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Statutory Prescription of Form of Opinions in Missouri

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The curriculum of the School remains substantially as it was, with the addition, however, of a required course in the Administration of Justice, which extends over one hour a week throughout the senior year. Dean William G. Hale conducts this course.

STATUTORY PRESCRIPTION OF FORM OF OPINIONS IN MISSOURI

A vigorous invective attacking critically two Missouri statutes is contained in the recent case of *Smarr et al. v. Smarr et al.* in which Judge Atwood handed down the opinion.[1] The court says:

> Observing the difficulty that has evidently attended the effort of counsel on both sides of this case to comply with our rule that they present a *fair and concise* statement of the facts of the case without reiteration, statement of law, or argument, we are reminded of our own dilemma when we endeavor to comply with a certain statutory mandate and at the same time bring our statement of the case within the reasonable compass of an opinion.

The statutes which are subjected to criticism follow:

> In each case determined by the supreme court or courts of appeals, or finally disposed of upon a motion, the opinion of the court shall be reduced to writing and filed in the cause, and shall show which of the judges delivered the same, and which concur therein or dissent therefrom. R. S. Mo. (1919) sec. 1518.
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> 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. R. S. Mo. (1919) sec. 1519.

A brief statutory and case history of these statutes is necessary to a consideration of the court's indictment.

In 1871, the legislature enacted two laws, the antecedents of those now in force, and the substance of those laws was the same as that of the laws in effect at the present time.[2] However, the legislation in 1871 pertained only to the Supreme Court, none of the courts of appeals having been established. In 1879, the statutes were amended, and became applicable to the Saint Louis Court of Appeals.[3]

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[1] (Mo. 1928), 6 S. W. (2d) 860, 861, 862.

[2] Mo. Laws 1871, 50, secs. 39 and 40.

[3] R. S. Mo. (1879) sec. 3781, sec. 3782, sec. 3785.

In 1881,[4] and again in 1883,[5] the legislature passed a measure providing that

> It shall not be necessary for the supreme court to file or prepare a written opinion in any cause, except such as shall be remanded for re-hearing or shall, in the judgment of the court, involve a principle or question not settled in an opinion of the court previously delivered and reduced to writing and filed; but in every case not embraced in the foregoing exception, it shall be optional with the court whether or not an opinion in writing shall be prepared.

The effect of this law was to abrogate the acts of 1871 as far as the Supreme Court was concerned, but it is to be observed that this law in no way modified the provisions then operating upon the Saint Louis Court of Appeals. However, in 1889,[6] the legislature again reversed its position and enacted laws which continue on the statute books at the present time and are those to which Judge Atwood takes exception.

It is of peculiar significance that the two statutes under discussion are applicable only in civil cases. A study of criminal and civil cases reveals that the courts invariably treat the facts and the law similarly whether the decision be in a criminal or civil cause. And this observation might well lead to the conclusion that the statutes are not deserving of the great amount of discredit which Judge Atwood heaps upon them. Suffice it to say that in other jurisdictions similar laws have been enacted, but seemingly such laws have been made applicable both to criminal and civil cases.[7]

The laws have been invoked by the courts only four times in the past thirty-five years. Prior thereto they were not cited. One of the laws was referred to for the first time in the case of *Merriam v. St. Louis C. G. & Ft. S. R'y. Co.* in 1894 when the court held that under the law [8] a party is entitled to a written statement of the opinion of the court.[9] Eight years later the court held that under the same law it was appropriate for the

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[4] Mo. Laws 1881, 111.

[5] Mo. Laws 1883, 61.

[6] Mo. Laws 1889, 210, secs. 3781 and 3782.

[7] R. S. Ill. (1925) c. 37, sec. 49; Iowa Code (1924) p. 1657, sec. 12813; Ga. Ann. Code (Michie, 1926) sec. 6202; Miss. Ann. Code (Hemmingway, 1927) sec. 3399; Mont. Rev. Codes (Choate, 1921) sec. 8801; W. Va. Code (Barnes, 1923) p. 2465, sec. 22.

[8] Now R. S. Mo. (1919) sec. 1518.

[9] Merriam v. St. Louis C. G. & Ft. S. R'y Co. (1894), 126 Mo. 445, 29 S. W. 152.

court to state its reasons for a decision. This was in the case of *Burdett v. Dale.*[10]

In 1911, speaking in the case of *Turner v. Anderson,* Judge Lamm said:

> It [now R. S. Mo. (1919) sec. 1519], also requires a "statement." Mark the language, a statement of a certain scope and sort, viz., one "that shall be understood" etc. The term "understood," in the connection used by the lawmaker, invites observation. But as they spring spontaneously, any discriminating and good-humored reader can make them for himself. Heretofore this statutory mandate has been deemed either obligatory or has been obeyed in a spirit of comity or out of deference to the lawmaking power. However, a certain natural and untoward thing has happened. The statute is the chief factor swelling the length of appellate opinions and causing them, now and then to be much murmured against. For the present we reserve the point, but it may be worth while soon to gravely consider and finally determine whether that statute is constitutional and should be longer obeyed.[11]

The judge then refers to a California case[12] in which Justice Field commented that such a statute represented an encroachment of the legislature upon the judiciary. Without ruling on this question, Judge Lamm continues:

> We pass the matter with the suggestion that a "statement" of the instant case (giving to that term the meaning of a summary of the evidence of 67 witnesses in just outline, color and connection) could not be compressed within modest or reasonable bounds, and made either intelligible or valuable. Accordingly we shall give our impressions of the salient features of the case omitting details.

That such statutes are unconstitutional is most unlikely. They merely lay down rules of procedure for the court to follow, and do not seem to usurp any judicial function.

An effect of the statutes was to provide legislation restricting the appellate courts from handing down memorandum opinions. In this connection it may be observed that the Supreme Court never has engaged in such a practice. The Saint Louis Court of Appeals which was established in 1877 continued to render memorandum opinions until 1885, although in 1879 the statutes had been made applicable to the court.

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[10] Burdett v. Dale (1902), 85 Mo. A. 511, 69 S. W. 480.
[11] (1911) 236 Mo. 523, 530, 139 S. W. 180.
[12] Houston v. Williams (1859), 13 Cal. 24.

The judges of the Missouri courts in their attack upon the statutes have not advocated memorandum opinions. However, Professor Edward H. Warren, apparently having observed the practice before the Supreme Court of the United States and appellate courts of New York, has suggested that courts should write "a mere memorandum opinion in cases which do not deserve an extended opinion."[13] The proposal is sound, but the problem is to determine which cases do and which do not deserve an "extended opinion." Another difficulty is that in memorandum cases the reasons for the decisions are not set forth. In the event that such cases are cited authoritatively by courts or counsel in subsequent cases, no reason can be assigned except that of *stare decisis*. On the other hand, memorandum opinions would assist the courts materially by providing a means of disposing of the innumerable cases now crowding the dockets.

The direct criticism of the statutes has been that they unduly swell opinions. Eliminating, as the Missouri courts have, a consideration of an amendment of the present statutes to provide for memorandum opinions, and with due deference to Judge Lamm and to Judge Atwood, who in the *Smarr* case decided in 1928, referred authoritatively to Judge Lamm's opinion in the *Turner* case, it seems that the statutes have not imposed upon appellate courts such a great burden as the judges believe.

In the first place, courts in Missouri under our statutes are not required to write more elaborate opinions than courts in many other states.

Secondly, if the courts were greatly concerned, they would reduce opinions in criminal cases, but in actual fact, as has been observed, opinions both in criminal and civil cases are substantially of the same nature.

Finally, the statutes should be given a reasonable construction. Surely they never were intended to require the courts to set out in great detail the testimony of fifty or a hundred witnesses. What is required is a sufficient statement of the case so that it can be understood without reference to the record and proceedings in the same. Such provisions materially assist attorneys in reading cases which, but for the statute, might be unintelligible.

It may be concluded that Judge Atwood has not violated the spirit or legal bounds of the statutes when he writes:

> Hence, in this opinion, although we have painstakingly examined the entire record, which is voluminous, we deem it proper to submit the result of our labor as briefly as an intelligible statement of the substance of the case will per-

[13] Warren, *The Welter of Decisions* (1916) 10 ILL. L. REV. 472, 475.

mit without incorporating any lengthy quotation or burdensome digest of the pleadings, evidence, and proceedings.[14]

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JURISDICTION TO AWARD ALIMONY IN MISSOURI WHERE DEFENDANT IS NOT PERSONALLY SERVED

In making awards for alimony courts are often faced with difficult and peculiar problems. The deserted wife, attempts of the husband to evade jurisdiction, the question of reaching property left behind him—all these are factors which the court must take into consideration. It is inevitable that occasional conflicts should result between unbending statutory regulations and the desire on the part of the court to distribute justice in extreme cases.

Prior to the case of *Chapman v. Chapman*[1] there had been no adjudication in Missouri of the question whether a deserted wife may have her absconding husband's property within the jurisdiction of the court seized and appropriated to the payment of alimony for the support and maintenance of the plaintiff. In that case the plaintiff sued for divorce, also praying that a receiver be appointed to take charge of real estate alleged to be the property of the absconding husband, and appropriate it to the payment of alimony in gross in the form of a special lien against the property. Plaintiff charged that her husband attempted to convey the property to his brother in fraud of her rights, and joined the brother as a defendant. Plaintiff had adequate grounds for divorce. Service on both defendants was by publication. Both defaulted. The trial court granted plaintiff a divorce, but declined to make any order touching the matter of alimony and dismissed the "bill" as to the brother. The Court of Appeals allowed the alimony, but the judgment of the trial court was affirmed by the Supreme Court.[2]

The trial court, in holding itself without jurisdiction to render any judgment for alimony without personal service on the husband, reiterated the position taken by the courts of practically all the states,[3] the occasional exceptions being by virtue of statute.[4]

[14] See note 1, *supra*.

[1] (1916), 194 Mo. A. 483, 185 S. W. 221.

[2] (1917), 269 Mo. 663, 192 S. W. 448.

[3] For earlier Missouri cases to this effect, see Ellison v. Martin (1873), 53 Mo. 575; Hedrix v. Hedrix (1903), 103 Mo. A. 40, 77 S. W. 495; Elvins v. Elvins (1913), 176 Mo. A., l. c. 651, 159 S. W. 746, cases cited; Moss v. Fitch (1908), 212 Mo. 484, 111 S. W. 475.

[4] The New York statute is typical, and will be considered later in detail. Laws 1923, sec. 1171-a c. 51.