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## Briefs Improved Under New Rule: "Statements of Questions Involved" Effectively Used During September Term, Although Some Misunderstanding Remains

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## Briefs Improved Under New Rule

### “Statements of Questions Involved” Effectively Used During September Term, Although Some Misunderstanding Remains

On July 1, 1938, the new rule previously promulgated requiring the appellant at the commencement of his opening brief to make a “statement of questions involved” went into effect (see 193 Wash. pp. 24-a to 25-a, Rule 16 (4)).

A survey by this journal of briefs filed in the September term of court under this new subsection of Rule 16 indicates that while the purpose and effect of this rule are well understood and properly applied by the majority of appellants presenting briefs during the current term of the Supreme Court, a considerable number of brief writers did not employ this rule as properly and usefully in the interest of their clients and of the understanding of the court as might have been hoped. Some lawyers apparently did not make use of their opportunity to study the preliminary explanation of the rule, together with the examples and illustrations of its operation, brought to the attention of the bar in the January, 1938, issue of the WASHINGTON LAW REVIEW, to which article the clerk of the Supreme Court specifically directed attention in a footnote to subsection 4 of Rule 16 (193 Wash. 25-a) when the rules were officially published in the Washington Decisions on July 13, 1938.

One type of mistake has been to set out a “statement of questions involved” substantially in the same form as conventional “assignments of error”. However, “assignments of error”, which are still preserved in the rules relating to brief writing, and the “statement of questions involved” are wholly dissimilar and perform different functions. An “assignment of error” points out the particular technical ruling or order of the trial court which is complained of, whereas the “statement of questions involved” requires a statement of the questions of law or fact involved in the case, which, to the extent that they were passed on by the trial court, *resulted* in the technical rulings which are complained of in the assignments of error.

A second common fault has been the submission of argumentative questions—questions that assume the correctness of the appellant’s view and are so stated as to permit only of an answer favorable to the appellant—questions which are not a detached or dispassionate statement of questions of law or fact upon which the answer of the appellate court is sought.

A third defect occasionally noticed has not resulted from a failure to understand the rule, as in the first instance, nor from a violation of the rule, as in the second instance, but has followed from an apparently bona fide attempt to state the questions. This defect consists of stating the questions so loosely and vaguely that the “statement of questions involved” is of no aid to the court.

Solely for the information of the bar, and in the helpful spirit of promoting clearer understanding and better compliance with the rule, which this journal believes is of great benefit to the client because of its marked assistance to the court’s ready comprehen-

sion of the case, the LAW REVIEW has made a selection at random of "statements of questions involved" from briefs on file during the September term of court illustrating some of the defects above mentioned. These examples, set forth in the Appendix to this comment, deserve the careful study of every member of the bar because they indicate errors to be avoided in preparing the statement of questions. In many instances defective "statements of questions involved" in appellant's briefs have been corrected by the "counter-statement of questions involved" contained in the respondent's briefs, but the "counter-statements" are omitted from the Appendix so that the insufficiency of the appellant's statements, standing alone, may be separately considered.

To show the pleasant side of the picture, this journal also sets forth in the Appendix some "statements of questions involved" which in its opinion satisfactorily comply with the rule. These latter "statements of questions involved" equally deserve careful study. In this respect reference is again made to the wide variety of illustrations in the January, 1938, issue of this journal.

Manifestly, the rule calls for an unbiased and clear statement of the questions of law or fact inhering in a case, to which questions the court below answered either "yes", or "no", or gave no answer. A clear and impartial statement of these questions at the very beginning of appellant's brief will greatly hasten, and promote the clarity of, the court's understanding of the points raised on the appeal, as has been previously pointed out (WASHINGTON LAW REVIEW, January, 1938), and this would appear to be the initial step toward a successful appeal.

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## Appendix

### "Statements of Questions" Showing a Lack of Understanding of the Rule

#### CASE A (from Appellant's brief):

1. Sufficiency of the Information.
2. Error of court in first finding defendant guilty of count II, and using such finding as basis for finding of guilt as to count I.
3. Error of court in trying two separate counts involving different facts, dates and elements.
4. Error by court in permitting evidence of defendant's character before same placed in issue by defendant.
5. Error of court in failure to strike evidence of immaterial matters volunteered to prejudice the court.
6. Error of court in permitting prosecuting attorney to compel defendant to give testimony against himself.
7. Error of court in refusing admission of testimony of witnesses offered by the defendant to rebut evidence of defendant's conduct of sales, by showing true conduct.
8. Error of court in permitting cross-examination of witness by prosecuting attorney upon offered but rejected testimony in behalf of defendant.
9. Error of court in receiving and retaining evidence offered by the state too remote and concerning arrests where no conviction had.
10. Error of court in receiving in evidence opinions of physicians and surgeons as to how injuries were inflicted upon deceased.
11. Error by the court in not presuming the defendant innocent until proved guilty beyond a reasonable doubt.

12. Error of court in convicting of the appellant of manslaughter for the killing by the appellant when the death of the person killed and the fact of the killing had not been established beyond a reasonable doubt.

13. Error of the court in trying and convicting appellant without a jury, the appellant having not admitted the truth of the charge nor confessed the same in open court.

14. Error of the court in denying appellant's motion to dismiss.

15. Error of the court in basing its oral opinion upon facts not sufficient to support it.

16. Error of the court in entering its findings of fact and conclusions of law and sentence upon facts not sufficient to support them.

17. Error of the court in denying appellant's motion for a new trial and overruling and denying appellant's motion in arrest of judgment.

18. Error of the court by abusing its discretion in permitting itself to be ruled and swayed by passion and prejudice in imposing penalty.

19. Error of the court in finding appellant guilty of the greater and a lesser included crime.

**CASE B (from Appellant's brief):**

This appeal involves the question of the proper application of the doctrine of last clear chance.

**"Statements of Questions" Framed Argumentatively**

**CASE C (from Appellant's brief):**

Has the trial court in supplemental proceedings the power to enter a vague indefinite general order authorizing sale of a beneficiary's interest in an estate without providing for the method of sale or the protection of the right of redemption?

**CASE D (from Appellant's brief):**

1. Can there be a contract without a promise? TRIAL COURT: Yes.

2. Can there be an enforceable contract to furnish a job when work, pay, and time are not agreed upon? TRIAL COURT: Yes.

3. Is an unincorporated association a legal entity which can enter into contracts and be subject to judgment when sued as such? TRIAL COURT: Yes.

4. Are an unincorporated labor union, all of its members, or any of its members, liable on contract in name of the union without proof that the union or the members sought to be held authorized its making? TRIAL COURT: Yes.

5. Can one recover money paid for alleged promise to furnish job without proving promise and that he did not receive the job? TRIAL COURT: Yes.

6. In an action on contract to furnish job, does plaintiff have burden of establishing that he did not earn money from other work? TRIAL COURT: No.

7. Can plaintiff sue one voluntary, unincorporated association on its contract and obtain judgment solely against another opposing unincorporated association without alleging or proving that the two associations are identical? TRIAL COURT: Yes.

**"Statements of Questions" Drawn Too Loosely to Inform Court of the Issues**

**CASE E (from Appellant's brief):**

Are the assets of the Estate of Blank held in trust for the judgment debtor, in a trust created by a person other than the judgment debtor? Negated by the lower court.

**CASE F (from Appellant's brief):**

1. When the evidence clearly and overwhelmingly supported the jury's verdict in favor of plaintiff (appellant), did the lower court have the right to grant defendant's (respondent's) motion for judgment notwithstanding the verdict and enter judgment for defendant (respondent) thereon?

The lower court held that it did have such right.

2. When the evidence clearly and overwhelmingly supported the jury's verdict in favor of plaintiff (appellant) and there existed none of

the grounds set forth by statute authorizing the granting of a new trial, did the lower court have the right to enter an order granting a new trial in the event that its order granting defendant's (respondent's) motion for judgment notwithstanding the verdict, and the judgment for respondent (defendant) entered thereon be reversed?

The lower court held that it did have such right.

### **“Statements of Questions Involved” Illustrating Compliance With Rule**

#### **CASE G (from Appellant's brief):**

##### **A. Right of Executor to Mortgage Trust Property:**

Under a will which devises certain property to a trustee to pay one-third of the income to a named beneficiary during her life and which further provides that such property shall not be

“disposed of without the written consent of the person or corporation to whom the same is hereby bequeathed or devised unless such disposition shall be determined to be necessary by proper court action”

does the executor, who is also a trustee, have power to mortgage the trust property without court order and without the consent of such beneficiary?

The Superior Court said Yes.

##### **B. Right of Petitioner to Maintain Proceeding:**

Is the beneficiary of a life income from a testamentary trust entitled to maintain a proceeding to remove the executor and trustee and to set aside a mortgage, assignment of lease and a real estate contract affecting the trust property, which have been given by the executor in violation of the will?

The Superior Court said No.

#### **CASE H (from Appellant's brief):**

1. Whether a “labor dispute” within the Labor Disputes Act of this state is involved where a union is engaged in picketing an employer on account of the failure of the employer to pay the union scale of wages and to comply with the union requirements as to hours of labor, where the union in question is not composed of employees of the employer involved. The trial court answered this question in the negative.

2. Whether, conceding that a labor dispute is not involved and that the granting of an injunction was justified, recovery may be had for damages, in that absence of proof of what percentage of the loss in business constituted profit. The trial court answered this question in the affirmative.

#### **SAME CASE (from Brief of Amici Curiae):**

1. Can a labor union arbitrarily picket an employer or his place of business, if in fact there is no dispute between the employer and his employees regarding hours, wages, working conditions, representation of employees, or other terms and conditions of employment, especially when none of the employees are members of the picketing union?

2. In any event, should an injunction issue against picketing defendants?

#### **CASE I (from brief of Amici Curiae):**

Is the city exercising a governmental function and consequently free from liability for accidents resulting when the chief of police or subordinate police officer causes barriers to be placed across the street to prevent operation of vehicles on a street being used by children for coasting? Answered by the lower court in the negative.