second problem involves a comparison of the time and labor involved in each of the two methods. The answer generally depends upon whether an appellant's lawyer or an appellate judge is speaking.

It is obvious that from the lawyer's point of view the reporter's transcript is the simplest and easiest way to send up his case. He need only file a request for the transcript with the clerk of the trial court⁴⁷ and arrange for sureties for the fee which will be charged.⁴⁸

If he chooses to reduce the evidence to a narrative statement, he must be careful to preserve the sense of the testimony and to omit no evidence which may be relevant. Moreover, he must secure his opponent's approval of his draft or be prepared for some difficulty in the settling of the statement, since his opponent has the right to propose amendments to the draft. The question and answer method is often chosen to avoid the expenditure of time and energy on these

⁴⁶ That review in these cases should be based on the complete record is recognized in some states where a narrative statement is permitted in other cases. *IND. STAT. (Burns, 1926) §688.*

⁴⁷ *CAL. CODE CIV. PROC. §953a.*

⁴⁸ *Ibid.* §953b.

disagreements over the content of the narrative statement.

It has been suggested that the composition of an adequate narrative necessarily involves a thorough analysis of the case and so is of great help to the lawyer in the writing of his appellant's brief, that, in fact, such preliminary analysis often results in a better brief than would have been written without it. Whether a thorough analysis is actually forced by composition of a narrative is a matter on which considerable difference of opinion exists. While some analysis of the record would appear to be a necessary consequence of the process of composing a narrative statement, it may be doubted whether the analysis so compelled is thorough enough to make any substantial difference. Furthermore, California requires no specification of errors⁴⁹ nor any listing of the questions of law involved on appeal.⁵⁰ And even if it is assumed that some analysis is necessary to the proper composition of a statement, it does not follow that the total burden will be lightened by such antecedent analytical work. Relief from the labor of making a statement may well compensate for any additional labor thereby added to the writing of a brief. Nor does it follow that the brief of the competent lawyer will be in any way inferior for the lack of this preliminary analysis.

From the point of view of the appellate court and in terms of the time and trouble involved, the narrative statement is unquestionably the preferable method. Experience has shown that in the ordinary case a narrative statement affords a substantially shorter record of the evidence.⁵¹ This has two very desirable consequences: the partial relief of congestion in the court calendar and the avoidance of the one-judge decision. Both are due to the fact that a shorter record makes quicker reading, thus allowing a more rapid disposition of the cases and the study of the record by other members of the court than the judge to whom the case is assigned.

On the question of comparative expense there is much conflicting evidence. For the use of either method, the lawyer must procure a copy of the reporter's transcript. If he selects the narrative statement method, his expenses include payment for the copy, the cost for typing and retyping drafts of the statement⁵² and, under present court rules, the cost of printing the entire record.⁵³ If the lawyer selects the question and answer method, his expenses include the cost of an original transcript and a copy and the cost of printing excerpts, or summaries thereof, of relevant portions of the transcript in the

⁴⁹ *Martin v. Southern Pac. Co.*, *supra* note 19.

⁵⁰ This is a requirement for briefs on appeal under CAL. SUP. CT. RULES (1931) 213 Cal. xlvii, Rule VIII, §2.

⁵¹ Notes (1912) 46 AM. L. REV. 917; (1912) 75 CENT. L. J. 281. For a contrary point of view see Severn, *op. cit. supra* note 45, at 1096 *et seq.*

⁵² *Ibid.* at 1094 *et seq.*

⁵³ CAL. SUP. CT. RULES (1931) 213 Cal. xlv, Rule VII, §1.

supplement to his brief.⁵⁴ Many prominent law firms have stated, as their opinion, that under the rules of appellate procedure now in force in this state the reporter's transcript affords the cheaper method of bringing up the record, though several added that under certain circumstances a bill of exceptions may be less expensive.⁵⁵ Another firm felt that the bill of exceptions method was the cheaper.

III

It is probable that most appellate judges prefer the narrative statement method. On at least three occasions, although not in recent years, appellate courts have condemned the reporter's transcript method.⁵⁶ Of twelve California appellate judges (that is, justices of the supreme court or district courts of appeal) recently questioned by the writer, in person or by letter, six unqualifiedly preferred the narrative statement method as it is used in bills of exceptions prepared under our present code sections. Only one of the six, however, went so far as to recommend the dropping of the reporter's transcript method. He took the view that that method encourages appeals, thus increasing the load of appellate courts. One judge "theoretically" preferred the bill of exceptions, but felt that the majority of those submitted are inadequate due to poor preparation. Four preferred the reporter's transcript method, two on the ground that the bill of exceptions as it exists in California involves unreasonable and unnecessary technicalities. One of the two remarked that, assuming the elimination of these technicalities, he would prefer the narrative statement. The other felt that the narrative statement serves a useful purpose in some cases and should be retained as an alternative method. The remaining two judges in this group recommended the abolition of the bill of exceptions method. One judge questioned had no preference.

Though most appellate judges thus seem to prefer the narrative statement method, most lawyers choose the reporter's transcript in making an appeal. Of appeals taken to the California Supreme Court during 1941 eighty-one per cent were on reporters' tran-

⁵⁴ *Ibid.* at xlvii, Rule VIII, §3.

⁵⁵ Among the firms questioned were Downey, Brand & Seymour, Sacramento, and Fitzgerald, Abbott & Beardsley, Oakland. Other firms questioned requested that their names not be used.

⁵⁶ In *Estate of Gamble* (1913) 166 Cal. 253, 255, 135 Pac. 970, Justice Shaw characterized the method as a "pitfall for the unwary". This remark was quoted with approval in *Sea v. Lorden* (1918) 37 Cal. App. 444, 174 Pac. 85. And in *Palmer v. Guaranty T. & S. Bank* (1920) 45 Cal. App. 572, 574, 188 Pac. 302, Justice Shaw stated that the method was "well calculated to encourage indolence and relieve him [the lawyer] of responsibility to his client."

scripts.⁵⁷ In the district courts of appeal in 1941 eighty-seven per cent of the appeals were on reporters' transcripts.⁵⁸ These figures should not, however, be interpreted to indicate the desire of the bar for abolition of the narrative statement method. Most of the California law firms mentioned above specifically repudiated any such desire. One firm conceded that under the rules now in force both methods have useful purposes and do not overlap, but felt that an entirely new method, similar to that suggested by the Judicial Council's draftsman and described below, would be desirable.

It is safe to say that the chief reason for the difference in choice is the desire of each group, the judges and the lawyers, to avoid as much unnecessary work as possible. The chief concern of the Judicial Council's draftsman has been to meet the needs and desires of both the appellate courts and of the lawyers. That is, the problem has been to shorten the record without placing upon the lawyer a great additional burden such as compulsory composition of a narrative statement.

The only possible approach to the problem of the shorter record, absent some sort of settled statement of the case, is to abbreviate the reporter's transcript by eliminating therefrom the superfluous material. The draftsman's chief suggestion for the accomplishment of such a task is this: "If in the judgment of the appellant, the record contains matters not material on appeal, he may, in this notice requesting a transcript . . . specify the portions to be transcribed, or direct omission of any matters deemed unnecessary to the consideration of the points to be raised on appeal."⁵⁹ Immediately upon the receipt of this request, the clerk notifies the respondent, who must then file, within a limited number of days, any objections he may have.⁶⁰ If any objections are filed, a hearing is held and the matter determined by the trial judge.⁶¹

It is clear that without some form of sanction for the inclusion of superfluous material, the provision just outlined will have little effect in inducing lawyers toward the preparation of a shorter appellate record. The Federal Rules and the rules of many states provide for such a penalty.⁶² It has taken the form of imposition of costs on the

⁵⁷ The exact figures, as obtained from the clerk of the court, are 77 bills of exceptions and 330 reporters' transcripts.

⁵⁸ The exact figures, as obtained from the clerks of the district courts of appeal for all four districts, are 72 bills of exceptions and 456 reporters' transcripts.

⁵⁹ 7 PRELIMINARY STATEMENT OF PROPOSED RULES ON APPEAL, PREPARED FOR THE JUDICIAL COUNCIL OF CALIFORNIA (1941) Rule 15(b).

⁶⁰ *Ibid.*

⁶¹ *Ibid.* Rule 15(c).

⁶² See Note (1936) 36 COL. L. REV. 1133, 1137 *et seq.*

appellant,⁶³ forced amendment,⁶⁴ or dismissal of the appeal.⁶⁵

Many courts have hesitated to impose any penalty for the inclusion of unnecessary material, chiefly because the omission of material is so much more serious a defect.⁶⁶ This objection is met in the draftsman's proposed revision by a provision for augmentation of the record, either on the suggestion of appellant or respondent or on the appellate court's own motion.⁶⁷

If the narrative statement is retained in California, and if the preliminary draft of the new rules is adopted, the statement will not be the equivalent of the present bill of exceptions. By that draft the requirement of the taking of exceptions as a prerequisite to the urging of errors on appeal is completely abolished,⁶⁸ a task practically accomplished already by section 647 of the Code of Civil Procedure. The abolition of the exception eliminates an unnecessary technicality in the composition of a narrative statement of the case. The lawyer will no longer face the difficult problem of deciding what is included in the list of matters deemed excepted to under section 647, nor the necessity of including in his statement the exceptions he takes. Moreover, appellant will be allowed to send up typewritten or mimeographed copies of the statement;⁶⁹ he need not have them printed for the court's use as he must today when he appeals on a bill of exceptions.⁷⁰

Assuming that the new rules proposed for the reporter's transcript sufficiently guarantee a short record, in the event of their adoption would the narrative statement method no longer fulfill any useful purpose? It has been pointed out above that most lawyers prefer the question and answer method, because it is an easy way to make a record, while most appellate judges prefer a narrative statement, because it provides a shorter record. Since the lawyer under present California law can choose the narrative statement method, but is not forced to do so, there seems to be no good reason to deprive him of that choice. The inaccuracies which may occur in the record should not overweight the facts that last year nearly sixteen per cent of all California appeals were taken on narrative statements, that many prominent law firms of the state favor their retention and that many of our appellate judges seem to approve them.

Doris Brin Marasse.

⁶³ FED. RULES CIV. PROC. Rule 75(e).

⁶⁴ COLO. RULES CIV. PROC. (1941) 107 Colo. 128, Rule 112(b).

⁶⁵ MONT. RULES SUP. CT. (1941) 111 Mont. xvii, Rule VIII, §8.

⁶⁶ Note (1936) 36 COL. L. REV. 1133, 1138.

⁶⁷ *Op. cit. supra* note 59, Rules 15(e), 48.

⁶⁸ *Ibid.* Rule 4, comment 1.

⁶⁹ *Ibid.* comment 3.

⁷⁰ CAL. SUP. CT. RULES (1931) 213 Cal. xlv, Rule VII, §1.