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## Comments

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# Comments

VALIDITY OF FOREIGN DIVORCES IN MISSOURI—Considerable confusion exists concerning what constitutes jurisdiction enabling a court to grant a divorce. The problems are made easier when it is recognized that this jurisdiction is based on domicil.<sup>1</sup> "This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern."<sup>2</sup> Without considering the soundness or desirability of these decisions the rule of the cases concerning divorce jurisdiction can be stated generally. A valid divorce may be granted at the common domicil of the parties.<sup>3</sup> As a result of the fiction applied by the courts in treating the marital status as a thing, the idea has arisen that the status of marriage has a situs at the place of the domicil of the parties, and it is this over which the court takes jurisdiction and upon which the court acts. So if neither party is domiciled within the state there is no res over which the court can take jurisdiction and no valid decree of divorce can be granted even if the defendant spouse appears.<sup>4</sup> The most difficult problem arises, however, when the divorce is sought at a place that is the domicil of only one spouse.<sup>5</sup> A divorce obtained at the domicil of one spouse, which is not also the last matrimonial domicil, with constructive service on the non-domiciled spouse, need not be given full faith and

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1. One's domicil is that place in which he has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a home, for an unlimited or indefinite period. *In re Garneau*, 127 Fed. 677 (C. C. A. 7th, 1904); *Greene v. Beckwith*, 38 Mo. 384 (1866); *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127 (1885); *Wyrick v. Wyrick*, 162 Mo. App. 723 (1912); *Hays v. Hays*, 221 Mo. App. 516, 282 S. W. 57 (1926); *In re Ozias' Estate*, 29 S. W. (2d) 240 (Mo. App. 1930); *Trigg v. Trigg*, 226 Mo. App. 284, 41 S. W. (2d) 583 (1931); RESTATEMENT, CONFLICT OF LAWS (1934) § 9.

2. *Ditson v. Ditson*, 4 R.I. 87, 93 (1856).

3. *Haddock v. Haddock*, 201 U. S. 562, 569 (1906); *Stone v. Stone*, 134 Mo. App. 242, 113 S. W. 1157 (1908). This need not be the place of marriage for a divorce is no longer granted as a result of a condition in the marriage contract. It is a method of bringing an end to a status.

4. *Andrews v. Andrews*, 188 U. S. 14 (1903); *Bell v. Bell*, 181 U. S. 175 (1901); *Kruse v. Kruse*, 25 Mo. 68 (1857); *Wagoner v. Wagoner*, 287 Mo. 567, 229 S.W. 1064 (1921); *Hays v. Hays*, 221 Mo. App. 516, 282 S. W. 57 (1926).

5. Numerous problems have arisen concerning the ability of a wife to acquire a domicil separate from that of her husband. Generally the domicil of a wife is that of her husband even though she is not physically present there, but from the first several states have allowed the wife to acquire a new domicil upon abandonment by the husband and to get a divorce there. *Cheever v. Wilson*, 76 U. S. 108 (1869); BEALE, CONFLICT OF LAWS (1935) § 28.1; *Parks, The Domicile of a Married Woman* (1924) 29 U. OF MO. BULL. L. SERV. 14. That a wife may acquire a domicil separate from that of her husband at least for the purpose of divorce is well recognized in Missouri. *Gould v. Crow*, 57 Mo. 200 (1874); *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (1912); *Howey v. Howey*, 240 S. W. 450 (Mo. 1922).

credit under the Federal Constitution.<sup>6</sup> But *Haddock v. Haddock*,<sup>7</sup> which so holds, and the later United States Supreme Court cases, do not prohibit a state from recognizing such a decree if it chooses to do so.<sup>8</sup> If, however, the decree is obtained at the domicile of one spouse which is also the last matrimonial domicile then this decree is entitled to be accredited by all states.<sup>9</sup> When the decree was granted at a place which was the domicile of one spouse but not the last matrimonial domicile, and the defendant spouse appeared and consented to the jurisdiction of the court, then the decree is valid and entitled to full faith and credit.<sup>10</sup> When one spouse has left the matrimonial domicile with cause and established a new domicile it should be possible to secure a divorce at this new domicile with constructive service on the defendant spouse.<sup>11</sup> This covers the various possible situations in which a divorce may be sought.<sup>12</sup>

6. In *Atherton v. Atherton*, 181 U. S. 155 (1900), the husband obtained a divorce in Kentucky, the place of the last matrimonial domicile. The wife was served constructively only and did not appear. Later, in New York, the wife brought an action for divorce and the husband appeared and pleaded the prior Kentucky decree, but the New York court refused to accredit it upon the ground that it was not based upon proper jurisdiction over the wife. The New York decision was reversed by the Supreme Court of the United States, it being held that the Kentucky decree was valid and should have been accredited. In *Haddock v. Haddock*, 201 U. S. 562 (1906), the husband obtained a divorce at his domicile, Connecticut, which was not the last matrimonial domicile. There was only constructive service on the wife and she did not appear in the action. Later the wife brought an action for divorce in New York, where she had remained, and the husband appeared and pleaded the Connecticut decree. It was not admitted as a defense to the action and on appeal to the United States Supreme Court the New York Court's judgment was affirmed. In *Thompson v. Thompson*, 226 U. S. 551 (1913), the husband obtained a decree of separation in Virginia, the place of the last matrimonial domicile and where the husband had continued domiciled. The wife was not personally served. This decree was held by the United States Supreme Court to be entitled to full faith and credit.

7. 201 U. S. 562 (1906).

8. *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (1912); *Howey v. Howey*, 240 S. W. 450 (Mo. 1922); *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945 (1912); *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681 (1913); *Perkins v. Perkins*, 225 Mass. 82, 113 N. E. 841 (1916); *Kenner v. Kenner*, 139 Tenn. 211, 201 S. W. 779 (1917); *Humphreys v. Humphreys*, 139 Va. 146, 123 S. E. 554 (1924); *Wand v. Wand*, 155 La. 257, 99 So. 211 (1924).

9. *Atherton v. Atherton*, 181 U. S. 155 (1901); *Haddock v. Haddock*, 201 U. S. 562 (1906); *Thompson v. Thompson*, 226 U. S. 551 (1913).

10. *Cheever v. Wilson*, 76 U. S. 108 (1869).

11. RESTATEMENT, CONFLICT OF LAWS (1934) § 113. This presents a new set of facts which is not considered in *Haddock v. Haddock* or *Thompson v. Thompson*, under which a valid divorce may be obtained. There is no United States Supreme Court case to support this view.

12. This classification of the cases is that of the Restatement of Conflict of Laws. No attempt is made to discuss the merits of these rules. Since the *Haddock* case there has been a great volume of material written by students of the subject. For a complete study of the problems involved see Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Parks, *Jurisdiction to Divorce* (1927) 35 U. OF MO. BULL. L. SER. 3; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; Parks, *Some Problems in Jurisdiction to Divorce* (1930) 41 U. OF MO. BULL. L. SER. 3; Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 445.

The earliest case in Missouri is *Gould v. Crow*.<sup>13</sup> There the parties were domiciled in Missouri and the husband removed to Indiana where he obtained a divorce with constructive service on the wife. She did not appear and later contested the divorce in a collateral attack when seeking dower in certain land conveyed away by the husband after the divorce. The grounds of attack were improper publication and false allegations in statements of fact that were necessary to give the Indiana court jurisdiction. The Missouri Supreme Court held that the record was good and the presumption is that all matters appeared in proof even though the record does not show how long the husband was domiciled in Indiana. The court said, however, by way of dictum, "Of course, if Jeffries (husband) went to Indiana expressly to obtain the divorce, that would render it fraudulent and void as to his wife, . . ." In the course of the opinion the court also set out its theory of a divorce action as follows: (1) A divorce action is a proceeding in rem; (2) the status of the husband and wife is a res; (3) the status attaches to each of the parties; (4) the status goes with each of the parties to their respective domicils; (5) the wife can have a separate domicil from the husband; (6) every state has the right to determine the domestic relations of all persons having their domicils within its territory; (7) where either husband or wife has a domicil the courts have jurisdiction for divorce purposes; (8) the decree so pronounced is a judgment in rem.<sup>14</sup> This has been a landmark case in Missouri in the field of divorce.

That Missouri would recognize a divorce granted upon constructive service in another state at the petition of the spouse who alone was domiciled there was again recognized in *Anthony v. Rice*.<sup>15</sup> In that case the wife attacked a divorce granted in Indiana at the petition of the husband. She was served with constructive notice and did not appear. The Missouri court held the notice was proper and then said, in regard to the wife's claim of fraud by the husband in inducing the court to take jurisdiction, that "there is no evidence of fraud in this record, and in the absence of evidence to the contrary we must hold these decrees valid. . . ." It is important to notice that the court was willing to consider any evidence of fraud that was not shown on the record and if that evidence had been sufficient the foreign decree would apparently have been held void.

Up to the time of the *Haddock* case it was the policy in Missouri to recognize a foreign decree of divorce granted at the domicil of one spouse.<sup>16</sup> This fact was mentioned in the *Haddock* case.<sup>17</sup> But some of the judges deciding the first case to arise in Missouri after the *Haddock* case felt considerable doubt as to whether the

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13. 57 Mo. 200 (1874).

14. This theory of the divorce action was accepted and stated in *Howey v. Howey*, 240 S. W. 450 (Mo. 1922), but was taken from *Gould v. Crow*, 57 Mo. 200 (1874).

15. 110 Mo. 223, 19 S. W. 423 (1892).

16. *Gould v. Crow*, 57 Mo. 200 (1874); *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423 (1892).

17. 201 U. S. 562, 602 (1906).

previous policy should be followed. In this case <sup>18</sup> the husband and wife were domiciled in Missouri, but the husband abandoned the wife while in Illinois<sup>19</sup> and left with another woman. The husband travelled through several states and finally took up residence again in Missouri. In July, 1868, the husband went to Illinois, obtained a divorce and returned to Missouri in October of the same year to marry this second woman. By these facts it is clear that the presence of the husband in Illinois did not give him a domicile in that state. It is true that no definite period of time is necessary for the acquisition of a domicile, but more than mere presence is required.<sup>20</sup> The motives and later acts of the husband disprove any intention to have Illinois as his home. But the Missouri Supreme Court said that since the wife could not have made a direct attack on the divorce decree because it was in rem she could not make a collateral attack either. The court said, ". . . the question of jurisdiction is also one of the issuable facts involved in the case, which is tried and adjudicated along with all the other facts therein, and the judgment pronounced thereon is just as binding and conclusive as it is upon all the other facts tried and determined therewith." The correctness of this statement can be questioned, but since the decision upholding the decree against attack was placed upon the ground that there was insufficient evidence to negative the existence of the proper jurisdictional fact it may be regarded as dictum.<sup>21</sup> In this case there was a vigorous dissenting opinion by Valliant, C.J., in which Kennish, J., concurred. The quoted portion of the majority opinion was severely criticized. The dissent proceeded on the basis that jurisdiction for the purpose of divorce is based on domicile and recognized that the finding of a court's own jurisdiction is subject to review in a collateral attack. The dissent also points out that it is the marital status of the person residing within the court's limits over which the court takes jurisdiction. "But if the party seeking the divorce is not a resident, that State has not jurisdiction of his status, and he cannot make the false statement of residence there the lawful foundation for constructive notice to his absent wife."<sup>22</sup> Reference was made to *Haddock v. Haddock* and the reasoning of that case was adopted. The majority opinion refused to recognize that the

18. *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458 (1911).

19. The husband and wife had left Missouri to find a new home. They had stopped for a night's lodging in Illinois. The next morning the husband abandoned the wife and left with a second woman. There was evidence that the meeting with this second woman was prearranged. The abandoned wife remained in Illinois.

20. ". . . as distinguished from legal domicile, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant." *Haddock v. Haddock*, 201 U. S. 562, 583 (1906).

21. ". . . it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of jurisdiction of the court by which the decree was rendered is open to inquiry." *Haddock v. Haddock*, 201 U. S. 562, 573 (1906).

22. *Lieber v. Lieber*, 239 Mo. 1, 66, 143 S. W. 458, 479 (1911).

allegation made by the husband was false and a fraud on the court when he stated that he was "then, and had been for more than one year prior to the beginning of this suit, a bona-fide resident of the State of Illinois."<sup>23</sup> No mention was made of *Haddock v. Haddock* in the majority opinion. In support of its view regarding the conclusiveness of the finding by a court of its own jurisdiction it cited only one case<sup>24</sup> which, however, involved a question of venue within the state.

The Supreme Court of Missouri in the next case<sup>25</sup> did consider the *Haddock* case and its effect on the established policy of Missouri to recognize foreign divorces granted at the domicile of one spouse. In this case a divorce was obtained in the state of Washington, the domicile of the husband but not the last matrimonial domicile.<sup>26</sup> The court said: "That case (*Haddock v. Haddock*) does not hold that such a decree cannot be recognized as valid in another State. . . .It is our policy to recognize the validity in this State of such foreign divorces. There is nothing in the *Haddock* case which in the slightest degree seeks to control our policy in this regard." But the court impliedly recognizes that if the public policy of Missouri were otherwise it could under the *Haddock* case refuse to recognize the Washington decree.

In *Silvey v. Silvey*,<sup>27</sup> the husband and wife were domiciled in Texas where the husband left the wife and came to Missouri. From Missouri the husband sent the wife \$40 each month. Nineteen days after the last payment was sent the husband filed suit for divorce in Arizona and swore before the Arizona court that the residence of his wife was unknown to him. The divorce was granted, and the wife later brought suit in Missouri for separate maintenance, attacking the divorce decree on the grounds that there was a failure to comply with the statute of Arizona for publication and that Arizona did not have jurisdiction to grant the decree.<sup>28</sup> The Missouri court treated the husband as domiciled in Missouri and expressly avoided the question of jurisdiction of the Arizona court to affect the marital status by saying, "We deem it necessary to notice only one of the grounds alleged by plaintiff (wife) in support of her contention that the Arizona decree can be collaterally attacked. That one is that the said court obtained no jurisdiction over her because the publication therein was fatally defective." It is to be noted that what the court has done here is directly contrary to the statement of the Missouri Supreme Court in *Lieber v Lieber*.<sup>29</sup> This divorce decree granted in Arizona was held void, not because the Arizona

23. In the report this is quoted from the petition of the plaintiff-husband in the Illinois suit.

24. *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836 (1898).

25. *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (1912).

26. This Washington decree was challenged to prevent the husband from being a competent witness to testify against the wife.

27. 192 Mo. App. 179, 180 S. W. 1071 (1915).

28. Since this decree was obtained at a place not the last matrimonial domicile and the defendant spouse did not appear, a court that follows the *Haddock* case would not need to give it full faith and credit. But the court in this case recognized the policy of Missouri to accredit a foreign decree granted at the domicile of one spouse regardless of whether it was the last matrimonial domicile.

29. 239 Mo. 1, 48, 143 S. W. 458, 473 (1911).

court did not have jurisdiction of the res, the marital status, but because there was a material non-compliance with the statutory requirements of publication under the Arizona law. The facts of the case presented an ideal situation to hold the decree void because the Arizona court had purported to act on something over which it had no jurisdiction, yet the Missouri court did not take up that matter.

Substantially the same facts as in the *Silvey* case were presented to the Missouri Supreme Court in *Wagoner v. Wagoner*.<sup>30</sup> In that case the parties were domiciled in St. Louis, Missouri. The husband filed suit for divorce in Missouri but, because the wife contested the case, he dismissed the suit. The husband then obtained a divorce in Nevada with constructive service on his wife, and returned to Missouri. She attacked the Nevada divorce because the matrimonial domicil of the husband and wife was in Missouri. The Missouri court said: "That the respondent (husband) was ever domiciled in Nevada is too absurd for serious consideration."<sup>31</sup> The opinion stated that the Nevada court was induced to take jurisdiction by actual fraud and that there was no jurisdiction of the res so that its decree was void in all things relating to the matrimonial status of the wife. This opinion is consistent throughout with the theory that jurisdiction to grant a divorce is based on domicil. In the opinion the theory of the *Haddock* case is approved but the decision is based on the fact that neither party had a domicil in Nevada. That the Missouri court would not accept the finding of a foreign court as to whether the plaintiff spouse had established a bona fide domicil would seem to be clear from this case. In a later case,<sup>32</sup> however, the husband had left the matrimonial domicil in Missouri and secured a divorce in Florida on the ground of adultery. By the law of Florida no period of residence was required when adultery was alleged as the ground if the acts were committed within the state. The Florida court had found the husband to be domiciled in that state. Regarding this decision the Missouri Supreme Court said: "If we are to measure this judgment of a sister state as we would measure one of our own judgments, then we would have to say that, where the jurisdiction of the court in the particular case is dependent upon extrinsic facts to be shown, the determination of those facts in favor of jurisdiction is final; there being no appeal." However, the court did consider the correctness of the finding of the Florida court and said there was not evidence enough to show fraud on the part of the husband in inducing the Florida court to take jurisdiction. The opinion later set out the situation in which a judgment of another state can be questioned as follows: (1) facts constituting lack

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30. 287 Mo. 567, 229 S. W. 1064 (1921).

31. The husband testified that when he left Missouri he was seeking rest and a suitable place to establish a new home. After wandering through several states he settled in Reno, Nevada, and engaged hotel accommodations at \$200 per month. He also obtained employment as a clerk in a store at \$75 per month. He stayed in Nevada no longer than was necessary to obtain the divorce and then returned to Missouri. He testified that after he returned he regarded St. Louis, Missouri, as his home.

32. *Howey v. Howey*, 240 S. W. 450 (Mo. 1922).

of jurisdiction over the subject matter, (2) failure to give legal notice to the defendant, and (3) where there has been some fraud in the concoction of the judgment. But the court adds that if it should go to the extent of considering a false statement of residence in the petition as constituting fraud in the concoction of the judgment, then it must be said that the evidence fails to show the lack of residence. The implication is that the Missouri court did not regard a false statement in the petition as to residence as a fraud on the court even when the false facts alleged were necessary to give the court jurisdiction.<sup>33</sup> The court added: "Our rule is that if the judgment roll shows a judgment on a subject-matter within the jurisdiction of the court, and shows service upon the defendant, then it is good as against a collateral attack. In other words, if the judgment is to be attacked for infirmities not apparent upon the face of the record, then it must be reached by some direct action." There was a dissent but no dissenting opinion. At no place in the opinion was there any mention of the *Wagoner* case. Again, in a second suit<sup>34</sup> between the parties in the *Wagoner* case the court through Graves, C. F., by way of dictum said of the holding in the first *Wagoner* case: "The question is not really in this case now, except as a mere circumstance, but it is a very serious question as to whether or not the original *Wagoner* Case was not wrongly ruled here." Then in a separate paragraph the court continues: "To the *Howey* Case we gave much thought, and its conclusion is yet satisfying . . . The facts stated in 287 Mo. (the first *Wagoner* case) show jurisdiction in the Nevada court, and this court should have accredited that decree. . . . (case rep). This under the well-established Missouri rule."<sup>35</sup> This is a severe criticism by a court of its own previous holding. It indicates that it would be almost impossible for one to attack the jurisdiction of a court over the subject-matter if the record does not show the defect relied upon.

Following this decision the Courts of Appeal have handed down four cases<sup>36</sup> which have followed the rule set out in *Anthony v. Rice*,<sup>37</sup> that a decree of divorce pronounced by a competent court in favor of a bona fide domiciled citizen of the state in which the court sat will be recognized by the Missouri courts. They did not, however, discuss what evidence is necessary to overcome the finding of the court

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33. It is important to note the language of the dissent in *Lieber v. Lieber*, 239 Mo. 1, 66, 143 S. W. 458, 479 (1911). There it was said that the false statement of residence could not be made the lawful foundation for jurisdiction over the marital status.

34. *Wagoner v. Wagoner*, 306 Mo. 241, 267 S. W. 654 (1924).

35. The opinion in the first *Wagoner* case was written by Brown, C., and concurred in by all the judges of whom one was Graves, J. Also in the second *Wagoner* case mention was made that the first *Wagoner* case was before one division of the Supreme Court only and the *Howey* case was before the court in banc. But it is shown in the report of the first *Wagoner* case that a motion to argue the case before the court in banc was denied.

36. *Keena v. Keena*, 222 Mo. App. 825, 10 S. W. (2d) 344 (1928); *Hanna v. Hanna*, 224 Mo. App. 1142, 32 S. W. (2d) 125 (1930); *Coffey v. Coffey*, 71 S. W. (2d) 141 (Mo. App 1934); *Barrett v. Barrett*, 79 S. W. (2d) 506 (Mo. App. 1935).

37. 110 Mo. 223, 19 S. W. 423 (1892).



of the prior forum that the plaintiff spouse is a bona fide resident, but the language in each case clearly indicates that the court would have held the foreign decree void if sufficient evidence had existed to set the decree aside on account of fraud inducing the court to take jurisdiction.

In view of the opinions of the Missouri court in *Howard v. Strode* and *Howey v. Howey*, it appears that the *Haddock* case had little effect upon the policy of Missouri to recognize foreign decrees granted at the domicil of one spouse. It may be said that it is the well settled policy of the Missouri court to treat decrees based on jurisdiction arising from the bona fide domicil of one spouse as final determinations of the status of both parties. The theory of divorce in Missouri, while it includes the situations presented in the Restatement of Conflict of Laws, is broader and not subject to the limitations implied in the Restatement. The statement of the court in the *Lieber* case concerning the conclusiveness of the finding of a court of its own jurisdiction is not believed to be the law in Missouri.<sup>38</sup> It is difficult to determine the intention of the court in the *Howey* case. Since the court did consider the jurisdictional fact of domicil of the plaintiff and also whether there had been fraud in the procurement of the foreign divorce decree, the statement that it is the Missouri rule that infirmities not apparent upon the face of the record must be reached by a direct action is not consistent. The court did hold, by way of dictum, that a foreign decree could be set aside because of fraud in its procurement. The first *Wagoner* case definitely stated this. It is not believed that the Missouri court would go as far in recognizing a foreign decree of divorce as the dictum in the second *Wagoner* case would imply, for that would mean that Missouri would recognize a divorce granted at a place not the domicil of either party.<sup>39</sup> But, in view of the language in the *Howey* case, the evidence of fraud necessary to have the decree set aside would have to be very strong. The Supreme Court of the United States has said jurisdictional facts are always open.<sup>40</sup> Consequently, it would seem that a foreign decree of divorce should be avoided upon a showing of lack of jurisdiction or fraudulently procured jurisdiction, though it must be admitted that there is language to the contrary in some of the Missouri cases.

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38. The Missouri court has held that if the question of jurisdiction of the court of the forum is presented and a ruling is made by that court then Missouri will not re-examine this decision even though it is a determination by a court of its own jurisdiction. *Hall v. Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 760 (1927). This set of facts, however, does not arise in any of the cases here presented because in no case did the defendant appear and challenge the jurisdiction of the court before the decree was granted.

39. Kansas is the only state that has gone as far in recognizing foreign divorces as the dictum in the second *Wagoner* case implies that Missouri should. "Any judgment or decree of divorce rendered upon service by publication in any state of the United States in conformity with the law thereof shall be given full faith and credit in this state, . . ." KAN. REV. STAT. (1923) § 60-1518. This statute has been construed in its broadest sense. *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681 (1913); *Kirby v. Kirby*, 143 Kan. 430, 55 P. (2d) 356 (1936).

40. *Haddock v. Haddock*, 201 U. S. 562, 573 (1906).

PROPOSED EXTENSION OF THE DYING DECLARATION EXCEPTION TO THE HEARSAY RULE—A statement made by a deceased person, in order to come within the dying declaration exception to the hearsay rule, must have certain characteristics and must have been made under certain circumstances, and may be offered in evidence only in a limited class of cases.<sup>1</sup> The purpose of this comment is to urge that the practice of restricting the use of dying declarations to this limited class of cases is arbitrary, unreasonable, and should not be continued.

Dying declarations, since they are statements made out of court, presented by a witness other than the declarant, and offered to prove the truth of the matter stated, are hearsay.<sup>2</sup> But they are admitted in evidence in certain cases, the exception being made for two reasons: first, because of the *necessity* for using the evidence, and second, because of the *substantial guaranty of trustworthiness* attached to these statements.

The statement of the necessity basis for this exception to the hearsay rule differs from that used in most of the other exceptions. It is the policy of the law to punish those who take the lives of others, and since homicides are often committed where no witnesses are present, conviction of manslaughter will be uncertain unless this testimony is admitted.<sup>3</sup> From this it was concluded that the importance of carrying out the policy of the law demands that such evidence be received.

The guaranty of trustworthiness is based upon the frame of mind (of contemplating eternity) that the declarant was in when he made the statement.<sup>4</sup> To make certain that he was in such a frame of mind, the courts attempt to determine whether the statement was made while the declarant was conscious of certain and impending death,<sup>5</sup> whether it was made while his mind was free from a desire for revenge,<sup>6</sup>

1. *Marshall v. Chicago & G. E. Ry.*, 48 Ill. 475 (1868); *Brownell v. Pacific R. R.*, 47 Mo. 239 (1871); *Jewell v. Excelsior Powder Mfg. Co.*, 166 Mo. App. 555, 149 S. W. 1045 (1912); *Spatz v. Lyons*, 55 Barb. 476 (N. Y. 1869); see 1 GREENLEAF, EVIDENCE (15th ed. 1892) § 156; 3 WIGMORE, EVIDENCE (2d ed. 1912) § 1432.

2. 3 WIGMORE, EVIDENCE (2d ed. 1912) § 1361.

3. "Such declarations are received in evidence from necessity for furnishing the testimony, which in certain cases is essential to prevent the manslayer from escaping punishment. When a death-wound is inflicted in secret, as was done in this case, no person can be expected to speak of the fact except the victim of the violence." *Donnelly v. State*, 26 N. J. L. 601 (1857). *Accord*: *Schell v. Stephens*, 50 Mo. 375 (1872); *Railing c. Com.*, 110 Pa. St. Rep. 100, 1 Atl. 314 (1885); *State v. Wood*, 53 Vt. 558 (1881).

4. "The solemn conviction of approaching death, it is said, supplies the place of an oath or affirmation." *State v. Morgan*, 56 S. W. (2d) 385 (Mo. 1932); see 1 GREENLEAF, EVIDENCE (15th ed. 1892) § 157; 3 WIGMORE, EVIDENCE (2d ed. 1912) § 1438.

5. "A dying declaration, in order to be admissible as such, must have been made in the belief on the part of the declarant of impending death, after the hope of recovery has been abandoned." *State v. Davis*, 337 Mo. 411, 84 S. W. (2d) 930 (1935); *State v. J. W. Majors*, 329 Mo. 148, 44 S. W. (2d) 163 (1931); see 3 WIGMORE, EVIDENCE (2d ed. 1912) §§ 1439-1442.

6. Some jurisdictions exclude the testimony if it is shown that the declarant was in a revengeful state of mind. Dying declarations by deceased are not admissible, where they clearly show that he was actuated by malice and desired accused to be

and whether the declarant believed in future rewards and punishments.<sup>7</sup> Limiting the use of dying declarations to cases of a particular type is proper if the reasons for admitting such evidence are present only in those cases, or if the courts lack confidence in the evidence and wish to restrict its use. By an examination of a few typical cases, in which dying declarations were held to be inadmissible, it may be seen whether the reasons for admitting such evidence were present.

In *Brownell v. The Pacific R. Co.*,<sup>8</sup> A was killed by defendant's railroad train. Action was brought by A's wife under the wrongful death statute of Missouri. Plaintiff offered in evidence a statement made by the deceased immediately after he had been struck by the train and while he was conscious of the pendency of immediate and certain death. The court held: "As a dying declaration it was clearly inadmissible, for the modern decisions clearly establish the doctrine that the rule permitting dying declarations to be given in evidence applies exclusively to criminal prosecutions for felonious homicides, and has no reference to civil cases." The court, applying the rule in the orthodox fashion, made no attempt to determine whether the reasons for admitting dying declarations were present. The necessity for using the evidence was present. The passage of the death act indicates that it is the policy of the law to allow the personal representative to recover where the deceased has been killed through the negligence of the defendant. Very often these accidents occur where no witnesses are present, and unless this testimony is admitted the personal representative may not be able to establish the actual facts and the policy of the law will be defeated. The statement was made while the declarant was conscious of immediately impending death; therefore it has that trustworthy characteristic which would make it admissible in a criminal prosecution for homicide. While it is true that the declarant might be motivated while making the statement by a desire to provide for his dependents, this fact does not justify excluding the testimony. It does, however, go to the credibility of the evidence, and dying declarations may be impeached on the same grounds as other testimony.<sup>9</sup>

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punished. *Reeves v. State*, 106 Miss. 885, 64 So. 836 (1914). In Missouri the jury gives such evidence the weight they deem proper. *State v. Taylor*, 330 Mo. 1036, 51 S. W. (2d) 1003 (1932).

7. Few courts have passed upon this problem, and those that have have taken different positions. "As this child was but four years old, it is quite impossible that she, however precocious in mind, could have had that idea of a future state which is necessary to make such a declaration admissible." *Rex v. Pike*, 3 Craig & P. 598 (1829). *Accord*: *State v. Angesi*, 92 N. J. L. 53, 104 Atl. 299 (1918). *Contra*: *Carver v. U. S.*, 164 U. S. 694 (1897); *Nesbit v. State*, 43 Ga. 238 (1871) (holding that disbelief in a future state of reward and penalties does not exclude the declaration.) Some courts have confused this requirement with the capacity to take an oath. *People v. Sanford*, 43 Cal. 34 (1872); *State v. Elliott*, 45 Iowa 486 (1877); see 3 WIGMORE, EVIDENCE (2d ed. 1912) § 1443.

8. 47 Mo. 239 (1871).

9. "... dying declarations are admissible in a case where the testimony would be competent if the declarant were on the witness stand." *Boyle v. State*, 97 Ind. 322 (1885); 105 Ind. 469, 472 (1885). See 1 WIGMORE, EVIDENCE (2d ed. 1912) § 488 (statutes abolishing interest as disqualification of witness); MO. REV. STAT.

In *Johnson v. State*,<sup>10</sup> under an indictment for carnal knowledge or abuse of a female child under ten years of age, the dying declarations of the child upon whom the offense was committed, identifying the defendant as the perpetrator of the act, were held incompetent because not offered in a prosecution for homicide. In this criminal case as in the civil case just discussed the usual reasons for admitting dying declarations are present. The evidence is needed because it is the policy of the law to punish such crimes, and since these crimes are frequently committed where no other persons are present the offender may not be convicted if such statements are not admitted. Since the declarations were made by the child while in the same state of mind as that required in homicide cases, they have the same trustworthy character.

Since the reasons for making this exception to the hearsay rule apply to all cases in which the death of the declarant is a vital factor it is difficult to see why the exception should be limited to some of the cases only.<sup>11</sup> It may be that courts lack confidence in this evidence, and for that reason do not care to extend its use. If this were true it would hardly seem reasonable for courts to admit it in prosecutions for homicide in which the defendant if convicted may be punished by death or a long term in prison, yet refuse to admit it in civil cases and lesser criminal prosecutions in which the defendant if convicted will be punished by fine or a short term in prison only. Professor Edmund Morgan has said on this point: "To be sure, it is a bit difficult to explain to a layman why an item of evidence which may be used against a man on trial for his life should not be usable against him when only a civil liability is involved. But layman are so dumb anyway!"<sup>12</sup>

Mr. Wigmore in substance offers the following explanation of the introduction and adoption of this rule into the Anglo-American law of evidence.<sup>13</sup> Dying declarations, when first used, could be introduced in both civil and criminal cases. East in 1803 made a statement in his Pleas of the Crown which was misconstrued by later courts and writers to mean that dying declarations were admissible only in criminal prosecution for homicide. He said: "Besides the usual evidence of guilt in general cases of felony, which is elsewhere treated of, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself,

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(1929) § 1723: "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting credibility."

10. 50 Ala. 456 (1874).

11. Morgan, *The Rule of Reason in Hearsay* (1932) 6 CONN. BAR J. 207.

12. Morgan, *The Hearsay Rule* (1937) 12 WASH. L. REV. 1, 16.

13. 3 WIGMORE, EVIDENCE (2d ed. 1912) § 1431.

is gotten rid of."<sup>14</sup> A careful reading of this statement will reveal that the author only intended to convey the thought that such statements are used more frequently in homicide cases because often the only witness to the crime is the victim and he is now dead. In 1860, Chief Judge Redfield stated in a note to his edition of Professor Greenleaf's treatise<sup>15</sup> that the primary reason for admitting such evidence is that there is none other available and the crime will go unpunished if these declarations are not admitted. Today most courts consider the guaranty of trustworthiness just as important a reason for admitting the evidence as is the necessity for using it.<sup>16</sup> Even assuming that the only reason for admitting the evidence is the one given by Chief Judge Redfield, the restriction seems unreasonable, for as has been pointed out there are many civil and criminal cases in which the same necessity appears. While Wigmore's explanation of how this anomalous doctrine became part of our law of evidence is probably true, it does not justify its continuance in the old form.

Reliable evidence is admitted in court proceedings to aid in ascertaining the truth. To exclude reliable evidence seems wrong. Hearsay is generally considered unreliable and is, therefore, excluded because the courts fear that juries will not be able to notice its unreliability and will give undeserved weight to it, thereby failing to arrive at the truth. Dying declarations are considered to be reliable evidence in the prosecution of homicides. It is submitted that the reliability of such evidence is not affected by the type of case in which it is used. If this evidence is reliable to exclude it in any case seems wrong.

Some states have awakened to the realization that there is no sound reason for the common law rule that dying declarations should be used only in criminal prosecutions for homicide, and that by continuing to apply it they are interfering with the fundamental function of a court—to arrive at the truth. For this reason they have relaxed the common law rule. Kansas and Oregon by court decision

14. 1 EAST, PLEAS OF THE CROWN (1803) § 353.

15. "It [evidence of dying declarations] is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission. . . . And although it is not of the same facts, the rule is no doubt based upon the presumption that in a majority of cases there will be no other equally satisfactory proofs of the same facts. This presumption and the consequent probability of the crime going unpunished is unquestionably the chief ground of this exception in the law of evidence." 1 GREENLEAF, EVIDENCE (10th ed. 1860) § 156.

16. "There are certain guaranties of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made, which, in contemplation of law, are supposed to compensate for the fact they are not sanctioned by an oath, and the party against whom they are used has had no opportunity to cross examine." *Tracey v. People*, 97 Ill. 101, 106 (1880). *Accord*: *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911); *State v. Riley*, 98 S. C. 386, 82 S. E. 621 (1914).

have extended the use of dying declarations to all civil cases.<sup>17</sup> Massachusetts by statute admits all declarations of any deceased person if the court finds that they were made in good faith before the commencement of the action and upon the personal knowledge of the declarant.<sup>18</sup> It is to be noticed that these statements need not be dying declarations. North Carolina and Arkansas both have statutes providing for the admission of dying declarations in wrongful death cases.<sup>19</sup> Missouri and several other states admit such evidence in abortion and related cases.<sup>20</sup> The Missouri law is an improvement over the common law, but there seems to be further room for improvement.

While the Massachusetts statute has proved very successful in that jurisdiction, as evidenced by the practically unanimous approval of its operation by the bar of that state,<sup>21</sup> its enactment in Missouri is improbable because of its complete disregard for the hearsay rule and all the supposed dangers of hearsay evidence.

It is believed that it would be an improvement in the Missouri law to admit dying declarations in all civil actions, or even to extend their use to wrongful death cases alone. But if the reasons for making dying declarations an exception to the hearsay rule are accepted as being sound, the most desirable change would be to admit such evidence wherever the reasons for making the exception to the hearsay rule apply. To do so would extend the use of dying declarations to all criminal and civil cases in which the death of the declarant is a vital factor.<sup>22</sup>

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17. The rule that dying declarations are admissible only in criminal cases (and those involving homicide) is without reasonable basis, and should not longer be followed. *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625 (1914). *Accord: Vassar v. Swift & Co.*, 106 Kan. 836, 189 Pac. 943 (1920); *McDonnell v. Swift & Co.*, 124 Kan. 327, 259 Pac. 695 (1927); *McCredie v. Commercial Casualty Ins. Co.*, 142 Ore. 229, 20 P. (2d) 232 (1933).

18. MASS. GEN. LAWS (1932) c. 233, § 65.

19. ACTS OF ARK., 1935, p. 90, Act 40, § 1; N. C. CONS. STAT. ANN. (1919) c. 29, amending CONS. STAT. (1919) § 160. The Arkansas statute reads: "In all suits for the recovery of damages for fatal injury or death of any person, the dying declarations of the person for whose fatal injury or death such suit has been brought in respect to the facts or circumstances pertaining to such fatal injury or death of such person or the cause thereof may be proved and admitted in evidence in like manner as dying declarations are now allowed to be proved and admitted in evidence in homicide cases in this State."

20. MO. REV. STAT. (1929) § 3690; N. Y. STAT. (1909) c. 66, § 1; OHIO GEN. CODE ANN. (1921) § 12412-1; PA. STAT. (Purdon) (1936) tit. 19, § 583.

21. MORGAN and Others, *THE LAW OF EVIDENCE* (1927) 37.

22. To make this change would not necessitate any change in the Dead Man statute because the Missouri statute provides: ". . . in actions where one of the original parties to the contract or cause of action is dead . . . the other party to such contract or such cause of action can not testify. . . ." MO. REV. STAT. (1929) § 1723. The declarant is not one of the original parties to the cause of action because he was dead before the cause of action arose.

## APPEAL AND ERROR—REQUISITES OF STATEMENT OF ASSIGNMENTS OF ERROR AND POINTS AND AUTHORITIES

Two recent Missouri cases, *Majors v. Malone*,<sup>1</sup> and *Scott v. Missouri Pacific Railroad Company*,<sup>2</sup> raise the question of what constitutes sufficient assignments of error and statements of points and authorities on appeal. Appellants' briefs failed sufficiently to assign some of the errors. Further, the points and authorities were neither adequately set forth nor properly related to the good and sufficient assignments. The Missouri Supreme Court dismissed the appeal in one case and ignored the allegation of error in the other, holding these defects to be fatal.

Rules governing the requisites, form and sufficiency of assignments of error and grounds of appeal are largely set forth in the various jurisdictions by statute or rule of court.<sup>3</sup> Assuming that the proper foundation for an appeal or writ of error has been laid in the trial court, what are the requisites of an appellant's brief? In Missouri and most states it must contain a statement of the facts,<sup>4</sup> an assignment of errors,<sup>5</sup> and a statement of the points and authorities relied upon.<sup>6</sup> In Missouri,

1. 100 S. W. (2d) 300 (Mo. 1937).

2. 333 Mo. 374, 62 S. W. (2d) 834 (1933).

3. *Nunnally Co. v. Bromberg & Co.*, 217 Ala. 180, 115 So. 230 (1928); *Winkler v. Hawkes & Ackley*, 126 Iowa 474, 102 N. W. 418 (1905); *Pierce v. Domon*, 98 Neb. 120, 152 N. W. 299 (1915); *Renfrow v. Ittleson*, 110 Okl. 109, 236 Pac. 585 (1925).

4. Mo. REV. STAT. (1929) § 1060; Mo. Sup. Ct. Rule 15; Kansas City Ct. of App. (Mo.) Rule 16; *Kyle v. Little Rock & F. S. R. Co.*, 148 Ark. 653, 226 S. W. 165 (1920); *Heins v. Peoples First Nat. Bank of Olivia*, 163 Minn. 193, 203 N. W. 624 (1925); *Royal v. Kansas City Western Ry. Co.*, 190 S. W. 573 (Mo. 1916); *Smith v. Newhouse*, 199 S. W. 938 (Mo. 1917); *Squaw Creek Drainage Dist. v. Hayes*, 217 S. W. 20 (Mo. 1919); *Kirby v. Balke*, 306 Mo. 109, 266 S. W. 704 (1924); *Bramhall v. McGhee*, 87 S. W. (2d) 453 (Mo. App. 1935); *Oliver v. Commonwealth*, 175 S. E. 864 (Va. 1934).

5. Mo. Sup. Ct. Rule 15; St. Louis Ct. of App. (Mo.) Rule 18; Kansas City Ct. of App. (Mo.) Rule 17; Springfield Ct. of App. (Mo.) Rule 18; *Branson v. Branson*, 100 Ind. App. 81, 193 N. E. 686 (1935); *Big Tarkio Drainage Dist. v. Peters*, 220 S. W. 874 (Mo. 1920); *Standard Computing Scale Co. v. Reames*, 258 S. W. 451 (Mo. 1924); *Lanphear v. Masonic Sanitarium & Training School Co.*, 263 S. W. 146 (Mo. 1924); *Thornbrugh v. Hall*, 263 S. W. 146 (Mo. 1924); *Hughes v. Stacey*, 7 S. W. (2d) 730 (Mo. App. 1928); *Galbreath v. Galbreath*, 24 S. W. (2d) 202 (Mo. App. 1930); *Brown v. Dawes*, 76 S. W. (2d) 714 (Mo. App. 1934); *Joyce v. Tobin*, 126 Neb. 373, 253 N. W. 413 (1934); *Ball v. Hall*, 62 Okl. 62, 161 Pac. 778 (1916); *DeArmond v. Fenwick*, 127 Ore. 509, 272 Pac. 893 (1928); *Gold Medal Dairy Co. v. Langendorf*, 61 S. D. 490, 249 N. W. 815 (1933); *Overstreet v. First Nat. Bank of Bowie*, 77 S. W. (2d) 699 (Tex. Civ. App. 1934); *Price v. Hornburg*, 101 Wash. 472, 172 Pac. 575 (1918); *Rist v. Porter*, 192 Wis. 218, 212 N. W. 275 (1927).

Some statutes and rules of court prescribe no precise form for the statement of errors. See *Redfield v. Boston Piano & Music Co.*, 178 Iowa 1275, 160 N. W. 934 (1917); 183 Iowa 194, 165 N. W. 365 (1917).

6. Mo. REV. STAT. (1929) § 1060; Mo. Sup. Ct. Rule 15; St. Louis Ct. of App. (Mo.) Rule 18; Kansas City Ct. of App. (Mo.) Rule 16; Springfield Ct. of App. (Mo.) Rule 18; *Moore v. Robinson*, 214 Ala. 412, 108 So. 233 (1926); *Worthington*

the appellant's brief may also contain an argument in support of his contentions,<sup>7</sup> though this is not essential.<sup>8</sup> Missouri and other courts require that errors be assigned separately and distinctly from the statement of points and authorities.<sup>9</sup> This is to avoid confusion and inconvenience both to the court and to respondent.<sup>10</sup> However, a formal assignment as such is not necessary,<sup>11</sup> and should the assignments of error be commingled with the points and authorities, appellant will not be barred altogether if the court is not confused and can readily distinguish both the assignments of error and the points and authorities.<sup>12</sup> Further, mere misentitling of either the assignments of error or the points and authorities is not fatal.<sup>13</sup> There is considerable confusion in Missouri as to whether errors assigned or points and authorities set forth in the statement of facts or in the argument will be considered by the court. Some cases have disallowed them.<sup>14</sup> Some cases involving a single allegation of error have held an assignment to be good if apparent from the brief as a whole, or parts read together.<sup>15</sup> There is obviously little likelihood of confusion in such instances. But other cases involving several allegations of error have reached the

*v. Robinson*, 22 Ala. App. 38, 111 So. 762 (1927); *Beaudry v. Bell*, 250 Ill. App. 468 (1928); *Harrison v. Cleino*, 256 Mo. 607, 165 S. W. 987 (1914); *Pence v. Kansas City Laundry Service Co.*, 332 Mo. 930, 59 S. W. (2d) 633 (1933); *A. Makray, Inc. v. McCullough*, 103 N. J. L. 346, 135 Atl. 815 (1927).

7. Mo. Sup. Ct. Rule 15.

8. Mo. Sup. Ct. Rule 15. However, some jurisdictions require the argument. See Sup. Ct. of the U. S. Rule 27, 286 U. S. 614, 615 (1932); *Lotts v. Board of Park Com'rs of City of Los Angeles*, 57 P. (2d) 215 (Cal. App. 1936); *Stroman v. South Carolina Power Co.*, 168 S. C. 538, 167 S. E. 844 (1932).

9. Mo. Sup. Ct. Rule 15, St. Louis Ct. of App. (Mo.) Rule 18; *Kansas City Ct. of App. (Mo.) Rule 17*; *Springfield Ct. of App. (Mo.) Rule 18*; *Counts v. Dobbs*, 235 S. W. 716 (Tex. Civ. App. 1921).

10. *Aulgur v. Strodman*, 46 S. W. (2d) 172 (Mo. 1932).

11. *Collier v. Catherine Lead Co.*, 208 Mo. 246, 106 S. W. 971 (1907); *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641 (1908); *Byam v. Kansas City Public Service Co.*, 328 Mo. 813, 41 S. W. (2d) 945 (1931); *St. Paul Fire & Marine Ins. Co. v. American Trust Co.*, 222 S. W. 137 (Mo. 1920); *Forsee v. Garrison*, 208 Mo. App. 408, 235 S. W. 473 (1921).

12. *Scullin Steel Co. v. Mississippi Valley Iron Co.*, 308 Mo. 453, 273 S. W. 95 (1925).

13. *Kundred v. Bitler*, 93 Ind. App. 691, 177 N. E. 345 (1931). *Campbell v. Campbell*, 323 Mo. 1149, 20 S. W. (2d) 655 (1929), held a section in a brief entitled "Law Points" bad, not because of the irregular title but because the points and authorities were insufficiently stated.

14. *Morris v. Gutshall*, 226 S. W. 589 (Mo. App. 1920); *Flach v. Ball*, 240 S. W. 469 (Mo. App. 1922); *Benanti v. Security Ins. Co. of New Haven*, 9 S. W. (2d) 673 (Mo. App. 1928); *Johnson v. Boaz-Kiel Construction Co.*, 22 S. W. (2d) 881 (Mo. App. 1930).

15. *Amick v. Empire Trust Co.*, 317 Mo. 157, 296 S. W. 798 (1927); *Church v. Combs*, 332 Mo. 334, 58 S. W. (2d) 467 (1933); *Reinert Bros. Const. Co. v. Whitmer*, 206 S. W. 387 (Mo. App. 1918); *Ward v. Stutzman*, 212 S. W. 65 (Mo. App. 1919); *Betts v. Harvey*, 297 S. W. 995 (Mo. App. 1927).



same result.<sup>16</sup> However, errors not assigned separately must be definite and specific wherever they appear.<sup>17</sup>

How specifically should errors be assigned and how definitely should points and authorities be stated? A mere assertion of error in general terms,<sup>18</sup> or statement of abstract propositions of law,<sup>19</sup> is insufficient as an assignment of errors. To be

16. *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460 (1914); *Cavanaugh v. Dyer*, 215 S. W. 481 (Mo. App. 1919); *Endres v. Hadelers*, 220 S. W. 1002 (Mo. App. 1920); *Bury v. St. Louis-San Francisco Ry.*, 223 Mo. App. 483, 17 S. W. (2d) 549 (1929).

17. *Duffy v. Allen*, 220 S. W. 857 (Mo. 1920); *Hanchett Bond Co. v. Palm*, 220 S. W. 673 (Mo. 1920); *Automatic Sprinkler Co. v. Star Clothing Mfg. Co.*, 306 Mo. 518, 267 S. W. 888 (1924); *State ex rel. Davidson v. Caldwell*, 310 Mo. 397, 276 S. W. 631 (1925); *Campbell v. Campbell*, 323 Mo. 1149, 20 S. W. (2d) 655 (1929).

18. Assignment that plaintiff's claim is not sufficiently itemized and dates are not sufficiently set forth in his complaint is too general. *Williams v. Stroub*, 168 Mo. 346, 67 S. W. 875 (1902). Assignments that the court erred in refusing to give the declarations of law asked for by defendant, gave those asked for by plaintiff, and gave others on its own motion, held too general. *Johnston v. Ragan*, 265 Mo. 420, 178 S. W. 159 (1915). Assignment that the court erred in holding that publication of notice of sale under a power in a trust deed is insufficient to stop the running of the statute of limitations, held sufficient. *Friel v. Alewel*, 318 Mo. 1, 298 S. W. 762 (1927). Assignments that the court erred in finding the issues for respondent instead of appellant, and that on the conceded facts plaintiff cannot recover, are too general. *Koch v. Shepherd*, 193 S. W. 601 (Mo. App. 1917). Assignment that the court erred in "failing and refusing to compel the defendant in his pleadings to comply with established law and procedure governing set-off and counterclaim," held too general. *George D. Hope Lumber Co. v. Stewart*, 241 S. W. 675 (Mo. App. 1922). Assignments that the court erred in "admitting incompetent, irrelevant, and immaterial evidence offered by the plaintiff," and "rejecting competent and relevant and material evidence offered by defendant," held too general. *City Trust Co. v. Cunningham*, 7 S. W. (2d) 456 (Mo. App. 1928). *Weymiller v. Weymiller*, 213 Iowa 955, 240 N. W. 237 (1932); *Aulgur v. Strodtman*, 329 Mo. 738, 46 S. W. (2d) 172 (1932); *Spangler-Bowers v. Benton*, 229 Mo. App. 919, 83 S. W. (2d) 170 (1935); *Cherry v. Boyles*, 151 Okl. 135, 6 P. (2d) 1049 (1931); *Hopkins v. Sargent's Estate*, 88 Vt. 217, 92 Atl. 14 (1914).

19. Statement that "Section 9619, Revised Statutes of Missouri 1909, is not unconstitutional because it contravenes section 30, article 2, of the Constitution of state of Missouri and deprives defendant of property without due process of law," held an insufficient assignment of error. *Hanchett Bond Co. v. Palm*, 220 S. W. 673 (Mo. 1920). "Upon the expiration of the term of the charter, the corporation ceased to exist, and thereafter it had no power to make a contract, and its title to property ceased, and it had no power to bind or convey its property in its corporate name,"—held insufficient as an assignment of errors. *Automatic Sprinkler Co. of America v. Star Clothing Mfg. Co.*, 306 Mo. 518, 267 S. W. 888 (1924). Statements that "instructions must not be broader than the petition or include elements of damages not included in the petition," and "unlawful entry, unaccompanied by physical injury or damage to property, will not support a judgment for more than nominal damages,"—held insufficient as assignments of errors. *Hughes v. Stacey*, 7 S. W. (2d) 730 (Mo. App. 1928). *Bray v. Tardy*, 182 Ind. 98, 105 N. E. 772 (1914); *Aulgur v. Strodtman*, 329 Mo. 738, 46 S. W. (2d) 172 (1932); *Marlatt v. Columbia Nat. Bank*, 223 Mo. App. 1185, 19 S. W. (2d) 514 (1929); *White v. McCoy Land Co.*, 229 Mo. App. 1019, 87 S. W. (2d) 672 (1935); *Taylor v. Taylor*, 90 Okl. 128, 215 Pac. 1070 (1923).

good, an assignment must refer directly to rulings of the lower court,<sup>20</sup> must be sufficiently definite to indicate how the court erred,<sup>21</sup> and should embrace only one point or subject of error.<sup>22</sup> Certain types of error must be much more specifically assigned than other types. For example, error in the admission of evidence<sup>23</sup> must generally be assigned in greater detail than error in instructions.<sup>24</sup> Points and authorities must also be definite. A mere list of legal authorities is insufficient.<sup>25</sup> A good statement of points and authorities must set forth in a concise and definite manner the legal propositions and the reasons upon which appellant's claim of error is based.<sup>26</sup> If it fails to disclose the substance of appellant's complaint, i. e., how appellant was in fact injured by the erroneous ruling, it is insufficient.<sup>27</sup>

20. Assignment that "the court erred in admitting evidence as to statements of the purported father and the mother of the plaintiff as to the plaintiff being an illegitimate child of John Gilliland and Mary Reed," held insufficient as not referring to the locus of the ruling in the record. *Nevins v. Gilliland*, 290 Mo. 293, 234 S. W. 818 (1921). Assignment that the court erred in admitting witness' evidence, but not particularizing the precise part which should have been excluded, held insufficient. *Thompson v. City of Lamar*, 322 Mo. 514, 17 S. W. (2d) 960 (1929). *Connoble v. Clark*, 38 Mo. App. 476 (1889); *State ex rel. Shipman v. Allen*, 144 Mo. App. 234, 128 S. W. 809 (1910); *Davis v. Barada-Ghio Real Estate Co.*, 163 Mo. App. 328, 143 S. W. 1108 (1912); *Seewald v. Gentry*, 220 Mo. App. 367, 286 S. W. 445 (1926); *Adamack v. Herman*, 33 S. W. (2d) 135 (Mo. App. 1930); *Schaper v. Smith*, 56 S. W. (2d) 820 (Mo. App. 1933); *LeClair v. LeClair*, 77 S. W. (2d) 862 (Mo. App. 1934).

21. An assignment that "the verdict and judgment are against the evidence, against the weight of the evidence, and against the law under the evidence," is insufficient in that it does not point out wherein the court erred. *Zahm v. Royal Fraternal Union of St. Louis*, 154 Mo. App. 70, 133 S. W. 374 (1910). *Martin v. Continental Ins. Co. of City of New York*, 256 S. W. 120 (Mo. App. 1923); *Waters v. Gallemore*, 41 S. W. (2d) 870 (Mo. App. 1931).

22. *St. Louis Ct. of App. (Mo.) Rule 18*; *Kansas City Ct. of App. (Mo.) Rule 17*; *Springfield Ct. of App. (Mo.) Rule 18*; *Honeycutt v. St. Louis, I. M. & S. Ry.*, 40 Mo. App. 674 (1890); *State ex rel. Concrete & Steel Construction Co. v. Southern Surety Co.*, 221 Mo. App. 67, 294 S. W. 123 (1927). But in some instances a grouping of assignments has been permitted. See *Weber v. Kansas City Cable Ry.*, 100 Mo. 194 (1889).

23. Evidence claimed to be improperly admitted should be particularly pointed out. *Gardner v. Robertson*, 208 Mo. 605, 106 S. W. 645 (1907); *Sanzenbacher v. Santhuff*, 220 Mo. 274, 119 S. W. 395 (1909); *Span v. Jackson-Walker Coal & Mining Co.*, 322 Mo. 158, 16 S. W. (2d) 190 (1929); *First Nat. Bank of Joplin v. Woelz*, 197 Mo. App. 686, 193 S. W. 614 (1917).

24. A specification that the court erred in giving all instructions at the request of plaintiff has been held sufficient. *Jacobs v. Danciger*, 328 Mo. 458, 41 S. W. (2d) 389 (1931), *cert. denied*, *Danciger v. Jacobs*, 52 Sup. Ct. 130, 284 U. S. 675 (1931).

25. *Hatch v. Hanson*, 46 Mo. App. 323 (1891); *Ex parte Whicker*, 187 Mo. App. 96, 173 S. W. 38 (1915); *Waller v. Robertson Transfer Co.*, 214 S. W. 267 (Mo. App. 1919).

26. *Sharp v. Missouri Pac. Ry.*, 213 Mo. 517, 111 S. W. 1154 (1908); *Boyer v. Missouri Pac. R.*, 293 S. W. 386 (Mo. 1927); *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 615 (1908); *Evans v. Roberts Cotton Oil Co.*, 178 S. W. 287 (Mo. App. 1915); *Wehmeier v. Yontz*, 215 Mo. App. 240, 256 S. W. 145 (1923).

27. *Hunt v. Hunt*, 307 Mo. 375, 270 S. W. 365 (1925).

What are the requirements of integration as regards assignments of error and statements of points and authorities? Appellant's assignments of error serve to inform the court and respondent of *what* he is complaining;<sup>28</sup> his points and authorities disclose *why* he is complaining.<sup>29</sup> These matters should be so linked up that their clear connection, their cause and effect relation, is apparent.<sup>30</sup> This linkage may be achieved by enumerating the errors assigned, and numbering in a corresponding manner the points and authorities relied upon,<sup>31</sup> or, as suggested in *Majors v. Malone*, by referring in the points and authorities to the error assigned by number or in some other unmistakable manner.

What are the consequences of an improper assignment of errors or an inadequate statement of points and authorities? Failure to conform to the rules governing appellant's brief cannot be waived by respondent.<sup>32</sup> Substantial,<sup>33</sup> but not absolute<sup>34</sup> compliance is required by the courts, and mere technical violations which neither prejudice the respondent nor confuse the court will be regarded liberally.<sup>35</sup> But errors improperly assigned,<sup>36</sup> and good assignments not supported by,<sup>37</sup> or related to,<sup>38</sup> a sufficient statement of points and authorities will not be considered

28. *Aulgur v. Strodman*, 329 Mo. 738, 46 S. W. (2d) 172 (1932); *Nash v. Buehler*, 26 S. W. (2d) 859 (Mo. App. 1930).

29. *Harrison v. Cleino*, 256 Mo. 607, 165 S. W. 987 (1914); *Hunt v. Hunt*, 307 Mo. 375, 270 S. W. 365 (1925); *Pence v. Kansas City Laundry Service Co.*, 332 Mo. 930, 59 S. W. (2d) 633 (1933).

30. *Wilkerson v. National Council of Knights & Ladies of Security*, 218 S. W. 976 (Mo. App. 1920).

31. *Bury v. St. Louis-San Francisco Ry.*, 223 Mo. App. 483, 17 S. W. (2d) 549 (1929).

32. *Marks v. Acme Phonograph Co.*, 236 S. W. 900 (Mo. App. 1922).

33. *Noel v. Ostlie*, 42 Ariz. 113, 22 P. (2d) 831 (1933); *Antel v. Poli*, 100 Conn. 64, 123 Atl. 272 (1923); *Wachter v. Goodrich*, 263 N. W. 312 (Iowa 1935); *Morris v. Gutshall*, 226 S. W. 589 (Mo. App. 1920); *Thomas v. Perry Irr. Co.*, 63 Utah 490, 227 Pac. 268 (1924).

34. *Nicolopole v. Love*, 39 App. D. C. 343 (1912); *Whitney v. Dewey*, 10 Idaho 633, 80 Pac. 1117 (1905); *Jensen v. Griffin*, 32 S. D. 613, 144 N. W. 119 (1913).

35. *Nunnally Co. v. Bromberg & Co.*, 217 Ala. 180, 115 So. 230 (1928); *Lester v. Enzor*, 24 Ala. App. 318, 134 So. 819 (1931); *Dalton v. Nelson*, 163 So. 467 (Ala. App. 1935); *Wise v. White*, 193 N. E. 85 (Ind. 1934); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935); *Anderson v. Byrum*, 73 S. W. (2d) 571 (Tex. Civ. App. 1934).

36. *Thornbrugh v. Hall*, 263 S. W. 146 (Mo. 1924); *Stroker v. City of St. Joseph*, 316 Mo. 1090, 292 S. W. 1031 (1927); *Standard Computing Scale Co. v. Reames*, 258 S. W. 451 (Mo. App. 1924); *Johnson v. Kansas City*, 272 S. W. 703 (Mo. App. 1925).

37. *Harrison v. Cleino*, 256 Mo. 607, 165 S. W. 987 (1914); *Johnson v. Underwood*, 324 Mo. 578, 24 S. W. (2d) 133 (1929); *Warren v. Conroy & Co.*, 292 S. W. 1068 (Mo. App. 1927).

38. *Pence v. Kansas City Laundry Service Co.*, 332 Mo. 930, 59 S. W. (2d) 633 (1933).

upon appeal.<sup>39</sup> Where there is no proper assignment of errors or statement of points and authorities appeal will be dismissed.<sup>40</sup> Leave will not be given appellant to amend his brief after respondent moves to dismiss,<sup>41</sup> or to file a reply to rectify its insufficiencies.<sup>42</sup> This view appears to be proper. To hold otherwise would encourage appellants to assign errors and state points and authorities broadly and indefinitely, rather than specifically; would put respondent at a disadvantage because of surprise; and would greatly delay disposition of the case if respondent were granted a continuance, thus encouraging dilatory tactics.

Missouri appellate courts have admittedly been lax in some past instances in applying the above rules,<sup>43</sup> and courts generally are especially liberal in criminal cases.<sup>44</sup> It is possible that in the past a large number of assignments of error and points and authorities have been considered which did not comply with the rule laid down in *Majors v. Malone*, and *Scott v. Missouri Pacific Railroad Company*. However, these decisions are strictly in accord with precedent, and indicate an intention on the part of the Missouri Supreme Court to require more rigid compliance than in the past with the requirements laid down for an appellant's brief. It is urged that a strict application of the rules governing an appellant's brief is to be preferred. Under the Missouri procedure, which does not require assignment of errors in the

39. However, under certain circumstances the appellate court may of its own motion consider and determine questions not properly presented by the parties. *Stid v. Missonri Pac. Ry.*, 236 Mo. 382, 139 S. W. 172 (1911); *State ex rel. McWilliams v. Little River Drainage Dist.*, 269 Mo. 444, 190 S. W. 897 (1916); *Schaff v. Nelson*, 285 S. W. 1036 (Mo. App. 1926). But the appellate court cannot correct an erroneous assignment of error. *St. Louis-San Francisco Ry. v. Kimbrell*, 226 Ala. 114, 145 So. 433 (1932).

40. Mo. Sup. Ct. Rule 16; St. Louis Ct. of App. (Mo.) Rule 21; Kansas City Ct. of App. (Mo.) Rule 18; Springfield Ct. of App. (Mo.) Rule 21; *Stroker v. City of St. Joseph*, 316 Mo. 1090, 292 S. W. 1031 (1927); *McDonnell v. Hawkeye Life Ins. Co.*, 84 S. W. (2d) 387 (Mo. App. 1935). Other possible remedies adopted in various jurisdictions are to strike the brief, refuse to consider the brief, affirm the judgment. See 4 C. J. S. § 1316, p. 1841.

41. *Galbreath v. Galbreath*, 24 S. W. (2d) 202 (Mo. App. 1930).

42. *Cross v. Atchison, T. & S. F. Ry.*, 141 Mo. 132, 42 S. W. 675 (1897); *Simmons v. Afolter*, 254 Mo. 163, 162 S. W. 168 (1914); *Orchard v. Missouri Lumber & Mining Co.*, 184 S. W. 1138 (Mo. 1916); *Cech v. Mallinckrodt Chemical Co.*, 323 Mo. 601, 20 S. W. (2d) 509 (1929); *Consolidated School Dist. No. 3 of Grain Valley v. West Missouri Power Co.*, 329 Mo. 690, 46 S. W. (2d) 174 (1931); *Lucas v. Cella*, 115 Mo. App. 395, 91 S. W. 996 (1905); *Buhler Mill & Elevator Co. v. Jolly*, 217 Mo. App. 240, 261 S. W. 353 (1924).

43. *State ex rel. Adair County Coal Co. v. Arnold*, 254 S. W. 850 (Mo. 1923); *Houck v. Bridwell*, 28 Mo. App. 644, 646 (1888); *Neff v. Sovereign Camp, W. O. W.*, 226 Mo. App. 899, 900, 48 S. W. (2d) 564, 565 (1932); *Round Prairie Bank v. Downey*, 64 S. W. (2d) 701, 702 (Mo. App. 1933). In *Hatch v. Hanson*, 46 Mo. App. 323 (1891), the court considered an appeal on its merits where appellant's points and authorities were insufficiently stated and respondent did not object.

44. *Ellis v. State*, 100 Fla. 27, 129 So. 106 (1930); *State v. Stenback*, 78 Utah 350, 2 P. (2d) 1050 (1931).

petition for an appeal or writ of error, as in some other jurisdictions,<sup>45</sup> appellant has ample opportunity to perfect his assignments and develop his points and authorities before the filing of his brief. And it is eminently desirable in the interest of judicial efficiency and the attainment of justice between the parties that the issues be as clear cut and as well supported by points and authorities as possible. Doubtless, the Missouri Supreme Court does not intend to carry its present announcement to an absurd extent. Nevertheless, it behooves Missouri attorneys to comply with the indications of the court as to what it will require.

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45. U. S. REV. STAT. (1873-74) § 997; 28 U. S. C. A. § 862; U. S. Sup. Ct. Rule 9, 286 U. S. 599 (1932).