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## Comments

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# Comments

## CRIMINAL PROCEDURE—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS—

In a large number of criminal cases the appellate courts of Missouri have refused to review one or more assignments of error because the appellant failed to preserve the alleged error or errors by a proper statement thereof in his motion for a new trial. It seems desirable, therefore, to ascertain the requirements in Missouri in regard to assignments of error in such a motion.

The motion for new trial may be defined to be an application by an interested party for a "re-examination of the issues in the same court before another jury, after a verdict has been given."<sup>1</sup> Its purpose has been defined by the Supreme Court of Missouri to be "to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he have a last chance to correct his own errors without the delay, expense, or other hardships of an appeal. This is on the theory that even a judge is entitled to a last chance—a *locus penitentiae*."<sup>2</sup> However, the motion for a new trial is not confined to the mere challenging of error committed at the trial, and may include other matters, such as newly discovered evidence.

The full purpose of the motion for new trial may, perhaps, more clearly appear from a discussion of the necessity of such motion from the standpoint of the preservation of error for appellate review. The rule has long been settled in Missouri that the motion is necessary to enable the appellate court to review such errors, occurring at the trial, as do not appear on the face of the record proper.<sup>3</sup> In this connection, the Missouri courts have uniformly held that the various statutory provisions in force from time to time as to the period within which the motion must be filed are mandatory; that motions not filed within such period will be considered as not filed at all, leaving only the record proper for review.<sup>4</sup> Further, in order to preserve for appellate review errors which do not appear on the face of the record proper, the party must save an exception to the decision of the trial court overruling his motion, the failure to do so operating as a waiver thereof.<sup>5</sup>

1. 2 THOMPSON, TRIALS (2d ed. 1912) § 2708.

2. *State v. McBrien*, 265 Mo. 594, 178 S. W. 489 (1915). See also *State v. Scott*, 214 Mo. 257, 113 S. W. 1069 (1908).

3. *State v. Marshall*, 36 Mo. 400 (1865); *State v. Burdett*, 145 Mo. 674, 47 S. W. 796 (1898); *State v. Kimmons*, 124 Mo. App. 498, 101 S. W. 683 (1907); *State v. Woodring*, 135 Mo. App. 632, 116 S. W. 449 (1909); *State v. Baird*, 297 Mo. 219, 248 S. W. 596 (1923).

4. *State v. Brooks*, 92 Mo. 542, 591, 5 S. W. 257 (1887); *State v. Maddox*, 153 Mo. 471, 55 S. W. 72 (1899); *State v. Fraser*, 220 Mo. 34, 119 S. W. 389 (1909); *State v. Riley*, 228 Mo. 431, 128 S. W. 731 (1910); *State v. Kile*, 231 Mo. 59, 132 S. W. 230 (1910); *State v. Hascall*, 284 Mo. 607, 226 S. W. 18 (1920); *State v. Baird*, 248 S. W. 596 (Mo. 1923); *State v. Keyger*, 253

S. W. 363 (Mo. 1923); *State v. Keller*, 304 Mo. 63, 263 S. W. 171 (1924). For cases under the present statute see: *State v. Turpin*, 332 Mo. 1212, 61 S. W. (2d) 945 (1933); *State v. La Breyere*, 333 Mo. 1205, 64 S. W. (2d) 117 (1933); *State v. Jefferson*, 334 Mo. 57, 64 S. W. (2d) 929 (1933).

5. *State v. Harvey*, 105 Mo. 316, 16 S. W. 886 (1891); *State v. Murray*, 126 Mo. 526, 29 S. W. 590 (1895); *State v. Gray*, 149 Mo. 458, 51 S. W. 85 (1899); *State v. Dunham*, 178 Mo. 1, 76 S. W. 1008 (1903); *State v. Briscoe*, 166 Mo. App. 516, 148 S. W. 984 (1912); *State v. Black*, 186 S. W. 1047 (Mo. 1916); *State v. Vaughn*, 252 S. W. 975 (Mo. App. 1923). For cases decided after the 1925 amendment see: *State v. Arrowood*, 11 S. W. (2d) 1015 (Mo. 1928); *State v. Gentry*, 55 S. W. (2d) 941 (Mo. 1932).

Section 1967 of the Revised Statutes of 1789 provided: "The motion for new trial shall be in writing, and must set forth the grounds or causes therefor, and be filed before judgment, and within four days after the return of the verdict or finding of the court, and shall be heard and determined in the same manner as motions for new trials in civil cases." This statute remained in force,<sup>6</sup> except for an amendment as to the time for filing,<sup>7</sup> until 1925, when it was again amended<sup>8</sup> to read: "The motion for new trial shall be in writing and must set forth in detail and with particularity in separate numbered paragraphs, the specific grounds or causes therefor. Such motion shall be filed before judgment and within four days after the return of the verdict, if the term shall so long continue; and if not, then before the end of the term; provided, that the court shall have power in any case for good cause shown to extend the time for filing such motion for a period not exceeding ten days from the return of the verdict." This statute is now in force.

In *State v. Standifer*,<sup>9</sup> apparently the first case to arise under the statute of 1925, the court said that its purpose is to prevent the practice of trial lawyers of attacking the trial court from ambush by filing "shotgun" motions for new trial charging the trial court "with every conceivable error it might possibly commit during the course of a trial and thus to conceal the real point or points relied upon in the generality of the charges of error made," and also to prevent the practice of waiting until the Attorney General has briefed all the assignments in such motions before filing their appellate briefs. The court declares the Legislature's intent to be "to require appellants in criminal cases to present to trial courts as assignments of error in the motion for new trial the very grounds relied upon for reversal in the appellate court."

The Missouri courts, in dealing with these statutes, have uniformly held them to be mandatory, and have ruled that matters of exception not so included in the motion will not be reviewed on appeal.<sup>10</sup> The following discussion deals with the particularity required by these statutes in the assignment of error in the motion for new trial, with special reference to the statute in force at the present time.

In *State v. Scott*,<sup>11</sup> the Supreme Court said: "It is well settled that a motion for new trial must so definitely set out the reasons therefor as to direct the mind of the trial court to the precise error of which complaint is made. And no reason not so specified shall be urged in support of the motion."<sup>12</sup> At this point it should be noted that a general assignment that the verdict is contrary to the law will preserve nothing for review,<sup>13</sup> and an assignment that the verdict is contrary to the evidence is suf-

6. Mo. Rev. Stat. (1889) § 4270; Mo. Rev. Stat. (1899) § 2689.

7. Mo. Laws (1909), 461; Mo. Rev. Stat. (1909) § 5285; Mo. Rev. Stat. (1919) § 4079.

8. Mo. Laws 1925, p. 194; Mo. Rev. Stat. (1929) § 3735.

9. 316 Mo. 49, 289 S. W. 856 (1926).

10. *State v. Mann*, 83 Mo. 589 (1884); *State v. Whitesell*, 142 Mo. 467, 44 S. W. 332 (1898); *State v. Gatlin*, 170 Mo. 354, 70 S. W. 885 (1902); *State v. Brown*, 209 Mo. 413, 107 S. W. 1068 (1908); *State v. Constitino*, 181 S. W. 1155 (Mo. 1916); *State v. Mahan*, 267 S. W. 866 (Mo. 1924). For cases decided under the present statute see: *State v. Wilhite*, 317 Mo. 388, 295 S. W. 82 (1927); *State v. Kribbs*, 300 S. W. 521 (Mo. App. 1927); *State v. Williams*, 71 S. W. (2d) 732 (Mo. 1934).

11. 214 Mo. 257, 113 S. W. 1069 (1908).

12. See also *State v. McBrien*, 265 Mo. 594, 178 S. W. 489 (1915). In *State v. Standifer*, 316 Mo. 49, 289 S. W. 856 (1926), the court, in construing the present statute to be mandatory, holds general assignments of error in the motion to be insufficient to merit consideration in the appellate court. Accord: *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Beebe*, 2 S. W. (2d) 712 (Mo. 1928).

13. *State v. Scott*, 214 Mo. 257, 113 S. W. 1069 (1908) (holding such an assignment to be insufficient because it does not indicate specifically wherein the verdict infringes upon the law); *State v. Anno*, 296 S. W. 825 (Mo. App. 1927) (in accord under the present statute). See also *State v. Thomas*, 82 S. W. (2d) 885 (Mo. 1935) and cases there cited.

ficient only to preserve the question whether there was substantial evidence to support the verdict.<sup>14</sup> Further, an assignment that the verdict is the result of passion and prejudice of the jury does not preserve any question for appellate review.<sup>15</sup>

*Disqualification or Incompetency of a Juror.* That rulings on the competency of a juror must be assigned as error in the motion for a new trial in order to be considered on appeal is well settled.<sup>16</sup> But there is little authority as to the particularity with which such a specification of error must be stated in the motion. It seems that under the earlier statute the courts required the moving party to state in his motion the name of the juror<sup>17</sup> and the grounds upon which he was alleged to be incompetent.<sup>18</sup> Where the juror was not challenged before the jury was sworn, the moving party was required to state in his motion that he had exercised due diligence in interrogating the juror on the *voir dire*, and that the alleged disqualification was unknown to him or his counsel at the time the jury was sworn, for if such disqualification was known at the time it was too late to raise the objection after the trial was over.<sup>19</sup> It seems that today the party must at least meet these requirements, since the present statute expressly requires a greater degree of particularity in the assignment of error than did the earlier statute, but no case has been found involving the application of the present statute to such an assignment of error.

*Misconduct of the Jury.* With regard to the misconduct of jurors as a ground for a new trial the authorities are even more meager than with regard to the competency of jurors. Under the earlier statute it was held that it was the duty of the party to call such misconduct to the court's immediate attention, and that where such was not done it must affirmatively appear in the motion for new trial that the party complaining thereof did not know of the fact before the jury retired.<sup>20</sup> It seems clear that such requirement would be enforced under the present statute, and it would seem that defendant should name the juror or jurors involved and "set forth in detail and with particularity" the conduct in question.

*Remarks or Conduct of Counsel.* As to the particularity with which improper remarks or misconduct of counsel must have been stated in the motion, under the statutes prior to 1925, there is very little authority.<sup>21</sup> Since the enactment of the

14. *State v. Scott*, 214 Mo. 257, 113 S. W. 1069 (1908); *State v. Espenschied*, 212 Mo. 215, 110 S. W. 1072 (1908); *State v. Jackson*, 283 Mo. 18, 222 S. W. 746 (1920); *State v. Hodges*, 295 S. W. 786 (Mo. 1927) (under present statute). In *State v. Meagher*, 49 Mo. App. 571 (1892), such an assignment was held to preserve the exception to the overruling of defendant's demurrer to the evidence. See also *State v. Thomas*, 82 S. W. (2d) 885 (Mo. 1935); *State v. McGee*, 83 S. W. (2d) 98 (Mo. 1935), both cases citing others under the present statute.

15. *State v. Ellis*, 290 Mo. 219, 234 S. W. 845 (1921); *State v. Wright*, 289 S. W. 646 (Mo. 1926); *State v. Rhodes*, 316 Mo. 571, 292 S. W. 78 (1927) (under present statute). See also *State v. McBrien*, 265 Mo. 594, 178 S. W. 489 (1915) (holding to be insufficient an assignment that the verdict was reached by unfair, unjust, and illegal means and methods).

16. *State v. Harlan*, 130 Mo. 381, 32 S. W. 997 (1895); *State v. Dilts*, 191 Mo. 665, 90 S. W. 782 (1905); *State v. Shelton*,

223 Mo. 118, 122 S. W. 732 (1909); *State v. Fields*, 234 Mo. 615, 138 S. W. 518 (1911); *State v. Ray*, 225 S. W. 969 (Mo. 1920); *State v. Berry*, 255 S. W. 337 (Mo. App. 1923). All these cases were decided prior to the 1925 amendment.

17. *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898); *State v. Shelton*, 223 Mo. 118, 122 S. W. 732 (1909); *State v. Harrison*, 263 Mo. 642, 174 S. W. 57 (1915); *State v. Midkiff*, 286 S. W. 20 (Mo. 1926).

18. See *State v. Shelton*, 223 Mo. 118, 122 S. W. 732 (1909); *State v. Midkiff*, 286 S. W. 20 (Mo. 1926).

19. *State v. Midkiff*, 286 S. W. 20 (Mo. 1926).

20. *State v. Richardson*, 194 Mo. 326, 92 S. W. 649 (1906), quoting with approval from *State v. Robinson*, 117 Mo. 666, 23 S. W. 1066 (1893).

21. *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898) seems to indicate that the remarks objected to should be pointed out in the motion. But see *State v. Hammon-tree*, 177 S. W. 367 (Mo. 1915).

present statute, however, it has become well settled that a general statement in the motion that counsel made improper remarks is insufficient.<sup>22</sup> That the remarks objected to must be specified was ruled in *State v. Jones*,<sup>23</sup> and in *State v. Neal*,<sup>24</sup> a statement that the state's counsel made an unwarranted or illegal argument to the jury and that the jury should have been instructed to disregard the argument, was held to be too general to raise the question of error under the present statute. The court said: "The argument should have been set forth in the motion specifically, in detail, and with particularity, showing the specific grounds and causes for the complaint."

As to whether the motion should also include a statement of the reasons why the moving party deems such remarks or conduct to be improper, no decisions on the express point have been found, but the language in *State v. Neal* indicates that it should contain such a statement.

*Remarks or Conduct of Judge.* Under the statutes prior to that of 1925 but few cases have been found dealing with the particularity of statement required to preserve for review remarks or conduct of the trial judge. In *State v. Knowles*,<sup>25</sup> the court held the assignment, "Because the court committed error at the trial of the case in that the court did not give and accord to the defendant a fair and impartial trial", to be too general to preserve for appellate review the remarks of the trial judge in ruling upon and excluding evidence. And in *State v. Burgess*,<sup>26</sup> it was held that there was nothing in the record upon which to base a substantial assignment of error where the conduct of the judge was referred to in a general way in the motion for new trial, with reference to exhibits attached to the motion, but no such exhibits were attached. These cases indicate that the moving party should have pointed out in his motion the particular remarks or conduct complained of, and this is the rule under the present statute.<sup>27</sup> But again, as in the case of improper remarks or conduct of counsel, there are no decisions, apparently, dealing with the question whether the motion must contain a statement of the reasons why the moving party considers such remarks or conduct of the judge to be improper, or whether it is sufficient to set forth the remarks or conduct and allege generally that it was improper.

*Rulings upon Evidence.* With regard to the assignment of error in the trial court's rulings upon evidence, two conflicting lines of authority existed in Missouri under the statutes prior to the 1925 amendment.

In *State v. Parmenter*,<sup>28</sup> where the specifications of error in the motion were only of a general nature, namely, that the court erred in admitting incompetent, irrelevant, and immaterial evidence on behalf of the state, and in rejecting competent, relevant, and material evidence offered by the defendant, the Supreme Court held, against the contention that the specifications of error were too general and that the particular testimony should have been pointed out, that ". . . no good reason exists why any distinction should be made between civil and criminal cases with respect to the particularity and definiteness in this regard required in the motion for new trial. If, at the time the testimony was offered by the state, defendant's objection was sufficiently specific and his exception duly saved, or if exception was saved at the time to the erroneous exclusion of testimony properly offered by him, a general assignment

22. *State v. Vesper*, 316 Mo. 115, 289 S. W. 862 (1926); *State v. Puchbauer*, 299 S. W. (2d) 821 (Mo. App. 1927).

23. 318 Mo. 525, 1 S. W. (2d) 137 (1927).  
 Accord: *State v. Moore*, 2 S. W. (2d) 138 (Mo. App. 1928).

24. 318 Mo. 716, 300 S. W. 1073 (1927).

See also *State v. Puchbauer*, 299 S. W. 821 (Mo. App. 1927).

25. 185 Mo. 141, 83 S. W. 1083 (1904).

26. 193 S. W. 821 (Mo. 1917).

27. *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Zoller*, 1 S. W. (2d) 139 (Mo. 1927).

28. 242 S. W. 897, 899 (Mo. 1922).

of error in the motion for new trial is sufficient to require us to review the assignment."<sup>29</sup> In *State v. Smith*,<sup>30</sup> the court said that the case of *State v. Barrington*,<sup>31</sup> relied upon by the court in the *Parmenter* case, had in effect overruled another line of cases<sup>32</sup> holding general specifications of error in the trial court's rulings upon evidence to be insufficient, some of them indicating that the particular testimony should have been pointed out.<sup>33</sup> *State v. Baldwin*<sup>34</sup> seems to be the last case decided under the earlier statute. The court reviewed the authorities, holding the doctrine of the *Parmenter* case to be controlling.

Under the present statute, however, it has become well settled that "a general exception in the motion for a new trial, that evidence, competent or incompetent, relevant or irrelevant, material or immaterial, was admitted or rejected erroneously" is insufficient to meet the requirements of such statute.<sup>35</sup> The moving party must point out the evidence in question,<sup>36</sup> and state his reasons for asserting that the court erred in admitting or excluding it.<sup>37</sup> But *State v. Ryan*<sup>38</sup> lays down the rule that the evidence complained of need not be copied verbatim in the motion, and that it is sufficient "if the assignment contains the name of the witness, the substance of the testimony complained of, and the grounds of its admissibility or inadmissibility."<sup>39</sup>

*Instructions.* As to the assignment of error in the giving of improper instructions, the rule was well settled prior to 1925 that a general allegation that the court erred in the giving of improper instructions was insufficient to preserve such error for review.<sup>40</sup> And, *a fortiori*, this is true under the present statute requiring that the motion "set forth in detail and with particularity in separate numbered paragraphs, the specific grounds or causes therefor."<sup>41</sup> And before, as well as after, the present

29. The court cited in support of its opinion: *State v. Noland*, 111 Mo. 473, 492, 19 S. W. 715 (1892); *State v. Barrington*, 198 Mo. 23, 76, 95 S. W. 235 (1906); *State v. Smith*, 237 S. W. 483 (Mo. 1922); and the separate concurring opinion in *State v. Ellis*, 234 S. W. 845, 849 (Mo. 1921). *State v. Parmenter* case was approved in *State v. Whitman*, 248 S. W. 937 (Mo. 1923) and in *State v. Jones*, 256 S. W. 787 (Mo. 1923). See also *State v. Shoemaker*, 183 S. W. 322 (Mo. 1916).

30. 237 S. W. 483 (Mo. 1922).

31. 198 Mo. 23, 95 S. W. 235 (1906).

32. *State v. Norman*, 159 Mo. 531, 60 S. W. 1036 (1901); *State v. Brown*, 168 Mo. 449, 68 S. W. 568 (1902); *State v. Holden*, 203 Mo. 581, 102 S. W. 490 (1907); *State v. Jackson*, 283 Mo. 18, 222 S. W. 746 (1920); *State v. Ellis*, 234 S. W. 845 (Mo. 1921).

33. But see *State v. Brown*, 293 S. W. 87 (Mo. App. 1927).

34. 317 Mo. 759, 297 S. W. 10 (1927).

35. *State v. Jetts*, 318 Mo. 672, 300 S. W. 752 (1927). Accord: *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Simon*, 317 Mo. 336, 295 S. W. 1076 (1927); *State v. Silvey*, 296 S. W. 128 (Mo. 1927); *State v. Tyler*, 220 Mo. App. 1202, 298 S. W. 1047 (1927); *State v. Beebe*, 2 S. W. (2d) 712 (Mo. 1928) *State v. Yeager*, 12 S. W. (2d) 30 (Mo. 1928); *State v. McGee*, 83 S. W.

(2d) 98 (Mo. 1935); *State v. Harris*, 87 S. W. (2d) 1026 (Mo. 1935).

36. *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Lock*, 300 S. W. 698 (Mo. 1927); *State v. Ross*, 300 S. W. 785 (Mo. 1927); *State v. Hancock*, 7 S. W. (2d) 273 (Mo. 1928); *State v. Benson*, 8 S. W. (2d) 49 (Mo. 1928); *State v. Majors*, 329 Mo. 148, 44 S. W. (2d) 163 (1931); *State v. McGee*, 83 S. W. (2d) 98 (Mo. 1935).

37. *State v. Ross*, 300 S. W. 785 (Mo. 1927); *State v. Ryan* 50 S. W. (2d) 999 (Mo. 1932); *State v. McGee*, 83 S. W. (2d) 98 (Mo. 1935). See also *State v. Buckner*, 80 S. W. (2d) 167 (1935) and the cases there cited.

38. 50 S. W. (2d) 999 (Mo. 1932).

39. See also *State v. Shawley*, 324 Mo. 352, 67 S. W. (2d) 74 (1933).

40. *State v. McBrien*, 265 Mo. 594, 178 S. W. 489 (1915); *State v. Othick*, 184 S. W. 106 (Mo. 1916); *State v. Gifford*, 186 S. W. 1058 (Mo. 1916); *State v. Rowe*, 271 Mo. 88, 196 S. W. 7 (1917); *State v. Knight*, 312 Mo. 411, 278 S. W. 1036 (1926).

41. *State v. Eaton*, 316 Mo. 995, 292 S. W. 413 (1927); *State v. Tyler*, 220 Mo. App. 1202, 298 S. W. 1047 (1927); *State v. Jetts*, 318 Mo. 672, 300 S. W. 752 (1927); *State v. Beebe*, 2 S. W. (2d) 712 (Mo. 1928); *State v. Sinovitch*, 329 Mo. 909, 46 S. W. (2d) 877 (1931); *State v. Glover*, 330 Mo. 709, 50 S. W. (2d) 1049 (1932); *State v. Neely*, 56 S. W. (2d) 64 (Mo. 1932).

statute, the Missouri decisions have required that the particular instructions claimed to be erroneous should be pointed out.<sup>42</sup> But the decisions under the present statute have added the requirement that the grounds upon which it is urged that the instructions are erroneous must also be specified.<sup>43</sup> Thus, it is no longer sufficient to allege generally error in the giving of certain numbered instructions,<sup>44</sup> or in the giving of each and every instruction.<sup>45</sup>

In the assignment of error in the motion for new trial as to the failure or refusal of the trial court to give necessary or proper instructions, the Missouri decisions, both before and after the amendment of the statute in 1925, have held that the motion should specify the points on which the court failed or refused to instruct,<sup>46</sup> and that it is not sufficient to allege generally that the court erred in failing to instruct on all the law of the case, or that the instructions given did not cover all the law of the case.<sup>47</sup> The decisions under the statute now in force have added the requirement that the motion should state the reasons why the moving party deems the failure or refusal to give a certain instruction was error,<sup>48</sup> so that it is no longer sufficient to allege generally error in the refusal to give a certain numbered instruction.<sup>49</sup>

*Newly Discovered Evidence.* Where the motion for new trial is grounded upon newly discovered evidence, certain propositions have long been established as to the particularity with which such ground must be stated.<sup>50</sup> The nature and character of the evidence should be set out,<sup>51</sup> and it should appear that the evidence is material

42. *State v. Rowe*, 271 Mo. 88, 196 S. W. 7 (1917); *State v. Stevens*, 281 Mo. 639, 220 S. W. 844 (1920); *State v. Dougherty*, 287 Mo. 82, 228 S. W. 786 (1921), these cases cited many others upon the point. See also *State v. Glenn*, 262 S. W. 1030 (Mo. 1924); *State v. Bradford*, 314 Mo. 684, 285 S. W. 496 (1926). For decisions under the present statute see: *State v. Anno*, 296 S. W. 825 (Mo. App. 1927); *State v. Lock*, 300 S. W. 698 (Mo. 1927).

43. *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Flynn*, 315 Mo. 1326, 292 S. W. 413 (1927); *State v. Schultz*, 295 S. W. 535 (Mo. 1927); *State v. Neal*, 318 Mo. 766, 300 S. W. 1073 (1927); *State v. Mason*, 14 S. W. (2d) 611 (Mo. 1929); *State v. Moore*, 36 S. W. (2d) 928 (Mo. 1931); *State v. Vigus*, 66 S. W. (2d) 854 (Mo. 1933); *State v. Campbell*, 84 S. W. (2d) 618 (Mo. 1935); *State v. Sagerser*, 84 S. W. (2d) 918 (Mo. 1935).

44. *State v. Lock*, 300 S. W. 698 (Mo. 1927); *State v. Adams*, 19 S. W. (2d) 671 (Mo. 1929); *State v. Miller*, 17 S. W. (2d) 353 (Mo. App. 1929); *State v. Bowers*, 29 S. W. (2d) 58 (Mo. 1930); *State v. Thompson*, 29 S. W. (2d) 67 (Mo. 1930); *State v. Martin*, 56 S. W. (2d) 137 (Mo. 1932).

45. *State v. Williams*, 292 S. W. 19 (Mo. 1927).

46. *State v. Chissel*, 245 Mo. 549, 150 S. W. 1066 (1912); *State v. Snyder*, 263 Mo. 664, 173 S. W. 1078 (1915); *State v. Thompson*, 180 S. W. 872 (Mo. 1915), all citing cases upon the point. See also *State v.*

*Fleetwood*, 190 S. W. 1 (Mo. 1916). For decisions since the 1925 amendment see: *State v. Standifer*, 316 Mo. 49, 289 S. W. 856 (1926); *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Simon*, 317 Mo. 336, 295 S. W. 1076 (1927).

47. *State v. Wilson*, 225 Mo. 503, 125 S. W. 479 (1910); *State v. Espenschied*, 212 Mo. 215, 110 S. W. 1072 (1908); *State v. Snyder*, 263 Mo. 664, 173 S. W. 1078 (1915); *State v. Taylor*, 267 Mo. 41, 183 S. W. 299 (1916). Under the present statute see: *State v. Standifer*, 316 Mo. 49, 289 S. W. 856 (1926); *State v. Eaton*, 316 Mo. 995, 292 S. W. 70 (1927); *State v. Simon*, 317 Mo. 336, 295 S. W. 1076 (1927); *State v. Tyler*, 220 Mo. App. 1202, 298 S. W. 1047 (1927); *State v. Beebe*, 2 S. W. (2d) 712 (Mo. 1928).

48. *State v. Williams*, 292 S. W. 19 (Mo. 1927); *State v. Bailey*, 320 Mo. 271, 8 S. W. (2d) 57 (1928); *State v. Fisher*, 46 S. W. (2d) 555 (Mo. 1932); *State v. Shuls*, 329 Mo. 245, 44 S. W. (2d) 94 (1931); *State v. Vigus*, 66 S. W. (2d) 854 (Mo. 1933); *State v. McGee*, 83 S. W. (2d) 98 (Mo. 1935).

49. *State v. Jetts*, 318 Mo. 672, 300 S. W. 752 (1927); *State v. Batey*, 62 S. W. (2d) 450 (Mo. 1933). See also *State v. Eaton*, 316 Mo. 995, 292 S. W. 70 (1927).

50. *State v. Nagel*, 136 Mo. 45, 37 S. W. 821 (1896).

51. *State v. Stewart*, 142 Mo. 412, 44 S. W. 240 (1898); *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898).

and not merely cumulative,<sup>52</sup> and that if received at a new trial it is likely to produce a different result.<sup>53</sup> The names of the witnesses should be stated,<sup>54</sup> and their affidavits as to the testimony they will give should be included,<sup>55</sup> or their absence accounted for in the motion.<sup>56</sup> Facts should be stated showing that the moving party exercised due diligence to discover and produce such evidence at the trial, and that it was not discovered until after the trial.<sup>57</sup> Further, the affidavit of the moving party should accompany the motion.<sup>58</sup>

There are, of course, several grounds for new trial other than those discussed above. But no cases have been found dealing with the particularity of statement required for such grounds. In those cases which have arisen under the present statute, however, the Missouri courts have construed the statute strictly, and counsel for defendants in criminal cases should make certain that motions for a new trial set forth "in detail and with particularity in separate numbered paragraphs, the specific grounds or causes therefor."

GEO. S. H. SHARRATT, JR.

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EVIDENCE—TESTIMONIAL IMPEACHMENT—MORAL CHARACTER—A recent decision of the Missouri Supreme Court raises the question of whether a defendant may be impeached as a witness by proof of his general reputation for morality. The decision raises a question that is worthy of examination and study in that it overrules a number of previous holdings by the Missouri Court. In *State v. Williams*,<sup>1</sup> defendant was charged with murder, and testified in her own defense. To impeach her as a witness, the prosecution offered to prove her general reputation for morality. It was held that the impeaching evidence was not admissible. It is a hardship on a defendant, argued the court, to admit evidence of her morality-reputation, since such evidence tends to prejudice her as a defendant. If there is a real relationship between morality-reputation and veracity-reputation, the former will affect the latter. It is therefore sufficient to inquire directly as to the party's reputation for veracity. On the other hand, if qualified impeaching witnesses are unable to say that the defendant's reputation for veracity is bad, the jury should not be allowed to deduce this fact from the witness' testimony as to the defendant's morality-reputation.

This holding overrules a long line of authority in Missouri. It was well established that a witness could be impeached by evidence of his general reputation for

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52. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893); *State v. Goodwin*, 300 S. W. 723 (Mo. 1927).

53. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893); *State v. Goodwin*, 300 S. W. 723 (Mo. 1927).

54. *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898).

55. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893); *State v. Stewart*, 142 Mo. 412, 44 S. W. 240 (1898); *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898).

56. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893).

57. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893); *State v. Goodwin*, 300 S. W. 723 (Mo. 1927).

58. *State v. Stewart*, 142 Mo. 412, 44 S. W. 240 (1898); *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106 (1898).

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1. *State v. Williams*, 87 S. W. (2d) 175 (Mo. 1935).



morality,<sup>2</sup> though the rule was sometimes reluctantly followed.<sup>3</sup> It was invoked in criminal cases where defendant testified as a witness but did not put his character in issue.<sup>4</sup> By abandoning the morality rule, Missouri aligns itself with the majority of jurisdictions in the United States.<sup>5</sup> In his opinion in *State v. Williams*, the principal case, Judge Ellison analyzes the law regarding impeachment of a witness by evidence of his general reputation, or general character, so excellently, and his discussion is so illuminating, that further comment here would be repititious. Therefore, the purpose of this note will be to inquire into the possible implications and extensions of the new rule.

Will the rule that a witness cannot be impeached by evidence of a general bad reputation for moral character be extended to witnesses other than a defendant in a criminal action? The expressed intention of the court is to abandon the old rule completely.<sup>6</sup> Indeed, it would be difficult not to do so in view of the Missouri statute which provides that a defendant in a criminal trial who testifies in his own behalf "may be contradicted and impeached as any other witness,"<sup>7</sup> thus making it impossible to distinguish in this respect between such a defendant-witness and other witnesses.<sup>8</sup> Most of the reasons set forth in *State v. Williams* for adopting the majority viewpoint apply with equal force in cases where the witness sought to be impeached is not a defendant in a criminal case.<sup>9</sup> Therefore it seems likely that Missouri courts will abandon the morality rule completely and hold that no witness can be impeached by evidence of a general bad reputation for morality.

To what extent will the holdings that a witness may be impeached by evidence of his reputation for specific traits of character be affected by adoption of the rule that a witness cannot be impeached by evidence of his general bad reputation for morality? Missouri courts have generally limited this type of impeaching evidence

2. *State v. Shields*, 13 Mo. 236 (1850); *State v. Pollard*, 174 Mo. 607, 74 S. W. 969 (1903); *State v. Scott*, 332 Mo. 255, 58 S. W. (2d) 275 (1933); 70 C. J. § 1039, p. 825; 28 R. C. L. § 210, p. 622; 2 WIGMORE, EVIDENCE (2d ed. 1923) § 923.

3. *State v. Pollard*, 174 Mo. 607, 74 S. W. 969 (1903); *State v. Archie*, 301 Mo. 392, 256 S. W. 803 (1923); *State v. Scott*, 332 Mo. 255, 58 S. W. (2d) 275 (1933); *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32 (1908).

4. MO. REV. STAT. (1929) § 3692: A defendant who testifies "may be contradicted and impeached as any other witness in the case." *State v. Clinton*, 67 Mo. 380 (1878); *State v. Baker*, 209 Mo. 444, 108 S. W. 6 (1908); *State v. Hulbert*, 299 Mo. 572, 253 S. W. 764 (1923); *State v. Shanks*, 150 Mo. App. 370, 138 S. W. 451 (1910). Cf. note 8, *infra*.

5. See *State v. Williams*, 87 S. W. (2d) 175, 183 (Mo. 1935); 2 WIGMORE, EVIDENCE (2d ed. 1923) § 923; 70 C. J. § 1039, p. 826.

6. *State v. Williams*, 87 S. W. (2d) 175, 184 (Mo. 1935).

7. MO. REV. STAT. (1929) § 3692.

8. A few Missouri cases have held that defendant's reputation for traits of character involved in the crime with which he stood charged could not be proved to impeach him, on the ground that such evidence tended to prejudice him as a defendant. *State v. Wellman*, 253 Mo. 302, 161 S. W. 795 (1913); *State v. Baird*, 288 Mo. 62, 231 S. W. 625 (1921); *State v. Ross*, 306 Mo. 499, 267 S. W. 853 (1924); *State v. Bugg*, 316 Mo. 581, 292 S. W. 49 (1926); *State v. Irvin*, 324 Mo. 217, 22 S. W. (2d) 772 (1929). But Judge Ellison points out in *State v. Williams* that these decisions are in direct contravention of MO. REV. STAT. (1929) § 3692, and are also insupportable in that, if the reasoning is carried to its logical conclusion, it would be impossible to impeach a defendant accused of perjury, slander, or similar crimes, by evidence of his reputation for truth and veracity. Cf. note 13, *infra*.

9. See *State v. Williams*, 87 S. W. (2d) 175, 184 (Mo. 1935).

to the traits of honesty and fair-dealing,<sup>10</sup> chastity,<sup>11</sup> and sobriety,<sup>12</sup> and have admitted the evidence as showing deterioration of general moral character.<sup>13</sup> In *State v. Williams*, the apparent purpose of the court in excluding testimony of general bad moral reputation is to restrict the inquiry to the witness' veracity-character.<sup>14</sup> If the reasoning of the court is carried to its logical conclusion, it would seem to exclude evidence as to those specific traits which bear on a witness' morality-character, but have no direct bearing on his veracity-character. Thus it would seem that evidence of witness' general reputation for chastity or sobriety should be excluded hereafter in Missouri. Our courts would then be in accord with the majority of American jurisdictions, which admit no proof of such specific traits to impeach a witness.<sup>15</sup> Proof of reputation for honesty and fair-dealing, on the other hand, bears directly on the witness' character for truth and veracity. So it is not likely that Missouri courts will exclude proof of these latter traits; and it does not seem desirable that they do so.

It is a general rule of law that a witness' character cannot be evidenced by particular acts of misconduct. This for the reason that to admit such evidence would result in unfair surprise and confusion of issues.<sup>16</sup> But it is expressly provided by

10. *State v. Archie*, 301 Mo. 392, 256 S. W. 803 (1923); *State v. Beatty*, 25 Mo. App. 214 (1887); *Kingman v. Shawley*, 61 Mo. App. 54 (1895); *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166 (1899) (holding that defendant's general character as a forger is admissible to impeach him as a witness); *Williamson v. McElvain*, 199 S. W. 567 (Mo. App. 1917).

11. Missouri decisions are not in harmony as to whether a distinction should be made between the sexes respecting this trait. They have consistently held that evidence of unchastity is admissible to impeach the credibility of a woman: *State v. Shields*, 13 Mo. 236 (1850); *State v. Grant*, 79 Mo. 133 (1883); *State v. Duffey*, 128 Mo. 549, 31 S. W. 98 (1895); *State v. Summar*, 143 Mo. 220, 45 S. W. 254 (1898); *York v. Everton*, 121 Mo. App. 640, 97 S. W. 604 (1906). But there has been a division in the holdings as to whether unchastity in a man is relevant to his credibility. The following cases have admitted such evidence: *State v. Clinton*, 67 Mo. 380 (1878); *State v. Rider*, 90 Mo. 54 (1886); *State v. Rider*, 95 Mo. 474 (1888); *State v. Shroyer*, 104 Mo. 441, 16 S. W. 287 (1891); *State v. Dyer*, 139 Mo. 199, 40 S. W. 768 (1897); *State v. Pollard*, 174 Mo. 607, 74 S. W. 969 (1903). The following cases have refused to admit such evidence: *State v. Sibley*, 131 Mo. 519, 132 Mo. 102, 31 S. W. 1033, 33 S. W. 167 (1895); *State v. Clawson*, 30 Mo. App. 139 (1888); *State v. Coffey*, 44 Mo. App. 455 (1891).

12. *State v. Grant*, 79 Mo. 113 (1883); *State v. Shroyer*, 104 Mo. 441, 447, 16 S. W. 286, 287 (1891); *State v. Wright*, 152 Mo. App. 510, 133 S. W. 664 (1911).

13. It is interesting to note in this connection the course that has been pursued by the Courts of Appeal of Missouri. In a series of holdings the rule was laid down that a testifying defendant may be impeached by proof that he bears the reputation in the community of being guilty of offenses against the law analogous to that for which he is being tried. The logic on which these holdings was based is as follows: "Knowingly to violate the law is a thing no moral man would do. It is a vice the practice of which under the doctrine under discussion, implies that the offender may not possess sufficient moral principle to testify to the truth, especially in the case where the truth may be against his interest". *State v. Oliphant*, 128 Mo. App. 252, 263, 107 S. W. 32, 35 (1908); *State v. Haines*, 128 Mo. App. 245, 107 S. W. 36 (1908); *State v. Christopher*, 134 Mo. App. 6, 114 S. W. 549 (1908); *State v. Wilson*, 152 Mo. App. 61, 132 S. W. 303 (1910); *State v. Chinn*, 169 Mo. App. 38, 154 S. W. 805 (1913); *State v. Fitch*, 180 Mo. App. 482, 166 S. W. 639 (1914). But compare note 8, *supra*.

14. "... It seems better that the impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity."

15. (1935) 70 C. J. § 1049, p. 842; *ibid.* § 1070, p. 859; 2 WIGMORE, EVIDENCE (2d ed. 1923) § 923.

16. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 979. But this rule does not exclude evidence of specific acts of misconduct which bear directly on the case in hand, i. e., specific acts showing bias, corruption, interest, and the like. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 949.

statute in Missouri,<sup>17</sup> and in most states,<sup>18</sup> that conviction of a criminal offense may be proved to affect a witness' credibility. The reasons for the general exclusionary rule do not apply to evidence of such convictions. There is no confusion of issues because "the number of acts of misconduct provable in this way is practically small," and because "the judgment (in the criminal trial) cannot be reopened and no new issues are raised thereby;" there is no unfair surprise because "the judgment is conclusive and cannot be attacked, and therefore the witness could not use his supporting witnesses to prove his innocence, even if he had them in court."<sup>19</sup> In accord with the spirit of the morality rule, Missouri courts have held that under this statute evidence of convictions of all types of crimes, including misdemeanors, is admissible as affecting the credibility of the witness, since all criminal acts tend to show general bad character.<sup>20</sup> To what extent will these holdings be affected by adoption of the rule that a witness cannot be impeached by evidence of general bad character for morality? The law in the various American jurisdictions is in a state of confusion. Statutes obtain almost everywhere.<sup>21</sup> Only a few courts limit the proof to those offenses which indicate a lack of veracity-character.<sup>22</sup> In some jurisdictions, evidence of any conviction is admissible;<sup>23</sup> in others, only a felony;<sup>24</sup> in others, any conviction that would have disqualified at common law.<sup>25</sup> There are numerous shades of distinction made by courts between the extreme viewpoints.<sup>26</sup> It is submitted that in those jurisdictions where the impeaching evidence is limited to the witness' bad reputation for truth and veracity, proof of conviction of crime should be confined to those offenses indicating an impairment of witness' veracity-character. Though the present Missouri rule admitting evidence of conviction of all types of crime is quite consistent with the morality rule, since any antisocial act is some evidence of bad moral character, it would seem that upon abandoning the morality rule some discrimination should be made between various types of offenses. Proof of convictions could well be limited to those crimes which reflect on the witness' veracity-character—such as perjury, forgery, and the like.

In Missouri, the trial court has discretion as to the extent of cross-examination for the purpose of impeachment.<sup>27</sup> This discretion is exercised to protect the witness from exposures which seem to be sought maliciously, or to be unprofitable for showing

17. MO. REV. STAT. (1929) § 1752.

18. 1 WIGMORE, EVIDENCE (2d ed. 1923) § 488.

19. 2 *id.* § 980.

20. *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027 (1903); *Choteau Land & Lumber Co. v. Chrisman*, 172 Mo. 610, 72 S. W. 1062 (1903); *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832 (1903); *State v. Hensack*, 189 Mo. 295, 88 S. W. 21 (1905); *State v. Arnold*, 206 Mo. 589, 105 S. W. 641 (1907); *State v. Merrell*, 268 S. W. 118 (Mo. 1924). But earlier cases did not apply the rule as liberally. See *State v. Donelly*, 130 Mo. 642, 32 S. W. 1124 (1895); *Gardner v. St. Louis & S. F. Ry. Co.*, 135 Mo. 90, 36 S. W. 214 (1896); *State v. Grant*, 144 Mo. 56, 45 S. W. 1103 (1898); *State v. Prendible*, 165 Mo. 329, 65 S. W. 559 (1901). These cases generally excluded evidence of misdemeanors, and limited the impeaching evidence to proof of convictions of infamous crimes, or felonies. They were overruled by *State v. Blitz*, *supra*.

21. 1 WIGMORE, EVIDENCE (2d ed. 1923) § 488.

22. *Langhorne v. Commonwealth*, 76 Va. 1016 (1882).

23. *State v. Griggsby*, 117 La. 1046, 42 So. 497 (1906); *State v. Henson*, 66 N. J. L. 601, 50 Atl. 468, 616 (1901).

24. *State v. Stein*, 60 Mont. 441, 199 Pac. 278 (1921); *State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (1905).

25. *Bartholomew v. People*, 104 Ill. 607 (1882); *Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. 546 (1902).

26. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 987.

27. *Lehnerts v. Otis Elevator Co.*, 256 S. W. 819 (Mo. 1923); *Kleckamp v. Lautenschlaeger*, 305 Mo. 528, 266 S. W. 470 (1924); *State v. Harp*, 306 Mo. 428, 267 S. W. 845 (1924); *State v. Riley*, 274 S. W. 54 (Mo. 1925); *State v. Wagner*, 311 Mo. 391, 279 S. W. 23 (1926); *State v. Barnes*, 325 Mo. 545, 29 S. W. (2d) 156 (1930).

the witness' untrustworthiness.<sup>28</sup> But a witness may be compelled to answer any question tending to shake his credit by injuring his character.<sup>29</sup> Neither irrelevancy to the facts in issue on the merits of the case, nor disgrace, constitutes an excuse.<sup>30</sup> No distinction is made between a defendant-witness in a criminal case and other witnesses.<sup>31</sup> These holdings are in harmony with the morality rule, for a showing of specific wrongful acts brought out on cross-examination evidences a witness' bad moral character. The acts are thus relevant to impeach the witness' credibility where that credibility may be impeached by evidence of bad moral character. What effect should abandonment of the morality rule have on these holdings? The weight of authority in those jurisdictions following the rule that a witness can be impeached only by evidence reflecting on his veracity-character is in accord with the present Missouri view.<sup>32</sup> A small minority permits unrestrained cross-examination.<sup>33</sup> Another small minority goes to the opposite extreme of forbidding all cross-examination as to misconduct.<sup>34</sup> The majority jurisdictions, which permit cross-examination as to wrongful acts at the trial court's discretion, ignore any relevancy of the evidence thus obtained to the witness' veracity-character.<sup>35</sup> It would appear most desirable if cross-examination were limited to those acts of misconduct which have a direct bearing on the witness' veracity-character and the trial court exercised its discretion within that field. A broader rule, if followed in a state holding that evidence of the witness' bad moral character is not relevant to his credibility, exposes the witness to unnecessary obloquy, and increases his natural reluctance to testify in a trial and subject himself to the ordeal of cross-examination.<sup>36</sup>

The veracity-character rule, which Missouri embraces in *State v. Williams*, is based on the following reasoning: bad moral character does not necessarily import a lack of veracity; so evidence tending to show the witness' bad moral disposition does not reflect on his credibility; therefore, only evidence tending to show the witness' veracity-character is material. This logic would seem to apply with equal force to all character evidence regardless of its nature, whether it is evidence of reputation for traits of character, or conviction of crime; or whether it is testimony of specific acts of misconduct elicited on cross-examination.

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28. *State v. Stegner*, 276 Mo. 427, 207 S. W. 826 (1918); *Jones v. St. Louis & S. F. Ry. Co.*, 253 S. W. 737 (Mo. 1923); *State v. Hull*, 318 Mo. 647, 300 S. W. 511 (1927).

29. *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242 (1880); *State v. Davis*, 284 Mo. 695, 225 S. W. 707 (1920).

30. *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242 (1880); *State v. Davis*, 284 Mo. 695, 225 S. W. 707 (1920). These cases also illustrate the proposition that the witness will not be required to answer if by so doing he will expose himself to criminal prosecution.

31. MO. REV. STAT. (1929) § 3926. *State v. Barker*, 249 S. W. 75 (Mo. 1923); *State v. English*, 308 Mo. 695, 274 S. W. 470 (1925).

32. 70 C. J. 802; 2 WIGMORE, EVIDENCE (2d ed. 1923) §§ 987, 981, 982, 983.

33. *Zanone v. State*, 97 Tenn. 101, 36 S. W. 711 (1896).

34. *People v. Derbert*, 138 Cal. 467, 71 Pac. 564 (1903); *Commonwealth v. Schaffner*, 145 Mass. 512, 16 N. E. 280 (1888); *Elliott v. Boyles*, 31 Pa. 65 (1857).

35. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 982.

36. *Id.* § 983.